Non-territorial Autonomy in Canada: Reply to Chouinard

Rémi Léger

Simon Fraser University, Canada

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There is an impressive amount of scholarship on the broad topic of multiculturalism and minority rights in Canada. A significant number of researchers have explored central issues related to our federal system, nationalism and nation-building, Aboriginal self-determination and religious or cultural accommodations. Key works—such as Charles Taylor’s ‘The politics of recognition’ (1994), James Tully’s *Strange Multiplicity* (1995) and Will Kymlicka’s *Multicultural Citizenship* (1995)—have gone on to shape research agendas and global debates on citizenship and democracy in diverse societies. An influential counter scholarship has also emerged. It refutes the dominant interpretations of the state’s successes in dealing with minority rights-claims and accommodations—see, for example, Gerald Kernerman’s *Multicultural Nationalism* (2006) or Rita Dhamoon’s *Identity/Difference Politics* (2009).

Stéphanie Chouinard’s article—‘The rise of non-territorial autonomy in Canada: towards a doctrine of institutional completeness in the domain of minority language rights’ (2014)—engages with this scholarship on two fronts. She first explores the case of Canada’s francophone minority communities (FMCs)—the close to one million French-speakers living in provinces and territories outside Québec. As an increasing number of researchers have noted over the past few years, these minorities have been rendered invisible in the scholarship on multiculturalism and minority rights in Canada (Thériault *et al.*, 2008, p. 22; Cardinal & Hidalgo, 2012, p. 55; Poirier, 2012, pp. 67–68). Second, Chouinard also introduces the seldom-used notion of non-territorial autonomy (NTA) to examine the claims of FMCs as well as state responses to their claims. She aims to show that NTA has emerged in Canada through the equivalent notion of institutional completeness.

I divide my comments on Chouinard’s article into two main parts and a conclusion. I begin by discussing her original thesis—the contention that FMCs have claimed NTA
and that the state, pushed along by the courts, has responded with NTA. I then explore the scholarship on NTA in order to show how Chouinard reproduces some of its definitional problems, and how these problems weaken the promising notion of institutional completeness. Finally, I conclude with a very general defence of institutional completeness both as an analytical lens and as a normative benchmark.

An Original Thesis

I first want to situate Chouinard’s article within recent scholarship on NTA as well as on multiculturalism and minority rights in Canada. Her twofold submission that FMCs have claimed NTA and that the federal government has responded with NTA is an original thesis. In Canada, there is a rich scholarship on territorial autonomy as it relates to francophones in Québec (Gagnon & Iacovino, 2007), the Inuit in Nunavut (Loukacheva, 2007) or even in Nunavik and Nunatsiavut (Rodon & Grey, 2009), and finally Aboriginal peoples across the country (Otis & Papillon, 2013). As for NTA, it is scarcely mentioned in relevant academic debates or policy research. Political scientists, normative philosophers and legal experts have dissected the ins and outs of territorial autonomy in Canada, and have, in essence, snubbed NTA.

As for the emerging scholarship on the applications and normative justifications of NTA, Canada is generally not cited. Common examples or case studies include Belgium (Jacobs & Swyngedouw, 2003), Estonia (Alenius, 2007), Hungary (Dobos, 2007), Russia (Osipov, 2010) and increasingly the Roma in Central and Eastern Europe (Klimova-Alexander, 2007; Lajcakova, 2010). In a recent article, Bertus de Villiers (2012), aiming to highlight the latest advances on NTA, examines the cases of Estonia, Slovenia, Kosovo and Finland. There is no mention of Canada. Indeed, de Villiers (2012, p. 171) lists Belgium and Russia as the only federations to have formal arrangements of NTA. More broadly, NTA is often seen as a promising tool for new democracies or democratizing countries, not for Canada or other such established liberal democracies. For many, the important reflections on and developments in NTA are taking place in Central and Eastern Europe. As per André Liebich (2008, p. 279), this area has ‘some of the most imaginative solutions to the co-existence of different peoples, such as Austro-Marxist schemes of cultural or non-territorial autonomy’.

