Community Government for Minority Groups – Revisiting the Ideas of *Bauer* and *Renner* Towards Developing a Model of Self-Government by Minority Groups Under Public Law

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Abstract

The recognition and protection of rights of minorities, particularly minorities that are not geographically concentrated, remains one of the most challenging themes for international law and constitutional law. Generally speaking, contemporary theory and practice favour groups that are concentrated at local and regional levels. The desire for such groups to govern themselves is accommodated through federal or decentralised distribution of powers. The ability of non-territorial concentrated minorities to be clothed with a form of autonomy is, however, challenging. In this article consideration is given to the proposing put forward by *Karl Renner* and

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Otto Bauer at the turn of the commencement of the twentieth century. These two Austrian politico-legal scholars grappled with the challenge of accommodating a vast range of ethnic minorities within a single state. The respective minorities lived intermingled which meant a traditional form of federal or decentralised autonomy and power-sharing was not practical. They developed the concept of an ethnic nationality being registered as a legal person for purposes of public law and for the legal person to be capable of making governmental decisions for its members. The ethnic minority could therefore achieve a level of self-government without its members being territorially concentrated. Although the ideas of *Renner* and *Bauer* were not implemented in their time, since then various countries have experimented with different forms of non-territorial autonomy, most notably Estonia, Belgium (Brussels); Hungary and the Russian Federation. This article provides an in-depth analysis of the ideas of *Renner* and *Bauer* and seeks to develop core principles that may be applicable to contemporary international and constitutional law.

I. Introduction

The relevance of collective rights claimed by minorities (for example the right to autonomy)[1] and ways to protect those rights are as important today as at any previous time. The reasons for the relevance of minority rights are multilayered, but in essence it is widely acknowledged firstly at a philosophical level that the full realisation of individual rights often find expression by individuals exercising their fundamental rights and freedoms within the context of the cultural, language and religious communities to which they belong, and secondly that at a practical level there are few conflict areas in the world that do not have at their core, the struggle by minorities for some form of recognition, power sharing, protection, or autonomy. Although legal theorists often struggle to come to terms with the place of collective minority rights within liberal democracy theory, at a practical level minorities are making themselves and their grievances heard, arguably like

[1] *Roach* speaks about an "emerging" right to autonomy since there is not yet agreement in international law that collective self-governance rights of minorities should be recognised other than through territorial forms of decentralisation; *S. C. Roach*, Cultural Autonomy, Minority Rights and Globalization, 2005, 26. It must be emphasised, however, that "autonomy" is not a term of art and therefore its exact meaning depends on the circumstances within which it is used. See *M. Suski*, Sub-State Governance Through Territorial Autonomy, 2012, 269.

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never before, by way of wide ranging claims for more effective recognition and protection.[2]

The challenge for many emerging and established democracies, including some of the nation's forming part of the European Union, is how to respond to claims by minority groups for more effective protection of their rights – both at individual and collective level.

The question to which I respond to in this paper is whether a minority group can, pursuant to the propositions of *Otto Bauer* and *Karl Renner*,[3] enjoy collective rights in public law whereby the group can be recognised as a public law legal entity, called a *Community Government*, which can make decisions through the mechanism of the Community Government with the effect of "governmental" laws or by-laws. My conclusions, as explained below, to the question are firstly that as a matter of principle governmental authority can be distributed on a territorial and non-territorial basis; and secondly that as a matter of principle a minority group ought to be able to become incorporated as a public law organ of government and thereby for the Community Government to be the recipient of decentralised powers and functions similar to the way in which regional or local governments receive their enumerated powers by way of statute.

The assumption that has prevailed for many years, namely that minority rights and interests can be entirely accommodated by way of the effective protection of individual rights as well as through informal constitutional and political arrangements[4] has been shown by *real politik* to be overly optimistic, inaccurate and simplistic. While individual rights, informal territorial autonomy and power-sharing arrangements are important mechanisms within the broad spectrum of options to protect minorities, the recognition of minority rights at a collective level in public law (other than through

[2] See the useful overview by *M. Weller*, Settling Self-Determination Conflicts: Recent Developments, EJIL 20 (2012), 111 et seq. He emphasises that the "range of self-determination options" has expanded as a result of dissatisfaction of minorities with their position as well as the (increasing) willingness of international law to explore internal self-determination in a pursuit of peace and stability. Also see *M. Weller*, Escaping the Self-Determination Trap, 2008. In his view the previously held view that minority rights could only be exercised by individuals, it is now becoming less persuasive, since "recognition of group identity as an object of legal protection" carries legitimacy, albeit not without controversy. (p. 24).

[3] In this article references would be to "*Bauer* and *Renner*" unless the publications or commentary of one of the two persons are referred to. Since the writings by *Bauer* and *Renner* were until recently only available in German, the topic of non-territorial autonomy for nationalities or minorities has been a rather neglected topic in literature in the English-speaking world.

[4] Such as electoral systems; decentralisation to local and regional governments; consultative mechanisms, and formal and informal power-sharing arrangements.

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non-governmental, civil society arrangements) remains on the agenda, perhaps more forcefully than ever.[5]

It is not surprising that Special Rapporteur *Capotorti* observed as follows in his seminal work for the United Nations in 1979 about the relevance of the protection of minority groups in modern day society:

> "For quite a long time after the end of the Second World War, it was thought – and stated in writing – that the question of the international protection of minorities was no longer topical. During the past few years however, that view has proved to be mistaken."[6]

More recently the United Nations in a "Guide for Advocates" advised as follows about the modern day relevance of minority protection to the democratic stability of nations and the importance for minority rights to be recognised in day to day governmental and peacekeeping activities by the United Nations:

> "The United Nations and other intergovernmental organisations recognise that minority rights are essential to protect those who wish to preserve and develop values and practices which they share with other members of their community."[7]

The topical question in international and constitutional law is not whether the rights of minorities should be recognised and protected. The issues that arise in contemporary constitutional law are whether it is only the individual who is a bearer of rights or the community as well; how to describe

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[5] The OSCE High Commissioner for Minorities, *Max van der Stoel*, observed in 1999 that "insufficient attention has been given to the possibilities of cultural autonomy". *M. van der Stoel*, Peace and Stability Through Human and Minority Rights: Speeches by the OSCE High Commissioner on National Minorities, 1999, 172.

[6] *F. Capotorti*, Study of the Rights of Persons Belonging to Ethnic, Racial and Linguistic Minorities, UNO 1979, UN-Doc E/CN.4Sub.2/384, Rev 1, par 38. *Capotorti* also sought to define "minority" but the definition he proposed was never endorsed by the UN and as a result the UN continues to refer to "minority" without having exhaustively or conclusively defined it. The "best solution" currently is to assume there is no generally agreed definition of "minority". Global Human Rights Law Collection: The Rights of National Minorities in International Law, 2014, 14.

[7] United Nations Human Rights office of the High Commissioner, Promoting and Protecting Minority Rights: A Guide for Advocates, 2012 HR/Pub/12/7. This directive is consistent with the observation by *Parker* that in its peacekeeping functions the United Nations Forces "are obligated to observe cultural rights and cultural autonomy. Not only are the important international agreements applicable to the United Nations, but the United Nations' rights under the Charter to create and use forces implies a concurrent duty to respect accepted norms of international human rights law. As demonstrated above, *cultural autonomy has joined those norms.*" *J. E. Parker*, Cultural Autonomy: A Prime Directive for the Blue Helmets, U. Pitt. L. Rev. 55 (1993), 207 (229).

