CORA Cork Open Research Archive
Cartlann Taighde Oscailte Chorcaí

Title	Territory, rights, and historical injustice
Authors	Bufacchi, Vittorio
Publication date	2016
Original Citation	Bufacchi, V. (2106) "Territory, Rights and Historical Justice," Philosophy and Public Issues (New Series), 6(2), pp. 107-123
Type of publication	Article (peer-reviewed)
Link to publisher's version	http://fqp.luiss.it/category/numero/2016-6-2/
Rights	© 2016 Philosophy and Public Issues, Luiss University Press
Download date	2026-11-04 16:40:05
Item downloaded from	https://hdl.handle.net/10468/4057



UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

SYMPOSIUM

PEOPLE AND TERRITORY



TERRITORY, RIGHTS AND HISTORICAL INJUSTICE

BY

VITTORIO BUFACCHI

© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 2 (2016): 107-123
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

[THIS PAGE INTENTIONALLY LEFT BLANK]

Territory, Rights And Historical Injustice

Vittorio Bufacchi

Margaret Moore's *A Political Theory of Territory* is arguably the most erudite treatment of territorial rights on the market.[1] Considering that territorial rights are a very relevant and prevalent topic in contemporary political theory, with a fast-growing and increasingly sophisticated body of literature, this is no mean achievement. I expect this book will become the reference point for all future publications on territorial rights for many years to come, and rightly so.

The premise of Moore's book is that the concept of 'territory' is under-theorized in contemporary political philosophy. She is right, and in this book Moore gives a very thorough analysis of why political theory needs to take territory seriously. More specifically Moore puts forward a moral and political theory of territory centred on the idea of self-determination, characterized by two moral rights: a moral right to residency (individual) and a moral right to occupancy (collective).

I want to take issue with two different aspects of Moore's treatise, on the subject of rights and the question of corrective

[1] Margaret Moore, *A Political Theory of Territory* (Oxford: Oxford University Press, 2015). Unless otherwise specified, all page or section numbers refer to this work.

© 2016 – *Philosophy and Public Issues (New Series)*, Vol. 6, No. 2 (2016): 107-123
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

justice. First, why does Moore assume that moral and political concerns about territory are disputes about 'rights'? In other words, notwithstanding the fact that it has become prevalent in the literature to talk about 'territorial rights', does a political theory of territory need to be formulated in the language of rights? And if so, what are the requirements of a theory of territorial rights? Secondly, Moore's assumption that territory raises political and moral issues that are best understood in terms of 'rights' has implications for the way we understand and address questions of historical injustice. Moore deserves to be praised not only for putting forward an elegant and convincing abstract theory of territorial rights, but also for suggesting how this theory can guide us in resolving extremely complex and morally challenging practical dilemmas. Nevertheless, there is the suspicion that her theoretical framework, grounded on a theory of rights, distorts the injustice of historical wrongs, and consequently misrepresents the best way to correct such wrongs.

I

The Right to a Territory?

Our relationship with a territory is morally significant, but do we have a right to a territory? Moore thinks so. She is not alone in this regard of course, in fact the majority of authors in political theory writing about territory often assume that this is part of a larger discourse on rights: the received opinion is that 'terriorial' and 'rights' are a natural combination, they are meant for each other, like Ben and Jerry, or fish and chips.[2] Security in numbers

[2] For an overview on 'territorial rights', see D. Miller, "Territorial Rights: Concept and Justification," *Political Studies*, Vol. 60, no. 2 (2012): pp. 252–268; T. Meisels, *Territorial Rights* (Dordrecht: Springer 2009); A. J. Simmons, "On the Territorial Rights of States," *Philosophical Issues* Vol. 11, no. 1 (2001): pp.

is a rational strategy, but the issue will not go away. Why territorial rights? Why rights? Why not territorial justice, or territorial morality? It seems to me that if we assume that territorial concerns are best understood as rights issues, then we need a fully comprehensive theory of rights.

