

Can non-territorial autonomy enhance indigenous peoples' right to self-determination?

Summary

- ▶ This policy brief investigates whether non-territorial autonomy (NTA) can secure indigenous self-governance.
- ▶ NTA incorporates multiple arrangements such as consociationalism and national-cultural autonomy (NCA), as well as forms of representation that de-territorialise self-determination.
- ▶ NTA is an institutional system that endorses representative or symbolic power rather than decision-making power.
- ▶ Theoretically and in practice, NTA does not address indigenous peoples' internationally granted rights, such as the 'right to land, territories and traditionally owned resources', upon which their right to self-determination is based.
- ▶ NTA can help to secure indigenous peoples' right to self-determination, but only as a supplementary, rather than a primary, policy tool.
- ▶ In situations where indigenous peoples are dispersed within a territory for various reasons, NTA can be a valuable tool and must be combined with territorial autonomy where possible.
- ▶ Any solutions that are developed must reflect indigenous peoples' needs and they themselves must be involved in the process.



Recommendations

- ▶ Do not subjugate indigenous peoples' rights to minority rights. International law recognises indigenous peoples as a distinct legal category with a right to self-determination. Indigenous peoples are not minorities to whom minority rights should be granted.
- ▶ Set realistic expectations about the capacities and limitations of NTA. In most cases, NTA institutions only provide symbolic representation and do not have decision-making powers. NTA institutions cannot enforce indigenous peoples' right to self-determination.
- ▶ NTA should only be used if indigenous peoples' territorial autonomy is not attainable (for example, if the indigenous peoples are dispersed throughout the territory or share it with other groups). NTA can be an effective additional policy tool to help indigenous peoples to achieve self-determination, but it should not be the only policy tool.
- ▶ In situations where indigenous peoples are dispersed throughout a territory for various reasons, NTA can be an important tool to support their aspirations and efforts. However, the developed solutions need to reflect indigenous peoples' needs.
- ▶ Indigenous peoples need to participate in the design process and decide which solution is best for them.

Introduction

Indigenous peoples are the third and most recent category to have a recognised right to self-determination. Indigenous peoples are a separate legal category and thus should not be conflated with minorities to whom minority rights are granted. Indigenous peoples' right to self-determination is defined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) as internal self-determination. Internal self-determination grants indigenous peoples the right to establish and control educational institutions in their mother tongue; territorial autonomy; control over natural resources; and the right to promote and maintain their institutional structures, customs, procedures and practices within internationally recognised human rights standards, etc.

Within this set of rights, the most important aspect of self-determination (alongside non-discrimination, respect for cultural integrity, social justice, development and self-government) is the right of control over traditional lands and resources (Martínez Cobo, 1983). Indigenous peoples' identities are closely linked to the territory they inhabit, of which they are a part.

Internal self-determination can be achieved through autonomy in a federal or confederate state structure or via more radical arrangements such as secession and independence. Intra-state autonomy is the most feasible option for indigenous peoples living in a geographically concentrated area.

However, in most instances, indigenous peoples are a minority in their traditional lands. In these situations, non-territorial autonomy (NTA) can be a solution. NTA can be implemented within or outside a state's borders without undermining the state's vital principle of territoriality. Previous research assumes that NTA guarantees representation for indigenous peoples through seat allocations in national parliaments or through the establishment of separate institutions (Robbins, 2015). In reality, NTA arrangements and indigenous peoples' institutions do not guarantee the necessary decision-making power to exercise the 'right to land, territories and traditionally owned resources', which is the very basis of self-determination.

Although NTA can be an innovative tool to support self-determination, it cannot be used to grant all indigenous peoples' declared rights. Misconceptions about what NTA can achieve can lead to further deprivation of rights. Consequently, it is necessary to fully understand the limitations and possibilities of NTA as it relates to the internationally enshrined right to self-determination of indigenous peoples.

