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Minorities, Territories and the Law of Ownership. Back to Basics and the Way Forward

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Abstract: In public law, the concept of property plays, arguably, a much more limited role than in private law. At a closer look, however, a rather different picture emerges. In fact, in public (national and international) law, property is less (if at all) regulated, but not less important than in private law. Rather, it is implicitly assumed and developed in collective rather than individual terms. Especially in the nation state construct, territory is the property of a state and the state is the property of a group of people (the dominant nation), whose power to control a territory is called sovereignty. For this reason, when the question emerges of how to deal with a territory predominantly inhabited by a minority group, the answers by different actors involved might be diametrically opposite. This is essentially because the link between people and territory is always framed in terms of ownership: who "owns" a territory? And how to deal with those who inhabit the territory without (being seen as those) owing it? This essay explores the responses to such questions. The focus will be on challenges posed by autonomy regimes as instruments for the accommodation of minority issues, including the evolving concept of territory. Against this background, the different understandings of the link and the recent practice of selected international bodies will be analysed, leading to some concluding remarks. It will be argued that territory is an unavoidable point of reference, but many aspects are not sufficiently addressed, such as the issue of the addressees of such arrangements, the evolution that minority-related concepts are facing in the present era, marked by the challenge of diversity and the overall understanding of territorial arrangements.

Key words: ethnicity, minorities, territories, ownership, autonomy.

1. INTRODUCTION

In public law, the concept of property plays, arguably, a much more limited role than in private law. At a closer look, however, a rather different picture emerges. In fact, in public (national and international) law, property is less (if at all) regulated, but not less important than in private law. Rather, it is implicitly assumed and developed in collective rather than individual terms. Especially in the nation state construct, territo-

ry is the property of a state and the state is the property of a group of people (the dominant nation), whose power to control a territory is called sovereignty.[1] Consequently, territorial claims by groups other than the dominant ones are addressed either by establishing "their own" state (often after violent conflicts or revolutions) or by forms of territorial autonomy within a state, which are designed as a lighter form of statehood. The link between ethnicity and territory remains largely implicit and is too often simplistically underpinned rather than rationally addressed.

For this reason, when the question emerges of how to deal with a territory predominantly inhabited by a minority group, the answers by different actors involved might be diametrically opposite thus jeopardising 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 ethnicity and territory is understood by the different parties involved might turn into the most explosive root for conflicts. This is essentially because the link between people and territory is always framed in terms of ownership: who "owns" a territory? And how to deal with those who inhabit the territory without (being seen as those) owing it?

This essay explores in a comparative perspective the responses to such questions. As the extreme case of creation of new states is relatively simple at least in a constitutional perspective, the focus will be on challenges posed by autonomy regimes as instruments for the accommodation of minority issues, including the evolving concept of territory (2.). Against this background, the different understandings of the link and the recent practice of selected international bodies will be analysed (3.), leading to some concluding remarks (4.). It will be argued that territory is an unavoidable point of reference, but many aspects are not sufficiently addressed, 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 of an outdated logic of ownership, which limits the potential of autonomy as an overall instrument of good governance.

2. LINKS BETWEEN ETHNICITY AND TERRITORY: DIFFERENT APPROACHES

In a comparative constitutional perspective, a variety of approaches can be observed as to the relationship that the legal system imposes (or pre-supposes) between groups and territories.[2] 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,[3] although in this context the scope is

[1] Jellinek, G. (1900). *Allgemeine Staatslehre*, *vol. 1* (*Recht des modernen Staates*), Berlin.

[2] As the Commission for Democracy through Law (Venice Commission) pointed out, there is "no common practice in the matter of territorial autonomy, even in general terms" CDL–INF (1996), 4, *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,* § 3c.

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

slightly different and therefore it is preferable not to rely on the nationalism terminology.[4]

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-a-vis Finland), Greenland or the Faroe Islands (vis-a-vis Denmark), New Caledonia (vis-a-vis France) and the like. In such cases, where population is homogeneous by fact or by law,[5] 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,[6] a paramount example in this regard can be observed in Québec, whose identity is framed in ethnic/linguistic terms even though several other French speakers are settled outside the province and, conversely, many non-French speakers live in Québec.[7] In 2006, the Canadian Parliament adopted a motion recognising that Québécois "form a nation within a united Canada",[8] and several legal rules attribute to Québec the exclusive role of representing the

[4] 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 subnational 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: Maitland, F.W. (1964). *Township and Borough: The Ford Lectures 1897*. Cambridge: Cambridge University Press, 6-29. Irrespective of definition issues, the question here is about the relation between organized communities and territorial space in subnational areas whose autonomy was established with a view of 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.

[5] 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 of 100 groups are settled, see State, B. *Immigrant Integration on Åland – an exploratory study*, Åland Peace Institute, Report no. 2-2007, available at http://www.peace.ax/en/publications/report-series (15.5.2021).

[6] 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.

[7] The whole issue of (more or less recent) migrants goes beyond the scope of this paper, as no autonomous entity has so far made them titular groups in terms of territorial claims. Their presence, however, is very relevant for getting the whole picture of the ethnic composition of a territory. See on such aspects Medda, R., Popelier, P. (eds.). (2016). *Pro-independence Movements and Migration: Discourse, Policy and Practice*, Brill, forthcoming.

[8] Motion of 27 November 2006. Though non–legally binding, the motion aims at resolving the long-lasting and still open wound of the role of Québec within Canada. It culminates a process marked by the failure of two proposed constitutional amendments (1987 and 1991), by two provincial referenda on the proposal of unilateral secession (1992 and 1995) and by a fundamental

"French Canada" on the federal scene.[9] Such an approach is the simplest from a legal point of view, because it only requires dealing with one side of the problem – autonomy – which is supposed to cover any other diversity issue.

A second type of relationship between ethnicity and territory is to be observed when ethnic and territorial elements do coexist and interplay with each other, with the consequence that a broad leverage is left in determining which one should prevail in the single case depending on the subjects at stake as well as on variable political priorities. Unlike in the previous category, in these cases, autonomy arrangements do take into account the heterogeneity of the population settled in a territory, although territorial self-government is in the first place conceived for the protection of one (or more) specific (minority) groups. Several examples fall into this category. Some countries rely on the principle of territoriality, such as, for example, in Belgium,[10] in Switzerland,[11] and to some extent also in the European Union.[12] This principle means that a territory is identified by law with a language and a culture, which are the sole official ones of that territory. Within the framework of a multinational polity, this means that the territories are somewhat frozen in their cultural

opinion issued by the Canadian Supreme Court (CSC, *Reference re. Secession of Québec* [1998] 2 S.C.R. 217). One of the open issues regards the concept of "Quebecker", whether this should be intended in territorial or in ethnic terms. It is worth notice that the English term "Quebecker" or "Quebecer" is normally used to refer to any resident of the province, regardless of his/her language, whereas in French the word "Québécois" is used both in the civic (i.e., all residents) and in the ethnic sense (i.e., only French-speaking inhabitants or even only those of French descent). See also the entry "Québécois" in the *Oxford English Dictionary*. Not by chance, even the English text of the motion uses the French term Québécois.

