

Territorial Conflict and Territorial Rights: The Crimean Question Reconsidered

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Abstract

This article focuses on contemporary theories of territorial rights in political and legal philosophy and explores their implications for the case of Crimea, focusing on three main accounts of territorial rights: Liberal nationalist, Lockean, and Kantian. The article advances the legal-political account of the “people” and its territorial rights as a promising approach to theorizing the corporate agents that have potentially valid territorial rights and claims. While normative theory does not yield a single unequivocal judgment that identifies one claimant as the solely justified territorial right-holder in Crimea, the application of general principles of territorial rights theory can help identify the pertinent considerations for the case, which clarify the normative implications of each potential resolution. While no party has an absolutely just territorial claim to Crimea, this article offers a qualified defense of the existence of a distinct “Crimean people,” defined by the distinct political history of Crimea and its long-standing legacy of autonomous legal-political institutions, which may constitute a shared political project for the culturally diverse population.

A. Introduction

Despite claims to the contrary,¹ the recent secession of Crimea from Ukraine and its subsequent incorporation into the Russian Federation find little justification in the international legal norms of self-determination. Even if an international legal right of peoples to self-determination exists outside of colonial contexts,² it does not include a general right to secede (i.e., the right to “external self-determination” in the form of independent statehood). The doctrine of “remedial secession,” which defends a right to secede as a remedy of “last resort” for sub-state groups that are subject to severe

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¹ Anatoly Kapustin, *Crimea's Self-Determination in the Light of Contemporary International Law*, 75 HEIDELBERG J. INT'L L. 101 (2015).

² ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL, 37–66 (1995); DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 226–42 (2002); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L. Q. 857, 860 (2012).

oppression, is not applicable to the Crimean case.³ First, according to the available information, the kind of extreme repression that supports remedial secession is not present in this case. Second, other measures by Russia to protect its nationals and ethnic Russians in Crimea under Ukrainian jurisdiction—for example, pressing to achieve intra-state protection for the population concerned—are necessary, before a measure of last resort can be justified.⁴

Beyond the legal norm, the moral-normative question remains open. Especially in the highly contested issue of the meaning of self-determination,⁵ it may be worth exploring normative considerations beyond the letter of the law. After all, the notion of peoples' self-determination was no more than a political ideal a century ago, before it was codified as an international legal norm.⁶ International law presently faces great challenges in the realm of application and enforcement of its most basic principles. These challenges, to be sure, ought to receive priority over the development of new and nuanced norms. Hopefully, conceptual clarification can contribute to practical application.

This article focuses on contemporary theories of territorial rights in political and legal philosophy and explores their implications for the case of Crimea. "Territorial right" is generally understood as jurisdiction—the right to make, adjudicate, and enforce laws—over a geographical domain coupled with control over access to the territory and its natural resources. David Miller defines territorial right as a tripartite concept consisting of (1) "[t]he right of jurisdiction, that is, the right to make and enforce law throughout the territory in question"; (2) the right of a territory's resources—the right "to control and use the resources available in the territory"; and (3) "the right to control the movement of goods and people across the borders of the territory."⁷

Territorial right, in other words, generally connotes familiar norms of sovereignty in post-1945 international law, in liberal-leaning interpretations.⁸ Theories of territorial right seek to accomplish a twofold task: First, to justify territorial right in general—namely, explain

³ Theodore Christakis, *Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea*, 75 HEIDELBERG J. INT'L L. 75, 82–84 (2015).

⁴ See ALLEN BUCHANAN, *JUSTICE, LEGITIMACY AND INTERNATIONAL LAW* (2004).

⁵ Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 2 (1993).

⁶ ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES*, 11–36 (1995); DAVID RAIČ, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* 171–88 (2002).

⁷ David Miller, *Territorial Rights: Concept and Justification*, 60 POL. STUD. 252–53 (2012). This definition is not beyond dispute but is generally accepted.

⁸ See JEAN COHEN, *GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM*, 223–65 (2012).

why the parceling of the world to geographically bounded sovereign units is morally defensible; and second, to develop guidelines that address the particularity problem—which group, individual, or institution should hold territorial rights in which particular territory. Put more pragmatically, this twofold task addresses the question of whether the currently existing territorial holdings of particular right-holders—individual states and peoples—are justifiable.

In the following sections, three main accounts of territorial right are examined, and in the final section their implications for the case of Crimea are explored. These three accounts are (1) liberal nationalism, which, despite known conceptual flaws, remains prominent in both theory and practice;⁹ (2) the Lockean theory of territory, which follows John Locke's natural law theory of property;¹⁰ and (3) the Kant-inspired theory of territorial right, rooted in Immanuel Kant's *Doctrine of Right*.¹¹ An important difference between the theories is their conception of the right-holder as an ethno-cultural nation in liberal nationalism versus a "people" defined primarily in legal-political terms, according to the more recent philosophical developments proposed by the Lockean and Kantian perspectives.

This article argues that liberal nationalism makes a valid prudential point for taking into account the aspirations of cultural nations when determining and revising territorial jurisdictions. However, at the moral-normative level, liberal nationalism's view that the cultural "nation" is a uniquely appropriate unit of political self-determination falls short. The legal-political "people" is a more promising approach to theorizing the corporate agents that have potentially valid territorial rights and claims.¹² This conception of the people is explained and defended below against the two standard objections of indeterminacy and subjectivity. The indeterminacy objection submits that the idea of a people is too vague, whereby a plausible distinction and judgment about who is a people—so as to be a subject and right-holder of self-determination—is not possible. The subjectivity objection asks why the self-identification and subjective sense of affiliation of individuals to groups known as peoples matter normatively, specifically in the context of

⁹ See DAVID MILLER, *ON NATIONALITY* (1995); MARGARET MOORE, *THE ETHICS OF NATIONALISM* (2001); NATIONAL SELF DETERMINATION AND SECESSION (Margaret Moore & Allen Buchanan eds., 1998); TAMAR MEISELS, *TERRITORIAL RIGHTS* (2005).

¹⁰ See CARA NINE, *GLOBAL JUSTICE AND TERRITORY* 26–44 (2012); Cara Nine, *A Lockean Theory of Territory*, 56 *POL. STUD.* 148 (2009).

¹¹ Anna Stilz, *Nations, States, and Territory*, 121 *ETHICS* 572, 580–84 (2011); Anna Stilz, *Why Do States Have Territorial Rights?*, 1 *INT'L THEORY* 185, 198–206 (2009).

¹² Corporate agent refers to a collective agent composed of individuals acting jointly. Moral agency is traceable to individuals, but in the case of territorial right the agent is a very large group of individuals, or individuals acting in virtue of their affiliation to the group. I use the term corporate agent to connote a collective agent that is substituted by individuals. On collective agents on this type, see CHRISTIAN LIST & PHILLIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 19–41 (2011).

territorial rights and political borders. In the case of Crimea, the difference between nation and people emerges in practice.¹³ Liberal nationalism would recognize in this case three national groups, distinct in their ethnic origins, language, and culture—Russian, Ukrainian, and Tatar. In distinction, the people-oriented perspective opens the possibility that there exists a “Crimean people”—defined by the distinct political history of Crimea and its long-standing legacy of autonomous legal-political institutions—that may constitute a shared political project for the culturally diverse population.

