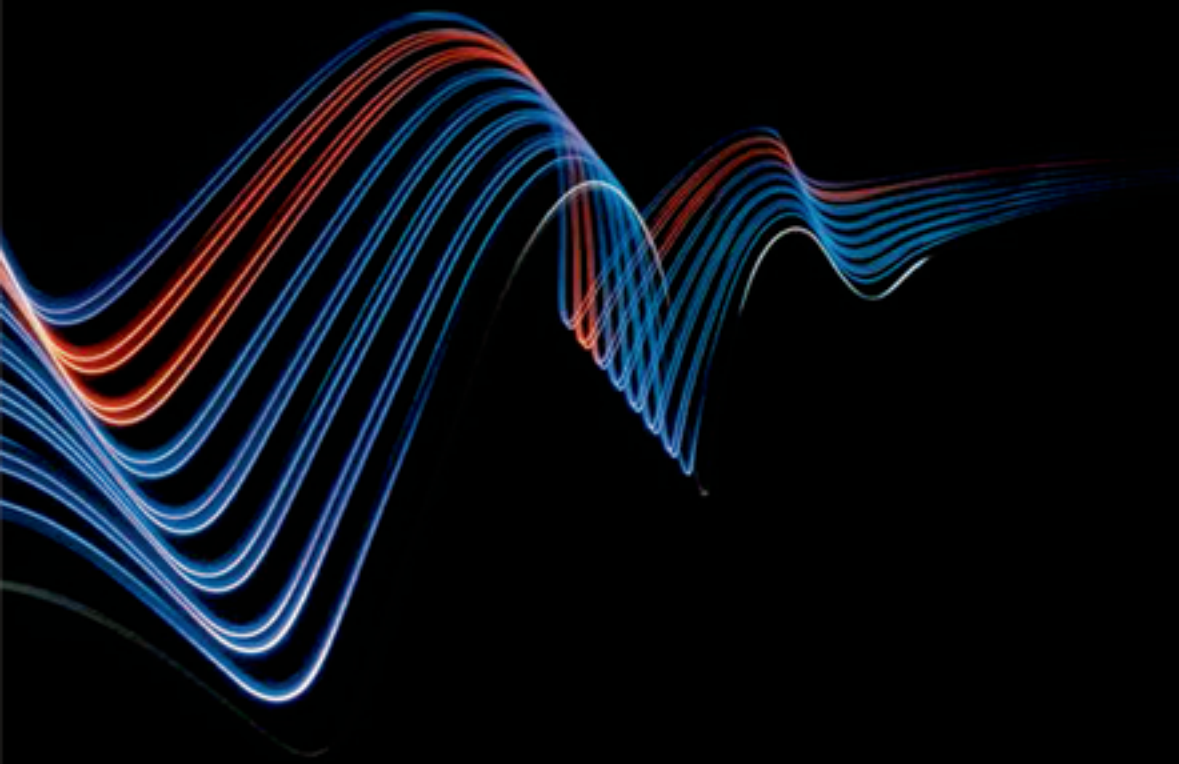
OXFORD



Minority Accommodation through Territorial and Non-Territorial Autonomy

Edited by Tove H. Malloy and Francesco Palermo

MINORITIES AND NON-TERRITORIAL AUTONOMY

MINORITY ACCOMMODATION THROUGH TERRITORIAL AND NON-TERRITORIAL AUTONOMY

Minority Accommodation through Territorial and Non-territorial Autonomy

Edited by
TOVE H. MALLOY
Director, European Centre for Minority Issues, Flensburg
and
FRANCESCO PALERMO
Director, Institute for Studies on Federalism and Regionalism, EURAC, Bolzano/Bozen

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© The multiple contributors 2015

The moral rights of the authors have been asserted

First Edition published in 2015

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2015945726

ISBN 978–0–19–874666–9

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

Acknowledgements

This volume is the second in a series of books constituting the output of a major programme that the European Centre for Minority Issues (ECMI) has initiated with the aim of exploring, understanding, and developing the concept of non-territorial autonomy (NTA) together with a number of partners. The series is expected to consist of five volumes that will address the status quo, the tensions within the concept, alternative approaches, theoretical and conceptual challenges, and new modes of application. The series will be elaborated from the perspectives of law and political science; it will be policy-oriented, and it will be global in scope. Authors and partners are members of the ECMI's general network, and series editor is Tove H. Malloy. The ECMI would like to thank the Board of Oxford University Press for its interest in the topic and willingness to enter into this working relationship.

This volume incorporates papers presented during a workshop organized by the European Academy, Bolzano/Bozen, Institute for Studies on Federalism and Regionalism, in cooperation with the ECMI, in Bolzano/Bozen, November 2011. Particular thanks go to the directors of the two institutions—Francesco Palermo in Bolzano/Bozen and Tove H. Malloy in Flensburg—for their generous support in securing funding for the project. The editors are also thankful to the staff of the two institutions, who have contributed to making the workshop happen.

The editors are deeply grateful to the contributors to this volume. They were very patient with us both in the search for a publisher and in the editorial process. A special thanks to Karl Kössler for providing invaluable support during the review process. We are also thankful to Oana Buta for providing editorial and copy-editing support and preparing the index, and to Paulina Borowska for assisting in preparing the front matter. At Oxford University Press, the editors would like to thank Alex Flach for his support in bringing our work to the Board of the publisher, Cathy Keable-Elliott for excellent copy editing, Keerthana Christopher for patiently guiding us through the editing process, as well as Elinor Shields and Natasha Flemming for assisting with the paperwork.

Tove H. Malloy
Series Editor
Flensburg

Contents

Table of Cases xi
Table of International Treaties xiii
Table of Documents xv
List of Abbreviations xvii
List of Contributors xix

Introduction 1
Tove H. Malloy

1. A Complicated Nexus 2
2. The Aim of the Book 6
3. The Plan of the Book 7

I. AUTONOMY AND TERRITORY

1. Owned or Shared? Territorial Autonomy in the Minority Discourse 13
Francesco Palermo

1.1 Introduction 13
1.2 Links between Ethnicity and Territory: Different Approaches 14
1.3 Autonomy *for* or Autonomy *of*? Territoriality and its Limits 19
1.4 Concluding Remarks: Ownership vs Governance? For a New Semantic of Autonomy 29

2. Can Non-Territorial Autonomy Bring an Added Value to Theoretic and Policy-Oriented Analysis of Ethnic Politics? 33
Geneviève Nootens

2.1 Introduction 33
2.2 What is NTA? 34
2.3 Can NTA Bring any Added Value to Theoretic or Policy-Oriented Analysis of Ethnic Politics? 46
2.4 Conclusion 54

3. Minorities and the Limits of Liberal Democracy: Demoicracy and Non-Territorial Autonomy 57
Ephraim Nimni

3.1 Introduction 57
3.2 The Liberal Democratic Nation State and its Minorities 59
3.3 The Securitization of Minorities in Liberal Democratic Nation States 62

