Non-Territorial Autonomy
An Introduction

Edited by
Marina Andeva · Balázs Dobos ·
Ljubica Djordjević · Börries Kuzmany ·
Tove H. Malloy

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ENTAN involved scholars from 36 countries who were organized in different thematic working groups. One of the working groups, chaired by Assoc. Prof. Marina Andeva (University American College Skopje) and vice-chaired by Assoc. Prof. Dr. Börries Kuzmany (University of Vienna), aimed at systematizing the findings and insights gathered from the whole network to produce a comprehensive bibliography of academic writings, research projects, teaching courses, and other materials in the field of minority rights and NTA. Moreover, the working group was tasked to design a university course that would bring the subject closer to the students in a multidisciplinary perspective. Eventually, the present textbook was developed as a systematic and comprehensive teaching tool. The chapters included in this textbook are written by members of ENTAN as their contribution to the teaching of the theory and application of NTA in diverse historical and contemporary contexts.

The Management Committee of ENTAN and the editors of the textbook are deeply grateful to the single contributors of the textbook. A special gratitude goes to the external reviewers of the single chapters: István Gergő Székely (Székelyföldi Közpolitikai Intézet—SZKI, Hungary), Jörg Hackmann (Szczecin University, Department of History and International Relations, Poland), Norbert Tóth (National University of Public Service, Hungary), Zsuzsa Csergo (Queen's University, Canada), Jacob Dahl Rendtorff (Roskilde University, Denmark), David Smith (University of Glasgow, United Kingdom), Athanasios Yupsanis (Aristotle University of Thessaloniki, Greece), Deon Geldenhuys (University of Johannesburg, South Africa), Levente Salat (Babeș-Bolyai University, Cluj—Kolozsvár, Romania), and Alice Engl (EURAC, Bolzano/Bozen, Italy). A great appreciation goes also to all the members of ENTAN, as well as all researchers contributing to the work of the network through the years. In specific for Chapter 2 an appreciation and support go to the provided funding from the European Research Council (ERC) within the project 'Non-territorial Autonomy: History of a Travelling Idea', no. 758015".

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Introduction

The aim of this textbook is to introduce, for the first time, the students to a comprehensive reading offering the opportunity to learn more on different aspects and issues around the multifaceted and evolving concept of Non-territorial autonomy (NTA), which is a group rights model to deal with national diversity within states. The textbook comprises thematic topics and a selection of multi- and interdisciplinary as well as comparative overviews of an emerging research field. It also demonstrates from different angles—theoretical considerations, historical background, and practical implementation—the possibilities of NTA in addressing cultural, ethnic, religious, and linguistic differences. It thereby provides non-territorial solutions to one of the key societal challenges in contemporary societies.

An examination of the concept of NTA requires a particular focus on different NTA arrangements and on the accommodation of the needs of different linguistic, religious, and ethnic communities within a state. The examples and practices cited in the textbook cover mostly Europe but it might be appealing to study and understand NTA beyond the European context and investigate its applicability in other parts of the world.

The book is divided into ten chapters. In the first chapter, the concept of NTA, the idea of non-territoriality vs. territoriality and territorial autonomy, introduces the students to the subject matter. The chapter highlights the circumstances and arrangements generally referred to when NTA as an umbrella term is

used. The origins of the idea of NTA, including the footsteps and traces of its theoretical development and the historical implementations from the Habsburg and Russian Empires to the Paris Peace Conference and interwar nation-states, are the focus of the second chapter. With this chapter, the students will learn how and when the concept of NTA came into being and its key characteristic features, as well as the main proponents and the historical events that shaped the concept. The third chapter highlights how NTA is reflected in international documents on minority rights and how NTA fits in the international protection of minority rights. While reading this chapter, students will see the interrelation between autonomy claims, the people's right to self-determination and how NTA seeks to reconcile the territorially defined model of modern nation-states with the desire of non-dominant ethno-cultural parts of the societies to have their voice heard and govern themselves. In the fourth chapter, the students have a chance to analyse how NTA fits within the wider political framework and whether there is a potential of seeing NTA as a democratization tool, especially since references to NTA have begun flourishing since the fall of the communist regime in Central and Eastern Europe. Students can assess the relationship between NTA and democratization and explore the main characteristics of a democratic NTA arrangement. The normative political philosophy and the question of the status of NTA are a focal point of the fifth chapter. Students will have an opportunity to think and debate on several key questions posed in the chapter, from which the most important would be: "Which institutions are representing national minorities and might those be NTA institutions?". An NTA arrangement comprises political decision-making which often results in legal and institutional consequences. Precisely because of this reason, a specific chapter six is dedicated to the political context of NTA arrangements with a focus on actors, their conditions, and the decisions they make. Students will have a chance to look at this from an empirical and descriptive approach. A specific chapter (seven) provides an overview of the various types and institutional forms of NTA especially in the European context, including the sectors and scope of their activities and the degree to which power has been delegated to NTA bodies. In addition, it also summarizes the various acts that might appear as a legal basis and guarantees for NTA in practice, including some "bypasses" that would present the pros and cons of the mostly applied legal solutions. The purpose of the subsequent chapter is to briefly show the multifaceted nature of NTA by pointing out some core conceptual

unconsistencies/variations, as well as by outlining the main types of NTA, a trigger chapter that will give students additional perspectives. Chapter nine outlines the variety of cultural NTA arrangements and their limitations from a diversity governance perspective based on language and religion by providing an overview of both more traditional but also more contemporary forms of cultural autonomy arrangements, as well as establishing the link between cultural forms of NTA and minority agency. The operationalization of NTA is included in the last chapter, where a particular focus is dedicated to the discussion of the *implementation* of rights promoting NTA. An analytical and rather insightful chapter that gives students the real and practical operation of minority rights within an NTA context. Whereas in the previous chapter the legal and political aspects were taken into consideration, in the last chapter the focus is given to a sociological account of how ethno-cultural groups operate and implement their rights.

The material in front of you, is a toolkit that students can take away from their studies, presented in a systematic and cumulative way, especially with respect to the theoretical and historical foundations of NTA and the explanations of different practical examples. As a teaching tool it brings closer the elements and instruments of NTA to all those students and teachers interested in the field.

The core organization of this textbook is to apply a recurring set of major explanatory approaches as we survey and investigate NTA arrangements and practices across space and time: the state and NTA, the various forms of NTA, human rights and NTA, minority groups and NTA, participation and NTA, institutionalization of NTA, democratization and NTA and the politics behind NTA.

The key strength of this organization is that it is simultaneously structured and open-ended in offering and transmitting the knowledge to the students:

- The largest part of each chapter covers practices "on the ground" that form the empirical content of different scientific fields (from history to law and politics).
- Attention to normative principles creates the connection between the choice of applying NTA and the reason why it should be applied.

- Short but substantial examples in every chapter offer an entry point into theoretical debates.
- Across the whole textbook, there is a consistent emphasis on the awareness of a diverse world, on diverse disciplines, and on the students' freedom and responsibility to figure out the role of NTA.

The structure of the chapters follows a comprehensive and understandable presentation of the most important issues, terms, topics, and examples when explaining the different perspectives and instruments which derive from a non-territorial setting for the protection and promotion of minorities. Each chapter is structured in a similar way as to ensure that the students have clear examples and illustrations of case studies as well as brief information on a particular issue or concept (called: concept in summary) or further information and details on questions raised in the respective chapters (called: concept in depth). Chapters also include, for a clearer presentation, figures and tables illustrating the issues at hand. At the end of each chapter, a summing-up section is included as well as useful study questions, suggested sources for further readings, and suggested sources that instructors and students can use to raise debates and discussions in class.

The book includes structural and cumulative support for learning:

- Each chapter invites students to go into depth, by giving questions for debate and discussion.
- Photos, charts, and graphic figures strengthen the text with anchors for visual learning.
- The explicit learning objectives head each chapter and lead students into review questions as a portal to investigative assignments and end-of-chapter summaries.

It is important to emphasize that this teaching framework responds not just to pedagogical challenges but also to an important broader challenge that is teaching NTA for the first time. Students are invited to engage in the topics brought up in this book in a way that is both supportive and open-minded.

In a time where multidisciplinary attempts to explain many societal phenomena dealing with diversity management, there is a need of a comprehensive introductory frame that emphasizes both the uniqueness and the diverse perspectives of NTA. My sincere hope is that this textbook realizes these immodest goals to some small degree.

Marina Andeva

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Editors and Contributors

About the Editors

Marina Andeva is Associate Professor at the UACS School of Political Science. Her other working engagements include the position of Research Fellow at the Institute of International Sociology in Gorizia (ISIG) since 2009. She gained her Ph.D. on Transborder Policies for Daily Life and an M.A. in Methods in European Policy Making at the University of Trieste, Italy, and a B.A. in Law at the Faculty of Law "Iustinianus Primus", Sts. Cyril and Methodius University, Skopje, Macedonia. Her research fields are multiculturalism and minority rights, cross-border cooperation, and migration studies.

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CHAPTER 1

The Concept of Non-Territorial Autonomy: Origins, Developments, and Subtypes

Levente Salat

The aim of the chapter is to propose a possible framing of the NTA concept, considering the historical legacies by which the usage of the term is loaded, on the one hand, and the complex empirical realities the notion is expected to map, on the other hand. First, the idea of non-territoriality will be explored briefly, with highlight on the circumstances that bring about arrangements generally referred to when the NTA concept as an umbrella term is used. Then the origin and the semantic content of several subjacent terms—national autonomy, national cultural autonomy, cultural autonomy, personal autonomy, functional autonomy, administrative autonomy, consociationalism—will be discussed, together with the problems triggered by the concurrent attempts to provide precise definitions to the various institutional embodiments of the general NTA idea.

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The chapter will conclude with a brief assessment of the consequences for the NTA scholarship which follow from the two main limitations of the NTA notion: the underdetermination of the widely used concepts and the gap between theory and empirical realities.

1.1 The NTA Concept

Instances of NTA are part of the broader category of autonomy arrangements and, as such, illustrate the logic of power-sharing. 'Autonomy' is "a relative term that describes the extent or degree of independence of a particular entity" within a sovereign state (Hannum & Lillich, 1980, p. 885). Concerning its scope, it is "a means for diffusion of powers in order to preserve the unity of a state while respecting the diversity of its population" (Lapidoth, 1997, p. 3). As far as its main institutional ingredients are concerned, it implies "the legally entrenched power of communities to exercise public policy functions of a legislative, executive and/or judicial type independently of other sources of authority in the state, but subject to the overall legal order of the state" (Wolf, 2022).

According to Lapidoth, autonomy differs from decentralization in at least four regards: (a) while decentralization involves delegation of powers, autonomy requires transfer of powers; (b) in the case of autonomy, the transferred functions are exercised by locally elected representatives, in the case of decentralization, locally elected persons participate in deconcentrated central authorities; (c) delegation of powers can be terminated unilaterally by the central power, the abrogation or amendment of an autonomy agreement requires the consent of the central authority and the autonomous entity; (d) in decentralized regimes the central authority keeps control and supervision, together with the right to revise the acts of decentralized entities, while interference with the act of autonomous entities is justified only in extreme cases, like exceeding statutory powers or endangering the security of the state (Lapidoth, 2001).

The power, which is divided and shared, belongs to the state, the beneficiary of the arrangement is a sub-state actor. From the perspective of the sub-state entity, autonomy equals with significant degree of self-government, which implies "elections to the highest decision-making body and the existence of an executive for the implementation of the decisions of the central body of self-government, but also other features, such as the mechanism of accountability of the executive body, the relationship

of the self-governing entity to the central government of the country" (Suksi, 2011, p. 6).

Thus, the two main actors of any autonomy arrangement are the state, on the one hand, and the autonomous entity, on the other hand. The distribution of state power can be done on territorial or non-territorial basis, which means that the sub-state actor endowed with certain functions otherwise exercised by the state can be a part of the country's territory, a geographical unit equipped with a special status (TA), or an institution resulting from laborious procedures initiated by members of a certain category of the state's population, regardless of their residence (NTA). According to Légaré and Suksi, state jurisdictions can be both, territorial and non-territorial: "A nonterritorial jurisdiction exists when independent public authority is exercised in respect of certain individuals throughout the state irrespective of the fact that those individuals are residing in territorial jurisdictions in which other individuals are subject to similar public authority from territorially delineated jurisdictions" (Légaré & Suksi, 2008, p. 144).

Categories within the populations of states interested in NTA arrangements are regularly non-dominant groups with strong identity markers, manifesting desire to keep and reproduce their language, religion, and culture, embedded in community traditions and informal institutions, despite the fact that the group has a discontinuous settlement pattern within the state's territory. The mobilization on behalf of the non-dominant group's members targeting NTA is a form of struggle for internal self-determination, aiming to gain control over state functions and resources which may be critical for the chances of linguistic, religious, and cultural reproduction.

The chances of success of an NTA movement depend on multiple factors, both as far as the state, and the non-dominant community are concerned, preceding events and contextual elements being critical, as well. Successful NTA movements result in a vast variety of arrangements, reflecting power relations, ethnodemographic realities, the potential for agency of the non-dominant group, institutional traditions, and preferences, etc. There are, however, autonomy movements targeting some form of NTA which have not proven—so far, at least—successful, yet expose clear potential of the claimants for such arrangements. And there are many forms of effective and resilient non-state law, traditional authorities, and practices of informal adjudication which display plenty of similarities with formal NTA arrangements, without being linked to any

known autonomy movement. Nimni observes in this regard that "Non-Territorial Autonomy has many different forms such as Consociationalism and National Cultural Autonomy, but also forms of representation that de-territorializes self-determination, as with indigenous communities, the juridical autonomy of religious communities, or in the practice of many forms of secular community representation" (Nimni, 2020, p. 13).

The NTA concept faces the challenge to grasp, frame and describe this complex empirical reality. It is not surprising that there is no consensus in the literature regarding the content and reach of the notion, several subjacent terms being used—sometimes interchangeably, sometimes with reference to overlapping realities—to denote partial materializations of an imagined ideal type, or to designate differences in the institutional embodiment of the original idea. The most frequently used terms will be listed below, together with brief summaries regarding the dominant views that define the associated contents.

1.1.1 NTA as an Umbrella Term

The term 'NTA' is an umbrella concept encompassing all possible forms of autonomy short of the territorial version: national autonomy, national cultural autonomy (NCA), cultural autonomy, personal autonomy, functional autonomy, administrative autonomy, and, sometimes, consociational arrangements, too. Though the distinction between 'territorial' and 'non-territorial' aspects of autonomy is not always easy or self-evident, the idea of non-territoriality is regularly associated with the personal/personality principle.

The origin of the term can be found in Roman Law in the context of which the principle of personality meant that the law of the State is *jus civile* in the sense that it applies only to citizens, like in other ancient legal systems. The *jus civile* has been developed in the Roman Republic, being based on both custom and formally adopted legislation. The need to deal with *peregrini* (foreigners) has led later to the development of *jus gentium* (law of nations), resulted not from legislation but from the flexible application, by magistrates and governors, of the *jus civile* to foreigners (see Box 1.1).

Box 1.1 Renner on the origins of the personality principle

"(…) The Roman Empire was replaced by Germanic and Arabian tribal states, which were based on tribal affiliation. Here the phenomenon first emerged of the defeated tribes retaining their legal system and their language, of two peoples distinct in terms of law inhabiting a unitary territory. (…) the Roman provincial retained his national law, even if he lived among Bavarians and Frisians, and the Frank, Alemannic or Chamaver retained his even if living among Romans. Before dealing with a dispute, the judge would ask him: '*Quo jure* vivis?' Which law do you live by? The party thereupon made a declaration of nationality. The judge then knew according to which body of law he was to judge that party. Here, the so-called personality principle prevailed. (…) The Carolingian Empire initially united many tribes without abolishing, suppressing or confining to a particular territory their national law, language and specificity. (…) Under its rule in the Carolingian Empire, ten nations coexisted not only with different national languages but also with different legal codes."
(*Source* Renner, 2005, p. 23)

Concept in depth

In Europe, the Middle Ages, especially in the second half, were characterized by legal pluralism, in the sense that different types of law and various courts have coexisted within the same territory, singling out categories of persons to whom those rules and institutions applied. In such circumstances, the law was personalized, i.e. each individual was judged based of the law (and court) of the category he/she belonged to. This way of dealing with law and adjudication was gradually abandoned until 1648, when the territorial principle was adopted, in the Westphalia Peace Treaty, as the basis of centralized state jurisdiction. The Westphalian state system—which gradually expanded to the whole world—consists of sovereign states that mutually recognize one another, accept the principle of non-interference in domestic matters, and are organized according to Bodin's theory of sovereignty which establishes a mutually exclusive relationship among the territory, the Sovereign, and the subjects inhabiting the territory (Bodin, nd [1576]).

The personality principle stipulates that identity communities can be organized into autonomous units without considering residence, by uniting the members, based on free choice, in associations empowered to administer independently issues pertaining to identity maintenance. Beyond the irrelevance of the members' residence, the non-territorial character becomes evident in the fact that several autonomous units created according to the personality principle may amalgamate in territorial terms within the same administrative unit, like religious denominations often do. Renner suggested that in multinational states "the

personality rather than the territorial principle should form the basis of regulation; the nations should be constituted not as territorial entities but as personal associations, not as states but as peoples, not according to age-old constitutional laws, but according to living national laws" (Renner, 2005 [1899], p. 24).

Under the umbrella of the NTA concept, the subjacent terms refer to versions displaying various characteristics: 'national autonomy' is the ideal type of NTA envisioned by Renner (and Bauer) at the turn of the nineteenth and twentieth centuries with the aim of preventing the collapse of Austro-Hungarian Monarchy, the model remaining unimplemented to date; 'national cultural autonomy (NCA)' refers to partial implementations of the ideal type between the two World Wars in the Baltics and in various parts of the Soviet Union, as well as in Central-East European states in the post-Cold War context; 'cultural', 'personal', 'functional', and 'administrative' autonomy, together with consociationalism and the 'institutional completeness' concept, are terms dominating contemporary NTA theory as the result of attempts to grasp—and give sense to—the differences in legal-institutional embodiments of the NCA model adapted to particular contexts.

1.1.2 National Autonomy

The idea of 'national autonomy' is heavily embedded in a particular historical context: the ambitious project of a thorough state-building reform in the late Austro-Hungarian Monarchy meant to effectively accommodate the nations of the Empire more and more interested in political emancipation. The core aim of the envisaged constitutional reform was to free the nation from the territory, by separating state functions into culturally irrelevant, on the one hand, and critical for the cultural reproduction of the national communities, on the other hand. The latter would have been handed over to legal entities formed by national communities according to the personality principle. The former were supposed to be administered in common by representatives of the autonomous units within institutions relieved of the burden of mediating national conflicts, thus capable to concentrate on security, welfare, health care, and other issues pertaining to the powers traditionally associated with sovereignty.

The autonomous national units would elect national councils in charge with administering cultural and educational affairs, including levying taxes

in order to contribute to generating the resources necessary for the provided cultural care. In a final setting, the reformed Austrian state would consist of (a) homogeneous territorial units dominated by one nation, (b) mixed territorial components in which two or more national autonomies were supposed to coexist by administering independently state functions pertaining to culture and cooperating in the domains of culturally neutral state affairs, and (c) constitutive nations which would embrace into corporate public bodies the members of each nation, both the ones who live in homogeneous and mixed territories, in accordance with the personality principle. Both Renner and Bauer had hoped that such an arrangement could put an end to what they called 'the fight of the nations for the power in the state'.[1]

Though the model of 'national autonomy' advocated for by Renner and Bauer was never implemented as such, it remained in the literature as an ideal type which proved to be inspiring for national movements of important minority communities in pre-Soviet Russia, especially Jews (Gechtman, 2016) and Germans (Alenius, 2007; Housden, 2004). Subsequently, further attempts of implementing the model were made in the Soviet Union and the new independent states in Central and East Europe (Kuzmany, 2020). The term 'national-cultural autonomy' emerged in this context, as normative and programmatic target for projects of internal self-determination of minority communities.

[1] See Springer [Renner] (1902). This issue has attracted much scholarly attention in the history of political thought. J. S. Mill, for instance, in a much quoted work published in 1861 considered that "uniting all members of the nationality under the same government" is necessary, since "free institutions are next to impossible in a country made up of different nationalities. Among people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist" (…) "when there are either free institutions, or a desire for them, in any of the peoples artificially tied together, the interest of the government lies in an exactly opposite direction. It is then interested in keeping up and envenoming their antipathies; that they may be prevented from coalescing, and it may be enabled to use some of them as tools for the enslavement of others" (Mill, 1998, pp. 428 and 430). In a more recent account, Wimmer suggests that "Ethnic conflicts can (…) be interpreted as struggles for the collective goods of the nation-state" (Wimmer, 1997, p. 631).

Box 1.2 Bauer on the organizational details of 'national autonomy'

Concept in depth

Building on Renner's work published under a pseudonym (Springer, 1902), Bauer summarizes some of the critical details of 'national autonomy' as follows:

"The realization of the personality principle would require the division of the population according to nationality. (…) it would be the mature citizen who was accorded the right to determine to which nationality he wished to belong. On the basis of this free declaration of nationality by the mature citizen, national registers would be established containing a list of the mature citizens of each nationality that was as accurate as possible. (…)

Establishing the national register would provide the basis of national autonomy. We would only need to constitute the members of a nation within the parish, within the district or canton, within the crown land, and ultimately within the empire as a whole as a public body with the task of attending to the cultural needs of the nation, of establishing schools, libraries, theaters, museums, and institutions of popular education and of providing the nation's members with legal assistance when dealing with the authorities, insofar as they require this due to a lack of command of the language employed by state departments and courts. In return, this body would be granted the right to procure the means required for these purposes through the taxation of the nation's members. National autonomy would thus be founded purely on the personality principle. Each nation would have the power to attend to national cultural development using its own means; thus, no nation would have to engage in the struggle for power within the state. (…)

The cantons would now enter into a dual relation with one another. First, the cantons would form territorial associations charged with dealing with certain affairs of a nationally neutral character. For example, all the cantons in Bohemia would constitute the province [*Land*] of Bohemia, regardless of the nationality of their inhabitants, and would jointly deal with certain territorial affairs. On the other hand, all cantons inhabited by a particular nation as well as the national self-administrative bodies representing this nation within the dual cantons would constitute that nation as a legal entity. All Germans in the nationally uniform cantons and all those Germans within the dual cantons who are entered in the national register would constitute the German nation and elect the national council. This national council would independently administer the national affairs of the Germans, establish universities, museums, and so on, and have the right to levy taxes on the Germans in the nationally uniform cantons and in the dual cantons. In the nationally uniform cantons the national council would have the right to establish such national institutions without being subject to the influence of any other nation; in the dual cantons, on the other hand, this would be permitted only with the approval of the national council of the other nation."

Source Bauer (2000 [1907], pp. 281, 283, 286–287)

1.1.3 National Cultural Autonomy

'National-cultural autonomy' is a widely used, yet controversial term. Though in the NTA literature it is commonly attributed to Renner and Bauer, the two prominent Austro-Marxists were advocating for something fundamentally different: 'national autonomy' which required, as

their theory stipulates, a social contract between the state and nations, resulting in a federation of national corporations, each embodying state power. In Renner's view, 'national cultural autonomy' is what the Jewish tradition of self-organization in Eastern Europe achieved, i.e. cooperative national associations preoccupied with their own administration, without interest in state power (for details, see Box 1.3). While 'national autonomy' envisages symmetrical arrangements among nations, 'national-cultural autonomy' is a term used in contexts referring to situations in which the challenge is to manage the relationships between dominant majorities and non-dominant minorities with the means of essentially asymmetrical arrangements.

Box 1.3 The Council of Four Lands

Concept in depth

The central body of Jewish autonomy in Poland for nearly two centuries—from the middle of the sixteenth to that of the eighteenth. The great number of the Jewish population of Poland, its importance in the industrial life of the country, and the peculiarities of the political and class organization of the Polish commonwealth ('Rzeez Pospolita') were the reasons why the Jews of Poland formed a separate class enjoying liberal autonomy within the sphere of their communal and spiritual interests, the outcome of which was their exemplary communal organization. A Jewish community, with its administrative, judicial, religious, and charitable institutions, constituted a unit of self-government. The term 'ḳahal' denoted both the community and the autonomous communal administration, the two concepts being identical. The administrative functions—the assessment of state and communal taxes, the supervision of charitable institutions, etc.—of the ḳahal were performed by elective ḳahal elders ('seniores'); while the rabbis ('doctores Judæorum') had charge of religious and judicial affairs.

(*Source Jewish Encyclopedia,* entry by H. Rosenthal and S. M. Dubnow. https://www.jewishencyclopedia.com/articles/4705-council-of-four-lands)

Councils of The Lands were the central institutions of Jewish self-government in Poland and Lithuania from the middle of the sixteenth century until 1764. The bodies in question were the Council of the Four Lands or council of the lands, the controlling body for the Jewish provinces ("Lands") of Poland, while the Council of the Land of Lithuania was the similar organization for the Lithuanian grand duchy, which was associated with the Polish crown. The two bodies were similar in structure and function. They were not constituted in either case as perpetual organizations, but were theoretically to the end ad hoc assemblies representing the permanent administrative entities, the local communities associated in their respective provinces or "Lands." The councils represent the highest form of Jewish autonomy within a regional or national framework attained by European Jewry, both in terms of territorial extent or of duration.

(*Source* https://www.jewishvirtuallibrary.org/councils-of-the-lands)

NCA could be perceived, thus, as the Renner–Bauer model adopted to the circumstances of non-dominant minority communities, situations in which it is beyond doubt 'who owns the state', and the interest of the minority is not more than gaining control over certain state functions and resources in order to preserve group identity within the frameworks of a state dominated by the majority culture. In the academic literature, the NCA concept is used preponderantly in historical, theoretical, and normative-programmatic contexts, without much reference to procedural and institutional details of the targeted arrangements. In situations when the usage of the term has an empirical relevance, the instance it refers to can be any of the remaining types of non-territorial autonomy: cultural, personal, functional, or administrative (for more details, see Chapter 2).

1.1.4 Subjacent Terms with Empirical Relevance

While NTA is an umbrella term, 'national autonomy' is the ideal type never implemented in practice, and 'national cultural autonomy' is the amended version of the ideal type adapted to the circumstance of non-dominant communities, the rest of the concepts utilized to denote further aspects of the broad NTA phenomenon depict various legal-institutional embodiments of the core idea: creating and/or empowering institutions meant to foster identity maintenance and reproduction of non-dominant cultural communities. Consensus is not characteristic in this part of the literature either, yet the differences among the various authors' opinions refer to more objective—legal and institutional—details.

Cultural Autonomy

'Cultural autonomy' is the most precisely circumscribed type of NTA, defined in similar or at least compatible forms by the influential authors. The term was officially used for the first time in the Estonian Cultural Autonomy Law adopted in 1925, incorporating most of the elements of the Renner–Bauer model: minority lists into which citizens could freely register, elections organized for electing the cultural council which, as a public law body, could issue by-laws within the limits of cultural and educational competences, impose taxes upon the members included in the lists, elect the members of the cultural self-government, the executive branch of the autonomy, and supervise its activities. The competences were limited to the organization, administration, and supervision of public and private schools in mother tongue, together with other cultural

institutions like theatres, libraries, museums. Funding for the activities of the cultural self-government was meant to be provided by state subsidies, local government support, and taxes collected from the members (Smith, 2005).

The opinion of several contemporary authors (de Villiers, 2012; Eide, 1998; Hofmann, 2008; Malloy, 2015; Suksi, 2015; Yupsanis, 2019, etc.) converge regarding the way cultural autonomy should be defined. The arrangements belonging to the category should result, according to the dominant view, from functional layering, through separate institutions, of public authority for the benefit of minorities scattered throughout the state. The public law powers and functions have to be transferred to representative bodies, the so-called cultural councils, invested, in principle, with legislative and executive power. Suksi observes, however, that "entities of cultural autonomy would deviate from the understanding of Bauer and Renner in that they would not be entitled to exercise legislative powers, nor would their membership be exempted from the application of general national legislation" (Suksi, 2015, p. 112). Indeed, in real-life cases, the role of the cultural councils is regulative, rather than legislative.

The legal status and enforceability of the law made by cultural councils are, in principle, the same as the enforceability of a law made by a regional or local government. Through the delegated administrative functions, the cultural councils should be entitled to take binding decisions on educational and cultural affairs, and levy taxes. The tasks of the cultural councils cannot be entrusted to member-serving organizations (NGOs) since those are not part of public authority. A concise summary of how cultural autonomy can be operationalized is provided in Box 1.4.

Box 1.4 The core features of the cultural autonomy model

- The right of individuals to ethnic self-identification upon voting age (personality principle),
- the establishment of a special minority register in which the self-proclaimed members voluntarily enter their names and which are then used as a basis for electing the cultural councils,
- the election and establishment of minority cultural councils and cultural self-governments,
- the organization and recognition of the aforementioned institutions as non territorial public law corporations endowed with collective rights and segmental sovereignty over the minority cultural affairs,
- the entitlement of the cultural autonomy bodies with legislative powers in their field of their responsibility as well as with tax-raising capabilities over their members for the backing of the cultural institutions and services, and
- the provision for state funding for the sustainability of the cultural autonomy regimes

Source (Yupsanis, 2019, p. 88)

Concept in depth

Examples of cultural autonomy implemented with relative success within a certain timeframe are Estonia, between 1925 and 1940 (Aun, 1953), Cyprus, from 1960 to 1963 (Stratilatis, 2021), and Serbia, beginning with 2002 (Beretka, 2021). Occasionally, forms of religious autonomy are considered as instances of cultural autonomy, like in the case of Muslims and Christians in Israel, or Muslims in India, which are considered by Cornell (2002) approaches that "produce the best overlap with the conceptualization of Bauer and Renner" (quoted in Suksi, 2015, p. 91). With regard to the Indian case, Harel-Shalev (2009) observes the following: "The Indian constitution guarantees autonomy to its religious minorities, and it promises minorities the freedom independently to manage their religious affairs, as well as a proportional share of the state's budget in religious affairs" (p. 1263). "The government's preference for non-intervention in religious affairs has been sustained over the years even though inter-communal peace was bought, to some degree, with the denial of human rights and increased stratification, contrary to the spirit of the Indian Constitution" (p. 1270).

Personal Autonomy

The 'personal autonomy' concept lays emphasis on the personality principle from which the legal person exercising cultural self-government emerges. Personal autonomy as a subtype of NTA arrangements should be distinguished from *material personal autonomy*, which implies, according

to Suksi, "a choice for a person as concerns different legal regimes (e.g. choice of whether or not to use a system created for the provision of services in minority languages, the choice of moving from a territorial autonomy or jurisdiction to other parts of the state or to another state)" (Suksi, 2015, p. 87). While this distinction is important and justified, the question whether *personal law regimes* are relevant or not for the NTA literature remains open. Galanter and Krishnan define personal law regimes in the following way: "legal arrangements for the application within a single polity of several bodies of law to different persons according to their religious or ethnic identity. Personal law systems are designed to preserve to each segment its own law. In the last several centuries, the most prominent instances have been personal law regimes in the areas of family law (marriage, divorce, adoption, maintenance), intergenerational transfer of property (succession, inheritance, wills), and religious establishments (offices, premises, and endowments). Such personal law typically co-exists with general territorial law in criminal, administrative, and commercial matters" (Galanter & Krishnan, 2001, p. 271).

In terms of institutional support, authors who deal with the topic agree that the subject of personal autonomy does not need to be a public body, personal autonomy rights can be vested in private law organizations, too (Brunner & Küpner, 2003; Heintze, 1998). According to this logic, personal autonomy as an organizational form can result from the freedom of association: the bottom-up creation of minority organizations carrying out different cultural and other activities that the members of the minority might feel important for identity reproduction can actually involve personal autonomy (Suksi, 2008a). The practice of furnishing with public powers civil law corporations is quite common in the field of education: in the case of private schools operating in minority languages and run by minority associations, public authority is delegated through the license, the right to issue diplomas, and to grade students (Suksi, 2015). Situation in which autonomous powers in different fields are given to different specialized associations, organizations, and institutions may also fall under the personal autonomy concept (Brunner & Küpner, 2003). Personal autonomy may also be seen as the mere guarantee of basic individual rights, which means that it does not require any separate administrative structure (Tkacik, 2008), though this approach is clearly at odds with the idea of autonomy defined as community empowerment.

Providing examples for personal autonomy arrangements is not easy since the term is often used interchangeably with the functional autonomy concept (discussed in the following subsection). The German language schools operating in southern Denmark, for instance, are described by Suksi as eloquent examples of "civil law institutions (…) used in the provision of public services and exercise of public authority for the minority and by the minority" (2015, p. 88), which means that the example qualifies, in principle, for what the definition of personal autonomy requires. Yet, Suksi labels the arrangement as a "form of functional autonomy", in agreement with Malloy (2015), who analyses the respective example under the heading of "functional non-territorial autonomy" in the Danish-German border region.

Though rarely discussed in the literature, officially recognized churches provide further examples of personal autonomy institutions. In Romania, for instance, Law 489/2006 provides a detailed description of the officially recognized 18 churches as private law legal persons of public utility with membership established according to the personality principle. The 18 churches operate in an autonomous way (Art. 8), according to their statutes and canonic codes, electing their own leadership, choosing the language of operation, having internal procedures of adjudication, hiring staff, holding property, receiving state subsidies, and accepting donations. It is interesting to note in this context that the separation of the Evangelic-Lutheran Church in Finland into two unilingual congregations by the Church Act, one Finnish-speaking, the other Swedish-speaking, is labelled by Suksi as "functional autonomy in ecclesiastical matters" (Susksi, 2008a, pp. 206–207).

Functional and Administrative Autonomy

'Functional autonomy' is a relatively new element in the NTA literature. Initially, it was suggested to denote the instances of private law version of personal autonomy, resulting from the transfer of selected State functions to private minority group organization, with the aim of relieving the regular public administration of certain duties (Heintze, 1998). Later, the term was proposed to refer to linguistic layering of public institutions, schools above all, but cultural and other type of institutions (health care, for instance) may also offer examples. The arrangements are meant to provide adequate linguistic services to a minority population within the State's institutions in charge with a certain public function, through the means of appropriate staffing and decentralization of control (Suksi,

2008a; Tkacik, 2008). In Suksi's account, integrated administrative structures for minorities are created according to public law rules in which "the languages are not separated into different legal persons but instead dealt with (…) within the legal person of the state or the legal person of the municipality", are present in Finland, Sweden, South Tyrol, Malaysia, Hong Kong, etc. (Suksi, 2015, p. 89).

Though generally viewed as belonging to the TA concept, 'administrative autonomy' is a term also used to denote a particular form of NTA: a set of functional autonomies—schools, public services or special, community-serving courts, etc.—coexisting in the same geographic area (Tkacik, 2008).

There is an interesting parallel between the 'administrative autonomy' concept as described by Tkacik and the idea of 'institutional completeness', targeted by the Francophone Acadian minority in New Brunswick, Canada. The aim of the arrangement is not just providing adequate linguistic services, as in the case of functional/administrative autonomy, but "to permit minorities to live in their own languages" (Chouinard, 2013, p. 236).

In the context of a very particular historical, social, and political setting, dominated by official bilingualism and the spirit of the provisions of the 1981 Equal Communities Act, on the one hand, and the tradition of elected school boards and health boards, complementary to the municipal councils, on the other hand, effective administrative duality emerged gradually in the province: distinct Acadian school boards, health boards, and municipal councils are elected in each four years which bear strong community mandate and are officially recognized as sub-state institutions sanctioned by state law, accessing public funds.

Attempts are made to establish Acadian land use planning commissions, economic development agencies and boards to supervise police forces, too. The sub-state minority institutional completeness provides the Francophone community significant autonomy in areas critical for language and culture maintenance. For further details, see Breton (1964), Chouinard (2013), and Bourgeois (2014).

Consociational Arrangements

Consociationalism is often mentioned as an effective tool of conflict management incorporating components of NTA. The original model proposed by Lijphart (1977) was meant to identify the common elements

which can be found in deeply divided societies governed by democratic political systems adapted to the circumstances of diversity by deviating from pure majority rule and institutionalizing power-sharing. Four such ingredients were described by Lijphart, two principal, and two secondary. The principal elements are the grand coalition of elites representing the various components of the society and the segmental autonomy of the components, the secondary elements are proportionality (in decision-making and resource allocation) and veto rights of the societal segments.

Explaining the meaning of segmental autonomy, Lijphart describes an arrangement very similar to the Renner–Bauer model: "On all matters of common interest, decisions should be made by all of the segments together with roughly proportional degrees of influence. On all other matters, however, the decisions and their execution can be left to the segments themselves", facilitating the "rule of the minority over itself in the area of the minority's exclusive concern" (Lijphart, 1977, p. 41). Segmental autonomy is in Lijphart's view a generalization of the federal idea which can be also non-territorial. He mentions Renner and Bauer as proponents of a "system of non-territorial federalism" based on the personality principle, which creates "autonomous *Kulturgemeinschafte*" (Lijphart, 1977, p. 43—italics in the original). In a later work, Lijphart mentions Renner and Bauer as "precedents" of the consociational theory (Lijphart, 2008, p. 4).

Examples of non-territorial federalism are provided in Lijphart's view by countries like the Netherlands, Austria, and Belgium (as far as the religious-ideological subcultures, rather than the linguistic communities are concerned), where the segments are geographically interspersed, and the segmental autonomy has been established on the personality principle. In Belgium and the Netherlands, consociational arrangements include the right of religious and linguistic minorities to establish and administer their own autonomous schools, fully supported by public funds, while in Cyprus and Lebanon separate personal laws have governed the family matters of religious minorities when consociational arrangements were in place.

The relevance of consociationalism for the NTA scholarship is discussed by several authors (Nimni, 2005; Oakley, 2013; Stratilatis, 2021, etc.). Nimni, for instance, believes "that the consociational model can be enriched considerably from the multifaceted conceptual dimensions of NCA, while the NCA model can be enriched by the wealth of

empirical work of consociationalist scholars on deeply divided societies" (Nimni, 2005, p. 8).

There are, however, critical observations, too. For Coakley, the relationship between consociationalism and group autonomy is less evident than it is commonly assumed: elaborate and deep forms of power-sharing may exist without group autonomy, and group autonomy, both territorial and non-territorial can exist without power-sharing: "Thus, we need not expect to find group or segmental autonomy simply because a set of consociational institutions is in place" (Coakley, 2013, p. 58). Bauböck argues that an essential distinction must be observed between Renner's model and consociationalism: "the latter searches for incentives for cooperation between political elites in central government institutions across segments, while the former is designed to achieve the opposite goal of separating nations from each other by giving each its own institutions of government" (Bauböck, 2005, p. 87).

McGarry and Moore (2005) admit that Renner has anticipated, indeed, consociational theory (including proportionality in state administration and minority veto over legislation), nevertheless they see a fundamental difference between the two. While both models equally freeze identities and reify existing divisions, Renner's construct triggers, due to its embeddedness in the personality principle, corporatist consequences which are not intrinsic in consociational designs: "although Renner's power-sharing proposals are prescient and important, his commitment to non-territorial autonomy, which requires corporatist principles, makes his form of power sharing less liberal than it might otherwise have been" (McGarry & Moore, 2005, p. 76).

1.1.5 Assessment

The NTA concept is clearly burdened by inconsistencies. There are, first of all, partly overlapping concepts—national autonomy, national cultural autonomy, cultural autonomy, on the one hand, and personal autonomy and functional autonomy, on the other hand—which are used rather arbitrarily by the various authors in different contexts. There are conflicting views on whether NTA arrangements need institutional support or not, and if so, the respective entities should be private or public law bodies. The large semantic span between the minimal version—personal autonomy understood as individual human rights—and the conceivable maximum—cultural autonomy requiring directly elected

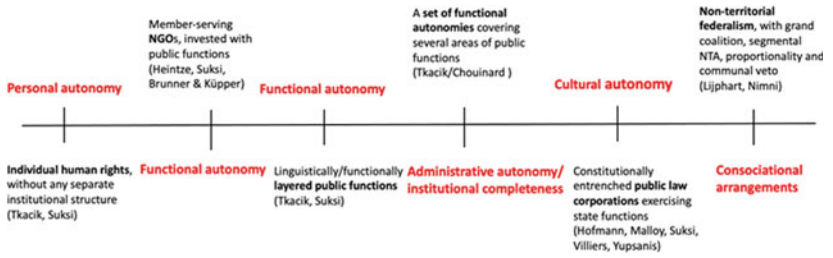

Fig. 1.1 The semantic span of subjacent terms covered by the NTA concept (Author's elaboration)

public law corporation—reflects a high degree of underdetermination which is undermining the credibility of the concept (see Fig. 1.1).

In terms of the arrangements' effectiveness, it is not difficult to observe that one can talk of genuine cultural self-determination in the case of 'cultural autonomy' at best. When the idea of 'cultural autonomy' is implemented according to the content of Box 1.4, institutional premises of democratic legitimacy within the autonomous community are provided, and effective cultural/educational self-government becomes possible in principle. When private law corporations created under the 'personal autonomy' heading are given consultative role by the State's authorities, the principle of cultural self-determination might be seriously compromised, and façade NTA arrangements may result. In the cases falling under the 'functional' and 'administrative' autonomy concepts, though cultural self-determination is evidently diffused, effective form of cultural self-government may occur due to the decentralization of certain competences to professional personnel (for more details, see the Chapter 6).

