

Who owns it?

— *Land claims in Latin America: their moral legitimacy and implications*

RELEVANCE

Conflicts due to unresolved land claims are a pressing political and social issue throughout Latin America. The aim of this project is to investigate the legitimacy of land claims by both indigenous and non-indigenous communities in Latin America, and to explore the means that these communities can adopt to vindicate the justified land claims that they may have. A better understanding of the normative considerations that underlie land claims and the strategies that have been adopted to pursue them in Latin America can help facilitate dialogue between social actors that currently are in conflict over land claims.

Three kinds of argument can support that communities have a legitimate claim to some land or territory, and that this claim generates weighty moral reasons (henceforth referred to as ‘responsibilities’) for other people to ensure that these claims are honored. The first argument is based on the idea that because these communities (or their ancestors) were unjustly dispossessed of their land, and are being kept in a state of poverty and deprivation due to their continued exclusion from the land, the State and those who currently occupy the land have a responsibility to rectify past injustice, and to reform the current legal order which perpetuates it—*contribution-based responsibilities*. The second argument is based on the idea that, because the community is in severe need and the State and affluent persons are in a position to alleviate their need at moderate cost, they have a responsibility to do so—*assistance-based responsibilities*. The third argument appeals to the idea that, even if the State and current occupants of the land did not cause or could not have prevented unjust exclusion from the land from happening, they have a duty to compensate the wronged community because they have benefited from these injustices—*beneficiary-based responsibilities*. Our project will evaluate the force of these three types of arguments in relation to the land claims of disadvantaged persons and groups in Latin America—focusing in particular on Mexico, Brazil and Chile—and explore their practical implications.

ASPECTS RELATING TO THE RESEARCH PROJECT

Background and Status of Knowledge

Three important events provide a helpful backdrop to our project. On the 1st of January 1994—the day that Mexico officially joined the North American Free Trade Agreement (NAFTA)—a rebellion exploded in the southern state of Chiapas. Hundreds of armed indigenous men took over several municipal precincts. Their demands included the restitution of land to 56 ethnic groups living in Mexico. It took the government two weeks and 3,000 soldiers to repress this movement, backed by the Ejército Zapatista de Liberación Nacional (EZLN).

On the 16th of April 1996, 12,000 landless squatters built an illegal encampment in Fazenda Giacomet, an unused property of 80,000 hectares in Paraná, Brazil. It was the largest illegal occupation of the *Movimento dos Sem Terra* or ‘Landless Workers’ Movement’ (MST). Founded in 1984 to fight for agrarian reform and land rights for poorer communities, MST is the largest grassroots movement in Latin America.

On the 12th of July 2010, 34 prisoners from the Mapuche ethnic group (inhabiting mainly the Araucanía Region, in the south of Chile) initiated a hunger strike that continues at the writing of this application in early October, 2010. Prosecuted by the civil and military law for violating private property, blockading roads and burning buildings and trucks which belonged to major

logging companies, the Mapuche have claimed that their actions were warranted because they sought only to repossess territory that rightfully belonged to them.

In the last fifteen years, dozens of social conflicts have taken place in different countries of Latin America, triggered by unmet land claims, which are also sometimes accompanied by demands for political self-determination. Some, such as Zapatistas and the Mapuche, have appealed to the ‘ancestral’ or ‘historical’ connections between specific communities and the land; connections which have been severed or weakened substantially, not least during the military dictatorships that affected the continent in the 70’s and 80’s, and on the governments that succeeded them. The Mapuche, for example, claim that the ‘the historical debt’ owed to them by the Chilean State goes back as far as the end of the 19th century, when it recognized the Mapuche to have a valid claim to only 500,000 hectares (5% of what they had traditionally inhabited and then claimed). The Mapuche also demand restoration of the 300,000 hectares that they lost during Augusto Pinochet’s dictatorship (1973-1990). Pinochet issued two decrees that facilitated the subdivision of their lands and granted land leases for up to 99 years (Aylwin 2000). In the case of the Zapatistas, one of their principal grievances concerns the manner in which the privatizations carried out by recent Mexican governments have marginalized and impoverished indigenous communities, sometimes forcing them out of the areas that they had traditionally inhabited (Collier and Quaratiello, 1999).

