

‘What are Resource Rights’

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## **Introduction.**

What is a resource right?

The term ‘resource rights’ seems to be used in different ways in political theory, depending on the topic. On the one hand, discussions of global distributive justice and particular phenomena like the resource curse treat resource rights like any other kind of property right. On the other hand, discussions of secession and self-determination treat resource rights as a kind of jurisdictional right primarily over persons. Additionally, our common and somewhat superficial understanding of resource rights can’t handle several cases, including straight-forward ones.

The point of this essay is to bring some depth and clarity to the concept of resource rights. My investigation is influenced by two cases. Throughout the essay I develop my own theory of resource rights that can handle each of these cases and that works well within an overall system of global distributive justice (although I won’t have time to go into the latter here.)

### **Case 1. The failed state**

The Republic of Sierra Leone, an independent state since 1961, went through a period of extreme turbulence in the 1990’s. The war, unrest, and corruption during this decade brought about an extensive breakdown of the rule of law resulting in severe suffering and human rights violations within Sierra Leone. It is fair to say that during this time Sierra Leone was a failed state and obviously an illegitimate state. On almost all theories of legitimacy and sovereignty, when a state is illegitimate, the state loses rights associated with sovereignty. For example, when a state is illegitimate to the extent that Sierra Leone was, it is permissible for a foreign party to invade the territory and establish rule of law. However, it is not the case that Sierra Leone loses its resource rights during this time. We don’t think that the territory is suddenly ‘up for grabs’ such that Liberia (or the UK) could permissibly annex it. And we don’t think that the invading foreign parties should now have resource rights to sell off and reap the benefits of Sierra Leonean diamonds.

What explains the disconnect here between rights connected to the legitimacy of the state and rights connected to the state even when it is not legitimate? And, given that it’s a failed state, who has the right in the absence of the state?

## **Case 2. Property Rights vs. Resource Rights**

Another option is to say that the Sierra Leonean people have a property right to the resources. However, consider the following case. The LDS church owns approximately 1,000 square kilometers of land in Nebraska alone, a fertile area larger than 50 existing countries. Do we think that the LDS church has resource rights over this land? I admit that's a tricky question to answer. But we can say at the very least the right that the LDS church has over their lands is different than the right that the Sierra Leoneans have over their resources. To develop that distinction, think of the individual property owners within Sierra Leone. We have to be able to make sense of a case where a group such as the self-determining Sierra Leoneans have resource rights within their territorial region that are distinct from the individual property rights of the persons and groups within that region.

With these cases in mind, I briefly consider and reject two existing theories of resource rights in favour of my own theory.

My view is that a resource right is the right of a self-determining group to control (make, adjudicate, and establish laws regarding the use of) the resources within its territory with respect to the persons within (who must obey the laws of the state) and outside of the borders (who are excluded from these resources).

The points that I emphasize are that the right is held by self-determining groups and that it is ultimately a jurisdictional right (as opposed to a property right).

This right is justified if the global system of resource rights overall is justified, i.e., is the system that best achieves justice globally.

### **Note. On the distinction between territorial rights and resource rights.**

Territorial rights are a cluster of rights entailing, (1) the right to establish justice within a region through the making, adjudicating, and enforcement of laws, (2) the right over land and resources within a region, and (3) the authority to determine habitation, immigration, and citizenship rights regarding the region. In some ways, all of the parts of this cluster are related to rights over land; that's why it's called a territorial right. I assert here that there's a difference between, for example, a right to establish justice regarding the civil liberties of persons within a region (part of the general right to establish justice) and a right to control the export of domestic oil (part of the resource right). The direct object of the former right is persons within a certain region, and the direct object of the latter is (non-human) resources within the same region. I consider a territorial right to stand for the entire cluster of rights, while resource rights only pick out the rights concerning directly the control of land and resources within the region.

### **Group Property Rights vs. Jurisdictional Rights**

One obvious option for explaining the right that groups have to resources is to call it a property right. If a resource right is just a property right, then perhaps we can explain why illegitimate states can have property rights even if they don't have the right to establish judicial authority over the people within the territory. Under this option, resource rights are understood as state or group property rights over the land and other resources within the designated territory;

resource rights are pretty much like any other property right, except that the agent holding the property right is a collective.

Against this view, I argue in this section that a resource right is essentially a jurisdictional right whereby a group has control over land and resources for the purpose of creating justice within that area.

