

Jurisdictional Rights in a Realistic Utopia: A Commentary on Miller

Kim Angell (University of Oslo)

According to David Miller a group may have a strong claim to *jurisdictional rights* over a particular land when the group is justified in retaining value which has become (inseparably) embedded in that land. Such a claim may be justified on (either of) three bases. If the group has created ‘material’ value, it deserves to keep the fruits of its labor. Further, the group is justified in retaining ‘material’ and ‘symbolic’ value when doing so is pivotal for their being able to sustain their ‘way of life’ and ‘identity as a people’, respectively (2011: 258-259).

As Miller underlines, this approach confronts a gap problem: The group could in principle retain the embedded value as long as they wield (collective) *private property rights* (ibid: 258, 263). This problem was not addressed in Miller’s earlier work on the subject (e.g. 2007: 201-230), but in his new article a two-pronged solution is offered:

Rights of private property alone will not serve because (1) such rights are always susceptible to being redrawn by whoever holds rights of jurisdiction and (2) much of the embodied value that the group has created is likely to be located in public space – in public architecture, landscapes of historic significance, and so forth. [...] [I]n order to secure that value over time, [the group] needs rights of jurisdiction such as those normally exercised by a state (2011: 263).

While arguments (1) and (2) are a much welcome expansion of Miller’s theory, I have some doubts as to whether they can do the intended job. Let me start with argument (2).

Retaining of Value in Public Space

On my reading, the idea behind this appeal goes roughly as follows: For value located in public space (such as architecture and landscapes), it is typically the case that the value may be lost unless it *continues* to be located in *public* spaces. This suggests that the value can only be retained by agents that are in a position to determine how public places should be managed and used; and how could *private* property rights be sufficient for that purpose?

Consider a landscape of historic significance. An important part of what makes this landscape valuable for a group might be that no individual (or sub-group) property owner can lay claim to (parts of) it, but rather that the group members have rights over it (as a whole) *qua* group, so that they can collectively determine how the landscape is to be managed and used. Public regulation of the landscape, as exercised (typically) by a state with *jurisdictional* authority, would clearly be sufficient for retaining the value. But is it necessary?

It is unclear to me why the group cannot in principle retain such value as a (collective) private property owner. Consider what may naturally happen to a private property right when we increase the number of its subjects (and often the scale of its object). When a (large) piece of land is privately and collectively owned by a large group, and where the exercise of the group's private ownership takes on complex forms of interaction between group members, there is typically need for an institution to *create rules of conduct* on the property and *adjudicate in cases of conflict* between group members regarding the individual use of their common property.

Such an institution, which we can call *quasi-jurisdictional*, is 'jurisdictional' in that simple sense. And when it creates rules of conduct on the land property it may define (parts of) its private land as 'public' spaces *for the group*; whereas for the state at large these spaces may still be seen as private property. At no point, however, do the 'legislative' activities of this institution necessarily rival the jurisdictional rights of the state. Quasi-jurisdictional institutions may coexist with jurisdictional institutions proper on the same piece of land.

The case of Norway and the Finnmark Estate might serve as an illustration. The Finnmark Estate owns roughly 95 per cent of the land in the northernmost part of Norway, Finnmark County. This land was formerly formally owned by the Norwegian State, but it was transferred to the Estate in the 2005 Finnmark Act. The Estate is managed by an elected board, which represents the inhabitants of Finnmark County, as well as non-resident Sami. It decides in matters concerning changes in the use of uncultivated land, on the basis of how such changes influence *inter alia* Sami culture, reindeer husbandry, commercial activity, and social life (Fitzmaurice 2009: 100-7).

The Finnmark Estate has legal status as a private land owner, but it engages in various quasi-jurisdictional activities. Miller's argument (2) seems vulnerable to the fact that value located in public spaces may in principle be retained by such institutions, which remain private in the relevant way. What about argument (1)?

Insecure Retaining of Value¹

As I interpret it, what I will call *the insecurity argument* can be stated as follows:

- (i) A group is justified in retaining value embedded in land;
- (ii) The group can retain the value by having (legal) property rights over the land;
- (iii) The group's retaining of value is insecure due to the state's having jurisdictional rights (to amend property rights);
- (iv) Having to live under such insecurity is morally unacceptable, and the group has a claim to have the insecurity reduced as much as possible;
- (v) The insecurity is reduced to the greatest extent by conferring upon the group (legal) rights of jurisdiction over the land.
- (vi) If (i)-(v), then jurisdictional rights should be conferred upon the group.
- (vii) Therefore, from (i)-(vi), jurisdictional rights should be conferred upon the group.

Let us start by assuming that the group's claim to retain value is justified by any (combination) of Miller's three bases.

Let us further grant that the group's living under insecurity is morally bad and that a remedy is warranted (as premise (iv) suggests). This is controversial enough, at least as long as the state acts somewhat decently. Say, it has a stable and strong preference for respecting the group's property rights, and this preference is common knowledge. If there is no actual threat, why bother to protect against it? But let us put this to one side.