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the bearers of the rights; how to define minority rights; how to harmonise the collective rights of a group and the individual right to free association; and what type of collective rights, if any, could be recognised.[8]

In this article I seek to develop a framework for recognition of a collective right to self-government by way of a Community Government by reflecting on the writings of two Austrian philosophers, lawyers and political leaders, *Otto Bauer* and *Karl Renner*. They addressed at the end of the nineteenth century and the early twentieth century the issue of how to accommodate the collective rights of cultural communities on a non-territorial basis at the time when the Austro-Hungarian Empire faced serious challenges from within as a result of the presence of a large number of "nationalities". While a scramble took place for territory and control by the respective nationalities, many individuals were left in a position of living intermingled with other nationalities in a manner that made territorial forms of decentralisation and territorial autonomy for their community impractical. *Bauer* and *Renner* were of the view that such communities could, through a legal persona that is established pursuant to public law, make autonomous decisions and administer laws over matters that impact on their culture, language and traditions.

This article explores the thoughts of *Bauer* and *Renner* and poses the question whether their thesis of "national cultural autonomy" may bear relevance to the contemporary constitutional law theory and practice challenge to respond to the claims by those minorities who do not have an "own" territorial space. In recent years, particularly since the early 1990s, interest in the works of *Renner* and *Bauer* has increased but there remains a gap as far as the systematic analysis of their propositions is concerned and how those propositions can translate into modern constitution building.[9]

The article is structured in the following way: First three main questions concerning the rights of minorities are developed; secondly an overview is provided of the main constitutional techniques to protect minorities and the

[8] *Parker* observes that in peacekeeping work of the United Nations and in international law a "norm" has developed namely that "cultural autonomy" enables people to make autonomous decisions about their language, laws and customs. According to this view, "cultural autonomy" has an individual and collective component. *J. E. Parker* (note 7), 216.

[9] *Renner* first published his work *Staat und Nation* in 1899 in German and it was only fully translated and published in 2005, in: E. J. Nimni (ed.), National Cultural Autonomy and Its Contemporary Critics, 2005, 15 et seq. *Bauer's* first work on the topic was published in 1907 under the title *Die Nationalitätenfrage und die Sozialdemokratie* which was translated into English and published by *O. Bauer* (volume edited by *E. J. Nimni* and translated by *J. O'Donnell*), The Question of Nationalities and Social Democracy, University of Minnesota Press, 1907/2000. This book is based on *Bauer's* doctoral theses which he completed at the age of 26. Also see *K. Renner,* Die Nation als Rechtsidee, 1914.

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limitations of those techniques, and thirdly attention is given to the background of *Bauer* and *Renner*, the circumstances during which they developed their theory, and practical aspects about their theory of national cultural autonomy.

II. Three Questions Concerning the Rights of Minorities

At the core of the discourse about the rights of minority groups are three questions:

1. Are members of minorities entitled to collective protection *as group* other than through individual rights and freedoms and constitutional mechanisms such as electoral systems; decentralisation to regional and local governments, and formal and informal coalitions;
2. if yes to question 1, then who are the minorities that may qualify for protection and how can they be defined with clarity, certainty, and consistency; and
3. if minorities are the bearers of collective rights, what rights are to form part of such a scheme and what mechanisms can be used for those rights to be given practical effect?

The answers to these questions are not settled in constitutional or international law or practice.

In response to the first question the debate is fierce, with at least three broad trends of thinking discernible, namely: (a) those who are of the view that other than by way of the protection of individual rights, there is no philosophical, legal or practical justification for collective rights of minorities to be recognised in public law; (b) those who acknowledge that minority groups may require special measures for their protection and advancement, but suggest that informal mechanisms such as decentralisation to territorial entities, special electoral systems, and voluntary coalitions are the best ways to protect those groups without bestowing any collective rights onto them; and (c) those who are of the view that in particular circumstances, special constitutional and statutory measures may have to be developed to recognise and protect the collective rights of minorities in public law and, where possible, include the right to non-territorial autonomy into the range of rights that are recognised.

In response to the second question it is reasonable to say that the definition of "minority" is an elusive venture. As far as international and constitutional theory and law are concerned there is no finality or certainty as to

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what is meant by a "minority".[10] "Minority" is not a term of art, albeit that the concept "minority group" is widely used in constitutional law, international law, political science and in general discourse. Even in a country such as India where the Constitution makes reference to the term "minority",[11] the term is not defined within the Constitution but is left for the courts to develop as circumstances require.[12] Also see in this regard the Constitution of South Africa which in s235 refers to the rights of "communities" but without to define those.

It is generally agreed in literature that the meaning of "minority group" should best be determined within the context and within the timeframe in which it is used.[13]

This vagueness of what is meant by "minority" has been called "constructive ambiguity"[14] since it allows a dynamic approach to working out the meaning of minority with reference to each particular situation. A definition of minority that is suitable to one country may not be applicable to another and the rights claimed by a minority in one country may not be the same as the rights claimed by a minority in another country.

The author proposes the following working definition for minority group, but I accept that such a definition is at best work in progress and is fluid:[15]

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[10] Although it is not the object of this article to discuss the ongoing efforts to accurately define "minority", one can observe that in broad terms the description of minorities has gone through various phases, where pursuant to the Treaty of Westphalia minorities were defined principally by religion; in the early twentieth century minorities were referred to as "national minority" which included ethnic, religious and cultural elements; and after World War 2 minorities are referred to in terms of their language, culture and religion, their non-dominant status and the voluntary nature of associated with them. See *T. D. Musgrave*, Self-Determination and National Minorities, 1997.

[11] aa29 and 30 of the Constitution of India.

[12] The Government Resolution of 12.1.1978 which established a Minorities Commission for India, also failed to define the term "minority" although it was declared that "there persists among the Minorities a feeling of inequality and discrimination". Home Ministry Notification No. II-160/2/2/77-MD of 12.1.1978. For an overview of the background and functioning of the Commission refer to *T. Mahmood*, Role and Working of the Central Minorities Commission in India: Appraisal in a Historical Perspective, Civ. & Mil. L. J. 37 (2001), 207 et seq.

[13] Some authors, see for example *Kymlicka*, seek to draw a distinction between "national minorities" and "ethnic minorities" on the basis that the former is a group of potentially self-governing persons who permanently reside within a state, while the latter is a group that have left their home country and are in the process of locating or settling. It is not within the scope of this article to pursue the merit of this proposed distinction. See *W. Kymlicka,* Multicultural Citizenship: A Liberal Theory of Minority Rights, 1995, 19.

[14] *H. Lerner,* Making Constitutions in Deeply Divided Societies, 2011, 147.

[15] For brief discussion and reference to sources refer to *B. de Villiers,* Language, Cultural and Religious Minorities: What and Who Are They?, U. W. Austl. L. Rev. 36 (2012), 67 et seq.

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> "A minority group is a group of individuals that shares ethnic, religious, language and/or cultural characteristics; is generally a numerical minority in the entire state or in a region of the state; is in a non-dominant position via-a-vis the rest of the population; and is recognised objectively to be a minority and of which the members demand subjectively that they constitute a minority."[16]

It is the third question that is the subject of this article.

I will attempt to explore an answer to the third question, namely whether there is a credible philosophical basis derived from the writings of *Bauer* and *Renner* for minorities to be granted collective rights in public law.

III. Limitations of Existing Mechanisms to Protect Minority Rights

The circumstances in which *Bauer* and *Renner* wrote were, at their root, not entirely dissimilar from the modern day social environment. Whereas *Bauer* and *Renner* were principally concerned with the accommodation of national communities in central Europe, the international community continues to struggle to find sustainable solutions for the accommodation of minorities in many parts of the world – including in Europe.[17] It is particularly in young and emerging that minority issues test the bounds of practicality and stability of existing constitutional theory and instruments. But, as recent events in Europe have shown,[18] the demands by minorities for some form of effective protection within some of the most established democra-

[16] *B. de Villiers* (note 15), 89. The difficulty faced to conclusively define a "minority" was recognised by *Max van der Stoel*, who as High Commissioner on National Minorities said that he recognises a minority when he sees it. He went on to suggest, without defining minority, that it is a community of persons who share ethnic, linguistic or cultural characteristics, who are a numerical minority, and who seek to maintain their own identity. *M. van der Stoel*, Intervention, at the Human Dimension meeting, Warsaw, 24.5.1993, 238.