Other groups, such as MST in Brazil, have instead appealed to the extremely unequal distribution of the land and its effects on the poor (Carter 2000). The land, in this case, is seen mainly as a means for securing a decent standard of living for members of disadvantaged groups. Currently 1% of the landowners (around 40,000 *latifundarios* or ranchers) are in possession of 46% of the land (around 360 million hectares), while about 25 million peasants—mainly *mestizos* and descendants of European immigrant—remain landless (De Oliveira, 2002). Although the Brazilian constitution has a whole chapter devoted to agrarian reform and contains clauses that authorize expropriation of rural property which is not performing its social function (Brazil Constitution, Title VII, Chapter III), the MST claim that the government has seldom exercised this right on behalf of poor landless people. They view their initiatives as consistent with the principles underlying these underutilized constitutional provisions.

Groups making land claims have employed various means to achieve their aims, ranging from public communications and legal demonstrations to armed insurgency. Their members have often engaged in civil disobedience and violated conventional property laws, including hunger strikes, sit-ins at government buildings, road blockades and, of course, land occupations. Governments and other groups in these countries have in turn responded in various ways, ranging from negotiation and attempts to initiate dialogue, to violent repression and eviction.

Central Research Aims

1. Understanding the nature of land claims in Latin America

Although there is a voluminous literature on the history and the social and the political dimensions of land contestations and conflicts in Latin America, the question of whether the land claims put forward by disadvantaged groups can be morally justified has not been examined to an adequate degree. The first aim of this project is to explore the moral arguments that have been invoked to support these land claims, and to evaluate their strengths and weaknesses. These moral arguments seem to appeal to three different principles: the principle of contribution, the principle of assistance, and the principle of benefiting from injustice.

a) Contribution-based responsibilities

This type of argument rests on the shared moral intuition that there are stringent ethical requirements not to contribute to injustice (wrongful harm), and to compensate those who have

been wrongfully harmed as a consequence of our failing to meet these requirements. All other things being equal, reasons associated with contributing to injustice are commonly thought to be important because they are *stringent*. They are stringent in the sense that they *constrain* agents: prospective contributors to injustice cannot easily justify their conduct by appealing to the costs to themselves of refraining from doing so, or by appealing to the overall good that their conduct will bring about. And they are stringent in the sense that they *demand* much of agents who have ignored constraints against contributing to injustice, but are now in a position to mitigate or alleviate the injustices to which they have contributed. Moreover, contribution-based responsibilities are often seen as *enforceable*: it is often justified to prevent people from contributing to injustice with proportional use of force. For this project, the principle of contribution says, *agents have stringent and demanding responsibilities to rectify past or ongoing injustice insofar as they have contributed or are contributing to it.*

The different groups making land claims in Latin America appeal to various alleged contributions by different social actors within their societies. One kind of alleged contribution refers to the wrongful dispossession of particular lands that belonged to these groups. This argument is typically invoked when indigenous peoples demand to get back what they consider to be their ‘ancestral’ or ‘historical’ territories, as in the case of the Mapuche in the Araucanía Region in Chile, the Awajún and Wampis in the Peruvian Amazon and the indigenous peasants in Chiapas, Mexico.

These groups also allege that affluent persons and state officials have contributed to injustices that they have suffered by upholding and enforcing an *institutional order*—laws and other social rules governing what kinds of things can be owned (and by whom), how they can be acquired, transferred, relinquished, and forfeited, how markets and the production systems are structured, the manner in which decisions concerning education and health are made, and so on—that have kept these communities in a severely disadvantaged position. In some instances, it is claimed, governments have inherited unjust arrangements from illegitimate predecessor regimes, but have failed to reform them. One of the main complaints of the Mapuche, for example, is that since 1990 the successive democratic governments have failed to take their demands of compensation for injustices perpetrated by the Pinochet dictatorship into account (Lavanchy 1999).

