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Making Home Rules for Mother Tongues

The Legal Implications of Linguistic Diversity in the Design of Autonomy Regimes



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Cover Photo: Reclining Buddha in Padaw Padet Kyun Island, Myeik, Myanmar.

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Dawei, 3 July 2015

José-María Arraiza

Förord

Principen om nationalismen där det politiska och det nationella är samspelt kan vara av markant betydelse för uppbyggande av autonomiska regimer. Likaså tillåter decentralisering och delegering av befogenheter för språk och utbildning (officiellt erkännande av språk, standardisering av språk, undervisningsspråk och relaterade läroplaner) formning av identiteter inom dessa autonomiska regimer. Resultatet är en ofullständig cirkulär relation där språk, samfund och politiska institutioner ömsesidigt och kontinuerligt formar varandra: lingvistiskt mångfald prägar och formar autonomiska ordningar och vice-versa. De juridiska implikationerna av territoriella och icke-territoriella former av autonomi är dock av en annan art. Emedan territoriell autonomi bygger på idén om ett eventuellt inkluderande hemland för lingvistiska grupper, vars vistelseort är avgörande, förstärker den icke-territoriella autonomin idén om ett exklusivt samfund bestående av själv-identifierade medlemmar som är kapabla till självstyre oavsett territoriella gränser. Denna avhandling utgör en analys av sådana juridiska implikationer genom komparativa och institutionella analyser. Avhandlingen föreslår som resultat en serie av normativa och pragmatiska rekommendationer inriktade på att främja demokratiseringsprocesser i linje med principer om multikulturalism.

Abstract

The principle of nationalism by which the political and the national is to be congruent can be a significant influence in the making of autonomy regimes. Likewise, the devolution of competences over language and education (official language recognition, language standardisation, language of instruction and related curriculum and syllabi) allows for the shaping of identities within such autonomy regimes. The result is an imperfect circular relation in which language, society and political institutions mutually and continuously shape each other: linguistic diversity influences the design of autonomy arrangements and vice-versa. The legal implications of territorial and non-territorial forms of autonomy are however different. While territorial autonomy follows the idea of a perhaps inclusive homeland for linguistic groups where place of residence is determinant, non-territorial autonomy strengthens the idea of an exclusive community of self-identified members able to govern itself regardless of territorial boundaries. The present dissertation constitutes an analysis of such legal implications through comparative legal and institutional analysis. It proposes as a result a series of normative and practical recommendations aimed at furthering democratisation processes in line with the principles of multiculturalism.

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*Some painters transform the sun into a yellow spot,
others transform a yellow spot into the sun.*

Pablo Picasso

1. Introduction

1.1. Linguistic Diversity and Autonomy Regimes

In a work of art, a person transforms matter into art and the art transforms the person into an artist. Linguistic diversity and political institutions have a similar reciprocal relation which involves collective action and complex institutional arrangements. Hence, the making of modern states has been accompanied by the making and consolidation of their national languages following a paradigm that marries an individual, a mother tongue, a nation and a state.¹ Such a large scale process is also reflected in nation building at the sub-state level. There, a circular relation may be observed by which political claims based on language contribute to the establishment of autonomy regimes which in turn, through language and education policies reinforce language-based collective action. This dissertation consists on an exploration of the legal implications within the areas of language use, language education and language standardisation which result from such relation. That is between societal processes of nation building at the sub-state level and its channelling into territorial and non-territorial forms of autonomy (territorial legislative autonomy, decentralisation, functional autonomy and national cultural autonomy).

Indeed, linguistic diversity was at the core of the self-determination movements of the 19th and 20th Century in Europe.² Linguistic nationalism, initially a European

¹ Yildiz 2012, pp. 30–67.

² Hannum 1996, p. 458.

phenomenon, is in this sense especially relevant to this dissertation, as it bases national identification primarily within language and – when in the periphery of the state – may seek institutions that accommodate such differences through self-governance.³ As Ernest Gellner puts it, “modern loyalties are centred on political units whose boundaries are defined by the language (...) of an educational system”.⁴ Nationalism, understood in Gellner’s terms as the political principle that seeks to make the national and the political congruent (be it at a State or a sub-State level) homogenises language differences and in a way helps to create group identities (in the modern sense) to make such political units economically and politically functional.⁵ In this sense, the will to homogenise through language policy has been as much present in the making of modern European states as in the creation of sub-state entities and non-territorial forms of autonomy.⁶ Indeed, political forces in sub-state entities may pursue similar nation building processes than those at the state level. Dialects within minority languages (*e.g.*, the seven varieties of Basque) are homogenised in the same way as within majority languages.⁷ Language academies and education systems are some of the tools used in such process.

This historical process has been a democratising one, where subjects have been transformed into citizens able to participate in the public affairs of the modern state. Even if a shared linguistic identity is not always the primary basis for political

³ Not all national groups, however, feel a strong connection between language and national identity (*e.g.*, the U.S, Brazilian or other Latin American nationalities in the Americas, for example).

⁴ Gellner 1964, pp. 158–69; Sahlins 1991, pp. 279–298.

⁵ Gellner 2008, p. 1.

⁶ Kraus 2008, pp. 29–32.

⁷ Nimni 2007, pp. 345–364, 352. Ephraim Nimni quotes the report to the Constitutional Assembly of 1794 “On the need and Means to Destroy Dialects (Patois) and Universalise the Use of the French Language”.

participation, linguistic proximity helps to participate and to understand political decisions. Demands for autonomy within multinational states are legitimate according to liberal multiculturalists such as Will Kymlicka, who claims that societal cultures, including linguistic groups, are the most genuine form of democratic participation.⁸

From a normative perspective, the main legal policy dilemmas in the making of autonomy regimes and language policy consist first in the choice between the “territoriality principle” (defining rights afforded to all the inhabitants of a defined area within a state or political unit) and the “personality principle” (defining rights which persons belonging to certain groups enjoy throughout the whole of a political unit or a state’s territory).⁹ The territorial principle rests on the imagination of a physical homeland where certain language rules apply, while the personality principle implies the existence of a community capable of governing itself, in parallel perhaps to the nuanced distinction between the expressions *home rule* and *self-rule* (autonomy deriving from the ancient Greek auto-nomos, αὐτόνομος: *αὐτός* meaning *self and νόμος law*). Hence, the territoriality principle is normally accompanied by a residence-based identity, while the personality principle relies on self-identification.

Making choices between territorial and non-territorial forms of autonomy (and their combinations) has different implications. The choice may reinforce either monolingualism or multilingualism create a link between claims for territorial self-government and language and impact on self-perception and thus on social cohesion.¹⁰ Such choices may be reasonable or not within a given polity depending on

⁸ Kymlicka 1999, p. 120; Nootens 2013, pp. 32–48, 35.

⁹ Patten 2003, p. 297.

¹⁰ May 2008, p. 312.

multiple variables.¹¹ For example, on one hand providing personality based rights to Catalan and Basque speakers throughout Spain is not politically feasible or demanded. Establishing territorial based linguistic immersion in Albanian for all inhabitants of Southern Serbia is equally out of the question. On the other hand slightly increasing the scope of language rights for Albanians in South Serbia or Catalans in Catalonia could perhaps be feasible.

Once a decision has been made on the model, the lawmaker must decide in which institutions it will be applicable (administration, legislative and judicial bodies, the education system, the army, the police and the public mass media, to name the basic ones). Of these areas, instruction of or in the minority languages is of paramount importance for the shaping of group identities. Equally, the choices on the use of minority languages in the public sphere and language standardisation are crucial for the members of the minority groups.

The core of this dissertation is thus an exploration of the legal implications of territorial and non-territorial autonomy for the areas of language education, official use of languages and language standardisation and their concrete consequences. For example, a territorially based right to use Catalan with local authorities will imply that such a right does not exist outside Catalonia's territory, and therefore speakers will need to be proficient in both Catalan and Spanish to move throughout Spain. Similarly, a personality-based right to use Serbian throughout Kosovo's territory will imply that a Serbian speaker will in theory not need to learn Albanian in order to relate to public authorities. In reality, both examples are complicated by political and social factors related to how law operates in practice. Public authorities may in both cases not always have the resources or the political will to implement the law. The objective

¹¹ Patten 2003, pp. 296–321.

of universalizing free primary and secondary education may sometimes run against the wish to accommodate diversity. Such factors concerning law in action as well as reasons behind policy decisions will also be taken into account. Last but not least, the teaching of English (considered by some as a European *lingua franca*) can influence teaching of minority languages.¹²

1.2. Research Questions

1.2.1. Exploring the Relations between Territorial and Non-Territorial Autonomy and Linguistic Diversity

The sub-title of the dissertation is “the Legal Implications of Linguistic Diversity for the Design of Autonomy Arrangements”. This implies understanding the consequences that linguistic diversity has on the making of both territorial and non-territorial autonomy regimes as well as analysing the different consequences that these have on linguistic diversity and hence group identity. The nature of a linguistic group identity will influence the shaping of autonomy institutions and *vice versa*. The different approaches to understanding group identity (generally divided between modernists and essentialists) will be analysed in detail.

1.2.2. What is the Relation Between Autonomy Arrangements and Language Laws?

Linguistic diversity influences the shape of autonomy institutions. Lawmakers should take into account the languages spoken within a territory and how citizens identify themselves according to such language. Such considerations are necessary to distribute competences over language and education, the recognition of languages and associated rights and policies. Following the metaphor of the artist and the art object

¹² House 2003.

mentioned in the introduction, it is important to note that the artist is far from free in designing institutions that accommodate or recognise minority languages. Limited resources and opposing political forces seeking the establishment or maintenance of majority linguistic hegemonies will also influence the final result. Hence, it is worth exploring legislation concerning language use, minority language education and language standardisation in relation to group identity. Once an approximate relation between legislation and linguistic group identity has been defined it is necessary to study the relation between such areas of legislation and territorial and non-territorial autonomy. This includes assessing how competences are distributed in each form of autonomy, the logic behind such allocation and possible consequences.

1.2.3. What are the Legal Implications of Linguistic Diversity for Territorial and Non-Territorial Autonomy Regimes?

Linguistic diversity is affected in different ways by the type of autonomy and the different legislative competences and/or regulatory and administrative powers they entail over areas such as education, language standardisation and official language use. The various combinations of territorial and non-territorial forms of autonomy have different constraints and characteristics and therefore have different consequences for the rights persons belonging to different linguistic groups enjoy and the power of their self-governance institutions to shape and consolidate group identities. From national self-governments to autonomous territories there is an ample mixture of institutional possibilities for minority participation and representation. Consequences of the implementation of such models may range from official recognition of languages at the sub-state level, promotion of the use of languages through their official use in the public sphere and the standardisation and promotion of a particular language within a territory or state-wide.

1.2.4. Which Legal Forms of Autonomy are Appropriate for the Different Linguistic Groups?

It is relevant to ask from both a *lex lata* and *de lege ferenda* perspectives how constitutional design responds to competing claims by different linguistic groups. Language policy is also a matter of resources and numbers. Certain policies are more adequate for certain groups according to their demography. Dispersed minorities which use a considerable number of languages within the same state will need a certain type of arrangement to ensure protection of their cultural rights. Concentrated minorities which inhabit states where only two local languages are spoken are in a very different situation. The degree of difficulty in mastering a language may also have an influence on the type of language policy arrangement. The legitimate claims of different groups (national minorities, indigenous peoples and migrants) may require different legal solutions.

1.2.5. What Leads States to Opt for Territoriality, Personality-Based or Mixed Forms of Autonomy in Linguistically Diverse societies?

Finally, an overarching consideration throughout this dissertation is to seek explanations as to which factors lead states to opt for territorial and personal forms of autonomy in different cases. The role of linguistic diversity in the choice of the type of arrangement will be analysed in detail. Of course, the processes vary a lot from case to case. Some autonomy regimes such as Catalonia in Spain or the national cultural institutions found in Hungary are the result of centuries' old institutional processes, while other regimes are designed within the short and pressured time span of the making of a comprehensive peace agreement. The dissertation pays special attention

to the Dayton and Ohrid accords and the Ahtisaari proposal.¹³ In all three cases the making of territorial and personality-based institutional arrangements (combined also with consociational measures) provides interesting material for analysis.

1.3. Method, Materials and Delimitations

1.3.1. Method, Materials Used and Expected Contribution

The methodology used in this dissertation is a mixture of comparative law and institutional theory. The study is positioned within public law, including the legal disciplines of administrative law (e.g., laws governing the use of languages by the local administration or in the education system), constitutional law (where fundamental rights pertaining to minorities are recognised and decision making processes established) and international law (including treaties pertaining to minority rights). The comparison is undertaken both horizontally, between different jurisdictions, and vertically, between domestic and international law. I also pay attention to processes of law-making and to how language issues are negotiated and/or incorporated throughout such processes.¹⁴

From a comparative law perspective I follow a three-step methodology proposed by Edward Eberle: acquiring the skills of a comparativist, evaluating the law as it is expressed concretely (external law), evaluating the law as it operates within a culture (law in action or internal law) and concluding with comparative observations.¹⁵ I take such an approach by focusing first at the theoretical level on understanding

¹³ The General Framework Agreement for Peace in Bosnia and Herzegovina, December 14, 1995, the Ohrid Framework Agreement, August 13, 2001, and the Comprehensive Proposal for a Status Settlement in Kosovo, March 26, 2007, S/2007/168/Add. 1.

¹⁴ Danilenko 1993.

¹⁵ Eberle 2009, pp. 451–486.

nationalism and multiculturalism as underlying ideas behind autonomy arrangements. I look at concrete legislation as it is written and use materials such as the reports of international bodies, e.g. the Advisory Committee on the Framework Convention for the Protection of National Minorities (henceforward AC FCNM) or the Committee of Experts on the European Charter on Regional and Minority Languages (henceforward CE ECRML) to evaluate the law in action.¹⁶ The reports of these treaty monitoring bodies serve as a guide to the multiple areas of law which concern the use of languages in both the public and the private sphere. As for the operation of law within a culture, I rely on academic studies by experts from various disciplines, including sociolinguistics as well as my own experience in the United Nations and the Organisation for Security and Co-operation in Europe.¹⁷

In order to provide the comparative analysis with more theoretical weight I draw on sources of institutional theory, particularly on the “New Institutionalism”. In general terms, institutionalism is the theory which studies institutions, how they affect behaviour and its social outcomes.¹⁸ Institutional design is a branch of political science which studies the architecture of institutions and its consequences for society. Formal institutions influence political behaviour and thus impact on society and the course of conflicts (by changing the rules of the game).¹⁹ At the same time, political collectivities influence their institutional environment creating a reciprocal relation. Hence, according to James March and Joseph Olsen, the proponents of “New

¹⁶ Council of Europe Framework Convention for the Protection of National Minorities, CETS 157, 1 February 1995 (henceforward FCNM). Council of Europe European Charter on Regional and Minority Languages, CETS 148, 5 November 1992.

¹⁷ I worked for the UN as a peace-keeper in Kosovo and East Timor (1999–2000), as a field staff of the OSCE Mission in Kosovo and as a Senior Legal Adviser to the OSCE HCNM.

¹⁸ Diermeier and Krehbiel 2003, pp. 123–144.

¹⁹ Horowitz 2000, pp. 601–652.

Institutionalism”, politics shapes society and society shapes politics, collective action being at the centre of the research focus.²⁰ In this dissertation I give weight to their view by analysing legal implications of language laws as well as the political values behind them. I draw primarily on normative views, which I complement with historical analysis aiming at understanding the roots of the process. I position myself within the modernist ethno-symbolic camp when it comes to understanding nationalism and national identity.

Ideal models are rarely implemented in the real world. The metaphor of Babel which I use in the constitutive article “Blueprints for Babel: Legal Policy Options Minority and Indigenous Languages” is useful in this context not only due to its implications for linguistic diversity but for design itself: the search for the ideal institution and the metaphor of its collapse.²¹ In this sense I follow Amartya Sen’s call for a realisation-focused approach to justice, against a “transcendental institutionalism” approach where ideal institutions are sought for with little attention to real outcomes.²²

I reviewed national legislation from a number of countries, including *inter alia* Finland, Spain, Macedonia, Slovakia, Hungary, Bolivia, Nicaragua, the Republic of Kosovo, Estonia, Canada and India. I do not treat such countries as separate case studies, but in an effort to go beyond the case study method I directly extract examples of legislative issues which exist within their jurisdictions and analyse differences and similarities, in the search for explanations. I have thus chosen to extract only certain aspects of each case as it is relevant to a particular argument (*e.g.*, the drawing of administrative boundaries based on linguistic lines in India).

²⁰ Peters 2012, pp. 1–24.

²¹ Raffield, Palmer Olsen & Toddington 2010, pp. 87–92; Arraiza, 2011.

²² Sen 2009, pp. 1–27

The majority of the laws I have reviewed have to do with administrative matters, such as the use of languages in dealings with administrative authorities and in the education system. In this sense, I am looking primarily at the public sphere and the vertical relation between the individual and the state (or the sub-state) entity. I am not dealing with matters concerning horizontal relations (*e.g.*, the use of languages by companies or in commerce).²³ Lastly, I have reviewed a comprehensive bibliography with a multi-disciplinary approach: in the bibliography there are both legal scholars, political scientists, linguists and sociologists. In this sense, I have used works by well-known scholars in the area of autonomy, language and minority rights (see the Bibliography in Chapter 6).

My expected contribution is to innovate by exploring the reciprocal relation between linguistic diversity and the making of territorial and non-autonomy regimes, taking into account the role of ideas and values such as multiculturalism and nationalism and to contribute with normative and practical recommendations for law-makers and policy-makers. In particular, I aim to explore the relations between territorial and non-territorial autonomy and different mother tongue education models (schemes based on linguistic immersion *versus* those based on the separation of students).

1.3.2. Delimitations

This dissertation and its constitutive articles cover only the research questions defined above. It does not go any further: it does not pretend to propose a theory of language rights and autonomy. Being primarily a theoretical comparative law and institutional

²³ Art. 13 of the ECRML deals with such type of horizontal relations.

analysis it does not include an in-depth analysis of actual societal impact, which would require extensive statistical data and a different social sciences methodology.

The dissertation takes into account the complexity of the matters at hand as well as the danger of oversimplifications, problematic extrapolations and endogenous arguments. As Michael Keating points out, social realities in an increasingly globalised world show highly complex patterns of identities where neither territory nor personality give straightforward answers as to where individuals belong or which are the most adequate language policies.²⁴ The complexity of a fluid, inter-connected society where the local, national and international levels are interdependent and the *relational* character of autonomy are taken into account.²⁵ The relationship between normative arrangements, their implementation and diverse societies is clearly an imperfect one where multiple factors (often exogenous to linguistic diversity) have a role. As Guy Peters puts it, “[i]f there is a well-developed conception of change in the normative perspective on institutionalism, the capacity of institutionalism to comprehend and guide the design of institutions appears extremely weak”.²⁶ Even if norms are in place, “[f]ew political institutions are capable of moulding behaviour of their members in quite the way that might be hoped by the formulators of an institution”.²⁷

My criteria for the selection of examples has been their relevance to the issue assessed and the research objectives of this study, that is theory development (including normative and practical recommendations) in the relation between autonomy and linguistic diversity.²⁸ For territorial autonomy regimes I have chosen

²⁴ Keating 2005, pp. 181–190.

²⁵ *Ibid.*, pp. 13–31, 17.

²⁶ Peters 2012, pp. 42–43.

²⁷ *Ibid.*, pp. 42–43.

²⁸ George & Bennet 2005, pp. 22–25, 83–84.

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Finland, Spain, Bolivia, Italy (South Tyrol) and Serbia (Vojvodina). For non-territorial regimes I have analysed Hungary, Serbia, Slovakia and similar cases. I have paid particular attention to cases from the former Yugoslavia (Kosovo, Bosnia and Herzegovina and Macedonia) due to the intrinsic linguistic diversity and the fact that they have had to develop at the same time the policies and the institutions needed to accommodate such diversity.²⁹ I have used India as a useful show case of the conflictive relations surrounding territorial organization and language diversity.

²⁹ Đuric 2011, pp. 85–105.

2. Theoretical Considerations

2.1. Language and Education Legislation and the Shaping of Linguistic Group Identities

Language and education legislation defines which languages are recognised and used in the public sphere and therefore impacts on how such language are perceived and how language speakers relate to them. It may even affect the form in which such languages are named (the designation of Bosnian, Serbian and Croat as different languages) as well as their internal rules (through standardisation). There is indeed a direct connection between linguistic diversity and political institutions.