It is surprising, and perhaps slightly disappointing, that a detailed analysis of rights is missing from Moore's otherwise careful and in-depth theoretical framework. Instead Moore deals with a number of pivotal but complex issues in a set of footnotes, touching on the nature of rights and the way to resolve the inevitable conflict of rights. I'm going to suggest that this is not sufficient; furthermore what she presents us with is not always persuasive.

At the outset of her treatise Moore tells us that "Everyone has an interest in land, and this general interest is important to grounding rights to it" (p. 9). Moore goes on to reiterate this message even more emphatically on the next page:

> In this book, I argue that people have an important interest in access to land that supports the way of life that is fundamental to their projects and identities, the place where they live and have relationships, the geographical domain of their self-determination, and the property that they hold, and that these interests are sufficiently important to be protected by right and hold others under obligations to protect or promote those rights (p. 10).

On the bases of these claims, it would appear that the logical structure of Moore's main argument unfolds along the following lines:

P1 There is value in collective self-determination.

300–326; A. Stilz, "Why do States have Territorial Rights?", *International Theory* Vol. 1, no. 2 (2009): pp. 185–213.

P2 There are normatively significant relationships between peoples and places (projects; identities; attachments; etc.).

P3 Self-determination (P1), residency and occupation (P2) constitute 'morally important human interests'.

P4 'Morally important human interests' generate rights.

Therefore:

C1 We have territorial rights to protect our self-determination, residency, and occupation.

Clearly Moore is endorsing an interest theory of rights, which has notable advantages, but also some well-known complications. I'll return to Moore's interest theory of rights later, but first the logical structure of her argument requires closer inspection.

Premises P1, P2 and P3 are not sufficient to justify C1. Even if we give Moore the benefit of the doubt and accept her views on the nature and importance of self-determination, residency and occupation, the move from acknowledging that there are special interests attached to territory to recognizing territorial rights is suspicious. The only way that Moore can make C1 follows from P1, P2, and P3 is by including another premise, P4: the assumption that rights are derived from 'morally important human interests'. In what follows I'm going to suggest that P4 is the weak link in Moore's argument.

No one denies that there are special interests attached to territory, but special interests don't automatically translate into rights. The special interest that we are told generates from our relationship with a territory is, perhaps, an argument for making territory a question of justice. But Moore is not defending a

theory of territorial justice, but a theory of territorial rights.[3] The reason why it is tempting but logically illegitimate to move too quickly from 'interests' to 'rights' is captured by Joseph Raz in his critique of what he refers to as 'traditional' accounts of human rights,[4] in particular those put forward by Alan Gewirth and James Griffin:

> Traditional theories fail for several reasons. ….here I will point to three problems. They misconceive the relations between value and rights. They overreach, trying to derive rights which they cannot derive. And they fail either to illuminate or to criticize the existing human rights practice

The first point he raises is crucial for us: misconceiving the relations between value and rights. Raz criticizes Gewirth for "ignoring the possibility of believing that certain condition are essential to our life, and even of striving to secure such conditions, without either claiming or having a right to them."[5] Raz returns on this point in his critique of Griffin, who like Gewirth fails to show that value establishes rights. The fact that something is of value to us is not sufficient to attract the special protection of rights, since as Raz: "By that argument if the love of my children is the most important thing to me then I have a right to it."[6]

[3] Of course some political theorists would argue that justice is fundamentally about rights. For example a left-libertarian like Hillel Steiner argues that rights are the basic blocks of a theory of social justice, but he is appealing to a right to self-ownership, and of course he embraces a will (or choice) theory of rights, and not an interest theory of rights, like Moore.

[4] J. Raz, "Human Rights Without Foundations," in S. Besson and J. Tasioulas (eds.), *Philosophy of International Law* (Oxford: Oxford University Press 2010), pp. 323-324.

[5] *Ibid*., p. 324.

[6] *Ibid*., p. 325.

A critique along similar lines applies also to Moore: she simply assumes that something being valuable, or in her language a 'morally important human interest', is enough to turn it into a right.[7] But it's not necessarily so: the fact that territories are necessary for our collective self-determination, and that there is value in self-determination, is per se not sufficient to establish a right to a territory.

