

# Plebiscites and the Justification of Territorial Claims

*Frank Dietrich*

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## 1 Introduction

Secession necessarily entails the redrawing of political borders. Separatist movements do not only desire to leave the existing state, but assume control over parts of its territory. Therefore, any justification of a moral right to secede must address two closely connected questions. It must, firstly, explain how states or separatist groups acquire (and lose) rights to a particular stretch of land. Secondly, it must provide criteria for the localisation of borders and, thereby, for the precise scope of the territory claimed by both parties.

In this chapter I will pursue two goals. Firstly, I will survey the current philosophical discussion on the justification of territorial rights and, secondly, I will try to defend a plebiscitary version of choice theory. ...

By a territorial right I mean a moral – not a legal – entitlement to a certain area. As regards its contents, I consider a territorial right to be a jurisdictional right. A territorial right specifies the borders in which the right holder is authorised to enact and to enforce laws.<sup>1</sup> ...

## 2 Property Theories

Classical political philosophers have been largely negligent on the justification of territorial claims. The contractual theory that John Locke developed in his “Two Treatises of Government” is an important exception. Hence, it is not surprising that his work is frequently referred to in the contemporary discussion on territorial rights. According to Locke, the individuals in the state of nature can rightfully appropriate land and other natu-

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<sup>1</sup> For a more detailed definition see Simmons 2001, 306.

ral resources by mixing it with their labour.<sup>2</sup> In his view, property rights are not created by the state; on the contrary, the state is created with the aim of protecting pre-existent property rights. By entering into the contract the individuals submit themselves and their estates to the authority of the government. Locke stated: “(...) It would be a direct contradiction, for any one, to enter into Society with others for securing and regulating of Property: And yet to suppose his Land, whose property is to be regulated by the Laws of the Society, should be exempt from the jurisdiction of that Government, to which he himself the Proprietor of the Land, is a Subject” (II, § 120). Consequently, the state’s territorial jurisdiction is coextensive with the land that the original contractors rightfully possess.

As regards the legitimacy of secession, the question whether the individuals are entitled to withdraw their land from the state is of crucial importance. Locke’s argument is based on a distinction between the founders of the political society and members of successive generations. The original contractors, who consented explicitly (and irrevocably) to the creation of the state, cannot resign their membership (II, § 121). In Locke’s view, they have neither the right to emigrate nor the right to secede from the political society. The descendants of the first generation are considered free persons who are not bound by the promises of their forefathers (II, §§ 95 and 116). They can only tacitly agree to the government either by possessing land which is under the jurisdiction of the state or simply by residing within its borders (II, § 119). But residence on the territory cannot be plausibly interpreted as a sign of consent, unless the individuals have the right to leave. Accordingly, they are allowed to incorporate themselves into another political society or to establish a new one in *vacuis locis* (II, § 121). However, Locke grants the right to emigrate only to individuals who are prepared to renounce their property of land: “(...) Whenever the Owner, who has given nothing but such a tacit Consent to the Government, will, by Donation, Sale, or otherwise, quit the said Possession, he is at liberty to go (...)” (II, § 121).

The restriction that Locke imposes on persons who are willing to dissociate from the political society needs, of course, a theoretical justification. Unfortunately, he provides no detailed explanation why land owners are not permitted to take their property with them. Perhaps the most persuasive interpretation of Locke’s thoughts has been suggested by

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<sup>2</sup> Locke’s account of appropriation presupposes that, although god has given the earth to mankind in common, every man has a property in his own person. Self-ownership of the labour of his body enables each person to add something to the fruits of nature which excludes the common rights of others (II, §§ 25 and 27).

Charles Beitz (1980, 490-493).<sup>3</sup> According to Beitz, the individuals in the state of nature who signed the original contract submitted their estates irrevocably to the authority of the government. Subsequent owners could only inherit or purchase the land on condition that it remains an integral part of the political society. Consequently, they have never enjoyed a fully unrestricted property right that would have authorized them to dismember the state.<sup>4</sup> Thus neither the members of the first nor of any subsequent generation may reclaim their land from the political society. In Locke's view, the individuals are not entitled to change the borders of legitimately constituted states by secession or unification with adjacent countries.

