

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

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From the recent debate on the justification of territorial rights, three main strands of theories have emerged: Lockean, Nationalist, and Kantian. Anna Stilz's and Lea Ypi's theories both fit into the latter category, exploring Kantian ways of justifying territorial rights. While their use of Kant differs, their basic justification of states' territorial rights is similar in that it rests on a) the role of territory in providing the conditions for autonomy and on b) the existence of a legitimate state that can claim territorial rights.

As I am broadly sympathetic to these basic provisos, I will focus this comment on the issue of particularity. This is an issue facing all theories aiming to justify states' rights to *particular* territories. We can also think of it as an issue of boundary drawing. Given that states have rights to, *inter alia*, jurisdiction over territory, what justifies them having this right over this particular territory rather than that particular territory? I will argue below that neither Stilz nor Ypi adequately address this issue, which is partly due to the tension between framing territorial rights as based in individual occupancy rights and the need to define a collective that can demarcate the relevant territory. Firstly, I will provide a brief overview of the two theories and point out a few of their merits over some contenders, as well as some specific issues with the "provisional condition" in Ypi's theory.

Stilz's *legitimacy*-based theory holds that states "have territorial rights because their jurisdiction serves the interests of their subjects" (2011, p. 578). Arguing along with Kant that states are necessary to secure freedom-as-independence, Stilz explains that states are the proper right-holders of territorial rights (2011, p. 580).<sup>1</sup> Thus a large part of her argument consists of explaining why we have obligations to respect the political authority of a state, with the implication that states require territorial rights of jurisdiction in order to secure freedom-as-independence. States must be legitimate in order to claim territory rights, which Stilz argues is the case when it represents its subjects: "[The] state represents the people when it enacts legislation in the public interest and grants the people a voice in determining this legislation" (2011, pp. 578-579). On this view, the state is only legitimate when it protects basic human rights and when it grants its subjects political participation rights.

In consequence, Stilz writes

The legitimate state theory holds that a state has rights to a territory if and only if it meets the following four conditions state to enjoy territorial rights of jurisdiction: (a) it effectively implements a system of law regulating property there; (b) its subjects have claims to occupy the territory; (c) its system of law "rules in the name of the people", by protecting basic rights and providing for political participation; and (d) the state is not an usurper (2011, p. 574).

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<sup>1</sup> Freedom-as-independence is a Kantian concept, which Stilz defines as follows: "To be free-as-independent [...] is not to be forced to obey the will of another person; it is to enjoy a sphere of independent self-government within which others cannot interfere" (2009, p. 37).

Rights of occupancy (b) are defined as follows:

A person has a right to occupy a territory if (1) he resides there now or has previously done so; (2) legal residence within that territory is fundamental to the integrity of his structure of personal relationships, goals, and pursuits; and (3) his connection to that particular territory was formed through no fault of his own (2011, p. 585).

The second criterion is really what explains how Stilz's theory is one of *territory*, and not just of political authority, as it stresses the necessity of territory in securing the conditions for autonomy. Stilz maintains that autonomy is connected to territory because almost all of our life plans are attached to a specific territory. Thus without stable legal residence, we would not be able to live autonomous lives. In sum, a legitimate state, defined as a state which represents the interests of its subjects, whose subjects have occupancy rights, defined as territory providing the fundamental requisites for an autonomous life, can claim territorial rights.

On this account on states; territorial rights claims, based on legitimacy of states and territory's role in securing the value of autonomy, Ypi's account agrees. She also holds stable residency to be key for autonomy: "[f]ailing to have one's place on Earth secured severely impairs individuals' ability to pursue their own ends. It deprives them of the possibility to form reliable life plans and to access opportunities necessary to promote them" (2012, p. 8). However, an important advantage of Ypi's theory is that it is not solely inward-looking. In her use of Kant, Ypi introduces the central idea that in an original situation, territory was free for all to use. Because this is the case, initial acquisition as well as continued control over territory needs to be justified universally, as it affects all those permanently excluded from the territory (2012, p. 6). On the basis of the permanent exclusion of those for whom territory was free to use prior to unilateral acquisition, Ypi ends up defending a *permissive* theory of territorial rights, in which states are only justified in claiming territorial rights provisionally and conditionally. Because, she argues, unilateral control over territory in a world where all territory is being claimed "implies imposing on other agents an obligation to continuously refrain from interfering with their use of those natural objects", these rights can only ever be justified provisionally (2012, p. 9). Furthermore, since territorial right claims consequently always involve the exclusion of others, the authorisation of unilateral possession is "conditional upon subjection to a collective political authority distributing rights and obligations compatible with principles of equal freedom" (2012, p. 10).

While Stilz's account is primarily focused on citizens' and the state's normative relation to territory, and the rights that these relationships are supposed to yield, Ypi extends the justification to address the issue of exclusion as well. Given that the nature of territorial rights implies exclusion – after all, it is precisely the unilateral control over territory that we wish to justify – this approach is clearly commendable. Moreover, Ypi stresses that current territorial boundaries are largely arbitrary and have come about in morally objectionable ways.