3.4 The Centralist Atomist Principle and the Limits of Liberal Democracies 66
3.5 NTA as a Democratic Alternative 68
3.6 NTA and its Multiplicity of Forms 70
3.7 The Transformation of Democratic Theory—From the Nation State Demos to a Commonwealth of Demoi 76
3.8 The EU as a Commonwealth of Demoicracies 78
3.9 Conclusion 80

4. Non-Territorial Autonomy: The Meaning of '(Non-)Territoriality' 83
Markku Suksi

4.1 Introduction 83
4.2 Institutions 85
4.3 Territory vs Non-Territory 93
4.4 Powers 98
4.5 Determination of Membership 104
4.6 Representation of the Group 110
4.7 Conclusions 111

II. AUTONOMY IN HISTORY AND LAW

5. Non-Territorial *Millets* in Ottoman History 119
Jan Erk

5.1 Introduction 119
5.2 Territorial Nation State and Westphalia 120
5.3 Territorial Nation State, Multinational Empires, and Territory 122
5.4 The 'Fallacy of Presentism' and Historiography with an Agenda 123
5.5 Austro-Marxists Karl Renner and Otto Bauer 125
5.6 The Ottoman *Millet* System 127
5.7 Conclusions 129

6. From Empire to Multilateral Player: The Deep Roots of Autonomy in Russia 133
Bill Bowring

6.1 Introduction 133
6.2 Autonomy in Tsarist Russia 136
6.3 Religious Autonomy in Tsarist Russia 143
6.4 Lenin and Bolshevik Concepts of Territorial Autonomy 146
6.5 A Retreat from National Cultural Autonomy—or 'Autonomy' as an Empty Shell? 152
6.6 Recent Developments—The Decay of NCAs? 154
6.7 Conclusion 156

III. TERRITORIAL AND NON-TERRITORIAL AUTONOMY IN A GLOBAL PERSPECTIVE

7. NTA as Political Strategy in Central and Eastern Europe 161
David J. Smith

7.1 Introduction 161
7.2 The Origins and Main Tenets of NTA 162
7.3 Institutional Legacies in Central and Eastern Europe 164
7.4 Hungary and Hungarian Minorities in Central Europe 166
7.5 NTA in Estonia 171
7.6 NTA in the Russian Federation 173
7.7 Conclusions 176

8. Autonomy as Symbolic Production: The Case of Contemporary Russia 179
Alexander Osipov

8.1 Introduction 179
8.2 TA and NTA—Organizational Models or Discursive Frames? 180
8.3 Symbolic Policies as Production of Meanings 182
8.4 National Cultural Autonomy in Russia: De-Territorialization of Ethnicity? 184
8.5 Ethnic Federalism: Territorialization of Ethnicity? 187
8.6 Autonomy, Ethnicity, and Territoriality as Symbolic Entities 192
8.7 Conclusion 195

9. Indigenous Autonomy in the Americas 197
Alexandra Xanthaki

9.1 Introduction 197
9.2 Definitional Issues 199
9.3 Territorial Autonomy 201
9.4 Autonomy and Representation 206
9.5 Non-Territorial Autonomy: Autonomy in Juridical Matters 210
9.6 Conclusions 216

10. Autonomy in South Asia: Evidence for the Emergence of a Regional Custom 217
Joshua Castellino

10.1 Introduction 217
10.2 Manufacturing Boundaries, Accommodating Identities 219
10.3 The States, Federalism, and Regional Autonomy 223
10.4 Conclusion 242

Conclusions: Beyond the Illusion of Ethno-culturally Homogenous Territory 245
Karl Kössler

1. Introduction 245
2. Reconciling Diversity, Autonomy, and (Non-)Territoriality 246
3. Autonomy and Sovereignty in Historical Perspective 252
4. Global Practice of Autonomy 255
5. Outlook 268

Bibliography 273
Index 309

Table of Cases

INTERNATIONAL COURT CASES

PCIJ

Minority Schools in Albania, Advisory Opinion, PCIJ Series A/B no 64, ICGJ 314 (PCIJ 1935) 87

HRC

Ballantyne et al. v. Canada, Communication Nos. 359/1989 and 385/1989 ..... 23, 251
Ángela Poma Poma v. Peru, Communication No. 1457/2006 ..... 211, 213

IACtHR

Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of 31 August 2001, Merits, Reparations and Costs, Series C No. 79 ..... 206, 212
Saramaka People v. Suriname, Judgment of 28 November 2007, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 172 ..... 202, 212
Pueblo Indigena Kichwa de Sarayaku v. Ecuador, Judgment of 27 June 2012, Merits and Reparations, Series C No. 245 212–13

ECtHR

Sidiropoulos and Others v. Greece [1998], appl. no. 26695/95 87
Matthews v. United Kingdom [1999], appl. no. 24833/94 27
Stankov and the United Macedonian Organisation Ilinden v. Bulgaria [2001], nos. 29221/95 and 29225/95 87
Metropolitan Church of Bessarabia and Others v. Moldova [2001], appl. no. 45701/99 87
Melnitchenko v. Ukraine [2004], appl. no. 17707/02 27
Gorzelik and Others v. Poland [2004], appl. no. 44158/98 87
Sejdić and Finci v. Bosnia and Herzegovina [2009], appl. nos. 27996/06 and 34836/06 22

ECJ

Ministere Public v. Robert Heinrich Maria Mutsch, C-137/84 27
Bickel and Franz, C-274/96 27
Angonese v. Cassa di Risparmio di Bolzano SpA, C-281/98 27
Spain v. United Kingdom, C-145-04 27
Eman and Sevinger v. College van Burgemeester, C-300/04 27
Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano and Others, C-571/10 27

NATIONAL COURT CASES

Bosnia and Herzegovina

Constitutional Court, Partial Decision U 5/98 III of 1 July 2000 250

Canada

Supreme Court, Reference re Secession of Québec [1998], 2 S.C.R. 217 ..... 16, 263

Colombia

Constitutional Court, Decision T-349/96 of 8 August 1996 215

Estonia

Supreme Court (Constitutional Review Chamber), Decision no. III-4/A-2 of 11 August 1993 ..... 94, 267
Supreme Court (Constitutional Review Chamber), Decision no. III-4/A-3 of 6 September 1993 ..... 94, 267
Appellate Court for Tallinn, Decision no. 3-09-464 of 1 June 2010 96

Finland

Supreme Administrative Court, Decision no. 3181 of 22 September 1999 107
Supreme Administrative Court, Decision no. 2223 of 19 September 2003 107
Supreme Administrative Court, Decision no. 81 of 26 September 2011 108

Former Yugoslav Republic of Macedonia (FYROM)

