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A Commentary on Anna Stilz, "Nations, States, and Territory" and Lea Ypi, "A Permissive Theory of Territorial Rights"

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Kantian theories of territorial rights currently on offer are attractive for a number of reasons. One advantage over other types of theories is that rights to territory are based on rights relations between *persons* and not on some mysterious relationship to land as such. They also stress the political ties of peoples rather than appealing to problematic notions such as national identity. Kant's legal and political theory provides a fruitful theoretical framework which allows for many different nuances in accounting for territorial rights, as illustrated by Anna Stilz's functionalist theory and Lea Ypi's permissive theory. In this paper, I argue that although these theories address some plausible intuitions about when limitations on the territorial claims of states should obtain, more work needs to be done in order to provide a more systematic account of these limitations.

Anna Stilz provides a functionalist theory of territorial rights which bases rights to territory on the shared political history of individuals under a common state and on that state's legitimacy. Central to her account is the distinction between occupancy rights and territorial rights proper. Occupancy rights are an aggregated bundle of individual rights to remain in a certain place. Territorial rights, in contrast, are the prerogative of states only. A state has a right to exercise jurisdiction over that territory if it represents the individuals who have occupancy rights, who then become a *people*. Despite the dependence of states' jurisdictional rights on prior individual occupancy rights, Stilz is in fact proposing a strong statist view of territorial rights: there are no territorial rights without the state.

A necessary condition for territorial rights is that states be able to *effectively* exercise justice within its territory. Territorial occupancy is essential to personal autonomy: the pursuit of individuals' goals, relationships and life projects. States in turn are needed because they can bring about the background framework enabling the exercise of personal autonomy: they can secure options and opportunities and provide the stability required for pursuing life plans (Stilz, p. 584). But a stable legal residence, Stilz claims, is also essential to personal autonomy (p. 584). Persons have a fundamental interest in remaining in the territory within which their lives and goals are organized. Whoever is born in a territory through "no fault of her own" and has continually lived there (showing that residence in that territory is essential to her life plans) should be granted occupancy rights. A question which naturally arises is what "no fault of one's own" precisely means, and consequently what would be wrongful occupation. I will return to this issue later on in the paper.

The theory adopts a different concept of a people or nation to nationalist theories. Peoples are identified primarily by their common political ties and statehood history rather than by shared culture. A history of

shared statehood gives rise to a relationship, which the individuals involved have a reason to value. This value provides them with a reason to uphold their legitimate state.

Their interest in maintaining this shared history gives them a claim to political autonomy, enabling them to continue to pursue their joint project without interference from outsiders (p.596). In contrast, common life under an illegitimate state does not create a people. Unless the population has been actively engaged in activities that promotes organization knowledge and can bring about future political capacity, such as liberation movements against the repressive government, it does not qualify for a people. It is evident that not all states will be able to satisfy the minimal conditions of legitimacy required for territorial rights in Stilz's account.

It is not clear how the argument about the value of shared statehood is supposed to relate to the view that there is a *duty* to create and uphold a legitimate state. Is the fact that shared statehood gives rise to a valuable relationship between citizens an *additional* reason to uphold the state? Or is the valuable relationship argument necessary only to protect the group's autonomy during times of political instability, where appeal to the legitimacy of the state is no longer possible? It is important to note that Kant's original thesis[1] is not that one has a duty to uphold *only* legitimate states, but that one has a duty to enter *rightful relations with others*, in other words, *to leave the state of nature.*[2] Even a less efficient form of political association than Stilz's minimally legitimate state would satisfy Kant's requirement (even though one should work towards approaching an ideal just constitution).[3] Stilz is actually reinterpreting the Kantian duty to leave the state of nature in a more demanding way by taking it firstly to be a duty to form a *state* and secondly as imposing an obligation to uphold *only legitimate* states. This is the reason why she needs to introduce additional considerations to the duty argument,[4] namely, to counteract the obvious implication of the theory which is that as soon as a legitimate state vanishes, so do the claims of the population to their territory and to political autonomy.