Finally, the mainstream NTA literature reflects a rather wide gap between the semantic content of the utilized concepts and the empirical realities those concepts are supposed to map, leaving in the blind spot plenty of empirical phenomena which would be worth to explore, like the institutional forms of religious autonomy or the wide variety of normative pluralism together with schemes of community representation that de-territorialize self-determination (see Fig. 1.2).

The growing interest for the NTA phenomenon which is evident in the scholarly literature lately will hopefully contribute to the gradual amelioration of these shortcomings. Progress in the two highlighted

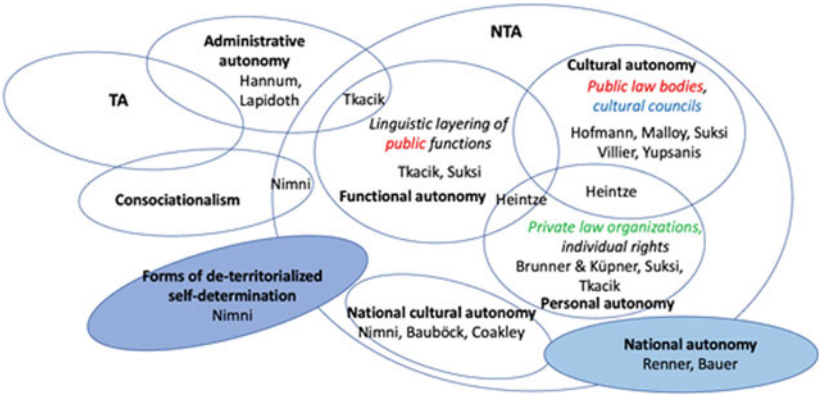

Fig. 1.2 The underdetermined character of the NTA concept (Author's elaboration)

regards—reducing underdetermination and narrowing the gap between theory and practice—would not only facilitate yielding the NTA concept less loaded with inconsistencies, but the differences between illusionary, façade forms of NTA, on the one hand, and genuine arrangements, which serve the interest of the targeted minorities, rather than those of the states, on the other hand, could also become more evident.

Summing-Up

- NTA arrangements fall under the broad autonomy concept and, as such, illustrate the logic of power-sharing. The power, which is divided and shared belongs to the state, the beneficiary of the arrangement is a not territorially defined sub-state actor. In NTA instances, the sub-state actors endowed with certain functions exercised by the state are institutions resulting from laborious procedures initiated by members of a certain category of the state's population, usually non-dominant groups, regardless of their residence.
- The mobilization of non-dominant groups targeting NTA is a form of struggle for internal self-determination, aiming to gain control over state functions and resources which may be critical for the chances of linguistic, religious, and cultural reproduction. Successful NTA movements result in a vast variety of arrangements, depending

on power relations, ethnodemographic realities, the potential for agency of the non-dominant group, institutional traditions, and preferences, etc.

- There are autonomy movements targeting some form of NTA which have not proven successful so far, yet expose clear potential of the claimants for such arrangements. And there are many forms of effective and resilient non-state law, traditional authorities, and practices of informal adjudication which display plenty of similarities with formal NTA arrangements, without being linked to any known autonomy movement.
- The term NTA is an umbrella concept encompassing all possible forms of autonomy short of the territorial version: national autonomy, national cultural autonomy (NCA), cultural autonomy, personal autonomy, functional autonomy, administrative autonomy, and consociational arrangements. The idea of non-territoriality is regularly associated with the personal/personality principle which stipulates that identity communities can be organized into autonomous units without considering residence, by uniting the members, based on free choice, in associations empowered to administer independently issues pertaining to identity maintenance.
- The idea of national autonomy is embedded in a particular historical context: the ambitious project of a thorough state-building reform in the late Austro-Hungarian Monarchy meant to effectively accommodate the nations of the Empire more and more interested in political emancipation. The aim of the envisaged constitutional reform was to conceptually separate the nation from the territory, by separating state functions into culturally irrelevant, and critical for the cultural reproduction of the national communities. The latter would have been handed over to legal entities formed by national communities according to the personality principle, within the frameworks of a broad symmetrical arrangement. The model of national autonomy advocated for by Renner and Bauer was never implemented as such, yet it remained an ideal type, inspiring national movements of important minority communities.
- National cultural autonomy is a term used in contexts when the relationships between dominant majorities and non-dominant minorities are managed by the means of asymmetrical arrangements: the dominant position of the majority is unquestionable, and the interest of

the minority is not more than gaining control over certain state functions and resources in order to preserve group identity.

- Cultural autonomy is the most precisely circumscribed type of NTA. The term was officially used for the first time in the Estonian Cultural Autonomy Law adopted in 1925: minority lists into which citizens could freely register, elections organized for electing the cultural council which, as a public law body, could issue by-laws within the limits of cultural and educational competences, impose taxes upon the members included in the lists, elect the members of the cultural self-government, the executive branch of the autonomy, and supervise its activities. Funding for the activities of the cultural self-government was provided by state subsidies, local government support, and taxes collected from the members.
- Personal autonomy is based on the idea that the subject of NTA does not need to be a public body, personal autonomy rights can be vested in private law organizations, too. The practice of furnishing with public powers civil law corporations is quite common in the field of education: in the case of private schools operating in minority languages and run by minority associations, public authority is delegated through the license, the right to issue diplomas, and to grade students. Personal autonomy arrangements can be found in other areas like culture, broadcasting, social assistance, etc.
- Functional autonomy implies linguistic layering of public institutions, schools, and local public administration above all, but cultural and other type of institutions (health care, for instance) may also offer examples. The arrangements are meant to provide adequate linguistic services to a minority population within the State's institutions in charge with a certain public function, through the means of appropriate staffing and decentralization of control.
- Though generally viewed as belonging to the TA concept, administrative autonomy is a term also used to denote a particular form of NTA: a set of functional autonomies—schools, public services or special, community-serving courts, etc.—coexisting in the same geographic area.
- Consociational theory was anticipated by Renner, and arrangements based on consociationalism may incorporate several elements of NTA. There are, however, fundamental differences between the two models, it cannot be inferred therefore that the two reciprocally generate one another.

Study Questions

1. Which are the main differences between TA and NTA arrangements?
2. What is the main difference between 'national autonomy' and 'national cultural autonomy'?
3. Which are the key institutional components of a cultural autonomy arrangement?
4. What makes the difference between personal and functional autonomy?
5. Which are the advantages, on the one hand, and shortcomings, on the other hand, of personal and functional autonomy compared to cultural autonomy?

Go Beyond Class: Resources for Debate and Action

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CHAPTER 2

Origins and Early Implementations of Non-Territorial Autonomy

Marina Germane and Börries Kuzmany

This chapter explores the origins of the idea of non-territorial autonomy and traces its theoretical development, as well as actual implementations, across time and space from the late Habsburg and Russian Empires to the Paris Peace Conference and to the interwar nation-states. Upon completing this chapter, you will learn how the concept of NTA came into being; what were its main features; who were the concept's main proponents; which political currents supported the idea and which opposed it; and, finally, how historical events and changes at both the state and the

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international levels shaped the NTA concept's ideological metamorphoses and determined its practical applications.[1]

2.1 Ethnic and Linguistic Diversity Management in the Austro-Hungarian Empire

2.1.1 The Habsburg State Reform: Historical Background

The Habsburg Empire was a multinational empire in Central Europe that comprised more than ten ethnolinguistic groups living, in a mixed pattern, in approximately twenty provinces that enjoyed different statuses within the overarching state. The Revolution of 1848—a democratic revolt against monarchic absolutism—introduced, for the first time, not only the idea of *civic equality* for all individuals but also the equality for all national groups within the empire. While the revolution itself ultimately failed, the idea of principal equality never receded entirely, despite being overshadowed by the reality of the socio-economic domination of the traditional Austro-German and Hungarian (in some regions—also of Polish and Italian) elites within the empire. The *nationality question*, born in 1848, remained a pressing issue until the eventual dissolution of the empire in 1918. Continuing tensions between individual rights, rights of the provinces, and the rights of the nationalities marked the decades-long discussions on the state reform within the empire (Stourzh, 1985).

Concept in depth

The nationality question
A historical term for the problem of accommodating ethno-cultural diversity of populations traditionally applied to Central and Eastern Europe in the nineteenth and early twentieth centuries. As Europe's continental empires were so ethnically mixed, it was difficult to speak about majorities and minorities, with the latter term also often perceived as derogatory by those it described. After World War I, and especially during and after the Paris Peace Conference, the 'nationality question' was gradually replaced by the 'problem of national minorities' in public discourse. It is important to note that minorities themselves continued to prefer the former term (hence the Congress of European Nationalities).

[1] The research for this chapter was supported by funding from the European Research Council within the project; "Non-Territorial Autonomy: History of a Travelling Idea", Grant Agreement No. 758015.

A crucial change occurred in 1867, when the Habsburg Empire was divided into the Austrian and Hungarian parts with separate constitutions and governments. Whereas Austria was established simultaneously as a multinational state *and* a federation of 17 provinces that all possessed their own provincial parliaments and governments, Hungary was constituted as the unitary state of the Hungarian political nation. Most importantly to our subject, while the new Austrian constitution transformed the various nationalities into legal subjects with certain rights, it nevertheless failed to define nationality itself, as well as its relation to the individual citizen. The discussions on the political implementation of non-territorial arrangements described in this part of the chapter largely refer to the Austrian part of the monarchy.

The Habsburg Empire's general public engaged in a decades-long state reform discussion that featured both centralist and federalist opinions. However, there was a disagreement within the federalist camp between those who favoured Austria's federalization according to its historically established provinces, and those who demanded to federalize along the national lines. At the same time, everybody understood that due to the existing highly mixed pattern of settlement, neither such nationally defined units nor the historical provinces would be ethnically homogeneous; thus, minority protection needed to be considered in any case. Following this reasoning and the understanding that nationality was rather a community of people than a community of territory, some suggested that it would be fairer to apply the *personality principle* rather than *territoriality principle* when it came to accommodating the linguistic and cultural needs of individuals (Lukas, 1908). This meant that a citizen's national belonging, rather than their physical presence in a given territory, should decide in what language they could communicate with the authorities, receive education, or exercise their political rights.

Concept in summary	**Personality vs. territoriality principles** In general, states organize and categorize their citizens according to both principles. Whereas citizens' other characteristics, such as social status or gender, are usually not associated with a given territory, their ethno-cultural belonging is most often conceptually and administratively linked to (a part of) a territory. Religious belonging was, for many centuries, also treated according to the territoriality principle. However, with the separation of church and state during the Enlightenment, confession became associated with the personality principle. Proponents of NTA suggested to do the same with nationality, arguing that this is not the citizen's place of residence that should determine how and in which language this person is educated, and how she or he communicates with authorities, but rather the national group to which this individual chose to belong.

2.1.2 Implementing Non-Territorial Arrangements in Imperial Austria

The first time the personality principle translated into political rights was in the so-called Moravian Compromise of 1905, which consisted of a new provincial constitution and a new suffrage law. Approximately, three quarters of the population of the Habsburg province of Moravia (today's Czech Republic) spoke Czech, and only one quarter—German; yet, the latter dominated the provincial parliament and institutions. Moravia's new electoral law introduced universal male suffrage but continued to privilege the nobility and bourgeoisie in the distribution of power. It granted the Czech parties a majority in the common multinational provincial parliament and government but conceded considerable veto rights to the German parties. Hence, the electorate was divided into different social classes, with most of them being also split into Czech and German sections (Glassl, 1967). This meant that a Czech taxpaying resident of Moravia's capital city Brno (Brünn) and his German taxpaying neighbour would be registered on two different electoral rolls and would elect their representatives in two different constituencies, one sending a Czech, and the other one a German deputy to the provincial parliament. The resulting problem of how to define such national belonging legally occupied Habsburg authorities and courts ever since (Kuzmany, 2023).

Very similar elements of non-territorial autonomy were later agreed upon in the provinces of Bukovina (today's Ukraine and Romania), Bosnia-Herzegovina, and Galicia (today's Ukraine and Poland). Given

Bukovina's extremely heterogenous population, more nationalities than in Moravia needed to be accommodated. The Bukovinian parliament passed a provincial constitution and suffrage in 1910 that legally provided for non-territorial arrangements for Ruthenians,[2] Romanians, Germans, and Poles, whereby Germans were de facto split again into Christians and Jews. The Galician Compromise of 1914 introduced a system combining non-territorially and territorially designed constituencies. The non-territorial arrangement in Bosnia's 1910 provincial constitution provided separate electoral districts based on the religious belonging of the electorate. However, many contemporaries interpreted the Orthodox, Catholic, Muslim, or Jewish electoral registers as de facto national registers of Bosnia's ethno-confessional groups (Kuzmany, 2016) (Fig. 2.1).

While all these compromises were clear non-territorial *arrangements*, there was, however, very little *autonomy* in them. They were, rather, consociational systems (Lijphart 1977) designed to secure political participation.[3] Most importantly, each nationality was entitled to elect its provincial parliament members without interference from other groups and to fill its proportionally allocated provincial government seats independently; in some cases, the elected members were also the highest controlling organ of educational institutions designed for their nationality. The aim was not to create different laws for different nationalities but to apply identical legal norms to people of different nationalities by way of separate local administration (Baernreither, 1910). Hence, no separate assemblies and certainly no separate budgets were ever introduced.

There is no consensus among historians whether this pacification-via-separation strategy in the provinces was successful, not least because there was too little time to observe it in action before World War I started in 1914 (Pokludová & Kladiwa, 2023). However, the very fact that several provinces followed Moravia's example, and that there were ongoing negotiations in other provinces, accompanied by a very lively public debate on the advantages and disadvantages of national autonomy—as it was called in the Habsburg Empire—testify that the idea was 'in the air'.

One of the intellectuals most engaged in this debate was Karl Renner (1870–1950). Born in Southern Moravia and trained as a legal scholar, he

[2] We prefer the ethnonym 'Ruthenian' to the later 'Ukrainian', because until the early twentieth century, 'Ruthenian' was used both in Austrian official documents and as self-identification by most individuals.

[3] For more on political participation, please see Chapter 3 by Balázs Vizi, p. 49.

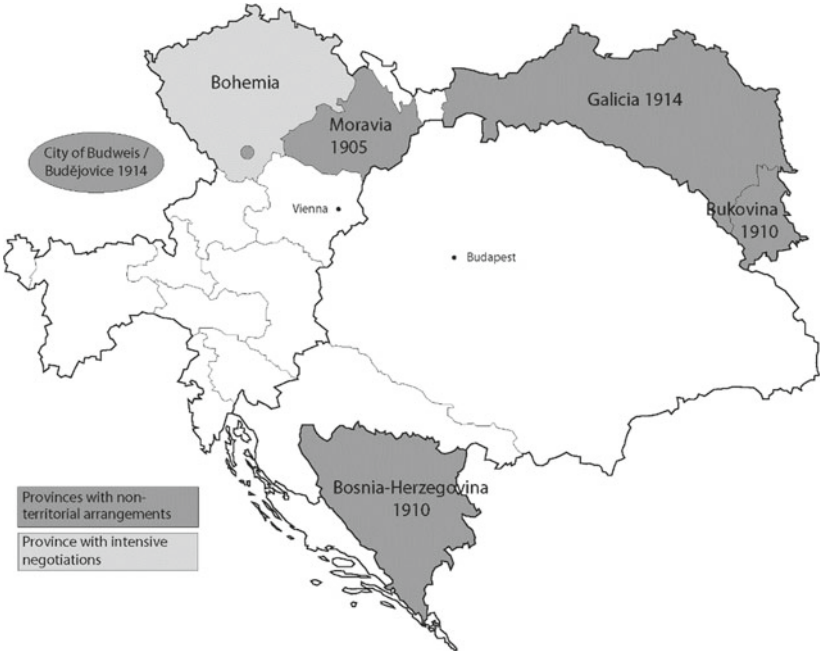

Fig. 2.1 At the beginning of the twentieth century, several Habsburg provinces introduced non-territorial arrangements in order to accommodate ethnic, linguistic, and confessional diversity [© Börries Kuzmany]

joined the Austrian Social-Democratic Party in 1890. Together with his younger comrades Otto Bauer and Etbin Kristan, Renner was the party's leading specialist on the *nationality question* and the mastermind of the Austro-Marxist concept of non-territorial autonomy. In sharp diversion from the Orthodox Marxist view on nationality, the Austro-Marxists were convinced that even in a future socialist society, national differences would not disappear. They thus argued that the national question was just as important as the class struggle and needed to be addressed immediately.

In his seminal 1902 book, Karl Renner suggested reorganizing Habsburg Austria (and later also Habsburg Hungary) into a federation of nationalities through a combination of territorial and non-territorial self-rule. Renner hoped to keep the Austrian polity strong by incorporating the nationalities as legal entities into the state (Arzoz, 2020).

NTA: The Rennerian model
'National autonomy', according to Renner, was a combination of territorial and non-territorial national self-rule. He envisioned a strong central parliament responsible for political, economic, and social affairs, along with eight non-territorially conceived national councils. These councils, comprised solely of the deputies of one nationality, have legislative power over the cultural and educational matters of that respective nationality. In Renner's model, the district becomes the basic administrative unit: in the monolingual districts, the autonomous national administration is identical to the state administration (i.e. territorial autonomy), while in the mixed districts, the state and the national organs are in charge of different affairs (i.e. non-territorial autonomy). Most importantly, the autonomous administration of cultural and educational matters is, according to Renner, not something separated *from* the state administration, but rather accomplished by the autonomous organs working *for* the state.

Concept in depth

2.2 Ethnic and Linguistic Diversity in the Russian Empires

Similarly to the Habsburg Empire, the multinational Russian Empire (according to the census of 1897, ethnic Russians comprised just 44% of the population) had also seen decades of state reform discussions. These debates aimed at the decentralization and democratization of the autocratic state. One of the earliest proponents of the parliamentary system in Russia, the Ukrainian political theorist Mykhailo Drahomanov (1841–1925), put forward a proposal to build the state up from its smallest entity, the local commune. These communes would then form a voluntary union with other communes, creating territorial units, which, in their own turn, would form the state. Drahomanov's *Free Union* (1884) programme, in a striking similarity to Renner's later model, combined *territorial and non-territorial autonomy elements* and was a major influence on the subsequent development of the Ukrainian national movement, as well as on the programme of the Russian Socialist Revolutionary Party, arguably the most important socialist party in Tsarist Russia.

The Revolution of 1905—a mass political and social unrest directed against the monarchy and the ruling classes—and the subsequent convocation of the First Russian Duma (state parliament) gave a new impetus to the democratization debates, which flared up at the centre and the periphery alike. The nationality question was understandably central to

those discussions, with the idea of *cultural autonomy* as a possible solution becoming increasingly popular, above all through the advocacy of Jewish thinkers and political activists, concerned with the future fate of Russia's numerous Jewish population. The Russian-Jewish historian Simon Dubnow (also Dubnov), 1860–1941, developed his own theory of Jewish Autonomism, published as a series of essays between 1897 and 1907. Firmly rooting his theory in the history of the centuries-old self-ruling Jewish communities, Dubnow, in a marked similarity to Renner and Bauer's ideas, suggested that Jews in the Russian Empire should demand not only civil equality for individual citizens, but also national, or collective, rights.[4] In essence, Dubnow applied the territorial demands made by other national minorities in the Russian Empire to the 'non-territorial' situation of the Russian Jews, calling for Jewish autonomy in the matters of education, culture, and communal welfare, as well as to self-taxation (Rabinovitch, 2014).

Various Jewish parties including socialists, democrats, liberals, and Zionists rallied behind Dubnow's ideas with a view of developing a political platform for the Russian Jews to stand in the elections to the 1st Duma. The notable exception was the General Jewish Labour *Bund*, arguably the most organized Jewish political group at the time. Although the social-democratic *Bund* made autonomy part of its political programme, it was categorically against the Jewish participation in the 'bourgeois' Duma.

The years of reaction that followed the Stolypin Coup of 1907 dampened the autonomy aspirations of Russia's numerous nationalities, but they did not put an end to them. The circulation of the ideas of Renner and Bauer through socialist and Marxist channels bore a deep impact on all Russia's nationalities, from the Baltics to the Caucasus; while they primarily aspired for territorial autonomy within the 'free democratic Russia', there was still a question of other ethnic groups in their midst, as well as of their co-ethnics dispersed through the huge empire. For those, non-territorial solutions were actively discussed (Gechtman, 2005; Khripachenko, 2012).

After the February Revolution of 1917 dethroned the Czar, the federalist projects of all liberal and socialist parties within Russia, from the Constitutional Democrats to Socialist Revolutionaries, from the Latvian

[4] For more on individual vs collective rights, please see Chapter 3 by Balázs Vizi and Chapter 5 by Piet Goemans.

Social Democrats to the Armenian *Dashnaktsutiun*, and from the Jewish *Bund* to the *Poalei Zion*, included autonomy in one way or another. Most often, a combination of territorial and non-territorial elements of autonomy was promoted, as attested by the resolution of the Congress of the Peoples of Russia that brought together more than 90 delegates in September 1917 in Kyiv.

And although the Bolsheviks—who came to power in November 1917—rejected the non-territorial autonomy advocated by the Austro-Marxists and the *Bund* outright, a closer look reveals that in reality, territorial approaches to the nationality question were often complimented by non-territorial arrangements within the Soviet Union (Battis 2023).

Concept in depth

NTA: The Medem Model

In his 1904 Yiddish essay 'The National Question and Social Democracy', the Jewish *Bund*'s main ideologue Vladimir Medem (1879–1923), who was also the party's authority on the nationality question, posited that a full-scope communal self-government is an expression of nationalism and thus undesirable in a socialist society. While being fully committed to the principle of non-territoriality, Medem put the main focus on linguistic and educational needs in the national group's daily life, rather than on its political participation in the overarching state. Medem also believed that the state was not to be trusted to administer those cultural and educational autonomous institutions with minorities' best interests at heart. He, therefore, called for the truly autonomous administrative units representing each national group on a non-territorial basis. In short, he favoured a narrower, primarily cultural definition of autonomy that would exist *in parallel* to the state. It is important to note that it is the Medem model of NTA that can be most often encountered in present times.

2.3 International Scene, NTA, and Minority Rights

Debates on the future of multinational Central and Eastern Europe intensified during World War I, which would eventually bring about the collapse of both the Habsburg and the Russian Empires and their disintegration into multiple nation-states. Those discussions transcended national borders, leading to the creation of transnational organizations advocating for peace and inter-ethnic harmony. One of those transnational bodies, the Central Organization for Durable Peace, founded in the Netherlands in 1915, aimed at popularizing the non-territorial nationalities experiments in the Habsburg Empire with a view of replicating some

of those successes at the international level. In March 1919, the Organization forwarded a draft of an *International Treaty on the protection of national minorities* to the Paris Peace Conference. Its author, the Austro-German legal scholar Rudolf Laun, building on his past-time professional experience in the Habsburg monarchy, suggested the creation of national collectives, as legal entities with an autonomous agency in cultural affairs, through voluntary national registers or *cadastres*. The draft treaty was ignored by the Conference, but it was not the peacemakers' last encounter with the demands for minority autonomy (Kuzmany, 2021) (Fig. 2.2).

While minority rights were not on the agenda of the Peace Conference at the start, the situation changed radically once a wave of antisemitic riots broke out across Central and Eastern Europe at the close of the war. Being widely reflected in the international press, the widespread disturbances made everybody wonder whether the newly minted nation-states could rival the late Russian Empire in its proverbial antisemitism, and whether additional safeguards were required for the protection of ethnic and religious minorities. The Jewish lobbying delegations to the Peace Conference, which included the representatives of the British, French, East European, and American Jewish organizations, submitted their memoranda to the peacemakers, asking not just for minorities' equal civil and political rights and non-discrimination on the grounds of race or religious creed, but also for the autonomous management of their religious, educational, charitable, and other cultural organizations. Those demands were, in part, based on the Copenhagen Manifesto issued by the World Zionist Organization in 1918 and asking for 'social, cultural and political autonomy for the Jews'.

The contribution of the Jewish delegations at the Paris Peace to the formulation of minority rights in the subsequent Minority Treaties that were placed under the guarantee of the League of Nations—thus creating the first-ever international regime of minority rights—is widely recognized by historians (Fink, 2004). And although the final version of the League of Nations' Covenant contained no reference to minorities at all, minority rights were firmly attached to the conditions of new statehood, and the Polish Minority Treaty, signed—reluctantly—by Poland in June 1919 along with the Treaty of Versailles, served as a template for the other minority treaties and unilateral declarations that were to follow (Robinson et al., 1943).

In the end, unlike the guarantees of equal rights, the words 'autonomy' or 'autonomous' did not make it into the Minority Treaties; however,

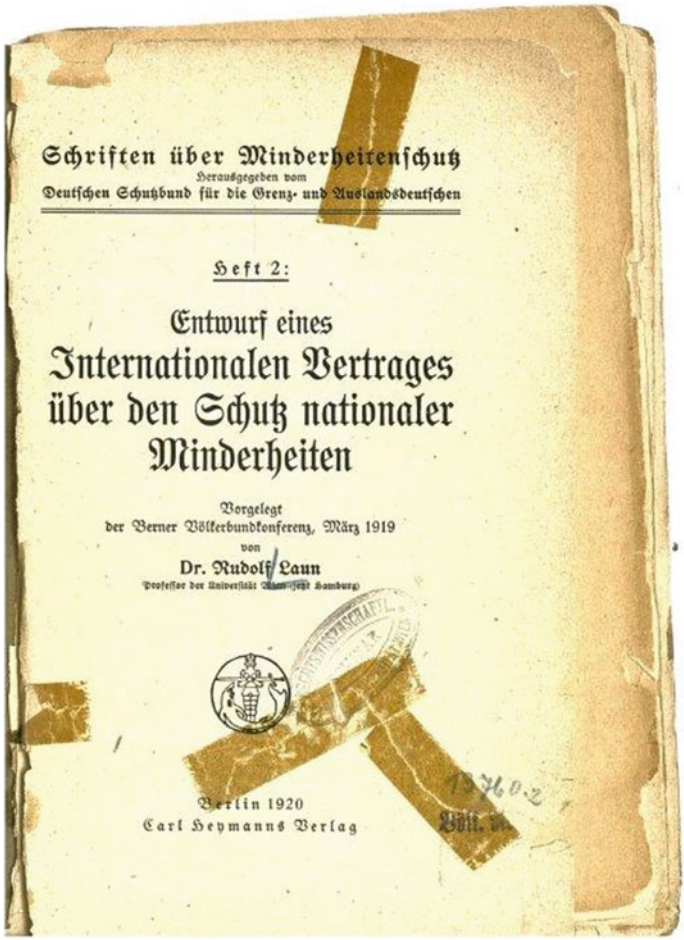

Fig. 2.2 Rudolf Laun's Draft International Treaty on the Protection of National Minorities (1919) contained NTA provisions that drew on the experience of national diversity management within the late Habsburg Empire © copyright expired

the stipulations on minority schooling, albeit couched in different terms, came quite close to the Jewish demands. But it is important to note that those rights were extended to individuals belonging to national minorities and not the national collectives themselves.[5] Therefore, as the concept of NTA unequivocally vests minority rights in national collectives, the Treaties' provisions **cannot be regarded as NTA**.

In the post-Versailles world, though, it quickly became apparent that minority rights enshrined in the Treaties clashed with the new reality of nation-states. Minorities often complained that the Treaties did not provide them with any meaningful agency, while nation-states perceived the League's interest in the situation of their minorities as unnecessary meddling in their sovereign affairs. The fact that the Minority Treaties applied exclusively to the enlarged and successor states of Central and Eastern Europe added insult to injury. Notably, throughout the interwar period, minority activists in the new nation-states continued to tirelessly advocate for non-territorial autonomy solutions to the nationality question (Smith et al., 2018).

2.4 Interwar Nation-States and NTA

Once the Bolsheviks grabbed power in November 1917, some of those autonomy projects of Russia's nationalities that originally had a territorial basis were transformed into claims to independent statehood. Those aspiring nation-states quickly repurposed autonomy that they had foreseen for themselves in the past for their newly made national minorities.

For example, when the Ukrainian Peoples' Republic declared independence in January 1918, it simultaneously passed the Law on National-Personal Autonomy, which was the world's first legal act granting non-territorial autonomy to national minorities. The law allowed Ukrainian Russians, Jews, and Poles to organize as corporate bodies of public law. The competences of the autonomous institutions were to be decided by the respective national unions themselves and were not necessarily limited to education and culture, but could also comprise social and economic issues—as long as they did not impair general state interests. The implementation of autonomy—i.e. setting up national registers, preparing elections to a minority constituent assembly, overseeing minority schools,

[5] See Chapter 3 by Balázs Vizi and Chapter 5 by Piet Goemans.

etc.—was assigned to the Russian, Jewish, and Polish minority ministers within the Ukrainian government. Due to the unstable political, military, and social situation in revolutionary Ukraine, none of the minorities reached the full status of non-territorial autonomy (the Jews came closest) before the Republic ceased to exist in 1921 (Liber, 1987).

The Jewish national personal autonomy (NTA) flourished in Lithuania from 1919 to 1922, when the Jewish National Council and the Ministry of Jewish Affairs were responsible not just for cultural and educational matters, but also for social affairs and philanthropy among the members of the Jewish communities; the Council was also granted the right to collect taxes. The foundations of the Jewish autonomy were stipulated in a provisional law passed in 1919, and the rights to autonomy of Lithuanian minorities in general—in the new republic's constitution of 1922. However, from 1922 on, fears of creating 'a state within a state' propagated by the right-wing circles of the Lithuanian majority prevailed, leading to the gradual curtailment of the Jewish autonomy before its final abolition after the 1926 authoritarian coup (Liekis, 2003).

Cultural autonomy (another designation for NTA) was promised to ethnic minorities in Latvia at the dawn of state independence as well. The two education laws (on general and on minority education) passed in 1919 gave minorities significant *de facto* control over their educational and cultural affairs and looked as a promising step in the NTA direction. However, the laws on minority autonomy, energetically advocated for by the Baltic German liberal MP Paul Schiemann and the Socialist Zionist MP Max Laserson, were never passed, despite the prolonged public and parliamentary debates in 1922–1925. After the authoritarian coup of 1934, minorities lost any control over education (Germane, 2013).

The situation was different in neighbouring Estonia, where various interconnected circumstances led to the adoption of a minority autonomy law in 1925. The law was equally rooted in the Austro-Marxist ideas of NTA and in the concepts developed by the aforementioned thinkers in the former Russian Empire, and is often cited as the best practical example of NTA implementation. The law gave minorities the right to establish cultural self-governments that represented voluntarily constituted communities that were also legally incorporated. In addition to receiving state funding, those communities also had the right to levy taxes on their members (Alenius, 2007).

Those self-governments were empowered to administer public and private minority schools and other cultural institutions. The law granted

non-territorial powers to the dispersed minority groups exceeding 3,000 members (only Estonian Germans, under the leadership of Ewald Ammende and Werner Hasselblatt, and Jews, under the leadership of Hirsch Aisenstadt, set up their respective self-governments under the law provisions), while territorial arrangements at the municipal level were put into place for the more compactly settled Swedish and Russian minorities. The law remained in force until Estonia's annexation by the Soviet Union in 1940, although after the authoritarian coup of 1934, the powers granted to minorities were partly restricted as a consequence of the general curtailing of democratic institutions (Hasselblatt, 1996; Laurits, 2010) (Fig. 2.3).

Fig. 2.3 The Jewish Cultural Council was the executive board of the Jewish NTA in Estonia. Tallinn, 1940 [© Tallinn City Archive, TLA.1387.1.16]

2.5 The Congress of European Nationalities (1925–1938)

Overall, by the mid-1920s, minorities in Central and Eastern Europe grew increasingly dissatisfied with the minority rights regime under the League of Nations, complaining that within that system, they were objects—rather than subjects—of international law. But minorities' faith in the League of Nations itself was still strong—they believed that if they could find a way to circumvent nation-states and establish a direct dialogue with the League, matters could be significantly improved. In 1925, upon the initiative of the Baltic Germans, supported by the Jews and other ethnic groups, the Congress of European Nationalities was established in Geneva. The Congress, which was envisioned as an international forum for minorities to exchange their experiences, discuss common problems and inform the League of Nations, in its heyday had over 200 delegates representing 20 ethnic minority groups from 15 European states. The Congress made non-territorial autonomy for minorities a cornerstone of its programme, and it was often discussed at its podium as a preferable solution to the nationality question.

Emboldened by the success of NTA in Estonia, in 1929 the Congress called for the replacement of the existing Minority Treaties by a genuinely pan-European guarantee of minority rights based on the non-territorial autonomy model. There were, however, internal disagreements at the Congress on the matter: while the territorially dispersed minorities, like the Baltic Germans and the Jews, favoured NTA, many compactly settled minorities—the Sudeten Germans most notable among them—preferred territorial solutions. The lack of ideological unity at the Congress did not serve to its credit, and the League of Nations' verdict was that the Congress had failed to present a convincing case for applying NTA beyond Estonia, and that a spirit of tolerance and liberalism would hardly be encouraged by institutionalizing separation between groups (Smith et al., 2018).

This failure to convince the League of the virtues of non-territorial autonomy, coupled with the aforementioned lack of internal unity and the growing financial dependence on Germany precipitated the demise of the Congress. Starting from the mid-1930s, the organization was gradually subverted by Nazi currents among its German membership, eventually losing its relevance for the European minority movement before finally ceasing to exist in 1938. This subversion, as well as the following collapse

of the League of Nations, along with its Minority Treaties regime and the entire international order, tarnished minority rights (and national autonomy by association). After World War II, minority rights all but disappeared from the political agenda, and the focus decisively shifted to individual human rights instead (Smith et al., 2018). As the rights of the national collectives are crucial to all NTA models, from Renner and Drahomanov to Dubnow and Medem, NTA was consigned to historical memory, being effectively transformed from a popular solution to ethno-cultural diversity to a moth-balled intellectual curiosity. Decades would pass before the concept saw daylight again. As the post-1989 transformation in Central and Eastern Europe was linked with the establishment of new nation-states (and re-establishment of the old), new national minorities emerged, and both old and new methods were required in order to of deal with the resulting ethnic diversity. Since then, interest towards NTA has been steadily growing on behalf of both academics and practitioners.

Summing-Up

- Mixed national settlement patterns in many parts of the Habsburg Empire led some legal scholars, politicians, and intellectuals to suggest that a person's national (i.e. ethnic) belonging should be the decisive in accommodating national diversity within the overarching state (*personality principle*). One of the most important contributors to these discussions was the Austro-Marxist Karl Renner, who suggested combining non-territorial and territorial elements of self-rule. Eventually, the late Habsburg Empire experimented with elements of non-territorial autonomy in several provinces: Moravia (1905), Bukovina (1910), Bosnia-Herzegovina (1910), and Galicia (1914) implemented new provincial constitutions that empowered their respective inhabitants to exercise their political rights according to their ethno-confessional belonging.
- In the late Russian Empire, the theoretical contributions on autonomy by the Ukrainian political thinker Mikhailo Drahomanov and by the Jewish historian Simon Dubnow, along with the ideas of Austrian Marxists, were the main inspirations for all Russia's liberal and socialist parties striving for democratization. The February Revolution of 1917 brought these ideas out in the open, with territorial and non-territorial arrangements being advocated as a solution

for the nationalities question from the Baltics to the Caucasus by various political parties.

- International debates on the future of the multinational Central and Eastern Europe intensified during World War I. Non-territorial solutions to the nationalities question were advocated by various international organizations, such as the Central Organization for a Durable Peace and the World Zionist Organization, and were also put forward at the Paris Peace Conference. But while provisions for minority schooling were eventually incorporated into the Minority Treaties, those rights were extended to 'individuals belonging to minorities' rather than to the national collectives. Therefore, the provisions of the Minority Treaties cannot be regarded as NTA.
- The world's first legal act granting non-territorial autonomy to minorities was passed by the short-lived Ukrainian People's Republic in 1918. The Jewish national personal autonomy flourished in Lithuania from 1919 to 1922; it was gradually curtailed before being finally abolished after the authoritarian coup of 1926. Although Latvia granted its minorities de facto autonomy in education and cultural affairs in 1919, the promised law on NTA never materialized, with minorities losing control over education after the authoritarian coup of 1934. The Estonian 1925 Cultural Autonomy Law is widely regarded as the best practical example of NTA implementation. The law, albeit with some curtailments, survived the authoritarian coup of 1934 and remained in force until Estonia's annexation by the Soviet Union in 1940.
- The Congress of European Nationalities, an international forum representing minority groups from 15 European states, made NTA into a cornerstone of its programme and suggested replacing the Minority Treaties by a pan-European minority rights regime based on the principles of NTA. The proposal was rejected by the League of Nations on the grounds that assigning collective rights to minorities would institutionalize separation between groups, against the spirit of tolerance and liberalism. After World War II, minority rights all but disappeared from the international agenda, with the focus shifting towards supposedly all-encompassing individual human rights.

Study Questions

1. Why was there a state reform discussion in the Habsburg Empire, and what was the reasoning behind it?
2. Which political parties in Imperial Russia advocated for NTA?
3. How did NTA activists try to influence the creation of an international minority rights regime during and after World War I? Were they successful in promoting NTA?
4. Which countries implemented NTA, and what were the similarities and differences among them?
5. What were the proclaimed goals of the European Nationalities Congress, and what role did NTA play in them?
6. Which historical events tarnished the perception of the concept of NTA after 1945?

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CHAPTER 3

NTA and International Minority Rights

Balázs Vizi

International standards on minority rights remain by-and-large silent on minority autonomy and references to autonomy arrangements can be found mostly in legally non-binding international documents. In fact, in political discourse minority demands for autonomy are usually perceived as having a territorial dimension and states often see these as hidden claims for future secession. Thus, the question of minority autonomy is often linked to security concerns and to the interests in maintaining political stability. While non-territorial autonomy could hardly be seen as providing any basis for secessionist territorial claims, the main problem is seen in the close interrelation perceived existing between autonomy claims and peoples' right to self-determination.

From another perspective, minority autonomy reflects the community characteristic of minorities, while minority rights are generally understood at international level as forming part of universal human rights, that are perceived as individual rights. Most states remain reluctant to recognize

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the collective characteristics of minority identity and for a long time, the general understanding of minority rights at international level was limited to the prohibition of discrimination and the minorities' right to existence. This was reflected in the 1948 Convention on Genocide and in the inclusion of discrimination based on "national or ethnic origin" in the 1966 International Convention on Racial Discrimination. Even, the first international legal provision on minority rights, Art. 27 of the 1966 International Covenant on Civil and Political Rights was carefully formulated to limit the community dimension of minority rights. This restrictive approach rendered difficult to include the collective dimension of minority identity. The primary goal of minority rights is to protect the existence of minorities and their identity. A serious dilemma emerges on whether this goal can be achieved by granting individual rights only or there is also a need to recognize community rights as well. International human rights law, that is based on individual rights, regards communities as the potential beneficiaries of protection but not the subjects of rights. This restrictive interpretation of minority rights reflects indeed the cautious approach and the fears of many governments that the legal reinforcement of the community-character of minorities potentially would lead to conflict between majority and minority populations. Against this background any claim for autonomy, where decision-making competences may be transferred to the minority community is seen as a demand for recognizing collective rights that can be inevitably linked to the right to self-determination as the only true collective right under international law.

This theoretical debate was translated into first hand political debate in the early 1990s when in Central and Eastern Europe a number of ethnic conflicts emerged and many states needed to find constitutional solutions for minority-majority relations. Many international documents on minority rights, adopted after 1990 in Europe, in one way or another address this question within the context of minorities' right to participate in public life, without linking autonomous arrangements to self-determination.

This chapter is aimed at highlighting how is NTA reflected in international documents on minority rights and how can NTA fit in the international minority rights regime.

3.1 Minority Rights as Human Rights

From a legal point of view, the actual regime of international minority protection is a relatively recent development in international human rights law. After 1945—also in reflection to the failure of the League of Nations' system of minority protection—most states were reluctant to take specific minority protection obligations and focused more on the reinforcement of the universal protection of human rights.

Particularly relevant were the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 and in a European context, the 1950 European Convention on Human Rights (ECHR) which do not provide any specific provision for minority rights, however the inclusion of the principle of non-discrimination and equality also at international level could be seen as a very important instrument also for the protection of the rights of persons belonging to minorities (Art. 2 and Art. 14, respectively).

The post-World War II pattern developed in the first place by the United Nations signalled a period of exclusive individual rights approach, and this was reflected also in the adoption of the International Covenant on Civil and Political Rights (ICCPR) which declared for the first time in a UN treaty the specific rights of minorities. Art. 27 of ICCPR reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". It is noteworthy that this provision essentially focuses on the right to identity but does not mention specific state obligations leaving a broad margin of discretion for States to act. However, later, the Human Rights Committee in its General Comment on Art. 27 argued that "cultural rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them".