Constitutional Court, Decision no. 133/2005-0-1 of 24 October 2007 17

Spain

Constitutional Court, Judgment no. 31/2010 of 28 June 2010 18

Switzerland

Federal Court, BGE 91, I, 480 of 31 March 1965 16
Federal Court, BGE 106, Ia, 299 of 25 April 1980 16

Table of International Treaties

1946 De Gasperi-Gruber Agreement (Paris Treaty) 17–18
1950 European Convention for the Protection of Human Rights and Fundamental Freedoms 87, 113
1960 UNESCO Convention against Discrimination in Education 87
1966 International Covenant on Civil and Political Rights 87, 89, 113, 181, 251
1969 American Convention on Human Rights 202
1985 European Charter of Local Self-Government 25
1989 Indigenous and Tribal Peoples Convention (ILO Convention 169) 97, 108, 211
1995 Framework Convention for the Protection of National Minorities 4, 16, 25–26, 49, 51, 83, 96, 99, 104, 134, 152–155, 162, 196, 248
2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 27

Table of Documents

OAS

Draft American Declaration on the Rights of Indigenous Peoples.....200–202, 210, 213

UN

Declaration on the Rights of Indigenous Peoples (2007) 200, 201–202, 208, 210, 212–213, 215
Francesco Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, U.N. Doc. E/CN.4/Sub.2/384/(1977).....4, 24, 35, 246
HCR, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 21 January 2003, UN Doc. E/CN.4/2003/90 (2003) 211–212
HRC, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur, 15 July 2009, UN Doc. A/HRC/12/34 (2009) 211–212
HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples, The situation of indigenous peoples in the United States of America, UN Doc A/HRC/21/47/Add.1 (2012)..... 211–212
HRC, Report of the Special Rapporteur on the Rights of Indigenous Peoples, Extractive Industries and Indigenous Peoples, 1 July 2013, UN Doc. A/HRC/24/41 (2013)..... 211–212
CERD, Summary Record of the First Part (Public) of the 1901st Meeting, 26 September 2008, UN Doc. CERD/C/SR.1901 (2008)..... 211
CESCR, General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life, 21 December 2012, UN Doc. E/C.12/GC/21 (2009) 211

CSCE/OSCE

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990) 49, 83
Lund Recommendations on the Effective Participation of National Minorities in Public Life (OSCE High Commissioner on National Minorities) 1999..... 26, 27, 45, 52–53, 68, 83, 162, 245, 264, 267
Ljubljana Guidelines on Integration of Diverse Societies & Explanatory Note (OSCE High Commissioner on National Minorities) 2012..... 26, 27, 109, 270

COUNCIL OF EUROPE

Committee of Ministers, ResCMN(2002)8 96
Committee of Ministers, ResCMN(2006)1 96
Committee of Ministers, ResCMN(2012)9.....96

Venice Commission, Opinion on the Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly (adopted 1993), CDL–INF (1996) 15, 256
Venice Commission, Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could Be Applied in Belgium (adopted 12 March 2002) CDL-AD(2002)1 25
Venice Commission, Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania, CDL-AD (2003)013 25
Venice Commission, Opinion on Two Draft Laws Amending the Law on National Minorities in Ukraine, CDL-AD (2004)013 25
Venice Commission, Opinion on the Draft Law on the Statute of National Minorities Living in Romania (adopted 21–2 October 2005), CDL-AD(2005)026 170
Venice Commission, Report on Non-Citizens and Minority Rights (adopted 15–16 December 2006) Study no. 294/2004, CDL-AD(2007)001 25,247
Venice Commission, Opinion on the New Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (adopted 17–18 June 2011), CDL-AD(2011)016 20
Venice Commission, Opinion on the Act on the Rights of Nationalities in Hungary (adopted 15–16 June 2012, Venice) 166, 168

EC/EU

Council Regulation (EEC) No 1 determining the languages to be used by the European Economic Community [1958] OJ 017 17

EP

European Parliament Resolution, 'On the Recent Political Developments in Hungary' (adopted 16 February 2012) 2012/2511(RSP) 20

List of Abbreviations

AC	Advisory Committee
CA	Constituent Assembly
CCPR	International Covenant on Civil and Political Rights
CEE	Central and Eastern Europe
CERD	Committee on the Elimination of Racial Discrimination
CoE	Council of Europe
CONAMAQ	National Council of Ayllus and Markas of Qullasuyu
CSCE	Conference for Security and Co-operation in Europe
CSUTSB	Confederación Sindical Única de Trabajadores Campesinos de Bolivia
ECtHR	European Court of Human Rights
EIA	Environmental impact assessment
EPRDF	Ethiopian People's Revolutionary Democratic Front
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
FRELIMO	Mozambique Liberation Front
FPIC	Free, prior, and informed consent of indigenous peoples
HCNM	High Commissioner on National Minorities
IOs	International organizations
IRA	The Indian Reorganization Act
JBNQA	James Bay and Northern Quebec Agreement
LTTE	Liberation Tigers of Tamil Eelam
MAS	Movement for Socialism–Political Instrument for the Sovereignty of the Peoples
MK	Mi'kmaw Kina'matnewey
NCA	National cultural autonomy
NSD	National self-determination
NTA	Non-territorial autonomy
NWFP	North-West Frontier Province
OSCE	Organization for Security and Co-operation in Europe
PGW	People's War Group
PRI	Institutional Revolutionary Party, Partido Revolucionario Institucional
ROC	Rest of the country
RSFSR	Russian Soviet Federative Socialist Republic
SWRD	Solomon West Ridgeway Dias
TA	Territorial autonomy
TANTA	Territorial autonomy and non-territorial autonomy
UDMR	Democratic Union of Hungarians in Romania
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
USSR	Union of Soviet Socialist Republics
Venice Commission	Commission for Democracy through Law

List of Contributors

Bill Bowring is a Professor of Law at Birkbeck College, University of London; a Barrister in Field Court Chambers, Gray's Inn; President of the European Lawyers for Democracy and Human Rights; Founder and Chair of the European Human Rights Advocacy Centre (EHRAC).

Joshua Castellino is Professor of Law and Dean of the School of Law at Middlesex University, London, and Adjunct Professor of Law at the Irish Centre for Human Rights, Galway, Ireland. He co-chairs the Thematic Group on Gender, Social Exclusion and Human Rights within the United Nations Sustainable Development Solutions Network.

Jan Erk teaches comparative politics at the University of Leiden in the Netherlands. His work has appeared in the journals *Comparative Politics, Comparative European Politics, Comparative Political Studies, Current History, European Political Science, Political Quarterly, Publius: The Journal of Federalism, Journal of Common Market Studies, Nations and Nationalism, West European Politics, Regional and Federal Studies, Canadian Journal of Political Science, Journal of Public Policy, Journal of Democracy, Public Administration, Nationalism and Ethnic Politics*, among others. Dr Erk is the co-editor of the journal *Regional and Federal Studies*.

