Exploring Territorial Autonomy as a Tool for Conflict Resolution

Sia Spiliopoulou Åkermark, The Åland Islands Peace Institute

1. Introduction

Regionalism as a concept covers two distinct strands of theoretical interests as well as of political and historical developments. On the one hand, during the past haft century or so, we have observed the increased pooling and conferring of competences and resources upwards into organizations and networks of regional or sub-regional character such as the European Union, the Council of Europe, the Nordic Council, The African Union, ASEAN, NAFTA, ECOWAS etc. On the other hand we have simultaneously been able to observe processes of enhanced decentralization and devolution within states, ranging from the establishment of singular territorial autonomies to tendencies towards the creation of federal systems. The very idea of multi-level governance indicates that decision-making and legitimation processes take place both at an international (global or regional) as well as at a national and sub-national levels. These processes take place within a paradox.[1] In some ways decisions and activities are increasingly de-territorialised as we experience in politics, popular movements and economic activity. At the same time, there is a re-territorialisation of public life, with increased emphasis on control over territory for natural resources or for the control of population movements and migration. This de- and re-territorialisation are of course also pursued through law and for this reason normative reflection should cover not only national and supra-national developments but equally sub-national, local, regional developments.

From the perspective of international law we can start off with the assertion that since the end of the Cold War, autonomy arrangements have been increasingly perceived and used by states and their representative diplomats and politicians as well as by international organizations as potential tools for resolving ethno-political conflicts as well as part of the affirmation of indigenous claims and self-determination struggles.[2] One important reason for this is the fact that as a whole, the all-or-nothing dichotomy of statehood and self-determination seems to have sustained conflict at least as much as having resolved them.[3] Further, external self-determination theory neglects the fact that we have today around the world tens of functioning territorial autonomies, more or less strong, but in any case not necessarily more vulnerable

[1] Keating, 'The Invention of the Regions', 15 *Environment and Planning C: Government and Policy*, (1997), 383-398.
[2] Spiliopoulou Åkermark, 'Foreword', in S. Spiliopoulou Åkermark (ed.), *The Åland Example and Its Components*, (2011), at 7.
[3] For an extensive argument, see Weller, 'Settling Self-Determination Conflicts: Recent Developments', 20 EJIL (2009), No. 1, 111-165.

than a number of states some of which are considered to be failing or failed.[4] The strong preoccupation of international lawyers with secession, state formation, recognition and state succession is of course a reflection and remnant of the state-only-centered paradigm and starting point of international law, which leaves little room for deeper consideration of and engagement with intra-state solutions.

2. Territorial Autonomy as a Form of Regionalism and the 'Other Side of Self-Determination'

Territorial autonomy, either as a permanent, or a temporary solution is understood and used in international law as the institutional expression of the internal dimension of self-determination.

While self-determination in the classic form of secession or separation (so-called 'external self-determination') has traditionally been found to be legally applicable to situations of post-colonial independence, more recently, it has been argued by judicial organs as well as by academic experts that it applies equally to situations of oppression or exploitation of a 'people' by the government in the state where this people is living, even though the positions are far from clear.

In the *Reference re Secession of Quebec* case the Supreme Court of Canada expressed the view that 'a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and *possibly* where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.'[5] However, this right simply triggers within the framework of the federal constitution a right to initiate negotiations while respecting and balancing the rights of minorities as well as majorities, argued the Supreme Court of Canada.

Before the Judgment of the Supreme Court, the Canadian Government had consulted two international experts (Professor James Crawford and Professor Luzius Wildhaber) for an opinion on whether Quebec had a unilateral right of secession. The two experts concluded that no such right exists but still found that 'there may be developments in the principle of self-determination according to which not only colonialism but also flagrant violations of human rights or undemocratic regimes could lead to a right of unilateral secession'.[6] Of course this does not answer the issue of what is a 'people' and who is entitled to this unilateral right of

[4] An effort for a mapping of territorial autonomies recently identified 65 territorial autonomies in 25 different states around the world. M. Ackrén, *Conditions for Different Autonomy Regimes in the World* (2009).
[5] Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. Emphasis added.
[6] As cited in Mayall, Nationalism, 'Self-Determination, and the Doctrine of Territorial Unity', in M. Weller and B. Metzger (eds.), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (2008), 5-16 at 13.

secession but it argued that under other circumstances 'peoples are expected to achieve self-determination within the framework of their existing state'.

The Canadian Supreme Court went even further in finding that:

A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development.

