

Introduction: Nature and origins of autonomy

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This introduction examines the purposes for which autonomy has been used and aims to place it within the norms and structures of the state. It identifies dimensions of autonomy which are critical to its operation and fortunes and also issues central to the understanding of the success and failures of autonomies, which are analysed in succeeding chapters. In the concluding chapter, some of these issues are addressed in comparative perspective, drawn from these case studies.

The focus of the book is on institutions and procedures: negotiations for autonomy, the mechanisms through which self-government is exercised, internally in the autonomous area, and in the relations between that area and the central authorities of the state. The term *institutions* is understood more in the sense that lawyers would give it than would economists: power, structures and processes of the state, including political parties. The principal issues of autonomy are examined in the context of its legal foundations, particularly the entrenchment of these institutions and procedures, at both international and national levels. Among the factors examined in this volume are the scope of the autonomous region to make and adopt its own constitution; the relationship of the constitution of the autonomous region to the national constitution; the broad scheme for the division of powers between national and autonomous governments; the participation of residents or institutions of the autonomous region at national level; the structure and composition of government institutions at the autonomous level; the relations between institutions at national and autonomous levels; methods of co-operation and consultation between different levels of government; modes of dispute resolution; and the interpretation and implementation of autonomy provisions. These issues, and others, are placed in the specific context of the country concerned, such as notions of state or parliamentary sovereignty, the purposes of autonomy (ethnic, administrative, economic), the relative size of the autonomous region compared to the rest of the country and differing legal traditions between the state and autonomous regions. These then provide the basis in the final chapter for the exploration of a number of common elements regarding the origin, nature and functioning of autonomy systems.

The book contains studies of thirteen autonomous areas, which are examined within a broadly common framework. The introductory and concluding chapters attempt to enhance understanding of the purposes, structures and institutions of autonomy by comparing the formation and operation of these autonomous areas. Is this a useful – even feasible – exercise? There may be problems of definition to start with, to be sure that we are dealing with the same phenomenon, that it is sufficiently distinguishable from other constitutional concepts and arrangements, that there are both sufficient commonalities and differences that justify comparisons, and that causation can confidently be ascribed to the structures and institutions of autonomy, albeit in the broader political, economic and social context.

Markku Suksi, a leading scholar of autonomy, provides a word of caution: ‘No solid theory underpins autonomy, because autonomy arrangements are often very pragmatic ad hoc solutions that escape generalisations.’¹ There are many purposes of autonomy and the arrangements for it vary a great deal, such as in terms of powers transferred or institutional relationships. If there is no core understanding of autonomy, is there any prospect of a comparative study? There are fruitful comparative studies of federalism, but few of autonomy (although there are collections of essays on individual countries). The assumption of this book is that autonomy is distinctive as regards both its purposes and institutions (from both federal and unitary states), and that there are sufficient commonalities and differences among autonomies to justify a comparative approach.

There appears to be a core understanding of the definitional and institutional meaning of autonomy. Often the purpose is the accommodation of ethnic diversity (‘ethnic’ used to refer to various kinds of distinction among people: religion, language, culture, history); but there can be other purposes, as in the arrangements between Tanganyika and Zanzibar, and those between China and Hong Kong and Macau, which are discussed in this volume. To some extent, an understanding of the different purposes and histories of autonomy can be gained through comparing the origin and mechanism of autonomy: autonomy as the result of decentralising a state (the more common instance) and autonomy by the coming together of previously separate territories or sovereignty. The latter is seldom driven by ethnic considerations.

However, in some instances the distinction is blurred, especially as the system of one country may owe itself to both decentralisation and unification of territories, of which India is a good example: at independence it absorbed a number of ‘princely states’ over which the British had no sovereignty, and re-organised the original state into provinces and autonomous areas (discussed in Chapter 5). The joining of territories is much less common, Kashmir/India and Zanzibar/Tanzania being the two examples studied in this volume.

¹ This statement was made at a conference on autonomy at Hong Kong University in 2005.

