

# Protecting Minorities on a Non-Territorial Basis—Recent International Developments\*

Bertus de Villiers<sup>#</sup>

University of Western Australia, Perth, Australia.  
Email: bertus.devilliers@uwa.edu.au

Received July 18<sup>th</sup>, 2012; revised August 30<sup>th</sup>, 2012; accepted September 10<sup>th</sup>, 2012

## ABSTRACT

The protection of minorities by way of non-territorial arrangements, also called cultural autonomy, is receiving increased attention in theory and practice. While federalism and decentralisation often afford indirect protection of minorities on a territorial basis—be it by way of autonomy to state or local governments—Dispersed minorities often fall through the territorial “cracks”. Cultural autonomy can potentially play a vital role to grant protection to minorities that do not have a territorial base of their own. This article, which reflects on recent international developments to protect minorities by way of non-territorial arrangements, shows how the theory and practice of cultural autonomy have gained legitimacy in countries such as Estonia, Slovenia, Kosovo and Finland. Finally, potential lessons are identified for potential application in other emerging democracies.

**Keywords:** Protection of Minorities Decentralisation; Autonomy; Cultural Councils

## 1. Introduction

One of the greatest challenges for modern democratic theory and practice is to provide adequate protection to language, religious and cultural minorities—Especially minorities that do not have a local or regional territorial area where they constitute the majority [1].<sup>1</sup> Federal and decentralisation mechanisms are often used to provide indirect protection to minorities that live concentrated in geographical areas. Minorities that live scattered or intermingled with other groups are, however, regularly excluded from effective participation in public policy. Ethnic minorities may feel permanently excluded for reasons described as follows by Horowitz:

“In many societies, there are ethnically bases parties, ethnic voting at high rates, and electoral outcomes that foster a sense of group inclusion and exclusion that exacerbates whatever pre-existing conflicts are present between the groups. Not surprisingly, a great many violent conflicts follow electoral exclusion of this kind, whether anticipated or accomplished [2]”.<sup>2</sup>

Decentralisation is recognised as a potential effective mechanism to provide indirect protection of ethnic minorities so as to enable groups to make or administer decisions on a regional or local level where their members reside. Decentralisation may take many forms but in essence it allows decision-making and/or administration to be undertaken at a local or regional level. Minorities that are sufficiently concentrated in a geographical area

\*The author acknowledges with great appreciation the grant made available by the Alexander von Humboldt Stiftung to facilitate the research on which this publication is based. The opinions expressed herein are entirely those of the author.

<sup>#</sup>Bertus de Villiers (BA Law, LL.B, LL.D) is a member of the State Administrative Tribunal of Western Australia. He is a visiting fellow of the law faculty of the University of Western Australia. He is an inaugural Fellow of the Western Australian Institute of Dispute Management under the auspices of the Murdoch University. He is admitted as a legal practitioner in Australia and South Africa. He was closely involved during the constitutional negotiations in South Africa from 1990-1996. Dr. De Villiers has travelled widely and has undertaken research on constitutional and political developments in various countries. He has published extensively on a wide range of constitutional issues, in particular topics dealing with federalism, protection of human rights, land reform and cultural diversity. He recently acted as the foreign expert in the Forum of Federation’s leadership training project in Ethiopia on federalism and intergovernmental relations.

<sup>1</sup>Although there is no agreement in international law as to the correct definition of “minority groups”, the definition most preferred and widely used is that proposed by Capotorti in his ground-breaking work undertaken for the United Nations on the protection of minorities as Special Rapporteur. Capotorti proposed the following definition of what constitutes a “minority”: “A group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from the rest of the population who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion and language.” F. Capotorti, *Study of the rights of persons belonging to ethnic, racial and linguistic minorities* UNO 1977 UN-Doc E/CN.4Sub.2/384, Rev 1, par 568.

<sup>2</sup>DL Horowitz, “Conciliatory institutions and constitutional processes in post-conflict societies” (2008) *William and Mary Law Review* 1215.

may therefore achieve some degree of autonomy over decisions and administration of laws that affect their language, culture, religion and traditions. Refer for example to the experiences of Switzerland, India, Malaysia, Belgium and Nigeria to grant to minorities protection by way of territorial arrangements.

Many minorities are, however, dispersed or intermingled with other parts of the population and without a territorial base where they constitute a majority. As a result such dispersed minorities often do not enjoy the potential benefits of territorial decentralisation or federalism [3-10].<sup>3</sup> Refer for example to the many minority groupings in Ethiopia, the Russian Federation, Indonesia, South Africa and Nigeria that are not the beneficiaries of territorial autonomy arrangements.

Although the praises of federalism and its ability to accommodate and protect minorities through territorial autonomy are often widely proclaimed [11],<sup>4</sup> few federations offer autonomy of decision-making to minorities that do not have their “own” regional or local base.<sup>5</sup> The key federal pillar of “self rule” [12]<sup>6</sup> is, generally, only applied on a territorial basis.

The limitations of territorially-biased federal and decentralisation arrangements bring to light the challenges faced in modern day constitution making in regard to the protection of minorities. It is relatively uncomplicated to use various forms of territorial autonomy to provide indirect autonomy to minority groups. It is however the

plight of minorities that do not have an area where they dominate, that often escapes attention. It comes as no surprise that the former High Commissioner on National Minorities observed that “insufficient attention has been paid to the possibilities of non-territorial autonomy [13].”<sup>7</sup>

The demands, particularly in emerging democracies, for non-territorial solutions for the protection of minorities, are growing stronger by the day. It is realised that, particularly in countries with large numbers of minorities, neat geographical solutions cannot be found to accommodate all the minority groupings. Refer for example to the following observations in regard to the situation in Nepal [14]:<sup>8</sup>

“A major concern shown (in Nepal) against the federal structure approved by the Constituent Assembly’s subcommittee and other similar models is that many groups are territorially dispersed and hence territorial federalism may not address the aspirations for autonomy of many dispersed groups. *Non-territorial federalism can provide autonomy to territorially dispersed groups.* It can also address the aspirations and needs of members of territorially concentrated groups that live outside their traditional homeland. *A combination of territorial and non-territorial federalism would, hence, address the aspirations for autonomy of various territorially concentrated and dispersed groups [15].*”<sup>9</sup> (author emphasis)

In contemporary constitutional developments, Belgium and the Russian Federation are arguably the only federations that have formal, albeit limited, legal arrangements to provide for territorial and non-territorial autonomy of cultural groups. The Belgian federation provides for the autonomy of cultural groups through the mechanism of cultural councils, in addition to territorial autonomy for the main language groups [16-23].<sup>10</sup> The Russian Federation provides very limited decentralisation and funding to cultural, non-governmental organisations—These organisations therefore do not constitute “governments” in a public law sense, but rather a civil organization [24-28].<sup>11</sup>

In this article, consideration is given to recent develop-

<sup>3</sup>The For a general overview refer to H. Hannum, *Autonomy, sovereignty and self-determination: The accommodation of conflicting rights* (University of Pennsylvania Press Philadelphia 1990); R. Lapidot, *Autonomy: Flexible solutions to interstate conflicts* (United States Institute of Peace Washington DC 1997); M. Suksi, Ed., *Autonomy: Applications and implications* (Kluwer The Hague 1998); Y. Ghai, Ed., *Autonomy and ethnicity: Negotiating competing claims* Cambridge UP Cambridge (2000); K. Myntti, *A commentary to the Lund Recommendations on the effective participation of national minorities in public life* (Abo Akademi Abo 2001); K. Gal, Ed., *Minority governance in Europe* (Open Society Institute Budapest 2002); SC Roach, *Cultural autonomy, minority rights and globalization* (Ashgate Aldershot. 2005), and E. Nimni “National-cultural autonomy as an alternative to minority territorial nationalism” (2007) 6 *Ethnopolitics*, 345-364.

<sup>4</sup>For example, Thomas Markert, the deputy secretary of the European Commission on Democracy through Law of the Council of Europe recently observed as follows about the use of federalism to resolve conflict, “Federalism allows taking into account diversity. It enables minorities living in a specific territory to have self-government, especially in areas that are crucial for maintaining their identity such as culture and education. It is no coincidence that in federal countries culture and education are typically within the competence of the federated entities. In addition to providing self-government for certain areas, federalism also gives the entities the possibility to make their voice heard at the federal level in a second chamber...Federalism is therefore at least in theory ideally suitable for maintaining unity within diversity.” M Markert, “Unity in diversity” in Council of Europe *The constitutional status of the regions in the Russian Federation and on other European countries* (Council of Europe 2003) 20.

<sup>5</sup>Belgium is the sole federation that contains formal non-territorial arrangements albeit limited to the capital city, Brussels.

<sup>6</sup>Elazar “coined” the concepts of “self-rule” and “shared-rule” to describe the essence of federalism. DJ Elazar, *Exploring federalism* (Tuscaloosa: University of Alabama Press 1987).

