

Territorial Rights: An Undisclosed Premise in Theories of Global Justice

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Debates in global justice theory often focus on *scope*. The scope of distributive justice describes the rightful recipients and duty-bearers of justice. For cosmopolitans, the *scope* of justice includes all persons. Statists, by contrast, describe the scope as limited by state boundaries. Both cosmopolitans and statists assert that if we know (a) the principles of justice, and (b) the scope of justice, then we know enough to say who is owed what from whom as a matter of justice. Unfortunately, this way of framing the debate fails, because there is another theoretical element essential for determining who is owed what from whom as a matter of justice. In order to know what justice requires, we must first know *which set of goods are legitimate objects of distribution*.

Distributive paradigms create obligations that X's [agents] distribute Y's [direct objects] to Z's [recipients]. In identifying the agents, direct objects, and recipients, certain criteria will be used. Current discussions on the scope of justice emphasize the X's and Z's. Diamonds, for example, are neither agents (X's) nor recipients (Z's) of distribution. Diamonds, however, may be the distributed; they may be Y's. Just like certain criteria establish what counts as an agent or as a recipient, so certain criteria establishes what counts as a distributive good.

There are two types of criteria used to establish what counts as a distributive good. The first establishes the *kind* of thing that is distributive. Human babies, for example, are not distributive goods. Babies are not 'goods' in the sense that they are up for grabs under the principles of distributive justice. Money, by contrast, is the prime example of a thing that is up for grabs. Because of their different features (that money is fungible and babies are not), one kind of good—money—is a distributive good, and babies are not. The second type of criteria establishes the *domain* of goods which may be distributed. Assuming a statist position, for example, the domain of goods which may be distributed are only those goods which the state (or its members) legitimately claims. On the statist view, US citizens have claims that the US fairly distribute goods among citizens, and citizens only. These goods are limited by the US's legitimate domain. The US has no right to distribute Canadian goods to US members, for example. Similarly, US citizens do not have any claim that the US distribute Canadian goods among US citizens fairly. Instead, US citizens have a claim that they receive US goods fairly.

Another way to put this point is that the scope of distributive justice necessarily presupposes entitlement claims. The US cannot distribute anything, and has no legitimate right to distribute anything, if it does not have a prior claim to any distributive goods.

Specifically, the scope of distributive justice presupposes territorial rights. Territorial rights are jurisdictional rights over the people and goods within a territory; they give groups the right to determine property rights law—the power to implement rules of distributive justice—over natural resources and other goods within a territory (Nine 2012, 6).

This chapter looks at the foundations of both cosmopolitan and statist arguments. Both sides depend on presumptions of territorial entitlements to make their claims work. Importantly, most cosmopolitan and statist theories cannot, on their own terms, tell us anything about territorial entitlement; these theories can't work without relying on separate theories of territorial rights. However, as illustrated throughout the chapter, theories of territorial rights do not neatly support many existing statist or cosmopolitan positions. We are left with a theoretical hole: a need for a new theory of global justice that takes seriously the connection between people and place.

Statism

Statist arguments limit the scope of justice to interactions within the state. They usually start with a discussion of the proper *site* of principles of justice. A site of distributive justice refers to a set of structures or relationships that must be governed by principles of distributive justice. Following the influential theories of John Rawls, statist affirm that the site of distributive justice is the basic structure of society. The basic structure of society is, “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation” (Rawls 1999, 6). This structure is the site of justice because it defines persons’ “rights and duties” and influences “their life prospects, what they can expect to be and how well they can hope to do. The basic structure is the primary subject of justice because its effects are so profound and present from the start” (Rawls 1999, 6-7).

On these theories, the scope of distributive justice is coextensive with its site. For Rawlsian theorists, the boundaries of the basic structure comprise the boundaries of the scope of our duties of distributive justice. These theories also recognize other kinds of duties of justice. For example, the scope of humanitarian justice includes all persons; in this sphere all persons have duties of basic humanitarian justice (to not torture, e.g.). Only the domestic sphere characterized by the existence of a basic structure is the appropriate domain of distributive justice.