The design of such legislation is in itself a technique seeking to administratively control (and govern) the use of languages in the public sphere. Such legislation covers a wide set of areas which may be delegated as competences to the sub-state level. These include *inter alia* the official use of (both majority and minority) language(s) by the administration, the language of primary, secondary and higher education, the development of curricula and textbooks, the language used in public signs and in media and the establishment and management of language standardisation bodies.³⁰

The prominence of language within such instruments tells a lot about the importance of the mother tongue as a constitutive element of the identity of national minorities, indigenous peoples and other groups.³¹ The Preamble of the FCNM calls for respect for and development of national identities and that of the ECRML to build a Europe based on cultural diversity.³² Identity and culture are much wider concepts

³⁰ AC FCNM Commentary on Language, 2012.

³¹ Arts. 5 and 9–14 of the FCNM and virtually all of the ECRML.

³² Preamble and Art. 5, FCNM; Preamble, ECRML.

than language, and language is of course not the only identity marker of a group. However it can achieve prominence by making groups distinguishable, where other traits may be less stable.³³ Identifying groups according to language is easier than addressing other cleavages within them. As reflected in the constitutive article “Squaring Indigenous Circles: the Making of Nicaragua’s Communal Property Regime” it is easier to establish distinctions between Miskitos, Sumos and Ramas based on their languages than on other sub-divisions.³⁴

Language is in any case a multi-dimensional, changing phenomenon. Language is fluid both in itself as well as between individuals. Far from the myth of purity of linguistic nationalism, languages are internally multilingual, the result of a variety of influences.³⁵ Externally, they are extremely mobile. Language acquisition may in some cases be easier and more unproblematic than conversion to a certain religion. Moreover, language differences are indeed not equally relevant for all groups. Some are considered to have language as their main defining feature (*e.g.*, the Catalans) while others share a language with their ethnic “others” and define themselves on other cultural traits (Scots in the U.K.). Joshua Fishman highlights the crucial links between language and ethnocultural identity: those of indexing (naming cultural artefacts), identification of the language with the culture, and symbolism.³⁶ The symbolic value attached to a language is as important as its use: national identity may

³³ May 2008, pp. 7–9.

³⁴ *Law No. 28 on the Autonomy of the Atlantic Coast Regions of Nicaragua*, 7 September 1987, Official Gazette 238, 30 October 1987 (henceforward Nicaragua Atlantic Coast Autonomy Statute). Arraiza 2012, pp. 69–103.

³⁵ Yildiz 2012, pp. 67–108.

³⁶ Fishman 1991; May 2008, pp. 132–135.

be detached from language use (*e.g.*, Gaelic in Ireland).³⁷ As Hobsbawm points out, “[a]t all events problems of power, status, politics and ideology and not of communication or even culture, lie at the heart of the nationalism of language”.³⁸

Hence, a distinction must be made between cases where linguistic nationalism is at the forefront of efforts to build a state or a sub-state entity, such as in Catalonia, and cases where language differences are not at the core of the enterprise. The Albanian language, for example, had less of a relevance in the Kosovo Albanian movement for autonomy (and independence) than identification with a common history and culture. As Rogers Brubaker described the terms “Hungarian” and “Romanian” may have completely different meanings and say “nothing about the degree of group-ness associated with those categories”.³⁹ The question is whether linguistic differences are believed to separate entities which may be regarded as nations in need of special political structures or simply groups which do not understand each other’s words.⁴⁰

In addition, it is worth distinguishing situations in which group belonging is understood as exclusive (*e.g.* Jewish identity) and those identities which are inclusive and open to the integration of new members as long as these learn and use the group’s language (*e.g.*, migrants who integrate in Catalonia through language acquisition). Unsurprisingly, integration policies in Europe for migrants and national minorities tend to focus on majority or State language acquisition.⁴¹

Historically speaking, language differences before the era of industrialisation were of a different kind. Indeed, before the introduction of state sponsored primary

³⁷ Coleman 2010, pp. 44–64.

³⁸ Hobsbawm 2013, p. 110.

³⁹ Brubaker, Feischmidt, Fox & Grancea 2006, p. 13.

⁴⁰ Hobsbawm 2013, p. 51.

⁴¹ OSCE HCNM 2012; Arraiza 2013a, pp. 73–89.

education there were no national languages as such, but a variety of local variants or dialects based on which national languages were built. In this sense, Hobsbawm points out that national languages are mostly semi-artificial constructs, as opposed to the “primordial foundations of national culture and the matrices of the national mind” some nationalisms would like them to be.⁴² In order for language to be a criterion for nationhood, it is first necessary to choose a particular standard version, useful for administrative use and literary expression.⁴³ The case of Serbo-Croatian is telling in this sense. There were three dialects spoken by Croats in the 19th Century (*Cakavian*, *Kajkavian* and *Štokavian*). The main leader of Illyrianism, Ljudevit Gaj chose *Štokavian* to represent the unity of South Slavs.⁴⁴ Later on, Serbian, Croatian, Bosnian and Montenegrin would be developed as distinct languages following the tumultuous developments of the history of Yugoslavia. Official academies of the Serbian, the Croatian, the Bosnian and the Montenegrin languages exist, even though many linguists will argue they are dealing with the same language. A perhaps comparable case may be seen in the standardisation and official recognition of the Valencian and Mallorquin varieties of the Catalan language within their regions.⁴⁵ Valencian has its official institute of language.⁴⁶ Mallorquin does not have its own regulatory body, but may claim to have standardised its grammatical rules the earliest (in 1835).⁴⁷ Group identities may therefore be shaped through language standardisation and education

⁴² Hobsbawm 2013, p. 54.

⁴³ Ibid.

⁴⁴ Hobsbawm 2013, p. 55.

⁴⁵ Arraiza 2014, pp. 12–14.

⁴⁶ Autonomous Region of Valencia, Law 7/1998, 16 September 1998, *On the Creation of the Valencian Academy of Language*, Official Gazette of the Autonomous Region of Valencia No. 3334.

⁴⁷ Amengual 2010.

policies which reflect a search for homogeneity and difference. As Gellner explains, standardisation and differentiation takes place even if varieties are closer to each other than the various forms of Arabic, considered a single language.⁴⁸

Following an instrumentalist approach to the understanding of groups, elites are the primary agents in pursuing ethnic differentiation. Instrumentalist authors see ethnic mobilisation as a result of the strategic action of elites, which manipulate ethnicity for the sake of power.⁴⁹ Paul Brass, for example, believed that Pakistan was created thanks to the actions of Muslim elites who used Islamic symbols to mobilise the masses for their own benefit. Contrary to this, Francis Robinson considered that existing Muslim attachments – the *Umma* – led Muslims to pursue autonomy in order to preserve their language and culture.⁵⁰ Elites are nevertheless part of society: the “masses” may not irrationally follow any political proposal without considering self-interest and dignity.⁵¹

Indeed, the possibility of using institutional design to influence conflict is a feature of the institutionalist tradition of enquiry.⁵² The design of political institutions has an impact on identity and on inter-group relations and therefore appropriate legal and political institutions are to be created for each defined community.⁵³ Miroslav Hroch for example proposes a three-phased nation building scheme, starting with enquiry and dissemination of cultural distinctiveness, followed by national activism and mass

⁴⁸ Gellner 2008, p. 43.

⁴⁹ Varshney 2007, pp. 274–291; Varshney 2003, p. 88.

⁵⁰ Smith 2010, p. 59.

⁵¹ Varshney 2003.

⁵² Lijphart 1977; Horowitz 2000; Choudhry 2009, p. 577; Grofman 1997, pp. 1–22.

⁵³ Varshney 2007, pp. 274–291.

mobilisation.⁵⁴ Autonomy design may be seen as a form of “negotiating nationalisms”, or competing nation building *projects*. The term “project” is here of particular relevance, because the scheme of an elite seeking to awaken a national consciousness serves only as a description of a political enterprise but not of a social process.⁵⁵ Indeed, the process of nation building may be unpredictable. Florian Bieber describes the paradox of Montenegrin identity, which has actually decreased as a self-identified category since the independence of Montenegro. Yugoslav and post-Yugoslav Montenegrin institutions not only failed to consolidate a stable Montenegrin titular identity, but also, fewer and fewer individuals self-identified as Montenegrin as time went on.⁵⁶ Another failed example is the unsuccessful consolidation of a Silesian identity and language in Poland.⁵⁷

2.2. Modernist and Essentialist Understandings of Group Identities

When institutionalist theorists such as Donald Horowitz studied in-depth the issue of identity and conflict in the 1980’s, a vision of national identity as fixed or essential was dominant.⁵⁸ It was commonly assumed that that indigenous communities, national minorities, indigenous peoples and other groups constituted fixed identifiable social groups which could be unproblematically given a label in law. Such an understanding of identity is opposed by the notion that group identities are contextual, fluid constructs, as reflected in modernist views. Hence, essentialists maintain that the force

⁵⁴ Hroch 1993, p. 7.

⁵⁵ Norman 2006.

⁵⁶ Bieber & Jenne 2014, pp. 1–30.

⁵⁷ Dembiska 2013, pp. 47–66. ECtHR Judgment of *Gorzelik v. Poland* (Application no. 44158/98), 17 February 2004.

⁵⁸ Horowitz 1985, p. 13; Varshney 2007, 274.

of ethnic or “ancient” ties as essential categories is stronger than the civic ties created by modern states. Essentialist nationalism understand nations as equal to ethno-cultural communities defined by fixed cultural traits. For authors like Walker Connor, man is a “national” (not rational) animal and “shared ancestry” is a determinant.⁵⁹ There are different versions of this position. Anthony Smith differentiates between perennialists and primordialists.⁶⁰ Perennialists are those who consider that nations have existed for a very long time. The nation is therefore a universal phenomenon applicable to any historical age. Primordialism is a similar view, which considers that nations are timeless, almost spiritual, categories which existed in the “state of nature” a long time ago. There are sociobiological versions of primordialism which highlight genetic ties between group members. Clifford Geertz writes about “primordial attachments” which are “assumed givens of social existence”.⁶¹ Other primordialists simply attach importance to the seemingly widespread belief in primordial nations.⁶²

Constitutions often contain an essentialist scheme of identities and languages. The Nicaraguan Constitution considers the existence of indigenous peoples as part of a multi-ethnic “people of Nicaragua”, which in turn is an integral part of the “Central-American nation”.⁶³ The Autonomy Statute of the Atlantic Coast names each group (Miskito, Rama, Creole, Garifuna), mentioning the exact number of Rama (850) and even Rama language speakers (thirty-five).⁶⁴

⁵⁹ *Ibid.*, p. 280; Connor 1972.

⁶⁰ Smith 2010, pp. 47–66.

⁶¹ Geertz 1973, p. 259; May 2008, p. 29.

⁶² Smith 2010, pp. 29, 53–58.

⁶³ Arts. 5 and 8, Constitution of Nicaragua.

⁶⁴ Art. 2 of the Nicaragua Atlantic Coast Autonomy Statute mentions that there are 850 Ramas, of whom only 35 have retained their language.

Essentialism is criticised frontally by the modernist position taken in this dissertation which understands the idea of the nation as a product of modernity.⁶⁵ Within the modernist camp, the *constructivist* critics argue that national and ethnic identities are in fact historically contingent social constructions. Modernity has brought the masses into the framework of identity formation and created previously non-existent extra-local or extra-regional identities. Identities are shaped by processes such as technology (the print), ideological movements (nationalism) and/or colonial policies. Hobsbawm, Brubaker, Gellner and Anderson provide such socio-economic explanations.

Brubaker rejects the category of nation as an analytical tool and invites us to see nations “not as substance but as institutionalised form”, and “to think of nationalism without nations”.⁶⁶ Thus, he warns against the adoption of categories of practice as categories of analysis.⁶⁷ Gellner considers that nations as natural phenomenon are a myth: nationalism takes pre-existing cultures and creates something new.⁶⁸ Nationalism is not so much the definition and assertion of mythical units, but rather the crystallisation of new units suitable for modern conditions.⁶⁹ He describes nationalism not as the result of a will to impose a culture, but rather the product of an objective need for homogeneity arising in the modern industrial age, where society can only function with a mobile, literate and interchangeable population. Equally, only through a common language the promise of education and citizenship is possible. Hence, nationalism is not the “*awakening* of an old latent, dormant force”, but “the

⁶⁵ Hobsbawm 2013.

⁶⁶ Brubaker 1996, pp. 18–21.

⁶⁷ *Ibid.*, pp. 13–15.

⁶⁸ Gellner 2008, p. 47.

⁶⁹ *Ibid.*, p. 48.

consequence of a new form of social organisation, based on deeply internalised, education-dependent high cultures, each protected by its own state” (or for our purposes by a sub-state entity).⁷⁰ Earlier, Benedict Anderson pointed to nationalism’s contradictions (a modern phenomenon claiming antiquity, universal but local, politically powerful and philosophically poor) and called nations “imagined communities”, not in the sense of being inauthentic, but because the members of the community never really get to know each other.⁷¹ For Anderson, the fixing of languages and their differentiation were unconscious processes resulting from “the explosive interaction between capitalism, technology and human linguistic diversity.”⁷² The alternative approach of “ethno-symbolism” combines both constructivist and primordialist understandings by appreciating the value of culture and symbols as important elements within the equation.⁷³ Ethno-symbolism rejects the elite-oriented analysis of modernists by acknowledging a reciprocal relation between lower strata and elites. Moreover, it calls for longer term analysis, avoiding “retrospective nationalism” (anachronistically reading into the past current political trends).⁷⁴

Another significant approach is that of situational ethnicity, which emphasises individual choice and ethnic boundaries rather than their cultural content. According to Fredrik Barth, the definition of ethnic groups takes place in relation to their social interactions with other groups as well as the boundaries which are thereby established.⁷⁵ Geertz points out that political elites which control the central

⁷⁰ Gellner 2008, pp. 45–46.

⁷¹ Anderson 2006, p. 1–7.

⁷² Anderson 2006, p. 45–46.

⁷³ Smith 1998; Smith 2010, pp. 47–63.

⁷⁴ Smith 2010.

⁷⁵ May 2008, p. 30–31.

government see language policies which support a primary “state” language as integrative or “civic” and demands for minority language recognition as essentialist and “ethnic” and irrational.⁷⁶ In this vision, state nationalism is seen as legitimate before the sub-state, illiberal, ethnic nationalism. Here, a parallel may be drawn with the concept of inclusive and exclusive identities. The state language will be presented as inclusive and integrative while the minority “ethnic” language will be portrayed as exclusive. There are nevertheless situations in which such a scheme does not fit social and political realities (such as inclusive policies in Catalonia and the Basque Country where identity is defined in voluntaristic terms).

In this dissertation, within an overall modernist approach I also take a mixed ethno-symbolic view to the shaping of group identities, acknowledging the realistic understanding of the history of the idea of nations and nationalism provided by the modernists as well as the need for a longer span of analysis in the understanding of language and culture throughout history beyond the recent developments of modern industrialisation and the creation of nation states (and nation state projects).

2.3. Peripheral Linguistic Nationalism as a Principle in the Making of Autonomy Regimes

The above comparison of different approaches to the issue of national identity serves to deepen our understanding of the role of nationalism in the making of autonomy institutions and its impact on language and culture. Nationalism, aiming at making the political and the national congruent, also aims at making linguistic units political units, which may become autonomy regimes. This is so because of the role language has had in the making of the states, both internally through language standardisation

⁷⁶ Geertz 2000; Varshney 2003, p. 85–99.

and homogenisation as well as externally, claiming territorial boundaries. Language standardisation was necessary in the transition from indirect to direct rule, which is seen by Michael Hecter as a primary factor in the origins of nationalism.⁷⁷ Medieval kings ruled indirectly through bilingual intermediaries. However, under direct rule a common language was needed to communicate directly with citizens as well as between members of the administration.⁷⁸ In this sense, language homogenisation is an essential part of the project of the modern liberal state. Hence, John Stuart Mill saw linguistic homogeneity as necessary feature of democracy, “free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government, cannot exist”.⁷⁹ Such a need is present both to “civic” states and “ethnic” sub-state entities, leading to competition between centre and periphery.

While externally, nationalism seeks to establish political boundaries to national groups, internally it is a homogenising force. As such, it uses pre-national cultural materials to create the idea of a national unit. This does not mean that every single linguistically differentiated group will engage in a nation building exercise. Such processes however have occurred since at least the 18th Century and modern industrialisation. In a multi-national state therefore there are State nationalism forces aiming to create a homogeneous national identity which is in Anderson’s terms “joinable in time” through language and peripheral forces with a similar goal: to strengthen group boundaries through culture (including language) standardisation

⁷⁷ Hecter 2000.

⁷⁸ Choudhry 2009, p. 591

⁷⁹ Mill 1862; Gellner 2008, pp. 45–46.

and homogenisation.⁸⁰ For Anderson, internal homogenisation is a key element in the “imagining” of a nation.⁸¹ Hence, the creation of educational systems runs parallel to the birth of the modern nation-states.⁸² In this sense, children tend not only to be taught to understand society, but rather to “approve of it, to be or become good citizens of the USA or Spain or Honduras or Iraq”.⁸³ According to Brubaker, “nationalising States” are those polities which are at an early stage in the process of creating or becoming nation-states.⁸⁴ Teaching history seeks to “awake national consciousness” by presenting the “past life of the nation”.⁸⁵

Constitutional design reflects the tension between the will to construct a nationalising state and the need to recognise other national and/or indigenous identities. According to its Basic Laws, Israel is a “Jewish and democratic State” (a controversial 2011 bill⁸⁶ sought to transform it into a “Nation-State of the Jewish People”), Hungary’s Constitution is proclaimed by “the members of the Hungarian Nation”, the Spanish Constitution is based on the “indissoluble unity of the Spanish nation” (and the “nationalities and regions which are part of it”).⁸⁷ On the opposite end, Bolivia is constituted as “a Unitary Social State of Communitarian Multinational Law (...), intercultural, decentralised and with autonomies (...) based on (...) linguistic pluralism (...) within the integrative process of the state”.⁸⁸ In Macedonia,

⁸⁰ Anderson 2006, p. 145.

⁸¹ *Ibid.*, p. 44.

⁸² Bartulović 2006, pp. 51–72, 56; Gellner 2008; Anderson 2006, pp. 46–49; Hobsbawm 2013, pp. 59–63.

⁸³ Bartulović 2006, p. 57.

⁸⁴ Brubaker 1996; Gutmann 1987, p. 23.

⁸⁵ Bartulović 2006, p. 65; Anderson 2006.

⁸⁶ Draft Basic Law: Israel as the Nation-State of the Jewish People, 3 August 2011.

⁸⁷ Art. 1, *Israel Basic Law, Human Dignity and Liberty*, 17th March 1992; Preamble, *Fundamental Law of Hungary*; Article 2, Constitution of Spain.

⁸⁸ Art. 1, Constitution of Bolivia.

the Ohrid Framework Agreement reformed the Constitution so as to avoid designing the state as belonging to one or the other nation, but rather to its citizens.⁸⁹

In this sense, the creation of autonomy often responds to the demands of “peripheral nationalism”, defined by Hechter as the “nationalism that is embodied in the attempt to assimilate or incorporate culturally distinctive territories in a given state”.⁹⁰ Peripheral nationalism is present “when a culturally distinctive territory resists incorporation into an expanding state, or attempts to secede and set up its own government (as in Québec, Scotland and Catalonia). Often this nationalism is spurred by the the efforts of state-building nationalism (...)”.⁹¹

Linguistic nationalism has its origins in 19th Century Europe, which was in the midst of a process of modernisation and where the choice of language “in the office and the school” became relevant.⁹² At the heart of it lies the implicit idea that the linguistic and the political is united (be it at state or sub-state level).⁹³ Linguistic nationalism pursues an ideal of language purity, uncontaminated by foreign words and imagines an ideal national subject, essentially monolingual, whose linguistic soul corresponds to a single nation deserving a state structure.⁹⁴ As Charles Tilly highlighted it, the language of nationhood and the symbolic use of the defence of language purity and survival itself are powerful narratives to mobilise the public in struggles over extraction and power.⁹⁵ Since the inception of European nationalisms territory has been imagined by linguistic nationalism as representing the body of the

⁸⁹ Weller 2005, p. 435.

⁹⁰ Hechter 2000, p. 15–17.

⁹¹ *Ibid.*

⁹² Hobsbawm 2013, pp. 95–100.

⁹³ Gellner 2008, p. 1.

⁹⁴ *Ibid.*, p. 56.