[17] The nation-state is suffering "three-directional erosion": from above, below and laterally. *M. Keating*, So Many Nations, So Few States: Territory and Nationalism in the Global Era, in: A. Gagnon/J. Tully (eds.), Multinational Democracies, 2001, 55. *Renner* exposed the "myth" of the nation-state as being the sole basis for the organisation of the states. *G. Nootens*, Nations, Sates and the Sovereign Territorial Ideal, in: E. J. Nimni (note 9), 54.

[18] Refer for example to demands for independence by Scotland, Catalonia and Basque country; calls by the Sami for greater protection and autonomy; non-territorial autonomy for the main language groups on Belgium in the capital city Brussels; efforts to accommodate minorities in Estonia, Hungary and Kosovo; and the struggle by millions of newcomers in Europe to assimilate with dominant cultures while at the same time retain and practice their own culture.

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cies are likely to become more relevant since the Continent where the homogenous "nation-state" found its origin, is experiencing challenges of increased heterogeneity.[19]

It is not surprising that theorists and practitioners increasingly acknowledge that a congruence between cultural community (or "nation" in the words of *Bauer* and *Renner*) and state is unattainable and, as a result, constitutional mechanisms and political processes need to be developed to respond to the challenges that heterogeneity brings to modern states. *Sabanadze* observes as follows about European states:

> "Historically speaking, the majority of States have been multi-ethnic in their make-up, often containing within their political borders sizeable, territorially concentrated minorities. Consequently, minorities emerged as a problem for the system, serving as a living reminder that it's [Europe] normative-theoretical foundations fail to match and reflect the empirical reality."[20]

A wide range of constitutional and political options have been developed in legal theory and applied in constitutional practice to protect minorities,[21]

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[19] Europe has, regardless of being the home of the nation-state, in many regards been leading the debate about ways to protect minorities. Examples of advances that have been made at a regional level in the Continent are for example the High Commissioner on National Minorities instituted by the OSCE and numerous protocols and regional treaties in which the rights of minorities are addressed. There is, however, also tension within Europe in regard to rights of so called "new" minorities vis-à-vis so called "old" minorities. Old minorities refer to the rights of those groups that have been resident in countries as a minority for many generations or even centuries, while new minorities refer to more recent immigrants. *Kymlicka* contends that the idea that some universal right exists that allows members of a (new) minority to obtain self-government wherever they reside in another country is "simply implausible". *W. Kymlicka*, National Cultural Autonomy and International Minority Rights Norms, Ethnopolitics 6 (2007), 379 (382). *K. Medda-Windischer,* New Minorities, Old Instruments?, International Community Law Review 13 (2011), 361 et seq. Within the European context there is some "rigidity" whereby the "old" minorities may be entitled to some special forms of protection, whereas the "new" minorities are expected to assimilate in their new countries of residence. See *F. Palmero,* International Standards and New Developments for the Protection of Minority Rights – A Few Proposals On the Example of Language Rights, in: D. Thürer (ed.), International Protection of Minorities – Challenges in Practice and Doctrine, 2014, 197.

[20] *N. Sabanadze*, Constraints and Challenges in Minority Protection: Experience of the OSCE High Commissioner on National Minorities, in: I. Boerefijn/L. Henderson/R. Janse/R. Weaver (eds.), Human Rights and Conflict, 2012, 113.

[21] See for example *J. A. Frowein/R. Bank,* The Participation of Minorities in Decision-Making Processes, 2001; *G. Greenberg/S. N. Katz/M. B. Oliviero/S. C. Wheatley* (eds.), Constitutionalism and Democracy: Transitions in the Contemporary World, 1993; *A. Lijphart*, Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries, 1999; *A. Lijphart*, Democracy in Plural Societies, 1977; *A. Lijphart*, Thinking About Democracy: Power Sharing and Majority Rule in Theory and in Practice, 2007; *D. L. Horowitz,* Ethnic Groups in Conflict, 2000; *D. L. Horowitz,* A Democratic South Africa? Constitutional Engineering in a Divided Society, 1991; *C. Baldwin/C. Chapman/Z. Gray,* Minority Rights: The

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but those options do not constitute a closed list[22] and theorists and practitioners should not "handicap" themselves by failing to search for more equitable and effective remedies.[23] Constitutional law theory and practice are dynamic and it is currently challenged to develop new concepts and to adjust the implementation of existing concepts in order to find sustainable solutions for dealing with minorities.

The article contends that the post-World War II emphasis on territorial control and dominance in order for minorities to have a "home base" where they could effectively govern themselves, has sent an erroneous message to heterogeneous societies and has often given rise to regional radicalism, ethnic cleansing, discrimination, creation of unsustainable regions and local governments, exclusion from decision-making of those without territorial dominance or control, and secession. It is trite to say that each minority cannot have an own state, an own region or an own local government. The suggestion that territorial forms of decentralisation are the "only" way to provide self-governance to minorities is seriously flawed and offers little hope for those communities without territorial dominance. The modern state is multi-ethnic, and more often than not the minorities within its territory live intermingled – not dissimilar to the circumstances that *Bauer* and *Renner* faced.[24]

Unless liberal democratic theory is developed to remove control over territory as a *sine qua non* for minority group autonomy, the violent competition for territorial control and dominance that is witnessed internationally and the instability that is caused as a result thereof, will continue and probably worsen.

The main constitutional mechanisms that have developed over time to accommodate demands by minorities for protection of their rights and interests continue to be important in contemporary constitution-drafting and

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Key to Conflict Prevention, 2007; *K. Henrard* (ed.), Double Standards Pertaining to Minority Protection: A Critical and Multi-Dimensional Re-Appraisal, 2010; *W. Kymlicka*, Multicultural Odysseys: Navigating the New International Politics of Diversity, 2007; *G. A. Tarr/R. F. Williams/J. Marko* (eds.), Federalism, Subnational Constitutions, and Minority Rights, 2004.

[22] The author agrees with *Sabanadze* who observes that the "question of national minorities can never be fully resolved or made to disappear, it can only be managed on a continuous and democratic basis.", *N. Sabanadze* (note 20), 114.

[23] *R. G. Wirsing*, Dimensions of Minority Protection, in: R. G. Wirsing (ed.), Protection of Ethnic Minorities: Comparative Perspectives, 1982, 4.

[24] It is not surprising that *Quer* observes that "during the last fifty years, some European states have progressively adopted non-territorial models of protection [of minorities] in response to the increasingly multicultural composition of society". *G. M. Quer*, De-Territorialising Minority Rights in Europe: A Look Eastward, Journal on Ethnopolitics and Minority Issues in Europe 12 (2013), 76 (77).

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governance,[25] but in practice the existing mechanisms are not perfect and shortcomings have been presented, for example:

The protection of the *individual rights* as the sole basis to protect the rights of minorities emphasise the right of individuals to associate, to speak their language, to adhere to their faith, and to form private associations. Generally speaking, however, bills of rights (a) do not oblige governments to actively support minority languages, cultures, and traditions; (b) do not oblige governments to assist minorities with their education in their mother tongue or promotion of their culture or traditions; and (c) do not oblige governments to involve minorities in decisions that affect their laws, culture, religion or traditions. Individual rights most often are formulated in the negative and do not impose positive rights or obligations whereby individuals can demand from government budgetary allocations and other resources for the promotion of the traditions, language or culture of their community. Even in circumstances where members of minority groups form associations, such associations are non-governmental, private organisations and do not necessarily have the ability or capacity to make decisions or implement laws about the traditions, culture or language of their members. Important and indispensable as the protection of individual rights is to liberal democratic theory and practice, individual rights as sole mechanism do not always provide an adequate basis for the protection of the collective rights claimed by minorities.

