



Pranay Sanklecha is studying for a masters in political philosophy at the University of Bern, Switzerland. His major research interests are in individual and collective responsibility, especially in collective action situations, ideal and non-ideal theory, and justice and legitimacy in global contexts.

Contact details: E-mail: pranay.sanklecha@students.unibe.ch



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Indigenous minorities' claims to land

by Daniel Weyermann

Abstract: *Claims of indigenous minorities to land are a significant political issue in many parts of the world. These claims, though, are contested, be it in theoretical, political or legal terms. I consider a position, put forward by Jeremy Waldron, that asserts some theoretical reservations towards indigenous minorities' claims to reparations and land. Waldron seems to assume that indigeneity is no important factor regarding land claims and reparative issues. I propose a rivalling account of indigenous land claims, based on the idea of self-determination. Self-determination itself can be understood in two different ways, it can either be conceived as a form of political autonomy or sovereignty, or it can be understood as having pre-political property rights.**

Introduction

Political issues regarding indigenous or national minorities are arguably amongst the most burning ethno-political concerns throughout the world. The history of slavery, colonialism and imperialism, the emergence of nation states and power politics had fatal consequences for many cultural groups in every part of the world. As Lars-Anders Baer, president of the Saami parliament in Sweden, indicates indigenous minorities have for a long time been “the wretched of the earth”¹ when it came to ethno-cultural or economic justice. Things may have changed, at least to some degree, during the last years.² In international law at least indigenous minorities have, after decades of struggle, gained recognition and a juridical basis to make their interests heard.³ Issues regarding indigenous minorities, apart from concrete legal and political considerati-

ons, also raise interesting philosophical questions. In this essay, I would like to scrutinise one of them. I will, most generally, be interested in indigenous minorities' claims to land, i.e. claims to their traditional territory of settlement. Through the history of colonialism and imperialism, different groups that we today refer to as indigenous peoples, aborigines, first nations etc, lost their traditional homelands to the new settlers. Throughout the world—or at least where the interests of indigenous minorities are not completely denied or ignored—claims to regain rights to this land seem to be at the heart of indigenous peoples' political struggles.

One of the main aims of this essay is to scrutinise what is at stake when we speak about indigenous land claims. Put differently, the main question is: how should we understand indigenous claims to land? In a first step, I will sketch a recently presented position by Jeremy Waldron that takes indigenous land claims to be fundamentally problematic. They are, Waldron holds, confronted with some grave theoretical flaws. In a second step, I will then outline an alternative account on indigenous land claims, drawing on the axiomatic idea of self-determination. I will thus outline a possible understanding of indigenous land claims on other grounds than the ones presented by Waldron. Thus, I will propose a possible interpretation of what rationale might underlie indigenous land claims. I argue that by claiming land, what is actually aspired is self-determination in

the broadest sense. Self-determination itself can be understood in two different ways, it can either be conceived as a form of political autonomy or sovereignty, or it can be understood as having pre-political property rights. Self-determination in the first sense means amplified political influence, self-government and autonomy. Ownership over a certain piece of land does not convey any such political recognition. It just includes rights to use, management etc. Thus in its second sense, self-determination is reached by pre- or extra-political ownership rights in the land. In my definition, political rights can be granted independent of ownership rights, just as ownership rights can be granted independent of any political rights. We can, now, interpret some indigenous land

Land: A part of the earth's surface, considered as property. The theory that land is property subject to private ownership and control is the foundation of modern society, and is eminently worthy of the superstructure.

/ Ambrose Bierce /

claims as claims to the ownership of land. Ownership of the claimed land might confer self-determination independent of any political status.⁴ This interpretation, then, might also be important in more general discussions on reparative justice—not just regarding land claims. The account presented might help to understand what the (political and economic) injustice committed against indigenous peoples consisted in.

How to understand indigenous land claims?

One point of access to the understanding of

indigenous land claims is the notion of indigeneity. Thus, we might ask: what qualifies indigenous peoples to make such claims? Or, as Waldron puts it: “what is important about indigeneity?”⁵ In a recent article, Jeremy Waldron scrutinises this question “with regard to the issue of the remediation of injustice”.⁶

He proposes that there are basically two ideas or principles that underlie the notion of indigeneity. It is them that make indigenous land claims—or claims to reparations—morally appealing. Indigeneity, he holds, is “defined relative to a given territory and the special relationship to *the land* (...)”.⁷ Depending on how one conceives indigeneity more precisely, two fundamental ideas linked to the notion can be distinguished. The first idea refers to “preexisting entitlements”⁸ to land that have been disrupted. In this case, indigeneity is morally important regarding land claims because it invokes what Waldron calls the “Principle of First Occupancy”.⁹ This principle holds, in a nutshell, that the first individual or group that occupies a piece of land becomes its owner. In the light of this principle, indigenous peoples have a right to the claimed land because they were first—and, one might add, because it has been wrongfully taken from them by subsequent settlers.