Karl Kössler is Senior Researcher at the Institute for Studies on Federalism and Regionalism of the European Academy of Bolzano/Bozen. After degrees in law as well as in political science and the minor subjects sociology, history, and economics, he obtained a PhD in comparative public law and political science. His research focuses on comparative federalism and regionalism, as well as fundamental rights, participatory democracy, and policymaking in multilevel systems.

Tove H. Malloy is Director of the European Centre for Minority Issues in Flensburg, Germany, and Professor at the Europa-University, Flensburg.

Ephraim Nimni is a Reader (PhD Hull) in nationalism and conflict resolution at the School of Politics, International Studies, and Philosophy at Queen's University Belfast.

Geneviève Nootens has been Professor of Political Science at the Université du Québec à Chicoutimi since 1998. Her research is mainly concerned with the redeployment of democratic practices and the diffusion of sovereignty; majority and minority nationalism; and plurinational societies.

Alexander Osipov is a Senior Research Associate of the European Centre for Minority Issues in Flensburg, Germany, and the head of ECMI's Justice and Governance Cluster.

Francesco Palermo, PhD, is Professor of Comparative Constitutional Law, University of Verona, and Director of EURAC's Institute for Studies on Federalism and Regionalism. A former Senior Legal Adviser to the OSCE HCNM, he is currently the President of the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities.

David J. Smith is Professor of Baltic History and Politics and Head of the Central and East European Studies Subject Group at the School of Social and Political Sciences, University of Glasgow. During 2012–14 he was also a Visiting Researcher at the Uppsala Centre for Russian and Eurasian Studies, Uppsala University.

Dr Markku Suksi is Professor of Public Law at Åbo Akademi University, Finland.

Alexandra Xanthaki is a Reader at the Brunel Law School at Brunel University, UK, where she teaches human rights. She has written extensively on minority and indigenous rights.

Introduction

Tove H. Malloy

Autonomy as a strategy for accommodation of ethno-cultural diversity in multicultural societies has been a policy tool for over six centuries. Yet, policymakers remain uncomfortable with it, and political scientists and legal scholars continue to relegate it to the list of ad hoc solutions. The latter may be explained by the individualistic approach to democratic franchise in liberal theory. But the former is due to the hegemonic position of territory in the modern paradigm of societal organization and state construction. Territory, or the need to hold power over territory, is a main reason for interstate as well as intra-state conflicts and disputes. The spell of territory on the individual's mind brings about feelings of homeland, nation, community, belonging, etc., and with it the need to delineate boundaries and exclusive possession. But also allegiance to extra-territorial homelands has caused tension in plural societies. Here the lack of loyalty to the territory of residence seems to cause tension. Either way, many of these disagreements have been settled through autonomy arrangements. Governments have, albeit reluctantly, implemented autonomy in various forms in response to diversity and pluralism with the ultimate goal of securing social and territorial cohesion. From the early notion of the *millet* system in the Ottoman Empire to the misconstrued notion of national cultural autonomy (NCA) applied in post-Soviet states, such as Estonia and Russia, autonomy arrangements have been adopted to abate separatism and dissent. Especially during the twentieth century, numerous models of autonomy have been implemented. Although autonomy has never attained the rank of an international standard,[1] it has achieved quite a good record at the state level. This book seeks to address this paradox.

Two autonomy models have dominated the tool-kit of state construction. Territorial autonomy (TA) has been applied in multiple cases; for instance, if sub-state territories inhabited by a majority of distinct ethno-cultural characteristic had been incorporated into a neighbouring state territory after settling territorial disputes,[2] or if a serious risk of assimilation of such distinct groups was

[1] See Zelim A. Skurbaty, 'Introduction', in *Beyond a One-Dimensional State: An Emerging Right to Autonomy?*, edited by Zelim A. Skurbaty (Leiden: Martinus Nijhoff Publishers, 2005), pp. xxxi–li.

[2] The Åland Islands.

present.[3] It has also been implemented as a devolution tool in regions where local identities are distinct from the national identity and there is a desire to preserve the distinct identity.[4] Non-territorial autonomy (NTA) has also been applied after conflicts, but is seen mainly in cases where smaller ethno-cultural groups, without claims to territory and living dispersed among the majority, are at risk of assimilation, especially in the area of culture.[5] Dispersed minority groups may demonstrate allegiance to another nation and territory, including the language and culture of that nation and territory. Analytically, the two concepts are separated in the academic literature. Whereas TA is defined as a group concept and on a territorial basis, NTA is assigned to the individual based on the personality principle.[6] However, this distinction is perhaps a bit simple. Members of minorities living in sub-state autonomous territories may also experience assimilation tactics similar to members of dispersed minorities, while dispersed minorities may mobilize collectively and politically in order to achieve autonomy based on homeland arguments. Likewise, the negation of territory in NTA proves problematic precisely because minority groups may implicitly make references to territory in their cultural and linguistic identities. Finally, autonomy policies are complicated by the fact that minorities are notoriously difficult to define. Even designated beneficiaries of autonomy policies, usually specific minorities, may elude a succinct description and definition. In other words, the nexus between minority-territory-autonomy is more complex than often assumed. This leads to a muddled conceptualization of the two different but closely related concepts and eventually to bad policymaking.

1. A Complicated Nexus

The notion of a triadic nexus in minority studies is not new. But whereas the agents and the variables in Rogers Brubaker's nexus on nationalizing states and national minorities were cognitive,[7] the main variable in the understanding of our nexus is neither cognitive nor rational. While territory might be seen as a fixed or dependent variable, it also functions as 'agent'—an unpredictable one when it comes to its influence on the human mind and the formation of identity. William E. Connolly has described the function of territory as twofold.[8] On the one hand, territory, deriving from the Latin *terre*, means land, earth, soil as well

[3] Vojvodina, Serbia, and South Tyrol, Italy.

[4] Scotland and Wales, United Kingdom; Greenland and the Faroe Islands, Denmark; Corsica, France.

[5] Estonia, Hungary, Slovenia.

[6] See discussions of Karl Renner and Otto Bauer's theory of the principle in this volume by Ephraim Nimni (Chapter 3) and Jan Erk (Chapter 6).

[7] See Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (New York: Cambridge University Press, 1996).

[8] William E. Connolly, *The Ethos of Pluralism* (Minneapolis: University of Minnesota Press, 1995), p. xxii and Ch 5.

as nourishment and sustenance. The effect is that it can play a positive role in people's self-identification with belonging to a certain place. On the other hand, territory may also derive from the Latin *terrere*, which means to frighten, to terrorize, and to exclude. From *terrere* comes the notion *territorium*, which implies borders and exclusion. This puts the two in tension. While *terre* provides sustenance, *territorium* implies repression. Connolly connects these interpretations to the modern organization of territory and the state and argues that 'to occupy territory, then, is both to receive sustenance and to exercise violence. To become territorialized is to be occupied by a particular identity.'[9] And he summarizes, 'territory is sustaining land occupied and bounded by violence.'[10] On the basis of this, Connolly concludes that territorialization is part of identity, not only national identity but also religion, class, race, gender, sexuality, and other ascriptions, where one does not exclude the other—thus allowing for multiple or hybrid identities. Rejecting the traditional view of territorialization as one state—one nation, he calls for a new democratic ethos that incorporates the divisiveness of territory.