In other cases, these groups claim that governments have enacted policies that have further contributed to their deprivations, or failed to enforce laws and agreements that would have protected them. Such arguments bring to mind a notion of contribution that has been emphasized in recent years by the philosopher Thomas Pogge, who claims that when affluent persons collaborate, avoidably, in imposing an institutional order in which peoples human rights go unfulfilled, they are contributors to injustice and have stringent duties to reform these institutions and to aid those who suffer as a result of unjust institutions (Pogge 2002).

b) Assistance-based responsibilities

Even if agents have not contributed to injustice, it can still be claimed that they have a responsibility to help those who are in dire need when they can do so at moderate cost. For this project, the principle of assistance states that *agents have a moral responsibility to help those who suffer severe harm at no fault of their own when the benefits of their actions are likely to be significant, and the cost to them will be moderate.*

This type of argument seems to have traction in those countries with a very unequal distribution of land, such as Brazil, where an estimated 60% of the farmland is unproductive, and where 21% of the population lives in poverty (Agriculture Census of the Brazilian Institute of Geography and Statistics, 1996; World Bank, 2003). That plight of disadvantaged groups could be alleviated by giving them unproductive land—public or private—on which no one is dependent might be a good reason to do so.

c) Beneficiary-based responsibilities

One additional moral reason that is appealed to by groups making land claims is that various social actors within their societies have benefited or are benefiting from wrongs that they have suffered. Hence, even if affluent individuals in Latin America have not contributed to an injustice, and even if they were not then in a particularly salient position to assist its victims, they may still have some additional responsibility now to help those who suffered the injustice escape their predicament if they benefit or have benefited from the injustice. We will understand the principle of benefiting from injustice as stating that *agents have moral responsibility to address injustices that they have benefited or are benefiting from*.

Beneficiary-based responsibilities have frequently been appealed to in the case of formerly colonized societies such as those in Latin America. Many people living in settler societies seem to have benefited from wrongs done to the indigenous populations of the lands in which their ancestors settled (Miller 2004, 2010). In the case of Latin America, the Spanish, Portuguese and (later) other European immigrants populated these territories to the exclusion of the indigenous peoples. Furthermore, the fact that many of the descendants of these European immigrants—often members of the local elite—enjoy now a high standard of living seems to confirm that they benefited and will continue to benefit from those past injustices (Ypi, Goodin, and Barry 2009; UNDP 2010).

Just as one can benefit from past injustices and therefore may be held responsible for compensating the victims of the injustice, one may also be held morally responsible for benefiting from injustices that are engendered by the institutional order that *currently* prevails in a society. Such arguments could especially be directed against present landholders in areas that used to be populated by the native peoples or which have been currently acquired under laws or agreements of dubious origins—for example, decreed by illegitimate rulers or signed without the consent of the majority. In Bolivia, for example, as part of the campaign to pass the law on agrarian reform in 2006, the government of Evo Morales published a list of 14 families linked to traditional political parties, ex ministers and opposition members who owned vast tracts of unused land suitable for agriculture. Senator Walter Guiteras, ex minister of dictator Hugo Banzer was singled out as owning more than 50,000 hectares together with his family (*El Diario*, 25th November 2006).

2. The plausibility of arguments based on assistance, contribution, and benefit

A central aim of this project is to investigate whether the three types of arguments identified above vindicate the land claims of disadvantaged people in Latin America. Each of these types of argument has some plausibility in this context, but none of them are obviously sound. Take, for example, historical land claims. The violation or usurpation of rightful land claims is generally acknowledged as a clear-cut case of injustice or wrongdoing, even by those who are skeptical about the idea of distributive justice (Nozick 1974; Boxill 2003). There are, however, some serious difficulties involved in applying this type of argument in the case of land claims. For instance, in a great many cases the individuals who were directly deprived of their land are no longer alive, and the connections that their descendants have to the land are sometimes quite tenuous. This makes it difficult to determine *who* should be compensated, *how* they should be compensated, and *who* should compensate them.

