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NETERITORIJALNA AUTONOMIJA KAO OBOGAĆIVANJE PREDSTAVNIČKE DEMOKRATIJE

Ephraim Nimni and Aleksandar Pavlović

EDITORS' NOTE

This thematic issue brings together five scholarly articles, each tackling from both theoretical and practical perspective a sensitive and elusive issue of accommodating minority rights within a wider national and political framework. These timely considerations are framed through a broader, vibrant and rapidly emerging approach of non-territorial autonomy (NTA), which is not so much a particular model but a generic term that refers to different practices of minority community autonomy that does not entail exclusive control over territory. In this way, novel forms of national self-determination can take place while the self-determining communities reside in shared territorial spaces. NTA can thus have a number many different forms such as consociationalism, national cultural autonomy, and can be particularly well suited for communities or nations that do not live in a unified or joint territory but are territorially dispersed or scattered. In terms of political representation, NTA can also involve novel forms of representation that de-territorialise representation, as with indigenous communities, the juridical autonomy of religious communities, or in the practice of many forms of secular community representation that blend or mix collective and individual rights or modifies the modality of one person one vote, in proposing collective community representation. In that, NTA enhances democracy by eliminating potential dictatorships of the majority by creating communitarian rather than territorial modalities of representation. Thereby, while still relying on the existing state to search for the solutions of minorities, NTA rescinds the idea that popular sovereignty is one an indivisible and introduces instead the idea of shared sovereignty between the participating communities in a particular state. This a crucial modality to prevent secession of disgruntled national minorities (Nimni 2020).

NTA thus transforms nation states into plurinational states, which allows for the integration and active participation of national minorities (see Keating 2001). Not all forms of plurinational democracy are associated with forms of NTA, but all forms of NTA are associated with plurinational democracy. The emergence of NTA at different times and in different parts of the world, results from a democratic deficit of the nation-state, particularly in its liberal

Ephraim Nimni: Queens University Belfast; e.nimni@qub.ac.uk
Aleksandar Pavlović: Research Associate, Institute for Philosophy and Social Theory, University of Belgrade; aleksandar.pavlovic@instifdt.bg.ac.rs.

democratic form. This democratic deficit results in the conflating of Ethnos with Demos, creating a sense of alienation or worse among national and ethnic minorities. A viable solution to this problem is transforming nation-states into plurinational states, so that participating communities no matter of their numerical proportion, have some collective representation in the process of decision making and symbols of the democratic state. A Plurinational Democracy is a multi-sovereign state in which legal pluralism and constitutional diversity can accommodate multiple nationality claims. Minority nationalisms do not and must not always entail demands for separate statehood. NTA and asymmetrical constitutional arrangements can provide means of accommodating plural national claims.

More specifically, this special issue came about as a result of the COST 18114 Action ENTAN – the European Non-Territorial Autonomy Network, launched in 2018. COST stands for the European Cooperation in Science and Technology, which is a funding organisation for research and innovation networks; primarily envisaged as a four-years bottom-up networks that help connect research initiatives across Europe and beyond, it enables researchers and innovators to grow their ideas in any science and technology field by sharing them with their peers through conferences, meetings, trainings and short research stays. The ENTAN action and its network – currently gathering more than 100 members from over 30 European countries – aims at examining the concept of NTA, particularly focusing on NTA arrangements for reducing inter-ethnic tensions within a state and on the accommodation of the needs of different communities while preventing calls to separate statehood. The Action tackles recent development in the theories and practices of cultural diversity; minority rights (including linguistic and educational rights); state functions and sovereignty; conflict resolution through policy arrangements; policymaking and inclusiveness. The main objective is to investigate the existing NTA mechanisms and policies and to develop new modalities for the accommodation of differences in the context of growing challenges stemming from globalisation, regionalisation and European supranational integration. The network fosters interdisciplinary and multidisciplinary group work, and provides for training and empowerment of young researchers, academic conferences and publications, as well as for the dissemination of results to policy makers, civil society organisations and communities.

In particular, this thematic issue stems from the First ENTAN conference *Non-Territorial Autonomy as a Form of Plurinational Democracy: Participation, Recognition, Reconciliation*, held in Belgrade on 22 and 23 November 2019. The aim of the first ENTAN conference was to examine how and in what context modalities of NTA can improve the value of democratic participation in Europe, by enhancing the collective incorporation of national minorities. The conference also evaluated the relation between democracy and collective rights, and how NTA can improve minority recognition and foster reconciliation in areas of conflict, and addressed both theoretical questions and empirical case studies.

As this conference indicated, the problem of scattered minorities' representation is not new, and there have been historically, important attempts to create modalities of national self-determination that do not require the creation of nation states. Among the most influential are the National Cultural Autonomy (NCA) model developed by the Austrians Otto Bauer and Karl Renner, the latter being a former president of Austria. However, while NCA was for a period important and influential in Central and Eastern Europe, it had limited influence in Western Europe and other parts of the world. There are also many other modalities of NTA that emerge simultaneously in different parts of the world, showing that the problem of minority self-determination is recurrent in many different countries. Papers by Pavlović and Ćeriman, Shikova and Burç, responded to this call and were previously presented at the conference. In compiling this issue, the editors complemented these articles by two contributions of Máiz and Pereira and Arzoz, which were not part of the conference itself.

The first two articles revisit the main concepts in the works of the two NTA pioneers and founding figures respectfully: Otto Bauer's (1881-1938) concept of plurinational federalism and Karl Renner's (1870-1950) idea of national autonomy. Approaching the former, Ramón Máiz and María Pereira in their contribution "Otto Bauer: The Idea of Nation as a Plural Community and The Question of Territorial and Non-Territorial Autonomy" re-examine his idea of a nation as "a community of destiny that generates a community of character". They see in his writings a tripartite conception that is far from culturalist reductionism, accounting for a number of economic, cultural and political factors involved in a complex and open political process of national construction. As they show, Bauer's fundamentally ascribed to Austromarxist view that "what unifies the nation is neither the unity of blood nor the unity of culture, but the unity of the culture of the ruling classes"; accordingly, the only right way to achieve genuine national community is, according to Bauer, by including the totality of the working classes by means of their conversion into a national class and through access to participation in the production of cultural goods.

In identifying Bauer's novel and relevant contributions, the authors point to his rejection of the ethnic homogeneity of territories. In his understanding, it was necessary to account for a paradigmatically modern phenomena of many border areas in which human beings of different cultures and nationalities mix due to economic transition, migrations, wars etc. and have plural identities. With this in mind, Bauer proposes his redesigning of the State in a form of multi-national state, which "constitutes a complex and conflicting democratic challenge: the possibility of accommodating different nationalities on an equal footing". Such accommodation of minorities through mechanisms of territorial and non-territorial autonomy, in authors' view, is regaining prominence in today's world, both in political theory and in comparative politics.

Xabier Arzoz's article "Karl Renner's Theory On National Autonomy" complements the previous discussion by presenting the main concepts of Renner's theory of national autonomy: his ideas on the nation, the multinational state,

the role of the majority principle, and the need for nations' legal recognition by and within the state. Similarly to Bauer, Renner understood the nation as a conscious cultural community, and wished to transform the Habsburg empire into a democratic monarchy run through autonomous national councils as basic federal elements. Opting for a legal recognition of the nation in the form of self-administrative body within Habsburg Austria, Renner thus conceived national autonomy as "a kind of social contract between the nations and the state; the duty of nations to comply with their tasks as state subjects, on the one hand, and the duty of the state authorities to accommodate nations' rights to self-determination and shared rule, on the other".

As Arzoz explains, Renner believed that such restructuring of the state would prevent two dangers that still concern today's studies on federalism: the domination of majority over the minority, and autonomy leading to the secession of the minority nation. In short, the author persuasively argues that, contrary to common views, Renner was not opposed to territorial autonomy, considering it as the best but rarely achievable goal because nations mostly live in mixed communities. Thus, the author concludes that "Renner's treatise on national autonomy constitutes a fully realised legal theory for the multinational state, structuring the state as a nationality-based federation combining territorial and personal elements" which is still inspirational for accommodating diversity in multi-ethnic states.

Rosa Burç's "Non-Territorial Autonomy and Gender Equality: The Case of the Autonomous Administration of North and East Syria-Rojava" offers an interesting discussion of the most recent developments of the Kurdish question in Syria. According to Burç, the Kurdish-led autonomous entity called Autonomous Administration of North and East Syria (NES) – also known as Rojava – considers women's liberation as an imperative condition for shaping a democratic society and introduces a novelty in the role of women as active agents in building a plurinational democracy. As she claims, "the Rojava model goes beyond the Kurdish question and can be considered an attempt to resolve a democratic deficit of liberal democratic nation-states through bringing together solutions that address the intertwined subordination of minorities and women." Starting with a brief contextualization of the so-called Kurdish question within the scholarly context, the article praises Rojava as a valuable experiment in grassroots democracy, decentralization, women's autonomy and minority protection evolving from an on-going war. As she argues, within the Rojava model there are two parallel set of structures, institutions that include men and women and women-only institutions. While being represented in the women's confederation, all women continue to maintain their autonomy as members of the respective institutions they are coming from. Burç claims that the dynamical structure of Democratic Autonomy with a strong emphasis on women's self-reliance as a revolutionary act of emancipation for both men and women, is what distinguishes the Rojava project from other modalities of Non-Territorial Autonomy. Moreover, she ambitiously argues that "NTA can only fulfill its democratic promise of equal participation and representation,

if the definition of subordination is extended beyond the category of minorities, incorporating subordinate groups within society that are not necessarily defined through ethnic and religious subjectivities, as the example on women's representation in Rojava has demonstrated."

Aleksandar Pavlović and Jelena Ćeriman in their paper *Beyond the Territory Principle: Non–Territorial Approach to the Kosovo Question(s)* probe the applicability of the NTA arrangements on resolving the Kosovo dispute between Serbs and Albanians, with particular focus on cultural and religious heritage. According to their understanding, the Kosovo issue actually comprises three rather distinctive problems: 1) the status of Northern Kosovo which is ethnically Serbian and still maintains various ties with the Serbian state, 2) the status of Serbian cultural and religious heritage, chiefly UNESCO world heritage Serbian medieval monasteries and churches and 3) the fact that Serbian population in central Kosovo, where most of the mentioned monasteries and churches are located, are inhabiting small municipalities or enclaves of Serbs surrounded by vast Albanian population. As they argue, the NTA approach is not equally applicable to all of these issues; it is less applicable to the question of Serb-dominated Northern Kosovo which, as they rightfully point out, dominates the public discourse and overshadows the other issues.

In approaching this issue, they rely on the recent work of Palermo (Palermo 2015), who distinguishes an autonomy granted to a certain territory/territorial unit, from an autonomy granted to a specific ethnic group, that is, between autonomy granted *to a territory* and all of its inhabitants ('autonomy to') and autonomy granted *to an ethnic group* that constitutes the majority within a territory ('autonomy for'). Further, they examine the applicability of the NTA concepts to the Kosovo issue by analysing several key legislative documents and legal framework surrounding Serbian cultural and religious heritage in Kosovo, its preservation and protection, particularly of Serbian Orthodox monasteries, churches and other historical and cultural sites, and compare these legislation to the existing legal NTA solutions in Croatia and in Montenegro. Ultimately, they pointed to the potential to combine territorial (devolution of key functions to municipalities) and non–territorial approaches as a means of securing the rights of the remaining Serb population, notwithstanding the continued obstacles to its proper implementation. Their article, therefore, brings a welcome change in the halted Serbian–Albanian dialogue by focusing on the NTA approach to Serbian enclaves and heritage in Kosovo.

Last, but not the least, Natalia Shikova in her article "The Possibilities and Limits of Non-Territorial Autonomy in Securing Indigenous Self-Determination" analyses the NTA possibilities in reaching indigenous self-government and reveals the dilemmas about the applicability of NTA in securing the right to self-determination to the indigenous peoples, with particular focus on the Sámi people from northern Norway, Sweden, Finland and Russia. As she reminds us, indigenous people – defined as first or original inhabitants, or the descendants of the peoples that occupied a given territory when it was invaded, conquered or colonized – are neither majority not minority, but form a third

category. In researching the NTA features and its possibilities in securing indigenous communities' self-government needs, she focuses on the Sámi Parliaments functioning in the three Scandinavian countries (Norway, Sweden, Finland). Notwithstanding the firmer position of the Norwegian Sámi Parliament within the system of governance, she still concludes that, in general, the Sámi Parliaments are mainly consultative or advisory bodies rather than self-governing institutions. Even though she admits that these institutions helped in improving the legal position of the Sámi, they do not reach the goal of indigenous self-determination and have limited capacities, lack decision making power (in Sweden) or have a very limited one (in Norway) and do not secure the indigenous people granted right for use of the land and traditional territories. Thereby, she concludes that, notwithstanding positive examples and success of some NTA institutions related to the ingenious peoples (e.g. Sámi Parliaments), the question still remains if NTA holds sufficient potential for addressing the indigenous needs uphold by the internationally granted "right to land, territories and traditionally owned resources".

Taken together, all five articles set an ambitious task of theorizing the question of accommodating minority rights in a broader (supra)national and political framework, and exemplifying it on particular cases spanning from the question of Sámi people and indigenous rights in the Nordic region, over Austria-Hungary, Kosovo and the Balkans, to Syria and gendering the NTA and the Kurdish question. In approaching these issues of accommodating diversities, these articles examined various NTA arrangements and novel political forms ranging from national cultural autonomy, over democratic confederalism and plurinational states and plurinational democracies, to gender and women rights.

In approaching these issues, the implied premise was that NTA is not a universally applicable solution that could be easily applied anywhere and everywhere, but that it should better be seen not as a conceptual opposite to territorial autonomy, but as something that complements it, as is indeed the case in practice across a range of contemporary contexts in Europe and beyond (see: Smith, Ioannidou and Hudson 2020: 41). Thus, while these articles, particularly selected case studies, do not work on cases traditionally captured under the rubric of 'non-territorial autonomy', the understanding of this term had broadened considerably in recent years (see Malloy, Osipov and Vizi 2015), making it a useful framework within which to consider a whole range of issues across different contexts, be they socio-linguistic or pertaining to religious identity. In this respect, we believe that this thematic issue amply shows, as Smith and others (2020: 39) observe, that governance of ethno-cultural diversity remains a key task for all contemporary states. All this makes the questions considered by this thematic issue of *Philosophy & Society* vibrant and contemporary, and calls for further research in this field.

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Ramón Máiz and María Pereira

OTTO BAUER: THE IDEA OF NATION AS A PLURAL COMMUNITY AND THE QUESTION OF TERRITORIAL AND NON-TERRITORIAL AUTONOMY

ABSTRACT
This article presents a detailed analysis of the concept of nation in the work of Austro-Marxist Otto Bauer. In his view, the nation is conceived as an evolutionary process of political, open and plural construction. His work also unravels the connections of nation with a plurinational democratic state, which was at the time a novel political and institutional vision. The article argues that his work is very relevant today, with rising complexity of the new contexts of global society and the multiplication of migrations and refugees; and the need to respond through an accommodation of minorities through mechanisms of territorial and non-territorial autonomy. Much of these concerns form the substance of Otto Bauer's work.

KEYWORDS
Austromarxism, nation, national minorities, multinational state, territorial and non-territorial autonomy

The principle of self-determination requires conceptually a territorial solution. Its normative requirements (separate membership, stable composition and self-government) "require control over a territory where comprehensive decisions over the use of resources and other such matters can be made, as well as allowing membership of the group to be controlled" (Miller 2020: 105–106). Provided that peoples and territories do not overlap, causing injustice in other groups and oppressing minorities will be the norm (Stilz 2019: 250). So the principle of national self-determination, in its presumed "democratic" transparency, is extremely dangerous for minorities, since "it has the proclivity for the sacrifice of cultural minorities on the altar of national construction, homogenizing cultural communities through the conflation of ethnos with demos" (Nimni 2015: 63).

The forgotten work of Otto Bauer provides us with a concept of nation that not only allows to design a multinational federation, but moreover to elaborate a theoretical articulation of territorial and non-territorial autonomy. Distorted and rejected by the communist movement of the time, from the internationalism of Rosa Luxemburg (Luxemburg 1979) to the instrumentalism of Lenin

Ramón Máiz: Faculty of Political and Social Sciences, University of Santiago de Compostela; ramon.maiz@usc.es.
María Pereira: Faculty of Political and Social Sciences, University of Santiago de Compostela; maria.pereira.lopez@usc.es.

or Stalin, it would also be forgotten by the social-democratic tradition itself that, following Karl Kautsky's own incomprehension (Kautsky 1978), would uncritically assume the monist and centralist theses of the national state. The final failure of the reconfiguration of the Austro-Hungarian Empire as a plurinational federal system, as well as the impossible unity of the working class within a multi-ethnic state, would forever dictate the contributions of a work to be dispatched in future with the labels of "Culturalist theory" of the nation and "cultural autonomy" (Czerwínska 2005: 137).

Paradoxically, Bauer's theory of the nation would be termed "economistic" by much later thinking about nationalism, which considered it to be indebted to the Marxian paradigm of ultimate determination by the relations of production and social classes: "The nation as a result of the conditions of production of the life of a people." For others, on the other hand, especially in the Marxist tradition, it was always excessively "culturalist", lost in esoteric concepts such as "character" or "destiny": "The nation as a set of human beings linked by a community of destiny in a community of character." In contrast to each other, however, what surprises the eventual reader today is the sophistication of a vision of the national question from the "sociological method" and the "social sciences", which translates into scientificly complex social phenomena and complex situations, from the multiplicity of factors that shape the national collective identity (Blum & Smaldone 2016: XI), against the temptation of any materialistic or idealistic reductionism. In this article, we argue the substantive political nature of a theory that tries to articulate at all times an explanatory diagnosis of the national phenomenon, from the social sciences, with a consequent normative prognosis of plurinational accommodation in heterogeneous and plural societies. Thus, the interest of Bauer's work, as we shall try to demonstrate, goes far beyond the field of study of the history of political ideas and the innovative contributions of Austro-Marxism, and is prolonged in very illuminating analyses that, indebted to a political and intellectual context that is exceptional for many reasons (*Finis Austriae*), have little use for the current debates on the complexities of cultural, ethnic and national accommodation in the multinational states in the context of globalization. In this paper, we shall first analyse the main fundamental components of his explanatory theory of the nation as an inessential community, and then give an account of the normative and institutional consequences (both territorial and non-territorial) in the democratic redesign of multinational States.

1. The Idea of Nation as an Open Process of Nation Making

Once the commonplaces of nationalist and Marxist traditions of the time had been abandoned, what was Bauer's alternative concept of nation? His idea of "nation as a community of destiny that generates a community of character" ("Die Nation aus Schicksalsgemeinschaften wachesende Charaktergemeinschaft") (Bauer 1907: 98–99) has been the source of innumerable

misunderstandings and partial readings ("culturalism", "psychologism", "Hegelianism", etc.), and so this study will now systematically address its scope and nature. Given the importance of this concept in the formulation of the concept of community, both in terms of character and destiny, it is necessary to clarify with some precision its formulation by Bauer. First of all, it should be underlined that there are three concepts involved in the explanation of the processes of national construction by Bauer: 1) Cultural community, 2) National destiny, 3) National character. As will be shown presently, far from culturalist reductionism, the factors involved in the processes of national construction are, in his view, the three mentioned above: economic, cultural and political.

The nation, for Bauer, does not constitute a natural community; instead, a specific cultural community (*Kulturgemeinschaft*) arises from the processes of continuous social differentiation (Agnelli 1969: 132), from the evolution of the conditions in which human beings produce their vital sustenance and unequally distribute the result of their work. On the other hand, the transmission of cultural goods between generations gives rise to a shared destiny of the nation which translates into a relative community of character or *Charaktergemeinschaft* (Bauer 1907: 22). The material substratum of the nation ceases to constitute a kind of obscure natural background, which in Europe at the beginning of the century began to acquire unmistakable racist tones. For Bauer, the development of a national community is not explained by the alleged "natural hereditary transmission of physical qualities", but by the creative transmission of "cultural goods", both material and immaterial. Thus, in the explanation of the processes of national construction, two moments are articulated in, at the time, a very novel way:

a) the materialist dimension of the production and reproduction of existence (development of productive forces, relations of production, mode of production), with the qualitative changes implied by generalization and the incipient transformations of industrial capitalism. It should be emphasized that, for the first time, the process of constructing the national consciousness is derived not from a differentiated ethnicity that stretches back into the depths of time, but from the relations of production and class conflicts of the period;
b) the cultural dimension, that is, the specific cultural property of each nation, its intergenerational transmission, and the political struggles for inclusion and participation in its elaboration by the working classes.

Every national cultural community is always formed by reciprocal action between individuals and social classes, not as an effect of an immaterial or universal essence or substance that passively unifies them ("Volksgeist", "Seele", "Schicksal", "Geist", etc.). There is, therefore, no "firm ground" on which to stand (that "Das feste Land" that Herder longed for in the community), nor an ontological foundation to grasp, from which the political presence of the nation can be deduced. We are now, for all intents and purposes, in the world of

modernity, the one Marx characterized lucidly in the Communist Manifesto as that where "All that is solid vanishes in the air". Certainly, for Bauer, following the footsteps of Ferdinand Tönnies, the *Gemeinschaft* cannot be reduced to *Gesellschaft*, and the collective identity of peoples should not be considered the mere sum of competitive individualities. Similarly, the double meaning of Gemeinschaft, as elaborated by Kant in his *Kritik der reinen Vernunft*, was namely, a *communio*, a substantial static community, and a *commercium,* the reciprocal social interaction associated with the freedom of modernity, Bauer clearly opts for the latter, but in terms of historical materialism and class struggle. Community is, for him, a reciprocal action constitutive, and not merely expressive, of a prior community essence occurring previously in history, and in modernity; this community dimension is indebted to the new relations of production of capitalism and its specific political conflicts. These are the limits of Bauer's communitarianism. This is undoubtedly one of the most interesting contributions of his theory of the nation: from the capitalist relations of production that translate into class struggle, from the construction of a state that monopolizes political power to ends previously unsuspected and of the creation of a differentiated culture, although exclusive to the emerging classes, the nation is conceived not as a crystallized empirical fact, but as a contingent and indeterminate historical process. This is the permanently incomplete result of the interaction between the three factors already mentioned: economic-social, cultural and political. A process, therefore, which has nothing to do with the "immanent development of the national consciousness". In fact, it is a random, complex and multi-causal production of a "shifting national being" (Bauer 1907: 43).

Precisely contrary to what one might think, nowhere is this processual, open, non-teleological character of the Nation better observed than in the very concept of national character. The latter is postulated as a bridge between the cultural and linguistic dimension and the relations of production. Bauer elaborates his concept independently on the spiritualism of *Volksgeist* (Hegel, Herder) and on the idea of nation as a totality and metaphysical essentiality that inevitably unfolds in history (as Fichte did in his Reden an die deutsche Nation). His perspective is that of the nation as a set of shared and disputed characteristics (values, attitudes, myths and symbols), created by a cultural community of historical destiny in its particular material struggle for existence, yet devoid of any hint of "substantial appearance," of all "fetishism of the national character" (Bauer 1907: 112).

In this way, the national character assumes very precise features:

1) It constitutes the result of a *process* of national construction, and therefore an explanandum not an explanans (Leisse 2012: 238), that is, a factor that must be explained, since it is not a causal dimension of the national phenomenon (Bauer 1907: 27).
2) It is always *partial*: the community of character is relative, not absolute, it competes and interacts in each individual with other possible identifications, such as class or religion.

3) It is not permanent, but modifiable and *changeable* ("veränderlich") in the course of history, and is shaped in modernity, rather than on "common ancestry" from time immemorial, through a "new culture".
4) It is *plural*: the community of character does not imply homogeneity at all, but permanent interaction, pluralism and struggle for the inclusion of the working classes. The distance with the concept of nation as a unanimous organic totality of Fichte, constructed by ablating what is heterogeneous from the bosom of the people and from the exclusive tracing of "inneren Grenzen" or "internal frontiers" (Máiz 2012: 37), is clear here in unmistakable terms.
5) It *articulates interests and emotions*: Bauer insists, in the face of the theoretical body of classical Marxism, and the advances of psychology and Viennese psychoanalysis of the time, on the need to introduce into the explanation of nationalisms not only the material preferences of citizens, but also their affects, passions and feelings. The study of *national hatred* among majorities and minorities is a good example of this.

Thus, for Bauer, the nation is not an empirical fact crystallized once and for all in history, but is configured as a complex and open political process, contingent on the creation of a community that, devoid of metaphysical, cultural or racial substance, becomes, strictly speaking, a non-essentialist community: "From this perspective, the nation is not for us a frozen thing in time, but a process that is becoming" (Bauer 1907: 105). Or, equally, "the nation as the product of an always unfinished process that is continuously developing" (Bauer 1907: 106).

Hence, for Bauer, "the history of a nation cannot be closed at any moment", nor can pluralism and internal antagonisms be extirpated from it. The community of destiny, does not only 1) does not constitute an "homogeneity of destiny", but is also merely a common and conflicting experience of it; (Bauer 1907: 107). In this case, it is not only a question of the social and political changes that accompany them, but also of the national character. No trace may be observed in Bauer of that disdain for politics as an "artificial" and volatile sphere before the rocky naturalness of the nation, which Friedrich Meinecke already noticed in his day in the classic idea of a German nation, that *Deutsche Grösse*, by Goethe, Schiller or Humboldt (Meinecke 1963: 76). Nor can any trace of the "decisionism" and warmongering that characterized the German nationalist mutation after the war, starting with Ernst Jünger and the conservative revolution, be detected.

In short, Bauer explains the nation as the result of a process of national construction in which various features interact, which must be evaluated empirically in each concrete context and conjuncture: 1) economic factors (the conditions of human beings in their struggle for existence, the transformations of the relations of production and productive forces, modifications of labour relations in capitalism); (2) cultural factors (the intergenerational transmission of cultural goods and their changes through the contributions of emerging new

social classes); and (3) political factors (the configuration of the centralist state based on the "atomistic-centralist vision" (Renner 1899, 1994), and overlapping class and national conflicts). As we have already pointed out, this argument is politically decisive, since the history of nations is the history of the ruling classes, and national culture is nothing but the culture of elites, excluding the popular classes. Indeed, Bauer goes a step further: in fact, "what unifies the nation is neither the unity of blood nor the unity of culture, but the unity of the culture of the ruling classes" (Bauer 1907: 104). For this reason, the history of nations is, above all, the political history of the struggles for the expansion and transformation of the national cultural community. Only with progressive enlargement, with the ever-incomplete realization of the cultural community (Bauer 1907: 115), by including the totality of the working classes by means of their conversion into a national class and through access to participation in the production of cultural goods, may a genuine national community one day be reached.

However, this expansion of the national cultural community is by no means the inevitable product of economic evolution, or of intergenerational cultural transmission, but of the political mobilization of the working class and its radical reformulation of traditional national struggles. Thus, in contrast to the policy of conservative nationalism, Bauer postulates an entirely new national evolutionary policy, whose aim is not the nationalist closure on the borders of an own State, under the tutelage of the ruling classes, but the struggle for the "development of the entirety of the people into a nation" (Bauer 1907: 139). From this perspective, the relative enlargement of the national cultural community, undertaken by the proprietary classes in the wake of the bourgeois revolutions, will further the expansion of the nation towards the working classes through the triumph of democratic socialism. That is why this national evolutionist policy is the policy of the modern working class, and nor the naive internationalism of workers supposedly deprived of their country, neither the embrace of naive nationalism directed by the bourgeoisie, its interests and its values. Bauer argues that socialism cannot abandon the realm of the nation, in which the struggle for the hegemony of a country is solved, to nationalists, thereby postulating a strictly labour-focussed policy. But to penetrate this strategic field implies, in turn, the need for a radical liquidation of the essentialist concept of a nation inherited from the nineteenth century and its normative derivatives, the monist thesis equally shared, beneath its rhetorical antagonism, by the Principle of Nationalities ("one nation, one state") and the Principle of the national state ("one State, one nation") (Bauer 1907: 149).

2.The Nation as a Plural and Heterogeneous Community

It must be emphasized that, as a result of its non-essentialist character, the shared national cultural community does not translate into the pathological obsession with the homogeneity of the national field, even though it gives rise to "a community of destiny that generates a community of character". On the

one hand, for Bauer, “Community does not mean mere homogeneity” (Bauer 1907: 97); on the other, the community of destiny does not suppose blind “subjection to the same destiny”. Social and especially class differences are important and imply different levels of cultural appropriation and the “shared” national destiny, as well as very different versions and interpretations of the national culture.

However, in addition, Bauer gives an additional twist in his critique of the idea of nation as a holistic and homogeneous totality: in his view, the humanity of modern times is not divided into discrete nations, and therefore: 1) every individual belongs unquestionably to a single nation, and 2) each territory or state to a single nation. In this respect, it is necessary to remember that in the Austro-Hungarian Empire, the national groups in each part of the empire constituted a minority in the area which they controlled politically: the Germans, for example, represented only 36% of the population of Cisleithania and the Magyars did not reach 50% in Hungary. On the other hand, the Czechs (the majority in Bohemia and Moravia), Poles, Ukrainians and Slovenians aspired to influence politically Cisleithania itself (Nimni 2005: 3).

One of Bauer's most relevant contributions of the analysis of the national question, with the normative and institutional consequences that shall be assessed presently, lies precisely in the rejection of the ethnic homogeneity of territories, that is, in the questioning of the classical monist equation of the nationalisms of the nation state or against the nation state: one state = one territory = one nation = one culture. Bauer analyses the social scientific analysis and the normative consequences for the first time (preceded in it, within the legal field, by Karl Renner) of an empirical fact that put an end to the illusive assumption of ethnic-territorial homogeneity. In his understanding, it is necessary to account for phenomena that in modernity would only become more accentuated and widespread. First of all the existence of many border areas in which human beings of different cultures and nationalities mix and have two or more national identities. Or rather, the presence of countries in which massive migrations, caused by the economic crisis or the unequal transition from primitive to industrial capitalism, if not the arrival of numerous refugees from the wars, ethnic cleansing or genocide create in the Europe of the end of the Austro-Hungarian Empire a cultural, national and identity landscape much more variegated and complex than the one foreseen by State nationalisms, or the nationalisms that aspire to construct their own State in the service of a single nation, its culture and interests. These cases, which in their time Bauer considered significant (“non-meagre”), acquire capital political importance because they question from a new angle (the ensuing population and cultural movements) the aforementioned major equation of nationalist monism: one territory = one nation = one language. The presence of individuals whose nationality and culture are minority within the territory in which they reside, who belong to two or more nations, or who even do not belong fully and totally to any, gives rise to a “totally novel” phenomenon of minority or overlapping national identities.

From the primary establishment of the national state, but also from the beginning of nationalities, the civic status of these human beings (the product of diaspora, migration, and the artificiality of the drawing up of borders) becomes an intractable problem: they are very numerous in Europe, blur the national homogeneity of territories and, consequently, become "unwanted and distrustful", or worse, "in times of national struggles, subjected to assimilationist domination, when not despised as "traitors and turncoats" (Bauer 1907: 102). Thus, minorities and cultural mixed-race people constitute a challenge without a democratic response from the classic nationalist territorial assumption of self-determination and secession. The national cultural community presents here a doubly inessential nature, not only as a contingent result of a process of political construction, but also as a plural matrix of diverse cultural interpretations and overlapping of identities, rendering illusory any attempt at resolution through the application of the pure territorial principle, without engaging openly in the domination and oppression of minorities. Moreover, the territorial principle, by implying that each territory is owned by a national majority and, where it is the case that the majority and national minorities inhabit the territory, leads to the inevitable oppression of minorities by the majority: "The pure territorial principle everywhere subjects these minorities to the majority" (Bauer 1907: 295). In Renner's words, the territorial principle states that "if you live in my territory you are subject to my legislation and my language" (Renner 1899, 1994: 30). Thus, the construction of territorial and sovereign national states, old or new, involves declaring all foreigners who cross borders as being outside and beyond the rule of law. For this reason, the issue of minorities is a priority for Bauer, who devotes many pages to his quantitative and qualitative study within the Empire, noting that an increasingly smaller part of the population lives in communities where various nationalities and cultures do not co-exist. The strict application of the territorial principle in a time of mass migration implies the endemic inequality of rights and the domination of majorities over minorities and, ultimately, owners of the means of production over working migrants, as Karl Renner liked to specify: "The domination of the sedentary minority over the emigrant majority" (Renner 1899, 1994: 43)

3. The Critique of the Principle of Nationalities and the Proposal of Plurinational Federalism

The explanatory theory of the nation from the "sociological method", "social sciences" and "historical materialism" in Bauer has profound consequences for his normative political theory and the institutional redesign of the State from the point of view of the territorial organization of power. The first is, of course, a radical double criticism of the centralist territorial state, the model of the République une et indivisible, but also of its supposed "democratic" alternative in the Principle of Nationalities and unilateral self-determination. From the analysis of the nation as an open and plural process, Bauer can only

denounce as voluntarist, unsatisfactory and incorrect the naturalist and monistic fallacy that preaches that a state should embrace a single nation, as well as its specular investment in the postulate that the only outcome for every self-respecting nation should be the attainment of an independent sovereign state.

The logical corollary of his theory of the nation, for Bauer, is that neither the nation state ("Nationalstaat") constitutes the undisputed rule of the territorial organization of political power, nor can the multinational State (*Nationalitätenstaat*) be considered a mere historical pre-modern residue or an Austrian exception doomed beforehand to failure. In contrast to the different versions, from Herder to Fichte, of the dualism that regards the State as an artificial entity and the nation as a natural entity, our author argues that the national state, in the service of "its" own nation, in no way constitutes a natural formation, since both nations and States are contingent results of equally artificial historical, economic, cultural and political processes. On the other hand, the multi-national State does not constitute in any way an atavistic political structure, destined inexorably to its disintegration in multiple national States, as Bauer counters, the evolutionary historical tendencies that explain the principle of nationalities, without any idealization, with the counter-tendencies that the multi-national State retained in Austria until the Great War (Bauer 1907: 153).

The multi-national State, however, constitutes a complex and conflicting democratic challenge: the possibility of accommodating different nationalities on an equal footing, self-government and mutual respect within the same State implies a radical reform of the Imperial structure characterized by inequality and domination among the nations and to reach a difficult pact on an equal footing between nations. Bauer's analysis is prolific and, given the scientific-social objective of his work, not as detailed and precise as that of Karl Renner. Yet, some of the basic conditions that it posits to democratically redesign a multi-national state may be synthesized:

1) If the multi-national State is not conceived as a utopia ideally opposed to the real world, but as an immanent conception that takes on impulse and is constructed from the own "internal evolutionary tendencies in Austria" (Bauer 1907: 332), the undeniable empirical fact of multi-nationality increasingly demands the need for a new covenant of peaceful coexistence among the nations that comprise it, a programme of institutional reforms that will overcome the deadlock of national struggles, based on the very different reality of the different nationalities.
2) That the centralist-atomistic liberal view of the Nation State be replaced by an "organic conception," that is, by the sovereignty shared among various nations: L'ennemi, c'est la souveraineté, wrote Karl Renner, by the recognition as subjects of law not only of the individual citizens in their relationship with the State, but also of the juridical-political personality of the internal national communities;
3) That these communities be understood as nationalities, in the sense specified above: communities of culture and destiny, plural, contingent

rather than as ancient territories, kingdoms and provinces ("Königreiche", "Kronländer", "Länder"), endowed with "historical rights". In *Staat und Nation*, Renner had already stressed that they had become not only authentic "impossible things", because they constituted neither social nor national individualities, but antidemocratic structures of domination which, by integrating several nations with various privileges, were constitutively based on the systematic oppression of national minorities by the majority.

4) That the multi-national State be organized in a federal way, as a State of States, through self-government and shared government, although through a federalism that recognizes and accommodates multi-nationality, that is, as a federal multi-national State, such as plurinational federalism, replacing the obsolete kaiserlich und königlich structure (Bauer 1907: 377).
5) That the defence of the federalization of the multi-national State be not only based on (1) the denunciation of the secessionist illusion of the fragmentation ad infinitum of national States of less territorial scope and the lack of a solution to the problem that all, in turn, have their own minorities dominated by the new national majority; but (2), on the assumption that, from the interests of the working classes, it would provide a more favourable political scenario for their demands and a broader economic space in which to advance their social progress, and lead and coordinate their struggles.
6) From this point of view, for Bauer, the nationale Autonomie is the right way for the self-government of nationalities (Bauer 1907: 278), because, in contrast to the national policy of power of the ruling classes, the working class can oppose their economic, social and political demands, together with the national objective of expanding the cultural community to the masses, towards an authentic and inclusive public community system.
7) Finally, the federal multi-national State that Bauer postulates also builds from other additional and hardly insignificant features:

   a) Firstly: democratization. From the revaluation of democratic socialism posited by Austro-Marxism, the democratization of the state of the old Habsburg monarchy becomes the central axis guiding the reform of the multi-national State as a "democratic multi-national state." The federal theory, deeply Republican in origins, requires the democratic quality of both the Union as a whole, and the Member States. However, democracy itself must be reformulated in a complex sense in order to cope with multinational accommodation. In the first place, it must assume the dogmatic articulation of the (individual, political and social) rights of citizens, with the collective rights (cultural and political) of the nations *qua* nations within the federation. Secondly, it must guarantee the demand for guarantees of democracy and

internal pluralism in each of the nationalities integrated in the federal multi-national State. That is, the federal multi-national State does not dissociate itself from the democratic quality of the federated states (self-government must be carried out through representative mechanisms chosen by universal suffrage, equal and secret, a citizenship endowed with rights and according to a proportional electoral system, etc.). Above all, federal democracy must reconcile the rule of majority decision with respect for national minorities.

b) Secondly, it reinterprets the unilateral right of self-determination leading to secession, in keeping with the Principle of Nationalities, as the Principle of internal self-determination ("innerstaatliches Nationalitätsprinzip") (Bauer 1907: 382). That is, as Karl Renner emphasizes in *Das Selbstbestimmungsrecht der Nationen* (1918, 2015: 89), no indisputable *ius secedendi* exists, but the right to self-government, to political autonomy endowed with broad powers and guaranteed constitutionally, does. This, in turn, translates into a vision of horizontal and non-hierarchical, "shared sovereignty" against the classic Westphalian concept and its pretensions of indivisible, unlimited and untransferable sovereignty. Hence the very core of multinational federalism that is built on a double axis: self-government and shared government, unity and national diversity. In this model, there are no absolute communities: all of them are partial and overlapping, and shared sovereignty is exercised through the self-government of one's own powers and shared government in matters of common interest.

c) This internal self-determination, this autonomy, however, is not limited to the reductive scope of the development by nationalities of their own culture. Contrary to what has often been affirmed, we must emphasize that Bauer's proposal refers not only to a mere cultural autonomy of nationalities, but to substantive self-government in fundamental subjects (Czerwinska 2005: 185). Political autonomy (Bauer 1907: 277), which generates an authentic sphere of political power in its own affairs ("eine rechtliche Machtsphere") (Bauer 1907: 438), which is projected into broad capacities of "self-legislation and self-administration" ("Selbstgesetzgebung und Selbstverwaltung") (Bauer 1907: 451), and which covers economic, educational, linguistic, official and even military matters in certain respects.

d) Thirdly, because of the undesirable effects (oppression of minorities) of the application of the pure territorial principle, Bauer postulates the possibility of introducing the *non-territorial or personality principle*, also elaborated in the day by Meinecke in *Weltbürgertum und Nationalstaat* (1907) and by Renner in *Staat und Nation* (1898) and *Das Selbstbestimmungsrecht der Nationen* (1918). However, neither Renner nor Bauer consider the principle of personality as an alternative to the territorial principle, but as an element of correction and

complementary to the first. Its proposal consists in a nuanced articulation of the territorial principle and the personnel. For example, through free individual declaration of nationality and the abandonment of ethnic-racial ascription, territoriality and personality can be combined in plural contexts. In no case is the "pure implementation" (Bauer 1907: 312) of the principle of personality postulated, except for the mechanisms test that, for example, favour the presence of territorial representative bodies together with the possibility of cultural participation (linguistic policies, educational system, administration, etc.), in the sense of reasonable accommodation, by applying the personal principle to the minorities. Thus, among others, dual management mechanisms are proposed in the case of mixed cantons, which allow minorities the right to be cared for in school and in administration in their own language (including linguistic federalism, that is, languages considered as heritage of the whole Union). Unlike, for example, the millet of the Ottoman Empire, autonomous national minority communities, instituted by the principle of personality, are organized here: 1) under democratic rules, and 2) based on individual express consent and internal democracy. These and other proposals gave rise to an intense debate, which was soon cut off by the war, on various formulas of reasonable accommodations that are very flexible and varied, personal and territorial, and which was hardly implemented at the end of the Empire. This accommodation, however, did not exclude the eventual assimilation of some minorities. But unlike Kautsky, who conceived assimilation as the obligatory adoption of the language and culture of the majority, Bauer regarded it as a long process and the eventual result of respect for pluralism and diversity, avoiding by all means the national coercion of the majority over the minority (Bauer 1912, 1980: 621).

Finally, it must be pointed out that this reinterpretation of the right of self-determination as internal self-determination, as territorial and non-territorial autonomy, derives from the pluralistic condition of the federal multi-national. State as a superior ethical and political model against the both naive and oppressive principle of nationalities, although the mechanism of secession does not resolve the horizon of political possibilities. This last option remains a remedial right before the failure of federal state of nationalities. That is, instead of constituting the eminent and unique strategic political objective of the solution to the problem of nationalities and their demands for self-government, secession remains for Bauer as a final option, negotiated and not unilateral, in the event of the repeated impossibility or irresolvable violent conflict (genocide, ethnic cleansing, war, etc.) of multinational federal accommodation. In this sense, it is symptomatic that, even in 1917, Bauer rejects self-determination as a universal political principle, although he does accept it under the critical circumstances of the moment, in the case of the Czech Republic and Poland.

The idea of multinational federalism continued to be the rule for him, and the principle of self-determination was the exceptional outcome in response to an irremediable political failure.

Behind the dangerous chimera of an imaginary world of homogeneous and sovereign national states, serving the interests of a single national majority, the reality of national, ethnic and cultural pluralism not only continued its course in history, but in late modernity increasingly grew. In the new context of global society and the multiplication of migrations and refugees, the ideas of multinational federalism, losers at a given moment, but replete with arguments, concepts and institutional solutions to the problems of collective action, may contain valuable contributions. This is precisely the case of Otto Bauer's work. The accommodation of minorities through mechanisms of territorial and non-territorial autonomy is regaining prominence in today's world, both in political theory and in comparative politics (Nimni et al. 2013; Malloy & Palermo 2015; Malloy et al. 2015).

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Ramon Mais i Marija Pereira

Oto Bauer: ideja nacije kao pluralne zajednice i pitanje teritorijalne i neteritorijalne autonomije

Apstrakt

Ovaj članak predstavlja detaljnu analizu kocepta nacije u delu austrijskog marksiste Ota Bauera. U njegovom viđenju, nacija je osmišljena kao evolutivni proces političke, otvorene i pluralne konstrukcije. Njegovo delo takođe otkriva i veze između nacije sa plurinacionalnom demokratskom državom, što je u njegovo doba predstavljalo novu političku i institucionalnu viziju. Zastupa se stanovište da je, danas, sa sve većim usložnjavanjem novih koncepata globalnog društva i umnožavanjem migracija i izbeglica – kao i potrebom da se na to odgovori putem prilagođavanja manjina kroz mehanizme teritorijalne i neteritorijalne autonomije – njegovo delo i dalje veoma relevantno. Sva ova pitanja umnogome čine samu suštinu dela Ota Bauera.