Another strand of research on NTA concerns ethnic conflicts and human rights. In this scholarship, NTA is a tool of conflict prevention or resolution. It is a set of normative principles and institutional mechanisms that are aimed at existing political situations. These detailed prescriptions are inspired from contemporary or historical case studies as well as from theoretical proposals. Sherrill Stroschein (2008), Christopher Decker (2007) and Andreas Follesdal’s (2011) respective works on Kosovo, Romania and Nepal are powerful examples of this research. Stroschein’s work, for example, makes a case for ‘dispersed state control’ whereby state functions—such as educational or health affairs—are allocated to subunits that need not be territorial. As a result, individuals within the same subunit might be dispersed throughout Kosovo and not concentrated in a neat geographical area. The subunits have an ethnocultural rather than territorial basis. As with the scholarship on existing or historical forms of NTA, Canada is also not featured in this second strand of research concerned with conflicts and human rights.

With that said, there are nevertheless a handful of exploratory works on the promise and possibilities of NTA in Canada. These are exploratory in the sense that they are theoretical
reflections on what could be or what ought to be as opposed to works that explore existing constitutional design or institutional mechanisms. David Elkins was the first to give serious consideration to the possibilities of NTA in Canada in a reflection on territory and territorial politics in the contemporary era (Elkins, 1995; see also Elkins, 1992). Starting from the premise that ‘the social distribution of population’ in Canada does not coincide with our ‘territorial division of protagonists’, Elkins (1995, pp. 147–155) promotes the creation of two non-territorial provinces, one for francophones living outside Québec, and another for Aboriginals across the country. Non-territorial provinces would enable these groups to exercise powers of control over matters deemed crucial to their flourishing, including education and health services.

Tim Nieguth (1999, 2009) has also written about NTA in Canada. His two articles take as their starting point the works of Austro-Marxists Karl Renner and Otto Bauer—I discuss these two authors in the second part of this reply. After examining the institutional content and the normative justification of their scheme, Nieguth suggests that NTA is worth considering as part of a broader package of rights and accommodations, which could include settling land claims with Aboriginal peoples and enshrining Québec’s national character in the constitution. In specific relation to FMCs, not much is said. In two brief passages, the author mentions that ‘certain powers’ could be devolved to public corporations representing FMCs, and that the scheme ‘could be a particularly useful tool’ for FMCs and other historic minorities (Nieguth, 2009, pp. 12–13).

Finally, Johanne Poirier (2008, 2012) has recently reflected on the possibilities and difficulties associated with granting autonomy to FMCs. As with Elkins and Nieguth, Poirier’s writings are theoretical reflections on institutional mechanisms and normative principles. Of particular interest to her are what could be or what ought to be. Her two articles discuss a range of institutional options, including territorial solutions such as a new province or new territories, and non-territorial solutions such as cultural autonomy or personal federalism (Poirier, 2008, pp. 535–550). For her, any institutional accommodation of FMCs, whether territorial or non-territorial, must account for their rights-claims and their broader aspirations (Poirier, 2012, p. 85).

To return to Chouinard, the synopsis provided here would seem to confirm that her thesis distinguishes itself from the existing relevant scholarship because hers is not an exercise in theoretical proposals or normative prescriptions. Her thesis is original because she submits that NTA already exists in the Canadian context. She affirms that ‘NTA [was] claimed by the FMCs’, and that, in response to these claims, Canadian courts have defined a ‘right to NTA through various judgments’ relating to minority language educational rights and official language rights (Chouinard, 2014, pp. 142, 146). In summary, Chouinard flips the existing scholarship on NTA on its head.

What is Non-territorial Autonomy?

Chouinard asserts that NTA in Canada has emerged through the equivalent notion of institutional completeness. She writes: ‘from 2000 to today, a clearer definition of a right to non-territorial autonomy has developed, through the concept of institutional completeness’ (Chouinard, 2014, p. 146). In this second part, I explore definitional problems that continue to cloud the scholarship on NTA, and I explain how Chouinard falls prey to some of them in the process of equating institutional completeness to NTA. In my
view, institutional completeness is a poorer analytical lens and normative benchmark when equated to NTA.

