

David Lea

Property Rights, Indigenous People and the Developing World: Issues from Aboriginal Entitlement to Intellectual Ownership.

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David Lea's work serves as a warning against romanticizing native peoples—you know, the kind of attitude according to which everyone loves Indians since, after all, they know how to practice ecological sustainability and live in peace (unlike the rest of us). Romanticizing begins with oversimplification. When we talk about indigenous peoples, we need to answer 'Which indigenous peoples?'. Not all of the indigenous peoples of the world fit into a single homogenized category. With respect to property rights, are we talking about the aboriginals from Australia, where years of enforcing a doctrine of *terra nullius* ('land belonging to no one') has left little to claim? Alternatively, are we talking about peoples of Papua New Guinea (PNG), where native collective ownership has stymied government efforts to build schools? Or, finally, are we referring to conditions in Fiji, where controlling ownership by half the indigenous peoples has stifled the development of the other half of the population, the non-indigenous part? Fortunately, Lea provides us with ample context for us to understand which indigenous population he has in mind.

Romanticizing the plight of the indigenous also makes us susceptible to adopting uncritically some ideologies over others. A well-meaning concern for indigenous peoples has led some to claim allegiance to the Locke-Nozick conservatives, who view property rights as 'contingently determined historical entitlements'. Lea rejects attempts to fit indigenous claims into the 'we-came-first' approach taken by Henry Reynolds in *The Law of the Land* (New York: Penguin 1992) and James Tully in *Strange Multiplicity* (New York: Cambridge UP 1996). Reynolds has tried to amend Locke's standard of those who worked the land first by recognizing their natural right to that land. Taking a different approach, Tully has argued that indigenous peoples already had sovereign rights over land, just a different form of sovereignty than the dominant Western one later used to expropriate their lands. Lea places his allegiances with the left-leaning Rawls-Waldron team headed by Will Kymlicka. In Kymlicka's *Liberalism, Community and Culture* (Oxford: Clarendon Press 1989), Lea finds the principled liberal notion of group autonomy that justifies but limits indigenous land claims. Before taking his leave of conservatives and unfettered capitalism, Lea warns of one more pitfall, namely, the claim by Richard Epstein in *Takings* (Cambridge: Harvard UP 1985) that land rights come only in complete bundles that include rights to control the land and rights to gain income from the land.

Lea does not endorse Kymlicka *in toto*. He finds Kymlicka's proposals for practical measures limited to political ones and opines that he ignores the all-important economic sphere. Yet, with respect to these economic measures, the road to hell can be paved with the bricks of good intentions. Lea documents another context of struggle, one where well-meaning governments attempt to find ways to enhance the wellbeing of indigenous communities by imposing corporate forms of ownership on them. Rather than generating wealth for the community, these forms of economic organization often create new divisions within the community and erode the power of indigenous political forms of governance.

Lea provides an excellent overview and analysis of the corporate model. Contractarians, myopically looking inside the corporation, want to minimize legal oversight, while communitarians promote legal regulation. However, Lea needs to face a contractarian counter-move taken, for example, within the field/movement/theory of Law and Economics, which would subject each of these legal proposals to efficiency/wealth maximization analyses. Finally, Lea enlightens us about stakeholder theorists who have attempted to find a middle ground through 'other constituency legislation'. Simply put, Lea finds the corporate model inappropriate for communal structures, since a corporate entity is separate from its members whereas a community is constitutive of its members.

The economic experts and pundits currently trying to assess the global economic crisis should have read Chapter 3 of Lea's book, which exposes some blatant flaws of corporate capitalism, such as the lack of shareholder control over increasingly colluding boards of directors and corporate managers. University faculty would also profit from a close read of this chapter, which documents the relatively exorbitant administrator salaries compared to the faculty. Lea also points to some intricate modes of disciplinary control such as 'the activity of reporting on oneself and recording one's activities and self-evaluation' (69). Those who, like Tully, hold onto a 'romantic perception that sees customary land tenure as an informal bastion safeguarding local autonomy and interests' of indigenous peoples (92), should read Lea's devastating critique. In Chapter 4, Lea makes good use of the Peruvian economist Hernando De Soto's argument in *The Mystery of Capital* (Sydney: Random House 2000) for a system of uniform formal rules for property transfers to transform communal property from dead capital, subject to the whims of local 'big men', into live capital, subject to seizure on loan default. Finally, those under the delusion of indigenous people having 'subsistence affluence' should look more closely at the evidence, referenced by Lea, of their impoverishment.

Lea begins to head towards the solution side of the ledger as he makes a case in Chapter 5 for the importance of income rights. Ownership includes the rights to use, exclude, and alienate. The first two are control rights, found primarily in the non-Western world. The last one, the right to alienate, is an income right, found largely in the Western world. It holds the key for differentiating communal from private rights. Overall, private property owners can alienate—that is, transfer their interests—whereas communal

property owners, for the most part, cannot do so. Lea cautions, however, that communal and private property regimes differ more in degree than in kind. We find, for example, leasing arrangements in communal property, which require group consensus. There are also individual property rights exercised within communal systems. However, these deviations remain limited. Nevertheless, Lea finds a critical divide between the two. Customary systems do not permit individual interests in communal land holdings to be monetized so that they could be used to purchase things of equivalent value. In short, Lea recommends that indigenous land owning systems need ways to grant individual income rights. Let us now turn more directly to his solutions side of the ledger.