The application of the main theoretical perspectives on territorial rights to the case of Crimea helps illustrate the merit and limits of the theories. Normative theory does not yield a single unequivocal judgment that identifies one claimant as the solely justified territorial right-holder in Crimea. However, the application of general principles of territorial rights theory can help identify the pertinent considerations for the case, and may clarify the normative implications of each potential resolution. Moreover, it is worth noting that no party has an exclusive and absolutely just territorial claim to Crimea. Subsequently, different resolutions can be morally equivalent, making room for pragmatic considerations of feasibility.

B. Liberal Nationalism and Territorial Right: The Importance of Being Prudential

Despite the apposite objections to liberal nationalism, it remains a prominent perspective on borders and territory both in theory and in practice. Territorial right, in this view, is justified in general by the value of national self-determination. The cultural nation is seen as a uniquely appropriate unit of political self-government for instrumental, normative, and conceptual reasons. Instrumentally, the sense of affiliation and the solidarity among fellow nationals helps sustain democracy and social justice: “[I]t provides the setting in which ideas of social justice can be pursued. . . it helps to foster the mutual understanding and trust that makes democratic citizenship possible.”¹⁴ Moreover, proponents of liberal nationalism argue for the pertinence of national self-determination to individual wellbeing. The political autonomy of the cultural-national community is instrumental to individual autonomy, freedom, and dignity. Will Kymlicka famously describes societal cultures as a context of choice that enables individuals to exercise their personal autonomy by giving meaning to the possibilities open to them.¹⁵ He further draws an analogy between the individual that chose to leave their culture of origin and a monk that vowed to live a life of

¹³ Following the terminology of the theories explored here, “nation” refers to the cultural and ethno-cultural nation, and “people” to the legal-political people. Other definitions and conceptions both of nation and people are possible. This terminology is employed in the interest of clarity.

¹⁴ MILLER, *supra* note 9, at 185; see also Avishai Margalit & Joseph Raz, *National Self-Determination*, 86 J. PHIL. 439 (1990).

¹⁵ WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 84, 165 (1996).

scarcity.¹⁶ Note that the liberal nation is a historical community that has distinct and identifiable cultural features, but it is *not* a collective ontological being that exists independently of the sympathies and subjectivities of the individuals that comprise it.¹⁷

Conceptually, proponents of liberal nationalism argue that there is a very close connection—indeed almost by definition—between individuals’ affiliation to their cultural nation and their aspiration to self-government. They suggest that the aspiration to self-government nearly inevitably corresponds to cultural affiliations. Moreover, proponents argue that it is either impossible or undesirable for state institutions to be devoid of any national-cultural characteristics because these institutions will inevitably reflect a particular national identity. Subsequently, on grounds of fairness and non-discrimination, states ought to institutionally recognize and accommodate the national groups within their territory. Liberal nationalism’s basic proposition with respect to territorial borders and self-determination is “one nation, one territorial-political unit”—a state or an autonomous region within it. In reference to the practice, liberal nationalists point out that many successful liberal democracies are nation states—a reality that was reinforced in Europe in the 1990s when democratization processes were connected to an increase in the number of states constituted by the logic of the cultural nation-state.¹⁸

Thus, national self-determination—namely, the idea that cultural nations are uniquely appropriate units of political self-government—is the general justification of territorial right in liberal nationalism for instrumental, normative, or conceptual reasons. Nations require an identifiable geographical domain in which to exercise their self-government, where the political and legal institutions that represent their members hold the jurisdiction. With respect to the particularity problem—which specific nations have territorial right over what geographical domains—liberal nationalism puts forth the principle of “homelands.” As a rule, national identities contain an attachment to a homeland. Individual nations come to acquire territorial rights over the geographical domain that is their homeland through interaction with the land over generations that invests material and symbolic value in it. Having shaped and improved their territory over time, creating places of symbolic and material value for them, nations gain territorial rights over the geographical domains that are their homelands.

Liberal nationalism is the subject of various criticisms that reanimate a time-honored debate in liberal, republican, and democratic political thought about the relationship

¹⁶ *Id.* at 86.

¹⁷ MILLER, *supra* note 9, at 4–6; see also Yael Tamir, LIBERAL NATIONALISM 35–56 (1993).

¹⁸ Evidently some of the seceding states remain internally multinational, or multi-ethnic, as in the case of Bosnia-Herzegovina, or have considerable national minorities, like Estonia. Others like the Czech Republic are un-national after the secession from Czechoslovakia.

between the nation and modern democracy. Is the liberal nation a near-necessary condition for the realization of democracy as a form of government, and for the pursuit of such values as freedom, equality, and individual autonomy? Or is it rather the case that the nation is a tenacious obstacle to democracy at odds with the essentially universalistic liberal and republican morality? In modern European history, the idea of the nation made important appearances for both equal rights and the notion of a government "by the people" within the context of struggles against absolutism and arbitrary hereditary rule. Such was its role in the French Revolution and in the 1848 uprisings across the Continent.¹⁹ Within the boundaries of the nation, the promise of equality among all citizens before the law and of self-government by the people appeared on the European and international stage. During the First World War, when President Woodrow Wilson incorporated self-determination into the war aims of the United States, the ideas of government by consent of the governed and respect for national aspirations were still being used interchangeably. For example, a 1918 President's address to Congress stated, "National aspirations must be respected; peoples may now be dominated and governed by their own consent. "Self-determination" is not a mere phrase; it is an imperative principle of action, which statesmen will henceforth ignore at their peril."²⁰

At the same time, the principle of nationality, when applied to determine state-borders in Europe over the past two centuries, has also given rise to violent conflicts, civil wars, and massive forced migrations of populations. Poland, Czechoslovakia, Yugoslavia, Greece, and Turkey are some of the cases of formerly multi-ethnic or multinational countries that violently transformed into nationally homogenous territorial units.²¹ Hannah Arendt remarks that after the end of the First World War, "[s]ince the Peace Treaties of 1919 and 1920, the refugees and the stateless have attached themselves like a curse to all the newly established states on earth which were created in the image of the nation-state."²²

The purpose of the current discussion is neither to resolve nor to rehearse this important and voluminous debate, which likely has no unequivocal conclusion. The aim is rather to

¹⁹ The events of 1848–49 and the political thought related to them receive little, if any, attention in contemporary scholarship, because they are considered a failure. However, historian Jonathan Sperber reminds us that they were "the largest, most widespread, and the most violent political movement of nineteenth century Europe," reaching "from the Atlantic Coast to the Carpathians [and] from the Mediterranean to the Baltic." JONATHAN SPERBER, *THE EUROPEAN REVOLUTIONS: 1848–1851* 3 (1994).

²⁰ Woodrow Wilson, *Address to the United States Congress* (Feb. 1918), in CARLILE MACARTNEY, *NATIONAL STATES AND NATIONAL MINORITIES* 189–90 (1934).

²¹ No moral judgment is meant here about blameworthy parties in this process, nor on whether claims about historical injustices are relevant. Some commentators tie forced migration and violence related to ethno-national conflict in Europe together with the violence, extermination, and expulsion of National Socialism. This is a conceptual error and an unfair critique of liberal nationalism.

²² HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 290 (2004).

explore liberal nationalism's specific implications for the problem of territorial disputes. Proponents of liberal nationalism today seek to keep the darker sides of nationality at bay through the distinction between liberal and illiberal nationalism, associating the history of violence with the latter and the promise of liberal democracy with the former. Still, the theory remains liable to two objections that deserve particular attention because they affect the very rationale of nationality as a principle of territorial borders. The two objections are (1) the "national determination" objection and (2) the territoriality objection. The gist of the former objection is that the relationship between the cultural nation and the self-determining political unit is not as straightforward as liberal nationalism suggests. Some democracies include more than one cultural-national group among their citizenry and are also reasonably successful in the lack of an overarching cultural-national identity. Furthermore, not all cultural nations seek political unification and independence, or when asked—for example, in a referendum—they turn out to be internally divided on the issue. The latter objection points at the disparity between cultural identities and territorial units. In contrast to what is suggested in liberal nationalism, cases of mismatch between cultural-national and territorial boundaries are frequent. They cannot be bracketed by the theory as exceptions.²³

1. Beyond National Determination

National determination is the supposition that "political loyalties are pre-determined by culture and descent";²⁴ that affiliation to a cultural group determines—as a rule—political aspirations. The problem with the supposition is not that it is entirely false—a host of cases can be cited in its favor—but that it is a gross over-simplification. Regrettably, and curiously, we do not have systematic data about the empirical relationships between individuals' cultural identities and their political affiliations and aspirations. Evidence can be only cautiously drawn, and with limited capacity for generalization, from available cases and indications. If we take the making of Europe's contemporary political map as the field of inquiry, one of the early and momentous liberal national movements emerged in Germany in the 1830s and culminated in the revolutionary national constitutional assembly of 1848 in Frankfurt. There, elected delegates from across the German Confederation gathered to compose a constitution to unify the German people into a liberal nation-state.

Still at the peak of a liberal national revolutionary moment, the distinctions between national and political loyalties are expressed in the assembly's deliberations. For example, delegates from Austria gave priority and pledged allegiances to their multination country, over the possibility of separating the German provinces from the rest, in order to

²³ See Zoran Oklopic, *Introduction: The Crisis in Ukraine Between the Law, Power, and Principle*, 16 *German L.J.* 350 (2015).

²⁴ MACARTNEY, *supra* note 20, at 278.

incorporate themselves into a unified Germany.²⁵ Franz (František) Palacký, a prominent early advocate of Czech nationalism, declined the invitation to participate in the assembly, on grounds of not being German.²⁶ At first sight the refusal appears to reinforce liberal nationalism's proposition today regarding the tight, if not inherent, connection between cultural-national and political identities. A second look at Palacký's letter reveals a more interesting picture. While he does not consider himself German, he does not self-identify with another national-cultural group, and describes himself as "Bohemian of Slavic descent."²⁷ Bohemia is a legal-political unit, formerly an autonomous kingdom that consisted, at the time, of Slavic and German populations. As an alternative to incorporation into the unified Germany, Palacký's desired political plan was not one of national independence but of a union of "a number of peoples, different in their descent, language, history and costume" that inhabit the south-east of Europe along the borders of the Russian Empire, including "Slavs, Wallachs, Magyars, and Germans, as well as Greeks, Turks and Shqiptars." This "vital union of peoples" was necessary for its members to "resist in perpetuity the powerful neighbor from the East," and—from a mid-nineteenth century perspective—was embodied in Austria: "In truth, if the Austrian Empire had not long been in existence, in the interest of Europe, in the interest of Humanity itself, one would hasten to create it."²⁸

Liberal nationalism, before its defeat, was not a theory of ethno-cultural political borders, but one that plainly saw the difference between ethno-cultural and political loyalties, assigning value and seeking expression for both. Moreover, in the rare cases in which people were asked in a referendum about their preferences to settle border-disputes, the outcomes did not always match cultural-national affiliations. The Peace Treaties that concluded the First World War stipulated plebiscites to determine sovereignty over three regions along the German-Polish border in Silesia, and to settle the border in the Klagenfurt region, disputed between Austria and the newly established Yugoslavia (then

²⁵ E.g., Titus Mareck, in *STENOGRAPHISCHER BERICHT ÜBER DIE VERHANDLUNGEN DER DEUTSCHEN CONSTITUIRENDEN NATIONALVERSAMMLUNG ZU FRANKFURT A.M.* IV: 2892, 2894 (Franz Wigard ed., 1848–49) [hereinafter *StB*]; and Adolf Wiesner, in *StB*, IV: 2784–85. These declarations of loyalty to Austria did not come from royalists, but from the radicals. Also from the Left came the opposition, led by Robert Blum, to inclusion of the German delegates from the Duchy of Posen, because this territory, though under Prussian rule, was not a part of the German Confederation. See FRANK EYCK, *THE FRANKFURT PARLIAMENT 1848–49*, at 275–83 (1968).

²⁶ Karl Marx, ever unimpressed by the appeal of nationalities, describes Palacký in his newspaper reports on the Frankfurt Assembly: "The chief champion of the Tschechian nationality, Professor Palacký, is himself nothing but a learned German run mad, who even now cannot speak the Tschechian language correctly and without foreign accent." KARL MARX, *REVOLUTION AND COUNTER-REVOLUTION IN GERMANY VIII* (1852), available at <https://www.marxists.org/archive/marx/works/1852/germany/ch08.htm>.

²⁷ H.A. WINKLER, *GERMANY: THE LONG ROAD WEST* (2007).

²⁸ FRANZ PALACKÝ, *ÖSTERREICHS STAATSIDEE* 82, app. A (1866). For this translation, excluding the final sentence, see ELISABETH WISKEMANN, *CZECHS AND GERMANS: A STUDY OF THE STRUGGLE IN THE HISTORIC PROVINCES OF BOHEMIA AND MORAVIA* 23 (1938).

the Kingdom of Serbs, Croats and Slovenes). The plebiscites took place in 1921 and 1920 respectively.²⁹ In both cases voters opted against their cultural-national affiliation: In the Silesian plebiscites, the majority of the constituency was Polish according to native-language criterion, but the majority of votes were for Germany. In the plebiscite on Klagenfurt, the large majority of the constituency was Slovenian, but the majority of votes were for Austria.³⁰ These long forgotten events might appear today as mere curiosities, but they represent the important early period of liberal nationalism that helps understand liberal nationalism today.

It does not follow from this analysis that contemporary proponents of liberal nationalism should simply embrace the former ideals of multinational states. Indeed it would be a mistake to ignore both failed attempts to realize these ideals, and the ensuing ferocity of ethno-national conflicts. Rather, in view of its history, present day liberal nationalism is best understood and is at its strongest as a “negative” normative perspective of post-failure; in other words, liberal nationalism is most useful as a prudential norm that obtains validity in view of the immense challenges to realizing the early ideals and the destructive outcomes associated with unsuccessful attempts. In contemporary liberalism, a norm of this kind can be described as a non-ideal theory, which takes into account non-compliance of actors in the existing situation, while keeping a normative-critical distance towards a wrongful reality. From this perspective, the error of present-day liberal nationalism is in presenting itself as a positive ideal theory of political borders, drawing on untenable arguments about the conceptual and normative near-inherent connection between political self-determination and ethno-cultural identities. The prudential perspective can keep the early ideal of multi-nationalism on the horizon and at the same time take into consideration the dynamics of ethno-national conflicts that are sometimes eased and de-escalated through uni-national self-determination.