Ključne reči: Austromarksizam, nacija, nacionalna manjina, multinacionalna država, teritorijalna i neteritorijalna autonomija.

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Xabier Arzoz

KARL RENNER'S THEORY OF NATIONAL AUTONOMY

ABSTRACT
Karl Renner's theory of national autonomy has not been sufficiently taken into account by scholars due to difficulties in its reception and puzzling content. Neither liberal nor communitarian, his original theory combines individual rights with collective rights, territorial autonomy with personal autonomy, classical federalism with establishment of nations as constituent parts of the state. This paper will introduce the reader to Renner's main concepts. It will start by presenting Renner's ideas on the nation, the multinational state, the role of the majority principle, and the need for nations' legal recognition by and within the state. Then, Renner's core notion of national autonomy and its organisation through the personality principle will be discussed. Further, the paper deals with Renner's concept of the representation of national interests at the federal or supranational levels. Lastly, it sums up the discussion and draws conclusions regarding Renner's theory of autonomy in general.

KEYWORDS
national autonomy, Austria-Hungary, minority rights, federalism, multinational state, principle of personality, territorial autonomy, nation, self-determination, majority rule

Introduction

The Austro-German social-democratic politician and theorist Karl Renner (1870-1950) published for over two decades (1897-1918) on national autonomy in articles, pamphlets, and books. Such dedication culminated in the book, *The right of nations to self-determination* (Renner 1918)[1] – which was actually the second, expanded edition of a book published under a pseudonym in 1902 (Renner 1902), in which he gives the most complete account of his theory on national autonomy for the multinational state, where it becomes structured as a nationality-based federative state combining both territorial and personal elements.

In the hundred years that have lapsed since its definitive formulation in 1918, Renner's theory on national autonomy has often not been duly considered. Various factors may have contributed. First, although he intended for his theory to be applied to any nationally-plural state, its technical formulation was based on the social reality of the Austrian part of the Habsburg dual monarchy, a reality which was profoundly transformed just a few months after

1 A second part covering the institutions of national autonomy was never published.

Xabier Arzoz: Professor, Faculty of Law, National University of Distance Education (UNED), Madrid; xabier.xarzoz@der.uned.es.

the book was published. After the end of the World War I, the small Republic of Austria became an ethnically homogenous state, and there was no need for any multinational restructuring. Though Renner lived for another thirty-two years and abandoned neither politics nor writing, never again did he write on national autonomy or the multinational state.

Second, the reception and dissemination of his work has not been fortunate. The book containing his fully realised legal theory for the multinational state was published under wartime conditions and, therefore, did not follow a normal course. It was never reprinted, neither separately nor in a compilation, despite Renner's long and highly successful political career (see Saage 2016). There was obviously no interest, during the First and Second Republics, for Austria to revive the nationality debates of the Habsburg era.[2] Furthermore, until recently the book was only available in German.[3] Therefore, access to the original formulation of Renner's legal theory on national autonomy was not easy, both due to language and the scarcity of editions.[4] This may explain why many scholars, even German-speakers, do not reference the book at all or refer only to its first, non-definitive edition.

Third, Renner's theoretical concepts (the legal recognition of nations, nations as constituent parts of the federative state, collective rights, personal autonomy, objections to majority rule) go against mainstream liberal political and legal theory and risk becoming an oddity (Kimminich 1989: 436; "so verläßt die personale Autonomie auch den Boden der herkömmlichen allgemeinen Staatslehre"). In the last half century, Renner's name has been associated largely with Austro-Marxism and, especially, with Otto Bauer's theory on the nation (see Bauer 2000). In most cases, scholarly publications only make passing reference to Renner, and if discussed at all, the value and feasibility of Renner's legal model for national autonomy tends to be summarily discarded, generally with sweeping arguments.

This article aims to give a fresh look at Renner's theory on national autonomy. Only if we know exactly what he meant, may we assess its merits and potential applicability. The article focuses on the definitive and most legally

2 Throughout this paper, the expression "Habsburg Austria" will refer to the sum of all crownlands represented in the Imperial Parliament in Vienna, which is to say, the so-called Austrian part of the Habsburg dual monarchy externally identified as Austria-Hungary.

3 Nevertheless, the first edition of the book (Renner 1902) was translated into Russian in 1909; the previous work *Staat und Nation* (Renner 1899) was also translated into Russian in 1906: see Schroth 1970: 35, 41. Recently, it has been partially translated into Spanish and Catalan: see Renner 2015 and Bauer and Renner 2016.

4 By contrast, Renner's other important theoretical work, on the social function of civil law institutions, whose first edition is from 1904 and the second and definitive edition from 1924, has had two reprints in German (1929 and 1965), three editions in English (1949, 1965 and 2010), one in Russian (1923), one in Croatian (1969) and one in Italian (1981). See Schroth 1970.

complete presentation of Renner's theory as rendered in *The right of nations to self-determination*.

Renner did not develop his notion in an ideological vacuum. Two main political influences must be mentioned. The first, the rich reformist liberal-constitutional tradition of Habsburg Austria, which paid considerable attention to nationality questions and whose greatest achievements include the stillborn Constitution of Kremsier of 1949, the December Constitution of 1867 and its hallmark, the constitutional guarantee of equal rights for all Austrian nationalities. Renner continued that reformist tradition[5].

His second influence was his militancy in the Austrian Social-Democratic Labour Party. In 1896, the year before he started publishing on national issues, the Congress of the Second International in London passed a resolution supporting "full autonomy for all nationalities."[6] By 1899, Renner had already published under pseudonym the core of his ideas on national autonomy.[7] Later that same year in Brünn/Brno, the All-Austrian Federative Social-Democratic Party approved a political program for constitutional reform of the Austrian part of the monarchy. It included the following points: Austria should become a democratic, nationality-based federative state; nationally defined self-administrative bodies should replace the existing crownlands, and legislative and executive powers should correspond to national councils; all national self-administrative bodies should integrate into a national union for the management of each nation's issues.[8]

The nationality-based federative state, nationally defined self-administrative bodies, national councils, and national unions are all crucial notions to Renner's theory. Through his intellectual capacity, he developed the Brünn/Brno program's inspirational but vague concepts into a theory on national autonomy for Austrian social democracy that could serve for constitutional reform of Habsburg Austria.

From Austria-Hungary to the Organisation of World Society

Renner regarded Austria-Hungary as "Europe's most peculiar state," and aimed to transform it into a "Great Switzerland," with a monarch at its head. In his view, the multinational state of Austria-Hungary, restructured following his ideas, could be a model for world democratic society of the future (Sandner 2002: 9). Nevertheless, for political reasons his proposals focused on the

5 See Kann 1950 for an introduction to the projects to reform the multinational state. The works of liberal politician and author Adolf Fischhof were influential for Renner's theory: see Lagi 2011.

6 The resolution was a compromise to avoid an explicit resolution supporting Polish independence. See Snyder 2018: 73-89.

7 Renner 1899. The text has been reprinted by Pelinka 1994: 7–58. For an English translation, see Renner 2005.

8 On the drafting of the program, see Mommsen 1963: 314–338. For an excerpt of the resolution, see Lehmann and Lehmann 1973: 73–75.

Austrian part of the dual monarchy. He expected Austrian reforms, by example, to have a moral impact on Hungary, which at that time constituted a separate national state (Kann 1950: 160).

Renner was not only convinced that the preservation of a vast economic space corresponded with workers' real interest, he also thought that the destruction of Austria was not desirable in and of itself (Panzenböck 1985: 10). Since most of the Austria-Hungarian territory was ethnically heterogeneous, he believed that the creation of national states would only reproduce the same problems already begging to be solved— a fear which indeed came to pass with time. Renner defended the integrity of the dual monarchy —his ideal framework for supranational integration – until the end of the World War I (Panzenböck 1985: 36). This was not monarchist or Habsburg fascination, but rather the taking advantage of political circumstances for both social-democrat and national autonomy objectives. When it became clear that the preservation of Austria-Hungary and its alternative – a Danubian federation – have become politically impossible, he settled, as most socialists and liberal German Austrians did, for the second best option: the incorporation of German Austria (*Deutschösterreich*) into Germany — an option that was, nevertheless, vetoed by the Treaty of Saint Germain. When, in 1945 as a part of Hitler's legacy, the incorporation of Austria into Germany had proven definitively impossible, he then opted for the creation of an Austrian state identity.

His recipe for constitutional reform in Habsburg Austria, and any other multinational state, was democracy and autonomy: democratisation of the political structures of the state, and national autonomy for the cultural communities existing within the state borders under a federal scheme. All structures had to be democratic: the territorial and national self-administrative bodies as well as the parliament and executive branch for the whole of the state. Renner was a reformist; he defended a democratic evolution strategy with a view to reducing national and class antagonism (Panzenböck 1985: 36; Lagi 2011: 124).

His commitment to democracy is beyond doubt. He wrote: "A group of people can only be governed in one of two ways, and only if each of those forms of government are implemented consistently and without hesitation: through absolute rule or democratically. Any intermediate solution must be excluded; any step away from either is harmful." (Renner 1918: 251)[9] He wrote intensely on electoral reform before universal male suffrage was instituted in 1907, and one of the first legal measures he personally drafted and got passed in November 1918 as the head of the chancellery was the extension of suffrage to women.

Nevertheless, some authors have criticised Renner for not having a democratic theory of his own or for not being interested in democracy as a system of government (Pelinka 1989: 56 ["demokratietheoretisch desinteressiert"]; similarly, Busekist 2019: 557–558). This criticism is unfair and, above all, inexact. His whole theory on national autonomy is a complete amendment to liberal democratic theory (correctly, Villers 2016: 927). It must be stressed that

9 All quotations in English from the German original are the author's translation.

he did not purport to replace the individual with the nation as the cornerstone of democratic society nor constrain the exercise of individual political rights within the confines of nations (otherwise, Villers 2016: 927, 937), but rather to integrate both into state architecture. Renner stressed the difficulties of majority rule in multinational societies. In fact, in the second and definitive edition of his classical work *Of essence and value of democracy* (1929), Hans Kelsen includes a paragraph on the "natural limits" of majority rule that recalls Renner's personality principle.[10]

The Nation within the Multinational State

Austro-Marxists were the first stream of thinkers to place the nation – understood as a cultural entity – at the centre of legal reflection on the state. Renner wrote that "the social democrat believes that the nation is indestructible and does not deserve to be destroyed." (Renner 1918: 23)

Renner understood the nation as a conscious cultural community, "a community of intellectual and emotional life," "of thought and feeling and the expression of thought and feeling: the national language and literature in which this unity is embodied." (Renner 1918: 74, 101–102; Renner 2005: 25). For him the national idea is not supranatural, but a causal product. Unlike Otto Bauer, Renner did not elaborate an original theory on the nation, nor did he intend to, for he was concerned – as his 1918 book clearly shows – with the *legal* structuring of his multinational model, therein his real contribution.

The Nation and the State

Renner aimed to organise nationality within the state to prevent two dangers that still concern today's studies on federalism: that the majority wield political domination over the minority and that autonomy lead to the secession of the minority nation (Langewiesche 2008: 100).

In Renner's view, the nation-state is not undesirable in and of itself; just the opposite, "it is the greatest resource and strongest demand for the nation [...] in the case of nations settled in a compact territory where that territory constitutes an appropriate area from both an economic and defence standpoint." (Renner 1918: 134) Nevertheless, he argued that, in most cases, this was merely a fiction. Very few are real nation-states; most are merely "nationality states" that deny national diversity within their borders.

The nation-state is "one of the possible solutions to the national question, a solution of blood and steel, through the demarcation of states by international law." However, it was not an adequate instrument to solve the question

10 According to Groß 2007: 309, this is an important aspect of Kelsen's work. On the relationship between Karl Renner and Hans Kelsen see Lagi 2007: this author argues the influence of Georg Jellinek and Karl Renner on the formation of Kelsen's democratic and liberal sensitivity.

of nationalities in Habsburg Austria, since the nation-state "does not suppress national conflicts when they include foreign minorities, but rather produces them and deepens them." (Renner 1918: 109) The nationalities state is the only one that actually safeguards political freedom and the equality of nations. For Renner, the future belonged to the nationalities state, not to the homogenous nation-state, which he considered too small to carry out its functions in the coming world economy.

Renner believed the national question could be neutralised through the disentanglement of national interests from those of a social or economic nature. Issues of national interest cannot be solved through majority rule. Consequentially, the state must confer competence on those issues – and only those – to the nations, who should be empowered to decide autonomously by means of public law corporations. Once social and economic interests have been separated from those concerning the nation, the central institutions of the state can manage the former.

The nation and the state have different areas of focus. The state is more of an economic community than a national one; it must comply with its economic, social, and humanitarian tasks regardless of national culture. Therefore, it has priority over the nation. "Nations achieve their objectives over centuries; they can always wait. The worker, however, has to go out and find work and bread on a daily basis. Orphans and the elderly need to eat everyday; they can never wait." (Renner 1918: 104)

The state fosters material culture and the nation, spiritual. Nations are responsible for public instruction, art, and literature. This means that, at the very least, they run national schools, universities, museums, theatres, etc.

Renner conceded that since public instruction also has to do with the essential conditions for material culture, the state should establish an educational minimum that all nations must provide, and safeguard said standard at each educational level in addition to guaranteeing the necessary educational resources for poor, less-developed nations.

The Nationalities State and Majority Rule

Renner's defence of the nationalities state included criticism of a sacred liberal principle: majority rule. In democratic systems, the law is the expression of the majority. Therein lies no problem whatsoever if the people, though a plural unit, only have one singular group identity. However, when the people have more than one group identity, the majority may represent a transversal political majority within the state, but may also represent the majority of the majority nation within the state, in other words, the decisions of the majority nation. Therefore, for Renner, when the state brings together various nations, the principles of political freedom and equality cannot truly be achieved but through the nationalities state; "when political parties represent nations, that weapon of combat [the election] becomes useless because the number of followers of a national political party cannot increase over the demography of the

nation it represents, even if election propaganda is passionate. For this reason, the struggle of minority nations will not lead to victory. Even still, struggle does not disappear, just the opposite, it intensifies." (Renner 1918: 137)

Criticism of majority rule in multinational contexts for reasons other than anti-parliamentarism was not exclusive to Renner or to Austro-Marxism; it belonged to the *acquis* of ideas also common to many Austrian liberal thinkers, who understood that the political recipes of classical liberalism would not work satisfactorily in a multinational political entity such as Austria.

Legal recognition of the nation

The constitutional law of late imperial Habsburg Austria recognised equal rights to nationalities.[11] Renner criticised this constitutional entrenchment since nationalities lacked legal personality. For him, the main task of the political reorganisation of the monarchy was the legal establishment of the nation as a legal person.

Each nation should occupy its place within the nationalities state as a personal public-law corporation. Renner makes an analogy to the individual's legal position. The individual has freedoms as a human being and political rights as a citizen. Similarly, the nation would also have a double condition as both subject and body of the state. As a subject, the nation enjoys freedom before the state and exercises its right to self-determination, but this status imposes on it certain limits, for instance, the waiving of *ius nullificandi* and *ius secedendi*. In its condition as a body of the state, the nation takes part in both the local and the central authority and rules jointly with other nations of the state, all while exercising its right to shared rule. National autonomy is only half of a nation's right in the nationalities state since it also includes proportional shared rule (Renner 1918: 128). Both autonomously and as a body of the state, the nation enjoys equal rights.

Legal recognition of the nation, through the conferral of a public-law legal personality, solves two relevant legal problems for which classic legal theory has no solution; the nation as a legal person can be both the holder of collective rights and accountable for infringements and wrongs. Attributed a public-law legal personality, the nation, through its self-administrative bodies, is able to directly assert itself against members of its community – if, for instance, they infringe upon the duty to contribute to sustaining the expenses of the national corporation –, against members of other national communities – if, for instance, they violate the nation's right to a collective reputation –, and against territorial bodies, other national corporations, and the state itself – if they impinge upon national competences.

11 According to Article 19 of the State Fundamental Law on the general rights of citizens, "all nationalities in the state enjoy equal rights, and each has an inalienable right to the preservation and cultivation of its nationality and language. The equal rights of all languages in local use are guaranteed by the state in schools, administration, and public life." On this key constitutional provision, see Stourzh 1985; in English, Mazohl 2014.

For its members, belonging to a nation implies a range of rights and duties via the national body, but it never becomes a political community; the source of political rights remains the state. Therefore, one might add, the risk for political domination and oppression within the minority group appears relatively minor.

The Right to Self-determination

Before World War I, Renner and Bauer had never demanded more than national autonomy for Austrian nationalities, but while Bauer changed his mind in the last year of the war in response to changing circumstances, Renner maintained his views on this and other points. His nationality policy included the preservation of the monarchy as an economic and political space (Panzenböck 1985: 9), and his notion of the right to self-determination was the antithesis of the "principle of nationalities," at least in its absolute understanding as a principle leading to the creation of new states – to each nation, a state. For this idea, Renner opposed the principle of personality as a basis for the internal organisation of the state.

Renner considered that both the state and the nation have rights and that the key is to draw the demarcating line between the rights of the whole state and the nation's right to self-determination. The nation's right to self-determination does not undermine state sovereignty since Renner understands the former as autonomy, not sovereignty. The nation and the state do not stand legally at the same level: the state is a sovereign power, the nation, a subordinate one (Pierre-Caps 1994a: 417; Pierré-Caps 1994b: 435).

The nation's right to self-determination does not include secession, since nations do not possess *ius secedendi*—at least, he adds ambiguously, "as long as the legal community continues." (Renner 1918: 150) As a scholar and reformer in Habsburg Austria, Renner defended that the right to self-determination only dealt with the internal organisation of the (multinational) state. Thus, he anticipated an important distinction that, after World War II, international law scholarship would establish between internal and external self-determination: the former refers to autonomy, the later to secession.

Certainly, after the collapse of Austria-Hungary and as a politician of the Republic of Austria, he envisioned, on some occasions (1918, 1938), what could be considered the external exercise of the right to self-determination—for the reunification of the German population into one state, but he only dared to do so when there was a propitious context, never when it would have run against international law or politics (1919-1920, 1937, 1945). For Renner, the external dimension of the right to self-determination was more of a political expedient than a legal instrument; it depended on moments of opportunity. There was no contradiction between the scholar and the politician (see also Busekist 2019: 10–15; otherwise, Guber 1986).

The Content of National Autonomy

For Renner, national autonomy based on the personality principle holds the key to a new political society: the nationalities state. National autonomy is conceived as a kind of social contract between the nations and the state; the duty of nations to comply with their tasks as state subjects, on the one hand, and the duty of the state authorities to accommodate nations' rights to self-determination and shared rule, on the other, constitute reciprocal checks and balances to the extent that one without the other loses its value and force. If nations refuse to assume their duty, the legal link between them and the state breaks, to be replaced by a simple power struggle (Renner 1918: 128).

Renner proposed building the state *with* the nations. In his view, the Austrian constitution could not be blind to the state's most relevant political fact: the existence of several national realities. He wished to organise nationalities as constituent parts of the state.

Renner's national autonomy model operates in nationally heterogenous territories, in which territorial autonomy is not possible or not enough. He does not exclude territorial autonomy as such; what he rejects is territory as the sole basis for the right to autonomy (Pierré-Caps 1994a: 404). His proposal for constitutional reform combines territorial and personal autonomy (Panzenböck 1985: 3; Mommsen 1963: 54). Many of Renner's critics and detractors, both contemporary and succeeding, including most of the leading figures of the social-democratic party, have failed to see that his proposal did not limit itself to the application of the personality principle, nor to the entrenchment of a handful of cultural rights; national identity was attended to through the formation of institutions of power (for contemporary objections, see Snyder 2018: 148).

In Renner's work, the territorial plan for the federation is not as well defined as that of the individual. It can be argued that reform of territorial organisation of Habsburg Austria allowed for several possibilities, as the many projects published before the end of the monarchy illustrate. What seems beyond question is that Renner was exceedingly critical of the existing territorial division, the division into seventeen crownlands. He defended the territorial integrity of the Habsburg monarchy, not of the crownlands. The crownlands were the internal enemy of the monarchy, the most serious obstacle to a solution to the national problem and, therefore, inadequate and dangerous for extended territorial autonomy; nothing was more wrong than the idea of recognising autonomy to the "historical-political individualities" just because they had had it before (Renner 1918: 80–81, 246).

Instead of the crownlands, he proposed the creation of eight new units (*Gubernien*), each with its own parliament and government, and above them, four new "special statute territories" (*Sonderstellungsgebiete*) for the Alpine lands, the Sudetes lands, the pre-Carpathian territory, and the coast, each with their parliament, government, and capitals in Vienna, Prague, Lemberg, and Trieste. These special statute territories would enjoy the status of member states of the

federation and would assume the core tasks of their own internal administration (see Renner 1918: 257–260).

Renner wanted to strengthen the districts, administrative divisions inferior to the existing crownlands or the units that should replace them but bigger than municipalities. He believed that they should constitute the essential link between the state and the municipalities (Schlesinger 1945: 214), awarding more practical relevance to redefining and reinforcing the districts than to the replacement of the crownlands by new units of government and special statute territories. The territory of the state should be divided into administrative divisions that respected homogeneity as much as possible. He believed that a reform of the layout of local administration (municipalities, districts, and shires) according to the settlement areas of Austrian nations, even without destroying natural units, could solve the national problem in local administration for four-fifths of the territory (Renner 1906: 240–242). Only the remaining space would contain areas of mixed settlement. All in all, Renner's main practical concern regarding territory was the reform of local administration from a democratic perspective.[12]

In monolingual areas, competence on culture would simply be added to the sphere of competences of the territorial administration. In multilingual areas, which according to Renner could be reduced to a fifth of state territory, national and territorial corporations would coexist. Part of the competences would correspond to the board of the national district or municipality, and the other part would be jointly assumed by the committees of both (or more) national communities under the presidency of a state civil servant. In addition, national self-administrative bodies would be responsible, through state delegation, for the execution of other territorial competences, such as the levying of direct taxes, recruiting, publishing laws, and communicating directives issued by state authorities (Renner 2005: 39).

Renner believed that, in this way, the state, in most of its functions, would interact with the citizen only in his or her language, and that the administration of multilingual regions would include a national administration for each citizen. In this way, citizens' rights to receive laws and have them executed in their own language would be safeguarded.

Though his initial focus is on national autonomy as *limited* to culture and national issues, Renner's model develops, in practice, into a *comprehensive* model for national administration. Critics usually overlook this aspect.

The outcome is a multinational state in which political unity is dissociated from national unity, but not in the usual way. The nation does not remain separate from the state apparatus, reduced to its cultural dimension, as a means of reconciling state unity with cultural and national diversity (but see Pierré-Caps 1994a: 421–422; Pierré-Caps 1994b: 435).

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12 Most of chapter 4 of Renner 1918 is devoted to these questions, which implies almost a fifth part of the 294 pages of the work.

Renner distinguished national autonomy from other arrangements, such as national cultural autonomy, which he explicitly identified with the Jewish national movement in Eastern Europe and which was later implemented in some communist and post-communist states. In national autonomy, he argued, the national corporation is part of the state. It holds state powers. It is a constituent part in the federative government. In national cultural autonomy, by contrast, the nation is purely a cooperative society with its own administration but no state power; this model presupposes a centralized state in which nations are not only given a separate existence; they lie outside the state (Renner 1918: 46).

In Renner's view, national cultural autonomy neglects three key aspects: the organisation of the state and the nations, the level of competences conferred upon their self-administrative bodies, and the structure of the state. He understood national autonomy should include "the founding of the nation at the same level as the state, its establishment as a member state, and the structuring of the whole state as a nationality-based federation." (Renner 1918: 84) In sum, Renner defended something very different from national cultural autonomy: the transformation of nations into a state, the transformation of the state into nations, and their reasonable structuring (Renner 1918: 82).[13]

Renner's national autonomy should also be distinguished from institutional arrangements implemented at the provincial level in Moravia (1905), Bukovina (1910), and Bosnia and Herzegovina (1910). He criticised their limited scope and harmful effects; the arrangements did not aim to protect the minority, but instead to protect the possessions of each nation.[14] He did, however, consider the separate Czech and German sections of the Bohemian school board to be authentic institutions of national autonomy; they began operation in 1890 and continued in independent Czechoslovakia (Renner 1918: 77).

Structuring National Autonomy: The Principle of Personality and Free Adhesion

Renner disregarded the controversial historical principle on territory: "In its pure form, the territorial principle [...] is the cruellest and most inappropriate solution. The position of the foreign nationalities included in a territory is contingent upon whether they are favoured or not, and they are forced to adopt a belligerent stance. It is the system of incessant squabbling, of never-ending disputes over assets" (Renner 2005: 32). It implies: "if you live in my territory, you are subject to my domination, my law and my language!" (Renner 2005: 27–28; similarly, Renner 1918: 75, 107)

13 In the original: "die Verstaatlichung der Nation und die Nationalisierung des Staates". He also opposed the content of the Brünn program for the concept of national cultural autonomy (Renner 1918: 46).

14 Renner 1918: prologue, footnote in 51, and 115; see also 74-79 for a contrast between the existing curial system and the proposed national autonomy.

The basis of Renner's notion of national autonomy is, by contrast, the principle of personality, which frees the nation from a territory in the same way that serfs were freed from land linkage.

Renner's principle of personality is based on free choice. His notion of national autonomy does not lie in the mandatory assignment of nationality to a certain territory nor in mandatory national attribution for individuals that speak certain language or possess certain objective features, but instead in individual free choice. He argued that, for national adhesion to be a source of rights and duties, it must be based on free consent.

Free choice with regard to adhesion to one nation or another should be exercised through inscription in a national registry or census available to all the nationalities of the state, regardless of their place of residence. Renner stated that individual choice of one's national identity allows for the real exercise of the individual right to self-determination, in correlation with that same right on a national scale (Renner 1918: 111).

Some scholars have criticized Renner's conception of identity for being inflexible, simple, and deterministic (Schwarzmantel 2005: 65; Garry and Moore 2005: 77; Villiers 2016: 934). Certainly, he did not enumerate all the circumstances or dynamics for the change of identity that inform today's academic debates; he implicitly presupposed that in most cases individuals would choose to affiliate themselves with the national community to which they were closest and that that nationality could only be chosen from a pre-determined list. This does not mean that his identity conception was rigid, simple, or deterministic. With a rural German background in ethnically mixed Moravia, he was well aware of the workings of bi- and multilingualism, foreign domination, acculturation, and assimilation: the bedrock of his theory on national autonomy.[15]

Renner did not purport to encapsulate individuals in communities of belonging or choice.[16] He expressly stated that "someone could not know to which nationality he or she belongs," and he accepted that "an individual can have a solid command of two cultural domains and have them coexist deep within," anticipating modern conceptions of plural and dynamic identities. Ultimately, he envisioned that anyone could withdraw or change his or her declaration of nationality for whatever reason – however opportunistic – for such reasons as the return to one's place of birth to receive mother-tongue instruction for his or her children (Renner 1918: 114) or to obtain a post in the administration (Renner 1918: 144). In an age of "guardians of the nation" (see Judson 2006), choice as a criterion for national identity, if not unusual, had begun to be contested,

15 Examples are numerous: "To be sure, national life is manifested mainly through the linguistic community. But this is not a fundamental manifestation of the common consciousness of nationality and race" (Renner 2005: 21); "Bilingualism can—in both cases [Germans and Czechs]—become the most effective tool for foreign domination" (Renner 2005: 42, and Renner 1918: 144).

16 By contrast, Villiers 2016: 930, 934, claims that in Renner's model decision on national belonging could not later be changed.

both politically and legally.[17] Furthermore, for Renner one's personal declaration of nationality was not a mandatory declaration of national allegiance (but see Bauböck 2005: 101), but an instrument for organising public services; "the truly relevant aspect is that the individual expresses in which language he or she wants to receive the law from the state." (Renner 1918: 112)

National Interests at the Supranational Level

The Participation of Nations at the Federal Level of Government

Renner planned for a nationality-based federative state, in which, by virtue of broad territorial and national autonomy, a strong power at the centre would carry out relations with nationally homogenous administrative districts. Supranational issues would be devolved to a central parliament and a central government acting as institutions of the supranational state. The federal legislative branch would be the authentic unifying body of the state (Renner 1918: 271), an entity to which Renner even recognised the "competence over competence" although under certain procedural guarantees and the supervision of a constitutional court (Renner 1918: 292).

Renner considered that his model implied few innovations regarding state government, since the centre of gravity of his reforms lied "in the configuration of an adequate local administration and in the foundation of national and territorial autonomy."[18] Therefore, unlike modern studies on state accommodation of national diversity, he did not focus on the consequences of nationalities' equal rights at the federal level of government. His reflections on this are scarce.

He limited himself to affirming that the three powers of the federation—the legislative and executive branches and the Constitutional Court—should be established free from national and territorial influences, though their composition and function should always represent all nations and territories (Renner 1918: 273).

The federal parliament would be composed of two chambers: a popular chamber elected according to the democratic principle of proportionality and a chamber of nationalities and autonomous territories. The election and composition of this second chamber would be the following: a third of its members would be elected by the representatives of national councils, another third by the territorial units and the final third by the head of state (Renner 1918: 279-280).

By contrast, Renner did not see a need for proportional representation of the nations in the federal government and administration, as it is the case today, for instance, in Switzerland or in Belgium for their various linguistic groups. In particular, he considered that appointments to the federal administration

17 It has been the legal practice in Habsburg Austria that, in cases of doubt, a person's individual national declaration would be accepted, but from 1910 on the case law began to change. See Kuzmany 2016: 46, 51.
18 Renner 1918: 294.

must be based on merit and capacity, and that ministerial organisation must be grounded on technical criteria, free from the reach of national governments and autonomous territories: he opposed, for instance, the idea that each nation and autonomous territory should have one minister (Renner 1918: 280). The prime minister or chancellor would be politically accountable only before the first chamber, the popular chamber, not before the chamber of nationalities and the autonomous territories (Renner 1918: 283).

While the exclusion of the nations from the formation and composition of the federal administration was absolute in *State and Nation*, Renner modified his position in *The right of nations to self-determination*.[19] First, the governments of nations and autonomous territories needed some representation at the centre. Renner proposed the creation of a specific body, a federal council, comprised of a representative from each national and territorial government, under the presidency of the Chancellor. Its function would be advisory, expressing the interests of national and territorial governments (Renner 1918: 285). Second, nations needed to have a proper influence over the appointment to administrative positions, in correspondence with both multinational and federal ideas. After considering several arrangements of direct and representative democracy, Renner opted for a joint appointment scheme for district governors who would be appointed by mutual agreement between the federal minister and the representative of the relevant nation or nations on the Federal Council (Renner 1918: 288).

Adjudication of Conflicts between the State and the Nations: A Constitutional Jurisdiction

Renner considered that the allocation of powers between the federal parliament, national representative bodies, and representative bodies of the autonomous territories – which should be based on law – required a judicial safeguard; it could not depend, he argued, on the conjunctural whims of the federal government and the parliament. Conflicts between the state and its nations should be adjudicated through the creation of a Constitutional Court of the Federation. This proposal, in the last section of his book, constitutes the legal closure of a federative model that combines territorial and national elements (Renner 1918: 291–294).

Renner argued that, in the existing system, the only way to react to an autonomous body impinging on federal powers was through federal coercion: the dissolution of the autonomous body, forced dismissal of its government, and suspension of its autonomy. Instead, he proposed judicial review; federal branches of government should submit a request to this new body, the Constitutional Court of the Federation, for the declaration of the unconstitutionality

19 However, some commentators only consider Renner's initial position as reflected in Renner 1899 and ignore significant nuances included in Renner 1918: see Wierer 1960: 109; Eide 1998: 267.

and nullity of legislative or executive acts that encroached upon federal powers, with a binding effect for all citizens. The Constitutional Court would adjudicate in conflicts between the state and its nations, between autonomous territories and nations, and between nations.

In addition, the Constitutional Court would look after the protection of the fundamental rights of citizens, continuing on with the function the existing Imperial Court (*Reichsgericht*) had carried out since 1869 in fulfilment of the state fundamental law of 1867.

Renner anticipated the essence of the first specialized constitutional court in history, a court the Republic of Austria would inaugurate only two years later. It must be noted that the Austrian Federal Constitution of 1920 was based on Hans Kelsen's drafts, following Chancellor Renner's instructions (Schmitz 1981 and 1991; Cruz Villalón 1987: 246–262). That Constitution adopted a federal model very close to the one envisioned by Renner, freed from the need to legally recognise nations other than that of Austro-Germans or to award them national autonomy. It became a purely territorial federal model, structured around a strong centre and weak territorial autonomous bodies, in which the allocation of powers was ensured by the Constitutional Court. The creation of this new institution, exactly one hundred years to the date, is Renner's most enduring and significant legacy.

Conclusion

Renner aimed to reconcile elements that were, apparently, mutually irreconcilable: the German concept of nation as a cultural community with free choice of identity; the revolutionary principle of nationalities—one nation, one state—with the conservative principle of state integrity; national autonomy based on legal recognition and equal rights for nations with democratic values such as equality of rights among individuals and the rule of 'one-citizen, one-vote;' and personal autonomy with its territorial counterpart.

Reconciliation involves adjustments, not mutual exclusion or derogation. Renner's principal adjustments concerned the main sources of national conflict in multi-ethnic societies: majority rule and disputed territories. In few words, his recipes were: majority rule should be excluded in areas of national interest, which he associated with language and culture, and territory should be de-nationalized and national rights de-territorialized, through the recognition of national rights on a personal basis regardless of place of residence.

Renner's treatise on national autonomy constitutes a fully realised legal theory for the multinational state, structuring the state as a nationality-based federation combining territorial and personal elements. Here we must highlight two final points regarding the role of nations and the principle of personality.

Nations are integrated into the architecture of the state, along with the individual; both are necessary. This implies several consequences: the transformation of the nations into a state, each acquiring the condition of constituent parts of the federative state, at the same level as its territorial units; the

establishment of national self-administrative bodies; the conferral of powers with regard to national issues (education, art, and literature), and the possibility of delegating other state competences. Instead of territory, Renner offers power to all nations, a share in state sovereignty.

Although Renner's national autonomy is often presented in opposition to territorial autonomy, this is not an accurate reflection of his theory. He was not against territorial autonomy, which he considered the best solution, the only obstacle being that it was technically impossible in most cases, as long as nationalities lived in mixed communities. In Renner's view, the personality principle complements territorial autonomy rather than undermining it. For the Austrian part of the monarchy, he proposed reforming the layout of local administration with a view to creating as many homogenous national districts as possible. He believed that, in this way, territorial autonomy could be implemented in four fifths of the territory, while national autonomy, distinguishable from territorial autonomy, would be applied only in the remaining mixed nationality districts. Hence, his model involves a combination of both personal and territorial autonomy.

Renner left many theoretical and practical questions unelaborated or unsolved, but he provided the inspiration and the tools needed to accommodate the varying circumstances, which arise in multi-ethnic states.

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Ksabijer Arcoc

Teorija nacionalne autonomije Karla Renera

Apstrakt

Teorija autonomije Karla Renera nije bila dovoljno razmatrana u naučnim krugovima usled složenosti kod njene recepcije i zbunjujućeg sadržaja. Njegova originalna teorija, ni liberalna ni komunitarna, spaja individualna prava s kolektivnim pravima, teritorijalnu autonomiju s ličnom autonomijom, klasični federalizam sa uspostavljanjem nacija kao konstitutivnih delova države. Ovaj rad će uvesti čitaoca u Renerove osnovne koncepte. Najpre, on će predstaviti Renerove poglede na naciju, multinacionalnu državu, ulogu principa većine, in a potrebu za pravnim priznanjem nacija od strane i u okviru države. Zatim ćemo razmotriti Renerov ključni pojam nacionalne autonomije i njegovu organizaciju kroz princip personalnosti. Dalje, u radu će biti reči o Renerovom konceptu predstavljanja nacionalnih interesa na federalnom ili nadnacionalnom nivou vlasti. Na kraju, članak iznosi zaključke o Renerovoj teoriji autonomije u celini.

Ključne reči: nacionalna autonomija, Austrougarska, manjinska prava, federalizam, multinacionalna država, princip personalnosti, teritorijalna autonomija, nacija, samoopredeljenje, vladavina većine

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Rosa Burç

NON-TERRITORIAL AUTONOMY AND GENDER EQUALITY: THE CASE OF THE AUTONOMOUS ADMINISTRATION OF NORTH AND EAST SYRIA - ROJAVA

ABSTRACT
The Kurdish-led autonomous entity called Autonomous Administration of North and East Syria (NES) – also known as Rojava – considers women's liberation an imperative condition for shaping a democratic society. The practice of autonomy in NES shares strong resemblances with Non-Territorial Autonomy (NTA) models; however, it introduces a novelty in the role of women as active agents in building a plurinational democracy. This paper examines (1) the intellectual and political origins of the political role ascribed to women in autonomous administrations and (2) how the practice of autonomy in Rojava has advanced women's rights by shedding light on both institutional implementation of women's rights, as well as the creation of (non)-territorial spaces of women's emancipation within the autonomous model. The argument made is that the conceptual framework of the Rojava model goes beyond the Kurdish question and can be considered an attempt to resolve a democratic deficit of liberal democratic nation-states through bringing together solutions that address the intertwined subordination of minorities and women.

KEYWORDS
women, representation, plurinational democracy, non-territorial autonomy, Kurdish question, Syria, Rojava, PKK, minorities

Introduction

Divided between Iran, Iraq, Turkey, and Syria and rendered minorities in the respective nation-states, Kurds in the Middle East have been the largest stateless people in the world struggling with the question of self-determination and recognition. While the emergence of the Kurdistan Region of Iraq (KRI) in the early 1990s institutionalized a first accommodation of Kurdish rights and demands for self-determination in form of territorial autonomy, the Kurdish political movement with its roots in Turkey has been developing an alternative articulation of autonomy known with the twin-concepts of Democratic Confederalism and Democratic Autonomy. Focusing on societal emancipation and the deconstruction of dominant categories that presume the conflation of territory and nation, the alternative proposal for autonomy shares strong epistemological resemblances with modalities of Non-Territorial Autonomy (NTA), yet at the same time introduces new approaches to the question of minority representation.

Rosa Burç: PhD Candidate, Center on Social Movement Studies (COSMOS), Faculty of Political Science and Social Sciences, Scuola Normale Superiore, Florence; rosa.burc@sns.it.

More than 100 years after the Sykes-Picot agreement that led to the division of land in the Middle East, today the same region is yet again undergoing a reshuffling of national boundaries, redefinition of collective identities and fundamental bottom-up questioning of the order of domination as imposed by nation-states. Not least with the Arab uprisings in 2011 the Middle East proved to be a vital political arena of contentious politics. In the case of Syria, the upheavals created a vacuum of power that facilitated the building of alternative structures in the wake of the local resistance against the Islamic State group in Syria. In this context, the wider global audience was exposed to the emergence of a political system evocative of what Murray Bookchin, exponent of libertarian municipalism, had advocated back in the 1990s for the American context, a "new politics that is unflinchingly public, electoral on a municipal basis, confederal in its vision and revolutionary in its character" (2015: 86). In a completely different geography and almost three decades later, these ideas were now expanded on and implemented by systematically marginalized groups, historically disregarded and deprived from participating in the making of the modern Middle East, such as religious and ethnic minorities, as well as women.

The Kurdish-led autonomous entity called Autonomous Administration of North and East Syria (NES) – also known as Rojava – advocates grassroots organization and women's liberation as an imperative condition for democratization in general and minority protection specifically. Contrary to a widely spread scholarly approach to the Kurdish question as either an issue of territory, nationalism, or a human rights issue constrained within the politics of one of the four nation-states, this novel articulation of the intertwined subordination of minorities and women as implemented in the Rojava model promises to contribute to the wider scholarly discussions on the ways of overcoming the democracy deficit inherent to (liberal) nation-states. The attempt at providing minority protection and gender equality through the creation of participatory spaces as spheres of *coming into existence* for underrepresented groups, like for example minorities within the Kurdish population, articulations of non-territorial autonomy as practiced in Rojava challenge existing Eurocentric categories of the imaginative geography that is mostly associated with feudalism, sectarianism and patriarchy, which as a consequence has this far overshadowed a genuine scholarly engagement with how spheres of freedom, creativity and minority agency are created bottom-up, despite conflict and through the re-articulation of dominant categories of the (Western) nation-state paradigm.

More specifically, while widely cited as a women's revolution, this paper aims to shed light on why gender equality is considered an imperative condition for minority protection by the Kurdish movement, in order to question the extent to which the Rojava case advances discussions on plurinational democracies, as well as minority participation in deeply divided societies.

Starting with a brief contextualization of the so-called Kurdish question within the scholarly debates on territoriality, nation-state, social movements and the Middle East, this paper will assess the ideational origins of the political role ascribed to women in the autonomy concepts as proposed by the

Kurdish movement under the Kurdistan Workers' Party (PKK). Following an analysis of the ways its institutionalization in the autonomous administration in Rojava has advanced women's rights and gender equality, this paper further argues that the Rojava case not only manifests a modality of NTA to resolve the so-called Kurdish question without reinstating the nation-state paradigm. But rather should be evaluated as the expansion of the NTA framework by including women's agency and gender equality as an imperative precondition for fostering plurinational democracies, hence demonstrates a case of cardinal importance for the study of non-territorial autonomy models.

Territoriality, Nation-States, and the Kurdish Conundrum in the Study of the Middle East

The Kurdish context offers a broad spectrum of opportunities to research alternative conceptualizations of democracy, minority representation, limitations to the nation-state system and to challenge the Fukuyamian thesis of the "end of history" (1992) as well as Samuel Huntington's prophecy of a "clash of civilizations" (1993). Yet, usually referred to as either the "Kurdish problem", "Kurdish issue" or "Kurdish Question" (Gunter 2019; Bozarslan 2012), scholarly literature in the field of political science has thus far mostly engaged with the reasons that led to the lack of a Kurdish nation-state and its consequences embedded within the framework of security studies or human rights issues. This approach has led to a situation where politics from below put forward by communities within the wider predominantly Kurdish geography have been vastly disregarded or marginalized when studying popular politics in the Middle East. Methodological nationalism, hence conceiving the nation-state as the sole unit of analysis, further has led to a situation where minority groups in the margins of the dominant nation, which enjoys cultural hegemony, were mostly seen as passive recipients or victims rather than active agents in reassembling political and societal constellations during and after conflict.

This approach in the study of the Middle East can be considered as an academic continuum of the expansion of the modern nation-state system to the Middle East. Commenced after the dissolution of the Ottoman Empire, new categories of statehood and a changing political geography were introduced. Some borders were designated along railroad tracks that initially supposed to unite peoples, then were used to delineate new nation-states, hence divide entire cities, villages and families, as is the case with the Turkish-Syrian border. An imaginative geography, as Edward Said calls it in his seminal work Orientalism (1978), became the main driving force of the colonial constellation and its sites of appropriation, domination, and contestation in the region (Gregory 2000). Hence, statelessness, status-lessness, denied citizenship and precarious minority rights have since then been prevailing themes of the so-called Kurdish question in the Middle East.