Indigenous peoples

Indigenous peoples are distinct communities that have historically rooted social-cultural and political attributes (Anaya, 1996). Indigenous people show historical continuity with the pre-colonial and pre-invasion societies that were present in their territories. They consider themselves to be distinct from other sectors of society that currently dominate their territories or parts of them. They are non-dominant sectors of society but are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. Indigenous peoples were the first or original inhabitants, or descendants of the peoples that occupied a given territory when it was invaded, conquered or colonised. Their culture is different to that of the majority and their cultural patterns are the basis for their continued existence as peoples.

‘Self-identification’ is an important concept in the understanding of indigenesness and to peoples’ perceptions of it (Burger, 1990). Additional indicators of indigenesness include a special attachment to the land; sense of shared ancestry; distinct language, culture, spirituality and forms of knowledge; separate political institutions; and marginalisation and colonisation not only by European colonial states but also by the later independent states (IWGIA, 1995). Nevertheless, the recognition of an indigenous community can only be granted by the state itself, as the abovementioned UNDRIP declaration is a legally non-binding instrument.

The right to self-determination

Throughout history, the struggle for self-determination, whereby governance is decided by the will of the governed, has caused major upheavals. The concept of self-determination has numerous meanings and has been applied differently depending on the political context.

Within contemporary international law, the principle of self-determination is fully integrated into the UN system, and several legal instruments recognise and guarantee it as a collective right of all peoples. As such, the right to self-determination encompasses several components including 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; and the right of peoples to freely determine their cultural development.

The exercise of self-determination has both internal and external aspects. Self-determination can be realised externally through independent statehood or internally within state borders through the granting of political and cultural rights, power-sharing mechanisms, etc. Recognition of who is entitled to self-determination has changed over time. The latest category of ‘peoples’ with a right to self-determination is indigenous peoples.

The form and content of indigenous self-determination

Indigenous peoples have a right to self-determination as a separate, recently recognised legal category. They have this right for several reasons including the systematic repression and marginalisation they have been subjected to, which has contributed to their inferior position within the societies they are part of (Castelino, 2014; Moore, 2003).

As state sovereignty is a predominant norm of international law, the recognition of indigenous peoples' rights lies in mechanisms related to internal self-determination (article 4 of the UNDRIP). Indigenous peoples' right to self-determination includes non-discrimination, cultural integrity, land rights, social welfare and development and self-government.

Self-government is a political arrangement that enables groups to govern themselves according to their own will and through their institutions, or to exercise autonomous decision-making over their collective affairs. Self-government is a modus operandi of the principle of self-determination and puts the right into practice. Self-governance grants autonomy and participatory engagement to indigenous peoples. The international instruments do not recommend any particular arrangement, but they do point towards meaningful self-government, realised through political institutions that mirror indigenous peoples' life patterns and should not be imposed upon them.

The right to self-determination should enable them to remain a distinct people and should grant necessary control over their own affairs, laws, customs and land tenure systems (Kuo-kanen, 2019). The right to self-determination supposes the right to dignity and diversity, which is directly linked to indigenous peoples' right to land and natural resources. Thus, when states are carrying out measures within an indigenous territory, it is necessary to obtain their free, prior and informed consent (UNDRIP).

NTA as a policy instrument

NTA is a tool of statecraft or policy instrument applied in ethnoculturally diverse states. NTA enhances a group's self-governance over issues relevant to its members. Traditionally, NTA includes a variety of different arrangements such as consociationalism and national-cultural autonomy (NCA), but also forms of representation that de-territorialise self-determination (Nimni, 2015).

NTA enforces the principle of personality and bases rights upon that rather than the principle of territory as territorial autonomy does (Lapidoth, 1997). In this sense, NCA is a form of autonomy whereby a non-majority population can establish a representative body without a territorial limitation and can carry out cultural or other activities relevant for minority groups at the local or national level (Vizi, 2015).