These territorial rights have been established during historical processes marked by political conflicts, population displacements or dynastic arrangements [...] which have led to an entirely arbitrary partition of boundaries. Citizens' control of specific territories reflects

unilateral decisions that [...] can only be provisionally and conditionally justified (2012, p. 3).

Therefore, the means of exclusion may never be fully justifiable. However, since Kantian theories are based on present occupiers' attachment to territory and the existence of a legitimate state, the details of initial acquisition do not actually matter for the justification of territorial rights.

Hence, where Lockean and nationalist theories rely on an account of how past generations have mixed their labour with the territory and in that way added both "real" and symbolic value to it, Kantian theories only focus on current occupiers' attachment to territory in a way that is fundamental to autonomy.<sup>2</sup> Not only does this present-focus avoid issues of why current generations should enjoy territorial rights, and in particular a right to exclude, on the basis of past generations efforts, but it also does not have to account for the injustices involved in acquisition and the mixing of labour by past generations, at least in order to provide a conditional justification. Thus while Ypi's argument about the nature of initial acquisition shows how theories relying on precisely initial acquisition cannot justify the exclusion such acquisition entails, it does not necessarily show how a theory that does not rely on such acquisition can nevertheless not be justified more than provisionally. Granted, there will always be exclusion from territory of people who would otherwise, absent unilateral territorial rights claims, have been able to use the territory freely. Such exclusion requires any justification of territorial rights to be universal, which may entail something like Ypi's condition of the creation of a universal political authority protecting the principle of right. However, it is not clear why the arbitrariness of initial acquisition should compromise current occupiers' claims and render them provisional only, when the nature of acquisition actually does not do any work in justifying the territorial claims of present-day states.

### **Particularity**

The remainder of this comment will focus on the so called particularity problem. For while these two Kantian theories succeed in explaining how current territorial boundaries of legitimate states can be, at least conditionally, justified, I do not believe they are entirely successful in telling us how boundaries ought to be drawn, or why particular states have rights over particular territories. The difficulty stems precisely from what is also the strength of these theories, namely the focus on current occupiers' attachment to territory, that is, the focus on those individuals who have ended up on the territory through no fault of their own. This renders the basis of the justification such that there is nothing inherent to it that can determine boundaries between individuals of particular territories other than the states that are currently claiming territorial rights over them. In order to say something about how boundaries may be re-drawn, however, we seemingly need to be able to define a collective of individuals whose occupancy rights over the territory where they reside can grant them territorial rights were they to form a state.

Such a collective can be defined in various ways and there have been some recent developments in this area (Moore 2014; Ochoa Espejo 2013). Stilz proposes a statist definition of the collective, which I will argue below leads to circularity, while Ypi does not offer a definition. Though there is not scope in this comment to develop my own account, I will suggest that when territory is understood to include specific

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<sup>2</sup> For Lockean and nationalist theories, see for example Miller (2011) and Simmons (2001).

political institutions that specific individuals rely upon and have participated in developing, territory itself may be used to define the collective that can claim territorial rights were they to form a state. I do not refer to current territorial boundaries, this account does not simply justify the *status quo*, but rather refers to the attachment of groups of individuals to certain spaces governed by certain political institutions.

Let us begin by looking at what it is that ties particular peoples to particular territories. On both Stilz's and Ypi's accounts, this is based on individuals' attachment to territory in a way that is fundamental to the pursuit of their ends, projects and relationships. Stilz consequently begins by addressing the particularity problem by pointing to conditions *b*) and *c*) as defined above (2011, p. 582). These are a condition of occupancy rights, held by a state's subjects, and a condition of legitimacy of the state, which is met when it represents its subjects. This in itself does not tell us where boundaries should be drawn unless we have an idea of a particular collective of individuals with occupancy rights, who occupy a particular territory. For on both Stilz's and Ypi's accounts (though Stilz elaborates on this more), all the state needs to do to be legitimate is protect basic rights and provide for political participation. Stilz maintains that the state needs to represent its citizens, but her notion of representation is minimal in that it only extends to granting citizens a voice in political decision-making. In theory, any state could represent any individuals in this sense. This does not tie particular states to particular individuals with claims to particular territories. In fact, as Stilz recognises, this account may even encourage a more just state to annex a less just one (2011, p. 595).

Stilz addresses the issue of particularity, and why annexation by a foreign power would be wrong, by arguing that where a state has existed a people has been created; a people with a political culture and institutions that serve as the basis for legitimate states. Without these particular institutions, the bases for the (representative) legitimate state would be disabled, even if the institutions that replace them, the colonising power, would be equally good or better at protecting freedom-as-independence. "Annexation is wrong because where a people's institutions can be legitimate, they have a claim, not just to any legitimate institutions but to the ones they have created together through their political history" (2011, p. 595).