Although historiography puts the concept of the nation-state in contrast to so-called territorial states, it is common sense that all states are claimants

of a certain territory; hence nation-states do not constitute an exception but more so the norm (Dunn 1995). According to Karl Deutsch the idea of territory is mainly a political projection, nonetheless because "no person can be born at more than one spot on the map. The actual place of birth has the size of a bed or a room, not the size of a country" (1970: 18). Especially with regards to the concept of the nation, land transforms into a component of ideology and becomes a crucial aspect of the national project. The nation-state paradigm therefore is inherently built on the idea of territoriality, as well as the dichotomy of majority and minority populations, which eventually constitutes an asymmetrical hegemonic relationship between the dominant nation and its minority. Although the literature offers a wide spectrum of divergent theoretical principles and categories on nation-states, most paradigms analytically depart from a nation-state centrism as an unchallengeable principle. Whilst this epistemology has been an obstacle in accounting for the impact of globalization and transnationalism trends in the past, it continues to pose an analytical difficulty today when attempting to address inherent weaknesses of the nation-state paradigm itself. The latter is also the case for social movement research that epistemologically regards movements as actors of nation-states, hence reinstates an analytical hegemony that lies within the perceptions of the dominant nation. Predominantly categorized as a nationalist or separatist movement and mostly neglected in the study of social movements as agents in processes of democratic deliberation, the Kurdish movement's articulation of non-territorial autonomy in Syria is a case that challenges also existing scholarly approaches to social movements (Gunes 2012; Watts 2009; 2006).

Out of this predicament, the Kurdish political movement, which operates from within the four nation-states, as well as from the diaspora, has developed a counter-hegemonic project beyond the rigid state vs. society dichotomy, where "society" becomes interchangeable with "dominant nation", and proposes relational spheres of autonomy, where alternative articulation of democracy and minority participation becomes the means of recognition and *coming into existence* for systematically marginalized groups such as minorities within the Kurdish minority.

Scholarship in the field of social movements has developed in a multifold way, offering a variety of conceptualizations and categories of inquiry to analyze and make sense of emergence, characteristics, successes and failures of contentious politics and social movements (della Porta 2016). Being aware of early limitations deriving from a Western bias and the exclusion of knowledge from different fields of scholarship such as revolution, democratization or ethnic conflict, scholars like Charles Tilly and Doug McAdam introduced overarching categories that allowed cross-disciplinary analysis through independent variables such as frames, resources and mechanisms. The focus on the structural component like on mechanisms, made it possible to define social movements through forms of actions instead of movement types, hence opened the way for a more dynamic and integrative approach to social movements (McAdam, Tarrow, and Tilly 2001).

Despite these novelties that certainly widened the spectrum of research on social movements, scholarship on movements continues to suffer from limitations coming from an underlying assumption that social movements are social realities that exist only within and in relation to the signifying nation-state, mostly emerging from within claim makers embedded within the dominant nation. Charles Tilly for instance puts forward that the emergence of nation-states contributed to the formation of modern social movements and their repertoires of action, moving the sphere of protest from the local to the national level (Tilly and Wood 2009). While this helps conceptualizing movements as actors on a national level, the question arises how to conceptualize for instance movements that mobilize from within more than one nation-state yet neither reinstate dominant categories such as separatism or ethno-nationalism nor make direct claims on the nation-state level? Taking the architecture of the nation-state for granted as a unit of analysis consequently creates blindspots in accounting for minority mobilization, such as is the case in the Kurdish movement's mobilization for minority representation in form of non-territorial autonomy articulated across Turkey, Iran, Iraq and Syria.

The most recent innovative contribution to the scholarly literature on contentious politics in the Middle East has been made by John Chalcraft (2016) with his study on the role of popular politics in the making of the modern Middle East. He moves beyond the limitations of objectivist historical sociology of social change and of subjectivist social constructionism and successfully periodizes a history of mobilization from below in the Middle East by applying a Neo-Gramscian perspective and using counter-hegemony as a formative concept (Chalcraft and Souvlis 2017). While Chalcraft successfully introduces new tools to understand popular politics in the Middle East, hence challenges the state vs. society dichotomy, as well as Orientalist accounts, his study fails to escape epistemological determinisms that are rooted in the dominant logic of the nation-state paradigm as it lacks an analysis of counter-hegemonic politics from below put forward by *stateless* and *status-less* groups in the region, in particular by minority communities such as the Kurds, as well as minorities within such as Ezidis or Kurdish refugees in Kurdistan.

Further, looking at the ways how multi-ethnic to deeply divided societies have been studied in terms of conflict prevention and solution, the focus has mainly been on top-down approaches such as the implementation of (ethnic) federalism (Heinemann-Grüder 2011), consociation (Lijphart 2012; Lehmbruch 1999), minority rights as liberal and communitarian versions of multiculturalism (Kymlicka 1996; Kymlicka and Pföstl 2014; Taylor 1994). These concepts however, in one way or another, reinstate majority-minority dichotomies that are inherent to the nation-state paradigm and that are imposed as top-down solutions like assigning autonomy within a nation-state based on a presumption of ethnically homogenous regions or closed group identities. This paper however will shed light on the more dynamic proposals and practices of autonomy from below, believing that assessing conceptualizations and implementations of forms of non-territorial autonomy in a region of the world, with

which feudalism, sectarianism, nationalism and conflict are mostly associated, will not only contribute to the study of popular politics in the Middle East but also to the theoretical debates on plurinational democracies. Hence, challenge and complement dominantly Eurocentric conceptualizations of democracy, as well as contribute to the study of NTA by advancing it by incorporating gender representation.

Kurdish Mobilization as a Non-territorial Movement?

The Kurdish movement under the leadership of Abdullah Öcalan, founder and ideological father of the PKK, started off as a Marxist-Leninist guerilla movement in Turkey that fought for a separate Kurdish state. With the end of the Cold War and the collapse of the Soviet Union, the PKK shifted its ideological paradigm toward a post-national movement, abandoning the desire for Kurdish statehood and promoting new governance structures that transcend and unmake nation-state paradigms (Jongerden and Akkaya 2011). The new paradigm puts forward the concept of Democratic Autonomy as part of the decentralized and cross-territorial model introduced as Democratic Confederalism. Both are a direct manifestation of how Kurdish movement actors have perceived and evaluated the history of cross-territorial systematic denial of political recognition and deprivation of rights for minorities. Social movement theory for instance mostly conceptualizes movement strategies and political opportunities in a state-centered way, meaning that windows of opportunities are considered most open, when the existing political system is vulnerable, hence movement actors can push through social change within the state (Meyer 2004; Tarrow 2011).

In the Kurdish case however, the question is what happens in highly centralized and authoritarian contexts where, let alone to push for social change on a national level, movement actors are only recognized as pseudo-citizens, if at all. Mesut Yegen (2009) argues that Kurds in Turkey for instance, have traditionally been perceived as outside the boundaries of the dominant nation, which not only has caused various assimilationist policies, displacements, persecutions but even the denial of minority rights and lack of recognition of Kurdish identity. The latter most severely manifested in the Turkish state's policies of banning the Kurdish language until 1999 (Bozarslan 2012).

The paradigm shift in the objectives of the Kurdish movement during the 1990s emerged at a time when Turkey, where the Kurdish movement started mobilizing first, was a cohesive state, consolidating the political elites and the dominant nation.[1] Cognitive liberation, as Doug McAdam (2001) puts it, was therefore not determined by taking advantage of a political opportunity that

1 Joel Migdal"s definition of a "cohesive state" asserts that those states with a high degree of integrated domination, hence a power balance between state and society, as well as within the state, are guaranteed to be successful. Integrated domination therefore is when the state manages to uphold full decision-making autonomy, which stands in contrast to "dispersed domination," when neither state nor society have the ability to implement. See Migdal 2001: 126.

became available but to mobilize cognitive resources, such as the development of new ideas, in order to stem out a long term political opportunity. Consequently, the formation of transregional grassroots politics was introduced as an alternative to the previous assumption of the need for an own nation-state or ethno-territorial autonomy. Given the territorial dispersion of the Kurds in the course of forced migration, as well as the ethnic and cultural heterogeneity of the predominantly Kurdish populated regions, with minorities within the Kurdish minority such as Yezidis, Alevis, Zazas, or Assyrians, the paradigmatic journey away from the idea of national liberation towards a non-nation-state liberational discourse was also triggered by the realization that a Kurdish nation-state would very likely repeat existing errors and reproduce the inherent blind-spots of the nation-state model that have led to the unfree situation of the Kurds and the Middle East's other minorities in the first place.

As part of the paradigmatic transformation of the PKK from a Marxist-Leninist organization to a plurinational democratic body, the Group of Communities in Kurdistan (KCK) was founded in 2005 in order to gather different parties and civil society groups together under one roof – according to confederal principles of equal representation and consensual decision-making processes (Gunes 2017). This was the first step toward the practical formation of plural, decentralized and confederal political bodies that were cooperating with each other across four different nation-states.

Following this paradigmatic reconceptualization that reconstructed territorial and societal demands away from the oppressive undertones of the nation-state model toward a more emancipated and self-reliant understanding of society, the guerilla units of the PKK, which initially were only regarded as an armed threat to the nation-states, became aware of their social impact on the region. Conflict resolution in the form of village assemblies initiated by the guerillas were introduced and replaced traditional feudal mediators (Jongerden and Akkaya 2011). Women started relying on all-women guerilla units that educated women in the concept of self-defense – not only practically and physically but more significantly, ideologically (Öcalan 2017b). Women started not only to organize themselves in collectives to defend themselves against violence, forced marriages or honor killings but also participated in education and leadership, as well as in building structures of autonomous positions for women in society leading to increasing recognition of gender equality. The latter became the main pillar of Democratic Confederalism as exercised in Rojava today, emerging as a crucial contribution to the general paradigm of NTA for it helps to expand and enhance the epistemological framework.

While the early manifestations of the new non nation-state paradigm show how the focus was shifted from political claim making on the nation-state level to shaping an ethical and political society on the local level, in 2012, amid the developing Syrian civil war, the paradigm became the driving force behind the emergence of non-territorial autonomy in Syria, as well as oppositional politics in Turkey (Burc 2018). Given that one cannot assume identical articulations of the paradigm in all regions the Kurdish movement is mobilizing, the case of

northern Syria must be contextualized within its history of state authoritarianism against minorities in the north and its high degree of geographical interconnectedness with Turkey as mentioned above.

During the 1960s and 1970s, the Syrian government's Arabization policies, like the "Arab Belt" project of Hafiz al-Assad in 1973, resettled Kurdish populations and exchanged them by Arab populations. Already in 1962 hundreds of thousands of Kurds in Syria were stripped from their citizenship, rendering the Kurdish population in the north stateless by definition (Taştekin 2016). This policy has an integral connection to the history of Turkification after the establishment of the Turkish republic in 1923 as among those who were stripped Syrian citizenships were families of former refugees who came with the stream of migration from Turkey when Kurdish populations fled the violent state homogenization policies in Turkey during the long 30s and settled on the other side of the border in Syria.

The perception of statehood and its lack is best illustrated in a statement that Selahattin Demirtaş, the imprisoned former co-chair of Turkey's pro-Kurdish left alliance Peoples' Democratic Party (HDP), made after the state-orchestrated assassination of human rights lawyer Tahir Elçi (Forensic Architecture 2018). According to Demirtaş "not the state killed Tahir Elçi but statelessness" (Deutsche Welle 2015). Here statelessness is expressed twofold, hence as more than the simple lack of an own nation-state but rather as the lack of fundamental protection of human and minority rights by any of the states that Kurds inhabit.

Therefore, while state authoritarianisms in Turkey, Syria, Iran and Iraq have been distinct in their particular manifestations throughout time and region, Kurds and other minorities share a common history and collective consciousness of being subjected to necropolitical violence implied by nation-states that aim to preserve their state sovereignty through assimilation policies and enforced national homogenization (Mbembe 2003; Burc and Tokatlı 2020),

PKK founder Abdullah Öcalan's presence in Syria in 1979 is widely referred to as a critical juncture in the mobilization of northern Syrian populations for the politics of the Kurdish movement (Tejel 2011; Taştekin 2016; Schmidinger 2018). Öcalan himself describes his presence in Syria as a significant memory in the collective consciousness of Kurdish people in the north (Öcalan 2016: 452). The impact of the PKK during the 1980s and 1990s in Syria, as illustrated by Thomas Schmidinger (2018) has been mainly due to being the only movement that was able to fill the void of a collective vision for minorities in the region, given that traditional and conservative Kurdish parties failed to offer a strategy out of state authoritarianism imposed by the Ba'ath regime at the time. Fehim Tastekin (2016) emphasizes that the Marxist approach on the minority question and the Kurdish issue was attractive in particular to young students in Damascus, as well as for populations in multi-ethnic and multi-religious border regions like Afrîn and Kobanê that later became key regions for building today's autonomous self-administration.

The political developments that were unfolding after the withdrawal of the Syrian military in 2012 must be assessed against this backdrop. Kurdish-majority

areas, in particular in the Turkish-Syrian border region, were left to the control of PKK-led forces and affiliated political parties such as the Democratic Union Party (PYD), supported by a local population in sympathy with the Kurdish movement's ideas since the first mobilizations during the 1980s. This opportunity led to the establishment of first grassroots autonomous administrations and in January 2014 the establishment of the Cantons of Rojava as administrative bodies to manage the de facto autonomy. Later, in March 2016, the Cantons were brought together under the umbrella federal administration of the Democratic Federation of Northern Syria (DFNS).

In a two-day meeting, held in the Rimelan town of Girkê Legê/Al-Muabbada, 31 parties and 200 delegates came together in a constituent assembly, representing the three self-administered Rojavan cantons Kobanê, Afrîn and Cîzîre, as well as some of the Arab, Assyrian, Syriac, Armenian, Turkmen and Chechen peoples of the regions of Girê Spî/Tal Abyad, Shaddadi, Aleppo and Shehba (BBC 2016). The declaration expressed the northern Syrian population's will to not engage in the establishment of national independence in the classic sense, but to defend a pluralist confederal system as part of conflict resolution in the wider Middle East. Grassroots democracy, women's liberation and a full representation of all societal groups organized in a council system were made the constitutive principles of the social contract (Rojava Assembly 2016). Since 2018 the autonomous entity is formally known as the Autonomous Administration of North and East Syria. Yet with the Turkish army launching the military operation "Olive Branch" in Afrîn in early 2018, and another offensive in October 2019 in other parts, the Rojava region has been partially under occupation by the Turkish army and its proxy militias, facing the threat of demographic engineering, persecution of minorities and forced migration (McGee 2019; Burc 2019).

Democratic Confederalism, a Model of NTA?

Important for the assessment of the Rojava model as a non-territorial case of autonomy is that despite being a Kurdish-led project, the self-administration is not organized along hierarchical ethnic lines, such as along binaries of majority vs. minority, but aspires to be a multi-ethnic entity with decentralized administration and representative bodies to accommodate all of the ethno-cultural and ethno-religious groups inhabiting the region (Akkaya and Jongerden 2012).

The shift from organizing under the name of "Rojava", which is a direct translation from Kurdish language and means "setting sun", hence describes the Western part of the wider region known as Kurdistan, to "Northern Syria" and later to "North and East Syria" can be evaluated as an expression of the non-ethnocentric claim of the project that however at the same time assumes a certain territory within the Syrian borders, precisely because of the need to incorporate all minorities living in the claimed autonomous administration. NTA models too see the need for a territorial state as contemporary

discussions on NTA models can be seen as a continuation of Otto Bauer and Karl Renner's thought on National Cultural Autonomy (NCA), where territorial representation is even preferred when the territorial space is culturally homogenous (Suksi 2015; Nimni 1999).

NTA approaches offer proposals also for those cases, in which minorities are dispersed or not inhabiting a specific region, hence where a homogeneity is not given. Yet in these cases too, the idea of minority protection and non-territorial autonomy engages within given state borders. The critique is therefore not made against the state as such but moreover against conceptualizations, in which nation and state territory are conflated and consequently lead to a political expression of a hegemonic relationship between the dominant nation and its minority. NTA moreover attempts to help distinguish between various modalities of autonomy to avoid assumptions of minority autonomy's potential threat to territorial integrity of existing states. Scholars also have emphasized that NTA models can be a mechanism to protect from regional autonomy being abused by minorities that want to promote their own interest at the expense and to the exclusion of others within the given territory (Nimni 2013; Villiers 2012).

Characteristic of both NTA and NCA models is the recognition of the need for minority representation within the plurinational state, which however does not entail the epistemological rejection of territorial representation – despite the terminological assumption deriving from calling these models non-territorial in the first place.

Modalities of NTA therefore propose the organization of nations into non-territorial publics with comprehensive autonomous rights that operate within a de-nationalized territorial state. Resolving the democratic deficit of the liberal democratic nation-state, which is considered essentially the system of one person/one vote or one state/one nation that can easily become a Tocquevillian tyranny of the majority given collective representation and political agency for minorities is not present, is the analytical point of departure in the assessment of alternative ways of minority representation in plurinational states (Nimni, Osipov, and Smith 2013).

The political project of Rojava resembles NTA as it incorporates both non-territorial claims within a given territory, yet can also be considered as an adjustment to the given political opportunity structure that was shaped by the developments connected to the loss of state authority in the northern region, geopolitical proxy wars and the need for organizational strategy amid a developing civil war. Territoriality therefore is an inborn condition for all political articulations of autonomy as no autonomy can exist outside a territory. In the Rojava example however, the idea of a territorial necessity is attempted to made obsolete for the daily practices of autonomy, as well as for the identification process during society building.

A simplistic approach to social movements and their articulations of social reality would evaluate the Kurdish movement in northern Syria as a nationalist movement that aims territorial autonomy or secession. The movement in

northern Syria though conceptualizes territory in non-ethnocentric ways and more with the motivation of deepening democracy through the creation of decentralized local self-governance structures that are designed to involve inhabitants of the region in the decision-making process and empower communities to become active in solving the immediate everyday problems they face.

The Kurdish movement's discourse on autonomy is very similar to NTA in its theoretical derivation as it takes the subordination of minorities as a formative pillar in articulating a political alternative to the predicament of minorities in the Middle East, particular those deprived from any sort of recognition and political participation. The Kurdish political movement's theorizing and practicing of autonomy also combines both territorial and non-territorial, as well as centralized and de-centralized elements. By placing the question of gender representation and participation in the center of democratic politics however, Democratic Confederalism incorporates hitherto neglected dimensions to NTA, hence the diagnostic perception that women as well as minorities suffer from a unique form of subordination. Taking both the subordination of minorities in liberal nation-states and of women in society itself as a point of departure, Democratic Confederalism enhances NTA by bringing together proposals that frame the question of autonomy and liberation not on national determinants but on the question of societal emancipation through gender and minority representation.

Democratic Confederalism and the Women's Question

In his writings, Abdullah Öcalan, architect of the idea of Democratic Autonomy, which was later concretized in the model of Democratic Confederalism, names three ills of our contemporary civilization, which he refers to as "capitalist modernity": nation-states, capitalism and patriarchy (Öcalan 2017a). Concepts of alternative governance structures that challenge the idea of one nation and one state therefore are the articulations of an antithesis to these three ills of our time, offering a counter-hegemonic political solution from the perspective of the deprived (Öcalan 2015). Despite the harsh conditions of being in solitary confinement on Imrali prison island in Turkey since 1999, Öcalan has elaborated on existing democracy theories inspired by the lens of his own biography and the region's ongoing traumatic experience of cultural homogenization and oppression by the state system.

In order to re-create a morally and politically capable society, something "capitalist modernity" has destroyed, Öcalan articulates the need to build a system in which decisions are made collectively, where the members of society know about their past and determine their present and future. Bearing in mind the risks of direct democratic decision-making, he submits that only in a society where the values are based on ecology, democracy, and women's freedom, can it be ensured that collectively taken decisions will be just. Intrinsic

to the establishment of Democratic Autonomy, he therefore argues, is an ecological women's revolution (Öcalan 2017b).

He characterizes "capitalist modernity" as the culmination of the hegemony of the state, capitalist classes, and of men that have throughout time appropriated and deprived society, the poor and women. History however has shown, as Öcalan submits, that the dispossessed have always resisted and fought against these strings of "capitalist modernity". Since resistance against the status quo has always been part of human history, it therefore has a place in our collective memory. He argues that this knowledge forms a natural self-defense mechanism against persisting dominant categories. Introduced as a Gramscian counterhegemonic category, he proposed the building of "democratic modernity" to ensure societal peace and emancipation from democratic deficits inherent to the nation-state paradigm (Öcalan 2015).

This means that even an already-created ecological and democratic society based on women's freedom for instance must continuously defend itself against the potential emergence of centralized power of statehood, especially in the aftermath of its revolution. For Öcalan, this only becomes possible if "democratic modernity" is continuously formulated as an antithesis to "capitalist modernity" by the society itself and through the legitimacy of its own institutions.

The word "democracy" is the key to Öcalan's theory. He claims that all liberal nation-states have been predestined to fail, since they have never opened enough space for society to democratize truly. Democratic Autonomy in a confederalist system however is essentially radical democratic in nature and aims at a new politics that is ethical in character and grassroots in organization. Here it is important to overcome Western biases that understand radical democracy as part of a state-centered concept of territorial autonomy, which is significantly "taking over" councils or constructing a more "women friendly" environment, as it is for instance the case in Switzerland and the implementation of consociation democracy (Burc 2019).

The idea of Democratic Autonomy, similar to the concepts of libertarian municipalism as put forward by Murray Bookchin (1991), goes further than this. It is narrated as a politics based on achieving a new ethos of citizenship and community in transforming and democratizing city governments, by rooting them in popular assemblies in order to then weave them together into a confederation consisting not of nation-states but cross-territorial municipalities.

Many times, Öcalan has insisted that the build-up of confederalist system would neither threaten the territorial integrity of nation-states nor disregard the sovereignty of the central government (Öcalan 2016; 2017b). However, the municipal structures would over time make those physical and imaginative borders of the nation-state obsolete for the political realm of community life. Democratic Confederalism, as put forward by the Kurdish movement, therefore is a model of dual power, in which a situation is created that makes it possible for self-administered, municipal areas to coexist next to the nation-state. Self-administrative bodies on all levels allow the political space to be open to all strata of the society and to politically integrate the entire society with all

its ethnic, religious, political groups (Öcalan 2017b). These groups are by no means regarded as static formations, as the idea of localizing political participation processes in an anti-hierarchical structure, also foresees the building of new associations, confederations and groups according to the given needs and situation, as well as their dissolution if needed. This dynamic approach challenges the idea of attributed identities to certain groups, which also means the unmaking of dichotomies such as majority and minority in how society is constituted politically. The integration of all social and political groups in the decision-making process is promoted by Öcalan as the central pillar of non-territorial autonomy as a way to ensure the society's capacity of problem-solving with regards to social issues, without the need for centralized power.

While the concept of Democratic Autonomy shares common features with modalities of non-territorial autonomy as well as reflects discussions on participatory democracy such as deliberative democracy and consociation, a novelty is certainly the role ascribed to women as significant agents in the decentralization process. Öcalan's writings engage with the inherent interconnectedness of the subordination of women and the inherent democratic deficit of nation-states. Öcalan argues that the society does not treat women as merely a biological separate sex but more as a "separate race, nation or class – the most oppressed race, nation or class" (Öcalan 2013, 10). The idea of a "weak sex" becomes a shared belief of the nation-state, which he defines as the institutionalization of power, which according to Öcalan must be read as "synonymous to masculinity" (Öcalan 2013, 27). Similar to Carole Pateman's (1988) thesis that the Rousseauian social contract in fact must be read as a contract based on men's sexual access to women, Öcalan describes it as a systematic housewifisation of women (2013, 11). He submits that this process of subordination of women predates the systems of slavery and must be understood as a blueprint of colonial practices. Different to Maria Mies, who described the exploitation of women as the last colony (Mies, Bennholdt-Thomsen, and Werlhof 1988), Öcalan argues that women in fact have been the fist colony in human civilization.

> If we see colonialism not only in terms of nation and country but also in terms of groups of people, we can define woman as the oldest colonized group. (...) It must be well understood that woman is kept a colony with no easily identifiable borders. (Öcalan 2013: 56)

The term "hegemonic masculinity" as coined by Raewyn Connell in her gender order theory, describes the institutionalization of gender relations that legitimize the subordination of women and other deviant forms of "being a man" (Connell and Messerschmidt 2005). Deriving from the Gramscian theory of cultural hegemony, gender relations in the proclaimed liberal nation-state are shaped in a way that the hegemonic masculinity is not challenged significantly. Connell speaks of cyclical patterns that produce, reproduce and perpetuate social inequality between men and women, in which, according to Öcalan,

the constructed "weakness" of the female sex is institutionalized in the social reproduction of patriarchy, hence male dominance (Öcalan 2013: 11). Feminist scholars like Cynthia Enloe for instance have further been assessing the intersection of citizenship and nationalism from a gendered perspective, putting forward that "nationalism has typically sprung from masculinized humiliation and masculinized hope" (Enloe 1989: 44). Öcalan takes a step further and argues that it proves significantly difficult to transform nationalism from within the system of a nation-state, which is inherently built on hegemonic masculinity since contesting male dominance would be perceived like "a monarch's loss of his state" (2013: 50). Öcalan consequently rejects proposals for a movement for woman's statehood as he argues that the struggle for democratization entails the articulation of counter-hegemonic political realms outside the statist and hierarchical structures and not their reinstatement (Öcalan 2013: 54). Democratic Autonomy, as Öcalan submits, provides a fertile institutional ground of possibilities for women to organize as they are considered as a social group with distinct social realities, demands and needs that cannot be subsumed by any centralized processes of decision making as their bear the threat of reinstating hegemonic masculinity. Democratic Autonomy as described above therefore facilitates the establishment of women's own political parties, the organization of a popular women's movement, their own non-governmental organizations, and structures of democratic politics, as well as institutionalized participation on all levels of governance.

Women's representation in the Self-Administration in Rojava

The practical manifestations and implementation of the Democratic Autonomy concept have been changed and adjusted according to the course of the ongoing conflict in Syria, hence a clear assessment of the strengths, weaknesses, as well as types of implementation prove difficult form a scholarly perspective. It is also important to emphasize that the institutionalization of democratic autonomy in Rojava has not only been a development within less than a decade but more crucially has been under a constant attack by either the Islamic State group, jihadist militias as proxies by regional powers, a strict embargo by neighboring states, including the KRI, and as well as Turkish military presence and operation against the Autonomous Administration. With this disclaimer in mind, the structures of the self-administration can be broken down to three institutional building blocks and an additional women's structure that is organized integrative yet independently at the same time.

The three main pillars of the structures of self-administration in Rojava are (1) Autonomous Administration, (2) Syrian Democratic Council and (3) TEV-DEM. Society organizes itself starting from the smallest political unit of society, the commune with approximately 150-1,500 inhabitants. All of them are represented bottom-up in councils of neighborhoods, then sub-districts, districts, cantons, region, and finally in the Autonomous Administration. However, Democratic Autonomy also facilitates society to organize parallel and outside

the communes in so-called civil institutions that are represented through committees on specific issues in the Autonomous Administration.

Next to the Autonomous Administration, which is responsible for coordination between the regions, there is the executive body known as the Syrian Democratic Council. The SDC is the political umbrella that provides the political framework for the resolutions of the Syrian conflict and can be considered a diplomatic body. Political parties can participate in the council, as well as representatives from civil society or the autonomous administrations.

While the Autonomous Administration aims at literal administration through elected bodies and ministries on issues such as health, education or infrastructure on the most local level, the council's aim is to represent political parties. The SDC is an umbrella that tries to integrate political parties in northern Syria into a federal, democratic, and women-led political entity.

And the third major institution is TEV-DEM, which was already established in 2011, and translates into "Movement for a democratic society". It is an umbrella body for civil society and acts like "counter-power" to the two other bodies (Rojava Information Center 2019; Knapp and Flach 2016).

With the institutionalization of the principles of Democratic Autonomy, also women's visibility in the governing institutions became more apparent. As described above, the ideological framework of the Rojava model understands women as revolutionary agents in the deepening of democracy as they not only allow the emancipation from systems of domination imposed on women in society but further allow men to overcome internalized hegemony over women. Beyond women's visibility as female fighters in the Women's Defense Units (YPJ) against the Islamic State group, civilian structures were built in the same logic of fostering women's rights and gender equality through the establishment of women autonomous structures. There are two parallel set of structures, on the one hand institutions that include men and women and on the other hand institutions that are women-only. The latter is represented by the Kongreya Star, a women's confederation of all women's groups in Rojava. The women's confederation gathers every two years to assess past development and to plan new roadmaps for women's autonomous structures in the NES and all women involved in any of the institutions of the self-administration are members of the women's confederation by default. This includes all governance levels such as councils, communes, cultural and artistic collectives, families", workers' committees as well as service institutions (Kongreya Star 2018).

While being represented in the women's confederation, all women continue to maintain their autonomy as members of the respective institutions they are coming from. Consequently, women do not only organize on a supra-level, in the women's confederation, but in every commune by creating their own women's commune parallel to the mixed structure. On every administrative and institutional level, the decisions taken by the women's body are binding for all structures, with an additional veto right reserved for women's structures for decisions taken in the mixed bodies. Further, all institutional bodies, from collectives, communes to political parties have a co-chair system, where one

seat is reserved for the man, who is elected by the mixed bodies and one seat is reserved for a woman, who is elected only by the women-only body, thus rendering equal representation an inherent feature of the political system (Kongreya Star 2018; Knapp and Flach 2016; Rasit and Kolokotronis 2020; Şimşek and Jongerden 2018).

It is interesting, especially from the perspective of NTA modalities, to observe autonomous women's organization in communes with mixed ethnic constellations, in which ethnic groups are also free to organize themselves in distinct autonomous structures as well as in multi-ethnic structures. Parallel to the mixed-gender and women-only constellation, therefore, according to the specific context, women of one ethnic group can organize separately in addition to being members of the multi-ethnic body. For instance, while Arab or Syriac women first were part of women's bodies mostly consisting of Kurdish women, the confederal structures of self-administration made it possible for them to also form their own women-only autonomous structures for their ethnic group while still owning membership in the women's (multi-ethnic) confederation (Dirik 2018).

Democratic Autonomy in Rojava therefore neither presumes a conflation of ethnicity and territory, even within the smallest organizational unit of the commune, nor does it homogenize women's autonomous organization based on a shared gender identity. The main idea is to create the self-reliant structure of community organization according to the specific needs of the very area and the societal group, while remaining within the general framework of shared values and principles.

In addition to women's visibility through political participation as a constituting principle of the self-administration, there are also non-territorial women's spaces built by cross-community women's initiatives like the women's houses called "Mala Jin" in every commune, as well as safe spaces for women like the establishment of a women's only village organized, built and maintained by women for women (Dirik 2018; Knapp and Flach 2016). While these women-only spaces help cross-community women to emancipate themselves from abusive relationships or function as a first shelter in case of gender-based violence, these spaces further have become a realm for collective education, unlearning of dominant gender norms, financial emancipation through self-organized cooperatives like women-run small businesses in textile, agriculture or food production (Dirik 2018). Women-only spaces as an integral part of society allows women to gain a strong sense of self-sufficiency, resilience and societal recognition and certainly should be considered intertwined with the institutionalization of women's rights within the structures of the self-administration based on Democratic Autonomy.

Conclusion

The dynamical structure of Democratic Autonomy with a strong emphasis on women's self-reliance as a revolutionary act of emancipation for both men and women, is what distinguishes the Rojava project from other modalities of

Non-Territorial Autonomy. Further, the conceptual framework proves to be of a cardinal contribution to the wider discussions on NTA and plurinational democracies, unpacking the intertwined subordination of minorities and women. The paper discussed the paradigmatic journey of Kurdish movement under the PKK from a nationalist to a confederalist movement, as well as the role of Abdullah Öcalan in developing the ideational framework that has facilitated the experiment in grassroots democracy, decentralization, women's autonomy and minority protection to be implemented in the midst of an on-going war. With a brief discussion of the scholarly approach to the Kurdish question and the blind-spots within the debates on territoriality, nation-state, contentious politics in the Middle East, the paper has shed light on the difficulties in conceptualizing the Kurdish movement and the Rojava case within the given scholarly labels such as ethnic, nationalist, secessionist, minority and/or territorial. Rojava's implementation of a decentralized model of autonomy based on participative democracy, non-territoriality and systemic gender equality through women's self-organization not only challenges conflating notions of territory, nation, ethnicity, state, and masculinity, mostly presumed in the dominant literature on minority governance, but further institutionally unmakes dichotomies such as majority vs. minority and gender relations constructed on masculine hegemony.

The paper has also shown the terminological and epistemological contradictions of NTA when proposing non-territorial autonomy as a means to overcome the blind-spots of the nation-state, yet continuing to reinstate the idea of homogenous groups, territorial autonomy and the territorial state in its theoretical modifications. Due to the Kurdish population being a minority in four different nation-states, with a big dispersed population across the region and the diaspora, the case of Democratic Confederalism has shown that although every autonomy exists within a given territory, this territory must not necessarily be static and tied to one state only.

The Democratic Confederal concept understands non-territorial autonomy as an opportunity to understand territorial borders as fluid, without abolishing or replacing them with new ones. It is rather an attempt at understanding territory as an interconnected space that might be represented by a state, however, is not solely defined by it. The Kurdish case therefore proves how a specific case, mostly disregarded in Western scholarship, can be indicative and of paradigmatic importance for universal claims made on the ways to foster plurinational democracies. The analysis of non-territorial autonomy as proposed by the Kurdish movement in Rojava, has shown that NTA can only fulfill its democratic promise of equal participation and representation, if the definition of subordination is extended beyond the category of minorities, incorporating subordinate groups within society that are not necessarily defined through ethnic and religious subjectivities, as the example on women's representation in Rojava has demonstrated.

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Roza Burč

Neteritorijalna autonomija i rodna ravnopravnost: slučaj Autonomne uprave Severne i Istočne Sirije – Rožave

Apstrakt

Autonomna oblast pod upravom Kurda zvaničnog naziva Autonomna uprava Severne i Istočne Sirije (NES) – takođe poznata i kao Rožava – smatra oslobođenje žena kao imperativ za oblikovanje demokratskog društva. Autonomne prakse u NES jako podsećaju na neteritorijalne (NTA) modele, ali takođe unose i novine u vidu uloge žena kao aktivnih činilaca u izgradnji plurinacionalne demokratije. Ovaj rad razmatra (1) intelektualno i političko poreklo političke uloge dodeljene ženama u autonomnoj upravi, i (2) način na koji su autonomne prakse u Rožavi unapredile prava žena time što su bacile svetlost kako na institucionalnu primenu ženskih prava, tako i na stvaranje (ne)teritorijalnih prostora ženske emancipacije unutar autonomnog modela. Iznosi se tvrdnja da konceptualni okvir Rožava modela prevazilazi kurdsko pitanje i može se posmatrati kao pokušaj da se reši problem demokratskog deficita liberalnih demokratskih nacija-država putem objedinjavanja rešenja koja se odnose na isprepletene oblike podređenosti manjina i žena.

Ključne reči: žene, predstavljanje, plurinacionalna demokratija, neteritorijalna autonomija, kurdsko pitanje, Sirija, Rožava, PKK, manjine.

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Jelena Ćeriman and Aleksandar Pavlović

BEYOND THE TERRITORY PRINCIPLE: NON-TERRITORIAL APPROACH TO THE KOSOVO QUESTION(S)

ABSTRACT

This article presents an attempt to approach the dispute over Kosovo between Serbs and Albanians from a non-territorial perspective, with particular focus on the preservation of the Serbian cultural and religious heritage. First, we argue that the Kosovo issue is at present commonly understood as an either-or territorial dispute over sovereignty and recognition between Serbian and Kosovo Albanian politicians. However, we claim that a lasting resolution to the Kosovo issue actually needs to account for at least three separate aspects: 1) status of Northern Kosovo which is ethnically Serbian and still maintains various ties with the Serbian state, 2) status of Serbian cultural and religious heritage, chiefly UNESCO world heritage Serbian medieval monasteries and churches and 3) the fact that the Serbian population in central Kosovo, i.e. south of the river Ibar, where most of the mentioned monasteries and churches are located, are located in small municipalities or enclaves of Serbs surrounded by vast Albanian populations. We examine the applicability of the non–territorial approach (NTA) to the Kosovo issue by analyzing the normative framework directly regulating the Serbian cultural and religious heritage in Kosovo, its preservation and protection, particularly of Serbian Orthodox monasteries, churches and other historical and cultural sites, while comparing these regulations to the existing normative NTAs in Croatia and Montenegro. Arguably, since most Serbian monasteries and churches are not included in any sovereignty negotiations, we point to the potential to combine territorial and non–territorial approaches, regardless of the continued obstacles in implementation arising from continued contestation of Kosovo's sovereign status.

KEYWORDS

Non-Territorial Approach (NTA), territorial approach (TA), Serbian-Albanian relations, Serbian cultural and religious heritage, Kosovo

1. Introduction

This article approaches the Kosovo issue(s) between Serbs and Albanians from a non-territorial perspective, with particular focus on cultural and religious heritage since the main discourse of this conflict is the discourse of enemies with different religious beliefs, language and ethnicity (Pavlović et al. 2015).[1]

1 The first draft of this article originated during Aleksandar Pavlović's short research stay at the University of Derby and University of Glasgow from mid–February to

Jelena Ćeriman: Research Associate, Institute for Philosophy and Social Theory, University of Belgrade; jelena.ceriman@instifdt.bg.ac.rs.
Aleksandar Pavlović: Research Associate, Institute for Philosophy and Social Theory, University of Belgrade; aleksandar.pavlovic@instifdt.bg.ac.rs.

On the first glance, such endeavour may seem counterintuitive. The NTA arrangements are not novel (see: Križanić and Lončar 2012), they have been employed rather successfully in Balkans and in Serbia, for instance, in the case of Hungarian minority in Serbian northern province of Vojvodina (Beretka 2013, Korhecz 2014). However, in ongoing debate Kosovo issue(s) appears as essentially a territorial one, and therefore cannot be resolved effectively by a non-territorial approach. In other words, is it not too late to talk about the NTA arrangements?

In approaching the Kosovo issue(s) from an NTA perspective, it is instructive to have in mind first that NTA should not be viewed as a universally applicable solution to all issues related to accommodating minorities and diversities within a polity. While the recent expansion in understanding of this term surely makes it a useful framework within which to consider a whole range of issues across different contexts, from socio-linguistic, over political and cultural to religious identity (see Malloy, Osipov and Vizi 2015), it still should not be viewed as an universal, ready-made solution to one and all problems of accommodating diversities. What is more, more often than not, the NTA approach in its practical and policy use is seldom found in its pure form, and is more commonly mixed and matched with a TA (territorial approach) in accommodating minority or collective rights by the central authorities. Broadly speaking, TA would be better suited for minorities that inhabit a relatively compact territory where they present a clear majority. As Sherrill Stroschein (Stroschein 2015: 24) reminds us, this dichotomy can actually apply to the same ethnic group with a single state: "Minorities in enclaves, or regions where their numbers constitute a local majority, tend to favour TA as a means for them to govern their own affairs within that TA territory - as is the case of the German-speaking minority in Alto Adige (South Tyrol) in northern Italy." Ultimately, it leads to what Stroschein calls the "mini-state" approach, "one that reproduces state administrative duties at a local level that is under the political control of the minority group" (ibid, 24). The 'mini-states' produced by TA can thus favour self-governance at the expense of minority participation in the main state. However, while this can seem as a favourable solution from the perspective of minorities, the majority population and state authorities can see it as a potential threat to the central authority.

As it appears, the present situation in Kosovo exemplifies the clash between local and central authorities appropriately, and one could easily summarize the present years-long stalemate in Serbia-Kosovo negotiation from this vintage point. Namely, the overall political framework that was supposed to regulate both intra and extra Serbian-Albanian relations and issues in Kosovo has been

mid–March 2020. The author is deeply indebted to David Smith and Robert Hudson who provided guidance and made a number of useful references and remarks, and to COST action ENTAN that enabled this stay through its STSM scheme. Further development of the aricle included comparative analysis of normative frameworks in the region which was particular contribution of Jelena Ćeriman.

the 2013 Brussels Agreement. Both parties ratified it, with Serbia agreeing not to block, or encourage others to block, Kosovo on its EU path, while Kosovo officials agreed to grant a substantial autonomy to the Kosovo Serbs. In Serbian interpretation, Association/Community of Serb majority municipalities should precisely have wide authority and replicate the state authorities by having the President, vice President, Assembly, Council as well as its own official symbols (coat of arms and flag).[2] However, Kosovo Albanians apparently saw this as a threat, and in the following years consistently tried to downplay its role. In 2015, the Kosovo government issued its official stanza claiming it to have a consulting character, and being not (much) more than a non–profit organization.[3] While there are still some hopes for reviving this Agreement, most recent authors already concluded that the Association "not only failed to produce the expected results, but also inflamed certain aspects of the conflict further entrenching Kosovo's stalemate" (Kartsonagi 2020: 104).

To complicate matters further, we submit that, even if this Agreement following from a TA approach is taken as a framework for solving the question of Kosovo Serbs, it would not be easy to implement in the case of the Serbian community south of the River Ibar, nor to apply it to the question of Serbian religious and cultural heritage. Namely, as scholars readily observed, TA is less useful for a minority population scattered within a country or a wider region, whose goals can differ from those of the members of the same ethnic group constituting a majority within a compact area or a region (Stroschein 2015: 24). Therefore, in this article we advocate moving from the purely territorial and sovereignty approach to North Kosovo, to the NTA approach to Serbian enclaves and heritage in Kosovo, as a welcome change in the halted Serbian-Albanian dialogue. In this regard, we relied on the recent works of Stroschein (Stroschein 2015) and Palermo (Palermo 2015), both of which argued that the non-territorial autonomy is not a one-size-fits-all solution, and

2 Such interpretation is rather grounded in the text of the Agreement (Brussels Agreement 2013):
"1. There will be an Association/Community of Serb majority municipalities in Kosovo. Membership will be open to any other municipality provided the members are in agreement.
2. The Community/Association will be created by statute. Its dissolution shall only take place by a decision of the participating municipalities. Legal guarantees will be provided by applicable law and constitutional law (including the 2/3 majority rule).
3. The structures of the Association/Community will be established on the same basis as the existing statute of the Association of Kosovo municipalities e.g. President, vice President, Assembly, Council.
4. (...) The Association/Community will have full overview of the areas of economic development, education, health, urban and rural planning."

3 Republic of Kosovo, 'Brussels Agreements Implementation State of Play, March—September 2015', *Report submitted to the European Union/European External Action Service by the Government of the Republic of Kosova*, Pristina, 2015, pp. 23–24. For a detailed analysis of this Agreement and the EU policy in this respect, see: Kartsonaki 2020: 103–120.

that it should better be seen not as a conceptual opposite to territorial autonomy, but as something that complements it, as is indeed the case in practice across a range of contemporary contexts in Europe and beyond.

Like Stroschein, Palermo recently argues that "[t]he conferment of a territorial self–government for minority groups, however, does not address the whole matter of autonomy 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" (Palermo 2015: 20). Thus, even though he recognizes that "territorial solutions are indeed necessary devices to address the minority issues" (Palermo 2015: 14), he goes further in order to explore various arrangements between ethnicity and territory in managing diversity. He distinguishes an autonomy granted to a certain territory/territorial unit, from an autonomy granted to a specific ethnic group, that is, between autonomy granted *to a territory* and all of its inhabitants ('autonomy to') and autonomy granted *to an ethnic group* that constitutes the majority within a territory ('autonomy for'). Whereas the latter approach strengthens ethnic-based claims to ownership and excludes local 'minorities within minorities', the former offers the possibility to develop pluralistic regional identities and institutional arrangements that accommodate all communities through a combination of territorial and non-territorial approaches. We understand the concept of NTA exactly as an arrangement that considers a tailored approach to the realisation of the weakening of ethnic tensions between Serbs and Albanians in Kosovo, since the NTA implies a form of cultural self–government without challenging the sovereignty of the state (Bauer 2000) and can therefore help in maintaining cultural diversity and overcoming the limitations of territorial autonomy without violating the principle of territoriality (Nimni 2007; Goemans 2013). Such arrangements require careful crafting and raise a host of issues to be worked through in practice, not least in the spheres of language use and education (for instance, how to negotiate the teaching of contested histories in schools?) (Palermo 2015). Also, the issue of national cultural autonomy has been a rather lively and fruitful field in Europe in recent decades (see: Smith and Hiden 2012), in particular the revival of Karl Renner's ideas of "extraterritorial cultural autonomy" (see: Smith and Hiden 2012:112), especially in Central and Eastern Europe and the Baltic states (Smith 2013: 27–55). Hence, we believe that it is worth considering if NTA perspective can bring some added value in the discussion over Kosovo issue(s).