Sometimes, speaking about indigeneity, the focus is not put on *first* occupancy but rather on *prior* occupancy. That brings us to the second possible principle that may underlie the notion of indigeneity in Waldron's analysis. This principle holds that indigeneity is morally important because it implies that “a prima facie right to be left undisturbed and allowed to develop according to its own dynamic”¹⁰ has been disrupted. This is what Waldron calls the “Principle of Established Order”.¹¹

As Waldron argues, neither of these principles makes the idea of indigeneity very appealing as both of them bear some grave theoretical problems.¹² Consider the Principle of Established Order. As an inherently conservative principle based on a human interest in security and sta-

The instinct of ownership is fundamental in man's nature.

/ William James /

bility, it may help to condemn injustices against an established order at one point in time. At the same time, however, the principle could also help to justify established orders that have been founded on exactly the same injustices. Following Waldron, all that matters regarding the Principle of Established Order is that there *is* such an order, not how it came into being. An obvious difficulty with this principle therefore is that the mentioned prima facie right to be left undisturbed counts for

every established order—also the one that is established now and has disrupted indigenous peoples' orders at some point in time. If indigeneity refers to the Principle of Established Order, it therefore does not add anything interesting to land claims by indigenous peoples.¹³

Even though Waldron does not state it more explicit, it seems to me that his analysis comes down to the upshot that indigeneity does not add anything interesting to the assessment of land claims. Put differently, for him, the fact that the claimant is an *indigenous* people is not morally interesting or significant, since he thinks the underlying principles are flawed.¹⁴ This proposition, though, is at least counterintuitive. Morally speaking, it seems to be quite a different matter if claims to a traditional Sioux reservation in the USA are put forward by the indigenous Sioux Nation or, let us say, a European company. It matters for the moral legitimacy of a land claim if the current occupier's ancestors were the very first settlers, or if they themselves occupied the place. Intuitively, at least, the land claims by the Sioux Nation in our example have a wholly different and more appealing moral character than hypothetical land claims by a European company. If indigeneity would not add anything morally interesting to land claims, however, why would intuitions differ so heavily regarding these two examples?

As the example just stated suggests, Waldron's account might be incomplete or miss an important point about the idea of indigeneity.¹⁵ I try to show that a rationale underlying indigenous land claims is the idea of self-determination – and not, as Waldron suggests, First Occupancy and Established Order.

Indigenous minorities' claims to land as claims to self-determination

Self-determination, political autonomy and ownership

Indigenous minorities' claims to land¹⁶ are reactions to historical or ethno-cultural injustices that have hindered (and continue to hinder) members of these groups “from fully realizing the values of being a member in the group”.¹⁷ Since these peoples once mainly lived self-determined and according to their own customs, with their own institutions and rules, these claims can be understood as claims to regain such self-determination. Thus, in a first step, I conceive self-determination as “the right of a group or people to be collectively self-governing”.¹⁸ Compared with Waldron's Principle of Established Order, self-determination seems to be more encompassing. Self-determination does not only invoke a temporal stability of an order; but it stresses the value of the societal culture¹⁹ for its members and the interest of the

members to be collectively self-governing regarding this order.

Indigenous land claims, though, do not have to be understood as reactionary claims to a state of affairs as it was before the indigenous people were incorporated into another political entity. Most of the time, anyway, this would not be a viable option. The influence of modernity has had an impact on traditional ways of life, changing indigenous cultures profoundly just as it has changed other societal cultures too. However, these land claims hint at the injustices suffered by indigenous peoples, and the self-determination lost over “economic, social and political development”.²⁰ Furthermore, it can be argued that nations have a right—at least a prima facie one—to self-determination as a condition for just international and ethno-cultural relations.²¹ Since indigenous peoples can—with reference to their societal cultures—be conceived as nations, this reasoning also holds with respect to indigenous minorities. On these grounds, it seems right that self-determination should be granted to indigenous minorities.²² In short, if peoples, nations and nation states do have the right to self-determination, so do indigenous minorities.