Translating what is deemed to be valuable to a right is a common move amongst interest theories of rights. In her book Moore appeals to what she calls a 'modified' interest-theory of rights. In Chapter 2 Moore explains what she means by this in a footnote:

> I rely on a modified interest-theory of rights, which combines the idea of wrong or disrespect to the equal moral status of the right-holder with the idea of damage or harm to important interests of the right-holder. It is a *modified* interest theory, because I am persuaded that that an account rooted only in welfare fails to account for the trumping character of rights (p. 32, fn. 31).

Moore is right to 'modify' the interest theory of rights, but this may not be enough. There are potentially three problems with Moore's 'modified' interest-theory of rights, and therefore three reasons why it remains problematic to assign rights on the basis of our territorial interests. I will refer to these as the inflationary problem, the conflict problem, and the instrumentalization problem.

[7] The language used by Moore and Griffin is very similar. While Moore talks about 'morally important human interest', Griffin appeals to 'especially important human interests': "It is only because they [autonomy and liberty] are especially important interests that rights can be derived from them; rights are strong protections, and so require something especially valuable to attract protection." J. Griffin, *On Human Rights* (Oxford: Oxford University Press 2008), p. 35.

1.1. *The Inflationary Problem*

One area of concern is that Moore's modified interest-theory simply generates even more right claims, which contributes to the inflationary trend that has seen every political claim, every moral argument, every policy, being justified in terms of 'a right'. The Inflationary Problem in rights discourse is well documented, and it applies especially to entitlement theories of rights such as H.J. McCloskey's, but also to interest theories of rights. Regarding the entitlement theory, James Nickel warns us that if a moral right exists whenever there are strong moral reasons for ensuring the availability of a certain good, "the list of entitlements will be nearly as long as the list of morally valuable goods … this conception has no built-in assurance that the demand side of rights will not outrun the supply side."[8]

Joseph Raz is also aware of the inflationary tendency within rights discourse: "An ever-growing number of rights are claimed to be human rights, for example, the right to sexual pleasure; the right to sexual information based upon scientific inquiry; the right to comprehensive sexual education. It is declared that all persons have the right to a secure, healthy, and ecologically sound environment. Future generations have rights to equitably meet their needs. All persons have the right to protection of the air, soil, water, sea-ice, flora and fauna…. Some academics argue that there is a human right to globalization."[9] To this expanding list of rights Moore wants to add territorial rights. The issue is not that we don't have sexual rights, or that we don't have a right to an ecologically sound environment. In fact we may even have territorial rights. But what we need is a theory which clearly indicate what rights we have, and why. Simply adding to the list is almost too easy.

[8] J. Nickel, *Making Sense of Human Rights* (Oxford: Blackwell 2007), p. 30.
[9] J. Raz, "Human Rights Without Foundations," p. 322.

The problem being of course that the currency of rights loses value the more widespread it is used. Admittedly this is a bigger problem for the literature on 'human rights', but since the line between a 'right' and a 'human right' is somewhat blurry, and Moore switches freely between talking about territory as a political right and a moral right, people would be forgiven for thinking that perhaps territorial rights are not just legal rights but also human rights. In fact, her thesis on self-determination is a perfect complement to, for example, Griffin's interest theory of human rights grounded on the concept of personhood, which he defines in terms of autonomy and normative agency.

1.2. *The Conflict of Rights Problem*

Related to the Inflationary Problem is a second problem, namely, that as we create more rights based on important interests, we increase the inevitable risk of rights (and duties) coming into conflict. How to resolve conflicts of rights has always been a thorn on the side of interest theories of rights, and Moore is fully aware of it:

> I treat rights as possessing moral stringency in the sense that they generally override competing moral (welfarist) considerations. … However, rights may conflict (or more precisely the duties generated by a right may conflict). This is hardly surprising: if the interest is sufficiently morally important to ground a right, it will give rise not to a single corresponding duty but to a number of duties" (32, fn. 32).