Concept in summary	**The most important international human rights treaties relevant for minorities 1945–1990** 1948 Convention on the Prevention and Punishment of the Crime of Genocide (right to existence) 1960 UNESCO Convention against Discrimination in Education, in particular Art. 5 1965 International Convention on the Elimination of All Forms of Racial Discrimination 1966 International Covenant on Civil and Political Rights, in particular Art. 27 1989 Convention on the Rights of the Child, in particular Art. 30 1989 ILO Indigenous and Tribal Peoples Convention

The international protection of minorities started to get more attention only in the 1990s, when first the UN General Assembly adopted a declaration on the rights of minorities, and when especially in Europe the rights of minorities have become a central issue in international relations. Following the collapse of communist regimes and as a response to violent dissolution of Yugoslavia and the Soviet Union, in international documents there has been a shift towards more active engagement of the State in protecting minority cultures and promoting the political inclusion of minorities. In this perspective, international documents emphasize that the protection of minority rights is not only a consistent part of human rights protection, but may also be an important security tool in maintaining social and political stability. Against this background, it has become widely accepted that effective participation of minorities in public life requires specific guarantees and institutions, potentially even recognizing autonomy arrangements.

In a European context, international organizations took an active role in addressing minority rights protection in the 1990s both in the perspective of extending international human rights protection and in reinforcing international stability and security. The protection of minority rights emerged also strongly in a security perspective, signed by the adoption of Conference on Security and Co-operation in Europe (CSCE, after 1994 OSCE) Copenhagen Document and other CSCE/OSCE declarations including references to minorities. On the other hand in their legal protection under international law, the adoption of the Framework Convention for the Protection of National Minorities (FCNM) in 1995 and that of the European Charter for Regional or Minority Languages (Language Charter) in 1992 were the most determining developments,

which codified the specific rights of minorities in different areas from linguistic to political rights. The FCNM was the first international treaty exclusively dedicated to the rights of minorities under international law as a legally binding document, establishing also a supervisory mechanism on its implementation. Neither the Language Charter nor the FCNM mentions minority autonomy, but in legally non-binding recommendations and commentaries both within the OSCE and within the Council of Europe, autonomous arrangements are interpreted as an appropriate tool for securing participation of minorities in political life.

Nevertheless, the focal points of international minority protection, identified in the principle of non-discrimination, and the acknowledgement of specific minority rights reflect contentious concepts of minority rights protection, the term of 'minority', the extension of specific rights (in language use, in political rights, etc.), the right to autonomy, are all strongly debated issues, many states have different approaches to these basic concepts of international documents on minority rights.

This theoretical debate is particularly relevant for NTA, since any minority claim for autonomy is often seen as a demand for the recognition of a collective right to self-government. That is why the question of collective or group rights is particularly important in this context.

3.2 Individual Rights vs. Group Rights

A major theoretical question is whether individual and group rights approaches to minority rights are mutually exclusive or they just reflect different dimensions of the same set of rights.

International documents in most cases acknowledge only the specific rights of individuals belonging to minorities, even if their rights can be exercised "*in community with other members of the group*" (ICCPR, Art. 27.), the community as such is not overtly entitled to these rights. This legal formulation does not deny the existence of minority groups as such, but nor does it offer explicit legal protection to the group either (cf. Henrard, 2000: 153–155).

A great part of literature in law and political science on minority rights focused on the issue of whether it is the individual or the community to be given priority in terms of rights recognition and protection. "Individualist" and "communitarian" approaches characterized the debate over minority rights in the past decades (cf. Kymlicka, 2001: 17–38).

Minorities with access to collective rights would come to enjoy widely assured and accepted individual rights of persons belonging to minorities. Asbjørn Eide expressed it in a deductive analysis of non-minority-specific

individual human rights that are relevant to minority groups as well: "Human rights are essentially individualistic. They deal with the rights of the human person as an individual. Many persons belonging to ethnic, religious or linguistic groups feel, however, that they need a *protection of their group and group identity*. The core elements of that identity is *the right to organize themselves as a group*, to use their own language, to be able to preserve, to reproduce, and to develop their own culture and therefore to control or have a significant impact on the content of the education of their new generations. A part of this concern is to be able effectively to influence political decisions affecting themselves" [emphasis added] (Eide, 1998: 6).

3.3 The Participation of Minorities in Political Life

Fundamental political rights, as human rights, shall be accessible to people belonging to minorities without any discrimination in line with the existing individual human rights standards. The crucial international human rights documents guarantee to all citizens the right to participate in their country's political life. However, these commitments recognize only the prohibition of discrimination without any minority-specific dimension.

At international level, there was a major concern that the exclusion of minority communities from public decision-making and from state organs may contribute to ethnic conflicts (Wimmer et al., 2010). This explains why minority participation in public life is seen as an "essential component of a peaceful and democratic society" (OSCE HCNM Lund Recommendations, para. I. 1.) and why the right to effective participation has become an important provision in minority protection instruments after 1990. States though reserved a large margin of discretion on deciding what procedures and institutions would secure minority participation. In fact, there is a broad scale how "participation" is understood ranging from lobbying to making decisions.

It seems to be clear that political rights are essential for the protection and promotion of group interests. The specific right to participation in the public life of minorities was formulated in the international documents on minority rights since the 1990s. This implies that people belonging to minorities should not only have the right to full equality before the law in their political rights without any form of discrimination, but it also

sheds light on their special needs in influencing public affairs. "Having a voice" in public affairs may be interpreted on a broad scale from presence, and consultative rights, to other forms of weak or strong influence on public affairs, including also different forms of "self-government" (see Ghai, 2010). Yet "effective participation" does not necessarily imply any form of autonomy. As modern nation-states are organized on a territorial and ethno-cultural basis, the question of minorities' participation in public life raise important questions on the role of the state and its relation to the political community. Majority community usually tends to prefer "representation" as it does not affect its control over the entire territory of the state and its own members outside the majority areas would not suffer discrimination. Even NTA may be deemed by the majority as giving up decision-making powers. On the other hand, for minority communities participation without self-government would be a limitation of their political rights, especially of their equality in controlling affairs that deeply matter for minority communities, such as culture, language. Both approaches may be threatening one or the other group, as either the majority or the minority may fear that its fundamental rights would be jeopardized.

There are two key documents which may help in interpreting minorities' rights to participation: in 1999, the OSCE High Commissioner on National Minorities (HCNM) published the Lund Recommendations and the FCNM Advisory Committee also issued a detailed commentary on the question in 2008. Both expert documents stress the importance of "effective participation" in public life: i.e. minorities should have more participatory rights than just having the right to express their political opinions openly (either through freedom of speech or via voting rights). Effective participation in public life can be guaranteed by the state in very different forms, such as: special representation in organs of the state (executive, legislative, public service, etc.); electoral systems which ensure adequate representation; institutions for consultation; control or dominance of decision-making processes; participation through sub-national forms of government; participation through autonomy arrangements, etc. Based on these two expert documents we may draw the conclusion that international standards mention the effective participation of "persons belonging to minorities" in a broad sense, the range of possible solutions thereby definitely comprising territorial and non-territorial autonomy.

Concept in depth

Lund Recommendations on the Effective Participation of National Minorities in Public Life in 1999

The OSCE High Commissioner on National Minorities (HCNM), following broad consultations with international experts, issued the Lund Recommendations on the Effective Participation of National Minorities in Public Life in 1999. The recommendations offer guidelines on principles participation in decision-making, at the central, regional, and local levels, elections, advisory, and consultative bodies; self-governance, autonomy covering territorial and non-territorial arrangements; and guarantees, including constitutional and legal safeguards, and remedies.

The HCNM's recommendations are legally non-binding and only offer advice, guidelines to States on how to interpret and implement international minority rights standards.

3.4 The Right to Autonomy in International Law

"Collective rights may encompass a wide range of issues important for minority life. If collective rights amount to some form of essential self-determination (political, cultural or other) they become an autonomy" (Brunner & Küpper, 2001: 19). In line with this definition, the most important criteria of any form of minority autonomy is that it shall be vested with specific jurisdiction over a substantial number of minority issues and shall be able to exercise this jurisdiction in its own responsibility. The various legal arrangements guaranteeing autonomy in national legislations can be divided along their finality, whether they provide autonomy for a group of people on a personal basis or for a territory and the people living on that territory.

Most international documents remain silent on autonomous arrangements and if not, make reference to minority self-government conditional on the existing legislation and policies of the State concerned. At universal level Art. 2. para. 2. of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities stated: "Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life". In addition to that, Art. 2. para. 3 adds that "persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate on the regional level concerning the minority to which they belong or the regions in which they live". It shall be noted that while Art. 2 (2) speaks about participation in "public life", Art. 2 (3) recognizes

the right of persons belonging to a minority to participate effectively "in decisions concerning the minority to which they belong". In this sense, participation "in decisions" imply that States are expected to grant special political rights for persons belonging to minorities with regard to issues that directly affect the minority group to which they belong. UN Declaration, however, leaves open for different interpretations the procedures and institutions of participation. In practice the important question is whether a minority group in a society has the right to control its own affairs through its own decision-making bodies, or its participation in public life is limited to the existing State organs, like the parliament or the government. Considering that in principle States should offer special measures for securing "effective participation" of minorities, individuals, and groups may find different levels of organizations appropriately, so there should not be any contradiction between autonomy and political participation (Thornberry, 1993: 134).

Later, in its Commentary to the Declaration the UN Working Group on Minorities stated that "while the Declaration does not provide group rights to self-determination, the duties of the State to protect the identity of minorities and to ensure their effective participation might in some cases be best implemented by arrangements for autonomy in regard to religious, linguistic or broader cultural matters". The Commentary also added that "the Declaration does not make it a requirement for States to establish such autonomy" but it made clear that "good practices of that kind can be found in many States". The Commentary also recognized the broad variety of possible autonomous arrangements, that can be territorial (local or regional) and cultural (non-territorial), and can be more or less extensive. An interesting new example for recognizing a comprehensive approach combining territorial and non-territorial elements of minority autonomy is reflected in the draft Nordic Sami Convention, adopted in 2017.

In a European context state practices offer various examples that autonomous arrangements may be one form of exercising control over and taking decision on issues specifically relevant for minorities. The legally non-binding CSCE Copenhagen Document (1990) reflects a cautious approach on coupling minority participation rights with establishing autonomy in specific circumstances "as one of the possible means" to protect minority identity. The Copenhagen Document stated that the CSCE States "will respect the right of persons belonging to national

minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities". However, the text does not recognize a minority right to autonomy, it just takes note that such autonomies exist in some states: "The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned" (para. 35). In 1991, the CSCE Meeting of Experts on National Minorities followed this cautious approach, when it listed the different approaches and mechanisms that the participating states introduced to secure the effective participation of minorities, noting "that positive results have been obtained by some of them in an appropriate democratic manner by, inter alia (…) self-administration by a national minority of aspects concerning its identity in situations where autonomy on a territorial basis does not apply (…)". The 1999 Istanbul Document, the Charter for European Security, following previous CSCE/OSCE documents also recognized that "various concepts of autonomy" and other approaches "constitute ways to preserve and promote the ethnic, cultural, linguistic and religious identity of national minorities within an existing State" (para. 19.).

The OSCE HCNM in the Lund Recommendations underlined that autonomy is a useful means to preserve minority identity against majority pressures in democracies and also highlighted that NTA, i.e. "personal or cultural autonomy" may represent a division of power in cultural issues, allowing members of minorities to exercise control over issues relevant for their group identity. Nonetheless, there are no clear standards on how should these autonomous bodies be elected and function. The term "cultural" autonomy is really flexible; there are many states that apply the term without offering any decision-making or self-governing competence to the "autonomous" institutions (Osipov, 2013: 7). Even if we talk about an elected body, an operational cultural or non-territorial autonomy arrangement can secure "effective participation" of persons belonging to minorities in political life, if it has influence in special policy areas relevant for minorities, like culture or education.

Within the Council of Europe, the Parliamentary Assembly made important contribution to the recognition of minority political rights,

including their eventual right to autonomy. In its Recommendation 1201(1993) the Parliamentary Assembly stated that "[i]n the regions where they are in a majority the persons belonging to a *national minority shall have the right* to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state" [emphasis added]. Later, in 2003 the Parliamentary Assembly adopted a separate resolution on the positive experiences of autonomous regions in Europe. This resolution recognized the positive role of territorial and cultural (i.e. non-territorial) autonomy arrangements in resolving internal conflicts.

The legally binding FCNM does not make any reference to autonomy when it formulates the importance of political participation under Article 15: "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them".

Yet the Advisory Committee of the FCNM highlighted in its commentary that while FCNM Art. 15 does not provide a right to autonomy, still "cultural autonomy arrangements, whose aim is *inter alia* to delegate competences to persons belonging to national minorities in the sphere of culture and education, can result in increased participation of minorities in cultural life". Relevant competences may include maintaining cultural institutions or schools, the authority to decide minority language school's curricula, etc.

Although this provision does not mention autonomy, but State Parties report on their domestic developments related to minority autonomy under this article and also the FCNM monitoring body, the Advisory Committee formulates its opinions on autonomy in relation to Art. 15.

While one may not find any explicit normative provision on minorities' right to autonomy, the existing international standards on minority rights do not exclude that, both the OSCE HCNM and the FCNM Advisory Committee encourage States to consider autonomy arrangements as an institution securing minority participation. Obviously, whether states create or not the conditions for minority autonomy within their constitutional settings remains a question of domestic competence.

Summing-Up

- The concept of *international minority rights protection*—in a rather simplistic formulation—may be seen as building on two equally powerful arguments: on the one side, it is seen as the full extension of human rights to persons belonging to minorities, while, on the other hand, from a political, security approach it is often conceived as an appropriate political instrument of conflict-prevention/conflict-resolution. In this sense, *general political rights* may also be adjusted to the situation of minorities in order to secure their effective participation in public life and decision-making. Participation in this perspective may be realized in many different forms and institutions including also different forms of autonomous arrangements. NTA, like any other minority autonomy arrangement, may fit well in both approaches: it can be an institutional tool in granting minority participation in public life (as a special form of political rights), and it may serve as an functional solution for inter-ethnic conflicts.
- International legal instruments do not recognize in any way minorities' "right to autonomy", and the question of minority autonomy appears in a very different context. Minority self-government or minority autonomy appeared in international documents in relation to the right to participation in public life. Against this background, the importance of "*effective participation*" in political life and decision-making appeared in regard to a comprehensive interpretation of minority rights, potentially including autonomy as well.
- Nevertheless, there seems to be a consensus among experts, reflected also in a number of legally non-binding documents that both territorial and *non-territorial autonomies may serve as positive examples* for securing minorities' participation; however, all autonomy or self-government arrangements depend on domestic legal and political conditions.

Study Questions

1. What are the forms of minority political participation recognized in international documents?
2. Can the principle of self-determination be linked to NTA?

3. What is the difference between individual and collective rights approaches to minority rights?
4. Which international documents mention autonomy as a positive example?

Go Beyond Class: Resources for Debate and Action

- Council of Europe Framework Convention for the Protection of Minorities https://www.coe.int/en/web/minorities/home.
- The Lund Recommendations on the Effective Participation of National Minorities in Public Life, OSCE High Commissioner on National Minorities, 1999. https://osce.org/hcnm.
- Report of the independent expert on minority issues on minorities and effective political participation: a survey of law and national practices, 2010. https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F13%2F23&Language=E&DeviceType=Desktop&LangRequested=False OpenElement.
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Council of Europe Documents

Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to Minorities in Cultural, Social and Economic Life and in Public Affairs, 5 May 2008, ACFC/31DOC(2008)001.

CoE PA Rec. 1201(1993) Recommendation on an Additional Protocol on the Rights of Minorities to the European Convention on Human Rights.

CoE PA Res. 1334(2003) Positive Experiences of Autonomous Regions as a Source of Inspiration for Conflict Resolution in Europe.

European Charter for Regional or Minority Languages, adopted on 5 November 1992, E.T.S. No. 148.

European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. no. 5. Adopted in Rome on 4 November 1950.

Framework Convention for the Protection of National Minorities, adopted on 1 February 1995, E.T.S. no. 157.

OSCE Documents

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990.

OSCE Charter for European Security The Charter was adopted at the 6th OSCE Summit of Heads of State or Government in Istanbul and Is Part of the Istanbul Document 1999.

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CHAPTER 4

NTA as a Democratization Tool

David J. Smith

As Chapter 2 of this volume has shown, NTA was implemented in several contexts and extensively discussed internationally during the first four decades of the twentieth century, mainly in relation to the former land empires of Central and Eastern Europe and their successor states established after World War I. Immediately after World War II, by contrast, NTA largely disappeared from the international legal and political agenda, as the concept of targeted minority rights was replaced by a new emphasis on universal individual human rights.

Far from becoming just a footnote in history, however, NTA has again started to attract strong interest from scholars and policymakers since the start of the 1990s (Coakley, 1994). This resulted from new applications of the concept in various settings around the world, but especially in Central and Eastern Europe following the end of communist rule. Here numerous laws and institutional arrangements bearing the NTA label have come into being, from Hungary (1993) to Estonia (1993) and Russia (1996) to the countries of former Yugoslavia (Slovenia 1994, Croatia

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2002, Montenegro 2007, Serbia 2009). This revival has occurred within the context of wider processes of democratization supported by European and Euro-Atlantic International Organizations, which have elaborated new international standards on minority protection. These standards have become the principal benchmark against which different forms of NTA are assessed today. The main aim of this chapter is to analyse how NTA fits within this wider framework and to assess the potential of NTA as a democratization tool.

Study Objectives

The chapter seeks to:

- determine the origins and drivers of contemporary variants of NTA;
- assess the relationship between NTA and democratization in post-Cold War Europe;
- establish the main characteristics of a democratic NTA arrangement; and
- use these characteristics to assess contemporary examples of NTA.

4.1 Origins and Drivers of NTA as a Tool of Democratic Statecraft

The contemporary revival of NTA as an instrument of democratic statecraft is not just a Central and East European phenomenon. Nor is it entirely a product of the post-Cold War era. NTA principles can be seen, for instance, in the arrangements that were introduced within the Brussels Capital Region that took shape as part of the federalization of Belgium from 1970 onwards, and the provisions made for French-speaking Acadians in Canada during the same period. New contemporary manifestations of NTA have thus represented a response to what the anthropologist Crawford Young (1983) called a 'surge of mobilised communalism' within Western democracies from the 1960s onwards, and attendant developments in international law such as the adoption of Article 27 of the 1966 United Nations International Convention on Civil and Political Rights. In this respect, NTA has also emerged as a key reference point in relation to the rights of indigenous peoples, as seen for example in the inauguration of the Sámi Parliament of Norway in 1989. The presence of a shared sense of belonging or 'We feeling' (Easton,

1965) uniting the citizens of a polity has long been understood as one of the fundamental building blocks of a functioning democracy. In the classic liberal conception, this common identity was taken to imply cultural homogeneity (Mill, 1861).However, as Will Kymlicka remarked in 2007, 'In the last forty years, we have witnessed a veritable revolution around the world in the relations between states and ethno-cultural minorities. Older models of assimilationist and homogenizing nation-states are increasingly being contested, and often displaced, by newer "multicultural" models of the state and of citizenship' (Kymlicka, 2007, 3). In the realm of political theory too, this same period saw new contributions such as Arend Ljiphart's (1968) concept of consociationalism, which held that democracy was possible in ethnically divided states if political elites representing rival communities could manage to agree on power-sharing arrangements, including features such as constitutional guarantees, territorial decentralization, and minority rights. While the NTA model is older in origin, it fits well within this contemporary frame, since autonomy is a matter not just of self-rule for a given minority, but also of shared rule between different groups inhabiting the same territorial space.

The NTA revival gained further impetus from the wave of democratization that swept Central and Eastern Europe and the Balkans from the late 1980s to the start of the twenty-first century. Amidst the initial liberal euphoria that followed the fall of the Berlin Wall in November 1989, many Western scholars and policymakers assumed that the societies emerging from authoritarian communist rule had now embarked on a pre-set transition to democracy. A major issue here was the fact that 'the so-called transitology school all but ignored nationality and political community as explanatory factors of democratisation—or simply took it for granted' (Duvold & Berglund, 2014, 344). The fall of communist regimes and, especially, the demise of the multinational USSR and Yugoslavia unleashed a new wave of political contestation around issues of state- and nation-building within newly created and/or reconstituted polities that were often deeply divided along ethno-cultural lines. In the worst case, these tensions descended into secessionist movements within the new states and violent inter-ethnic conflict over territory, as seen most graphically and tragically in the case of former Yugoslavia, but also in successor states to the USSR such as Georgia and Moldova. These developments quickly brought into focus the question of how to strengthen the 'stateness' of post-communist countries—i.e. how to preserve the integrity of their territorial borders and forge their ethnically diverse

populations into stable and cohesive political communities—as one of the essential prerequisites for the development of functioning democratic political institutions (Brubaker, 1996; Linz & Stepan, 1996).

Post-communist democratization typically went hand in hand with popular support for 'Europeanisation' or 'Return to Europe', the expectation being that closer integration with the main European and Euro-Atlantic organizations established in the post-Cold War West would enhance the security, stability, and prosperity of societies emerging from communist rule. Gaining membership in the European Union (EU) became an especially key goal of reformist governments in the region; one essential prerequisite for joining the EU was to become a member of the Council of Europe (CoE), Western Europe's post-World War II 'club of democracies', which began to expand to the democratizing states of the East from the start of the 1990s. At around the same time, issues of minority protection found their way back onto the agenda of both these organizations, which took their cue from ongoing work undertaken by the Conference on (from 1994, the Organization for) Security and Cooperation in Europe (CSCE/OSCE) (see below). In 1993, when the EU unveiled its 'Copenhagen Criteria' for admitting new applicant states from Central and Eastern Europe, these included 'stability of institutions promoting democracy including respect for and protection of minorities'. This conditionality left the EU in a strong position to exert external pressure on applicant governments to adopt firmer guarantees for the rights of national minorities. In terms of the standards to be applied, the EU was guided primarily by the CoE, which drafted its own legally binding Framework Convention for the Protection of National Minorities (FCNM) in 1994.

It was against this background that NTA again began to attract significant attention from scholars and policymakers as a potential means of addressing growing autonomy claims by politically mobilized national minorities in post-communist Eastern Europe. As Aviel Roshwald (2007, 373) observes, NTA came to be understood as a model '[offering] minorities the option of substantive cultural self-determination without linking it to territorial autonomy, with all the centrifugal tendencies the latter may awaken'. Transitional governments in states containing large minority populations could indeed see the benefits of NTA as a statecraft tool, as they sought to negotiate the potentially 'conflicting logics'

of democratization and nation-building (Linz & Stepan, 1996) within the context of their aspirations for European integration. In Estonia, for instance, revived discussions on NTA began already before the country restored its independence, as part of the gradual democratization of the Soviet political system from 1988 onwards. For the Estonian national movement that emerged during that year, NTA provided an important symbolic link to the democratic traditions of the 1920s Estonian Republic. At the same time, it was also understood as a potential means of defusing claims for territorial autonomy on the part of the country's large Russian-speaking minority (Smith, 2020).

NTA was similarly discussed within Russia's own turbulent political transition during this period, with the Law on National Cultural Autonomy (finally adopted in 1996) being understood as a way of addressing perceived threats to the state's integrity posed by the ethnoterritorial structures inherited from the USSR (Smith, 2021). In the case of Hungary, the decision to adopt NTA was driven partly by the needs and claims of the country's small and territorially dispersed minority communities, but also by the fact that NTA designates minorities as groups with collective rights and the possibility to set up public legal bodies (Dobos, 2014). Against the backdrop of emerging debates on international standards of minority protection, Hungary hoped that its 1993 Minorities Law would be seen as an example of good practice and a template that other states would be encouraged to adopt, especially those neighbouring countries containing large, politically mobilized ethnic Hungarian minorities with their own autonomy claims (Molnar Sansum & Dobos, 2020). Post-communist governments in Hungary have consistently sought to build ties with these external Hungarian communities as part of contemporary nation-building; at the same time, especially during the 1990s and 2000s, they have been keen to ensure that the rights and claims of these minorities are upheld within their states of residence, to prevent any large-scale migration to Hungary that would place additional burdens on the state.

Concept in summary	**NTA: A tool of democratic statecraft** NTA has regained relevance in recent decades as a potential way of addressing 'dilemmas of ethnic diversity' (Roshwald, 2007) in democratic and democratizing states. One of the essential preconditions for functioning democracy is 'stateness'—the existence of a consolidated political community of citizens bound by a common sense of belonging or 'We feeling' (Easton, 1965). How to achieve this when multiple ethno-culturally defined national identities coexist within the same territorial state? NTA seeks to address the challenge of reconciling civic equality and ethno-cultural diversity within a single state framework.

4.2 NTA, Democratization, and the Post-Cold War European Minority Rights 'Regime'

When it comes to processes of state- and nation-building in multi-ethnic settings, it is clear that issues of security (i.e. bolstering 'stateness' and preserving state integrity) and democratization (ensuring social justice, equality, and the needs of minorities) are inextricably linked and support one another. Nevertheless, if NTA is to be truly established as a functioning instrument of democratic statecraft (as opposed to a top-down instrument for controlling and containing minorities' claims within a majority-dominated state), it is necessary to shift the dominant focus of discussions on minorities and diversity away from security and into the realm of 'normal' democratic politics. The analysis in the preceding section, however, supports Will Kymlicka's claim that the academic and political discourse and practice around NTA in Central and Eastern Europe during the 1990s were motivated more by concerns about security than they were by considerations of democratization per se (Kymlicka, 2007b).

In some cases (e.g. post-2000 Serbia), the adoption of NTA drew on pre-existing institutional arrangements and significant participation by minority actors from the ground up. In others, however, the process was driven from the top down by states and their dominant majority elites rather than reflecting the needs and priorities of minorities themselves. As Kymlicka and others rightly point out, suggestions by some at this time that NTA might be applied as a general catch-all alternative to territorial forms autonomy were hardly tenable: in the case of larger, more territorially concentrated populations especially, it was rather fanciful to think that minority identities could be 'deterritorialized'

entirely. Thus, while NTA might indeed be the only possible vehicle for smaller and territorially dispersed groups seeking to preserve their distinct identity, in other contexts it was better understood as a complement to other territorially based arrangements. By this reasoning, the best way to ensure 'stateness' in ethnically divided societies is 'not to attempt to de-territorialize minority identities, but rather to liberalize and democratize substate nationalisms, and to embed aspirations for self-government within a larger liberal–democratic constitutional framework' (Kymlicka, 2007b, 388; see also Bauböck, 2001).

This feeds into a further important question, which is how NTA fitted within the new international 'minority rights regime' (Galbreath & McEvoy, 2011) that developed during the 1990s. At the forefront of developments in this area was the CSCE/OSCE, which had been established during the mid-1970s *détente* period in an attempt to enhance stability and security (including, crucially, not just state but also *human* security) across the then Cold War divide. At a landmark June 1990 meeting in Copenhagen, CSCE participating states affirmed that 'questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law', and that 'respect for the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy' (CSCE, 1990a). The CSCE Charter of Paris for a New Europe, adopted in October 1990, went further, stating that justice, stability, and democracy require that conditions for protecting and promoting the ethnic, cultural, linguistic, and religious identity of national minorities be created (CSCE, 1990b). In 1992, the CSCE also created a new post of OSCE High Commissioner on National Minorities (HCNM) with a mandate to identify and address causes of ethnic tensions and conflicts, provide analysis and recommendations, and get involved in a situation if, in the HCNM's judgement, there are tensions involving national minorities which could develop into a conflict. Successive HCNMs have since produced nine sets of thematic recommendations and guidelines to assist policymakers and representatives of states in developing policies that may ease inter-ethnic tensions.

While this OSCE activity complements and consolidates other frameworks such as the CoE FCNM and EU Copenhagen Criteria, it remains hard to talk of a coherent, legally binding international minority rights 'regime' in post-Cold War Europe. The guidelines and recommendations laid down by OSCE HCNM place no obligations on governments and

the FCNM, while legally binding on its signatories, is indeed very much a framework—in the absence of any single, universally accepted definition of "national minority", it falls to individual states to define this term and, by extension, the applicability of the Convention. At the EU level, while respect for and protection of minorities is now enshrined in Article 2 of the Lisbon Treaty as one of the core values of the Union, EU institutions lack any effective levers to ensure this value is upheld once a state has acceded as a full member. Despite the strength of commitment to European integration in Central and Eastern Europe during the early 1990s, governments there were reluctant to cede sovereignty over their populations to international organizations as part of a strong minority rights regime, particularly when existing member states in the West were not subject to legally binding obligations towards their own minorities. Particular concerns over security in Central and Eastern Europe led the EU to impose respect for and protection of minorities as a membership criterion for states in the region. This provided EU institutions with significant leverage over these countries prior to their accession; since the eastern enlargement, however, there has been no political will to make these standards legally binding on all members. The fact that certain long-standing EU member states in Western Europe have either not signed or not ratified the Council of Europe FCNM meant that the EU also found itself accused of applying double standards in relation to Central and Eastern Europe.

Within this state-centric framework, the political feasibility of adopting NTA as an approach to diversity accommodation (and, where applied, what 'NTA' means in practice) has varied significantly depending on the national context. More broadly, international minority protection has remained a contested political field divided between those governments—such as Hungary—which adhere to a communitarian, collective rights-based understanding of political community and others (in practice the large majority) following a more unitary 'atomistic' conception of democratic statehood based on individual rights and prioritizing equality and non-discrimination over the active official promotion of cultural diversity (Nimni, 2007). The former communitarian approach did feature in the initial discussions around minority rights following the end of the Cold War. The 1990 Copenhagen Declaration, for instance, noted 'the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these

aims, *appropriate local or autonomous administrations* corresponding to the specific historical and territorial circumstances of such minorities'.

Advocates of minority autonomy also frequently refer to the (non-binding) 1 February 1993 Recommendation 1201 by the Parliamentary Assembly of the Council of Europe that the European Convention on Human Rights should be supplemented by an additional protocol on minority rights. Article 11 of this Recommendation states that 'In the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state'. As Csergő and Regelmann (2017, 2) observe, however, initial international interest in "collectively pursued minority rights" during the early 1990s has since been superseded by a greater focus on "individualist politics of non-discrimination". In part, this is because the latter represents the only 'minimum standard' upon which different member governments can agree (Kymlicka, 2007b, 380). At the same time, Csergő & Regelmann argue, the shift in emphasis away from collective frameworks such as NTA has been guided by (securitized) 'assumptions about the dangers of minority ethnic boundary-making'. Contrary to the hopes held by Hungarian and other NTA advocates at the start of the 1990s, then, the CoE FCNM contains no explicit reference to minority autonomy. However, in so far as multiple arrangements bearing this title do exist across states party to the FCNM, NTA does form a relevant part of regular monitoring under its Article 15 on effective participation (Council of Europe Advisory Committee, 2016, 30; Djordjević, 2023). In this respect, FCNM also references the relevant recommendations and guidelines published by OSCE HCNM, whose political mandate of assisting states undergoing democratic transition has involved assessing different 'actually-existing' NTA arrangements and the extent to which they can be deemed consistent with recognized good practices in democratic governance (Marsal, 2020). The next section briefly outlines the benchmarks for democratic NTA as set out in these guidelines. This ideal-type definition is then used to reflect on some contemporary examples of NTA.

Concept in summary	**NTA within International Minority Protection** Revived debates and practices around NTA have occurred against the background of new international norms on democracy and minority protection elaborated by the CSCE/OSCE, Council of Europe, and EU. These norms have not, however, translated into a robust 'minority rights regime' providing for effective transnational oversight or scope for agency on the part of minority actors themselves. The framework remains very much state-centric in nature. Thus, legally binding provisions in this area remain at the level of general framework principles, with priority given to individual rights rather than to collective rights instruments such as NTA. Nevertheless, within this framework, already existing NTA arrangements are considered as one possible means of ensuring that persons belonging to minorities enjoy rights to effective participation within public life.

4.3 Defining the Scope of Democratic NTA: Participation and Voice

In Renner and Bauer's original scheme, NTA served to delineate ethnic groups and grant them legal rights within a multinational federal conception of statehood. In contemporary international norms and current scholarship, however, it is defined rather as a means of promoting effective participation by persons belonging to minorities within the framework of an integrated democratic political community. Malloy et al. (2015) use this understanding to categorize different NTA arrangements according to the level of 'voice' they confer to minorities within the overall political system of a state. Non-territorial (as well as territorial) arrangements are also specifically referenced within the 1999 OSCE HCNM Lund Recommendations on the Effective Participation of National Minorities in Public Life, under the subsection on 'Self-Governance', which highlights the utility of non-territorial forms of governance for regulating "education, culture, use of minority language, religion, and other matters crucial to the identity and way of life of national minorities" (OSCE HCNM, 1999, 11).

As both practitioners and scholars point out, however, the efficacity of NTA arrangements depends to a large degree upon the wider legal and political framework in which they operate. It is important, for instance, that the scope of autonomy and the competences of autonomy bodies are

clearly spelt out in law, ideally through entrenchment in the constitution, though this legal framework should also be flexible enough to respond to the changing circumstances and needs of different minority communities. In the absence of such clarity and consistency, the rule of law may be compromised, leaving NTA arrangements vulnerable to manipulation by influential political elites. Also important from the standpoint of democratic norms are the relationship between NTA bodies and state and local government (i.e. to what extent do these bodies actually have an effective say in decisions that affect the minority communities they represent?), the volume and regularity of the funding that is provided to NTA bodies and the existence of formalized and transparent mechanisms for the allocation of this funding, and the extent to which NTA bodies are in touch with and accountable to the broader minority constituency (Marsal, 2020).

This ties in with another dimension emphasized by the HCNM Lund Recommendations, which is the respect of good governance principles by NTA institutions. According to the Recommendations, a democratic framework of self-governance requires that decision-making processes 'should always be inclusive of those concerned, transparent for all to see and judge, and accountable to those affected' (OSCE HCNM, 1999, 20). The importance of respecting political pluralism within minority representative bodies is reiterated and further developed by the HCNM's Ljubljana Guidelines on Integration of Diverse Societies, drafted in 2012, which emphasize the need to fully respect individual human rights (OSCE HCNM, 2012, 47) rather than simply the status and assumed interests of a monolithically defined ethnic group. If one political grouping within a minority dominates autonomous institutions without regard to the opinions of opposing factions and/or the needs of the wider community, internal democracy is diminished and the perceived legitimacy of these institutions is likely to suffer accordingly. This is especially so in cases where deficient rule of law allows a state government to co-opt and control the dominant minority grouping through political bargaining (Marsal, 2020).

Concept in summary	**Key components of democratic NTA** Guidelines set out by the OSCE and Council of Europe in particular offer a relevant set of benchmarks for assessing the contemporary practice of NTA in various settings. Generally seen as crucial is the wider legal and political framework within which NTA arrangements operate, and the extent to which this upholds principles of democracy and rule of law. It is also important that NTA institutions themselves adhere to good governance principles, ensuring that all voices are heard within internally diverse communities and that one segment of a minority elite does not monopolize institutions and use them to pursue its own interests over those of the broader community.

4.4 Assessing the Practice of NTA

In their 2015 comparative analysis of current NTA arrangements in Europe and Canada, Malloy, Osipov, and Vizi divide their cases into three categories according to the strength of voice given to ethnocultural groups both in running their own affairs and in the wider political community. These categories run from substantive 'voice through self-governing institutions' (Hungary, Croatia, Serbia, Slovenia, Sámi Parliaments in Norway, Sweden, and Finland) through an intermediate category of 'minority self-management' ('quasi-voice' through delegation of public functions to minorities—Acadians in Canada, Sorbs in Germany, reciprocal Danish-German arrangements in Schleswig/Slesvig) to the weakest category of 'symbolic participation' ('non-voice', in that minorities are given neither an effective say in their own affairs nor any co-decision-making powers—the Russian Federation and Estonia).

Other studies of NTA practice in these contexts (including the conclusion to the same volume—Salat, 2015) cast doubt on this categorization. While not disputing the wholly symbolic character of arrangements in Russia and Estonia, they argue that even in those cases where NTA is legally entrenched and highly institutionalized, minority representatives enjoy little in the way of real political influence. The system of Sámi NTA in the Nordic countries, for instance, is often held up as 'one of the most prominent models for addressing indigenous rights questions' (Stępień et al., 2015, p. 117); yet in reality, elected Sámi 'parliaments' have no legislative authority and function primarily as consultative bodies with limited scope to address issues of concern to the communities they represent (Spitzer & Selle, 2020). The system of NTA established in Hungary

under its 1993 Minorities Act is without question the most highly developed among those in post-communist Europe and was presented as breaking new ground in the field of minority rights. Critics nevertheless contend that this system has been largely built from the top down, within an increasingly centralized—and, under Viktor Orbán's rule from 2010, authoritarian—political system. Thus, Minority Self-Governments have competences largely confined to the sphere of culture, their 'rights of agreement' with local municipalities are limited and often disregarded, and they remain financially dependent on local authorities (Agarin & McGarry, 2014; Dobos, 2020).

A further case in point is Serbia, where initially far-reaching NTA provisions introduced in 2009 were quickly contested by more nationalistically minded elements among the Serbian majority, resulting in a 2014 Constitutional Court ruling that significantly diluted the competences of National Minority Councils. Issues such as a lack of clarity around the legal status of these bodies and insufficient state funding have been compounded by a perceived erosion of their internal democracy. Recent studies of the Hungarian Minority Council, for instance, point to an effective takeover of this institution by a dominant ethnic Hungarian political grouping that is locked into a clientelist relationship both with Serbia's ruling party and with Viktor Orbán's *Fidesz* in neighbouring Hungary, with the Hungarian state providing the vast majority of funding for projects run by the Minority Council (Smith, 2023). Such examples suggest that legal entrenchment and institutionalization count for little if NTA operates within a wider political system that does not uphold fundamental principles of democracy and rule of law. Regardless of the context, however, another important factor is the extent of the social capital and bottom-up activism that a minority group can itself bring to bear. In the case of Hungary, for instance, the NTA system has been largely satisfactory from the perspective of a German minority that is well-integrated and organized, comparatively well-resourced (including through external support from a democratic kin-state) and mainly focused on the development of German language and culture. It is a different matter in the case of a Roma minority that continues to face pressing issues of discrimination and socio-economic exclusion, with some critics asserting that a system which focuses solely on culture and marks the Roma as ethnically 'Other' (Kovats, 1997) may even exacerbate these problems.

Concept in summary	**NTA and democracy: theory and practice** Studies of existing NTA arrangements find that these often fail to adequately fulfil the criteria set by relevant International Organizations, even where a high level of legal entrenchment and institutionalization exists. Thus, even those forms of NTA lauded as most comprehensive often fail to give minority representatives an effective 'voice' in decision-making on matters relevant to them and thus veer towards a purely symbolic form of representation. In the absence of an effective rule of law or wider supporting democratic political system, NTA arrangements can also easily fall prey to the particular interests of minority (or external kin-state) elites, undermining their representatives and legitimacy in the eyes of the wider communities they purport to represent. Blanket generalization is, however, difficult, since much will also depend upon the nature of the minority community and the resources and social capital it can draw upon.

Summing-Up

- NTA as originally conceived can be regarded both as an instrument of democratization and an instrument of statecraft. In the context of the late nineteenth-century empires of Central and Eastern Europe, demands for greater democracy took hold within a society increasing divided along ethnonational lines. Karl Renner and Otto Bauer devised NTA as a way of satisfying multiple emerging demands for national self-determination while preserving the existing territorial boundaries of a Habsburg polity that they wished to reform along social-democratic lines. Although this vision was never realized, elements of this multinational federal theory and practice were carried over into interwar Europe, where they informed debates on how to how to address the 'minority question' in the successor states to the empires.
- Although the concept of specific targeted rights for national minorities—as opposed to universal individual human rights—disappeared during the first decades after World War II, the question of how to accommodate ethno-cultural diversity within a democratic framework reasserted itself from the 1960s onwards, first within Western liberal states and then, with greater urgency, within the newly democratizing (and in some cases newly established) states that emerged following the collapse of communism in Central and eastern and the demise of Yugoslavia and the USSR. Against this background, the original ideas of Renner and Bauer acquired new

currency, as a possible means of averting the ethnic conflicts and territorial fragmentation that arose during the demise of Yugoslavia in particular.

- It has nevertheless been suggested that the revived interest in NTA was driven by considerations of statecraft (preserving state integrity) rather than democratization and the needs and claims of minorities per se. Suggestions that NTA might become a 'magic bullet' (Coakley, 2016)—a one-size-fits-all alternative to more politically contentious and thus potentially destabilizing territorial autonomy claims—have been rightly dismissed as unrealistic, in so far as the democratic claims of larger minorities invariably involve a territorial dimension.
- Nevertheless, in purely pragmatic terms, a more limited functionally based devolution of power through NTA merits consideration as a possible way of drawing minority representatives more closely into the political life of the state, building trust and cohesion and perhaps paving the way for a more substantial devolution of power as democracy becomes consolidated (Bauböck, 2001; Salat, 2015). In this respect, as Marsal (2020) observes, arrangements grouped under the category of NTA have allowed discussions on stepping up participation of national minorities in public life in contexts where the very word 'autonomy' raises particular historical and political sensitivities.
- Participation has indeed been the watchword when it comes to situating NTA within the new international minority rights 'regime' devised and enacted by the CSCE/OSCE, CoE, and EU since the start of the 1990s. While little priority is accorded to collective rights and public-legal status for minorities within this largely individual-focused liberal framework, NTA arrangements are deemed useful in so far as they support more meaningful inclusion of minority representatives in political decision-making that affects their communities. As the various examples highlighted in this chapter testify, however, this presupposes that NTA institutions are nested within a wider supportive democratic framework that has all too often been absent in Central and Eastern Europe, even where post-communist transition has been deemed complete. It also implies practices of good governance at the level of NTA institutions to ensure that the

voices of all segments within internally diverse minority communities are heard and that individual rights are upheld. Without this, as Marsal (2020) notes, NTA can simply come to replicate in miniature the very centralized nation-state structures that it was supposed to challenge in the first place.