⁹⁵ Brubaker 2010, pp. 375–381.

nation and the language its soul. Constitutional and national identity have been thought of as ideally identical.⁹⁶ 19th-Century German romantics believed in the superiority of their language over others and imagined their nation as ideal, seeking cultural hegemony within a territory.⁹⁷ Romantic beliefs and myths about language purity have later been brought into question. Michel Foucault, observed different periods in the historical evolution of languages, starting with an initial “resemblance”, moving on to a Cartesian view of language as a “discourse” expressing ideas and finally developing into the current “modern” understanding of language as an autonomous “object” and the birth of philology.⁹⁸ The latter understanding of languages as autonomous objects fits well the discourses of linguistic nationalism, which emphasised a romanticised “mother tongue”: the irreplaceable language with which an individual can express his or her inner thoughts and feelings. Individuals are thereby supposed to belong to one language community only.⁹⁹ Yasemin Yildiz criticises such an approach using examples such the multilingual world of Franz Kafka (where Yiddish, German, French and Czech are significant) and its power relationships and proposes to shift from a monolingual to a post-monolingual paradigm. According to Yildiz, “we need to reimagine subjects as open to criss-crossing linguistic identifications, if not woven from the fabric of numerous linguistic sources (...) Languages do indeed relate to identities, but not in any predetermined, predictable way (...)”.¹⁰⁰

⁹⁶ Rosenfeld 2010, pp. 152–156; Anderson (2006), pp. 67–82.

⁹⁷ Hannum 1996, p. 458.

⁹⁸ Manjali 2005, pp. 81–107.

⁹⁹ Yildiz 2012, pp. 30–66.

¹⁰⁰ *Ibid.*, pp. 203–211.

Minority language groups in places like Catalonia or Québec have united language rights claims with those of political self-government (be it autonomy or secession). In the Catalan case, the protection of Catalan language is presented as intimately-related with the claim of secession (even though the domestic tax system has a prominent place the debate).¹⁰¹ Such groups have usually undergone a historic process of language homogenisation and standardisation which helped create the homogeneous (linguistic) identity. However, this is not a watertight description. As Gellner points out, the linguistic identity of the Scottish Highlands within Scotland is much greater than that of Scotland within the U.K., however there is no Highland Nationalism.¹⁰² Also the economic dimension of language use should not be underestimated. Language policies in Sri Lanka in the 1970s led to a redistribution of economic opportunities away from Tamil for the benefit of the Sinhalese.¹⁰³ Broadly speaking, however, the quest for a fair autonomy and language rights framework may be understood at least partly as the response of the legislator to nationalist mobilisation on the basis of language.

Language laws and autonomy are seen as leading either to social cohesion or in the worst cases to secession or war. For example, language was a highly divisive issue in the making of India's Constitution. Political mobilisation by Urdu-speaking political forces led to the creation of Pakistan and demands by non-Hindi speakers led to the creation of linguistic states in the 1950s and 1960s.¹⁰⁴ In 1948 a "Report of the Linguistic Provinces Commission" (the Dar Commission) described such demands

¹⁰¹ Arraiza 2013b, pp. 101–118.

¹⁰² Gellner 2008, p. 46.

¹⁰³ Choudhry 2009, p. 599.

¹⁰⁴ *Ibid.*, pp. 579, 585, 586.

for linguistic provinces as “parochial patriotism” against the legitimate Indian nationalism: “[i]f India is to live, there simply cannot be an autonomous State anywhere in India for any group, linguistic or otherwise; and no sub-national province can be formed without preparing the way for ultimate disaster”.¹⁰⁵ Hence, the 1950 Indian Constitution declared Hindi to be the official language of the union. The use of English for official purposes was initially supposed to end 15 years after the constitution came into force. However, the idea of making Hindi the only official language led to massive opposition (sometimes violent) in non-Hindi speaking states. As a result, English was kept as a “subsidiary official language”.¹⁰⁶ In this line, the 1956 Kher Commission took the view that making Hindi an official language would be illiberal as it would confer a great deal of symbolic power on a large minority, creating two classes of citizens.¹⁰⁷ There is still a degree of controversy over the subject. In 2010 the Gujarat High court ruled that there was no legal obligation to label products in Hindi, as it was not India’s “national language” but rather an official language together with English.¹⁰⁸

In sum, peripheral linguistic nationalism is a significant factor in the making of autonomy regimes. At the same time, the devolution of competences over language and education allows for the shaping of identities. The result is an imperfect reciprocal relation in which language, society and institutions mutually and continuously shape each other.

¹⁰⁵ Choudhry 2009, p. 588.

¹⁰⁶ Constitution of India; 1963 Official Languages Act; 1976 Official Languages Rules.

¹⁰⁷ *Ibid.*, p. 595.

¹⁰⁸ Gujarat High Court, *Sureshbhai vs Union*, SCA/2896/2009 2/ 4, 13 January, 2010.

2.4. Multiculturalism and the Accommodation of Linguistic Diversity

The fact that national identity may be explained through modernist lenses does not mean it is a weak force. The powerful drive of culture in politics is indeed not diminished by its socially constructed nature.¹⁰⁹ There is some consensus on the idea that cultural differences must be accommodated in order to perfect the liberal Westphalian State. A degree of recognition is needed to ensure equal rights and opportunities. Multiculturalism is the political principle that legitimises the institutional accommodation of cultural diversity. In Kymlicka's words "liberal democratic states should not only uphold the familiar set of common civil and political rights of citizenship which are protected in all liberal democracies; they must also adopt various group-specific rights or policies which are intended to recognise and accommodate the distinctive identities and needs of ethnocultural groups".¹¹⁰ As Charles Taylor puts it, speakers of minority languages are at a distinct disadvantage.¹¹¹ He proposes a form of liberalism which recognises cultural difference.¹¹²

Multiculturalism is criticised for adopting an essentialist understanding of groups. Indeed the legal accommodation of ethnic and national differences begs a legal definition of the groups which are to be accommodated (as the Nicaragua example mentioned earlier), which automatically leads to simplistic definitions. Indeed, it is important that the "cultural lenses" of law are calibrated to the inner complexity of identity and language.¹¹³

¹⁰⁹ Kaufmann 1996, pp. 136–175.

¹¹⁰ Kymlicka 2001, p. 42.

¹¹¹ Choudhry 2009, p. 596.

¹¹² Taylor 1994.

¹¹³ Arraiza 2013a, p. 76.

Linguistic diversity is understood by multiculturalists as a value insofar as it is valuable to individuals. By asserting that individuals exercise freedom only through their societal cultures, Kymlicka combines individualism with group rights, capturing in a sense the nationalist perspective.¹¹⁴ Individual autonomy is accordingly substantive only when a cultural context is respected. Cultural belonging is a precondition for autonomy, for meaningful choice-making.¹¹⁵ Culture provides the “context of choice” which makes individual autonomy (seen as the power of forming and revising and individual plan of life) possible. States cannot be, culturally (or linguistically) neutral and do not provide such context *per se*.¹¹⁶ Hence, special rights (including self-government rights) are therefore needed because arbitrary advantages must be addressed.¹¹⁷ In his words, “[t]he freedom which liberals demand for individuals is not primarily the freedom to go beyond one’s language and history, but rather the freedom to move around one’s societal culture”.¹¹⁸ Kymlicka distinguishes between migrants’ and national minorities’ rights (“polyethnic rights” – protection for certain practices – for migrants and self-government and special representation for national minorities).¹¹⁹

Following this line, societal cultures have an inherent “right to survive” which includes a right to maintain their – sometimes vulnerable – languages. This is possible if they are numerically significant within a territory and if their language is a language

¹¹⁴ Laitin & Reich 2003, p. 89.

¹¹⁵ Kymlicka, 1989.

¹¹⁶ Kymlicka 1995, p. 113; De Schutter 2005, pp. 17–40.

¹¹⁷ Kymlicka 1992, pp. 140–146; Rawls 1971, p. 96.

¹¹⁸ Kymlicka 1995, p. 90.

¹¹⁹ *Ibid.*, pp. 7, 26–33.

of opportunity in that territory.¹²⁰ In such situations, groups may demand that language rights are recognised. David Laitin and Rob Reich argue in this sense that a “liberal democratic approach to linguistic justice” should be followed in which institutions should allow much more than simply the freedom to maintain one’s own culture, but rather also to express whichever other preference and choice.¹²¹ Liberal multiculturalism is important in the context of autonomy design because it contains a strong defence of self-governance and language rights. Kymlicka considers autonomy an emblematic policy approach for national minorities.¹²² He notes, though, the lack of support for such arrangements.¹²³

Minority language rights are in a sense a form of autonomy (cultural, non-territorial) which allows for a minority to maintain its language as a feature of its societal culture. Territorial autonomy facilitates the politics of recognition by devolving to the sub-state level the capacity to develop law and policy on language matters. In cases where minorities are territorially concentrated, territorial autonomy allows groups to develop their own laws and policies. Overall, multiculturalism acknowledges the legitimacy of the various claims of minority groups and attempts to build a liberal framework in which to accommodate them. Self-government for national minorities in its diverse forms is an integral part of such a framework.

¹²⁰ Laitin & Reich 2003, p. 91; Kymlicka 2001, p. 79.

¹²¹ *Ibid.* 2003, p. 92.

¹²² Kymlicka 2007, p. 71.

¹²³ Kymlicka 2009, pp. 209–216, 263.

2.5. Human Rights Basis for Managing Linguistic Diversity through Autonomy Regimes

2.5.1. An International Legal Basis for Autonomy and Minority Rights

Both multiculturalism and peripheral nationalism support the claim that there are human interests so important in the use of minority languages and on the effective political participation of minorities so that a series of human rights is created.¹²⁴ Human rights provide a framework which can serve as a basis for multicultural policies in multi-nation states. Hence, international norms on self-determination, political participation and minority language rights offer concrete expressions as to how the rights of minorities may be accommodated through different forms of autonomy. The inherent wide discretion of the states is mirrored in the lack of definition and the weakness of the legal obligations present in such standards. Indeed, the most developed instrument concerning autonomy is a non-binding policy document (the OSCE HCNM Lund Recommendations).¹²⁵ That said, it is important to understand the implications of the right to self-determination, to effective political participation and to minority language use.

2.5.2. Self-Determination

Often peripheral nationalists in places such as Scotland, the Basque Country or Catalonia understand that their claims amount to a right of self-determination understood as a right to secede and create a new state. The right of self-determination explicitly recognises an entitlement of “peoples” to “freely determine their political

¹²⁴ Spencer 2008, p. 242.

¹²⁵ OSCE HCNM Lund Recommendations.

status and freely pursue their economic, social and cultural development”.¹²⁶ There is an implicit requirement for the group in question to be considered a people under international law. Such a requirement is by no means met by all linguistic groups. Indeed, the existence of more than 7,000 living languages makes such enterprise impossible.¹²⁷ The importance of language differences for self-determination is noteworthy. As Hurst Hannum states, “[l]anguage is perhaps the most distinctive feature of a culture (...) Self-determination, as that concept developed in the 19th and early 20th Centuries in Europe, was based primarily on linguistic groups, rather than on religion, politics or economics”.¹²⁸

As discussed in the constitutive article “From the “Right to Decide” to the “Duty to Negotiate” and Back: The Catalonian Bid for Independence in Domestic and International Perspective”, the right of self-determination does not entail a right to unilateral secession.¹²⁹ It is subject to the territorial integrity of states, at least as long as governments are representative of the entire population, including minorities. Territorial integrity is protected at least while no gross human rights violations against

¹²⁶ Common Art. 1, ICCPR and *International Covenant on Economic, Social and Cultural Rights*, UN General Assembly Resolution 2200A (XXI), 16 December 1966, U.N.T.S., vol. 993 (henceforward ICESCR).

¹²⁷ This is the figure used by the Ethnologue, <<http://www.ethnologue.com/world>>, accessed on 1 September 2014.

¹²⁸ Hannum 1996, p. 458.

¹²⁹ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the UN General Assembly on 24 October 1970 (G.A. Res. 2625/XXV). UN General Assembly Resolution 1514 (XV) (henceforward Friendly Relations Declaration; Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted in 1960; Supreme Court of Québec. Reference Re Secession of Québec, [1998] 2 SCR 217, 25506, para. 154.

a minority group have taken place.¹³⁰ Hence external self-determination may be possible if internal self-determination is blocked.

Self-determination is distinct from the minority rights reflected in Article 27 of the ICCPR.¹³¹ It has a well recognised internal dimension by which minorities within a state may acquire a share in it through effective political participation (including autonomy). According to Suksi, “[m]aking laws is equal to the effective exercise of power over the territory of a state”.¹³² Therefore, where territorial legislative autonomies are in place, their powers constitute a share in the internal self-determination (and sovereignty) of the state. The regulatory and administrative powers which may be found in administrative autonomy, functional autonomy or cultural autonomy may be considered, to a lesser extent, to constitute also a share in self-determination. An understanding of autonomy as internal self-determination is clearly reflected in the 2007 United Nations Declaration on Indigenous Peoples, which recognises the right to autonomy of such peoples as a means to exercise self-determination.¹³³ In all, self-determination serves as a blueprint for democratic governance by asserting the ultimate sovereignty of the people.

¹³⁰ Friendly Relations Declaration; Section I(2), 1993 Vienna World Conference Declaration and Programme of Action.

¹³¹ UN Human Rights Committee (1994), *para.* 1.

¹³² Suksi 2011, pp. 138–139.

¹³³ Art. 4, *Declaration on the Rights of Indigenous Peoples*, U.N.G.A.R. 61/295107th Plenary Meeting, 13 September 2007 (henceforward 2007 Declaration on Indigenous Peoples).

2.5.3. Minority Language Rights

International human rights standards do not contain strong minority language rights.¹³⁴ One example is Article 27 of the ICCPR (the rights of minorities), which has a cautious wording protecting primarily negative rights of individuals belonging to minorities.¹³⁵ The 1992 UN Declaration on Minorities is similarly soft-worded.¹³⁶

Language rights are a highly contextual type of rights linked to localised historical processes.¹³⁷ Indeed, the promotion of a particular culture does not fit well with more universalistic causes. Minority language provisions rest in a grey zone between rights and policy. The strongest development of the rights of minorities concerning languages as binding legal obligations has primarily been undertaken by the European FCNM and ECRML, where the latter offers rather than a list of rights a variety of policy options presented as a menu for States to choose the depth of their commitments. Language issues are highly present throughout the FCNM's provisions. Article 5 entitles minorities to "maintain and develop their culture" ensuring their existence as a group, but also shaping how it is defined (e.g., standardising and homogenising a particular language), which signifies a considerable shift in comparison with Article 27 of the ICCPR (where the right is limited to the enjoyment of a culture).¹³⁸ Article 10 allows national minorities to use their language in the public

¹³⁴ Common Article 1, ICESCR & ICCPR. Art. 2, United Nations *Universal Declaration on Human Rights*, U.N.G.A.R. 217 A (III) of 10 December 1948; Article 2(1), ICCPR; Article 2.2, ICESCR; Article 14, Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS 194, 4 November 1950; Art. 2, United Nations *International Convention on the Elimination of Racial Discrimination*, U.N.G.A.R. 2106 (XX), 21 December 1965.

¹³⁵ Art. 27, ICCPR.

¹³⁶ United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, U.N.G.A.R. 47/135, 18 December 1992.

¹³⁷ Arzoz 2009, p. 573.

¹³⁸ Art. 5, FCNM.

sphere and Article 14 implies a right to language reproduction through education where minorities are present traditionally or in large numbers.¹³⁹ Combined with participatory and self-government rights, this gives minorities the possibility to pursue nation building at the sub-state level.

Policy documents by international organisations such as the OSCE HCNM recommendations, reinforce the trend of language rights through non-binding norms set up as policy choices.¹⁴⁰ Reluctance on behalf of the states to grant solid language rights reflects their caution not to endanger the foundations of their nation-state structures, the need for efficiency in public administration as well as the intrinsically political character of language rights.

Indigenous peoples within the jurisdiction of the FCNM and the ECRML (e.g., Sami) normally benefit from its protection.¹⁴¹ On a more global scale, the autonomy rights combined with the long list of linguistic rights contained in the 2007 Declaration on Indigenous Peoples establish a mixed regime of territorial and non-territorial autonomy over the indigenous peoples' own languages.¹⁴² However, there is no explicitly recognised right to use the indigenous peoples' own languages in dealing with the non indigenous public administration.

¹³⁹ De Varennes & Thornberry 2005.

¹⁴⁰ OSCE HCNM, Oslo & Hague Recommendations.

¹⁴¹ Norwegian Sami do not desire the FCNM's protection, being protected under ILO standards. AC FCNM, *Third Opinion on Norway* (2011), para. 11; *Third Opinion on Finland* (2011); *Third Opinion on Sweden* (2012); *International Labour Organisation Convention 169*, Geneva, 76th ILC session, 27 Jun 1989; CE ECRML, *Application of the Charter in Finland*, 4th Monitoring Cycle (2012), p. 34; *Application of the Charter in Sweden*, 4th Monitoring Cycle (2011); *Application of the Charter in Norway*, 4th Monitoring Cycle (2012).

¹⁴² Arts. 13, 14 and 16, UN Declaration on Indigenous Peoples.

2.3.4. Participation in Public Affairs

The right to participate effectively in public affairs is at the heart of autonomy arrangements. Participation in conjunction with self-determination is often referred to as the right of the people to participate in government and determine the content of its policies. The 1990 Copenhagen Document of the Conference on Security and Co-operation in Europe refers to the possibility of establishing autonomous administrations.¹⁴³ Article 15 of the FCNM, while not explicitly recognising a right to autonomy, has been interpreted by Marc Weller as an entitlement of minorities to self governance over issues that are relevant to them. The reluctance of states to accept autonomy led to a reference to participation in decisions “where they live” being struck from the draft Article 15. However, the Explanatory Report supports decentralisation and local governance as subsidiarity.¹⁴⁴

Article 15 of the FCNM also points out to an obligation of the state parties to “create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life”, which in linguistically divided societies has undoubtedly a linguistic dimension.¹⁴⁵ In this regard, the FCNM could be interpreted as implying a right of national linguistic groups to self-governance. The ECRML supports participation in the form of advisory bodies in its

¹⁴³ Copenhagen Meeting Document of the Conference of the Human Dimension of the CSCE (1990), para. 35.

¹⁴⁴ Weller 2005, p. 437; Art. 4(3), Council of Europe, *European Charter on Local Self-Governance*, Strasbourg, 15 November 1985. 1 E.T.S. 122.

¹⁴⁵ Art. 15, FCNM.

Article 7(4).¹⁴⁶ In turn, the Lund Recommendations develop in detail the notions of territorial and non-territorial self-governance for minorities.¹⁴⁷

Finally, as for the relation between language rights and autonomy, little is to be found in international standards. The AC FCNM thematic commentary on language states that “a federal structure, decentralisation and various systems of autonomy can be beneficial to persons belonging to minorities. Cultural autonomy arrangements, for instance, may aim to delegate to national minority organisations important competences in the area of minority culture, language or education”.¹⁴⁸ In its commentary on participation the AC FCNM refrains from analysing autonomy arrangements or their relation to language rights. It denies a right to autonomy although recognises that autonomy can foster effective participation. It singles out non-territorial autonomy: “corresponding constitutional and legislative provisions should clearly specify the nature and scope of the autonomy system and the competencies of the autonomous bodies.”¹⁴⁹ Logically, such a recommendation is also valid for territorial autonomy arrangements. Exceptionally, the AC FCNM has supported autonomy arrangements (Gagauzia in Moldova).¹⁵⁰

It is worth noting that the International Labour Organisation Convention No. 169 of 1989 devotes considerable attention to effective participation. This includes requirements for consultation with affected indigenous communities in government

¹⁴⁶ Art. 7(4), ECRML.

¹⁴⁷ Weller 2005, p. 434.

¹⁴⁸ AC FCNM 2012, *para.* 90. The same idea is present in the Committee’s Commentary on Political Participation. AC FCNM 2008, *paras.* 67, 133–137.

¹⁴⁹ AC FCNM 2008, *paras.* 133–137

¹⁵⁰ Weller 2005, p. 437. AC FCNM State Report of Serbia and Montenegro (2002); AC FCNM Opinion on Serbia and Montenegro (2004), *para.* 111.

decisions affecting their interests, guaranteed representation and a strong attention to self-governance in questions related to development, land use and traditional institutions.¹⁵¹ As for migrants, international law does not specifically grant minority rights to such groups. However, some entitlements are recognised for example concerning Article 27 of the ICCPR: there, the Human Rights Committee commented that there is no temporal requirement for a minority to “exist” in a country, and therefore migrants may be persons belonging to minorities.¹⁵² In this sense, the existence of a minority does not depend on the decision by a state but rather on objective criteria.¹⁵³ In addition, migrant workers have a series of language rights recognised in the UN Migrants Convention.¹⁵⁴ These are the basic linguistic rights: non-discrimination on the basis of language, rights in criminal proceedings as well as a qualified right for migrants’ children to be taught the local language and the mother tongue.¹⁵⁵ There is no right to self-government of migrants in international law.

In all, human rights and in particular regional European standards on minorities support the multicultural enterprise by creating a set of qualified obligations for public authorities to establish institutions which respect and protect cultural diversity. How such a complex project is put into practice and what relation is established with linguistic diversity is dealt with in the following chapters.

¹⁵¹ Weller 2005, p. 433.

