

SYMPOSIUM
TERRITORY, BELONGING
SECESSION, SELF-DETERMINATION AND TERRITORIAL RIGHTS
IN THE AGE OF IDENTITY POLITICS



CONTESTED LAND
AND CHANDHOKE'S KASHMIR

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Contested Land and Chandhoke's Kashmir

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When Allen Buchanan wrote *Secession; A morality of political divorce from Fort Sumter to Lithuania and Quebec*, he argued that we needed a distinctive set of political principles to deal with cases of secession, and he defended and elaborated his own just-cause or remedial rights theory of secession against a rival view of secession as appropriately subject to democratic or plebiscitary choices by the population.¹ This influential book set the terms of the debate, and subsequent theories in the ethic of secession were elaborated and developed, based largely on Buchanan's two categories (justice and choice) in liberal political thought. Plebiscitary (or choice) approaches to secession were grounded in liberal principles of freedom of association, and autonomy; and remedial rights only theories emphasized the state as a vehicle of justice, and argued that secession was justified only if the state had violated human rights.

Chandhoke's book focuses on contested secession in an area of the world that is not marked by liberalism, and in which secession is deeply and violently contested, both within the

¹ Allen Buchanan, *Secession: The Legitimacy of Political Divorce From Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991).

secessionist unit (Kashmir) and by the two rival states that claim an interest in it (Pakistan and India).² It therefore promises a unique perspective on secession. It only partially delivers on its promise in part because Chandhoke does not move out of the framework set by that original ethics of secession literature, framing the discussion in terms of a conflict of rights, and the consequences of asserting various rights, but does not consider more fundamental issues of territory and territorial rights, which are directly raised by her case. And it does not succeed also in part because the suggestions that she offers are under-argued philosophically, and this is true particularly where she departs from Buchanan's original just-cause understanding of secession, and focuses on democracy as a foundational principle by which legitimate political orders are measured.

I

Territorial Rights

In the last few years, there has been a flurry of interest by political theorists in the idea of rights over territory, what they consist of, what justifies them, and who holds them.³ This set of

² Neera Chandhoke, *Contested Secessions. Rights, Self-determination, Democracy, and Kashmir* (Oxford University Press, 2012).

³ Avery Kolers, *Land, Conflict, and Justice: A Political Theory of Territory*. (Cambridge: Cambridge University Press, 2009); Tamar Meisels, *Territorial Rights*, 2nd edition (Dordrecht: Springer, 2009); David Miller, "Territorial Right: Concept and Justification", *Political Studies* 60 (2012): 252-268; Margaret Moore, "Natural Resources, Territorial Right and Global Distributive Justice," *Political Theory* 40 (2012): 84-107; Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012); Ryan Pevnick, *Immigration and the constraints of justice; between open borders and absolute sovereignty* (Cambridge: Cambridge University Press, 2011); A. John Simmons, "On the Territorial Rights of

debates promises to ground the issue of secession in a deeper, more fundamental analysis of the kind of thing that territory is, and to situate this within a normative account of the proper relationship of territory to the people living on the land, and/or with interests in it, and the state that claims jurisdictional authority over the land. Chandhoke does not engage with this set of debates, at least not directly, and, I will argue below, this limits the usefulness of her analysis. Nevertheless, since the territory of Kashmir is the focus of the study, it is possible to extract the approach to territory that is implicit in her analysis and her proposals with regard to Kashmir.

We tend to think of territory as involving a triangular relationship between (1) a piece of land, (2) a group of people residing on the land, and (3) a set of political institutions that govern the people within the geographical domain (the territory).⁴ There are many different possible relationships between people, land and the state and correspondingly different ideas of what territory is for, which suggest different conceptions of the appropriate territorial right-holder.

The main question raised in the case of Kashmir is: who ought to hold territorial rights? What kind of entity should have jurisdictional rights over territory? This first question is raised at a very specific level, because there are a number of possibilities. Kashmir is currently divided between India and Pakistan (and there is also a small, relatively unpopulated part within China, a point that I bracket here). This means that first we have to consider, generally, whether Kashmir should remain divided or

States,” *Philosophical Issues: Social, Political and Legal Philosophy* 11 (2001): 300-26; Anna Stilz, “Nations, States and Territory,” *Ethics* 121 (2011), 572-601. Lea Ypi, “A permissive theory of territorial rights,” *European Journal of Philosophy*, first published online 9 Feb 2012.