II. Nationalities and Territories

The second objection submits that liberal nationalism is ill equipped to address cases where national identities and territorial borders do not overlap, and that these cases cannot be bracketed by the theory as exceptions. Cases often emerge in which a territory contains more than one cultural-national group and subsequently competing claims to national self-determination. Crimea is an example of a case where national groups—the definition of each is itself contested—make competing claims to the territory or to parts of it. Once more, if we take the making of Europe’s contemporary map as a field of inquiry, we are soon to discover that there is nothing unusual about the Crimean case in this regard. More often than not, states and territorial units seceding from an imperial reign to

²⁹ For a detailed survey and documentation of the plebiscites, see SARAH WAMBAUGH, *PLEBISCITES SINCE THE WORLD WAR: WITH A COLLECTION OF OFFICIAL DOCUMENTS* (1933). See also Hannum, *supra* note 5, at 5–7.

³⁰ WAMBAUGH, *supra* note 29, at 198–252.

independence comprise of culturally-nationally diverse populations with conflicting political aspirations. Recall that to justify and evaluate claims to territories, liberal nationalism proposes the criterion of interaction with the territory over the generations, and its improvement through investment of material and symbolic value. Applying this principle then yields patchworks of territorial rights and layers of overlapping claims, whereby no national group has a unique claim to a contiguous territory.³¹ Furthermore, liberal nationalism does not fully explain how the notion of a culturally defined nation anchors the full bundle of territorial rights. As Margaret Moore writes, theories of liberal nationalism “do a good job, therefore, of explaining a group’s ‘attachment’ to a particular geographical area, but are weaker in explaining why that cultural group is entitled to a full set of territorial rights.”³²

To address challenges of this kind, David Miller develops the notion of “debatable lands.” There, more than one national group has a valid territorial claim; the theory recommends institutions that can accommodate this diversity. Because an overarching national identity is absent, national liberal democratic institutions can be expected to be weaker, devolving authority and autonomy to the sub-state national groups.³³ Conceptually solid, this approach possibly undermines the very principle of national self-determination. If, as suggested above, territories contested in this sense are not the exception, liberal nationalism today faces three uneasy normative possibilities: (1) Advocate the desirability of national self-determination, implicitly condoning the historically violent transformation of culturally and nationally diverse states towards homogeneous territorial units;³⁴ (2) advocate for the desirability of multi-nation states, wherein the theoretical foundations of national self-determination are by and large abandoned, because the argument for a tight connection between cultural nationality and political self-determination ought to be revised; and (3) advocate for the desirability of national self-determination, applicable only for those cases where, by some coincidence of history, national and territorial boundaries overlap.

The restatement of liberal nationalism as a prudential norm may propose a way out of this conundrum. This perspective can keep the early normative ideals of early liberal nationalism on the horizon—namely of multination states and their distinction between cultural and political loyalties—without naively and hazardously prescribing policies that

³¹ See generally, Zoran Oklopčić, *The Idea of Early Conflict Constitution-Making: The Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes*, 16 GERMAN L.J. 658 (2015).

³² Margaret Moore, *Which People and What Land? Territorial Right-Holders and Attachment to Territory*, 6 INT’L THEORY 121, 122 (2014).

³³ David Miller, *Debatable Lands*, 6 INT’L THEORY 104 (2014).

³⁴ As noted above, the point is not to assign moral blame but to take the relevant history of an idea into account. For a detailed overview, see MACARTNEY, *supra* note 20.

have repeatedly and violently failed. As a prudential norm, liberal nationalism proposes the following: Nations and national identities are not, as such, morally objectionable. They are important insofar as they are valuable for the individual members that compose them and are attached to them. There is no intrinsic moral reason for political self-determination to track nationalities. In view of the often violent dynamics of ethno-national territorial conflicts within multinational states, national self-determination may propose a “lesser-evil” perspective among non-ideal possibilities.

C. States, Peoples, and Territorial Rights: Lockean and Kantian Theories of Territory

Recent developments in scholarship propose theories of territorial right inspired by the political thought of John Locke and Immanuel Kant. They are sometimes labeled the “functionalist accounts,” because the justification they provide for territorial rights draws primarily on the function that the territorial political authority fulfills.³⁵ The Lockean account appeals the role of the authority in fulfillment of basic human needs and the legitimate establishment of minimal justice in the territory. The Kantian account highlights the establishment of a system of rights and justice in the territory—particularly, property rights. As noted above, the twofold task of territorial rights theories is to (1) justify the institution in general and (2) address the particularity problem of identifying specific legitimate right-holders in particular territories.³⁶ With respect to the first, there is overlap between the two theories. At the same time, they reflect the basic differences between Locke and Kant on rights in the “state of nature” and the role of the legal-political authority in the stipulation and protection of basic civil rights (e.g., property). On the Lockean account, the role of the political authorities is primarily in coordination and stable enforcement of rights that can be stipulated and imperfectly upheld in the state of nature, while from the Kantian perspective the stipulation itself and promulgation of property rights require a legal-political authority that can constitute an omni-lateral will. While these issues are philosophically fascinating, they are of less consequence for the current discussion. Both perspectives are likely to yield similar judgments as to which legal-political authorities in the real world fulfill their legitimizing functions and subsequently live up to the general justification of territorial rights. Let me, therefore, briefly recapitulate both positions, before proceeding to the issue of right-holders that is of more consequence for the Crimean case.

The Lockean theory of territory is analogous to Locke’s natural law theory of property. To justify territorial right, the argument appeals to the basic universal values of natural law

³⁵ Liberal nationalism too has an instrumental element insofar as the theory appeals to the goods that nationality allegedly helps sustain—trust and democratic cooperation. However, the crux of the justification of territorial right is anchored in the value of national self-rule. Territorial right, on this view, is required for the nation to govern itself.