Locke's argument for the territorial integrity of political societies faces, at least, two problems. Firstly, one may doubt whether the original contractors were entitled to submit their estates irrevocably to the government's authority. The decision of the founders affected the interests of all future generations and may well be seen as a violation of the law of nature (Franklin 1996, 419). Secondly, the individuals in the state of nature appeared to have no rational reason for accepting such far-reaching restrictions on their land rights. According to Locke, the original contractors were prepared to confer rights on the state because they wished to gain protection for their property. Given this motive it is, however, difficult to see why the individuals should submit their land irrevocably to the political society. The capacity of the state to provide protection is normally not impaired if some citizens withdraw their land and gain political independence.<sup>5</sup> Moreover, it does not serve the interest of the original contractors to constrain the property rights of all subsequent generations (Beitz 1980, 499-500).

As regards Neo-Lockean theories on territorial rights, it is important to distinguish between "individualist" and "collectivist" versions. Most proponents of individualist theories regard Locke's account as unpersuasive and approve of a right to secede.<sup>6</sup> Hillel Steiner, for instance, wrote: "For, although Locke himself (for reasons which remain mysterious) balked at embracing this conclusion, it is very clearly implied by his principles. That is, precisely

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<sup>3</sup> Further discussion of Locke's theory of territorial rights is to be found in Gale 1973; Grant 1987, 110-128; Baldwin 1992, 212-216; Franklin 1996 and Simmons 2001, 312-317.

<sup>4</sup> This interpretation is backed by passages such as the following: "Whoever, therefore, from thenceforth, by Inheritance, Purchase, Permission or other ways enjoys any part of the Land, so annexed to, and under the Government of that Commonwealth, must take it with the Condition it is under; that is, of submitting to the Government of the Commonwealth, under whose Jurisdiction it is, as far forth as any Subject of it" (Locke II, § 120; see also II, §§ 73 and 117).

<sup>5</sup> Arguably the individuals in the state of nature would have mutually agreed to less extensive restrictions, such as a prohibition to purchase land to potential aggressors, in order to protect their property.

<sup>6</sup> For a defence of Locke's views see Simmons 2001, 312-320.

because a nation's territory is legitimately composed of the real estate of its members, the decision of any of them to resign that membership and, as it were, to take the real estate with them, is a decision which must be respected" (Steiner 1998, 66).

One problem of individualist theories is that they cannot account for private possession of land in foreign countries. For instance, a considerable number of German pensioners have acquired real estates on the Spanish island of Mallorca. It is common understanding that the Spanish government has not lost jurisdictional authority over parts of the island. A theory which derives territorial rights of states from individual property rights fails to explain this finding (Brilmayer 1990, 14-15; Buchanan ...). Secondly, individualist Neo-Lockean theories, such as Steiner's, privilege land owners to other citizens. As outlined in the introduction, a territorial right entitles the state to enact and to enforce laws within a certain area. Its justification must take the interests of all persons into consideration who live under the jurisdiction of the right holder. Individualist theories focus exclusively on the interests of a part, possibly a very small one, of the population. Although, all inhabitants are affected by the exercise of political power, only land owners have the capacity to confer territorial rights to the state. This does not accord well with a democratic understanding of political legitimacy and has perplexing consequences for the justification of secession. A single land owner who holds a strategically important piece of land may effectively veto a secession desired by a large majority of the people.

More recently, Cara Nine has proposed a collectivist account of territorial rights which does not run into the aforementioned difficulties. Contrary to individualist thinkers, she does not refer to property rights of land owners who consent to the state's jurisdictional authority. Instead she argues as follows: "The state is capable of changing the land, thereby creating a rights relation with it. States change the land in the same way as individuals, via labour. The state labours by creating, adjudicating and enforcing laws" (Nine 2008, 155). Laws may change the land, insofar as they influence individual decisions on its cultivation and the exploitation of natural resources. In Nine's view, to create a territorial right the change must be morally valuable; in particular, it must promote individual liberties and encourage an efficient use of the land. To defeat a territorial claim of the state, a separatist group must prove that these requirements are not met. Most importantly, a secession can be

justified if the state severely encroaches on the liberties of parts of its population (Nine 2008, 158).<sup>7</sup>