Study Questions

1. Why was NTA disregarded as a potential tool of democratization after World War II and why did it later come back into focus from the 1960s onwards?
2. What did political scientists mean when they talked about 'stateness' in post-communist Central and Eastern Europe and why was this so important for democratization?
3. To what extent does NTA represent a good fit with the principles of international minority protection devised since the start of the 1990s?
4. What are the most important criteria that determine whether an NTA arrangement is consistent with democratic principles?
5. How important has NTA been as a democratization tool in Central and Eastern Europe since the end of the Cold War?

Go Beyond Class: Resources for Debate and Action

- Council of Europe (https://www.coe.int/en/web/minorities/country-specific-monitoring).
- European Non-Territorial Autonomy Network (https://entan.org/).
- Organisation for Security and Cooperation in Europe (https://www.osce.org/hcnm/lund-recommendations).

Future Readings

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CHAPTER 5

Normative Principles and Non-Territorial Autonomy

Piet Goemans

Should non-territorial autonomy (abbreviated as NTA) be implemented and if so, why? Let us start by delineating the topic at hand. We are interested here in the debate on multiculturalism applied to national minorities as it is conducted in the liberal Rawlsian[1] tradition of the field of normative political philosophy. Contrary to the fields of political science or legal studies, this field is normative: it not only aims to describe institutions but also asks which institutions should be created. The central question of the

[1] This kind of liberalism, which is inspired by the work of John Rawls, is the dominant tradition in normative political philosophy. It should be distinguished from the narrower political ideology of liberal parties like, for example, the German Free Democratic Party. Republicans, Christian-democrats, and socialists, even arguably a socialist like Karl Renner, the foremost intellectual father of NTA, are typically also liberals in the Rawlsian sense. There are other traditions. Marxism, for example, also has an interesting and strong tradition in political philosophy. It is, however, rather descriptive and usually looks down upon the attempts of normative philosophers to discover the truth about normative principles of justice.

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debate on multiculturalism in this field is: Which institutions are owed to cultural minorities? Finally, we are interested in national minorities, so not in other cultural minorities, like religions or immigrants. Hence, the question is: Which institutions are owed to national minorities and might those be NTA institutions?

NTA is taken here to consist of the following list of institutions, which it gives to (minority) nations that it organizes non-territorially by means of a national register:

a. some kind of language regime, possibly a language right,
b. proportionality in the public administration,
c. a national council that autonomously decides on cultural and educational matters, and
d. some minimal powers, possibly only advisory powers, on matters that are not cultural or educational.

In the debate on multiculturalism applied to national minorities, there are multiculturalists, like Yael Tamir, Will Kymlicka,[2] and Alan Patten, who propose to give national minorities territorial autonomy (abbreviated as TA) rather than NTA. There are also liberal individualists, like Brian Barry, who are sceptical of most multicultural policies, including TA and NTA. All these authors propose and discuss normative principles, i.e. fundamental reasons for doing something, like implementing some institution. Examples of such normative principles are Rawls's difference principle—which says that inequalities should benefit the least favoured—and the utilitarian principle—which says to aim at the greatest happiness for the greatest number of people. Normative philosophers discuss the internal consistency, plausibility, desirability, etc. of such principles. The idea is that, if there is a consensus about some principle, then citizens, politicians, and judges should take this into account and create the institutions to implement that principle.[3] The normative principles that authors

[2] Kymlicka and other normative thinkers have commented on Renner's version of NTA in Nimni (2005).

[3] One might object that the principles that a country adheres to, should be chosen democratically by its people. Note, however, that it is not exclusively either the political philosophers or the citizens (or politicians) who choose the principles. As Patten (2014: 23) points out, there is room for collaboration here. Citizens (and politicians)

like Tamir, Kymlicka, Patten, and Barry propose might, in some other theoretical constellation, demand NTA or elements of NTA. We are interested here in what that constellation would look like. In short, we ask which normative principles are promising justifications for NTA.

Below we will consider two principles that possibly justify NTA: equality and cultural preservationism. Notice that there are other normative principles that may justify NTA. Charles Taylor's (1994) recognition or perhaps some form of national collective autonomy are good candidates. However, a somewhat in-depth comparison of the principles of preservationism and equality and their application to NTA gives a good idea of what normative political philosophers do.

The first section shows that it is difficult to argue for NTA on the basis of a principle of equality; the second that it is easier to do so on the basis of a principle of preservationism. Most forms of NTA also use some kind of group right. Although group rights are instruments rather than principles, they are objected to on the basis of principles. Hence, the third section will discuss group rights.

5.1 The Principle of Equality as a Justification for NTA

One possible normative principle is that we owe nations some form of equality. Let us, first, have a look at a theory that proposes such a principle of equality. We will then discuss why it turns out not to be a very promising justification for NTA.

Proposing a principle of equality raises the question: equality of what? 'Equalize the number of national members' is, logically speaking, a perfectly consistent principle of equality. But it is not a very appealing one: some nations are just smaller. Hence, we need a theory that selects those things that need to be equalized between nations. The next step is to see that what we equalize needs to be substantial. That is so because we live in a nation-state world, which implies that states have a tendency to privilege the majority nation in all sorts of ways, including language regime, rituals, symbols, etc. (see, e.g., Tamir, 1993: 147). A principle of equality demands that we revoke or compensate those privileges and that

also deliberate on institutions and here—a much more humble role—the philosopher's systematizations may help.

implies substantial accommodations. Hence, our theory of equality needs to make a selection of the things that need to be equalized and what is equalized should be substantial.

Alan Patten (2014) has taken up the challenge of describing a principle of equality that consistently singles out substantial and morally relevant things for equalization. For Patten the kind of equality that is suited is equality of recognition and he sees recognition as—this is a simplification—specific kinds of accommodation by the state for a nation (Patten, 2014: 158). In short, Patten equalizes accommodations for nations. Let us take a closer look at an example of an accommodation that Patten would equalize. TA is such an accommodation. After all TA is nothing more than a set of decision-making powers attached to a polity. The majority has a polity in which it dominates the decision-making process: the state. Patten (2014: ch. 7) argues that, given that the majority has a polity that it dominates, the minority should also get a polity that it dominates. Patten suggests to give the minority a sub-state polity in which it is in the majority. The result is a federation with TA for the minority nation. The majority and the minority would be equally recognized if there is rough equality between the powers, functions, and responsibilities of the majority's statewide polity and those of the minority's sub-state polity (Patten, 2014: 248). See scenario A in Fig. 5.1 for an illustration of the equality of the minority's powers and the majority's powers in this kind of territorial federalism.

Now we can understand why a pure principle of equality is not very promising as a justification for NTA. Imagine that we try to equalize the powers of the minority's non-territorial polity to those of the majority's territorial polity, the state. We encounter a problem here: there is a cap on the powers that can be devolved to a non-territorial polity (this cap is illustrated by the red square in scenario B). Devolving too many powers leads to highly undesirable situations. Devolving, for example, the powers to decide on welfare benefits to a non-territorial polity leads to a situation in which members of a rich nation, who will have many welfare benefits, live intermingled with members of a poor nation, who will have few welfare benefits. Given that NTA ultimately also leaves individuals the choice which nation to belong to, we would then be institutionalizing something like nation-shopping. "This year I am French because they give ten extra holidays!" Obviously, this is undesirable. Thus, given this cap, it is not possible to equalize the powers of a non-territorial polity to those of the territorially organized state polity. Notice that this is not a problem for TA. Should we then conclude that it is impossible to consistently justify NTA on the basis of a pure principle of equality?

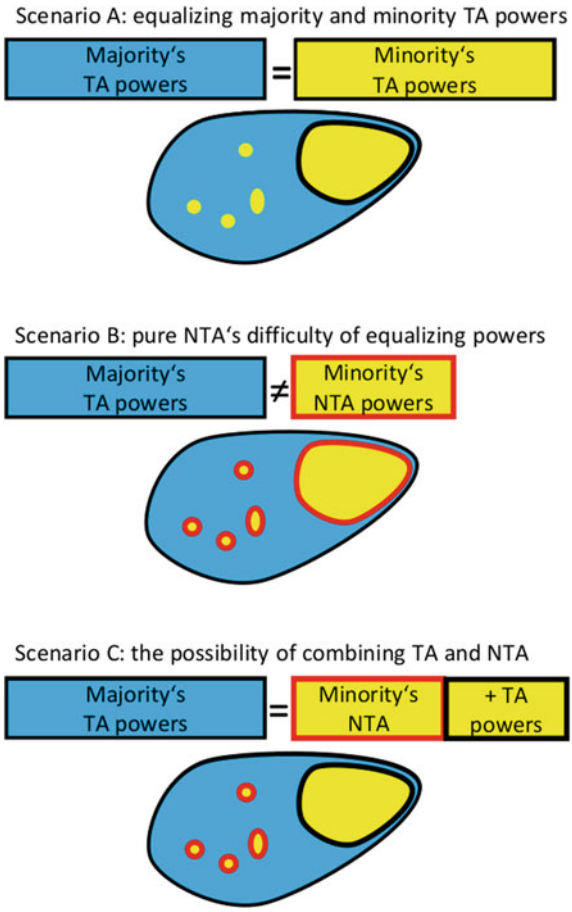

Fig. 5.1 Equalizing powers only using TA, only using NTA, and using both NTA and TA (Author's elaboration)

There are a number of ways to avoid the impossibility that was just mentioned. It is perfectly possible to combine NTA with TA. One then gives the minority both a territorial sub-state polity and a non-territorial polity, both with their powers. As is shown by scenario C, these powers combined might then be equal to the powers that the majority has in the statewide polity. But even then the question remains whether that is

enough: the state's powers are quite substantial. In any case, if we want to argue that national minorities are owed NTA on the basis of a principle of equality, then there needs to be rough equality between the powers of the state on the one hand and those of the national minority's non-territorial and, possibly, territorial polity, on the other.

Another way of avoiding the impossibility described above is by combining the principle of equality with another principle and giving the former a subordinate role in the theory that justifies NTA. Indeed, it is perfectly possible to combine normative principles.[4] One would then need an account that explains why one only treats some aspect of nations equally. A promising way of doing that in the case of NTA would be to see nations only as cultural and not as political communities. Otto Bauer's (2000) work can certainly be a source of inspiration here. The challenge then seems to be that, as Tamir (1993: 147) argues, politics and culture are highly intertwined. In any case, it is possible to justify certain institutions of NTA, for example, the educational and cultural powers (c),[5] by appealing to a principle of equality that is qualified by saying that it treats nations equally only as cultural and not as political entities. Other institutions of NTA, for example, the language regime (a), could then be further justified by appealing to another principle, for example preservationism, which we will discuss next.[6]

5.2 The Principle of Cultural Preservationism as a Justification for NTA

Another normative principle that may serve as a justification for NTA is cultural preservationism (see Table 5.1 for a comparison between the two principles). In what follows, preservationism will, first, be explained in

[4] For simplicity's sake we limit ourselves here to a discussion of pure, i.e. uncombined, principles.

[5] With these small-case letters between brackets references are made to the list of NTA institutions given in the introduction.

[6] Kymlicka, arguing for TA rather than NTA, makes such a combination of normative principles. The nucleus of his theory is preservationist whereas the edges are informed by another principle. For this reason, Kymlicka should not be equated with preservationism, even though, as we will see in the next part, he does provide arguments for preservationism.

Table 5.1 Comparison between the principles of equality and preservationism as justifications for NTA

	Principle of equality	*Principle of preservationism*
Aim of the principle	State treats minority and majority equally	Preserve minority culture
Institutions proposed by the principle	A proto-state for the minority equal in relevant ways to the majority's state	Language regime and powers to manage cultural heritage and preserve culture
Criticism of the principle	The concept of neutrality can be criticized; prevents every kind of majority nation-building policy	The preservationist worldview might not pass the test of liberal justifiability
How well does the pure principle **fit** with or justify NTA institutions?	Uneasy fit: there is a cap on the powers that can be devolved to a NTA polity	Fits well: preservationism does a good job explaining the national register and other NTA institutions

relation to the criticism that it has attracted from liberal individualists. It will, then, be shown how NTA relates to it.

Which elements of a culture does preservationism aim to preserve? Several liberal individualists, including Barry (2001: 65–68, 255–258), have criticized cultural preservationism for trying to preserve cultures as they exist now, including their potentially outdated norms, values, practices, and ideas.[7] There are ways around this objection and the core of Kymlicka's theory shows one of those ways. Kymlicka (1989: 166–167) distinguishes cultural structure from cultural character, with the latter consisting of the norms, values, etc. that ought not to be preserved. He defines the "cultural structure" as a "viable community of individuals with a shared heritage (language, history, etc.)" (Kymlicka, 1989: 168). Notice that norms and values may change while the heritage and

[7] Another version of this criticism can be found in the debate on the definition of the concept "nation", i.e. the criticism of essentialism that modernists and social constructivists direct at so-called primordialists. Notice that, notwithstanding the ritual lambasting of primordialism in this descriptive debate, the normative authors Tamir (1993: 65), Kymlicka (1989: 179–180), and Patten (2014: 50–57) do believe that a sufficiently consistent account of the nation can be given. Patten (2014: 50–57) develops a social lineages account of (national) cultures that can ward off such criticisms of essentialism. Interestingly, Patten's account is reminiscent of Otto Bauer's (2000: ch. 1, esp. 117) definition of the nation.

the viable community remain intact. In short, Kymlicka avoids the liberal individualist objection by only trying to maintain the structure and not the character of a culture.

Another but related liberal individualist concern regarding preservationism is that it forces a worldview—a conception of the good, to use the technical term—upon individuals (see, e.g., Barry, 2001: 123–131). If so, then preservationism would be incompatible with Rawlsian liberalism, the mainstream tradition of normative political philosophy. Rawls (1971: 136–142) presents his theory in terms of a veil of ignorance. Simplified this can be explained as follows. An institution would be just when people with different worldviews (the coloured bars in Fig. 5.2) would choose that institution behind a veil of ignorance, which makes them ignorant about the worldview they would hold in the actual society. In other words, if you do not know which coloured bar is your worldview, then you will choose to base institutions only on the black circle through which all coloured bars run. Behind the veil of ignorance, I would, for example, not design institutions such that they disadvantage Catholics, since I myself might actually be a Catholic. The result is—to put it simply—state institutions that are based on a sort of lowest common denominator of all different worldviews (the black circle in Fig. 5.2). Liberals worry that cultural preservationism stems from a particular worldview (the green rectangle in Fig. 5.2) that gives moral worth to cultures. As such that worldview would not be part of the lowest common denominator between worldviews. After all, there are worldviews that do not give moral worth to cultures. Hence, a state imposing preservationist policies can, according to liberal individualists, not be justified.

Kymlicka has also provided an argument that may bring cultural preservationism into the lowest common denominator between worldviews. He starts his argument with the value of individual autonomy, which is, of course, very important to liberals. Kymlicka (1989: 165; 1995: 83) argued that cultural membership is important for individual autonomy because culture provides us with the spectacles through which we see options for life choices, through which these options become vivid and meaningful to us.[8] In other words, individuals need their culture to be truly autonomous: not so much to have options but to really see them.

[8] To put it in technical terms, Rawls (1971: 62, 90–95) argues that, behind the veil of ignorance we would choose to maximize the level of primary goods, i.e. goods like health, intelligence, etc. Kymlicka (1989: 162–168) argues that cultural membership should also be part of the list of primary goods. Kymlicka (1995: 83) recuperated the spectacles metaphor from Ronald Dworkin.

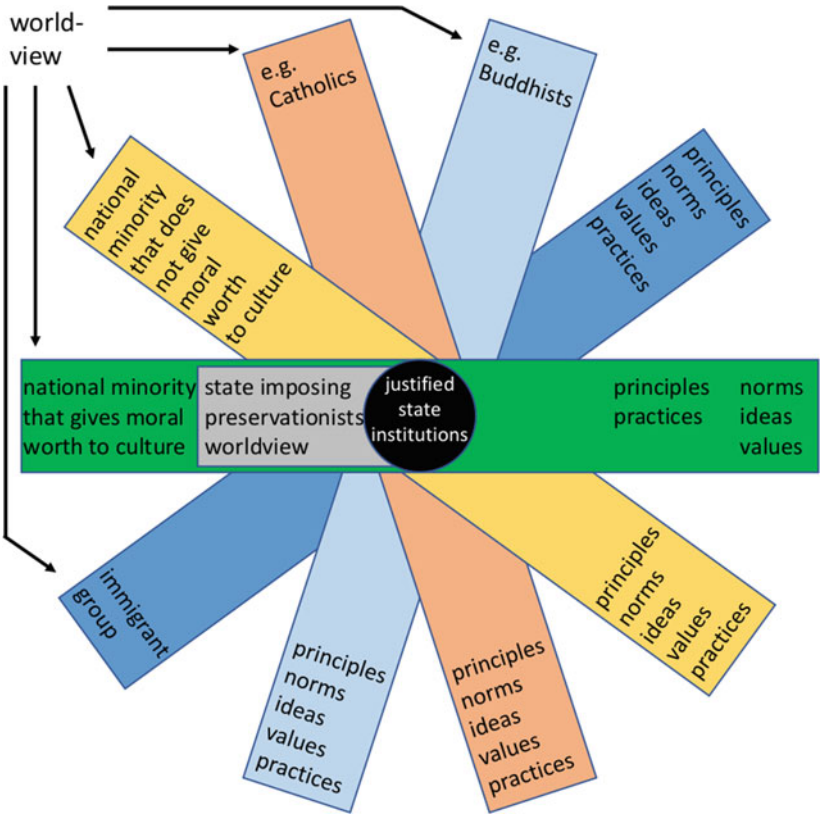

Fig. 5.2 Just policies, according to liberalism, are based on the lowest common denominator of different worldviews (Author's elaboration)

Hence, liberals should, if Kymlicka is right, also accept preservationist policies as being just.

Liberal individualist worries remain. There are plenty of individuals who choose to assimilate into another culture and thus arguably do not need their native culture to be autonomous. This raises the question whether a state may impose duties on them to preserve their own culture. Notice how NTA's national register could provide a solution here. One of the popular solutions to liberal worries about the state imposing a world-view is a right to exit. Chandran Kukathas has famously argued that we

can tolerate almost everything that cultures impose on their members, so also preservationist policies, as long as people have a right to exit their culture.[9] One problem with such a theory is that, even if one has the right to exit, it may still be too costly to exit because, in the case of many cultures, one has to move to effectively exit these cultures. This is much less troublesome to NTA. Exiting in NTA does not require one to move, it is just a matter of registering under a different nationality. Perhaps, then, with a national register, liberal individualists might give a form of cultural preservationism, embedded in strong liberal institutions, a second chance.

Notice, finally, how well cultural preservationism and NTA fit together. Many of the institutions of NTA can be justified by the principle of cultural preservationism. That is obviously so for the language regime (a). One may wonder why the proportional, in other words the equal, filling of positions in the public administration (b) is necessary. But notice that we are preserving a minority culture that lives intermingled with a majority culture and that the state does not, apart from its administration, have very many tools at its disposal to preserve a language threatened by this mingling. When it comes to powers on educational and cultural matters (c), notice how heritage is part of the cultural structure according to Kymlicka. In a way, one can see these powers as the management of this heritage. That leaves the minimal or advisory powers on other matters (d). Preservationism actually explains this best. It often happens that a majority culture cunningly designs a policy in some field other than education or culture that happens to have the side effect of damaging the minority culture. The minimal powers are intended to avoid this. But they remain minimal: they are intended not to satisfy a principle of equality but to satisfy cultural preservationism, i.e. to ensure the preservation of a culture.

Preservationism has received much criticism. But, if we are interested in NTA, we should take it seriously. All the more so because, as will be argued below, it might be suited to certain liberal individualist criticisms. In any case, if we are looking for one principle that by itself can justify NTA, then preservationism is probably our best bet. Like with the principle of equality, we might, of course, also be looking for a combination of principles.

[9] See Kukathas (2012) for his most recent statement of the right to exit.

5.3 Group Rights and NTA

Multiculturalists want to meet the demands of cultural groups. A strong and promising way of doing so is by using group rights. Group rights are instruments rather than normative principles. Nevertheless, they should be discussed here because liberal individualists believe they can be objected to on the basis of normative principles—hence they are individualists. There are many forms of group rights. We will focus on two representative ones and compare them to individual rights. Subsequently, we will turn to NTA and ask which kind of (group) right is best suited to NTA.

Concept in depth

What is your intuition about how far language preservation policies may encroach upon individual rights?

Imagine you are one of the last speakers of the Guugu Yimithirr language. This Australian Aboriginal language is very interesting on account of it being extremely space conscious. What other languages would express with "left" or "right", this language expresses by using the cardinal directions north, south, east, and west. Hence, speakers are always aware of the cardinal direction of themselves and their surroundings. This language seems to be something that is intrinsically valuable. Suppose it is 2100 and you are the youngest of the only four speakers that are left. If you stop speaking this language, it is almost certain to die out. Should you be forced to speak it? If your moral intuition says you cannot be forced then consider the following questions. Are there no actions, like sending your children to a certain school or living in a certain neighbourhood that you may be forced to do? If your moral intuition says that you can be forced, then consider the following question. Are there actions that you may not be forced to do, perhaps spend the rest of your days in a linguist's laboratory undergoing tests? You may also want to consider the following questions. Does it matter that this is a very special language? Should there be a way to opt-out, to escape the duty to do something for your language? To what extent is this case similar to a language with half a million speakers? What would be necessary to preserve such a language?

Strong group rights, which the foremost specialist on group rights, Peter Jones (1999: 361–367; 2016: section 4), calls corporate rights, give moral status to (a good of) a group. To explain this moral status, think of what it would mean for (a good of) a group to have intrinsic value. Corporate rights usually imply that a good of a group, for example, a language, is valued intrinsically. The language is not just valued instrumentally because individual group members value it. It is valued intrinsically, on its own, irrespective of what people think of it. In other words, it has moral status. Liberal individualists have found much to criticize in corporate rights. One common criticism is reminiscent of the

liberal criticism of preservationism that we saw above. To understand this criticism, notice how it is impossible for individual rights that protect a sphere of individual freedom to directly impose a worldview. After all, such individual freedom rights only give more space to citizens in which to live out their own worldview. As such individual rights can perform a function that liberal individualists think is essential to rights: the function of a bulwark against the state imposing worldviews. To the contrary, it is possible for corporate rights to impose a worldview. After all, an individual speaker of a language that is protected by a corporate right might not agree with the moral status that this corporate right gives to her language. Hence, corporate rights no longer have the function of a bulwark, which liberal individualists believe is essential to rights.

There is one case in which strong group rights, like corporate rights, may still be liberal. That is in the case of a specific kind of goods: what Denise Réaume calls participatory goods.[10] What is special about these goods is that the state cannot hire someone to *enjoy* producing these goods with me. Take, for example, languages, the prime example of participatory goods. The state cannot hire someone to *enjoy* speaking a language with me, to keep a language community vibrant. As Réaume (1988: 10) says, "the enjoyment *is* the good". Réaume (1988: 2) argues that, if we want to grant a right to a participatory good, then we need to grant a group right. Several philosophers, including liberals, recognize the existence of goods like participatory goods, calling them "communal", "shared", "common", or "irreducibly social goods" (see Jones, 2016: section 5). Most of them also believe that these goods should be protected by some form of group right. Notice also that if such goods exist and Réaume is correct in saying that a right to such goods needs to be a group right, then liberalism would be discriminating against worldviews that rely on such goods. Many liberals will, then, want to be able to grant rights to them. So, perhaps, in the case of a participatory good, like language, also liberals should recognize strong group rights[11], like corporate rights.

[10] Participatory goods are a type of public goods. The latter are already at risk of not being provided—which is what the phrase "tragedy of the commons" refers to. Participatory goods are even more at risk.

[11] See Goemans (2018) for an account of strong group rights based on the concept of participatory goods, which does not assign moral worth to those goods.

Let us turn to the second, weaker form of group rights: Jones's own collective conception, which he calls collective rights (Jones, 1999: 356–361; 2016: Sect. 4). Collective rights are justified not by granting (a good of) a group some moral status, but by the shared interests of all the group members. Take, for example, someone who wants a park in her neighbourhood. One person alone may not have a right to a park: her interest in the park may not be of sufficient weight for the authorities to have to build it. The interests of all the people that would use this park may, however, weigh enough for the authorities to have to build it. Thus, the shared interest of all park-users creates a right, whereas an individual interest in the same thing would not create that right. If we allow for collective rights, then we allow for shared interests to create rights that individual interests on their own might not create. Notice that collective rights thus largely answer the liberal worry about group rights imposing a worldview. A collective right cannot be used to impose a worldview on the group members (Jones, 1999: 370–373). Either an individual group member has an interest in the performance of the duty that is demanded by the collective right or the individual does not have that interest. In the latter case, the individual's interest is not used to add to the justification of the group right and the individual is automatically not part of the ad hoc group.

Finally, next to corporate and collective rights, there are also individual rights. Let us compare these three kinds of rights to each other (see also Table 5.2). Take a case in which either a corporate, a collective, or an individual right of person A has to be weighed against some right of person B. And while we are at it, let us immediately apply this to NTA institution (b): proportionality in the public administration. Take A's right, possibly a group right, for there to be translations of certain documents, which enables this proportionality. B, A's superior, would rather not bother with such translations. Suppose that the law is not altogether clear. There is a law which stipulates that there should be proportionality but does this mean a right to the translation of these documents? Finally, suppose that A sues B for not providing translated documents. Put yourself in the position of a judge confronted with such a case and have a look at the relevant interests of both persons, which you will have to weigh against each other. A good way of understanding the different conceptions of (group) rights is to see that one could give different answers to the question which interests, on A's side, should you, the judge, look at? In other words, whether collective or corporate rights or only individual rights are allowed has

Table 5.2 Comparison between individual, collective, and corporate rights

	Individual rights	*Collective rights*	*Corporate rights*
Does (a good of) the group have moral status?	No	No	Usually, yes
Strength of the right	Weak	Intermediate	Strong
Basis of the right?	Only individual interest	Shared interests	Also group interests
Which interests should the judge take into account in the example?	Only A's individual interest (in a translated document)	A, X, Y, and Z's individual interests (in a translated document)	A's individual interests and the group's interest in the survival of its language

an impact on the kind of interests on A's side that you may take into account. If we only accept individual rights, then the only interests that you should look at are the interests of person A.[12] If we accept collective rights, then you should add to A's interests those of X, Y, and Z, i.e. other minority members that also deal with the documents in question. If we accept corporate rights, then you should, next to taking into account A's interest, also take into account an interest that is attached to A's group, the survival of the language, for example, rather than to A herself. Thus, the interests on A's side that may be taken into account get heavier when we go from only individual to collective and corporate rights. With only individual rights A is more likely to lose the case, with a corporate right A is more likely to win. This explains, the appeal of group rights, perhaps even corporate rights, to multiculturalists.

Let us apply all this to the specific institutions of NTA and ask which kind of right is best suited to which institution. The language right (a) is similar to proportionality (b), which was just discussed. As we have seen, individual rights are weak, perhaps too weak. Collective rights are substantially stronger. The strongest possible language right is a corporate right. The advantage of collective rights over corporate rights is

[12] This, again, is a simplification. Individual rights may be qualified such that the group interest is brought in through the back door. Nonetheless, the comparison of individual, collective, and corporate rights on the basis of interests still gives a good idea of what is at stake in the theoretical debate.

that they are better protected against being used to impose a worldview. In the case of decision-making powers, whether they be minimal (d) or on educational and cultural matters (c), the reasoning is somewhat different. If we want to give rights to such powers, then they are probably collective or corporate rights.[13] Such powers are hard to imagine as individual rights. Again, collective rights provide stronger protections against imposing worldviews. Seeing such powers as corporate rights has the advantage of recognizing the group as a unitary entity that stands on a par with other similar groups. Seeing them as corporate rights also makes it easier to give due consideration to the interests of future generations. Finally, notice how it is perfectly possible to combine the different kinds of group rights just explained. Hence, we could understand parts of NTA as corporate, other parts as collective and still other parts as individual rights.

NTA has been presented here as possibly being in line with preservationism and corporate rights which are—to put it lightly—strongly criticized by liberal individualists. It is, however, important to understand this criticism correctly. For, NTA has something in common with liberal individualism. What certain liberal individualists, like Barry, object to is much wider than merely strong group rights. Barry (2001: 7–8, 325–326) objects to the replacement of an egalitarian politics of solidarity, or redistribution, with an identitarian politics of difference or recognition, in short, with multiculturalism. He fears that group rights will open the floodgates to that politics of difference.[14] Barry argues, for example, that multicultural policies politicize group identities (Barry, 2001: 234); that they give potentially conservative elites of a group the coercive powers of the state (Barry, 2001: 129); and that they give cultural entrepreneurs an organizational nucleus from which to launch themselves into the political sphere (Barry, 2001: 197). Barry would seem completely opposed to NTA. Oddly enough, however, the intellectual fathers of NTA, Karl Renner, and Otto Bauer, could not agree more with Barry here. They were Marxists who aimed at "solving" the national question so that it

[13] Kymlicka has tried to sidestep the debate on group rights. Jones (1999: 375) accurately points out, however, that the kind of institutionalized national self-determination rights, in other words rights to TA, that Kymlicka proposes, typically take on the form of corporate rights.

[14] Jones (2016: section 7) mentions further individualists that voice similar fears in the debate on group rights.

would no longer interfere with their preferred politics of solidarity. How can we understand this? Suppose that minority nations will wake up—to slightly alter Bauer's (2000: 176–193) phrase—and thus that the liberal individualist dream of being able to ignore minority nations proves to be mistaken. What Barry then is telling us, is to accommodate minorities in a parsimonious and targeted way, a way that contains the politics of difference. One corporate right better fits such a parsimonious strategy than several sprawling collective ones. Similarly, one clearly defined aim, preservationism, better fits this parsimonious strategy then the sprawling consequences of the principle of equality.

In conclusion, there are many possible combinations of principles and instruments. Furthermore, they can be combined to result in a pure form of NTA, NTA combined with TA, or just some non-territorial institution. If our aim is to justify NTA, then some strategies—like a pure principle of equality—are implausible, and some strategies—like preservationism and corporate rights—are more plausible than is often assumed.

Summing-Up

- A pure principle of equality proposes to equalize the powers given to the majority's polity with those given to the minority's polity. There is, however, a cap on the powers that can be given to a non-territorial polity. Hence, justifying NTA based on a pure principle of equality seems less promising.
- The principle of preservationism says that cultures need to be preserved. It has received much criticism from liberal individualists but it is still defensible. NTA fits well with preservationism.
- There are several versions of group rights. Two representative ones are corporate and collective rights. An advantage of corporate group rights is that they enable us to grant rights to participatory goods. An advantage of collective rights is that they cannot be used to impose a worldview on group members.

Study Questions

1. Should minority nations get accommodations and, if so, why? Should they get them in order to preserve their culture or in order to be equal in some way to the majority?

2. If your native language is at risk of withering away, do you have some obligation towards it? Should you send your children to a native language school? May you be forced to do so?

Go Beyond Class

The Stanford Encyclopedia of Philosophy is a well-respected encyclopedia that is available online and often used in research papers. It is a good place to start researching a philosophical question. It has entries on, among many other things, multiculturalism, and group rights.

Further Readings

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CHAPTER 6

The Politics of NTA

Levente Salat

In this chapter, the political context of NTA arrangements will be discussed, with focus on the actors involved in such arrangements, the conditions the actors have to meet, the political decisions they need to make, the legal and institutional consequences of those decisions, and, finally, the social and political costs of the arrangements and the criteria of success. Given that NTA arrangements are manifold, some of the issued addressed will be detailed with regard to each sub-type or form of manifestation. The approach will be mainly descriptive and empirical, but since there are gaps between the ideal type and examples of practical implementation, normative considerations/recommendations will be necessary, too, at least in certain regards.

6.1 What Brings About NTA Arrangements?

NTA arrangements are the result of political processes, the outcome of power dynamics between dominant and non-dominant groups. Behind every instance of the NTA phenomenon, there is a history of minority

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activism and claim-making, on the one hand, and political decisions made in the name of the State, on the other hand. Since dominant groups are regularly titular communities within states, such groups consider that the state is their exclusive property. Accordingly, they hold that the state's structure, its institutions, and resources should serve the interest of the dominant group. This creed triggers public services and policies which fail to consider the needs and expectations of non-dominant groups (if such groups exist within the state's borders). The response of the non-dominant groups can be mobilization, activism, and claim-making, targeting changes in the structure of the state, or in the ways public services are provided, depending on the size, pattern of settlement, and potential for agency of the community.

The political processes unleashed by the sequence of majority state- and nation-building, minority claim-making and State-responses to the non-dominant groups' political activism are not always peaceful: conflicts may occur, and violence may be deployed by the parties. In such circumstances, actors representing the State are forced to take into consideration minority claim-making in order to mitigate or prevent conflict. State authorities may decide, however, to adapt their state- and nation-building strategies to the ethnodemographic realities of the population without minority mobilization, too, which brings about, among other forms of accommodation, NTA arrangements in a peaceful manner. Solutions emerging from State-initiatives may not always serve the interest of the targeted non-dominant groups: in situations of this kind the interests of the State may prevail and façade NTA arrangements may result.

We will concentrate in what follows on considerations which might prove useful in understanding the circumstances that bring about, with the means of conventional politics, NTA arrangements. A deeper insight into the world of the actors, their nature, interests, and objectives will be the first target.

6.2 The Actors

Though NTA arrangements are the outcome of power dynamics between dominant and non-dominant identity groups within states, the actors among whom the power-sharing occurs are, formally speaking, the State and a sub-State unit constituted according to the personality principle. The first questions which need to be answered are, thus, the following: what are 'states' and how do sub-State units come into being?

6.2.1 The State

States are commonly assumed to be self-evident, perennial realities which do not need justification. Given the importance states play in the life of individuals and human communities, by providing safety and stability, this is a justified belief, sustainable especially in a cross-sectional, short time perspective. Judging on the *longue durée*, however, the history of states is more volatile (for a visual illustration, see Centennia Historical Atlas, 2020), the number of states existing in the world changing constantly.[1] Beyond the risk of break-up to which failed or weak-performing countries are exposed, states, even the well-established ones, are never "finished and complete" (Linklater, 1998, p. 187) in the sense that structural reforms may prove necessary in certain circumstances and the narrative justification of the arrangement needs to be renewed from time to time, regularly in the form of providing updated answer to the question "Who are we?" (Huntington, 2004).

Taking all these into consideration, a better understanding of the nature of the State can be achieved if we explore in more depth the relationship between the State-concept, on the one hand, and adjacent terms like people, nation, and the society, on the other hand. The first thing to be observed is the fact that there are real and constructed, passive and active components within the realities to which the four terms refer.

To start with the real-constructed division, it is only the society which has real, objective existence, in the sense of individuals sharing a common space of living, governed by rules and traditions within a certain territory. As far as the concepts of the 'people' and the 'nation' are concerned, these two are "imagined communities"(Anderson, 1983), the answers to the questions who are the 'people', who belongs to the 'nation', and what is the relation between the two being provided by prevailing narratives.

[1] It is largely due to the contested nature of political entities' status that data referring to the evolution of the number of states in the world are difficult to find in reliable, easily accessible sources. The *List of political entities by century*, available on Wikipedia, provides alphabetically ordered lists of states, together with data concerning to recognition, respectively sovereignty, where applies, without aggregating numbers per years (such aggregates are provided for decades, starting with the 1940s). Counting the entries listed and taking into consideration the information provided with regard to recognition, it seems that the number of sovereign countries was 65 in 1910, around 100 in 1920, 170 at the end of 1980s, and 197 sovereign states by 2000, along with 28 entities which claim sovereignty yet being de facto dependent territories. https://en.wikipedia.org/wiki/Lists_of_political_entities_by_century (accessed on November 9, 2022).

Both terms are loaded with heavy political connotations: their content changes in time and even within a certain timeframe there are disagreements among those included in the concepts regarding who should be given citizenship, what does the people want, and which are the criteria of belonging to the nation.

As far as the passive–active division is concerned, it is interesting to observe that neither the 'society', nor the 'people' and the 'nation' speak or decide for and by themselves, political elites are the ones who do so. In fact, there are competing attempts to define the 'people' and the 'nation', the ruling elite being selected by the society based on the most appealing narrative (In real settings, this "competition" has often been decided in bloody civil wars. Different forms of coercion have been deployed in peaceful times and places, too, as explained, among others, in Mann [1986, 1993] and Tilly [1992]). The choice is never made once and forever: the prevailing narrative may be challenged any time, it is the task of the elite to safeguard the relevance by operating in due time the necessary changes.

Bearing all these in mind, it is not difficult to observe that the State is in fact the target—and possible outcome—of a political project, a claim and a promise made by a political elite, forwarded in the name of the society, using the imagined 'people' and 'nation' to provide for the legitimacy of the arrangement, according to the narrative. In a historical perspective, it is not difficult or impossible to identify the political projects which led to the emergence of most contemporary states, and there are, as we know, political projects targeting the establishment of new states—Quebec, Scotland, Catalunya, etc.—which have proven unsuccessful so far.

When the target is reached, the State becomes the most powerful active actor of the setting, providing political care, through public policies and resource allocation, to the passive components of the arrangement: the society, the people, and the nation. Once, this phase is achieved, the task of the political elites is not over, since the narrative providing justification for the arrangements has to be cherished, kept at bay from subversive challenges. In this reading, revolutions occurring in the history of various states are attempts to replace the dominant narrative with one which is more suitable to reflect the society's changed realities. Successful revolutions trigger regularly elite changes as well. Other forms of subversive challenges may result from factions within the ruling elite. Figure 6.1 offers a visual summary of the above.

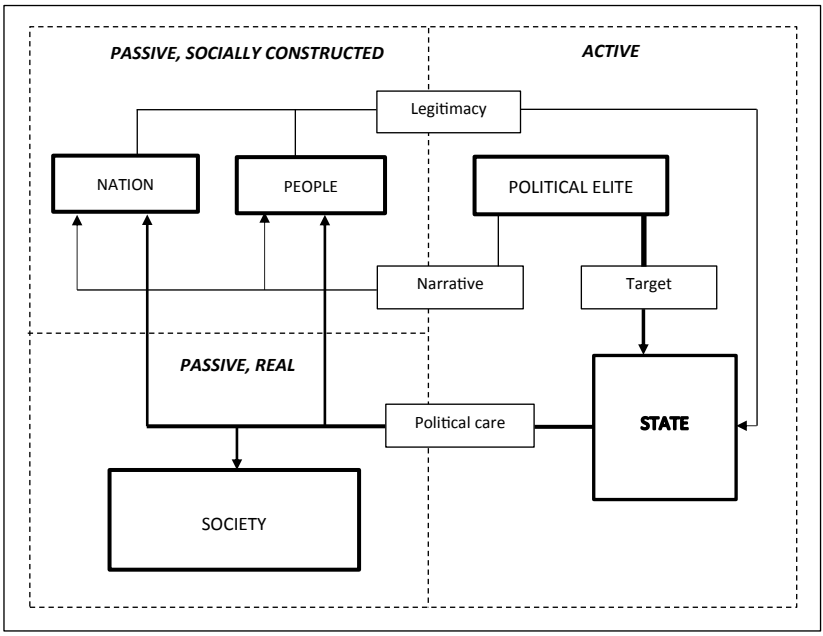

Fig. 6.1 The concept of the -state (*Source* Salat, 2021)

According to most narratives providing justification for the existence of states, the main beneficiaries of the arrangement are the society, the people, and the nation: the State is there for them, and not vice versa. Yet, once established, the State becomes self-interested and its legitimacy cannot be contested, regardless of the performance of the political elites speaking on its behalf. This is particularly true in the era of the nation-states when states are commonly considered to be the in the ownership of the titular nation, fact beyond scrutiny according to the dominant narrative.

6.2.2 Sub-State Actors

Contemporary states are predominantly nation-states, representing the latest phase of development in the long history of political communities. Political communities are cooperative human settings within which stability is provided due to the monopoly of power, exercised, as it is

commonly assumed, with the consent of the ruled.[2] The power-monopoly meant not only centralized decision-making but generalized support for a dominant way of life, religion, culture, language, and identity, provided by the means of codified norms and allocated resources. Political communities evolved from tribes, city-states, empires into modern nation-states, many disappearing without traces, others leaving lasting imprints on the way of life and identity of human communities known today.

