

Comments on David Miller, “Territorial Rights: Concept and Justification”¹ *Colleen Murphy*

In his article “Territorial Rights: Concept and Justification,” David Miller provides a thoughtful and sophisticated account of a nationalist theory of territorial rights. A state’s territorial rights can be divided into rights of jurisdiction (to make and enforce the law governing a territory), rights to control resources, and rights to control borders. There are three possible primary holders of territorial rights: individuals, groups, or institutions. Miller focuses on the second and third possibility in his paper. After explaining reasons for rejecting an institution-based theory of territorial rights, Miller defends the claim that nations and indigenous peoples are the primary holders of territorial rights.

As Miller recognizes, grounding the territorial rights of states is a complex task and the stakes for being able to make territorial claims are high. Secessionist movements and intractable political conflicts often have disputes over territorial rights at their root. The standards for legitimate immigration policy have implications for the lives of millions of people around the globe. In the first part of this review, I summarize Miller’s positive case for taking peoples or nations to primary holders of territorial rights. I then focus on an interpretive issue, namely, how we should understand the relationship among the three conditions Miller cites to justify territorial rights claims. I contend that ultimately Miller’s analysis is unsatisfactory. On different interpretations of the relationship among these conditions, the view Miller defends either has unacceptable implications for who counts as territorial rights bearers or cannot be used as a guide for resolving the practical conflicts over territory that make the justification of territorial rights so important. However, despite this, Miller’s account is significant because it points to important questions that remain unanswered about the conditions that need to be satisfied for a claim to territory to be legitimate.

Miller begins by developing a set of desiderata for an adequate account of territorial rights out of a critical analysis of statist theories of territorial rights. A satisfactory theory of territorial rights must justify the rights of a particular state to a particular territory. It must include a legitimacy condition, which provides an account of how a state becomes authorized to represent the people who live on a given land. A theory must capture the importance of history, specifically how individuals or groups come to develop a particular relationship with a given territory. At the same time, a theory must not be beholden to history, but must be sufficiently flexible to accommodate change, for example in the circumstances that originally grounded territorial entitlements or in the self-understanding of groups.

On a nationalist theory of territorial rights, states enjoy territorial rights derivatively. Their claims to such rights are dependent on, or derive from, the rights that a nation or indigenous group primarily possesses. Insofar as a state legitimately represents a nation, it can exercise territorial rights on that nation’s behalf. Miller offers two general lines of argument to support the attribution of territorial rights primarily to nations and indigenous peoples.

¹ Miller, David. 2012. ‘Territorial Rights: Concept and Justification’. *Political Studies*. 60(2). 252-268.

The first line of argument concentrates on the characteristics a group must possess if it is to be able to claim territorial rights over time. Specifically, a group must be a “transhistorical agent.”² Nations are such agents, because members are bound together by “an inherited understanding of the nature of the group”³, which is reflected in a shared identity and set of rules.

Miller’s second argument focuses on the relationship between nations and land. There are three main claims about this relationship that Miller defends. The first claim is backward-looking. Call this the material value condition.⁴ A group has a right to a particular territory if it has materially transformed the territory in ways that increase its material value. Implicit in this claim is a Lockean idea that groups (or individuals) are entitled to the value they create. In Miller’s view, the activity of a group increases the value of land in a universal sense if its transformative activities foster the conditions required to satisfy basic needs. Paradigm transformations include cultivating land or building roads. Miller suggests that transformative activity that promotes basic needs also enhances the market value of land and the goods produced by it. Transformative activity can increase value in a specific sense, if the transformations increase material value from the perspective of a particular world-view. Building a church and planting a vineyard are examples of activities that increase value in a culturally-specific sense.

A second claim is directed to the present and future, and is based on the link between territory and the conditions required for flourishing. Call this the community flourishing condition. In Miller’s words, a group has a claim to a particular territory if “the territory has been shaped to fit the needs and the cultural values of the group in question, so if it is now taken from them, they will no longer be able to sustain their way of life.”⁵ That is, insofar as a group’s communal life is organized around and shaped by a given territory, occupying that land can become a condition for maintaining that community’s way of life. To exclude a group from this territory would be to inflict an undeserved cost on all of its members.

The third claim appeals to the symbolic importance that land can come to have for a nation. Call this the symbolic value condition.⁶ This symbolic importance of land may stem from, for example, the fact that it was the site of significant events in the history of a group or is considered to be sacred. Miller notes that the symbolic value condition only justifies territorial rights when the land in question is part of a nation’s homeland. Land with symbolic significance outside a homeland only generates rights of access.