The inability to see territory in its true sense means, according to Connolly, that the modern territorial system of states and international relations is nostalgic, anachronistic, and does not reflect reality. This is because, the system actually accepts 'disalignment'[11] and 'impurities'[12] in both state and nation formation. Competing demands for nationhood within the same territory exist as well as contestations to the state's monopoly over citizens' allegiances and identifications. There is no longer one corresponding place of collective political power, and there is 'no a priori reason why deep differences with respect to…state priorities must be expressed only within the parameters of state politics'.[13] In short, the spatialization of democratic politics must be pluralized and democracy must be disaggregated. Otherwise, the territorial state will stifle democratic energies or translate them into national chauvinist sentiments. Connolly does not explicitly discuss autonomy or policymaking; his argument is theoretical. However, following his line of thought, one might see autonomy as an abnormality in state construction and international relations. To be more precise, TA would represent the 'disalignment' of the boundaries of the sovereign state, and NTA may be seen as accommodating the 'impurity' of society. As such, both may be seen as a threat to social cohesion and the unity of the state. Nevertheless, states have acknowledged and accepted, albeit under pressure, these faults. In this volume, we seek to demonstrate that the presumption of alignment and unity is a myth because autonomy is applied prolifically around the globe.

The other variable in the nexus is the ethno-cultural group, usually a minority in a non-dominant position. Again, one could argue that the variable is an 'agent' of some unpredictability. The issue of definition impacts on this variable.

[9] Connolly, *The Ethos of Pluralism*, p. xxii.
[10] Connolly, *The Ethos of Pluralism*, p. xxii.
[11] Connolly, *The Ethos of Pluralism*, p. 136.
[12] Connolly, *The Ethos of Pluralism*, p. 138.
[13] Connolly, *The Ethos of Pluralism*, p. 159.

The concept minority has defied definition both in the literature and in law for decades. This is to the consternation of many international lawyers because it is difficult to litigate on someone's behalf without knowing whom the defendant is. The UN Sub-Committee on the Prevention of Discrimination and Protection of Minorities has grappled with the issue almost since its establishment, and a number of prominent experts have been asked to seek a solution to the problem.[14] Basically, the problem of a legal definition in international law is a question of whether a universal definition of minorities can be properly articulated. Inasmuch as international law instruments must apply to a wide range of states, a definition would by necessity have to be broad and general. That is near impossible in contemporary circumstances where minorities self-identify according to particular characteristics and a hybrid of diverse affiliations. It is for the same reason that Brubaker warns against 'groupism,' that is, the tendency to take bounded groups as fundamental units of analysis and basic constituents of the social world.[15] This is why scholars prefer to argue that the question of a definition is unique to each case.

Seeking a definition, furthermore, runs into the dilemma of whether to use objective or subjective criteria.[16] Objective criteria may result in discrimination; subjective criteria could lead to segregation. This is why in the legal context experts will have to work with the premise that a minority is a matter of fact, not law. It has also been suggested that minorities are voluntary associations,[17] and most human rights instruments aimed at protecting minorities provide that belonging to a minority is a free choice.[18] This does not, however, allow for the innate bonds that many cultures foster. Notwithstanding this dilemma, there are scholars outside the realm of law who have volunteered definitions over the years; they have usually combined objective and subjective criteria.[19] The problem of

[14] Francesco Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN.4/Sub.2/384/Rev.1; Jules Dechênes, 'Proposal Concerning a Definition of the Term "Minority"', UN Doc. E/CN.4/Sub.2/1985/31. See also Tove H. Malloy, *National Minority Rights in Europe* (Oxford: Oxford University Press, 2005), Ch 7.

[15] Rogers Brubaker, *Ethnicity without Groups* (Cambridge, MA: Harvard University Press, 2004), p. 2.

[16] For a good discussion, see Gaetano Pentassuglia, *Minorities in International Law* (Strasbourg/Flensburg: Council of Europe and ECMI, 2002), Ch 3.

[17] John Packer, 'On the Definition of Minorities', in *The Protection of Ethnic and Linguistic Minorities in Europe*, edited by John Packer and Kristian Myntti (Åbo: Institute for Human Rights, 1995), pp. 23–65, as well as John Packer, 'Problems in Defining Minorities', in *Minority and Group Rights in the New Millennium*, edited by Deirdre Fottrell and Bill Bowring (The Hague: Kluwer International Law, 1999), p. 49.

[18] See, for instance, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 19 December 1992), art 3(2), and the European Framework Convention for the Protection of National Minorities (adopted 1 February 1995), art 3(1).

[19] Inis L. Claude, *National Minorities: An International Problem* (Cambridge: Harvard University Press, 1955), p. 2; J. A. Laponce, *The Protection of Minorities* (Berkeley: University of California Press, 1960), p. 6. See also in general, Carlile Aylmer Macartney, *National States and National Minorities* (London: Oxford University Press, 1934) and Tore Modeen, *The International Protection of Minorities in Europe* (Åbo: Åbo Akademi, 1969).

the objective and/or subjective views is related to the issue of predetermination versus self-determination.[20] Where self-determination allows minorities to manifest themselves, predetermination requires advanced decisions on the identity of minorities. A combination of the two may, therefore, be the best solution.

Finally, the third component of the nexus, autonomy, is by no means a clear concept. The notion of autonomy has been extensively explored in moral and political philosophy and has become a cornerstone of our understanding of liberal theories of justice and democracy. But between Emanuel Kant's early account of autonomy as the ability of the individual to discern, write, and enact her own moral laws[21] to the late modern view in education that autonomy is the individual's authenticity in terms of total sovereignty and right to make choices about moral values and self-construction,[22] there is an ocean of scholarship with little relevance for our discussion. The notion of autonomy in focus in this volume is rather more derived from justice and the idea that a person has the freedom and the right to be in control of her own life within reasonable parameters. Self-determination is at the centre of this argument, but it is qualified by the need to mediate between demands. Thus, an autonomous person is able to see the reasonableness of making choices between first- and second-order desires and is willing to compromise when needed.[23] When speaking of collective autonomy, as we do in this volume, the notion becomes somewhat complicated in that it has to build on an assumption of collective agency if autonomy is to have any value. While personal or individual agency is not usually problematic in individual autonomy, collective agency is controversial precisely because of the issue of individual choice. Collective agency is thus wrought with controversies that are beyond the scope of this book.[24] Suffice it to note that the collective agency presupposed in collective autonomy involves making compromises between the individual members for the purpose of preserving the collective unity. For this reason, a just framework of individual rights within the collective realm must be a basic requirement. The concept of autonomy in focus is, therefore, a political as well as a legal notion.