⁴ D. Miller, “Territorial Right: Concept and Justification,” 252-268.

unified, and in the latter case, whether it should be part of India, part of Pakistan, or independent. The answer to these questions depends, at least to some extent, on more general understandings of what kind of entity ought to hold territorial rights and the relationship of that entity to the people living there. There are two dominant positions on territory and territorial right-holders in the theoretical literature, which do not exactly correspond to the just-cause/choice division which marks Buchanan's original analysis, and around which Chandhoke frames her discussion. (1) On one understanding of territorial rights, the appropriate or legitimate holder of territorial rights is (1a) a state or (1b) a legitimate state. The general assumption of both traditional international relations theory and international law is that territory is an indispensable component of the sovereign state, indeed, it is definitional of the state that it has control over territory; related to this, many political theorists assume that whatever justifies states will also justify the territory that states have, and the various dimensions of state sovereignty. If we take that view, there are direct implications for our interpretation of the history of the Kashmir problem and whether what happened in 1947 was legitimate; and implications too for whether, since it happened, India now has legitimate territorial rights in (Indian) Kashmir.

Chandhoke discusses this historical story at length, arguing that the princely kingdom of Jammu and Kashmir, along with the United Kingdom, which claimed paramount sovereign authority, could transform itself from an independent state to a unit of the federation of India, a transformation which involved, not only constitutional change in the structure of the state but also the transfer of territorial rights (right over territory as jurisdiction) to another constitutional entity, India. As Chandhoke relates, when India gained independence, the princely state of Jammu and Kashmir was not part of British India, but the princely kingdom was not independent of British sovereignty either, being subject

to the doctrine of paramountcy through various treaty and political arrangements in force. In October, 1947, Pakistan backed armed incursions into pro-Pakistan parts of Jammu and Kashmir, which led the Hindu princely ruler to request military aid from India, which, in turn, requested that the state of Jammu and Kashmir accede to India prior to sending troops. This led to the signing of the Instrument of Accession on 26 October 1947, which was accepted by Lord Mountbatten, the Governor General of India. In a letter accompanying the Instrument of Accession, Lord Mountbatten stipulated, however, that the decision of territorial control of the princely state could not simply be decided by the prince and another state (India) but should be ultimately decided through a plebiscite. Let us set aside for the moment the issue of the plebiscite, because it raises a different view of the territorial right-holder. The operative assumption in the request by India and the prince's accession to that request is that the existing state had the authority to make that kind of decision, that it is the fundamental holder of territorial rights and could transfer those rights – rights not only to legislate across the domain, but also decide the terms and structure of the entity with jurisdictional authority -- without regard for the people who live on the land. This functionalist and statist view of the holder of territorial right has important implications not only for accession cases, but also for cases of a failed state and a conquered state.

It is also subject to a number of serious criticisms. First, it's not clear how a *moral* right can be conclusively justified by purely empirical considerations, such as the fact that an entity has *de facto* control and can fulfil the functions of the state. The second is that, on this conception, territorial right is purely retrospective – it is conferred on whatever entity can exercise power across the domain and fulfil state functions, but this cannot decide when two aspirant groups are claiming territorial rights over a geographical area. Third, and perhaps most significantly, it

ignores the interests of the people who live in the territory, which we often think of as one of the three (crucial) elements in the triangular relationship between land, state and people.

To avoid the criticism that statist theories of the territorial right-holder grant moral rights to powerful agents regardless of how they treat their citizens, or interact with similar (collective) agents, many political theorists follow in the footsteps of Kant and argue for a more normatively justified account of the state, such that a state has territorial rights if and only if it is a just (or legitimate) state. This brings in the third element of the triangular relationship by viewing a state as justified in having rights over a territory when there is a certain (appropriate and normatively justified) relationship between the state and the people who are governed by the state and live within its territorial domain. This account accords better with our sense of the basis of state authority, and is the one most commonly invoked by Chandhoke in her endorsement of standards of justice and democracy to assess the position of India in relation to (Indian) Kashmir. Helpfully, Chandhoke applies these standards both to the state of India as a whole, and to Kashmir specifically – suggesting that the Indian state itself is sufficiently just/democratic to claim authority, but that there are deficiencies in the Indian state's relations with Kashmir in particular.