In the first chapter of this paper, we contextualize the issue of preservation of Serbian religious and cultural heritage in Kosovo, and propose application of the NTA approach in the Serbian-Albanian dialogue, which focuses on this heritage. It is followed by description of used methodology, followed by an analysis of normative framework and its shortcomings regarding Serbian religious and cultural heritage in Kosovo, as well as a comparison of this legislation to the existing NTA solutions in Croatia and Montenegro. In the concluding chapter of this paper we summarize findings of our analysis.

2. Contextualization: Breaking Down the Kosovo Issue(s)

The Kosovo issue(s) could be summarized as follows: Serbian claims are essentially based in history – Kosovo has been an autonomous part of Serbia in the former Yugoslavia; it has numerous Serbian medieval churches and monasteries of outstanding value (some are on the UNESCO list of World heritage), witnessing about centennial Serbian presence in Kosovo; Kosovo was ruled by Serbian medieval rulers, and is the place of the decisive battle in which medieval Serbia perished under the hand of the Turks, who ruled for the next five centuries. Albanian claims are based in demographics – Albanians comprised clear majority of population in Kosovo at least from the late 19th century onwards and are at present close to 90% of the population. The Albanians boycotted Serbian institutions under Slobodan Milošević's oppressive rule of the then Serbian province of Kosovo in the 1990s; an armed conflict between the insurgents and Serbian police followed, ending by NATO bombing the then Yugoslavia and ending Serbian sovereignty over Kosovo in 1999. In 2008, Kosovo unilaterally declared its independence – which Serbia considers illegal – and has since been recognized by 23 out of 28 EU countries and altogether by approximately half of all countries in the world; it is a member of a number international bodies, but not of UNESCO, Interpol and UN (for a more in–depth overview of Kosovo history, see: Vickers 1998, Mertus 1999; for an insight into a contemporary political situation, see: Judah 2008). In short, the Kosovo conflict appears to be fundamentally a territorial one – it can be either Albanian or Serbian, function under either Kosovo state sovereignty or Serbian state sovereignty; no other option or middle ground is plausible. Amongst many ideas circulating in the media and public over the ultimate resolution to the Kosovo issue, one of the two most commonly mentioned would be the option where Northern Kosovo with 4 municipalities which have almost 100% Serbian majority is ceded to Serbia, with Serbia then recognizing Kosovo and agreeing to its seed in the UN and membership in international organizations. However, most Albanian, Serbian and EU leaders have so far vigorously opposed this option on the grounds of either protecting the territorial unity of Kosovo or preventing the precedent that would open up the Pandora box of border disputes in the Balkans. The second option has been to form a strongly connected Community of Serbian municipalities in Kosovo, with significant autonomy and legislative functions and ability to maintain various ties with Serbia (comparable to the post–Dayton model of the Republic of Srpska in Bosnia) (for the discussion of both option see: Vladisavljević 2012: 46–62). However, Kosovo Albanian politicians have so far also resisted having broader autonomous Serbian units in Kosovo.

As we submit, the Kosovo issue actually comprises three related, but separate problems. First, the ultimate status of Northern Kosovo, which still has a stable Serbian majority and where the presence of Kosovo state is at best mildly felt. As mentioned, this issue has been a subject of debates, proposals for land swaps, for its formal accession to Serbia in exchange for Serbian

recognition of Kosovo independence and the like (see: Santora 2018); hence, it is at present the least rewarding to be observed from an NTA perspective. While Northern Kosovo and its issues have a huge presence in Serbian media and politics, the Serbs living in the municipalities and enclaves scattered in central and southern parts of Kosovo receive far less attention. Their political leaders are used to cooperate with the Kosovo state structures, and generally speaking, international and Kosovo state authorities and institutions have established a more solid presence there. In addition, most of the aforementioned outstanding Serbian orthodox churches and monasteries, that the Serbs have great affection for, are located either within these enclaves or in places nowadays inhabited solely by Albanians.

One of the main reasons for the insufficiency of the TA approach to Kosovo as envisaged by the Brussels Agreement is that it fails to account for the rather drastic recent and ongoing demographic shift among the Kosovo Serbs. Namely, while in the pre-1999 period the majority of Kosovo Serbs lived south of the river Ibar, their numbers significantly dropped and are constantly going down in recent years. Putting exact figures to these claims proves to be quite challenging given the problematic validity of population censuses and estimates conducted in the last decades. The last fully reliable insight into the population of Kosovo was the 1981 census, which showed some 230 000 Serbs and Montenegrins (15%) and over 1 200 000 Albanians (77%) in the total of over 1 500 000 inhabitants (Popis 1991). The census of 1991 showed the figure of 215 000 Serbs and Montenegrins. Albanians massively boycotted this census and thus the official Yugoslav statistics recorded only 9 000 Albanians (Popis 1993). However, since at the time Kosovo Albanians still controlled some institutions, they issued their estimate made by the Statistical Office of the Autonomous Province of Kosovo, with close to 1 600 000 Albanians or nearly 90% of the population. Since then, the only census in Kosovo was the one from 2011, conducted by the now independent Kosovo institutions, which this time the Serbs boycotted heavily (see: Musaj 2015). Without fully reliable data, scholarly articles seem to be a more useful source of estimation than the official documents. Vladisavljević thus make a reference to “well over 100,000 Serbs expelled from Kosovo after the war” (Vladisavljević 2012: 32), which seems closer to the actual figure, while Fridman and the European Centre for Minority Issues mention the remaining number of Serbs living in Kosovo nowadays to be at 130 000 and 140 000 (Fridman 2015: 176; Minority Communities 2012: 4). All things considered, it seems reasonable to suggest that nearly half of Kosovo Serbs fled from Kosovo after 1999. Initially, it were urban Serbs that suffered the most – once thriving Serbian population from Prishtina, Prizren and other major cities, accounting for some 40% of the overall Serbian Kosovo population, were expelled. Also, another several thousand of rural Serbs from isolated Serbian villages and enclaves in Metohija were expelled during the 2004 riots (called Pogrom in Serbia), thus turning the whole Metohija/Dukagjin into almost ethnically clean territory apart from some enclave villages, such as Goraždevac, Velika Hoča and parts of Orahovac. Finally, yet another conclusion that can be

derived from the previous discussion is that the territorial distribution of the Serbian community changed rather drastically in the post-1999 period: while previously some three-quarter of Kosovo Serbs lived south of the river Ibar, nowadays a majority of Kosovo Serbs are located in the Northern Kosovo, with a clear tendency that such trend will continue in the future.

To respond to dire situation of the Kosovo Serbs south of Ibar river, especially after the 2004 ethnic violence, international community and Kosovo institutions made a number of legal provisions. One of the key measures was the territorial redistribution of Kosovo. In terms of territorial distribution, Kosovo in the former Yugoslavia, as well as in the years after 1999, had 30 municipalities. Five of these had Serbian majority according to the 1991 census: Leposavić, Zvečan, Zubin Potok, Štrpce and Novo Brdo. This distribution to 30 municipalities held till 2008, when new administrative division has been introduced, with 38 municipalities, 10 of which have Serbian majority: Leposavić, Zvečan, Zubin Potok, Severna Mitrovica, Gračanica, Novo Brdo, Ranilug, Parteš, Klokot and Štrpce. Apart from these municipalities, Serbian population is nearly absent from all other parts of Kosovo, with only a handful of Serbs residing nowadays in the largest cities of Priština and Prizren, and some remaining in the village enclaves such as Goraždevac or Velika Hoča in Metohija.

Much of Serbian cultural and religious heritage is situated in the majority Albanian inhabited areas and outside the municipalities with a majority of Serbian population. There are four Serbian Orthodox sites in Kosovo which have been recognized by the UNESCO as part of the World Heritage: Dečani Monastery, Patriarchate of Peć, Bogorodica Ljeviška (Our Lady of Ljeviš) and Gračanica Monastery. Apart from Gračanica, which lies within the Serb majority enclave in central Kosovo, all others are situated in the almost exclusively Albanian municipalities of Peć, Dečani and Prizren respectively. Serbian heritage has so far been essentially a divisive issue – Kosovo officials trying to register these monasteries in UNESCO as Kosovo heritage, and Serbian officials making efforts to block and prevent them in doing so. For Kosovo, the UNESCO membership would represent an important step towards full international recognition which is still hampered by the Russian veto of the UN seat. Similarly, Serbian state officials and media commonly presented the question of Serbian cultural heritage in Kosovo as the matter of national sovereignty (Pudar Draško, Pavlović and Lončar 2020).

If one wishes to apply the NTA approach to Kosovo, the first big question is the autonomy from whom and for whom. The position of the Serbian Orthodox Church, several political parties and, mutatis mutandis, mainstream Serbian politics is that it is the Albanians that should enjoy autonomy within Serbia (Zlatanović 2018: 88–94). For the Kosovo Albanians it is the other way round – Serbs and their heritage can at best enjoy autonomy within the Kosovo state (Szpala 2018). Even though Serbian officially lost sovereignty over entire Kosovo after the NATO bombing in 1999, Northern Kosovo effectively kept close ties with Serbia to this day. Until 2012, there was no border control between central Serbia and Northern Kosovo. Serbian state institutions

were fully functional there, including educational system, hospitals and medical staff. Legal disputes were settled at Serbian courts and uniformed Serbian policemen were also present there, alongside UNMIK personnel. From 2012 some elements of the Kosovo state are present in the North as well – border crossings have been established, Serbian policemen wear official Kosovo uniforms, and Kosovo police sometimes intervenes in the North, but this area and its population – almost exclusively Serbian – preserve institutional ties with the Serbian state and retain many symbols of Serbian statehood. In distinction, Serbian enclaves and population south of Ibar river are more firmly connected to the Kosovo state – they have Kosovo identity cards, drive cars with Kosovo plates, and most official buildings and institutions in their towns or villages have Kosovo state symbols and function under Kosovo sovereignty.

The international community had a large influence on the status of Serbian heritage in Kosovo. While countries differed in recognizing Kosovo independence or not, international players seemed dedicated to provide security to endangered Serbian religious sites in Kosovo, especially after these being attacked in 2004, and continue to do so (Arraiza, internet). With that goal, international community put a pressure on Kosovo Albanians to adopt a number of laws granting special status to Serbian churches, monasteries and heritage sites (Lončar 2019). More so, in formulating the policy "standards before status", they actually conditioned the recognition of Kosovo independence by a number of legal demands and provisions, and adoption of favourable laws for the Serbian church and heritage featured prominently among them. In effect, this means that most of those legislation granting the protection of cultural and religious heritage has been effectively imposed on Kosovo Albanian political structures.

In approaching this issue here, we are following the factual situation that could be described as follows – no matter what the ultimate agreement might involve, crucial Serbian monasteries are located in the regions with almost exclusively Albanian population – this is the situation with the monastery of Dečani, Patriarchy of Peć, and Our Ladies of Ljeviška and other monuments in Prizren; true, Gračanica and Velika Hoča are located within Serbian enclaves, but these are little more than small islands of Serbian population. This means most of Serbian heritage in Kosovo would effectively remain outside of the territory covered by any association of Serb municipalities. Although Serbian government is continually contesting Kosovo's status, in all the aforementioned locations the Kosovo state has undisputed sovereignty, and it is certain that such situation is not going to change having in mind demographic estimates and current political dominance of the Kosovo institutions held by Kosovo Albanian political structures.

Therefore, as we believe, moving from the purely territorial and sovereignty approach to North Kosovo to the NTA approach to Serbian heritage in the entire Kosovo might actually be a much needed change in the Serbian-Albanian dialogue.

3. Methodology

The aim of our paper is to point out the possibilities of including NTA perspective in resolving the issue of Kosovo, with a special focus on the preservation of the Serbian cultural and religious heritage in this territory. Our starting point is that the Kosovo issue is at present commonly understood as an either–or territorial dispute between Serbia and Kosovo, a „zero sum game" over sovereignty and recognition between Serbian and Kosovo Albanian politicians. However, having in mind the status of the Northern Kosovo which is ethnically Serbian and still maintains various ties with the Serbian state, and the status of Serbian cultural and religious heritage, chiefly UNESCO world heritage Serbian medieval monasteries and churches, as well as the fact that Serbian population in central Kosovo i.e. south of the river Ibar, where most of the mentioned monasteries and churches are located, are inhabiting small municipalities or enclaves of Serbs surrounded by vast Albanian population, we argue that a combination of territorial and non–territorial approaches might be particularly valuable for the Serbian–Albanian dialogue, i.e. solution of the Kosovo issue.

Following Palermo's stand 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 (...) changing because of the evolution of the overall legal environment" (Palermo 2015: 27–28), we tend to examine the possibilities in normative framework regarding Serbian cultural and religious heritage in Kosovo for overcoming territorial perspective, or rather inclusion of non–territorial approach to the Kosovo issue in Serbian-Albanian dialogue.

For this purpose, in the first step of the content analysis we analyse the following documents: the Cultural Heritage Law (2006), the Constitution of the Republic of Kosovo (2008), and the Law on Special Protective Zones (2008), the Law on Historic Centre of Prizren (2012), and the Law on the Village of Hoçë e Madhe / Velika Hoča (2012). More specifically, we focus our analysis on the legal aspects of the preservation and protection of Serbian cultural and religious heritage in Kosovo, particularly of Serbian Orthodox Monasteries, Churches and other historical and cultural sites. In this step of the analysis, we identify possible inclusion of the NTA perspective in the above mentioned normative framework. As mentioned earlier, we understand the NTA concept as a form of cultural self-government (Bauer 2000) that can help in maintaining cultural diversity and overcoming the limitations of territorial autonomy without violating the principle of territoriality (Nimni 2007; Goemans 2013). Basically, this can be achieved through allocation of power from the central authority (state) to specific communities in order for these communities to make decisions in certain policy fields. During the first step of the analysis, we are looking for the presence and possibilities of allocation of power from the central government of Kosovo to the Serb communities in Kosovo regarding the Serbian cultural and religious heritage in this territory.

The second step of the content analysis involves analysis of the existing NTA solutions in legal arrangements elsewhere, concretely in Croatia and Montenegro. These two countries were chosen given the common socialist, post–socialist and post–Yugoslav past, but also as an example of Southeast European countries where NTA entities have come to life in practice in the form of National Councils of National Minorities. In addition, a conflict between the Montenegrin authorities and the Serbian Orthodox Church over the Serbian cultural and religious heritage is currently ongoing in Montenegro, and it is important to compare the way in which NTA perspective is included in resolving this issue in Montenegro and in Kosovo. National Councils of National Minorities represent bodies of self–governance on the entire territory of a specific state and therefore they are representing and protecting the interests of members of minority groups regardless of their place of residence (Beretka, 2013). Therefore, their existence is based purely on the non-territorial autonomy principle. For the purpose of the comparative analysis in this paper we analyse Constitution of the Republic of Croatia ("Narodne novine No. 56/90, 135/97, 8/98 – consolidated text, 113/2000, 124/2000 – consolidated text, 28/2001, 41/2001 – consolidated text, 55/2001 – correction, 76/2010, 85/2010, 5/2014), Constitutional Law on the Rights of National Minorities of the Republic of Croatia ("Narodne novine" No. 155/2002, 47/2010), and the Law on the Legal Status of Religious Communities ("Narodne novine" no. 83/02, 73/13), and available documentation on the official website of the Serb National Council in Croatia (SNC) (https://snv.hr/eng), as well as the Constitution of the Republic of Montenegro ("Službeni list CG" No. 1/2007, 38/2013 – Amendments I–XVI), Law on Minority Rights and Freedoms (Official Gazette of the Republic of Montenegro No. 031/06, 051/06, 038/07, Official Gazette of Montenegro, No. 002/11, 008/11, 031/17), and the draft of the Law on Freedom of Religion (internet).

Third step of the analysis includes comparison of the named legislation and their shortcomings in Kosovo and in Croatia and Montenegro regarding preservation of Serbian religious and cultural heritage.

4. Analysis

In this chapter our focus is given to the analysis of normative arrangements and its shortcomings regarding preservation of Serbian religious and cultural heritage in Kosovo and their comparisons with the NTA normative solutions in Croatia and Montenegro regarding this topic.

The main conclusion of the analysis is that NTA arrangements, specifically the national councils of the Serbian national minority in all three analysed countries, are not seen as a solution to the issue of preserving the Serbian cultural and religious heritage. Reasons for such situation range from the complete absence of norms that would define the function of the Council in the protection

of Serbian heritage (such as the case of Kosovo) to the insufficient application of the developed normative framework in practice (as in the case of Croatia).

4.1 Normative Framework regarding Serbian Religious and Cultural Heritage in Kosovo

When it comes to the Serbian National Council of Kosovo and Metohija, the analysis has shown that this body is not recognized in the normative framework of the Republic of Kosovo as an actor that has a role in preservation of the Serbian religious and cultural heritage. It is the same case with the Association of Serb Municipalities, which is a self-governing association of municipalities with a Serb majority population in Kosovo. Concretely, both institutions were proclaimed by Serbs in North Kosovo which problematized their legitimacy and caused a denial from the Kosovo Republic. Therefore, they are not official Kosovo institutions, but on the contrary, they are their alternative and a main rival. The Community was expected to be officially established within Kosovo's legal framework in 2015, but it was postponed over conflicts regarding 2013 Agreement, which was proclaimed unconstitutional by the Constitutional Court of Kosovo (Bajrami 2013).

The protection of cultural and religious sites in Kosovo has been guaranteed by the Cultural Heritage Law, the Constitution of Kosovo, and the Law on Special Protective Zones, the Law on Historic Centre of Prizren, and the Law on the Village of Velika Hoča / Hoçë e Madhe. They guarantee the preservation and protection of cultural and religious heritage, particularly "Serbian Orthodox Monasteries, Churches, other religious sites, as well as historical and cultural sites of special significance for the Kosovo Serb community, as well as other communities in Republic of Kosovo" (Law on Special Protective Zones, 2008, Art. 1).

Effectively, these laws were essentially enforced upon Albanians by the international community as a condition for recognizing their independence. Thus, most of the Kosovo laws clearly follow from the regulations drafted by Martti Ahtisaari, the United Nations Secretary General Special Envoy, introduced in 2007 the Comprehensive Proposal for Kosovo Status Settlement (hereafter the Ahtisaari Plan). The Ahtisaari Plan additionally strengthened the guarantees for minority protection including multicultural rights, considerable autonomy on the local level and protection of cultural heritage. The need to protect Orthodox religious sites was explicitly acknowledged in the Annex 5 of the Ahtisaari Plan. Annex 5 of the Ahtisaari Plan states that: "The Serbian Orthodox Church in Kosovo shall be afforded the protection and enjoyment of its rights, and [that] those Serbian cultural sites which are considered to have special significance for Kosovo Serbs will be provided with security by the Kosovo police force" (Beha, 2014, p. 95).

Kosovo was asked to recognise the Serbian Orthodox Church in Kosovo as an integral part of the Serbian Orthodox Church in Belgrade rather than as a separate institution (Article 1.2). This provision establishes its solid presence

– and by extension the presence of Serbia as well in Kosovo, particularly because the Serbian Orthodox Church has also had political relevance in Kosovo. It was guaranteed the protection of its property, freedom of movement to the clergy, but also fiscal incentives such as customs duty and tax privileges, which were not granted to other religious communities. In addition, the Ahtisaari Plan stipulates that Kosovo authorities have access to the property of the Serbian Orthodox Church "only with consent from the Church, in the event of a judicial order issued relating to alleged illegal activities, or in the event of imminent danger to life or health" (Article 1.5).

Besides that, the Ahtisaari plan allows for a selected number of Serbian Orthodox monasteries and churches to be labelled "Special Protective Zones" with the aim to: "Provide for the peaceful existence and functioning of the sites to be protected; preserve their historical, cultural and natural environment, including the monastic way of life of the clergy; and prevent adverse development around them, while ensuring the best possible conditions for harmonious and sustainable development of the communities inhabiting the areas surrounding such sites" (Article 4.1).

The plan lists dozens of sites belonging to the Serbian Orthodox Church, where any construction, industrial or property development are prohibited and sets the area that these zones will span over. It also clearly suggests that the Serbian Orthodox Church is the highest authority in the special protective zones, whose agreement is needed for any commercial construction or development, public gatherings, recreation and entertainment or urbanization of agricultural land (Article 4.1.2). In addition, Kosovo Police Service was made responsible for the security of religious sites (Article 3.1.1).

The provisions of the Ahtisaari Plan have been included in the new Kosovo Constitution and legislative framework adopted since 2008. It was agreed that in the event of conflict the Ahtisaari plan shall prevail over the Kosovo Constitution (Beha, 2014). The Kosovo Constitution, written in the following year and inaugurated in the months after the Kosovo unilaterally proclaimed independence, contains elements related to the status of Serbian religious and cultural heritage in the following articles:

Article 9: "The Republic of Kosovo ensures the preservation and protection of its cultural and religious heritage."

Article 58, Amendment 5: "The Republic of Kosovo shall promote the preservation of the cultural and religious heritage of all communities as an integral part of the heritage of Kosovo. The Republic of Kosovo shall have a special duty to ensure an effective protection of the entirety of sites and monuments of cultural and religious significance to the communities."

In addition, Article 81 stipulates that the Laws on protection of cultural heritage constitute the Legislation of vital interest. Such laws require for its adoption, amendment and repeal both the majority of the Assembly deputies in general, and the majority of those seats reserved for minority ethnic communities. In effect, this means that the minority favourable laws regulating, in this case, Serbian religious and cultural heritage, cannot be adopted or changed

without the consent of the local Serbs, and that Kosovo state representatives cannot enter the property of the Serbian Orthodox Church without its consent.

While these laws appear favourable for the Serbs, especially the Church, some also pointed out the downsides of this issue. For one thing, the legislation lacks provisions related to funding and sanctions for the violation of the laws, which may significantly affect their implementation. In addition, it seems that the legislation particularly focus on the protection of the sites rather than inter-ethnic reconciliation. This is visible, first, in its content which is not concerned with opening the sites to the public, education of the Kosovo citizens about the importance of the Orthodox religious sites or inter-ethnic and inter-religious communication and reconciliation. While there were some efforts to frame cultural heritage as a common patrimony of all Kosovo citizens, these efforts gradually evaded after the March 2004 attacks on the Serbian cultural heritage. Second, the lack of support for inter-ethnic communication and reconciliation is visible in the way the legislation was designed exclusively by the international actors without the inclusion of local actors (see Lončar, 2016b). Since current legislation was designed by international actors and imposed on the Kosovo institutions, it does not reflect either the feelings of Albanians towards minority cultural heritage or sentiments of minorities towards integration in the Kosovo society. All in all, the normative framework that now regulates cultural heritage is a result of international pressures and conditionality for gaining full independence. However, while international actors had crucial role in initiating and passing the laws, they were not successful in securing their full implementation or changing the "hearts and minds" of the Kosovar citizens and their attitudes towards minorities. The question of legal status that Serbian cultural heritage enjoys in Kosovo seems to be virtually absent from public discourse on both sides, although it is precisely the legal status of Serbian monasteries in Kosovo, rather than the sovereignty issue, that determines their destiny. Shifting the focus from the question of sovereignty to the legal status of cultural heritage in Kosovo thus seems to be the most productive option in the long run. However, for the moment, both sides are investing considerable efforts into proving their exclusive right to heritage, instead of negotiating for a full implementation of the favourable legislative and avoid instrumentalizing the rich and rightfully important Serbian religious and cultural heritage in Kosovo.

4.2 NTA Normative Arrangements in Croatia Regarding Serbian Religious and Cultural Heritage

When it comes to the question of NTA normative arrangements in Croatia regarding Serbian religious and cultural heritage, for the purpose of this paper we analyse: Constitution of the Republic of Croatia, Constitutional Law on the Rights of National Minorities of the Republic of Croatia, and the Law on the Legal Status of Religious Communities, as well as available documentation on the official website of the Serb National Council in Croatia (SNC). Unlike

the normative framework in Kosovo, the normative framework in Croatia provides a good basis for the participation of the Council of the Serbian national minority (as an NTA solution) in the preservation of cultural and religious heritage, but the full application of the norms is mostly absent.

In the preamble of the Constitution of the Republic of Croatia, the Republic is established as "a nation-state of the Croatian people and a state of the members of other nations and minorities who are its citizens", among others, Serbs. All minorities are guaranteed equality with citizens of Croatian nationality, as well as the realization of their rights as members of national minority groups. Article 15 of the Constitution emphasizing that members of all nations and minorities "shall be guaranteed freedom to express their nationality, freedom to use their language and script, and cultural autonomy." Religious freedoms are prescribed in Article 41 of the Constitution which states the equality of religious communities before the law and separation from the state.

Although Constitutional Law on the Rights of National Minorities is the main law regulating directly the rights of minorities in Croatia, it was politically controversial and much–discussed law (amended and suspended several times). However, its adoption was one of Croatia's international obligations upon entry into the Council of Europe and also an obligation for the implementation of the European Union Association and Stabilization Agreement, so the legislators at the Law's drafting phase endeavoured to apply the most generally accepted standards in minority protection (Petričušić 2004). In this law, in Article 7 it is stipulated that the Republic of Croatia "ensure the exercise of special rights and freedoms of national minority members they enjoy individually or jointly with other members of the same national minority or, where so provided in this Constitutional Law or a special law, jointly with members of other national minorities, in particular with regard to: (...) cultural autonomy through the preservation, development and expression of their own culture, preservation and protection of their cultural heritage and tradition; practising their religion and establishing their religious communities together with other members of the same religion; (...) representation in the Parliament and in local government bodies, in administrative and juridical bodies; participation of the members of national minorities in public life and local self–government through the Council and representatives of national minorities." Serbian minority is satisfying the threshold of 1,5% of the entire population in Croatia, which is granting it the maximal political participation. i.e. maximum number of the representative seats stipulated in this Law by the Article 19. Regarding promotion, preservation and protection of the position of national minorities in the society, members of national minority groups can elect, under the conditions defined in this law, their minority self–governments or minority representatives in the self–government units (Article 23). Article 25 introduces Councils for national minorities as non–profit legal persons. According to this law, the self–government unit's administration should "seek opinions and proposals of the minority self–government formed in its area regarding the provisions regulating minority rights and freedoms" (Article 32). This law

also introduces institution of Committee for national minorities with an aim to "consider and propose ways of regulating and addressing issues related to the exercise and safeguarding of minority rights and freedoms" (Article 35). In order to fulfil this purpose, Committee will co–operate with government and self–government bodies, and all legal entities (i.e. international organisations and institutions and/or authorities of the countries of origin of the national minorities) that are engaged in activities related to the exercise of minority rights and freedoms (ibid).

On the other hand, the Law on the Legal Status of Religious Communities (Narodne novine no. 83/02, 73/13) does not in any way mention the Councils of national minorities as actors for the preservation of religious and cultural heritage in Croatia, and thus also the Serbian heritage. However, this law provides that religious communities will receive means from the state budget in an amount that will be determined depending on the type and significance of religious facilities (cultural, historical, artistic, religious and the like) and activity of the religious community in the fields of upbringing, education, welfare, health and culture according to its contribution to national culture, as well as its humanitarian and other generally useful activity of the religious community (Article 17). In practice, this actually means that the Serbian Orthodox Church, that is, the dioceses, independently take care of the preservation of sacral heritage on their territories. In that sense, they directly cooperate with the relevant ministry. Although the Council of the Serbian National Minority was instructed in the pace of renovation of religious and cultural facilities, they do not have access to the reports on these activities, which are collectively collected by the Ministry of Culture of the Republic of Croatia and which are not publicly available.

The Serb National Council (SNC) on its website states that it is "a national co-ordination of Serb national minority councils"[4], and that it is "democratically elected political, consulting and coordinating body acting as self-government of Serbs in the Republic of Croatia concerning the issues of their human, civil and national rights, as well the issues of their identity, participation and integration in the Croatian society". This is also defined in the SNC Statute (Chapter 2, Article 8 and 9, source: official website). However, when it comes to the reconstruction and protection of memorial places their "contribution mostly lies in initiating processes or research" due to the "lack of current capacity and resources" (source: official website). The last available Work programme on their website is for 2018 and it transfers unfinished activities from previous years regarding preservation of the Serbian cultural heritage. Given the unavailability of Work programmes for 2019 and 2020, as well as unavailability of reports on activities carried out, it is not possible to conclude the degree of progress or involvement of SNC in the protection of Serbian religious and cultural heritage in Croatia.

4 There are 94 councils with the total of 1581 councilors in the Republic of Croatia.

4.3 NTA Normative Arrangements in Montenegro regarding Serbian Religious and Cultural Heritage

When it comes to the question of NTA normative arrangements in Montenegro regarding Serbian religious and cultural heritage for the purpose of this paper we analysed: Constitution of the Republic of Montenegro, Law on Minority Rights and Freedoms, Law on Religious Communities and Law on Freedom of Religion. One of the aspects of this analysis was on the role of the Serbian Orthodox Church in Montenegro in preserving the cultural and religious heritage, since the analysis of the normative framework in Kosovo pointed to the Serbian Orthodox Church as one of the key actors in resolving this issue. However, the analysis of the normative framework in Montenegro pointed to similar problems that the Serbian Orthodox Church has in Kosovo, although the conflict in Montenegro occurs between religious communities with very close cultural characteristics.

In Montenegro, the current dispute between the Serbian Orthodox Church and Montenegrin authorities over religious and cultural heritage has begun in 2015 over a public debate on the draft of the Law on Freedom of Religion, adopted in 2019. Namely, the conflict arose over a provision that all religious buildings built before 1918, which are now ruled by the Serbian Orthodox Church, must be returned to the Montenegrin state ownership. This refers to all religious buildings or lands that was acquired from public revenues and were in the state ownership before 1918, when Montenegro became a part of the Kingdom of Serbs, Croats and Slovenes (later Kingdom of Yugoslavia). This, however, will not apply to buildings or land for which there is an evidence of religious communities' ownership. Serbian Orthodox Church, however, believes that this Law is unconstitutional and discriminatory towards that particular religious community, and that its provisions try to seize the property of the Serbian Orthodox Church in Montenegro. Concretely, Article 52 of the Law stipulate that: "Religious buildings and land used by religious communities on the territory of Montenegro, and for which it is determined that they were built, i.e. obtained from public revenues of the state or were in the state ownership until December 1, 1918, as cultural heritage of Montenegro, are state property", as well as: "religious buildings which are determined to have been built by joint investments of citizens until December 1, 1918 are state property", which will, based on Article 53, within one year from the Law enforcement implement the administrative body responsible for property affairs which will "determine religious buildings and land that are… state property, register them and submit a request for registration of state property rights in the cadastre".

The conflict reflects the absolute application of the TA approach in practice as it puts territorial principle and statehood on the first place by stipulated in the Article 14, paragraph 1 of the Law that: "A religious community, i.e. an organizational part of a religious community whose seat is abroad (…) acquires the status of a legal entity by entry in the register of religious communities maintained by the Ministry." And, in Article 16, paragraph 1 of the Law that:

"The application for registration of a religious community shall be submitted to the Ministry by a person authorized to represent the religious community", and in paragraph 2: "The application referred to in paragraph 1 of this Article shall contain: 1) community which must be different from the names of other religious communities and must not contain the official name of another state and its characteristics". Thus, as none of the three major religious communities – Orthodox, Roman Catholic and Muslim, is domiciled in the territory of Montenegro, i.e. they are all part of religious communities based abroad, they are all placed in an inferior position in relation to the Montenegrin Orthodox Church, which, de facto, and now de jure, is a state project of the ruling political structure and has been already "established (...) on the territory of Montenegro". This means that all three religious communities must submit an application for registration to the relevant Ministry although they have existed for centuries. Since disputed provisions provoked numerous reactions, even a lawsuit for verification of the constitutionality of the Law before the Constitutional Court in Montenegro and Court for Human Rights in Strasbourg, the Government of the Republic of Montenegro decided to temporarily suspend application of the Law on Freedom of Religion.

When it comes to National councils of national minorities in Montenegro, Constitution of the Republic of Montenegro in Chapter V Minority Rights, Article 79 stipulates establishment of a council of national minorities in order to protect and promote their special rights. This provision is further elaborated in the Law on Minority Rights and Freedoms according to which councils play an important role in preservation of national identity of a specific minority group, as well as in the improvement of rights and freedoms of minority nation and their members (Article 33). Law also defines: criteria for representation of minority nations in public services, authorities of state administration and local government (Article 25, 28 and 29), an obligation to submit each year "a work report with a report on financial operations and report of independent auditor" to the "competent working body of the Parliament" (Article 33a), and functions of the councils, among which is a submission of the "initiative to the President of Montenegro to refuse to promulgate a law which is violating the rights of minority nations and other minority national communities and their members" (Article 35), criteria for allocation of the funds to the councils (Article 36i) etc. Based on this law, the Serbian National Council of Montenegro was established in 2008, when the Serbian people in Montenegro faced the need to define their national status after the declaration of independence of the Republic of Montenegro in 2006. Since its establishment, the work of the Serbian National Council of Montenegro is characterized by strong disagreements and divisions over the issue of the constitutivity of the Serbian community in Montenegro, which has led to huge difficulties in the realization of Serbian national interests in Montenegro, bearing in mind divisions that also arose among members of the Council due to a political activity of the president of the Council, Momčilo Vuksanović. Although conceived as a supra-party and supra-territorial organization, in the following years from the establishment

the Council turned its activities and narrative towards political action, accusing a good part of the representatives of the Serbian community in Montenegro, primarily intellectuals, being guilty for a “difficult position of the Serbian people in Montenegro”, since they are “a group that predominantly vote for certain political options because of their civic and Euro-Atlantic blindness, not realizing that the concept of the civil state of Montenegro actually represents a sure path to assimilation and disappearance of Serbs” (Ministarstvo za ljudska i manjinska prava, 2017: 43). Also, Council reports that “Serbian government has similar attitude towards Serbs in Montenegro, and it does not make the least effort to provide to the compatriots, who are in Montenegro linguistic and religious majority, long–acquired rights and equal status” (ibid). Having in mind Councils’ narrative represented in the report submitted to the Ministry, in the end we can question whether activities of the Council are much closer to the TA than to the NTA model regarding interests of Serbs, as well as the very preservation and protection of the Serbian cultural and religious heritage in Montenegro.

Conclusion

This article discussed a possibility of de–territorializing the Kosovo issue and applicability of the NTA arrangements in approaching the issue of Serbian cultural and religious heritage. As we claimed, the predominant framework in approaching the Kosovo issue so far was TA approach, as exemplified by the 2013 Brussels Agreement. Following Stroschein and Palermo (Stroschein 2015; Palermo 2015) we submitted that, even if this Agreement would be taken as a framework for resolving the question of rights of Kosovo Serbs it would be hard to implement it in the case of Serbian religious and cultural heritage. Namely, as scholars readily observed, TA is less useful for a minority population scattered within a country or a wider region, and can hardly be applied to the case of Serbian heritage located in the areas with an absolute Albanian majority. Thereby, we advocated for moving from the purely territorial and sovereignty approach to North Kosovo, to the NTA approach to Serbian heritage in Kosovo, as a welcome change in the halted Serbian-Albanian dialogue. We examined NTA forms through the councils of Serbian national minority, which in practice in Croatia and Montenegro, as well as in the examined normative framework in Kosovo do not have great influence and level of power, and therefore do not influence preservation of cultural and religious heritage in any of these countries. Croatian normative documents, however, especially Constitutional Law on the Rights of National Minorities, all in all, has established a good normative framework for activities of Councils of national minorities, granting them greater political participation on both state and local levels. However, even the most advanced protection of minority heritage foreseen by the legal instruments is not sufficient without full implementation in practice, which is seriously lacking in Croatia.

The biggest challenge in such situation, as Palermo (ibid, 29) notes, is to move beyond traditional understandings of autonomy that have too often been "trapped in the Westphalian nation state discourse... [Autonomy is] seen in terms of something 'belonging' to groups competing for ownership of a territory". What is needed is not to deterritorialise group-based identity claims entirely, but to embed them firmly within a democratic pluralist framework that allows for dialogue and an agreed devolution of power according to the most appropriate format (territorial, non–territorial, or both). This has been a particular challenge in Central and Eastern Europe and the Balkans. Each examined case in this paper is, however, governed by its own particular context, and in this regard one has to consider not only domestic political configurations but also the geostrategic situation of the state in question (see: Andeva, internet: 39–42). Thereby, we pointed to the potential to combine territorial and non–territorial approaches as a means of caring for the needs of Kosovo's residual Serb population and their heritage, while notwithstanding the continued obstacles to implementation of this approach arising from continued contestation of state sovereign status.

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Jelena Ćeriman i Aleksandar Pavlović

Izvan teritorijalnog pristupa: neteritorijalni pristup kosovskom pitanju

Apstrakt

Tekst se fokusira na neteritorijalni pristup (NTA) sporu oko Kosova između Srba i Albanaca, posmatrano preko srpskog kulturno-religijskog nasleđa na ovoj teritoriji. Polazno stanovište je da se kosovsko pitanje uobičajeno shvata kao teritorijalni spor između srpskih i kosovsko-albanskih političara oko priznanja suvereniteta. Stav autora je da trajno rešenje kosovskog pitanja mora obuhvatiti najmanje tri odvojena aspekta: 1) status Severnog Kosova koji je etnički srpski i još uvek održava veze sa Srbijom, 2) status srpskog kulturno-religijskog nasleđa, odnosno srpskih srednjovekovnih manastira i crkava koji su uglavnom prepoznati kao svetska baština UNESCO-a i 3) činjenicu da srpsko stanovništvo na centralnom Kosovu, tj. južno od reke Ibar gde se nalazi većina pomenutih manastira i crkava, naseljava male opštine ili enklave Srba okružene većinskim albanskim stanovništvom. Primenljivost NTA koncepta na kosovsko pitanje analizira se preko normativnog okvira koji se direktno odnosi na srpsko kulturno-religijsko nasleđe na Kosovu, odnosno na očuvanje i zaštitu srpskih pravoslavnih manastira, crkava i drugih istorijskih i kulturnih mesta na Kosovu, komparirano sa NTA rešenjima koja se odnose na očuvanje srpskog kulturno-religijskog nasleđa u normativnom okviru Hrvatske i Crne Gore. S obzirom da lokacije na kojima se nalazi većina srpskih manastira i crkava nisu uključene u pregovore o suverenosti Kosova, namera je da se ukaže na potencijale koji dolaze iz kombinovanja teritorijalnog i neteritorijalnog pristupa, bez obzira na stalne prepreke za sprovođenje takve zamisli koja prevashodno proizlazi iz stalnog osporavanja suverenog statusa Kosova.

Ključne reči: Neteritorijalni pristup (NTA), teritorijalni pristup (TA), srpsko-albanski odnosi, srpska kulturno-religijska baština, Kosovo

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Natalija Shikova

THE POSSIBILITIES AND LIMITS OF NON-TERRITORIAL AUTONOMY IN SECURING INDIGENOUS SELF-DETERMINATION

ABSTRACT
Non-territorial autonomy (NTA) incorporates a mixture of different arrangements such as consociationalism and national-cultural autonomy (NCA), and forms of representation that de-territorialize self-determination. The paper analyses NTA possibilities in reaching indigenous self-governance and reveals the dilemmas in the applicability of NTA for securing the right to self-determination of indigenous peoples. Although the practice points towards some positive examples and successes of NTA institutions related to ingenious peoples (e.g. Sámi Parliaments), the question remains whether NTA holds sufficient potential for addressing indigenous needs upheld by the international principle "right to land, territories and traditionally owned resources."

KEYWORDS
non-territorial autonomy, indigenous people, self-determination, self-governance, decision making, Sámi people

Introduction

Despite the reservations of the states about the affirmation of the indigenous self-determination, within the international law, the indigenous peoples are the third and most recent category of the right holders of the right to self-determination. The indigenous people are considered to be a separate legal category, that should not be subjugated to minorities or guaranteed minority rights. They do not perceive themselves as minorities either. They considered being the "original peoples", the first ones that occupied territory, previously self-governed nations. Their rights are undoubtedly linked to the memories of the displacement from the land to which they belonged and with which they had a strong connection (Moore 2003).

The indigenous self-determination is granted by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) from 2007.[1] This UN instrument refers to the internal self-determination that can be realized through

1 The UNDRIP is an attempt to repair historical wrongs and injustice from which the indigenous peoples suffered. The colonization and dispossession of their lands,

Natalija Shikova: Assistant Professor, Faculty of Law, International Balkan University, Skopje; natalijashikova5@gmail.com.
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establishing and controlling educational institutions in their mother tongue; territorial autonomy; control over natural resources; promoting and maintaining the institutional structures, customs, procedures, and practices under the internationally recognized human rights standards, etc. Still, the most important element which encompasses the indigenous self-determination (alongside the non-discrimination, respect for cultural integrity, social justice, development, and self-government) is the right of control over the traditional land and resources (Cobo 1983).

The theory varies about the modes of reaching the granted internal self-determination. Some possibilities range from independence through secession or autonomy in a federal or a confederate state structure (Moore 2003; Leviat 2003). The intra-state autonomy for the ones living in a geographically concentrated area can be a feasible option. However, in many cases, the indigenous peoples constitute a minority on their traditional land and in those cases, a non - territorial autonomy (NTA) can be a solution. NTA can be implemented within the state borders or outside them without questioning the state vital principle of territoriality. Despite the variety of ideas, there is a variety of state responses over the indigenous self – government demands, and in practice, the solutions are depending on different social and political contexts in which the indigenous peoples live (Minnerup & Solberg 2011). In the literature, it is assumed that NTA can ensure the political representation of indigenous peoples through reserved seats in the national parliaments or by the establishment of separate institutions (Robbins 2015).

The paper reviews the theoretical dilemmas about the applicability of non-territorial autonomy to the indigenous communities. Although the practice points towards some positive examples and success of some NTA institutions related to the ingenious people (e.g. Sámi Parliaments), the question remains if NTA holds sufficient potential for addressing the needs routed in the indigenous self–determination. The research focuses on the NTA features and its possibilities in securing indigenous communities' self-government needs. It relates the applied NTA with the granted "right to land, territories and traditionally owned resources" as a very base for reaching the right to self-determination.

For this paper the effects of NTA will be accessed from two points: 1) does NTA give meaningful representation to the non-dominate group? 2) does it increase its abilities for self – governance. However, despite some common characteristics, the NTA does not incorporate a single model, and arguably each of the cases should be analyzed as a separate one. The effectiveness of each applied NTA arrangement needs to be explored from a separate point and viewed through a visor of the achieved objectives relevant for the group members. To elaborate on the relation of NTA towards indigenous people's right to self-determination the example of Sámi Parliaments as NTA institutions will be taken into consideration that will be analyzed through the official reports

territories, and resources, prevent them from exercising their right to development in accordance with their own needs and interests, Gómez Isa 2017.

of the various international bodies and recent legal cases. The indicating conclusions can serve as a basis for creating conditions for further development of the modalities and finding appropriate and relevant political arrangements for further effectuation of the ingenious people's rights.