From this statement we can deduce that according to Moore territorial rights are, in Hohfeldian terms, claim rights and not privilege or liberty rights, since they are correlated with a number of duties. It would also appear that Moore is fully aware of the problem of dealing with conflict of rights. There are many different ways of dealing with this problem. In another footnote,

Moore (pp. 32-33, fn. 33) considers giving rights lexical priority, but she dismisses this strategy on the grounds that we cannot assess trade-offs between rights along a single metric. Moore is probably right, but the problem still stands: how do we resolve conflicts of rights?

Moore solution is the following. She argues that rights have to meet two criteria: they have to be feasible, and they have to be compatible. By 'feasible' Moore means that they cannot be impossible, while the 'compatibility' requirement is explained in the following terms:

> What do I mean by the compatibility requirement? I mean that the right should be defined in such a way that it does not come into necessary conflict with other fundamental rights, which also identify and protect fundamental human interests (p. 29).

This is ingenious, but I'm not convinced this is going to work, at least not for Moore. The compatibility requirement may be an option for choice or will theory of rights—this is what Hillel Steiner refers to as the condition of compossibility, a term he borrows from Leibniz—but not the interest theory of rights, not even the 'modified' theory of rights.

It is very attractive to appeal to the discourse of rights, and a theory of 'territorial rights' has a more urgent and authoritative appeal than 'territorial justice' or 'territorial principles' or 'territorial doctrines'. But theories of rights are messy, and merely adding 'territory' to the existing list of rights creates more problems than it solves. If Moore is serious about people having a moral right to territorial occupancy and residency, she needs to tell us how her theory of rights works: Are territorial rights claim rights or liberty rights? If they are claim rights who is under a duty to provide the right-holder with her rights? When does an interest generate a right and when does it not generate a right?

Should we be concerned with the inflationary tendency of rights? And crucially how do we resolve conflicts between rights and between duties? These are complex issues, which cannot be dealt with in a series of footnotes.

1.3. *The Instrumentalization Problem*

There is a third potential problem with Moore theory of territorial rights, namely, the Instrumentalization Problem. 'Rights' are powerful tools, both conceptually and rhetorically. Being on the side of rights makes one's argument not only stronger, but also correct from a normative perspective. Those who champion rights claim to have morality on their side, which is not insignificant. But rights discourses can also be incendiary, and even engender intolerance.

In Chapter 2 Moore tells us that territorial rights are not absolute rights: "In all cases, however, I regard these rights not as absolute claims, but as subject to certain limitations" (p. 29). Moore is right of course, indeed this is a standard view held by most authors writing about rights, including human rights. For example Nickel reminds us that "human rights are high priority norms. They are not absolute but are strong enough to win most of the time when they compete with other considerations."[10]

One potential problem with the language of 'territorial rights' is that political actors who demand and fight for their territorial rights often choose to assume that rights are absolute. This is to be expected of course, since political actors are in the business of promoting their interests at all costs. The Instrumentalization Problem arises when people start to appeal to self-determination and territorial rights in order to justify territorial wars. In other

[10] J. Nickel, *Making Sense of Human Rights*, p. 9.

words, there is the risk that unscrupulous politicians and activists use the language of territorial rights to justify territorial gains and territorial wars. Perhaps political theorists need to be more cautious before using certain terms.

It is of course tempting to dismiss this concern, on the grounds that we cannot take issue with philosophers if people make improper use of philosophical ideas. Be that as it may, in Ch.7 of her book Moore discusses the idea of the acquisition (and diminution) of residency or occupancy rights and the related right of return, in terms of 'legitimate expectation'. This suggests that perhaps she is aware of the Instrumentalization Problem, or at the very least she realizes that she needs to specify what the 'certain limitations' are which makes territorial rights not an absolute claim. But what exactly are those 'legitimate expectations'? According to Moore, "[it] means something like 'what it is reasonable to expect to happen'" (p. 146). This is an interesting claim, and a good starting point, but per se it doesn't go far enough. First of all it may be necessary to distinguish 'legitimate expectations' from 'rational expectations', and secondly the term 'legitimate' requires detailed analysis. It is not enough to replace 'legitimate' with 'reasonable', since the concept of 'reasonableness' is doing a lot of work here, but it is a famously opaque and obscure concept, perhaps even more so than the term 'legitimate'.[11] One thing is certain: when it comes to territorial politics, people have all sorts of 'illegitimate expectations', sometimes driven by questionable motives (vengeance or revenge or retribution), sometimes driven by thinly disguised self-interest (access to natural resources), and only occasionally in good faith.