Hence, on Stilz's account, it seems it is no longer individuals' relation to territory coupled with a legitimate state providing democratic participation that matters, but rather a collective agent with a particular history of shared political cooperation within a state: "We grant collective autonomy to the people in order to recognize the relational value for participants of the shared histories of political cooperation" (2011, p. 595). What matters is thus not only individuals' relation to the state and to territory, but also their relation to each other, and she goes on to argue how peoplehood has a particular relational value based on their history of political cooperation. At the same time she argues that only political cooperation through sharing a state can create the relevant moral bonds, which moves the issue of boundary drawing back to the existence of states. We seemingly end up with some circularity: the existence of a state, past or present, defines the people, while at the same time the people define the territory of the state.

To some extent this circularity is due to the rather peculiar claim that the only relevant political activity for self-determination claims is the history of sharing a state (2011, p. 593). She argues that “to qualify as a people, a group must also demonstrate the political capacity for supporting legitimate institutions today” (2011, p. 594). One wonders why this is not simply a sufficient criterion on a legitimacy based account. Why have the condition that a group must have shared a state in the past, when this condition is not sufficient anyway? Having shared a state may explain why a group has the relevant political capacity, but it may not (in fact, it may show the opposite), and other forms of limited self-governance may be sufficient in demonstrating political capacity. Ypi argues similarly that membership in the state, or in the “rightful political authority”, is inherited “through shared political participation” (2012, p. 12). But she does not specify that such political participation must have taken place within the framework of a state, in other words that the collective must be defined by the existence, past or present, of a state.

In particular, when we consider Ypi’s stress on the arbitrariness of current state borders, it becomes even harder to understand Stilz’s insistence on states as the only relevant form of political cooperation. Most territorial boundaries have come about in unjustified ways, yet they entail a right to exclude outsiders by those who currently occupy these territories. Kantian theories can circumvent this problem by focusing on present occupiers, rather than acquisition or enhancement of land. But if a particular political history of a people sharing this state is justifying future territorial claims (even after the state may have ceased to exist), does the genesis of the state and its particular territory not become relevant again?

Ypi, on the other hand, addresses the particularity problem by referring to the political and historical contingencies that have created current territorial boundaries and pointing out their arbitrariness.<sup>3</sup> This, as I explained above, leads her to argue for the permissive theory of territorial rights, which emphasises that “what matters is how states now act politically to overcome the unilaterality of that initial acquisition” (2012, p. 16). Rather than providing principles for how boundaries may be drawn, if they were to be drawn anew, however, Ypi argues that such matters ought to be decided in the global political association she advocates (2012, p. 20).

Hence, both the legitimacy-based and the permissive theory of territorial rights discussed here offer some good reasons for why legitimate states have territorial rights within *current* boundaries, but offer little insofar as new boundaries are concerned, such as secession from legitimate states. Granted we need a conception of the people that we then “attach” land to, how do we develop such conception without referring back to the territorial boundaries (which come with unilateral acquisition and exclusion attached) we were meant to justify? It seems clear that the statist account offered by Stilz cannot provide such an account. Moreover, as I pointed out above, I am not convinced that focusing on the arbitrariness of current borders is helpful in solving the particularity problem either. For are these boundaries arbitrary in a morally relevant sense? If there are good reasons to attach certain people to certain pieces of land, then boundaries may not actually be arbitrary in a morally relevant sense. Exclusion will still take place that needs to be justified universally, but territorial claims to land within particular borders may be justifiable as part of a universal justification of the rights as such. In other

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<sup>3</sup> With regards to annexation, she adds that it would be wrong to annex another state because that would present a unilateral move - like the unilateral claim of a state to a particular territory that we are trying to justify (Ypi, p. 20).

words, if we can attach present-day collectives to land, then their claims to a particular territory may not be morally arbitrary, even if the reasons for how they ended up there were.

As a way of defining such collective and their attachment to land, I believe Kantian theories' emphasis on political participation is key. In addition, a territory is also defined by the political institutions that profoundly shape individuals' lives. If they do not feel attachment to these institutions, perhaps due to marginalisation or alienation from the specific political culture, the state will fail to represent them and their political voice will be weakened. This will undermine autonomy, which secure legal residence – occupancy rights – is meant to protect. Political institutions ought to be regarded as part of territory and present day citizens have a strong autonomy-based claim to occupy as well as having a voice over the development of territory with those particular political institutions. Individuals, on this account, have an interest in stable legal and democratic residence within the territory, including its political institutional framework, where they have ended up residing through no fault of their own.

To be more precise, we may simply state that political participation under *some* institutional framework may create a political collective, which, if they have the political capacity may make territorial claims if they were to create a state. Prior (democratic) political institutions are thus still necessary to define the collective, but boundary drawing is not confined to either the *status quo*, or to the existence, past or present, of a state. Moreover, this account stresses individuals' relation to territory (including its institutions), not necessarily to each other. Though such relationship between individuals comes into existence by virtue of sharing the same institutions, it is nonetheless the institutions that ground the relationship and without which it would not exist or form a political collective. This further emphasises the difference between such an account and nationalist ones, the latter which Kantian theories are keen to move away from.

In short, it is participation in particular political institutions within a particular territory that may form a collective, which may have the political capacity to also form a state that can claim territorial rights. These territorial rights would then be claimed on the territory in which the individuals comprising the collective, shaped by political participation under a common political institutional framework (that may or may not be a state), have ended up through no fault of their own.

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