There are two elements of the argument limiting the scope of the principles of distributive justice to the domestic sphere. The first, theoretical, element aims to establish that the principles of distributive justice are limited to a basic structure. The second, empirical, element aims to establish that basic structures do not exist at the global level. Exploring the second element highlights the importance of territorial rights for global justice theories, and I turn here first. State rights over natural resources and other territorial entitlements seem to qualify as an international basic structure—or at least they exist as a fundamental prerequisite for the existence of state basic structures. International institutions, in particular the international institution of territorial rights, define individual rights and duties and influence individual life prospects in a way that is profound and present from the start (Abizadeh 2008). Exclusive ownership of resources impacts relative global levels of wealth and well-being. When a group exercises its resource rights, the members of foreign groups do not have a primary right to develop and use of those goods. The location, size, and kind of resources controlled by the collective have effects on the well-being and autonomy of members of that group relative to the members of other groups. Resource rights affect the way that the economy, culture, and other domestic institutions will develop.

Additionally, international institutions supporting exclusive territorial jurisdictions construct the direct bases upon which rights, duties, benefits, and burdens are distributed amongst individuals. A group with jurisdictional rights has the right to establish a rule of law according to its own set of principles and values. Currently international institutions recognize the importance of territorial rights for the self-determination of groups, but only as a respect for those groups that *already* exercise their right of self-determination (with a very few exceptions). The current institution of territorial rights is static. The set of right-holders (states) and the particular territories remain the same. Suppose that the world is divided into only three regions. In each region a different group, A, B, or C, has exclusive territorial rights (including the authority to determine property rights). Living within these regions is a number of groups. Three of the groups, call them d, e, and f, are groups that may qualify for the right of self-determination (they have many of the qualities that we would normally assign to that sort of a group). Groups d, e, and f do not have territorial rights. We can imagine that these are minority groups, the members of which currently live under the jurisdiction of A, B, or C. In this case, all of the people in this world live under the principles of justice regarding rights over goods as determined by A, B, or C.

Even under conditions of perfect freedom of movement between states, the system of territorial rights deeply influences the life prospects, rights, duties, relative wealth, and other goods that persons enjoy. Because jurisdictional rights are held only by groups A, B, and C,

persons are allocated goods and afforded liberties and opportunities in accordance with the principles of justice chosen by A, B, and C only. If the distribution of resource rights in this world were changed so that d, e, and f also had resource rights, then the life prospects, rights, duties of persons would be fundamentally different. As this system of territorial rights affects the distribution of goods amongst persons in such an enduring and profound way as a kind of basic structure, it must be justified.

Returning to the first, theoretical, element of statist arguments, that principles of justice are limited to a basic structure, reveals several lines of argument.¹ I examine only one here, that the basic structure is coercive in relevant ways, and therefore it is the proper subject of justice. This line of argument is representative of the general kind of arguments made by statist, and the criticisms that I make apply to the general kind of argument as well as to the particular arguments from coercion.

State structures uniquely coerce the members of that state; to be legitimate, these coercive structures must be justified. One example of uniquely pervasive state structures is state private law. Within a state, the regime of private law establishes a system of property amongst members. The property holding may be bigger or smaller for each individual member, depending on the system of private law. So state coercive structures are responsible, then, not only for defining individual property holdings, but also for inequality between members. The relative status of members in a society must be justified in as much as that status is the result of pervasive coercive structures, and coercive structures are justified only if they are or would be endorsed by the persons it directly coerces (Blake 2001; Nagel 2005).

We may suppose that members would consent to this coercive set of private state laws, if the legal structure is governed by principles of distributive justice. This gives us reason to believe that principles of distributive justice must govern state coercive structures. In extension, the arguments that international structures do not directly coerce individuals in the same pervasive way as domestic institutions conclude that international structures are not subject to the same principles of distributive justice (Blake 2001, 280). Thus state coercive structures are subject to the principles of distributive justice, and global structures are not.