Lea presents a useful but abbreviated discussion on customary law, which he finds largely wanting primarily because (to use H. L. A. Hart's distinction) of its lack of specific primary rules. In addition, customary law often does not have secondary rules, that is, mechanisms for deciphering, determining, and evaluating purported primary rules. Therefore, custom cannot function as law to establish entitlements.

Lea then provides some fascinating examples from Papua New Guinea of attempts to designate groups without also having a way to determine the income rights of the group members: Bougainville mine (group trustees), Lake Kutubu oil fields (legislated as involuntary Incorporated Land Groups, ILGs), and a forestry case (landowner companies, whose relation to ILGs Lea does not make clear). Lea proposes that the indigenous nation state of PNG form domestic companies (with lease-back arrangements). It remains unclear what form these domestic companies would take. Worker-controlled enterprises, perhaps? Or maybe some form of joint-stock ownership? Would Lea favor some form of Native American gambling enterprises, which seem relatively successful?

Fiji presents a different set of problems where, through a government agency, an indigenous native group controls almost all of the land that it leases to non-indigenous Fijian Indians for sugar production. Lea recommends that these indigenous island states adopt Western notions of private property. Here, he seems to rely on a questionable historical analogy. He uncritically accepts T. Bethel's claim in *The Noblest Triumph* (New York: St. Martin's 1998) that the early colonies of Jamestown and Plymouth prospered only when they replaced collective with private ownership. To the contrary, John Rolfe (the first to raise tobacco as an export crop and the person who achieved peace with Native Americans by marrying Pocahontas) and the institution of slavery may have had more to do with Jamestown's prosperity than private property.

The remaining chapters (9-13) of the first part of the book take up an entirely new topic, namely, the relation of intellectual property (IP) to the Third (and not the Fourth) World (or, more accurately, the Newly Industrialized Countries or NIC's, such as India). Lea provides a welcome clarification of the nature of intellectual property. Intellectual property rights are a form of income rights. In fact, they consist almost exclusively of income rights and include few control rights (use and exclusion). For rights to intellectual

property are not rights over any physical thing and have only a remote connection to any productive process. Lea does an admirable job undermining attempts to establish a moral ground for these intellectual property rights. He finds non-consequentialist appeals to individual autonomy and development wanting. For example, in a chapter misleadingly entitled 'The Myth of Free Markets', Lea demonstrates how IP rights actually restrict markets. More importantly, he adeptly exposes the flaws in consequential arguments for IP. He demonstrates, for example, that IP regimes typically restrict rather than increase the supply of the goods in question.

The final chapters take the reader through a sophisticated and detailed analysis of different types of IP. First, intellectual property rights over computer software prove to be the most difficult to justify. Computer IP proponents cannot avail themselves of the same argument made by pharmaceutical companies. Drug companies, for example, probably spend more than any other type of company on research and development (R & D), whereas computer companies probably spend the most on policing and lawsuits. According to Lea, computer companies actually produce relatively little in the form of tangible goods, thereby diverting resources and investments from agriculture and manufacturing.

Fortunately, Lea does not let drug companies off the hook. They put a higher percentage of their revenues into profits than they do into R & D. Taking a different approach against drug companies, Lea claims that they have social responsibilities to protect the right to health, especially of poor and disadvantaged peoples abroad. One cannot help but wonder why Lea puts so much faith in rights of regimes to protect poor people from multinationals, yet does not even mention rights of indigenous peoples. Nevertheless, by reading these chapters, readers will become well informed about devices such as the 1995 TRIPS agreement (Trade-Related Aspects of Intellectual Property Rights), which enables the United States and other rich countries to monopolize the world drug market.

Lea ends this second half of this book where he started, *viz.* with intellectual property rights over living things. It may come as a surprise to learn that RiceTec has a patent on strains of India's basmati rice and Monsanto has one over chapattis (and swine reproduction). The Indian government successfully protected locals over the first issue, but it does not have the resources to carry out the fight in the second one. According to Lea, a legal structure that limits claimants to legal persons and does not include communities supports these forms of corporate biopiracy. Legislation, not only in the United States but also in India and Iraq, has made it virtually impossible for farmers to grow their own seed varieties, making them dependent on corporate patented seeds.

Despite my criticisms, Lea has produced an impressive work that should serve as an exemplar of interdisciplinary study. He has mastered political philosophy and the social sciences as well as the intricacies of national and international regulations. He

remains critical and yet sympathetic to the plight of Fourth and Third World peoples, without falling victim to romanticizing their situations. He always seems to manage to present a balanced account of highly charged issues.

If readers want a sophisticated and detailed account of how competing conceptions of property rights impact on indigenous peoples, as well as insights into how intellectual property regulations impact the Third World, then they could not find a better guide than David Lea. Let us hope that more people heed the calls of writers like this.

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