The precise purposes and structures may vary but the essence of autonomy is clear. Precisely because there is such a variation, there are advantages in comparing dissimilar cases, to understand the variety of purposes served by autonomy and to see what works and what does not. Of course this implies that there is a common core and broadly similar context; the volume shows that the political and constitutional context for Chinese ‘autonomy’/‘autonomies’ is so different from other autonomies studied here that they are not broadly comparable, yet there are points on which a comparison is illuminating. Comparison of such dissimilar cases may also help us to get a better grasp of the essence of autonomy.

It is significant that when the Finnish government was preparing the autonomy law for Åland in the 1930s, it looked at various examples of autonomy including the British Isles and Danzig, but concluded that none was suitable for Åland. It is interesting that the fundamental principles of the Åland autonomy were put together by an international committee of jurists appointed by the League of Nations, and that the final arrangements had to obtain the approval of both the Finnish and Swedish governments (see Suksi’s Chapter 2 and references therein). These linkages between international and domestic norms, and between the international community and kin states, have continued to characterise the origin and functioning of autonomies.

Origins of autonomy

With the rise of identity politics based on race, caste, gender, religion, language or ethnicity, the traditional structures of power, particularly in relation to the state, are being challenged across the globe. The easy recruitment of dissidents and the ready availability of arms pose horrendous threats to the classical conception and practice of the state. Throughout history the state, often annexing the territory of others, has been the principal means of regulating relations among communities. At first the state was identified with a ruling dynasty and in due course with the majority community. Then most states were exclusionary, on the basis of caste, religion or ethnicity; large sections of the people had no entitlements to franchise, public office or even occupations. Gradually the state began to be invested with emotions and symbols, connected to those of the majority or the ruling community.

After the Westphalian settlement,² political and legal concepts, developed under the sovereignty of the state, reflected the essential principles of the modern state. Gradually the concept of citizenship, based on the rights and duties of the individual, became central to membership in the political community constituted by the state. With the growth of the notion of human rights and

² There are different understandings of the Westphalian doctrine. I refer here to related notions of a dominant ideology (then of the religion of the ruler), the location and centralisation of sovereignty in the state, and the predominance of the ‘nation-state’. These elements produce a degree of rigidity and inflexibility and are unable properly to accommodate diversity. See the following footnote for references.

democracy, members of excluded communities were given the right to citizenship. This did not imply the political inclusion of these communities, as such; instead citizenship became a means towards their assimilation into the wider political community.

From the eighteenth century onwards, as the political map of Europe was re-drawn, the homogeneity of the people, defined by their cultural, particularly linguistic, affiliation, became the basis of the creation of new states. Congruence between a cultural community and the boundaries of the state became the major principle of the re-organisation of states ('nation-state'). This approach was justified on the grounds of the preservation of both culture and democracy, and subsequently social welfare (arguing that redistribution of resources implicit in welfare programs is possible only if there is social solidarity, dependent on a common history and culture). The position of communities different from the dominant one was ameliorated through the recognition of rights of minorities.

The state in Asia and Africa has not followed this trajectory. At least in Asia the state accommodated considerable diversities of people; demanded loyalty and taxes, but accepted different religions, languages and customary practices, with limited disruption of lifestyles, and a certain porosity of borders.³ All this changed with colonialism, which brought with it firm and rigid boundaries, the inter-mixing of communities adhering to different religions and speaking different languages, and above all, the imposition of the Western type of state. Colonial peoples, with a few exceptions, became independent within the integument of this state. The imposition and centrality of the state, with the logic of the 'nation state', changed relationships between the diverse communities from both the pre-colonial and colonial periods. The unifying tendencies of state sovereignty (in values, policies, laws and institutions), buttressed by aspirations of development and modernisation, became a straitjacket, under which the smaller communities suffered considerable discrimination, and some exclusion. As previously in Europe, the state has attempted to inculcate 'nationalism' through assimilating minorities to the religion, language and mores of the majority.