Miller ends by analysis by explaining why it grounds territorial rights, and not just occupancy rights.⁷ Consider jurisdiction rights. If a group adds material value to land, its ability to enjoy that value is contingent in practice on having political institutions that represent it governing the land. Absent such institutions the enjoyment of value remains vulnerable. Rights

² Miller, 258.

³ Ibid.

⁴ Miller, 259-261.

⁵ Miller, 259.

⁶ Miller, 261-262.

⁷ Miller, 263-266.

of resources are needed because of how a land's resources influence the shared life that develops within a nation or people. Self-determination suggests that nations be allowed to exercise control over the resources on their land. Moreover, such control provides an incentive for people's to use resources in a sustainable manner. Finally, the right to control borders is important because of the impact that new residents have on the character of a nation over time, which in turn influences its ability to enhance or maintain the material and symbolic value of land.

In my discussion of Miller's analysis, I want to focus on the relationship among the material value, communal flourishing and symbolic value conditions. Specifically, I am interested the role the three conditions play in a justification of territorial rights. One way of putting my question is: must a group meet all three conditions to enjoy territorial rights?

Miller's discussion at times suggests that a nation need not satisfy all three conditions in order to have territorial rights. For example, Miller argues that if we are to treat fairly the territorial claims of modern Western nations and indigenous groups, it is important to include the symbolic value condition. This is because the material value condition favors developed Western nations; Miller implies that some indigenous groups may not transform land in a way that increases material value significantly at all. Thus including the symbolic value condition provides support for the territorial claims of indigenous peoples.⁸ In addition, Miller critical discussion of Anna Stilz's statist theory of territorial rights suggests that a group need not satisfy the communal flourishing condition; a group that was ethnically cleansed from a land does not lose its claims to the territory on which it once lived by virtue of the fact that it no longer organizes its communal life on that land.⁹

However, if we loosen the number of conditions that a group must satisfy in order to be a territorial rights bearer, then Miller's account has troubling implications. Consider the material value condition. Nations are not the only collectives that play an important role in transforming land in ways that alter its value. Indeed, in the context of increasing globalization, they are not the main agents that do. Rather, multinational corporations are in many respects the drivers of the increase (or decrease) of material value. Such corporations are often deeply involved in shaping and altering the economy of communities globally and in transforming land for extended periods of time, in some cases for generations. Oil companies extract natural resources, while agricultural companies cultivate land and grow crops. Such corporations also have the identity over time that territorial rights require. So if a group need meet only one condition to claim territorial rights, then corporations like BP (British Petroleum) seem to have such rights. But granting territorial rights to multinational corporations would undermine the project of justifying states' territorial rights, since the corporations of interest are by definition multinational and located in multiple states.

Perhaps, then, a group must satisfy all three conditions, at least to some threshold level, to enjoy territorial rights. This interpretation of the three conditions would exclude multinational corporations; corporations do not seem to endow land with symbolic significance in the way that

⁸ Miller, 262.

⁹ Miller, 261.

nations do. Moreover, this interpretation provides resources for grounding not just rights of access but stronger territorial rights claims. As Miller notes, rights of jurisdiction are needed in part because the enjoyment of material value produced is uncertain absent such rights. However, as I argue below, expanding the conditions a group needs to satisfy comes with a cost: the territorial claims of some nations become questionable.

Consider, for instance, the country of Qatar. Qatar enjoys the second highest per capita income in the world.¹⁰ The very large natural gas and oil reserves in the territory, and the process of transforming land through the extraction of those resources, have played a key role in the increase in material value the country has enjoyed recently. Qatar also has the highest net migration rate in the world.¹¹ There are only 300,000 Qatar citizens in the country with a population of approximately 1,800,000. The immigrant community in Qatar plays an essential role in the creation and maintenance of material value, providing precisely the labor upon which the extraction of oil and gas reserves depends. Thus, the Qatari national community is in a sense not primarily responsible for the transformation that has led to an increase in the material value of land, if we consider the basic labor needed for this transformation. Moreover, there is a sense in which the Qatari community does not satisfy the community flourishing condition. It is not in a position to organize and sustain its way of life on its own land; the sustaining of the community and its way of life is dependent in fundamental ways on the non-nationals residing in the land.

My discussion thus far suggests that Miller faces something of a dilemma: On the one hand, if the three conditions are not jointly necessary, then too many groups, and in particular multinational corporations, will count as rights bearers. On the other hand, if we insist on the joint necessity of the three conditions, then some nations, such as the Qatari nation, will not count as territorial rights bearers. The unattractive consequences of adopting either interpretation of Miller's conditions may indicate that there is something wrong with the criteria themselves. My discussion above suggests that we may not be able to justify states' territorial rights using Miller's framework, either because the rights bearers are not represented by just one state or because the groups within a state are not rights bearers.