[20] Arend Lijphart, 'Self-Determination versus Pre-Determination of Ethnic Minorities', in *Power-Sharing Systems*, edited by Will Kymlicka (Oxford: Oxford University Press, 1995), p. 275.

[21] Emanuel Kant, *Groundwork of the Metaphysics of Morals*, translated by Mary Gregor (Cambridge: Cambridge University Press, 1997).

[22] See, for instance, Edward L. Deci and Richard M. Ryan, *Intrinsic Motivation of Self-Determination in Human Behaviour* (New York: Plenum, 1985) and Christopher P. Niemiec and Richard M. Ryan, 'Autonomy, Competence, and Relatedness in the Classroom. Applying Self-Determination Theory to Educational Practice', *Theory and Research in Education*, vol. 7, no. 2 (2009): pp. 133–44.

[23] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), p. 20. See also John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971/1973).

[24] Collective agency is a core issue rendering the discussion on collective rights controversial. See Tove H. Malloy, *National Minority Rights in Europe*, Ch 3. See also David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986).

However, insofar that it is both a political and legal notion, autonomy as strategy has taken two distinct directions in history. On the one hand, there has been the security approach, which has been the most dominant. It aims to control non-dominant groups through some sort of accommodation. This aim is instrumental; it is a means to secure the territorial integrity of the state first and foremost, and as a secondary aim, to maintain the status quo for cohesion and unity. In contrast, there has been the normative approach. The aim here is to accommodate non-dominant groups based on good faith rather than control. While this aim is also instrumental, it has the purpose of implementing some positive measures for non-dominant groups because they are seen as representing an intrinsic cultural value, be it a culture, a nation, a religion, or other. The latter is based in liberal democratic theory and the idea that individuals, as well as individuals jointly, are free self-determining agents insofar that this freedom is exercised within reasonable bounds. Marc Weller and Stefan Wolff have linked the two, arguing that 'to endow an ethnic group with legislative, executive and judicial powers to address these concerns effectively will contribute to individual, group and state security and thus to preventing the disruption of the territorial and/or social integrity of a given country.'[25] In other words, normative frameworks and security are inter-dependent when strategizing autonomy as a diversity management tool.

2. The Aim of the Book

Interdependence is the theme of this book. Interdependence of law and politics, of frameworks and security, as well as in the triadic nexus, has not been clearly examined in the academic literature. Analyses of the political and legal concept of autonomy have focused primarily on justification and much less on institutionalization. While the justification debate has sought to explain why or why not collective autonomy is a good strategy for resolution of tension or conflict in diverse and divided societies, the institutional debate has focused on implementation and outcome. Again, one cannot fully comprehend the concept of autonomy without examining both. However, whereas justification has drawn quite some attention in the literature,[26] the institutional frameworks required to design

[25] Marc Weller and Stefan Wolff, eds, *Autonomy, Self-Governance and Conflict Resolution. Innovative Approaches to Institutional Design in Divided Societies* (London: Routledge, 2005), p. 13.

[26] See, for instance, Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (Berkeley: University of California Press, 1968); Arend Lijphart, *Democracy in Plural Societies* (New Haven, CT: Yale University Press, 1977); Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination. The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990); John McGarry and Brendan O'Leary, eds, *The Politics of Ethnic Conflict Resolution* (London: Routledge, 1993); Ted Robert Gurr, *Minorities at Risk* (Washington, D.C.: United States Institute of Peace Press, 1993); Ruth Lapidoth, *Autonomy. Flexible Solutions to Ethnic Conflicts* (Washington, D.C : United States Institute of Peace, 1996); Yash Ghai, ed., *Autonomy and Ethnicity* (Cambridge: Cambridge University Press, 2000); Michael Hechter, *Containing Nationalism* (Oxford: Oxford University Press, 2000); Otto Bauer, *The Question of Nationalities and Social Democracy* [Nationalitätenfrage und die Sozialdemokratie] with an Introduction by Ephraim Nimni and Preface by Heinz Fischer (Minneapolis: University of

and implement good autonomy arrangements have received far less attention,[27] especially with regard to NTA.[28] For this reason, this volume explores the nexus minority-territory-autonomy through a debate between theory and practice. While the strategy is to speak truth to the hegemonic view of the modern territorial system of state construction and international relations, the goal is to further the good application of autonomy as a strategy for managing diversity. As a part of this goal, we hope to inform both design and decision-making on autonomy arrangements by contributing to a better understanding of legal frameworks and security as part of both TA and NTA, two distinct but related models within the nexus. We will do this through a theoretical discussion that exposes the tensions and dialectics of the nexus as well as through a presentation of the practical implementation of the two models in a number of countries covering three continents.

3. The Plan of the Book

The argument proceeds in three steps. In Part I, we begin by juxtaposing the two models, TA and NTA, in a theoretical discussion aiming at excavating the tensions and dialectics of the nexus minority-territory-autonomy. As already noted, each of the components of the nexus is complex, difficult to define, unpredictable as 'agent', and variable as well as intrinsically intertwined. Francesco Palermo starts out in Chapter 1 by asking some of the very hard questions in this debate: who 'owns' a territory and how should the implicit paradigm of ownership be dealt with in the debate on autonomy and good governance? He focuses on TA and distinguishes between autonomy *for* a group versus autonomy *of* a territory. By the first he means that ethno-cultural groups, who have devolved powers in terms of autonomy, by implication hold ownership of the territory in question, whereas on the second notion, he argues that the right to autonomy belongs to the territory, thus the governance of that territory may be governed autonomously by one or often several groups. The latter notion, according to Palermo, is taking hold in the

Minnesota Press, 2000); Tim Poitier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia. A Legal Appraisal* (The Hague: Kluwer International Law, 2001); Zelim A. Skurbaty, ed., *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Leiden/Boston: Martinus Nijhoff Publishers, 2005); and Ephraim Nimni, Alexander Osipov, and David J Smith, eds, *The Challenge of Non-Territorial Autonomy. Theory and Practice* (Oxford: Peter Lang, 2013).

[27] Good examples include: Markuu Suksi, ed., *Autonomy, Applications and Implications* (The Hague: Kluwer Law International, 1998); Weller and Wolff, *Autonomy, Self-Governance and Conflict Resolution*; Andre Legare and Markku Suksi, 'Rethinking the Forms of Autonomy at the Dawn of the 21st Century', *International Journal on Minority and Group Rights*, vol. 15, nos 2–3 (2008): pp. 143–55, and Jens Woelk, Francesco Palermo, and Joseph Marko, eds, *Tolerance through Law: Self-Governance and Group Rights in South Tyrol* (Leiden: Martinus Nijhoff Publishers, 2008). The seminal text on NTA is, of course, Karl Renner's *Das Selbstbestimmungsrecht der Nationen in besonderer Anwendung aug Österreich* [The Right of Nations to Self-Determination especially in Austria] (Leipzig/Vienna: Franz Deuticke, 1918).