The Indigenous People and Their Need for Self-Governance

There is a lack of (scholarly) clarity on how to define the indigenous people or more important who's indigenousness to legally acknowledge (Kymlicka & Patten 2003). It is clear that the indigenous groups are groups that comprise distant communities each with their social-cultural and political attributes that are richly rooted in history (Anaya 1996), but it is important to legally clarify this category. The leading definition gives the UN Special Rapporteur on indigenous people - Jose Martinez Cobo, that describes them as "(...) those who have a historical continuity with pre-colonial and pre-invasion societies that have developed in their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, under their cultural patterns, social institutions and legal systems" (Cobo 1986). Seemingly, within the UN system three crucial elements are illuminating the meaning of the term "indigenous people": 1) the indigenous peoples are first or original inhabitants, or the descendants of the peoples that occupied a given territory when it was invaded, conquered or colonized (Stavenhagen 1994); 2) they are non–dominant in the general culture within the state, i.e. they have a different culture from the majoritarian one (Burger 1987) and 3) the "self - identification", or own understanding about the indigenousness is crucial in defining of the indigenous (Burger 1990). Additionally, they are some useful indicators that should help in the further determination. Among them, it can be enumerated: a special attachment to the land, sense of shared ancestry, distinct language, culture, spirituality, forms of knowledge, political institutions of their own, marginalization and colonization not only by European colonial states but also by the later independent states (IWGIA 1995).

Despite the attempts for clarification of the term, it is obvious that reaching a definition acceptable to the majority of the UN members is unfeasible in a current state of the affairs. None of the less, some authors are proposing a practical way of solving the issue or a "flexible approach". That means leaving the term open since fixed criteria can lead to the possible inability of their completion (Kingsbury 1998). Although difficult to reach a common understanding who are the indigenous peoples, there is a common understanding that the indigenous groups have been the greatest losers during the post-colonial period. Most of them are living below the poverty line (Bhengra; Bijoy, & Luithui, 1998), and commonly displaced from their traditional lands. Besides distinctiveness (manifested in language, religion, clothing) what characterized

them is the general perceptions and prejudices present in many societies related to their assumed "backwardness," and "relative isolation" (Singh 1993; Verma 1990). Alongside, the international law (traditionally seen as a law of the states), historically excluded the indigenous peoples. They were exempt from the distribution of sovereign power and included within the sovereign power of states established on their traditional territories. Although we can witness certain improvements and steps taken in addressing discrepancies, this two-fold process of exclusion and inclusion, is still ongoing (Macklem 2001).

However, it is generally accepted that indigenous peoples are undoubtedly holders of the right to self-determination. They have this right for several reasons, among them, being exposed on the systematic repression exercised by the central governments, their conquest, as well as the complete marginalization they have experienced or are experiencing, and because of that are in an inferior position (Moore 2003; Castelino 2014). Their original culture has been degraded and destroyed, mainly through the policies of the white settler societies. To adapt they need enormous lifestyle transformations and hence it is important to have separate governance (Kymlicka 1998). The self-government should enable them to take responsibility in the management of own cultural, customary and social affairs and to have to powers to administer them (de Villiers 2020).[2]

The Right to Self-Determination and the Indigenous Peoples

The idea of self-determination as the need to govern following the will of the ones governed has been part of major upheavals throughout human history. It has different meanings and it was applied differently in distinct political contexts. As for contemporary international law, the principle of self-determination is fully integrated into the UN system and recognized and guaranteed as a collective right to all *peoples*. Among the international legal instruments that grant the right to self-determination are the UN Charter (1945); the General Assembly Resolution 1514, "Declaration on the Granting of Independence to Colonial Countries and Peoples" (1960); the Resolution 1541, "Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter" (1960); and the most controversial one – the General Assembly Resolution 2625, "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (1970) that for some scholars implicitly opens the door for secession if the government is not representative. The right to self-determination is stipulated as well in the International Covenant on Civil and Political

2 Some of the authors make distinctions between autonomy and self-government. For Crawford the autonomy is a preliminary stage of the development of self-government, Crawford 1979; for Lapidoth 1997, the self-government assumes significant self-rule, whereas autonomy is a more flexible concept. Self-government usually applies to a specific region, whereas the autonomy except the territorial can be as well personal, Tomaselli 2016.

Rights (ICCPR) (1966) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (1966).

Established as customary international law, the real dilemma remains who are the "peoples" to whom the right to the self-determination is granted? (Castelino 2000) The answer of who is entitled is contextually dependable. In the context of colonialism, "the people", were considered to be colonial countries and peoples, and later, the peoples under foreign domination or occupation. In the post-decolonization phase, the peoples are considered to be the people within the democratically constructed state, people within the state borders. Despite the variations, in general, within the UN system, it is understandable that the term "people" encompasses: (a) a social entity possessing a clear identity and its social characteristics; (b) an entity that implies a relation to a particular territory, even if the people in question were expelled from it and replaced by another population; and (c) the term "people" should not be replaced with ethnic, religious or linguistic minorities whose existence and whose rights are recognized with the article 27 of the ICCPR (Cristescu, 1981). In that sense the "people" are considered to be 'whole people', the entirety of a nation, having in mind the need for representation stressed in the 1970 Declaration. That goes alongside the generally accepted state-centric view that people are the citizens and that they have the right to choose the political status, and freely pursue their economic, social, and cultural development. That means the title is vested in the aggregate population of the existing state, not to the substitute groups. In that sense, the self- determination has two aspects the internal and the external one although some scholars argue that the traditional division of internal-external self-determination is not satisfactory and multiple expression of the self-determination (the can differ among the right holders) should be accepted (Tomaselli 2016a; Xanthaki 2007).

It is challenging to argue about the grounds for placing the sovereignty (as part of the self-determination) to certain peoples and not to the others, but none of the less, the indigenous people became the last category of the recognized right holder of the right to self-determination but considering its internal aspect. That is in line with the general concerns of the indigenous peoples since most of them limit their claims to some form of regional autonomy or land and cultural rights, and do not strive much for complete independence (Karlsson 2001). Although some of the theorists are suggesting that before the colonization, the indigenous societies were undoubtedly autonomous and governed themselves, the opposite group consider that that indigenous sovereignty is a contradiction, since it is highly incompatible with the indigenous understanding of the world. Regardless of the views, many indigenous peoples consider as fact their pre-existing sovereignty, consider to be previously politically independent societies or nations, that they governed themselves over their territories and under their laws. As for current legal standing, the indigenous people were "sovereign", before their lands were taken by the settlers regardless of how they (the indigenous people) understand the sovereignty. Despite the existing differences within the western legal tradition, it is considered that

the indigenous people's sovereignty lies in their customs and their traditional norms. The recognition of the indigenous title means acceptance of the indigenous legal order and recognition of their political capacity. It means acceptance within the state borders or co-existence of partially autonomous societies each with its own systems of law, and a recognition of the legal title to their traditional lands (Kuokkanen 2019).

The internal aspect of the right to self-determination applicable to the indigenous people (that is as well applicable to the national, ethnic, religious, linguistic minorities) encompasses a wide and flexible range of options for addressing, protecting, and promoting diversity (less than creating an independent state). It is a flexible concept and can range from special rights for the groups to the power-sharing arrangements, consisting a frame that covers various measures and rights meant to ensure a balance of power (Halperin, Scheffer and Small 1992; Summers 2007; Cassese 1995; Hannum 1990; Castellino 2000; Falk 2002). The internal self - determination set in the international documents, entitles the indigenous peoples to protect their identities, cultures, territories, and forms of governance and makes their rights a counterweight to the state sovereignty (Anaya & Puig 2017). In that sense despite the contradictory nature of the international legal system, when it comes to the indigenous peoples, the post-1945 international law, gives them a privileged status concerning their human rights and needs for reparation of the historical injustices (Keal 2003). As the greatest achievement in these regards is the art. 4 of the UNDRIP (2007) that affirms that indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (UNDRIP 2007).

The Form and Content of the Indigenous Self-Determination

The right to self-determination is a collective right that encompasses numerous components. The right involves the right of peoples to freely define their political status; civil and political rights; the right of peoples to freely exercise their economic development; permanent sovereignty over natural resources; the right of peoples to freely practice their social development; the right of peoples to freely determine their cultural development. Still, the application of the right is lacking practically and contextually consistency. Since the state sovereignty is predominating norm of the international law, the room for the implementation of the self-determination for the indigenous peoples lies in the applicability that covers the internal self-determination (article 4 of the UNDRIP). In that sense, the incorporating rights part of the right to self-determinations are non-discrimination; cultural integrity; land rights; social welfare and development; self – government (as the applicable political dimension of the right to self- determination).

The limits concerning the applicability of the right to self-determination to the indigenous people, can be explicable from the position of the states that

remain the primary actors in the international law and have a direct role of its creation. The key element of statehood is fixed (or fixable) territory although the legitimacy of the fixed territory can be contested because of arbitrariness and colonialist approach in the process of creating the borders (Castelino 2014). However, the territorial base of sovereignty has been taken for granted in the past five centuries, and in that respect, all the states are connecting their jurisdiction with a certain territory over they have sovereignty (Kymlicka and Patten 2003). There is a change in understandings (Lightfoot 2016) but still, only a small number of states are recognizing a form of "sovereignty" for the indigenous people, granting them weak sovereignty (Anaya and Puig 2017).

Compromising the state-centric view about sovereignty with the right to self-determination of the indigenous peoples is leading us to the indigenous self-government that in fact should give the content of the indigenous right to internal self-determination. Self-government is a political arrangement that enables groups to govern themselves according to their own will and through their own institutions. Within that frame, the decisions ought to be made at the most possible local level. The normative foundation of the self-government is in the exercise of autonomous decision-making over collective affairs. From that point, the self-government puts the principle of the self-determination into practice and it is *modus operandi*.

The right to self-determination to the indigenous peoples should enable them to remain distinct people by having control of their own affairs and practicing their own laws, customs, and land tenure systems through their institutions and in accordance with their traditions. In that aspect, when it comes to the right to self-determination of the indigenous peoples, it must be noted the paramount significance of the land in that context (Kuokkanen 2019). Article 15 of the UNDRIP is specifying that indigenous peoples have the right to dignity and right to diversity of their cultures, traditions, histories, and aspirations. The right to self-determination, means that the indigenous peoples should be free to decide about the development of their cultures and that right is directly and un separately interlinked with their rights to land and natural resources (articles 25 and 26). They have the right not to be subjected to force assimilation (article 8 (1)), genocide (article 7(2)), relocation, and forced displacement (article 10). The free, prior and informed consent is necessary in regards to the indigenous culture when states are taking measures that can affect the cultural rights of the indigenous peoples within their territory. The same obligations drive from article 19 of the UNDRIP, that is envisaging the state obligation to consult and cooperate in good faith with the indigenous peoples through their representative institutions.[3] The relationship with their land represents spiritual and emotional links for them and there lies their need to secure it. From all of this, it can be seen that the land and control over it presents

3 The same obligations are stipulated within the Indigenous and Tribal Populations Convention No. 169 by the International Labour Organisation (1989) aimed to remove the previous assimilationist orientations.

a basis for the indigenous self-determination (Pentassuglia 2018; Fitzmaurice 2017; Gilbert 2007; Cittadino 2019), or, the control over natural resources is a precondition for the exercise of a meaningful internal self-determination for the indigenous peoples (Tomaselli 2016b).

The self – government for the indigenous people means autonomy and participatory engagements. The international instruments are not indicating over any particular arrangements but they are pointing towards meaningful self – government, arguably political institutions that mirror their specific patterns of life that in any case should not be imposed upon them. Typically, the self-government is reserved for specific areas of the state sovereignty such as education, healthcare, policing, resource management, and cultural affairs, but in order effectuate the right to self-determination, the indigenous people need for have self – government as well as in respect of the questions related to the land and access to the natural resources (Macklem 2001). The quests for self – government are posted in different geopolitical realities and they gain different state reflections. There are a variety of approaches in setting the self-government models, such as autonomy through contemporary Indigenous political institutions; autonomy based on the concept of an indigenous territory; regional autonomy within the state; indigenous overseas autonomy, etc.[4] In that line, as a part of a global trend, some states (among them the Scandinavian ones) are using constitutional, legislative, and other measures to respond to the indigenous people's quests for autonomous governance (Anaya 1996; Anaya and Puig 2017), and one of them is NTA.

Non-Territorial Autonomy and the Indigenous Peoples

NTA Characteristics

Non-territorial autonomy (NTA) is considered to be a statecraft tool or policy instrument applied in the ethno – culturally diverse states (Salat 2015). The literature about NTA does not point toward many common features of all applied NTAs, but thoughtful analysis of the seminal works clarifies that NTA can be used for the representation of the non-dominant groups. NTA can enhance the group's ability to self-governance over the matters that are relevant for the

4 Example of indigenous self-government models practiced through contemporary institutions are the Sámi Parliaments in the Scandinavian countries; examples about autonomous governance based on the concept of an indigenous territory are comarcas in Panama, reserves in Canada, and reservations in the United States. Regional autonomy within the state encompasses regional autonomy within the framework of the federal state (e.g., Nunavut in Canada); an arrangement entrenched in the national constitution (e.g., Russia and the Philippines) or established by statute (e.g., Región Autónoma Atlántico Norte and Región Autónoma Atlántico Sur in Nicaragua). An example of overseas autonomy is Kalaallit Nunaat/Greenland. Though this is not a complete illustration of the varieties of models, most of the existing ones (except Greenland) are mainly criticized that neither entail *de facto* political autonomy or self-government nor they represent the inherent indigenous governance structures, Kuokkanen 2019.

group members. Developed by Otto Bauer and Karl Renner at the beginning of the 19 century and meant to address the issues related to the eventual (in that time) dissolution of the Austro-Hungarian Empire, NTA assumes national-cultural non-territorial autonomy that resides on the "personality principle" (Nimni 2000). Contextual information of NTA arrangements is related to the description of the institutions, their functionality, and legal frame that is protecting them (i.e. according to the scholars the personal cultural autonomy does not exist without self – regulating institutions). The initial Renner approach envisages that self – rule is preferred option in the sphere of cultural and in educational affairs, where the consocial institutions should manage the central affairs such as security and the foreign policy (Nimni 2005). In that sense, traditionally, NTA includes a mixture of different arrangements such as consociationalism and national-cultural autonomy (NCA), but also forms of representation that de-territorialize the self-determination (Nimni 2015).

The NTA arrangements serve the best in cases when the minorities or the beneficiaries are dispersed among the majority population and there is no possibility to apply the territorial autonomy. In that sense the implementation of the NTA models can be a practical solution, i.e. NTA can be extended if territorial autonomy arrangements are not applicable (Lapidoth 1997). But that can stand even if the territorial autonomy cannot be applicable due to the various political factors and power balances, and not only because of the demographic and territorial reasons. However, in most cases, the concentrated groups will favor territorial autonomy in comparison to NTA because the territorial autonomy will give a territorial base for the management of their affairs. On the other side, territorial autonomy is often perceived as a step toward secession and interruption of the state territorial integrity and as such is not a much-preferred approach (Kymlicka, 1996). From that aspect, NTA has certain advantages in comparison to territorial autonomy since it enforces the personality principle and sets the rights upon it, not over the territorial principle as the territorial autonomy does (Lapidoth 1997). The NTA applicability relays on a subjective definition of nationhood (the criterion of nationhood is the feeling, belonging, or an attachment to one's particular national community Renan 1882). In that sense, the national cultural autonomy is understood as a form of autonomy where's the non-majority population can establish a representative body without a territorial limitation and can carry out cultural or other activities relevant for minority groups either on a national or on a local level (Vizi 2015). In some cases, those models serve to prevent the territorial claims (Smith 2013a; Vizi 2015) that are considered to be more radical, or somehow to neutralize them (Korhecz 2015; Smith 2013b; Korhecz, 2015; Tomasseli 2016).

The scholars distinguish a voice, quasi voice, and non-voice of NTA institutions, concerning their ability to ensure participation of the ethno-cultural groups within the decision-making process (Malloy, Osipov & Vizi 2015). Considering the reaching of desired outcomes, ensuring participation and self- rule, it cannot be overlooked that in many cases the NTA institutions inherently lack competences, capacity, and financial stability. In many cases, the institutions are

providing only symbolic representation, and when it comes to decision making, they only secure participation in the decision making or decision making in mainly administrative issues (for example election and appointments of the management boards). In that line, it is obvious that NTA institutions in many cases carry sole consultative functions (not an independent decision making) or as the utmost possibility, they secure co-decision powers. In that concern, NTA arrangements are considered to carry weaker powers than territorial autonomy.[5] Additionally, NTA institutions can act as policymakers, in most of cases they failed to gain a position of serious partners to the central governments. Consequently, from the public law viewpoint and in comparison to the territorial autonomy arrangements, NTA has a limited range of functions (Korhecz 2015).

None of the less, irrespective of the related benefits and envisaged constrains, both territorial autonomy and NTA arrangements are not mutually exclusive and can be applied simultaneously (Lapidoth 1997).

NTA and the Indigenous Peoples, the Example of Sámi Parliaments

To examine the effectiveness of the NTA institutions over the indigenous people's right to the self-determination we will explore the Sámi Parliaments as an NTA institutional arrangement.

The Sámi are the indigenous people that are living in four states (in Finland, Norway, Sweden, and Russia). The Sámi population is a numerical minority within those states numbering between 70,000 and 100,000, with about 40,000 to 60,000 in Norway, 15,000 to 20,000 in Sweden, 9,000 in Finland, and about 2,000 in the Russian Federation. The Sámi people traditionally inhabit a territory known as Sápmi, that spreads in the northern parts of Norway, Sweden, Finland, and the Russian Kola peninsula. The Sámi people are divided by the formal boundaries of the respected states, but they continue to exist as one people united by cultural and linguistic bonds and a common identity. The Sámi people's culture and traditions rely on a close connection to nature and their land. Traditionally, the Sámi are depending on hunting, fishing, gathering and trapping, whereas the reindeer herding is of particular importance for them (Eriksson 1997; Report of the Special Rapporteur 2016).

The Sámi people are the indigenous people in Europe, that are enjoying NTA within the states they inhabit. The discourse of Sámi self-determination is founded upon international law. According to some scholars, the Sámi policies are the only indigenous example in Europe (apart from Greenland), and

5 Territorial autonomy is one of the often-used means for settling of the self-determination disputes outside the colonial context. It represents the self-governance of a demographically distinct territorial unit within the state. The extent of autonomy can vary and is established within the Constitution and/or an autonomy statute that grants autonomy. Autonomy implies original decision-making power and not devolved competences, Weller 2009. The territorial autonomy supposes acting in own direction, independence, but limited self-rule, Lapidoth 1997. Still, it assumes constitutional recognition and significant competences, Weller & Nobbs 2010.

the Sámi Parliaments are the institutional model that can represent a good example in the indigenous world. Controversially, according to the opposite opinions, although Sámi are recognized as indigenous people, their rights are constructed as minority rights. The Sámi cultural, non- territorial autonomy is exercised through the elected, representative bodies and it is recognized in the state's constitutions (in Norway and Finland). However, although often perceived as bodies that govern Sámi autonomy in the area of culture, education, language, and the indigenous status, the parliaments remain primary advisory bodies without legislative authority and low powers in the field of policy in three Nordic states (Stepien, Petrétei, and Koivurova, 2015). Additionally, they have a limited ability to act independently and to make autonomous decisions (Anaya 1996; Stepien, Petrétei, & Koivurova 2015).

The Sámi Parliaments (Saamediggi in Northern Sámi) exist in the three Scandinavian countries (Norway, Sweden, Finland). The Sámi Parliaments are consisted of elected Sámi representatives. The political participation of the Sámi is grounded upon objective criteria (to be registered as a voter for electing representatives of Sámi Parliament, the person need to speak the Sámi language or should have Sámi ancestors), that, to some extent can represent a derogation of a personality principle that is set in the self-identification and belonging to a certain group. Since no thorough study has been conducted that analyses the political participation and involvement on the individual level, it is very difficult to determine if the set institutional developments so far added towards political marginalization and segregation or lead to the greater inclusion of the Sámi (Selle and Strømsnes 2010).

The Sámi Parliaments are institutions without legislative power. They have a certain degree of political influence and autonomy that varies among the countries in which they are established. In respect of their position within the system, the Sámi Parliaments are representative bodies with the administrative authorities. The misbalance between these two functions (representation and administration) is existing undoubtedly and additionally differs among the countries that they reside. Each of the respective countries has different policies in respect of the institutional design, status, authority, and mandate of the Sámi Parliaments (i.e. the Sámi Parliament in Sweden is only an advisory body that monitors the issues related to Sámi culture in Sweden; the Norwegian Sámi Parliament has a firmer position within the system of governance since the decisions brought within its competencies cannot be formally overruled by the Norwegian government; the competences of the Sámi Parliament in Finland are not clearly defined) (Josefsen 2011; Josefsen, Mörkenstamb & Saglie 2014; Kuokkanen 2019).

In respect to the legal instruments that are granting the indigenous rights, Norway was the first country in the world that ratified the Indigenous and Tribal Peoples Convention (ILO Convention 169) in 1990. Unlike Norway, Sweden has not ratified the ILO Convention 169 even though it has considered it. Finland as well did not ratify the Convention, arguing that the national legislation is not (yet) in line with the provisions of the Convention regarding

the indigenous peoples' rights to their traditional territories and resources.[6] The disparities in the political status and recognition of Sámi as indigenous groups reflect directly in the development of the Sámi Parliaments in the three Nordic countries. Still, as a general characteristic, the Sámi Parliaments are mainly consultative or advisory bodies rather than self-governing institutions. They exercise limited decision-making authority over their own affairs, mainly through the administration and dissemination of state funding in areas of education, language, health, and social services.[7] Based on the Sámi politicians' attitudes over the Sámi Parliaments, the Sámi Parliaments have low capacities and numerous political constrains (Stepien, Petrétei, & Koivurova, 2015). In that sense, their authority is insufficient to realize the self-determination of the Sámi and provide them with a genuine autonomy.

The NTA Effectiveness vis a vis the Right to Self-Determination of the Indigenous Peoples (through the Example of Sámi Parliaments)

The scholarship that analyses the indigenous self-determination is skeptical over the ability of the NTA to address the indigenous people's rights and secure the indigenous self-government. NTA in international perspective is often described as a very radical approach to safeguarding the right to indigenous self-determination (Josefsen 2011). Additionally, the theory related to NTA is not clear about the division of sovereignty concerning material assets and resources that are often a source of conflict between states and nations (Patton 2005; Ivison, D. Patton, P. & Sanders 2000), that in this case matters considerably, especially in the context of securing the indigenous people's rights.

Within the example of the analyzed NTA institutions of the indigenous people, it is obvious that the Sámi collective rights have been established only to their culture and language rights. Considering the spiritual, social, cultural, and economic relationships that the indigenous peoples have with their lands, we must ask to what extent the NTA supports the indigenous self-government. Besides, the fundamental problem is obvious acculturalization of the indigenous rights as minority rights and for some scholars, the construction of the Sámi rights and Sámi self-government in cultural terms adds to that. Moreover, the Sámi Parliaments as NTA institutions are not traditional social structures of the indigenous Sámi people but rather copies of the Nordic parliamentary institutions. They do not incorporate traditional Sámi governance structures or conventions into their operations and in the studies conducted among the indigenous groups are frequently criticized because of their inappropriateness to address the indigenous people's needs. In that sense, the NTA gives the limited ability to the indigenous people to exercise self-government. Indigenous peoples' survival as autonomous nations are depending on control over

6 See Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).

7 As for the detailed legislative framework and Sámi Parliaments, see Tomaselli and Granholm 2009.

the land and resources and connection to them remains fundamental to the indigenous cultural and personal identities. Seemingly, several scholars argue that the authority of the institutions of cultural or non -territorial autonomy of the Sámi people, is merely symbolic in its substance (Josefsen 2011; Josefsen, Mörkenstamb & Saglie 2014; Kuokkanen 2019).

In addition to the above-mentioned concerns, the analysis of the UN documents, whose primary mission is promotion and protection of the indigenous rights are as well pointing towards inadequate protection regardless of the set NTA institutions. Namely, the Special Rapporteur on the rights of indigenous peoples, raises increased concerns, especially towards investments in the Sápmi region and the states' balancing of the interests in that context. The ongoing extraction of the natural resource in the Sápmi region creates an unstable atmosphere of social conflict and that opinion share the affected Sámi communities, the public authorities as well as the involved companies. According to the Special Rapporteur, the limitation of Sámi property rights can only be justified upon the valid public purpose and that is not a mere commercial interest or revenue-raising objective. States have a responsibility to protect the rights of the indigenous people in the context of the natural resources and they need to establish a "regulatory framework that recognizes indigenous peoples' rights over lands and natural resources" since they are a *sine qua non* for their well-being and a precondition to continue to exist as a distinct people. The states have a duty to consult and to obtain their free, prior, and informed consent for the investment projects ongoing on their traditional territories. The international standards in that respect need to be operational and the state responsibilities, except from the UNDIPR, are coming as well from the ILO Convention 169 (1989) (Rapport 2016).

As for the implementation of the right to self-determination, the Rapporteur in each of the observed countries notified the insufficient consultation of the Sámi Parliaments by the respective governments. The lack of financial means is obvious and there is an ongoing need to increase the Sámi Parliaments' autonomy and self-governance authority. Their ability to participate in and genuinely influence decision-making in matters that affect the Sámi people need to be strengthened to overcome the concerns about limited decision-making power of the Sámi institution.[8] In that sense the Sámi Parliaments can be seen as an example of the advanced—but limited—political participation. Notwithstanding the importance of their creation and functions, their role remains substantially narrow (Rapport 2016; Tomaselli & Granholm 2009).

That was not only critic so far (Sullivan, internet),[9] though, as recent cases that support the indigenous self-determination in its substance, the United

8 See more at the Report of the Special Rapporteur Victoria Tauli -Corpuz on the human rights situation of the Sámi people in the Sápmi region of Norway, Sweden, and Finland within the Human Rights Council issued in 2016, as a follow up of the Special Rapporteur Jeames Anaya visit in 2010.

9 https://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=4289211

Nations Human Rights Office of a High Commissioner (UNCHR) in 2019 brought the decision finding that Finland violated the Sámi political rights concerning the Sámi Parliament representation. The country improperly extended the pool of Parliament's eligible candidates and that affected the effective enjoyment of the right to internal self-determination vested in a capacity of the indigenous peoples to define own group membership without an excessive intervention from a state.[10] As a most recent precedent, it needs to be mentioned, that at the beginning of 2020, the indigenous reindeer herders won 20 years-long legal battle in Sweden related to the protection of hunting rights. Namely, the victory is over the State appeal against the 2016 Gällivare District Court decision for recognition of the exclusive rights of Girjas Sámi to control the local hunting and fishing activities. The Court restore their rights lost in 1993 and called upon the Sámi's exclusive rights of hunting and fishing on their territories, established by the middle of the 18th century. With this ruling, the Supreme Court strengthened the Sámi people's position in their fight over the control of the ancestral lands (Orange, internet).[11]

From all above explained, it is evident that still there is a great need to additionally address the Sámi concerns on the national levels within three Nordic countries. Although, the creation of the Sámi Parliaments is rather unique example of Sámi's (limited) form of cultural autonomy, it cannot be overseen that the Sámi people still have very limited voice over the issues of their concern (Tomaselli & Granholm 2009).

Conclusion

Based on the performed analysis taking into account the granted rights of the indigenous peoples, the paper presents the possibilities of NTA to address the need for the indigenous self-government. Methodologically there is no solid theoretical framework for general analysis of NTA and the effects from the applied NTAs should be analyzed on a case by case basis. For getting knowledge about the effectiveness of NTA in addressing the indigenous peoples right to self-determination, the applied NTA model in the case of Sámi Parliaments is analyzed. The implemented model in some points is considered as an important model for indigenous self-governance and participation in decision-making that could inspire or eventually provoke the development of similar institutions elsewhere in the world (Report of the Special Rapporteur, 2011). However, the specific reports and recent legal cases are pointing out that the Sámi Parliaments as NTA models do not reach the goal of indigenous self - determination. The Parliaments, have limited capacities, are not real self-determination bodies and despite the name "parliament", either they

10 https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24137&LangID=E

11 https://www.theguardian.com/world/2020/jan/23/indigenous-reindeer-herders-Sámi-win-hunting-rights-battle-sweden

do not have a decision making power (in Sweden) or have a very limited one (in Norway) and do not secure the indigenous people granted right for use of the land and traditional territories (Report 2016). Although as a result of those institutions in the last 30 years, the legal position of the Sámi significantly improved (Kuokkanen 2019; Tomaselli and Granholm 2009), it is still far away from reaching self-determination.

Historically, the indigenous people are the most disadvantaged people in international law (Anaya and Puig 2017). The self-determination granted to them need to be based on the principle of territoriality and only the territorial base can ensure control over their territories though genuine decision-making process crafted on their preferences and carried by their tailor-made modalities that they will be able to choose and enforce them independently (Preparatory Report 2015). In that sense, NTA can represent fewer rights than the international instruments are granting for the indigenous people, as observed in Sámi people's example. In that sense, NTA has limited possibilities in reaching the indigenous self-determination. NTA can be applied when other means are far from the reach.

The recent international practice threats the indigenous people differently than minorities, considering them distinct cultural communities with specific relations and patterns of land use (Anaya 1996) and they should undoubtedly enjoy the granted rights. Arguably, in this state-centered world, no meaningful political autonomy is possible without a distinct territorial base (Sanders 1986). The self-governance of the indigenous people needs to be based on their interests, forms of organization, use, and distribution of their resources even if this possibly would mean a reformulation of the state social contract. In that aspect, the autonomy that assumes a new kind of relationship expressed in legal, institutional, and territorial terms appears to be closer to the indigenous people's needs (Blaser 2010; Tomaselli 2012). Meanwhile, both territorial and non-territorial arrangements could coexist and NTA should not be *a priori* excluded, especially where both indigenous and non-indigenous people share the territory or they are dispersed among the population (Tomaselli 2012). Nevertheless, because of their special status within the international law and strong connection with the land, the NTA can serve as complementary and not a single option for realizing the right to self-determination for the indigenous peoples.

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Natalija Šikova

Mogućnosti i ograničenja neteritorijalne autonomije u obezbeđivanju samoopredeljenja starosedeocima

Apstrakt

Neteritorijalna autonomija (NTA) obuhvata spoj različitih aranžmana kao što su konsocijationalizam (consociationalism) i nacionalna kulturna autonomija (NCA) i razne oblike reprezentacije koji deteritorijalizuju princip samoopredeljenja. Ovaj članak analizira mogućnosti NTA u ostvarivanju samoopredeljenja kod starosedelačkog stanovništva, i otkriva dileme o primenljivosti NTA u omogućavanju prava na samoopredeljenje starosedelačkih naroda. Iako praksa ukazuje nan eke pozitivne primere i uspehe NTA institucija povezane sa starosedelačkim narodima (poput Laponskih parlamenata), *opstaje* pitanje da li NTA ima dovoljan potencijal da odgovori na potrebe starosedelaca u pogledu njihovog međunarodno priznatog “prava na zemljište, teritorije i resurse koje su tradicionalno posedovali”.

Ključne reči: neteritorijalna autonomija, starosedelačko stanovništvo, samoopredeljenje, samouprava, odlučivanje, Laponci (Sámi)

II

STUDIES AND ARTICLES

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Michael Walzer

PROPORTIONALITY AND RESPONSIBILITY

ABSTRACT
This article examines two versions of the proportionality constraint in just war theory, one minimalist, prohibiting almost no military acts, and one maximalist, prohibiting pretty much everything. I argue that neither one meets the needs of the theory and that they should be supplemented and modified by an ethic of responsibility.

KEYWORDS
proportionality, responsibility, asymmetric warfare, just war theory

I

In this paper, I want to rehearse an argument that I have made before and then apply it to the new circumstances of asymmetric warfare.[1]

Proportionality arguments are very old, and they have always been highly elastic, easily stretched to cover a lot of whatever needs to be covered. It is mostly civilian casualties that need to be covered, unintended but foreseeable collateral damage. The argument is well known; I will provide only a single (and a standard) example. Here is a factory making tanks for the German war effort during World War Two. The factory is located in a working class neighborhood—it wasn't put there in order to benefit from the civilian cover; that's where factories were built before workers had cars. The factory just is where it is. The Allies believe that it is very important to stop the production of tanks; they do not intend to kill civilians, but they know that some number, possibly (given the aiming devices available in 1943) a large number, of civilians living nearby will be killed if they bomb the factory. They believe that this number is "not disproportionate" to the value of destroying or even seriously damaging the factory. In fact, almost any number could plausibly be described in that way; it is hard to set a limit on how high the numbers can go, given the importance of the military mission. Proportionality was, or used to be, a very permissive doctrine. So long as the injuries and deaths were not intended, there could be a large number of them, and no-one would complain—I mean no-one except the injured civilians and the families of the dead. But there is something wrong

1 See my *Just and Unjust Wars* (1977) and, for an early effort at the application, Walzer 2009.

Michael Walzer: Professor Emeritus, Institute for Advanced Study, Princeton, New Jersey; walzer@ias.edu.

with a limit that isn't limiting, that doesn't give us any clear sense of what to do and when to stop—or, more exactly, doesn't do that in any effective way.

So I argued (thirty years ago) that not intending the foreseeable deaths was not enough; it was necessary to intend that those deaths would not occur and to take positive measures that would minimize their number—even if these positive measures had costs.[2] Well, they would certainly have costs; even something as simple as warning civilians to get out of the way has the obvious cost of warning enemy soldiers to get ready for an attack, and then your own soldiers will have to deal with an enemy that is alert and prepared. And there, in that simple example, is the issue that I meant to raise, and have been arguing about (and worrying about) ever since: the issue of risk. What risks should soldiers take to reduce the risks they are imposing on civilians? And then there is an additional issue: should this last question be answered differently for different groups of civilians—fellow citizens, enemy citizens, and citizens of neutral states; complicit civilians and innocent bystanders?[3] There are many possible classifications of the noncombatant population: should they make a difference? But I am not going to address that latter issue here, at least not directly; it doesn't often arise in the circumstances of asymmetric warfare, where insurgent forces hide among their own civilians, and it is these civilians, "enemy" civilians, who are at risk in the ensuing military operations. We can ask simply, what risks should be taken when their lives are at stake?

It is important to emphasize that I am not asking what risks soldiers should take to protect or to rescue civilians—as in the Israeli raid on the Entebbe airport in 1976 (where passengers on an Israeli plane were being held) or the American effort to rescue hostages in Iran in 1980. In cases like these, the civilians are clearly one's own, and the object of the military mission is to protect them from attack or to rescue them when they are being held as hostages. Here the obligation to take risks derives from the fact that these are fellow citizens. Israel would have had no obligation to go to Entebbe, or America to Iran, if the hostages there had been Swedes. The issue that I am addressing in this paper has nothing to do with protection or rescue; it has to do with the avoidance of killing—that is, with reducing the risks that *we are imposing* on enemy civilians in the course of an attack launched by us on a military target. The point is not to protect them from hostile forces but from our own forces, from ourselves; the point is to avoid killing them, if that is possible. What risks should be taken for that purpose?

Questions about risk are not easy, and I hope that I have never suggested that they are. The main point of my argument 30 years ago was simply to generate some resistance to the elasticity of proportionality calculations. I wanted soldiers and their officers to think about how to minimize civilian

2 Walzer 1977: 152–159. This is a proposed revision of the doctrine of double effect. For further discussion, see Woodward 2001.

3 For a controversy about the question of risk, see Kasher and Yadlin 2005; 2006 and Margalit and Walzer 2009. Also, Kasher 2009.

casualties—which they didn't have to do, in the old days, once they decided that the number of likely deaths was not disproportionate to the value of the military target. And that was easy to decide--as I have just argued, it was too easy to decide that the likely deaths were "not disproportionate".

The key phrase in the last paragraph is "some resistance" to the old elasticity. My argument certainly didn't make the key factors any more precise. I can't do that now. What positive measures should soldiers take, with what care, at what cost, at what risk? These were and are judgment calls. There is no possibility of saying: the risk should be 9 or 17 or 33. And, even without precision, we also need to think about the limits to my limits. Since soldiers are already taking risks for the sake of their military mission, any additional risks can't endanger the mission, else the first set of risks would be pointless. What is called "force protection" is crucial to the success of the mission and to the possibility of future missions, and so this must be given its proper weight. That means more judgment calls, more necessarily rough estimates of probabilities, but these difficult judgments and estimates are morally necessary. Officers making decisions in the field have to think about something besides proportionality—call it "responsibility." They have to take responsibility, for their own soldiers, of course, but also for the civilians they put at risk, and for the deaths they cause, even in legitimate military operations. As morally responsible actors, they should try to reduce the numbers. And in judging their conduct, we should always ask: Who is responsible for putting these civilians in harm's way?

II

Now, let's set risk and responsibility aside for a moment and turn back to proportionality. Something very strange has happened to the proportionality argument. The elastic has snapped back, and now it doesn't justify too much; it hardly justifies anything at all. The highly permissive doctrine has become a highly restrictive doctrine. Indeed, sometimes it seems as if proportionality arguments have become the functional equivalent of pacifism: their purpose is to make it impossible to fight. However, they don't do that in an evenhanded way, as we will see if we consider the reasons for the change.

The reasons have to do with the increasing number of asymmetric conflicts and what we might call the "moral/political surround" of those conflicts. I mean by asymmetry a war or a series of engagements between small insurgent forces, on one side, who claim that they have no choice but to fight from civilian cover and to attack vulnerable civilian populations – terrorism isn't their last resort but their only resort—and, on the other side, modern high tech armies. In the contemporary world, the high tech armies tend to be the armies of democratic states and the insurgent/terrorist forces are commonly hostile to democracy, but this is obviously a contingent, not a necessary, fact. (Actually, I think that there is a contradiction between terrorism and democracy,

though not between insurgency and democracy—but that is another subject, for another time.) In any case, the newly restrictive proportionality argument works against the high-tech armies.

Assume that the terrorist attacks on civilians are unsuccessful; few civilians are killed (which is what we hope for)—then it will turn out that most of the killing is done by armies responding to the attacks. The ratio of army killing to insurgent killing may get as high as 100-1, as it did in the 2008=09 Gaza war, and this looks disproportionate and is quickly criticized, denounced is more accurate, as disproportionate – in two different ways.

The first way is common but certainly wrong: think of how proportionality works in, say, a family feud in Kentucky between those famous families, the Hatfields and the McCoys. The Hatfields kills two McCoys, and then the McCoys are entitled to kill two Hatfields—that's a proportionate response, nothing more is permitted, and then the feud is over (at least temporarily), and everybody goes home. Any number higher than two will be called disproportionate and will continue the feud. Here proportionality is a backward looking measure, and that's the way a lot of people understand it. That's the way the UN's Secretary General seemed to understand it when he called the Israeli response to Hezbollah's 2006 raid "disproportionate" during the first week of the Lebanon war. He seemed to think that the IDF should kill the same number of fighters as the Hezbollah raiders had killed (8), and capture the same number (2), and that would be, that should be, the end of the story.[4] But this wasn't a family feud.

In war, proportionality is a forward-looking measure. Unintended civilian deaths are supposed to be measured against the value of seizing or destroying a particular target – as in stopping the production of tanks in my earlier example, which seemed to justify or allow a large number of civilian deaths. But if the target is a single terrorist cadre hiding in a village (in Pakistan, say), or a rocket-launching team firing from the front of an apartment building (in Gaza), as it often will be in asymmetric warfare, even a low number of civilian deaths will seem hard to justify. And it is in this context that proportionality arguments have become highly restrictive. We might argue for a cumulative measure: What is the military value not of hitting this cadre or this team but of stopping or slowing down the terrorist attacks overall? Or, what is the value of preventing the terrorists from acquiring and deploying more and more deadly weapons? Those are better questions and, if taken seriously, they might provide a useful standard. But, still, if the attacks have been radically ineffective, proportionality can still be, or can be used as, a highly restrictive doctrine. So this is the second way, better than the family feud model but still wrong, of condemning the high tech army's response to insurgent and terrorist attacks.

4 See Walzer 2009: 44–45 for an assessment of Kofi Annan's comment on the Lebanon War.

III

At this point, we need to turn back to the responsibility argument. Who is putting these civilians at risk? The immediate answer is that they are being put at risk by the insurgents or terrorists who hide among the civilian population or fire from civilian cover. It is a hard argument to make politically these days, though it is readily understood in the starkest cases. If civilian hostages are strapped to tanks that then drive into battle, the soldiers who fire at the tanks and kill the hostages are not responsible for the deaths they cause. The killing of innocent persons is their work but not their fault. On the other hand, if there were a way of disabling the tanks without killing the hostages, that is what the soldiers should do, even if doing it is (marginally) more risky for them – and they should do it without regard to the nationality or religion or political allegiance of the hostages. Similarly, in responding to attacks from civilian cover, soldiers must make some effort to find out how many civilians are at risk (so that proportionality can be calculated, at least roughly) and some effort to get close enough to aim at the insurgent or terrorist cadre. They are not without responsibility in cases like these, but it is critically important to insist on the initial shift of responsibility to the other side. This shift has not been sufficiently recognized in political and legal judgments of the Gaza war (see, for example, the Goldstone Report[5]) or in the arguments about the killing of civilians in Afghanistan.

When we think about the risks that soldiers must take in asymmetric warfare, there is a relevant political argument that I want to note but not focus on. Often the insurgents are not hiding among civilians for their own protection (the phrase "human shields" may be misleading). They are hiding among civilians in order to expose the civilians to attack – because they believe, and they are probably right, that the death of these civilians will work to their advantage. So that would suggest that the risks soldiers take to minimize civilian deaths may well be required by their military mission. The rules of engagement promulgated for American soldiers in Afghanistan in 2010, for example, were probably politically motivated—aimed, that is, to win "the battle for hearts and minds".[6] They were not the product of mere morality. But my own interest here is in mere morality.

The insurgents, of course, don't acknowledge that they are deliberately exposing civilians; they claim that if they don't fight from civilian cover, they will increase the risks to themselves—and to their cause. Suppose their cause is just, as in, say, the national liberation struggle of Algerians against the French in the 1950s (an early example of asymmetric warfare), what risks must the Algerian (FLN) insurgents accept? They certainly can't put bombs in cafes and bus stations, as they did[7]; the deliberate killing of innocent people is ruled out from the beginning. They must seek alternative ways of fighting, even if the

5 Moshe Halbertal (2009) provides a useful critique.

6 I heard discussions of the new rules of engagement at a conference at the US Naval Academy, "Ten years Later: Warfare Ethics since 9/11", held in April 2011.

7 On the Algerian war, see Horne 2006.

risks of failure are greater (I don't think that they actually are greater, but that is, again, a subject for another time).

Fighting from civilian cover is a harder question. Clearly, the responsibility for the dangers that civilians now face lies first of all with the insurgents who are using them. How far can they reduce their own risks in this way? But the attacking soldiers must also answer questions about the dangers their attack produces. What risks are they bound to accept to minimize that danger? At this point in the argument, we need to think about whether there is any kind of baseline for our (nonmathematical) calculations of risk. The importance of doing this was suggested to me by Noam Zohar, who has written well on these questions.[8] In order to think about baselines, I am going to do what I usually don't like to do – describe a series of hypothetical situations. I will try to make them as realistic as I can.