One immediate problem for a collectivist theory is that the state's right to change the land needs to be explained. According to Nine (2008, 160), the state must establish its relationship with the land over time before it acquires a territorial right. At the beginning of this process the state cannot yet claim jurisdictional authority over the land. Contrary to the individuals, who are vested with self-ownership rights, the state is initially not entitled to labour (to enact and to enforce laws) on the land. Hence, the analogy with Locke's account of individual appropriation of land is not as straightforward as Nine suggests. Moreover, the cultural practice of national groups within the state may as well influence the use of land. Thus not only states but also stateless nations may assert territorial rights by drawing an analogy with Locke's account (see Meisels 2005, 80-86).<sup>8</sup> As regards the right to secede, Nine's restrictive interpretation appears debatable. Provided that the separatists are prepared to respect individual liberties, the creation of an independent state is not incompatible with Lockean principles.

### 3 Justice Theories

A justice-based account of territorial claims has been developed, most prominently, by Allen Buchanan within the framework of a remedial right theory of secession. In his writings on the morality of secession he has from the very beginning emphasised the need to justify territorial demands (Buchanan 1991, 10-11). Buchanan regards the capacity to explain how states acquire and lose territorial claims as an important virtue of his remedial right theory. In his view, it is a major shortcoming of competing positions, such as property theories or choice theories, not to provide a plausible account of territorial rights (Buchanan 1991, 104-114 and 2004, 373-379).

Buchanan's basic idea is that only states which wield their political power in a just way can be morally entitled to the land which they control. To assert a right to a particular stretch of land, states must primarily meet two requirements of justice. Firstly, they must not have forcefully annexed the territory in the past and, secondly, they must respect the human

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<sup>7</sup> Although arguing within the framework of a Lockean theory, Nine arrives at a similar conclusion as justice-based accounts of secession (see section 3).

<sup>8</sup> See the "cultural argument" in section 4.

rights of its inhabitants. If a state is guilty of an unlawful annexation, it has not established and, consequently, never possessed a right to govern the territory.<sup>9</sup> If a state engages in human rights violations, it thereby forfeits its right to rule over the areas where the victims of its persecution live. In Buchanan's words: "(...) A state's claim to territory can be voided by a persisting pattern of serious injustice, because it is the provision of justice that justifies state power in the first place" (Buchanan 2004, 370; see also Buchanan 2003, 199).<sup>10</sup>

If a state has never enjoyed or recently lost the right to govern parts of its territory, the way is clear for secession. In that case, a separatist group which seeks to gain political independence does not violate a valid claim of the host state to the territory. However, the fact that the host state cannot lay claim on parts of its territory does not necessarily mean that the secessionists are morally entitled to it. To acquire a territorial right, a separatist movement must meet the same requirements of justice as the host state. Evidently, a secession which is sought as a remedy against state injustice cannot be considered to be an unlawful annexation. Hence, the key question is whether the newly created state is prepared to respect the human rights of all people who live under its jurisdiction. In Buchanan's view, the separatists can only establish a territorial right if they are determined to replace an unjust regime by a just one.

Buchanan's account has the advantage of giving host states and separatist states alike strong incentives to comply with human rights standards. His attempt to base territorial rights on considerations of justice faces, however, three closely connected problems. To begin with, as far as just states are concerned, Buchanan's theory does not account for the localisation of borders. The boundary lines between two states which meet the aforementioned requirements of justice can be drawn in many different ways. Buchanan's justice-based argument offers no normative guidance on how to choose between possible alternatives. From the perspective of his theory, any distribution of territorial authority appears to be legitimate. Buchanan must presuppose that just states have already reached an agreement, e.g. on the basis of customary law or historical peace accords, on their borders. If the spatial scope of their jurisdiction is determined, states can acquire and maintain territorial

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<sup>9</sup> As regards the forceful annexation of territory Buchanan has argued for a statute of limitations (2004, 355-357).