One of the legacies of the political communities' long history can be identified in what Sally Falk Moore (1973) called "semi-autonomous social fields": social entities with the capacity to make rules and induce compliance, embedded in a larger world dominated by formal legal institutions. The boundaries of the semi-autonomous social fields are processual, rather than territorial: compliance becomes possible due to personal decisions of the individuals to live and be judged according to the rules of the community.

No reliable data is available regarding the possible number of semi-autonomous social fields existing currently in the world. It is not without grounds, however, to assume that the 10,000 cultures mentioned in a UNESCO account (*Our Creative Diversity*, 1995), or the 7151 languages inventoried with scientific rigour by the Ethnologue project (Eberhard et al., 2022) may be remnants of political communities which have regulated the life of human communities for a certain period of time back in history. These two numbers indicate categories of cultures and languages, not being illustrative thus to the number of communities speaking the different languages or choosing to self-identify as practitioners of distinctive cultures. A more suggestive number in this sense could be the 5000 'ethnic groups' referred to in a UNDP report (*Human Development Report 2004*).

10,000 cultures, over 7000 living languages, 5000 ethnic groups in less than 200 states are illustrative, without doubt, of the broad challenge ethno-cultural diversity poses to state authorities. These numbers are misleading; however, if we are interested in the political relevance

[2] The tradition of contractarianism has deep roots in the history of political thought, starting with the ancient Greeks (Protagoras, Hippias, Epicurus, etc.), through the middle ages (Thomas Aquinas, Hooker, Althusius, etc.), till the most influential representatives of the social contract theory, Hobbes (1651), Locke (1690) and Rousseau (1762). Social contract theory explains how individuals aggregate themselves into an acting unity by establishing a rule that reflects the common will of the contractors. For more on that, see Lessnoff (1986) and Boucher and Kelley (1994).

of the various aspects of diversity: in terms of linguistic diversity, for instance, from the 7151 languages documented by Ethnologue, in the case of 1000 the number of speakers falls somewhere between 100 and 1000 individuals, and another 2000 are spoken currently by 1000–10,000 persons.

There are several datasets available to date aiming to provide more accurate data regarding the political consequences of diversity. One of these is the "*Ethnic Power Relations* (EPR) Core Dataset 2021" (Vogt et al., 2015), which identifies 800 politically relevant ethnic groups, dominant and non-dominant, documenting their access to state power in each country of the world from 1946 to 2021, coding the degree to which the groups' representatives situate on a scale of holding executive level state power from total control of the government to overt political discrimination. A more elaborate version of the research is available on the GROW^{up} platform (Girardin et al., 2015) which, in addition to the visual representation of the time-series data, includes narrative descriptions, too, of the investigated 800 ethnic groups' situation and context (for illustration, see Box 6.1).

Case study	**Box 6.1: Ethnicity in Ethiopia** Ethiopia is an ethnically heterogeneous country, with some 70 to 80 different ethnic groups living within its borders. However, the majority of people belong to four groups: the **Oromo**, the **Amhara**, the **Tigry** and the **Somali**. The Oromo (also called Galla) are the largest group and constitute about 35% of the population. They were once concentrated in the southern highlands but have now spread to other regions. The Oromo category is not unified politically and there are important differences in the social organization, religion, and economy across the subgroups. The Amhara live in the western highlands and constitute approximately 30% of the population. Along with the Tigry, they trace their ancestry to a merging of Semitic and African peoples in the region several thousand years ago. The Amhara culture later became the center of the Aksum Kingdom and dominant in the 19th and part of the twentieth centuries. The Tigry count about 2 million people (the majority of this group is located in Eritrea, where they make up to 50% of the population). The fourth largest group are the Somali settling in the southeast of the country. The majority of the Somali population belongs to the Ogaden clan (subdivision of the Darod). Amhara and Tigry are overwhelmingly Ethiopian Orthodox Christians, while the Somali are predominantly Muslim and the Oromos are equally made up of Muslims and Christians *Source* Giradin et al. (2015)

Another comparable source, focusing on religious communities, is the "Religion and State – Minorities (RASM)" dataset, part of the *Religion and State* project, which provides data on the religious discrimination of

771 minorities in 183 countries, representing at least 0.2% of the populations they belong to, using data collected on yearly bases from 1990 to 2014. An overlap between the 800 groups included in the EPR dataset and the 771 communities monitored by the RASM data exists evidently, but it is not significant. The broad picture which emerges from these two datasets suggests that in many states of the world the fight of national groups for the State, or for power in the State, is still a fact.

Building on the above, we can conclude that the number of 'semi-autonomous social fields' existing currently in the world could be somewhere between 800 and 10,000. Judging based on the data available in the GROW^{up} platform, their situation in relation to the state can be very different, from partners in power-sharing arrangements to being subjected to active, intentional, and targeted discrimination, with the intent of excluding them from both regional and national power.

Returning to the model of the State suggested in the previous subchapter, it is not difficult to identify the sequence of options which could lead to these two complementary outcomes. If the 'society' contains 'semi-autonomous social fields', the political project targeting the State—both in the sense of its establishment or maintenance[3]—has two options: either ignores them or includes the political actors speaking in the name of the semi-autonomous social fields in the design of the political project.

In the first case, the narrative providing justification for the arrangement will be based on wishful thinking and if the political project is successful, the State will be obliged to provide homogenizing political care, or to rush into various forms of ethnic cleansing, which regularly triggers instability, autocratic forms of governance or even civil war, depending on the size, potential for agency and level of political

[3] The establishment of the state usually follows the declaration of independence of a territory that had belonged to another state, through referendum or unilateral secession (like in the case of most successor states of the former Soviet Union and Yugoslavia), or the emergence of a new state due to the unification of two previously independent states (like contemporary Germany). The desire of independence is regularly the result of the failure of the political project that created the state to which the new independent territory had belonged. According to the prevailing world order, declarations of independence may create *de jure* states, if the new political entity is recognized by all members of the international community of states, or de facto states if certain states recognize the declared independence, while other do not (as in the case of Kosovo). The term 'maintenance' refers to successful adaptation of the political project underlying a state to new challenges occurring in domestic matters or the international context, through constitutional reform implemented peacefully or through a revolution.

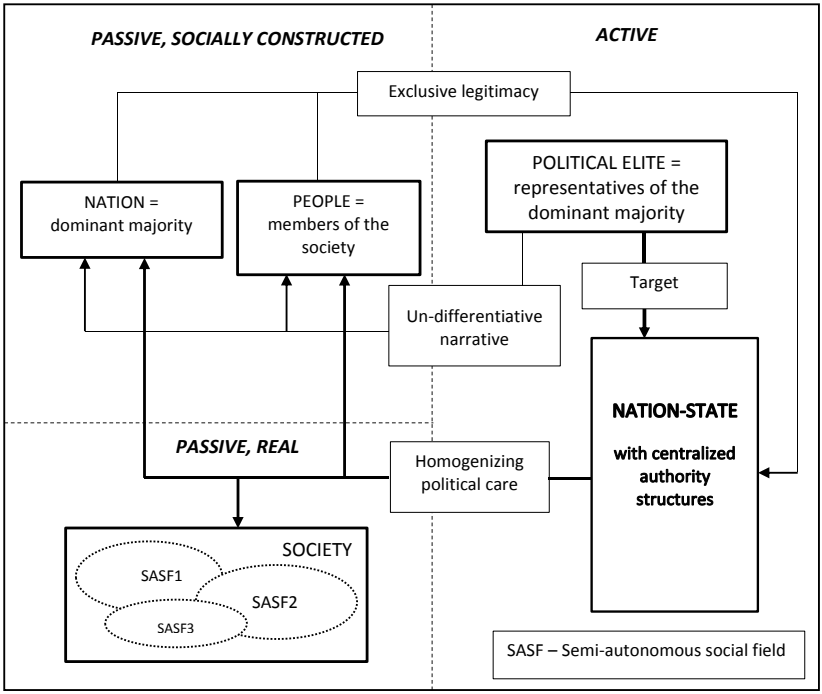

Fig. 6.2 The concept of the centralized nation-state (based on: Salat, 2021)

mobilization of the semi-autonomous social filed(s). For illustration, see Fig. 6.2.

A sub-state actor comes into being when the second scenario is deployed and an officially recognized semi-autonomous social field ends up exercising, through its representatives, a certain type of control over a part of the State's structural components and resources. For illustration, see Fig. 6.3.

It is important to not, however, that sub-state entities do not target in all cases the protection of non-dominant ethno-cultural groups: they can emerge as the outcome of the general organization of the state as well (Suksi, 2011). State-design of this kind, resulting in arrangements in which two or more authorities have "either limited or relative, differential or functional sovereignty over certain areas, groups or resources" (Lapidoth, 1997, p. 46) may occur simultaneously with the establishment

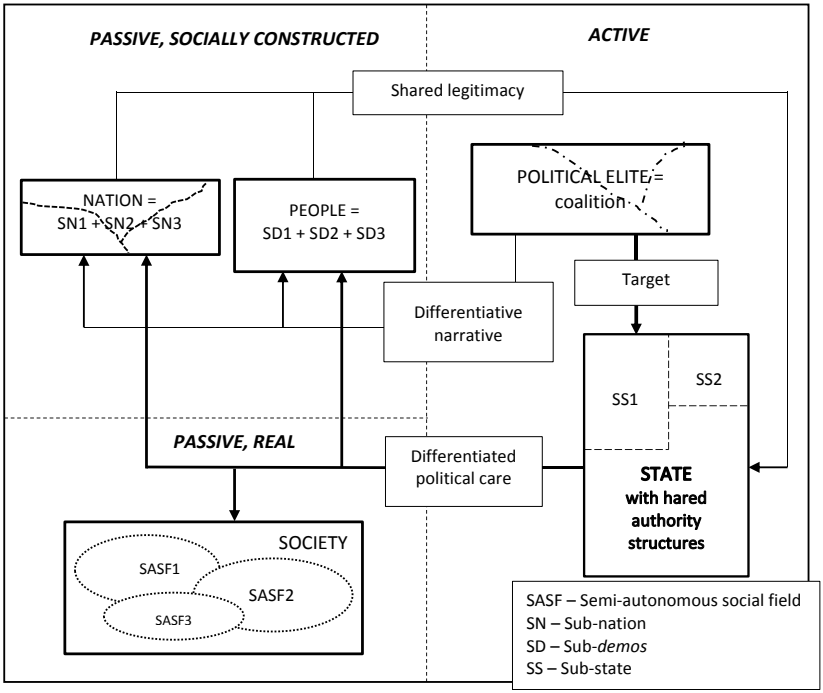

Fig. 6.3 The concept of the state with shared authority structures (based on: Salat, 2021)

of the State, or later in the course of the state's history, when adapting the structure of the State to previously ignored realities is considered necessary by the ruling elites. Moments in which similar decision are made are often preceded by violence or protracted conflict, but economic considerations or international pressure may also play a role (Lapidoth, 1997).

The probability of redesigning existing states in order to bring about divided or shared authority structures seems neglectable only if we think about states as perennial, self-evident political units which do not need justification. If we consider states as being the outcome of elites-backed political projects, it is easy to observe that the form in which the state is defined is neither an objective necessity, nor the only way it can be conceived. It depends on political will and appropriate decisions taken

by the involved actors to achieve the format serving everybody's interest. Among the many variants of dividing and sharing the authority of the state, the type of arrangement suiting best the given situation depends on particularities of both, dominant and non-dominant groups.

6.3 The Establishment of NTA Arrangements

Theoretically speaking, an NTA arrangement may come into being at any time in the history of a State: while TA is often the outcome of protracted conflict, NTA arrangements may result from political bargaining, legislative processes, or institution-building. Since there is no binding provision in international law from which NTA could follow,[4] the arrangements emerge in domestic politics from claim-making and pressure exercised by representatives of non-dominant communities and are the outcome of lengthy processes of negotiation, rather than judicial remedies. Canada provides a rare counterexample with regard to the functional autonomy of the Francophone minority communities (FMCs) outside Québec, known as "institutional completeness", emerged largely due to a series of favourable decisions of courts: "While the government of Canada has been timid in recognizing institutional completeness for FMCs, the courts have been more innovative, defining the right to NTA through various judgements" (Chouinard, 2013, p. 233).

State authorities may decide on their own, without being challenged by targeted claim-making, to implement variants of NTA, when they try to prevent the escalation of minority mobilization, or to provide proof of decent treatment of non-dominant groups. When agreement is reached between the negotiating actors and/or the political will on behalf of the State's representatives exists, the envisaged form of accommodation has to be ratified in law, which requires institutional design: choosing from the multitude of variants and procedural details, according to the particularities of the given situation.

[4] Certain forms of personal and functional autonomy may be seen as the implementation of provisions of international law, like Art. 25 (c) of the International Covenant on Civil and Political Rights, see Suksi (2015, p. 89).

6.3.1 Preconditions

NTA arrangements are suitable in asymmetrical settings where the dominant position of the titular nationality in the state is beyond doubt and uncontested, yet there is at least one non-dominant minority group within the frameworks of the population distinguishable from the majority based on strong identity markers like language, religion, way of life, etc., voicing interest in identity maintenance. The non-dominant group should be a 'semi-autonomous social field', i.e. should possess institutionalized traditions enabling the community to make rules and induce compliance. The non-dominant group should have clear potential for collective agency and an internal structure of authority capable of deliberating, evaluating, and choosing a course of action. This is particularly important in order to avoid top-down, symbolic NTA arrangements which may occur in situations when "the government behaves *as if* ethnic groups were able to self-organize, govern and represent themselves and thus need respective normative and institutional frameworks" (Osipov, 2013, p. 134).

The pattern of settlement of the non-dominant group within the State's population should be scattered and discontinuous, excluding TA as a possible form of accommodation. Where TA is perceived as a potential threat to the State's territorial integrity, the interest in NTA could be enhanced.

The size of the non-dominant group should be appropriate: large enough in order to secure that the institutions created within the arrangement prove operational and justified, and not too big, so that the chances of electing a single representative body—if cultural autonomy is the target—are not undermined by internal divisions. More numerous communities with complex social structure, incapable of consensus regarding the establishment of cultural autonomy, may become beneficiaries of functional autonomy, with limited self-government exercised in the various boards supervising the different fields of activity, like education, health care, mass media, etc.

Appropriate level of political mobilization and legitimate structure of authority within the non-dominant group are important preconditions of effective negotiations. Patronage and overwhelming support on behalf of the kinstate could yield the minority uninterested in NTA or undermine the chances of being accepted by the majority as partner in negotiations targeting power-sharing schemes.

6.3.2 *Decisions*

The establishment of an NTA arrangement requires decisions on the side of the State's authorities, on the one hand, and the non-dominant group, on the other hand. It is important to recall at this point that political elites are speaking both in the name of the State and the minority group, respectively, who need to secure the approval of their constituencies for what they agree and how they perform in the course of the negotiations (interesting accounts on the complexities of the negotiations from which the Estonian Law on Cultural Autonomy emerged in 1925 are Alenius [2007] and Housden [2004]). The choices, preferences for details of the institutional design may reflect not only perceived constraints, but the performance and limitations of the participating elites, too. As States dominated by nationalist elites driven by suspicion and fear rooted in experiences of the recent history may prove difficult partners in negotiations, self-interested elites can also capture the will of the non-dominant communities, raise the stakes in the negotiation artificially and produce counterproductive outcomes for the non-dominant group.

The State

On the side of the State, the most important decision is to secure the political will underpinning the future arrangement, i.e. to achieve commitment on behalf of the political elites speaking in the name of the State to undertake actions in order to delegate public authority, powers, and tasks to an entity that represents the non-dominant group(s). From this commitment follows the official recognition of the non-dominant group(s), a crucial element of any NTA arrangement which opens the way for one or more 'semi-autonomous social fields' to become sub-state actor(s) with legal status. The list of non-dominant ethnic or religious groups officially recognized by states may not include all possible candidates, the respective decisions regularly reflect historical or political considerations.

If there are no appropriate provisions included in the Constitution, the commitment to formally ratify a power-sharing arrangement may require amending the constitution, to prevent future attacks. If the right to autonomy is provided by the Constitution, the authorities of the State must decide the scope and depth of the future arrangement which will become part of the State's system of government, grounded in the existing legal order.

The consequences of the decisions made in this phase are far-reaching: the State has to accept that the arrangement will subject part of the population to the decisions made by a sub-state authority, which equals with undertaking that the State will not impose its own regulations on the respective segment of population in the fields covered by the delegated competences. In spite of this self-limitation, the State remains responsible as far as the individual human rights of the non-dominant community's members are concerned.

The Non-Dominant Group(s)

If there is just one non-dominant group interested in NTA, the political elite speaking in the name of the community has the difficult task to foster intra-community consensus regarding two basic questions: the type of NTA, on the one hand, and the form of legal entrenchment, on the other hand. As far as the type of the arrangement is concerned, the choice from the available options—cultural, personal, functional, or administrative autonomy—should be grounded in the particularities of the minority: size, ethnodemographic characteristics, available institutions, intensity of political mobilization, level of political culture fostering consensus-building, etc.

Opting for cultural autonomy means engagement to voluntarily register for membership, elect one single representative body, the Cultural Council, accept it as the highest decision-making authority and undertake to submit to its binding decision within the spheres of competence, including, perhaps, taxation. Achieving all these requires a cohesive group capable of consensus-building, committed to take extra burden and actively participate in community governance in the fields of culture and education.[5]

In the case of larger, internally divided communities, if reaching agreement with regard to the details pertaining to the establishment and functioning of cultural autonomy proves difficult, functional autonomy could be the suitable alternative. The linguistic and cultural layering of

[5] It is not surprising that there are not too many examples of successful cultural autonomy regimes: Estonia (1925–1940), Cyprus (1960–1963), Serbia (2002–) could be mentioned, perhaps. For details, see Aun (1953) on Estonia, Stratilatis (2021) on Cyprus, and Beretka (2021) on Serbia. Cases are known when certain minorities remained disinterested in otherwise successful cultural autonomy regimes during the inter-war period, like the Russians (Aidarov & Drechsler, 2011) and the Swedish minority in Estonia (Kuldkepp, 2022).

certain public functions in education, public administration, health care, jurisprudence, or mass media may provide access to adequate public services, with a fair level of minority control exercised in the relevant boards or the respective institutions, without the need of accepting the authority of one centralized representative body. Arrangements of this kind display, however, the failure of minority elites to reach consensus within the community and the adopted solutions may be the result of unilateral State initiative, without agreement reached in negotiations, yet not independent of minority claim-making (the resulting arrangement may not even be called 'autonomy', as in the case of Romania, where a rich network of functional autonomies exist in education, culture, public administration, and religion, while the public discourse labels all forms of autonomy incompatible with the Romanian State (Salat, 2014). If functional autonomies are present in more fields of activity simultaneously, administrative autonomy might be in place, according to the definitions provided in Chapter 1.

As far as legal entrenchment is concerned, elites speaking in the name of a certain non-dominant group may opt for cultural self-government exercised under public or private law. Though the use of private law entities for the provision of public services is considered generally an option with low effectiveness, the size and needs of particular communities may justify this choice and the implemented solutions might prove appropriate (for example, the NTA arrangements in the Danish–German border-region [Malloy, 2015]).

If more non-dominant groups are present and express interest in some form of NTA, the first task is to build a coalition of the elites speaking in the name of the respective minorities and reach agreement regarding the targeted outcome. Since the attributes of non-dominant groups within a society are regularly different, consensus among the minorities' representatives is difficult to reach and the lack of agreement can undermine the chances of establishing an NTA regime. In Latvia, for instance, the chance of adopting a law on cultural autonomy in the 1920s was undermined by the fact the several autonomy drafts were submitted to the Latvian Parliament, the *Saeima*, by the Jewish, German, and Polish minorities: "The discord among the minorities, and their inability to present a united front undermined the whole idea of cultural autonomy in the eyes of the majority, and weakened the minorities' position" (Germane, 2013, p. 114).

One non-dominant group may try to take the lead and speak in the name of all, though the task of achieving an arrangement endorsed by the other minorities is not an easy undertaking either. In Romania, a draft law including a scheme of cultural autonomy was submitted to the Parliament in 2005 by the representatives of the largest non-dominant group, the Hungarian minority. In addition to the fact that the attempt provided an example of failure to reach agreement within the minority community itself, the proposal was not endorsed by the other 18 minorities represented by one MP each in the lower chamber of the Romanian Parliament, which reduced the chance of adoption even more (Székely, 2020).

Joint Decisions

When political will on behalf of State authorities and commitment of the representing elites are in place, on the one hand, and the elites speaking in the name of the officially recognized non-dominant group(s) are in the possession of their mandate to negotiate, on the other hand, negotiations may start in order to decide the details of the institutional design.[6] The negotiations would have different paths according to the targeted autonomy scheme.

If cultural autonomy is at stake, the parties need to agree with regard to issues of membership, mechanisms of participation, institutional forms, powers, funding, and adjudication in case of conflict. If personal autonomy is the target, the type and number of private entities entrusted with public service delivery has to be agreed, areas of competences, operational licenses, quality assurance, recognition of qualifications, etc. Reaching agreement with regard to functional autonomy requires relatively little effort, the institutions exercising state functions being already in place. In this case, the fields of activities need to be settled within which the linguistic/cultural layering of the service provision will be accomplished, and the principles of staffing and self-management have to be outlined.

[6] As Suksi observes, "One reason for the low level of use of NTA may be the need to tailor-make each solution: because such solutions fall outside any textbook example of 'rational' organization of public administration and require thinking outside the box, the setting up of non-territorial forms of autonomy are probably perceived as difficult, complex, and arduous" (Suksi, 2015, p. 115).

Institutional Design of Cultural Autonomies

From membership in cultural autonomies follows the right of individuals to ethnic self-identification upon voting age and the establishment of special minority registers containing personal data of individuals who declare membership in a national minority (children could be included at the request of the parents). Registration in such a minority list should be voluntary and would equal with the unconstrained declaration of the wish to participate in the collective efforts aiming to maintain the culture, language, religion, and common identity of the minority. The public authority handed over by the State to the institutions of the cultural autonomy can be exercised only over those individuals who have voluntarily opted for registered membership. The possibility of withdrawal from the declared membership, with clearly stipulated procedural details, should exist.

With regard to the minority registers, the negotiating parties must agree first of all whether the minority lists will be administered by state authorities or the cultural autonomy body itself. Subsequently, consent is required on the procedures of establishment of the nationality list; the personal data items it will contain; if the circle of potential members who can apply for registration is restricted to citizens of the state or not; if decisions regarding who belongs to the respective identity group will be made based on self-identification or with the help of certain objective criteria; who will decide if objective criteria are used in the determination of membership; rules of accessing data included in the minority lists, procedures of maintenance, etc. Based on the minority lists produced by the various non-dominant communities, authorities of the State could decide whether a minority qualifies or not for the establishment of a cultural autonomy, depending on the number of individuals included in the minority register compared to census data. Agreements are necessary with regard to the thresholds of legitimacy, both in terms of the minority registers and participation in elections, below which the arrangement will be terminated.

For minorities eligible to apply for cultural autonomy, direct and uniform elections must be organized in order to establish the Cultural Council (with roles similar to the parliament), the core institution of minority self-governance which will be recognized as a legal person under public law. Decisions in this respect must include, among others, the number of members in the Cultural Council (depending on the size of the minority), duration of the mandate, filing candidates, rules pertaining

to the separate voting rolls for each non-dominant group, details of the electoral system, timing, quorum, etc. The possibility to choose from alternatives, securing genuine electoral competitions among organizations filing candidates and carefully chosen details of the electoral system are crucial ingredients of the perceived legitimacy of the arrangements. Given the importance of separate jurisdictions created for the purposes of internal elections to autonomy structures of the minorities, the rules for the elections of cultural councils should be approved by State authorities.

In terms of powers, agreements are necessary regarding the institutional structure of the cultural autonomy, first of all. If the elected Cultural Council will function as the chief decision-making body, i.e. it will serve as the legislative branch of the cultural autonomy, agreement must be reached concerning the size, structure, and nomination procedure of the executive branch (the Cultural Government) of the minority self-governance. The activities carried out by the Cultural Council as part of the official state apparatus will include, besides the delegated competences, the coordination, and supervision of the autonomy's executive branch. For this task, a Cultural Curatoria may be created, with decentralized structures in charge of supervising the activities of the Cultural Government in the territory and managing the minority registers in the respective areas. The location of the cultural autonomy institutions and the way those are subordinated to the central state institutions should also be agreed upon. For illustration, see Box 6.2.

Case study	**Box 6.2: The Estonian Law on Cultural Self-Government of Minorities (Excerpts)** *State Gazette* No. 31/32 Saturday, February 21, 1925 (…) § 2. The scope of authority of cultural self-government institutions of minorities includes: a. organization, management and supervision of public and private educational institutions operating in the respective minority's mother tongue; b. taking care of other cultural tasks of the respective minority and managing the institutions and companies established for this purpose § 3. The cultural self-government of the minorities has the right to issue coercive decrees to its members in the areas referred to in § 2. (…) § 4. The network of minority public schools is developed by the respective county or city and the respective minority cultural self-government by agreement, and approved by the Government of the Republic at the proposal of the Minister of Education. (…)

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	§ 5. The organs of cultural self-government of minorities are the cultural council and government of the respective nationality. Their location is the capital of the republic In order to solve and organize local issues, the culture council of the respective nationality may establish cultural curatoria, whose area of activity is the county together with the cities. With the approval of the Government of the Republic, a joint cultural curatorium can be established for several counties § 6. The financial basis of cultural self-government institutions of minorities is: a. costs and obligations assumed by the state in relation to public primary and secondary schools according to the law; b. expenditures of local governments and other obligations related to the supervision of public secondary and primary schools, to the extent imposed upon them by law; c. state and local governments' subsidies for carrying out cultural tasks; d. public taxes from the members of the respective minorities, imposed on them by the cultural council, as provided for in the budget plan approved by the Minister of Finance and Education within the Government of the Republic; e. gifts, collections, donations, endowments and income from the properties or businesses of the self-government. (…) *Source* http://sipsik.world.coocan.jp/seadus/kult1925.html (Own translation—LS)

The jurisdiction of cultural autonomy arrangements regularly encompasses the territory of the whole state—exceptions in this regard are NTA arrangements targeting the Sami with provisions limited to territories traditionally inhabited by the members of the respective communities—the delegated competences of public authority being exercised over the registered members, without regard to residence. The delegated competences are exercised in the form of biding decisions on individual matters pertaining to the areas of public service handed over to the cultural autonomy. Belonging to a cultural autonomy does not exempt the members from the general civic duties.

The direct powers of the cultural councils settled in the negotiations should include, among others, adopting and amending the cultural autonomy statute, the establishment, coordination, and supervision of educational, cultural and broadcasting institutions (both public and private), the transfer of existing institutions under the jurisdiction of the cultural council (both in the sense of exercising control over the previously existing public institutions, and transferring to the public sector existing private schools), adopting the budget, holding and managing property, to initiate the adoption and participate in the elaboration of

laws and regulations in the fields of culture, education, information, official use of language and script, as well as to monitor the implementation of such regulations. The cultural council should have the task to represent the minority in its relations with the State.

An interesting chapter of competences associated with cultural autonomy is the possibility of conducting cross-border and international affairs. If the results of the negotiations include such powers, the cultural council may establish contact and cooperate with kinstate, regional and international organizations, or similar bodies of national minorities in other countries. In similar cases, the cultural self-government of the minority may participate in negotiations targeting bilateral agreements with kinstates, may be consulted with regard to the conclusion of international agreements affecting the status of national minorities, or participate in supervising bilateral inter-governmental treaties in the area of minority protection. For illustration, see Box 6.3.

Case study	**Box 6.3: Law on National Councils of National Minorities (Excerpts)** Official Herald of the Republic of Serbia, Nos. 72/2009, 20/2014—decision of the Constitutional Court, 55/2014 and 47/2018 (…) **Art. 1a.** A National Council is an organization that entrusted by law with certain public powers to participate in decision-making or to decide independently on certain issues in the field of culture, education, information and official use of languages and scripts in order to achieve the collective rights of a national minority in self-government in these areas. The members of a national minority can only elect one National Council **Art. 2.** Members of national minorities in the Republic of Serbia shall have the right to elect their National Councils with a view to exercising the right on self-government regarding culture, education, dissemination of information and official use of language and script A national minority shall be represented by its National Council in the field of education, culture, informing in the language of a national minority as well as in the official use of language and script, and it shall participate in the decision making process or decide on the questions related to these fields A National Council may establish institutions, companies and other organizations in the fields referred to in paragraph 2 of this Article, in accordance with special laws. (…) **Art. 25.** The National Council may submit to ministries and special organizations proposals, initiatives and opinions on issues related to the exercise of the powers envisaged by this law Before considering and deciding about the issues in the field referred to in Article 2 of this Law, the bodies in paragraph 1 of this Article shall seek the National Councils' opinion

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	The National Council may launch an initiative with the Government for the abrogation and/or nullification of regulations issued by ministries and separate organisations that are not in compliance with the provisions of this Law and other laws and regulations pertaining to national minorities. (…) **Art. 27.** The National Council shall cooperate, in accordance with law, with international and regional organisations dealing with the rights of persons belonging to national minorities, the country's organisations and institutions, as well as with the national councils or similar national minorities' bodies in other countries. (…) The National Council representatives shall participate in negotiations or be consulted as part of negotiations the aim of which is the conclusion of bilateral agreements with home countries, especially when national minority rights are discussed Representatives of the National Councils shall participate in the work of mixed inter-governmental bodies whose aim is supervision of the implementation of bilateral inter-governmental agreements on the protection of a specific national minority's rights **Art. 28.** Representatives of national minorities, via the Council for National Minorities of the Republic of Serbia, shall take part in the conclusion of and/or accession to international agreements regarding the status of national minorities and preservation of their rights *Source* www.paragraf.rs

Funding is a delicate and important part of the agreement which needs to be reached. Though cultural autonomy bodies should be entitled, theoretically, to levy taxes on members in order to secure the financial bases of the provided services, the costs of the arrangement are regularly much higher and necessitate subsidies from the regular state and local budget. Double taxation of members of cultural autonomy arrangements remains, however, an important matter of principle which can be implemented in the form of annual membership fees. Cultural councils may also receive private and corporate donations.

The institutional design of cultural autonomies should include mechanisms or policies for resolving conflicts, too. Members of the cultural autonomy, as well as institutional components should be granted the possibility to contest the violation of the autonomy arrangement or the non-application of the provisions of the autonomy statute before the competent body of the State's judicial system. Members should also have the right to seek legal remedy in cases of abusive application of the autonomy statute's provisions, or in cases of perceived human rights abuses resulting from decisions of the Cultural Council. Institutionalized ways of renegotiating the autonomy arrangement need to be available as

well, should ethnodemographic or other kind of changes make it necessary. Conditions and procedures of liquidating the arrangement should be stipulated as well.

Particularities of Personal and Functional Autonomy

In the case of personal autonomy, public powers are delegated to a private entity, regularly associations registered as legal persons under private law, established by non-dominant groups. Though rarely mentioned in the NTA literature, in cases when religion is a distinctive feature of non-dominant group identity, recognized churches operating as legal persons registered under private law are eloquent examples of personal autonomy institutions. The history of the religious traditions and associated institutions may go beyond the history of the respective State, and thus, the establishment cannot be seen as the outcome of negotiations between the dominant majority and a non-dominant group, yet the official recognition of the respective church and the inclusion in the sphere of churches eligible for state subsidies may clearly be seen as such an outcome.

While the freedom of association is a constitutional right in most cases, generally available for minority groups interested in creating platforms suitable for nurturing group identity, furnishing with public powers such and entity is less self-evident, since it equals with making the private entity part of the State's public administration. It happens most often in the field of education: private schools created and operated by non-dominant communities may hold recognition as fulfilling public school requirements. As Suksi observes, international law is reinforcing in this regard: "a minority does not generally have the right to claim a certain official position for the governance of a matter, except within the area of education, where it is well-established under public international law that a minority population would have the right to set up its own private schools, under certain conditions established under the 1960 UNESCO Convention against Discrimination in Education and in a number of other international instruments adopted after that" (Suksi, 2015, p. 87). In similar cases, negotiations targeting the institutional design of personal autonomy should deliver agreements regarding operating licenses granted under the existing educational legislation, access to funding from state budget and formal recognition of the diplomas. The resulting minority empowerment may trigger autonomy in school management, staffing, and curricular design.

Complementary to the field of education, minority backed private entities may carry out activities in other areas of interest for non-dominant groups like culture (theatres, libraries, museums, festivals, etc.), mass media (printed and broadcasting), social services (counselling, medical

care, maternity services, assistance for elderly, etc.), economic sector (agricultural organizations, financial establishments, tourism, etc.), youth and sport clubs, etc. (Malloy, 2015). Majority–minority negotiations leading to such arrangements should facilitate the adoption of legislative acts providing for the formalization of the minority institutions in the respective areas, including the conditions under which accessing public funds becomes possible. Instances of the kind may provide examples of considerable self-empowerment and self-management, yet depend largely on minority activism.

Functional autonomy implies facilitating for members of non-dominant groups to be in charge of managing certain public functions in accordance with state law. The most frequent institutional setting for similar arrangements is the linguistic layering of public institutions, i.e. organizing regular administrative agencies along separate linguistic lines, the provided public functions/services being accessible, due to adequate staffing, both in the majority and minority language, within one common institution. Frequent examples are provided by bilingual schools and municipalities, but other areas of public services may also be organized, too, in accordance with the principle. The autonomy requirement is fulfilled if consultative bodies representing the non-dominant groups have a say in appointing staff and/or delegating members in supervisory boards.

It is interesting to observe that such arrangements are not always the outcome of majority–minority negotiations: representatives of the titular groups in states often decide on their own to implement variants of functional autonomy as a response to minority claim-making. Though there are many examples present in various regions of the world, the targeted non-dominant communities are reluctant to consider them forms of genuine autonomy, and in most cases the term ‘functional autonomy’ is not used by state authorities either.

In the particular context of Canada, New Brunswick, the official bilingualism, and the administrative duality of the province has facilitated the emergence of a special kind of functional autonomy of the francophone linguistic minority, the Acadians, discussed in the literature under the label of ‘minority sub-state institutional completeness’. The tradition of elected municipal councils, school boards, and health boards made possible the gradual establishment, through court decisions and the mobilization of the minority electorate, of a network of linguistically homogeneous institutions which gives the opportunity to members of the

francophone minority to "live their life in their language". The resulting sub-state institutions are sanctioned by the state and are publicly funded. Complementary to the three main areas (local administration, education, and health care), land use planning commissions, economic development agencies, credit unions, boards supervising the activity of the police are also in place. The Université de Moncton created initially as a private institution was officially recognized as public institution based on the 1981 Equal Communities Act. These minority-controlled sub-state institutions give to the francophone minority significant autonomy in sectors critical for cultural survival (Bourgeois, 2014; Chouinard, 2013).

6.3.3 Implementation

The agreements reached in the negotiations should be ratified by law. In the case of cultural autonomy, a separate law is necessary, for personal and functional autonomy schemes amending existing laws may suffice. The adoption of a Cultural Autonomy Law may require issuing later various by-laws, meant to regulate specific aspects brought up by practice. In Estonia, for instance, complementary to the 1925 law which was intended originally as a temporary framework, subsequent by-laws were issued on the organization of the Cultural Self-government, the Nationality Register, and the Cultural Curatoria. (Aun, 1953, p. 30, fn 11).

Regardless to the type of arrangement, the resulting legislation must pay special attention to two complementary aspects: accountability and change management. When public functions are transferred to institutions created and controlled by members of a self-governing non-dominant group, empowerment has to be balanced with accountability, i.e. the issue of responsibility in case of malfunctions or mismanagement should be clearly addressed by the legislation, together with the necessary legal remedies.

Since circumstances change and the conditions on which the agreements reached in the negotiations depend can alter, the need to renegotiate certain provisions of the arrangement may occur. The legislation must include clear procedures and mechanism which make possible the renegotiations.[7]

[7] The details of the resulting legal and institutional frameworks will be discussed in other chapters of the book. See Chapter 3.

6.4 Assessment

If negotiations which bring about NTA arrangements are difficult and laborious, operating the resulting arrangements is not easy either: it requires self-limitation and tolerance on behalf of the dominant majorities, and engagement, activism, extra burden, and hard work as far as the targeted minorities are concerned. Adequately, socialized publics and relatively high level of political culture on both sides are critical requirements, too.

Where all the above conditions are met, the implemented NTA arrangements have the potential to deepen democracy, provide effective channels of political participation, and compensate the members of non-dominant identity groups for the disadvantages which follow from public services addressing preponderantly the needs and expectations of the State's titular majority. The compensations, if appropriate and effective, may contribute to securing circumstances for linguistic, cultural, and religious identity maintenance on medium or even long term.

However, NTA arrangements, like most man-made arrangements, are not a panacea: in real life situations the above listed conditions are rarely met, which means that in cases of implemented versions of the ideal types of NTA the potential positive outcomes are burdened by shortages and trigger significant social costs.

Assessing NTA arrangement is a difficult task for at least two reasons: (a) since the benefits of the model are strongly intermingled with social costs and drawbacks, providing separate complementary lists of advantages and disadvantages is hardly possible; (b) given that judgements concluded on the theoretical level regarding the merits and deficiencies of the ideal type are often contradicted by findings of the case studies based on empirical analysis, these two dimensions of the assessment are difficult to reconcile. The difficulties incurred by attempts to evaluate NTA will be illustrated below by focusing on three topics often addressed in the literature on NTA assessment: the limitations of non-territoriality, the agency requirement, and the pitfalls of implementation.

6.4.1 The Limitations of Non-Territoriality

NTA arrangements are often portrayed in the literature as a valid complement to the territorial organization of state power, when and where

ethnodemographic realities justify it. While TA replicates the disadvantages of territorial dominance embedded in the regular organization of state power—by enhancing competition for control, creating "minorities within minorities", justifying tacit forms of discrimination and even the expulsion of non-members—schemes of NTA de-securitizes majority–minority relations due to the workable alternative offered to TA, seen by suspicion by most state authorities faced with the challenge of deep diversity.[8] State power assigned to culturally rather than territorially defined groups and self-government limited to cultural aspects, though challenge, in principle, the idea of the nation-state, do not require majorities to give up their dominant positions in the State, while the institutionalized forms of self-administration and access to state resources creates loyal minorities, reducing the chances of ethnic conflict. In addition to mitigating tension, states implementing NTA arrangements leave non-dominant groups bereft of the arguments that they are threatened by assimilation and their freedom is suppressed.

Indeed, NTA arrangements, suitable for small and dispersed identity groups, do not pose any threat to the sovereignty or territorial integrity of a state since the connection between self-determination and NTA is regularly weak or non-existent: non-territorial sub-state entities invested with state functions do not exercise law-making powers. Thus, the promise of offering an alternative to territorial forms of autonomy has a price, the relatively low level of public authority shared with sub-state entities with non-territorial character (Suksi, 2015). Accordingly, NTA schemes provide considerably weaker forms of minority protection than TA (Yupsanis, 2015).

Concerns are voiced in the literature with regard to the chances of de-territorializing state powers, too. While the personality principle might prove effective in creating communities of will from which officially recognized sub-state entities might emerge, the strict division between territorially defined state powers and institutions associated with NTA is

[8] Pål Kolstø observes the following: "Ironically, the clearest evidence in support of the suggestion that territorial autonomy within a state might be exploited as a springboard to achieve full independence, is provided by the Soviet successor states themselves. During perestroika the leaders in the union republics made maximum use of the territorial autonomy granted to them in the Soviet constitution, and managed to engineer the dissolution of the Soviet state. The political authorities in the successor state seem to be saying: since *we* misused TA, we cannot give TA to you, the current minorities" (Kolstø, 2001, pp. 211–212. Italics in the original—LS).

often impossible or requires compromises.[9] Survival of linguistic minorities, for instance, is hardly possible in modern, industrialized societies without territorial forms of protection (Bauböck, 2005) and some of the most successful cases of cultural autonomy are, in fact, supplementary to well-established TA arrangements (Bauböck, 2001). These practical limitations of the non-territoriality principle cast a shadow over one of the core tenets of the NTA ideology, the belief that when debate and contestation is removed from cultural matters, the effectiveness of common government is enhanced.

A further problem with the promise of non-territoriality is that it could be a disincentive for minorities which take advantage of certain settlement patterns. Less numerous minorities for which TA is inconceivable, which represent however a considerable percentage within units of public administration, might be more willing to benefit from participating in local power than becoming part of cultural autonomy institutions, especially if those are underfunded and have just symbolical powers. In addition to other reasons, the disinterest of the Russian and Swedish minorities in the provisions of the 1925 Estonian law on cultural autonomy is explained with similar arguments (Aidarov & Drechsler, 2011; Kuldkepp, 2022).

6.4.2 The Agency Requirement

One unquestionable merit of the NTA model is that it provides a clear answer to the question who is the 'self' in the self-governing arrangement: the community of will emerging from the minority registers, created on the basis of voluntary, individual decisions, can be seen as the outcome of procedures analogue with referendums. Thus, the moral bases of the resulting sub-state units are more consolidated compared to states which claim to be result of self-determination without any referendum. The judgement is valid partially for the case of personal and functional autonomies, too, since the private institutions or linguistic lines of public services exist until people choose to take advantage of them.