9 An interesting example is article 6 of the Canadian Supreme Court Act 1985, according to which three justices out of nine must come from Québec. This provision conventionally excludes non–French speakers from Québec from the chance to be appointed.

10 The evolution of the Belgian system after the constitutional transformation that culminated in the new constitution of 1993 shows some tendency toward the first model. Significant in this respect is the institutional merging that took place in the Flanders between regional and community institutions in which the latter basically "absorbed" the first. See Swenden, W. (2002/2003). Personality versus Territoriality: Belgium and the Framework Convention for the Protection of National Minorities. In: *European Yearbook for Minority Issues*, 331–356; Keating, M. (2001). So many nations, so few states: territory and nationalism in the global era. In: A.G. Gagnon, J. Tully (eds.) *Multinational Democracies*. Cambridge: Cambridge University Press.

11 The principle of territoriality in Switzerland was firstly elaborated as an unwritten constitutional corrective to the freedom of language by the federal court (see judgment of 31 March 1965, *Association de l'Ecole française*, BGE 91, I, 480, and judgment 25 April 1980, *Brunner*, BGE 106, Ia, 299) and was subsequently formalized in the (Con-)federal constitution (article 70 of the Swiss constitution). See Pedrini, S., Bächtiger A., Steenbergen, M. R. (2013). Deliberative inclusion of minorities: patterns of reciprocity among linguistic groups in Switzerland. *European Political Science Review,* 5, 483-512.

12 Unlike any other international organization, the European Union recognizes the official status of all languages that are official at national level in the various member states (since January 2007, when Irish was accorded the status of a full official language of the union, the sole exception is represented by Letzeburgesch, which is official in Luxemburg but not in the EU)—see article 342 TFEU (former article 290 TEC) and Regulation No. 1/1958. See further Palermo, F. (2006). Linguistic Diversity within the Integrated Constitutional Space. *European Diversity and Autonomy Papers*, 2, available at http://www.eurac.edu/documents/edap/2006_edap02.pdf (15.5.2021).

identity, because this is guaranteed by the central constitution, which therefore provides for the stabilization of groups but also for the guarantee of forced cooperation among them. Other, and no less numerous, examples are those countries in which self-government for groups was the driving force for territorial autonomy, but self-government developed also beyond the original scope, gradually attenuating the "original intent" of "mere" minority protection, moving towards a territory-centred system in which ethnicity becomes recessive to autonomy as such. Examples of this kind of evolution are to be found, among others, in New Brunswick in Canada,[13] in Northern Macedonia,[14] and in South Tyrol in Italy.[15]

A third linkage between territorial autonomy and group protection is to be noted when ethnicity was instrumental in determining the reasons for the development of territorial autonomy, but the legal design of the autonomy regime emphasises the territorial dimension more than (or at least as much as) the ethnic one (also depending on the political positions). One could think of the Spanish autonomous communities where the historic nationalities are settled:[16] beside the clear attempts to identify the autonomous ter-

[13] In the province of New Brunswick, the French- and English-speaking populations are by and large equal in size. The powers of that province, however, are largely made up the same as any other Canadian province except Québec. See Magord, A. (2008). *The Quest for Autonomy in Acadia*. Brussels: Peter Lang; Bickerton, J. (2012). Seeking New Autonomies: State Rescaling, Reterritorialization and Minority Identities in Atlantic Canada. In: A-G. Gagnon and M. Keating (eds.) *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings.* London: Palgrave Macmillan, 98-117.

[14] After the Ohrid agreement of 2001 and the subsequent constitutional amendments, Macedonia has established a strongly promotional minority-protection system, which nevertheless basically only regards the Albanian community. Beside the rules adopted at the state level for the representation of the Albanian minority, in 2002 a law on local self-government was adopted, whose aim was to maximize the number of municipalities in which Albanians make up 20% of the population (and thereby make Albanian an official language at the local level). The subsequent referendum held in 2004 failed because of insufficient participation in the ballot, and the law was therefore confirmed: accordingly, a much higher number of municipalities than before became bilingual. See further Marko, J. (2004/2005). The Referendum on Decentralization in Macedonia in 2004: A Litmus Test for Macedonia's Interethnic Relations. *European Yearbook for Minority Issues*, 4, 695–721 and Tomovska, I. (2008). Post-Conflict Developments and Decentralization in Macedonia", *European Yearbook for Minority Issues*, 7, 146-147.

[15] The autonomy for South Tyrol was conceived as an instrument for the protection of the German-speaking minority, as explicitly stated in its international foundation, the Gruber-Degasperi agreement of 1946. However, the process of reconciliation and normalization that is taking place in that area in the last 30 years has gradually emphasised the territorial elements of the autonomy regime vis-a-vis the ethnic ones. For further analysis see J. Woelk, F, Palermo, and J. Marko (eds.). (2008). *Tolerance through Law. Self Governance and Group Rights in South Tyrol*. Boston: Martinus Njihoff, Leiden.

[16] According to Spanish constitutional terminology, this pre-legal element as a precondition for autonomy is called "differential factor" (*hecho differencial*). Article 151 of the Spanish constitution of 1978 provides for the "fast track to autonomy" for the pre-existing nationalities, even though this term never appears in the constitution. As a matter of fact, the communities that achieved autonomy this way were those in which the national character is most developed (Basque Country, Catalonia, Galicia) plus Andalusia. On origin and development see inter alia Arlucea Ruiz, E. (2014). The Qualitative Development of the Spanish System of Autonomous Communities: Changes to the Statutes of Autonomy. In: A. López Basaguren, L. Escajedo San

ritory with one nation (or nationality),[17] this concept is predominantly inclusive in terms of belonging to the group,[18] which is normally defined by a free choice of individuals who commit themselves to a culture and a language.[19] The same is true for Scotland, which has developed a civic, territorial identity protected through self-government and where the very referendum on independence in September 2014 was open to all residents, irrespective of ethnicity, origin or language.[20] Similarly, one can think of the Croatian region of Istria[21], as well as of the Serbian Autonomous Province of Vojvodina:[22] in both of these cases, regional autonomy has a clear territorial emphasis, because the national minorities are numerically inferior to the majority population even at the regional level. Similarly, other examples of ethnic-originated, but substantially territorially managed self-government can be observed in all cases in which forms of autonomy (additional competences, etc.) for

Epifanio (eds.) *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*. Berlin: Springer, 575-586.