<sup>10</sup> At different stages of his writing Buchanan has referred to two other instances of injustice that deprive a state of its territorial rights, viz. discriminatory redistribution (1991, 38-45) and the violation of intrastate autonomy (2004, 357-359),

rights by exerting a just rule. Their conformity to standards of justice, however, cannot determine how their borders with other just states must be drawn.

Secondly, states which meet the requirements of justice may lay competing claims on a particular stretch of land. If two or more states are willing and able to govern an area in accordance with human rights standards, the conflict must somehow be decided. Evidently, on the basis of Buchanan's argument it is impossible to assert which party is morally entitled to the territory. Two strategies for dealing with this problem can be imagined. On the one hand, the right could be assigned to the state which proves to be capable of imposing its rule on the territory. This, however, would come close to a "might make right" principle which does not go well with a theory of justice. On the other hand, the right to control the territory could be assigned on the basis of an additional normative criterion, such as the will of the residents. Thereby, Buchanan's theory would, however, incorporate a plebiscitary element (see section 5) and essentially change its character.<sup>11</sup>

This dilemma has direct relevance for the normative assessment of secessionist demands. Most separatist movements which seek to gain independence from democratic states can be expected to meet the requirements of justice. For instance, in the case of Quebec or Scotland both parties, the host state and the separatists, are willing to respect human rights. To be sure, in Buchanan's view the host state is already vested with a territorial right which the separatists must not violate. If it is the aim of his theory to achieve justice for as many people as possible it is, however, not clear why the status quo enjoys a privilege. The creation of new states which are determined to comply with human rights standards means no setback in terms of justice.<sup>12</sup> Hence, the claim the separatists lay on the territory cannot easily be dismissed. Thirdly, ...

#### 4 National Theories

In the last two decades, nationalist thought has enjoyed a remarkable revival within liberal political philosophy.<sup>13</sup> Not surprisingly, for many advocates of liberal nationalism the justi-

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<sup>11</sup> For an important attempt to refute this argument see Waldron 1993.

<sup>12</sup> Admittedly, authoritarian regimes lose one incentive – protection against secession – to establish democratic institutions.

<sup>13</sup> See Tamir 1993; Miller 1995 and 2000; Moore 2001; Gans 2003 and Meisels 2005. Kymlicka 1995 and Kolers 2009 hold a similar position, albeit they speak of cultural societies and ethnogeographic communities instead of nations

fication of territorial rights has been an important concern. In their view, the close connection with a particular geographic region constitutes a distinguishing feature of nations. National communities, unlike other types of communities, believe to have a historical homeland to which they are entitled.<sup>14</sup> Hence, national minorities which aspire to secede from their host states lay always claim to a specific territory. Basque nationalists, for instance, can only think of establishing an independent state in the Basque Country; from their perspective, it would be unacceptable to obtain political self-determination elsewhere. Other types of communities, such as families or religious groups, are not so intimately tied to a particular stretch of land. Although their members may attach great importance to ancestral homes or sacred sites, they usually do not deem it necessary to live there.<sup>15</sup>

For the justification of territorial rights it does, however, not suffice to demonstrate that the idea of a homeland is an important element of nationalist thought. One has to provide normative reasons as to why national communities are morally entitled to control a specific territory. Basically, the proponents of liberal nationalism have advanced three arguments. Firstly, they have referred to the historical fact that a previously uninhabited area was initially settled by the members of a national community. According to the *first occupancy argument*, the group which was the first to live in the place acquired the right to rule over it. It is worth noting, that in two respects this argument differs from Locke's account of original appropriation in the state of nature. First occupancy is assumed to create a jurisdictional right (not a property right) to the land which is collectively (not individually) owned. Despite the prominence of the "we were first" claim in political conflicts, most liberal nationalists have come to see it rather critically. They largely agree that first occupancy as such, without prolonged settlement, fails to establish a territorial right (Khatchadourian 1989, 37-42; Gans 2003, 104-109; Meisels 2005, 30-36).