It is, however, far from clear what self-determination could mean exactly, and what would be the best way to achieve it.²³ In one way, these claims to land as claims to self-determination are most straightforwardly understood as claims to political autonomy, i.e. self-government. Political autonomy, as I conceive it here, can mean a wide range of things. Understood in a strong sense, it could mean political independence and secession from the actual state into which indigenous peoples have, often by force, been incorporated.²⁴ Or it could mean some form of increased regional influence. This could be achieved through the formation of something like a distinct sub-sovereign entity that could become a department of, or enter a federation with, the formerly encompassing state.²⁵

A weaker form of political autonomy could be reached by strengthening regional influence, for instance by enforced regional participation in decision making. There may, from case to case, be various options available, but it seems clear that different aspects would have to be considered in assessing which one may be just and viable; not only the interest of the indigenous people, for instance, but also of other groups, the concerned state(s) etc. In short, political autonomy can be reached in a number of ways. But all of them have to guarantee that the indigenous group gains a certain political status or influence, so that it would be represented more adequately in the national or international political sphere of nation states.

In another fashion, however, the claims to self-determination could be understood not so much in terms of political organisation or inter- and intra-national relations, but rather as claims to something like “prepolitical rights of property”²⁶. In this view, self-determination is not conceived in terms of a political status within a broader established political order. Rather it is seen as a, presumably, more fundamental or first-order right to the territory where the indigenous minority lived—as a group and community of memory²⁷—long before any (mainly) alien political system has been imposed from the outside. Nils Oskal makes a similar point when he states that “[indigenous peoples’ right to land and water use] (...) can be discussed in principle as a separate question from the issue of political participation rights for indigenous people in the general state governmental right”²⁸. From this point of view, claims to land are claims for the restoration of a people’s traditional homeland for their own use, management etc. This can be seen as a necessary condition to pursue many aspects of their distinct and unique lifestyle, features that may be reasons for the members to ascribe intrinsic value to their societal cultures.²⁹ The restoration of this property is, in other words, “understood as a precondition that enables the members of the group individually and collectively to fully realize the value of group membership”³⁰. In the context of the Saami in Northern Europe, for instance, we might think about traditional forms of nomadic reindeer herding and pastoralism.³¹ Indigenous minorities are conceived as societal cultures, just as other nations are; but they are furthermore societal cultures with a (traditionally) strong bond to the homeland that they occupied longer than the actual nation states have existed.³² Therefore, the control over this land in ownership terms might be a viable option to grant self-determination to indigenous minorities.

An objection: the inseparability of political and pre-political claims

After having drafted a possible view on indigenous minorities and self-determination, I would now like to bring up a problem of the dichotomic interpretation of self-determination as stated here: that the claims to a political status or to the ownership of land seems to be inherently intertwined. The problem is, concretely, that it is difficult to imagine political self-government that is not linked to some kind of ownership of land. In turn, a claim to property rights of land seems hollow when not linked to some stronger, political claim. How could we say, for instance, that a state is politically autonomous and sovereign when the territory of this state is owned by, let us say, the

neighbour state? There is a strange tension between the notions of self-government and ownership: ownership can, after all, also be understood as a kind of sovereignty, just as sovereignty of a state seems to imply ownership of the state territory.

This problem, however, is probably one of categorical confusion. Sovereignty, or political self-government, is—as I conceive it here—a term linked to a political status that may involve the power to decide, to rule etc. It is linked to a state or another political entity that manages this political power. Ownership, on the other hand, has nothing to do with a political status. It is in this sense “prepolitical”³³ that it does not necessarily have something to do with political organisation. It can thus be distinguished as something in its own right.³⁴ After all, the individual or collective ownership of a thing can meaningfully be distinguished from any kind of political power over the thing.

Note, however, that I conceive the distinction between political and pre-political not as a temporal one. Rather, it indicates that there are different domains or realms. The political domain is constituted through political entities such as nation states, the pre-political domain is constituted independent of the political do-

minorities’ claims to land—at least if we understand them as claims to the ownership of land. It seems important to acknowledge, for the justifiability of these claims, that the property in the land existed before settlers, kingdoms and nation states created it; and that indigenous peoples also have natural, i.e. pre-political rights. This is a view that was not shared by Locke. It is a pejorative view on indigenous cultures that underlies his account of property. It is an account that can be understood as a method of dealing with the abundances of the ‘unowned’ land in America.³⁷

Nevertheless, the view that there are pre-political rights does not imply that the two aspects of self-determination proposed do not relate to each other at all. Levy, for instance, deduces a right to self-government from the pre-political right to ownership: “given a view that indigenous peoples had and have rights to their own land, and that they had and have rights of freedom to practice and maintain their own ways—[for] indigenous minorities self-government is justifiable (...)”³⁸

Therefore things might not be so clearly discernible as I have suggested earlier. However, the only point that I would like to make here is that it makes sense to consider political autonomy and ownership as two aspects of self-

You need to understand this. We did not think we owned the land. The land was part of us. We didn't even know about owning the land. It is like talking about owning your grandmother - you can't own your grandmother. She just is your grandmother. Why would you talk about owning her?