17 The terminological issue ("nation" vs. "nationality") strongly re-emerged during the process of adoption of the new autonomy statute for Catalonia in 2006. The issue was resolved with a compromise: the (legally nonbinding) preamble affirms that "in reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority", whereas the (legally binding) text of the statute only contains the word "nationality". This, however, was held unconstitutional by the Constitutional Tribunal in its seminal ruling on the Catalan statute no. 31/2010. See Arbos Marin, X (2013). The Federal Option and constitutional management of Diversity in Spain. In: A. López-Basaguren, L. Escajedo San Epifanio (eds.) *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain.* Berlin: Springer, 375-399.

18 See Suski, M. (2011). *Sub-State Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions*. Berlin-Heidelberg: Springer, 111.

19 See again the new autonomy statute for Catalonia. Article 1 states that "Catalonia, as a nationality, exercises its self-government constituted as an autonomous community". Moreover, the preamble affirms that "the contribution of [Catalan] citizens has shaped an integrating society […]" Also the Basque identity is, by and large, defined in cultural and linguistic (thus basically voluntary) terms, rather than in ethnic terms.

20 Cohen, A. P. (1997). Nationalism and Social Identity: Who Owns the Interest of Scotland?. In: *18 Scottish Affairs*, 95–107; McLean, I., Lodge G., Gallagher, J. (2013). *Scotland's Choices: The Referendum and What Happens Afterwards*. Edinburgh: Edinburgh University Press; *The Agreement on a referendum on independence for Scotland*, (2012). Constitution Committee of the House of Lords 7th Report, Session 2012-13; Select Committee on the Constitution, 8th Report of Session 2013–14 *Scottish independence: constitutional implications of the referendum*, available at http://www.publications.parliament.uk/pa/ld201314/ldselect/ldconst/188/188.pdf (16.5.2021).

21 See Ashbrook, J. (2008). *Buying and Selling the Istrian Goat: Istrian Regionalism, Croatian Nationalism, and EU Enlargement*. Bruxelles: Peter Lang; Stjepanovic, D. (2012). Regions and Territorial Autonomy in Southeastern Europe. In: A. G. Gagnon and M. Keating (eds.) *Political Autonomy and Divided Societies: Imagining Democratic Alternatives in Complex Settings*. London: Palgrave and Macmillan.

22 Articles 182–187 of the Serbian constitution of 2006. See The participation of minorities in public life, *Science and technique of democracy*, 45 (2011); see also the Statute of Autonomous Province of Vojvodina (Law on Establishing the Competences of the Autonomous Province of Vojvodina, no. 99/09); Guglielmetti, C., Avlijaš, S. (2013). Regionalization and regional development in Serbia. In: F. Palermo, S. Parolari (eds.) *Regional Dynamics in Central and Eastern Europe: New Approaches to Decentralization*. Leiden: Martinus Nijhoff Publishers, 204.

territories in which minorities are settled are subject to numerical clauses; in these cases, it is up to the same minority groups to set self-government in motion.[23]

3. AUTONOMY *FOR* OR AUTONOMY *OF*? THE "LAW OF OWNERSHIP"

In the end, all forms of minority self-government including, to some extent, those normally labelled as non-territorial autonomy, have a territorial dimension. The overlap between territory and its "ownership" by a national, ethnic, or linguistic group can be more or less intense, but the legal instruments to address minority issues are by and large all territorial, both because they are applicable only to a specific territory and because they confer to minority groups certain self-government powers within that territory.[24]

The overlap between one group and one territory reveals an interiorized ownership-relation that goes back even to the very names of groups and territories: territories have usually been named after the populations residing in them, and vice-versa, to an extent that makes it almost impossible, in most cases, to determine which name has been developed first.[25] Our own minds are shaped taking implicitly for granted that territories are the property of groups, and the whole history of mankind is marked by wars and conflicts for the ownership of territories. When autonomy is granted, this addresses a population by conferring control over a territory, now limited by constitutional rules, but still essentially framed as exclusive sovereignty, following the same abstract pattern of statehood (people, territory, sovereignty). In other words, it seems that the implicit paradigm of the link between ethnicity and territory is always an ethnic and not a civic one: when linked with

[23] The examples range from the Finnish "prototype" (at local level, only municipalities inhabited by more than 8% of Swedish speakers can be officially bilingual—see Language Act of 1922 as recently replaced by Language Act no. 423/2003) to more-recent cases making use of the same principle. See, for example, the Italian law no. 482/1999 (which provides for the establishment of forms of municipal self-government upon request of one third of the members of the municipal council) and the Czech law on Regions no. 129/2000, § 78, providing that minority self-governments can be set up in the regions in which at least 5% of the people belongs to a recognized minority.

[24] For non-territorial arrangements, this link is attenuated and partial, as it is not designed in terms of ownership of a whole territory. The scope of application of the personal/cultural rights is however still territorial, as mentioned above: only members of one particular group are entitled to specific rights in a given territory. Like for territorial arrangements, also non-territorial ones succeed in their purpose of being exclusive and to address only members of minority groups, as demonstrated by several examples of legal impossibility to pre-determine who belongs to groups and to exclude those not pertinent to them. See inter alia the issue of registration as members of the minority groups that arose with regard to the Minority Self-Governments in Hungary in 2005 and for Minority Councils in Serbia in 2009. See European Commission for Democracy through Law (Venice Commission), 'Opinion on the New Constitution of Hungary Adopted by the Venice Commission at its 87th Plenary Session' (Venice, 17-18 June 2011), CDL-AD(2011)016; European Parliament Resolution of 16 February 2012 on the recent political developments in Hungary, 2012/2511(RSP). Here, ethnic nationalism is referred to as a characteristic of the general ideological environment. Practical applications of nationalist doctrines differ significantly. For instance, Hungarian nationalism targets predominantly kin minorities outside the country while the Slovakian one concerns primarily domestic policy.

[25] For some hints on such a complex and not fully explored area see Connor, W. (2001). Homelands in a World of States. In: M. Guibernau, J. Hutchinson (eds.) *Understanding Nationalism*. Oxford: Blackwell, 53-73.

minority groups, territorial autonomy is generally framed as autonomy *for* that particular group,[26] even in cases where the approach is more civic than ethnic.

The conferment of a territorial self-government *for* minority groups,[27] however, does not address the whole matter of autonomy[28] and might even be detrimental to the overall management of complexity, because it risks replicating the State pattern at a lower level. Territoriality alone – in terms of (absolute or partial) control of a territory by a group – is thus a far too simple solution for a far too complex problem.