So, imagine a military attack by insurgent forces from a camouflaged position in a forest or a field on the outskirts of a city (I take this example from a documentary about the French resistance in World War Two—so it's not entirely hypothetical[9]). The attack is directed against a passing army unit. There are some risks, obviously, for the attackers, and a small number of civilians living or working nearby may be endangered—not a disproportionate number, according to the insurgents' calculations of military benefit. Take this as the standard or baseline case. It doesn't involve terrorism, and the cover is vegetative, not human; the insurgents are hiding in a field, not a city. They aren't wearing uniforms, but they are otherwise adhering to the rules of just warfare: they are not attacking civilians, and they are not deliberately exposing civilians to harm. Now, if they move from this position into the city, and hide, and fight, attacking their enemies from the midst of the civilian population, they would reduce the risk to themselves at the expense of the civilians among whom they are hiding. They would, so to speak, be offloading risk from themselves to noncombatant men, women, and children (their fellow citizens or fellow nationals). I think we should say flatly that they are not allowed to do that; it is unjust; it is morally wrong; and, if they do it, they are responsible for civilian casualties caused by any counter-attack—or, at least, by any careful and well-aimed counter-attack

But suppose we change the baseline. The insurgent/terrorist forces are in the city center because that's where they live; that's where they have always lived. And, anyway, the open spaces around the city are controlled by the army. Surely the insurgents can fight from where they are—here the case is akin to the factory in the working class neighborhood. But it might be the case that they could readily move into more sparsely inhabited parts of the city and fight from there. If they do that, they will reduce the risk to civilians in the densely populated neighborhoods and take on greater risks for themselves. Are they bound to do that? I want to say yes, to some extent at least (we can argue about how strong the obligation is). Offloading risk seems worse than refusing to take

8 See, for example, Zohar 2014.
9 The film is "The Sorrow and the Pity (1971), directed by Marcel Ophuls.

positive measures that would reduce risk, but both seem wrong to me. And if they are wrong for the insurgents, then they must be wrong for soldiers too.

Now imagine an army planning an attack on a legitimate military target. Its strategists and tactical experts have worked out a plan that involves some degree of risk for the soldiers, but given the importance of the target, the risks are acceptable. And there are foreseeable civilian deaths, but the number is "not disproportionate" to the value of the target. Now a junior officer comes along and says that he has a plan that will reduce the risks to soldiers but increase the risks to civilians (though not to a level that violates the proportionality rule). If this officer's proposal is adopted, it would be soldiers, not insurgents, who are offloading risk. Is that the right thing to do? They wouldn't be using civilians as shields; I am not suggesting a simple equation here. But they would be benefiting from a strategy that deliberately put civilians in harm's way for the sake of the benefit, and I don't think we would want them to do that.

Now imagine another junior officer who has a plan that will greatly reduce the risks to civilians but increase slightly the risks to soldiers (without endangering the mission). Should the soldiers be asked to accept the added risk? Once again, I find it easier to say no to my first question (about offloading risk) than yes to the second (about adding it on), but both those answers are probably right. They suggest what responsible people, moral agents, ought to do in the circumstances of war.

But these hypothetical examples, while they are usefully illustrative, are also highly artificial. In practice, in the actual circumstances of warfare, we don't have a baseline, and we don't know at any moment in real time if the question soldiers face is about offloading risk or adding it on. So perhaps we needn't work very hard to distinguish between the two—we should just notice that there are these two possible ways of describing the situation. And then all we need is an argument about risk itself—and that argument should go this way: in planning and conducting military operations that endanger civilians, strategists and soldiers (and insurgents too) must take care and take risks to reduce the dangers. They have choices to make, and the lives of unarmed and vulnerable civilians, men, women, and children, have to figure significantly in those choices.

I won't make any effort to specify how much risk soldiers (or insurgents) ought to accept. But if we can't say how much, we can sometimes say: not enough. Warning civilians to leave a specified area, for example, and accepting the risk of also warning soldiers—these are not enough to justify indiscriminate attacks afterwards. As the American experience with free-fire zones in Vietnam indicates, many civilians don't leave. Despite the warnings, they stay on because they are old and sick, because they are caring for relatives who are old or sick, because they are afraid that their homes will be looted, or because they have no place to go.[10] It is a good thing to issue the warnings, but there will be work, and possibly risky work, that still has to be done to figure out how many civilians remain in the area and to look for ways of reducing the risks imposed on them by an attack.

10 Walzer 1977: 188–196 (on free fire zones in the Vietnam war).

Exactly how much of this sort of work is morally necessary is, as I have already said, a judgment call, and the judgments have to be made by field officers or, at least, by officers who know the field. International law and just war theory can only provide rough guidelines. Still, the guidelines are important, and the training of soldiers, and especially the professional training of officers, should include a serious engagement with those guidelines--a discussion of their meaning and a study of actual cases in which they were applied, well or badly; and it should also include exercises that prepare soldiers to apply them well. It is incompetence, above all, that produces brutality,[11] and so we need soldiers who are trained to act competently in these difficult situations.

Only this kind of training can give us some confidence in the judgment calls to come. And since we are all of us civilians at some point in our lives, and many of our friends and relatives are civilians right now, we need that confidence.

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Majkl Volzer

Proporcionalnost i odgovornost

Apstrakt

Ovaj članak ispituje dve verzije ograničenja proporcionalnosti u teoriji pravednog rata, jednu minimalističku, koja ne zabranjuje gotovo nijedna vojna dejstva, i jednu maksimalističku, koja zabranjuje gotovo sve. Tvrdim da nijedna ne zadovoljava potrebe teorije i da bi ih trebalo dopuniti i modifikovati etikom odgovornosti.

Ključne reči: proporcionalnost, odgovornost, asimetrično ratovanje, teorija pravednog rata

11 I owe this line to an Israeli soldier with some knowledge of Middle Eastern battlefields.

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Edward Djordjevic

CONJURING LEGITIMACY: SHAKESPEARE'S *MACBETH* AS CONTEMPORARY ENGLISH POLITICS

ABSTRACT
The text provides a political reading of Shakespeare's *Macbeth*, claiming that the play is responding to the curious connection between witchcraft and state power in the preceding century, as well as contemporary political events. Namely, practices variously labeled as witchcraft, magic, conjuring were an integral aspect of English politics and struggles over royal succession in the sixteenth century; even more so were the witch hunts and attempts by British monarchs to control witchcraft. These issues reached a head with the accession of James VI of Scotland to the English throne in 1603, and the Gunpowder Plot in 1605. On the surface, Shakespeare's play, written in the immediate aftermath of the failed attempt at regicide, brings these historical and political issues together in an effort to legitimize James' rule. However, the article shows that a closer look reveals a more complicated, indeed subversive undercurrent at play. Paradoxically, while *Macbeth* does provide James with legitimacy, at the same time it calls into question the grounds of that legitimacy.

KEYWORDS
Macbeth, legitimacy, witches, conjuring, Gunpowder Plot

Of course, there never were any witches. Therein lies the crux of the problem for any attempt at their scholarly study: the subject about which the researcher is supposed to 'reveal' something, being an empty term, must first be filled with content, at which point the game, as it were, is up. It is itself, in a sense, an act of academic conjuring, by which the scientist must textually invoke unnatural beings only to attempt to present their nature. The broader problem of witches as scholarly subject is also true on the narrower level of the witches in Shakespeare's *Macbeth*. More often than not, the reach and limits of an interpretation of the play are revealed in the understanding of the witches. For example, one could be rather literal about them, considering them merely fashionable entertainment among Elizabethan and Jacobean audiences (Herrington 1919); this is no less right than any other way of thinking of them, although it closes off a wealth of other interpretations.

A common take, both scholarly and in performance (Willis 1995), is what can be called the psychological reading. It centers on Macbeth's (and Lady Macbeth's) psyche, often locating the problem of the play in the tensions that arise between ambition, conscience, madness, delusion of grandeur, folie à deux, etc.

Edward Djordjevic: MA, Belgrade; edward.djordjevic@gmail.com.

(Bradley 2005). A great advantage of this reading is that there is little mystery about the witches themselves: they are either regular women who Macbeth's addled brain turns into supernatural beings (which is consistent with his other hallucinations), or they are even less, that is, nothing but manifestations of his madness, that is, illusion. Either way, this resolves the problem of their reality as a device in the play. But the applicability of this interpretation is also its weakness, since displacing the plot onto almost any tyrant ruling over a troubled county also abstracts the play from its historical and political context.

To read the play as mere entertainment or as a study in psyche is to ignore any reference to the intense witch hunts taking place in Europe at the time, and particularly Scotland; it also ignores the politics surrounding James VI of Scotland's ascent to the English throne and the Gunpowder Plot of 1605. It further ignores the very important political and historical role the play itself would have had for contemporary audiences. The present paper, therefore, seeks to provide an explicitly political reading of *Macbeth* that relates both to the history of witchcraft and the politics at the time of James' reign. Specifically, the political question around which the play is structured is that of *legitimacy*.

If to our ears the question of political legitimacy and the issue of witchcraft and witch hunts have little to do with one another, not so in the sixteenth century. It is important to note that as far as sixteenth-century England was concerned, witches and witchcraft were simply fact. This was true across all regions and social strata. Just about every village would have had its local witch or sorcerer, a person who knew their way around herbs and potions, could turn animal parts or products into medicine or poison, could cast or resolve spells, held 'knowledge' to effect change in the human or natural world, which was either passed down or held in a book (Clark 1999; MacFarlane 1999). And a few of them were also, unsurprisingly, involved in matters of state. Consider the perhaps most famous case of Elizabeth Barton. Born in 1506, in her youth she developed an illness, during which it was revealed that she had the gift of divine visions. Her powers included curing her own illness, which was confirmed by an ecclesiastical commission, but she retained her prophetic utterances thereafter. And it was her visions that lead her to the court of Henry VIII around 1527 (Watt 1997). However, once there, she opposed Henry's plans to divorce Catherine of Aragon and marry Anne Boleyn, going so far as to prophesize the king's demise should he go through with his plans. In 1532, Watt tells us, she had "an openly seditious eucharistic vision" (Watt 1997: 69) regarding Henry's alliance with France. Shortly thereafter, she was arrested, condemned by a bill of attainder (a legal act by the parliament allowing for punishment without trial) for treason, and executed.

What is important here is how integral Barton's role was in the political turmoil of Henry's court. Prophetic visions allowed a poor servant girl to reach a high level of influence, they could be "openly seditious," and considered threatening enough that it required the harshest charge and punishment. According to Diane Watt, Barton herself was aware of the political role of her visions, that is, she was emulating other Christian mystics who stood up to authority, such

as Bridget of Sweden and Catherine of Sienna. Prophesizing, Watt insists, was one avenue available to Renaissance women to enter public life and advance political goals (Watt 1997). In other words, all parties involved took witchcraft, visions, and prophecy seriously. Moreover, lest we think of sixteenth-century English rulers as doubly naïve – first for believing in witches, and then for also believing that killing witches could somehow disrupt the prophecy – let us ask what exactly did Henry hope to achieve in executing Elizabeth Barton? Consider to that end Barton's words that "in case hys Highnes proceded to the accomplishment of the seid devorce and married another, that then hys Majestie shulde not be kynge of this Realme by the space of one moneth after, And in the reputacion of God shuld not be kynge one day nor one houre" (quoted in Watt 1997: 51). Now, whether he would remain king a month after he divorced Catherine and married Anne, Henry knew no one could know (including himself and Barton); but he could certainly control the "reputacion of God," that is to say, the *legitimacy* of his decision.

Throughout the sixteenth and into the seventeenth centuries, as Watt shows, witchcraft remained a means for those less powerful to influence the political theater in England (1997). (Even if most witchcraft, as MacFarlane points out in *Witchcraft in Tudor and Stuart England* had little to do with kings and governments, but was a local community affair [1999].) Still, an even greater means of establishing and maintaining power was the rooting out of witchcraft. English sovereigns established their power in part by passing laws to protect their persons and the state *against* witchcraft: Henry VIII in 1541; Elizabeth I passed several anti-witchcraft laws, each harsher than the previous, although the one from 1563 is perhaps most famous (Young 2018); and then in 1604, Parliament passed the strictest anti-witchcraft law to date, under James I. In a sense, they all had good reason: in *Magic as a Political Crime*, Francis Young calls Elizabeth "perhaps the most magically attacked monarch – at least while on the throne of England – in English history" (Young 2018: 87). Her only competition in this regard – hence the disclaimer "while on the throne of England" – was her successor James I, who prior to assuming the English throne in 1603 had endured a turbulent career as James VI of Scotland. "In Scotland, popular magic of any kind was seen as a menace to the state and was associated with treason" (Young 2018: 155). The most famous case were the North Berwick trials that took place in 1590, when a circle of witches and sorcerers admitted (under torture, of course) to having raised storms on the seas that hampered James' journey back from Denmark. The "visit to Denmark was of crucial importance, because his purpose was to marry Princess Anne, daughter of Frederick II of Denmark, and thus *secure the future* of the House of Stewart" (Young 2018: 155-156, emphasis added). Clearly, not only did British monarchs (and other men and women of state) believe that witchcraft could impact politics, they believed that controlling witchcraft was paramount for establishing and maintaining order.

In addition to having marked "James VI for the rest of his life" (Young 2018: 155), the North Berwick trials became well-known across Britain due to the

pamphlet printed in London in 1591, *Newes from Scotland*. One detail from the affair that would not seem conspicuous to us, but Shakespeare uses it to great effect in *Macbeth*, is that witchcraft and magic in England until that point was almost always an activity of a single man or woman. The three witches in *Macbeth* were "unprecedented" in that this was "…the first time in an English drama when witches had been represented as congregating in a group" (Wilson 2002: 126). The famous case of the Lancashire witches, the first example in England of witches tried as a group, did not occur until 1612, six years *after* the likely first performance of *Macbeth* (Poole 2002). Now, the decision to have three witches as opposed to one raises many more questions than an article such as this could give answers: what can three witches do that one cannot? Why three, rather than, say, seven or thirteen, etc.? Not to mention that later in the play we encounter three more witches very briefly and their chief witch, Hecate. Among the many valid possible answers, one is that it is a matter of representation: this is the Scottish play, it only makes sense that the magical element be the way it is conducted in Scotland, that is, in congregation, as a witches' sabbath. This detail gestures towards a reading of *Macbeth* through a historical lens, referring not only to the historical Macbeth and Duncan in the eleventh century, but to a more recent history of witchcraft, its manifestations, and role in power struggles of the sixteenth century. Paradoxically, the witches in *Macbeth*, when considered this way – as opposed to either mere entertainment or manifestations of madness – provide a link with real, concrete English and Scottish history.

This is true in at least one more sense. Both Robert Wilson in "The pilot's thumb: *Macbeth* and the Jesuits" and Garry Willis in *Witches & Jesuits* argue convincingly that the witches are to a great extent a link to the events surrounding the Gunpowder Plot of 1605 (Willis 1995, Wilson 2002). Although it is the words spoken by the Porter in Act II, scene 3 that are usually considered the most explicit reference to the Gunpowder Plot and the execution of the would-be assassins, Wilson and Willis both show how London audiences would have understood Shakespeare to be presenting the plotters and conspirators *as* witches (which is also another potential answer as to why Shakespeare had several of them). The identification of the Gunpowder Plot conspirators with witches was less of a metaphor than it might seem. Attempting to blow up Parliament with the king in attendance was no ordinary assassination – had it been successful, it would have been a crime of the highest order – treason. This was the very essence of witchcraft, or at least the authorities' charge against it. Recall that Elizabeth Barton was tried and executed for treason, as were the witches of the North Berwick trial: the casting of spells (witchcraft) and killing of kings were equal in that they were both the work of the Devil.

Yet, there was a further connection of the conspirators to witchcraft: any justification of action or claim to innocence was considered dissemblance and equivocation, that is, a cunning trick against the king and justice. Henry Garnet, the Jesuit priest whose connection to the plot was tenuous, but was presented at the trial as plot ringleader, had previously written *A Treatise of*

Equivocation, instructing Catholics how to lie to the authorities if captured (Willis 1995). (It is the word equivocation that connects the Porter's speech in Act II to the trial.) The prosecutor at the Gunpowder Plot trial was the famous jurist Edward Coke, who, Willis notes, directed most of his anger at the conspirators' "perversion of the nature of language. Equivocation, as an attack on meaning itself, is a more fiendish instrument than gunfire for overthrowing kings" (Willis 1995: 22).

There is a hint here of something Michael Walzer wrote about in "Regicide and Revolution." His point, briefly, is that while throughout history kings were often murdered and always under threat of being killed, monarchy, or what he calls kingship, was not called into question until the English Revolution in the seventeenth century and the French in the eighteenth (Walzer 1973). These two revolutions ushered in the possibility of the destruction of monarchy as a system of rule. And while there is no suggestion that the Gunpowder Plot conspirators had in mind anything like the later English and French revolutionaries, it is not hard to see that the sheer scale of their (failed) endeavor brought up anxieties about the very nature of order and disorder. Quieting these anxieties required not just punishment of death, but condemnation through "official ideology-theology" (Willis 1995: 22) and erasure of any justification of the plotters' effort. Since the plot to blow up Parliament and the king failed, the trial was less about (attempted) murder and much more about ideology, justification, and legitimacy. It was indeed, as Willis describes the prosecutor Edward Coke's target, about controlling and fixing language. Thus, the Gunpowder Plot itself, and the trials of the plotters and conspirators ultimately had to do with justification and legitimacy. As did the execution by Henry VIII of Elizabeth Barton for her prophetic visions, and the North Berwick witch trials.

Macbeth was likely written in the same year as the Gunpowder Plot trial. It is possible that its very first performance was for King James I of England, during a visit of his brother-in-law, King Christian of Denmark, but this is not certain (Clark and Mason 2015). Undoubtedly, however, by making the play about Scotland and Scottish history, introducing witchcraft as a prominent element (James fancied himself an expert on witches, having written *Daemonologie*, a treatise on uncovering, trying, and executing witches), Shakespeare is currying favor with the new king. Furthermore, although a subplot in the play, the prophecy and fate of Banquo and his son Fleance would have been immediately recognized by both royal or lay audiences as crucial. Namely, it is Banquo to whom in Act I the witches foretell initiating a line of kings ("Thou shalt get kings, though thou be none," 1.3.67), and in Act IV when that prophecy is confirmed, it is presented as the famous show of kings that leads directly to James.

In addition to drawing a clear line of kings, the vision from Act IV would have also appealed to James because it confirmed his ideology of the *source* of legitimacy: lineage. The line of kings could not be in greater contrast from Macbeth himself, who is curiously cut off from any kind of genealogy. We know next to nothing of his parents, he has no children, and even the additional title he acquires during the play, Thane of Cawdor, he earns, that is, it is not

hereditary. And of course, he ascends to the throne not through inheritance, but by murdering the king. He himself is aware of the problem,

> Upon my head they placed a fruitless crown
> And put a barren scepter in my gripe,
> Thence to be wrenched with an unlineal hand,
> No son of mine succeeding. If't be so,
> For Banquo's issue have filed my mind (3.1.60-64).[1]

If lineage confirms legitimacy, as was widely believed, it is important to say that *Macbeth* is not a story of a king losing his legitimate rule through unjust or horrible deeds. All the tyranny after Duncan's murder, and indeed even regicide do not render Macbeth a less legitimate king, because Macbeth never was, nor could be the legitimate king. Being a murderer and tyrant as king (in contrast with Duncan who, as even Macbeth acknowledges "hath been/So clear in his great office" 1.7.17-18) make Macbeth a *bad* king, but not an illegitimate one. His tyranny only adds to an already established illegitimacy. This was precisely the position James himself took, as Shakespeare likely knew. According to James, a king was legitimate based on lineal descent, regardless of how he treated his subjects. For James, tyranny, while bad, was not grounds for illegitimacy (James VI, internet). In this sense, the purpose of Macbeth the character is to provide as strong a contrast with the new king. The less of any lineage and legitimacy Macbeth holds in the play, the more it is implied for James.

Yet, Macbeth's illegitimacy is not as straightforward as it might appear. How does he become king? After all, murdering the king is only half the job. The play here (as throughout) moves quickly: after the discovery of Duncan's assassination, in the last scene of Act II, the Scottish noblemen tell us that Duncan's two sons have fled (drawing suspicion on themselves for the murder), but also that Macbeth has been "already named, and gone to Scone/To be invested" (2.4.31-32). Act III opens with Banquo remarking – to himself, but referring to Macbeth – "Thou hast it now, King, Cawdor, Glamis, all" (3.1.1), meaning that Macbeth is now king. When Banquo finishes speaking, stage direction says 'Enter Macbeth as King'. Yet, the audience does not get to see *how* Macbeth was chosen king, or by whom. Now, historically speaking, the story of Macbeth Shakespeare is retelling takes place at a moment in Scottish history when one system of rule supplanted another. Up until the time of the historical King Duncan and Macbeth, new kings were selected from the extended family of the old king, a system known as tanistry (Herman 2007; Clark and Mason 2015). The historical Macbeth was actually on the side of preserving the old order, which was disrupted by Duncan who sought to ensure the throne for his son Malcolm – thus replacing tanistry with primogeniture. Even if he knew this, Shakespeare could not present any of this in the play, given that James held

1 All quotes from *Macbeth* are from Clark, Sandra and Mason, Pamela (eds.) (2015), *Macbeth*. London: Bloomsbury.

such clear and strong beliefs about the God-given nature of monarchy. Presenting the actual process of choosing Macbeth to be king would legitimize him at least somewhat, and reduce the blatant contrast with James. If Shakespeare was to call legitimacy into question, he would have to go about it in a subtler way.

The critique of this concept of legitimacy comes almost as an unintended consequence of the omission because, as it were, it goes too far. Consider that, whoever 'named' Macbeth king, presumably gave reasons and justification, drawing on some, however meager, claim to the Scottish throne (even if coming from Macbeth himself). In the play, the audience are deprived of even hearing any claim to the throne. Which is to say, in an effort to erase all legitimacy from Macbeth, Shakespeare had to erase not only lineage, but also any other potential source of legitimacy and any potential *claim* to the throne, which is to say also any *claim* to legitimacy. But Shakespeare has thus 'overplayed' his hand, revealing that legitimacy goes beyond the fact of lineage. It would seem that an integral part of legitimacy is also a claim to that legitimacy. Even if legitimacy is lineal, it is still necessary for someone to claim that lineage, to produce it discursively, to connect the dots as it were. Shakespeare even does precisely this for James VI with the show of kings in Act IV. And by hiding the moment of legitimacy-claiming for the illegitimate Macbeth, Shakespeare only confirms the significance of the discursive element (connecting the dots) within legitimacy.

There is a paradox at play here: *Macbeth* does indeed (in the show of kings) claim the lineage that puts James rightfully on the Scottish throne; but in so doing, it modifies the philosophical grounds for legitimacy from James' own understanding and ideology. For James, legitimacy was strictly lineal: being descended from rightful kings makes one a rightful king. By omitting the process by which Macbeth becomes king in the play, and by writing in a scene with a show of kings, Shakespeare inserts a discursive element – the claim to legitimacy – into its grounds.

Another way of describing this paradox is to think of the role of theater in the issue of political legitimacy. If *Macbeth* the play is about legitimacy, but legitimacy is only about lineage, what good would such a play be? Performed for the king, it would only state the 'truth' of lineage, of which the king is already convinced and upon which he already grounds his rule; yet, performing it for the masses would be even more pointless, since the rightful king is rightful by virtue of descent and there is nothing the masses (or anyone else) can do about it. If, on the other hand, legitimacy, in addition to rightful descent, includes a discursive element, it is vital for the play to be performed to both the king and the masses, because it becomes the very discursive element necessary for the fulfilment of condition of legitimacy. *Macbeth* the play, in other words, was the mouthpiece that claims legitimacy for James; at the same time, however, it undermined the purely lineal grounds of that legitimacy.

The theater, it seems, conjures legitimacy. Indeed, one of the meanings of the verb to conjure is to call forth, and in addition to being about an il/legitimate king, the entire play is riddled with acts of conjuring (beyond the characters of the witches). In Act I, for example, Duncan, speaking to Macbeth, says,

"There's no art/To find the mind's construction in the face:/He was a gentleman on whom I built/An absolute trust" (1.4.12-15). While describing betrayal by the former Thane of Cawdor, Duncan is unwittingly foretelling Macbeth's treason against him. Banquo, speaking to Macbeth who tells him to make sure to come to his banquet: "My lord, I will not [fail to come]" (3.1.28), and a few lines later, "our time does call upon's" (3.1.36) – thereby prophesizing first his appearance at the royal banquet as a ghost, and also his own demise, since 'our time is upon us' can be read to mean that he has to leave, but also that it is his time to die. In speaking to Malcolm, Macduff describes the situation in Scotland from where he has just fled with the words "Each new morn/New widows howl, new orphans cry" (4.3.4-5), yet he does not know that his own wife and children have been slaughtered in the interim. Even minor characters, such as Siward, conjure unconsciously: when he says "certain issue, strokes must arbitrate" (5.4.20) he is referring to the idea that sometimes war is necessary to resolve political conflict. But the word 'issue' also means children, and a few scenes later Young Siward's life is 'arbitrated' by a stroke of Macbeth's sword. To which we can add Lady Macbeth, whose words from Act II, scene 2 about Macbeth washing his hands of Duncan's blood, as well as her advice to her husband upon his hallucination of Banquo that he lacks "the season of all natures, sleep" (3.4.139), only portend her own madness and sad demise. All these characters have an uncanny ability to utter statements that are truer than they realize. Shakespeare consistently puts words in their mouths through which they unwittingly conjure their own horrible fates.

Of course, words and language are most powerful and under least control in Macbeth's mouth. From the moment we meet him, the words he utters are enigmatic to the point of meaninglessness: "So foul and fair a day I have not seen" (1.3.48) – not only is he already echoing the spellbinding incantation of the witches from the very first scene, but we are already disoriented regarding what he means to say. Shortly after, when he's told that he would become the Thane of Cawdor and King, his words again escape his control: "and to be king/Stands not within the prospect of belief,/No more than to be Cawdor" (1.3.73-75). The first of these two lines seems to say that he does not believe he could become king, only to be reversed in the second line by comparing it to becoming Cawdor, which title he has already been given. When he finds out that he is also indeed the new Thane of Cawdor, and that the witches' prophesies might come true, he says that "This supernatural soliciting/Cannot be ill; cannot be good" (1.3.132-133), that is, it is somehow both good *and* bad. Let us give one further example of Shakespeare making language betray his main character. In the banquet scene, upon seeing the ghost, he is trying to explain to himself and Lady Macbeth what is going on: "Blood hath been shed ere now, i'th' olden time,/Ere humane statute purged the gentle weal" (3.4.73-74). The word purged in the second line is meant to convey that the law has stopped the bloodshed of old and created a gentle weal, i.e. the common good; but it could equally be read to mean its exact opposite, that is, that 'humane statute' destroyed the common good.

The banquet scene, furthermore, best reveals another curious aspect of Macbeth's language. When the ghost of Banquo first appears, Macbeth is understandably stunned, but gathers himself shortly to address and challenge the ghost, "Why, what care I? If thou canst nod, speak too" (3.4.67), whereupon the ghost leaves. It returns a second time, again frightening Macbeth, but again, he girds himself up against the ghost with the words, "Hence, horrible shadow,/ Unreal mockery, hence" (3.4.103-104), and the ghost does indeed disappear. It would seem that the ghost can be commanded through language (one meaning of the word conjure is to command an oath); the problem is that Macbeth himself is not in command of his own language – just the opposite. Perhaps it is out of his control because it is so powerful, for it is worth noting that the witches' prophecies always also emerge from the mouths of those characters to which they are given: Macbeth repeats the initial prophecy first by questioning it, but also by writing it down to send to his wife. The three prophecies given to him in Act IV he repeats one by one: Birnam Wood moving in the opening of scene 3, Act V; then, he repeats verbatim the witches' instruction to 'laugh to scorn one not of woman born' in scene 7 with Young Siward; and finally, upon meeting Macduff, his initial reaction is to utter "Of all men else I have avoided thee" (5.8.4.), a rephrasing of the apparition's "Beware Macduff" (4.1.70) from Act IV. Even Banquo, the only other character to see the witches, repeats what has been said to him: "Yet it was said/It should not stand in thy posterity,/But that myself should be the root and father/Of many kings" (3.1.3-6).

These descriptions destabilize the locus of power of the utterance. Even if witches are real, and their spells and conjuring have an effect on the world, it would seem that by introducing this repetition of utterance but displacement of speaker, Shakespeare is blurring the source of that power: does the prophecy of Macbeth being king lie in what the witches say or in the message he sends to Lady Macbeth? Is the spell by which none of woman born shall harm Macbeth powerful due to its being uttered by the second apparition or by Macbeth pronouncing it himself in 5.3.3-7:

> ...What's the boy Malcolm?
> Was he not born of woman? The spirits that know
> All mortal consequences have pronounced me thus:
> 'Fear not, Macbeth, no man that's born of woman
> Shall e'er have power upon thee.'...

It could be that for a spell to work, it must be conjured once again by the subject of the prophecy.

Macbeth repeats one of his prophecies – the one according to which he cannot be harmed by one of woman born – three times in Act V. Two of those utterances are around sword fights with candidates for this label 'not of woman born': Young Siward (in 5.7) and Macduff (in 5.8). But the responses he receives in speaking to them are very different. The young Englishman threatens, "with my sword/I'll prove the lie thou speak'st" (5.7.10-11). Although uttered as

a prophecy (in the future tense), it gives advantage to the sword over language; but the sword is clearly no match for Macbeth's charm, and Young Siward is killed. The situation changes when Macbeth comes across Macduff. Although he too initially equates his voice and his sword (in 5.8.7), upon being told that Macbeth bears a charmed life, Macduff deploys his own spell against the tyrant: "let the angel whom thou still hast served/Tell thee, Macduff was from his mother's womb/Untimely ripped" (5.8.14-16). Referring to himself like this, in the third person (after the comma) gives the words a performative aspect, as if uttered (to Macbeth) by a supposed angel, that is, the witches. This utterance acquires a spellbinding or spell releasing quality. Resolving the charm, or casting a counter-charm, Macduff is able to slay Macbeth.

All of which may be spells, invocation, conjuring, and yet might not require witches. Or rather, it might only require them as a legal fiction of sorts. Prior to about the time *Macbeth* was written, witches resolved the problem of the claim to legitimacy. To return once again to Michael Walzer and his point on killing kings and killing monarchies, before the English and French Revolutions, "kings for centuries were killed in corners, the murders hushed up, the murderers unthanked, neglected, condemned" (Walzer 1973: 620). This is largely how the murder of Duncan plays out. However, by shifting the power of the utterance and spell, first into the mouths of his characters (who are not witches), and then into the overall public realm of the theater, Shakespeare is shifting the very grounds of legitimacy. Perhaps we can now understand at least some of the reason for such a close connection between witches and power in sixteenth-century England. Namely, through their divine visions, witches were the way kings and queens claimed their legitimacy without having to turn to the public. A private vision (by a witch) in direct communication with God or the angels establishes the divine nature of monarchy, but also circumvents the need to justify oneself – thus relinquishing at least some of the power of legitimation – to the public. Because, as Walzer says regarding the English and French Revolutions, "to try [the king] and then to execute him in public was to challenge monarchy itself" (ibid. 621). This is not to say that Shakespeare was a monarchy-challenging revolutionary; but it does seem that there is an inkling about the shaky foundations of divine rule, or a sense that sweeping change to the English political landscape was not too far off. (At the risk of sounding too Whiggish about this history, the very next king after James, Charles I was beheaded in that English Revolution that, according to Walzer, destroyed the divinity of monarchy.)

In addition to the omission of Macbeth's claim to the throne (in Act II), there is another, even subtler, curious omission in Macbeth that gestures towards a shift in English politics. The witches of Macbeth are very nearly entirely Macbeth's private matter. Although they do appear at the beginning to Banquo as well, in Act IV, when Macbeth *goes* to their lair (as opposed to being intercepted), he is alone. If he knows where to find them, as he tells Lady Macbeth ("I will tomorrow,/And betimes I will, to the weird sisters" 3.4.130-131), presumably he could take her or someone else to them as well, but this is

never an option. Furthermore, after Macbeth's visit, the witches make no other appearance in the play. After his death, the victorious Malcolm and Macduff, along with the English, make no effort to find them, nor is there any implication that they will now be visited by the sisters. The witches, as it were, disappear with Macbeth. (In Roman Polanski's 1971 film version of the play, at the end, Donalbain, Malcolm's brother, goes looking for them, implying a new cycle of power struggle. This, however, has no basis in the text.) The final removal of the witches makes sense in light of their strong association with treason: with the fall of the tyrant Macbeth, rightful rule is once again established, and there is no more need for tortured language, twisted words, ambiguous spells. *Macbeth* could therefore be read as political commentary on the (beginning of the) end of the legal fiction of witchcraft. Wilson notes that the association of the witches with the Gunpowder conspirators would have allowed London audiences to hear Macduff's line that "the time is free" (5.9.21) as being free of treason (Wilson 2002:139). With magical conjuring shifted from hidden lairs to the public London theaters, the connection between witchcraft and royal power was also loosened, if the spell was not yet fully broken.

James was indeed right in his megalomania that the principal aim of the Gunpowder plotters was killing the king; but it is worth remembering that the actual plan was to blow up the entire building of Parliament. Like the language in *Macbeth*, the performers unwittingly targeted more than they likely intended: by setting the explosives in the basement of the Houses of Parliament, the perceived target was the entire legal and political order of England. And even without the detonation, the plot trial placed that political order center stage, for all to see. Unlike the execution of Elizabeth Barton, who was condemned by attainder, and the North Berwick witch trials, where the accused were brought before King James VI personally, the trials for the Gunpowder plotters and conspirators were public. In his efforts at the trial, the head prosecutor, Coke, might as well have made use of an above quoted line from *Macbeth* (and Macbeth, ironically): "Blood hath been shed ere now, i'th' olden time,/ Ere humane statute purged the gentle weal" (3.4.73-74). Namely, although he vehemently prosecuted the accused in James' name, the grounds had shifted almost imperceptibly from divine right of kings (and their 'blood i'th' olden time') to 'humane statute'. Coke and James would clash over this very issue of grounds – whether the king stood above the law or *vice versa* – only two years later, in 1608, and remain enemies for the rest of their days (Glendon 2011). James perhaps did not notice that in providing him with legitimacy, the Gunpowder trials nevertheless displaced the claim to and source of that legitimacy – thereafter, it would have less to do with lineage and God, and more with law and public forum.

Macbeth was thus embedded in English politics, both historical and of the moment – indeed, the play *was* contemporary English politics. It is important to remember that when the play was written, James was a new and *foreign* king, and the history and culture of Scotland were not familiar to London audiences in the way they became in subsequent centuries. And on the other hand,

the Gunpowder Plot was, even unsuccessful, an extraordinary event. Both of these would have required a means through which to be given meaning, in an age when even printing was fairly rare (for example, none of Shakespeare's plays were printed in his lifetime), not to mention electronic communication, on which we have come to rely to shape our view of the world. Theater was a major way English society reflected itself to itself. In presenting a story about an il/legitimate king, *Macbeth* displaced the discussion about legitimacy from courts and witches' lairs into the public forum – theater, quite literally, conjured legitimacy.

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Edvard Đorđević

Prizivanje legitimnosti magijom: Šekspirov *Makbet* kao savremeni engleski politički činilac

Apstrakt

Članak polazi od političkog čitanja Šekspirovog *Makbeta*, tvrdeći da je to delo odgovor na možda neobičnu vezu između magije i državne moći u 16. veku, kao i na politička dešavanja u vreme njegovog pisanja. Naime, delatnosti koje su raznorodno obeležene rečima vradžbina, magija, prizivanje, itd. bile su sastavni deo engleske političke sfere u 16. veku, naročito u borbama za presto. Međutim, još važniju ulogu u političkom smislu je imao lov na veštice i pokušaji britanskih kraljeva da kontrolišu magiju. Ova pitanja su dostigla svoj istorijski vrhunac 1603. godine, dolaskom na engleski presto Džejmsa I (koji je do tada bio Škotski kralj Džejms VI), kao i Barutnom zaverom 1605. Šekspirova drama, napisana odmah posle suđenja zaverenicima za neuspeli pokušaj ubistva engleskog kralja, naizgled služi tome da legitimiše vladavinu kralja Džejmsa. Međutim, pažljivijim čitanjem i stavljanjem u istorijski i politički kontekst, uviđa se da *Makbet* sadrži izvestan subverzivni element. Paradoksalno, iako *Makbet* uistinu legitimiše Džejmsa za kralja, istovremeno dovodi u pitanje osnov po kome on ima kraljevski legitimitet.

Ključne reči: *Makbet*, legitimitet, veštice, magično prizivanje, Barutna zavera

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Guglielmo Feis

PROPOSITIONS AS (NON-LINGUISTIC) OBJECTS AND PHILOSOPHY OF LAW: NORMS-AS-PROPOSITIONS

ABSTRACT
The paper distinguishes two accounts of legal normativity. One-source accounts claim there is only one source for legal normativity, which is ultimately linguistic. Two-source accounts claim legal normativity is both linguistic and non-linguistic. Two-source accounts claim we need to go beyond language and beyond propositions taken as linguistic entities, while they are one-source accounts' main conceptual tool. Both accounts construct propositions as linguistic. There is, nevertheless, a documented analytic tradition starting with G.E. Moore that constructs propositions as non-linguistic entities. Today, the problem of the unity of proposition and structured propositions are highly debated in metaphysics. How does such debates fit into the one-source *vs*. two-source picture of legal normativity? Why has analytic legal philosophy failed to consider such an option concerning propositions (arguably calling descriptive *sentences* about norms "normative *propositions*" did not help)? This paper thus (I) reconstructs the argumentative dynamics between one-source and two-source accounts; (II) presents the less considered philosophical view of propositions as non-linguistic entities and (III) discusses how to include or dismiss such a philosophical view in the one-source/two-source debate on legal normativity.

KEYWORDS
Non-linguistic propositions, legal normativity, non-linguistic normativity, normative propositions

Analytic legal philosophy often draws on analytic philosophy: from conceptual analysis to analytic jurisprudence, from the analysis of normative language to analytic (meta)jurisprudence.[1]

1 Examples abound. See e.g. Bix 2003 or Marmor 2005, Marti & Ramírez-Ludeña 2016, Plunkett & Sundell, 2013a, 2013b; Stavropoulos 1996: Chapter 2–4 (esp.). In the Italian circles see the mentions of early day "heroic" (i.e. Frege and Russell) analytic philosophy in Jori & Pintore 2015. The connection with (early day, pre-Kripkean and somehow pre-Quineian) analytic philosophy is also clear in Guastini, e.g. Guastini 2012. Scarpelli 1959 draws on Hare, while Amedeo Giovanni Conte was the Italian translator of Wittgenstein's *Tractatus*. The lexicon of intensions and extentions is well spread in the Italian tradition and also in the Argentinean tradition that draws on *Normative Systems*, e.g. Alchourrón & Bulygin 1971, Chiassoni 2007, Guastini 2011, Roversi 2007. Completeness is not the purpose of this note. All the note wants to show is that different authors and traditions are acquainted (in different ways) with authors familiar with the notion of propositions used here (see §2-3).

Guglielmo Feis: PhD, Center for Advanced Studies – South Eastern Europe, University of Rijeka; guglielmofeis@gmail.com.

In this paper, I shall consider one of the old doctrines of analytic philosophy, i.e. the thesis according to which propositions are *objects*, i.e. non-linguistic entities. The view was held by (G.E.) Moore and Russell and is what motivates contemporary research on (structured) propositions as well as the problem of the unity of proposition.[2] I take such thesis as a (philosophical) fact because – factually - there are philosophers holding that propositions are objects (see later §2).

Such a thesis is interesting for legal philosophy and for non-linguistic normativity. In fact, if we accept this thesis, the spectrum of non-linguistic normativity increases.

Non-linguistic normativity is characterized as making reference to objects like deontic states of affairs exhibited by conventions, customs or non-written laws. (Conte 2007) offers such a characterization. For him the linguistic referents of the term 'norm' are (1) 'deontic sentences', i.e. written deontic phrases; (2) 'deontic propositions', i.e. meanings of deontic sentences; (3) 'deontic utterances', i.e. worldly utterances of normative phrases. The non-linguistic referents are (4) 'deontic states of affairs', i.e. norms that "are there" as states of affairs, e.g. customs, that are not written down nor pronounced and (5) 'deontic noema', i.e. norms as objects of thought, (Husserlian) intentional objects.[3]

To this Contean view you can oppose more standard views in legal theory drawing on the distinction between written *provisio* [*linguistic disposition*] and normative meaning [*norm*]. Such a distinction is present every time we need to construct different normative meanings starting from the same law-in-books (e.g. legal interpretation, argumentation, discussion about principles). Now, if propositions are no longer linguistic entities but objects, i.e. non-linguistic entities, non-linguistic normativity expands.

In drawing the line between linguistic and non-linguistic we have to specify what does it mean to be 'linguistic'. There would be plenty of approaches to spell this out (theoretical, cognitive, anthropological, semiotics, etc).

2 Non-linguistic propositions are found in Moore 1899 and then used by Russell in 1903. See Gaskin 2008: 9 and chs. 2–3. Moore is pretty clear in saying his propositions are not linguistic entities. They are rather made by concepts (see later, §3). In legal philosophy and deontic logic Woleński 2018 claims propositions are non-linguistic entities.

3 For such researches see at least Conte 1970, 2007 and Roversi 2007, Żełaniec 2007. Elsewhere I showed how authors such as Guastini or Alexy are able to encapsulate more than the linguistic referents (1) to (3), even though the research line which is more interested in a research on non-llinguistic normativity does not seem to consider that, see Feis and Borghi 2017. Another interesting – and interestingly underrated and undermentioned – remark is found in Bulygin 1982: 137. In fact, Bulygin uses 'normative proposition' to mean something way closer to Conte's deontic state of affairs than to philosophers' propositions (i.e. the idea of proposition of Moore and Russell that led to what we will see in §2). For Bulygin a normative proposition "[...] describes a much more complex social fact, viz. The fact that a given social rules exists, i.e. it is accepted by a social group. This is exactly what we understand by a normative proposition". Emphasis on non-linguistic normativity is present in Moroni & Lorini 2016, B. Smith 1995, Studnicki 1970.

We can rely on a hyper-naive definition of 'linguistic' as "verbal or written language" and get started. It is a cheap solution, but at least it allows us to develop an argument. Be it as it may, this issue of "what is 'linguistic'?" is relevant but orthogonal to our issue: in fact, when two-sources Contean-inspired accounts distinguish themselves from one-sources there is no disagreement nor misunderstandings on what 'linguistic' means nor on what 'propositions' are (i.e.: both accounts neglect non-linguistic propositions of §2). Further, in this paper I am already bridging two different disciplinary areas that, despite the interdisciplinary spirit, are not that well aware of each other.

In fact, there are *two* intended audiences for this paper. On the one hand, there are the metaphysicians and the analytic philosophers working on propositions. They are well aware of the issue of the unity of the proposition – i.e. answering to the question of what's the difference between a list of words and the proposition made of such a list – and of different proposals on propositions (e.g. different accounts of structured propositions) as well as of attacks on the concept of propositions (e.g. the one by Quine). We shall briefly recap some of these issues in §2.

This first reader would be interested in knowing a bit more on the relevance of these issues for the legal domain, i.e. a domain in which the key elements – norms – are assumed to have no truth-values (the issue of truth-conditions is more complex). Further, the legal domain is permeated by the concept of *validity* which is not into play in the metaphysics debate.

On the other hand, there are the philosophers of law and scholars in jurisprudence. They are aware of how validity adds layers to our talk of propositions: we have the written text of the norm (sometimes called *disposition* or *normative proposition*), then its meaning (the "real" norm): both are often assumed to have no truth-values. Then we can have descriptive statements about norms, like "it is truth that, according to the legal system X, it ought to be the case that Y" and also "in the history of legal system X, it is true that a certain law proposal has been approved according to the procedures of that legal system".