The crucial aspect for the purposes of the present discussion on territorial autonomy is the reference by the Canadian Supreme Court to the 'principles of self-determination in … internal arrangements' in addition to the requirement of equality and non-discrimination. An assessment with regard to the 'internal arrangements' would then be needed in order to make a feasible claim to external self-determination (as secession or voluntary separation). The Supreme Court did not go into the details of this assessment but repeated in its reasoning the importance of respect of individual rights as well as rights of minorities, the operation of democracy in the provinces as well as in the country as a whole and the principles of federalism and constitutionalism.[7] These principles were discussed by the Canadian Supreme Court in their historical and political contexts and democracy was defined in a broad sense and as encompassing the promotion of self-government and the accommodation of 'cultural and group identities'.[8]

More recently, James Mayall, has proposed that it might be possible to argue that the peace agreements between north and south Sudan and between Papua New Guinea and Bougainville, both of which provide for referendums on independence after a transitional period of joint government, are a move in the direction of an acceptance of the existence of a right to unilateral secession in situations of oppression.[9] However, it is unclear and questionable how and why these two cases would qualify as such evidence, especially since the situation in South Sudan shows still grave weaknesses in the implementation of the agreement and continued use of force in the region, in spite of the immediate recognition of The Republic of South Sudan by (North) Sudan. Civil war and recurring violence were part of the long struggle in Bougainville up until the agreement of 2001and it is too early to know what shall evolve out of the transitional autonomy arrangements that entered into force in

[7] Para. 32 of the Judgment.
[8] Para. 64 of the Judgment.
[9] Mayall, 'Secession and International Order', Conference Paper (2011), available at the website of the UK Royal College for Defence Studies, http://www.mod.uk/NR/rdonlyres/A933317A-517A-41E9-8A35-FC8067D7C051/0/2011SecessionandInternationalOrderFinalDraft.pdf (as of 15 July 2012).

2005 for Bougainville. Further, both cases involve considerable interests of natural resources (oil in Sudan and copper in Bougainville) and the processes can be seen as part of the continuing de-colonization processes, even though there are considerable differences between them. Separation by agreement is of course always possible as evidenced by the separation of Norway and Sweden in 1905, the break up of the Union between Iceland and Denmark in 1944, and the separation between the Czech and Slovak republics in 1992.

In the *Kosovo* case, by contrast, the International Court of Justice in its Advisory Opinion of 2010 did not find it necessary to discuss whether there was at the time or earlier any meaningful potential of internal self-determination. The Court relied simply upon the conclusion of the Special Envoy for Kosovo of the UN Secretary General, President Martti Ahtisaari. Mr Ahtisaari had concluded in his 2007 report that a 'careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations of the parties' gave at hand that independence was the 'only viable option for Kosovo'.[10] Perhaps not so surprisingly, the Court consequently concluded that, while it did not wish to take any position as to the prerequisites of the exercise of the right to (external) self-determination nor of what the Court referred to as 'remedial secession', in the view of the ICJ, general international law did not contain any prohibition of unilateral declarations of independence.[11] This conclusion does not bring us very far though, as it does not give any guidance as to the legal effect of the declaration of independence, nor does it approach the issue of what is an acceptable arrangement and regime of internal self-government (e.g. territorial autonomy), with or without international supervision. Not surprisingly the Advisory Opinion was followed by nine declarations, dissenting and separate opinions.[12]

All in all, the above discussion must come to the conclusion drawn earlier by Weller that the legal rules of (external) self-determination, and even more so the application of these rules, do not resolve self-determination disputes in today's world.[13] The obsession of international lawyers with secession and state formation may possibly be explained also due to the cautiousness of international lawyers in 'trespassing' the remit of constitutional law. While the borders of legal disciplines are soft, as a general rule among constitutionalists, the interest has been mainly focused on various forms of symmetric federalism, dominated by models such as those of the US, Germany, Switzerland and more recently e.g. Ethiopia and, less on the role of

[10] International Court of Justice, *Accordance with International law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, of 22 July 2010, para. 69.

[11] Ibid., paras. 82-84.

[12] It can also be noted that out of the 93 States that have recognized Kosovo (by July 2012), the great majority, 69 states, had done so already before the rendering of the Advisory Opinion of the Court, the majority being EU and NATO members.