Even granting that state basic structures are unique sites of justice, the statist argument cannot reach its conclusion without an additional premise regarding the territorial entitlements of the state. Moreover, this entitlement cannot be determined by arguments from coercion alone.

¹ For an overview and criticism of three of these arguments, see (Abizadeh 2007)

The upshot of most arguments limiting the duties of distributive justice to the domestic sphere is to cut off the distribution of goods from one state to another. However, if one people has a legitimate claim to the resources within a territory inhabited by a different people, then a redistribution of goods from the latter people to the former is required as a matter of justice. Redistribution, even within a domestic state, cannot occur without knowing what may be legitimately redistributed. If one people cannot legitimately claim the resources under its feet, then it does not have a legitimate claim to redistribute those goods, even if the distribution would result in a just pattern. Initial conditions of resource ownership are essential to understanding the limitations of distributive justice.

This is why several authors have approached cosmopolitan justice from a 'common world ownership' perspective. For example, Hillel Steiner argues (along the lines of 17th century political philosophers) that the natural world is owned in common. He interprets this as the thesis that all natural resources are owned by each person equally (Steiner 1996). Under these conditions of resource ownership, patterns of distributive justice described by statist are subverted. Because the just allocation of goods under conditions of equal *world* ownership would require considerable global redistribution, limiting distribution to the domestic sphere would be unjust, *even if we grant that the basic structure of the state is a site of justice*. The power of resource entitlement lies in its pre-institutional nature. The conditions of the basic structure are constrained by these pre-existing natural rights regarding legitimate ownership of resources. An analogy is seen in private ownership. Your sister and her three children come to stay at your home over the holidays. During their stay, your sister divides up equally all of the things within your home and the home itself between the five of you. Without taking any prior entitlement claims into account, this is arguably a fair division of goods. However, notwithstanding the division's abstract fairness, this particular act of division is unjust, because your sister had no prior claim to divide up your property. Similarly, in order for statist theories to succeed, then, they must presuppose that the domestic state has legitimate title over its territory.

Moreover, a theory based on consent cannot settle the matter of resource ownership on its own. Consent theory cannot explain territorial entitlement. First, states have not previously consented to existing territorial entitlements. Instead, states have formed over a long history of colonialism and conquest; they did not consensually 'disown all claims to the land in others' possession' (Locke 2003, 5. 45). Rather, states put much energy into establishing forces that would coercively take others' land away so as to make it their own.

Second, territorial entitlement is not justified on the basis of *hypothetical* consent. Perhaps states (or other relevant collectives) ought to consent to a system of territorial

entitlement because this system has certain important virtues, even if states do not in fact do so. Unfortunately, this interpretation has a significant problem: the consent model is framed in terms of group, not individual, consent. And the coercion of individuals must be justified (or justifiable) to *those individuals*. However, territorial entitlements cannot be explained in terms of individual consent. Along with other worries, this position cannot establish state territorial rights because it gives individuals the power to secede their property from the state—and this would have the result that territory ceases to be a state entitlement. Rather, ‘territory’ becomes an aggregation of private property rights (Nine 2008).

In sum, the system of territorial rights must be justified for states to have authority to distribute goods from that territory. However individual consent cannot explain particular territorial rights. Consequently, the consent theory does not have the tools to explain claims to territory on its own. In order to justify this system to individuals, a separate theory must explain the resource rights of political units. If territorial rights cannot be explained, then statism cannot get off the ground.