³⁶ Nine, *supra* note 10, at 26–27; Stilz, *Why Do States Have Territorial Rights*, *supra* note 11, at 187–88.

theory: The preservation and flourishing of human kind. Subsequently territorial right is justified in general because it fulfills two main functions instrumental to the preservation and flourishing of human kind. These are the fulfillment of basic human needs and the establishment of minimal justice in the territorial domain, including the legitimate exercise of coercive power in the adjudication and enforcement of law. Cara Nine draws on capability theories for an account of basic human needs—of what it means for human beings to be preserved and flourish—from physical security, through access to means of subsistence and healthy human relationships, to a measure of political participation that influences the circumstances under which one lives.³⁷ A legitimate territorial authority enables the coordination on a large scale of the complex economic and social activities that are required for the fulfillment of the basic needs. In an analogy to the Lockean theory of property, territorial political authority is justified primarily as a response to the challenges of coordination and of enforcement of rights. The Kant-inspired theory of territory draws on Immanuel Kant's *Doctrine of Right*.³⁸ On this view, the function of territorial right—namely, the jurisdictional authority to make, adjudicate, and enforce laws over a geographical domain—is the establishment of a system of rights and justice, in particular a system of property rights. According to Kant, the political-legal authority is required for the very stipulation of property rights, not merely for coordination and enforcement of rights that, according to Locke, exist already in the “state of nature.” For the most part, this difference between the approaches is philosophical. In the real world, where there is no “state of nature,” the legitimizing function of the political authority is equivalent.³⁹

1. The Problem of Right-Holders: The “People” Conundrum

In view of the general justification of territorial right, which appeals to critical functions that the territorial authority fulfills, the appropriate right-holders are expected to be those in a position to best fulfill said functions. Yet both theories bring the value of self-determination into their perspectives on the problem of right-holders. Nine identifies the self-determining people as a uniquely appropriate holder of territorial rights because of the capacity of this corporate agent to govern itself—namely, its members—legitimately.⁴⁰ According to Stilz, legitimate states, rather than peoples, are the primary holders of

³⁷ Nine, *supra* note 10, at 30–34.

³⁸ See Stilz, *Why Do States Have Territorial Rights*, *supra* note 11, at 198–200; Stilz, *Nations, States, and Territory*, *supra* note 11, at 580–82; see also ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 145–81 (2009). For Kant's discussion of the state of nature, the move to the civil state, and the nature of the state, see Immanuel Kant, *Part II: Metaphysical Principles of the Doctrine of Right*, in *THE METAPHYSICS OF MORALS* 41, 44–49.

³⁹ For John Locke's conception of the state of nature, see John Locke, *TWO TREATISES OF GOVERNMENT* 285–446 (Peter Laslett ed., Cambridge Univ. Press 1988).

⁴⁰ Nine, *supra* note 10, at ch. 3.

territorial rights. The legal-political authority is necessary for the exercise of territorial rights and the legitimate state is one that fulfills the functions that justify territorial rights in general. But peoples—formed into a corporate agent through cooperation under shared political institutions—hold residual territorial rights, in case of state breakdown—due, for example, to a war or a revolution. This residual right consists of the prerogative of the people to re-establish their own state, and not be incorporated into another state—even if that state is legitimate in that it fulfills the necessary functions in the domains of rights and justice.⁴¹

The argument for self-determining peoples as right-holders maintains that they have the unique feature of agreement among their members to jointly govern themselves. Therefore, they are capable of exercising legitimately coercive jurisdictional power over themselves. The initial targets of this argument are individualist-cosmopolitan positions that deny altogether the standing of political collectives in theories of international rights and justice.⁴² While valuable in this regard, the argument for self-determining peoples as holders of territorial rights is subject to the familiar objections and challenges from within the scholarship on self-determination. Such challenges particularly refer to how to determine who is a “people” and to explain why the subjective self-identifications of individuals with a people matter normatively for the allocation of territorial rights. The argument for legitimate states rightly emphasizes the importance of the legal-political component in the conception of the people as a corporate agent that holds territorial rights. The question, however, persists why are the subjective self-identification of individuals with a “people” normatively important? Why do they justify residual territorial rights, namely the prerogative of the “people” to (re)establish its own legitimate state? These long-standing objections to the notion of peoples as the subjects of political self-determination—and subsequently as holders of territorial rights—can be labeled the indeterminacy and subjectivity objections.

Before exploring these issues in more detail, it is important to clarify in which sense the Lockean and Kantian perspectives propose an alternative to liberal nationalism. As we have seen above, one of liberal nationalism’s main challenges is to explain the connection between national-cultural identities and political self-determination—namely, the exercising, or aspiration to exercise, self-government in the form of independent statehood or territorial autonomy. One line of objections to liberal nationalism endorses an individualist-cosmopolitan perspective that rejects the moral standing of collective or corporate agents—national or otherwise—in a theory of international rights and justice. Only freestanding individuals are then units of moral concern. Self-determination is, in general, at odds with these varieties of cosmopolitanism, due to a presumed conflict with

⁴¹ Stilz, *Nations, States, and Territory*, *supra* note 11, at 580.

⁴² *E.g.*, Robert Goodin, *What Is So Special About Our Fellow Countrymen?*, 98 *ETHICS* 663 (1988); see Simon Caney, *Cosmopolitanism and the Law of Peoples*, 10 *J. POL. PHIL.* 95 (2002).

moral universalism. A second kind of alternative to liberal nationalism does not contest the value of self-determination and the associated international political orders of territorially bounded, self-governing polities. The objective here is *inter alia* to rethink the kind of collectives or corporate agents that have a valid normative claim to political self-determination—namely, to self-government. The Lockean and Kantian theories of territory fall within this latter category. They propose legal-political oriented perspectives on the subjects of self-determination—states and peoples. The former line of objections is bracketed here. In the following section, the legal-political oriented perspective on peoples is explored as a more promising approach to the subjects of self-determination than liberal nationalism's cultural nation.

II. Political Self-Determination and the "People"

The problem of defining and identifying peoples as subjects of self-determination is not new. It has no perfect conceptual and theoretical answer, while in practice it is often easy to know a people when we see it. Subsequently, the theory assumes a modest objective of developing appropriate conceptual guidelines to the problem, and to help clarify possible solutions. Although the legal-political approach is better equipped than liberal nationalism to achieve this task, a preliminary clarification is in order. The legal-political approach, as defended in contemporary theories, seems to include more than one position: Kantian state-oriented and the Lockean people-oriented conceptions, as well as the "peoplehood" conception developed by Margaret Moore.⁴³ The working hypothesis for the discussion here is that a tentative agreement is identifiable—or can be manufactured—between the different perspectives, so that they can be presented and analyzed jointly.⁴⁴ Call this joint conception of the people, where the perspectives converge, the "political people."

The political people is a very large group of individuals, sufficiently large to meet the viability condition, comprised of individuals that have a shared sense of affiliation to that group. The sense of affiliation is connected to particularistic properties, which pertain directly to its joint political-legal-institutional spheres. Like the nation, a political people typically has identifiable particular attributes. While there is no expectation for uniformity and homogeneity among all members, there is an overlap that informs an inter-subjective sense of affiliation. Unlike the nation, these commonalities are not primarily connected to cultural, ethnic, or other pre-political contents and identities. Rather, they are connected to a joint political project, or a political identity, pertaining directly to the public, political, and legal spheres.⁴⁵ The materials of which the projects and associated identities are made

⁴³ Moore, *supra* note 32.

⁴⁴ See Ayelet Banai, *The Territorial Rights of Legitimate States: A Pluralist Interpretation*, 6 INT'L THEORY 140 (2014).