Secondly, and more importantly, nationalist authors have pointed to the formative influences that the cultural activities of a nation typically exert on a territory. The members of a national community employ particular forms of agriculture, found towns and erect outstanding buildings, such as castles and cathedrals. Thereby they create a visible relationship between the nation and the territory which gives them, according to the *cultural ar-*

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<sup>14</sup> The territorial aspect of national identity is discussed inter alia in Knight 1982; Anderson 1988; Smith 1991, 8-15 and Miller 1995, 21-27.

<sup>15</sup> David Miller made this point very clearly: "(...) If you are a good Muslim you should make a pilgrimage to Mecca at least once, but you need not set up house there. A nation, in contrast, must have a homeland" (1995, 24).

gument, a right to it.<sup>16</sup> Thirdly, liberal nationalists have stressed the value that the members of national communities assign to a particular geographical region. Persons identifying with a nation usually have strong emotional bonds to the area which they regard as their homeland. The importance the individual members attach to the territory explains, according to the *identification argument*, why the nation is entitled to it.

Since individuals usually identify with an area because of its cultural characteristics, the two latter arguments are closely connected.<sup>17</sup> Thus David Miller wrote: “The people who inhabit a certain territory form a political community. Through custom and practice as well as by explicit political decision they create laws, establish individual or collective property rights, engage in public works, shape the physical appearance of the territory. Over time this takes on symbolic significance as they bury their dead in certain places, establish shrines or secular monuments, and so forth. All of these activities give them an attachment to the land that cannot be matched by any rival claimant” (2000, 116; see Moore 2001, 176-201 and Meisels 2005, 75-96).

The justification of territorial claims offered by nationalist authors faces a number of conceptual problems. To begin with, nationalist thought originated in the 18<sup>th</sup> and 19<sup>th</sup> centuries and thus is a relatively recent phenomenon. The achievements to which the cultural argument refers were mainly accomplished by people who did not think of themselves as national communities. Hence, it is sometimes difficult to establish whether the group which formed the territory many centuries ago is identical with the nation which presently lays claim on it. (Example ...?). Furthermore, modern nations are rather heterogeneous communities whose members disagree on many questions. They can even hold different views on the size and borders of the territory which rightfully belongs to the nation. There is, for instance, an ongoing debate within the Zionist movement to which land the Israeli state is entitled (Gans 2008). If the members of a national community are split over territorial matters, the scope of their right cannot be readily determined. Since they have different conceptions of their homeland and accordingly different emotional ties, the identification argument yields no clear result.<sup>18</sup>

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<sup>16</sup> The peculiarities of a territory may as well bear on the “character” of a nation which has been settling on it over a long period of time (Gilbert 1998, 94-101).

<sup>17</sup> Chaim Gans in his discussion of historical rights makes a distinction between “first occupancy conceptions” and “formative territory conceptions” (2003, 97-123, see Meisels 2003, 73).

<sup>18</sup> Authors, such as Tamir (1993, 83-94) and Miller (1995, 96-98 and 150-151) highlight the pluralistic character of modern nations. In their view, national communities are engaged in ongoing dialogues about their particular identities, i.e. their histories, customs and values. Since public debate is thought to be an open-ended process, it does not solve the above stated problem.

As regards the normative justification of territorial rights, a major weakness of the above arguments becomes apparent if nations lay claim on territories where they do not live anymore or are a minority.<sup>19</sup> In the course of history national communities sometimes leave the areas where they originally settled or they are outnumbered by other groups. Nevertheless the territory may play an important role for the nation's narrative and many of its members may feel a strong attachment to it. Claims to territories where for the most part other groups live are put forward by host states and separatist movements alike. The Serb government, for instance, strongly opposes the secession of Kosovo because it regards the province as the cradle of the Serb nation. Basque separatists aspire to establish an independent state on the historical homeland of the Basque nation which in their view includes parts of Navarre (Mansvelt Beck 2005, ...).