[28] We do this in a previous volume; see Tove H. Malloy, Alexander Osipov, and Balázs Vizi, eds, *Managing Diversity Through Non-Territorial Autonomy: Accessing Advantages, Deficiencies, and Risks* (Oxford: Oxford University Press, 2015).

autonomy discourse due to the increasing diversity of societies. He calls, therefore, for a new semantic that rejects the Westphalian hegemony and welcomes the reality of diversity in territories seeking autonomy. Essentially, Palermo is pointing out the difference between TA and consociationalism (or NTA) while also showing that they overlap. The rest of Part I aims, therefore, to excavate this tension with specific focus on NTA.

In Chapter 2, Geneviève Nootens speaks to the strategic debate on autonomy by unpacking the concept of NTA in two theoretical steps. First, she questions the ambivalence among states in accepting NTA as a governance tool, suggesting that the hegemony of state sovereignty prevents governments from seeing the issues rationally. Next, she questions whether NTA, or what she terms de-territorialization of self-government, does in fact contribute to state security and unity. The aim of her discussion is to ascertain whether NTA is an added value to liberal democracy. On this, she remains sceptical. Unlike Nootens, Ephraim Nimni is entirely convinced about the value of NTA to liberal democracy in Chapter 3. He explains how NTA is, in theory and in fact, a democratic alternative to traditional models of diversity management in liberal democracy, especially models based on the centralist atomist principle. Drawing on a number of existing models of application, Nimni argues for a transformation of democratic theory toward seeing multicultural societies as a commonwealth of demoi. Markku Suksi follows this line of argument to some extent in Chapter 4, arguing that NTA may have the potential for breaking the strict territoriality of the sovereign state in so far that NTA arrangements allow for cross-border and international relations between beneficiaries of NTA and their kin abroad. He also mentions specific provisions in international law that may be seen as sources of an emerging right to autonomy. Nevertheless, Suksi remains somewhat sceptical, mainly due to the lack of operationalization of NTA. Drawing on the constitutional frameworks of Estonia, Finland, and Serbia, he offers a comparative and institutional discussion of NTA based on non-territoriality in terms of powers, membership, and representation. Because institutionalization and public policy design for NTA is weak or missing in many cases, Suksi is reluctant to endorse a paradigm shift.

Part II moves to history and law exemplified by a discussion of historical legacies and the issue of universal application. Not surprisingly, the historical legacy of autonomy has its roots in the statecraft of empires, multicultural empires in need of securing unity and avoiding territorial break-up. Jan Erk starts the discussion in Chapter 5 with an analysis of the *millet* system of the Ottoman Empire. Like Nootens and Nimni, he faults the Westphalian nation state system for the pains that modern societies experience in terms of accommodating ethno-cultural diversity under the yoke of a dated, inflexible, and exclusionary ethos. Thus, he sees the pre-modern *millet* system as an NTA model, albeit not perfect, for preserving ethnic, religious, and linguistic diversity in large territorial states. In Chapter 6, Bill Bowring examines autonomy in the Russian Empire in a discussion of the evolution from empire to federal state, and thus from TA to NCA. Although the current version of NCA, as applied in the Russian Federation, is

discredited by most experts today, Bowring argues that autonomy has deep roots in the region and in Europe.

In Part III, we turn to the global perspective in a discussion involving three continents. In Chapter 7, David Smith begins with an analysis of NTA as a political strategy in Eastern Europe. He examines successes and failures in four countries, Estonia, Hungary, Romania, and Russia, all of which represent the legacy of communism in their choice of strategy. Smith seeks to place strategizing in two current debates: the political management of ethnic diversity, on the one hand, and democratization and participation, on the other. Both agendas have come in contact with NTA as a viable tool for achieving results. Alexander Osipov takes the analysis on Russia a step further in Chapter 8 through a very detailed examination of the way in which NTA has been adopted by the Russian regime as a strategy for diversity management. Drawing on a theoretical approach seeing NTA arrangements as discursive frames for symbolic accommodation, Osipov seeks to show that a false consciousness has allowed symbolic NTA arrangements to be seen as sincere accommodation.

In Chapter 9, Alexandra Xanthaki takes the discussion to the western hemisphere and the application of indigenous TA in North and Latin America. Highlighting the different approaches to colonization between the rulers of the two continents as well as different state formations, Xanthaki explains how this resulted in diverse approaches to and different histories of TA. In addition, she examines two aspects of NTA, the right to participation in central politics of the state with regard to issues pertaining to indigenous matters and to legal pluralism. The latter Xanthaki considers among the main challenges in the implementation of autonomy for indigenous peoples in the hemisphere.

From the Americas, the focus moves to South Asia. In Chapter 10, Joshua Castellino examines regional autonomy, meaning TA, in India, Pakistan, Sri Lanka, and Nepal. The four cases are selected as examples of states with live conflict-laden autonomy questions but also as significant evidence of autonomy arrangements as a regional custom in the area. Given the interplay of existing arrangements and unsettled situations, Castellino questions whether South Asia may not, in fact, be the most dynamic region in implementing autonomy as diversity management in the next decades.

In the Conclusions, Karl Kössler reiterates the argument against the hegemony of territory in interstate relations while at the same time recognizing that autonomy will not change this system. He sees, however, the fact of diversity as the major challenger to the 'chimera' of homogeneity. In this sense, he sees NTA as an emerging function that may well gain greater importance in state formation of non-homogenous culturally diverse societies. This is not at the price of TA but rather in complementarity to TA. As such, he sees a burgeoning redefinition of democracy in search for new narratives of diversity. This will be the focus of volume three.

I

AUTONOMY AND TERRITORY

1

Owned or Shared? Territorial Autonomy in the Minority Discourse

Francesco Palermo

1.1 Introduction

The link between ethnicity and territory is one of the most explored in literature, although significantly more from a minority rights perspective than in comparative federal studies.[1] Such a link has an institutional, a discursive,[2] but also an implicit dimension that is too often simplistically underpinned: the question of the understanding of a territory predominantly inhabited by a minority group. This raises a wide range of questions that are often not explicitly addressed, as the answers by different actors involved might be diametrically opposite, thus jeopardizing precarious conflict settlements based on territorial autonomy. While the settlement of conflicts might, in fact, require solutions that precisely avoid making incompatible views explicit, when the delicate balance between unexpressed underpinnings is upset, the lack of clarity as to how the link between (minority) ethnicity and territory is understood by the different parties involved might turn into the most explosive root for conflicts.