Unfortunately, the two audiences are mostly not aware of each other. Given the limited word-range I can (ab)use, I leave the reader to refer to the literature of the other side (notes are going to be a bit heavy for that reason).

Such an absence of mutual recognition is nonetheless important as it is gives rise to terminological misunderstandings. In fact, for legal philosophers *propositions* are most often metaphysicians' *sentences*, i.e. concrete tokens of linguistic entities rather than non-linguistic entities.

'Normative propositions', in legal philosophers' jargon, are taken to be descriptive *sentences* about the law. So, for the analytic (non legal) philosophers, these "normative propositions" are *not* propositions in the metaphysicians' usage, but *sentences*. Legal philosophy frames the propositional side of norms by calling them *norms* (quite a straightforward choice). Those are the *Sollen*/ Ought normative elements, that is where (normative) *meanings* come into play.

I want to point out that here, at the *norms* level, we may have propositions (in the philosophical usage) i.e. as non-linguistic entities. We can choose to

call these *norms-as-propositions*. With reference to the terminology of legal philosophy, *norms-as-propositions* are *norms* and *not* normative propositions (i.e. sentences about norms).[4]

Further, in legal philosophy these various philosophical entities (propositions, meanings, sentences) are taken as primitives which are not (in general) discussed. You have a definition of them. Full stop. Despite legal philosophers' proud attitude of doing *analytic* legal philosophy, propositions as non-linguistic entities – which are found at the core of the proud heritage and masters of Frege, Moore and Russell – are hardly discussed.[5]

To be even more explicit and outright simplistic: we have two terminologies that are supposed to describe the *same* conceptual endeavour. Unfortunately, the distinctions one terminology made are not kept in the other one (which is assumed to be equivalent to the first one and have the same expressive power). The paper starts to show that. Empirical confirmation may be obtained by way of mapping references and quotations of the less-inclusive terminology to problems and issues of the broader conception. I point out why it is important to notice and be aware of the fact that two terminologies that are not interchangeable are used as if they were. (For two other approaches in reading the paper, see the last footnote).

Of course the choice of which terminology to use and consider in a supposedly interdisciplinary (and scientific) enterprise it wholly up to the reader.

1. Legal Philosophy, (Normative) Propositions and Non-Linguistic Normativity

The fact that laws and (normative) propositions and normative sentences often interact is noted and discussed in many theories of legal philosophy. One of the main theoretical acquisitions is the distinction between the written text (call it the (written) norm or the provisio) and its (interpreted) meaning, i.e. the content it expresses (the proper proposition, sometimes called *norm* in a technical term).[6]

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4 I thank Luka Burazin for pointing me out the necessity of this clarification so that the two audiences can fruitfully interact.

5 The conjecture which needs a paper to be completely proved is that the analytic they have in mind is the Oxford style linguistic philosophy of ordinary language. Most of the pillars of "Continental" (i.e. European) analytic legal philosophy refers to (J.L.) Austin or Hare and other "ordinary language approach". Formal approaches are hardly mentioned.

6 Dworkin (at least according to Marmor 2005: 39) seems to use propositions together with interpretation (i.e. attributing meaning). Marmor quotes that passage from Dworkin to support his interpretation: "Legal practice, unlike many other social phenomena, is argumentative. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions" (Dworkin 1986: 13–14).

At this point, many (well-known) complications arises. (Descriptive) Propositions – but the same holds for statements, discourses and sentences – are said to have truth-values; still, items in the normative domain do not have truth-values (or, at least, that seems to be a sort of "standard view"). Be it as it may, even granting that normative propositions have no truth-values, we can have a descriptive usage of normative propositions, i.e. when we describe the composition of real-world legal system.[7]

This suffice to show that: (i) legal philosophy talks about propositions; (ii) propositions play a fundamental role in the legal domain (e.g. it seems we need to resort to propositions to allow norms of a code to be translated into another one, to say that N1 in L1 and N2 in L2 are the same).

Given that, it is no surprise that we find propositions at the core of our divide between one-source and two-sources accounts of normativity. These two accounts are not distinguished that way and this is no "common knowledge" nor "standard distinction". In fact, as it emerged from above (e.g. fn. 3), what I am isolating as two different accounts tends to be rather "conservative" and respectful of their own traditions and standardized sets of references and sources and they rarely dare to explore the different tradition. (You may say that the present article is interdisciplinary and untraditional, if you like).

According to one-source view, all legal normativity is *linguistic*. According to two-sources view, we have two different kinds of normativity, linguistic normativity and non-linguistic normativity.

There are many possible debates on this paradigm, e.g. one may challenge that we need *contents* also in non-linguistic normativity and say that what is presented as a 1/0 dichotomy is rather a matter of degrees or *expressibility*.[8] A different way would be to go deeper into what 'linguistic' means and what 'being linguistic' amounts to in the present debate. If 'linguistic' means 'being representable (with some symbolic device)' it is likely that everything will be somehow "linguistic".[9]

From all we have said above – the importance of propositions for legal philosophy and the distinction of two views on legal normativity – we saw that

7 This can actually be used to solve this "need to find truth-values". See, e.g. Marmor 2005: 3: "It is a widely acknowledged fact that we can make propositions about the law in any given legal system which are true or false." Still, no-truth-values theories will press you saying that descriptive usage of norms are nor "real" norm. You may reply that it is up to them to enlighten us on what this "real" norm really is. Of course, we have attempt to retain logic even when we lack of truth-values, e.g. Alchourrón & Martino (1990). (A "chronological" note: working on deontic logic von Wright realized that logic may have a wider reach than truth).

8 I.e. we can take customs, graphic norms or other examples of non-linguistic normativity and say we can express them linguistically after various cognitive steps. The harder are the cognitive steps the more "non-linguistic" will be the corresponding normative material.

9 I thank Adriano Zambon for a discussion on that point. Specifying how also in such an "all linguistic" framework we are able to distinguish different sorts of "languages" (e.g. ordinary language, musical notation, logic, C#, etc.) is beyond the previous point.

both views include propositions. The main conceptual dynamic concerning the kinds of normativity is that two-sources accounts try to show that there is more to legal normativity than what one-source accounts say there is. Often, one-source accounts are mainly associated with saying that law is nothing but (a set of) normative propositions[10] (which may, of course, be classified in different terms).[11]

Summing up, propositions are: (i) key terms for both parties (one-source and two-sources); (ii) the two views agree on what propositions are, i.e. they are something associated with meanings and, more importantly for our purposes, (iii) they are *linguistic* devices.

Here comes our conceptual twist: analytic philosophy has a view according to which propositions are non-linguistic objects. With respect to one-source and two-sources accounts of legal normativity, such a view is found into a shared philosophical heritage that goes back to analytic philosophy (it is your choice to invoke "tradition" or "Masters", here). We now present this neglected philosophical view (§2) and then see how one-source and two-sources accounts may react to it (§3).

2. Propositions as Non-Linguistic Entities

Presenting the issue of structured propositions or the question of the unity of proposition is a daunting task. First, it is an issue that metaphysicians discuss without connections to the legal domain. Further, the issues are rather complex and abstract, at least way more abstract than "what's the nature of law?" or "how do we define a legal system?".[12]

Nonetheless, despite its abstractness and its absence in the legal debate, the issue is relevant for legal philosophy because, as we have seen in the previous section, legal philosophy makes an extensive use of the concept of proposition. Such a concept is (i) moved in the legal domain (remember: as *norm*, not as *normative propositions*) and, arguably, (ii) legal philosophy borrows the

10 See for example these excerpts: "In this perspective, the main purpose of this article is not to suggest using more normative images than normative linguistic sentences in plans and building codes; it is instead to advocate greater awareness of the peculiarities of both and of how they can complement each other" (Moroni & Lorini 2016: 320). Actually, if propositions are non-linguistic entities, we have way more peculiarities to be aware of. Compare also: "graphic rules are more widespread and important than usually recognized by, in particular, philosophers of law and legal thinkers (who generally assume, explicitly or implicitly, that rules are formulated in words)" (Moroni and Lorini 2016: 320).

11 I.e. claiming that all the law is a matter of normative propositions does not imply saying that all normative propositions are of the same kind. For example: one-source accounts can freely distinguish primary and secondary rules or meta-norms, or constitutive rules.

12 For an overview see at least King 2011, McGrath & Frank, 2018. Book-wise, see Gaskin 2008, King 2007. A great grasp at the different views is found in a relatively short paper: Soames 1987.

concept of proposition without bothering too much about the philosophical problems of propositions *per se*.[13]

The best way to introduce this issue is probably that of going back to one of the first accounts introducing this concept of non-linguistic proposition. According to (Gaskin 2008: 9), (G.E.) Moore's paper *The Nature of Judgement* (1899) is awarded such precedence. Here's Moore's (1899) account of proposition as non-linguistic entities:[14]

"A proposition is composed not of words, nor yet of thoughts, but of concepts. Concepts are possible objects of thought; but that is no definition of them. It merely states that they may come into relation with a thinker; and in order that they may do anything, they must already be something. It is indifferent to their nature whether anybody thinks them or not. They are incapable of change; and the relation into which they enter with the knowing subject implies no action or reaction. It is a unique relation which can begin or cease with a change in the subject; but the concept is neither cause nor effect of such a change. The occurrence of the relation has, no doubt, its causes and effects, but these are to be found only in the subject. It is of such entities as these that a proposition is composed. In it certain concepts stand in specific relations with one another." (Moore 1899: 179).

Such a view influenced Russell that, in his *Principia*, developed a theory for propositions. Long story short, what are now called 'Russellian propositions' are non-linguistic entities. These entities are identified and can be defined as follow: a Russellian proposition (i.e. a proposition as a non-linguisitc entity) is an "ordered *n*-tuples of objects and properties (including relations)".[15] Such technical construction boils down to this definition: "Russellian propositions are meanings of declarative sentences, and contain as literal constituents the wordly entities-centrally objects and properties (including relations)-introduced by semantically significant parts of those sentences".[16]

So objects, i.e. real-world entities, are parts of a proposition. This means that, in the proposition:

(P) "The Statue of Liberty is in Manhattan",

the statue is part of the proposition as is Manhattan and the relation "being inside". We have two objects and one relation. Though we may express (P) linguistically and I am writing about it, the Russellian proposition P is *not* a

13 Quick proof: search the legal literature on normative propositions and find some references to the unity of propositions problem or structured propositions. Report if the result is different from ø.

14 Nothing hinges on this pseudo-philology. Arguments matters not being first. Or, to use Moore's own words: "The question is surely not of which is "better to say," but which is true" Moore 1899: 176.

15 Gaskin 2008: 56.

16 Gaskin 2008: 57. Though Gaskin in the quote qualifies sentences as "declarative" elsewhere in his book (e.g. §2) he considers the impact of propositions also in the case of orders and questions.

linguistic entity.[17] If we take proposition "Take the A Train if you want to go to Manhattan" then the A Train, Manhattan, you, the relation of taking a train, a desire to go to Manhattan and the relationships between you and the desire to go to Manhattan are all parts of the proposition. (Things get quite complex pretty soon).

Given this characterization, Russellian propositions end up being not only *non-linguistic* but also *abstract* entities.[18] Other popular conceptualizations of philosophers' propositions is that they are: (a) set of (possible) worlds in which such proposition is true or (b) sets of concrete situations or facts.[19] Still, concrete situations and facts are non-linguistic, and neither are worlds (for sets: you express them linguistically or graphically, still there is no necessity for sets to be linguistic entities.

3. Non-Linguistic Propositions, Norms-as-Propositions and Legal Philosophy

Let's recap. Assume propositions are non-linguistic as analytic metaphysics says (i.e. the view presented in §2 above). What happens to a debate we find in legal philosophy about normativity in which such an options is not considered? Propositions cut through the boards of our two parties' picture of legal normativity. We have no room to say: the distinction is not important as it is not relevant for the debate. Both one-source and two-sources accounts of normativity feature propositions as *linguistic* entities. Even worst, analytic legal philosophy sometimes (see fn. 1) links its research to that of Frege and Russell and the rest of analytic philosophy.

17 A further way to point out how Russellian propositions are not linguistic would be the following. Assume facts to be non-linguistic entities (again, though we can express facts linguistically). Then, true Russellian propositions yield facts: you have objects exhibiting certain relations that correspond to how things are in the world. See further Neale 1995: par. 2. (Some) facts play a role in King's own theory of propositions, see King 2007: Chapter 2. King 2007: chs. 1-2 is a great tool to grasp more of how such problems developed. For a recent (mathematical) theory of propositions as non-linguistic abstract objects see N. J. J. Smith: 2016.

18 Gaskin 2008: 57 notes that Russellian propositions are "similar in this regard to (type) sentences". Of course, "being abstract" and "being linguistic" can be divorced, Russellian propositions being an example of that. Still, (Russellian) propositions being abstract will make them harder to be found in concrete examples of legal codes or textbooks of cases - in which mostly we shall have tokens of them.

19 Soames 1987 offers a critique of (a) and an exploration of (b). In the article (p. 47), Soames presents two conceptions of *semantic theory*, for the first "the meaning of a sentence is a function from contexts of utterance to what is said by the sentence in those contexts", for the second "the meaning of a sentence can be thought as a function from contexts to utterances to truth conditions of the sentence as used in those contexts". Soames' "semantic" is again different from some of the 'semantic' we find in legal theory, e.g. the "semantic sting".

Unfortunately, the metaphysicians' picture of §2 creates a problem to both accounts. On the one hand, one-source accounts have to include non-linguistic normativity as well (i.e.: that coming from propositions as non-linguistic entities). On the other hand, two-sources accounts are no longer distinct from one-source accounts nor original (assuming originality makes a point). In fact, their rival account already has the two sources of normativity inside them, hence there would be no more difference between the two accounts.

Both types of account, in fact, assumed a mistaken (or, at least, partial) view of propositions, conceiving them as *linguistic* entities. Such a mistake is more relevant the more you proud yourself of your "analytic heritage" (if the reader finds that "being proud of an heritage" contradicts an attitude of "free research for the truth" or other academic jargon I am not able to offer any placebo to counter such a feeling).

Given what follows from the above reconstruction, both the one-source and the two-sources account may want to resist the use of propositions as *non-linguistic* entities. Analytic jurisprudence in general, relying on their Hart-Hare-(J.L.) Austin heritage may try to deny this view because it is "metaphysics" (which is bad according to their ideology (tradition?)).

Maybe the two-sources account can reply that non-linguistic propositions are only a minor thread for them. They can keep fighting the (old) one-source account claiming we also need deontic states of affairs and deontic noema, i.e. we need the whole set of Contean five referents (including deontic states of affairs and deontic noema) and not only the first three (deontic sentences, deontic propositions and deontic utterances). That is an available option.

Assuming that, we may need to update the one-source *vs*. two-sources picture. We are now in a position to distinguish *two* different *two-sources* accounts. According to the *strictly propositionalist account*, normativity is all a matter of utterances, sentences and propositions. According to the *extended account*, normativity includes the tools used by the propositionalist plus deontic states of affairs and deontic noema.[20]

In the long run, this does not look as a promising reply for our former two-sources account: if we go deep into the philosophy of states of affairs and noema (as mental entities, meanings or noema *per se*) they are tightly connected with propositions.[21] So the two-sources account might end up losing its grip on the (old) one-source. The two sources insisted on being original and in going beyond propositions,[22] but if we take into account the new evidence from §2, there is quite a lot of work to be done on propositions in the legal domain.

Now, accepting the evidence from §2, it seems that the contraposition between linguistic and non-linguistic normativity is spurious or – to borrow from

20 As showed elsewhere, more charitable readings of supposed champions of one-source accounts end up featuring more referents than those available in a *strictly propositionalist account*, see Feis & Borghi (2017).

21 See on that McGrath and Frank 2018: par. 9.

22 See the previous quotes from Moroni and Lorini in fn. 10.

Leiter – it is a *pseudo problem* as, for Leiter, is the Demarcation Problem.[23] One way for one-source accounts to avoid embracing non-linguistic normativity through (non-linguistic) propositions would be to retreat their usage of 'proposition'. One-source account may just commit themselves to utterances and sentences. After all, "normative *propositions*" may be considered as *sentences* relying on the tool-bag of the metaphysician.[24]

Nonetheless, denying that propositions as per §2 have nothing to do with legal philosophy is difficult. Without propositions (i.e. *norms*), legal philosophy is in need of a new theory of meaning and seems to lose an important distinction (*norms* vs. *normative propositions*). It is way more than possible to develop such a propositions-free theory of meaning (i.e. we have no knock down arguments to that, and, personally I am always sympathetic to extreme reductionism, even if it fails or is hard to defend – see e.g. Feis & Tagliabue 2015. A better option would be to deny propositions exist (as a matter of ontology).[25]

The most interesting *way around* the problem is that of saying *norms* are something different from non-linguistic propositions (that we called *norms-as-propositions*). One possible reason to say that would be digging in your heels and claim norms have no truth-values (and, also, stressing that truth-values are essential for a theory of propositions as presented in §2). This strategy looks more interesting and promising.

Nonetheless, it seems first that the problem of the unity of propositions applies as well in the case of normative propositions. What changes a list of words (which includes normative elements) from the proposition built from these same elements in the list? More generally: it seems law has pieces and parts. This is true from a practical perspective (commas, articles, etc.) and, at least metaphorically, from a theoretical one.[26]

Further, legal debates on truth-values of norms and some two-sources accounts offered us ways to circumvent this problem. On the one hand, we have theories of (deontic) logic without truth-values (i.e. [Alchourrón & Martino

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23 Another great quote from Leiter's 2011 paper concerns the scarce ability to innovate in philosophy of law: "jurisprudents are rarely, if ever, innovators in philosophy. They, instead, are the jurisprudential Owls of Minerva, bringing considered philosophical opinions in its maturity (sometimes, alas, on its death bed) to bear on theoretical questions that arise distinctively in the legal realm" Leiter 2011: 665–666. In the case of non-linguistic propositions, it seems that the failure consists in not discussing the option presented here in §2. Whether this is a conscious omission or a lack of knowledge of some of the history one borrows from in constructing a traditions' cultural heritage and pedigree is a matter of sociology (and, maybe, a *curiosum* in philology of legal philosophy and the literary genre of intellectual biographies).

24 This is a costly move, especially in a "ordinary language" philosophical framework.

25 Quine did that and, even though it does not seem he succeeded, at least *practically*, as most legal philosophers seems to show when they talk about propositions. Nothing prevents us from trying harder.

26 See, e.g. the title of Atienza & Ruiz Manero 2007. For more on the "problem of the list" and the analysis of propositions (something that goes back to Russell's *Principia*) see chapters 1-2 of King 2007.

1990]). This shows we can construct logical structures with normative material even *without* truth-values.[27] A similar point is present in Moroni and Lorini. While arguing in favour of two-sources accounts, Moroni and Lorini go back to a paper by Westerhoff on the logical relationships between *pictures*. (Westerhoff 2005) discusses Venn-diagrams to claim we have logical relations between pictures, i.e. non-linguistic entities (actually Westerhoff calls them "non-sentential").[28]

Another way to justify talking about *norms-as-propositions* and all their intricacies is to show that legal philosophy has already tried to find other parameters or "values" to figure out how to act in a word of Is (*Sein*) on the base of Oughts (*Sollen*). Actions and performances are often what is used to anchor the "Oughts" to pieces of the "Is".[29]

Such a view may well have its list of problems, e.g. the more we go away from norms in terms of obligation of prohibition, the harder it is to capture all the kinds of norms with that view. *Alas*, that does not help the two accounts we are examining here. This "action-based" approach shows how we can connect some descriptive features (most often used to characterize propositions) to norms. Our point was to find ways for the two kinds of accounts of legal normativity reconstructed here to reject non-linguistic propositions *entirely*, not only on *some* difficult cases. So, it seems we have ways to show that what is of conceptual import in the debate on non-linguistic propositions translates in the legal domain as *norms-as-propositions*.

Summing up, the paper rediscovers a doctrine of analytic philosophy that may have an impact on legal philosophy's discussion of normativity. The paper also points out to further work needed to reframe some questions on the opposition between linguistic and non-linguistic normativity once such a doctrine of

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27 By the way, also Kelsen's idea of hierarchy seems to be a logical concept we can model through the idea of (strict) partial orders. In that way we have to specify the role of symmetry, transitivity and reflexivity, all elements that are important to map out chains of validity or which norm is able to modify another norm.

28 Still Westerhoff *has* a logic, that of diagrams, even assuming pictures have no truth-values. Dropping truth-values does not drop a logic. Further, in order to develop structured views of propositions it seems truth-conditions can be more important than truth-values and (see fn. 29 below) finding truth-conditions in the normative domain looks easier than getting truth-values). On a different note, Gaskin 2008: §2 offers reasons to extend his analysis of propositions from mainly descriptive propositions to questions (often neglected by friends of no-truth-values objection) and orders.

29 Here's Marmor's 2005: 114 presentation of the idea: "To understand a rule is to be able to specify which actions are in accord with it (and which would go against it), just as to understand a proposition is to be able to specify its truth conditions. In other words, it does not make sense to say that one has understood a rule if one cannot identify the actions which are in accord with it". Another "chronological" consideration: Marmor is by no means the first to have had this idea which goes back to many different authors (e.g. Scarpelli, Hart, von Wright, Munzer, Hofstadter and McKinsey, Hamner Hill) under different guises: obedience-statements, satisfiability, doability, etc.

proposition is considered and not excluded *a priori*.[30] Maybe legal philosophy is really just a matter of sentences without propositions and we need to replace propositions with sentences. I have nothing against exploring this possibility, but I would like to be sure that a relevant part of legal philosophers (i.e. those with a one-source account) are aware of that and willing to go in that direction.[31]

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30 Such a further work cannot be pursued here. Hints were given: there are two audiences and disciplines to bridge. What can we do about it? What happens taking propositions as set of possible worlds *and including laws into these worlds?* Do we need an extra parameter to track validity? Is deontic possible world fine? Is there a special unity problem for legal propositions? (Tentative answer: no, unless some special value is given to deontic modals and/or legal validity).

31 There is also another way to read this paper considering it as a "history of philosophy" or "sociology of legal analytic philosophy" paper (assuming the latter exists). As such, it constitutes a partial sketch of some attitudes of constructing 'analytic' as equivalent to 'ordinary language philosophy'. This, coupled with a strange attitude according to which 'metaphysics' and 'ontology' are bad philosophical words (ignoring Russell's, Frege's, Quine's, Lewis', Kripke's and you-name-it contributions to analytic philosophy in those fields), made it possible to ignore a main tenet of analytic philosophy about propositions that contrast with the ordinary assumed definitions of the analytic jurisprudence. A further further work would be to compare and contrast what theories of meanings are in philosophy (e.g. Davidson's programme) with theories of meanings in analytic jurisprudence (i.e. issues in legal interpretation, often referring to Hart's park example).

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Guljelmo Fejs

Propozicije kao (nelingvistički) objekti i filozofija prava: norme-kao-propozicije

Apstrakt

U radu se razlikuju dve pozicije u pogledu pravne normativnosti. Pozicije jednoizvornosti tvrde da postoji samo jedan izvor pravne normativnosti, koji je naposletku lingvistički. Pozicije dvoizvornosti tvrde da je pravna normativnost i jezička i nejezička. Pozicije dvoizvornosti tvrde da treba da prevaziđemo jezik i propozicije uzete kao lingvistički entiteti, glavno konceptualno sredstvo pozicije jednoizvornosti. U obe pozicije konstruišu se propozicije kao jezičke, ali je zabeležena analitička tradicija počevši od Dž. E. Mura koja propozicije konstruiše kao nejezičke entitete. Danas se u metafizici jako raspravlja o problemu jedinstva propozicija i strukturiranih propozicija. Kako se takva teorija uklapa u sliku jednoizvornosti *protiv* dvoizvornosti pravne normativnosti? Zašto analitička filozofija prava nije uzela u obzir takvu opciju u vezi sa propozicijama (nesporno, nazivanje opisniih *rečenica* o normama „normativnim *propozicijama*“ nije pomoglo)? Članak: (I) rekonstruiše argumentativnu dinamiku između pozicija jednoizvornosti dvoizvornosti; (II) predstavlja manje razmatrani filozofski pogled na propozicije kao nejezičke entitete i (III) razmatra kako uključiti ili odbaciti takav filozofski pogled u raspravi o pravnoj normativnosti u pogledu jednoizvornosti i dvoizvornosti.

Ključne reči: nejezičke propozicije, pravna normativnost, nejezička normativnost, normativne propozicije

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Iva D. Golijan

ETHICAL AND LEGAL ASPECTS OF THE RIGHT TO DIE WITH DIGNITY

ABSTRACT
The issue of euthanasia presents a contact area of ethics, law, and politics. This text provides a contribution to the expert public debate on the introduction of euthanasia into Serbian legislation. It does so first by clarifies the term – *euthanasia* (as a right to die with dignity). Further, it considers the *obligations* of other persons that arise from this right and the conditions under which they present a restriction on *personality rights*. By citing examples from the fields of ethics and law, the text states that the distinction between active and passive euthanasia is in fact a product of inadequate deliberation during the implementation of this differentiation.

KEYWORDS
euthanasia, mercy killing, active euthanasia, passive euthanasia, suicide, responsibility, ethics, law

1. Introduction

The immediate cause for the creation of this text is the Preliminary Draft of the Civil Code of the Republic of Serbia that contains a provision allowing the *right to die with dignity*. It refers to the Article 86 from the first book of the Preliminary Draft which regulates the *personality rights*:

> The right to euthanasia, as a right of an individual to consensual, voluntary, and dignified termination of life, can be exceptionally realized if the stipulated humane, psycho-social, and medical conditions are fulfilled.
>
> The conditions and the procedure for the realization of the right to euthanasia are stipulated by a special law.
>
> The abuse of the right to euthanasia, for obtaining unfounded material or other benefits, represents the basis for criminal liability.
>
> *Note:* Due to the complexity of realization of the right to euthanasia that, apart from legal, has medical, psychological, and social aspects, the Commission[1] shall subsequently definitively declare their stand on the basis of arguments of experts

1 The Commission for drafting the Civil Code was formed on the basis of the Decision of the Government of the Republic of Serbia (the “Official Gazette of the RS”, No. 104 from 17th November and 110 from December 2006 - correction) in order to codify civil law and draft the text of the Civil Code.

Iva D. Golijan: PhD Student, Faculty of Law, University of Belgrade; janjniiva@gmail.com.

> from different fields and professional activities, taking into consideration the proposal of the text of the special law that is prepared after the public debate on the Preliminary Draft. Upon the potential adoption of the proposal, the appropriate amendment of the Criminal Code (*Preliminary Draft of the Civil Code of the Republic of Serbia 2015, Article 86*) would be conducted.

As stated in the *Note*, if this provision is adopted, in the proposed or a different form, it will initiate passing of a special law, which shall regulate the mentioned right in detail, which implies the amendment of the Criminal Code of the Republic of Serbia (the "*Official Gazette of the Republic of Serbia*", No. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, and 35/2019). This definitely refers to the Article 117 of the Criminal Code – "Mercy Killing", in which this crime is punishable by imprisonment from six months to five years (compare Banović, Turanjanin, Ćorović 2018: 237–287).

On the basis of the formulation from the Criminal Code, we can draw two significant conclusions:

1. The right to euthanasia, i.e. the "right to die with dignity" is not considered in detail in the domestic law, that is, the legislator did not take into consideration all aspects of the act for which legal sanctions are envisaged in the Article 117: *mercy killing* is not the same as, for instance, passive euthanasia, and that is why the intention from the Note of the Preliminary Draft of the Civil Code of Serbia is correct, stating the necessity of an opinion of experts in this field;

2. The possibility of imposition of a relatively lenient sentence for *mercy killing*, i.e. a large range between the minimum and maximum stipulated punishment, indicates that the legislator took into consideration that euthanasia is *de facto* implemented in our country, outside the legal framework, and that there are cases in which its implementation is tolerated, because it is the consequence of the will of the patient himself/herself. Particularly for that reason, there is a need for regulating this area that would bring the right to die with dignity into the field of *de iure*.[2]

In this text, we will try to contribute to the expert discussion on the right to die with dignity, primarily by, on the basis of relevant expert literature, indicating at the difference between different forms of *euthanasia*, as well as at the experience of other countries in legal regulation of this area.

On the other hand, we will indicate at the sociological and ethical discussions on euthanasia, which have a significant impact on legal views on the right to die with dignity, being convinced that political, ethical, and legal levels intertwine in this area, more significantly and intensely than when it comes to abortion or the death penalty.

Our assumption is that taking a stand whether the right to die with dignity should be legally allowed primarily implies that the following should be clearly defined: (1) what this right exactly refers to (which form of euthanasia), (2) what the obligations of other persons arising from this right are, and (3) under which

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2 More on the difference between euthanasia *de facto* and *de iure* in Keown 2002: 73.

conditions the rights of other persons deny the right (of a patient) to die with dignity, and under which conditions the obligations of other persons, arising from the mentioned right, represent the limitation of their *personality rights*.

2. Types of Euthanasia

The term *euthanasia* originates from Greek and it literally signifies "good death", a peaceful and easy process of dying, devoid of pain and suffering. Gregory Pence says that euthanasia "usually means the killing of one person by another for merciful reasons" (Pence 2015: 31). That means that during euthanasia, the agent of death is not the ill person that is exposed to severe suffering, but the other person. Even in the case when the person that will undergo euthanasia explicitly demanded it to be done, while they were conscious and reasonable, the bare act of taking their life implies a decision and action of another person. That frequently requires an assessment on whether the suffering is severe and unbearable, and whether there is any hope that the condition of the person whose life will be taken can be rehabilitated. Suicide, as opposed to that, implies that the executor is the person that desires to end their own life – even in the cases when that execution requires the assistance of other persons. Then, rational assessment is on the side of the person asking for assistance in order to end their life.

However, Pence's differentiation is hardly applicable to the so-called "borderline cases", such as the one given by Helga Kuhse describing the euthanasia of Mary F. who was injected with a lethal injection at her own request (Kuhse 1991: 295) or the cases presented by Singer when describing Kevorkian's "suicide machine". Taking into consideration these cases, we propose the following conceptual distinction: the term *euthanasia* signifies taking a life of a person that is known to be certain to die in near future, in order to reduce their suffering (with or without their consent), while the term *suicide* refers to the cases in which persons are not directly vitally endangered, but who take their own life single-handedly or with assistance of other persons.

The examples in which terminally ill persons resort to suicide, not to save themselves from severe physical suffering, but to spare their loved ones of worries and financial expenses for treatment and care, requires a supplementation to the previous distinction: in the case of euthanasia (1) the rational assessment of the condition of the patient is made by other persons, regardless of whether the severely ill person directly expressed a wish to end their physical suffering by taking their life, whereas in the case of suicide, the rational assessment and action is always performed by the person wishing to end their life. From that it follows that (2) euthanasia, apart from the ethical, also presents an issue of legal *right* (of the patient, family, or physicians to terminate their life) and that suicide is *par excellence* an ethical issue.

Therefore, in ethics, but also in legal norms of some countries, assisted suicide is not treated as euthanasia, unlike *physician-assisted suicide*, which will be further discussed later.

If euthanasia is neither a *homicide* by the decision of others (family or social community), nor a suicide (from non-medical reasons, or reasons that are not medically objective), that means that euthanasia implies a relation between the will of the person that wishes to die in the situation that can be medically justified, and other persons, which need to contribute to the realization of this decision by their actions or inactions.

When closely determining the term of euthanasia in a modern context, it is necessary to primarily make a distinction between *active and passive euthanasia.*

Active euthanasia implies the administration of medical therapy with the intention of terminating someone's life. By its form, active euthanasia can be direct and indirect. In the first case that implies the shortening of the life of a terminally ill patient by injecting opiate that will drive away the pain and by administering a lethal injection, usually potassium-chloride, which stops the heartbeat (when the patient is already deeply sedated).

In the legislations of many countries, active euthanasia is equal to the criminal acts of murder or negligent homicide. In our legislation, the *Criminal Code of the Republic of Serbia*, Article 118 "Negligent Homicide" envisages the same sanctions for causing the death of another person by negligence as for mercy killing (the Criminal Code of the Republic of Serbia 2019, Article 118). That means that the action of this criminal act is the same as with homicide, with the difference that its subjective feature is the motive of mercy, which causes the different determination of the sanction in comparison to the other acts of life deprivation (Banović, Turanjanin, Ćorović 2018: 237–287).

Indirect active euthanasia implies the termination of life of a patient occurring by the "incidental effect" of a medical treatment, the aim of which is to relieve the pain. Terminal sedation is a form of indirect euthanasia.

At the first glance, indirect active euthanasia can be qualified as negligent homicide. However, the German Medical Association took a clear stand that the quality of life achieved by relieving the pain needs to have an advantage over the quality of life in general (Klajn-Tatić 2007). Although such a determination certainly has in mind the definition of health by the United Nations, the mentioned attitude is taken into consideration during court proceedings in which physicians are tried for bringing their patients into terminal sedation. However, these proceedings are rare, and in many countries, not only in Germany, this type of euthanasia is *de facto* applied, even though it is not approved by positive legal regulations.

Passive euthanasia, on the other hand, implies that the diseased in the terminal phase of the disease is cancelled the treatment that keeps them alive, which after a shorter or longer period leads to death. That implies that patients are not administered food, water, oxygen, artificial respiration, medication, transfusion, or dialysis - without which the patient is not able to survive (Radišić 2008: 145).

This type of euthanasia is allowed in many countries. In our legislation, this type of euthanasia could be sanctioned by the Article 117 of the *Criminal Code of Serbia*, and it could be treated even more severely if there is a suspicion of the existence of the explicit will of the diseased to be treated in this manner.

The degree to which domestic legislation is vague and imprecise when it comes to this type of euthanasia is shown by the obvious discrepancy between the *Law on Patients' Rights* (the "Official Gazette of the Republic of Serbia" No. 45/2013 and 25/2019 - other law) and the *Criminal Code.* Namely, the Article 17 of the *Law on Patients' Rights* takes over the previous provision of the Article 33 of the *Law on Healthcare of the Republic of Serbia* from 2005. The Article 17 of this Law stipulates:

> A patient, capable of reasoning, has the right to refuse the proposed medical measure, even in the case when that measure saves or maintains his/her life.
>
> The competent healthcare professional is obliged to point out to the patient at the consequences of their decision to refuse the proposed medical treatment and to ask for a written statement from the patient that needs to be kept in the medical documentation. If the patient refuses to give the written statement, an official note needs to be made on that.
>
> In the medical documentation, the competent healthcare professional writes the information on the consent of the patient, or their legal representative, to the proposed medical measure, or the refusal of that measure (the Law on Patients' Rights 2019, Article 17).

According to this definition, passive euthanasia is practically allowed, although the stated provision of the *Law on Patients' Rights* actually does not envisage that, by denying treatment, based on the expressed will of the patient, a physician in hospital conditions contributes to the faster lethal outcome (and, thereby, to the shortening of the duration of suffering).

On the other hand, the *Code of Medical Ethics of the Medical Chamber of Serbia* (the "Official Gazette of the Republic of Serbia", No. 104/2016) explicitly prohibits just active euthanasia, permitting in curative procedures, by inaction, according to the will of a patient, acceleration of the lethal outcome, which in a certain way contradicts the provisions of the *Criminal Code of Serbia*. The mentioned definition of euthanasia in the *Code of Medical Ethics of the Medical Chamber of Serbia* will be discussed later in this paper.

Physician-assisted suicide, unlike *assisting in suicide*, can certainly be treated as euthanasia. This type of euthanasia implies the explicit request of the patient to be subjected to lethal treatment, and a physician assists the patient in that, by, for instance, indicating which medical devices will cause a rapid and painless death, or by supplying the mentioned devices. In this case, the patients themselves are the agents of termination of life, but the activities of another person are necessary in order to achieve the deprivation of life, which is why this is a specific form of euthanasia.

Physician-assisted suicide is allowed in Belgium, Switzerland, the Netherlands, Luxembourg, Albania, Colombia, as well as in the American states – Oregon, Montana, and Washington. In European Union, this issue has not been resolved in a unique manner, and the practice is that every country is allowed a margin of appreciation when it comes to euthanasia (Simović, Simeunović-Patić 2017: 317–336).

According to the criminal legislation in Serbia, this type of euthanasia is treated as *incitement to suicide and aiding in suicide:*

1) Whoever incites another to suicide or aids in committing suicide and this is committed or attempted, shall be punished with imprisonment from six months to five years.
2) Whoever assists another in committing suicide under provisions of the Article 117 hereof, and this is committed or attempted, shall be punished with imprisonment from three months to three years.
3) Whoever commits the act specified in the paragraph 1 of this Article against a juvenile or a person in a state of substantially diminished mental capacity, shall be punished with imprisonment from two to ten years.
4) If the act specified in the paragraph 1 of this Article is committed against a child or a mentally incompetent person, the offender shall be punished in accordance with Article 114 hereof.
5) Whoever cruelly or inhumanely treats another who is in a position of subordination or dependency and due to such treatment the person commits or attempts suicide that may be attributed to negligence of the perpetrator, shall be punished with imprisonment from six months to five years (the Criminal Code of the RS, Article 119).

Even though assistance in suicide, which includes the physician-assisted suicide, is connected in the Criminal Code of the RS with "manslaughter" from the Article 115 ("manslaughter in a heat of passion"), it is punishable with a significantly more lenient sentence, although, unlike with "negligent homicide" (Article 118), it involves a *decision* of other person to provide assistance in suicide (which presupposes the assistance of a physician in the described conditions).

By closely defining the term of euthanasia, we have stated that it implies deprivation of life based on the decision of the patient. Scientific discussions, but also legal documents, talk about the distinction between voluntary and involuntary euthanasia.

Strictly observed, both cases involve euthanasia based on the will of the patient, just in the case of involuntary euthanasia, the patient, before losing consciousness or other capacities to express their decision, clearly expressed their desire to be submitted to euthanasia at certain circumstances of the terminal stage of the disease, but the immediate decision, now, based on the will of the patient, needs to be made by someone else, usually a person the patient authorised for that.

However, in legal and medical practice, there are cases in which a patient is terminally ill, with no hope of being cured, and their condition significantly burdens the life of people taking care of them, in the sense of creating severe financial deprivation. And, nevertheless, according to our opinion, the deprivation of life of a patient, without their clearly expressed will stated in the time when that was possible, does not constitute euthanasia, but a form that contains all elements of the criminal act of homicide.

This case, also, needs to be differentiated from the condition occurring in the case of the brain death, when the decision of the family on turning off the devices that keep the patient alive is legitimate and allowed, and within the framework of domestic legislation.

3. Ethical Dilemmas and Their Legal Context

3. 1. Moral Justification of the Patient's Decision

The patient's decision to terminate their life in an active or passive form, due to the terminal condition that is accompanied by unbearable suffering differs from suicide precisely in the matter of the attitude towards the physician, i.e. the person that needs to perform a type of euthanasia.

However, if we just focus on the patient's decision from the position of moral absolutism, we encounter certain dilemmas. Thus, in the Kant's text *Metaphysic of Morals*, in the part discussing suicide (§ 6), taking one's life is considered unacceptable, because in that manner one annihilates "the subject of morality in one's own person" (Kant 1996: 177). In other words, for Kant, the inadmissibility of suicide arises from the fact that the decision on the termination of life opposes to the moral autonomy that separates the humans from the causality chain of nature, giving *dignity* to their existence, i.e. "a life independent of animality and even of the whole sensible world" (Kant 2015: 129), and that means "to root out the existence of morality itself from the world", although it is "an end in itself", as stated in *The Metaphysics of Morals*.

The same as with mutilation, in order to realize certain dispositions that would generate good profit (castration that increases vocal abilities) or in order to sell organs of one's own body, suicide according to Kant supposes a hypothetical imperative, i.e. placement in a state of subordination to an external purpose, which means abandoning the self-purpose *produced* by the practical mind.

Nevertheless, apart from the causality issues accompanying the stated paragraph of *Metaphysics of Morals*, Kant's relation to suicide, if applied to moral justification of the patient's request for undergoing euthanasia, faces a problem indicated by a special medical condition: *dementia.* Demented persons do not dispose with that "value of *intelligence*" of the self-purposeful mind, and they are not capable to rise above the life "independent of animality" with their moral autonomy (Budić 1998). This issue is exacerbated by the fact that a dementia patient is not able to consciously perceive the condition in which they are, and thereby not able to make the stated decision, which raises the issue of permissibility of involuntary euthanasia in that case.

On the other hand, the illness itself, as an expression of natural causality, significantly impacts the mind autonomy that Kant in the *Critique of Practical Reason* calls "intelligence". In the work *The Magic Mountain*, Thomas Mann gives a convincing description of a sick condition, in a monologue of Settembrini: "A human being who is first of all an invalid is *all* body;

therein lies his inhumanity and his debasement. In most cases he is little better than a carcass...” (Mann 1987: 117).

Therefore, what if the nature with its causality has already reduced an ill person to the state of their “animal existence”, if they, suffering unbearable pains, actually do not dispose with moral autonomy, since their condition does not allow any self-regulation, but supposes constant submission to physiological processes, in a vicious circle which one cannot leave?

Understanding life as a value by itself, precisely for the reason it provides *experience*, because it represents the *possibility* of overcoming the factual situation was also developed by Nagel in his deprivation theory:

> First, the value of life and its contents does not attach to mere organic survival: almost everyone would be indifferent (other things equal) between immediate death and immediate coma followed by death twenty years later without reawakening. And second, like most goods, this can be multiplied by time: more is better than less. (Nagel 1970: 74)

Nagel’s attitude is opposed to the mentioned attitude of the German Medical Association, according to which a life without pain is more significant than the mere living. But, can it be claimed, on the basis of that, that the request of a patient to be submitted to euthanasia is morally unacceptable? Can one defend, on the basis of this “objectively” established value of life, the attitude that in the case of a terminal disease, the only justified imperative is the one represented by Dr Rank, one of episodic characters in Ibsen’s play *A Doll’s House*, who considers that every wretched day is still incomparably better than the cessation of every feeling?

The question of moral responsibility of a patient can also be asked in the context of the Christian understanding of “sanctity of life”. If a patient refuses the so-called “disproportionate actions”, such as a painful medical treatment, their decision cannot be characterised as a suicide. In a figurative sense, the refusal to continue the life with the treatment that presupposes pronounced discomfort can be understood as the mentioned “disproportionate action”, according to which, at least when it comes to voluntary passive euthanasia, the patient would be absolved of moral responsibility for such a decision (Kuhse 1991: 299).

According to that, passive euthanasia would be morally allowed, i.e. a patient is not morally responsible if they do not want to undergo a treatment that assumes a significant risk or is uncertain when it comes to its outcomes. Thus, in that sense, the patient actually does not wish to die, but between the offered options chooses “inaction” as the one that would, in their opinion, produce the most acceptable conditions for the continuation of life (even if that involves daily pain and other difficulties). However, it does not mean that it would be morally permissible to refuse the medical treatments that would certainly prolong life and that belong to “proportionate” means.

The issue of euthanasia, however, differs from the issue of suicide by the fact that euthanasia supposes moral relation not only towards self (at least

towards self as towards the other), but also towards the others. In causality issues on the problem of suicide, Kant touches on the area of euthanasia, giving an example of a man bitten by a rabid dog who, aware that it is an incurable disease, commits suicide so as not to bring misfortune to other people in his rabid state (Kant 1993: 223). In a somewhat different context, the question can be raised if the demand of a patient to undergo euthanasia is justified in the case when the patient considers that their condition will cause harm to other people, who they want to spare, i.e. whether this demand can be universalised in this or in a similar context.

In the context of this paper, however, legal and political context of the issue of euthanasia also emerges, arising from ethical dilemmas. Euthanasia implies a role of a physician, regardless of whether they will administer a lethal injection or allow a patient to die. In the deontological context, the *request* from the other person to realise this decision presupposes the use of that person as a *means*, and not as a *purpose*, which implies the denial of their moral autonomy.