The freedom of choice is given also with regard to the degree of autonomy a non-dominant community is ready to assume: cultural autonomy, demanding more work, and responsibility are available for minorities capable and willing to take the effort; personal autonomy

[9] This is acknowledged already by Renner (2005). For further details, see Hannum and Lillich (1980), Kemp (2005), Bauböck (2005), Coakley (2016), and Stratilatis (2021).

implies less responsibility but claims comparable amount of burden; functional autonomy is an option for more fragmented minority communities, uncapable, or unwilling to get organized. Cultural and personal autonomies require committed elites working hard on securing legitimacy and keeping the autonomy institutions functional, based on which the issue of agency could be considered satisfactorily solved.

Despite this remarkable potential, in practice, there are several technical details which become responsible for compromised outcomes of the arrangements. The minority registers, for instance, often raise questions regarding how disputes about membership will be solved, the possible answers to which blur the shining of the original idea. Does the voluntary, individual declaration of membership suffice, or some objective criteria of belonging should be taken into consideration? If the use of objective criteria is deemed necessary in order to prevent abusive registration of non-members, who should take the decision: the community or authorities of the Sate? When questions of these kinds need to be answered, solutions which do not produce unintended harmful consequences are hardly available. A ruling of the Slovenian Constitutional Court states, for instance, the following: "Everyone has the right to declare their belonging to their national or ethnic community. However, in deciding who is the beneficiary of special rights… the will of the individual is not decisive, rather legal criteria shall be established… membership in the autochthonous Italian or Hungarian ethnic community is not a matter of the will of the individual, but the autochthonous community itself" (Villiers, 2012, p. 179, fn 90).

Concerns are raised with regard to the compulsory character of self-identification: though from the perspective of the individual expressing the will to be included in the nationality register is voluntary, laws on cultural autonomy regularly stipulate that becoming subject to such an arrangement requires registration, which may harm the freedom to choose to be treated or not to be treated as member of a certain minority, without any disadvantage that might follow from this decision (Suksi, 2015).

Other negative consequences associated with the implementation of the personality principle are the lack of concern for individuals who do not wish to exercise political rights pursuant to their nationality; the reductionist view of cultural identity often limited to language; failing to address the situation of individuals who associate with more than one nationality; excluding the possibility of simultaneous membership in

two or more national registers; undermining pluralism within the culturally autonomous community; prescribing/limiting the ethnic categories which may apply for cultural autonomy; rewarding ethnic mobilization to the detriment of common citizenship (Villers, 2016), or stimulating ethnobusiness (Dobos, 2013). While most of these concerns might be properly handled with careful legal design, in real world cases they often trigger, indeed, unintended consequences.

Finally, influential opinions hold that cultural autonomy schemes need to assume that ethnic minorities are coherent and cohesive social groups, with internal structure, organization, and leadership, capable and willing to cooperate in order to give life and operate cultural autonomy institutions (Aidarov & Drechsler, 2011; Kemp, 2005; Osipov, 2013). Though many non-dominant groups lack, indeed, the capacity for agency, it is counterfactual to suggest that no minority community may qualify for what cultural autonomy arrangements require.

The evident truth that not all members of a non-dominant group may be equally committed to get involved and actively participate in the institutionalized protection of their culture does not invalidate the arrangements' moral legitimacy since nationality registers, if properly implemented, sort out this problem: in addition to the freedom of choice to become or not to become a member, the possibility of exit or withdrawal being regularly part of the arrangement. It is not less true, however, that cases are known when minority elites empowered by cultural autonomy arrangements use their positions to dominate the intra-community debates and annihilate interest differences (Korherc, 2021; Székely, 2020). It may also happen that states grant cultural autonomy rights to small and week minorities while more numerous and better organized communities are excluded from the list of potential beneficiaries of NTA arrangements (Yupsanis, 2019).

6.4.3 The Pitfalls of Implementation

Though establishing cultural autonomy bodies in order to allow for minorities to live in their cultural and linguistic world is a generous undertaking on behalf of dominant majorities, the long and arduous way from the political will to the implementation is full of temptations and pitfalls. If minority claim-making is peaceful and the conflict potential of the setting is moderate, political elites speaking in the name of the

State do not have strong incentives to effectively delegate public functions to statutory associations under public law. Even though authorities of the State invest time and resources to creating institutions of cultural autonomy, dominant elites are regularly reluctant to furnish the respective bodies with more significant powers and functions, and to allocate appropriate funding, despite the fact that NTA arrangements do not incur risks for those who hold state power. As a result, the idea of cultural self-government legitimized by elections often turns out to be compromised: the arrangements run the risk of becoming vehicles of symbolism (Suksi, 2015); the limited capacities and mere consultative roles of the elected bodies discourage minority members to vote and run as candidates (Dobos, 2013); schemes seen by the dominant elites as genuine forms of national cultural autonomy turn out to be instruments of state patronage and guided control, instead of authentic models of representation and self-organization for ethnic groups (Osipov, 2013).

In addition to technical concerns regarding the limitations of non-territorial jurisdiction (Bauböck, 2005), in terms of competences commonly associated with cultural autonomy, doubts are justified whether minority-controlled subs-state institutions limited to cultural domains can guarantee substantive self-determination, and whether those powers can be effectively separated from other spheres of state jurisdiction (Kemp, 2005; Lapidoth, 1997). While personal and functional autonomy may offer partial solution to this problem (Bourgeois, 2014; Malloy, 2015), the subordination of cultural autonomies' members to state jurisdiction in critical domains like social security, health services, welfare, etc., may undermine, indeed, the generous idea of cultural self-determination. In this regard, alleged internal contradictions of Renner's original model are mentioned: while militating for the separation of politics and culture on the level of the state in order to prevent conflict, culture is made politically relevant in the case of cultural communities (Kemp, 2005); notwithstanding that churches, considered by Renner the most genuine institutions based on the personality principle, were made autonomous by depoliticization, the cultural autonomy model aims to make national minorities autonomous by politicizing them through granting to their representatives political authority over cultural affairs (Levey, 2005). Separating culture from state politics and establishing appropriate and effective institutions of cultural self-rule on sub-state level is, indeed, a major challenge of any NTA arrangement.

The various assessments of available examples highlight further pitfalls of well known, frequently referred to cases. A broad attempt to compare TA and NTA arrangements as possible solutions to the challenges faced by states due to the diversity of their population reached the conclusion that NTA schemes are, in fact, either residual, supplementary, or transitional arrangements, without a full potential for community empowerment[10]. A comparative analysis of the cultural autonomy regimes in Slovenia, Serbia, and Croatia led to the conclusion that it would be preferable to abandon the cultural autonomy idea since the arrangements implemented in the three countries are rather policies of state patronage (Yupsanis, 2019).

Concerns are raised in the literature regarding the degree and effectiveness of the minority empowerment, too. A comparative assessment of historical and contemporary cases led to the conclusion that the autonomy found in the investigated instances is either not clearly non-territorial, or the non-territorial arrangements fall short of true autonomy (Coakley, 2016). Another comparative analysis of several contemporary case studies concluded that examples of personal and functional autonomy may prove to be more effective, in certain circumstances at least, than cultural autonomies operating under public law (Salat, 2015). A further collection of cases selected from various regions of today's world offered ground to the assumption that legally not sanctioned, de facto autonomy arrangements are effective and resilient, from which follows that traditional community institutions may prove to be a more important condition of effectiveness than official recognition of state authorities (Malloy & Salat, 2021).

A broad area of critical comments concerns the possible human rights implications of implemented NTA arrangements, together with the long-term consequences for social integration and the future of non-dominant groups. The "coercive" or "restrictive culturalism" empowered by the State (Levey, 2005; Nimni, 2005) subjects members to the group's authority, compelling them to accept and support the cultural governing

[10] See Bauböck (2001). In his view, NTA arrangements are *residual* in Central and East Europe in the sense that the elected cultural councils are mere consultative bodies lobbying the governments instead of acting like institutions of self-rule; in South Tyrol and Brussels NTA schemes are *supplementary* in the sense that they are complementing the provisions of TA arrangements; in North Macedonia the implemented NTA arrangement is *transitional* since the particularities of the targeted Albanian minority would justify TA, yet the logic of the transition imposed consolidating the new state before considering the possibility of devolved state power to minority inhabited regions.

institutions, or even to accept the discriminatory treatment of their cultural tradition (Steiner, 1991). NTA practices are often depicted as inflicting the danger of atomizing societies, eroding the unity of the political community, and not simply preserving, but locking into place the historical differences among groups: "A state composed of segregated autonomy regimes would resemble more a museum of social and cultural antiquities than any human rights ideal" (Steiner, 1991, pp. 1552–1553).

Similar critiques disregard, on the one hand, that available legal remedies and the possibility to opt out can prevent or solve most of the human rights concerns; one the other hand, that some of the listed worries are everyday practices of states, too. The argument highlighting the risks of institutionalizing differences instead of diminishing them builds on the tacit assumption that cultures are of two kinds: either cultures dominant in states endowed with the right to be maintained and preserved, or non-dominant cultures doomed to seek, on medium and long term, assimilation into dominant cultures. Since this assumption is evidently non-tenable, the atomizing argument does not hold either: if the population of a state is diverse, encompassing non-dominant identity groups, official recognition, and legal empowerment of the groups through NTA arrangement makes the overall polity less atomized compared to the option when members of minority communities feel excluded and marginalized.

6.5 Conclusion

Are memberships in a political community, equality, and cultural distinctiveness reconcilable? Is Renner's vision of a state in which national communities do not fight for exclusive control but cooperate within various forms of shared rule, including non-territorial arrangements, attainable?

If one approaches these questions from the position of ignorance or shallow understanding of the NTA phenomenon, the answers available reflect a sad and hopeless world: the political community cannot afford to be tolerant of diversity and the state, as we know it, needs dominant majorities in charge with exercising exclusive control over the population of various territorial units. No binding provision of international law or widely accepted standard of state behaviour exists which could trigger a change, and no widely known, successful examples are available in the practice of states of our contemporary world.

Getting familiar with the politics of NTA may help in understanding that this is not an irremediable, objective fatality we have to accept and live with. Understanding the preconditions, the type and nature of the actors involved, and the processes which bring about NTA arrangements, together with the limitations and costs, can contribute to raising awareness, both in the world of political elites and the wider public, that alternatives to the exclusive territorial political authority, which triggers many negative consequences in the circumstances of diversity, exist. Two elements of this awareness are particularly important.

First, realizing that since the non-dominant status in a polity is not an objective given but the outcome of the treatment by state policies and authorities, the situation can be improved by appropriate compensatory treatment. NTA arrangements are one of the available solutions, and if the authorities of a state are reluctant to consider the adoption of a minority regime incorporating elements of NTA, then suspicions are justified that political elites have vested interest in maintaining the existing structural inequalities.

Second, successfully implemented NTA arrangements are reliable indicators of state and political elite performance: where all the conditions on which effective NTA schemes depend are met, both the dominant majority and the non-dominant groups provide evidence of high standards of political culture, effective social dialogue, and the capacity of careful institutional design.

Summing-Up

- NTA arrangements are the result of political processes and power dynamics between **dominant** and **non-dominant** groups. Behind every instance of the NTA phenomenon there is a history of minority activism and claim-making, on the one hand, and political decisions made in the name of the State, on the other hand. The political processes occurring during the sequence of majority state- and nation-building, minority claim-making and State-responses to the non-dominant groups' political activism are not always peaceful: conflicts may occur, and violence may be deployed by the parties. This chapter focuses on processes and circumstances that that bring about NTA arrangements with the means of **conventional politics**.
- NTA regimes are particular forms of **power-sharing** enshrined in state law, between two actors: the **State,** and a **sub-State unit** of

non-territorial character, constituted according to the **personality principle**.

- Instead of considering them self-evident, perennial realities which do not need justification, **states** can be seen as **socially constructed** entities, the target and possible outcome of a political project: a claim and a promise made by a political elite, forwarded in the name of the society (the population of a given territory), using the imagined 'people' and 'nation' to provide for the legitimacy of the arrangement, according to a narrative.
- States are political communities with established territorial boundaries. Political communities evolved from tribes, city-states, empires into modern nation-states, many disappearing without traces, others leaving lasting imprints on the way of life and identity of human communities known today. One of the legacies of the political communities' long history are the '**semi-autonomous social fields**' (Moore) existing on the territory of most contemporary states: informal social units, communities with the capacity to make rules and induce compliance.
- The boundaries of the semi-autonomous social fields are processual, rather than territorial: compliance becomes possible due to personal decisions of the individuals to live according to the rules rooted in the community's traditions. Authorities of a state can either ignore the semi-autonomous social fields existing on their territory and embark on homogenizing policies, or incorporate them in the nation- and state-building project. **Sub-state units** of non-territorial character emerge from the **official recognition by the State** of semi-autonomous social fields.
- NTA arrangement may come into being any time in the history of a State: while TA is often the outcome of protracted conflict, NTA arrangements may result from political bargaining, legislative processes, or institution-building. Since there is **no biding provision in international law from which NTA could follow**, the arrangements emerge in **domestic politics** from claim-making and pressure exercised by representatives of non-dominant communities and are the outcome of **lengthy processes of negotiation**.
- **Preconditions** facilitating NTA: such arrangements are suitable in **asymmetrical settings** where the dominant position of the titular nationality in the state is uncontested, yet there is at least one **non-dominant minority group** within the frameworks of the population,

distinguishable from the majority due to strong identity markers (language, religion, way of life, etc.), voicing interest in identity maintenance, and possessing scattered, **discontinuous patterns of settlement**. The non-dominant group should have clear **potential for collective agency**, i.e. internal structure of authority capable of deliberating, evaluating, and choosing course of action.

- The establishment of an NTA arrangement requires **decisions** on the side of the State's authorities, on the one hand, and the non-dominant group, on the other hand. Since political elites are speaking both in the name of the State and the minority group, respectively, the respective elites need to secure the approval of their constituencies for what they agree and how they perform in the course of the negotiations. The results of the negotiation should be **ratified by law**. Details of the institutional design differ according to the type of NTA agreed upon, depending on the particularities of the setting (size and level of mobilization of the non-dominant group, prehistory of the majority-minority relations, international context, etc.)
- **Cultural autonomy** is suitable for more **cohesive non-dominant groups**, capable of consensus-building, committed to take extra burden and actively participate in community governance in the fields of culture and education. In terms of institutional design, cultural autonomy requires **minority registers**, separate electoral rolls, and **elections for the Cultural Council** which will be recognized under **public law**, as the main decision-making body of the arrangement, empowered to make **decisions biding for the members** within the boundaries of delegated competences (limited to education, culture, language maintenance). The Cultural Council elects or appoints further institutional components through which the **cultural self-governance** will be operated.
- **Personal** and **functional autonomy** are options available for non-dominant groups unwilling or uncapable to self-organize in order to designate a common authority and accept its biding decisions. **Personal autonomy** arrangements require **bottom-up statutory bodies** registered under **private law**, yet recognized as exercising state functions by providing services in fields of **education** on the bases of operating licenses and recognition of the issued diplomas. Personal autonomy arrangements may cover **additional areas of interest** for non-dominant groups like, culture, mass media, welfare,

economy, etc. The private law organizations active in the various domains may be organized into an **umbrella structure**.

- **Functional autonomy** aims to facilitate for members of non-dominant groups to be in charge with managing certain public functions in accordance with state law. In terms of institutional design, it implies the **linguistic layering of public institutions**, i.e. organizing regular administrative agencies along separate linguistic lines, the provided public functions/services being accessible, due to adequate staffing, both in the majority and minority language, within one common institution. Similar arrangements may be considered forms of NTA if consultative bodies representing the non-dominant groups have a say in **appointing staff** and/or delegating **members in supervisory boards**.
- Operating NTA arrangements requires self-limitation and tolerance on behalf of the dominant majorities, and engagement, activism, and hard work as far as the targeted minorities are concerned. Adequately socialized publics and relatively high level of political culture on both sides are critical requirements, too. Where these conditions are met, the implemented NTA arrangements **have the potential** to **deepen democracy**, provide **effective channels of political participation** and **compensate** the members of non-dominant identity groups for the disadvantages which follow from public services addressing preponderantly the needs of the State's titular majority. The compensations, if appropriate and effective, may contribute to securing circumstances for linguistic, cultural, and religious **identity maintenance** on medium or even long term.
- The **potential benefits** of the NTA arrangements are strongly intermingled with **shortages**, **disadvantages, and drawbacks**, most of which follow from the limitations of non-territoriality, the agency requirement, and various pitfalls on the course of implementation. Part of these disadvantages may be prevented or ameliorated by careful institutional design, others are social costs which must be assumed by the actors participating in similar arrangements.
- Understanding the politics of NTA, the variety of institutional embodiments together with the limitations and costs, can contribute to **raising awareness**, both in the world of political elites and the wider public that alternatives to the exclusive territorial political authority, which triggers many negative consequences in the circumstances of diversity, exist.

Study Questions

1. Why are successful, enduring NTA arrangements relatively rare?
2. Why are churches, as institutions, carrying most of the NTA requirements, rarely mentioned or discussed as instances of personal autonomy?
3. Which are the most important merits of cultural autonomy?
4. Which are some drawbacks of cultural autonomy?
5. Which are three compelling arguments regarding the political benefits of NTA that could raise the interest of a policy expert belonging to a dominant majority in an ethno-culturally divided state?

Go Beyond Class: Resources for Debate and Action

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CHAPTER 7

The Legal and Institutional Context of NTA

Katinka Beretka and Balázs Dobos

Non-territorial autonomy (NTA) is one of the methods designed to accommodate ethno-cultural diversity and empower minority communities. While there has not been a generally accepted and even legally binding definition for the term autonomy in international law, NTA is also far from being a single, cohesive, and uniform model of diversity management. The appellation involves rather a generic, multifaceted and shifting umbrella term that embraces a wide variety of practices and theories (Nimni, 2013; Prina, 2020), including those notions explicitly used in national legislations, such as "cultural autonomy" (e.g. in Croatia, Estonia, Hungary and Latvia), and "national cultural autonomy" (e.g. in Ukraine and Russia), as well as a bunch of similar denominations in theory, like "segmental", "extraterritorial", "personal", or "corporate" autonomy (Andeva, 2013: 82–83, Rudneva, 2012: 30). Their common elements lie in the fact that as a general rule they are based on the

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individuals' ethnic self-identification and seek to represent a specific ethno-cultural segment of the society regardless of its size and place of residence in order to preserve their members' identities and distinct features, without aspiring control over the territory. Therefore, the model is suitable especially for relatively small and geographically dispersed communities, including the Roma, and some indigenous peoples, too (De Villiers, 2014, Klímová, 2008, Nimni, 1999).

According to the degree of autonomies, compared to territorial autonomy, because of the asymmetrical power delegation, NTA usually has less competences, fewer participation rights in those particular areas being important for the group members' identities, typically culture, education, language and religion, is less surrounded by legal guarantees, and is financially more dependent on state budget. Moreover, the existing arrangements labelled as some forms of NTA in various Central and Eastern European countries all lack legislative powers and decisive authority. NTA can range from unrecognized and informal, non-legal practices and arrangements to private law institutions and even to constitutionally entrenched, institutionalized and extensive structures of separately elected self-governments at various levels, while alternative and emerging examples stemming from legal pluralism and network governance tend to be also accepted as forms of NTA (Malloy, 2020). This, in turn, raises not only the question of the different institutional forms NTA may take and the various public and private law approaches, in which NTA may be embedded, but also the questions of group membership, effectiveness and the degree of institutionalization. Which individuals belong to a given minority, who has the right to enjoy the benefits provided by NTA arrangements, and who should decide on these issues? Are the traditional cases with their strong institutional and legal background the most effective, is there fully institutionalization at all, and further, whether NTA really needs to be institutionalized in a top-down manner and officially recognized by the state to make an NTA durable and functioning? To what extent does agency affect effectiveness, and are there other models that build more on bottom-up activities?

To address the issues above, the present chapter aims to provide an overview of the various types and institutional forms of NTA especially in the European context, including the sectors and scope of their activities and the degree to which power has been delegated to NTA bodies. In addition, it also summarizes the various acts that might appear as a legal basis and guarantees for NTA in practice, including some "bypasses" that

would present the pros and cons of the mostly applied legal solutions. In NTA cases, these are often the combinations of public and private law arrangements. Although at first sight this could be seen as too "lawyerly", the aim is to make the concept of entrenchment of NTA understandable even to non-law students. A case study about the national minority councils in Serbia would provide such data and information to illustrate how NTA can be built and institutionalized in a legal order in a top-down manner; in other words, which steps have led a political goal (programme) to become a constitutional category.

7.1 Policies and Institutions

7.1.1 Autonomy of Whom and for Whom? the Main Questions of Creating NTA Arrangements

NTA settings almost inevitably raise crucial questions and dilemmas, both in theory and in practice, firstly about community boundaries: who belongs to the given minority and who does not (Bauböck, 2001), who shall have the right to vote and become candidates in elected bodies, and further, how these issues should be appraised. For instance, the elected models of NTA vary in the extent to which they rely on individuals' self-identification and personal choices, a right that is the cornerstone of minority protection, or in rather rare cases, they also build on potentially objective elements determined either by external public authorities or by the groups themselves. As to the latter, ancestry has been a common element in determining the group of Sami voters in the Nordic countries. In both Estonia and Slovenia, minorities themselves have the right to compile and administer the registers of their own voters, while in Croatia, Hungary and Serbia these are administered by state or municipal authorities. Especially in these latter cases, group membership could be inflated by fraud and by people who presumably or obviously do not belong to the community, a phenomenon commonly referred as ethnobusiness or ethnocorruption. In addition, it has become a recurring criticism of NTA that, while individual identities can be multiple and situational, NTA may take the existence of cohesive, bounded and stable groups for granted, thereby it tends to freeze certain ascribed types of identities and inter-ethnic differences (Tark et al., 2021).

It also raises further challenges of whether and how NTA regimes are able to represent the various forms of internal diversity of the minorities concerned, preferably in proportional manner. Another intertwined question is its relationship to the territory, whether and to what extent NTA can be considered independent of the territory, so to what extent it can be clearly demarcated from territorial autonomy. Because NTA arrangements, as a general rule, are often not territorially defined, but in certain cases they can only be established in well-defined mixed regions (Slovenia), or in other instances, the application of numerical thresholds for NTA bodies at local or regional levels could exclude smaller communities with slightly lower numbers (Croatia, Hungary), thereby distorting the purely personality principle. A further important crucial question concerns those particular policy areas the NTA systems cover, within which minority members seek to preserve their identities. While a closely related question is centred on the extent to which autonomy extends within those policy fields on a possible scale that ranges from the weak rights of merely giving opinions and having consultations—as in the vast majority of the existing official NTA regimes—to the rather exceptional cases of stronger co-decision-making, or veto power in specific minority-related issues. In sum, these are the extent to which power is exercised independently by NTA (self-rule) and jointly with others (shared rule), the policy areas that are covered by NTA, the depth to which they are institutionalized, the administration that is available to manage these matters, and the financial autonomy the NTA has.

7.1.2 Policies to Adopt Different Strategies of NTA

In Europe, many, especially former Communist Central and Eastern European countries, including Croatia, Czech Republic, Estonia, Hungary, Kosovo, Latvia, Lithuania, Montenegro, North Macedonia, Russia, Serbia, Slovakia, Slovenia, and Ukraine, have started to refer explicitly to the notion of NTA or cultural autonomy in their minority policies and legislations even from the beginning of the 1990s or more recently. As to these cases, it has been widely accepted that these arrangements were created in a top-down manner, were neither results of the pressure of the minorities, nor motivated by normative ideas of justice to manage ethno-cultural diversity. Instead, they were much more influenced by instrumentalist and other practical considerations, such as international pressure, compliance with international standards

of minority rights, or internally driven expectations of reciprocity (see, e.g. Yupsanis, 2016). Much fewer of them have included NTA in their primary laws, most notably in their constitutions (e.g. Croatia, Estonia, Hungary, Montenegro, Serbia and Slovenia), and consequently, a few of them have adopted a specific and comprehensive law on minority autonomy. In this respect, the most important examples include the 1991 law on the unrestricted development and right to cultural autonomy of Latvia's nationalities, the 1993 law on cultural autonomy in Estonia, the 1994 law on self-governing ethnic communities in Slovenia, the 1996 law on national cultural autonomy in Russia, and the 2009 law on the national councils of minorities in Serbia, while most of them have been criticized by experts and the Advisory Committee on the Framework Convention for the Protection of National Minorities for their weaknesses and deficiencies. In a similar way, the Sami Parliaments of the Nordic countries have been officially established or re-established through specific laws of the countries in question (1987 Norway, 1992 Sweden, and 1995 Finland). Most of the remaining countries in Central and Eastern Europe have at least referred (like Lithuania and Ukraine), or set out the details of NTA in their general minority laws (Croatia, Hungary and Montenegro), while the number of countries that have adopted a law on minority rights is obviously higher in Europe.

In other cases, in the absence of a specific NTA or minority law, the delegation of power can take place in other forms either through the amendment of the existing ordinary laws, commonly referred as mainstreaming of minority rights. This is especially the case in the category of the so-called administrative NTA, in which general legislative acts, like laws on language or education, along with other relevant provisions guarantee certain aspects of cultural autonomy, yet scattered across the legal framework as it is in Canada or with regard to the Swedish minority in Finland. This top-down approach does not introduce duties upon the beneficiaries of autonomy, and their bottom-up activities are rather optional (Malloy, 2022: 59). Still in other instances, the main legislative and executive organs could adopt other tools, like by-laws, decrees, statutes, strategies, and guidelines regarding NTA, which ultimately make the guarantees of NTA more fragmented and less protected. The absence of general legislative acts is especially true for the functional model of NTA, which is often not legally set out. This type of NTA relies on private law actors and institutions, which, resulting from their bottom-up activities, tend to gain official recognition, and take on public functions and

public–private partnership service delivery (like maintenance of schools and kindergartens) for their minority members regulated by rather ad hoc provisions in public law. Such arrangements could be found primarily in the case of the German minority in Denmark, the Danish minority in Schleswig–Holstein, and the Sorbian minority in Brandenburg and Saxony (Malloy, 2022: 59–60).

7.1.3 Institutional Formats and Powers of NTA

A key element of the NTA model is that, as it seeks to cover potentially all minority members regardless of their place of residence, local, or national size, at least one institutional body, ideally with legal personality, needs to be established at local, regional, or national level. In the institutionalized and legally entrenched model of NTA, in the first group of cases, this involves that certain minority civil society organizations operating under private law have been entrusted with public tasks affecting the lives of communities, such as maintaining their own minority educational and cultural institutions, which is reminiscent of the functional model above. Among those Post-Communist countries, where NTA goes beyond mere declaration and has concrete institutional consequences, this is the case most prominently in Russia. However, the idea has been barely implemented in the country (Osipov, 2010). This functional approach, in which minority-related public functions are delegated to voluntary minority NGOs, immediately poses the question of legitimacy in at least two ways. For a voluntary organization, it is more difficult to reach the less active and committed members of the group; and further, the great number of associations might easily undermine the potential for the autonomous organizations to represent the minority in interactions with the state authorities (Brunner et al., 2002: 27). Moreover, in some countries, an association, generally, can represent only the interests of its members and may have only a limited focus.

Another group of countries, namely Estonia, Hungary, several former Yugoslav republics such as Croatia, Serbia, and Slovenia, and the Sami Parliaments of the Nordic countries represent another variant, which is more reminiscent of the Austro-Marxists theorists' original ideas from the early twentieth century. In these latter cases, those minority members who are also registered on a voluntary basis as voters have the right to establish their own minority councils, self-governments, assemblies, or parliaments

as public law institutions at different levels through direct or indirect elections. From this perspective, other examples lie between these two main approaches, meaning that minority bodies have both elected and non-elected members, most notably in Montenegro, where minority councils are partly elected through electoral assemblies, in which those citizens can participate who previously declare their affiliation, although they are not registered. In addition, some key representatives of the communities like minority MPs, minority party leaders, or local majors of municipalities in which the minority population constitute local majority, can be members ex officio, too, and in certain cases their number is higher than that of the elected members of the councils.

However, even the traditional models of NTA, despite their strong institutionalization and legal entrenchment, have different historical legacies, operate in diverse political, legal-institutional, and social contexts, and offer varying competences and resources for minority communities that have also diverse characteristics within and across countries. Therefore, the existing European examples of traditional NTAs are scattered on a large scale, starting with the Swedish and Finnish cultural councils in Estonia, which are only symbolic, consultative bodies, do not even have legal personality, cannot make their own decisions and thus cannot even have their own bank accounts. Minority councils and the separately elected representatives in Croatia have slightly more extensive possibilities, but they also essentially only have consultative rights. Although in both cases these tasks could have been carried out by NGOs, too, interestingly enough, official governmental policies still insist on labelling them as autonomies. By contrast, the self-governing ethnic communities have the right of consent in Slovenia on local and national decisions affecting the protection of minority rights, the minority self-governments in Hungary and the national councils in Serbia can make decisions in their own affairs (mostly questions of self-organization and interest representation, and powers and competences delegated to them to ensure cultural autonomy) and maintain various cultural and educational institutions.

7.2 Guarantees and Entrenchment

This section examines those international and domestic (legal) instruments that may guarantee stability, functionality, operability, suitability, and adequacy of NTA arrangements; usually these guarantees together are called entrenchment of autonomy in the literature. In this regard,

Markku Suksi has identified six possible legal entrenchments of (territorial) autonomy in order to make it "sustainable" and independent from the "arbitrariness" of the central government as much as possible: international and treaty-based entrenchment, general, semi-general, special, regional, and entrenchment under the right to self-determination. The latter has not been really studied in the context of NTA; neither do we. Although the mentioned categorization refers to territorial autonomy, it can be partially and with modifications applied to NTA as well.

7.2.1 International Entrenchment of NTA

Unlike territorial autonomy (e.g. the case of South Tyrol or the Åland islands), guaranteeing NTA for a certain ethnic/national/linguistic/religious group is not subject to any international conventions or agreements in Europe (international entrenchment). Of course, it does not necessarily mean that there were/are no initiatives launched by international organizations to improve the life of a certain minority community through NTA, but in practice these proposals usually remain(ed) at the level of informal conversations, as suggestions in ongoing (national) legislative procedures.

Bilateral agreements concluded between neighbouring countries in the field of minority protection may mention bodies of NTA as representatives of the respective national minority before the parties of the treaty in question. These bilateral provisions, however, usually do not have constitutive character with respect to NTA; they just rely on the existing legal solutions, being part of the legal framework of the concrete signing party. Yet, it does not mean that such bilateral treaties would be impossible in a legal sense (treaty-based entrenchment).

There is no consensus in the literature about the necessary link between the durability of an autonomy arrangement and the involvement of the international level. According to Nordquist, the international community can play a significant role in the entrenchment of autonomy, especially in conflict resolution. But a lasting and stable political-legal environment within the individual country: internal conditions, such as particular political culture, advanced economy, and democratic leadership are much more essential for the maintenance of autonomy in the long term (Nordquist,

1998, pp. 66–73) than international support. In addition, minority populations may exercise public policy functions that derive from the right to autonomy only within the legal framework of the state of their citizenship; the constitutional-legal order of the given country dictates how the concrete autonomy arrangement would look and function.

At present the right to NTA is not an explicitly guaranteed minority right by any legally binding international legal acts (this statement does not, of course, apply to legally non-binding proposals, recommendations and declarations). However, recognition of such a right in international law would offer minorities a permanent and a more secure basis for deciding on their own issues (Harhoff, 1986: 39–40) than domestic legal guarantees; since, even the strongest constitutional stipulations can be altered or repealed and the most progressive governments can change their policies or lose power (Yupsanis, 2014–2015: 23–24), as will be read below.

7.2.2 Constitutional Guarantees of NTA

In Suksi's next four models, the legal basis for autonomy is provided in internal/domestic legislation, including the constitution and/or national laws of various characters (Suksi, 1998: 152). However, it is important to note at the beginning of this analysis that legislation must be created in both formal and material sense in such a way to ensure the realization of benefits of autonomy. It involves certain procedural guarantees besides the well-elaborated content. It is beyond dispute that a constitution (sometimes called fundamental law) as a country's highest primary legal act may provide the strongest guarantee for NTA (general entrenchment); but at the same time, any legislation, including the constitution, can be amended. In this regard, the crucial point is how complicated the constitutional amendment process is: whether there is a two-step procedure, whether a special majority (two-third, three-fourth, etc.) is required for both proposing and voting, whether amendment of some sections (e.g. part on human and minority rights) is subject to special conditions, such as obligatory or advisory referendum. In the case of a *weak* constitution, NTA is not as securely protected as in a *strong* constitution, at least in a formal sense.

Another aspect of NTA's constitutional guarantee refers to the eternity clauses: constitutional provisions and principles that aim to protect the highest constitutional values in a country and are immune for amendment (actually, they can only be erased from the constitutional order by adoption of a new constitution). They can be explicit, mentioned *in concreto* in the text of a constitution, or implicit, deduced from the spirit of a constitution, usually through Constitutional Court's interpretation. It is rare that provisions on the protection of national minority rights are plainly defined as eternity clauses (Szakály, 2020: 297–305). It is a more common practice that national minorities are viewed to be part of the constitutional/national identity of the given state, thus indirectly, through the inviolability of the constitutional/national identity of the country, enjoy the constitutional protection provided by an eternity clause. However, even in such cases an obstructive Constitutional Court practice can challenge the scope of national minority rights, and the right to NTA as an integral part of them.

Besides guaranteeing collective minority rights and defining the titular or body of NTA the constitution makers often entrust the elaboration of the details to the lawmaker (parliament). However, constitutional basis is not a *conditio sine qua non*[1] of having a legally entrenched NTA.

7.2.3 Guarantees of NTA in Lower-Level Norms

NTA and its elements can be codified in one or more laws adopted by simple or special majority in the parliament, as it is the case in the aforementioned traditional and administrative types of NTA. Compared to the constitution, laws much more depend on the current political will, political situation and power relations, they can be amended more easily, even besides special requirements applicable to laws in field of human and minority rights (e.g. qualified majority, opinion or consent of both chambers in case of a bicameral parliament, consultation with representatives of national minorities). In the hierarchy of legal sources, they should be in accordance with the constitution, but some laws can have a character of constitutional law and as such be constitutive part of the constitution itself.

[1] An indispensable condition.

From the aspect of implementation, the most transparent and convenient solution is recording all issues of autonomy in a separate law: either in a law regulating exclusively NTA issues (like an organic law according to Suksi's semi-general entrenchment), or in a general law on minority rights. However, especially in the case of administrative NTAs, (sectoral) laws directed to specific fields, like education, culture, administration etc. may contain provisions on NTA, as well, especially regarding its relationship with other levels of governance, competences and institutional manifestation, or sources of financing. The strength of this kind of entrenchment highly depends again on procedural issues: who can initiate the amendments; whether the body of NTA or any other minority associations or representatives have any role during the preparatory-drafting stage or even later, in the adoption phase (gives opinion, participates in consultations, has veto right, etc.). This option might be the equivalent to Suksi's regional entrenchment in the context of territorial autonomy.

When there are special conditions applicable to the legislation attached to NTA in any way (see again the above mentioned potentially applicable requirements to constitutional amendment process) the entrenchment is called special.

By-laws, like governmental decrees, ministerial orders, or decisions, according to their legal nature and legal force, usually do not constitute new rights or duties, but further regulate some relating specific issues, such as the election or registration procedure, the administrative aspects, in which the competences of NTA may be exercised, the formula according to which the budgetary sources may be distributed. Their relevance is much higher when NTA is founded in public law than in case of private (law) organizations and practices.

This gives rise to the questions: what does it exactly mean that territorial autonomy is always based in public law, whereas NTA in public OR private law, or even their combination.

7.2.4 Legal Basis of NTA

In accordance with the prevailing theories and logic governing the process of setting up NTA in a given country, NTA may be defined as self-governance through a legal entity, registered under public or private law that exercises public authorizations in certain fields, primarily concerning

identity related issues or as a network of minority serving (both formal and informal) institutions. In both concepts, NTA needs to have explicit or implicit legal basis that ensures the right of national minorities (all of them in a country or only some recognized groups) to self-rule that reaches beyond the freedom of association.

If the body that implements the autonomy is an organization with public law status (established, governed, and financed directly or indirectly by the state or any of its authorities) and constitutes a separate layer of governance in order to provide political institutionalization for ethnic groups, NTA needs to be founded in public law. In this case, almost each element of the division of competences between the state and the national minority—or public entity elected by members of the respective ethnic group—is regulated by public law (usually constitution and/or laws). According to Joseph Marko and Sergiu Constantin only "self-governance entrenched in public law and integration through political representation and participation establish the functional requirements for the possibility to successfully reconcile political unity with legal equality and multiple diversities" (Marko & Constantin, 2019: 695).

National minorities also may participate in decision-making and exercise public functions through private associations, NGOs, or other organizations established and registered under private law; but usually these are weak institutions with a limited mandate and mostly consultative functions, without significant influence on governing actions. In this case, public law provides a general framework, mostly regulating only procedural issues, like the main phases and requirements of establishment, registration, management, and financing, but the given private law organization concretizes the general rules in its articles of association (statute), adapting them to its own activity and profile. The state may regulate involvement of these private law associations into formal processes by ordinary legislation. In both cases, autonomy, in our case NTA and its main constitutive elements need to be embedded in law; in which law and how, we could see before.

However, in some exceptional cases, NTA may be entrenched in quasi-legal practices of minority communities, as well, "tolerated" and/or recognized by the state (e.g. tribal law, other forms of social control), commonly referred as *legal pluralism* in the relevant literature. This kind

of NTA, often also called functional autonomy, comprises such non-state-generated mechanisms and practices that do not (always) have explicit legal basis. Because of implicit or informal approval of the state, authorities tolerate these self-standing, quasi-legal orders of minorities that are parallel to the "official" one; but there is no obstacle to these mechanisms being incorporated into the formal legal system over time. Anyway, from a legal point of view, functional autonomy lacks such an institutional background that through classic norm-making powers could adopt binding rules as an integral part of the legal system. Although the bottom-up approach of functional autonomy greatly affects the sustainability of NTA, unlike NTA entrenched in public law, according to Marko and Constantin, it is short of capacity to "find the right direction in the permanent processes of norm contestation between law and politics" (Marko & Constantin, 2019: 696).

Unlike NTA, territorial autonomy has always been founded in public law, functioning similarly to the other levels of power, like local municipalities or regions.

Concept in depth

Legal pluralism

Legal pluralism in context of NTA refers to coexistence of more than one normative systems within the same geographical and temporal space, formally recognized by the state (*de jure* legal pluralism) or functioning without any explicit endorsement (de facto legal pluralism). These "law like" normative systems emerged from the activity of community councils, religious tribunals, or other intra-communal mechanisms, exist in parallel to the state laws that often raises the question of consistency with universal human rights standards and legal conflict resolution proceeded from concurrent legislation. Although today these practices are typically incorporated into written law throughout Europe (and we can find more precedents from outside the Continent), the Gypsy legal traditions and the Islamic law in Western societies serve as a good example of de facto power diffusion with state institutions (Quane, 2021, pp. 69–70)

National minority councils in Serbia

National minority councils—bodies of NTA—in Serbia are *sui generis* organizations entrusted by law with certain public authorizations to participate in formal, official decision-making along public bodies of the state, autonomous province, or local municipalities, and to decide independently on issues in the field of culture, education, information, and official use of language and script. Although their norm-making competences are quite vague, and their legally required activity is of mainly consultative, administrative nature, and the national minority councils are undoubtedly part of the Serbian governmental system through numerous sectorial laws, based on the Constitution of the Republic of Serbia (2006). However, the idea of national minority autonomy goes back much earlier, when in the beginning of the 1990s, different concepts of ethnic self-governance developed in the programmes of the Vojvodina Hungarian political parties, and in the political activities of the Bosniaks in Sandzak. During the Yugoslav wars, NTA was primarily a political goal (re)presented by minority politicians from Serbia before the international community and the Serbian government, even though the Hungarian national minority has succeeded to set up its provisional national minority council in 1999 as a result of a common autonomy conception of the Vojvodina Hungarian political parties, supported by the then Government of Hungary. This political agreement is significant, among others, because its elements became part of the provisions of the Law on National Councils of National Minorities in force today in Serbia. Given its purpose, the Provisional Hungarian National Minority Council functioned as a forerunner of the Hungarian minority self-government, but according to its (non-existent) legal personality it was more like a political forum or a conference NTA gained an explicit legal basis only in 2002, when national minority councils were codified for the first time in the Serbian legal order in the Article 19 of the federal Law on protection of rights and freedoms of national minorities, as legal persons, elected through electoral assembly (indirectly) in order to exercise the right of national minorities to self-government in cultural spheres of life. From 2002 onwards, the councils were mentioned in growing number of laws and by-laws, became included even into the bilateral agreements concluded between Serbia and the neighbouring countries in the field of national minority protection, however, due to the lack of specific powers, the role of most of the councils established under the federal minority protection act was rather formal It was an interesting occasion that NTA became part of the Yugoslav legal order without being mentioned by the federal or even national (Serbian) constitution at that time. It evolved into a constitutional category only a year later in the Charter on Human and Minority Rights and Civil Liberties that was constituent part of the Constitutional Charter of the State Union of Serbia and Montenegro Since Serbia became an independent unitary state (2006), national minority councils have been part of the constitutional order; their election, competences, sources of financing, relationship with other levels of governance are subject to the Law on National Councils of National Minorities (2009). Members of national minorities in Serbia elect their national minority councils on the basis of a special minority electoral register maintained by the state (or in the lack of it indirectly) every four years. Each national minority may elect only one council, which represents the members of the respective ethnic group in the entire country. According to the results of the latest 2018 elections, there are 22 minority councils in Serbia

Summing-Up

- Territorial autonomy has always been founded in public law, while NTA arrangements can be private or public law institutions.
- Traditional, administrative, and functional models of NTA differ in the extent to which they are institutionalized, legally entrenched in primarily laws, how they were created in a top-down manner or rely also on bottom-up activities, whether they are centred around public or private law umbrella organizations, and how they approach the issues of group membership.
- The strength of legal entrenchment depends on both procedural (process of adoption, amendment, supervision, evolution of those legal acts in which the respective NTA arrangement is entrenched), and material issues (content, scope of regulation).
- The basis of traditional NTAs in public law may be laid down by national constitutions, ordinary or special majority legislations; still international or treaty-based entrenchment is not a widely used practice in the cases of NTA.
- NTA may have basis in private law through both formal legislations regulating private associations of minority communities in official decision-making processes and informal practices of minority communities "tolerated" and/or authorized by the state.
- Legal pluralism means coexistence of more than one normative system within the same geographical and temporal space, formally recognized by the state (*de jure* legal pluralism) or functioning without any explicit endorsement (de facto legal pluralism).