Broadly speaking, there are two theoretical avenues for understanding the nature of resource rights. First, we can think of it as a property right and susceptible to the same theoretical justifications and foundations as other property rights. As a property right, rights over resources are like any other property rights; they articulate a set of exclusive rights over goods that allow the owner to use, manage, and alienate the good as the owner desires. Resource rights function importantly in this way. A state has ownership rights over its natural resources. Currently in international law, the state has the right to develop and to sell its natural resources. In many cases, valuable resources within the state territory are nationally owned, and in these cases especially, resource rights look as if they are merely property rights, as 'privately' owned by the state. Moreover, resource rights have effects that mirror the effects of property rights—resource rights affect the relative wealth and well-being of persons within a nation as well as the opportunities to which they can avail themselves.

Alternatively, we can think of rights over resources as a component part of territorial rights and susceptible to the same theoretical justifications and foundations as territorial rights. As a component part of territorial rights, resource rights are understood as part of the establishment of justice within the jurisdictional domain of the state. Territorial rights are foremost understood as jurisdictional rights, the right to establish justice within a region. Theorizing resource rights as a component part of territorial rights means that the theory will analyze resource rights in terms of its connection with the group right to establish justice within a region.

I think it is imperative to evaluate resource rights as both a kind of property right and as a jurisdictional right. Both functions have profound impacts for individuals worldwide. However, I believe that resource rights should be understood in the first instance as a component part of territorial rights, as part of the overall right that state's have to establish justice within a region. And, as we will see, thinking of resource rights as a component of territorial rights gives us a theoretical umbrella under which the property right dimension of resource rights can be evaluated.

I have several reasons for asserting that resource rights should be understood in the first instance as jurisdictional rights.

First, as I've already demonstrated with the case of property rights, if resource rights aren't understood first in this jurisdictional way, then the fact that persons own property in land becomes a problem. That is, if a state's rights over the land and resources within its territory are merely property rights, then personal property rights and state rights over resources come into conflict.

Second, resource rights are currently assigned on the basis of territorial rights. It is important to understand why it may be justified that self-determining groups hold resource rights *because they are* self-determining groups with a claim to establish justice within a region. That is, there is an important connection here between the Who and the What parts of our inquiry. In identifying what are resource rights, we will be caught up in discussing what sort of agent may claim territorial rights.

Third, resource rights are more than rights to oil reserves or diamond mines. Resource rights are rights over a diverse set of material goods within a region. This includes agricultural land, desert lands, forests, lakes, coastal areas, urban areas, air, etc.<sup>1</sup> The application of property theory sometimes works well with nationally owned oil reserves or nationally owned parks, those goods that are under the direct control of the state. However, it is more difficult to fit the application of property theory to a variety of diverse goods that make up a local community, for instance.

Finally, it is difficult to understand property rights independent of a prior judicial and legislative authority. Several authors have argued that property rights are dependent on the state for their articulation, adjudication, and enforcement. If this is the case, then the state cannot 'own' its resources in the sense of having a property right unless it first has the jurisdictional authority to legislate over these resources. Thus, it seems essential to theorize this authority over resources in the first place.

It is better to understand state rights over resources as, in the first place, a component of the state's authority to establish justice over land and resources. Part of this authority includes the state right to declare the nationalization of certain natural resources, such as oil. Additionally, a state has the right to direct the use, access, and development of land and resources through the legislation of property rights and to draw taxes from property owners. A benefit of this view is that with the initial understanding of resource rights as a component of territorial rights, we can explain both the property dimensions of the right (a group has exclusive control over resources to develop, sell, or preserve as it desires) and the jurisdictional dimensions of the right (a group has the authority to legislate property rights regarding those resources) of resource rights.

Now we can make sense of the case where a group (like the LDS church) has a property right over the land and the state has control over the land as well. The state has determinate control over the land and resources in order to establish justice within its borders. This authority includes the right to make, adjudicate, and enforce property rights within its borders. The LDS church has a certain set of property rights over its lands within Nebraska that are derived from the way that the US and Nebraska have executed their resource rights.

### **The 'package' rights of the legitimate state vs. a resource right of a self-determining group**

Another understanding of resource rights is the view that resource rights are part of an impermeable package of rights belonging to states. This view is tied to a somewhat dated understanding of state sovereignty and international law under which the state is the ultimate authority within its territory, and international law only exists to maintain the ultimate authority of each state. If a foreign agent wants legal access to or ownership of a natural resource within a state's borders, the foreigner has no option but to apply to the state for permission, given the status of international affairs under this view.

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<sup>1</sup> States may not be said to have the same kind of rights over portable or transient goods as they do over geographically secure goods. Water rights in river water are an example. States have only limited rights over their river waters because down-stream states also have a claim to the water that will flow into their territory.

The obvious point to make here is that this view of resource rights can't help us to illuminate the role that resource rights play in the two cases above. Moreover, current theories of state legitimacy and authority have made things even more complicated. These theories emphasize that state authority and the traditional rights, like resource rights, which come with state authority, are attached to legitimate states. Thus not any state gets the state-package rights, but only legitimate states get these rights.<sup>2</sup> This view can't explain why the Sierra Leoneans have resource rights, since they are not a legitimate state.