<sup>7</sup>Although M. van der Stoep, *Peace and stability through human and minority rights: speeches by the OSCE High Commissioner on National Minorities* (Nomos, 1999), 172.

<sup>8</sup>The challenge faced for minorities in Nepal is summarised as follows: “Above all, the country is moving from a hierarchical society in which one’s place was dictated by gender, caste and ethnicity, to one that aspires to making human dignity and equality its fundamental principles. The concern of the marginalised communities (“minorities” in a sociological but not necessarily numerical sense) has been to ensure their rightful place in the political and economic spheres...” Y. P. Ghai, “A commentary on the place of minorities and indigenous communities in Nepal” in Adhikari, 2010, 233.

<sup>9</sup>M. Lawoti, “Non-territorial federalism” *The Kathmandu Post* (09/07/2010) available at: <http://www.ekantipur.com/the-kathmandu-post/2010/07/08/oped/non-territorial-federalism/210257/>

ments in particularly young democracies of Europe to protect dispersed minorities on a non-territorial basis. Countries such as Estonia, Slovenia and Kosovo have displayed remarkable creativity and ingenuity to develop constitutional mechanisms to grant autonomous decision-making by way of decentralisation to minority groups on a non-territorial basis. The article gives an overview of some of those arrangements and identify what, if any, lessons can be drawn for other emerging democracies that are still searching for way to protect the rights of dispersed minority groups.

## 2. What Is Non-Territorial Autonomy?

It is widely recognised, especially in some of the new democracies of Central and Eastern Europe, that practical solutions to the question of dispersed minorities are needed so as to deepen and consolidate the progress that has been made in democratic development in emerging democracies [29].<sup>12</sup> An option that is increasingly being pursued is to decentralise decision-making and administrative powers to communities or to cultural councils established by communities. Cultural or non-territorial auto-

nomy is therefore seen as a supplement to territorial autonomy and even in some instances a substitute for territorial autonomy [30].<sup>13</sup>

Non-territorial autonomy can be described as follows:

“A non-territorial jurisdiction exists when independent *public* authority is exercised in respect of certain individuals throughout the state irrespective of the fact that those individuals are residing in territorial jurisdictions in which other individuals are subject to similar public authority from territorially delineated jurisdictions [31]”.<sup>14</sup> (author emphasis).

Non-territorial autonomy rests on two principles, firstly the decentralisation of decision-making to a group rather than to a geographical territory, and secondly the clothing of such a group with public powers as a form of government in contrast to a private club or an association.

Hofman observes as follows in regard to the practical application of non-territorial autonomy to minority groups:

“Generally speaking, the concepts of cultural autonomy or functional layering of public authority may be usefully applied in situations where a minority does not constitute the majority or a sizable minority of the population in a given region of a state but finds itself dispersed throughout the whole of a state. In such a situation (e.g. Hungary [32-34])<sup>15</sup>

<sup>10</sup>The non-territorial arrangements in Belgium only apply to the capital city, Brussels. For general reference see P. Peeters, “Federalism: a comparative perspective—Belgium’s transformation from a unitary to a federal state.” In: B. de Villiers, Ed., *Evaluating federal systems* (Cape Town Juta (1994) 194-207; K. Deschouwer, “Kingdom of Belgium” in Kincaid and Tarr, Eds., 2005, 48-75; Lecours, A., “Belgium” in Griffiths Ed., 2005: 58-72. Deschouwer, K., “Kingdom of Belgium” in J. Kincaid and A. Tarr, Eds., *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen’s University Press, Montreal 2005) 48-75, and H. Dumont, N. Lagasse and others “Kingdom of Belgium,” In: A. Majeed, R. L. Watts and D. M. Brown, Eds., *Distribution of powers and responsibilities in federal countries*, (McGill-Queen’s University Press, Montreal, 2006) 34-65; W. Pas, “A dynamic federalism built on static principles: The case of Belgium,” In: Tarr, Williams and Marko, Eds., 2004, 164; J. Fitzmaurice, *The politics of Belgium* (Hurt London, 1988) 113; and W. Swenden, “Asymmetric federalism and coalition-making in Belgium,” (2002) 32(3) *Publius: The Journal of Federalism*, 67-85.

<sup>11</sup>Russia also has cultural association arrangements but those are principally of a private nature and not public law institutions such as the cultural councils in Belgium. Other federations such as India and South Africa also have many informal non-governmental organizations that look after the cultural, language and religious interests of their members, but none of those have the status as public law organs of government. For general reference to the arrangements in the Russian Federation refer to Busygina I. and A. Heinemann-Gruder “Russian Federation” in Moreno and Colino Eds., 2010: 263; B. Bowring, “The Tartars of the Russian Federation and national-cultural autonomy: a contradiction in terms?” (2007) (6) *Ethnopolitics* 417 - 435; B Bowring, “Legal and policy developments in the Russian Federation in 2007 in regard to the protection of minorities” (2006/7) (6) *European Yearbook of Minority Issues* 35; D. Wirda, “Legislation of the Russian Federation concerning ethnic minorities and its shortcomings” <http://www.eawam.ru/EN/pub/Projects/TacisProject/Widra.htm>; and B. Bowring, “Austro-Marxism’s last laugh? The struggle for recognition of national-cultural autonomy for Rossians and Russians,” (2002) 54, *Europe-Asia Studies*, 229-250.

<sup>12</sup>For general reference refer to N. Chronowski, T. Driconzi and T. Takacs, Eds., *Governmental Systems of Central and Eastern European States* (Kluber Warszawa, 2011).

<sup>13</sup>W. Kymlicka, “National cultural autonomy and international minority rights norms,” (2007) 6(3) *Ethnopolitics: Formerly Global Review of Ethnopolitics*, 379-393 at 385.

<sup>14</sup>There is some debate, although not the subject of this research, as to what the proper terminology is to use for community autonomy, namely “personal” autonomy or “cultural” autonomy with some contending that “personal” autonomy refers to the rights persons exercise in pursuance of their fundamental individual rights while cultural autonomy specifically refers to the rights of a group. For a very brief but useful overview of this debate refer to M. Suski, “Personal autonomy as institutional form—focus on Europe against the background of article 27 of the ICCPR” (2008) (15) *International Journal on Minority and Group Rights*, 157-178.

<sup>15</sup>To Hungary can be added the recent developments in regard to cultural autonomy in Russia, Estonia, Kosovo, Hungary, Slovenia, Macedonia and Croatia. Malloy describes the range of mechanisms enacted in Slovenia for the purpose of protecting the rights of the two co-nations, Hungarian and Italian, as “an instructive example of how co-nation consociationalism might work.” T. H. Malloy, *National minority rights in Europe* (Oxford University Press, Oxford, 2005), 188. The arrangements include collective autonomy on the basis of a mix of territorial and cultural autonomy; participation in joint structures, mutual veto’s in certain circumstances and special rights in regard to local self-government. Also refer to the arrangements in Macedonia to protect minorities as discussed by J. Marko, “The referendum on decentralization in Macedonia in 2004: a litmus test for Macedonia’s interethnic relations” (2004/5) (4) *European Yearbook of Minority Issues*, 695-721. The main elements are the use of minority languages in public offices; support for education in mother-tongue; local self-government where communities are concentrated; and a double majority system in parliament in regard to certain legislation. The decentralisation to small local government entities in Macedonia has been described as a “compromise solution” to territorial autonomy or federalism since it enables communities at a local level to take care of the matters that affect their lives most intimately. I. Tomovska, “Post-conflict developments and decentralization in Macedonia,” (2008) *European Yearbook of Minority Issues* (7) 146-147.

have opted for the introduction of a system endowing institutions established under public law with the power to regulate—or at least to have a most significant say in the regulation of—“cultural affairs”, including, in particular, the running of public education institutions, such as *Kindergartens* and schools, or the management of their own cultural institutions and media, such a publically funded radio and TV broadcasting programmes. *The important aspect here is the fact that minorities exercise, in the fields concerned, some kind of self-government—usually through representative bodies, the members of which are elected by and from the members of the minority concerned* [35].<sup>16</sup> (author emphasis).

Non-territorial or cultural autonomy can therefore be granted to a linguistic, cultural or religious minority group as a *legal entity* (“cultural council”) with public law legislative and executive status and functions to operate as an organ of government. The status and powers of a public law entity must be distinguished from the working of many non-governmental organisations that promote the interests of their members by way of clubs or associations. Non-governmental organisations do not have governmental legislative and executive functions. Cultural councils on the other hand, are clothed with the powers of government in the same way than a regional or local government.