There is a problem however with this general picture. If this is her view, then it is not clear that either the prince or the British had territorial rights to pass along to India in the first place. That is to say, if the appropriate standard for holding territorial rights is the standard of justice, even understood in a relatively relaxed way, then, if we apply this view retrospectively, most political entities cannot be thought of as entitled to their territory in the first place. Indeed, it is unclear whether we can say that many states in the past had any territorial rights. This conception also

has perverse consequences in cases where a state is unjust or unable to exercise authority, because it suggests that another (more just, more effective) state could be justified in exercising territorial rights across that domain, a point which I've made elsewhere.

The other two rival theories of territorial rights argue that the fundamental holder of territorial rights are the people, understood either as (2a) a cultural nation (Miller) or (2b) as a politically mobilized community that shares a common political identity and relationships (Moore). It is not the point of this Comment to discuss the strengths and weaknesses of these rival conceptions of territory, but only to note that Chandhoke herself never considers the possibility that the right to create jurisdictional authority might not be held by the state, nor even a just state, but ultimately by the people, in some configuration. Yet this is at the heart of the rival perspectives on the Kashmir question. Although these territorial issues are not discussed directly, she mainly follows Buchanan's just-cause theory of secession, which is grounded in the Kantian view that territorial rights are held by a just state, and does not consider the rival view that that the people (or nation) are the fundamental holder of jurisdictional authority,

Although at various places she laments the fact that the referendum to decide the future of Kashmir was not held, this seems to be largely because this would have constituted a mechanism of conflict- reduction, rather than as a fundamental right that the people of Kashmir held. Indeed, she is clear that many histories dwell on the "non-holding of the plebiscite" as "an original sin of the Government of India", but, she insists, "the fault lies elsewhere." (p. 26) and she details the various ways in which the original autonomy and minority protections that were in place were not adhered to in the period immediately

following accession, thereby suggesting that the problem was injustice. This is of course consistent with the view that some people in Kashmir felt that the constitutional status quo (Indian rule) was illegitimate, and responded violently, which in turn led to a repressive response by the Indian state in exerting control over the territory.

At the heart of the Kashmir problem, then, is the question of who has rights to exercise jurisdictional control over the territory. The problem with Chandhoke's discussion is that, although it is clear that she is opposed to secession, and so in some sense must regard India as now the appropriate territorial right-holder, it is not clear exactly why she thinks this, and how this fits with her historical narrative about the development of the Kashmir problem.

II

Self-determination and democracy

Towards the end of the book, Chandhoke makes some substantive recommendations about improving justice and democracy in Kashmir, but these interesting and largely sensible suggestions are not given sufficiently rigorous argumentation. She argues for an expansive understanding of the ideal of democracy to include rights of participation and procedural fairness (p. 173), address background inequality (p. 174), include linguistic and cultural rights (pp. 180-1), reconsider our commitment to majoritarian forms of democracy (p.172) and she offers a guarded acceptance of ethno-federalism (pp. 180-7). She also argues that the concept of democracy includes the idea of self-determination, a point to which I will return below.