¹⁵² UN Human Rights Committee, General Comment 23 on Article 27, *para.* 5(2).

¹⁵³ *Ibid.*

¹⁵⁴ United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, U.N.G.A.R. A/RES/45/158, 69th plenary meeting, 18 December 1990 (UN Migrants Convention).

¹⁵⁵ Arts. 1, 7, 16, 18, 22, 33 and 45, UN Migrants Convention.

2.6. The Institutional Design of Autonomy Regimes

2.6.1. The territoriality and personality principles

In order to understand how linguistic diversity may influence the design of autonomy arrangements it is important to understand the variety of processes which lead to them. Autonomy arrangements are designed as part of law-making processes which in some cases have lasted decades - if not centuries - and in others months or even days. Sometimes these are the result of domestic law-making (Catalonia, Basque Country), international treaties such as the 1946 Paris Agreement over South Tyrol and/or international decisions such as the League of Nations on the Åland Islands or UN Security Council Resolution 1244.¹⁵⁶ In Thomas Benedikter's words: "the design of an autonomy regime is as flexible as the structuring of a federal state or any constitutional setting of a state. Moreover, it is an *open process* propelled by the continuous dynamics of social and political development and the need of improving the quality and efficiency of an autonomy (...)". [Emphasis added].¹⁵⁷

The lawmaker needs to take into account the nature of the language differences and their demographic distribution. The size of the group and its territorial concentration is a fundamental factor in opting for territorial or personality based models. Having a concentration of nearly 20 per cent of Albanian speakers in the Macedonian municipalities is not the same as having a majority of the population

¹⁵⁶ Dayton Accords; Ohrid Framework Agreement; Ahtisaari Proposal; Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 19 December 1984; 1921 League of Nations Decision on the Åland Islands including Sweden's Protest, Official Journal of the League of Nations 697, September 1921 (henceforward Åland Islands Decision).

¹⁵⁷ Benedikter 2009, p. 242.

understanding the minority language (as in the case of Catalonia). The power of influencing language use through education plays a role here. Language immersion policies in education (as Catalonia's "language normalisation") may be used to extend its area of use and integrate newcomers, as part of nation building.¹⁵⁸

Hobsbawm points out that nation building processes normally have a relation with territorial claims.¹⁵⁹ Language use and territorial boundaries however do not coincide, nor does the identification diverse persons attach to it. Should persons have a wide variety of language choices at their disposal or should administrative boundaries drawn following linguistic criteria? Once the decision is made about the recognition of the language, the question, as stated earlier, is whether the norm will be designed following the "personality principle" or the "territoriality principle".

The question of territoriality is a transversal one that affects all other legal policy options. There are indeed territorial dimensions of non-territorial autonomy (linguistic demographic thresholds). Pure territoriality creates an unbalance between citizens who have access to the minority language through education and those who do not. This translates into a myriad of problematic situations concerning access to public employment and other areas in the public sphere. Pure non-territoriality, as in the case of the Serbian language in Kosovo (co-official throughout its territory) may be left unenforceable due to lack of resources or political will. A qualified implementation of territorial and non-territorial norms, such as the one present in Finland with the Finnish and the Swedish language, seems a good blueprint in this sense.

¹⁵⁸ May 2008, p. 247.

¹⁵⁹ Hobsbawm 2013, p. 47.

According to Denise Réaume, the personality principle is more suited for persons speaking a minority language wherever they are and is normally linked to rights-based justifications, while the territoriality principle favours mono-lingualism and is legitimised through utilitarian arguments.¹⁶⁰ Réaume argues that using the word “personality” is misconceiving, as the defining element is the existence of a “viable language community”.¹⁶¹ Thus, territoriality defines the geographical frame of any language policy, usually based on the concentration of minority language speakers.¹⁶² Here, Alan Patten argues that the key question in deciding whether territoriality and personality criteria should be used is the reasonableness of expecting minorities to use majority languages: “[w]here it is reasonable to expect members of the minority to use the majority language in public settings, the territorial principle is acceptable. Where it is not, the personality principle should be preferred”.¹⁶³

2.6.2. Territorial Legislative Autonomy

As there are very different processes leading to autonomy, such arrangements take quite different forms. The models of autonomy regimes are usually classified as territorial (administrative and legislative) and non-territorial (personal, cultural and functional) (Fig. 1).¹⁶⁴ Territorial forms of autonomy include territorial legislative autonomy (such as the autonomous communities of Spain, the Åland Islands, South Tyrol or the Faroe Islands) which is the “classic” form of autonomy regime, including the power to legislate over certain enumerated competencies and where subsidiary

¹⁶⁰ Réaume 2003, p. 271; Patten 2003, pp. 296–321.

¹⁶¹ *Ibid.*, pp. 288–295.

¹⁶² *Ibid.*, pp. 274, 275.

¹⁶³ Patten 2003, p. 304.

¹⁶⁴ Tkacik 2008, p. 372.

powers lie at the central level. It is distinct from federal regimes in the fact that in a federation the subsidiary powers lie at the federal level and the autonomy is not represented and does not directly participate through an institutional mechanism in decision making at the central level.¹⁶⁵

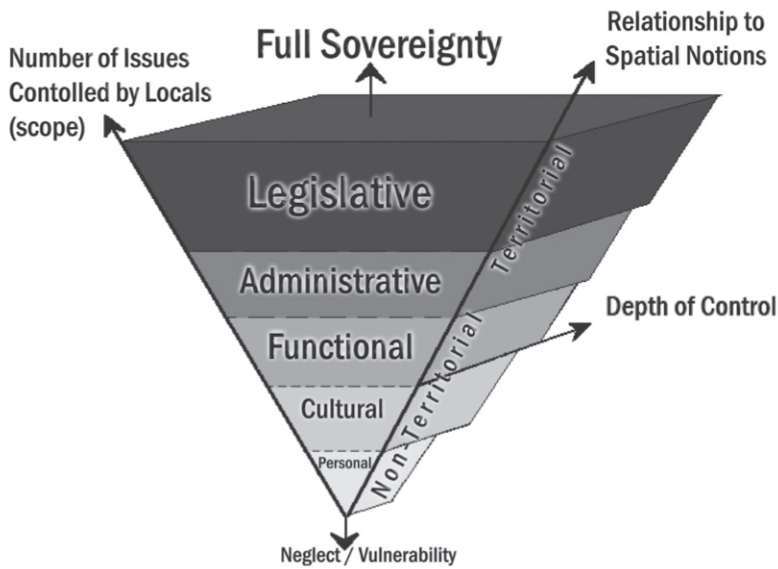


Fig. 1. Forms of autonomy in relation to territory and competences.¹⁶⁶

According to Hurst Hannum there cannot be a real autonomy regime unless there is at least a locally elected legislative body with a minimum of independent legislation, a locally selected chief executive and an independent local judiciary.¹⁶⁷ Such requirements may be considered to be too rigid. Finally, there are territorial autonomies which do not have legislative powers. They do not have the competence to legislate over language and education matters. For example, the Law on the Use of

¹⁶⁵ Suksi 2011, pp. 138–139.

¹⁶⁶ Tkacik 2008, p. 372.

¹⁶⁷ Hannum 1990, pp. 458–466.

Languages in the Atlantic Coast Regions of Nicaragua is a central level law, as neither the South Atlantic Autonomous Region nor the North Atlantic Autonomous Region have the power to legislate over such matters.¹⁶⁸ The autonomous province of Vojvodina in Serbia is yet another case. Vojvodina can only issue sub-legal acts (the statute, provincial decisions, regulations).¹⁶⁹ Nevertheless, these examples will be used to analyse the implications of the territorial principle.

2.6.3. Decentralisation and other territorial arrangements relevant to language policy

Decentralisation or administrative autonomy is a form of administrative devolution at the local level which does not involve legislative powers.¹⁷⁰ It takes place through the devolution of administrative and regulatory powers to the regional and/or the municipal level. Regions are normally not institutionally represented at the central level and their entrenchment is weaker than federal states.

Switzerland, Canada and Belgium offer models of territorial arrangements which are intimately inter-connected with language policy. While these states are federations and do not contain territorial autonomies in the classic sense (leaving aside Nunavut in Canada) they present different relevant approaches to linguistic diversity. As Patten points out, Belgium and Switzerland may be seen as the clearest examples of a territorial approach to multilingualism, while Canada is a good example of a country giving primacy to the personality principle.¹⁷¹

¹⁶⁸ Law No. 162, On the Official Use of the Languages of the Communities of the Atlantic Coast of Nicaragua, 22 June 1993.

¹⁶⁹ Art. 27, *Autonomy Statute of Vojvodina*, Official Gazette of the Autonomous Province of Vojvodina Nr. 20/2014, 22 May 2014 (henceforward *Autonomy Statute of Vojvodina*).

¹⁷⁰ Kymlicka 2005, pp. 138–140.

¹⁷¹ Patten 2003, p. 298.

In Switzerland, the legislative competence over language policy is devolved to the cantonal level, where the most important language policy decisions are made. As a result, twenty-two cantons are monolingual, three bilingual and one trilingual. The Swiss Constitution recognises diversity as a national value as well as four official languages (German, Italian, French and Romansh).¹⁷² Romansh does not have a special status before the other three, despite being the only autochthonous language in Switzerland. The Preamble of the Constitution refers to the will of the cantons “to live together with our diversities, with respect for one another in equity”.¹⁷³

Belgium accommodates its Dutch, French and German speakers through territorial divisions.¹⁷⁴ The territory is divided into three regions (Flemish, Walloon and the bilingual French/Dutch Brussels-Capital). There are also four linguistic regions which determine the language of official use. Then, language policy is retained by the French, German and Dutch Communities, which are organs of a non-territorial nature and comparable to the national cultural autonomy model.¹⁷⁵ The federal power retains two official languages (French and Dutch) and one of official translation (German). This has led to monolingualism in practice in each region, with the exception of the bilingual Brussels-Capital.¹⁷⁶ The autonomy of the German Community is restricted to language: social and economic matters are under the Walloon region.¹⁷⁷

¹⁷² Art. 70, Swiss Federation Constitution.

¹⁷³ Schmitt 2012, pp. 77–99.

¹⁷⁴ Stroschein 2003.

¹⁷⁵ Arts. 1–4, Constitution of Belgium; Nimni (2005), p. 9.

¹⁷⁶ Weerts 2012, pp. 51–75.

¹⁷⁷ Dewulf 2009, pp. 65–81.

In the federation of Canada, language policy is a concurrent jurisdiction between the federal and the provincial legislatures.¹⁷⁸ The Canadian Charter of Rights and Freedoms establish English and French as the official languages of Canada. Both have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.¹⁷⁹ At the provincial level, French is official in Québec and English in the rest of the provinces save New Brunswick, where both are official. The autonomous province of Nunavut has its own language rights and self-government legislation.¹⁸⁰

2.6.5. Linguistic Demographic Thresholds

The use of demographic thresholds to determine language use within an administrative unit or otherwise to access certain language services such as education deserves a special mention. In such arrangements, when the minority language speakers within a territory reach a certain threshold, a set of bilingual arrangements are activated (public administration, police, street and other public signs, media, etc). Thresholds follow the logic of allocating limited resources to meet the demands of minority language speakers. The thresholds acknowledge that demographic concentration strengthens the claims of the users of a minority language. Thus, they normally apply to those rights that require an additional financial and human resource effort from the State, such as communications with public officials or the display of

¹⁷⁸ Braen 2012, pp. 37–50.

¹⁷⁹ Arts. 16–23, *Canadian Charter of Rights and Freedoms, Constitution Act 1982*. Such obligation is older than the Charter: in 1985 the Supreme Court of Canada affirmed the obligation of the province of Manitoba to translate and publish all its legal acts in both English and French and declared all unilingual legal acts temporarily invalid. Supreme Court of Canada Judgment, 18606, 1985, 1 SCR 721, *Re Manitoba Language Rights*.

¹⁸⁰ Benedikter 2009, pp. 143–147.

public signs. Determining the adequacy of a threshold requires careful consideration of available resources, demography, needs and demands.¹⁸¹ Thresholds concerning access to minority language and to relate with public authorities in such languages are normally different. For example, in Serbia, fifteen students are required for minority language instruction, while fifteen per cent of the inhabitants are needed to make a municipality bilingual.¹⁸²

Demographic thresholds are based on census which contain questions on language use and/or ethnic or national belonging. They are based on quantitative data and thus do not necessarily reflect the traditional use of a language in a certain area, which may be a requirement under Article 10(2) of the FCNM.¹⁸³ Hence, demographic thresholds should not be interpreted too strictly. In the case of the Slovak Republic, the CE ECRML criticised the strict application of a 20 per cent demographic threshold as amounting to a “territorial reservation incompatible with the Charter” because the concentration of minorities rarely reached it.¹⁸⁴ The Slovak Republic amended its law to reduce the threshold from twenty to fifteen per cent after two censuses.¹⁸⁵

¹⁸¹ Examples of existing thresholds include Finland (eight per cent at the municipal level), Slovakia (twenty per cent at the municipal level) and Kosovo (five per cent at the local level). Finland Language Act (423/2003), Kosovo Assembly Law 02-L/37 *On the Use of Languages*; Article 2(1), Slovak Republic Law 184/1999 *on the Use of Minority Languages*, 11 July 1999, as amended.

¹⁸² Art. 11, Republic of Serbia *Law on Official Use of Language and Script*, Official Gazette of the Republic of Serbia 45/91, 53/93, 67/93, 48/94, 101/05 and 30/10 (henceforward Serbian Law on Languages); Art. 5(2), *Law on Preschool Education*, Official Gazette No. 18/2010; Art. 5, *Law on Primary Education*, as amended to 2009, and Art. 5, *Law on Secondary Education*, as amended to 2009, similar provisions apply in Vojvodina.

¹⁸³ Art. 10(2), FCNM.

¹⁸⁴ CE ECRML *Application of the Charter in the Slovak Republic*, Second Monitoring Cycle (2009), para. 12.

¹⁸⁵ AC FCNM Slovak Republic Fourth State Report (2014), para. 35.

2.6.6. Cultural and Personal Autonomy

Non-territorial autonomy is based on the personality principle and covers various arrangements, including personal, cultural, national cultural and functional autonomy. Personal autonomy is a bare minimum: all democratic countries could be said to in principle accommodate the personal autonomy of minority language speakers, as long as basic human rights are respected. Such degree of autonomy exists regardless of the existence of cultural autonomy or territorial autonomy. However, it is in itself normally insufficient to accommodate the claims of minority language speakers. “Cultural autonomy” and “personal autonomy” are often used as synonyms. However, for the purposes of this article, “cultural autonomy” differs from personal autonomy in the sense that it requires the legal recognition of a particular group, where only the members of such group benefit from certain rights. Cultural autonomy in the broad sense encompasses both the recognition of individual linguistic rights as well as institutions of cultural self-governance. In a stricter sense, cultural autonomy arrangements refers to those specific arrangements which allow a group to determine and implement the policies over matters of culture, such as national cultural autonomy institutions. The AC FCNM follows this narrower definition.¹⁸⁶

Personal autonomy, in turn, is a broad concept which in moral philosophy relates ultimately to the free will of the person.¹⁸⁷ In this context, “personal autonomy” refers to the choices a person makes pursuant to his or her language as well as his or her self-identification as a member of a group. Personal autonomy is present when an individual can choose between different legal regimes that have been made available

¹⁸⁶ AC FCNM Commentary on Language (2012), *para.* 135; AC FCNM Commentary on Participation (2008), *para.* 90; Eide, Greni & Lundberg (1998), pp. 251–277; Tkacik (2008), pp. 369–401, 374–383.

¹⁸⁷ Stacey Taylor 2005.

to him/her by the State. Such personal autonomy exists regardless of whether the law does or does not recognise explicitly a group differentiated right other than Article 27 of the ICCPR.¹⁸⁸ Indeed, the rights of minorities are typically recognised as individual rights partly due to the fear of states that group recognition may lead to political territorial claims. Further than that, the recognition of minority language rights has been articulated primarily in the political arena as a legal policy option, rather than a universal right.¹⁸⁹

As an institutional form, personal autonomy refers to situations in which persons belonging to minorities associate privately to protect their interests without the State necessarily recognising their existence.¹⁹⁰ Hence, personal autonomy implies using the freedom to associate in absence of special arrangements. Associations that wish to provide a platform for a minority identity have the right to be registered as legal persons.¹⁹¹ The existence of a special right or a separate administrative structure is therefore the key difference between personal and cultural autonomy.¹⁹²

2.6.7. National Cultural Autonomy

Historically, the roots of national cultural autonomy may be found in different cultures throughout the world. The Ottoman *millet* system is often referred to as a precedent.¹⁹³ National cultural autonomy is sometimes defended as a model less prone

¹⁸⁸ Tkacik 2008, pp. 360–401, 374.

¹⁸⁹ May 2011, pp. 265–289.

¹⁹⁰ Suksi 2008b, pp. 157–178. United Nations *Declaration on the Rights of Persons Belonging to Minorities*, A/RES/47/135, 92nd Plenary Meeting, 18 December 1999.

¹⁹¹ Suksi 2008a, pp. 195–225, 196, 197.

¹⁹² Brunner & Küpper 2002, pp.13–36, 29–30.

¹⁹³ Quer 2013, pp. 76–98, 78, 90–93.

to support secession claims than territorial autonomy.¹⁹⁴ For this reason, it has been revisited recently as an alternative to traditional forms of minority protection linked to territory, avoiding competition for territorial control and detaching citizenship from nationality.¹⁹⁵ The national cultural autonomy model was first theorised in the context of the disintegration of the Austro-Hungarian empire by the Austrian socialists Otto Bauer and Karl Renner, who proposed a model where nation and state were decoupled, organising national groups into non-territorial public corporations (with the power to levy taxes amongst its members) accompanied with certain rights as well as power sharing mechanisms at the central level.¹⁹⁶ These would operate within a de-nationalised territorial state, competent to address more “nationally neutral” political matters.¹⁹⁷

The model offered by Renner and Bauer challenged the notion that sovereignty is unitary and indivisible, that self-determination requires territorial arrangements and that nation states are the only recognised players. Moreover, it advocated integration into multi-national states and focuses on people, not territory.¹⁹⁸ On its down side it reflects an essentialist idea of national identity where communities are understood as fixed and homogeneous.¹⁹⁹ Such an understanding does not correspond to a reality of multiple identities and fluidity and may privilege conservative forces within cultural groups. An institution where the primary value is identity may indeed turn towards identity orthodoxy. Indeed, the *millet* system was originally thought for religious

¹⁹⁴ Bauböck 2005, pp. 98–101, 108.

¹⁹⁵ Quer 2013, p. 38.

¹⁹⁶ McGarry & Moore 2005, pp. 74–95.

¹⁹⁷ Nimni 1999, pp. 289–314, 292; Smith 2013, pp. 25–55, 29.

¹⁹⁸ Nimni 2007, pp. 348, 360.

¹⁹⁹ Bauböck 2005, pp. 98–101, 106.

communities (Kymlicka considered it a “federation of theocracies”).²⁰⁰ Thus, the national cultural autonomy model has adapted well to the ideology of nationalism, where identity achieves a quasi-religious status, linked to birth, death and continuity, as observed by Anderson in relation to the monuments to the unknown soldier.²⁰¹ The idea of free self-identification and the powers of national cultural institutions over the orthodoxy in the use of languages offers a curious parallelism between the religion-based *millet* and the national identity-based national cultural autonomy bodies.

Examples of such arrangements are the national councils existing in Central, East and South–Eastern Europe. The powers granted to national self-governments include the establishment of education institutions, participation in their management, the development of teaching *syllabi* and other material as well as the creation and maintenance of minority language media.²⁰² In this sense, cultural autonomy institutions are a tool for the consolidation of linguistic groups. Indeed, the majority of groups benefiting from these arrangements are national linguistic groups linked to the creation of modern European states in the 19th and 20th Centuries.

2.6.8. Functional Autonomy

Finally, functional autonomy is a form of non-territorial autonomy where a certain function (*e.g.*, education in a minority language) is entrusted to the representatives of a group and an administrative layer is added to the regular one. In Suksi’s words, it may be understood as “an organisational option for the provision of adequate

²⁰⁰ Kymlicka 1996, pp. 155–158, 157.

²⁰¹ Anderson 2006, pp. 9–10.

²⁰² Arts. 11–15, Republic of Serbia Law on National Minority Councils; Chapter V, Hungary Act CLXXIX of 2011 on the Rights of Nationalities.

linguistic services to a minority population in respect of a certain public function (such as education) by means of creating special linguistically identified administrative units at different hierarchical levels inside the general line organisation charged with the national or local administration of the public function”.²⁰³ For example in Finland, education in Swedish is administered at all levels by Swedish speaking officials only.