The cultural and the identification arguments, as stated above, suggest that national communities can be morally entitled to areas where predominantly other people live. Most obviously, the interests of the members of national communities that lay claim on a territory may conflict with the interests of its current inhabitants. Here it is important to recall that a territorial right has to be understood as a jurisdictional right. It authorises the right holder to enact and to enforce laws on the people who live within the borders of the territory. Decisions by the territorial sovereign affect fundamental concerns of the inhabitants, such as their physical protection and social welfare. These concerns carry greater weight than any interest asserted by a national group whose members live elsewhere. Therefore, the justification of territorial rights must first and foremost take the interests of the residents into account. Giving the interests of the nation priority amounts to allowing a kind of alien domination over the actual inhabitants.<sup>20</sup>

Some nationalist authors accept this criticism and deny that nations can rightfully claim jurisdiction over areas where for the most part other people live. In their view, the above arguments should only be applied to territories where the national community is presently in the majority (Moore 2001, 193-197; Gans 2003, 109-115). Thereby they implicitly acknowledge, however, that a theory of territorial rights must primarily focus on the interests of the actual inhabitants. If the cultural formation of or the personal identification with a certain stretch of land conflict with residence, the latter criterion must be given priority.

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<sup>19</sup> The cultural argument and the identification argument, moreover, give rise to competing rights. Often more than one nation may claim that its culture has shaped the physical appearance of the territory and that its members identify with it.

<sup>20</sup> Arguably, the interests of national communities may ground rights to the protection of cultural heritage and free access to important monuments.

## 5 Choice Theories

In view of the preceding discussion, choice theories of territorial rights appear to be an attractive alternative. The adherents of choice theories propose to base decisions on territorial conflicts on the will of the inhabitants. If two parties, e.g. a host state and a separatist movement, lay competing claims on an area, a plebiscite must be held. The party which gains the majority of the votes is considered to be morally entitled to govern over the territory. The eligibility for the plebiscite is restricted to persons who meet two requirements: Firstly, they must have lived on the territory for a certain period of time and, secondly, they must not have taken home there by illegitimate means, such as the killing or expulsion of former inhabitants.<sup>21</sup>

Most prominently, Harry Beran has developed a choice theory of secession within a contractual framework (1987, ...). According to contract theory, a state is morally entitled to wield political power if its citizens consent to its rule. A state, in this view, clearly lacks the authority to control a territory if most of its inhabitants vote for secession. There is still another strategy for justifying choice theory in Beran's writings that should be distinguished from the *contractual argument*. Beran has repeatedly referred to central principles of liberal democracy, such as individual freedom, sovereignty and majority rule (1984, 24-29). According to the *coherentist argument*, the normative ideas that underlie modern democracies imply a right of secession. If one accepts the aforementioned principles, one cannot consistently oppose a plebiscitary right to secede.

Choice theories of territorial claims have the advantage of focusing on the interests of those people who live under the jurisdiction of the right holder. Thereby they avoid a problem that property theories, justice-based arguments and nationalist accounts have in common. Each of the three theories may under certain circumstances accord territorial rights to states which the vast majority of the local population strongly reject. Property theories disregard the preferences of persons who do not own land; theories of justice fail to take any-

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<sup>21</sup> Arguably, persons who have suffered expulsion or fled from acts of violence must be admitted to the plebiscite.

body's will into account; nationalist theories focus on cultural achievements and emotional ties of groups which may live elsewhere.<sup>22</sup>

Perhaps the most important challenge a choice theory must meet is the justification of majority decisions. It must explain why the larger part of the inhabitants may establish a territorial right against the will of the minority. A choice theory that is based on a contractual argument does not succeed with justifying majority votes. Within a contractual framework, *each* person living on the territory must consent either directly to the jurisdictional authority of the state or indirectly to the decision procedure. Evidently, if the inhabitants of a territory are divided on the question of secession they will not reach an unanimous agreement. A coherentist argument appears to be capable of overcoming this problem by referring to established principles of liberal democracy. Within democratic societies majority decisions are deemed legitimate if fundamental individual liberties are not trespassed. If one is prepared to accept the majority principle under this proviso the same must hold with regard to secessionist referenda. Provided that the separatists are willing to respect individual liberty rights, a majority vote on independence appears to be justified.