The next step in the argument is to suggest that the proper remedy is to *confer a set of legal rights* (of jurisdiction) upon the group. Why is that the proper remedy? As quoted above, Miller might appear to argue that jurisdictional rights should be our preferred remedy because having such rights will *eliminate* insecurity. This interpretation of the argument seems to me implausible.

The argument must, I think, be concerned with *reduction* of insecurity, not elimination of it. Even if a group is given legal jurisdictional rights in international law, the group's retaining of value would still be relevantly insecure as long as the right to amend international law is held by

¹ This section presents a shortened version of an argument I develop at some length elsewhere (Angell forthcoming).

an agent which is non-coterminous with the group – in this case, the international community of states. This makes elimination of the relevant insecurity (through the conferring of legal rights) impossible. If so, I take it that the best alternative for Miller’s argument is to opt for *the largest possible reduction* of insecurity, all else equal. This explains the formulation of premise (v) in my reconstruction of the argument.

How can we reduce the insecurity experienced by the minority groups? Insecurity can be reduced in the sense that the *probability of state interference* with the group’s *retaining of value* is reduced, and stably kept at a lower level. State behavior might be relevantly influenced in various ways. But because Miller’s solution (as I read him) is to confer a set of legal rights, I delimit my discussion to such measures.

In order for Miller’s solution to reduce insecurity there must be an international law enforcer which is *willing* and *capable* of backing up the conferred rights. We can assume that any state currently controls the means of coercive law enforcement vis-à-vis its minority group. Merely declaring that the group has a right to secede will thus not change much (with regard to the secure retaining of value) if the state opposes secession. Assuming that existing states will deny secession attempts, an international enforcer must assist the secession and guarantee the legal jurisdictional rights of the new state. Put short: in such cases, *deterrence* is what reduces insecurity.

But if the state must be deterred from interference by threats of international punishment, this opens up for at least one alternative way in which to reduce the group’s insecurity.

On my reconstruction, Miller’s scenario involves

- (a) international protection of *jurisdictional rights*; whereas the alternative involves
- (b) international protection of *property rights* for the minority group.

If the insecurity argument is to ground jurisdictional rights, it must be true that scenario (a) can be expected to be *superior* in reducing insecurity. But, as I will now suggest, when we compare (a) with (b), we have reason to expect the opposite.

Without attempting to be exhaustive, let me give what seems to me the most straightforward ground for expecting that scenario (b) outperforms (a). Threats of international enforcement only reduce insecurity (through deterrence) if they are *credible*. All else equal:

Credibility varies with the *costs of enforcement*; and enforcement costs increase with increases in the degree of *non-compliance* with the law.

My suggestion is that a regime of law recognizing (a) will be met with a relatively higher degree of non-compliance. This reduces enforcement credibility, and causes (a) to yield a relatively lower reduction in insecurity, all else equal.

What may substantiate this suggestion?

When a group is granted jurisdictional rights it also receives a right to secede. The insecurity argument allows for rights of *no-fault* secession, based on a group's living under insecure legal rights. To fully appreciate the implications of Miller's proposal, note that there is nothing in the insecurity argument which suggests that its recommendations may be implemented as a one-off event. It will require redrawing of boundaries whenever a relevant minority group becomes justified in retaining value.

Existing states are far from willing to grant a right to no-fault secession. In the status quo of international relations there is no endorsement of anything remotely like such rights. There is *some* recognition of a *remedial* right to secede, based on severe violations of (very) basic human rights. But even this is controversial (cf. the Kosovo case). Further: It seems implausible to expect that states will "change their minds" anytime soon. For states like Spain, Norway, the UK, Canada, and their likes, much would be at stake: Miller's proposal would recognize secessionist rights for the Basques, the Catalans, the Sami, the Scots, the Québécois, and so on.

In contrast, there are examples of intra-state *property* arrangements being successfully enforced in current international law. The ratification of ILO Convention No. 169 is the most prominent example. And even though only 22 states have ratified thus far (ILO 2009), arrangements like (b) seem capable of obtaining political support (much) more easily than (a).

This should not surprise us. States in general strongly prefer to sustain full jurisdictional authority over their territories. When presented with a choice between scenarios (a) and (b), they will strongly prefer complying with international law in (b), all else equal.² Such behavior is rational because (b) involves a lesser cession of jurisdictional authority. It follows that the costs

² I assume that the law will be enforced against all (or as many) states (as possible) by varying coalitions of enforcing states carrying a UN mandate (or similar). I also assume that Miller's argument is meant to offer guidance for reform of international *law* (rather than applying to *illegal* actions).

of enforcing state compliance with (b) are relatively smaller. If high enforcement cost lowers enforcement credibility, (b) will then be relatively superior in reducing insecurity, all else equal.