Federalism and *decentralisation* are widely used mechanisms to indirectly protect minorities through allocation of powers and functions to regional and local levels of government. Minorities that live concentrated in a geographical area have the benefit of using the statutory powers of the region or local government to make and administer decisions that promote and protect the interests of the majority and to administer policies in the language and within the cultural realities of the majority community. In this way the group indirectly takes care of itself, speaks its language in government and administration, develops policies that satisfy their needs and administer laws. The shortcomings of the territorial model are obvious: (a) majoritarian government continues to be emphasised, albeit at the regional and local level – so called "regional tyranny"; (b) minorities without an

[25] The main mechanisms that are often referred to in literature are protection of individual rights; decentralisation to regional and local authorities; electoral systems that encourage minority participation; bicameralism in the legislature; recognition of traditional authorities; and formal and informal power-sharing arrangements in the executive. See for example *J. A. Frowein/R. Bank*, The Participation of Minorities in Decision-Making Processes, Expert Study Submitted on Request of the Committee of Experts on Issues Relating to the Protection of National Minorities, Council of Europe 1.11.2000.

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"own" region or local governments remain without remedy for self-government; (c) demarcation of regions and local government overemphasise ethnicity with groups demanding their "own" region or local government with resultant unsustainable regions and local government being created and an endless demands for more regions; (d) discrimination and ethnic cleansing may take place within regions and localities; and (e) most importantly, the proposition that control and dominance of territory are prerequisites for political power and self-government are enhanced. The inevitable message to minorities is: "without a region you cannot achieve self-government".

Specially designed electoral systems, reserved seats and quotas have been used to ensure minorities are represented in legislative institutions at national, regional and even local levels. In this way the voice of minorities is heard within legislative and policy forming institutions. Important as these mechanisms are, the shortcomings are apparent namely: (a) representation does not necessarily equate to influence; (b) the minority remains subject to the will of the majority; and (c) the minority does not have any collective rights of self-government by which it can promote and protect its own identity, language or traditions. Taking part in the legislative process is important from the perspective of "power-sharing", but from the perspective of "autonomy" or "self-government" the electoral system does not hold much promise since collective rights of the minority are not recognised.

Various *power-sharing* mechanisms and arrangements can be used to ensure that the voice of minorities is heard in national legislative institutions, for example through a second house of parliament; coalition government; guaranteed seats; consultative mechanisms and advisory bodies. These are important elements for minority protection but they suffer principally two shortcomings: (a) Most models of power-sharing are built either on territorial representation or on voluntary coalitions which continues to leave minorities vulnerable unless they secure a territorial base or enter into a power-sharing agreement on terms that suit the majority; and (b) the power-sharing models do not address the need of minorities to make autonomous decisions and administer laws about matters that affect their traditions, culture and language.

The above techniques to protect minorities are credible, simple to understand, have in many instances endured the test of time, and are widely accepted in international and constitutional law theory and practice. The techniques are however not a closed list and they generally do not adequate-

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ly address the question of non-territorial, collective rights of minorities to self-government by way of a Community Government.[26]

Bauer and *Renner* recognised this deficiency in the turmoil of their time where so many nationalities were living intermingled within the same sovereign territory but without clear territorial bases. The proposition of *Bauer* and *Renner*, which has resonance to contemporary challenges, was that nationalities could in appropriate instances establish legal persona in public law and that those bodies (called Community Government in this article) would have lawmaking and administrative powers over the members of the community wherever they lived. In contemporary literature cultural autonomy as proposed by *Renner* and *Bauer* is referred to as a

> "kind of autonomy … usually offered to ethnic groups that are not compactly living in a particular administrative area within a State. Under such an arrangement, autonomy covers cultural and social matters like education, language and culture."[27]

The ideas of *Renner* and *Bauer* are as relevant today, if not more, as the case was in the early 1900s, but those propositions are also not without shortcomings as is shown below.

IV. The World of *Bauer* and *Renner*

1. Background

Karl Bauer (1881-1939) and *Otto Renner* (1879-1950) formulated their theory on national cultural autonomy, also referred to as non-territorial autonomy ("NTA" is an abbreviation often used),[28] at the end of the nineteenth and beginning of the twentieth century as the central European-

[26] The author concurs with *Ghai* who observes that as far as autonomy is concerned, there is no "developed or reliable theory" with some "haziness" about the structures and institutions that can harness and accommodate demands for autonomy, *Y. Ghai* (ed.), Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States, 2000, 8.

[27] *K. Abushov*, Autonomy as a Possible Solution to Self-Determination Disputes: Does It Really Work?, International Journal on Minority Rights 22 (2015), 182 (192).

[28] *A. Osipov*, Non-Territorial Autonomy During and After Communism: In the Wrong or Right Place?, Journal on Ethnopolitics and Minority Issues in Europe 12 (2013), 7 (8). He refers to the many faces of NTA in the current world order and concludes that there is a lack of uniformity and consistency in theory and practice about the concept. According to him NTA in general entails "a broad range of institutional setups which envisage self-organisation and self-administration of ethnic groups for the fulfilment of public functions in the ways other than territorial dominance and administration of a certain territory".

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world had to come to terms with the aftermath of the Habsburg Empire and the formation and ultimately the disintegration of the multi-ethnic Austrian-Hungarian Empire (1868-1918)[29]("Empire").

The multi-ethnicity and complexity of the Empire's population; the process of industrialisation that impacted on agrarian practices; and the large scale migration to urban centres throughout the Austrian-Hungarian territory created circumstances that were extremely challenging to the systems of government at the time.[30] The Empire stood witness to large scale movement of people that had to be accommodated within the constitutional theory and law at the time. The Empire covered a vast territory which included most of central Europe. The Empire was formed in 1867, a result of an agreement (so called *Ausgleich*) between Hungary and Austria. Other than the vastness of its territory, population and regions, the Empire had little communality and lacked a vision for the entirety of the vast area.

The Austria-Hungarian Empire comprised about 53 million people with at least 15 different nationalities, such as German, Hungarian, Croats, Poles, and Ukrainians. These groups had traditional territories where they respectively dominated, but there were also large rural areas and particularly the cities within the Empire where the members of nationalities intermingled with each other. The respective nationalities were in competition with each other for territorial control, employment, political control, control of the entire territory as well as competition for scarce means to promote measures for the protection of their respective identities.[31] Even Vienna which was the heartland of the German culture, with the growing presence of multi-ethnicity as a result of strong urbanisation did not escape the challenges of competition between respective nationalities (the population of Vienna quadrupled in the short space of 50 years).

It is in response to these circumstances that *Renner* and *Bauer* developed their theory of national cultural autonomy since regardless of how internal regional lines of the Empire were drawn, cultural and political boundaries could not be made to be congruent.

The Empire became, in effect, a laboratory for the study and management of inter-ethnic relations.[32]

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29 See *E. J. Nimni*, Nationalist Multiculturalism in Late Imperial Austria as a Critique of Contemporary Liberalism: The Case of Bauer and Renner, Journal of Political Ideologies 4 (1999), 289 (294).

30 See *J. Hannak,* Karl Renner und seine Zeit, 1965.

31 *A. Osipov*, National Cultural Autonomy: Ideas, Decisions, Institutions, 2004, 35.

32 The ideas of *Bauer* and *Renner* were never implemented in the Empire for various political and social reasons, for example the First World War intervened; there was scepticism within their own Party of the merit of the proposals; the proposals were complex; there were

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In the western part of Europe the idea of the nation-state was on the rise and territorial sovereignty for nations were seen as the best way forward for a continent that had experienced countless conflicts as a result of diversity and inter-ethnic conflict. In the Empire, however, drawing of boundaries like in western Europe to coincide with residential patterns of nationalities, was impractical. The different philosophical approaches in Western and Eastern Europe to deal with ethnic minorities that prevailed at the time of *Renner* and *Bauer*, remain to a certain extent today.