Stilz argues that respect for human rights ensures the laws of states are not simply imposed on their subjects, but that subjects could also endorse these laws (p. 589). Human rights are thus among the minimal standards for a state's legitimacy. She concludes that countries such as China and Venezuela lack territorial rights, since they fail to uphold these minimal standards. Although "quasi-democratic"

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[1] Kant's writings are cited according to the volume: page number of the Prussian Academy Edition of Kant's Complete Works (1900-, *Gesammelte Schriften,* Ausgabe der Preußischen Akademie der Wissenschaften, Berlin: Walter de Gruyter). I use the following abbreviations for the individual works cited:
MS *The Metaphysics of Morals* (*Die Metaphysik der Sitten*)
PP Toward Perpetual Peace. A Philosophical Project ('Zum ewigen Frieden. Ein philosophischer Entwurf')
Both texts are in the translation of Mary Gregor (*Practical philosophy*, Cambridge University Press, 1996).

[2] MS VI: 307

[3] This is what Kant calls a republican constitution, *Perpertual Peace* VIII: 350. See also MS VI: 340.

[4] See Byrd and Hruschka, *Kant's Doctrine of Right: a Commentary*, CUP 2010, chap. I, for an account why leaving the state of nature does not commit one to enter specifically a state, but a *juridical condition* (*rechtlicher Zustand, status iuridicus*), that is, a condition under which the rule of law applies and individuals can enjoy their rights (MS VI: 305-6). Although '*Zustand'* (Latin: *conditio*) can also be translated as 'state', it should not be confused with a state as a political institution (*Staat*), although entering a civil condition *can* coincide with the creation of a state.

Venezuela would have a better standing than China (since fundamental rights are at least embedded in the Venezuelan constitution) it also fails to exercise justice (p. 588). Stilz is careful to stress that the lack of territorial rights does not entail an authorization for foreign states to displace or annex these populations. The reason is that displacement and annexation are unilateral acts which no other state has the authority to impose on another, regardless of the occupants' lack of territorial rights. But if annexation and displacement are unilateral acts, so is the occupation of a certain territory to the exclusion of others. Why is unilaterality a problem in one case, but not in the other? This is something that Stilz unfortunately does not explain.

Non-state peoples are nevertheless disadvantaged by Stilz's account. Peoples "are brought into being by states; they need not pre-exist them" (p. 580). Unless there is a collective agent capable of sustaining legitimate political authority, groups with no centralized political authority such as tribal and clan groups may have rights of occupancy but no jurisdictional rights over their territory. The fact that non-state peoples cannot have territorial rights makes them particularly vulnerable: nothing could speak against their annexation by a well meaning legitimate state, which would grant them occupancy but retain the privilege of exercising jurisdiction over the territory. Stilz's account privileges liberal states as the only forms of political organization capable of satisfying the minimal conditions for legitimacy and for territorial rights. This seems counter-intuitive insofar as one may consider a native people's relation to a particular territory much more significant to them in terms of personal autonomy and way of life than for liberal societies. The only alternative open to groups which do not identify themselves with the legitimate state under which they are subjected would be to organize themselves politically against the government. However, the group would be violating an obligation to uphold a just state, which is already in place. The possibility of starting a new form of political organization is closed off in that case. Kant, in contrast, recognized the territorial rights of non-state peoples and granted them a right not to be occupied even under the pretext of bringing political organization to the "wild savages."[5] This is because he did not see the existence of a legitimate state as a necessary condition for territorial rights.