The jurisdiction of such a cultural council applies to its members regardless where they reside in a region or country. The autonomy of the minority and its ability to manage and control its own affairs through a cultural council are therefore not dependent upon the members of the group forming a majority at a regional or local level [36].<sup>17</sup>

Cultural autonomy and decentralisation of decision-making to a cultural council can take place by way of a constitutional or statutory instrument in which the power to make binding laws or the administration of laws is given to a community’s cultural council—rather than to a region or local government as is the case with territorial federations or decentralised unitary systems.

Cultural autonomy within the realm of public law must therefore not be confused with the right of individuals to establish for private purposes their own non-governmental associations such as clubs, schools, media or forums for the protection or promotion of their identity. Such private associations are common in all democracies and arise from the right of freedom of association of individuals. The private associations do not, however, carry

any public law functions or authority as organs of government. The decisions of non-governmental organisations are therefore of a private nature and enforcement, if any, is voluntary or takes place under civil law.

Cultural autonomy therefore entails that *public law* powers and functions associated with an *organ of government* are decentralised to a cultural council. The jurisdiction of a cultural council is non-territorial in contrast to national, regional and local governments which have a territorial jurisdiction. The legal status and enforceability of a law made by a cultural council is the same as the enforceability of a law made by a regional or local government [37].<sup>18</sup>

In short, where the decisions of territorially based governments apply to all persons that reside within their territory, the decisions of a cultural council only apply to the individual members of the community irrespective of where they reside. Cultural autonomy is specifically designed to enable minority communities to make decisions of government, to raise taxes and to offer services of government to their members regardless of where they reside.

Cultural autonomy is generally speaking “adequate for minorities who live dispersed in the country but have a strong political will for self-government and articulate their claims as such. The community is entitled to different, wide-ranging rights in political, economic and social life, although these rights have so far usually been limited to matters of culture, language, religion and education [38].”<sup>19</sup>

Although the practical application of non-territorial autonomy arrangements remains scarce, there are, as is discussed below, very useful historic and contemporary examples of it.

In summary, as a matter of principle there is no difference in substance between the constitutional allocation of powers and functions on the one hand to a legal person a formed by a cultural group, and on the other hand the powers and functions allocated to a geographical entity such as a region or a local government. In the same way that the constitution or statute can define a territory for purposes of decentralisation, a similar mechanism could be used to define a cultural council for purposes of decentralisation.

### 3. Differences between Territorial and Non-Territorial Autonomy

The following are some of the most important practical differences between cultural and territorial autonomy:

- 1) For territorial autonomy the boundaries of geo-

<sup>16</sup>Hofmann, R., “Political participation of minorities” (2006/7) *European Yearbook of Minority Issues* (6), 11.

<sup>17</sup>A Legare and M Suksi “Introduction: rethinking the forms of autonomy at the dawn of the 21<sup>st</sup> century,” (2008) *International Journal on Minority and Group Rights*, (15) 144.

<sup>18</sup>T. H. Malloy, “The Lund recommendations and non-territorial arrangements: progressive de-territorialization of minority politics,” (2009) *International Journal on Minority and Group Rights* (16) 665-679.

<sup>19</sup>K. Gal, “Minority Governance on the Threshold of the Twenty-First Century,” in Gal, Ed., 2002, 8.

graphical entities be it regions or local government must be defined, while for cultural autonomy the cultural group the subject of the autonomy must be defined or a process must be established for groups to register for purposes of cultural autonomy [39];<sup>20</sup>

2) The jurisdiction of cultural autonomy relates to individuals that are members of the cultural group regardless of where they live, while the jurisdiction of a region or local government affects everyone residing within the geographical area of the local or regional government; and

3) The typical functions that can be allocated to a cultural council are more restricted than the powers and functions that can be allocated to a territorial entity. This is because cultural autonomy deals predominantly with the culture, language, religion and customs of a group and not with wider governmental functions that have a territorial dimension, for example, infrastructure, environment, public transport, agriculture, etc. Typical functions that may be decentralised, in whole or in part, to cultural councils are aspects of education, media, cultural symbols, commemorative days; language and personal and family law.

The concern is often expressed that cultural autonomy may be difficult to achieve; that it may cause conflict; that it may undermine national unity; and that it may lead to discrimination.

While these concerns about cultural autonomy require attention to prevent it from materialising, there is no guarantee that territorial arrangements do not give rise to similar risks. In fact, there are many international examples where regional autonomy has been used and abused by minorities for purposes of promoting their own interests to the exclusion of others.

The emphasis that is often placed on territorial autonomy as the only effective avenue for minorities to gain a form of autonomous decision-making, may be a far greater risk to the stability of a country,<sup>21</sup> than to give minorities the assurance that even if they do not dominate a region or local government, their cultural and linguistic rights would be respected and protected by way of a cultural autonomy.

In sum, the risks and challenges posed by non-territorial arrangements are not necessarily greater than the

<sup>20</sup>As is pointed out above, international law has not yet been able to find a comprehensive definition for the concept “minority”, although within state constitutional arrangements there has been greater success to identify the groups the subject of special arrangements. B. De Villiers, “Human rights in developing countries: Some crucial issues,” (1996) *Journal of South African Law*, (4) 692.

<sup>21</sup>Refer to the experiences of India, Nigeria and Ethiopia discussed above where the sole emphasis placed on territorial solutions have led to a spiral of state creation (Nigeria); ongoing demands for more states (India); creation of subregional arrangements leading to five or 6 levels of government (Ethiopia) just to give each group some sense of territorial “control”.

risks and challenges posed by territorial arrangements [40].<sup>22</sup>

#### 4. Examples of Cultural Autonomy

Although practical examples of cultural, non-territorial autonomy are scarce, there are nations that have experimented with cultural autonomy. Valuable lessons can be learnt from those experiences. The following are examples of countries that have in recent years experimented with cultural autonomy—Estonia, Finland, Slovenia, and Kosovo.

#### 5. Estonia—Setting the Pace

Estonia has arguably enacted the most far reaching and comprehensive arrangements for the establishment of cultural councils; the powers and functions of the councils; and matters related thereto.

Estonia has had two phases of bestowing cultural autonomy on cultural communities.

The first phase of cultural autonomy in Estonia lasted from 1920 to 1939 at which time it was occupied by USSR. The second phase commenced after the fall of the Berlin Wall and the return to democracy in Estonia [41].<sup>23</sup>

Estonia was one of the first post-World War I countries that acknowledged and protected the rights of its national minorities [42,43].<sup>24</sup> The respective minority groups, who lived intermingled and for whom territorial autonomy was not a practical or viable option, were granted the right to establish cultural councils with decentralised powers and to make decisions that were binding on the members of the group regardless of where they lived [44].<sup>25</sup>

The minority groups that could qualify for the community autonomy were the Russians, Germans, Jews and Swedish [45].<sup>26</sup>

The system of minority protection was regarded as one of the most successful in Europe. It was said at the time that “the pride of the Estonian nationhood was its treatment of national minorities [46].”<sup>27</sup>

The second phase of cultural autonomy, which is essentially a continuation of Estonia’s previous experiences, commenced with Estonia’s return to democracy and the enactment of the *Act on Cultural Autonomy for Ethnic*

<sup>22</sup>Refer in general to K. Henrard, “‘Participation’, ‘representation’ and ‘autonomy’ in the Lund Recommendations and their reflections in the supervision of the FCNM and several human rights Conventions,” (2005) *International Journal on Minority and Group Rights* (12) 133-168.

<sup>23</sup>K. Alenius, “The birth of cultural autonomy in Estonia: how, why, and for whom?” 2007, 38(4), *Journal of Baltic Studies*, 445-462.

<sup>24</sup>J. G. Jackson, *Estonia* (Allen and Unwin 1941) and B. de Villiers, *Die statsregtelike beskerming van outonome besluitneming minderheids-groepe* (LL.D. Thesis, University of Johannesburg 1989), 98-107.

<sup>25</sup>R. T. Clark, “The Constitution of Estonia” (1921) *Journal of Comparative Legislation and International Law* (3) 250.

*Minorities* on 28 November 1993 [47]<sup>28</sup> and the *Estonian Language Act* 1995.

The essence of this legislation is recognition of the right of national minorities to protect, promote and preserve their identity, language and culture.

The Act on Cultural Autonomy grants collective cultural autonomy to minority groups so as to enable them to make and implement laws about their culture, language and traditions [48].<sup>29</sup>

“Cultural autonomy” is defined as “the right of individuals belonging to a national minority to establish cultural autonomy in order to achieve the cultural rights given to them by the constitution.”<sup>30</sup>

The cultural autonomy of a group is awarded to a legal entity, a cultural council, which has the power to make decisions and administer those decisions on behalf of a group.<sup>31</sup> The jurisdiction of the cultural council is exercised on a personal/individual rather than on a territorial basis.<sup>32</sup> The decisions of a cultural council are therefore applicable to all of its members regardless of where they reside in Estonia. Membership of a cultural group is voluntary.