Renner and *Bauer* were leading figures, and sometimes internal political competitors of Austrian Social Democracy. *Renner* was not only a prominent philosopher. He was also chancellor of Austria (1918-1929, 1945), President of Austria (1945-1959) and a highly respected academic and constitutional lawyer. *Bauer* was a leader in Social Democracy and a well-known Marxist intellectual prior to the First Word War. In contrast with traditional Marxist dogma, *Bauer* and *Renner* were of the view that the nationalities of the Empire had to be reconciled with the modern state. *Bauer* served as minister in the government of *Renner* and after 1933 he was regarded as the intellectual leader of the Austrian Social Democratic. While *Renner* was regarded as the spiritual leader of the right wing of Austrian Social Democracy, *Bauer* was seen as the leader of the left wing. In regard to the nationalities-question, they adopted a common approach.

2. Non-Territorial Accommodation of Nationalities

Renner and *Bauer* agreed that the question of nationalities could be addressed by way of non-territorial cultural autonomy.[33] Whereas contemporary debates about minority protection take place vis-à-vis majority government, *Renner* and *Bauer* viewed nationalities as the building blocks of decision-making and administration whereby the legal entities for each nationality would make decisions for the nationality and also cooperate with

concerns that the German influence would be diluted; and public support was never tested. Estonia was perhaps the best case study at the time of implementation at the time of cultural autonomy as proposed by *Renner* and *Bauer*, while in contemporary time traces of cultural autonomy are found in Brussels, the Russian Federation, Hungary and Kosovo. *B. de Villiers*, Estland: Kopseer vir die USSR, maar lesse in minderheidsakkommodasie?, Tydskrif vir die Suid-Afrikaanse Reg 8 (1989), 55 et seq.; *B. de Villiers*, Protecting Minorities on a Non-Territorial Basis – Recent International Developments, Beijing Law Review 3 (2012), 170 et seq.

33 *E. J. Nimni* (note 29), 289.

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the legal entities of other nationalities about matters of common concern.[34] The question of majority versus minority rights therefore did not present itself in their theory since they viewed the respective nationalities as being symmetrical to each other.

Renner was of the view that institutional design and the rule of law were essential to prevent and resolve disputes between the nationalities, hence the proposition that national minorities should be able to gain a public law identity (pursuant to a statute or the Constitution) which they could use as a basis to make and implement decisions about their culture and identity.[35] In addition, those public law legal entities could through joint decision-making legislate for the entire Empire. During the time of their writing, nationalism was becoming a strong "centrifugal force within the ethnically complex territories of central and Eastern Europe",[36] and whereas orthodox Marxist thinking of the time was to dismiss the relevance of nationalities, *Renner* and *Bauer* were of the view that the forces inherent to rising ethnic awareness had to be managed through institutional mechanisms based on constitutionalism.

Bauer and *Renner* contended that traditional federalism, of which the USA, Canada and Switzerland were prime examples at the time, was based on territorial autonomies which would not suffice for the Empire since the nationalities they had to deal with often lived intermingled and scattered over large rural areas and cities.[37] Although *Bauer* and *Renner* acknowledged that nationalities in the Empire sometimes lived concentrated at local levels, they were also mindful that any form of regional demarcation of the

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[34] See *O. Bauer* (note 9), 284 et seq. and *K. Porter,* The Realisation of National Minority Rights, Macquarie Law Journal 3 (2003), 51 (62). In their view the governance of the state were to occur at two levels: firstly *within* the respective councils of nationalities and secondly *between* the councils. The individual's political rights would be exercised primarily within the context of his or her nationality.

[35] *K. Renner* said it was of the "highest necessity" that the nationalities-question be resolved according to the rule of law. *K. Renner*, in: E. J. Nimni (note 9), 17. Also see *B. Bowring,* Burial and Resurrection: Karl Renner's Controversial Influence on the "National Question" in Russia, in: E. J. Nimni (note 9), 185.

[36] *D. J. Smith*, Institutional Memories and Institutional Legacies: Managing Majority-Minority Relations in Post-Communist Europe qua Cultural Autonomy, in: K. Cordell/T. Agarin/A. Osipov, Institutional Legacies of Communism: Change and Continuities in Minority Protection, 2013, 91.

[37] *Renner* explained how the individual is less tied to the land as their ancestors; that economic interests span vast territories; and that people move around in ways that were previously unheard of. The "personality principle" is according to him less "utopian" than simple territorial solutions because the personality principle acknowledges the reality of individuals from different cultural backgrounds living intermingled and often far from their traditional lands and communities. *K. Renner*, in: E. J. Nimni (note 9), 33.

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Empire would lead to regions that were also multi-national, thus not addressing the nub of the problem of autonomy for nationalities.

They concluded that to solve the challenges of competing nationalities solely through territorial arrangements was "doomed to failure regardless of how territorial boundaries were drawn."[38] For *Renner* the "central issue was how to covert the Austro-Hungarian Empire from a decaying conglomerate of squabbling national communities into a democratic confederation of nations."[39] Whereas modern federal theory is based on territoriality, *Renner* and *Bauer* took a more nuanced approach whereby they anticipated territorial and non-territorial elements sanctioned by public law.

3. Ottoman Empire's Accommodation of Dispersed Minorities

Although *Renner* and *Bauer* are generally regarded as the intellectual fathers of the concept of cultural (non-territorial) autonomy for national minorities, the principle of non-territorialism had been known in practice at the time outside European nations. Within the Ottoman Empire (c. 1299-1923) there had been some experience with non-territorial accommodation of religious minorities, for example through the Millet system,[40] whereby religious groupings such as the Jews and Christians had the freedom to apply and abide by their respective religious codes and to promote their traditions and beliefs.[41] The communities were self-governing within the general framework of the Ottoman Empire and were "tolerated" as being not of full equality with those of the Islamic Faith but nevertheless being people of the Book.[42] The Millet system did not envisage equality of the non-dominant groupings, but was rather used to affirm the domination of the Islamic faith to those of other faiths. The relevance of the Millet system was, however, that it allowed a form of non-territorial autonomy for religious groups

[38] *D. J. Smith* (note 36), 91.

[39] *E. J. Nimni*, National-Cultural Autonomy as an Alternative to Minority Territorial Nationalism, in: D. J. Smith/K. Cordell, Cultural Autonomy in Contemporary Europe, 2008, 34.

[40] *G. S. Cloete*, Etnisiteit en groepsverteenwoordiging in die staatkunde – 'n vergelykende studie, D. Phil, 1981, 138 et seq.

[41] *B. Braude/B. Lewis*, Christians and Jews in the Ottoman Empire, 1982.

[42] The millets were regarded as inferior by the Ottomans, but the millets did, within the vastness of the Empire, offer a basis for religious groupings within a pre-modern era to exist, to organise their own affairs and not to be limited by territoriality.

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whereby they could manage their own religious affairs, laws and customs on the personality principle.[43]

The word "millet" in Turkish means "nation" or in more practical terms it amounts to a "religious community". To some observers this was the first example of multi-ethnic pluralism in the pre-modern world. The respective millets became closely associated with the dogma of their religious community and catered for their members regardless of the integrated way in which the members of the communities lived.[44] The millets not only had autonomy to conduct their religious affairs, they could raise taxes and enforce their religious and family law arrangements on the members of their society. Millets even provided what is nowadays regarded as core governmental social services, such as provision of education, medical treatment, care of the aged, and other social services, but on the basis that the services were provided on a community rather than a territorial basis.[45] At the decline of the Ottoman Empire there were around 17 millets in operation.[46]

In Russia at the same time of the writing of *Renner* and *Bauer* some of the major political parties were investigating the merit of *Renner*'s ideas for possible application in that vast territory with its many nationalities.[47] Similar debates took place in Estonia and Latvia, with Estonia enacting in 1920

[43] *G. M. Quer* (note 24), 87. *Quer* proposes that aspects of the Millett system remains relevant to contemporary society and could be used for the effective management of minority rights in Europe particularly since the Millett system applied jurisdiction on a non-territorial basis and regulate decision-making over the custom, culture, personal laws, and traditional practice of a community.

[44] The Orthodox Church for example was for all practical purposes transformed into a political institution which represented the interested of the Greek faithful. *K. Pears*, Turkey and Its People, 1912, 7; *W. J. Cahnman*, Religion and Nationality, The American Journal of Sociology 49 (1944), 525.