Since the people's special relation to the land is irrelevant for territorial rights, a related worry is the account's difficulty in explaining why legitimate states can claim a *particular* territory as opposed to any other area of the globe. Although accounting for the so called "particularity problem" is a well known strength of nationalist theories, Stilz rejects nationalist approaches by criticizing the Lockean labor theory on which these approaches rely. For instance, states are not able to claim jurisdiction over underdeveloped areas using a Lockean framework. Nationalist theories tacitly rely "on a prior account of administrative boundaries – labor within which grounds a right to the entire territory – rather than explaining the genesis of these boundaries" (p. 577). But it is unclear how Stilz's theory can do a better job of justifying the genesis of boundaries. The legitimacy of states is independent of how boundaries came about; it has to do with the way the state exercises its function. Nevertheless, Stilz wants the theory to be able to determine the legitimacy of boundaries, apart from the existence and performance

[5] This is precisely Kant's arguments against colonialism. See MS VI: 353.

of states. But what determines what is just or unjust when it comes to the genesis of boundaries? The fact that persons came to occupy a certain geographical area through "no fault of their own"? But what if other people arrived there first, equally through no fault of their own? What is it about this "innocent" occupation of space that can give rise to occupancy rights, as opposed to other forms of unilateral occupation? This is an aspect of the theory that is unclear due to the lack of a systematic approach to acquisition of land.

A Permissive Theory of Territorial Rights

Lea Ypi appeals to aspects of Kant's legal theory which have not been explored before in contemporary approaches to territorial rights and which have been so far mainly confined to Kantian scholarship: the notion of permissive laws (*leges permissivae*, *Erlaubnisgesetze*). A permissive law is an authorization to do an action which would otherwise be prohibited, because it is strictly required for the promotion of a morally required end or state of affairs. As the title of the theory suggests, there is a *permission* to control territory to the exclusion of others.

Kant tells us a story about why acquisition of land and external objects is necessary for the exercise of external freedom.[6] He also explains why the concept of having an external object of choice entails not only the possibility of disposing of that thing independently of a constant physical connection to the object, but also *exclusive* possession.[7] The need to bring the use of external objects under legal concepts leads us to *postulate* persons' ability to become legal owners of objects and consequently to a *permission* to acquire to the exclusion of others.

Because acquisition of land and objects must start *before* a cosmopolitan condition of public justice has been achieved, the right to control external objects and land is *provisional*. However, the permission to acquire to the exclusion of others also imposes *obligations*: we have a duty to enter a condition of public justice with all others, for it is only under a civil condition that unilateral acts of acquisition can be regarded as compatible with the united will of all. As Ypi rightly recognizes, the obligation to enter rightful relations with others is not restricted to the inner state level, but is universal in scope; it must be extended to international and finally to *cosmopolitan* level. On this point, Ypi's theory can be considered "more radical" than Stilz's, which focuses on states' internal organisation.

Ypi interprets provisionality as postponing a full justification of territorial rights. As she puts it, why a group is entitled to a specific territory in the world is an answer that "cannot be conclusively provided; not until a political authority realizing the universal principle of right is founded" (p.16). Further, she

[6] This is for Kant a complicated story because external objects are not included in one's innate right (that applies only to one's own person and actions) and therefore require an "extension" of freedom. For an account of how Kant incorporates external objects under laws of freedom, see Arthur Ripstein, *Force and Freedom. Kant's Legal and Political Philosophy*. Harvard University Press, 2009, Chap. 3.

[7] This is what Kant calls *intelligible possession* (*possessio noumenon*), MS VI: 249.

claims that provisional theory is "ecumenical" because it can accommodate different accounts of how groups have come to occupy specific areas of the globe. After all, Ypi concludes, regardless of the way groups have come to control a certain territory, "the kind of claims they can be collectively authorized to make over specific areas of geographic space are provisional and conditional at best" (p. 16). Kant's theory of acquisition is, and must be, blind to the empirical conditions of occupation, since empirical facts per se are unable to play any justificatory role in his theoretical framework. In other words, there is nothing intrinsic about the form of occupation that can justify territorial rights. The form of occupation can only provide a "sign" of the *extent* of one's occupation. However, how can the claim that territorial rights are "conditional and provisional at best" help us determine when occupation is rightful?