[13] Weller, 'Why the Legal Rules on Self-determination Do not Resolve Self-determination Disputes', in M. Weller and B. Metzger (eds.), *supra* note 6, 17-45.

international actors or the use of international instruments in the negotiation and entrenchment of autonomy solutions.[14]

However, political and legal developments precede and bypass that interests and priorities of legal scholars and the insistence of proponents of secessionism. Since the end of the Cold War, territorial autonomy as a form of so called complex power-sharing, has often been used as a proposal or as an institutionalized effort in conflict resolution around the globe in a number of cases, including Northern Ireland, the Kurds in Northern Iraq, the Chittagong Hill Tribes in Bangladesh, the Moros in the Philippines, Aceh, Papua New Guinea/ Baugainville, Nicaragua's Atlantic Coast, Gagauzia, Crimea, Kashmir, Tibet, West Sahara, Sri Lanka, the Northern Territories (Japan) and Abyei in South Sudan. Some of these efforts are still open and inconclusive and seem to have failed disastrously, at least in the short run. In addition to such efforts, asymmetric solutions are evolving in constitutional processes of devolution of power in the United Kingdom, Spain and elsewhere.[15]

In other words it is high time for international law to leave aside the arguments and rules of external self-determination. Statehood and external self-determination can be expected to continue playing an important role as a remaining last resort option. In fact already in 1921 the Commission of Rapporteurs that addressed the Åland Islands question had concluded that secession should be seen as an 'altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees'.[16] The fact that the independent State of Finland had just declared its independence a few years earlier (in late 1917) and had gone through a civil war (1918) and while the state was in a poor financial situation were not seen as insurmountable obstacles neither by individual States nor the League of Nations when giving preference to the option of territorial autonomy for the Åland Islands, even though that was against the expressed will of the people of Åland at that time.

[14] For a more recent combination of perspectives and an analysis of several specific cases see M. Weller and B. Metzger (eds.), *supra* note 6. For an argument in favor of federalist solutions see E. McWhinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law: Failed States, Nation-building and the Alternative, Federal Option* (2007).

[15] See examples in Appendix 11.2 in M. G. Marshall and T. R. Gurr, *Peace and Conflict 2005*, Center for International Development and Conflict Management, available at http://www.systemicpeace.org/PC2005.pdf (as of 15 July 2012). See further the database of the *Cambridge – Carnegie Project on the Settlement of Self-Determination Disputes using Complex Power-Sharing*, available at: http://www.polis.cam.ac.uk/research/cps/documents.html (as of 6 June 2012).

[16] Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations, Doc. B7/21/68/106(1921), at 28. It can be noted that in its Written Statement to the ICJ with regard to the *Kosovo* case, Finland, on the one hand referred to the Åland case, arguing that both situations (the Åland dispute in the early 20th century and the Kosovo dispute at the turn of the 21st century) were 'abnormal' as a consequence of war and unsettled borders, however this similarity did not prompt the Finnish positions to conclude that territorial autonomy would be a viable solution for Kosovo. Rather, the Finnish argument seems to rely upon the idea of 'remedial secession', but it is unclear why this would have precedence in the period 1989-1999 in Serbia and not in the 1917-1818 period in Finland.

In this paper the focus is on territorial autonomy since the core argument made is that international law should pay increased attention upon the conditions and circumstances of viable internal solutions, not only as individual human rights systems but as structural solutions. Is this an argument which can serve as an example of Eurocentric or Western arrogance, in being satisfied with the settlement of things in the old colonial powers and pushing large parts of the colonized and de-colonized urgencies aside? I believe not, since the matter is equally relevant for all those counties colonial as well colonized. Processes of colonization of different forms have been taking place for ever in all parts of the world, as evidenced by the arguments of the indigenous movement. Furthermore, as pointed out already in 1992 by UN Secretary General Boutros Boutros-Ghali in the *Agenda for Peace*, 'if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become even more difficult to achieve'.[17] There is a right to autonomy as much or as little as there is a right to secession; what we need is to consider in a structured and theoretically sustained way the conditions which make autonomy viable and the multiple options covered by the overall notion of territorial autonomy.

3. Evidence of the Factors Influencing the Success of Autonomy arrangements

To the extent they have been engaged with territorial autonomy, and beyond the level of general arguments for and against territorial autonomy, international lawyers have mainly dealt with two themes within autonomy research; firstly, the division of powers between the autonomous region and the central state and, secondly, the institutions of legislative, judicial and executive powers in the autonomous region, issues which are mainly of an institutional, domestic constitutional character.[18] It has even been argued occasionally that autonomy is a source of conflict. However, in such arguments it is usually put forward that the granting of autonomy is a core cause of conflict, while there is little examination of the factors influencing the quality and durability of the total regime surrounding an autonomy solution, such as the links between and the protection of language and culture. Nor are such studies engaged in conditions prevailing in the autonomy, in the host state and in the surrounding environments (states and regions).[19]

This is why one can only welcome the more recent shift of research focus away from the pros and cons of autonomy as such and in the abstract, to the qualities of the totality of solutions and the preconditions that affect them as well as to the ability of such autonomy regimes to