As a consequence of identity politics, some key principles and components of the liberal state – sovereignty as vested in the entire people as a collectivity and manifested in the centralisation of the state; common citizenship with equal rights and obligations; equality; uniformity of law and legal institutions; majoritarian democracy; the nature of rights; and the distinction between the public and the private,⁴ have been critically examined, found wanting and are being

³ Bhikhu Parekh, 'Cultural diversity and the modern state' in Martin Doornbos and Sudipta Kaviraj (eds.), *Dynamics of State Formation* (New Delhi: Sage Publications, 1997); Rajni Kothari, 'Ethnicity' in his *Rethinking Development: In Search of Humane Alternatives* (Delhi: Ajanta Publications, 1988).

⁴ I have discussed the rise of and challenge to the liberal state form in my chapter, 'Constitutionalism and the challenge of diversity', in Heckman, Nelson and Cubbington (eds.), *Contemporary Reflections on the Rule of Law* (Routledge: London, 2009) and in my chapter

re-defined. The challenge to these norms of the modern state has frequently involved violence, which has forced world attention on the discontent of ethnic groups. The response to the challenge has taken several forms: empowerment and participation of smaller ethnic groups, special types of representation in the legislature, executive and other public agencies, affirmative action and promotion of minority cultures. Short of secession, one of the most far reaching of such responses is autonomy. It has significantly re-configured the state, redistributed state power and resources, changed the basis of relations between communities, modified the concept and form of citizenship and the bearing of rights and obligations and introduced new dynamics in state politics.

Defining autonomy

Although the idea of autonomy is clear, there are some difficulties in defining it. Autonomy is used in a number of different contexts and senses, and often connotes a state of being rather than a legal category. Autonomy is used, predominantly, to protect a cultural, national or ethnic community, but there are other uses too which are briefly explored in this introduction. Autonomy sometimes refers to the choices of an individual, and sometimes of a community. It is also connected to the conceptualisation of the state and to tendencies towards decentralisation, away from monopolisation of power at the centre. Autonomy takes many forms and is espoused by many groups. In particular there is confusion between autonomy and federation as legal concepts – because both attempt to define a space where different values and aspirations can be pursued. Autonomy also sometimes involves the idea of periphery: the accommodation of the unusual, the recalcitrant, almost the outsider (such as in Åland, South Tyrol, the Nagas, Hong Kong and Wales). Nor is autonomy merely a device to reconcile the citizenry to the state or its form of democracy: it is also about the celebration of diversity, identity and spaces. It recognises the importance of sub-national communities and collectives, their values, cultures and institutions. Autonomy refers not only to specific constitutional arrangements, but also to practices and attitudes to politics, dialogue, openness and so on – a framework of mind and national orientation.

For the purposes of this book, autonomy connotes self-government, the ability of a region or community to organise its affairs without interference from the central government or neighbouring regions or communities. In an earlier publication, I defined autonomy as a device to allow ethnic or other groups claiming a distinct identity to exercise direct control over affairs of special concern to them while allowing the larger entity to exercise those powers which cover common interests (a definition which has been adopted by some

¹ 'Ethnicity and competing notions of rights' in Harvey and Schwartz (eds.), *Human Rights in Divided Societies* (Oxford: Hart Publishers, 2012). See also James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995).

scholars).⁵ When negotiations on the oldest surviving autonomy, Åland,⁶ were underway, the Finnish government defined autonomy in the following way: ‘to secure for the Åland islanders the possibility of arranging their existence as freely as possible for a territory which does not itself constitute a state.’⁷ (The original instruments do not use the term autonomy, but self-government.)