I agree with many of her suggestions: the proposals for linguistic and cultural rights and the openness to power-sharing forms of democracy and to territorial forms of self-determination (ethno-federalism) presuppose an acceptance of collective (rather than individual) forms of identity, and the proposal for ethno-federalism suggests the view that there might be overlapping legitimate collective agents to exercise territorial forms of self-determination. Unfortunately, this part of Chandhoke's argument is more suggestive than philosophically rigorous. She does not define democracy in conventional terms, as a way to ensure input, or equal political voice, by the governed about the way that they are governed, and who governs them, but in a much looser way, so that it is co-extensive with many good things which are logically separate from how we ordinarily think of democracy. As an example, she writes: "Democracy is about safeguarding the rights of each individual irrespective of cultural belonging" (p. 172). Democracy is also identified with economic and social justice: "If the basic precept of democracy, that is, equal moral status has to be validated through the processes and procedures of democracy, then social and economic inequalities must be tackled through redistribution, as a matter of priority." (p. 174) A little further down, she writes: ".. political democracy and social/economic democracy are not distant cousins, they are constitutive of democracy itself." (p. 174). It is not clear why Chandhoke seeks to assimilate these distinct values into the ideal of democracy. It is at least equally plausible to think that there are different principles to legitimize a political order: as Luuk van Middlelaar has recently argued with respect to the E.U., there are principles of justice, including principles to ensure the just distribution of benefits and burdens of cooperation; principles of democracy or equal political voice in the institutions of governance; and principles of self-determination, which are concerned with group or collective identities and the aspiration of

people in their collective identity to have control over the collective conditions of their existence.⁵ There are probably normatively important, internal relationships, to be worked out, between these ideals; for example, one might think that a fully just political order would also have to be democratic; or one might think that the principle of self-determination implies some kind of vertical (democratic) relationship between the governed and the institutions of governance, and that these internal relationships could be explored through careful argumentation. But Chandhoke does not do this: instead, she defines these ideals as included in, constitutive of, democracy itself. And since India is a democratic state, it suggests that India is, in spite of its deficiencies in other respects, a legitimate governing authority in Kashmir, with only a few reforms to make its democracy more perfect.

With respect to self-determination, which is at the heart of the Kashmir problem, Chandhoke argues that the ideal can be captured by a more capacious understanding of democracy. Again, it is not clear why we should think that the self-determination (of a collective entity) is encompassed by democracy, on any ordinary understanding of the terms. In ordinary language, democracy refers to the institutions of governance which ensure that the governed have equal political

⁵ Luuk van Middlelaar, *The Passage to Europe*, (New Haven: Yale University Press, 2013). Middlelaar argues that there are three different sources of legitimacy, which have distinct historical roots, and which underlie many of the reforms to different structures, procedures and policies of the E.U. There is the Roman strategy, associated with justice; the Greek strategy, associated with democracy; and the German strategy, associated with popular sovereignty. In Middlelaar's work, these are presented as instrumental to attaining sociological legitimacy, whereas I am suggesting that they could also constitute ways to secure moral legitimacy, in so far as each is responsive to our modern recognition that no one has any natural authority over another, and that the exercise of social power needs to be justified.

voice in the making of political decisions, usually through the election of political elites. Self-determination by contrast is about collective self-rule, where the group has the capacity to make principles and policies with respect to the collective conditions of its existence. The fact that the two are distinct can be seen by considering the (hypothetical) case of Tibet within a democratic China. Even if China were to transform itself democratically, into a society that recognizes equal individual voice and equal individual influence over decision-making, this would still involve a denial of the political associational life of Tibetans as a group, who are demographically outnumbered by Han Chinese and who cannot make rules or instantiate principles to govern their own affairs.

Moreover, Chandhoke does not simply argue for a more capacious understanding of democracy, but that we need to narrow the concept of self-determination. She writes: “If we scale down the concept of self-determination as a legitimizing principle of *state-breaking* and *state-making* and see it as a constitutive aspect of democracy instead” (173), we can move beyond the current stalemate. This is equivalent to suggesting that those people in Kashmir who are worried about their self-determination as Kashmiris, or people on the territory of Kashmir, should just adopt another view. This places the blame squarely on those people who care about their collective self-determination as Kashmiris; and who question the appropriateness of Indian jurisdiction over Kashmir. The problem would be solved if these people could seek their self-determination within a democratic and inclusive India. Indeed many problems can be solved if people think in ways other than they do.

While Chandhoke does offer useful suggestions, both for a changed democratic order in India, and for a more modest idea of self-determination, they are not placed within a philosophical

treatment either of territorial rights, or of the precise relationship between people, territory and the state that is implied either in the territorial rights literature, or by a more pluralist understanding of different relationships and configurations between the ideals of democracy, self-determination and justice.

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