[17] *Agenda for Peace,* UN Documents A/47/277 and S/24111 (1992), para. 17.
[18] See e.g. H. Hannum, *Autonomy, Sovereignty and Self-determination – The Accommodation of Conflicting Rights, Philadelphia* (1996); several contributions in M. Suksi (ed.), *Autonomy: applications and implications* (1998); several contributions in Z. Skurbaty (ed.), *Beyond a One-Dimensional State: An Emerging Right to Autonomy* (2005).
[19] Cornell, 'Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Perspective', 54 *World Politics* (January 2002), 245-76.

adapt to new conditions. Indeed, in the past ten or fifteen years, however, the interest of research has turned towards an effort to explain what factors influence the stability and longevity of autonomy solutions.[20] Bringing forward the work of Yash Ghai and on the basis of several case studies, it is here argued that we can discern five crucial factors, or rather cluster of factors, influencing the success or failure of autonomy solutions.[21] They concern the timing of the establishment of the autonomy; the nature of the dispute and domestic dynamics; the legal and political situation in the state in which the autonomy is created or proposed to be created as well as the way the arrangement has been negotiated and introduced (what we call in sum 'the democracy requirement'); the role of external actors and the international society; and, finally, the institutional design of the autonomy arrangement as such.

With regard to timing, it is argued that the empirical evidence indicates that the prospects of arriving at a successful introduction of an autonomy are strongest when the state, and I would argue the region, is undergoing a regime change or a wider re-shuffle. This evidence contradicts in fact the opposite argument used by Finland in its written statement in the Kosovo case before the International Court of Justice.[22] With regard to the nature of the conflict, it has been suggested that a factor influencing success in autonomy negotiations is the ability to diffuse or fudge sovereignty. Similarly it is beneficial if the conflict can be understood and constructed as being less bipolar and confrontational between two clearly defined opposing sides.[23]

As regards what is here described as the 'democracy requirement', this requirement concerns both the mode of the negotiations in view of a possible autonomy as well as the subsequent institutions and processes ensuing out of the settlement. The democracy prerequisite is not necessarily met by referenda which may destabilise and increase tensions rather than diffusing them. If referenda campaigns are captured by extremist voices on either side, then efforts for compromise, the essence of autonomy solutions, shall prove futile. It should also be noted that empirical evidence indicates that also international actors often neglect the importance and role of local voices.[24]

A huge problem remains that of the short-term commitments of the international community, often prolonging mandates by few months at a time. While international engagement may be genuine and important in finding a solution, the involvement does not pursue the later implementation and upholding of agreements. As security issues are usually only a small

[20] Y. Ghai (ed.), *Autonomy and Ethnicity, Negotiating Competing Claims in Multi-Ethnic States* (2000); S. Wolff, *Disputed Territories: The Transnational Dynamics of Ethnic Conflict Settlement* (2003).
[21] Ghai, *supra* note 20, at 14-25. For a full analysis of the five clusters of factors see S. Spiliopoulou Åkermark, 'Introduction', *supra* note 2, at 8-25.
[22] *Supra*, note 16.
[23] Ghai, 'Ålands Autonomy in Comparative Perspective', in S. Spiliopoulou Åkermark (ed.), *supra* note 2, at 88-112. Spiliopoulou Åkermark, ibid., at 19.
[24] Spiliopoulou Åkermark, 'Kashmir: The Lengthy Conflict between India and Pakistan', in S. Spiliopoulou Åkermark (ed.), *supra* note 2, 178-183.

portion of the problem in its entirety, engaging only in this aspect, for instance in keeping military observers or military or police presence, may appease the confrontations but does not achieve any long term solution of the dispute itself. Using once more the Åland Example we can observe that the settlement approached four core areas in its rather condensed and principled way. It dealt with:

- The power-sharing problem by establishing a system of territorial autonomy with exclusive competences and while guaranteeing enough links and cooperation instruments with the central state;

- The security problem by reconfirming the earlier demilitarisation regime and expanding it through the neutralisation of the territory during war. It also allowed for the establishment of a local police under the exclusive competence of the Autonomous Government and Parliament;

- The identity and minority culture protection issue with extensive language guarantees and by recognising exclusive competence of Ålandic authorities in matters of education and culture;

- The economic resources issue and the financial viability of the newly established autonomy by allowing for control of land by the Ålandic government and parliament and by introducing limitations to the right of establishment of business.[25]

While today some of the provisions would most likely be seen as contrary to free trade and individual human rights these rules were of course a product of their time, and more importantly, they were contingent legal responses to the four core issues which re-occur in nearly all ethno-territorial disputes. So, all of them need to be taken equally seriously also today.