Autonomy is often seen as a sort of deviation from the normal principles, institutions and processes of a state, though sanctioned by the state, for the specific purpose of enabling a community to pursue a lifestyle justified on grounds of its values and culture. There are, as a rule, no generally prescribed objectives, powers or institutions at the international level that constitute autonomy. There are certain norms under international law or emerging practices concerning autonomy, but they say little about powers or structures, and only a bit more about entitlement. At the national level, only a few constitutions provide for entitlement to autonomy – exceptions include China and Spain. The first of these sets out in considerable detail rules governing one kind of autonomy, the nationalities’ regional autonomy, but for another, ‘Special Administrative Region’, there is only the simple and short article authorising its establishment, leaving the details to the National People’s Congress (as discussed by Ghai in Chapter 10 on Hong Kong). The Spanish Constitution establishes both potential powers of autonomous areas and the process for negotiating specific powers and structures (as discussed by Flores Juberías in Chapter 7). When there is no constitutional entitlement to autonomy, autonomy arrangements are generally negotiated ad hoc, to suit particular objectives and circumstances, including the necessity to amend the constitution.

Autonomy usually takes territorial forms, but some sort of autonomy can also be exercised through cultural councils or other limited forms of self-government, such as the regimes of personal laws. These devices are essentially ways of overcoming the limits of territory – when the community in question is dispersed over a wide area or, if concentrated, is not the majority there. There are also alternatives to autonomy: various forms of minority rights, special systems of representation, affirmative action, recognition of culture, languages, proportionality principle, freedom of religion and so on. Sometimes these are combined with autonomy (and may be designed to protect the interests and promote the participation of minorities within the autonomous area). Belgium is an interesting example of two forms of autonomy: one geared towards culture, and the other connected to territory as an administrative unit. In this volume, Bosnia-Herzegovina comes closest to the combination of autonomy

⁵ Yash Ghai, ‘Ethnicity and autonomy: a framework for analysis’ in Yash Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press, 2000), 8–11.

⁶ This claim is often made for Åland, but, depending on how one defines autonomy, Québec can justifiably make that claim.

⁷ Government Bill 73/1919, 2.

with other devices, while South Tyrol combines autonomy with power sharing. This volume concentrates on territorial autonomy.⁸

Although autonomy has become common in recent decades, its origins are much older. One of the entities discussed in this book, Macau, was autonomous for centuries under Portuguese rule (see Chapter 12 by Cardinal). The Francophones in Québec have enjoyed autonomy in Canada since the nineteenth century. Finland, another country discussed in this book (Chapter 2), was an autonomous Grand Duchy of the Russian Empire between 1809 and 1917, with its own constitution and legal order. Article 2 of the 1906 Constitution of Russia stated that '(t)he Grand Duchy of Finland, while it constitutes an indivisible part of the Russian State, is governed in its domestic affairs by special institutions on the basis of a special legislation.'⁹ The example of the creation of the Free City of Danzig under the Treaty of Versailles in 1919 was another precedent for the recognition of Ålandic autonomy. The loose structures and character of some Asian empires, including India under the Mughals, and the millet system of the Ottoman Empire, facilitated forms of self-government.

An even older instance of spatial organisation of government are 'reserves', which were first used by European settlers in the Americas to isolate and dominate indigenous peoples, and were subsequently adopted in Australia, Africa and parts of Asia. The apartheid policy of Bantustans was a modern version of this. However, in recent years the aspirations and historical claims of indigenous peoples have been recognised through the transformation of reserves into self-governing areas, particularly in Canada and the Philippines, although the extent to which they can opt out of national laws, which may be necessary for the preservation of their political and cultural practices, is variable.

But autonomy, on the present wide scale, is essentially the product of the twentieth century, for historical reasons outlined previously (and examples given later). As a form of limited self-government, it has become fashionable as a solution to some problems of multi-ethnic states. It has come to be seen as a mid-way or compromise solution between a unitary state and secession. It is often more popular with the international community than either the state or the ethnic group in relation to which autonomy is proposed (many recent autonomies have been conceded and accepted under international/regional pressure). Sometimes the suspension of a civil war is secured by the offer to negotiate autonomy, as in Sri Lanka, Sudan and many other places.