A common strategy when determining what is owed by way of remedy for injustices of this kind is to appeal to counterfactuals. Individual claims to rectification are based on *what would have happened* had the initial injustice not occurred. For example, it is asserted that if the injustice had not taken place, the descendants of the victims would now be better off than they are, while the descendants of those who perpetrated the injustice would be worse off than they are. As Jeremy Waldron has pointed out, however, this may be mere conjecture (Waldron 1992). Would the traditional owners of the land have held on to it and increased its value? Would they

instead have sold or squandered it? Another option is to say that their descendants instead are entitled to what they would have had if they behaved prudently, whether or not it seems likely that they would have acted in this way (Cohen 2009). A further problem is that altogether different people might now be alive had history taken a different trajectory (Parfit 1983; Broome 1992). More importantly, circumstances can change in ways that make complete restitution of land rights unjustified. Given population growth and scarce resources, justice may now require that original owners of land share their land with others, including the descendants of those who unjustly appropriated the land from their ancestors. On the other hand, it seems unacceptable to disregard such claims entirely on these bases, particularly with respect to more recent injustices that have deprived these groups of resources that were rightly theirs, or where the land to which communities are making claims has larger cultural significance for them (Sher 1981, 2005). In addition, the communities making such claims in Latin America do not typically demand that all lands traditionally held be returned to them, but rather that they have a fair share of this land.

Claims based on benefiting from injustice also have normative appeal (Thompson 2001). The idea of such beneficiary-based duties has been invoked in many policy discussions. Indeed, duties of this type are incorporated in many modern legal codes through the doctrine of restitution for unjust enrichment. Those who have mistakenly received goods or services owed to others, for example, must forfeit them or provide compensation to those who have been unjustly deprived of them (Birks 2005; *Pavey & Matthews Pty Ltd v Paul* 1987). But there are also difficulties in applying this type of argument to the issue of land claims. Talk of benefiting from an injustice implies that someone is made *better off* by its occurrence. But better off relative to what? Benefiting from a wrong implies a *baseline*, some state of the world to which another state of the world can be compared. We can begin to understand benefiting from injustice only by examining the different baselines—historical or counterfactual—that are implicitly or explicitly adopted when people claim that some agent is a beneficiary of injustice. Once these baselines are clarified, questions regarding the moral significance of benefiting from injustice can be more fruitfully tackled. One aim of the project will be to examine which baselines should be employed in making such assessments.

The stringency of an agent's responsibilities based on benefiting from injustice seems to depend greatly on whether they benefited from injustice with or without additional wrongdoing. An agent benefits *with* additional wrongdoing when they either contributed to bringing about the injustice from which they benefited, or when they ought to have prevented the injustice from occurring but failed to do so. When they benefit in such cases, their responsibilities appear to be quite stringent. An agent benefits without additional wrongdoing from an injustice when he neither contributed to the wrong, nor failed to prevent it. The moral significance of benefiting from injustice without additional wrongdoing seems much weaker and dependent on contextual features. If indigenous groups had fared very well in socioeconomic and political terms, one might have been reluctant to consider that the state and descendants of European settlers had particular responsibilities towards them. However, in the current situation it is plausible to say that that is not the case, and that attributing beneficiary-based responsibilities to restore land to these groups is more plausible.

3. The moral implications of failures to meet responsibilities

Illegal and sometimes violent actions perpetrated by land claimants in Latin America, or by the State and the current landholders in response to their invasions have drawn much attention in the local and international media. The Chiapas revolt, in 1994, for example, turned the hooded leader of the EZLN, Subcomandante Marcos, almost into a pop icon, interviewed by Nobel Prize Gabriel García Márquez, required by Benetton for a fashion campaign and supported by international figures as diverse as Noam Chomsky and Danielle Mitterand. In Brazil, the MST gained worldwide recognition when photographer Sebastião Salgado made an exhibition and

published a book that documented life in an illegal encampment (Salgado 1997). But in spite of their presence in the news headlines, discussions of whether or not the actions of these groups are justified have tended to produce more heat than light. Can the dispossessed permissibly use violent and/or illegal means to make their claims heard? In assessing the permissibility of illegal or violent conduct to vindicate land claims, much hinges on whether those targeted by these actions can plausibly be viewed as having failed in their contribution-, assistance-, and/or beneficiary-based responsibilities to them.

For example, if those targeted by these violent actions have contribution-based duties to restore land initiating these actions, then this could provide support for the claim that the latter would be within their rights to employ a broad range of means, including armed insurrection. After all, if the contribution is significant and has led to the deprivation of whole groups, should not these be entitled to act in self-defense? This much could seem to follow from standard treatments of the permissibility of using defensive force even against innocent aggressors (Øverland 2005).