Furthermore, taking into account the time factor, cases which are sometimes nowadays looked at as success cases such as the federal and constitutional settlements in Canada, the Åland Islands as an autonomous and demilitarized region in Finland, or the autonomous region of South Tyrol in Italy, have had a long life to mature and evolve and moreover they were not always looked at as successes by all parties originally.

4. Contemporary Justifications of Territorial Autonomy Arrangements

Territorial autonomy is increasingly justified in terms of internal self-determination, often of ethnic, linguistic or cultural minorities, and within a democratic participation framework.[26] The conceptual relation between territorial autonomy and the empowerment and protection of

[25] For an analysis of the dynamic evolution of the institutions and communication processes see Stephan, Öst and Spiliopoulou Åkermark, Chapters 1-3, in Spiliopoulou Åkermark (ed.), *supra* note 2, at 28-85.
[26] On justificatory chains in international law, see Spiliopoulou Åkermark, 'Shifts in the multiple justifications of minority protection', 7 European Yearbook of Minority Issues (2007/2008), 5-18.

minorities, however, remains underexplored in international law today and it is hereby argued that the creation of a territorial autonomy does not necessarily meet the goal of creating sufficient conditions for the protection and promotion of minority identity. As we saw in the Åland Example, the language and culture guarantees were additional to the political power-sharing and dividing arrangements. In plain words, being left alone to decide, does not support adequately the position of a language or culture in a state.

Moreover, regional integration is argued by scholars to be a factor influencing positively the success of autonomy solutions. We should therefore be examining carefully the role of international law in efforts involving territorial autonomy sought to accommodate minorities. Do such autonomy regimes follow the ideals of internal self-determination as mentioned above, i.a. democratic participation, minority protection and long-term conflict prevention?

Autonomy can be an administrative tool to guarantee the stability and territorial integrity of a state, i.e. in essence a security arrangement. It helps to fit the idea of a unitary state in the multiplicity of the nation. Within a contractual paradigm, an asymmetric federalism, such as autonomy arrangement for one or some of the constituent entities of a state, allows 'diverse communities to negotiate the federal compact'. As the idea of a social contract between state and individuals informs liberal constitutional theory, similarly this idea is transposed between the state and diverse communities. One of the difficulties in the paradigm is of course the fact that ethnic communities or minorities incorporate in most cases a variety of views and positions and negotiation may be hard to conduct and conclude. As pointed out by Vasuki Nesiah, such a conception of autonomy, relies heavily on conditions of separation, i.e. the state should refrain from involvement in matters of private life or of the autonomous region.[27]

Finally, a democratic or participatory paradigm of autonomy enhances aspects of strengthened local self-government and strengthening of grass root democratic traditions. One of the difficulties and at the same time the possibilities in today's world is, however, the fact that participation and democratic debate takes place increasingly across national borders and not necessarily on issues limited by domestic politics and law. This is what makes the international life of autonomous regions today so important to document, analyse and discuss. In this sense a territorially bound autonomy shall always be a partial response to this third paradigm if it does not allow for international exchange and interaction, legally as well as in other areas of life.

In studying the South Tyrolean experience, Joseph Marko argues that there is a 'complementary functionality of segregation and integration'.[28] Any autonomy system needs to establish and regularly reassess, including by legal amendments and through practice, sufficient elements of separation and self-government and adequate channels of

[27] Nesiah in Ghai (ed.), *supra* note 20, at 64.

[28] Marko, 'Is there a South Tyrolean model of conflict resolution to be exported?' in J. Woelk et al. (eds.), *Tolerance through Law – Self Governance and Group Rights in South Tyrol* (2008), at 380.

communication and negotiation which allow for what Unto Vesa has called 'responsiveness', i.e. the willingness to recognize and communicate something which goes beyond the willingness to accommodate.[29]

We have learned to adapt our understanding of state sovereignty as dependent upon international coordination and cooperation. A similar shift is now taking place with the concept of territorial autonomy. Autonomy is a relational concept; an autonomy is self-governed *in relation to* others, i.e. both the central state but also other states, other autonomies, other regions and other actors. Territorial autonomies are not autonomous in the sense of being isolated or self-relying, as little as states can be so. International law can thereby offer insights with regard to the webs of contacts and interactions of autonomies in the world as well as with regard to their record in minority protection, inclusive participatory processes and individual human rights protection.

[29] Vesa, 'The Åland islands as a conflict resolution model', in Chinsoo Bae, Unto Vesa *et al.* (eds.), *Territorial Issues in Europe and East Asia: Colonialism, War Occupation and Conflict Resolution* (2009), at 34-59.