The moral right of a physician to decide whether they will act according to the will of their patient, regardless of whether they deal with active or passive euthanasia, is usually overlooked in the legal observation of this issue. Ethically observed, a physician cannot be denied the right to a moral decision, and the action of the patient requiring euthanasia would be morally unjustified in that case. In other words, as shown by libertarian debates, the consent (wish) of the patient, in the narrow sense, is not a sufficient condition for the violation of the *inalienable* right to life, and, in the broad sense, their decision is completely irrelevant, because the justification of euthanasia must be endorsed by an appropriate medical association (McConnell 2000a: 43). Starting from the Locke's distinction between the inalienability of the right to life and the possibility of losing that right, Moser (2017: 449), following in the footsteps of McConnell, considers that a patient cannot "alienate" the said right, although it can be taken away from them under certain circumstances.

Thus, in the legal and ethical context, certain *norms* need to be established, on the basis of which it would be decided on the right or liabilities of the persons expected to actively or passively influence the termination of life of a patient in the terminal stage of an illness.

3.2. Justification of the Patient's Decision

Euthanasia implies that another person causes the death of a patient, for the sake of the patient, i.e. according to their request, in case of a terminal stage of an illness. Passive euthanasia, in that sense, assumes that the patient's life is not ended by, for instance, administering a lethal injection, but that the lethal outcome is accelerated by ceasing or giving up on the administration of a medical treatment.

The fact that medical practice and legal regulations in the world, except in the Netherlands, prohibit active euthanasia and allow the passive one, is mostly based on the conclusion that the first case more directly causes the fatal

outcome. On the other hand, when it comes to giving up on a treatment that would prolong life, in numerous scientific papers, the nature of the illness itself is taken as the agent leading to the lethal outcome. Therefore, withholding, i.e. inaction, is not the direct cause of death, but the illness.

On the basis of that, the prevalent opinion is that active euthanasia is inhumane, because it implies taking someone's life, which contradicts the proclaimed tasks of the medical profession.

However, not only when it comes to the field of ethics, but in the legal context, as well, the distinction between the passive and active euthanasia is entirely problematic. That can be clearly perceived if we take a look at the Article 67 of *The Ethical Codex of the Medical Chamber of Serbia:*

> Deliberate shortening of a life is contrary to medical ethics.
>
> It is forbidden to undertake actions that actively shorten the life of a dying patient.
>
> In the event when the postponing of the inevitable death of a dying patient would present just inhumane prolongation of suffering, a physician can, in accordance with the freely expressed will of the patient capable of reasoning on refusing the further measures for prolonging life, limit the further treatment to efficient alleviation of the patient's suffering (The Codex of Medical Ethics of the Medical Chamber of Serbia 2016, Article 67).

If we keep in mind that the crime of deprivation of life out of mercy implies a certain action, the question arises whether the "refusing the further measures for prolonging life", in the conditions envisaged by the cited article of the *Ethical Codex,* is a certain *action*, and whether the *inaction* can be classified as a type of an *action*.

Namely, the action of a criminal act is in the human behaviour, and the behaviour does not start in the voluntary act (Mrvić-Petrović 2008: 82), but supposes a *decision*, based on the rational connection of an activity or inactivity (action or inaction) with the consequences it causes. Moreover, if there is awareness that the *inaction* would cause a lethal outcome, then it can certainly be classified as active euthanasia.

Furthermore, giving up on the treatment can cause more suffering than active euthanasia, because the patient, deprived of the therapy, is often in a more painful terminal stage, which, although it shortens life, makes their final moments more difficult and unbearable than the condition that preceded it:

> Fixing the cause of death may be very important from a legal point of view, for it may determine whether criminal charges are brought against the doctor. But I do not think that this notion can be used to show a moral difference between active and passive euthanasia. The reason why it is considered bad to be the cause of someone's death is that death is regarded as a great evil – and so it is. However, if it has been decided that euthanasia – even passive euthanasia – is desirable in a given case, it has also been decided that in this instance death is no greater an evil than the patient's continued existence. And if this is true, the

> usual reason for not wanting to be the cause of someone's death simply does not apply (Rachels 1975: 79).

The agent of "withholding" a medical treatment that would prolong life, or of giving up on a therapy that would have the same effect, according to the wish of the patient, is therefore *the other person*, usually a physician or other medical personnel. Thus, the physician's decision to undertake a measure, with the effect of euthanasia (whereby the passive euthanasia is a product of an action, i.e. inaction), is a matter of moral choice – independent of legal assumptions that would justify or sanction these measures. Therefore, in that sense, there is no such a drastic difference between passive and active euthanasia, as it seems at the first glance:

> If a doctor lets a patient die, for humane reasons, he is in the same moral position as if he had given the patient a lethal injection for humane reasons. If his decision was wrong – if, for example, the patient's illness was in fact curable – the decision would be equally regrettable no matter which method was used to carry it out. And if the doctor's decision was the right one, the method used is not in itself important (Rachels 1994: 90).

That withholding the action in medical practice can be understood as action that directly contributes to death is shown by the cases in which the refusal of physicians to perform a medical treatment caused the lethal outcome of the illness. Even if we adopt Rachels's objections, what distinguishes passive euthanasia from the mentioned cases are two significant aspects: the patient's request on one hand, and the terminal condition that gives no hope of the possibility of life prolongation and pain relief on the other hand.

The decision of the patient, in this situation, is initial, i.e. only on the basis of that decision should it come to passive euthanasia, by which it differs from a homicide (which would, for instance, be the refusal to administer adrenalin or corticosteroids to a patient in a state of anaphylactic shock) or from a suicide by the fact that the patient is in the terminal stage of illness that is considered incurable, and there is no hope of enabling the alleviation of suffering in any other way.

The fact that this is also not assisted suicide, in which the agent would be the patient (who would just be allowed to reach the necessary means for a painless termination of life), but the other person, imposes numerous ethical dilemmas.

First of all, there is a question of the patient's adequate assessment of their condition. The patient cannot, except in rare cases, have the record on the severity of their illness. They cannot read and interpret the medical examination findings and do not possess the experience when it comes to the course of the disease, the probability, and expectations regarding its further stages. All this information is provided to the patient by a physician.

If the physician can assume that the communication of the *truth* about the patient's condition and the prospects for the further course of the disease could influence their decision on wishing to continue the medical treatment

that would maintain their life for some time, then the physician actually influences their decision by familiarizing the patient with their condition.

All this speaks in favour of the fact that the communication of the diagnosis can usually play an important role in forming the patient's decision to request the cessation of further treatment, which keeps them alive. In that sense, the patient's decision is not autonomous, but based on certain dispositions that the patient adopts from the physician. If we allow the possibility that a medical error, in case of a misdiagnosis that omits to record a serious illness, would cause the worsening of the illness, because it will lead the patient to ignore the symptoms for a long time, then it is equally likely that communicating an imminent fatal outcome would also affect the patient's reception of their own condition and even their experience of physical ailments.

The previous insight opens three ethically significant questions: (1) in what sense is the opinion of the patient *competent* (since the decision is, at least partially, made under the influence of the physician); what are, actually (2) real intentions of the patient, independently of the medical context that they get from the physician, and (3) is the opinion of the patient even *relevant* during the decision-making, in the sense that it automatically obliges the other person to abide by that decision?

In his criticism of "hard paternalism", Feinberg points at the possibility that a patient renounces their right to life (alienates the right to life) because they are not adequately informed, because they cannot understand the nature of their condition, or because they are in a manner forced to make that decision. Criticising Adam's paternalism, Feinberg clearly indicates at this danger (Feinberg 1977: 240).

Rejecting the paternalistic context, but adopting the aforementioned part of Adams' objection, Feinberg advocates "soft paternalism", the conviction that the *consent* of the patient can be considered valid under certain conditions. That leads to semantic clarification that is based on the difference between "giving consent" and "requesting", but in either case the influence of the physician or family members can play a significant role in the patient's decision.

Although, for Feinberg, certain conditions need to be met for the patient's decision to be considered valid when it comes to active euthanasia, we can apply them here to passive euthanasia, as well, which according to the previous arguments presents a certain type of "activity" with the aim of accelerating the lethal outcome.

The so-called Brock's safeguards that need to be fulfilled in order to claim with certainty that the patient's decision is devoid of abuse, implying that (1) the patient is competent, (2) informed on the intervention, and that (3) their consent is given freely and completely voluntary, present a relatively complex mechanism. Setting aside the legal aspect of this issue, we will focus on the ethical moment of Brock's complex principle on the basis of which the competency of the patient to make the decision on euthanasia can be verified (Brock 1992: 20).

Meeting these requirements not only legally protects the patient, ensuring that the patient makes the decision voluntarily, but also protects the physician, who is then the implementer of the freely made decision. In other words, if this ethical condition is not fulfilled, the action of the physician, whether it is euthanasia or the prolongation of life, would be paternalistic, i.e. it would deny the freedom to the patient of their own moral decision.

However, even if all Brock's safeguards are fulfilled, the question remains what if the terminal illness impacts not the patient's process of reasoning, but their value of judgement. Furthermore, it remains debatable, what the patients actually desires: cessation of pain or other suffering, or termination of life. If the cessation of pain is considered to be the primary aim, then they actually desire to experience painlessness and perceive death as the absence of the feeling of pain. But it is uncertain whether the same patient, at the point when the pain is temporarily stopped, would make the same decision. The time that needs to be allowed to the patient to consider their decision does not need to coincide with the time of stopping the pain (MacIntyre 2004).

Therefore, if this difference is adopted, stating that the patient is actually never competent enough, then moral burden falls on the physician, who should answer the question of whether imminent biological death is inevitable, and whether the suffering to which the patient is exposed can be, in the short time before the lethal outcome, stopped in any other way. In that sense, the decision of the patient, whatever it may be, remains irrelevant. Just as the consent of the patient cannot be sought when they are in shock or semi-conscious state, so in this case it cannot be sufficient. Commenting on the paternalism of Dr Campbell, McConnell indicates at the significance of the physician's decision, considering that the decision of the patient is necessary, but never sufficient:

> The second problematic aspect of Dr Campbell's argument concerns the specific recommendation that he believes follows from the fact that a request for euthanasia is not known to be voluntary. He maintains that in such cases the request should not be followed. Apparently it is permissible to act on the request only if it is known to be voluntary. But this is a very demanding standard, and one that is not at all reasonable in most areas of medicine. If a patient in great pain presents in the emergency room of a hospital and consents to recommended surgery, we do not hesitate to perform the procedure because the pain renders the consent not voluntary. It is question-begging to retort that this case is different from euthanasia because the surgery is obviously rational and in the patient's best interests. For as Dr Campbell rightly concedes, if a patient's pain is irremediable and can be ended only by hastening death, then it may well be rational for that patient to choose to end his or her life (McConnell 2000b: 218–219).

If the request or consent of the patient does not present a sufficient condition for euthanasia, then that means, in ethical sense, that a physician, who is guided by other criteria, also has a certain moral responsibility. That is why the intention of the physician is specially considered as one of the questions in the ethical consideration of the problem of euthanasia.

4. Action and Prediction in Palliative Medicine

Article 68 *The Code of Medical Ethics of the Medical Chamber of Serbia*, stating that the treatment of a dying patient is a medical obligation, in the second paragraph, emphasises that an obligation of a physician is to alleviate physical and mental suffering, that a duty of a physician is to "provide the conditions for dying worthy of a human" (the Code of Medical Ethics of the Medical Chamber of Serbia 2016, Article 68).

However, it is appropriate to ask the following question at this point: if the provision of these conditions for dying with dignity leads to the lethal outcome, is that then active euthanasia, i.e. the criminal act of mercy killing?

The decision on that implies the reconstruction of the physician's motive. However, this only seemingly solves the problem. Namely, a physician can be fully aware of the consequences of their actions, i.e. that the administration of pain relief medications will cause the lethal outcome. Does, in that case, the provision of conditions for dying with dignity, in spite of the awareness of the physician of the possible outcome of this procedure, at the same time signify active euthanasia? If the answer is affirmative, the question remains if this is direct or indirect active euthanasia.

The clarification, necessary to conceive valid legal regulations, presupposes ethical dimension here as well.

When it comes to the negative consequence towards the accident and towards the intention, here we are still in the fields of normative ethics and moral absolutism. However, when it comes to an accident, the ethical context can be perceived only on the basis of the consequence. An accident implies an unintentional event, so its moral value in that sense can be perceived just from the specific consequence, not starting from the cause, that is, from the great premise the practical syllogism is based on.

In an attempt to formulate this difference observed in examples, Quinn suggests that the distinction is made on the basis of the response to the question – *why an action is taken.* If the question is replied with "to" (question: "Why are you pushing a mower?", the answer: "To cut the grass"), then the other consequence can be considered accidental. However, if the direct answer (with "to") is avoided, then the consequence is certainly is not unintentional. Thus, using the well-known example of hysterotomy, when saving the mother implies killing the foetus stuck in the uterine canal, if we ask the doctor "Why are you killing the baby?", they would reply: "It can't be avoided if I want to save the mother" (Quinn 1989: 343), then they reply hides the intention to sacrifice of the foetus, contained in the intention to save the mother. However, when it comes to accident, the question "why" is not followed by a direct reply. Let's say that a physician has an intention to help a patient hasten their death by withholding therapy. However, the cessation of therapy caused a reduction in the patient's suffering, although there was indeed a rapid lethal outcome. The physician did not have the intention to primarily contribute to the end of suffering, because they did not know that the therapy the patient was receiving

paradoxically caused the effects it was supposed to prevent (pain reduction, for instance). Thus, the resulting reduction of pain occurred as a positive side of this procedure; although the intention of the physician was to cause the cessation of suffering by death, it appeared that the accidental cessation of pains accidentally caused peaceful death.

Therefore, the consequentialist explanation some utilitarians resort to does not assess the intention, but the procedure. The intention of the physician that decides to remove the foetus from the uterine canal not intending to kill it, and the physician who consciously does that (with intention) results in the same consequence, which can be morally qualified.

Contrary to the original version of the double effect principle, interpreters who do not start from principles, but from consequences, explain the difference between the direct production of a negative consequence and the "unintended", accidental consequence through the differentiation between the goal and the means. Therefore, it can be qualified as evil when the consequence is negative. However, if evil *is used* in the calculation of types of actions that can achieve a goal, then that is morally justified. For example, the trauma children experience during some medical treatments is negative by itself, but in the context of the achieved goal, which is recuperation, it has to be differently qualified.

The difference between deontological and utilitarian point of view becomes quite obvious if we use examples. Thus, Sophia Reibetanz gives an example of a physician facing a moral dilemma: he has only one dose of a life-saving medicine and two patients, of whom the one who does not receive the medicine will certainly die (Reibetanz 1998: 220). Deontologically observed, if the physician gives the medicine to one of the patients, he indirectly causes the death of the other one, although his action is not the direct cause of death, but the lack of the medicine is. Strictly deontologically, in that case, the physician observed one patient as a means of saving the other (not giving the medicine to one patient enables the saving of the other one). However, according to the utilitarian observation of consequences, the physician acted morally, because he saved one life, which represents the maximum of the positive outcome in the given circumstances.

On the other hand, if the patient is qualified to decide, i.e. if the necessary, but not the sufficient condition is met, and it is their decision to undergo euthanasia, the physician who needs to perform it, in the active or passive sense, also needs to go through the process of ethical decision-making. They can act by applying risky methods for relieving symptoms, but they can also consider that the patient's death is actually the only salvation from the suffering the patient is experiencing.

The difference in the intention, but also in the effect, between the listed cases is obvious. Nevertheless, the principle of double effect cannot in an unambiguous way, i.e. in principle, determine the limit within which the intention to help a vitally endangered patient turns into the intention to kill them. In the palliative medical practice, it is unlikely that we will come across cases when the intention is clearly derived from a principled position. Also, it is hard

to assume that the physician will act absolutely deontologically, and that they will not consider the final outcome, because these two perspectives are actually intertwined. Therefore, the assessment of the final outcome significantly determines the intention, as well, and the intention indicates the possible measures, which should be applied prudently (Hills 2003: 152).

In other words, if the physician should not be governed by the factual condition, but by the imperative of action, which implies at least an attempt to overcome the factual condition, then, the action cannot be morally valued neither on the basis of the deontological principle, nor the expediency of the action.

5. Conclusion: The Rights of Patients and Other Persons

When it comes to the responsibility of the patient, as well as the responsibility of a physician, ethical stands are entangled, as we have tried to show, in antinomies. In that sense:

1. Moral responsibility of the patient cannot be ignored, even though there are conditions (and that can be generally applied), when the patient is not competent or capable of making the decision.
2. However, in that case, the physician also does not have moral responsibility, i.e. their potential responsibility is entangled in antinomies of genus-species relationships, that is, of principles and their concrete actions. Even in the Aristotelian framework, it is possible to imagine a physician who has morally correct normative intentions, but who acts in such a way that it does not lead to their realization, because he/she makes *wrong assessments* (the case of Oedipus);
3. The patient, regardless of their intentions, has the right to life-long medical care, which must not be denied even in the case when they clearly want that (i.e. they must be medically cared for in cases where they are unable to do otherwise, leave the hospital, etc.);
4. The decision on the essential steps in order to reduce the suffering of the patient who is in the terminal stage of an illness always starts from the postulate that the patient is the goal, that is, that they cannot be used as a means to some other goals.

The last two theses show how ethical issues shift to the legal field. It is only then that moral *indecency* transfers into the realm of objective injustice.

The right of choice, thus, does not rest on moral, but on social, political justification. Precisely for that reason, the issue of merciful death represents one of the topics of controversy of opposing political doctrines in Western countries.

The main arbiter, on the basis of which the decision on euthanasia is actually made is the social community, which transfers the problem of moral responsibility to the field of *law*.

Along with writing the extensive *Preliminary Draft of the Civil Code of the Republic of Serbia*, the proposer conceived the basic parts of the future *Law*

on the Right to Die with Dignity, which should resolve numerous dilemmas, some of which we have pointed out in this paper. This has been done before the announced expert public debate, but certain formulations indicate that professional opinions have been consulted, primarily ethicists and physicians.

First of all, the intention of the proposer is to clearly resolve the dilemma posed by the existing laws and regulations, primarily by the *Law on Patients' Rights* and the *Ethical Codex of the Medical Chamber of Serbia.* That is clearly indicated by the working version of the formulation which states:

> In an exceptionally difficult and long-lasting medical, psychological, and social situation of the dying person, on the basis of their clearly, undoubtedly, and freely expressed will, the request on premature termination of life can be accepted in the form of dying with dignity (Working Material on the Draft Law on Dying with Dignity 2018).

Hereby, the *action* of medical personnel is indicated more clearly than in the formulations of the laws and regulations we have discussed in the paper. However, it is necessary to determine the precise criteria for determining the patient's power of judgement in the situation with long-lasting physical and psychological suffering, and, consequently, their *freedom* of expressing their will (i.e. whether the patient truly comprehends that the specific medical treatment will deprive them of their life).

Furthermore, if the said request is *accepted*, the question remains if that explicitly allows active euthanasia, which would be the logical consequence in our opinion. If the patient's wish to end suffering by terminating their life in the terminal stage of an illness is fulfilled, then the right to die with dignity assumes a rapid and effective measure, rather than sluggish, lengthy, and potentially painful methods of passive euthanasia.

On the other hand, this formulation does not specify whether the activity of the premature termination of life is direct or indirect. Although, from a legal perspective, this presents a dilemma that could be resolved to the benefit of direct active euthanasia, which most probably will not happen, due to the insufficiently prepared public opinion.

The point that causes most dilemmas, on the other hand, deals with the formulation on the manner the decision is made on the premature termination of life in the terminal stage of an illness – *who* can make that decision. The Material states:

> In case the dying patient is not conscious, i.e. they "objectively cannot clearly, undoubtedly, and freely express their will to terminate their life by dying with dignity, then such will can be, exceptionally, expressed by their legal representative or other authorised attorney".

Here, of course, it needs to be clarified whether the said legal representative obtained the authorization to decide about that while the patient was conscious and able to freely express their will and whether the terms under which they

can make that decision are clearly specified. Additionally, the question is raised regarding the conditions under which this authorisation will have legal force.

The Material also envisages the fulfilment of certain conditions so that indirect or direct euthanasia could even occur. Those conditions are threefold, and the Material names them as *medical, humane, and social*.

It should be kept in mind that determining the mentioned conditions should, apart from regulating the patient's rights, also regulate the rights of other persons. If the authorised person accepted to make the decision at certain point, it is necessary to establish the basis on which the medical personnel would have the obligation to follow that decision and, thereby, avoid the burden of ethical responsibility (pressure of conscience), which can not only jeopardize the rights of medical personnel to spiritual well-being, but can also be an immediate initiator of illness (due to stress).

That is why the formulation in the Material is definitely incomplete, since the medical criterion implies that "the competent council of doctors of the appropriate speciality, on the basis of medical documentation and direct insight, establishes that in the specific case in the near future there is no hope to achieve healing of the patient or improvement of their health, in spite of using scientific, expert, and practical experience and knowledge of modern medical science."

Collective responsibility prevents abuse, but in a sense, it liberates other persons from moral responsibility. However, a question remains: on the basis of which criteria can it be decided with merit that a condition is medically hopeless?

On the other hand, humane conditions imply that "the dying person is in such psycho-physical state that, due to physical pain and psychological suffering, has become unbearable over a long period of time".

Apart from the medical and humane, the Material envisages that the *Draft Law* cumulatively requires the fulfilment of the third condition, which is named social, "if, owing to long-lasting health and psycho-physical state of the dying person, their immediate family, or the person caring for them, experiences such severe material and social consequences that significantly endanger their material existence or future social position".

Only when all three criteria are fulfilled, on the basis of a written explanation, the competent court, in extra-judicial proceedings, should make a decision on the request for the execution of euthanasia. That means that the burden of responsibility is shared between the medical and judicial authorities. The decision of the court is considered final and enforceable, so the dilemma, which certainly needs to be resolved in the final text of the Law, remains: what if the patient changes their mind in the meantime, or a sudden and unexpected improvement occurs (or the improvement of the material state, which relieves the family or caregivers of the social burden, which the patient had in mind during the directly or indirectly made request for euthanasia).

On the other hand, it is necessary to commend the solution from the Material stating that euthanasia on the basis of the court's decision is conducted

by a team of a team of executors from the medical profession, one of which directly conducts the act of euthanasia and keeps it as a medical secret.

This solution once again speaks in favour of the necessity to clearly indicate, at the introductory parts of the text, that the euthanasia is active, i.e. that the manner of its implementation implies not just indirect, but also direct active euthanasia.

Contrary to the well distributed burden of responsibility, according to which executors from the medical profession share the responsibility with the medical commission that gives its opinion and the court that, in extra-judicial proceedings, approves euthanasia, the solution stating that one executor directly conducts euthanasia (especially if that is direct active euthanasia) presents a weak and insufficiently considered point, because it limits the right to spiritual well-being of that person, who becomes the sole and single agent, faced with the individual whose life they need to prematurely end. It is possible to design the process so that a whole group, or several groups, of certified executors perform this process, in such manner that it remains unknown which of them is the immediate cause of the premature lethal outcome.

The mentioned drafts of legal solutions, of course, will not annul the ethical problems, which seem to remain inevitable when it comes to euthanasia, abortion, cloning, or the death penalty, as contact areas of ethics and law.

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Iva D. Golijan

Etički i pravni aspekti prava na dostojanstvenu smrt

Apstrakt

Problem eutanazije predstavlja dodirno područje etike, prava i politike. U ovom tekstu, koji nastoji da pruži doprinos stručnoj javnoj raspravi o uvođenju eutanazije u srpsko zakonodavstvo, najpre je terminološki jasno preciziran sam termin – eutanazija (kao pravo na dostojanstvenu smrt). Nadalje, u tekstu se razmatra kakve su obaveze drugih lica koje proističu iz ovog prava i pod kojim uslovima obaveze drugih lica, koje proističu iz pomenutog prava, predstavljaju ograničavanje njihovih prava ličnosti. Navođenjem primera iz područja etike i prava, u tekstu se konstatuje da je razlikovanje aktivne i pasivne eutanazije zapravo proizvod neadekvatnog promišljanja prilikom izvođenja ove diferencije.

Ključne reči: eutanazija, ubistvo iz milosrđa, aktivna eutanazija, pasivna eutanazija, samoubistvo, odgovornost, etika, pravo

III

IN MEMORIAM

PUNOLETSTVO MISLI: TRIVO INĐIĆ (1938–2020)

Miloš Ćipranić

Ne ostaje nedorečenost nakon odlaska Triva Inđića, već žalost što nismo imali još vremena i prilika da ga slušamo. Ne ono što smo hteli da podelimo sa njim – što ovom prilikom ne uspevam – već zaista ono što smo još mogli da čujemo od njega. Kada kažem „punoletstvo misli", ne mislim samo na zrelost koju je ona u stanju da postigne, na visinu koju je dosegla svojim oblikovanjem i kretanjem, nego i na puno „leta", godina, iskustva, koji su omogućili i doveli do zrelosti o kojoj govorim. Možda je biološka metafora zrelosti podesna, jer je čovek prolazno biće. Truizam koji, ipak, boli.

Zagledan u probleme sutrašnjice, Trivo Inđić govorio je o „veku koji napuštamo", „veku koji smo već potrošili". Ako je istina – kako navodi Petar Skok u svom *Etimologijskom rečniku* – da vek izvorno znači „borba", životna snaga u svom trajanju, onda Inđićev život to potvrđuje kao neupitan dokaz. Isprepletani, njegov i XX vek podudarali su se na mnogim prelomnim tačkama. Činjenica da je, uz druge pripadnike svoje generacije, živeo u barem pet država – koje su menjale svoj obim, jedna za drugom nastajale i nestajale, nikada mirno, unutar čak i oprečnih političkih sistema, od Kraljevine Jugoslavije, konačno, do Republike Srbije – već sama po sebi ukazuje na dugotrajno nestabilno društveno okruženje u kome je valjalo provesti vek, ali i odgovoriti na posledice koje su morale neminovno da proisteknu iz takvog stanja stvari. Iz njega nije samo govorio čitav jedan vek našeg prostora, već i ono što je moglo od njega biti, a što se nije dogodilo, što ne znači da zalog nije ostavljen.

Bio je jedan od osam predavača Filozofskog fakulteta koji su udaljeni sa Beogradskog univerziteta zbog svojih političko-teorijskih stajališta i podrške studentskim protestima iz juna 1968. godine. Radi se o grupi profesora iz koje je proistekao Centar i napokon Institut za filozofiju i društvenu teoriju 1992. godine. Od samog osnivanja Instituta, Trivo Inđić je bio i ostao njegov drag gost. Tokom prve decenije rada IFDT-a, učestvovao je u više razgovora o knjigama, na naučnim skupovima „Sofistika i sokratika" i „Interkulturalnost u multietničkim društvima", održao je predavanje „Interakcija kulture i tehnologije u jugoslovenskom društvu", što je zapravo predmet koji ga je dugo vremena zaokupljao i koji će naći svoje mesto u potonjim knjigama *Za novo prosvetiteljstvo* i *Tehnologija i kulturni identitet*. Dao je doprinos *Filozofiji i društvu* tekstom o Ljubomiru Tadiću i o njegovom delu je pisano u našem časopisu.

I poslednjih godina svog života, oplemenjivao nas je svojim prisustvom i podrškom. Bio je jedan od govornika na skupu „Demokratska tranzicija u Španiji i Srbiji: iskustva i paralele“, u Kulturnom centru Novog Sada u organizaciji Regionalnog naučnog centra IFDT-a, kao i na tribini „Kuda je otišla 1968? Paradigma (ne)uspešne promene u bivšoj Jugoslaviji“, ovog puta u beogradskom Kulturnom Centru. Ne treba posebno naglašavati da je njegov značaj kao učesnika oba skupa i u tome što je bio akter i svedok procesa i događaja o kojima se govorilo. U okviru ciklusa „Sećanja na rad Instituta“ dao je, u osvrtu na okolnosti koje su dovele do formiranja IFDT-a, nešto što bi se krajnje uslovno moglo smatrati njegovom autobiografijom, mada je tom prilikom naglasio da ga memoarski žanr nije toliko zanimao. Imali smo, prema tome, privilegiju ne samo da učimo kroz njegova dela, već i da sarađujemo lično sa njim i da ga slušamo.

Rođen je 1938. godine u Bosanskoj Krajini, u zapadnim krajevima, u kojima se naš narod prvi put susreo sa prosvetiteljskim idejama i odakle su u nekadašnju Srbiju i stizali prvi impulsi modernog građanskog društva, što je potcrtavao u svojim radovima i nastupima. Rodio se u dramatičnom dobu evropske istorije, u nevreme Španskog građanskog rata, o kome će više puta pisati, uvoda u Drugi svetski rat tokom koga će izgubiti oba roditelja. Ne mogu da zamislim koliko je takvo rano životno iskustvo uticalo na njegov pogled na svet. Posle kraćeg poratnog boravka u Splitu, prešao je u Beograd i u njemu odrastao, završio osnovne i potom magistarske studije iz političke sociologije na Pravnom fakultetu. Učestovao je na Korčulanskoj letnjoj školi, bio je član grupe *Praxis* i u istoimenom časopisu je objavio 1972. godine članak o anarhokomunizmu, jednoj drugačijoj, alternativnoj, pa i suprotnoj, verziji socijalizma od one vladajuće u SFRJ.

Najveći deo radnog veka proveo je u Institutu za međunarodnu politiku i privredu, Zavodu za proučavanje kulturnog razvitka i Institutu za evropske studije. Inđićeva urednička delatnost činila je važan deo njegovog pregalaštva u našem javnom životu. Pored redakcijskog rada u časopisima kao što su *Gledišta* i *Kultura*, od samog njihovog osnivanja, sa Ivanon Vejvodom uređivao je istaknutu ediciju *Libertas* u okviru izdavačke kuće Filip Višnjić. U njoj su se našli autori kao što su Piko dela Mirandola, Etjen de la Boesi, Norberto Bobio, Emanuel Levinas. Među njima je i Bartolome de las Kasas sa svojim spisom *Izveštaj o uništavanju Indija*, koga je Inđić veoma cenio i za koga je napisao predgovor. Nakon uvođenja višestranačkog sistema, radio je kao savetnik saveznog ministra za prosvetu i kulturu i predsednika republike, bio je ambasador u Španiji i predsednik Komisije za saradnju sa UNESKO-om. Njegova diplomatska misija i državno službovanje se mogu posmatrati kao praktička sublimacija višedecenijskih istraživanja i posvećenog rada na problemima kulture, politike, identiteta i studija hispanistike. Potom se polako povlači iz javnog života, ali ne potpuno, sve do 10. maja ove godine, kada nas zauvek napušta.

Smatram da se danas njegovi tekstovi moraju čitati s obzirom na tačno vreme i okolnosti u kojima su napisani, jer za to postoji čvrst razlog – imati u vidu šta zagovaraju i protiv čega i koga su upereni u stalno menjajućoj i dinamičnoj političkoj stvarnosti, makar i implicitno. U tom pravcu, jedna od bitnih odrednica koje prožimaju i upotpunjuju njegov život i delo svakako je angažovanost. O njoj je pisao i, plaćajući cenu, potvrđivao je u praksi suprotstavljanjem tekovinama sistema za koga je smatrao da je autoritaran i da proizvodi političku klimu koja odaje manjak stvarne demokratije. Zahtevao je reformisanje starih i prizivanje novih institucija, jer je smatrao da se jedna zajednica ili narod

najbolje prepoznaje u njima. Posebno je u žiži njegove pažnje, kao jedna od konkretizacija opresivnog poretka, bio famozni član 133. Krivičnog zakona koji se odnosio na tzv. „verbalni delikt". Zapravo, zalagao se za ono što je označio kao „etika odgovornosti". Jednom prilikom, opisao ju je kao „saučesništvo u poslovima svog vremena i svest o prihvatanju mogućih posledica svog delanja". U eseju „Evropski kulturni identitet" istakao je slobodu, jednakost i autonomiju ličnosti i mišljenja kao temeljne vrednosti koje je čovek kroz istoriju sticao postupno i uz veliku žrtvu. Dostignuća koja treba čuvati ili iznova dosezati i produbljivati.

Jedan od možda omiljenih Inđićevih termina – što nikako ne podrazumeva da njegov sadržaj ima afirmativnu vrednost, već, suprotno, krajnje negativnu – jeste „monokultura". Učestalost tog termina u tekstovima sa kraja osamdesetih i početka devedesetih znakovita je jer se njime sažeto označavaju ishodi svođenja kulturnog i konfesionalnog na nacionalno, demokratskog pluralizma mišljenja na autoritarni partijski monizam, do kojih je došlo u jugoslovenskom društvu, tendencija koje su, između ostaloga, odlučno doprinele raspadu zajedničke države, daljem diferenciranju međusobno srodnih naroda i stvaranju niza malih, slabih država, čije posledice trpimo i danas. Nesumnjivo je bilo teže misliti i nositi se sa idejom policentričnog identiteta. Da data dijagnostička slika i epilog ne bili previše mračni i pesimistični, i kako se sve ne bi završilo samo kriticizmom, kao alternativa monokulturi ponuđena je i življena „kultura otpora", koja nastavlja da nas obavezuje, ako već nije kasno.

U svom delu uporno i dosledno se zalagao za nemerljivi, odista temeljni značaj obrazovanja, kao nedovršivog projekta i osnove kako ostvarivanja svakog oblika slobode pojedinaca i građana, tako i opstanka i trajanja zajednica koje skupa čine i nastoje da grade. Zalaganje za neoprosvetiteljski imperativ obrazovanja u jugoslovenskom i srpskom društvu na prelazu vekova i, *plus ultra*, razmeđi milenijuma imalo je barem dva uzroka. Čini se, uopšteno gledano, i dalje nedovoljni obrazovni nivo njihovog stanovništva, izazovi tehnoloških revolucija i promena i sve ubrzanija mondijalizacija sa kojom su se evropska civilizacija i ukupno svet suočili. Kako i sam piše u jednom članku naslovljenom „Kultura budućnosti", objavljenom u Kulturnom dodatku *Politike*:

> Ništa više neće biti kao pre, sem onog izvornog pitanja kulture o smislu tih promena i sveta u kome živimo, napora da sačuvamo sposobnost razumevanja i tumačenja tog sveta i da tu kreativnost i te spoznaje predamo budućim generacijama.

Posebno bih istakao Inđićevu pohvalu poetičkom umu. U suočavanju sa onim što je bilo juče i što dolazi sutra bitnu ulogu imaju uobrazilja, estetsko i umetničko iskustvo kao korektiv diskurzivnim formama mišljenja, scijentizmu, zakonu merljivosti što se nastoje preneti na sva područja ljudske egzistencije. Voleo bih kada bih mogao svakoj tački i dimenziji saopštenja „Estetsko obrazovanje, kriza škole ili o umetničkom vaspitanju kao putu ka političkoj slobodi" (1997) da posvetim onoliko prostora koliko zaslužuje, ali ostanimo ovom prilikom na nekim tezama. Upravo u njemu se uočava kao greška ili predrasuda isključivanje snage i dometa umetničke kreativnosti kojom se otkrivaju ciljevi kojima bi valjalo stremiti. Istina, „umetnosti se nadređuje racionalno mišljenje i jezik", međutim, ne treba skrajnuti umetničke forme poput „muzike, koja se ne može svesti na jezik", jer i one konstitutivno doprinose emancipaciji i obrazovanju čovečanstva. Umetnost ponekad od filozofije zna da pokaže prodorniju kritičku oštricu i da ide napred u odnosu na nju. Tekst se završava pozivanjem na Platona, koji u *Zakonima*

naglašava ulogu onog obrazovanja koje vodi do stvaranja idealnog građanina. Pitanje je da li je današnja vera u umetnost veća nego što je bila u očima atinskog filozofa.

Da su umetnički i književni izraz zauzimali bitno mesto u njegovom životu svedoči više pokazatelja. U javnost prvi put izlazi upravo svojim pesmama, koje je potpisivao i pod pseudonimom. Hteo je da bude književni kritičar, na šta upućuje veći broj objavljenih prikaza romana i pesničkih zbirki tokom pedesetih godina. Pisao je i likovnu kritiku. Priroda posla kojim se bavio uslovila je da umetničkom stvaralaštvu priđe i sa tačke gledišta koja nije estetička. Tu prevashodno mislim na njegovo obimnije istraživanje *Tržište dela likovne umetnosti* (1986). Iako je u njegovom delu sve više preovladavalo istraživanje institucionalnih faktora života umetnosti, nisu zanemareni problemi koji naginju više ka estetici.

Oduzimanje pasoša i sprečavanje odlaska u inostranstvo, u koje je voleo da ide kako bi se lično susretao i upoznavao sa onim što drugačije ne bi mogao da vidi i sazna, nije uzrokovalo njegovo stalno insistiranje na budnom praćenju evropskih i svetskih intelektualnih i društvenih tokova. Pre se radilo o jednom imperativu zbilja od vitalne važnosti. Pitam se u kolikoj su meri pređena kilometraža i neposredan kontakt sa ljudima različitih kultura, običaja, klasa, jezika, kontinenata, doprineli odbacivanju nasilnog nametanja svake vrste uniformnosti, naročito civilizacijske. Da, „uniformnost" bi bila drugi termin koji je često koristio, ustajući protiv svega onoga što označava i donosi sa sobom.

Lično, kroz Inđićeva dela otkrivao sam jednu drugu, u nas manje poznatu, Evropu. U njima su, dakle, ovde dobili reč oni mislioci društvenog koji su pisali na španskom i italijanskom jeziku, za koje bi neko, pun predrasuda i bez dovoljnog znanja, rekao da su rubni u pogledu ozbiljne teorije, da ne pripadaju grupi onih na koje se zaista treba usmeravati kako bi se ljubav prema mudrosti i znanju zadovoljila u punoj meri.

Po nekakvoj vrsti automatizma ili pak inercije, čini se da danas, možda više nego ikad, preovlađuje stav da se misli prevashodno na engleskom jeziku. Tom se redukcijom u znatnoj meri zamračuju kulturno bogatstvo i slojevitost evropske i ne samo evropske tradicije, tradicija. Takav stav posebno je poguban u akademskoj zajednici. Nesumnjiv je anglocentizam koji vlada na Beogradskom univerzitetu. Uz neosporne prednosti koje donosi *lingua franca* današnje epohe, kao nužnost globalizovanog sveta, takvo stanje stvari povlači za sobom i manje pozitivne efekte. Ostanemo li i dalje na nivou akademije – i još uže, humanistike i društvenih nauka – lako je utvrditi da se kroz prevlast engleskog isključuje čitav horizont na njega neprevedenih dela, ali ona, uprkos tome, ne prestaju da budu bitna. Ovde možemo da se vratimo na problem obrazovnog i školskog sistema, na čijoj je nezamenjivoj važnosti, ali i reformi, instistirao Inđić. U „Kulturi i obrazovanju" čitamo:

> Jedan od krupnih zadataka XXI veka i biće upravo da razreši dilemu oko dva glavna toka: sa jedne strane, rastuća dominacija globalne kulture, koju stvaraju moćne sile uniformnosti i homogenizacije, koje nose savremene ekonomske, tehnološke, medijske i lingvističke integracije, a sa druge strane, potreba da se zaštiti raznolikost kultura – kulturni diverzitet – podjednako kao i biološka raznolikost.

U našoj sredini njegov opus, štaviše, snažno dokazuje da se hispanistika ne da svesti na filologiju. Da područje hispanističkih studija daleko premašuje oblasti jezika po sebi i književnosti. Teorijski strogo bavljenje figurama kao što su Migel de Unamuno i, naročito, Hose Ortega i Gaset ili posvećeno istraživanje avangardnih društveno-političkih eksperimenata, prevashodno

anarhističkog usmerenja, koji su, čini se, više nego igde u stvarnosti iskušavani u Španiji, ostaju kao neki od zadataka za koje je postavljena pouzdana osnova.

Govorio je da je još kao mladić došao do saznanja o postojanju socijalističkog pluralizma kroz otkriće Španskog građanskog rata i različitih struja koje su u njemu učestvovale na republikanskoj strani. Odatle je i proistekao njegov interes za proučavanje španske istorije XX veka i levičarskih političko-ekonomskih pravaca. Rezultat višegodišnjeg, decenijskog rada na tim predmetima je monografija *Savremena Španija*. Ona je značajna iz više razloga, a jedan od njih je svakako pokušaj da na osnovu njenog sadržaja bolje razumemo i jugoslovensko iskustvo iz prošlog veka, koje sugestivno naliči španskom, naročito ako se pođe iz perspektive „zakasnelih nacija", što je i Inđićevo polazište.

Iako su kategorije društvenih masa i elita još od ranije bile tema njegovih istraživanja, ona izvesno vrhune knjigom *Uspon masa. Jedno poređenje iz sociologije masa: Mosca i Ortega* iz 1985. godine. Ova magistarska teza pretočena u monografiju kao da je najavila ili barem dala teorijske osnove za razumevanje pojave koja će uslediti nedugo zatim u veoma zaoštrenom vidu, naime, onoga što je popularno poznato kao „događanje naroda". Pravovremenim i dubinskim čitanjem knjige – u kojoj se potvrđuje socijalna činjenica masifikacije političkog života, kao proizvoda modernosti sa rizičnim potencijalom – možda se u tom trenutku realno nije moglo preventivno reagovati, ali sa današnje tačke gledišta kroz nju takve pojave svakako postaju jasnije za opisivanje i razumevanje. Inđić se potom u aprilu 1991. godine osvrće u *Republici* na taj vaininstitucionalni izliv tzv. narodne volje i dobrim delom ga posmatra i prelama kroz prethodno postavljenu prizmu, ali odlučujući pokretač za nastanak i odvijanje tih simptomatskih događaja naše savremene istorije ne vidi toliko u delovanju „masa" otrgnutih od svojih orijentira, koliko u manipulativnoj instrumentalizaciji koju nad njima vrše političke elite. Čak i ako je možda termin stavljen pod navodnike po sebi nepodesan da se njime artikuliše ontologija društvenog, jer na tragu pozitivizma dolazi iz fizike, na delu su sigurno bili slepa pokornost autoritetu, povodljivost i nezrelost.

Ako se za čas usredsredimo na stilistiku Inđićevog pisanja, primetićemo da se služi metaforikom koja dolazi iz sveta defektologije i prava. To prevashodno čini kada opisuje ili, takoreći, „dijagnostifikuje" opresivni politički sistem. U takvim kontekstima (objedinjujem neke od sintagmi razasutih u više tekstova), stvara se podaništvo naroda „bez čula za politički život", naviknuto na „slepu poslušnost", „mutavo, poslušno stado svemogućeg i sveznajućeg pastira". Drugim rečima, pridaje mu se i voljno se prihvata „status maloletnika", stavlja se „pod starateljstvo" i „tutorstvo", umesto da se razvijaju i neguju individualnost i autonomija svih građana ili političkih subjekata.

Uprkos navedenim primerima slikovitog govora kojim se ne baš na pozitivan način karakterišu odnosi koji su nam nametnuti, u njegovom demokratskom socijalizmu nema nadmenog elitizma. Štaviše, Inđićeva antropologija je u biti optimistična, a njegove reči i gestovi tokom razgovora odavali su ljubav prema humanitetu i razoružavajuću veru u njega. Ako ovaj oproštajni tekst ima i odviše citata, to činim sa namerom da omogućim Trivu Inđiću da ga i ovde iznova čujemo, makar posredno, na kratko, možda neverno i na ovaj, uvek nedovoljan, način.

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