/ Kent Nerburn /

main and concerns moral rights. As Jacob T. Levy states: “If we think that Aborigines (and other indigenous peoples) had rights to their land before colonization, rights that the colonists and colonial states were wrong to violate, then we are committed to the idea that justice and injustice in property relations are in some sense pre- or extrapolitical.”³⁵

We can thus distinguish between political claims, i.e. claims to political autonomy in whatever form, and pre-political claims in the sense that they refer to a right that exists independently of any political order. As an illustration, consider John Locke’s well-known account of rights and property, where property can be acquired before any civil state is organised—even though this does, in his view, not count for indigenous peoples.³⁶ This view of property, as something pre-political and in this sense natural, is also stressed by many libertarians and other theorists of natural rights. Whether this is an adequate view on property, and a defensible one, is another question that I cannot treat here. However, it is important to note that this is in fact the view, as Levy states, that seems to underlie indigenous mi-

determination that are interesting on their own account. Even though they might be—even fundamentally—linked in one way or another. If seen as a theoretical abstraction and to gain a focus on the autonomy or property aspect of claims to self-determination, at least, the proposed dichotomy should be acceptable.

Outlook: Self-determination through ownership of land and a rationale for reparations

If one treats the whole problem of indigenous land claims in terms of self-determination, a richer account on why indigenous peoples are claiming land becomes available. By introducing the idea of self-determination, the two principles proposed by Waldron and presumably invoked by indigeneity—the Principle of Established Order and of First Occupancy—are conceivable in a new light. To narrow the issue of indigenous land claims on these two principles does no justice to such claims. To conceive the problem in more general terms of political autonomy and ownership seems to provide a more adequate understanding of indigenous land claims. Linked to the idea of self-determination, indigeneity thus remains

an interesting and important idea regarding land claims.

This understanding of indigenous land claims can, furthermore, also be important regarding the discussion of reparations for indigenous peoples. Investigating the rationale of indigenous land claims might help to formulate adequate reparative measures on a material level.

Notes:

* I would like to thank the Reviewers of this essay for the interesting and helpful commentaries and suggestions. Many thanks also to Hanna Lukkari for time and thought spent on these pages.

(1) Baer 2005: 248, and Fanon 2004.

(2) Kymlicka 2001c: 121 states: “there have been dramatic developments in international law regarding indigenous peoples in the last two decades (...)” See also Baer 2005: 248-251.

(3) United Nations 2007.

(4) Note that these interpretations are conceived of as mere theoretical possibilities. I do not say that indigenous peoples do in fact understand their claims in one way or the other. I would rather say that both interpretations of the claims are possible and plausible ones. How indigenous minorities do actually conceptualise or conceive land claims is another question that is not treated here.

(5) Waldron 2007: 24. In what follows, I will consider Waldron’s account of the notion of indigeneity in Waldron 2007. I limit my investigation to Waldron’s explicit conceptual analysis of indigeneity in Waldron 2007, despite the fact that Waldron’s extensive work on related topics would deserve more attention than I accord it here. Since this essay is not intended to be a commentary on all of Waldron’s theses, I think it is defensible to limit the scope of investigation in the way I do.

(6) Waldron 2007: 24.

(7) Waldron 2007: 28 (emphasis in the original).

(8) Waldron 2007: 29.

(9) Waldron 2007: 30.

(10) Waldron 2007: 31.

(11) Waldron 2007: 31-37. The crucial difference between these two principles thus is that “the Principle of First Occupancy looks to the dawn of time, to the moment at which the land in question was first taken peacefully into human use and possession” whereas the Principle of Established Order rather “looks to what was happening at a moment just before the present, just before the first European ships came over the horizon” (Waldron 2007: 31). The second principle does not, furthermore, “delve into tangled historical questions about any *status quo ante*”, but rather “recognizes the opacity of the past” and “prohibits overturning existing arrangements irrespective of how they were arrived at” (Waldron 2007: 31). However, it is questionable if this distinction is well-founded. When the first Indians arrived in North America, coming from Asia over the Bering Strait, they settled down and established an order. A settlement without some kind of order is unthinkable. It thus could be argued that Waldron’s distinction is an artificial one. I thank one reviewer for this point.