In fact, the ultimate rationale of territorial solutions based on autonomy *for* groups, is to transform minority issues into deliberative processes based on the majority rule. Playing with the territorial scope of legal norms, minority issues are addressed through the classical logic of majority-based democracy, turning (national) minorities into (subnational, territorial) majorities, or at least into much more consistent minorities. Accordingly, the will of the autonomous body is (forcibly) coincident with that of the (territorial) majority of the (national) minority.

Overall, territorial self-government proved to work well.[29] Its immense strength lays not only in its being a viable alternative to external self-determination (thus preventing possible conflicts), but also, and even more so, in its ability to not derogate from the fundamental element of Western constitutionalism (majority rule) in addressing minority issues. By doing so, minority issues do not jeopardize the democratic foundations of the legal systems and can be pragmatically accommodated (although with some difficulties and compromises) within the classical – majority-based – deliberative procedures. Like a wizard, the legal system transforms minorities into majorities and incorporates them into a majority-based decision-making process. It could provocatively be said that the "law of ownership" changes, or at least aims to change, the very nature of minority groups, because it turns them into (potential) majorities. Such an approach—the efficient it can be—might turn majority-minority relations upside down, but it cannot completely resolve them, for the simple reason that it is still based on a principle that is ultimately at odds with minority rights: majority rule.

However, there are several clear signs that such an approach to autonomy based on ownership (and, when referred to minority groups, conceived as autonomy *for* such groups only) is getting outdated. Instead, a more comprehensive and sophisticated view of autonomy is emerging, focusing on territories rather than on groups "owing" them and including minority rights in a wider perspective, that can be called autonomy *of*. Of territories as such, rather than just for one group thereby settled.

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[26] See Weller, M. (2010). Introduction. In: M. Weller, K. Nobbs (eds.) *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*. Philadelphia: University of Pennsylvania Press, 2–7.

[27] See (also on some contradictions of non-territorial autonomy arrangements) Bauböck, R. (2004). Territorial or Cultural Autonomy for National Minorities? In: A. Dieckhoff (ed.) *The Politics of Belonging: Nationalism, Liberalism and Pluralism*. Lanham: Lexington Books, 221-258.

[28] This is why it is a relatively marginal aspect in the comparative federalism literature, while it is of primary importance in a minority-rights perspective, as stated above.

[29] See Weller, M. (ed.). (2009). *Asymmetric Autonomy as a Tool of Ethnic Conflict Settlement*. Philadelphia: University of Pennsylvania Press. See also A. Tarr, R. Williams, J. Marko (eds.). (2004). *Federalism, Sub-National Constitutions and Minority Rights*. Greenwood: Westport; Y. Ghai (ed.). (2000). *Autonomy and Ethnicity*. Cambridge: Cambridge Univ. Press.; Lapidoth, R. (1996). *Autonomy: Flexible Solutions to Ethnic Conflicts*. Washington, D.C.: United States Institute of Peace Press. For interesting reflections *see* Mancini, S. (2008). Rethinking the boundaries of democratic secession: Liberalism, nationalism and the right of minorities to self-determination, 6:3–4 *International Journal of Constitutional Law,* 553–584, esp. 562–566.

3.1. Beyond Ownership: Trends in Theory and Practice

In recent times, at least three factors are contributing to make minority issues much more complex than a purely territorial approach suggests: the emergence of power sharing as a counter-majority mechanism; the increasing attention to the rights of the groups sharing a territory, irrespective of their status; the decreasing importance of the State as the exclusive point of reference for determining minority positions.

Power-sharing or ethnic consociational democracy is a governmental technique that aims at overcoming the majority–minority spill over by obliging all involved groups through institutional cooperation beyond their numerical ratio.[30] It can be paritarian (i.e., the groups have the same number of representatives in the power-sharing institutions)[31] or proportional (i.e., the groups' representation is proportional to their numerical consistency, but nonetheless guaranteed irrespective of their numerical strength).[32] Power sharing follows a different pattern than does territorial autonomy. Although of course applied to a territory, it does not try to turn minorities into majorities; rather, it develops a form of government that is based on a different rationale than majoritarian democracy. Power sharing is an instrument that makes it possible to go beyond the classical democratic paradigm (based on rule of majorities) by enforcing a more sophisticated decision making (based on the rule of law) in a way that none of the groups may be outnumbered (at least not without having been effectively involved) within the institutions of the State or subnational unit. The recent proliferation of power-sharing agreements[33] testifies to the

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[30] For a comprehensive analysis and the detailed illustration of several case studies see M. Weller, S. Wolff, (eds.). (2005). *Autonomy, Self-governance and Conflict Resolution: Innovative Approaches to Institutional, Design in Divided Societies*. London: Routledge. See also McGarry, J., O'Leary, B. (2009). Must Pluri-national Federations Fail? *Ethnopolitics*, 5–25; B. O'Leary, J. McEvoy (eds.). (2013). *Power-Sharing in Deeply Divided Places* Philadelphia: University of Pennsylvania Press.; O'Leary, B. and McGarry, J. Territorial Pluralism: Its Forms, Flaws and Virtues. In: F. Requejo and M. Caminal (eds.) *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases*. New York: Routledge, 17-50.

[31] Such as, for example, in the case of the Government and of the Constitutional Court in Belgium, of the Presidency, the Council of Ministers and the House of Peoples in Bosnia and Herzegovina (see however ECHR, *Sejdić and Finci v. Bosnia and Herzegovina*, appl. 27996/06 and 34836/06, 22 Dec 2009), etc.

[32] Such as, for example, in South Tyrol for the composition of the provincial and regional governments, in Canada for the composition of the Supreme Court, in Belgium for the Senate, in Switzerland for the Federal Council as well as for the Federal Tribunal, etc.

[33] From Northern Ireland to Macedonia, from Mindanao to Bougainville, from Bosnia and Herzegovina to Kosovo, just to quote examples from the last decade. Gates, S., Strøm, K. (2007). Power-sharing, Agency and Civil Conflict - Power-sharing Agreements, Negotiations and Peace Processes. *CSCW Policy Brief*. Oslo: PRIO. 1.; Mukherjee, B. (2006). Why Political Power-Sharing Agreements Lead to Enduring Peaceful Resolution of Some Civil Wars, But Not Others? *International Studies Quarterly*, 50, 479–504; O'Leary, B. (1989). The Limits to Coercive Consociationalism in Northern Ireland. *Political Studies*, 37, 562–587; Ripiloski, S., Pendarovski, S. (2013). Macedonia and the Ohrid Framework Agreement: Framed Past, Elusive Future. *Perceptions*, 18 (2), 135-161; Kelleher, S. (2005). Minority Veto Rights in Power Sharing Systems: Lessons from Macedonia, Northern Ireland and Belgium. *Adalah's Newsletter*, 13; O'Leary, B. (2005). Debating Consociational Politics: Normative and Explanatory arguments. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 3–43; Wolff, S. (2005). Between Stability and Collapse: Internal and External Dynamics of

insufficiency of a "pure" territorial model to exclusively address minority issues by simply "majoritarizing" them.