[11] For example, it is not clear to me whether Moore is using 'reasonable' in the Rawlsian or Scanlonian sense of the term. For an analysis of 'reasonableness' see V. Bufacchi, "Reasonable Agreement," *Imprints*, Vol. 2, No.3 (1998).

II
Territorial Rights and Historical Injustice

Moore deals with issues of historical injustice in Chapter 7. As historical injustice is a complex issue, understandably Moore points out that in this chapter she does not deal with all kinds of corrective justice, but "just on corrective justice with respect to land, and even then, not all kinds of corrective justice … the moral wrongs involved in the taking of land are certainly worth theorizing" (p. 140). She is right; the moral wrongs involved in the taking of land are certainly worth theorizing, and we need a political theory of territory to do so, and Moore provides us with the tools to do just that. But what is peculiar about her theory is that she does not seem to be concerned about the acts of violence involved in the taking of territory, instead she is concerned about the specific good that is being taken: land and territory. It follows that according to Moore colonialism is wrong because the process of unlawfully and illegitimately taking of land disrupts our social attachments, and in the process undermines our self-determination:

> Most people think that the wrong of colonialism isn't captured just by the fact that the imperial authorities failed to include the colonial peoples fully in their political projects, and instead erected forms of political and legal domination over them…. This was part of the problem, to be sure, but we also think that a significant part of the problem was that the imperial powers were involved in the taking of territory … The problem with colonialism wasn't simply the violation of the equality condition (equal treatment of persons); it was that the imperial power was engaged in taking territorial rights from another people, through extending political authority (rules of justice) over them (p. 100).

Moore returns on this point in a footnote in Chapter 7, where she explains exactly why the violation of territorial rights is wrong: "I am using the term 'imperialism' to refer to a situation where one group occupies the land of another, thereby violating

their territorial rights, and also subjugates them, thereby denying them the capacity to be self-determining" (p. 160, fn.4).

There are valid reasons why Moore uses the lenses of territorial rights in order to make sense of the historical injustice of colonialism, especially as it highlights certain aspects of the horrors and wrongness of colonialism, yet in the process of stressing why territorial issues are crucial to an understanding of the evils of colonialism Moore risks to downplay other important aspects, to the point where those other evils of colonialism are left out of the equation altogether. In other words, the starting point of Moore's analysis is to lament the fact that territory is under-theorized, but in her effort to put territory at the forefront of our analysis she ends up under-theorizing the violence of colonialism. So while what Moore is saying is not wrong, it is surprising how the violence that accompanies colonialism is not even mentioned.

The only place where the violence of colonialism is remarked on by Moore is in the following passage:

> We can identify at least four sorts of potential wrongs involved when land is taken, primarily through expelling people from their homes and communities, in addition to the coercion that usually accompanies such events: (1) being deprived of individual rights of residency; (2) being denied group rights of occupancy; (3) being denied collective self-determination; and (4) having individual or collective property rights violated (p. 140).

What is worrying about this passage is the way Moore deals with the abhorrent violence of colonialism. Moore merely touches on the 'coercion that usually accompanies' colonialism and imperialism, before leaving this issue aside and never returning to it. She goes on to consider what should be done to remedy territorial rights violation, as if that is the main issue to be confronted. The fact that the violence of colonialism plays a

minor role in Moore's argument about the wrongful taking of land and territory is not inconsequential: not taking violence seriously is potentially problematic because it distorts the way we think about corrective measures.