Cosmopolitanism

Institutional cosmopolitans fall into two categories: those that endorse *only* global political institutions and those that endorse a multi-level approach to global institutional structures, supporting both global and local political structures. The latter is more common (Brock 2009; Gilibert 2012; Hassoun 2012). Multi-level institutional cosmopolitanism endorses the division of political power between global and state (or state-like) authorities. Iris Marion Young explains:

The first element in a vision of global democracy, then, is local self-determination, but without sovereign borders... The global level of governance is ‘thin,’ in the sense that it only lays down rather general principles with which all jurisdictions must comply. Interpretation and application of the principles, as well as any governance issues that do not come under the principles, are left to local jurisdictions. Public administration, according to this vision, is local and regional, which is to say that each locale has the power to decide for itself how it complies with the general regulatory principles. (Young 2007, 33-34)

Although many cosmopolitans argue that a global redistribution of goods is justified, they do not want to turn the world into one global state.

This cosmopolitan vision calls for collective territorial authority at lower levels of government. The local authority has self-determination rights to establish, within the bounds of cosmopolitan principles, rule of law within its domain. These regional powers

include authority over natural resources and determination of individual property entitlements. This means that certain group rights over territory will remain, and the territorial nature of these 'sub-states' in the divided paradigm must be defended. Regional authority is not supreme, as it is subject to general cosmopolitan principles. But it is to a great extent comprehensive. These state-like local structures affect the set of distributive goods to which the members of these structures have access. They will also affect the rights of the group to develop natural resources that are geographically contiguous with the group.

Because this cosmopolitan position calls for group territorial authority, it relies on territorial rights to establish appropriate objects of distributive justice. These objects of distributive justice would be subject to the primary jurisdictional control of persons residing in that geographical area, thus establishing important differences between the life prospects of members of different groups. Further, depending on the kind of cosmopolitan theory, certain elements of distributive justice may be limited to the domestic group (Caney 2005, 163). As the statist theory requires a justification of state territorial entitlements in order to justify their conclusions regarding the scope of distributive justice, so too does this version of cosmopolitan justice. In as much as a local collective claims legitimate moral authority to redistribute certain goods to its members, it must have a pre-political claim to those goods.

Similarly, if the cosmopolitan theory endorses only global political institutions, it must justify the *global* claim to territory. In both cases (the statist and the global), the institutions are claiming a moral entitlement to redistribute a set of goods—this claim to the goods must be justified in order for the theories to reach their final conclusion. In this case the global claim to territorial entitlement should be justified against distinct units that may wish to secede from global authority, such as former states.

Like most statist theories, cosmopolitan theory cannot account for territorial entitlement on its own terms. This is because cosmopolitan theory, as defended by democratic or humanitarian principles, is a theory of political legitimacy over *persons* and not a theory of entitlement over goods. These theories of political legitimacy over persons are insufficient to explain how collectives have claims to territory. There is a difference between a right to establish justice regarding the civil liberties of persons, such as whether homosexual marriages are legal, and a right to establish development restrictions over areas of the rainforest. Jurisdictional authority over persons (the former) is distinct from jurisdictional authority over resources (the latter) in that in the former case, the authority is exercised over actions that directly concern people, while in the latter authority is exercised over actions that directly concern resources. A collective could govern persons without governing resources—certain religious courts, for example, have jurisdictional authority over

personal matters without having jurisdiction over resources. A territorial right, by contrast, gives the collective the authority to control resources and other goods within the territory.

One possibility is for the cosmopolitan theorist to appeal to claims that the world is owned 'in common'. Suffice it to say that, first, the appeal to common world ownership amounts to an appeal to pre-political claims to territory, and so it supports the thesis that theories of global justice necessarily rely on claims to territorial entitlement. Second, as we will see, the appeal to common world ownership does not support a claim on behalf of the global community.

Common ownership of the earth is a hypothesis debated by natural law theorists in the 16th-18th centuries. It is a useful theoretical tool in explaining the moral relationship between persons and natural goods. The cosmopolitan could claim that if all persons own the world's resources in common, then the use or division of those resources must be justifiable to all persons. This justification of the use of joint holdings should ideally come in the form of voluntary consent. If we all collectively own all natural resources, then taking any part without permission would be stealing from the collective. Perhaps all natural resources (and even all goods derived from natural resources) can be distributed globally, because collectively we all have a prior entitlement to the world. Thus, by reference to pre-political claims of common ownership, cosmopolitan distributive principles can be justified. If this is the case, then the cosmopolitan could claim that the scope of distributive justice is global. And the statist would have a hard time resisting foreign claims to domestic resources. However, this cosmopolitan argument fails because this use relies on a positive community interpretation of common ownership that is unsupportable.