The Act on Cultural Autonomy recognises the right of citizens<sup>33</sup> of Estonia, who are distinct from the general population of Estonians on the basis of their ethnic, cultural, language or religious traditions and identity, to be recognised as a “national minority”.<sup>34</sup>

The principle objectives of the cultural autonomy are to organise education in the/their mother tongue; to establish and manage educational facilities; to establish a fund for the promotion of culture and education; and to form institutions for the promotion of culture.<sup>35</sup>

At the time of the enactment of the legislation, there was an estimated 14 major ethnic groups residing in Estonia [49],<sup>36</sup> but not all of those would qualify for cultural autonomy.

Once a national minority is recognised, such a group qualifies for the autonomy arrangements,<sup>37</sup> but the group is not obliged to take up autonomy. A group may there-

fore qualify for autonomy but the members may decide not to mobilize to take up autonomy arrangements.

Certain minority communities, namely those that had recognition under the previous phase 1 minority arrangements, who have traditionally formed part of Estonia and whose existence as a national minority is not in dispute, are explicitly recognised by the Act and they need not to comply with any further requirements or registration in order to obtain or qualify for autonomy. Those groups are listed as the German, Russian, Swedish and Jewish communities [50].<sup>38</sup>

Other minorities, such as the Ukrainians and Belarussians who may wish to qualify for cultural autonomy, must demonstrate that they have at least 3000 members before they can apply for the Act to be applied to them.<sup>39</sup>

The Act provides for the establishment of a National Register of Minorities in which each of the groups that acquire autonomy, is registered. The Register for each group is maintained by the group themselves. The Register must contain the details of their members.

Members of the national minorities have the guaranteed rights to undertake various activities of which the following are examples: to form cultural institutions with the aim to promote and protect their identity; to practice their traditions and culture; to use their mother tongue within limits determined by law; and to publish and communicate in their language.<sup>40</sup>

The Ingrian Finish community was the first to obtain cultural autonomy in 2005. The second community to take up autonomy was the Swedish. An interesting aspect that the Swedish community has to contend with is that so many of their members, and especially children, have become integrated with the Estonian society due to the close proximity of the two countries. It is therefore sometimes “difficult to determine where exactly the (Swedish) community begins and ends [51].”<sup>41</sup> This is a typical challenge of non-territorial protection of minorities where persons may have multiple identities and the classification of a person as belonging to a single identity may be problematic.

Once a national minority qualifies to obtain cultural

<sup>26</sup>V. Raud, *Estonia: Reference Book* (Nordic Press 1953) 41.

<sup>27</sup>E. Nodel, *Estonia: Nation on the anvil* (Bookman Associates 1963) 176.

<sup>28</sup><http://www.unhcr.org/refworld/docid/3ae6b51810.html>

<sup>29</sup>a11 of the Act on Cultural Minorities 28 November 1993. Available at <http://www.legaltext.ee/text/en/XX00038.htm> (accessed on 17 July 2012). For general discussion refer to M Suski, *On the constitutional features of Estonia* (Abo Akademis tryckeri Abo 1999).

<sup>30</sup>a2(1) of the Act on Cultural Minorities.

<sup>31</sup>a26 of the Act on Cultural Minorities Determines as Follows: “Institutions of Cultural Autonomy Are Independent Legal Persons, May Own Real Property and Are Liable for Their Financial Obligations.”

<sup>32</sup>a6 of the Act on Cultural Minorities.

<sup>33</sup>It therefore excludes “new” (immigrant) minorities of whom the members are not citizens of Estonia. In order for a minority to be recognised it must “maintain long-standing, firm and lasting ties with Estonia...” a1 of the Act on Cultural Minorities.

<sup>34</sup>a1 of the Act on Cultural Minorities.

<sup>35</sup>a5 of the Act on Cultural Minorities.

<sup>36</sup>[http://old.estinst.ee/factsheets/factsheets\\_uus\\_kuju/the\\_cultural\\_autonomy\\_of\\_ethnic\\_minorities\\_in\\_estonia.htm](http://old.estinst.ee/factsheets/factsheets_uus_kuju/the_cultural_autonomy_of_ethnic_minorities_in_estonia.htm)

<sup>37</sup>There is an interesting similarity between the phasing in of community autonomy arrangements in Estonia and the asymmetry of regions in Spain, Italy and Iraq where historic regions could gain autonomy prior to other regions. In Estonia, there is no obligation on national minorities to take up cultural autonomy and even if they wish to do so, the extent of the powers is the subject of negotiation with each group.

<sup>38</sup>a2(2) of the Act on Cultural Minorities. The Russian community is the largest of the national minorities and has an extensive network of schools and cultural activities to service the needs of their community. “Cultural autonomy in Estonia – bane or boon for indigenous cultural survival” 21 January 2010 *EESTI EDU* <http://www.eesti.ca/?op=article&articleid=26937&lang=en>

<sup>39</sup>a2(2) of the Act on Cultural Minorities.

<sup>40</sup>a4 of the Act on Cultural Minorities.

autonomy, it is entitled to establish structures by which decisions of government can be made and administered about its culture, language, religion and traditions. Those institutions must be elected in a manner consistent with the democratic processes of the country. The members of the cultural community elect their representatives on the basis of an electoral act which must be approved by the national government. The national government may nominate a representative of the national electoral committee to ensure that democratic processes and the electoral regulations of Estonia are adhered to by the respective cultural councils.<sup>42</sup>

A cultural council may establish regional and local offices from where the interests of its members can be served in various parts of the country.<sup>43</sup> Cultural councils for a specific community can therefore internally function in a federal way with their different regional offices forming the national cultural council.

The autonomy arrangements of Estonia resemble the autonomy arrangements of a federation or a decentralised unitary arrangement where the powers of the constituent units (in this case communities rather than territories) are legally defined and protected.

The relationship between the national authorities and the cultural councils has been described as follows:

“The task of the national authorities is to provide legal guarantees, without interfering in each ethnic group or individual’s right to decide for themselves in all matters concerning preservation of their ethnic identity, cultural traditions and mother tongue [52]”.<sup>44</sup>

The institutions established for the cultural minority can take steps within the public field (in other words not merely as a private organisation or a non-governmental organisation) to promote and protect their language and culture by way of education in their mother-tongue, freedom to express themselves in their own language; the protection and promotion of their customs and cultural traditions. The language protection includes that the minority group may use their language in dealings with state and local authorities in areas where they constitute a majority.<sup>45</sup>

The budget of a cultural council is made up of three main sources namely government grants; taxes or membership fees from its members and grants from persons, companies and counties of the minority group’s origin.<sup>46</sup>

A cultural council may be abolished by the national government if the council requests it; if the numbers of

the community fall below 3000; if for two consecutive elections the council has not been able to constitute an electoral list that complies with statutory requirements; or if less than half the number of persons on the electoral list vote in two consecutive elections.

Estonia has arguably the most advanced and detailed arrangements in the work for the establishment and operation of cultural councils. The cultural councils are, at least in terms of the statutory framework, on par with geographical regions and local governments in other decentralised unitary and federal arrangements.

## 6. Sami of Finland: Protecting Traditional Rights

The Sami is a small, indigenous group in Finland and number approximately 7500. Although their traditional territories are situated in the north of Finland, they do not form a majority in any part of Finland. Members of the Sami are also found spread across in Norway, Sweden and Russia which are their traditional areas of hunting, fishing and living.

In Finland about 60% of the Sami live in their traditional areas with the remainder of about 40% reside in other parts of Finland, including in the capital Helsinki. In the areas where the Sami live they are fully integrated in their residential patterns with the rest of the population. Territorial autonomy, even at a local level, would therefore not be to their benefit except for a few instances where they live in sizeable concentrations at local levels [53].<sup>47</sup>

Although Finland is a unitary state, the decentralisation and consultation arrangements it has made for the benefit of the Sami are instructive for purposes of this overview.

In light of the dispersed living patterns of the Sami and their high level of integration with the rest of the population, a combination of territorial and cultural autonomy had to be devised to enable the Sami community to protect and develop their culture and in particular their language.<sup>48</sup>

“Culture” is given a wide expression by the Constitution of Finland as including the traditional livelihoods of the Sami, fishing, hunting, the use of their language and the promotion of their lifestyle.<sup>49</sup>

The Sami Language Act [54]<sup>50</sup> is a key mechanism to protect and promote the Sami language and culture across the whole of Finland.

Some of the key provisions of the Sami Language Acts are as follows: the right to use the Sami language in

<sup>41</sup>J. Petrone, “Estonian Swedes embrace autonomy rights” *The Baltic Times*.

[http://www.citypaper.ee/estonian\\_swedes\\_embrace\\_autonomy\\_rights/](http://www.citypaper.ee/estonian_swedes_embrace_autonomy_rights/)

<sup>42</sup>a13(1) of the Act on Cultural Minorities.