Ypi often suggests that provisionality implies weaker, or at least more "flexible", rights compared to rights which have a conclusive status. For instance, she claims that because the right to territory is provisional, persons with peaceful intent have a right to visit one's territory (p. 19)[8], tacitly suggesting that in a world in which territorial rights would be peremptory, there would be no rights to visit. There is evidence in Kant's text that provisionality actually grants host peoples the right to *reject* peaceful visitors at will (if refusing entry does not entail the visitors' destruction)[9], and not the rights of the visitors themselves to be admitted in a foreign territory. Kant's argument for a right to safe haven appeals to the notion of common possession of the earth and not to the fact that the rights of the host people are "only" provisional.[10] Although Ypi mentions the notion of common possession of the earth, she does not explain in depth the relationship between that notion, provisional rights to territory and the right to visit.

As Kant stresses, respecting provisional acquisition *as true acquisition* is a necessary condition for the development towards global public justice. "Provisonal" should be understood as "preliminary legal possession" as opposed to conclusively *secured* possession (possession which is unequivocally determined and secured by an omnilateral global political institution)[11]. Provisionality is thus a *future-oriented* form of justification ("in expectation and preparation for a global civil condition")[12]. However, this does not allow us to regard provisional rights as being somehow "flexible" due to their inconclusive status: since all rights are provisional from a global perspective, it would be possible to impose all sorts of arbitrary limitations on provisional rights before a cosmopolitan civil condition obtains (in case it would *ever* obtain in such a chaotic scenario). Although one may have intuitions concerning when and how territorial rights should be limited, one still needs to *justify* these limitations. If we are to explain how the territorial claims of groups ought to be limited, we must do this in a principled way, compatible with the justification of their territorial rights.

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[8] For the right to visit (*Besuchsrecht*), see *Perpetual Peace* VIII: 358. See also MS VI: 356.
[9] Preparatory Works to *Perpetual Peace* XXIII: 173.
[10] For an account of the relationship between common possession of the earth and the right to visit, see my "Common Ownership of the Earth and Provisional Right", unpublished manuscript.
[11] Byrd and Hruschka, 2010, p. 139.
[12] MS VI: 257.

Ypi's emphasis on "permissive principles" also clouds the real justification of territorial rights, which is freedom in a Kantian account. Permissive principles are *authorizations*, and as such cannot function as self-standing principles within a theory of rights. Permissions are dependent on more fundamental principles, namely prohibitions or commissions to do certain acts, which they *limit* under certain circumstances. Permissive principles can neither "prescribe" (p. 19) nor be employed "to assess normatively relevant circumstances in which a course of action incompatible with the idea of equal freedom is pursued" (p.3). If a permission applies, this is because practical reason already recognizes the need to sanction a certain state of affairs as a necessary starting point for realizing right. Permissive principles as such have no normative or regulative role. Permissive laws are nevertheless required because they *mediate* between the historical and often violent beginnings of political associations and its rational justification. Civil society must start somewhere. However, this start is inevitably coercive, simply because there is no other way for the implementation of right to *start* other than with unilateral acts which hinder the freedom of others in a way that is incompatible with the principle of right. Permissive laws ensure that right is able to begin without contradicting itself. But they provide no justification of territorial rights.

Conclusion

Among the theories of territorial rights currently on offer, Kantian theories are the ones which link the right to control a territory to the exercise of human freedom. Because individual freedom must be not only secured but also made compatible with the freedom of all others, the subjection to political institutions is considered a *duty*. Although the Kantian theories of territorial rights I analyzed in this paper broadly agree with this general picture, they diverge in their accounts of how the exercise of freedom justifies territorial rights and on the scope of the obligation arising from the right to exclude others from a territory. However, I argued that a common shortcoming of these theories is accounting for limitations on territorial rights: while Ypi's permissive theory allows too much arbitrariness in regard to provisional acquisition, Stilz's account lacks a more unified approach to occupancy rights.