Autonomy is no longer an aberration. Operating at the intersection of international and constitutional laws, it is now widespread. Today it would be difficult to study most countries' constitutional and political system without addressing

⁸ For cultural autonomy, see Asbjorn Eide, 'Cultural autonomy: concept, content, history, and role in the world order' in Markku Suksi (ed.), *Autonomy: Applications and Implications* (The Hague: Kluwer, 1998); and Yash Ghai, *Public Participation and Minorities* (London: Minority Rights Group, 2001).

⁹ Marc Szeftel, *The Russian Constitution of April 23, 1906: Political Institutions of the Duma Monarchy* (Bruxelles: Les éditions de la librairie encyclopédique, 1976), 84.

autonomy. Some constitutions have recognised the right to autonomy (Spain and China, previously Papua New Guinea). This book has studies of autonomy in large states (China, India, the United States, the United Kingdom, Italy and Canada), medium-sized states (Finland, Tanzania, Australia) and small states (Papua New Guinea) whose constitutional and political systems are hard to understand without an understanding of systems of autonomy. Russia, not studied here, used autonomy extensively during the Soviet period to deal with minorities, as does the present somewhat more democratic system (though some minority regions could not be so accommodated and were allowed to secede). Some countries have had to deal with demands for autonomy on a frequent, extended, or even continuous basis, such as India, Sri Lanka, Indonesia, Sudan, Canada, Spain and France. Even if autonomy is not granted, the very agitation for it is of considerable interest to constitutional scholars. Other instances of autonomy are discussed in this chapter. Autonomy has become an integral part of contemporary constitutions, but there are few studies of its origins, structures and operation – and both its influence and dependence on constitutional and political orders.

Purposes and varieties of autonomy

Autonomy became important during the period of decolonisation following World War I and particularly World War II. It was used principally for two purposes. The first was to accommodate communities within former colonies which because of their distinct ethnicity wanted to secede on independence (such as Åland in Finland, the Buganda in Uganda, the Maasai and other minority communities in Kenya, Bougainville in Papua New Guinea, Banabans in Kiribati). The second purpose was to re-organise the relationship between the colonial authorities and the colonies, short of independence (Cook Islands and Niue in relation to New Zealand, Puerto Rico and American Micronesia in relation to the United States, New Caledonia in relation to France and various British colonies in the Caribbean).¹⁰ In a similar vein, decolonisation also led to some re-organisation of territory, for example in relation to Italian colonies in Africa, in the Horn of Africa where Eritrea was joined to Ethiopia in a sort of federal relationship and Italian, British and French possessions

¹⁰ The closely connected concept of association was defined in 1959 by the UN General Assembly (distinguishing it from internal self-government as follows):

‘(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that Territory through the expression of their will by democratic means and through constitutional processes.’

‘(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms agreed upon.’

in North Africa were brought together in the new federation of Libya. Perhaps the most striking example was the way in which India became independent, where a number of states not fully incorporated within British India ('princely states') were encouraged or forced to join India on independence, with significant autonomy (of which Kashmir is examined by Cottrell in this volume, Chapter 5). In more recent times the manner in which the British handed back Hong Kong, and the Portuguese handed over Macau, to China also shows the utility of autonomy. Its utility was evident also in the post-colonial period (twice the attempt to keep the southern part of Sudan within that country led to autonomy for the south, and to major re-organisations of India). Autonomy played a critical role also in the re-organisation of states and territory in the cataclysmic events during the breakup of the Yugoslav republic in the 1990s, particularly in Bosnia-Herzegovina (examined in this volume by Marko, Chapter 9), Montenegro and Kosovo.