This type of arrangement is, as a form of cultural autonomy, often specifically aimed at accommodating the educational rights of national minorities. In this sense, language diversity is the primary subject of functional autonomy and the reason for why it is established to begin with. Indeed, functional autonomy is often defined to accommodate education needs. It is a non-territorial measure in the sense that it is defined as entitlements of persons which belong to a group, and not as norms which apply in a certain territory. Functional autonomy requires a certain degree of separation according to language within the administration. Such separation should in principle not be considered discriminatory unless the conditions concerning discrimination are met (*i.e.*, forcefulness, unequal quality).²⁰⁴ However, the separation of students according to language (and implicitly by ethnicity) creates concerns in post-conflict divided societies (*e.g.*, Bosnia and Herzegovina). Social and political circumstances in such scenarios may actually lead to discrimination.²⁰⁵

²⁰³ Suksi 2008a, p.195.

²⁰⁴ United Nations Educational, Scientific and Cultural Organisation (UNESCO), *Convention Against Discrimination in Education*, 14 December 1960.

²⁰⁵ The Supreme Court of the Federation of Bosnia and Herzegovina ruled that there was discrimination on access to education in Mostar. Supreme Court of Bosnia, Judgment 58 0 Ps 085653 13 Rev, 29 August 2014.

3. The Legal Implications of Linguistic Diversity in the Design of Autonomy Regimes

3.1. Nationalism, Secession and Peace-Building: Forces Behind the Making of Autonomy

Before exploring the legal implications of the different forms of autonomy it is important to look at the forces behind their creation. The idea of the nationally homogeneous state collides with an heterogeneous reality, where more than one ethnic identity and sometimes more than one nation-building project coexist within a territory, producing a range of legal policy dilemmas. Such questions reflect a continuous tension between the centre, with its state building programme and the periphery, where minority groups may have their own nation building projects. Moreover, relations between states are often marred by territorial claims based on links of kinship.

From the perspective of the territoriality principle, the lawmaker may choose between centralising or decentralising state power. Amongst the strongest forces driving the making of territorial and non-territorial autonomy regime there are the fear of secession on the part of the central level and the will to make the political and the cultural congruent on the part of both state and sub-state forces. Centralising (and perhaps repressing and assimilating) may seek to counter the disaggregating force of peripheral (linguistic) nationalisms as well as the risk of territorial claims by possible kin-states. Devolving power may on the other hand also seek to appease centrifugal forces and settle them through territorial and/or non-territorial forms of autonomy. Hence, paradoxically the fear of secession seems to justify both territorial forms of autonomy (Catalonia) and its negation (to the ethnic Hungarian populated Eastern Slovakia). In the case of Slovakia, the proximity of a kin state (Hungary) and

outstanding sentiments of irredentism in Hungarian politics creates a strong preoccupation concerning secession. This is also the case in Transylvania, the Hungarian-inhabited areas of Romania. In other cases, despite fears of secession many jurisdictions have chosen to establish territorial models as a form to ensure stability. In Sicily, the establishment of an autonomy regime is considered to have ended the nation building project of a separate Sicilian state.²⁰⁶

Peripheral linguistic nationalism was an important factor in the making of territorial legislative autonomy regimes such as the Basque Country and Catalonia. There, national (and linguistic) groups may seek to establish political territorial units, sometimes in the form of new states, sometimes in the form of sub-state arrangements. Such projects are however not a general rule and not all linguistic groups seek such institutional goals. This point is made by Hobsbawm, who quoting John H. Kautsky reminds us that “[c]ountries including many language and culture groups, like most African and Asian ones, have not split up, and those taking in only part of a single language group, like the Arab ones and North Africa, have ... not united”.²⁰⁷ Hence, peripheral nationalism and linguistic diversity are not necessarily the main reason behind the creation of autonomy regimes. Indeed, there are a number of territorial autonomy regimes where language diversity is not an issue. In this sense, the relation between territorial legislative autonomy, language and education laws and linguistic diversity is primarily defined by whether linguistic diversity (and perhaps a form of peripheral linguistic nationalism) was behind the creation of the regime itself and whether the resulting regimes are competent to legislate over language and education issues. If such competence is devolved, autonomies may have the capacity

²⁰⁶ Hobsbawm 2013, p. 187; Cimino 1977.

²⁰⁷ *Ibid.*, p. 179.

– if this has not been defined constitutionally – to establish a minority language as co-official as well as to pursue either linguistic immersion or separate schooling through functional autonomy. Thus, territorial autonomy seems more appropriate to situations in which a linguistic group is concentrated.

Spanish legislators addressed the existing Basque, Catalan and Galician peripheral nationalisms as well as the potential for secession in the making of the Spanish 1978 Constitution.²⁰⁸ The Constitution gave first Catalonia and the Basque Country a high degree of autonomy which was ultimately given to all remaining fifteen autonomies. Indeed, the making of the Constitution took into account the existence of sub-national languages (Catalan, Basque and Galician) and their respective nation building projects.²⁰⁹ The competence over official language use is devolved to the sub-state level where language laws create special frameworks within the territory of the autonomous region. The constitutional provisions establish an obligation to learn Spanish and the right to use Spanish, which creates the need for a balance in language policy formulation in all areas.²¹⁰ Conflicts concerning language use in the education system are routinely sorted out by the judicial institutions. Legally speaking, political identities are defined by place of residence. Thus the “political condition of Basque” is defined in the Basque Autonomy Statute by the legally registered place of residence (last legal place of residence if residing outside Spain).²¹¹ The same applies for Catalanian, Valencian and all other identities. Acquiring such political condition is easier than in the Åland Islands, where the equivalent right of domicile (awarded to

²⁰⁸ Hannum 1996, pp. 263–279.

²⁰⁹ Constitution of Spain.

²¹⁰ *Ibid.*, Art. 3(1).

²¹¹ Art. 7(1), Cardinal Law 3/1979, 18 December 1979, *On the Autonomy Statute of the Basque Country*.

Åland residents and their descendants) is only awarded to (Finnish) newcomers after five years of residence.²¹²

India has in this sense some similarities with Spain. Ensuring stability was also the goal in the creation of Andhra Pradesh state, which separated the Telegu speaking part from neighbouring Madras state.²¹³ A large number of states were created on linguistic basis upon the recommendations of a States Reorganisation Commission in 1956.²¹⁴ This does not mean that each of these areas were home to a nation building project. However, the State took into account what today would be viewed as a multicultural policy to ensure long term integration and prevent instability and violence. The conflicts however continued in various states. In 1960, the bilingual Province of Bombay was divided into the states of Maharashtra and Gujarat after violent language riots. In 1966 Punjab was also split between Punjab, Haryana and Himachal Pradesh.²¹⁵

Apart from accommodating peripheral linguistic nationalism, territorial autonomy is sometimes the result of international policy making. In some instances international treaties have been signed and international bodies have made decisions to guarantee peace between two states by addressing territorial claims. Thus, certain international treaties include provisions for territorial self-governance and language rights of minority groups. The main force behind the creation of autonomy regimes is in these cases not the existence of a particular nation building project but rather the need to address potential territorial claims by neighbouring states. Such is the case with South Tyrol and the Åland Islands (even though the Åland settlement is not

²¹² Arts. 6 & 7, Act 1991/1144 on the Autonomy of Åland.

²¹³ Choudhry 2009, p. 609.

²¹⁴ Mawdsley 2010, p. 39.

²¹⁵ *Ibid.*, p. 40.

technically an international treaty and the autonomy regime was instituted already in 1920, one year before the linguistic dimension was added on by the League of Nations).

The 1921 Decision by the Council of the League of Nations on the Åland Islands granted this Swedish speaking territory language rights.²¹⁶ While in the mainland the historical process of nation building during the Russian dominated Grand Duchy of Finland area led to Finnish by-passing Swedish as the language of elites and massive primary education, the Åland Islands continued to be predominantly Swedish-speaking.²¹⁷ The 1921 international decision inserted new guarantees concerning the preservation of education in Swedish (as well as maintenance of property in the hands of the islanders, restricting the franchise of newcomers and ensuring the appointment of a Governor who enjoyed the population's confidence). It is worth noting that such novelties were introduced by the League of Nations explicitly in order "(...) to assure and to guarantee to the population of the Åland Islands the preservation of their language, of their culture and of their local Swedish traditions (...)" which indicates the weight that language had in the negotiations.²¹⁸ A number of linguistic rights which apply to citizens of the Åland Islands have been defined, including for example an exemption from linguistic proficiency in Finnish to access higher education in mainland Finland.²¹⁹

²¹⁶ Council of the League of Nations, *Decision on the Åland Islands Including Sweden's Protest*, Official Journal of the League of Nations No. 697, September 1921. *Act on the Self-Government of Åland Islands* (Statutes of Finland 124/1920).

²¹⁷ Ibid.

²¹⁸ Suksi 2011, pp. 144–151.

²¹⁹ Art. 41, Finland *Act on the Autonomy of Åland*, 16 August 1991/1144.

3.2. Legislative Competences over Language Use in Territorial Autonomies

Competences over language use in a state may be distributed in a number of ways. First, constitutions may choose to declare one or more languages national or official at the state level (as Finland does with Finnish and Swedish). Secondly (or in addition), they may establish at the constitutional level a set of language rights (as the Hungarian, Slovak or the Finnish Constitutions do) and delegate further legislative development to the parliament, sometimes in the form of cardinal laws. Thirdly, they may devolve the power to legislate on official language use to a sub-state territorial level (as the Constitution of Spain does with the Autonomous Regions, for example).²²⁰ Fourth, they may leave the issue entirely out, as the U.S. or the German Constitution do. There are many other questions to be addressed: which public settings will the language provisions cover (judiciary, administration, legislative); whether the languages will have the same degree of recognition, and at which territorial levels (local, regional, central).

The Constitution of Finland, for example, recognises the special status of the Åland Islands and its power to enact legislation in accordance with its autonomy statute.²²¹ The Autonomy Act of Åland establishes Swedish as its only official language which means that non-Swedish speakers do not receive the same linguistic protection as in mainland Finland. In fact, the AC FCNM considered Finnish speaking population in the Åland a “minority within a minority”.²²² Legislation over the official use of

²²⁰ Art. 3(2), Constitution of Spain.

²²¹ Art. 75, Åland Autonomy Statute.

²²² AC FCNM *First Opinion on Finland*. ACFC/INF/OP/I(2001)002, 22 September 2000, *paras.* 17, 46.

languages is approved by the Finnish parliament, however its application in the Åland is constrained by the autonomy statute's language provisions.²²³

It is worth noting that the sub-state entity with legislative powers becomes to a certain extent a mirror image of the central state. It may have at its disposal a similar toolkit of options to develop its language and education policy: it may establish one or more language as official (as Catalonia does), may recognise certain groups and the powers of national minority councils (as the Vojvodina Autonomy Statute does) or may even establish certain linguistic thresholds at local levels in which language rights are activated (Kosovo).²²⁴ Another option is for the autonomous legislative to determine in the legislation which areas are bilingual or monolingual. Navarra legislated on the use of Basque language by dividing its territory into a Basque speaking area, a bilingual area and a non-Basque speaking area.²²⁵ Each territorial division is subject to a different regime, where the Basque speaking area maintains a higher degree of protection.²²⁶

3.3. Territorial competences over language of instruction and language educational models: Immersion Versus Separation

When a sub-state entity is given at least a shared non-exclusive power to legislate on education matters, it may pursue different bilingual education models. It may follow the principle of linguistic immersion and ensure that all inhabitants are fluent in the

²²³ Art. 18, Åland Autonomy Statute. Finland Language Act.

²²⁴ UNMIK Regulation no. 2006/51 of 20 October 2006 on the Promulgation of the Kosovo Assembly Law 2006/02-L-37 *On the Use of Languages*. The Vojvodina Autonomy has only regulatory powers, though. Art. 19, Autonomy Statute of Vojvodina.

²²⁵ Art.5, *Foral Law on the Basque Language*, Official Gazette of Navarra No. 154, 17 December 1986 (Henceforward Navarra Foral Law on the Basque Language).

²²⁶ Arts. 18 and 26, Navarra Foral Law on the Basque Language.

minority language or it may prefer to separate students on linguistic basis. There is also the possibility of offering mixed arrangements.

The first option aims to further the sub-state entity's own nation-building programme through compulsory learning of the regional or minority language as well as offering bilingual services across the board. This is the case of Catalonia, South Tyrol, the Åland Islands (even though Swedish is legally not a minority language) and with certain nuances the Basque Country in Spain. The result is not monolingualism, but a bilingualism where the dominant minority language and the State language are normally acquired by all inhabitants of the territory. This model is known as the "linguistic immersion model".²²⁷ An important distinction must therefore be made between "linguistic immersion" models and those where students are divided into different schools or classrooms according to primary language (*e.g.*, mainland Finland), which could hereby be called "linguistic separation".

The second option, or the "linguistic separation" model implies for the central level to establish a mixed territorial and non-territorial model by offering more than one language of instruction through separate schools (or classrooms) whenever a certain demographic threshold is met (or by directly defining bilingual territories). This means establishing a degree of functional autonomy, especially if the measure is implemented through specialised administrative units at both local and central levels. This is the case within Vojvodina, mainland Finland (Finnish and Swedish schools), South Tyrol (German and Italian schools) Macedonia (Albanian and Macedonian schools) and Serbia's minority schools. Mainland Finland presents in this context the

²²⁷ Huguet 2004.

stronger language promotion option, where Finnish and Swedish language schools teach the other language as a second national language.²²⁸

In Macedonia schooling is provided in Albanian wherever there is a demand and a special office within the Ministry of Education deals with minority language matters.²²⁹ Separation of students in post-conflict scenarios is however problematic.²³⁰ The OSCE voiced concerns that Albanian students do not effectively learn Macedonian or regularly interact with ethnic Macedonian students.²³¹ Such dynamics are also visible in Bosnia and Herzegovina, where competences for language and education policy are devolved at the cantonal level (in the Federation of Bosnia and Herzegovina) and entity level (Republica Srpska). As a result, students learn different versions of history and group identity depending on whether they live on a Croat or Bosnian canton (in the Federation) or the Serb-majority Republica Srpska entity. In this case the territorial model leads to a minority language (and a particular view of group identity and history, usually essentialist) becoming dominant. Theoretically nothing would prevent the relative minority to learn the (cantonal or autonomous region) language. However, in practice it is not realistic to expect relative minorities to do so. Members of relative minorities regularly send their children to study in their majority areas (ethnic Bosnians living in Republika Srpska study in Bosnian cantons in the Federation and *vice versa*). In the Central Bosnia canton (in the Federation

²²⁸ Article 10(2), *Finland Language Act*. This is not the case however with the Sami language, which is only used as language of instruction in the Sami Homeland together with Finnish.

²²⁹ Law on the Use of Languages spoken by 20 per cent of the population of the Republic of Macedonia and in the Units of Local Self-Government, Official Gazette of the Republic of Macedonia Nr.101/08.

²³⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO), *Convention Against Discrimination in Education*, 14 December 1960.

²³¹ “Steps Towards Integrated Education in the Education System of the Republic of Macedonia”, 2010.

entity), schools offer two types of curriculums within the same building, producing the phenomenon known as “two schools under one roof”.²³² The UN Committee on the Elimination of Racial Discrimination has condemned such practice as perpetuating non-integration, mistrust and fear of the “other” and the Federation Supreme Court has judged the practice discriminatory on an ethnic basis.²³³

In Serbia, mother tongue pre-school education is provided conditional to the consent of fifty percent of the parents.²³⁴ At primary and secondary levels, fifteen first grade pupils are required for education to be provided in the minority language or bilingually. Where pupils belonging to national minorities receive instruction in Serbian they are taught their mother tongue and culture as a subject. Teaching in minority languages is available in Albanian, Croatian, Hungarian, Romanian and Slovak at pre-school, primary and secondary levels, and in Bulgarian and Ruthenian at primary and secondary levels.²³⁵ This is a mixed territorial and non-territorial model where national cultural autonomy bodies play a role as will be explained later.

Another example of separate education system is present in South Tyrol, where both German and Italian speaking schools teach the other language as a second one. The 1946 De Gasperi-Gruber Agreement ensured linguistic rights (both in education and the administration) for German speakers and gave South Tyrol legislative and

²³² Arraiza 2014, pp. 14–17.

²³³ The Supreme Court of the Federation of Bosnia and Herzegovina ruled that there was discrimination on access to education in Mostar. Supreme Court of Bosnia, Judgment 58 0 Ps 085653 13 Rev, 29 August 2014. United Nations 2010, para. 11.

²³⁴ Art. 5(2), *Law on Preschool Education*, Official Gazette No. 18/2010, Art. 5, *Law on Primary Education*, as amended up to 2009, and Art. 5 of the *Law on Secondary Education*, similar provisions apply in Vojvodina.

²³⁵ *Ibid.*. AC FCNM *Third Opinion on Serbia* (2013), p. 42.

executive powers.²³⁶ The distribution of competences is more complex than in Spain. Francesco Palermo distinguishes up to eight legislative powers: exclusive state powers, concurrent regional, concurrent provincial, exclusive regional, exclusive provincial, provincial laws enacting national legislation, regional delegated and provincial delegated legislation.²³⁷ South Tyrol is competent to legislate over primary and secondary education as long as it conforms to the principles set out by the central level.²³⁸ The model of South Tyrol is therefore similar to the Spanish one concerning competence allocation, but promotes separate education. As the Finnish and the Catalan models it has the advantage of ensuring that students are more or less bilingual in both majority and minority languages at the end of mandatory education. A minority language as a subject may be optional. The Kosovo curriculum for example offers such a choice.²³⁹

The linguistic immersion model in Catalonia is made possible by the Constitution of Spain. Education in Spain is a shared competence between the central and the autonomous level. Thus, while the Spanish parliament legislates over education, the education authorities of the autonomous government are the ones executing it. The Statute establishes a right to education in Catalan and Spanish. Moreover, it entitles Catalonians to a right of “linguistic choice” by which citizens may relate to the administration in either Spanish or Catalan.²⁴⁰ These provisions have been considered lawful by the Constitutional Court with the condition that authorities abide by the

²³⁶ Alcock 2001, pp. 4–8.

²³⁷ Palermo 2008, p. 39.

²³⁸ Art. 9(1)1 *Autonomous Statute of South Tyrol*; Decree 670, 31 August 1972; Art. 117(n), *Constitution of Italy*; Palermo, Woelks & Marko 2008.

²³⁹ 2011 Kosovo Curriculum Framework, p. 35.

²⁴⁰ Arts. 31(1) & 35(5), *Autonomy Statute of Catalonia*.

principle that Spanish is also a language of education.²⁴¹ Catalan is the primary language of education in Catalonia in all public schools. In fact, the Autonomy Statute prohibits separating students according to mother tongue.²⁴² In this sense, Catalonia offers an inclusive and integrative identity model which offers an opposite image to Central Bosnia's "two schools under one roof".²⁴³

Paradoxically, in the Republica Srpska entity, a single Serbian curriculum is offered producing not the integrative effects of the Catalan model but rather the opposite.²⁴⁴ In a similar form, education in the Åland Islands takes place in the Swedish language only, with Finnish as a teaching subject.²⁴⁵ There have been calls on the part of Finnish speaking parents to introduce some instruction in the Finnish language. However the Åland education system only includes the possibility to study Finnish as the second language from the fifth grade and the availability of certain remedial education in which Finnish can also be used.²⁴⁶

An alternative option which mixes the separation and the immersion models are the special geographic areas defined in Navarra and Valencia. Within those areas there are no separate schools: all students are offered the same options.²⁴⁷ Hence, in the Basque Country the students are given three options (not determined by a student's mother tongue).²⁴⁸ Option A implies majority of classes in Spanish with Basque as a

²⁴¹ Legal Basis 24, Constitutional Court Judgment on the 2006 Statute of Autonomy of Catalonia.

²⁴² Art. 35(3), Autonomy Statute of Catalonia.

²⁴³ Magill 2010.

²⁴⁴ Arraiza 2014.

²⁴⁵ AC FCNM, First Opinion on Finland.

²⁴⁶ AC FCNM, *Second Opinion on Finland*, ACFC/OP/II(2006)003, 22 April 2006 (henceforward AC FCNM Second Opinion on Finland), *para.* 141.

²⁴⁷ Art. 5, Navarra Foral Law on the Basque Language; Art. 36, Law 4/1983, *On the Use of the Valencian Language*, 23 November 1983, Official Gazette of Valencia No. 133.

²⁴⁸ Valencia Autonomy Statute, Navarra Law on the Basque Language.

subject. Option B means as many classes in Basque as in Spanish and in D (there is no letter C in Basque) students receive most classes in Basque with Spanish as a subject.²⁴⁹

3.4. Competences over National Identity-Related Curriculum

It is important to distinguish between competencies over education in a concrete language and the competence to design education materials relevant for ethnic and national identity. Subjects such as history, literature or geography have a considerable impact on self-perception. The promotion of a national identity through education serves the interests of political forces which claim to represent it by increasing their constituency and giving relevance to a particular view of identity and history.

