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

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

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

Introduction

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

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

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

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

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

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

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

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

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

The Indigenous People and Their Need for Self-Governance

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

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

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

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

The Right to Self-Determination and the Indigenous Peoples

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

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

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

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

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

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

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

The Form and Content of the Indigenous Self-Determination

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

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

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

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

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

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

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

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

Non-Territorial Autonomy and the Indigenous Peoples

NTA Characteristics

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

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

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

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

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

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

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

NTA and the Indigenous Peoples, the Example of Sámi Parliaments

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

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

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

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

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

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

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

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

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

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

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

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

6 See Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).
7 As for the detailed legislative framework and Sámi Parliaments, see Tomaselli and Granholm 2009.

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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Natalija Šikova

Mogućnosti i ograničenja neteritorijalne autonomije u obezbeđivanju samoopredeljenja starosedeocima

Apstrakt

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

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