NTA arrangements are most suitable in situations where the beneficiaries are dispersed throughout the majority population and there is no possibility to grant them territorial autonomy. Self-regulating institutions are at the essence of NTA arrangements. However, in many cases, NTA institutions lack competencies, capacity and financial stability. Typically, they provide symbolic representation and only secure participation in decision-making related to organisational or administrative issues. NTA institutions have consultative functions rather than the power for independent decision-making. At most, they secure co-decision powers. From a public law perspective, NTA has a limited range of functions and grants fewer powers than territorial autonomy.

NTA and the right to self-determination of indigenous peoples

Previous research related to indigenous self-determination is sceptical of NTA's ability to safeguard indigenous peoples' rights and to secure self-governance (Josefsen, 2011). NTA is unclear about sovereignty over material assets and resources and may not be effective in securing indigenous peoples' rights. Indigenous groups have a special relationship with their land, meaning the territory that shapes their spiritual, social and cultural lives.

NTA is best suited to the needs of dispersed minorities, but it tends to subjugate indigenous rights to minority rights. Even in situations where the most advanced NTA institutions exist (such as the Sámi Parliaments), they are not legally or institutionally equipped to grant self-determination to indigenous groups. Existing NTA institutions have limited capacities, are not real self-determination bodies and, despite being called 'parliaments', they do not have decision-making powers or have very limited powers that cannot grant indigenous peoples the right to land and traditional territories (United Nations Special Rapporteur on the rights of indigenous peoples, 2016). However, where indigenous peoples are dispersed throughout a territory, whether due to being expelled, displaced or relocated, NTA can be a valuable tool to support them. If possible, NTA may be combined with territorial autonomy.

A possible solution is to create institutions that are not territory-based and provide important services to the community such as education, land management, protection of their culture, etc. These solutions need to reflect indigenous peoples' needs, and their beneficiaries must participate in the creation and selection of options that best suit their needs.

Policy implications

Historically, indigenous peoples have been the most disadvantaged people in international law. Their self-determination needs to be based on the principle of territoriality. This approach ensures that they have control over their territories through a genuine decision-making process, crafted based on their preferences and tailor-made modalities that they can choose and enforce independently (Preparatory Report from the Sami Parliament in Sweden/Sámediggi/Sámedigge/Saemiedigkie/Sametinge, 2015).

Recent international practice is to treat indigenous peoples differently to minorities and to consider them as distinct cultural communities with specific relations and patterns of land use (Anaya, 1996) that should be granted their rights.

Indigenous peoples' self-governance needs to be based on their interests, forms of organisation and use and distribution of their resources, even if this necessitates a reformulation of a state's social contracts. Autonomy based on a new legal, institutional and territorial relationship is best suited to indigenous peoples' needs. Only this model can fulfil their right to internal self-determination.

However, NTA should not be excluded from the outset. Both territorial and non-territorial arrangements may coexist, especially when both indigenous and non-indigenous people share a territory, or when the indigenous peoples are dispersed among the population (Tomaselli, 2012). Some constitutional mechanisms fail to fully protect the rights of indigenous peoples, especially when it comes to safeguarding the culture, language and traditions of dispersed groups. The principle of NTA autonomy can give indigenous peoples greater control of decision-making and the administration of policies and laws that impact their language, culture, customs and identity.

If a non-territorial institution is established within the realm of public law, it should have the same legality, credibility and legitimacy for the indigenous peoples as the local and state governments. However, it may be challenging to define indigenous peoples for the purposes of cultural autonomy, since they may not be a homogenous entity. Membership of a cultural community is based on an individual's right to freedom of association. Membership cannot be forced and no person should suffer from discrimination due to their choice to associate, or not to associate, with a group (De Villiers, 2014).

Consequently, NTA arrangements can be a complementary tool to help indigenous peoples to realise their right to self-determination, especially when other policy options are unavailable (Shikova, 2020). NTA can protect their specific way of life if they are dispersed throughout a territory and territorial autonomy is not suitable for the realisation of their cultural and economic rights (Klimova Alexander, 2007).

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