[45] *F. Prina*, Introduction – National Cultural Autonomy in Theory and Practice, Journal on Ethnopolitics and Minority Issues in Europe 12 (2013), 1 (3).

[46] *K. Barkey,* Islam and Tolerations: Studying the Ottoman Imperial Model, 2008; *D. G. Bates/A. Rassam,* Peoples and Cultures of the Middle East, 2001. It must be noted that the millets did not function on democratic principles and their authority was principally doctrinal based, but the principle of communities being governed by way of non-territorial restrictions is what is relevant for the purposes of the *Bauer/Renner* concept of cultural autonomy.

[47] *Lenin* is said to have described Russia as a "prison of nations" since its population composition was so complex. See *P. Kolsto,* Faulted for the Wrong Reasons: Soviet Institutionalisation of Ethnic Diversity and Western (Mis)interpretations, in: K. Cordell/T. Agarin/A. Osipov (note 36), 31; *Lenin* favoured territorial autonomy to accommodate the diversity of the population rather than non-territorial options. *B. Bowring*, Minorities Protection in Russia: Is There a Communist Legacy?, in: K. Cordell/T. Agarin/A. Osipov (note 36), 49; *R. Pipes,* The Formation of the Soviet Union 1917-1923, 1954, 536.

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what some regard as the best example at the time of national cultural autonomy.[48]

4. Events Since the Fall of the Wall

Since the fall of the Berlin Wall, aspects of national cultural autonomy have been pursued in various forms in countries such as Russia, Estonia, Hungary, and Kosovo, and, as is shown in this article, the topic continues to be alive and relevant in contemporary literature.

National cultural autonomy has for all practical purposes been close to the heartbeat of central Europe for at least the past century.[49] Smith explains how in the western part of Europe issues arising from nationality were principally dealt with by way of individual rights and liberties and territorial arrangements that coincided with the "nation-state", while in the Communist central and eastern Europe "managing ethnic diversity has been a central preoccupation from the very outset of the modern state-building process."[50]

The philosophical framework of democratic theory in the *Renner* and *Bauer*-world was in many respects substantially different from contemporary liberal democratic literature. Whereas *Renner* and *Bauer* described the nationality groups as *the* cornerstone of the state, contemporary liberal theory holds that the individual is *the* cornerstone of democratic society.[51] Whereas in *Bauer* and *Renner*'s world the concept of "minority rights" were not known, one could argue that the concept of "minority rights" is now imbedded into constitutional thinking with several constitutional and

[48] *R. T. Clark*, The Constitution of Estonia, Journal of Comparative Legislation and International Law 3 (1921), 250; *V. Raud*, Estonia: Reference Book, 1953; *B. de Villiers* (note 32), 55 et seq.

[49] Refer to *A. Osipov* (note 28), 10 et seq. for a concise overview of examples in Europe where non-territorial autonomy is pursued in different ways. Different forms of non-territorial autonomy have been applied in the Russian Federation, Hungary, Estonia, Latvia, Croatia, Serbia, Slovenia and the Ukraine. There is no singular "model" being pursued by these countries but the common denominator they share is the protection of minority groups by way of non-territorial arrangements.

[50] *D. J. Smith*, Non-Territorial Autonomy and Political Community in Contemporary Central and Eastern Europe, Journal on Ethnopolitics and Minority Issues in Europe 12 (2013), 27 (28).

[51] See *F. Guber*, Das Selbstbestimmungsrecht in der Theorie Karl Renners, 1986.

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international law instruments that refer to the rights of minorities.[52] Particularly in light of their pro-Marxist philosophies, it would not have been obvious for *Bauer* and *Renner* to be remembered as protagonists for multi-ethnicity. Their views on the importance of nationalities where not shared by mainstream Marxism,[53] but ironically, it is particularly in countries where Marxism has had its biggest impact, that the ideas of *Bauer* and *Renner* have been revisited in recent years as part of democratisation efforts.

The world has changed since the 1900s, but the shared challenge that remains is how to deal with the demands for self-government of minorities on a non-territorial basis. Smith observes as follows: "[I]f minority demands can be de-territorialised, the reasoning goes, they will be easier to contain and thus pose less of a threat to state integrity."[54]

The quest to deal with rights of minorities today is not much different from the challenges that *Bauer* and *Renner* sought to address when they formulated their ideas about the rights of nationalities. As *Nimni* observes:

> "A re-examination of the nationalities debate in Austria during this period [of *Bauer* and *Renner*] reveals surprising analogies to contemporary liberal democratic debates on minority rights, and multiculturalism."[55]

The *Bauer-Renner* propositions for the Austro-Hungarian Empire remain relevant today – namely how to find a way to respond to demands by minorities for collective rights of self-governance and autonomy within public law on a non-territorial basis.[56]

V. *Renner* and *Bauer* – Collective Rights in Public Law

The propositions developed by *Bauer* and *Renner* will be discussed under headings that appear to be most relevant to contemporary debates about minority rights namely:

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[52] For a useful overview of international instruments that address the issue of minority rights refer to United Nations Promoting and Protecting Minority Rights: A Guide for Advocates, 2012.

[53] *Osipov* refers to the criticism expressed by *Lenin* who saw national cultural autonomy as constituting a risk to the international unity of the working class. See *A. Osipov* (note 28), 13.

[54] *D. J. Smith* (note 36), 32. Also see *D. J. Smith/J. Hiden,* Ethnic Diversity and the Nation State: National Cultural Autonomy Revisited, 2012.

[55] *E. J. Nimni,* Introduction for the English Reading Audience, in: O. Bauer, The Question of Nationalities and Social Democracy, 2000, xv.

[56] Refer to the discussion by *Smith* (note 36, 32 et seq.) of several models of non-territorial autonomy in Central and eastern European states.

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- What is a nationality?
- Are nationalities static or dynamic in their membership and composition?
- Does the numerical size of a nationality matter?
- How important is an own territory for nationalities to make decisions about their culture?
- Why should nationalities be recognised in public law?
- What are typical powers that a Community Government would exercise?

1. What Is a "Nationality"?

Renner and *Bauer* were confined in their thoughts to the nationalities that had to be dealt with in the context of the Austro-Hungarian Empire. The Empire had around 15 major nationalities that were well known and simple to identify.[57] *Renner* and *Bauer* did not direct their propositions at finding a generic definition for "nationality" in the same way that contemporary literature struggles to develop a definition for "minority". *Bauer* and *Renner* understood the term "nationality" within the context of the Empire. Where in contemporary society "nationality" refers to the entire population of a sovereign state, *Bauer* and *Renner* disputed the idea that nationality should necessarily coincide with statehood. To them nationality was defined by language, culture and traditions, while state was defined by territory. The challenge faced by *Renner* and *Bauer* is, however, that securing definition for "nationality" represents a "significant hurdle" in practice since nationality is such a dynamic and fluid concept.[58]

Whereas contemporary international and constitutional law continues its endeavours to develop a suitable and universally applicable definition for "minority", *Renner* and *Bauer* made no such attempt to find an exhaustive definition for "nationality" since they were not concerned with the challenges of the world outside of their own.[59] The principle underlying their theses was that "nation" does not comprise a territorial element but rather

[57] The main nationalities were Germans (24 %); Hungarians (20 %); Czech (13 %); Poles (10 %); Ukrainians (8 %); Croats (5 %); Serbs (4 %); Slovaks (4 %); Slovenes (3 %); and Italians (3 %). See Austria-Hungary, New World Encyclopaedia, at <http://www.newworldencyclopedia.org>.

[58] *J. McGarry/M. Moore,* Karl Renner, Power-Sharing and Non-Territorial Autonomy, in: E. J. Nimni (note 9), 76.

[59] It must also be added that at the time of their writing the challenges that multi-ethnicity would bring to countries of Africa, Asia and the Americas were not known. Their focus was exclusively on the circumstances of Central Europe and the Empire in particular.