The past 20 years have witnessed the re-emergence of NTA in political and academic debates on multiculturalism and minority rights as well as on ethnic conflicts. NTA has elicited growing interest from academics as well as from a number of social actors and policymakers in Central and Eastern Europe. Political scientists, for example, have identified and evaluated existing political mechanisms that are consistent with theories and principles of NTA. Examples include Estonia’s 1993 Law on Cultural Autonomy for National Minorities, Hungary’s 1993 Law on the Rights of National and Ethnic minorities, Russia’s 1996 Law on National-Cultural Autonomy and Slovenia’s 1994 Law on Self-managing Ethnic Communities (see Coakley, 1994; Smith, 2013). For their part, normative theorists have explored the main conceptual features of NTA, as well as reflected on how these features relate to liberal principles of justice and equality (Bauböck, 2004; Nootens, 2006; Kymlicka, 2007). Taken together, these efforts have shed light on the trajectory of NTA, and have made NTA an increasingly credible institutional option for the protection and promotion of ethnocultural groups.

The scholarship on NTA remains, however, fraught with definitional problems. Alexander Osipov (2013, p. 3), a leading scholar of NTA, wrote: ‘there is no uniform definition and no commonly accepted understanding of what NTA may actually mean’. In no particular order of importance, NTA can reference the scheme elaborated for the Austro-Hungarian Empire at the turn of the twentieth century, the laws implemented in Estonia and Latvia in the 1920s, the scheme envisioned by the Congress of European Nationalities during the interwar period, the Russian experiences ensuing from its Law on National-Cultural Autonomy, and recent institutional mechanisms created over the past 20 years in Central and Eastern Europe. Of course these various iterations of NTA can share certain features, but they also differ in terms of content and objectives. For example, as David Smith (2010, p. 85) observed in relation to the Minorities Congress, ‘debates were clearly inspired by the theories of Renner and Bauer’, but at the same time they ‘also drew directly upon the practical work and experiences of a range of minority political activists’.

Chouinard runs into and reproduces some of these definitional problems. In her article, NTA is presented as a specific, clearly defined scheme for the protection and promotion of ethnocultural groups. Indeed, she equates NTA with the works of Karl Renner and Otto Bauer during the final days of the Austro-Hungarian Empire. These two social democratic theorists aimed to ‘enable the working class of the various national groups of the Empire to reconcile the quest for their respective nationalist goals with a common socialist action against capitalism’ (McRae, 1975, p. 37). For Renner and Bauer, there was no logical connection between nationality and territory. Membership in a nation was to be a personal declaration, regardless of where an individual resided within the state. A German living on predominantly Czech territory could declare him/herself a German national. Nations could thus include concentrated and/or dispersed populations. Their scheme revolved around a complex federal structure with overlaid territorial and non-territorial administrative units. Non-territorial national councils were to have powers to legislate on cultural matters, and the territorial provinces would have regulated non-cultural matters. More directly, it involved four core features: (1) individuals were to declare their national identity on a register upon reaching voting age; (2) each nation would have been considered a public law corporation endowed with collective rights; (3) nations were to elect national
councils on the basis of their membership register; and (4) these councils would have had the power to legislate in educational and cultural affairs and to tax their co-nationals to finance their institutions and services.

Chouinard’s analysis of court decisions does not confirm the emergence of a right to NTA à la Renner and Bauer. This specific scheme of NTA has no legal or political basis in Canada, regardless of the relation there may be between institutional completeness and NTA. Francophone minority communities are not established as public law corporations and Canadians do not declare their national identity upon reaching voting age. Moreover, if FMCs have developed complex networks of community organizations and institutions in every province and territory, these do not amount to national councils (see Johnson, 2010). For Renner and Bauer, these councils were to be elected and would have had powers to govern their own cultural affairs—akin to the separation of powers in a federation. A national council could have elaborated a cultural policy or an education policy, and it would have had the power to tax co-nationals. Francophone minority communities are not entrusted with such legislative or taxation powers. The bulk of their responsibilities are delegated not devolved, and thus jurisdiction remains with the state. In addition, their networks are largely funded through agreements signed with federal departments, and their organizations and institutions are involved in the delivery of services and activities designed to support the development of the French language and cultures (Forgues, 2007; Cardinal et al., 2008).