This is what Moore says about corrective justice:

> Most theorists writing in the corrective justice tradition distinguish between three different mechanisms for correcting historical injustice: *restitution*, giving back whatever it is that has been unjustly taken; *compensation*, giving something of a certain value but not the thing itself, either because restitution is impossible or in addition to restitution to make good the loss the victim has suffered meanwhile; and *apology*, again either because restitution is not possible or because there is independent reason to acknowledge the wrong even if it is. All of these can apply when land is taken, and which remedy is appropriate depends on identifying which particular rights are violated, and the justificatory arguments for the rights (p. 139-140).

Because of her preoccupation with self-determination, grounded on attachment to a specific piece of land and territory, it is perhaps to be expected that the way Moore thinks of corrective justice is in terms of identifying and rectifying specific rights violations, associated with territorial rights. But prioritising a moral discourse centred on the idea of territory and the rights to occupancy and residence come at a cost, as it demotes other moral considerations, and other ways of thinking about corrective justice. It is one thing to put forward a political theory of territory, but quite another to be monistic about territorial rights and expect to explain most things through the lenses of this one theory.

Moore argues that the right to return to the land from which you were unjustly expelled is not eternal, but has time-limits. This is in order not to fall foul of the first-occupancy principle. This is probably correct, which is why sometimes an apology is as much

as one can hope for, and that in any case an apology can go a long way to heal a wound. But what matters here is the reason for the apology, or in other words what it is we are apologizing for. Given the appalling violence that accompanies colonization, I'm not convinced that apologizing for the violation of a territorial right is the issue here.

Consider the following hypothetical scenario:

> *The Case of the Apology*: The colonial power known as Engerland colonized Eireland for many centuries, using brutal violence, reducing the local population to dire poverty, occupying their territory, and expelling the people of Eireland from their ancestral land. Engerland now argues that while they acknowledge that what their ancestors did many centuries before was wrong, too much time has passed for the people of Eireland to return to the land that was wrongly taken from them. All Engerland can do now is to issue a formal apology for the historical wrong associated with a violation of territorial rights.

There is something deeply problematic about this scenario, and yet it is consistent with Moore's political theory of territorial rights, and in particular with her views on corrective justice. It would be consistent with Moore's theory to suggest that it is not the barbarity of the oppression, the arbitrary nature of the violence, the physical and psychological disintegration of many generations, but the violation of a right to a piece of land that is the reason for an apology. This strikes me as counterintuitive. Yes, our relationship with place is morally significant, and it has value, but we don't have a right to everything we find valuable, and it does not mean that corrective justice regarding land should focus exclusively, or even primarily, on territorial rights.

III

Conclusion

In this chapter I have raised two issues with Moore's political theory of territory, dealing with a fundamental assumption in her argument. First, I argued that even if we give Moore the benefit of the doubt in terms of recognizing our special important interest in self-determination, and in accepting that territory is crucial for our self-determination, both as individuals and as groups, we must not assume that the fact that territory is valuable to us automatically translate into the language of rights. The relationship between 'value' and 'rights' is perhaps misconceived, to use Raz's language, and one cannot move from one to the other as quickly as Moore does. Therefore even though it is common practice to talk and write about 'territorial rights', this concept is fundamentally problematic, since introducing 'rights' in this moral equation only complicates matters: the more we use the language of rights the more rights are devalued, we also introduce more conflict of rights which we don't know how to resolve, and finally we generate 'legitimate expectations' about territorial rights, even though we don't necessarily know what these amount to. Secondly, I argued that putting too much emphasis on territorial rights could potentially distort our views on historical injustice, and how this is to be corrected.

Notwithstanding my reservations, Moore has written the sort of book that deserves the widest possible readership: this book belongs to that small minority of academic publications that simply cannot and should not go unnoticed. Moore deserves the highest praise for the accomplished scholarship that informs every twist in her argument in every page of an ambitious tome that explores both the theory and practise of one of the most

fascinating but controversial issues in political theory (and international politics) today.

University College Cork

If you need to cite this article, please use the following format:

Bufacchi, Vittorio, "Territory, Rights and Historical Justice," *Philosophy and Public Issues (New Series)*, Vol. 6, No. 2 (2016), 107-123, edited by S. Maffettone, G. Pellegrino and M. Bocchiola