It is therefore essential to cast some light on basic questions related to (and far too often implicitly assumed by) the debate on (territorial) autonomy. To what extent does minority protection require territorial arrangements for self-government? Is minority self-government necessarily a threat to the state's unity? What are the consequences of territorial arrangements on minorities within the autonomous territory? Above all, who 'owns' a territory and how should the implicit paradigm of ownership be dealt with in the autonomy discourse?

This chapter explores from a comparative perspective the territorial responses to questions regarding the accommodation of diversities. The focus will be on contemporary challenges posed to territorial solutions as instruments for the accommodation of minority issues, including the evolving concept of territory (section 1.2).

[1] But see inter alia Robert Agranoff, ed., *Accommodating Diversity: Asymmetry in Federal States* (Baden-Baden: Nomos, 1999) and Alan Tarr, Robert Williams, and Joseph Marko, eds, *Federalism, Sub-National Constitutions and Minority Rights* (Westport: Praeger, 2004). On the reasons, see below.

[2] See the chapter by Alexander Osipov in this volume.

Against this background, the different understandings of the link and the recent practice of selected international bodies will be analysed (section 1.3), leading to some concluding remarks (section 1.4). It will be argued that territorial solutions are indeed necessary devices to address minority issues, although in the present context several new elements must be carefully considered, such as the issue of the addressees of such arrangements, the evolution that minority-related concepts (including territory) are facing in the present era, marked by the challenge of diversity, and the overall understanding of territorial arrangements, still hostage to an outdated logic of ownership, which limits the potential of autonomy as an overall instrument of good governance.

Prior to any further consideration, however, a preliminary, fundamental remark is necessary to clarify the close relationship between minorities and territories. It has been rightly pointed out that

> minorities as such do not exist. Rather, there exist large and small, numerous and otherwise, social groups. In abstract, all groups, each endowed with its own identity, equally represent the natural and cultural diversity of the human species. A social group may be seen as transformed into a minority when, on the basis of a shared and single feature of reference, it establishes relations with another group which, by virtue of a largely (but not solely) quantitative criterion comes to constitute the majority.[3]

Quantitative and qualitative elements to determine a minority status have thus to be referred to a given territory in which specific numerical and power relations exist. In principle, the whole world is a territory, and thus, even a 'universal' approach to minorities is in the end territorial. Legally, a minority can only be identified in relation to the scope of application of a law, which is necessarily territorial. This to a large extent also applies to non-territorial (personal or cultural) forms of autonomy for minorities and groups: these forms of autonomy also have a territorial scope of application, and are often established only as a secondary alternative when territorial arrangements are not available.[4]

It is thus fair to say that territory is the fundamental, unavoidable reference and context for the application of minority rights. The relationship between groups and territories, however, is far from being uniform.

1.2 Links between Ethnicity and Territory: Different Approaches

Having clarified that territory is a necessary and logical precondition for the very identification of a minority and thus for the protection of minority rights, a variety

[3] Roberto Toniatti, 'Minorities and Protected Minorities: Constitutional Models Compared', in *Citizenship and Rights in Multicultural Societies*, edited by Tiziano Bonazzi and Michael Dunne (Keele: Keele University Press, 1995), pp. 45–81.

[4] See Karl Renner, *Das Selbstbestimmungsrecht der Nationen in besonderer Anwendung auf Österreich* [The Right of Nations to Self-Determination] (Leipzig/Wien: Deuticke, 1918). The concept of personal autonomy goes back to the so-called Austro-Marxists, who elaborated it between the end of the nineteenth and the beginning of the twentieth centuries. On non-territorial autonomy, see the respective chapters in this volume.

of approaches can be observed as to the relationship that the legal system imposes between minorities and territories.[5] Simplifying, three main abstract approaches can be identified for our purposes, on a scale ranging from the maximal emphasis on the ethno-cultural dimension to the strongest accentuation of the territorial one—something that social scientists would call a scale ranging from ethnic to civic nationalism,[6] although in this context the scope is slightly different and therefore it is preferable not to rely on the nationalism terminology.[7]

A first model vests territories with the exclusive task of being the framework for the self-government of specific minority groups. Because of geographic or historical reasons, territorial autonomy is conceived in these cases as the exclusive instrument for group protection, representation, and participation within a broader national framework. Typical examples are islands on which a population different from the rest of the state is settled, which belong to a nation state because of peculiar historical events, such as in the case of the Åland islands (vis-à-vis Finland), of Greenland or the Faroe islands (vis-à-vis Denmark), of New Caledonia (vis-à-vis France), and the like. In such cases, where the population is homogeneous by fact or by law,[8] territorial autonomy fully overlaps with self-government of the concerned groups. However, while such overlap might be necessary in the case of remote islands for obvious geographic reasons, the coincidence *ope legis* between a territory and a group is often pursued also in much less homogeneous areas, with many more problems attached. Beside controversial, violent, and not yet fully settled contexts,[9] a paramount example in this regard can be observed

[5] European Commission for Democracy through Law (Venice Commission), 'Opinion on the Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly', (adopted 1993), CDL–INF (1996), para 3c. As the Venice Commission pointed out, there is 'no common practice in the matter of territorial autonomy, even in general terms'.

[6] See, among many others the classic work by Michael Ignatieff, *Blood and Belonging: Journeys into the New Nationalism* (Toronto: Penguin, 1994).

[7] Frederic W. Maitland, *Township and Borough: The Ford Lectures 1897* (Cambridge: Cambridge University Press, 1964), pp. 6–29. While the phenomenon is pretty much the same, the scope of this analysis is broader and narrower at the same time. It is broader, because not all links between ethnicity and territory can be framed in national terms, as some identities are really territorial rather than national and do not aspire to own nationhood. It is narrower, since the territorial dimension only refers here to sub-national entities and only to those inhabited (predominantly) by (national) minorities, plus it is not necessarily based on citizenship but rather on residence. Furthermore, lawyers might be more at ease with the old concept of *legal geography* developed by Frederic Maitland, who used this term to identify the relationship between a community and its territory. Irrespective of definition issues, the question here is about the relation between organized communities and territorial space in sub-national areas whose autonomy was established with a view to accommodating ethnic claims. For these reasons, the nationalism discourse and terminology does not entirely fit here, and a territorial (ethnic or civic) discourse is preferable.

[8] The legal system presupposes and imposes that these territories be considered uniform in terms of elements defining the traditional groups inhabiting the territory and of their representation in the state structure. On the case of the Åland islands, where more than 100 groups are settled, see Bogdan State, 'Immigrant Integration on Åland—An Exploratory Study', *Åland Peace Institute Report*, no. 2 (2007), accessed February 2015, http://www.peace.ax/en/publications/report-series.

[9] Such as in several Eastern and south-eastern European states, as well as in the Iraqi autonomous region of Kurdistan according to the 2005 constitution, etc.