The validity of the insecurity argument's premise (v) depends upon scenario (a)'s being superior to *any* alternative scenario in reducing insecurity. So, if my suggestion about (b)'s *relative* superiority is on target, the insecurity argument fails as a basis for jurisdictional rights – regardless of whether alternative (legislative or other) arrangements turn out to outperform (b).³

This analysis needs some further buttressing. Miller plausibly underlines that the group's jurisdictional rights should be *balanced* against eventual competing claims on the state's part. Secessionist rights might thus not be the overall recommended outcome. The result might instead be 'a federal constitution' (2011: 263). But if so, is my appealing to the fact that states are strongly opposed to *secessionist* rights misplaced?

I think not. Before a jurisdictional right can be balanced against another, it must first be established (as such) in the pro tanto sense. And it is unclear to me how Miller's insecurity argument can do this without showing that scenario (a) – which confers *secessionist* rights – is superior in reducing insecurity. The conferring of such rights must be among the alternatives presented to the states. We cannot consider the "balanced" outcome right away. If we do so, and instead ask whether international protection of *intra-state autonomy* rights for the group is superior in reducing insecurity, then the insecurity argument ceases to be a (potential) ground for *jurisdictional* rights in the first place.

This analysis gives, I think, some reason to doubt whether the insecurity argument will do the job for Miller. Even if scenario (a) reduces insecurity, there is (at least) one alternative that provides *greater* reduction, namely, (b).

State Behavior in a Realistic Utopia

As it stands, the insecurity argument's descriptive premise (v) seems false. States – as we know them – can be expected to act such that scenario (a) will not yield the largest reduction of insecurity. But here it might seem pertinent to object that my analysis pays too much attention to

³ It has been plausibly suggested to me that various forms of *constitutional protection* of minority rights, which require no international enforcement, might reduce insecurity even more than scenario (b). But as long as such arrangements also outperform (a), Miller's insecurity argument will fail to ground jurisdictional rights. I thank Chris Bertram for discussion of this point.

the status quo: a normative theory should not be hostage to patterns of state behavior which we may realistically hope to change in the future.

It is unclear to me to what degree the insecurity argument is meant to be part of what Miller (following Rawls) elsewhere calls a *realistically utopian* theory (2008: 38-47). When devising such a theory we are not restricted by the current behavior of states. Instead we can focus on what sort of behavior might be feasible.

For Miller, the ‘final aim’ of political philosophy is ‘to guide action’ (ibid: 44). Feasibility constraints normally become an issue when a theory recommends, or builds upon, courses of action which depart significantly from those found in the status quo, and which we have reason to doubt will ever materialize. On Miller’s version of a realistically utopian theory, the bounds of feasibility are determined by what ‘members of [...] society could be brought to accept by reasoned discussion’ (ibid: 46).

Arguably, even though existing states do not accept rights to no-fault secession, it does not seem impossible that states (after reasoned discussion) could come to prefer (a) in a future world. Could such an *appeal to feasibility* save the insecurity argument as a ground for jurisdictional rights? I am sympathetic to this kind of appeal. But it seems to miss the mark here. At least, it offers an *incomplete* defense of the insecurity argument.

It seems straightforward that the patterns of state behavior which are recommended or assumed by the *normative* principles of a (realistically utopian) theory need only be feasible. However, in the case of the insecurity argument, the normative premises do not themselves recommend rights of jurisdiction/secession. They merely recommend that the relevant groups should be allowed *to retain value* under *the lowest level of insecurity possible*. The argument seems indifferent as to whether this is the case under scenario (a), (b), or something else. That is, the specific set of legal rights, if any, vindicated by the insecurity argument is determined solely by its *descriptive* premise (v).

It might be feasible that states can come to prefer (a) over, say, (b). But this is not enough to rescue the insecurity argument: arguably, various alternative behavioral patterns might pass Miller’s feasibility test, and yield an equal or larger reduction in insecurity. A world where states prefer (b) over (a), for one, seems a serious contender. Before we have an account of which of the feasible worlds will contain least insecurity, the insecurity argument favors none over the other.

So, rather than rescuing the insecurity argument, the appeal to feasibility merely points to the need to *supplement* Miller's approach. This could be done either by explaining why we may expect least insecurity in the feasible world where states prefer scenario (a); or, if no such account is available, by adding premises which explain why that world is the most desirable one for reasons other than reduction of insecurity.

In this commentary I have expressed some doubts on whether Miller's two arguments will bridge the gap between property and jurisdiction. For reasons of space I have not commented on the parts of Miller's approach which I find very plausible. Parts of his case against statism (cf. 2011: 254-256) are one example. I also find the structure of his forward-looking consideration from the need to sustain one's life plans – and how land may be integral to that pursuit – very fruitful. Elsewhere (Angell manuscript) I argue that a non-statist approach, with a similar forward-looking structure, might solve the topical gap problem, and ground jurisdictional rights proper.

[E-mail: kim.angell@stv.uio.no]

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