<sup>43</sup>a11(2) of the Act on Cultural Minorities.

<sup>44</sup>[http://old.estinst.ee/factsheets/factsheets\\_uus\\_kuju/the\\_cultural\\_autonomy\\_of\\_ethnic\\_minorities\\_in\\_estonia.htm](http://old.estinst.ee/factsheets/factsheets_uus_kuju/the_cultural_autonomy_of_ethnic_minorities_in_estonia.htm)

<sup>45</sup>a52(2) of the Act on Cultural Minorities.

<sup>46</sup>a27 of the Act on Cultural Minorities.

<sup>47</sup>Only one municipality in Finland has a Sami majority—Utsjoki. U. Aikio-Puoskari and M. Pentikainen *The language rights of the Indigenous Sami in Finland* (University of Lapland Rovaniemi 2001) 4.

<sup>48</sup>a121 of the Constitution of Finland.

dealings with public authorities;<sup>51</sup> promotion and teaching of the Sami language;<sup>52</sup> publication of Government announcements in the Sami language if it affects the Sami community;<sup>53</sup> and registration as a Sami.<sup>54</sup>

More elaborate language rights exist within the Sami homeland.<sup>55</sup>

An important obligation is placed on the state to make available funds and resources to promote and protect the Sami language.<sup>56</sup>

Finish legislation establishes the legal basis upon which the Sami are identified. Firstly, self identification which entails the subjective expressions and intentions of an individual to associate and be associated with the Sami people and secondly, an objective element whereby the closeness of a person to the Sami community is dependent on whether one or both of his/her parents spoke the Sami language or one or both parents learnt Sami as their first language.<sup>57</sup>

Membership of the Sami is therefore flexible and “soft” around the edges. It is acknowledged that due to the high level of integration of the Sami into the Finish community, a flexible approach is required where their status as citizens with equal rights are recognised while at the same time special provision is made for the maintenance and development of their culture, language and customs.

The Sami received its own elected representative body (called the Sami Delegation) in 1973 [55]<sup>58</sup> and the Constitution of Finland recognises the right of the Sami to “maintain and develop their own language and culture.”<sup>59</sup> The Sami Delegation existed until the end of 1995 when it was replaced by the Sami Parliament.<sup>60</sup>

The Sami Parliament, with its 21 elected members, has a territorial and non-territorial jurisdiction. The core of its jurisdiction is what is known as the Sami-homeland, but its decisions about culture, language and education are also applicable to the Sami where ever they live in sufficient concentrations in Finland [56].<sup>61</sup> Any Sami on the Sami Electoral Register can stand for election in the

Sami Parliament and participate therein [57].<sup>62</sup>

The Sami Parliament does not have a formal legislative function although it is responsible to attend to the interests of the Sami and to allocate the funds set aside by the national Parliament of Finland, for specific projects to promote the Sami identity such as production of language materials, interpretation services, publication of books and teaching material, and other cultural needs.<sup>63</sup>

Reference to Sami “autonomy” when speaking about the Sami Parliament, is therefore “somewhat misleading”,<sup>64</sup> but the Sami Parliament does have autonomy in the allocation of grants for purposes of the cultural development of the community.

The main functions of the Sami Parliament are to give advice to government institutions about matters that affect the Sami and to allocate and administer the grants awarded to the Sami People.<sup>65</sup>

An important influence of the Sami Parliament lies in the statutory obligation of the national, regional and local authorities in Finland to negotiate with the Sami about matters that affect their lives.<sup>66</sup>

The obligation to negotiate requires from public authorities to “negotiate with the Sami Parliament in all far-reaching and important measures which may directly and in a specific way affect the status of the Sami as an indigenous people” in regard to the following matters: community planning; management of public lands; mining; culture; teaching and education of and in Sami language; and any other matter that impacts on the status of the Sami language and culture.<sup>67</sup>

Failure by a government institution or authority to negotiate, does, however, not affect the legal validity of a decision or legislation.<sup>68</sup> The criticism is therefore often heard that the duty to negotiate does not have sufficient “teeth”.

Although the Sami Parliament does not have a veto over decisions that may impact on them, the procedural rights and obligations for negotiation are substantial [58].<sup>69</sup>

In practice the Sami are given an opportunity to attend and address committees of Parliament; public authorities are aware that the obligation to “negotiate” requires more than to “consult”; and administrative decisions have been set aside due to a lack of negotiation [59].<sup>70</sup>

The Sami language can be used in the area known as

<sup>49</sup>a17 of the Constitution of Finland.

<sup>50</sup>*Act on the Use of the Sami Language when dealing with Authorities* (Finish Official Gazette SSK 8/3/1991).

<sup>51</sup>aa1, 4-6 of the Sami Language Act.

<sup>52</sup>Chapter 5 of the Sami Language Act.

<sup>53</sup>aa8 and 9 of the Sami Language Act.

<sup>54</sup>a7 of the Sami Language Act.

<sup>55</sup>Chapter 3 of the Sami Language Act.

<sup>56</sup>a31 of the Sami Language Act: “An appropriation shall be included in the State budget for purposes of State support to municipalities, parishes, herding cooperatives within the Sámi homeland and private entities referred to in section 18 for covering the specific additional costs of applying this Act.”

<sup>57</sup>Finish Official Gazette SSK 17/7/1995/974.

<sup>58</sup>U. Aikio-Puoskari and M. Pentikainen *The language rights of the indigenous Sami in Finland—under domestic and international law* (Annex 1 University of Lapland 2001).

<sup>59</sup>a17 of the Constitution of Finland.

<sup>60</sup>Finnish Official Gazette SSK 17/7/1995/974.

<sup>61</sup>M. Tkacik, “Characteristics and forms of autonomy” (2008) *International Journal on Minority and Group Rights* (15), 375.

<sup>62</sup>L. Hannikainen, “Autonomy in Finland: The territorial autonomy of the Aland Islands and the cultural autonomy of the indigenous Sami People” (2002) *Baltic Yearbook of International Law* (2), 189.

<sup>63</sup>Aikio-Puoskari and Pentikainen, 2001, 187.

<sup>64</sup>Aikio-Puoskari and Pentikainen, 2001, 24.

<sup>65</sup>a8 Act on the Sami Parliament no 731/1999.

<sup>66</sup>a9 Act on the Sami Parliament.

<sup>67</sup>a9 Act on the Sami Parliament.

<sup>68</sup>Aikio-Puoskari and Pentikainen, 2001, 25.



the Sami homeland as well as in certain other regional and local areas where the Sami live.<sup>71</sup> Members of the Sami community may also, where practicable, engage with authorities in the Sami language.<sup>72</sup> In the Sami homeland public notices and signs must also be in the Sami language. The Sami Parliament is responsible for the production of materials for educational and public use to promote the Sami language.

## 7. Slovenia: Local Government and Cultural Autonomy

In Slovenia the right to self-governance of two national minority communities, the Italian and Hungarian communities, is recognised.<sup>73</sup>

The right of self-governance comprises a combination of local self government and cultural autonomy, with municipalities being the basis of self-government.<sup>74</sup> In areas where these communities live, special municipalities are formed to accommodate their living patterns and to give effect to their special rights.<sup>75</sup> Each municipality that is ethnically diverse, must establish a commission on ethnic issues to consider the interests of the minority communities within its area.<sup>76</sup>

A municipality may, within the area of its jurisdiction, establish a “narrower section” so as to give particular attention to the rights of minorities.<sup>77</sup> Such a sub-section may recommend to the municipality specific regulations that are of relevance to the community.<sup>78</sup> The sub-section may have specific powers and also has a separate legal persona from the main municipality so as to represent the interests of its residents.<sup>79</sup>

The two communities have the right to mother-tongue, state funded education; the right to establish media and publishing; and to develop and maintain links with their countries of origin.<sup>80</sup>

The Constitution provides that the communities are entitled to establish “autonomous organizations in order to give effect to their rights” and, in addition, that the State may authorize these autonomous organisations to

undertake State-functions that would normally be within the responsibility of the State.<sup>81</sup> The communities can therefore be clothed with formal powers of government.

These community-bodies have a public law and governance function in contrast to other community organisations that serve their members under civil law for purposes of social activities.<sup>82</sup>

The state may decentralise to such community organisations powers and functions to fulfil. The state must, if it decentralises, also provide funds and “moral support” for the discharge of the functions.<sup>83</sup>

The powers of the self-governments are wide ranging from consultative to consent powers, including autonomous decision making over matters that directly affect the respective communities.<sup>84</sup>

Each of the two communities has, for the local areas where they live in a mixed pattern, its own voters roll on which only members of the community may be Registered.<sup>85</sup> The official language of the communities where the two communities live, is Italian and Hungarian respectively.<sup>86</sup>

The Self-Governing Ethnic Communities, as they are called, are “public legal entities”<sup>87</sup> which means they have a different status from mere private associations that tend to the interests of its members. As a “public legal entity” the Communities have the status of a “government” and the decisions are legally enforceable under public law, and not as a mere contract under private law.