It is much more plausible that Chouinard had another, more general understanding of NTA in mind. This other understanding of NTA denotes constitutional or institutional arrangements that do not entail exclusive control over a territory. Its aim is to enable ethnocultural groups to manage their own affairs such as culture or education. As Edmund Aunger wrote (1996, p. 192): ‘[it] means minority rule, not in all domains, but in the area of the minority’s exclusive concern’. Non-territorial autonomy thus entails minority control over a particular matter not over a particular territory. Take as an example English- and French-language school boards in Canada. Generally speaking, these school boards share a territory over which neither has exclusive control. The two school boards recruit students from the same catchment area. Ephraim Nimni, a leading scholar of NTA, recently called upon this more general understanding. He wrote that NTA is ‘not a specific model’, but rather a ‘generic term that refers to diverse practices and theories of minority community empowerment and self-determination that does not entail exclusive control over territory’ (Nimni, 2013, p. 1). Nimni discussed a number of examples of NTA, including the scheme elaborated by Renner and Bauer, but also the Ottoman millet system and Bolivia’s new constitution.

This general understanding is a much more plausible candidate for Chouinard’s analysis of the evolution of NTA in Canada. For example, her article identifies three areas of overlap between NTA and institutional completeness: (1) the recourse to a personal rather than a geographic principle; (2) the emphasis on contentious matters or functions; and (3) the importance of minority control and its legitimacy. These overlaps are much more in line with the generic rather than the specific understanding of NTA. The scheme elaborated by Renner and Bauer is specific and clearly defined. It imposes more rigorous normative and institutional standards than these three overlaps. Moreover, Chouinard’s discussion of the emergence of NTA in Canada boils down to how the network of institutions and activities that follows from institutional completeness need not have exclusive control over a territory. These institutions are about FMCs having jurisdiction
over cultural, educational or health matters. Her discussion of the Lalonde case, for example, reveals that the goal of the legal challenge was the safeguard of the only French-language hospital in the National Capital Region, and not making that hospital the exclusive health services provider in the geographic area. In other words, plaintiffs were not vying for exclusive control of the territory. Their aim was to administer their hospital because it is a matter of minority concern.

In my view, however, institutional completeness loses much of its analytical and normative purchase when equated with this general understanding of NTA. Institutional completeness goes from being a promising notion with some constitutional and perhaps even legislative basis in Canada to a general principle about how minority control does not entail exclusive control over a territory. If the first understanding of NTA means too much to have any basis in Canadian legislation or court decisions, this second understanding means too little to shed analytical light on case studies as well as to offer normative guidance to social actors or policymakers. In essence, institutional completeness becomes a poorer analytical lens and normative benchmark. Beyond the important idea that the power to legislate can be separated from the exclusive control of a territory, it does not provide any guidance to hard questions around group institutions and representation, constitutional design or powers that the minority ought to control. Its lack of content and specifications leaves us ill-equipped to examine existing arrangements or to prescribe new ones. It merely enables one to determine whether or not a given constitutional or institutional arrangement entails exclusive control over a territory.

Recent works also hint at similar reservations in regard to the analytical and normative purchase of this general understanding of NTA. In her influential work on Kosovo, Stroschein turns to the scholarship on NTA, and draws from it ‘a functional premise of control—meaning that substate units need not be territorial’ (Stroschein, 2008, p. 656, emphasis in original). However, aiming to provide additional normative guidelines, she does not resort to the label of NTA in describing and defending her scheme. Her work instead uses the term ‘functional governance’. This scheme enables her to shed important light on the new Kosovar constitution and its implications for the Balkans region. Osipov has also expressed serious doubts (and frustrations) on the analytical and normative purchase of NTA; not only can scholars ‘do without resorting to such a notion as NTA’, but also they ‘could even more clearly express themselves and defend their arguments with alternative terminology and research tools which are already in place’ (Osipov, 2013, p. 9). Perhaps inspired from Stroschein, he opines that functional autonomy represents a ‘more appropriate’ scheme for analysing existing arrangements relating to the protection and promotion of ethnocultural groups (ibid., p. 10). Even Nimni, a leading proponent of NTA for a number of years, has shifted the focus of his research. His recent works discuss examples of NTA as a way to document and defend a paradigm shift in the governance of diverse societies (Nimni, 2009, 2013). Nimni no longer seems to conceive of NTA as an analytical tool that can shed light or a normative benchmark that can prescribe guidelines regarding case studies. For him, NTA is a symbol of a broader intellectual and political movement that aims to reconsider the ‘state-centric view of the world’—the view that nations correspond to states, and that states are bestowed with territorial sovereignty (Nimni, 2013, p. 2).
Overall, I hope to have shown in this second part that equating institutional completeness to NTA has analytical and normative costs because NTA either means too much (NTA à la Renner and Bauer) or too little (NTA as a family of theories and practices).