⁴⁵ In distinction from the arguments in constitutional patriotism, the particularities are not seen merely as incidental varieties of universalism, but as subjectively valuable properties of the group.

include, for example, political histories, values and symbols, public languages, legal and institutional traditions and methods, and specific place-related experiences. To be sure, these ingredients sometimes overlap with the content of national identities. For example, a public language can be a feature of specific political and public institutions as well as a feature of a national identity. However, the political and national perspectives will differ on the meaning, status, terms of inclusion, and other policies concerning the public language. Political peoples are constituted by the particularities that pertain directly to political and public institutions, and thus differ from the cultural distinctiveness that national identities include. Moore defines three conditions in this context, for a group of individuals to be a people:

(a) [T]here is a shared political commitment to establish rules and practices of self-determination on the part of a wide majority of members, (b) they have the political capacity to establish and sustain institutions of political self-determination, and (c) they possess an objective history of political cooperation together, through, for example, state or sub-state institutions, or in a resistance movement.⁴⁶

In this context, “self-determination” means self-government in the form of legal-political institutions that exercise jurisdiction over a territory. To Moore’s conditions of a political commitment, viability and agency, the general conception of political people proposed here adds an element of identifiable particularity. A people, too, is a distinct political collective that connotes a particular attachment of its individual members. There is a longstanding tradition in political thought that contrasts civic and cultural nationalism in terms of universalism versus particularism. This argument is untenable, both conceptually and in practice: peoples also have distinct languages, histories, and territorial attachments. However, the content and features of distinctiveness are, at least in theory, different in cultural nations and political identities.

This is to say that a group seeking to obtain or maintain self-determination ought to have a relevant reason for self-government—namely to explain why their specific political project is not feasible within another legal-political unit. As a rule, the viability condition means that the group should have the capacity, or at least the potential capacity, to sustain autonomous legal political institutions—they must be sufficiently large and have access to the required material resources. The capacity and viability dimension ought to be evaluated, sometimes counterfactually, under the assumption of decent international conditions. For instance, if the Chechen Republic of Ichkeria that declared independence in 1993 proved non-viable, it was presumably not because of internal circumstances, but due

⁴⁶ Moore, *supra* note 32, at 127.

to military invasions from outside.⁴⁷ Hostile international conditions of this kind can be taken into account in an “all things considered” judgment about the feasibility of secession in a specific case and its utility. But they are not first order moral-normative considerations to determine viability, and whether a claim to self-rule is justified.

With the four main conditions that define a political people, the indeterminacy challenge is tackled. They are sufficiently demanding and clear to distinguish between peoples and many other kinds of groups in the world—related to hobbies, geographical locations, artistic tastes, lifestyle preferences, family relations, and so on. All of these other important aspects of human and social life also find expression and protection in legal and political rights, such as freedom of association and political participation. Self-government, the territorial right of jurisdiction over a territory, is claimable only by a political people, a specific kind of group. Any definition yields grey areas and borderline cases, but the dimensions and conditions specified above give us a sufficiently clear and plausible picture that tackles the challenges of indeterminacy raised against ethnicity and culture-based definitions and resists purely subjective conceptions.⁴⁸ If peoples can be defined and identified according to their political projects and particularities, the questions remain: why and in what sense “peoplehood,” thus understood, anchors the claim to self-government.

III. Why Peoples’ Self-Determination?

We have seen above that both Kantian and Lockean—and, to an extent, liberal nationalism—justifications of general territorial right draw on the functions that the territorial authority performs—the provision of basic needs and establishment of a system of rights and justice. The justification is instrumental or functional in the sense that it draws on the goods that the territorial authority delivers. At the same time, once the people emerges as an important component in the picture—as the subject of self-determination, or, for example, the legitimate holder of territorial rights—other norms and considerations are implicitly incorporated into the theory. From a purely functionalist position, it would follow that the territorial units ought to be created and maintained in a way most conducive to optimal results with respect to the pertinent goods and functions. However, Lockean and Kantian positions agree that there is something normatively valuable about the wish and inclination of the members of a people to govern themselves jointly—presumably even if the results are suboptimal with respect to the function.⁴⁹

⁴⁷ This is not a judgment about the rightfulness of the Chechen attempt at secession, but an example for how the condition of viability operated.

⁴⁸ Purely subjective conceptions are typical of proponents of plebiscitary approaches. See Harry Beran, *A Liberal Theory of Secession*, 32 POL. STUD. 21 (1984); see also CHRISTOPHER WELLMAN, *A THEORY OF SECESSION: THE CASE FOR POLITICAL SELF-DETERMINATION* (2005). I return to this issue below.

⁴⁹ “Sub-optimal” does not connote extremely bad or catastrophic.

According to Nine, peoples' self-determination—their inclination to form and sustain self-government and self-identification of the individuals of which the people is composed—is a condition for the legitimacy of the territorial political authority, beyond how it performs on delivering the goods that justify territorial right in general.⁵⁰ The residual territorial right of the people in the Kantian approach also assigns value to considerations beyond the capacity of the state to perform its legitimizing functions.⁵¹ What, then, is valuable about this subjective and inter-subjective aspect of self-determination? This is the subjectivity objection to self-determination. As Moore notes, “[i]t is not at all clear that the fact that people have a particular identity, in itself, constitutes an argument for recognizing it politically or institutionally, at least not without additional arguments.”⁵²

There is a case to make that a freedom-based account explains the value assigned to peoples' self-determination in theories of territorial right. On the freedom-based view, the kind of shared political projects that members of self-determining groups aspire to pursue and maintain through the exercise of self-determination are valuable from the point of view of their individual freedom⁵³—that is, the realm of freedom to form and follow one's own life-plans and pursue projects valuable to them. Accordingly, these political commitments gain a normative claim to be respected, subject to important limitations arising from the individual rights of their members, and to conditions of reciprocity and generality in regard to rights of non-members.⁵⁴ Following Christopher Wellman, we can distinguish between arguments for self-determination that value freedom for instrumental reasons and those that value it for deontological reasons.⁵⁵ The freedom-based justification of self-determination belongs in the latter category in that it considers the freedom of individuals, including in the exercise of self-determination, as valuable in and by itself, even if the results are suboptimal in terms of wellbeing.⁵⁶

With the freedom-based justification of self-determination in view, the Lockean and Kantian theories of territory stand on two normative legs, neither of which is reducible to the other. The functionalist argument justifies the institution of territorial rights in general—the existence of territorially bounded, legal-political coercive authorities. The

⁵⁰ Nine, *supra* note 10, at 51–52.

⁵¹ Stilz, *Nations, States, and Territory*, *supra* note 11.

⁵² MOORE, *supra* note 9, at 28.

⁵³ Wellman, *supra* note 48 (defending self-determination as a case of freedom of association—an individual liberty).

⁵⁴ Ayelet Banai, *Political Self-Determination and Global Egalitarianism: Towards an Intermediate Position*, 39 *SOC. THEORY & PRAC.* 45, 49–63 (2013).

⁵⁵ Wellman, *supra* note 48, at 38–58.

⁵⁶ *Id.* at 39.

non-instrumental value of freedom in the exercise of self-determination justifies claims by peoples to create and maintain “their” territorial polities, corresponding with their shared political projects. The value of self-determination alone does not justify the institution of territorial right and the territorial state in general. The functionalist account alone does not explain why self-determination has value. Both arguments are required for the Lockean and Kantian justifications of general territorial right and of specific right-holders—of the principle of peoples’ political self-determination.