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"an association of persons"[60] who were bound together by a common language and culture and, when applied to their circumstances, the main nationalities in the Empire were known.

Although *Bauer* and *Renner* did not refer to the term "minorities" within their writings, their reference to a "nation" entailed to a community of individuals bound together by shared culture, language, traditions, laws and religion, but most relevantly by language. The concept of "nation" to them was not entirely static since it allowed for adjustment, but at the core of a "nation" were a combination of inherited and acquired characteristics of shared language and culture which was objectively recognisable and, for all practical purposes, permanent. A critique of their work is that they saw "nationality" as sharply defined and internally cohesive, thereby perhaps not giving sufficient recognition of the dynamics of change that language and culture communities experience.[61]

Bauer and *Renner* accepted freedom of choice whereby an individual could indicate his/her nationality, but once such a choice was made for purpose of exercising political participation, it was final.[62] Each nationality would therefore compile a voters' role of its members, who in turn would be able to participate in democratic processes within the nationality.[63] They did not anticipate a general voters' roll for the entire population.

Bauer and *Renner*'s description of "nation" differed in at least two important respects from contemporary literature's debates on "minorities": firstly they placed an emphasis on known, linguistic and cultural groups[64] within the Empire which meant they did not involve themselves with definitional challenges of finding a generic definition for "nationality" that would be internationally applicable; and secondly they did not place any emphasis on the "numerical" or "non-dominant" status of a nation vis-à-vis other nations. To them the respective nationalities were to be treated equal-

60 *O. Bauer* (note 9), 285.

61 *R. Bauböck*, Political Autonomy or Cultural Minority Rights? A Conceptual Critique of Renner's Model, in: E. J. Nimni (note 9), 99.

62 *Renner* compared this choice to be exercised by an individual as similar to the choice of religious affiliation whereby an individual determines the denomination to which he/she wishes to subscribe and then consequently accept the rites and symbols of that community. *K. Renner*, in: E. J. Nimni (note 9), 29.

63 By allowing individuals to choose the nationality with whom they wanted to associate, *Renner* and *Bauer* included the element of freedom of choice into their theory. In doing so they rejected the idea that individuals are born into a nationality and imprisoned by it, but at the same time they assumed that individuals *had* to make a choice of nationality and they did not propose a mechanism to deal with conflicts that may arise from the choice.

64 *Renner* saw language as an important element of "nationality" but it was not the sole characteristic. *K. Renner,* in: E. J. Nimni (note 9), 21.

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ly at law regardless of their numerical size. This approach contrasts with contemporary debates according to which an essential element of the definition of "minority" is based either on the numerical size of a group or the non-dominant nature of the group.

In the same way that Human Rights Commissioner *Van der Stoel* (see note 16) remarked that he recognises a minority when he sees one, *Renner* and *Bauer* did not attempt to give an exhaustive definition of nationalities that could be applied outside the Empire.[65]

The writings of *Bauer* and *Renner* do not offer much assistance when it comes to finding an exhaustive definition for the concept "minority" in contemporary debates, other than that the communality between a nation as they saw it and a minority in contemporary society is a group of individuals that share common bonds of language, culture and traditions. An essential question that is difficult to answer generically since the circumstances of minorities differ, is what are the essential rights that minorities seek to have protected – only language rights or do they also strive to protect a wider range of rights including culture (which is notoriously hard to define), self-administration, economic and welfare "rights"?[66]

It is notable that in contemporary cases where non-territorial autonomy arrangements are pursued, such as Belgium, Estonia and Hungary, a similar approach is taken as was adopted by *Bauer* and *Renner* namely that the communities that are the recipients of autonomy are explicitly mentioned in the respective constitutional instruments, thereby averting the challenge of trying to define the concept "nation", "community" or "minority" by way of statute.[67]

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[65] Although the challenge to define "minority" is to some extent averted by naming the specific minorities that are to be protected, the challenge remains to define those minorities that have been named. For example, if the Germans are a recognised minority in Hungary, then how are "Germans" defined and how is the definition sufficiently flexible to allow for the dynamic nature of the German community to be accommodated at law? According to *Roth* this illustrates the challenge to define what is basically a social phenomenon as a legal entity; *G. Brunner*, The Concept of Group Rights in the Field of Protection of Minorities, in: A. Sajo (ed.), Western Rights: Post-Communist Application, 1996, 297.

[66] See the criticism of *R. Bauböck*, in: E. J. Nimni (note 9), 103.

[67] See for example how on Brussels where non-territorial autonomy applies, the main language communities are referred to namely the Dutch, French and German; while in Hungary the 13 communities that are entitled to autonomy are named without defining those communities (Bulgarian, Gypsy, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian); and in Estonia four communities (German, Russian, Swedish and Jewish) that automatically qualify for non-territorial autonomy are explicitly mentioned.

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2. Are Nationalities Static or Dynamic in Their Membership and Composition?

Renner and *Bauer* were of the view that the nationalities they had to deal with were on the one hand static in composition, but they also acknowledged that nationalities had a capacity to adjust over time. *Renner* and *Bauer* preferred an approach whereby community identity was seen as being handed down through time and tradition which left little room for adjustment and adaptation.[68] The individual could choose his/her identity which gave some flexibility to previously held views that the individual was constrained by and born into a nationality.

Nationality was therefore viewed as static in the sense that the key elements of nationality such as language, traditions and culture form part of a person's hereditary background that is handed down through generations by genetics, conduct, writing, music and oral teaching and education.[69] To *Renner* a nation is culturally defined as a result of a "personal association of those sharing a way of thinking and speaking"[70] and as a result a community exists of "intellectual and emotional life." In contrast, the state implies a territorial legal order "dominated by the sphere of material interest of the dominant groups in the state", which makes state and territory inseparable.[71] The "root of dominance" according to *Renner* is consequently found in the control of territory.[72] *Renner* therefore saw the territorial jurisdiction of the state as being subject to greater change as the identity of nationalities, which according to him were more durable, stable and secure.

Nationality is therefore viewed by *Bauer* and *Renner* as an intergenerational concept that continues its existence regardless of surrounding circumstances, and most pertinently it is not affected by changes to state sovereign boundaries. Nationality entails shared culture, shared religion, shared language, common descent and shared laws and customs.[73] In essence, each

[68] According to *Schwartzmantel*, *Renner's* views about the dynamics of "nationality" were rather rigid with change in culture or assimilation being unlikely; *J. Schwartzmantel*, Karl Renner and the Problem of Multiculturalism, in: E. J. Nimni (note 9), 66.

[69] The view of "culture" having a longevity and consistency as proposed by *Bauer* and *Renner* has been criticised (for example *J. McGarry/B. O'Leary,* The Northern Ireland Conflict: Consociational Engagements, 2004, but consideration must be had that as far as the "nationalities" are concerned that *Bauer* and *Renner* had to deal with, those have had longevity and consistency that arguable satisfied the approach proposed by *Bauer* and *Renner*.

[70] *K. Renner*, in: E. J. Nimni (note 9), 25.

[71] *K. Renner*, in: E. J. Nimni (note 9), 23.

[72] *M. Wong*, Reclaiming Identity: Re-Thinking Non-Territorial Autonomy, Journal on Ethnopolitics and Minority Issues in Europe 12 (2013), 56 (58).

[73] *O. Bauer* (note 9), 250.

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nationality is bound together as a "community of fate".[74] At the same time, however, nationality is dynamic in the sense that elements of it can change, adjust and adapt to changing circumstances.

Nationality according to *Renner* and *Bauer* is not necessarily frozen in time but it nevertheless has consistency and permanence. They viewed nationality as more than a mere sociological concept which unites individuals together within their private sphere. To *Bauer* and *Renner* nationality had relevance to the formation of the Empire and as such it had to be recognised in public law. They proposed that "nation" was an essential part of an individuals' political, social and economic milieu and therefore legal and constitutional effect could and should be given to the rights of nationalities within the Empire.