If the principle of benefiting from injustice has moral significance, this could also provide support for some sort of resistance on the side of the victims of that injustice. To violate the property rights of those who have inherited or acquired land under unjust property laws could be morally justifiable. Moreover, if arguments that the State and groups within these societies have failed to act on assistance-based responsibilities are plausible, this could also have disturbing implications, especially if these agents act culpably, e.g. that they know that they can help these people at little cost and yet simply refuse to do so (Øverland 2009). The resistance employed by these groups, however, can be justified only if it is proportional to the interest at stake, and violent resistance to vindicate land claims could easily turn out to be disproportionate.

Having first evaluated the soundness of the three types of arguments made in support of land claims, a central aim of this research will therefore be to evaluate how these groups can legitimately pursue their claims.

References

- Bengoa, José (1996) *Historia Del Pueblo Mapuche (Siglo XIX y XX)*, (5 ed.) Santiago: Ediciones Sur.
- Birks, Peter (2005) *Unjust Enrichment and the Law of Restitution*, Oxford: Clarendon Press.
- Boxill, Bernard R. (2003) "A Lockean Argument for Black Reparations," *Journal of Ethics* 7/1: 63-91.
- Brazil Constitution, Title VII, The Economic and Financial Order, Chapter III Agricultural and Land Policy and Agrarian Reform, Articles 184-191, <http://www.v-brazil.com/government/laws/titleVII.html>
- Broome, John (1992), *Counting the Cost of Global Warming*. Cambridge: The White Horse Press.
- Carter, Miguel (2005) "The Landless Rural Workers' Movement (Mst) and Democracy in Brazil.," in *Working Paper number CBS-60-05*, Centre for Brazilian Studies, University of Oxford.
- Cohen, A. I. (2009) "Compensation for Historic Injustices: Completing the Boxill and Sher Argument," *Philosophy & Public Affairs* 37/1: 81-102.
- De Oliveira, Francisco (2002) "Landless Battallions," *New Left Review*: 77-104.
- Gil Tébar, Pilar (2007) "Las ONGs y las mujeres indígenas de Chiapas" in Navarro, Fernando (compiler), *Orbis incognitus: avisos y legajos del Nuevo Mundo*, Spain: Universidad de Huelva, pp. 729-734.
- Lavanchy, Javier (1999) "Perspectivas para la comprensión del conflicto mapuche", Santiago: Centro de Estudios Miguel Enriquez.
- Lid, Knut Andreas and Jemima García-Godos (2010), "Land Restitution in the Colombian Transitional Justice Process," *Nordic Journal of Human Rights* 28/2 (in press).
- Miller, David (2004), "Holding Nations Responsible," *Ethics* 114/2: 240-68.
- Miller, Richard (2010) *Globalizing Justice*, Oxford: Oxford University Press.
- Nozick, Robert (1974) *Anarchy, State and Utopia*. New York: Basic Books.
- Øverland, Gerhard (2009) "Forced Assistance," *Law and Philosophy* 28/2: 203-32.
- Øverland, Gerhard (2005) "Self-Defence among Innocent People" *Journal of Moral Philosophy* 2/2: 127-146.
- Parfit, Derek (1987), *Reasons and Persons*, Oxford: Clarendon Press.
- Pavey & Matthews Pty Ltd v Paul* (1987) (HPH 362)
- Salgado, Sebastião (1997) *Terra, Struggle of the Landless*, London: Phaidon Press.

Sher, George (2005) "Transgenerational Compensation," *Philosophy & Public Affairs* 33/2: 181-200.
Sher, George (1981) "Ancient Wrongs and Modern Rights," *Philosophy and Public Affairs* 10/1: 3-17.
Thompson, Janna (2001) "Historical Injustice and Reparation: Justifying Claims of Descendants," *Ethics* 112/1: 114-35.
UNDP (2010) "Actuar sobre el futuro: romper la transmisión intergeneracional de la desigualdad", Informe Regional sobre Desarrollo Humano para América Latina y el Caribe 2010, New York.
Ypi, Lea, Robert Goodin, and Christian Barry (2009) "Associative Duties, Global Justice and the Colonies," *Philosophy and Public Affairs* 37/2: 103-135.