The second critical element that shows the limits of territorial solutions in terms of explicit or implicit ownership clearly emerges from the above considerations. Territories are (and will more and more be) all but homogeneous in ethnic terms. Aiming to transform national minorities into regional majorities (or at least into more consistent minorities), territorial autonomy does not address the fundamental issue of the rights of regional minorities or majorities within minorities, i.e., of persons belonging to the national majorities, which are numerically inferior in the autonomous territory, nor of smaller minorities within that same territory (so called minorities within minorities), nor of the overall integration of ever more plural societies. Scholars[34] and international organizations[35] pay increasing attention to this phenomenon, starting from a substantive approach to rights: according to this approach, minorities are not a stable artefact, but rather a dynamic, relational factor whose very nature as minority groups largely depends on the applicable law.[36] In sum, belonging to majorities and minorities resembles a revolving door rather than being a permanent factor. So, for example, vegetarians might not be a minority in general, because they are not recognized as such by the law, but they can become a minority vested with enforceable rights in some context, in which specific regulations apply O'Halloran, P. J. (2005). (e.g., in prison or in hospital, if the menu is not differentiated). Similarly, English speakers in Québec cannot be considered a national or ethnic minority in the traditional sense,[37] nor are they with

Post-agreement Institution Building in Northern Ireland, In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 44–66; Bieber, F. (2005). Power Sharing after Yugoslavia: Functionality and Dysfunctionality of Power-sharing Institutions in Post-war Bosnia, Macedonia, and Kosovo. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 85–103; O'Halloran, P.J. Post-conflict Reconstruction: Constitutional and Transitional Power-sharing Arrangements in Bosnia and Kosovo. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 104–119; Peake, G. (2005). Power Sharing in a Police Car: The Intractable Difficulty of Police Reform in Kosovo and Macedonia, In: S. Noel (2005). (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 120–214; Bahcheli, T., Noel, S. Power Sharing for Cyprus (Again)? European Union Accession and the Prospects for Reunification. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press, 215–238; Wilkinson, S. I. (2005). Conditionality, Consociationalism, and the European Union. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press. 239–263; Mc. Garry, J. and O'Leary, B. (2005). Federation as a Method of Ethnic Conflict Regulation. In: S. Noel (ed.) *From Power Sharing to Democracy Post-Conflict Institutions in Ethnically Divided Societies*. McGill-Queen's University Press. 263–296.

[34] See on the various meanings of the concept A. Eisenberg, J. Spinner-Halev (eds.). (2005). *Minorities within Minorities: Equality, Rights and Diversity*. Cambridge: Cambridge University Press.

[35] See below.

[36] Poulter, S. (1992). Limits of Pluralism. In: B. Hepple, E. M. Szyszczak (eds.) *Discrimination: the Limits of Law*. London: Mansell, 183–215.

[37] See expressly in this sense the UN Human Rights' Committee decision in the case of *Ballantyne et al. v. Canada*, Communications Nos. 359/1989 and 385/1989, *Ballantyne/Davidson v. Canada* and McIntyre v. Canada, in UN doc. GAOR, A/48/40 (II), p. 103, para. 11.5., when the com-

respect to subject matters decided by the federal government, but they are a functional minority when it comes to subjects decided at provincial level, in which they are minoritized in the decision-making process.

Increasing attention is being paid in literature and in law to groups labelled as "regionally, non-dominant titular peoples".[38] This term describes groups that are part of the (local) population and, although locally inferior, who constitute the "majority" group at the national level. Such a concept well reveals the deficits arising from the combination of territoriality and majority rule and forces to develop more accurate devices to deal with ethnic complexity as such, regardless of the specific territorial dimension in which it might be observed. In simple words, at least where the basic conditions of survival for groups are given,[39] a qualitative leap is required where the instruments of diversity management are concerned. In these contexts, today's complexity requires instruments that are able to protect groups that can be occasionally in minority position, that are dynamic and not static, and whose members have the right to freely identify, according to criteria and preferences that might well change over time. Modern instruments for diversity management should address diversity issues in general and should not only focus on the protection of predefined minority groups. A more-comprehensive approach to group rights and to integration of complex multi-ethnic societies is thus required.

The third critical element is the increasing awareness of the fact that the State cannot any longer be the exclusive level of reference for the identification of minority positions.[40] Although it is true that beginning in the Westphalian age the State has been the sole master of minority definition and rights,[41] and although it is not contestable that the State still plays the main role in this respect, it cannot be denied that considering as minorities only the groups that are numerically inferior to the population of the State and fulfilling the other criteria elaborated by Capotorti in the 1970s would be a formalistic exercise that neglects the reality. The limit of a purely territorial approach to minority issues emerges as a consequence of numerous phenomena impacting on the very rationale of territories, including cross-border cooperation also as a means to enhance minority protection[42] and

mittee refused to view English speakers in Québec as a minority, because they are part of the national majority in Canada even though they are a minority in Québec.

[38] Potier, T. (2001). *Regionally Non-Dominant Titular Peoples: The Next Phase in Minority Rights?* JAMIE Paper 6 (2001). Available at http://www.ecmi.de/jemie/download/JEMIE06Potier11-07-01.pdf (15.5.2021).

[39] Unfortunately, for many minority groups in Europe and in the world, the fundamental question is still their own survival as a group. In these situations, it does not seem possible to move beyond the dimension of "mere" legal protection and, from the perspective of the majority, legal recognition of the minority. In many cases, the explicit recognition of basic rights of protection (in the fields of language, culture, participation, etc.) would already be a major step forward.

[40] As it still was in the well-known attempt for a definition by Capotorti, F. *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*. Geneva, UN Center for Human Rights, UN Doc E/CN.4/Sub.2/384/Add. 1-7.

[41] On the historical developments see Ruiz-Vieytez, E. (1999). *The History of Legal Protection of Minorities in Europe (XIIth–XXth Centuries)*. Derby:University of Derby.

[42] See articles 17 and 18 of the FCNM and, more broadly on the role of cross-border cooperation in ethnic sensitive areas, Palermo, F. (2012). The 'New Nomos' of Cross-Border Cooperation. In: F. Palermo *et al*. (eds.) *Globalization, Technologies and Legal Revolution. The Impact of Global Changes on Territorial and Cultural Diversities, on Supranational Integration and Constitu-*

more generally globalization,[43] that overall changed the most rooted attitude towards autonomy.[44] More specifically, recent and significant examples of a new and more substantial approach to the link between minorities and territories beyond the State and the national dimension are provided by several international and supranational organizations such as the Council of Europe, the European Union and the OSCE.