Autonomy has also played a role in the settlement of disputes between states. After World War I the dispute between Germany and Poland over the ownership of the city of Danzig was settled by giving the city an autonomous status, as was that between Germany and Lithuania over Memel. The dispute between Austria and Italy over Alto Adige (also known as Südtirol in German, or more commonly in English as South Tyrol), annexed by Italy from Austria during World War I in 1918, was settled by agreeing on autonomy for the territory within Italy only in 1946 after World War II in an agreement between Italy and Austria (known as the Paris Agreement and discussed by Peterlini in this volume, Chapter 4). The same approach was adopted over Åland in the dispute between Finland and Sweden. And the differences between China on the one hand and Britain and Portugal on the other over Hong Kong and Macau were resolved through negotiations over the status and scope of their autonomy. The dispute between Indonesia and Portugal over East Timor was resolved by offering autonomy to its people (though in the end Indonesia also offered the choice of independence which East Timor gladly accepted).

For these reasons, the international community has played a critical role in the grant and sometimes even the management of autonomy – contradictory as that seems – especially in Bosnia-Herzegovina and Kosovo. The European Union has been particularly active, especially as many conflicts have taken place in Europe. The United States has, as is its style, played a general role as a somewhat biased sheriff of the globe and has intervened in several negotiations on autonomy. Inevitably the objectives of the EU and the US have played as important a role as those of the people and governments concerned (for example in regard to Israel/Palestine, Bosnia-Herzegovina, Sudan and the Kurdish autonomy during the last years of Saddam Hussein in Iraq, enforced by European and US aircraft).

On longevity of autonomy: permanent or transitional

Most studies focus on autonomy as a permanent arrangement, but some autonomies are, or have been, transitional. In some cases the transition is

to full integration with the state: as in the case of Hong Kong and Macau, in which the autonomous area has no choice. The transitory nature of autonomy served several purposes. It enabled the British to claim that they had left Hong Kong with significant self-government (reference to the fifty-year limit was seldom made); it provided assurance to Hong Kong people that life would go on as before; and it guaranteed China the full recovery of Hong Kong.

Another type of transitory autonomy involves the promise of independence, as in the Sudan and New Caledonia,¹¹ leading to separation, at the choice of the autonomous area (perhaps this was also the Irish perception of Home Rule in the nineteenth century). Bougainville is another example, but here the referendum on the subject in which only members of the autonomous people vote, is 'advisory' (see Chapter 13 in this volume), and, if passed, would open a process of negotiations on separation. The Oslo agreement on the future of Palestine (Declaration of Principles on Interim Self-Government Arrangements 1993) also provided for transitional autonomy for five years during which time a permanent agreement would be negotiated. The notion of what we might call conditional autonomy is to test whether autonomy sufficiently meets the demands and expectations of the autonomous part (although in the Oslo agreement separate status of Palestine was the ultimate objective). In the case of Palestine, continued progress towards a settlement was made conditional on the good behaviour of the Palestinians. Sometimes the agreement is reached because one or both sides want the easing of foreign pressure. In all these cases the option of independence, not now but maybe in the future, is a powerful factor in reaching an agreement – and thus the perceptions and motivations of the two sides are often very different.

Sometimes autonomy may be transitional to something yet to be worked out: a holding operation (proposed Palestine autonomy, renewed autonomy of Kosovo, de facto autonomy of Montenegro and settlements in Sudan, Bougainville and New Caledonia). In some ways this is true of the autonomy in an associated state; here effectively and morally, the choice is of the associated state, for whose benefit the autonomy option is adopted, whether it wants increased powers and responsibilities or independence. Under the dynamics of autonomy, situations change: Puerto Rico is now making a claim for statehood and is likely to get it as the mainland is becoming more amenable to multiculturalism, and Scotland where a referendum for yet another change in status is scheduled to take place in 2014.

A particular advantage of autonomy is that, based on territory, it enables ethnic problems to be solved without 'entrenching' ethnicity, although some forms of autonomy may indeed entrench ethnicity, as with reservations where cultural dimensions and the need to preserve the identity of the group may serve to sharpen boundaries against outsiders, or the claims of the

¹¹ D. Chappell, 'The Noumea Accord: decolonization without independence in New Caledonia?' in *Pacific Affairs*, 72:3, 373–91.