Among theories of secession and self-determination, we find a plebiscitary interpretation of the freedom-based account,⁵⁷ which the remainder of this section seeks to challenge. On the plebiscitary view, self-determination is an individual right akin to freedom of association. Individuals residing in a contiguous territory are free, by plebiscite, to secede and to form an independent polity. The claimants determine the territory in which the referendum is to be conducted and ought to gain a majority. If within a seceding state, individuals residing in a contiguous territory have another preference: They too can conduct a referendum and, if they gain a majority, secede. The ideal and model is of voluntary association, whereby individuals are free to determine to which polity their territory of residence shall belong, implemented in the form of cascading plebiscites. An important difference between the peoples account and the plebiscitary interpretation is the following: On the former, self-determination is a right of individuals in virtue of their affiliation to a specific kind of a group or a corporate agent—the people. On the latter view, self-determination is a right of individuals in virtue of their preference, regardless of affiliation to any particular kind of group, and is not in principle limited to inclination towards a shared political project. Two objections to the plebiscitary interpretation are noteworthy. First, it is liable to the indeterminacy objection, mentioned above, in that it leaves the subject of self-determination far too ambiguous and fluid. Subsequently, there is an implausible mismatch between the subject and the content of the right. Self-determination, after all, pertains to state institutions. They are weighty and complex institutions; their making and breaking is complicated and burdensome. To be sure, sometimes there are good reasons to make and unmake political borders. But given the nature of the task, these reasons ought to be strong. It is not clear how any ephemeral individual preference and identity could potentially justify such dramatic an occurrence as secession. Second, the plebiscitary interpretation grants individuals the right to determine the jurisdictional fate of the territory in which they reside. However, places of residence are often the outcome of previously allocated territorial rights. People live where existing states permit them access and residence and in accordance to their property regimes and rights. The plebiscitary interpretation does not take this consideration into account, let alone offer a solution. It remains unclear what justifies the prerogative of individuals to

⁵⁷ See Wellman, *supra* note 48; Beran, *supra* note 48; see Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 *ETHICS* 48, 69–70 (1992); see also Amandine Catala, *Secession and Annexation: The Case of Crimea*, 16 *GERMAN L.J.* 581 (2015) (presenting an amended version of the choice theory).

determine the jurisdictional fate of the territory on which they happen to reside.⁵⁸ The peoples perspective is liable to neither objection and is, therefore, proposed here as the appropriate interpretation of the freedom-based account of the value of self-determination.

D. The Case of Crimea

With the main justifications of territorial right in view, this section proceeds to examine their implications to the case of Crimea. The discussion considers the situation prior to the secession of Crimea in 2014 and its subsequent annexation to Russia. The first question at hand pertains to the right-holders: Which peoples and nations in the territory are in a position to be recognized as having potential territorial right and valid claims to self-determination in the territory or in parts of it? International law and the theoretical principles reviewed above converge on their time perspective in that they give priority, indeed nearly exclusive attention, to the present: Present borders and present population. In the period of Crimea as an autonomous republic within Ukraine (1991–2014), Russians were the larger national group in Crimea, amounting to some sixty percent of the population of just over two million, followed by Ukrainians and Crimean Tatars that made for about twenty-five percent and twelve percent of the population respectively.⁵⁹ It is fairly clear that each of these three groups can be described as a people and as a nation in view of the criteria and conditions stipulated above. From the perspective of the nation, we look at cultural features of the group, possibly a belief in common descent and self-identification. Crimean Tatars have cultural characteristics, including language, religion, and history distinct from the Russian and Ukrainian population. The Russian and Ukrainian nationalities are also connected each to a language, religion, and history. Ukrainian nationalism is comparatively recent and the boundaries of this nation remain internally contested. However, claims to national self-determination appear in the beginning of the twentieth century, in the aftermath of the Russian Revolution and the First World War.⁶⁰ Today, census data indicates that individuals in Crimea indeed identify themselves with the three nationalities. At the same time, closer sociological studies indicate that the relationship between Russian and Ukrainian identities is not one of clear and

⁵⁸ This is not to undermine rights anchored in residence and occupancy. Only the move from residence and occupancy to the right to determine territorial jurisdiction in the plebiscitary approaches is hasty.

⁵⁹ For demographic data, see, e.g., Jane Dawson, *Ethnicity, Ideology and Geopolitics in Crimea*, 40 COMMUNIST & POST-COMMUNIST STUD. 427, 429 (1997); see also State Statistics Committee of Ukraine, ALL-UKRAINIAN POPULATION CENSUS (2001), available at <http://2001.ukrcensus.gov.ua/eng/results/general/nationality>.

⁶⁰ NORMAN HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS (1945); see also MACARTNEY, *supra* note 20.

straightforward separation: Some identify with both, while for others there is no overlap between descent, language, and self-identification.⁶¹

As noted above, liberal nationalism takes a twofold, contested step from the inter-subjective fact of nationality to justification of territorial right. First is the claim about the tight relationship between nationality and political self-determination; second is the justification of territorial right by interaction over generations with the territory and investment of material and symbolic value in it. Both arguments find a measure of pertinence and validity in the case of Crimea but also face important challenges. After Ukraine's independence, Crimean political parties reflected national allegiances to an important extent. The Republican Movement of Crimea and the Republican Party of Crimea (RDK and RPK), co-founded by Yuriy Meshkov, took a pro-Russian stance without subscribing to fully-fledged ethno-cultural Russian nationalism.⁶² In 1994, Meshkov was elected President of the Autonomous Republic of Crimea,⁶³ winning over seventy percent of the vote in the second round, running on an unmistakably pro-Russia agenda.⁶⁴ However, neither attempt at secession nor violent confrontation ensued at the time, but negotiations with Kiev to keep Crimean autonomy within Ukraine and to refuse "Ukrainization" of the region did take place. Two political organizations of the Crimean Tatars took part in the post-Independence politics: The Organization of the Crimean Tatars National Movement and the National Movement of the Crimean Tatars. The former was politically oriented toward strong claims to autonomy and Tatar self-determination in Crimea, with a confrontational attitude towards the Soviet and later Ukrainian rule; and the latter sought accommodation within the larger state.⁶⁵ This glance into the political scene in Crimea following Ukraine's independence illustrates that while nationality no doubt influences political mobilization, it is not as such a political program. Both Russian-based and Tatar-based political forces present competing political visions, some taking a strong regional perspective, whereby Crimea is an autonomous political unit for its different nationalities, either within Russia, within Ukraine, or in neither.

How do the national groups in Crimea fare, from liberal nationalism's perspective, in the justification of their territorial right? In view of the multilayered history and the diversity of Crimea's population over the centuries, the picture is complicated and it is hardly possible

⁶¹ Paul Pirie, *National Identity and Politics in Southern and Eastern Ukraine*, 48 *EUROPE-ASIA STUD.* 1079, 1083 (1996).

⁶² Dawson, *supra* note 59, at 432–33 (showing a distinction from other pro-Russian splits from the Republican movement that endorsed ethno-cultural Slavic nationalist ideology).

⁶³ From 1991 Crimea's administrative status within Ukraine was The Autonomous Republic of Crimea.