Conclusion

In conclusion, I want to offer a very general defence of institutional completeness both as an analytical lens and as a normative benchmark. I have argued that the move to view institutional completeness through NTA weakens rather than strengthens it. That move would seem to transform institutional completeness into a poorer analytical lens and normative benchmark. This is especially disappointing because the past few years have witnessed the emergence of new and exciting scholarship on institutional completeness. As Chouinard notes, Raymond Breton coined the term in a study of the integration of immigrants in Montréal, Canada, in the 1960s. Breton’s research showed that ethnocultural groups that have their own institutions—such as churches, socio-economic organizations and newspapers—were having more success in attracting and retaining their members. In his words: ‘the presence of formal organizations in the ethnic community sets out forces that have the effect of keeping the social relations of the immigrants within its boundaries’ (Breton, 1964, p. 196). In the 1980s and 1990s, the notion of institutional completeness was used in research on FMCs, including by Breton himself (see Breton, 1984, 1985; Bernard, 1988; Denis, 1993).

More importantly, recent research has brought institutional completeness in new and exciting directions. Sociolinguist Rodrigue Landry has elaborated and promoted a scheme of cultural autonomy for FMCs that relies in an important way on institutional completeness (Landry et al., 2007, 2010). In his research, institutional completeness, as part of the broader scheme of cultural autonomy, becomes a normative benchmark that states ought to respect if their goal is to ensure the promotion and protection of ethnocultural groups. In a recent article, Linda Cardinal and Eloisa Gonzalez Hidalgo (2012) elevated institutional completeness to the level of moral and political principle—that is, a principle that ought to guide our political actions. If national minorities have a right to self-determination and ethnic groups a right to non-discrimination (see Kymlicka, 1995), these two scholars argue that FMCs ought to have a right to institutional completeness. These works are examples of how institutional completeness can become a sound normative benchmark for the treatment of FMCs and perhaps even other analogous ethnocultural groups.

Another strand of research further enhances institutional completeness as an analytical lens. In a recent book chapter, political scientist Edmund Aunger set out to measure whether or not the existence of minority institutions has an impact on the continued use of the minority language. The initial step of the research consisted of identifying French-language institutions in 1,861 municipalities with francophone residents (in Canadian provinces and territories excluding Québec). Then, relying on official language data from Statistics Canada, Aunger was able to show that there is a positive relation between institutional completeness and linguistic vitality. ‘When the number of institutions increases,’ he wrote, ‘the use of the French language also increases, and that in a linear fashion’ (Aunger, 2010, p. 73, personal translation). It is my sense that this more robust definition of institutional completeness could enable one to shed important light on the
impact of government policies and programmes that aim to promote the flourishing of minority languages.

In summary, I strongly believe that institutional completeness holds great analytical and normative promise. Indeed, I would urge scholars working on the promotion and protection of ethnocultural groups in Central and Eastern Europe and even elsewhere in the world to borrow from Breton as well as from the more recent scholarship on institutional completeness. As for the relation between institutional completeness and NTA, in my view it is scholars of NTA that would benefit from a turn to institutional completeness and not the other way around.

**Note**

1. The exception to the rule is the following undeveloped statement from Kymlicka (2007, p. 387): ‘In Canada, for example, strong TA for the French-majority province of Quebec co-exists with significant non-territorial linguistic and cultural rights to Francophones who live outside Québec (and with non-territorial rights for “internal minorities” within Quebec)’. Notice that it speaks to non-territorial rights not NTA per se.

**References**