Now, it is of crucial importance to see how choice theories deal with separatist movements which are likely to oppress minorities. At first glance, the coherentist argument suggests that they cannot establish a moral title to the land by winning a majority vote. One can, however, make an analytical distinction between the right to rule over territory and the right to rule over people (Dietrich 2006, 590-593). A state's territorial jurisdiction as such cannot encroach on basic individual rights and thus cannot violate the principles of liberal democracy. Only a state's jurisdiction over persons may conflict with the provision under which a majority decision is considered to be legitimate. Therefore, even a majority group that is not willing to respect minority rights may establish a territorial claim by plebiscite. Of course, jurisdiction over territory and over persons cannot be separated in practice – the former specifies the spatial scope of the latter. Permitting an oppressive majority to exercise its territorial right would amount to sanctioning the subjugation of minorities. Therefore, the majority must be prevented from making use of its territorial right until it is prepared to abstain from rights violations. There is, however, no other party that can rightfully claim the territory.<sup>23</sup>

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<sup>22</sup> Collectivist versions of Neo-Lockean theories are in this respect similar to justice theories.

<sup>23</sup> Humanitarian Intervention ...

A further problem for choice theories is the specification of the area whose inhabitants are permitted to decide on political independence. In some cases the separatists and the representatives of the host state have conflicting views on the location of the plebiscite. Evidently, the chance of gaining a majority for or against secession depends very much on how the territory is defined. Thus it would be a serious weakness in a plebiscitary argument, if it had nothing to say on the question of border drawing (Bishai 1998, ...; Schmücker 2006, ...). To solve this problem, Harry Beran (1984, 29-30) proposed to identify the area in which a plebiscite is to be held by making the use of the majority principle recursive.<sup>24</sup> According to Beran, the separatists may determine the seize of the territory on condition that they grant an equal right to others. If they gain political independence as a result of the majority decision, any group within the newly created state must be allowed to organize a referendum on counter-secession. This time, the loyalists may establish the area in which the plebiscite is to be held on condition that they allow any group within it to organize further votes, etc. Thus the precise scope of the territorial rights the separatists and the host state possess emerges as the result of a reiterated majority procedure.

Beran expects only one plebiscite to be necessary because he believes that the separatist can and will anticipate possible counter-secessions. In his view, the process of recursive secession must be understood as a thought experiment that helps to specify state borders. Given the fact that separatist movements usually know quite well in which areas they are likely to loose a majority vote, Beran's assumption is not over-optimistic.<sup>25</sup> It is worth noting that Beran has considered to prohibit the creation of very small states and enclaves (1984, 30-31). However, as the example of San Marino suggests, there is little evidence that these entities are not capable of guaranteeing individual liberties. Hence, a general restriction of the right to secede with regard to microstates and enclaves contradicts the principles of liberal democracy. Consequently, adherents of choice theories must be prepared to accept a more patchwork-like distribution of territorial rights.

In addition to specifying a territory, choice theories must stipulate who has a moral right to live there and thus to vote in a plebiscite. As indicated at the beginning of this section, some negative criteria readily come to mind. For instance, persons who have expelled the former inhabitants and occupied their homes clearly should not be permitted to vote. Choice theories, however, must positively state how a right to residence and thereby a right

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<sup>24</sup> See also Beran 1987, ...; 1990, 154 (Ireland); 1993, 485-486 --- Pavković, Pogge

<sup>25</sup> Incentive to avoid counter-secession – stability

to participate in a referendum is established. According to Harry Beran, “this right is acquired not simply by birth in a territory, let alone by some period of residence there, but by being a member of a group which traditionally occupies a territory or by being in a territory by permission of the traditional occupants” (1990, 158). As regards Beran’s example, the dispute between Kanaks and French in New-Caledonia, this criterion may be sufficiently clear. Applied to other cases, such as the Israel-Palestine-conflict, the meaning of “traditional occupancy” has to be explained in more detail. Even more importantly, by referring to “occupancy” and “group membership” Beran comes close to nationalist theories. The proposed criterion does not match well with the principles of liberal democracy on which his overall argument is based. Thus a persuasive account of the entitlement to vote in a plebiscite has not yet been provided within the framework of choice theory.<sup>26</sup>

## 6 Conclusion

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<sup>26</sup> Would have to address complex problems, such as immigration, population policy (Tibet etc.), etc.

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