3.2. Beyond Territory: The Contribution of International (Soft) Law

At least two important bodies of the Council of Europe have started to pave the way to a new understanding of territory with regard to minority issues.[45] The Commission for Democracy through Law (Venice Commission) has convincingly pointed out that the territorial reference for determining the existence of a minority does not necessarily coincide with the State,[46] nor is the concept of minority necessarily dependent on the requirement of citizenship. In a fundamental report, the Commission stated that citizenship (i.e., the formal relationship with a State and thus a territory) can no longer be considered the only criterion for the recognition of minority rights and that noncitizens should also benefit from specific minority protection.[47] The Commission's definition of a minority "does not limit the protection of the rights of minorities only to persons belonging to minorities who are citizens" of the State they live in.[48] Instead, "a new, more dynamic tendency to extend minority protection to non-citizens has developed over the recent past".[49]

Similarly, the Advisory Committee on the Council of Europe's Framework Convention for the Protection of National Minorities requires an inclusive approach to minority rights that goes beyond the formal requirement of citizenship, this being sometimes, as a matter of fact, a tool for excluding titular groups from the benefit of fundamental rights.[50] Therefore, the Advisory Committee also encourages an extensive interpretation of the Framework Convention with a view to extending its application to noncitizens where ap-

tional Theory. Liber Amicorum in Memory of Sergio Ortino. Baden Baden: Nomos, 71-90.

[43] De Varennes, F. (2012). The Challenges of Globalization for State Sovereignty: International Law, Autonomy and Minority Rights. In: F. Palermo *et al*. (eds.) *Globalization, Technologies and Legal Revolution*, 113-137.

[44] Z. A. Skurbaty, (ed.). (2005). *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* Boston: Nijhoff/ Leiden.

[45] Other Council of Europe's bodies have also played a role in such a process. Suffice here to mention the Congress of Local and Regional Authorities and its role in monitoring the implementation of the Charter of Local Self-Government.

[46] European Commission of Democracy Through Law, *Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities Could Be Applied in Belgium*, CDL-AD (2002)1, Strasbourg, 12 March 2002.

[47] See European Commission for Democracy through Law, *Report on Non-Citizens and Minority Rights*, adopted at the Commission's 69th plenary session (Venice, 15–16 December 2006), Study no. 294/2004, CDL-AD (2007)001.

[48] CDL-AD (2003)013, *Opinion on the Draft Law on Amendments to the Law on National Minorities in Lithuania*, §5.

[49] CDL-AD (2004)013, *Opinion on Two Draft Laws Amending the Law on National Minorities in Ukraine*, §18.

[50] See, for example, the first opinion on Estonia, adopted 14 September 2001, §17 (ACFC/INF/OP/I(2002)005).

propriate[51], and calls for a substantive rather than formalistic approach to the issue of titular groups.[52] Even more significant for our purposes are the achievements of the Committee's Third Thematic Commentary on Linguistic Rights of Persons Belonging to National Minorities (2012)[53] and Fourth Thematic Commentary on the Scope of Application of the Framework Convention (2016).[54] Acknowledging that identity is not static but evolving throughout a person's life[55] and that multiple affiliation is in fact quite common and thus identity can change "depending on the relevance of identification for him or for her in a particular situation",[56] the Committee admits that what really matters is integration of diverse societies.[57] This can also be pursued by autonomy arrangements, which "can be beneficial to persons belonging to minorities",[58] but the real challenge for such arrangements is not to isolate titular groups and rather to make autonomous territories more suitable than (nation) States for developing integration and coexistence among different groups.

Such an approach is promoted even more explicitly by the most recent set of recommendations issued by the OSCE High Commissioner on National Minorities (HCNM), the Ljubljana Guidelines on Integration of Diverse Societies (2012).[59] Taking further the achievements of the previous Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999),[60] the Guidelines state that "in certain circumstances, territorial self-governance arrangements, such as territorial devolution of powers, may also facilitate the representation of individual minority groups. Regardless of form, institutions of self-governance must be based on democratic principles and processes to ensure that they can legitimately claim to reflect the views of all the communities settled in the concerned territory

[51] See, for example, the first opinion on Lithuania, adopted 21 February 2003, §90 (ACFC/INF/OP/I(2003)008).

[52] See further Swenden, W. (2003). Personality versus Territoriality: Belgium and the Framework Convention for the Protection of National Minorities. *European Yearbook for Minority Issues*, 2, 331–356; A. Verstichel, A. Alen, B. de Witte, Lemmens, P. (eds.). (2008). *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* Antwerp: Intersentia.

[53] ACFC/44DOC (2012)001 rev, on which Palermo, F. (2013). Addressing Contemporary Stalemate in the Advancement of Minority Rights: The Commentary on Language Rights of Persons Belonging to National Minorities. In: T. H. Malloy, U. Caruso (eds.), *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities. Essays in Honour of Rainer Hofmann* Boston: Martinus Mijhoff, Leiden, 121–140.

[54] ACFC/56DOC(2016)001.

[55] Third Thematic Commentary, para. 13.

[56] *Ibid.*, para. 18.

[57] *Ibid.*, para. 12.

[58] *Ibid.*, para. 90.

[59] T. H. Malloy (ed.), (2013). *Minority Issues in Europe: Rights, Concepts, Policy.* Berlin: Frank & Timme GmbH. 146; Marko, J. (2013). Five Years After: Continuing Reflections on the Thematic Commentary on Effective Participation. The Interplay between Equality and Participation. In: T. H. Malloy, U. Caruso (eds.) *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities,* 98.

[60] In the Lund Recommendations the HCNM affirmed the fundamental democratic role of territorial arrangements for minority self-governance (paras 19 and 20), also called for a possible combination of territorial and non-territorial arrangements for a successful minority participation. See further the special issue of the *International Journal on Minority and Group Rights (2009)*, 16 (4), 511–700, entirely devoted to the Lund Recommendations in their tenth anniversary.

and that they fully respect the human rights of all persons, including of minorities, within their jurisdictions. In this context, power-sharing arrangements, where in place, should not be constructed in a manner that excludes any communities from representation".[61] Such an integration-oriented approach to autonomy is perhaps so far the most advanced statement on territorial autonomy issues contained in an international document, as international law is notoriously hesitant to take any position on territorial organization of States.