This is a highly contentious issue in the Balkans, where kin-States such as Croatia, Serbia or Albania provide foreign students in Bosnia and Herzegovina, Macedonia and South Serbia with textbooks which reflect their own national identity rather than that of the students' home country.²⁵⁰ In this sense, the competences of the Bosnia and Herzegovina territorial cantons allow for such a practice (similarly, national cultural institutions in Serbia use foreign text-books in minority schools). In Kosovo, the Ahtisaari Proposal addressed this issue through the establishment of a mechanism by which the Serbian populated municipalities could use textbooks produced by the Ministry of Education of the Republic of Serbia prior notification to and consent by its counterpart in the Republic of Kosovo.²⁵¹ The mechanism has however not been implemented due to disagreement between the governments of Kosovo and Serbia on

²⁴⁹ Arraiza 2010.

²⁵⁰ Arraiza 2014.

²⁵¹ Art. 6(3) and Annex III, Ahtisaari Proposal. Kosovo Assembly Law L3-068 On Education in the Municipalities of Kosovo.

such questions. Nevertheless, the Republic of Serbia continues to administer *de facto* all Serbian schools in Kosovo.²⁵²

In light of the political conflicts which support to ethnic kins originated in Central Europe, the Council of Europe Venice Commission issued a report on the “Preferential Treatment of National Minorities by their Kin-State” examining kin-State’s support’s compliance with international law and advocating for better co-operation and dialogue on such matters.²⁵³ Also, the OSCE HCNM Bolzano/Bozen Principles on National Minorities in Inter-State Relations propose that the consent of the host state is sought before providing educational assistance abroad.²⁵⁴

In some territorial autonomy regimes such as Spain, where the competence over education is a shared one, both the central level and the sub-state level have a say in the making of the curriculum concerning history, culture and geography. The Ministry of Education establishes the basic curriculum which is then completed by each region. The schools, following the principle of pedagogic autonomy, are free to choose the textbooks they desire to use, subject to regular inspections by the autonomous and the central level.²⁵⁵ As a result, each region has considerable freedom in designing its educational curriculum, which is reflected in the fact that the subjects of history, geography and literature usually reflect the prevailing peripheral nationalist views on the matter.²⁵⁶ In this regard, the Åland Islands is a comparable case, where education follows pedagogical autonomy principles.²⁵⁷

²⁵² Arraiza 2014.

²⁵³ Council of Europe Venice Commission, *Report on the Preferential Treatment of National Minorities by their Kin-State*, 48th Plenary Meeting (Venice, 19-20 October 2001).

²⁵⁴ Section 12, HCNM Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations.

²⁵⁵ Additional Art. 4, Cardinal Law 2/2006, 3 May 2006, *On Education in Spain*.

²⁵⁶ Enkvist 2003. Spanish Royal Academy of History 2000.

²⁵⁷ 2003 Åland Islands Curriculum.

In contrast, the Atlantic Coast of Nicaragua is a showcase of the problems associated with the autonomous region not having such competencies. The definition of the content of textbooks by the central level has resulted in poor quality of the content of Miskito textbooks. The post-Sandinista government of Chamorro made an effort to “exorcise” Sandinista political thought and values from the education system which resulted in the introduction of new textbooks. They were poor quality translations from the regular Spanish ones, without due consideration for the culture and the identity of indigenous peoples (and even with derogatory representations of indigenous languages).²⁵⁸ In 1991 the Ministry of Education delegate in the Atlantic regions refused to distribute such books, which motivated his dismissal and the elimination of his position.²⁵⁹

3.5. Competences over Language Standardising and Language Policy Bodies

The standardisation and homogenisation of languages is a central process in the making of national identities. This is therefore another legislative area which is relevant to the relation between linguistic diversity and autonomy. Academic linguistic research becomes public policy through standardising institutions such as the official academies of language. The importance of these institutions is crucial for the consolidation of minority languages in territorial autonomy regimes where a language is unique to the sub-state territory.

²⁵⁸ Arnove & Orvando 1993, p. 154.

²⁵⁹ *Ibid.*, p. 156.

In Spain, the autonomous regions are competent to create and manage such institutions. Some of them such as the Basque, Galician and the Catalanian academies were created in the 19th and early 20th Centuries as private cultural associations.²⁶⁰ Others were born after the transition from Franco's dictatorship in 1978. The Asturian Academy of Language, for example, was created by the autonomous government in 1980.²⁶¹ The autonomy statutes treat them differently in each region. In the Basque Country, Galicia and Catalonia, they are official consultative institutions concerning grammar and orthography.²⁶² Their jurisdiction is in principle not bound by the territory of the autonomous territories where they operate, but extend over the languages they aim to standardise. This has led to jurisdictional conflicts of the Institute of Catalan Studies with neighbouring Aragon and Valencia.²⁶³ To solve the dispute, the latter created a Valencian Academy of Languages in 1998.²⁶⁴

Faroese is another example of a language autochthonous to the territory of a territorial autonomous regime. Language standardisation in the Faroe Islands was one of the objectives of the national movement which first aimed at autonomy (achieved in 1948) and later at independence.²⁶⁵ Its regulatory and language policy body is the Faroese Language Board, established in 1985. Similarly, in Greenland the Language Secretariat – which functions both as a regulatory and a policy body – is dependent of

²⁶⁰ The *Euskaltzaindia* (Basque Academy of Language) was created in 1918. The *Institut D'Estudis Catalans* (Institute of Catalan Studies) in 1907 and the *Real Academia Galega* (Galician Academy of Language) in 1906.

²⁶¹ *Official Decree of Asturian Regional Council 33/1980*, 15 December, and approved by Decret 9/1981, modified 12 April 1995 (BOPA number 136 of 14.6.1995).

²⁶² Art. 6(5), Basque Country Autonomy Statute. Addendum, Law on Galician Language Policy. Law on the Authority of the Institute of Catalan Studies.

²⁶³ Pradilla 2004.

²⁶⁴ Law on the Valencian Academy of Language.

²⁶⁵ Vikør 2002, p. 126.

the autonomous region. Since the 1979 Home Rule law, the government has pursued a policy of Greenlandisation, including linguistic immersion in Greenlandic.²⁶⁶

Indeed, language policy bodies are of a slightly different nature than regulatory ones, as their aim is to ensure that language policy is implemented correctly. In Catalonia, for example, there is a Department of Linguistic Policy within the administration. A stronger type of arrangement is that of the language commissioners (Wales, Ireland, Kosovo and Canada).²⁶⁷ These are supposed to function as watchdogs over language rights in their respective jurisdictions, as well as to promote the use of minority languages and provide advice to other public bodies and citizens. The Irish, Kosovo and Canadian language commissioners are established at the central level, while the Welsh may be seen as an autonomous institution, created by the Welsh National Assembly in 2012.²⁶⁸

Some language bodies relate to one particular language (Irish, Welsh) while others relate to all official languages within a state (Kosovo and Canada Language Commissioners). In this sense, the Pan South Africa Language Board deserves mentioning, as its duty is to promote and protect the eleven South African languages as well as the principles of multilingualism and language rights.²⁶⁹

²⁶⁶ Art. 2(9) of the *Greenland Home Rule Act*, Act No. 577 of 29 November 1978 states that “Danish should be thoroughly taught”. Art. 7 of the new Greenland autonomy statute (Act no. 473 of 12 June 2009) establishes Greenlandic as the official language but does not mention Danish at all. Fishman (1999), p. 36.

²⁶⁷ Office of the Language Commissioner in Kosovo, Office of the Commissioner of Official Languages (Canada) and Irish Language Commissioner.

²⁶⁸ Wales Official Languages Act, 2012.

²⁶⁹ *Pan South Africa Language Board Act 25/1995*, Official Gazette of South Africa No. 1522, 4 October 1995.

India provides various examples of language bodies linked to territorial sub-state units. The Academy of Malayalam Literature in Kerala or the Official Language Commission of Andhra Pradesh reflect the enormous linguistic diversity of India. Although non-territorial, these are located within the province where language is used and funded by their regional governments.²⁷⁰

3.6. Decentralisation on Linguistic Basis

Decentralisation following linguistic criteria, including the delineation of municipal boundaries on a linguistic (and therefore ethnic) basis, has significant consequences for the groups affected, particularly when administrative competencies over language and education issues are devolved. The groups are given a greater share of autonomy and their identities are therefore reinforced.²⁷¹

The municipalities in Finland, Kosovo and Macedonia are relevant examples of decentralisation at the municipal level in linguistically diverse settings. In such cases central level laws are implemented at the municipal level by local self-governments (which do not have legislative competences over language). Central level laws determine which languages are official at the local level, sometimes using demographic thresholds, which constitute the nexus between the territoriality and personality principles in such arrangements.

States have often considered actually re-drawing the administrative lines of municipalities in order to accommodate the linguistic needs of its inhabitants. This has been the case to a certain extent in Finland, as well as in Macedonia and Kosovo.

²⁷⁰ Kerala Shitya Academy (Kerala, India), *Andhra Pradesh Official Language Act*, 1966.

²⁷¹ Aisling 2013, pp. 491–492.

The first Constitution of Finland established that if administrative boundaries were to be altered, linguistic homogeneity should be sought and linguistic minorities should be as small as possible.²⁷² Re-drawing of boundaries for economic efficiency purposes has up to the present taken into account the linguistic make up of its inhabitants. There is indeed a requirement for a “Linguistic Impact Assessment” prior to re-defining any municipal boundary.²⁷³

In Kosovo, in accordance with the 2006 Ahtisaari Proposal, administrative boundary lines were redrawn in order to create linguistically homogeneous municipalities for Serbs. As mentioned earlier, the Ahtisaari Proposal unsuccessfully attempted to provide a solution to the problem of parallel educational structures within Kosovo’s territory by creating new municipalities and establishing formal channels for financial and technical assistance and curriculum from the Republic of Serbia. In contrast to Finland, where Swedish and Finnish speaking municipalities have equal competencies, Serb majority municipalities have additional “enhanced municipal competences” over education, culture and other matters (e.g., appointment of police station commanders).²⁷⁴ The result of the reform is not territorial autonomy, as the municipalities do not have lawmaking powers, but rather a form of local autonomous administration combined with privileged relations with their kin-state.

The Ahtisaari model was in this sense largely inspired by the Macedonia 2001 Ohrid Framework Agreement. This agreement included as part of its legislative reform package a new Law on Municipal Boundaries where administrative lines

²⁷² McGrae 1997, p. 60. Art. 50. Constitution Act of Finland (1919).

²⁷³ Suksi 2014, pp. 397–383.

²⁷⁴ Arts 17(1), 22, 23, *Kosovo Law on Local Self-Government*, Section 19, OSCE HCNM: Lund Recommendations. Republic of Kosovo Law 03/L-47 *On the Protection and Promotion of the Rights of Communities and their Members*, March 13, 2008.

defining the territory of local self-government units would be redrawn taking into account the result of the census.²⁷⁵ The measure was met with great opposition by the majority political parties. Finally, boundary demarcation took place in 2004, and sixteen municipalities came under the control of Albanian political forces.

²⁷⁵ Art. 3, Annex B, Ohrid Framework Agreement.

4. Language and Education Legislation in Non-Territorial Models

4.1. Cultural Autonomy Arrangements in Relation to Linguistic Diversity

Cultural autonomy arrangements follow the same principles described concerning the territorial models: accommodating ethnic and national diversity in order to make the state viable and fair. However, while the territoriality principle follows the idea of a homeland for a community of language speakers where language is a significant aspect of home rule, the personality principle seeks the idea of protecting and empowering the minority language community itself, bound not by physical lines but by an identity of their speakers which is imagined as common and to a certain extent homogeneous. The linguistic rights contained in the FCNM and to a lesser extent the institutional arrangements foreseen in the ECRML pursue the idea of such language communities and thus constitute cultural autonomy measures both in the broad individual rights sense and in those cases in which self-governance mechanisms are specifically contemplated.²⁷⁶

Despite its reinforcement of communal identity, cultural autonomy often is seen as a safer option than territorial autonomy in order to prevent secession, particularly in the presence of potential territorial claims based on links of kinship with ethnic or national minorities, such as the case of the ethnic Hungarian inhabited regions of Western Slovakia and Romania, which due to their proximity to their kin-state raise fears about secession.²⁷⁷ As with territorial autonomy regimes, multiculturalism serves

²⁷⁶ Sections 17 & 18, Lund Recommendations.

²⁷⁷ Pytlas 2013, pp. 162–183.

as the balancing principle for the accommodation of differences in multi-national states.

Another common reason for the establishment of cultural autonomy measures is linked to the lack of demographic concentration of minority language speakers together with the recognition of the vulnerability of their language. Patten distinguishes between “secure” and “vulnerable” societal cultures.²⁷⁸ In secure societal cultures, a language community is able to provide its members an adequate context of choice, while in an insecure it may not be able to do so. Cultural autonomy is, according to Patten, an appropriate framework for vulnerable societal cultures.²⁷⁹

4.2. National Cultural Autonomy and Linguistic Diversity

The most commonly referred cases of contemporary national cultural autonomy bodies have a clear linguistic component in its foundations. For example, the thirteen groups recognised in Hungary as entitled to form nationality self-governments are also linguistic groups.²⁸⁰ Nationality self-governments have administrative powers over culture, media and education and a consultative role.²⁸¹

According to Hungarian law, nationality self-governments may become full local self-governments (“transformed nationality self-government”) if more than half of its registered electors belong to nationalities and more than half of the elected members

²⁷⁸ Patten 2003, pp. 308–310.

²⁷⁹ Ibid.

²⁸⁰ These are the Bulgarians, Greeks, Croatians, Poles, Germans, Armenians, Roma, Romanians, Carpatho-Rusyns, Serbs, Slovaks, Slovenes and Ukrainians. Appendix, Art. 22(1), Hungary Act CLXXIX of 2011 *On the Rights of Nationalities* (henceforward Hungary Law on the Rights of Nationalities).

²⁸¹ Arts. 19, 24(1) & 118, Hungary Law on the Rights of Nationalities.

ran as nationality's candidates at the local municipal elections.²⁸² In such cases municipalities have all their regular competencies and, in addition, those of the nationality self-governments concerning language, culture and education. Interestingly, Hungarian law establishes certain restrictions to the principle of self-identification concerning political participation. Only self-declared and registered members of national minorities are entitled to vote in nationality self-government elections.²⁸³ Also, the right to stand for office is conditioned to the candidate declaring to represent (exclusively) his or her nationality, to speak the language of the community, being familiar with its culture and traditions and to not having run for office representing any other nationality in the prior ten years.²⁸⁴ Finally, only nationality organisations are entitled to propose candidates.²⁸⁵

Estonia's cultural autonomy framework similarly allows for the creation of bodies in charge of developing cultural policies for the preservation of minority identities.²⁸⁶ The groups which are entitled to national autonomy are the German, Russian, Swedish and Jewish, plus those which reach 3,000 members. The criteria for achieving minority status is therefore historical and demographic, and not specifically linguistic. Estonia's approach has however been in practice to restrict the application of the law to citizens only, in practice limiting its scope to Ingrian-Finnish and Swedish minorities only and leaving outside the large Russian group which for political reasons

²⁸² Art. 71(2), *Ibid.*

²⁸³ Art. 53, *Ibid.*

²⁸⁴ Article 54, *Ibid.*

²⁸⁵ Articles 58-63, *Ibid.*

²⁸⁶ Art. 50, Constitution of Estonia, Art. 2, *Act on Cultural Autonomy of National Minorities*, 26 October 1993, Official Gazette I 1993, 71/1001 (henceforward Estonia Cultural Autonomy Law).

does not have Estonian citizenship. The AC FCNM has consistently criticised this restrictive approach and considers the law impractical and ineffective.²⁸⁷

The national cultural autonomy model requires a census in which the ethnicity of the population is ascertained. Establishing a census requires a legal identification of ethnicities which if unqualified may lead to essentialist conceptions of ethnicity. Hence, the making of a census in divided societies is normally a highly controversial issue, where conflicts arise concerning contested numbers, identifications and use of the data. In Serbia, the Albanian minority boycotted the 2011 census. Moreover, the Roma were arguably under-represented due to members of this community fearing negative consequences as a result of self-identification.²⁸⁸ Similarly, in Macedonia political parties called for boycott of the 2011 Census.²⁸⁹ The OSCE HCNM has advocated for the inclusion of multiple and open identifications in census as a principle.²⁹⁰

4.3. National Cultural Autonomy and Powers Over Language and Education

National cultural autonomy bodies do not have legislative competencies, but regulatory and administrative powers over matters of language or education. Serbia's national minority councils, elected through a special voters' register, have

²⁸⁷ According to the AC FCNM, the Russian national minority was reportedly denied the status because it is considered so large that no one group can be considered its representative. AC FCNM, *Third Opinion on Estonia*, ACFC/OP/III(2011)004, 7 November 2011 (henceforward AC FCNM Third Opinion on Estonia), *paras.* 61–65.

²⁸⁸ AC FCNM, Third Opinion on Serbia, *para.* 17.

²⁸⁹ AC FCNM, Third Opinion on FYROM, *para.* 13.

²⁹⁰ OSCE 2012 Ljubljana Guidelines on the Integration of Diverse Societies, p. 15.

considerable powers in the field of education such as proposing the management boards of minority schools and proposing curriculums to the national education institutions. They may establish cultural associations and media in minority languages.²⁹¹

However, the implementation of the Law on National Councils in Serbia has proven difficult due to unclear transfer of competences to the councils.²⁹² Minority representatives complain that “lack of funds, low circulation of minority language textbooks, lack of harmonisation with the school syllabus in Serbia and long delays between the submission of a manuscript and the final distribution of textbooks” hamper the implementation of the councils’ powers.²⁹³ Interestingly, national minority councils have full control over textbooks (often imported from kin-States): the Ministry of Education verifies only the quality of translations and that contents are not discriminatory.²⁹⁴

In both Hungary and Serbia, minority self-governments have the power to create minority language schools and to participate in their administrative, educational and financial management. This has enabled several minority self-governments to manage new schools.²⁹⁵

Another interesting example of a cultural autonomy institution is the Sami Parliament in Finland. The Sami Parliament is a mixture of territorial and non-

²⁹¹ Articles 11–21, 47, *Serbia Law on National Minority Councils*, Official Gazette of the Republic of Serbia, No. 72/2009. Minority voters may register in one national council only.

²⁹² AC FCNM, Third Opinion on Serbia, *paras.* 15, 33.

²⁹³ *Ibid.*, para. 154.

²⁹⁴ *Ibid.*, para. 152.

²⁹⁵ AC FCNM Third Opinion on Hungary (2010), *paras.* 119, 124. Arts. 11–15, Serbia Law on National Minority Councils.

territorial autonomy, given the fact that it recognises certain rights and institutions which are only applicable within the Sami Homeland, which is defined geographically by the Finnish Sami Parliament Act as the municipalities of Enontekiö, Inari and Utsjoki.²⁹⁶ The idea of a homeland and a community are thereby strongly tied together. However, the Sami homeland does not meet the criteria of territorial legislative autonomy. Its powers are rather of an advisory nature. Nevertheless, the government of Finland is legally obliged to negotiate with the Sámi Parliament any measure affecting Sámi education in the Sami Homeland (Sami instruction is offered by the municipalities to pupils which are proficient in the language).²⁹⁷ Moreover, the body is responsible “to look after the Sami language and culture”.²⁹⁸

4.4. National Cultural Autonomy and Powers concerning Language Standardisation

National cultural autonomy institutions may in some cases be in the position to define and promote language standards either directly or by setting up standardisation bodies. In Serbia, the national minority councils can propose toponyms and street names as well as to “take measures and activities to improve the official use of the language and script of a national minority”.²⁹⁹ Hence the Vlach and the Bunjevci National Minority Councils have taken steps towards the standardisation of their respective languages (Vlach and

²⁹⁶ Section 4, *Act on the Sámi Parliament* (974/1995, 1026/2003) (henceforward Finland Sami Parliament Act).

²⁹⁷ Art. 9(1)5, *Ibid.*, Art. 10(2), *Finland Basic Education Act* (628/1998, amendments up to 1136/2010).

²⁹⁸ Art. 5(1), Finland Sami Parliament Act. Three Sami languages are spoken in Finland: North Sami, Inari Sami and Skolt Sami.

²⁹⁹ Article 22(8) Serbia Law on National Minority Councils.