Against the 'package' rights of states view, I argue that groups with the right to self-determination are the unique agents who may hold resource rights. This takes the ascription of the right out of the realm of the discussion of legitimate states.

First, let me distinguish between a self-determining group and a state. In the Sierra Leone case, it's fair to say that the state as a set of functioning institutions is practically non-existent. The people of Sierra Leone, however, continue to exist. When I write of the state, then, I refer to the set of functioning institutions that effectively make, adjudicate, and enforce law within the region. The self-determining group refers to the collective of individuals who identify as and are recognized as members of the group. (I recognize that this way of defining a self-determining group is problematic, especially in cases where citizens may identify with a minority national or tribal group more than with their 'state' group. I will set this complication aside for the moment. For now, I will assume that the members of failed state like Sierra Leone can be said to form a self-determining group of Sierra Leoneans.)

The primary function of a resource right is to *establish justice* through the legislation, adjudication, and enforcement of the rule of law with regards to land and resources within a particular geographical region. Given the nature of resource rights, these rights are properly held by those groups that are capable of establishing justice (even if only as a prospect) and that require jurisdiction over land and resources in order to establish justice. My reasoning here takes the form: in order to be a candidate for a right, the agent must be capable of fulfilling the function of the right. One might object that, for example, in order to own a car, I do not need to know how to drive. In this case, resource rights and certain other rights are disanalogous. In the case of resource rights, if a right holder is not the type of agent that can fulfil the function of the right, that is, in establishing justice, then necessarily injustice ensues from this right holder having the right to resources. Moreover, the effects of this injustice are devastating for many persons inside and outside of the territory. It is not the case that injustice necessarily ensues when a non-driver owns a car, nor that there will result from this ownership devastating consequences. (Perhaps, in this case, a better analogy would be to the right to drive a car.)

The concept of self-determination picks out a certain kind of group. These groups have certain qualities that identify them as self-determining groups. Theorists disagree on ways to identify these qualities, but there is consensus on the fact that all of these groups share one quality: the members of the group desire that the group be politically autonomous, that the group be able to make significant social and political decisions for their group that should be respected by outsiders. In other words, the members of the group wish to establish their own brand of justice for themselves.

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<sup>2</sup> For example, Allen Buchanan states that "The legitimacy of a state—including its rightful jurisdiction over territory—depends upon its providing a framework for cooperation that does not systematically discriminate against any group." (Buchanan, 1991, p. 45)

This does not commit us to the view that any self-determining group must be granted resource rights, but only to the view that this is the *type of group* that can make a claim for resource rights. In liberal theory at least, self-determining groups have a unique fit with resource rights. This is because of the fit between self-determining groups as groups capable of establishing justice as political autonomy for their members and the role that resource rights play in establishing geographical political autonomy, thereby making comprehensive determinate jurisdiction over a particular population possible.

With the understanding of a resource right as a jurisdictional right held by self-determining groups, we can explain what's happening in the two cases. In the 'failed state' case, the people of Sierra Leone, assuming that they form a self-determining group, retain resource rights because the right belongs to groups with the right of self-determination regardless of the condition of their state, as long as these groups demonstrate a capacity to establish justice (in the foreseeable future). In the case of group property rights, the LDS church's land rights and the resource rights of the US do not conflict because property rights are sufficiently different from resource rights; resource rights are jurisdictional rights. (I maintain that the LDS church is not a group with the right of self-determination, although I have not argued for that position here.)

## **Conclusion**

Broadly speaking, given the role of resource rights in important contemporary debates, I assert that there are three criteria for any theory of resource rights. First, the theory must be able to explain how resource rights works within liberal theories of the state and territorial rights. This includes explaining the connection between resource rights and political legitimacy, between resource rights and self-determination, and between resource rights and the basic liberal values of individual freedom and well-being. Second, the theory must be able to work within (or at least talk directly to) liberal theories of global distributive justice. Third, the theory has to achieve a flexible articulation of resource rights that is capable of reasonable change in response to empirical considerations, such as emerging empirical analysis regarding how global economic stability is affected by resource holdings and analysis on the resource curse.

With this essay I have only tackled (part of) the first criterion. I have sought to establish a definition of resource rights, that they are rights held by a self-determining group to control (make, adjudicate, and establish laws regarding the use of) the resources within its territory with respect to the persons within (who must obey the laws of the state) and outside of the borders (who are excluded from these resources).

This conception of resource rights does a better job explaining common cases of resource rights claims than our existing conceptions. Moreover, I think that this conception gives us a promising groundwork for meeting the second and third criteria, although I don't have the time to go into that here.