Study Questions

1. Explain the differences between public and private law NTA arrangements.
2. How would you define the main features of traditional, administrative and functional models of NTA?
3. In which legal acts can NTA be legally entrenched?
4. Explain why even constitutional embeddedness does not guarantee the permanency of NTA.
5. Explain why certain examples of legal pluralism might serve as alternative and emerging models of NTA.

Go Beyond Class: Resources for Debate and Action

- Autonomy Arrangements in the World (https://www.world-autonomies.info/).

Future Readings

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CHAPTER 8

The Many Faces of Minority Non-Territorial Autonomy

Ljubica Djordjević

The idea of non-territorial autonomy (NTA) has received renewed attention both in policy documents and academic literature starting from the 1990s and the redesign of minority protection in Europe. In the context of the bloody breakups of Yugoslavia and the Soviet Union along ethnic lines, as well as the general reluctance in eastern Europe towards territorial autonomy as a perceived stepstone towards secession, NTA has been discussed as a tool to reconcile minority interests for internal self-determination and the states' needs for stability, sovereignty, and territorial integrity. However, this has not resulted in defining a uniform model of NTA. Moreover, NTA is "rather a multiplicity of interpretations loosely connected to each other than a single normative principle or coherent model" (Osipov, 2015, p. 207). It lacks certainty as a general concept and only some core "components may be easier to pinpoint" (Suksi, 2015, p. 84). As a result, "NTA operates in different and varied forms" and "includes a mixture of different arrangements" (Nimni, 2015, pp. 68, 70).

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The purpose of this chapter is to demonstrate this multi-faceted nature of NTA by pointing out some core conceptual unclarities/variations, as well as by outlining the main types of NTA. The first section outlines the vagueness of the NTA concept, or concepts, through explaining manifestations of the territoriality and personality principles in the NTA, discussing the difficulties in defining 'autonomy' and to what extent NTA can be considered as a fully-fledged autonomy, and finally showing how the very term NTA has been interpreted in various ways by different authors. In the second section, the chapter provides an overview of the most common types of NTA: cultural, functional, and personal autonomy. It explains core features of each of the type and offers some real-life examples that can help to better grasp the variety of manifestations of the NTA. As a result, the discussions in the chapter shall help to understand that NTA is not a uniformed and coherent model, but has various forms and components that can be differently combined. While such vagueness of the NTA can be considered its weakness, at the same time such flexibility is also its strength, as it enables the NTA to be tailor-made to meet the given context and best address the specific needs of diversity accommodation.

8.1 The Vagueness of the NTA Concept(s)

There are a few underlying principles behind the NTA. First is the group recognition and the personality principle. The bearer of the autonomy is a designated ethnic, linguistic, or religious group, and the democratic principle and the diversity accommodation are combined in the NTA in the manner to enable governance by the minority and for the minority. The main rationale behind the NTA is to provide a channel for self-rule for dispersed or small minorities, who cannot benefit from territorial autonomy (TA). However, the distinction between the personal and territorial elements in NTA is not so straightforward, and they are often combined rather than clearly distinguished. Second principle rests on the idea that the NTA should provide a channel for internal self-determination and self-rule for the minority. However, the very concept of autonomy remains rather blurred and "the expression ´autonomy´ is itself subject of debate" (Prina, 2020, p. 426). Plus, the existing NTA arrangements grant weak powers to the respective minority institutions. Third principle is that NTA is primarily cultural autonomy: the functional focus of NTA lies "on cultural rather than material matters" (Coakley,

2016, p. 11). Its main goal is to facilitate protection of the core minority identity (cultural) traits. However, the term culture is to be interpreted broader, so that NTA goes beyond 'folkloristic' understanding of cultural preservation. Plus, some variations exist depending on whether the NTA arrangement rests on public or private law. All this leads to the fact that NTA can be implemented in different formats.

8.1.1 Territoriality and Personality Principles in the NTA

The very idea of the NTA is to adjust the relationship between the ethnicity (group belonging), power, and territory and enable peaceful coexistence of various ethnic groups on the same territory. Because of the relevance of the territory not only for the governance but also for the protection of ethnic identity, territorial autonomy (TA) has been viewed as the main instrument for accommodating diversity in ethnically diverse (multinational) states. For numerically bigger, territorially concentrated, and politically well-organized national minorities, territorial autonomy comes as a proper format for internal self-determination and managing of own affairs. For such groups, NTA is barely attractive as it cannot serve as an adequate alternative or substitute for TA, but at best as a complementary tool. The NTA has traditionally been perceived as a suitable model for dispersed minorities, who cannot be territorially organized and as such do not meet the preconditions of territorial autonomy. Such perceptions of dichotomy between the TA and NTA have created the impression of TA as being the primary instrument for minority accommodation and internal self-determination, whereas the NTA is the second-best alternative, a sort of a 'comfort' solution for the groups who have failed to obtain TA. This dichotomy, which is largely conditioned with the still dominant understanding of the nation-state, creates some conceptual misunderstandings with the NTA.

Notwithstanding that many countries in Eastern Europe have introduced some forms of NTA out of a fear of separatism stereotypically associated with (minority) TA and as a sort of compensation for it, it is wrong to perceive NTA as an alternative to the TA. Territorial and non-territorial autonomy are not mutually exclusive but rather mutually complementary concepts. Thus, opting for one does not automatically exclude the other, and the same minority regime can indeed combine both territorial and non-territorial autonomy. For instance, persons belonging to a minority living outside the autonomous territorial unit can enjoy some

benefits based on the NTA. Or persons belonging to a minority in the autonomous territorial unit can enjoy some collective rights in the form of NTA too. Finally, the two can be combined in the sense that territorial autonomy is group-neutral (pure or 'standard' territorial division), whereas group recognition is provided through the NTA.

The conceptual difference between TA and NTA can also been observed through the feature that TA primarily rests on the territoriality principle while NTA is based on the personality principle, but this is not so straightforward. Indeed, the guiding principle in forming TA is that the autonomy is vested in the territorial unit and the autonomous decisions affect all persons living in the given territory, whereas NTA rests on persons belonging to the specific group, and autonomous decisions affect only those people. Yet, territory and personality cannot be rigidly separated. In territorial autonomies where territorial division aims at accommodation of ethnic diversity, the group (personal) dimension can be manifest too: territorial autonomy de facto serves to the self-rule of the specific ethnic group. On the other hand, NTA cannot entirely decouple from territory. People live in spaces, and decisions made within autonomy have effects in some territory/territories. Moreover, many examples are indicative of territorial restrictions to the NTA, i.e. minority right to NTA is limited to designated areas where the group traditionally lives (for example, the link between the Sami Parliaments and Sami Homeland, the autonomy of Muslims in Western Thrace, the 'ethnically mixed areas' in Slovenia, to name but a few). Other examples show that even the models entirely based on the personality principle require some territorial organization (as proposed in the Renner/Bauer model, or the organization into local, regional, and national nationality self-governments in contemporary Hungary). Finally, if applied to territorially concentrated minorities in the position of local or regional majorities, the NTA can de facto produce effects of territorial autonomy.

Notwithstanding all the nuances, the guiding rule underling every NTA is that the bearer of autonomy are persons belonging to the designated (ethnic, religious, or linguistic) group. In that sense, every NTA is in its nature a personal autonomy, although many authors list personal autonomy as a variant of NTA. Simply put, NTA is an autonomy of the group for the group: only persons belonging to the group can establish the NTA and participate in the decision-making, and only they are (directly) affected by the decisions taken through this arrangement. This core feature of the NTA poses one of the main challenges to the very

concept: how to identify who is in and who is out, who belongs to the group and who does not. This is one of the contested issues not only in theory but also in the existing practical examples. While acknowledging the necessity to observe the freedom of self-identification, many models search for solutions to secure some sort of 'objectivity check' and thus minimize the potentials for abuse. Moreover, as the democratic standard requires for the autonomous bodies to be directly elected, the NTA presupposes creation of special voting registers of persons belonging to the specific group, which is also challenging.

Concept in depth

The Group Recognition and the Question of Belonging

Based on the personality principle, NTA opens the important question of the personal scope of application, both on the group and individual levels. The concept of NTA inevitable calls for some sort of group recognition and differentiation. This selection of the groups who can form a NTA can be challenging and calls for some negotiation based on various criteria: historical, political, demographical, economical, to name but the central. States are generally restrictive in approach, reserving the NTA arrangements for only a few groups, usually 'autochthonous' or 'traditional' minorities. For instance, Hungary recognizes 13 national minorities who are entitled to form nationality self-governments, provided that the demographic criteria are met; in Slovenia, only the Italian and the Hungarian communities can establish the self-governing national communities, and only in the so-called 'ethnically mixed areas'; in the Nordic countries, the Sami enjoy the right to establish the Sami Parliament; in Germany, only Danes and to some extent Sorbs can benefit from some sort of minority autonomy.

The issue of individual identification appears even more challenging for the NTA. There are various models of individual identification with the minority, whereas the main two options are the self-identification and identification by others. Moreover, the identification can rest on subjective and/or objective criteria. The European standard favours self-identification based on the individual (subjective) sense of belonging. However, bearing in mind the shortcomings in the fully subjective self-identification and potentials for the abuse in accessing the benefits of minority protection, justified imposing of objective criteria and identification by other has also been accepted as a complementary method. Such objective criteria usually refer to maintaining the links with the group, minority language proficiency, family links with the members of the group, etc. The criteria for identification with the minority benefiting of the NTA has been a contested issue in almost all cases: the definition of who is Sami has for years called for intensive debates in Finland and has been subject to striking court battle between the Sami Parliament and the Finish state; in Slovenia, the question of who can be enrolled on special voting registers (reserved for members of Italian and Hungarian communities) has also been disputed, brought before the Constitutional Court, and provoked the reaction of the Parliament, which had to set guiding criteria for the enrolment. The question here is not only about what are the 'objective' criteria of belonging to the protected minority, but also who decides on these criteria and whether they are met: is it the state through its legal order, or the minority as part of the autonomous prerogatives?

8.1.2 The Scope of Autonomy

The main rationale behind the NTA is to provide a channel for minority internal self-determination through transferring decision-making powers in areas pertinent to the minority identity to the minority itself. Along this line, the NTA is a form of minority self-rule. However, the substance/content of the minority self-rule under NTA remains rather vague. The very concept of autonomy is quite blurred, not to mention the minority autonomy, which has not even been recognized in international law as a separate minority right but derived from the right to participation. As it has been rightly observed, the literature offers "a great deal of confusion when it comes to explaining precisely what [autonomy] is" (Nootens, 2015, p. 35). Is it self-government or self-rule, form of self-legislation, subsidiarity, or something else? Simply put, a fully-fledged autonomy has three core dimensions: legislation—power to adopt binding rules, governance—power to administrate the delegated issues, and finances-taxation: the power to impose taxes and to autonomously manage the budget. The existing analyses of NTA examples at least in Europe show that "many arrangements that are called 'autonomous' are in fact far from fulfilling the stronger definitions of autonomy" (Salat & Székely, 2014, p. 472). There are a few arguments that underpin such statement. First, the NTA "normally does not entail the exercise of law-making powers" (Suksi, 2015, p. 113) and the examples throughout Europe show that the self-rule competences of NTA bodies are limited to internal self-organization. Second, in most cases, the autonomy is in fact limited to self-governance manifested through delegation of mainly administrative tasks from the state to the NTA body. Moreover, "the low level of public authority that entities belonging to the category of NTA generally can exercise" (Ibid., p. 114) often suits better to the consultative arrangement than the autonomy. Finally, in most cases the NTA bodies are (over-) dependent on the state funding and lack financial autonomy.

The quality of autonomy does not only depend on the level of delegated public powers, but also the areas in which it can be exercised. It appears that there is a general consensus in perceiving NTA as mainly cultural autonomy (as opposed to political autonomy embedded in territorial autonomy). It has been rightly observed that "autonomies based on the personal principle are most often confined to competences regarding cultural matters, while additional political competences are only to be seen in territorial arrangements" (Salat & Székely, 2014, p. 453). Hence,

education, language, culture in a narrow sense, and religious issues (if applicable) form the core of the NTA arrangement, as being central to the protection (preservation and development) of the minority identity. Indeed, this can be unattractive for politically well-mobilized minority groups, especially if the instruments for minority participation in decision-making are weak. Moreover, the effects of the NTA on the minority protection will depend on the quality of the delegated public powers (as briefly described above). The argument here is that if the autonomy arrangement in the NTA is limited in scope (culture), this can be compensated through the high level of delegated public powers. Unfortunately, this is not the case in the reality, and most of the NTA arrangements are in essence 'soft' or 'symbolic' autonomy.

Concept in summary	**Autonomy in a Nutshell** The word autonomy has Greek roots: it comes from the Greek 'autonomia'/ αὐτονομία /, combining the words auto (self) and nomos (custom or law). On the individual level the term is usually understood as personal freedom, whereas at the institutional (political) level is interpreted as the power to self-rule and/or self-governance. International law does not guarantee minority right to autonomy, and it is usually derived from the minority right to participation. Autonomy presupposes that some public powers are transferred to the autonomous entity, in the case of NTA a minority group represented in a body or institution. Such autonomous powers are limited to organizational issues (self-organization) and management of minority culture (in the wider sense, also covering education, religion, and language). In a fully-fledged NTA, the minority would have full powers to set rules on the minority culture and implement those through own institutional framework. The practice, however, shows, that the states tend to keep the core of the competences, and through NTA arrangements simply open channels for minority participation in decision-making by public authorities. Thus, in many instances, minority self-rule is transformed into shared-rule. Management of minority institutions is another very important aspect, through which self-governance can be manifested. In this case, the minority represented through the NTA body can be vested with the power to autonomously run minority institutions within the legal framework set by the state, or to participate in managing institutions to the various degrees, which is also indicative of the quality of autonomy.

8.1.3 One Term Many Meanings

The term NTA is a generic term covering a variety of meanings and interpretations. There is no single uniformed NTA model, and this vagueness enables NTA to take various shapes. On the practical level, this is rather an asset than a failure, because various NTA elements/features

can be differently combined and adapted to the specific situation in the respective state. More problematic is however the inconsistency in the academic approach to the NTA: not only there is "a diversity of terminology" (Coakley, 2016, p. 11), but authors give different meanings to the same terms. The analysis performed by the Nootens is indicative in this respect. It has been identified that most of the authors define NTA as either personal or cultural autonomy, with the aim to address religious, ethnic, cultural, and/or linguistic issues. This is widely acknowledged and can be considered the standard. Yet, for some authors "'cultural autonomy' is the generic expression encompassing all forms of NTA", whereas others use the term "'personal autonomy' as the generic expression", and sometimes these two are used as synonyms (Nootens, 2015, p. 42). Moreover, in some classifications, personal and cultural autonomy are put as separate types of NTA (for example, Suksi, 2015, or Heintze, 1998), or references are made to "cultural autonomy based on the personality principle" (Salat & Székely, 2014, p. 443). In addition to cultural and/or personal autonomy, functional autonomy is usually identified as one of the subtypes of NTA. However, again, the interpretations of the functional autonomy vary: is it, for instance, a transfer of public powers to civil law entities or (personal) autonomy given to religious communities, or both? Some understandings of NTA go so far to include consociationalism and "forms of representation that de-territorialize self-determination, as in the case of indigenous communities, the juridical autonomy of religious communities, or in the practice of many forms of religious and/or multicultural forms of representation" (Nimni, 2015, p. 68). On the other hand, it has been argued that consociationalism does not fit the NTA, because it fosters cooperation beyond ethnic lines (Salat & Székely, 2014, p. 445). However, the concepts of 'legal pluralism' and 'institutional completeness' "become increasingly relevant to the study of non-territorial autonomy arrangements" (Ibid.).

Such a terminological and conceptual mishmash clearly shows that the categories of NTA are not clearly defined, that the borderlines between them are rather soft, for which reasons "it is not possible to clearly distinguish between them" (Heintze, 1998, p. 21). Moreover, they "often overlap or have a complementary role in the various institutional set-ups" (Salat & Székely, 2014, p. 445).

NTA Revealed: key points

- Being based on the personality principle, every NTA is per se a personal autonomy (as opposed to territorial autonomy).
- With the main focus put on the protection of the national identity, and under understanding that the culture in wider sense is core for such protection, every NTA is per se also a cultural autonomy (as opposed to political autonomy).
- As there is no one uniform model of NTA, each NTA arrangement is a mixture of different elements, with the milestones being the identification of groups and individuals covered, the quality of transferred powers (areas and functions), and the very institutional setup for the exercise of transferred powers.

Concept in depth

8.2 The Main Types of NTA

Notwithstanding the various conceptual interpretations of NTA as well as variety of NTA arrangements, one can identify three standard types of NTA: cultural, personal, and functional autonomy. As already mentioned, the understanding of these types, or modalities, of NTA are not uniform and there are conceptual nuances in approaches, but some core features can be singled out. These will be briefly explained, based on the academic discussion and the available practical examples in Europe.

8.2.1 National Cultural Autonomy

Cultural autonomy is the usual form of NTA, to the extent that it is often perceived as synonymous to the NTA. The Renner/Bauer model of NTA, which is consider the only fully-fledged *model* of NTA, is also in essence a cultural autonomy. Moreover, most of the existing NTA arrangements in Europe show features of cultural autonomy. Simply put, cultural autonomy can be defined as "a personal autonomy of some kind which is limited to cultural affairs" (Heintze, 1998, p. 21).

The rationale of cultural autonomy rests on two important premises. First is the understanding that one of the central goals of minority protection and accommodation of diversity is the protection of minority identity, i.e. the core identity (cultural) traits: cultural affairs lay at the heart of minority protection. Second is the understanding that the application of the majoritarian democratic decision-making would result in (ethnic) majority to decide on the issues pertinent to minority national identity. Against this backdrop, cultural autonomy should enable for the minority to decide on cultural issues and facilitate cultural development of the

minority group. It is important to note that cultural autonomy is more than cultural freedom. It goes beyond the right to education in own language, the right to use of language, or the right to manifest own culture. The core feature of cultural autonomy is creation of a public body through which minority can manage own cultural and educational affairs. Moreover, it is necessary that the state transfers some of the public powers to such body of minority cultural autonomy. To some extent, cultural autonomy can be perceived as a top-down arrangement, because it is the state who establishes special legal persons-statutory associations under public law, which are then vested with some decision-making powers in minority relevant cultural areas. Such bodies can then manage minority educational and cultural institutions and have a say in all issues relevant for the minority (for instance, school curricula and textbooks, cultural strategies and programmes, policies aimed at language protection, to name but a few). Noteworthy is that such bodies are directly elected by persons belonging to the minority in question, which poses challenges to defining criteria of belonging as well as creation of special voting registers, as already explained above.

Case studies	**National Cultural Autonomy in Practice** The first practical experiment with the institutionalized minority cultural autonomy was made in the interwar Estonia, based on the Cultural Autonomy Law of 1925. In this model, any ethnic group with more than 3,000 people could create a legal body, which had some powers in the areas of education and culture, including managing institutions, plus could levy taxes on the group members. The system was revoked when Estonia became part of the Soviet Union, and reintroduced in 1993, after Estonia regained its independence. However, the national cultural autonomies in Estonia have no significant public powers, and are rather of symbolic nature. Hungary has introduced minority cultural autonomy in 1993, and this model is often considered as an exemplary model of cultural autonomy in Europe. National minorities ('nationalities') in Hungary can establish nationality self-governments at the local, regional, and national levels. These are directly elected bodies, with a wide range of public functions, covering self-organization, representing minority interests in various instances, managing institutions, participation in decision-making, to name but a few. In Serbia, cultural autonomy is facilitated through national minority councils. These are centralized bodies, and one minority can establish one council. The system is rather liberal and any group that meets the criteria of national minority stipulated in the law and numbers at least 300 people can establish the council. So far, 23 national minority councils have been established. The competences of national minority councils cover four areas of minority self-governance: culture, education, information/media, and official use of minority language. Core is the authority to establish minority institutions or participate in managing public institutions (schools, cultural institutions, media). In addition to this, national minority councils can have a say in issues pertinent to curricula and text-books, protection of cultural heritage, media programmes in minority language, topographic indications, just to name a few. In addition to these examples, national cultural autonomy can be found in Slovenia, Latvia, and the Russian Federation, although the latter two have been contested.

8.2.2 Cultural Autonomy Plus: Indigenous Peoples

NTA can provide a suitable framework to accommodate indigenous peoples, and it comes as no surprise that many autonomy arrangements for indigenous peoples throughout the world contain NTA elements. The position of indigenous peoples is slightly different than of national minorities, because of the understanding that the international law envisages the right to (internal) self-determination to indigenous peoples from which they can derive the right to autonomy. Moreover, international law has set the standard of the 'free, prior, and informed consent' as a

necessary element in the protection of indigenous peoples, which presupposes existence of some form of institutional organization of the group. The requirement of the 'free, prior, and informed consent' means that states (public authorities) are obliged to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions (…) before adopting and implementing legislative or administrative measures that may affect them" (UNCHR, 2013). The scope of issues in which indigenous peoples must be consulted goes beyond the protection provided to national minorities, and covers not only 'cultural' affairs, but also questions pertinent to land, territory, and resources, including mining and other utilization or exploitation of resources. The obligation to obtain the consent from indigenous peoples is even stronger in the cases of relocation from their lands or territories, and/or the storage or disposal of hazardous materials on these lands or territories. Hence, while the autonomy arrangements for national minorities in the format of institutionalized cultural autonomy typically cover issues pertinent to education, language, cultural heritage, autonomy arrangements for indigenous peoples usually go beyond and include land, resources, environment, indigenous economic activities, and protection of the indigenous 'way of life' in a broader sense. Because of the specific attachment of the indigenous peoples to the land/territory that is not only spatial but also emotional/spiritual, autonomy arrangements for indigenous peoples even when based on personality principle inevitably have a strong territorial dimension, and indeed combine territorial and non-territorial elements.

A variety of autonomy arrangements for indigenous peoples can be found in non-European contexts, which is not surprising due to the historical reasons. The Americas (Canada, USA, and a handful of states in Latin America) and New Zealand are typical examples of systems that provide protection for indigenous peoples through autonomy, usually based on personality principle (hence, NTA) but limited to designated 'homelands' (territories). In Europe, the Sami have the status of the indigenous peoples and enjoy some degree of autonomy in the three Nordic countries (Finland, Norway, and Sweden). Some ethnic groups in the Russian Federation and Ukraine also enjoy the status of indigenous peoples and some NTA arrangements can be found there too. On the other hand, the autonomy for the indigenous peoples in Denmark is facilitated through territorial autonomy (Greenland).

Case study	**The Sami Parliaments in Brief** The Sami of Norway, Sweden, and Finland enjoy autonomy that has been institutionalized through the Sami Parliaments. They are democratically elected representative bodies, with some powers in areas such as education, language, and indigenous status. Although the competences of the Sami Parliaments are restricted to the areas of Sami homeland, the elections for the Sami Parliaments take place throughout the states' territories, meaning that Sami who do not live in the homeland can vote and stand for the elections. The question of the legal definition of who is Sami and thus has voting rights is "one of the most critical, complex, and contested matters in Sami legislation" (Stępień et al., 2015, p. 124). The criteria of demonstrating belonging to Sami vary among the three countries, but in essence they rest either on the Sami language or the family ties with the Sami. Although Sami Parliaments are considered as institutionalized form of Sami autonomy, they "remain primarily advisory bodies without legislative authority" (ibid., p. 124). They have most say in the areas of language, culture, and education, and to a much lesser degree (if at all) in the areas of land, resources, and agriculture.

8.2.3 Functional Autonomy

While the national cultural autonomy is rather top-down driven, based in public law, and institutionalized through a public body, the core feature of functional autonomy is that it is based on private law and has a stronger 'bottom up' character. This type of NTA rests on the minority right to association, whereas the state delegates (or transfers) some functions (powers) to minority civil organizations. To some extent, functional autonomy is sort of a public–private partnership. Positive aspect in such an arrangement is its bottom-up foundation that provides more organizational autonomy for the minority: the minority group "assembles voluntarily and unbureaucratically" (Heintze, 1998, p. 24) with only minimal state interference (through setting the general rules for the creation of civil organizations). As a consequence, minority can have a stronger sense of ownership of the autonomy arrangement, plus it can be more flexible and adaptable to minority needs. Yet, on the other hand, the legal entrenchment in civil law can weaken the stability, sustainability, and the impact of the arrangement. Much depends on the specific contexts then. Although the model rests on minority civil organizations, the state remains an important stakeholder too. The finding that "any autonomy arrangement requires (…) a state which (..) is willing to share part of its autonomous powers" (Salat & Székely, 2014, p. 444) is applicable

to functional autonomy too. There is a need to distinguish functional autonomy from pure exercise of the right to association: sample establishment of a minority organization does not suffice to label this as autonomy. Crucial is the exercise of public powers, "the provision of public services and exercise of public authority for the minority and by the minority" (Suksi, 2015, p. 88).

Case study	**Autonomy of the Danish Minority in Germany** The organization of the Danish minority in Germany is usually considered as a book example of functional autonomy. Although Danish minority organizations do not perform public powers in a strict sense, they nevertheless "take over functions of societal management that are typically in the realm of the state or its bodies" (Wolf, 2019) and thus can be seen as some form of minority autonomy. Four Danish minority organizations serve as pillars of functional autonomy: *Dansk Skoleforening for Sydslesvig* (South Schleswig School Association), which administrates minority educational institutions (kindergartens, primary and secondary schools); *Sydslesvigsk Forening (SSF)*(South Schleswig Association), which is the cultural umbrella association; *Dansk Sundhedstjeneste for Sydslesvig* (Danish Health Service for South Schleswig), which administrates health services and elderly care; and *Südschleswigscher Wählerverband (SSW)*(South Schleswig Voters Association), a political party that represents Danish minority in decision-making processes by the authorities.

8.2.4 Personal Autonomy for Religious Communities

As already mentioned, every NTA is in its nature a personal autonomy, because it rests on the personality principle. Often, personal and cultural autonomy are taken as a synonymous, or one or another are taken as a generic category. Notwithstanding all the nuances, it is noteworthy to single out autonomy arrangements provided to religious groups. Several arguments speak in favour of such an approach: historical background, the issues covered, and the institutional setup. The historical roots of minority protection in Europe have strong religious dimension: the first legally relevant group differentiation and protection were based on religion, and it was the religious groups who first claimed some level of autonomy (notwithstanding the very historical development of the separation of state and church, and the position of the church in the sovereignty dispute as sealed with the Westphalia Peace). Europe has an important historical legacy of the religious autonomy both in the West (most prominently, the Catholic and Protestant churches) and the East (the Ottoman *millet* system). When it comes to the scope of issues, it is important to

note that they are not limited to religious freedom and manifestation of religion in narrow sense, but cover some broader aspects relevant for the religious identity, such as education, family matters, and exception from some general rules (taxation, military service, for example). Finally, institutional setup is driven by the organization of religious groups, as on the group level religious autonomy is exercised by churches and religious communities.

Although due the principle of separation of state and church combined with the individualization of human rights and freedoms, the public powers that churches and religious communities can exercise have shrunk, the autonomy on religious grounds remains one important form of personal autonomy. First, churches and religious communities enjoy high level of institutional/organizational autonomy as protected by the freedom of religion and the principle of state/church separation. Second, despite the secularization of the constitutional order, churches/religious communities have retained some powers in providing education, social services, taxation, and in family law (the legal validity of church marriage). In some sense, performing of these public functions can also be interpreted as form of functional autonomy too.

The question of personal autonomy for religious communities has recently gained renewed attention in Europe, mainly in the context of the accommodation of Muslim communities and the status of sharia law. The debate is most advanced in the UK, with regards to the use of sharia law and the legal status of sharia councils. Notwithstanding their role for the Muslim community/communities in the UK and their de facto powers, they cannot be considered as an autonomy in strict sense, because no public/state powers are formally delegated to them. Thus, the autonomy arrangement for Muslims in Western Thrace (Greece) remains the single European example of autonomy for Muslims in Europe. Moreover, it is the only European example of legal pluralism and legal recognition of sharia in Europe.

Case study	**Autonomy for Muslims in Western Thrace (Greece)** The autonomy arrangement for Muslims in Western Thrace rests on the Treaty of Lausanne of 1923, which has remained unchanged irrespective of the significant changes in the international law of minority protection. This model "reflects (…) a *millet*-like approach regarding the attribution of religious and linguistic rights through religion" (Tsitselikis, 2020). Some level of autonomy exists in three areas: education, religion (mufti offices), and community property. Muslim students can attend minority schools that offer bilingual education (Greek/Turkish), but the impact of the community on minority education is rather limited. The core feature of the model is the state recognized jurisdiction of muftis over family and inheritance matters (ibid.). Finally, the third core element of the model are the communal foundations, the *vakifs*, "pious institutions, the income of which is attributable to the religious or minority communities and therefore to the members of these minorities" (ibid.). However, while the minority foundations are legally visible, the question of their ownership is rather blurred, which "undermines the management and the legal status of the minority foundations." (ibid.)

Summing-Up

- There is no unique NTA model, nor a single comprehensive concept of NTA. Theoretical approaches to the NTA vary, same as the NTA examples in practice. Central to the NTA are its foundation on the group recognition and the personality principle, as well as the transfer (delegation) of public powers to minority institutions/organizations. Other elements can be combined in various ways and thus lead to different practical manifestations of NTA.
- Despite based on personality principle, NTA is not fully detached from territory, and often NTA arrangements combine both personal and territorial elements.
- Autonomy in a strict sense presupposes a wide range of powers from legislation to taxation. In most cases, NTA is not far-reaching when it comes to autonomous powers. At best, it provides a framework for minority self-governance (purely administrative), and in practice it is often narrowed to a consultative mechanism.
- Cultural autonomy as an institutionalized form of NTA exists when a minority representative body is established in the public law and then vested with some public powers. Members of such body are democratically elected among persons belonging to the minority in question. Powers of such body are limited to cultural affairs that are

crucial for the protection of minority identity: education, language, and culture. Because of the importance of the land and nature for indigenous peoples, autonomy arrangements in these cases goes beyond pure cultural questions and covers also land use, resources, environment, etc.

- Functional autonomy is based in private law and facilitated through minority civil organizations. The concept rest on the freedom of association, whereas state transfers some public powers to organizations autonomously established by the minority. The typical areas covered with functional autonomy are education and social services.
- Autonomy of churches and religious communities can serve as one example of personal autonomy, based on religious affiliation. The community can provide education, social services, or can levy taxes. In some instances, members of the religious community can be exempted from the application of general rules, and the state can accept the religious rules as legally binding for the members of the community. In Europe, the latter is the case only in Greece and applies to Muslims in Western Thrace.

Study Questions

1. How are non-territorial (personal) and territorial elements combined in NTA?
2. Why defining who belongs to the minority is an important and contested issue for the NTA?
3. When a NTA arrangement can be considered autonomy?
4. What are the main features of and main differences between cultural, personal, and functional autonomy?

Go Beyond Class: Resources for Debate and Action

- Autonomy Arrangements in the World: Non-Territorial Autonomies, at https://www.world-autonomies.info/non-territorial-autonomies;
- The European Non-Territorial Autonomy Network (ENTAN), at https://entan.org/;
- Samediggi, About the Sami Parliament, at https://sametinget.no/about-the-sami-parliament/;
- Sydslesvigsk Forening, About SSF, at https://syfo.de/en/about-ssf.

Future Readings

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CHAPTER 9

Language and Religion Within Cultural Autonomy Arrangements: An Exercise in Minority Agency?

Kyriaki Topidi

Cultural autonomy describes the "devolution of political powers to nationalities/groups formed on a non-territorial basis through voluntary individual affiliation of their members" (Bauböck, 2001, 2) in order to provide the space for the cultural development of minority groups. It can be, therefore, understood as a form of non-territorial autonomy. Commonly, cultural autonomy as a means of self-governance on a non-territorial basis is juxtaposed to territorial autonomy, whereby autonomy arrangements follow territorially based criteria (i.e. criteria that apply on the basis of geographical identification). In practice, territorial and non-territorial elements of autonomy can co-exist.

Given the, often, abstract conceptual understanding of NTA, the aim of this chapter is not to provide an analysis of the ideal type(s) of cultural

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autonomy arrangements in minority group contexts. Instead, it purports to evaluate the design, implementation and evolution of such arrangements between states and minority groups as applied in specific areas of minority culture. Following a first brief section that describes the main features of cultural autonomy (see also Chapter 8), the chapter will focus on two important identity markers of minority groups to show how these have formed the basis for a number of NTA arrangements. These are language and religion which are at the heart of the protection of minority identities. Through the lens of these two important identity markers, the chapter will adopt a double objective: first, to outline the variety of cultural NTA arrangements and their limitations from a diversity governance perspective on the basis of language and religion and second, to highlight the link between cultural forms of NTA and minority agency.

9.1 The Main Features of Cultural NTA Arrangements

Cultural autonomy has been developed by theorists in Europe from the nineteenth century onwards and has known a number of historical attempts at implementation in order to manage diversity in highly heterogeneous contexts. Since its inception, cultural forms of NTA have extended beyond self-government arrangements to cover also informal co-decision arrangements between state and non-state actors, with the aim to manage diversity at all levels of government. To do so, the challenge in the contemporary applications of NTA has become to shift to less state-centric institutional approaches when protecting cultural diversity in order to allow for the empowerment of minority groups.

Cultural NTA arrangements have two main purposes: to guarantee collective rights in selected spheres of competences to the groups concerned but also to give shape to the right to determine one's conditions of cultural existence (normative autonomy). The most common forms of cultural NTA concentrate on awarding a linguistic, cultural, or religious minority the possibility to form a legal entity with public law legislative status. Such bodies are usually (though not always) distinct from non-governmental organizations and associations promoting the interests of their members. Distinguishing minority rights entitlements from NTA arrangements based on language and religion is not, however, straightforward: proposed criteria focus on the emphasis of NTA on

institutions as key elements (Malloy, 2015) and/or the degree of institutionalization of the diffusion of powers from the state to entities representing minority groups (Ibid.).

In general, the recognition of national cultural autonomy arrangements by states may entail state support towards the designated institutions to fulfil their aims. Within such a framework, 'cultural councils' have certain (limited) legislative or executive functions, comparable to those of regional or local governments. Instruments delegating some power to designated NTA institutions to manage their cultural affairs can range from the establishment of fully functioning self-governing institutions to merely symbolic policies. The personal scope of cultural autonomy bodies extends to individuals that are members of the minority cultural group, regardless of their geographical location. Materially, their scope of competences can cover culture, language, religion, and customs of the group but not any general functions that have a more territorial dimension (e.g. public transport). Common examples of areas covered by cultural autonomy arrangements include education, media, as well as personal and family law in some cases.[1]

In cases where minority groups do not enjoy state recognition or public law status, cultural forms of NTA can also become bottom-up processes, aligning themselves closer to functional types of autonomy (see Chapter 8). In those cases, minority cultural communities take the initiative to form religious, representative, educational, and other organizations with which the state can interact. Such arrangements cover a wide range of culture-related activities and aims such as the construction of places of worship, the establishment of educational institutions, institutions related to the production/consumption of foods, organizations that cater to women, youth or the elderly among the minority group or, very characteristically, religious councils and/or tribunals that serve specific cultural communities in matters of dispute resolution. While some of these forms of cultural organization fall into the scope of minority rights as applications of the right to freedom of association, some move beyond the legal framework of minority protection and interact with states in the provision of public services. In either case, the risk, within these arrangements, from the perspective of the minority groups, can be that they may lead

[1] See for example Articles 11–15 of the Law on National Councils of National Minorities, Official Gazette of the Republic of Serbia, No 72/2009 or Chapter V of the Hungary Act CLXXIX on the Rights of Nationalities.

to the accommodation of values and norms that are contradictory to the political and legal systems in which these groups exist. In addition, these initiatives can also raise questions of legitimacy in terms of representation for the minority groups themselves, as the example of the Islam Councils illustrates below.

Case study	**Islam Councils in Europe** Established as a result of a bottom-up process initiated by Muslim diasporic communities in Europe or as part of government sponsored initiatives, these bodies have been created to provide a channel of communication between Muslim minority groups and their respective states. They encourage the reconciliation of religious observance with the rule of law, signalling the demand of Islamic religious bodies for recognition and representation of their interests. They often tend to be constituted however only by a part of the communities they represent (for instance primarily Sunni male-dominated segments of these groups). They can be found in many European states such as Austria (Islamische Glaubensgemeinschaft in Österreich), Spain (Comision Islamica de España), Italy (Consulta per l'Islam in Italia), or Germany (Deutsche Islam Konferenz) to name a few examples.

One of the critical challenges that cultural autonomy arrangements face concerns the criteria for belonging to the group benefiting from it (see also Chapter 8). On the one hand, self-identification matters insofar as the individual should feel part of the group. On the other hand, minority groups also wish to exercise some degree of control to prevent false intrusions. In general, the rights to self-determination and to association guarantee to the individual both the right to 'opt-in' but also to 'opt-out' of the minority system. The crucial character of the definition of group membership is further challenged today by the presence of multiple, overlapping and even shifting identities of individuals. Finnish legislation, for example, when determining Sami membership, establishes a dual legal basis: first, on the basis of self-determination where members express their subjective intention to associate with a group (subjective criterion) and second, on the basis of the closeness of the persons to the Sami community assessed on whether one or both of their parents spoke the Sami language or on whether one or both parents learnt Sami as their first language (objective criterion).[2]

[2] Finnish Official Gazette SSK 17/1/1995/974.

Another important element of cultural autonomy arrangements in Europe (and beyond) stems from the fact that the geographic concentration of groups is no longer the norm due to population mobility. This is why, very often, cultural non-territorial autonomy is considered to be a supplement to territorial autonomy arrangements.

To sum up, although there are no universally accepted legal definitions neither of the concept of autonomy nor of culture, it is worth noting that the OSCE 1999 Lund Recommendations on the Effective Participation of National Minorities point out that 'non-territorial forms of governance are useful for the maintenance and development of the identity and culture of national minorities' and, within their Explanatory Note, further stress that institutions of self-governance must be based on democratic principles and the autonomous authorities have the obligation to respect and ensure human rights to all persons within their jurisdictions, even of the 'minority within a minority'.

9.2 Minority Identity Markers and NTA

There are several cohesive cultural elements that may impact the evolution of collective identities and broader integration processes within multiethnic and multicultural societies. Among these elements, language and religion are widely recognized as determinant cultural traits, though both are difficult to determine. As key cultural factors within the European context, non-territorial autonomy arrangements have focused on them as central elements in the institutional attempts to organize autonomously minority cultural life.

In practice, the benefits for minority groups from cultural NTA arrangements are modest upon implementation. Being opaque and fragile and containing limited legal entitlements for minority groups, these arrangements often do not reach their full potential. Particularly in relation to the aim of cultural preservation, national cultural autonomy arrangements in addition may in some instances assume that minority communities are homogenous groups culturally speaking and impose as a result static representations of minority cultures while creating tensions between groups rights and individual rights of some of their members (e.g. gender discrimination). Both the limited scope of their activities as well as the essentialization processes in cultural terms have implications for the degree of exercise of agency for the groups concerned.

9.2.1 Language

Language constitutes a prominent identity marker for minority groups. For some, it is arguably the main cultural creation of any minority group. It connects individuals with the same ethno-linguistic background to a sense of community in at least three ways: first, because language reflects a group's cultural identity, essence, and history. The second way that language matters for minority groups is as a social medium to organize the life of a community in schools, media, employment, or courts. Finally, language is also a symbolic power element as well as a public visibility instrument, as minorities use their language to assert distinctiveness and uniqueness, often with political implications.