Bunjevac).³⁰⁰ The standardisation of both languages is controversial, in particular of the Vlach language, as it affects the relations of Serbia with Romania. The Romanian government considers Vlach to be a dialect of Romanian (and considers Vlachs to be Romanians) and therefore is against its recognition. In addition, the council of Vlachs in Serbia cannot claim to represent Vlach groups in other countries (*e.g.*, Macedonian Vlachs).³⁰¹

In this context, the indigenous Sami Parliaments in Norway and Finland have respectively their own language policy and regulatory bodies, the Sami Parliament Council on Language Issues (Norway) and the Sami Language Council (Finland).³⁰² In Sweden's Sami Parliament, there is no specialised language body, despite official recognition of such languages.³⁰³

There are various Sami languages. Six of the nine living Sami languages (often termed as “varieties”), currently have standard written forms.³⁰⁴ In yet another interesting connection between religion and national and ethnic identity, the codification of Sami languages was initiated by religious missions in the 18th and 19th Centuries. Similarly, the Miskito language in Nicaragua was also standardised initially by the missionaries of the Moravian evangelical church.³⁰⁵ These were therefore external codifications. The Sami have had a say in such matters only in the recent times.³⁰⁶

³⁰⁰ CE ECRML, Report on Serbia, 2nd Monitoring Cycle, paras. 13. 32.

³⁰¹ *Ibid.*, 14.

³⁰² Norwegian Ministry for Labour and Social Inclusion, Action Plan on Sámi Languages (2009).

³⁰³ Art. 7, Sweden Language Act, 2009/600, 28 May 2009.

³⁰⁴ Vikør 2002, pp. 121–124.

³⁰⁵ Arnove & Ovando 1993, pp. 138–140.

³⁰⁶ Maciejewski 2002, p. 245.

4.5. Functional Autonomy and Linguistic Diversity

Functional autonomy seems most appropriate in societies where two predominant languages are in place and where territorial legislative autonomy is ruled out as an option. The distribution of powers over language use and education in functional autonomy requires the establishment of special administrative units. Normally, such units are educational boards at local, provincial and/or state level. Examples range from Switzerland and Finland to Macedonia and Canada (Alberta, New Brunswick and Northern Territories).³⁰⁷ Alternatively, functional autonomy may utilise national cultural autonomy institutions, where as in the case of Serbia national minority councils have competences over education. Such a combination exists to a certain extent also in Hungary, Romania and Slovenia.³⁰⁸ In Serbia, Finland and Macedonia, as explained earlier, functional autonomy is combined with administrative autonomy where official bi-lingual arrangements are activated through demographic thresholds (8 per cent in Finland, 20 per cent in Macedonia, 15 per cent Serbia).³⁰⁹

Historically, Finland's language regime (including functional autonomy in education) involves the standardisation of a language within an autonomous regime (the Grand Duchy of Finland between 1809 and 1917) in the height of European romantic nationalism, its becoming the centre of a national movement and the post-independence accommodation of Swedish, which was since the 12th Century the language of elites and high culture. During the 19th Century, linguistic nationalism in Finland led to a renewed interest in the language as well as the introduction of Finnish

³⁰⁷ Suksi 2008a, pp. 220–223.

³⁰⁸ Suksi 2008, pp. 218, 219.

³⁰⁹ Finland Language Act (423/2003); Law on the Use of Languages spoken by 20 percent of the population of the Republic of Macedonia and in the Units of Local Self-Government, Official Gazette of the Republic of Macedonia No.101/08; Serbian Law on Languages.

in the school system. Attempts on the part of Russia to centralise power in Moscow led to Swedish speaking elites, the “Fennomans”, to vehemently support a process of Finnish nation building beginning at the 1830’s (the antithesis of such movement were the “Svecomans”, seeking a special status for the Swedish-speaking community).

Within this period, Elias Lönnrot published his *Kalevala*, a compendium of Finnish mythology presented as a national identity symbol (a national saga).³¹⁰ The Swedish speaking Johan Ludvig Runeberg in turn idealised the fight against the Russian occupation in *The Tales of Ensign Stål* (1840) and other works.³¹¹ These two persons represent the maturity of the Finnish national movement. The Russian Tsar made concessions on the official use of Finnish. In 1863, Russia recognised that Finnish would be on a “footing of complete equality” with Swedish as Finland’s official language.³¹² Hence, Finnish documents could henceforward be used in relation to the administration and the judiciary. In 1886, all departments and officials of the central administration were allowed by a further decree to use Finnish as well as Swedish. Then in 1902 a new decree increased language equality by allowing municipal governments to use the language of the majority of its population. Individuals had a right to choose the language they used before the authorities.³¹³

The modern design of functional autonomy for the Swedish-speaking schools dates back to the 1919 constitution after independence from Russia, where political forces supported administrative autonomy in the area of languages as well as bilingual Swedish and Finnish education but fell short of providing additional competences to

³¹⁰ Lönnrot 1999.

³¹¹ Runeberg 1952.

³¹² McRae 1997, pp. 34–35.

³¹³ *Ibid.*, p. 37.

Swedish-speaking cantons.³¹⁴ A separate Swedish school administration was one of the main objectives of the Svenska Finlands Folkting in the 1920's. This quest brought the Swedish speaking movement in direct conflict with the nationalist "genuine Finnishness" movement, the *aitosuomalaisuus*.³¹⁵ Bitter political confrontations took place in the inter-war period over issues such as the minimum number of students necessary to establish a Finnish or Swedish speaking school. The role of Swedish language in higher education was also a matter of contention.³¹⁶ Over the 20th Century, however, the general tendency was to universalise the right to mother tongue education which is offered even when numbers of students are low. The results have been particularly evident for the Sami since the 1970's, with a considerable growth of Sami schools in rural areas of the North.³¹⁷

As a result, students of primary and secondary education are allocated to schools in accordance with their mother tongue (Swedish or Finnish and Sami in the Sami Homeland).³¹⁸ Teachers of primary and secondary school are required to have excellent proficiency of speech and writing in the language of instruction of their school.³¹⁹ There are separate Swedish and Finnish administrative boards of education at municipal, provincial and state levels (indeed, a full educational system in Swedish).³²⁰

³¹⁴ *Ibid.*, pp. 55–82.

³¹⁵ *Ibid.*, p. 285.

³¹⁶ Saukkonen 2012, p. 5.

³¹⁷ McRae 1997, p. 287.

³¹⁸ Arts. 10(1), 10(2) and 6(2), Finland *Basic Education Act*. Finland *High School Act* (629/1998).

³¹⁹ Suksi 2008a, p. 203.

³²⁰ *Ibid.*, p. 204.

Education in Macedonia does not reach such a degree of functional autonomy. There are Albanian representatives in the central Bureau for Education Development of the Ministry of Education, as well as a Deputy Minister of Albanian ethnicity.³²¹ However, such arrangements are informal, and not grounded in law. Even after the Ohrid Framework Agreement reforms, education in Macedonia remained clearly a central competence. This includes the power to define the content of the education curriculum and syllabi for preschool, elementary and public secondary education, undertaken by the Bureau for Education Development. A special office within the Ministry of Education deals with minority language matters.

The Ohrid Framework Agreement is, however, not the first instance where linguistic rights were recognised to the Albanians. Such recognition began with the 1963 Constitution of Yugoslavia.³²² The Albanians were considered to be a nationality and not a nation due to the fact that they have a kin-State outside Yugoslavia (Albania). Repression against Albanian nationalism in the 1980's led to an amendment of the 1989 constitution of Macedonia declaring the Socialist Republic of Macedonia to be a nation state of the Macedonians, a national identity promoted through the standardisation of the Macedonian language and the establishment of nationalising institutions such as the National Library, the Academy of Sciences, the National Theatre and the autocephalous Orthodox Church. Previous references to Albanian and Turkish minorities as a legitimate components of the state were removed.³²³ Classes in the Macedonian

³²¹ Arraiza 2014, pp. 17–21.

³²² Art. 43, 1963 Constitution of Yugoslavia.

³²³ Preamble, 1991 Constitution of the Republic of Macedonia, 17 November 1991.

language were increased in Albanian schools.³²⁴ The stage was indeed set for conflict since the early nineties.

After the Ohrid Framework Agreement, municipalities were re-delineated by taking ethnic (and hence linguistic) criteria into consideration and they were given certain competences in school administration.³²⁵ These include the establishment of primary and secondary schools and the power to define the language of instruction in accordance with law.³²⁶ Competences also include participation in school boards and appointment of school principals.³²⁷ The result is a highly decentralised system leading to monolingual schools in either Macedonian or Albanian, a small number of Turkish schools and an even smaller number of Serbian (primary) schools.³²⁸ Indeed, seventy-five percent of schools are mono-ethnic. Only in certain mixed localities, such as Kičevo and Tetovo, ethnic Albanian and Macedonian study together. There, shifts are organised as in Central Bosnia's "two schools under one roof".³²⁹ There are no joint classes, with exceptional cases where physical education is given to mixed groups. Hence, where demographics do not lead naturally to monolingual schools, parental choices lead to the same result.³³⁰ The government, with international support, has implemented some integration programs based on extracurricular activities.

³²⁴ Myhrvold 2005, p. 5.

³²⁵ Art 3(2), Ohrid Framework Agreement; *Law on Primary Education*, Official Gazette of the Republic of Macedonia No. 103/08, 19 August 2009; *Law on Secondary Education*, Official Gazette of the Republic of Macedonia No. 52/02, 11 July 2002; OSCE Mission to Skopje, Survey on Decentralisation (2008).

³²⁶ Arts 16(2) and 19(1), Republic of Macedonia Law on Primary Education. Art 22(8), Republic of Macedonia Law on Local Self-Government.

³²⁷ Art 132(2), Republic of Macedonia Law on Primary Education. Secondary School principals are appointed by the Ministry at the proposal of the School Board. Art 102, Republic of Macedonia Law on Secondary Education.

³²⁸ Art 42(5), Republic of Macedonia Law on Primary Education.

³²⁹ Magill 2010.

³³⁰ Koneska 2012, pp. 28–50.

In neighbouring Serbia, the post–Milošević period led to the development of a new minority policy where Serbia turned towards European Union accession, becoming also a party to the Council of Europe (and the FCNM and the ECRML).³³¹ Mother tongue pre-school education is provided conditional to the consent of fifty percent of the parents in a given school. At primary and secondary levels, fifteen first grade pupils are required for education to be provided in the minority language or bilingually. Where minorities receive instruction in Serbian, they are taught their mother tongue and culture as a subject.³³² National councils have competences on education, including a say on the appointment or dismissal of school boards.³³³

These examples demonstrate the adaptability of functional autonomy arrangements. It indeed may be used in territorially decentralised settings, as part of national cultural autonomy institutions and as a confidence building measure in post-conflict settings.

4.6. Non-Territorial Measures Within Territorial Autonomies

Institutional arrangements are rarely purely territorial or personal but display both features. Personality based measures contain territoriality-based measures (such as thresholds which apply within a concrete municipal territory) and personality-based measures are also present in territorial sub-state arrangements.

³³¹ Council of Europe, Report Submitted by the Federal Republic of Yugoslavia pursuant to Article 25, Paragraph 1 of the FCNM, ACFC/SR(2002)003, 16 October 2002 (henceforward FRY First State Report), pp. 18–21.

³³² Art. 5(2), Law on Preschool Education, Official Gazette of the Republic of Serbia No. 18/2010, Art. 5, Law on Primary Education, as amended up to 2009, and Art. 5, Law on Secondary Education, as amended up to 2009, similar provisions apply in Vojvodina. AC FCNM, *Third Opinion on Serbia* (2013), p. 42.

³³³ Arts. 10–12, Serbia Law on National Councils of National Minorities.

Essentially, cultural and territorial autonomy are complementary. Kymlicka puts as examples Canada, where the territorial arrangement of the French-majority province of Québec co-exists with significant non-territorial linguistic and cultural rights for Francophones who live outside of it as well as with non-territorial rights for minorities within Québec.³³⁴ Also Finland, where Swedish-speakers enjoy both territorial autonomy in the Åland Islands and non-territorial language and cultural rights elsewhere in the country, is an example of this. In Russia, Tatars enjoy territorial autonomy within Tatarstan and national cultural autonomy in the rest of the country.³³⁵

Of particular interest are those situations in which a territorial autonomy regime offers non-territorial arrangements within its territory. The autonomous statute of Vojvodina in Serbia for example foresees the delegation of tasks to national minority councils as well as their involvement in decisions concerning education, language and culture.³³⁶ In addition, the comprehensive individual rights afforded to national minorities in Serbia are applicable within Vojvodina's territory.³³⁷ In Spain, the citizens of the Aran valley may use the Aranese language throughout Catalonia in their dealings with the Generalitat.³³⁸ Such rights may be considered to be personally defined, even though belonging to the Aranese group is defined territorially (residents of such region).³³⁹ The distinct linguistic, political and communal property rights of the indigenous peoples living in the Atlantic Coast of Nicaragua are defined on a

³³⁴ Kymlicka, 2007, p. 385.

³³⁵ *Ibid.*

³³⁶ Arts. 25, 31, Autonomy Statute of Vojvodina.

³³⁷ Art. 22, *Ibid.*

³³⁸ Art. 36(2), 2006 Autonomy Statute of Catalonia.

³³⁹ Art. 11, *Ibid.*

personal basis within a region.³⁴⁰ Interestingly, the autonomous regime creates a link between the personally defined rights of members of communities to communal property rights, which are in effect indigenous homelands. Thus, the Western “square” legal system aims at accommodating the indigenous circular property relations.³⁴¹ Similarly in Bolivia, the Constitution combines linguistic minority rights of indigenous peoples with territorial autonomy regimes.³⁴² The Constitution recognises thirty-six indigenous languages as co-official together with Spanish: each Department is obliged to declare official at least two languages.³⁴³

³⁴⁰ Art. 12, Autonomy Statute of the Atlantic Coast of Nicaragua; Art. 2, Nicaragua Law on Languages.

³⁴¹ Arraiza, 2012, p. 69.

³⁴² Chapters II and VII, Constitution of Bolivia.

³⁴³ Art. 5, *Ibid.*

5. Conclusions

5.1. Legal Implications of Linguistic Diversity in the Design of Territorial Autonomy Models

When specific legislative competences over language use and education are devolved to an autonomous region, this sub-state entity may act like a state in itself and define which languages are official within its territory subject to the Constitution. The clearest example in this case are the autonomous regions of Spain, which have the right to determine such degree of recognition within their statutes. As a consequence, the inhabitants of the majority linguistic group within a territory are empowered over matters of language and culture in comparison with the members of such group outside of it. Normally, this will lead to the establishment of a dominant linguistic group identity within the territory, which in turn may create concerns on the part of the “minority within the minority”. Speakers of the minority languages favoured in the territorial autonomy will only be able to use them in the public sphere in their region and not throughout the state.

If the choice is to merely to devolve administrative competencies to a territorially defined entity, such as a municipality, the central level may define official use of languages and associated rights through thresholds (mainland Finland, Slovakia, Macedonia and Serbia) or directly designate such areas by law (Navarra). Such options cater to the demands of minority groups and may diffuse conflict (as in Macedonia). The choice between establishing thresholds or defining bilingual territories by law also has a consequence for linguistic minorities. When a threshold is in place, the census becomes a political battleground (*e.g.*, as in Kosovo and Macedonia). However, if the area is designed regardless of demography the census ceases to be an issue.

Conclusions

Most models of territorial autonomy require a certain degree of bilingualism on the side of the (relative) minority in order to function, as they will need to use the state language in their dealings with central authorities. This can be qualified by combining territorial and non-territorial forms of autonomy. In the field of mother tongue education, an autonomous sub-state entity can organise education services through the establishment of a linguistic immersion programme (as Catalonia, Faroe or Greenland) or the establishment of separate schools in accordance with personal choices (Bosnian and Croat schools in the cantons of the Federation of Bosnia and Herzegovina). The linguistic immersion model is adequate where a considerable demographic concentration of a minority within a territorial unit and has the advantage of establishing an equal playground for all in which inclusiveness is the norm. It reinforces the regional identity and can help prevent the disappearance of regional and minority languages (Catalan, Faroese). Such reinforcement can however, also intensify exclusion, polarisation and secession claims in post-conflict settings (as in Republika Srpska). The separation model, where students attend either separate classrooms or buildings ensures the right of persons belonging to minorities to education in their mother tongue. However, in post-conflict scenarios involving large minorities (Albanians in Macedonia) it may run counter to peace building efforts if it is not accompanied by measures aiming at integration. Such a concern does not exist when the groups benefitting from it are numerically smaller (Turkish schools in Kosovo). The politics of kin-states may also lead to political disputes concerning the education of ethnic kins. Overall, both separation and immersion models in post-conflict settings require strong measures aimed at integration through extra-curricular activities and/or reforms of the content of education.

Another consequence of the territorial models is that technically speaking there is no need to define groups following the personality principle, as political identities

ultimately depend on legal residence. It is sufficient to establish which languages may be used, that is, it is not necessary to recognise and list different groups with all the dilemmas which this entails.

5.2. Legal Implications of the Non-Territorial models in Relation to Linguistic Diversity

Contrary to the situation in territorial models, autonomy regimes which are based on the personality principle require that groups are legally defined. The lawmaker needs to determine which groups are recognised, and the groups need to define their boundaries, which in the case of territory-based identities is not necessary as these are based on residence. A person may move to Catalonia and become a Catalan in Catalonia (a territorial model), where the residence-based political condition of Catalan does not even legally require learning Catalan language. In turn, a non-Vlach will rarely effectively become part of that group in Serbia (non-territorial model), neither by residence nor by learning the Vlach language (despite the fact that paradoxically he or she may freely self-identify as such). The cultural autonomy models are hence especially valid for those groups which have an exclusive identity character (normally not welcoming new-comers, at least on language basis alone). States normally rely on self-identification as the primary principle, avoiding the problem of objectively defining who is or who is not a member of a group. Such a need makes the census a highly sensitive tool, which is likely to originate both inter and intra-community disputes as well as controversies with kin-States (*e.g.*, Romania and Croatia in the case of Vlachs and Bunjevci).

Devolving administrative competences on language (including standardisation) and education helps the consolidation of group identities as such as well as the homogenisation of internal differences within languages. The quality and adequacy of

textbooks is problematic both when competences are devolved or centralised. The lack of effective supervision by the state and the problem of resources (availability of adequate textbooks) may affect the quality of education, while excessive centralisation leads to the opposite problem (*e.g.*, culturally inadequate Miskito textbooks). Provision of textbooks by kin-States complicates the problem further.

In the field of education, functional autonomy leads to separate education systems. This may not be a problem in consolidated states such as Finland or Italy but poses a challenge in post-conflict societies. Moreover, an education system based on the personality principle united with minority language rights in other spheres of public life makes it less of a necessity to learn the majority or state language, which also reduces the need for inter-group interaction and thus integration. Minority language speakers are more free to move around the state's territory without having to use other language than their mother tongue.

A visual comparison of the linguistic immersion and separation models with the parameters of territorial and personality-based organisation of the state or sub-state leads to the scheme shown in Fig. 2. There are four main choices at the disposal of the law maker (A, B, C and D). Area A refers to linguistic separation and personality-based regimes, such as the functional autonomy educational systems found in Macedonia and mainland Finland. Area B corresponds to territoriality and separation, where territorial regimes such as Navarra, the Basque Country, Vojvodina and South Tyrol offer separate education either based on personal choice or on specifically designed geographic areas. Area C, personality and immersion, represents the increasingly rare monolingual state (France, Greece or Iceland), where citizenship and national identity are in theory equated. Area D covers the territorial immersion models (Catalonia, Åland Islands, Belgium and Switzerland), where monolingual

units offer education in the (relative) majority language in that sub-state territory. Each area (A, B, C, D) has different implications.

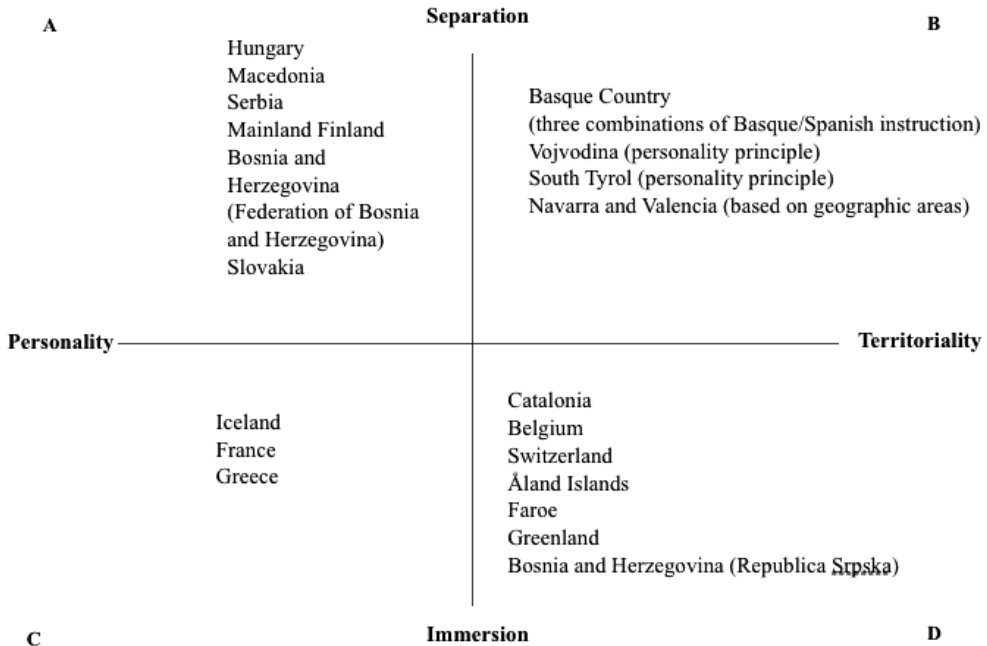


Fig. 2. Language education models and the territoriality and personality principles in autonomy design.