Any law or regulation that affects the constitutional rights of either of the communities, can only be passed with the support of the community.<sup>88</sup>

The key institutions for the two minorities are the self-governing, cultural associations. It is from these institutions that the detailed arrangements for local governments originated. Komac emphasises that, regardless of the local government arrangements, the “self-governing ethnic communities remain, on the basis of the constitutional provisions and the appropriate laws, the only legal partner in the process of dialogue between the ethnic communities and the State [60].”<sup>89</sup>

The thorny question that often confronts non-territorial solutions is how to determine who belongs to a community and who does not?

In Slovenia the Constitutional Court has found that it is not primarily the decision of the individual that deter-

<sup>69</sup>The limited powers of the Parliament has been criticised as being more of a “policy” nature than a legislative forum. K. Myntii, “The Nordic Sami Parliaments” In: P. Aiko and M. Scheiden, Eds., *Operationalizing the right of indigenous people to self-determination* (Abo Akademi University, Abo, 2000), 203-221

<sup>70</sup>M. Scheinin, “The right to enjoy a distinct culture: indigenous and competing uses of land” In: T. S. Orlin, A. Rosas and M. Scheinin, Eds., *The jurisprudence of human rights law: A comparative interpretative approach* (2001), 159-222.

<sup>71</sup>Act on the Use of the Sami Language before Authorities No. 1201/1991 as amended by Act no 1728/1995.

<sup>72</sup>a17 of the Constitution of Finland.

<sup>73</sup>aa3 and 5 of the Constitution of Slovenia.

<sup>74</sup>a2 Law on Self-Governing Ethnic Communities Official Gazette no 73/93 as amended

<sup>75</sup>a5 Law on Self-Governing Ethnic Communities.

<sup>76</sup>a39 Law on Self-Governing Ethnic Communities.

<sup>77</sup>a18 Law on Self-Governing Ethnic Communities.

<sup>78</sup>a19a Law on Self-Governing Ethnic Communities.

<sup>79</sup>a19c Law on Self-Governing Ethnic Communities.

<sup>80</sup>a64 of the Constitution of Slovenia.

<sup>81</sup>a64(3) of the Constitution of Slovenia.

<sup>82</sup>a145 of the Constitution of Slovenia.

<sup>83</sup>a64 of the Constitution of Slovenia.

<sup>84</sup>Korhecz, 2002: 175.

<sup>85</sup>a39 Law on Self-Governing Ethnic Communities and Law on the Records of Voting Rights No 46/1994.

<sup>86</sup>a11 of the Constitution of Slovenia.

<sup>87</sup>a2 Law on Self-Governing Ethnic Communities.

<sup>88</sup>a64 of the Constitution of Slovenia.

mines membership of a minority, but rather whether such individual is accepted by the community.<sup>90</sup>

## 8. Kosovo: Community Rights in a Deeply Divided Society

An integral part of the democratisation process in Kosovo, after many years of conflict, is the recognition of “community” rights.

“Community” is defined by the Constitution as “inhabitants belonging to the same national, linguistic, or religious group traditionally present on the territory of Kosovo.”<sup>91</sup>

The attempts to give effect to minority protection were strongly supported by the international community and in particular the United Nations through its Special Envoy in Kosovo, Martti Ahtisaari.

The recognition by the United Nations and the international community that non-territorial arrangements had to be made in order to ensure peace and stability in Kosovo, is a major step forward in giving the technique credibility and legitimacy for possible use in other situations where the rights of dispersed minorities require protection.

A key element of the comprehensive settlement in Kosovo was the acknowledgement that non-territorial ways had to be found to protect the rights and interests of the communities. It was, however, also acknowledged that community protection should not be constructed or construed in a way that frustrates the ability of the majority ethnic Albanians to effectively govern the country [61].<sup>92</sup>

The scheme developed for the protection of communities forms several layers and comprise of the following five key elements:

The first element is the binding Framework for Comprehensive Settlement formulated by Mr Ahtisaari.<sup>93</sup> The Framework sets out the principles upon which the settlement had been reached.

The second layer comprises the international conventions that are directly applicable to Kosovo—for example the Council of Europe’s Convention for the Protection of National Minorities is included in this layer and therefore the Convention becomes part of Kosovo’s national law.

The third layer is the Constitution of Kosovo which

contains a chapter on community rights.

The fourth layer is the “omnibus”<sup>94</sup> Law on the Promotion and Protection of the Rights of Communities and their Members in Kosovo.<sup>95</sup> The Law on the Protection of Minorities is entrenched and can only be amended with the support of the majority of the community representatives in the Assembly.

The fifth layer is the reorganisation of local government for the promotion of self-governance for the benefit of communities that live concentrated in small, local areas [62].<sup>96</sup>

The following are some of the key rights that are afforded to the respective communities pursuant to the above scheme:

- An individual has the right to chose if he/she wishes to be treated as a member of a community or not.<sup>97</sup> Individuals are protected against discrimination regardless of their decision to belong or not to belong to a particular community.
- Members of minorities are protected against discrimination and a positive obligation is placed on the state to assist communities to fully realise their rights.<sup>98</sup> This obligation of the state involves financial and non-financial support to communities.
- The right of members of communities to receive education in their own language, to establish educational institutions with the assistance of government, and to have access to public broadcast facilities for the promotion of their language and culture, is recognised.<sup>99</sup>
- Minority communities receive guaranteed representation in the 120-seat national Assembly, with 10 seats reserved for the ethnic Serbs and a further 10 reserved for other communities.<sup>100</sup>
- There is guaranteed representation of communities in the national executive with one from the Serb and one from the other communities appointed in cabinet.<sup>101</sup>
- Representation of minorities in the judiciary and civil service.<sup>102</sup>
- Two deputy presidents are elected for the National Assembly—one by the Serb community and one by the other communities.<sup>103</sup>
- The Committee on Rights and Interests of Communi-

<sup>89</sup>M. Komac, “Protection of ethnic communities in the Republic of Slovenia” Institute for Ethnic Studies. <http://www.ciemen.org/merca tor/butlletins/46 - 10.htm>

<sup>90</sup>Decision 844 of the Constitutional Court, Official Gazette No 20/1998 p1313. The court said as follows: “Everyone has the right to declare their belonging to their nation or ethnic community. However, in deciding who is the beneficiary of special rights...the will of the individual is not decisive, rather legal criteria shall be established...membership in the autochthonous Italian or Hungarian ethnic community is not a matter of the will of the individual but the autochthonous community itself[f].”

<sup>91</sup>a57(1) of the Constitution of Kosovo.

<sup>92</sup>M. Weller, “The Kosovo Constitution and provisions for the protection of minorities in Europe” (2006/7) *European Yearbook of Minority Issues* (6) 485-527.

<sup>93</sup>The first principle is that Kosovo “shall be a multi-ethnic society” and secondly that Kosovo shall protect the rights of “all it Communities”. aa1.1 and 1.2 of the Comprehensive Proposal for the Kosovo Status Settlement.

<sup>94</sup>Weller, 2006/7: 497.

<sup>95</sup>Law no 3/L-047 signed on 13 March 2008.

<sup>96</sup>A Zeqiri, V Stephens and M Zhou “Implementation of the decentralisation process in Kosovo: Challenges and perspectives” (2007/8) *European Yearbook of Minority Issues* (7) 697.

<sup>97</sup>a57(1) of the Constitution of Kosovo.

<sup>98</sup>“The government shall particularly support cultural initiatives from communities and their members, including through financial assistance.” a48(1) of the Constitution of Kosovo.

<sup>99</sup>a59 of the Constitution of Kosovo.

<sup>100</sup>a64 of the Constitution of Kosovo.

ties has the right of veto of a draft law that is classified as of “vital interest” to them.<sup>104</sup> Such laws of vital interests are for example—laws changing or abolishing municipal boundaries; laws on the use of language; laws on the protection of cultural heritage and religion; and laws on education.<sup>105</sup>

- A Community Consultative Council<sup>106</sup> is established with the function to advise the President on matters affecting the communities.<sup>107</sup>
- Expanded autonomy is given to local governments where minority communities constitute a majority, particularly for the Serb community.<sup>108</sup> For example, local governments with enhanced powers may have responsibility over matters such as appointment of local public officials such as police, rights in education, secondary health care, cross-border cooperation with other local governments and raising of revenue.<sup>109</sup>
- Special rights of minority communities are protected in local governments where a minority community constitutes 10% or more of the population.<sup>110</sup> The local governments derive their powers on the basis of subsidiarity which enhances the principle of non-interference by higher authorities and local autonomy.<sup>111</sup>
- Collective rights are recognised for the communities as groups in addition to the rights of all individuals.<sup>112</sup> The government may delegate to such community organisations functions as an agent of government.
- A list of the names of communities that receive automatic protection are listed in the Act,<sup>113</sup> but the door is left open for other communities to also qualify for protection.