Language, as one of the salient identity markers of a group, has been historically present in several self-determination struggles in Europe and has been furthermore closely associated with European nationalism during the nineteenth century. Similar to the broader framework of the distinction between territorial and non-territorial autonomy, the recognition of the rights of minority cultures, in connection to language policy, is usually based on the choice between regimes based on *territoriality* (where linguistic rights are afforded to inhabitants of a defined geographical area) and those based on *personality* (where linguistic rights are given to persons belonging to certain groups independently of territory).The second category, of particular interest here, presupposes self-identification of the members of the groups and a certain capacity of the group to govern itself. It is generally premised on an understanding of linguistic diversity as 'both a condition and an argument for political mobilisation' (Arraiza, 2015, 12).

Non-territorial autonomy models allow minority language speakers to use their language across the territory of a given state when accessing state services (e.g. in education, within public administration). Linguistic forms of NTA are essentially born out of the complex relationship between languages, societies, and political institutions. In simpler terms, linguistic diversity affects the design of autonomy arrangements and vice versa (Arraiza, 2015, 8). At the basis of these arrangements are identity claims aiming mostly for state recognition and/or state support in minority culture preservation, as the example of minority language schools in Serbia shows below.

Case study	**Linguistic NTA and National Minority Councils in Serbia** Teaching of minority languages is available in Albanian, Croatian, Hungarian, Romanian and Slovak (pre-school/primary/secondary levels of education) as well as in Bulgarian and Ruthenian (primary/secondary levels of education) in Serbia. National minority councils of each respective group are involved in the setting up of own schools. They can participate at all educational levels from preschool to post-secondary in the management of the schools through proposals, recommendations and opinions, the appointment of school management boards as well as that of principals, and also have a say in the constitution of syllabi related to minority history, culture, language and textbooks (Articles 12–13 of Law on National Councils of National Minorities, 2009). In practice, however, Minority Councils have no decisive authority in their area of competence and no legislative or taxation powers and therefore only function as consultative bodies (Yupsanis, 2019, 86). There are also divergences observed among the minority groups in terms of the delivery of education in their native language. For example, there are 21 schools offering education in Bosnian as opposed to 72 schools for Hungarian speakers for approximately the same population size for both groups. The number of monolingual minority schools is even more reduced: 12 Albanian, 8 Bosnian, 8 Hungarian, 4 Romanian and 4 Slovak. Concerns related to teaching personnel and financial resources allocated to these schools persist (Viscek, 2018).

In general terms, the question of language use, especially within education but also in public administration, is a commonly contested one within majority-minority relations. Particularly for education, determining the language of instruction within educational establishments largely depends on where the responsibility for education as a competence lies. NTA functional autonomy arrangements are common in education systems, especially where linguistic minorities are sufficiently concentrated to create minority language/minority religious schools (e.g. schools in North Macedonia can be provided in Albanian subject to sufficient demand).[3] The determining criterion in qualifying such schools as forming part of a web of NTA arrangements is the degree of autonomous decision-making power and agency (see the Canadian example of Minority School Boards below). Indicatively, national minority self-governments have been able to either take over from the state the management of minority schools or have established new ones or other supplementary minority education schemes to provide culturally relevant education to their members.

[3] Law on the Use of Languages spoken by 20% of the Population of the Republic of N. Macedonia and in the units of Local Self Government, Official Gazette 101/08.

Case study	**Educational NTA in Canada and the Minority School Boards** The Canadian Charter of Rights and Freedoms defines the conditions under which Canadians can access publicly funded education in a minority language. Section 23 of the Canadian Constitution provides a right for citizens who are part of a linguistic minority in the province where they reside to be educated in their own language. This form of NTA has been institutionalized through the establishment of **minority school boards.** Each province and territory has established French-language schools boards to manage the French-first-language schools. In Quebec, the opposite structure applies to English-first-language schools. These school boards represent a form of educational self-management. They adapt the provincial school curriculum to the minority's culture while integrating aspects of culture into it (e.g. events, historical elements). The Boards have decision-making powers that include the establishment of the programme of instruction within the schools, the administration of minority language facilities as well as the recruitment and assignment of teachers and other personnel. In that sense, they represent a comparatively advanced form of linguistic NTA both in legal and implementation terms.

NTA arrangements in education, however, can lead to the separation of students according to language (but also religion). This kind of separation cannot be nevertheless qualified as discriminatory in human and minority rights legal terms as it guarantees the right to education in one's mother tongue. The case of the self-governing union of Danish minority schools in Germany (Schleswig-Holstein), which though private is entirely publicly funded by the state (with an equivalent scheme applying in Denmark's German minority schools) is a characteristic illustration of linguistic NTA that separates students according to minority language. Similarly, as the Belgian case shows below, these schools represent attempts to balance the principles of territoriality and personality.

Case study	**Linguistic NTA in Belgium** According to Article 129 of the Belgian Constitution, combined with Article 30, linguistic communities in Belgium can regulate language in the areas of administration, education and the private sector, within each community's borders. The arrangement allows French-speaking and Flemish-speaking communities to administer their cultural matters autonomously. Non-territorial units for each community therefore control matters related to education, language, culture, and health care. The establishment of 'language areas' within Belgium illustrates the attempt at balancing the principles of territoriality with personality. This is because language in the Belgian context is not a neutral property, with an intense historical background (e.g. see the Flemish Movement of the last nineteenth century). Particularly in the bilingual Brussels Capital Region (covering 19 municipalities) no official registration exists of who is a Flemish or French speaker. In theory, at least, people can shift their linguistic identity to the extent that the state supports both languages, using for example the services of a francophone hospital while reading public documents in Flemish. In practice, attitudes towards language use in Brussels mostly concern the adequate use of Flemish alongside French. The linguistic debate has been also intensified in the recent past in the periphery of Brussels which extends to officially Flemish-speaking municipalities: French-proficient Brussels population relocating to these areas has been perceived as a threat of *frenchification* of Flemish municipalities. The quest for the construction of monolingual homogenous spaces on the basis of linguistic autonomy arrangements seems therefore to be an ongoing process.

9.2.2 Religion

Minority status of a religious and ethnic group, especially in diaspora, tends often to reinforce religious identification. Specifically, with regard to religion, minority cultural autonomy can take two forms: first, some countries provide for certain laws related to religion that apply to members of religious minorities regardless of where the person may be located. These kinds of arrangements are qualified as *personal law*. Issues of personal law usually cover aspects of family law (e.g. marriage, divorce, inheritance). Disputes are solved by different jurisdictions specific to religious communities. A typical example in this case is India and its personal law system. A second option is for the state to assign intermediaries to organize religious-identity-related activities. For example, the German Islam Conferences operate as a state-stakeholder partnership: the German state negotiates with various Muslim organization aspects of cultural and everyday life in Germany.

Breaking the limits of territoriality, minority groups often organize themselves to provide public services in culturally relevant ways to their respective group. This dynamic movement is particularly reflected in different patterns within public education (e.g. Islamic faith schools in the UK, Denmark, or Austria).[4] Minority groups are not, however, in general, automatically designated as beneficiaries of cultural autonomy. In simpler terms, there is no right to autonomy granted to them by virtue of international human rights law. States may decide to award degrees of cultural autonomy, however, either because they perceive such groups to pose a threat to the survival of the state in general or because the state considers the vitality of such groups as relevant for political, ideological, or even historical factors. In some cases, more concretely, minority groups create associations under private law within a domestic legal system which are active in the promotion of the cultural interests of a minority, expanding therefore the concept of cultural NTA as initially formulated by Bauer and Renner [for more on this see Chapter 1].

The form of these initiatives is shaped in present times, by the increasingly complex constellations of interactions between the State, the market and non-state, including religious, minority actors. They are also connected to the questioning of secularism (i.e. the separation of the state and religion) as the dominant trajectory to govern cultural diversity. Such conditions have triggered a process of change in the distribution of public goods from states. This happens because, although there is a decline of individualized religion's significance and role in society, at least within Europe, religion and religious actors remain still heavily involved in providing health care, education and other social services and at the same time, activism continues to be grounded on religious identities. As importantly, due to population movements particularly within Western Europe, minority religious identities are more and more hybrid and policy (as well as legal) interventions are called upon to take account of the growing spread of such multiple *hyphenated* identities.

Forms of NTA based on religious minority affiliation have been accordingly designed to prevent/limit conflicts and are most visible in public education: for instance, a typical scenario could envisage a private school,

[4] The 1960 UNESCO Convention against Discrimination in Education was the first international legal document to establish a right awarded to a minority group to set up its own private schools under certain conditions.

operating in a minority language and/ or a minority religion and maintained by a minority cultural association issuing education diplomas under a licence by the State. It should be emphasized that these forms of diversity governance function as pluri-centric networks where state and minority-led actors form alliances towards culturally related public purposes. Autonomy in this context functions less as a framework or arrangement awarding cultural rights to minority groups through specific institutional set-ups. It resembles more a space in which minorities exercise agency by developing and promoting matters related to their culture in cooperation with the state. While these arrangements do not strictly fit into the framework of cultural NTA as devised by Bauer and Renner, especially as a number of religious minority schools are not recognized as corporations under public law, they nevertheless constitute responses to minority cultural claims and the quest for the protection of cultural diversity in contemporary terms. The essence of these arrangements relies on a partnership of these bodies with the state (e.g. through partial or full funding of their activities, the adoption of national curricula with discretion in certain areas, etc.) in order to provide education.

The role of minority religious schools in a globalized context is of interest to NTA arrangements and autonomy more broadly, especially when state support is entailed. They serve as institutions created for and by minorities to resist homogenization of their cultures (language, culture, religion, and traditions) while building bridges between groups to come into cultural contact.

At the same time, minority religious schools[5] are commonly singled-out as policy-related concerns connected to integration, social cohesion, citizenship, and the rights to religious freedom and education. To take the example of Muslim groups, the number of Islamic schools is growing in Europe along with the number of Muslim learners who attend them. The increase is due to the cultural and religious claims of Muslim minority communities, the group's population increase and parental dissatisfaction with secular public-school systems that are perceived as an 'alien social environment' for Muslim learners.

The role and support of the State can vary when responding to Muslim minorities' claims to religious education: in some European countries,

[5] Religious or faith schools encompass all schools that adopt a distinctive religious character in their operation (e.g. curriculum, admission policies, appointment of teaching staff, internal regulations, etc.).

religious education can be funded either through grants or within the structure of the public education system, in itself. In other contexts, Islamic schools are privately funded or alternatively publicly funded and privately operated and even publicly funded and publicly operated.[6]

In the context of bottom-up movements towards the creation of Islamic schools in Western Europe, the state continues to play an important role, especially when regulating the activities of public religions. The level of competition and potential conflict among such public religions push the state to forge partnerships and co-operate with them.[7] For education, this means that faith organizations are encouraged to position themselves as 'agents' or 'mediators' of government policies, including when setting up schools. In those scenarios, the state can opt for selective and strategic partnerships, as already mentioned, that are usually labelled as community cohesion initiatives. This explains in many instances legal and policy choices within public education as well as the strictly regulated legal framework of such schools.

[6] Teacher training programs at university level for Islamic religious instruction exist in some instances as well (e.g. in Germany such programmes can be found in Muenster-Osnabruck, Frankfurt, Tuebingen and Nuremberg- Erlangen, [Berglund, 2015]). The cases of the US and France are explicit insofar as religious and more particularly Muslim schooling is exclusively private initiative based.

[7] The trend is particularly obvious in public education in the UK, with a long-standing cooperation of the State with faith organizations (e.g. New Labour's ‚faith sector' policy).

Case study	**Religious Minority Schools in Denmark** Religious communities in Denmark have been given the right to establish private schools that are eligible to receive state funding of up to 75 per cent of their total budget, provided that their curriculum and practice meet state guidelines. Since 2005, the requirements for religious private schools with state support required additionally the educational institutions to prepare students to 'live in a society characterized by freedom and democracy'. The operation of religious minority schools has been particularly controversial with respect to the approximately 25 independent (private) Muslim schools on the basis of alleged tensions between their curricula and the rules of democracy and freedom. Seven among the private Muslim schools were recently closed by the state due to insufficient promotion of Danish values in their curricula. Private religious education initiatives, however, enjoy constitutional protection in Denmark (Article 76 of the Constitution). While this provision can be construed prima facie as a minority protection guarantee, in practice there are traces of a development of a system of Islamic foundations in Denmark that count among their aims the establishment/support of private schools (e.g. the Culture and Education Foundation, the DIKEV Foundation, the Grand Copenhagen Endowment or the Foundation for the Muslim Association). The institutionalization of Islamic foundations within Denmark, and other Western European countries, is triggered by practical concerns that include the provision of Islam-compliant education. Their presence can be therefore interpreted as part of a broader diversity governance model contributing towards public service delivery. Without state financial support and transparency on the criteria for state support of these schools, their existence is however directly threatened.

9.3 The Prospects for Cultural NTA for Minority Groups

Cultural autonomy arrangements have the potential to promote minority collective rights and also lead to the empowerment of these communities. This is because they create the background against which the groups can shape their destiny and have a say in matters that affect them from the perspective of cultural heritage and protection of cultural difference. Such mechanisms, in their practical implementation in Europe, however, have only offered limited forms of autonomy to the minorities groups that have benefited from them. The degree of their success is limited by weak political influence on policy-making, reduced resources at their disposal and for minority languages, and their marginal use by their speakers.

The experiences of state endorsed cultural autonomy in Europe raise thus a number of issues: some arrangements that envisage self-governing entities performing public functions (e.g. in education) are symbolic,

devoid of a tightly defined content (e.g. Latvia, Russia, North Macedonia). Others implemented through minority representative bodies enjoy only consultative functions (e.g. Hungary, Serbia, Sami Parliaments). A third category of arrangements introduced from below (i.e. by non-state actors) in the form of public-private partnerships depend heavily on state support, limiting agency of the groups concerned. Finally, NTA arrangements in the cultural field may lead to institutionalized inequality among minority groups. Those groups lacking leadership and adequate resources are unable to take advantage of these schemes (e.g. the Roma in several CEE countries).

Overall, however, the potential of NTA arrangements in cultural matters represents today a challenge to a state-centric view of the world, particularly when accounting for 'new' minorities that have been created as a result of migratory movements but also of historic minority groups that are characterized by mobility but still wish to put forward cultural claims to states (Nimni, 2013, 2). As such, NTA arrangements can be used to include the diverse practices and theories of minority community empowerment and self-determination beyond territorial considerations.

Ultimately, such arrangements cannot ignore the impact of population movements and new technologies that have increased the type and degrees of complexity of cultural diversity in our societies. The debates over diversity preservation are constantly fed with new or evolving claims for the accommodation of minority cultural identity extending the character of cultural non-territorial autonomy practices. They also invite the consideration of the shortcomings of state supported NTA regimes in relation to language and religion in terms of public recognition processes, the need for the extension of their decisional powers and not least the sustainability of state funding to support their activities.

Summing-Up

- Cultural autonomy arrangements are designed to allow minority groups to manage their own cultural affairs through the creation of ethnicity-based or religion-based institutions.
- Minority cultural autonomy bodies are either the result of state recognition enjoying public law status or based on informal co-decision arrangements between the state and non-state actors.
- Minority language preservation occupies a central place in NTA arrangements and the degree of linguistic diversity determines the

design of NTA and vice versa. In practice, states may create legal frameworks granting cultural autonomy to minority groups and also devote resources to set up institutions of cultural autonomy but this does not automatically give these institutions significant power and/or functions.

- Religious forms of cultural autonomy function as pluri-centric networks where state and minority-led actors form alliances towards culturally related public purposes.
- Education is a prominent field of minority schools creation within and outside public schools systems, very often depending on state financial support. Both language and religion are significant minority identity markers at the core of these arrangements.

Study Questions

1. What are the usual forms of NTA arrangements in the field of culture?
2. To what extent NTA arrangements on language and education cover the needs of minority groups? What adjustments would you suggest?
3. What is the nature of the legal/political relationship between the state and minority groups in cultural matters within NTA scenarios? Does it correspond to the evolution of forms of minority agency on the ground?
4. Are forms of NTA culturally sustainable? What advantages/risks do you see?

Go Beyond Class: Resources for Debate and Action

- Minority Schools in Greece as Autonomous Institutions (Thrace): https://www.world-autonomies.info/non-territorial-autonomies/greece.
- Functional Minority Autonomy in Germany in cultural matters (especially point 3): https://www.world-autonomies.info/non-territorial-autonomies/germany.

Further Reading

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CHAPTER 10

Operationalizing Non-Territorial Autonomy: Indicators Assessing Mobilization for Empowerment

Tove H. Malloy

In order to understand how members of ethno-cultural groups enjoy and benefit from non-territorial autonomy (NTA) in their daily lives, it is important to understand how they establish and operate NTA institutions. In the previous chapters, we have learned that there are legal and political frameworks which are required to allow ethno-cultural groups the right to set up their own NTA institutions and organizations.

- But how do members of ethno-cultural groups come together collectively to organize autonomy as a result of being granted rights to decide over their own affairs?
- What are the capabilities and activities which ensure that the members of ethno-cultural groups can be empowered?

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In other words, not a legal and political account of what are their rights but rather a sociological account of how they operate and implement their rights. This is the focus of this chapter.

Importantly, a key to understanding the discussion in this chapter is the *implementation* of the rights promoting NTA. Normally, governments are expected to implement rights but in the case of ethno-cultural NTA, the members of minority groups need to have a strong role in implementing their own rights. This is because, according to Tove H. Malloy, the main idea of being autonomous is being empowered and involved (2014). First, being empowered requires knowledge about how to access one's rights. Knowledge about the special rights that are part of the foundation of NTAs, such as cultural and political rights, is important. Secondly, autonomous action is required to exercise those rights. Taking action, or to act on the special rights assigned to ethno-cultural groups seeking to enjoy NTA, means the ability to muster agency. One can, of course, decide not to take action and thus not to exercise a right, but that does not cancel the right once it has been codified as law. Agency is the power and willingness to influence one's own life, for instance to make something happen that improves one's situation. The entrepreneurship of ethno-cultural actors can play an essential role in this. However, in the case of NTA, *collective* action is required because individuals cannot enjoy NTA alone; it is a joint endeavour pace Mansur Olson's theory of collective action (1965). Therefore, members of ethno-cultural groups must decide as groups to take joint action to implement their own rights. Only then will they be empowered.

Furthermore, to implement NTA there needs to be institutions and organizations through which members of ethno-cultural groups can carry out the work and make NTA operational. These are not usually established by the state and the authorities because that would be a violation of the idea of autonomy. Rather, ethno-cultural groups must set up the facilities, using both material and non-material resources, in order to become empowered. However, authorities can support ethno-cultural groups in their work. With regard to the material side of NTA, governments and authorities can provide subsidies in terms of buildings and land or access to such as well as to other tangible materials needed to set up and run organizations, as discussed by Detlev Rein (2015). With regard to the non-material side of NTA, governments can provide subsidies for instance

to running costs and salaries. These financial aspects depend on the agreements that are reached between the state and/or local authorities, on the one side, and the ethno-cultural groups seeking to establish and run their own organizations, on the other side. In other words, ethno-cultural groups must be able to represent themselves and put forward their wishes or needs to the government and its authorities in order to access their NTA rights. This also means that ethno-cultural groups must be able and willing to co-operate with the government and authorities. A key question is, therefore, how do ethno-cultural groups muster collective agency that enables them to make decisions and co-operate with public authorities?

The answer to the key question is manifold. Ethno-cultural groups seeking NTA status must establish institutions and procedures that promote autonomy internally within the group and within their organizations. They must be motivated to want to establish the operational structures for their autonomy. Motivation is usually driven by a desire to preserve and protect the ethno-cultural traditions and identities of the group. At the same time, ethno-cultural groups must set up institutions that not only operate and function well but also are respected among their own members and by the public authorities. If they are successful in this, their NTA setup will gain legitimacy. According to Malloy, public authorities on their part must make sure that ethno-cultural NTA groups are able to participate in the democratic debates and procedures relevant to their NTA powers on par with all other civil society organizations and public agencies (2018). Article 15 of the European Framework Convention for the Protection of National Minorities (FCNM) adopted on 1 February 1995 and in force 1 February 1998 provisions that ethno-cultural groups should be able to participate effectively in public life, including political, social, and cultural aspects of public life. Moreover, ethno-cultural groups must make sure that the institutions are managed and operated properly, and the procedures are followed correctly. They must know that poorly managed institutions will not last, and thus there is a risk that the opportunity to establish NTA may be lost. For the same reason, it is important that NTA institutions and procedures follow the rule of law and good governance internally as well as externally. Ethno-cultural groups establishing and managing their own NTA institutions must comply with all constitutional standards and ensure that the constitutional rights of all members and persons interacting with NTA institutions are not violated.

If they receive public funds, they must show that they are not corrupt in managing the funds. As argued by Jeremy Waldron, ethno-cultural groups must also show that they respect mainstream society and the general rules of society by accepting civic responsibility (2000). Finally, the NTA institutions must be able to show impartiality in internal disputes that could jeopardize the respect of mainstream society. In other words, ethno-cultural NTA institutions are autonomous only in so far that they abide by the general rules of mainstream society, earn the respect of same and co-operate with society. If ethno-cultural groups can achieve these goals, they will feel in control over their own lives.

10.1 Methodology

To verify that ethno-cultural NTAs are successful is a complex analysis that needs relevant scientific tools. A good set of indicators is the best tool for assessing NTA operations. According to the World Bank, indicators are broadly defined as information indices describing the state-of-affairs of something (2004). Indicators can be designed on the basis of both quantitative and qualitative information. Quantitative indicators are based on facts presented with a specific objective numeric value measured against a standard and usually not subject to distortion, personal feelings, prejudices, or interpretations. Qualitative indicators represent non-numeric conformance to a standard, or interpretation of personal feelings, tastes, opinions, or experiences. An indicator is thus a technical description of factors to be examined when aiming at verifying and measuring developments in a specific area of society. The reason why indicators are descriptive is that an indicator can only measure what has happened in the past; it cannot predict or estimate the future.

In addition, indicators have aims. In the study of ethno-cultural groups, Francois Grin argues that some indicators assess legal and political aspects of governance (2006), other indicators assess the actors within a system of governance. The first type aims to assess policy frameworks or systems, whereas the second aims to assess behaviour—the behaviour of the actors within the systems. Both are known as performance indicators not to be confused with policy indicators, which are static. In this chapter, we will discuss performance indicators that seek to assess the level of action and agency of ethno-cultural groups operating NTA institutions and organizations.

The performance indicator approach of assessing groups establishing and operating NTAs, Malloy argues, is theoretically based on the sociological method of 'structure and agency' (2021). Structure-and-agency is a social science approach to understanding human behaviour. It has been developed and applied by numerous sociologists over the years. It is a non-positivist approach based on the structuration theory of sociology. One of its proponents was the British sociologist, Anthony Giddens, who argued that just as an individual's autonomy is influenced by structure (society and its institutions), structures are maintained and adapted through the exercise of agency (the ability to influence one's life by acting on one's own will) (1982). In a sense, there is a two-way inter-action between the structures and the agency of people. Giddens theorized the idea of structuration, meaning the inter-active process between society and people that binds them together in a mutual inter-relationship of socialization (1984).

In practice, the methods applied focus on many aspects of socializations, such as production and reproduction of social practices in specific contexts. They seek to identify both stasis and change, agent expectations, relative degrees of routine, tradition, behaviour, and creative, skilful, and strategic thought. They examine among other spatial organization, intended and unintended consequences, skilled and knowledgeable agents, discursive and tacit knowledge, dialectics of control, as well as actions with motivational content, and constraints.

Drawing on the theory of structuration, we can identify five areas of collective ethno-cultural agency that relate to the operationalization of NTA institutions:

a. Mobilizing for the cultural survival of ethno-cultural groups (motivational content).
b. Establishing authority of decision-making within the group (skilled agents).
c. Securing control over administration and management of own institutions (spatial organization; dialectics of control).
d. Promoting internal acceptance of regulation set by the group (actions of constraints, agent expectations).
e. Securing impartiality in internal adjudication of disputes (strategic thought, dialectics of control).

There are a number of assumptions guiding these areas. First, autonomy over own affairs through own institutions will support a perceived need for protecting the group against assimilation. According to Will Kymlicka, assimilation is considered a negative result of intercultural and multicultural socialization because it does not allow the individual members of ethno-cultural groups to maintain their personal identity. Having to suppress one's identity—whether sub-consciously or consciously by succumbing to external pressure—is considered a violation of the rights of the individual (1989: 145–146). Thus, governments that overtly or covertly impose policies to suppress ethno-cultural identities are committing crimes against humanity. The international human rights treaty system requires states to adopt legislation that protect the cultural identity of individuals. Second, according to Charles Taylor, autonomous decision-making will empower the group to reduce aspects of intersocietal relations that are detrimental to the group's cultural survival (1989). Third, according to Kymlicka, autonomous administration and management of independently created and organized NTA institutions will empower the group to preserve and promote cultural identity (2007). Fourth, autonomy to make decisions about internal regulations will empower the group to be respected as a group seeking to preserve its ethno-cultural identity, and fifth autonomy over internal conflict management and adjudicative mechanisms will empower the group to resist assimilation of cultural traditions. The five areas and the assumptions behind them comprise the framework for a set of performance indicators, or an index of indicators for how ethno-cultural groups operate their own NTA institutions.

10.2 Designing NTA Indicators

To design NTA indicators it is necessary to identify how ethno-cultural groups implement the rights that secure their autonomous action. In technical terms, the index of NTA performance indicators must describe the criteria for how agency is mobilized, how actions are effectuated, and how these aspects can be verified. First, describing methods of ascertaining agency requires knowledge about motivation and drive. Second, describing actions requires data about programmes. Third, describing methods of verification requires knowledge about sources, and fourth,

describing methods of appraisal requires synthesis and perhaps comparison. These methodological aspects are crucial to designing good indicators. This chapter only provides very general suggestions; often methods must be adjusted to the specific situation and the specific country. Thus, there are four categories of description for each of the five NTA performance indicators. Finally, it is important to note that NTA is seldom static but continues to develop or, if not properly implemented, to deteriorate. What we can verify is, therefore, the *degree* of NTA as opposed to a set standard of when NTA exists.

Designing indicators: Concept in summary	**Box 10.1 Categories of description** a. Agency b. Action c. Verification d. Appraisal *Sources* Malloy, T. H. Introduction. (2021). In T. H. Malloy & L. Salat (Eds.), *Non-Territorial Autonomy and Decentralization* (pp. 3–22). Routledge.

10.3 An Index of NTA Indicators

Using emancipatory terminology, the five areas of ethno-cultural NTA may be rephrased as five indicators each describing a value of autonomy as follows:

1. Self-organization in terms of self-established and self-created institutions.
2. Self-decision-making in terms of independent design and reasoning about strategies.
3. Self-administration and self-management in terms of implementation of strategies, routines, and procedures.
4. Self-regulation in terms of self-imposed human rights norms and other systems of ethics.
5. Self-adjudication in terms of independent conflict settlement and crisis management.

These five autonomy values, or NTA values, will be discussed below with a view to explore how they can become performance indicators.

10.3.1 Self-Creating and Self-Organization

NTA in terms of the value of self-creating and self-organization means having the freedom to establish and design institutions of relevance for preserving and promoting the ethno-cultural group's culture and identity. This means independence from government intervention, but not necessarily lack of government sanctions. Full independence from government oversight does not exist. To be autonomous means acting freely but with a duty to comply with general and common rules as well as any rules agreed upon for the setup of the NTA institutions. In legal terms, the right to set up NTAs is a right to certain powers (often defined by a contract or agreement). According to Peter Jones, in so far that an ethno-cultural group enters into an agreement with the entity that can convey the powers (the government or authorities), the group is bound by the conditions of the agreement, i.e. the group has a liability to implement the agreements as prescribed (1994: 22–24).

Using this indicator, it is possible to assess the degree of autonomy that NTA cases represent with regard to detecting a bottom-up drive within the ethno-cultural group to establish structures, physical and non-material, inter-dependent structures with some horizontal articulations about mutual goals that support the cultural life and cultural survival of the group. A key to the appraisal of the degree of autonomy is the cohesiveness and motivation of the drive for cultural survival through self-creating and self-organization.

Technically, the method is descriptive, and the verification approach is quantitative and qualitative with references to empirical data about registration of organizations with public authorities, by-laws adopted by the organizations as well as strategies developed. Action plans and projects that may indicated preparedness to implement are also relevant. Anything that can verify that the ethno-cultural group is motivated collectively and mobilizing to establish and use the organizations to protect and promote the group's culture and identity is thus relevant as basis for an assessment of the degree to which NTA is implemented.

Performance Indicator: Concept in summary	**Box 10.2 NTA value: Self-creating/self-organisation** a. Agency: Entrepreneurial drive to create and establish own NTA institutions and organisations independent from government intervention. b. Action: Physical and non-material inter-dependent structures with some horizontal articulations about mutual goals. c. Verification: Registration records. By-laws of organisations. Strategy documents. Action plans. Public law on civil society self-organisation. d. Appraisal: Overall motivation and mobilisation of the group as a group. *Source* Malloy, T. H. (2021). Introduction. In T. H. Malloy & L. Salat (Eds.), *Non-Territorial Autonomy and Decentralization* (pp. 3–22). Routledge.

10.3.2 Self-Decision-Making

NTA in terms of self-decision-making, or independent decision-making, means having the freedom to adopt decisions, to plan and strategize about own NTA institutions within regulative, normative, cognitive, and imaginary frameworks. Self-decision-making supports self-organization in that it requires the ability and capability to make independent reasoning leading to decisions about independent strategies for institutions. But, according to E. Sadan, it goes beyond self-organization in that it requires mechanisms for decision-making and the ability for such mechanisms to arrive at joint actions (2004). Thus, in addition to establishing organizations, self-decision-making requires the ability to devise tactics about how to implement plans and programmes. It also requires the ability and willingness to react to and make decisions about changes within the organizations and the already adopted plans. Moreover, these decisions must carry authority within the broader group of ethno-cultural members in order that the organizations continue to enjoy respect within the minority group.

Technically, the degree of self-decision-making can be verified both quantitatively and qualitatively. The method is again descriptive with references to empirical data, such as annual reports and other types of periodic evaluations of performance. Third-party research can be of good value here as well as community narratives and interviews with individual members. Public statements and media reports may also be relevant and useful. The key is to find information that may assist in assessing the authority of the self-decision-making processes within organizations. The greater authority, the greater legitimacy.

Performance Indicator: Concept in summary	**Box 10.3 NTA value: Self-decision-making** a. Agency: Taking decisions about planning and strategizing for future of own NTA institutions taking place within regulative, normative, cognitive and imaginary frameworks. b. Action: Processes in terms of ability to reason and deliberate. Mechanisms for decision-making. Tactics devised and strategies followed. c. Verification: Annual reports. Evaluation documents. Community narratives. Interviews with actors. Public statements and media. Third-party research. d. Appraisal: Authority. Legitimacy. *Source* Malloy, T. H. (2021). Introduction. In T. H. Malloy & L. Salat (Eds.), *Non-Territorial Autonomy and Decentralization* (pp. 3–22). Routledge.

10.3.3 Self-Administration/Self-Management

NTA in terms of self-administration and self-management means having the freedom to organize bottom-up activities and programmes without state interference with a view to implement decisions taken about strategies, action plans, and goals. This can range from a simple system of managing membership fees to a very sophisticated system of handling public service provisions, such as delivering education, cultural activities, social care, or more complex community needs. The ability to co-operate with public authorities is central to this type of NTA functions. Experts of public administration, like Huanming Wang and colleagues, talk of public–private partnerships by which private actors join public agencies in delivering a service (2018). In some cases, private actors may take over entirely the functions on behalf of the public agencies. This means that the private actors must abide by same rules as for public agencies and thus cannot operate fully private and without interference from the authorities. There are different reasons for setting up public–private partnerships. In some cases, it is a necessity because the public sector is not strong enough or large enough to take on the functions. In other cases, it is an ideological view that cooperation between public and private organizations is more efficient. The latter is relevant, if the private side of the cooperation has greater knowledge about the field. In the case of NTAs, Kyriaki Topidi has argued that the NTA organizations may have greater experience with providing adequate services to their own members in areas such as education and culture (2021). It usually requires organizations to elaborate a set of by-laws as well as management routines. They should have

capacities for programme planning and project implementation. In cases of cooperation with authorities for delivering services, the competences of the NTA organizations should be clearly defined.

Technically, the degree of self-administration can be verified both quantitatively and qualitatively. The method is descriptive with reference to empirical data on by-laws, management documents, annual plans, and annual reports as well as project descriptions and project implementation. A key to the appraisal of the degree of autonomy in terms of self-administration and self-management is the permanency of the institutions, their ability to keep control of their own affairs, and their competences in managing their own organizations. Availability of funding is also a relevant factor in assessing whether NTA organizations can continue as self-managed institutions.

Performance Indicator: Concept in summary	**Box 10.4 NTA value: Self-administration/self-management** a. Agency: Control over administration and management of own NTA institutions and organisations. b. Action: Implementation of by-laws and strategies. Management routines in place. Programme planning and project implementation. Interactive co-operation with authorities. Competences of public management areas and public service delivery. c. Verification: By-laws. Management documents. Annual programmes and annual reports. Project descriptions. d. Appraisal: Control. Competency. Permanency. *Source* Malloy, T. H. (2021). Introduction. In T. H. Malloy & L. Salat (Eds.), *Non-Territorial Autonomy and Decentralization* (pp. 3–22). Routledge.

10.3.4 Self-Regulation

NTA in terms of self-regulation refers to both the freedom and duty to make decisions about self-imposed ethics within NTA institutions. Such freedom is not absolute and should be described with regard to external pressure or external guidance on duties. Helen Quane has increased the focus on the degree of freedom in terms of autonomy and human rights norms (2021). Especially, if NTA organizations take on state-like features and services, alone or in public–private partnerships with authorities, adherence to human rights norms must be assessed. All types of collective autonomy are now expected to assert adherence to such norms, NTA included. Countries are constantly under scrutiny by international

organizations and international NGOs to show that human rights are respected at all levels of society, and this impacts on how much freedom NTAs have internally and whether they take on the duty to self-regulate. Deon Geldenhuys discusses this in terms of the rights of the Afrikaner in South Africa (2021). Ethno-cultural groups are, therefore, expected to self-impose human rights norms precisely because universal ethics must be respected.

Such self-regulation is arguably a sign of good faith on the part of the ethno-cultural groups, but it also has implications for the assessment of the degree of autonomy. One could argue that the decision to self-regulate or not to self-regulate is the ultimate test of whether an NTA has gained legitimacy within the general public and with governments. At the same time, there are also specific matters, such as criminal justice, that might require the NTAs to accept externally imposed regulations. Criminal law is not usually deferred to autonomous groups, whether they enjoy territorial autonomy or NTA. The most autonomous situation is found in the agreements with the Native Americans in the USA as described by Sherrill Stroschein (2014). Most reservations have powers over their own law enforcement structures, including a tribal police force, and have tribal courts that adjudicate family law and some criminal matters for tribal members. However, they do not have any jurisdiction over non-members residing or visiting the reservations. As noted, regulation in the NTA context is seldom a unilateral decision. Thus, assessing self-regulation can be dependent on the legal and political framework established for the NTA model.

Technically, the degree of self-regulation is verified both quantitatively and qualitatively using empirical data on codes of conduct policies adopted by NTA institutions, ethics statements in strategies and action plans and surveying public law regulations. A key to the appraisal of the degree of autonomy is the level of internal acceptance that the self-imposed rules have among the members of the group. The higher acceptance, the higher legitimacy of the NTA institutions.

Performance Indicator: Concept in summary	**Box 10.5 NTA value: Self-regulation** a. Agency: Taking decisions about self-imposed regulations and ethics/codes of conduct. b. Action: Decisions and policies for self-imposed ethics made freely and/or under external pressure/guidance. Adopting code of conduct. c. Verification: Codes of conduct regulations. Strategy documents. Action plans. Public law regulations. Public statements. d. Appraisal: Acceptance. Legitimacy. *Source* Malloy, T. H. (2021). Introduction. In T. H. Malloy & L. Salat (Eds.), *Non-Territorial Autonomy and Decentralization* (pp. 3–22). Routledge.

10.3.5 Self-Adjudication

The final indicator is one that may allow ethno-cultural groups a fairly strong degree of autonomy. NTA in terms of self-adjudication of settlement of internal conflicts, using internal crisis management based on independent mechanisms and procedures means having the freedom to stand outside the official, recognized state system of adjudication. This is a right that is afforded very few ethno-cultural minorities around the world, unlike indigenous groups, who also benefit from international support through the 2007 United Nations Declaration on the Rights of Indigenous Peoples. In a few cases, religious groups have been granted limited rights to adjudicate within the group on matters related to family law. For instance, as S. Bates has reported, in the UK the Divorce (Religious Marriages) Act 2002 allows Jewish spouses to negotiate before a Jewish community (religious) court before getting the divorce recognized by and English law court. Basically, where a husband or wife is refusing either to give instructions for the writing of a 'Get' (the divorce agreement) or refusing to accept it, the 2002 Act enables one of the parties to apply for an order to delay the making of the official divorce decree absolute obtained in the civil proceedings, until the other party has cooperated. The English court has a discretion whether to make the order and will only make it if it is satisfied that in all the circumstances of the case (2002). With regard to legal pluralism systems, Brian Tamanaha has described how it is occasionally accepted regarding certain matters such as family law (2008). According to Topidi (2021) and Levente Salat and Sergiu Miscoiu (2021), some ethno-cultural groups enjoy a mixed model whereby they may self-adjudicate within the group while adhering

to the legal rules of mainstream society, such as for instance human rights. Usually, mixed models require that the decisions of internal tribunals are subsequently approved by public law officials or courts. In that case, the level of autonomy is restricted and less empowered.

Technically, the verification of self-adjudication is qualitative, and the method is descriptive with reference to empirical data on common law policies within the group, codes of conduct as well as procedural regulations adopted by the group. It is also necessary to verify the jurisdiction of public law over the NTA self-adjudicating bodies. Key aspects to the appraisal of the degree of autonomy are the legitimacy of the adjudicative mechanisms, their internal acceptance among the members of the group, and the authority of the decisions delivered. In addition, it is also important to assess the legitimacy of the mechanisms among public law instances and state officials.

Performance Indicator: Concept in summary	**Box 10.6 NTA value: Self-adjudication** a. Agency: Internal conflict settlement, crisis management and crime prevention based on independent mechanisms and procedures. b. Action: Competences of public management areas. Structures of authority: councils, courts, tribunals. Enforcement. c. Verification: Common law descriptions. Codes of conduct regulations. Procedural regulations. Records of third-party research. d. Appraisal: Authority. Legitimacy. Acceptance. *Source* Malloy, T. H. (2021). Introduction. In T. H. Malloy & L. Salat (Eds.), *Non-Territorial Autonomy and Decentralization* (pp. 3–22). Routledge.

Summing-Up

- Assessing implementation of ethno-cultural NTAs involves examining the operational side of autonomy. Such examination requires verification of a number of relevant aspects and factors defining the NTA as well as criteria for evaluation. The methodology may vary from situation to situation and country to country but there are certain scientific methods and general tools that can be applied, if adapted to the specific situation. The objects of verification are the institutions, organizations, and processes that ethno-cultural groups mobilize to become autonomous. This means both the structures established and the people that organized the structures must be studied. While there has been very little scholarship on how to assess

ethno-cultural NTAs, there is a rich academic tradition for studying structures and agencies as inter-related. Based on the *structuration theory* of sociology, it is possible to analyse the relationships between NTA institutions and their beneficiaries.

- Technically, the assessment of implementation can be carried out using indicators. Indicators are basically the blueprint for the research needed to arrive at a scientific evaluation of a phenomenon. In essence, indicators are descriptions of the methods to be applied, including quantitative and qualitative methods of collecting data, sources of verification, and criteria for evaluation. The methods applied depend on the aim of the indicator, meaning what does the indicator aim at describing. In the case of NTA indicators, the aim is to assess behaviour and performance of ethno-cultural groups. Thus, NTA indicators are *performance indicators*. The design of NTA performance indicators must, therefore, involve describing agency and actions as well as verification sources and success criteria.
- The design of NTA indicators aims to describe the values that lead to *empowerment* of ethno-cultural groups seeking to become autonomous. There is no set index for NTA indicators as yet but based on previous research it has been possible to design five NTA indicators. These describe the processes that lead to emancipation by way of independent and autonomous actions, including establishing and managing NTA institutions, making autonomous decisions about strategies and implementing these, as well as adapting NTA institutions and procedures to the general rules of society and the state.

Study Questions

1. Why do we need a sociological evaluation of NTAs? How does it differ from the political and legal descriptions of NTA frameworks?
2. Why is the approach of structure and agency relevant for understanding the implementation of NTA? How does structuration theory formulate the relation between structure and agency?
3. How do members of ethno-cultural groups implement their own rights? What are the factors that lead the members to access their rights?

4. When is a group autonomous? Which minority rights are key to becoming autonomous?
5. Discuss each NTA indicator from the perspective of both the members of the ethno-cultural group and the state authorities.

Go Beyond Class: Resources for Debate and Action

- Autonomies of the World, https://www.world-autonomies.info/.
- European Non-Territorial Autonomy Network (ENTAN), https://entan.org/.
- KPI.org, https://kpi.org/KPI-Basics.

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