Things can be held in common in two ways. On one hand, things could be held in a 'positive community'. In this sense, ownership rights differed from things being owned privately, 'only in the respect that the latter belong to one person while the former belong to several in the same manner' (Pufendorf 1673, 4.2). This sense of common ownership is a corporate ownership—all persons share ownership rights over the same thing. On the other hand, common ownership in a 'negative community' is a pure liberty—it is the absence of a duty not to access, use, or control a good. The negative community entails that all persons may engage in similar activities over the same good. Things belong to a person as if she were the only being in the world. In this state, no person is excluded from any particular thing (Buckle 2002, 95-96). Further, in a negative community, agents can establish ownership over resources without waiting for everybody else to consent. That is, they can take things 'out of the commons' and make them private property.

Cosmopolitans need to rely on a positive community view, because only a positive community imposes obligations on persons to respect others' common claims to goods. These obligations explain why the use of any resources must be justifiable to all persons globally—because all persons globally have property claims to those goods. In a negative community, persons do not have any obligations regarding others when they use resources.

Unfortunately, the positive community interpretation of world ownership is incoherent—it is impossible to act on the imperative to preserve one's self and to respect the positive community of world ownership at the same time. A positive community of ownership implies that all members of the community (in this case the community is the community of humanity) have a shared property right in all of the world's resources. This is a state where the owners have claims, not merely liberties, regarding their property. More importantly for understanding common world ownership, each member has a claim as a shareholder—members of the community have claims against other members. The use of the commonly owned goods is subject to shareholder approval. In other words, in a positive community of ownership, common property cannot be used in ways to which the members of that community have not consented. Criticising this view of common world ownership, John Locke says that “if such consent was necessary, man had starved, notwithstanding the plenty God had given him.” (Locke 2003, 5.28). Continuing with a metaphorical reference to God as master and provider, Locke explains: “children or servants could not cut the meat, which their father or master had provided for them in common, without assigning to every one his peculiar part” (Locke 2003, 5. 29). Relying on the consent of all other persons in the world, before using any of the world's resources would prohibit the taking of those things necessary for human survival. Because of this incoherency in the positive community view of common world ownership, we should understand common world ownership as a condition where all persons have a liberty to use any resources.²

Locke's point is not just that world resources are 'commonly owned' in a negative community as long as global democratic consent is impossible, but also that world resources should never be understood as owned in common in a positive community. As long as others have a say in how any resource should be used, then it is possible that the mandate of the community will conflict with the imperative to preserve one's self. Consequently, because of the imperative of self-preservation, persons always have the liberty to unilaterally appropriate property without the consent of the community, and this liberty is theoretically opposed to the positive community understanding of world ownership.

² Given certain provisos, (Locke 2003, 5, 31 and 33).

Conclusion

The arguments of this chapter have been largely negative. I have argued that there is a flaw—a hidden premise—in many theories of global justice. Territorial entitlements are a necessary element of arguments concerning the scope of distributive justice. Moreover, most theories aimed at establishing the scope of justice cannot on their own terms explain pre-political territorial entitlement. This is true both for arguments aimed at limiting the scope of justice to the domestic sphere and for arguments aimed at establishing a cosmopolitan scope. It is imperative that theories of global justice start thinking about territorial rights, and this requires evaluating theories of justice through a new lens. Not only are personal elements (such as coercion) important to finding a comprehensive theory, but also spatial and object-relative elements (such as relating people to places) are fundamental in creating a coherent and comprehensive theory of global justice.

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