Of course, Miller could avoid this dilemma if his analysis is not meant to provide necessary and sufficient conditions that must be in place for a group to enjoy territorial rights. Rather, his aim may be to provide conditions that intended to be satisfied in degrees. That is, his view may be that the territorial claims of a nation are stronger the degree to which it satisfies the three conditions he laid out. This interpretation seems especially relevant and helpful for the kinds of cases that Miller begins his article by considering, cases where the territorial claims of two national groups are in conflict, such as with secessionist movements and in Israel/Palestine. Analyzing the degree to which a group satisfies the three conditions for territorial rights could provide important resources for making judgments about how the conflicting territorial claims of different groups should be treated.

¹⁰ CIA World Factbook, 2012, <https://www.cia.gov/library/publications/the-worldfactbook/rankorder/2004rank.html?countryName=Qatar&countryCode=qa®ionCode=mde&rank=2#q>.

¹¹ CIA World Factbook, 2012, <https://www.cia.gov/library/publications/the-world-factbook/geos/qa.html>.

One initial worry about this move, however, is that it may disadvantage precisely the groups whose territorial claims seem intuitively to raise issues of justice. For this understanding seems to privilege the claims of groups currently occupying a territory that is disputed, and disadvantage diaspora or refugee communities or groups. Groups that are now refugees or forced to settle into a new community following a campaign of ethnic cleansing will no longer be able to organize their life around the land where they previously lived, nor continue to add material value to that land. So though the symbolic value conditions may continue to be satisfied, the other conditions may not.

A different worry concerns the implementation of Miller's framework. Miller motivates the question of territorial rights by appeal to the practical issues at stake. We want to know how to assess the claims of secessionist movements and what constitutes a justifiable resolution to the Israel/Palestine conflict. However, it is extremely difficult – and controversial – to come up with a metric that would allow us to make judgments about the degree to which a group satisfies a particular condition.

Consider the material value condition. Miller himself notes the practical difficulties involved in attributing a specific increase in material value to a group. This practical difficulty is part of the reason why, according to Miller, we cannot have any kind of redistributive tax on the natural value of the natural resources of a given land.¹²

Developing a metric for this criterion is controversial because there are competing conceptions of what counts as adding value to land. Miller recognizes this point, which is part of his reason for distinguishing universal and culturally-specific accounts of value. But the controversy remains even if we recognize this division, because of different understandings of universal value. Miller argues that universal values are grounded in basic needs, in the sense that a transformation of land that enhances a community's ability to satisfy its basic needs thereby enhances the material value of the land. When it comes to measuring this kind of impact, Miller implicitly appeals to a market-based, economic metric. The idea seems to be that increasing the market value of land, by for example building buildings and cultivating farmland, is what counts.

However, this is not the only way in which transformation may increase the ability of a community to satisfy its basic needs. Moreover, some transformations that may enhance the market value of land may undermine the ability of a community to satisfy its basic needs in the long-term. What I have in mind are practices that generate profit in the short-term, but are not sustainable in the long-term because, for example, they use finite, non-renewable natural resources or erode the long-term fertility of land. For example, it is widely acknowledged that the current dependence of industrial Western countries on oil is unsustainable. These considerations suggest that an account of material value must, at a minimum, take into account both increases in market value and impacts on sustainability.

The inclusion of these two values will make the development of a metric for assessing additions of material value even more difficult. It also seems intuitively that it will change the

¹² Miller, 264.

strength of the claims to territory of different nations. Importantly, it may change the position of nations and indigenous groups vis-à-vis this criterion. Even if we grant Miller's claim that indigenous groups satisfy the criterion of increases in economic value less robustly than developed Western nations, indigenous peoples in general enjoy lifestyles that are more sustainable. Thus, indigenous peoples may satisfy the material value condition to the same degree as Western industrial nations. The controversy surrounding the choice of a metric is likely to increase given the very real implications this choice has for current territorial conflicts.

Though I remain unsatisfied with the conditions grounding territorial rights claims that Miller advances, this should not detract from the importance of Miller's argument. In developing desiderata for a successful theory of territorial rights, Miller provides a persuasive account of the limitations with prevailing statist theories. At the same time, he outlines a substantively different alternative that successfully includes a consideration of both the past as well as the present in the conditions that need to be satisfied for a group to be a territorial rights bearer. If nothing else, Miller's article provides rich material for thinking about the really difficult, but absolutely crucial, set of issues surrounding territorial rights and their justification.

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