Also in the European Union, despite the absence of a direct power to regulate minority issues,[62] a number of decisions of the Court of Justice are quite relevant in supporting a view of territory in terms of provider of services (which can include minority-relevant issues) rather than in terms of ownership. The rulings are formally grounded on subject matters not *prima facie* relevant to specific minority issues, such as the free movement of people and the principle of non-discrimination on the ground of nationality, but they have *de facto* introduced an EU system of minority protection[63] that has had important consequences also in terms of European legislation and ramifications in various areas, including the right to vote, adopting a more "civic" criterion of residence vis-à-vis the State-centred criterion of citizenship.[64] The essence of these rulings is that rights established for specific minority groups in a particular territory, such as the right to use a minority language with administrations and in court, must be available to all who happen to be in that territory, irrespective of their nationality, ethnic belonging and even residence.

All this leads to believe that although territory is still (and will always be) an unavoidable term of reference for the very recognition of minority positions, its practical meaning and its scope are largely variable from case to case and in general are changing because of the evolution of the overall legal environment. However, the meaning of territory and autonomy needs to be profoundly updated in the light of the present challenges. A territorial dimension is inherent to minority rights, provided, however, that territory is seen in a more inclusive and flexible way. In other words, in a more advanced stage of diversity management as we are increasingly experiencing in several parts of the world, territory

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61 Ljubljana Guidelines, no. 39.

62 The reference to rights of "peoples belonging to a minority" added to the values on which the EU is grounded (article 2 TEU as amended by the Treaty of Lisbon in 2009) does not seem to provide any specific power in this field. See more extensively Toggenburg, G. N. (2012). The Dark and the Bright Side of the Moon: Looking at Linguistic Diversity Through the Telescope of the Common Market. In F. Palermo *et al*. (eds.) *Globalization, Technologies and Legal Revolution*, 275-315.

63 Inter alia cases Mutsch (*Ministere Public v. Robert Heinrich Maria Mutsch*, C-137/84, 11 July 1985), Bickel and Franz (*Criminal proceedings against Horst Otto Bickel and Ulrich Franz,* C-274/96), Angonese (C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*), Kamberaj (C-571/10, *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano and Others*). See for further analysis Palermo, F. (2011). The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ. *Maastricht Journal of European and Comparative Law*, 8 (3), 299–318 and Toggenburg, G. N.

64 See inter alia case C-145-04, *Spain v. UK* on the right to vote for the European Parliament for non-citizens (following the seminal ruling of the European Court of Human Rights of 18 February 1999, case no. 24833/94, *Matthews v. United Kingdom*) and case C-300/04, *Eman and Sevinger v. College van Burgemeester*, where the Court held that also the opposite situation is admissible, i.e. to deny the right to vote to some category of European citizens based on their residence (in this case, Dutch citizens of the Antilles). See also ECtHR, judgment 19 October 2004, *Melnitchenko v. Ukraine*.

maintains its central role if its understanding moves away from an old-fashioned design as something simple, static, hard-law based, and exclusive, toward a more modern factor that is necessarily complex, variable, inclusive, and also based on several soft-law instruments. Complexity, variability, nonexclusivity, soft persuasion instead of hard imposition are key elements of the modern law of minorities.[65]

4. CONCLUDING REMARKS: GOVERNANCE VERSUS OWNERSHIP?

Notwithstanding all such theoretical and practical developments towards a more sophisticated and inclusive approach to territory, much of the debate surrounding it is still – often involuntarily – trapped in the Westphalian nation-State discourse. Territory is still seen in terms of something "belonging" to groups competing for the ownership and, where territorial autonomy is concerned, as one (majority) group accommodating another (minority), thus as an instrument to mitigate the deficits of minority participation by replicating the nation-state on a smaller scale.

What in this paper has been called "the law of ownership" is the legal reflection of such an approach in constitutional and legal regulations which, in the name of accommodations, implicitly deal with territory in terms ownership. The logic behind this is simple and perhaps inevitable: groups put forward claims over specific territories and the legal system graduates the intensity of sovereignty (from full – own statehood – to partial – territorial autonomy) depending on the (political, economic, military) strength of the demands. If the right balance between claims and concessions is made, such type of "Westphalian autonomy" regulated by the law of ownership works relatively well, as it quite effectively makes it possible for territorially compact minority groups to manage their own affairs by simply controlling (or having a greater influence on) the devolved institutions.

This view, however, reveals the same flaws as the nation-state approach, which pretended that territories be homogeneous and dominated by one titular group (the nation), in some case granting some rights (up to a certain degree of control to "their own" territory) to other recognized groups. Not only is such view far too narrow and simplistic in today's world, but it is often the reason why fragile democracies reject it and why vocal (or even secessionist) minorities invoke it. The fear of autonomy on the side of the States and its frequent overestimation on the side of some minority groups are inversely proportional to the stability of democracies: a strong democracy is not afraid of autonomy, and a democratic minority usually does not see it as the first step towards independence. But the more autonomy is presented as an instrument for ethnic self-governance, the more it becomes a threat.

This paradox is particularly evident in the post-communist world. To a large extent, the ethnicization of autonomy in the post-communist countries is the main legacy of the communist past. This is still the case in China, where the law on 'national regional autonomies' equals autonomy with ethnic self-government,[66] but also in Russia, where the

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[65] Palermo, F., Woelk, J. (2005). From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights. *European Yearbook of Minority Issues*, 3. Leiden/Boston: Brill. 5-13. and the following remarks by Malloy, T. H. (2006). Towards a New Paradigm of Minority Law-Making: A Rejoinder to Palermo and Woelk's Law of Diversity. *European Yearbook of Minority Issues*, 4, 2004/2005 Leiden/Boston: Brill, 5-27.

[66] Ghai, Y., Woodman, S. (2009). Unused powers: autonomy legislation in the PRC. *Pacific Affairs,* 82, 29-46; Davis, M.C. (2008). Establishing a Workable Autonomy in Tibet. *Human Rights Quarterly*, 30, 227-58.

very names of the sub-state entities depend on whether their territorial basis corresponds to the ethnic divisions of the populations or not.[67] This is also the reason why hardly any territorial autonomy regime has been established in former communist countries – and the few ones resulted in either cancellation of autonomy[68] or in de facto secession.[69] In fact, not unlike during communism, ethnic autonomy is still in practice accepted only if it is limited to folklore and has no political significance. Substantive autonomy, instead, is immediately linked to (threats of) secession because a different concept of autonomy is simply not imaginable.[70] The paradoxical outcome is that the predominant understanding of autonomy in post-communist countries still does not differ substantially from that of the former Soviet Union which was, effectively, "a pseudo-federation of (on paper) ethno-territorial republics".[71] And the international community, albeit involuntarily, endorses this view of autonomy by default, refusing to openly engage in the development if a more territorial and less ethnic approach to autonomy.