(12) Waldron 2007: 32-37.

(13) Waldron 2007: 32-33.

(14) This, at least, is what I assume Waldron says. I base this interpretation on the account in Waldron 2007: 32-37, especially the conclusions regarding the underlying principles of indigeneity on p. 33 and 37.

(15) Of course, it is also possible that the intuitions in favour of the Sioux have nothing to do with indigeneity but derive from some completely different sources. But the example nevertheless suggests that the idea of indigeneity might still be a pertinent idea to assess our intuitions regarding cases such as the one of the Sioux.

(16) Note that I am talking about self-determination of groups or collectivities, not of individuals. I am thus concerned with self-determination on an inter-group level, i.e. self-determination of societal cultures regarding other societal cultures. That is, between an indigenous minority and, let’s say, the group of new settlers.

(17) Meyer 2001: 286. Regarding the importance of this value, see Meyer 2001 in general.

(18) Moore 2003: 89: “self-determination is usually understood as the right of a group or people to be collectively self-governing.” Now we might want to discuss whether groups can be bearers of rights and what the consequences of such a conception of rights would be. This, however, is not at all the aim of this essay. It is true that I assume that groups can be bearers of rights and can be moral and legal agents. If one is not ready to accept this premise, a lot of what I put forward may seem very odd. For a discussion on groups as right bearers, see for instance Kymlicka 1995, p. 34-48, and Kymlicka 2001c.

(19) As Kymlicka 2001a: 53 states, to speak of societal cultures means that there is “a set of institutions, covering both public and private life, with a common language, which has historically developed over time on a given territory, which provides people with a wide range of choices about how to lead their lives”.

(20) Control over these aspects is, according to the United Nations, an international right of nations. See United Nations 1966b: part I, art. 1, sec. 1.

(21) Consider the Human Rights standards: “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” See United Nations 1966b and United Nations 1966a: part I, art. 1, sec. 1.

(22) When we speak of self-determination and societal cultures, it also seems to make sense to introduce the notion of nation. First of all, nations are usually conceived in similar terms as Kymlicka’s societal cultures (see Kymlicka 2001c), therefore indigenous minorities can—in most cases—be referred to as societal cultures or nations. Consider also the fact that indigenous peoples are sometimes referred to as first nations. Secondly, the notion of self-determination is often used in the context of nations or international relations, speaking e.g. of national self-determination. Speaking of nations in this context therefore seems to be fruitful and justifiable.

(23) Note that in what follows, I do not propose any substantial analysis of the notion of self-determination, autonomy or ownership. Rather, I indicate possibilities of how to link indigenous land claims to the notion of self-determination, i.e. how to interpret indigenous land claims in terms of self-determination. In a further step, a more thorough in-

vestigation of these notions for the given context would be desirable.

(24) For a discussion of this option, see Meyer 2001: 286-290. For a critical position toward this option, see Horowitz 2003.

(25) For a favourable analysis of the latter option to gain political autonomy, see Kymlicka 2001b.

(26) Levy 2003: 133.

(27) For a discussion of the notion, see Meyer 2001: 263-269.

(28) Oskal 2001: 258.

(29) Meyer 2001: 270-271.

(30) Meyer 2001: 288.

(31) Beach 1994: 151-155.

(32) This may, however, no longer be the case with all indigenous minorities—due to forced population transfers or aggressive settlement policies, for instance. For considerations in this direction, see Levy 2003: 120.

(33) Levy 2003: 133.

(34) As Eide 2001: 138, states: “establishing sovereignty over a territory does not in itself mean that the state becomes the owner of land in the private law sense of property rights. Admittedly, sovereignty can give the state a right to establish for itself private property in land if there are not other prior rightful owners. This would imply that the territory is held to have been *terra nullius*, in the sense that it belonged to no one, when the state asserted its ownership.”

(35) Levy 2003: 133.

(36) Locke 2003: chapters II and V.

(37) Locke 2003: §49: “In the beginning, all the world was America (...)” According to Locke, therefore, when “a Swiss and an Indian” encounter each other “in the Woods of America” (Locke 2003: §14) they meet as if in the state of nature. For an overview on Lockean property theory and its links to colonialism, see Armitage 2004 and Tully 1993.

(38) Levy 2003: 133.

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Daniel Weyermann has graduated in philosophy and history at the University of Bern. He studied philosophy in Bern, Paris and Helsinki.

Contact details: E-Mail address: daniel.weyermann@students.unibe.ch



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