## 9. Conclusions

The following observations can be made in conclusion about the protection of dispersed minorities by way of non-territorial, autonomy arrangements:

Finding practical and sustainable solutions for the protection of dispersed minorities, in particular ways to grant such minorities collective rights of autonomy in addi-

tion to their individual rights, remains one of the major challenges to democratic theory and practice. The emphasis of territorial dominance as the only viable options for granting autonomy to minorities, in effect encourages competition for territorial control; causes ongoing demands for more regions; facilitates discrimination at regional levels against other minorities; justifies expulsion of non-members from regions and local areas; and creates a basis of other discriminatory practices and even secession.

It is widely accepted that territorial solutions do not necessarily suit the situation of all minority communities. One can therefore endorse the observation of Weller when he concludes after taking account of recent developments at international and state constitutional law:

“Minority consultation can no longer be achieved through the establishment of a single mechanism. Instead, each state needs to consider, in cooperation with minority representative groups, a spectrum of measures needed to be taken to ensure effective participation through consultative mechanisms [63]”.<sup>114</sup>

It has been shown in this article that governmental powers and functions can be decentralised to a legal entity acting on behalf of a cultural community on a non-territorial basis. Whereas the jurisdiction of territorial arrangements are directed to a geographical area, the jurisdiction of cultural autonomy is directed to a legal entity acting on behalf of the members of the cultural community regardless of where they reside. The typical functions that may form part of cultural autonomy are aspects of education, language, culture, historic days, symbols, monuments, media, public signage and literature.

The legal framework for cultural autonomy can be set out in the Constitution or in a special Act of Parliament. In the same way that geographical federal arrangements are set out in the Constitution, cultural arrangements can only be guaranteed in the Constitution thereby giving the legal framework a strong federal-flavour.

The definition of a “minority” is one of the major challenges to overcome on the way to develop and implement cultural autonomy arrangements. Developing a clear definition for “minority group” in a particular country is mainly a question of fact. Some countries have opted to name specific minorities for purposes of protection (e.g. Estonia and Hungary), while others have set criteria for

<sup>101</sup>a96 of the Constitution of Kosovo.

<sup>102</sup>a61 of the Constitution of Kosovo.

<sup>103</sup>a67 of the Constitution of Kosovo.

<sup>104</sup>a78 of the Constitution of Kosovo.

<sup>105</sup>a81 of the Constitution of Kosovo.

<sup>106</sup>a12 of the Law on the Promotion and Protection of Communities.

<sup>107</sup>a60 of the Constitution of Kosovo.

<sup>108</sup>aa20-23 of the Law on Local Self Government.

<sup>109</sup>a3 of the Law on Local Self Government.

<sup>110</sup>a62 of the Constitution of Kosovo.

<sup>111</sup>a3 of the Kosovo Law on Local Self Government provides that “public affairs shall be dealt with as closely as possible to the citizens of the municipality by the lowest level of government that is able to provide the public services efficiently.”

<sup>112</sup>a5 of the Law on the Promotion and Protection of Communities.

<sup>113</sup>a64(2) of the Constitution of Kosovo.

<sup>114</sup>M Weller, “Minority consultative mechanisms: Towards best practice” (2007/8) *European Yearbook of Minority Issues* (7) 37. For example, the European Court of Human Rights has found that the following “minority rights” are protected under European Convention on Human Rights: right to engage in private activities such as freedoms of expression, religion, non-discrimination and association; acknowledgement of existence of a minority group; right to use names and surnames; public display of language; establishment of private media; right to use language in cultural and educational activities and institutions; and right to protect and develop the minority group’s culture.

any minority to register in order to obtain cultural autonomy (eg the Russian Republic and Estonia). The challenges to define “minority” are not dissimilar to the arduous process to demarcate and create new regions within federations. In the same way that countries such as India, Nigeria, South Africa and Ethiopia had to work their way through the often difficult process of creating regions and adjusting boundaries, the same can be done with the recognition of minorities [64].<sup>115</sup>

The decision of an individual to take up membership of a cultural council is a personal choice; it arises from his/her right to freedom of association; it cannot be forced upon a person; and no person should suffer any discriminatory action in regard to his/her choice to associate or not to associate with a group. This is a fundamental principle that derives from the protection of individual rights and freedoms. No individual should therefore be obligated, for whatever reason, to belong to a cultural council, to attend or utilise its services or to participate in its activities.

## REFERENCES

- [1] F. Capotorti, “Study of the Rights of Persons Belonging to Ethnic, Racial and Linguistic Minorities,” 1977.
- [2] D. L. Horowitz, “Conciliatory Institutions and Constitutional Processes in Post-Conflict Societies,” *William and Mary Law Review*, Vol. 49, No. 4, 2008, pp. 1213-1248.
- [3] H. Hannum, “Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights,” University of Pennsylvania Press, Philadelphia, 1990.
- [4] R. Lapidot, “Autonomy: Flexible Solutions to Interstate Conflicts,” United States Institute of Peace, Washington DC, 1997.
- [5] M. Suksi, “Autonomy: Applications and Implications,” The Hague, Kluwer, 1998.
- [6] Y. Ghai, “Autonomy and Ethnicity: Negotiating Competing Claims,” Cambridge University Press, Cambridge, 2000. [doi:10.1017/CBO9780511560088](https://doi.org/10.1017/CBO9780511560088)
- [7] K. Myntti, “A Commentary to the Lund Recommendations on the Effective Participation of National Minorities in Public Life,” Abo Akademi, Abo, 2001.
- [8] K. Gal, “Minority Governance in Europe,” Open Society Institute, Budapest, 2002.
- [9] S. C. Roach, “Cultural Autonomy, Minority Rights and Globalization,” Ashgate, Aldershot, 2005.
- [10] E. Nimni, “National-Cultural Autonomy as an Alternative to Minority Territorial Nationalism,” *Ethnopolitics*, Vol. 6, No. 3, 2007, pp. 345-364. [doi:10.1080/17449050701487363](https://doi.org/10.1080/17449050701487363)
- [11] M. Markert, “Unity in Diversity” in Council of Europe The Constitutional Status of the Regions in the Russian Federation and on other European Countries, Council of Europe, 2003.
- [12] D. J. Elazar, “Exploring Federalism,” University of Alabama Press, Tuscaloosa, 1987.
- [13] M. van der Stoep, “Peace and Stability through Human and Minority Rights: Speeches by the OSCE High Commissioner on National Minorities, Nomos, 1999.
- [14] Y. P. Ghai, “A Commentary on the Place of Minorities and Indigenous Communities in Nepal,” Kathmandu, Adhikari, 2010.
- [15] M. Lawoti, “Non-Territorial Federalism,” The Kathmandu Post, 2012. <http://www.ekantipur.com/the-kathmandu-post/2010/07/08/oped/non-territorial-federalism/210257/>
- [16] P. Peeters, “Federalism: A Comparative Perspective—Belgium’s Transformation from a Unitary to a Federal State,” In: B de Villiers, Ed., *Evaluating Federal Systems*, Juta, Cape Town, 1994, pp. 194-207.
- [17] K. Deschouwer, “Kingdom of Belgium,” In: Kincaid and Tarr, Eds., *Constitutional Origins, Structure, and Change in Federal Countries*, McGill-Queens University Press, Montreal, 2005, pp. 48-75.
- [18] A. Lecours, “Belgium,” In: Griffiths, Ed., *Handbook of Federal Countries*, McGill-Queen’s University Press, Montreal, 2005, pp. 58-72.
- [19] K. Deschouwer, “Kingdom of Belgium,” In: J. Kincaid and A. Tarr Eds., *Constitutional Origins, Structure, and Change in Federal Countries*, McGill-Queen’s University Press, Montreal, 2005, pp. 48-75.
- [20] H. Dumont, N. Lagasse, et al., “Kingdom of Belgium,” In: A. Majeed, R. L. Watts and D. M. Brown, Eds., *Distribution of Powers and Responsibilities in Federal Countries*, McGill-Queen’s University Press, Montreal, 2006, pp. 34-65.
- [21] W. Pas, “A Dynamic Federalism Built on Static Principles: The Case of Belgium,” In: Tarr, Williams and Marko, Eds., *Federalism, Subnational Constitutions, and Minority Rights Prager*, Westport, Frankfurt, 2004.
- [22] J. Fitzmaurice, “The Politics of Belgium,” Hurt, London, 1988.
- [23] W. Swenden, “Asymmetric Federalism and Coalition-Making in Belgium,” *The Journal of Federalism*, Vol. 32, No. 3, 2002, pp. 67-85. [doi:10.1093/oxfordjournals.pubjof.a004960](https://doi.org/10.1093/oxfordjournals.pubjof.a004960)
- [24] I. Busygina and A. Heinemann-Gruder, “Russian Federation,” In Moreno and Colino, Eds., *Diversity and Unity in Federal Countries*, McGill-Queen’s University Press, Montreal, 2010, p. 263.
- [25] B. Bowring, “The Tartars of the Russian Federation and National-Cultural Autonomy: A Contradiction in Terms,” *Ethnopolitics*, Vol. 6, No. 3, 2007, pp. 417-435.
- [26] B. Bowring, “Legal and Policy Developments in the Russian Federation in 2007 in Regard to the Protection of Minorities,” *European Yearbook of Minority*, Vol. 6, No. 35, 2006-2007, pp. 529-543.
- [27] D. Wirtda, “Legislation of the Russian Federation Concerning Ethnic Minorities and Its Shortcomings,” 2012. <http://www.eawarn.ru/EN/pub/Projects/TacisProject/Widr>

<sup>115</sup>B. de Villiers (2012), “Creating federal regions—minority protection versus sustainability,” *Heidelberg Journal of International Law*, (72(2)), 310-351.

