Non-Territorial Autonomy
An Introduction

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

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Editors
Marina Andeva
University American College Skopje
Skopje, North Macedonia

Balázs Dobos
Centre for Social Sciences
Budapest, Hungary

Ljubica Djordjević
European Centre for Minority Issues
Flensburg, Germany

Börries Kuzmany
University of Vienna
Vienna, Austria

Tove H. Malloy
University of Flensburg
Flensburg, Germany

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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.

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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

Contents

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

K. Beretka
Faculty for Legal and Business Studies Dr. Lazar Vrkatic, Novi Sad, Serbia
e-mail: beretka.katinka@gmail.com

B. Dobos (✉)
Centre for Social Sciences, Institute for Minority Studies, Budapest, Hungary
e-mail: dobos.balazs@tk.hu

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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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