⁶⁴ Sergei Markedonov, *The Crimean "Question,"* *OPENDEMOCRACY* (Jan. 16, 2015), available at <https://www.opendemocracy.net/ad-russia/sergei-markedonov/crimean-%E2%80%98question%E2%80%99>.

⁶⁵ Dawson, *supra* note 59, at 434.

to establish a unique territorial claim according to liberal nationalism's perspective. Tatar history in Crimea is thought to date back to the thirteenth century, including some 300 years of a self-ruling Khanate, first independent and then within the Ottoman Empire, which was brought to an end with the conquest by Russia in 1783. The Tatar history in the territory can be classified as an investment of symbolic and material value in it, making it their homeland. It is harder to determine how exclusive their territorial claim is and within which geographical boundaries it applies. Describing the Khanate, one historian notes:

Crimea was a land of great diversity, illustrated, for example, by the variety of religions found on the peninsula. The presence of Muslims and Orthodox, Armenian, and Catholic Christian, as well as Rabbinic and non-Rabbinic Jews was reflected in all spheres of life, from urban space and architecture to art and literature. However, little is known about how actually lived together and how attributes other than religion, such as gender, kinship or occupation, impacted daily life. Our understanding of how the state handled this diversity is equally imperfect.⁶⁶

Today, the Tatars amount to only around ten percent of the population of Crimea. One of the reasons for this demographic marginalization was the influx of Russian and Ukrainian populations following the conquest of Crimea and its annexation to Russia in the later part of the eighteenth century. In 1944, Tatars were deported from Crimea, and have only been allowed to resettle there since the 1980s. During more than two centuries of Russian rule, Crimea also became the homeland of Russians that over the generations invested symbolic and material values in it. It is unnecessary to endorse Russian national myth about the "civilizing" conquest of "barbarian" Crimea in order to recognize the important ways in which Russian cultural and material investment has shaped the territory. The question of whether to extend the time perspective from the present and take into consideration past injustices of the kind faced by the Tatars in Crimea poses a genuine dilemma. On the one hand, international law and liberal political theory have good reasons to take a future-oriented perspective and bracket the Pandora's box of territorial conquests. For international law the principle of *uti possidetis* was necessary to make self-determination in the post-colonial period at all practicable—requiring that self-determining units gain their independence in their existing borders at the time, and with the population within those borders. From a liberal perspective, presently living individuals and their wellbeing have the moral priority over those long gone. It is rather hard to establish that an inter-generational harm occurred, whereby events that took place in the late-eighteenth century affect presently living Crimean Tatars. On the other hand, full neglect of historic claims and

⁶⁶ Denise Klein, *Introduction*, in *THE CRIMEAN KHANATE BETWEEN EAST AND WEST 4* (Denise Klein ed., 2012).

injustices implicitly permits the mighty to hold on to the gains they made by force, without repercussions. Be that as it may, from liberal nationalism's perspective, Crimean Tatars have a valid claim to territorial self-determination in Crimea. It remains unclear to which geographical domain within the peninsula the Tatar claim applies, and how to balance it against Ukrainian and Russian territorial claims to Crimea anchored in their national histories in and interactions with the territory.

1. The People's Perspective

We have seen above that contemporary theories of territorial right propose a notion of the people as a right-holder as an alternative to liberal nationalism's cultural nation. While the material of which peoples are constituted sometimes overlaps with the material that constitutes the nation, they are also distinct in that they focus on shared legal-political histories and projects. Looking at the case of Crimea from this perspective, a complex picture emerges. While political identities contain a national element, there is no straightforward overlap between nationality and political self-determination. Legal-political history reveals a number of periods that influence and shape political orientations today: Legacy of the early modern Khanate followed by Imperial Russia, a Soviet republic, and an autonomous republic within Ukraine. In parallel, Russian and Tatar groups can also be classified as peoples, based on their distinct legal-political histories and current orientations. Russians mobilize to keep their language as dominant in the territory and a political alliance to Russia, while Tatars struggle to resettle and reestablish themselves in the territory, seeking autonomy.⁶⁷

The long and distinct legal-political history of Crimea, coupled with the current regional identity reported by the inhabitants, bring in the possibility of a "Crimean people," with internal cultural diversity in languages, ethnicities, and religions. From the people's perspective, there is a strong case to make in favor of Crimean political-territorial self-determination in the form of a strong territorial autonomy with internal constitutional arrangements to safeguard the standing of the demographically marginalized Tatar population. From a moral-normative perspective, Crimean autonomy within Russia is, in principle, equivalent to Crimean autonomy within Ukraine. This might come as a disappointment to those that feel strongly in favor of either country, but there is no principled normative reason for why Crimea ought to be within the borders of Russia or of Ukraine. There are, however, normative non-ideal considerations of feasibility and procedural norms to be taken into account. First, Russia's intervention in Crimea that resulted in the secessions finds little if any justification—normative or legal. Second, in the long run, given domestic balances of power, it is more feasible that Crimean autonomy,

⁶⁷ For overviews of identities based on surveys and sociological studies, see Pirie, *supra* note 61; see also Carina Korostelina, *The Multi-Ethnic State-Building Dilemma: National and Ethnic Minorities' Identities in Crimea*, 5 NAT'L IDENTITIES 141 (2003).

and in particular the rights of the Tatar population, would be respected within Ukraine than within Russia. Third, at the same time, there is no foreseeable scenario in which Russia will re-cede Crimea and hand it back peacefully to Ukraine. In sum, the application of the theories of territorial right to the case of Crimea enables us to identify normatively preferable solutions, though not in the form of an unequivocal and exclusive territorial right-holder. In view of the immense implementation challenges that international norms face—in general, and especially with respect to powerful international actors as Russia—the prospects for these solutions to materialize are not bright.

E. Conclusion

This article explored three main accounts of territorial right in contemporary political theory and applied them for the case of Crimea. It was argued that liberal nationalism continues to be prominent both in theory and in practice, and is best construed as a prudential argument—but its normative justification for self-determination of cultural nations falls short. Two additional accounts of territorial rights were considered: The Lockean and the Kantian perspective. On this account, a people, defined predominantly in legal-political terms and distinct from the nation, is the subject of self-determination. This conception of the people was defended against two standards objections: Of indeterminacy—how to determine who is a people—and of subjectivity—why subjective self-identifications of individuals matter. In view of the principle of national self-determination, the nationalities in Crimea—Crimean Tatars, Russians, and Ukrainians—have overlapping territorial claims. However, the theory does not provide clear guidelines for how to balance between such claims or adjudicate between them. The people's perspective traces political identities and allegiances. In the case of Crimea, with its long legal-political autonomous and distinct history, and strong regional identities of its inhabitants, this perspective opens the possibility of a culturally diverse Crimean people. There is a strong case to make, from the normative perspective, for Crimean territorial self-determination, in the form of regional autonomy, either within Russia or Ukraine. In the long run, it is more feasible that such autonomy would be better respected within Ukraine than in Russia. However, it seems unlikely that the territory will be handed back by Russia. The application of normative principles to the case of Crimea helps identify preferable solutions, but does not identify an unequivocal and exclusive territorial right-holder. In view of the immense challenges that the implementation of international norms has faced, the prospects for these solutions to materialize are not bright.