Territorial autonomy has, however, also an indirect and perhaps even more important meaning, including for minorities, provided it is divorced from the law of ownership. Although it is not at all a recipe for success,[72] autonomy is in fact first and foremost an instrument of good governance, which implies targeting a territory as a whole and not only the dominant group within it. Autonomy was actually devised for governance purposes and this function becomes even more relevant the more complex the society and thus the more complex the administration. This is the main reason why the number of federal or quasi-federal countries has more than tripled in the course of the 20th century, and at present the majority of the world's population lives under federal or quasi-federal rule.[73]

In other words, territorial autonomy is an instrument for the management of complexity. And as all countries are increasingly diverse and increasingly complex with respect to

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67 See Tarr, G. A. (1999). Creating Federalism in Russia. *South Texas Law Review,* 40.

68 The extent to which an autonomy can be considered only existing on paper largely depends on subjective and ultimately political evaluations. However, it seems incontestable that former soviet autonomy regimes such as Karakalpakstan in Uzbekistan or Adjara in Georgia only exist on paper. One could argue that the autonomy of "ethnic" subnational entities in Putin's Russia (from Tatarstan to Chechnya) has decreased to a level that puts the very existence of autonomy into question, and also some autonomous regions in former Yugoslavia such as Vojvodina or Istria are at present more "normalized" than in the past.

69 Leaving aside the peculiar case of Kosovo and the entities in Bosnia, one could think of so called "frozen conflicts" and to the most developed autonomy regime of the post-soviet time: Crimea, which recent annexation by Russia represents a self-realizing prophecy. See Wydra, D. (2004). The Crimea Conundrum: The Tug of War Between Russia and Ukraine on the Questions of Autonomy and Self-Determination. *International Journal on Minority and Group Rights*, 10 (2), 111–130.

70 Brubaker, R. (1996). *Nationalism Reframed: Nationhood and the National Question in the New Europe*. Cambridge: Cambridge University Press, 30-31.

71 Khazanov, A. M. (1997). *Ethnic Nationalism in the Russian Federation*. Daedelus, 126.

72 Comparative practice shows examples of both successful and failed territorial arrangements. See for illustration and examples 8:1 *Ethnopolitics* (March 2009), with papers by Brown, G .K. Federalism, Regional Autonomy and Conflict: Introduction and Overview, 1–4; McGarry, O'Leary (2009), 5–25; and Wolff (2009), 27–45.

73 See Hueglin, T. O., Fenna, A. (2006). *Comparative Federalism: A Systematic Inquiry*. Toronto: Broadview Press, 3.

the governance functions to be performed, autonomy has benefits that go beyond minority self-government or the protection of ethno-cultural differences. If a territory, irrespective of its ethnic composition, can autonomously decide on a number of issues (alone or in cooperation with other territories, belonging to the same or to a different country, sharing the same problems),[74] it is likely that the decisions will be qualitatively better and the territory will develop more harmoniously with benefits extending to all communities settled there.

Furthermore, autonomy is a mechanism for enhancing democracy; it is about shared and thus de-concentrated powers.[75] Therefore, it could prove particularly helpful in contexts in democratic transition but also in more consolidated areas in order to prevent drawbacks in conflict settlements based on territorial autonomy. While there is no right to autonomy for persons belonging to national minorities, there is a right to democratic governance, which autonomy might help to establish.

This might indirectly but significantly benefit minorities as well, as minority issues are embedded in larger contexts and cannot be disconnected from them. Thus, the more efficient overall governance is, the less likely it is that minority rights will be neglected and even less likely that minority issues will develop into conflicts. In fact, the bigger the problems are in terms of territorial, democratic and economic development, the more likely ethnic conflicts will be. In turn, the efficiency of the State structure – to which autonomy can effectively contribute if properly used and understood – is a powerful tool for providing the appropriate conditions for minority rights to be respected and for accommodating diversity issues.

Admittedly, in some cases also the opposite is true: ethnic self-government can ease tensions and, if this is the case, may contribute to the overall development of a territory. But this depends on a number of circumstances, including the consent of the State to ethnic autonomy,[76] which is not explicitly given in most contexts, or just reluctantly acknowledged following a violent conflict.[77] Thus, a territorial approach to autonomy is more likely to benefit ethnic groups than an ethnic approach would tend to benefit a territory as a whole.

In sum, only if the law of ownership is replaced or at least strongly complemented by the law of governance, and territories are seen as shared common goods rather than as private property of one or more groups, the full potential of territories as tools for effective governance can be developed and, conversely, their conflict potential be reduced.

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[75] See Weller, Wolff (eds.). (2005).

[76] See Gagon, Tully (eds.). (2001).

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Manjine, teritorije i zakon o vlasništvu. Povratak osnovama i put napred

Rezime: *U javnom pravu, koncept imovine igra nesumnjivo mnogo ograničeniju ulogu nego u privatnom pravu. Međutim, ako se pogleda izbilza, dobija se sasvim drugačija slika. Zapravo, u javnom (nacionalnom i međunarodnom) pravu imovina je manje (ako je uopšte) regulisana, ali ne i manje važna nego u privatnom pravu. Umesto toga, implicitno se predpostavlja i razvija više u kolektivnom nego u individualnom smislu. Naročito u kontekstu nacionalne države, teritorija je vlasništvo države, a država vlasništvo grupe ljudi (dominatne nacije), čija se moć upravljanja teritorijom naziva suverenitet. Iz tog razloga, kad se pojavi pitanje kako upravljati sa teritorijom pretežno naseljenom manjinskom grupom, odgovori različitih uključenih aktera mogu biti dijametralno suprotni. To je u osnovi zato što se veza između ljudi i teritorije uvek postavlja u smislu vlasništva: ko „poseduje" teritoriju? I kako postupati sa onima koji nastanjuju teritoriju bez (da budu viđeni kao) da je poseduju? Ovaj rad istražuje odgovore na takva pitanja. Fokus će biti na izazovima koje postavljaju režimi autonomije kao instrumenti za rešavanje pitanja manjina, uključujući evolutivni koncept teritorije. U tom kontekstu, biće analizirana različita shvatanja veze i nedavna praksa odabranih međunarodnih tela, što će dovesti do nekih zaključnih napomena. Biće argumentovano da je teritorija nezaobilazna referentna tačka, ali da mnogi aspekti nisu dovoljno obrađeni, kao što je pitanje adresata takvih uređenja, evolucija sa kojom se koncepti povezani sa manjinama suočavaju u današnje vreme, a koja je obeležena izazovima raznolikosti i celokupnog razumevanja teritorijalnih uređenja.*

***Ključne reči**: etnička pripadnost, manjine, teritorije, vlasništvo, autonomija.*