In area A, the personality principle leads to strengthening the idea of separate exclusive ethnic or national identities which are relatively independent of their physical location. The self-identification based on national identity found in Central, Eastern and South Eastern Europe must be however distinguished from the self-identification based primarily on language only found in mainland Finland. The social and political contexts are indeed quite diverse, as are the benefits and challenges found in each case. However the technical organisation of education is strikingly similar.

Area B qualifies such a position with a territorial arrangement which adds a territorial layer to communal identities. It is a complex zone where separation may be determined either by physical location, by ethnic or national belonging or simply by

personal or parental choice (many Basques whose mother tongue is Spanish have chosen the Basque instruction model in the last decades).³⁴⁴ As in area A, the social and political realities in each case are quite different. In Vojvodina, the territory-based regional identity is coupled with personality-based national ones.

Area C is the increasingly rare space of the classic nation state where individual (indeed, citizen), language, nation and state are equated. In countries like Greece, Iceland or France there is little or no recognition of ethnic and national diversity in their legal systems. Despite a multi-ethnic past, citizenship and identity are intrinsically united, demonstrating significantly successful nation building processes.

Finally, Area D seems to offer an inclusive territorial identity which is based on language for all inhabitants of a territorial arrangement. However, the cases are quite different. The situation of persons who give primacy to their Spanish identity over their Catalan one in Catalonia is by no means comparable to, for example, that of Bosniacs in the Republika Srpska. Each of the countries and territories which fall within this area have in this sense deep differences as well as some similarities. In Catalonia, Åland Islands, Faroe Islands and Greenland, homeland, language and community are strongly inter-connected, while Switzerland, Belgium and the Republika Srpska in Bosnia and Herzegovina are more or less successful attempts at addressing differences through territorial self-governance.

In all four areas citizens benefit from learning the state or majority language and probably need to, however such a need may be less urgent in Areas A and B and even less in Area D. In some of these cases, it is not reasonable to expect minorities to learn the second state language (*e.g.*, Serbs in Kosovo) while in others it is even mandatory for majority language speakers to learn the lesser used language (Swedish in Finland).

³⁴⁴ Arraiza 2011, p. 131.

Personality-based autonomy regimes (Area A) are often thought to be less prone to secession claims than territorial ones. However, if linguistic minorities are territorially concentrated there will still be a large number of minority schools and minority-speaking local administrations within a given area (*e.g.*, northern Macedonia, the Albanian majority municipalities of South Serbia) which may equally entertain such territorial claims. The full control over textbooks by national minority councils and the fact that often these textbooks are obtained from kin-States (which is also the case in South Serbia and North Macedonia where Albanian textbooks are used) reinforces such a view.

5.3. Concluding Observations

Autonomy is one form of making the political and the cultural congruent. Moreover, it helps ensure that societal cultures are protected and individual freedom is preserved, following principles of multiculturalism. Political structures help re-create group identities that are in turn used as platforms to demand territorial or cultural self-governance. Giving rights to a group in turn helps to consolidate it as such: political institutions have an impact on linguistic groups and *vice versa*. There is however no single legal formula to square the circular relation between linguistically diverse societies and the politics of autonomy. Moreover, ethnic and national identity is a complex and multifaceted phenomenon which escapes firm generalisations.

As seen throughout this dissertation, the territoriality principle and its idea of a physical homeland for a minority where their language is a component of home rule for its inhabitants, and the personality principle seeking to empower a language community, are not exclusive but essentially complementary. They constitute two broad institutional design options intimately related to the challenge of cultural (and

linguistic) diversity. Equally, territory-based identities may complement personality-based ones.

There is a close relation between the design of autonomy and the standardisation, promotion and use of minority languages. Peripheral linguistic nationalism plays a role in supporting to the maximum level of the recognition and use of a language as well as the provision of minority language education. Multiculturalism, that is, capturing and transforming nationalist claims by pursuing integration with respect to cultural differences, represents a balancing principle at the central level. The power to standardise languages, their official recognition and their promotion through education lead to the reinforcement of linguistic identities which may in turn be used to claim further powers.

Territorial legislative autonomy may lead to the consolidation of a territory-based identity which is normally of a relatively inclusive character (such as Catalans in Catalonia, Basques in the Basque Country) and exceptionally exclusive (Republika Srsпка). Such consolidation derives from their power to define language and education law and policy, subject to constitutional rules and the demographic concentration of at least one minority group. Indeed, they have at their disposal similar options as states: official recognition of languages and the establishment of associated language rights, education policies based on either thresholds, delimitation of areas or linguistic immersion as well as the recognition and or creation of language standardisation and/or policy bodies. Territorial autonomy united with the devolution of competences over language policy offers the advantage of a clear set of rules applying equally to all the inhabitants of a given sub-state entity. Legislative autonomy empowers geographically concentrated minorities to make language policy decisions. Given the heterogeneity of virtually all societies, the risk is replicating the

nation-state paradigm at the sub-state level, creating new grievances. Hence it is essential that all autonomy institutions contain internal checks and balances.

Non-territorial autonomy is characterised by the lack of legislative competencies and the need to define groups by law. This may, however, be balanced by a high degree of control over education institutions and language standardisation bodies. Indeed, the power to regulate issues such as language standardisation may give minority representatives considerable influence. The definition of groups by law may promote an essentialist understanding of identity as opposed to the inclusive identities produced by territorial autonomy regimes. Non-territorial autonomy is in this sense more amenable to include a larger number of smaller identities and even the creation and promotion of relatively new ones. It requires a census which allows the state to make decisions over ethnic and national identity in concrete laws and policies and may lead to essentialist conceptions of identity. Census may, however, also be based on multiple, complementary identifications.

In sum, territorial autonomy regimes seem appropriate for larger, territorially concentrated ethnic and national minority groups (particularly indigenous peoples) where one minority language is dominant throughout such territory. In turn, non-territorial autonomy is appropriate for highly heterogeneous states where minorities are scattered and only concentrated in relatively smaller geographical areas.

In both institutional design options the persons belonging to such groups are normally expected to learn the state or majority language. Non-territorial models allow speakers to use their language elsewhere within the state however, they constrain the use of minority languages to a self-contained group, as non-speakers do not have the obligation to learn such languages.

As to the question of what leads states to choose between territorial and non-territorial autonomy, the answers require in-depth historical studies of each context.

The history of a state's institutions played a major role in the establishment of the autonomous regions of Catalonia (a "historical territory" in the Spanish legislation).³⁴⁵ In the states that originated after the disintegration of the Ottoman empire the tradition of the *millet* system has lingered on through the national cultural autonomy institutions.

The fear of secession is always present in relation to sub-state nationalism. Paradoxically, both centralisation and devolution (personal or territorial) aims ultimately at the same goal: fairness and stability. Equally, the fear of secession may lead to both territorial and/or non-territorial forms ("escaping forward" in Spain and preventing further empowerment of Hungarians in Slovakia). Understandably, in post-conflict scenarios where autonomy is designed in a relatively short time, a generous variety of options is usually included. Thus, the Ohrid and Dayton Accords and the Ahtisaari Proposal provide a wide repertoire of territorial and non-territorial forms of self-government.

The problems encountered in the implementation of these peace agreements, the ongoing crisis in Spain concerning Catalonia's aim for secession as well as tensions between kin-States in Central and Eastern Europe call for well informed efforts to ensure that laws and policies empower groups fairly, improve relations between them and democratise. For these reasons, the multiple, inter-connected implications of the territoriality and personality principles should be knowingly taken into account. As the introduction to this dissertation mentioned, the work of art transforms the artist himself. Autonomy provides the possibility of transforming societies into more tolerant, integrated, peaceful and stable places to live. In this sense, making good home rules for mother tongues is an essential political investment.

³⁴⁵ Chapter 3, Constitution of Spain.

5.4. Practical Recommendations

5.4.1. Tool-kit on Linguistic Diversity and Autonomy

It would be useful to develop a legal policy tool-kit for linguistic diversity considerations in the design of territorial and non-territorial autonomy regimes. Such a document should take into account both international standards on minority rights as well as experiences from the practical implementation of such regimes as identified by academic research, international monitoring bodies and civil society organisations. It would clarify and expand the range of options available to policy makers and introduce more analytical flexibility in the lawmaking process.

5.4.2. Enhanced Analysis by Treaty Monitoring Bodies

The AC FCNM and the CE ECRML could enhance the quality of their country and thematic analysis by using a more multi-disciplinary approach, including the comparative analysis methodology as well as analysing the political and philosophical principles (*e.g.*, nationalism, multiculturalism in its diverse forms) motivating concrete legal and institutional policies. A shift from the monolingual paradigm where individual, language and national minority are equated would enrich its analysis.

5.4.3. Promotion of a Holistic Approach to Autonomy as a Conflict Prevention Tool

International organisations such as the OSCE, the Council of Europe and the UN should consider promoting a holistic approach to the use of territorial and non-territorial forms of autonomy and their combination as a form of conflict prevention and as a viable alternative to secession in the fulfilment of the right to self-determination. These organisations could undertake such promotion through existing regional or international strategies on autonomy and minority rights.

5.4.4. Introducing Nationalism and Multiculturalism Studies in Post-Conflict Settings

Both linguistic immersion and separation models of education in post-conflict settings may have as an unwanted consequence the reduction to a minimum contacts between students of different ethnic groups, leading to polarisation. It would be desirable that the curriculums within these areas include comparative studies on nationalism (and its relation to the making of national languages) and multiculturalism within their history curriculums (including notions on language and national identity) so that new generations can relativize identity and benefit from mother tongue education without hampering integration.

5.5. Normative Recommendations

5.5.1. Linguistic Impact Assessments

The development of legislation on matters affecting territorial competences (*e.g.*, redrawing of municipal boundaries, decentralisation or autonomy reforms) and the rights of minorities (*e.g.*, national cultural autonomy institutions, language laws) should require the drafting of linguistic impact assessments to ensure that the consequences of such legislation are appropriate from an international human rights law perspective.

5.5.2. Complementary Forms of Autonomy

In the design of autonomy arrangements, law and policy makers should adopt a holistic legal policy approach by taking into account the various possibilities that mixing territorial and non-territorial autonomies offer, drawing from international examples from across the globe and including institutions currently used for both national minorities, indigenous peoples and other groups.

5.5.3. Inclusiveness and Multiplicity of Identities

Legal frameworks establishing territorial and non-territorial autonomies should recognise the multifaceted aspect of ethnic and national identities through inclusive and complementary group definitions (e.g., with open-ended census allowing identification with multiple identities and affiliations).

5.5.4. Central Recognition and Sub-State Accommodation

The ideal model of language and autonomy promotion seems to be a central level degree of recognition (entrenched at the constitutional level) to be developed and tailored by sub-state entities (or non-territorial bodies) in accordance with cultural and political particularities. In this sense, indigenous peoples could benefit from higher protection of their languages at the state level than what is currently reflected in international standards.

5.5.5. A Two-Plus-One Educational Model

From an educational perspective, the best option appears to be a “two-plus-one” educational model that offers fluency in the majority and minority languages as well as a third ‘global’ language (English, French, Spanish, etc) in a way that both majority and minority language speakers feel comfortable and their personal and cultural autonomy is secure.

5.5.6. Promoting Minority Cultures Within Majorities

Where this is not possible, states should be open to offering students of the majority linguistic groups the legal possibility of learning minority languages both within and outside those areas in which minorities constitute the relative majority (e.g., Madrid students learning Catalan, Kosovo Albanians learning Serbian or Turkish). Such a

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possibility should be duly reflected in their legal frameworks on education through optional subjects.

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Appendix: Constitutive Articles

- A. 'Squaring Indigenous Circles: The Making of Nicaragua's Indigenous Communal Property Regime', 29 (1) International Journal on Minority and Group Rights, 2010, pp. 69–103.

Available at:

<http://booksandjournals.brillonline.com/content/journals/10.1163/157181112x620546>.

International standards on indigenous peoples contain a theoretical promise of spatial empowerment and traditional governance as part of autonomy which in practice is not absent of conflict and human rights concerns. Western “square” individual property rights conceptions are confronted with “circular” communal property relations. Legitimate interests of indigenous communities conflict with non-indigenous ones. The communal administration of the land is to be balanced with environmental protection. This article problematizes these dilemmas by analyzing the development of a communal property system within the Atlantic Coast Autonomy of Nicaragua. It identifies essentialist and constructivist ideas on indigenous identity and other policy assumptions behind it, the technical answers given to indigenous claims (*de facto* restitution, participatory demarcation and titling, conflict resolution mechanisms) and their consequences. It argues that a set of norms which is considered legitimate by all communities and which respects the rights of non-indigenous persons, including a fair dispute resolution mechanism, is needed for its success in protecting environmental and social stability and preventing violence. To achieve such objective in this or similar scenarios, an open minded approach to group identities and to available options (inclusive of others or exclusive to a community, collective or individual rights) in the design of special property regimes would be useful.

- B. 'Blueprints for Babel: Legal Policy Options for Minority and Indigenous Languages', 17 (1) *European Public Law*, 2011, pp. 111–138.

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Legal policy decisions on minority languages reflect concrete ethno-national political struggles, which use culture as a platform. They also reflect a global policy shift towards multiculturalism, which legitimizes diversity. Choices in the key parameters of territoriality, recognition, institutional scope, and obligations for newcomers balance competing interests of majority and minority individuals while pursuing the stability of state structures. European regional standards offer a menu of options for this end. A comparison of the cases of Spain, where Basque, Galician, and Catalan enjoy territorially defined co-officialdom, Bolivia, where a constitutional reform has entrenched indigenous language rights, and the mixed case of Finland, where minorities and indigenous peoples enjoy protection, demonstrate the need for complex arrangements to address historical and cultural specificities. It also exposes the vulnerability of migrants and weaker minorities not mobilized in ethno-national terms.

- C. 'Language Policies in Bosnia and Herzegovina, Kosovo and Macedonia', 7(1) *European Journal on Minority Issues* / *Europäisches Journal für Minderheitenfragen*, 2014, pp. 8–29.

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Language education policy in the former Yugoslavia is characterized by a physical separation between students according to language (and consequently ethnicity). Such separation does not necessarily amount to segregation in the legal sense and may be a feature of functional autonomy. However, it can arguably prevent reconciliation and long-term social cohesion. The comprehensive peace (and/or status) agreements in place in Kosovo, Macedonia and Bosnia and Herzegovina have led to similar practices of separation following different models. The article compares from an institutional design perspective the territorial decentralization, devolution of education competences and language recognition features of the Dayton Accords, the Ohrid Framework Agreement and the Ahtisaari Proposal. The main differences between the

three cases relate to the devolution of education competences at central and local levels. Their commonalities consist of a constitutionally entrenched delineation of boundaries, minority language rights and the absence of integration as an explicit goal of legislation. Such features do not, however, necessarily prevent the implementation of integration programs seeking a middle ground between accommodation and the outright creation of difference.

- D. 'Weaving Miskito and Mestizo Imaginations: The Atlantic Coast Autonomy of Nicaragua', in Salat, Levente – Constantin, Sergiu – Osipov, Alexander, Székely, István Gergő, (eds.) *Autonomy Arrangements Around the World: A Collection of Well and Lesser Known Cases*, pp. 85–111. Cluj-Napoca: Romanian Institute for Research on National Minorities (Series: *Documenta et Studia Minoritatum*).

Available at: <<http://www.ecmi.de/publications/detail/autonomy-arrangements-around-the-world-a-collection-of-well-and-lesser-known-cases-324/>>.

The Atlantic Coast Autonomy of Nicaragua is the result of an attempt at reconciling the different political conceptions by its center and an indigenous and ethnic periphery. It is a soft model of autonomy for a hard case: an impoverished, underdeveloped, ethnically diverse area plagued with inter, intra and center-periphery tensions over political power, land and other resources. The regime was designed to end a civil war and to achieve durable peace and stability. Its design followed the institutionalist assumptions and essentialist understandings of ethnic identity of the time, and responded to longstanding historical demands for cultural recognition and self-government, including the management of communal property and the use of customary forms of authority. The result was a weak and under-resourced system of autonomous self-government with no legislative powers, a promising but perhaps unrealistic system of linguistic and cultural rights protection and an imperfect mechanism for the protection of indigenous land rights against the advances of the agricultural frontier and damaging concessions affecting the natural resources of the Coast. More than two decades after the end of the Cold War, there is still potential for political violence at the micro level. Achieving sustainable development and balancing the rights of all individuals in the Atlantic Coast, including non-indigenous or Afro-descendent Mestizos and protecting its environment from economic pressures

continue to be pressing challenges which will require additional reforms in the long run.

- E. ‘From the “Right to Decide” to the “Duty to Negotiate” and Back: The Catalan Bid for Independence in Domestic and International Perspective’, 6(2) *European Journal on Minority Issues* / *Europäisches Journal für Minderheitenfragen*, 2013, pp. 101–118.

In light of constitutional constraints materialized in the 2010 Constitutional Court decision on the Statute of Autonomy, in the midst of an economic crisis and facing outbidding by other nationalist forces, the Catalan government has moved from seeking autonomy reform through constitutional channels towards partition via a referendum on self-determination. Facing considerable legal and political obstacles, it has resorted to creating facts on the ground to achieve international legitimacy. Its justification is a far-fetched narrative on the “right to decide” based on an arguable “duty to negotiate” of the Spanish government with a territory where a significant part of the population desires independence (expressed through mass demonstrations and votes for nationalist parties). Such narrative mobilizes voters on the idea that unilateral secession is an internationally sanctioned right and that EU accession will be unproblematic. This understanding of self-determination is at odds both with the 1978 Constitution and international norms. To prevent a vicious circle of groundless demands and central immobilism leading to uncertainty, a strategy of reasonable accommodation and reform is proposed, exploring more flexible solutions.

- F. ‘The Management of Linguistic Diversity through Territorial and Non-Territorial Autonomy’, 2 *European Journal on Minority Issues* / *Europäisches Journal für Minderheitenfragen*, 2015, pp. 7–33.

Available at: <<http://link.springer.com/journal/12241>>.

Nationalism can be a significant influence in the making of autonomy regimes. Likewise, the devolution of competences over language and education allows for the shaping of identities within such autonomy regimes. The result is an imperfect circular relation in which language, society and political institutions mutually and

continuously shape each other: linguistic diversity influences on the design of autonomy arrangements and vice-versa. Territorial and non-territorial autonomy have however different consequences. This article revises through a comparative approach how matters of linguistic diversity – including minority language education and language standardisation – are managed differently through the various forms of territorial (legislative and administrative) and non-territorial autonomy (national cultural autonomy and functional autonomy). To do so, it draws on concrete examples involving minority languages in Spain (territorial legislative autonomy) and in Serbia (national cultural autonomy). Also, it explore further the potential consequences of territorial and non-territorial models by imagining two counterfactual scenarios: a non-territorial arrangement in Catalonia and a territorial one in Serbia.

José-María Arraiza

Making Home Rules for Mother Tongues

The Legal Implications of Linguistic Diversity in the Design of Autonomy Regimes

The principle of nationalism by which the political and the national is to be congruent can be a significant influence in the making of autonomy regimes. Likewise, the devolution of competences over language and education (official language recognition, language standardisation, language of instruction and related curriculum and syllabi) allows for the shaping of identities within such autonomy regimes. The result is an imperfect circular relation in which language, society and political institutions mutually and continuously shape each other: linguistic diversity influences the design of autonomy arrangements and vice-versa. The legal implications of territorial and non-territorial forms of autonomy are however different. While territorial autonomy follows the idea of a perhaps inclusive homeland for linguistic groups where place of residence is determinant, non-territorial autonomy strengthens the idea of an exclusive community of self-identified members able to govern itself regardless of territorial boundaries. The present dissertation constitutes an analysis of such legal implications through comparative legal and institutional analysis. It proposes as a result a series of normative and practical recommendations aimed at furthering democratisation processes in line with the principles of multiculturalism.