- a.htm
- [28] B. Bowring, “Austro-Marxism’s Last Laugh? The Struggle for Recognition of National-Cultural Autonomy for Russians and Russians,” *Europe-Asia Studies*, Vol. 54, No. 3, 2002, pp. 229-250.
- [29] N. Chronowski, T. Driconzi and T. Takacs, “Governmental Systems of Central and Eastern European States,” Klubber, Warszawa, 2011.
- [30] W. Kymlicka, “National Cultural Autonomy and International Minority Rights Norms,” *Ethnopolitics: Formerly Global Review of Ethnopolitics*, Vol. 6, No. 3, 2007, pp. 379-393.
- [31] M. Suski, “Personal Autonomy as Institutional Form—Focus on Europe against the Background of Article 27 of the ICCPR,” *International Journal on Minority and Group Rights*, Vol. 15, No. 1, 2008, pp. 157-178.
- [32] T. H. Malloy, “National Minority Rights in Europe,” Oxford University Press, Oxford, 2005.  
[doi:10.1093/acprof:oso/9780199274437.001.0001](https://doi.org/10.1093/acprof:oso/9780199274437.001.0001)
- [33] J. Marko, “The Referendum on Decentralization in Macedonia in 2004: A Litmus Test for Macedonia’s Interethnic Relations,” *European Yearbook of Minority*, Vol. 4, No. 2, 2004, pp. 695-721.
- [34] I. Tomovska, “Post-Conflict Developments and Decentralization in Macedonia,” *European Yearbook of Minority*, Vol. 7, No. 3, 2008, pp. 146-147.
- [35] R. Hofmann, “Political Participation of Minorities,” *European Yearbook of Minority*, Vol. 6, No. 1, 2006, p. 11.
- [36] A. Legare and M. Suksi “Introduction: Rethinking the Forms of Autonomy at the Dawn of the 21st Century,” *International Journal on Minority and Group Rights*, Vol. 15, No. 1, 2008, pp. 144-165.
- [37] T. H. Malloy, “The Lund Recommendations and Non-Territorial Arrangements: Progressive Deterritorialization of Minority Politics,” *International Journal on Minority and Group Rights*, Vol. 16, No. 4, 2009, pp. 665-679.
- [38] K. Gal, “Minority Governance on the Threshold of the Twenty-First Century,” In: K. Gal, Ed., *Minority Governance in Europe*, Open Society Institute, Budapest, 2002, pp. 17-42.
- [39] B. de Villiers, “Human Rights in Developing Countries: Some Crucial Issues,” *Journal of South African Law*, Vol. 9, No. 3, 1996, pp. 180-201.
- [40] K. Henrard, “‘Participation’, ‘Representation’ and ‘Autonomy’ in the Lund Recommendations and Their Reflections in the Supervision of the FCNM and Several Human Rights Conventions,” *International Journal on Minority and Group Rights*, Vol. 12, No. 1, 2005, pp. 133-168.
- [41] K. Alenius, “The Birth of Cultural Autonomy in Estonia: How, Why, and for Whom,” *Journal of Baltic Studies*, Vol. 38, No. 4, 2007, pp. 445-462.
- [42] J. G. Jackson, “Estonia,” Allen and Unwin, New York, 1941.
- [43] B. de Villiers, “Die Staatsregtelike Beskerming van Outonome Besluitneming Minderheidsgroepe,” LL.D.Thesis, University of Johannesburg, Johannesburg, 1989, pp. 98-107.
- [44] R. T. Clark, “The Constitution of Estonia,” *Journal of Comparative Legislation and International Law*, Vol. 3, No. 1, 1921, pp. 250-275.
- [45] V. Raud, “Estonia: Reference Book,” Nordic Press, Tallinn, 1953.
- [46] E. Nodel, “Estonia: Nation on the Anvil,” Bookman Associates, London, 1963.
- [47] <http://www.legaltext.ee/text/en/XX00038.htm>
- [48] M. Suski, “On the Constitutional Features of Estonia,” Abo Akademi Tryckeri, Tallinn, 1999.
- [49] [http://old.estinst.ee/factsheets/factsheets\\_uus\\_kuju/the\\_cultural\\_autonomy\\_of\\_ethnic\\_minorities\\_in\\_estonia.htm](http://old.estinst.ee/factsheets/factsheets_uus_kuju/the_cultural_autonomy_of_ethnic_minorities_in_estonia.htm)
- [50] “Cultural Autonomy in Estonia—Bane or Boon for Indigenous Cultural Survival,” 2012.  
<http://www.eesti.ca/?op=article&articleid=26937&lang=en>
- [51] J. Petrone, “Estonian Swedes Embrace Autonomy Rights,” *The Baltic Times*, 2012.  
[http://www.citypaper.ee/estonian\\_swedes\\_embrace\\_autonomy\\_rights/](http://www.citypaper.ee/estonian_swedes_embrace_autonomy_rights/)
- [52] [http://old.estinst.ee/factsheets/factsheets\\_uus\\_kuju/the\\_cultural\\_autonomy\\_of\\_ethnic\\_minorities\\_in\\_estonia.htm](http://old.estinst.ee/factsheets/factsheets_uus_kuju/the_cultural_autonomy_of_ethnic_minorities_in_estonia.htm)
- [53] U. Aikio-Puoskari and M. Pentikainen, “The Language Rights of the Indigenous Sami in Finland,” University of Lapland, Rovaniemi, 2001.
- [54] “Act on the Use of the Sami Language When Dealing with Authorities,” 1991.
- [55] U. Aikio-Puoskari and M. Pentikainen, “The Language Rights of the Indigenous Sami in Finland—Under Domestic and International Law,” University of Lapland, Rovaniemi, 2001.
- [56] M. Tkacik, “Characteristics and Forms of Autonomy,” *International Journal on Minority and Group Rights*, Vol. 15, No. 3, 2008, pp. 375-386.
- [57] L. Hannikainen, “Autonomy in Finland: The Territorial Autonomy of the Åland Islands and the Cultural Autonomy of the Indigenous Sami People,” *Baltic Yearbook of International Law*, Vol. 32, No. 2, 2002, pp. 175-192.
- [58] K. Myntii, “The Nordic Sami Parliaments,” In: P. Aiko and M. Scheiden, Eds., *Operationalizing the Right of Indigenous People to Self-Determination*, Abo Akademi University, Abo, 2000, pp. 203-221.
- [59] M. Scheinin, “The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land,” In: T. S. Orlin, A. Rosas and M. Scheinin, Eds., *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach*, Turku, Finland, 2001, pp. 159-222.
- [60] M. Komac, “Protection of Ethnic Communities in the Republic of Slovenia,” 2010.  
<http://www.ciemen.org/mercator/butlletins/46-10.htm>
- [61] M. Weller, “The Kosovo Constitution and Provisions for the Protection of Minorities in Europe,” *European Yearbook of Minority*, Vol. 9, No. 6, 2006, pp. 485-527.
- [62] A. Zeqiri, V. Stephens and M. Zhou, “Implementation of the Decentralisation Process in Kosovo: Challenges and Perspectives,” *European Yearbook of Minority*, Vol. 7, No. 4, 2007, pp. 697-715.
- [63] M. Weller, “Minority Consultative Mechanisms: Towards Best Practice,” *European Yearbook of Minority*, Vol. 7, No. 1, 2007, pp. 21-58.

[64] B. de Villiers, “Creating Federal Regions—Minority Protection versus Sustainability,” *Heidelberg Journal of In-*

*ternational Law*, Vol. 72, No. 2, 2012, pp. 310-351.