There is a contradiction in the way that *Bauer* and *Renner* perceive "nationality" and individual choice. On the one hand *Bauer* and *Renner* held that nationality is received from forebears, while on the other hand they suggest nationality is open to individual choice on the basis of freedom of association. This is perhaps the most fundamental area where their views of nationality differ from those of many contemporary scholars, namely the question whether the individual is a product of nationality, or whether nationality is a product of the individual. *Bauer* and *Renner* seem to have hedged their bets by proposing on the one hand that the individual is born into a nationality, but allowing on the other hand an individual to choose his/her nationality.[75]

According to *Bauer* and *Renner* an individual had freedom to choose or elect their nationality when they became of voting age, but once they have chosen a nationality the choice is locked-in and an individual cannot move between nationalities. They did not anticipate arrangements whereby an individual would have no chosen or dominant nationality nor did they address the status of individuals who display mixed nationality.[76] *Renner* described how an individual when they come to voting age would declare their nationality and in this way, the individual's rights to self-determination

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[74] *O. Bauer* (note 9), 250.

[75] *Renner* and *Bauer* did not address practical questions that may arise from the selection of nationality, for example how would nationalities be defined; what happens if a persons' selection of a nationality is challenged; and what judicial oversight would be in place for legal entities operating on behalf of the nationalities.

[76] *Nootens* observes that it is not clear from his writing how imbedded the concept of singular identity was to *Renner*, but given modern day circumstances a more "flexible" view of identity is required than what *Renner* may have foreshadowed; *G. Nootens,* in: E. J. Nimni (note 9), 57.

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and freedom of association are recognised.[77] He did not explain why the choice could be made only once or why the choice had to be made at all.

The model put forward by *Renner* and *Bauer* for the Empire was therefore relatively straightforward namely that known nationalities were recognised in public law, but in its simplicity also lay imbedded its shortcomings from the perspective of contemporary liberal democratic theory.

The model was simple since it used as building blocks the known nationalities within the Empire and each individual was deemed to belong to a nationality. By acknowledging those nationalities explicitly, definitional challenges were averted since there was no need to settle a definition of "nationality" that could apply universally. By requiring an individual to choose a nationality it meant that the entire population would be compartmentalised into one of the known nationalities. There would be no cross-cutting voters' roll since the political interaction between nationalities would only between ethnically elected representatives.

The main shortcomings of the *Renner-Bauer* model were, however, that (a) it did not address the situation where an individual did not want to exercise political rights via a nationality; (b) it assumed that an individual's identity was one-dimensional and therefore limited to the language they speak; (c) it did not address practical questions such as how choice of nationality were to be exercised and if a dispute about membership of a nationality arose how a determination were to be made; (d) it failed to address the situation of individuals that associate with more than one nationality; (e) it limited freedom of association to rights within the nationality; (f) it did not cater for individuals that associated with a nationality other than the 15 that were proposed to be recognised in the Empire; and (g) it ran the risk of rewarding nationalist mobilisation without encouraging common citizenship, supported by pluralist movements or political parties.[78]

The simplicity offered by *Bauer* and *Renner* therefore erodes the potential applicability of their propositions in contemporary theory and in practice.

Arguably the most serious challenge faced by proponents of non-territorial autonomy in contemporary society is how to respond to the mul-

[77] *K. Renner*, in: E. J. Nimni (note 9), 31.

[78] Account must, however, be taken that *Renner* and *Bauer* did not propose a general theory to all nations, but sought to devise a framework to retain the unity of the Empire. According to *Renner* it was "utopian" to hope that the respective nationalities within the Empire would reconcile. *K. Renner*, in: E. J. Nimni (note 9), 16; The conflict that has plagued central Europe since their writing arguably affirms their perhaps pessimistic assessment that the multitude of nationalities would not be able to secure stability on the basis of territorial arrangements within a single sovereign state.

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tifaceted nuances of an individual's identity. Locking in an individual into a specific language identity shouts out against the most fundamental human rights of freedom of association. Rigidity of identity choice may also encourage ethnocentrism; exclusion and discrimination since it depends for its survival on an "us versus them" approach. Although *Renner* and *Bauer* escaped the challenge of defining "nationality", they did not offer a practical response to what happens if there is a dispute about a person claiming to be a member of a nationality while other persons in the nationality dispute the choice; the status of a person being from mixed nationality origin; or the rights of persons who reside in the Empire but who do not belong to any of the known nationalities.

Renner and *Bauer* were not called upon to address these concerns in their theory or in practice within the Empire.

3. Does the Numerical Size of a Nationality Matter?

Bauer and *Renner* viewed nationalities as equal in status before the law (symmetry) regardless of their differences in numerical size. It was the *existence* of a nationality that gave rise to certain political rights, not the numerical size of a nationality.[79] The equality principle applied between nationalities similarly to which the equality principle in contemporary law applies to the relationship between individuals. Whether a nationality was for example German or Hungarian or Italian, it had the right of self-governance on behalf of its members and it was entitled to represent its members in discussions with other nationalities about matters of common concern.[80] In this way dominance by one nationality over another by virtue of majoritarianism was averted. Once nationalities receive public law rights of self-government through the legal entity (e.g. Community Government as called in this paper) established for each nationality, the nationalities could meet as equals at the local, regional and national levels to make decisions that are in the best interests of the Empire over matters that concerned all of the na-

[79] "By giving minorities the freedom to choose, and control, their cultural destiny, NTA [non-territorial autonomy] can contain feelings of alienation resulting from societies being dichotomised between 'dominant' and 'non-dominant' groups."; *F. Prina* (note 45), 2.

[80] The principle of territorial jurisdiction can therefore co-exist with non-territorial jurisdiction. In cultural affairs the nationalities exercise their powers over their members regardless of where they live, but in the case of matters that fall outside the cultural realm, the nationalities jointly make decisions. *M. Wong* (note 72), 59.

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tionalities.[81] *Renner* also expressed concern that constitutional mechanisms aimed at ensuring representation of nationalities, such as proportional representation, minority seats and curial voting may assist to make the voice of nationalities heard in the legislature, but that would not assist the nationalities when those laws are administered.[82] To him it was important that nationalities could administer laws in accordance with the personality principle, meaning within the language and cultural milieu of their members.[83]

No nationality was therefore at risk of being outvoted by another, or at the mercy of another when it came to the administration of legislation.

The rationale for this approach was obvious – *Bauer* and *Renner* came from a background where conflict between nationalities in Europe had led to major wars and bloodshed and to them it was essential that nationalities were treated as equals in order to find peace within the newly established Empire. Whereas the Westphalia-principles acknowledged the importance of peace being built on respect between sovereign nation-states, *Renner* and *Bauer* were of the view that the territorial integrity of the Empire could be assured by granting the respective nationalities recognition on a non-territorial basis. By removing territory as a requirement for recognition, the competition between the nationalities to control land would be reduced. *Bauer* and *Renner* were acutely aware of the potential or tyranny by the majority, something which their modern day critics may not adequately acknowledge in their own writings.

The proposition put forward by *Renner* and *Bauer* has some contemporary resonance, for example in international law confederations which are formed between sovereign states recognise the equality of sovereign states regardless of the population size of the respective states. Confederated entities make decisions by consensus; no state can be bound against its will; and the sovereignty of each state remains unaffected by the confederate relation-

[81] *K. Renner,* in: *E. J. Nimni* (note 9), 24, 31. This arrangement were to be followed at all levels of government, in other words, wherever nationalities were living intermingled, separate institutions would exist for cultural matters and for non-cultural matters. At the central level, *Renner* proposed a bicameral arrangement whereby the federal states as well as the nationalities were represented in the second house of parliament. *K. Renner,* in: E. J. Nimni (note 9), 34. See *R. A. Kann,* The Multi-National Empire: Nationalism and National Reform in the Habsburg Monarchy, 1848-1918, 1964, 244.

[82] *K. Renner,* in: E. J. Nimni (note 9), 35.

[83] *Renner* placed considerable emphasis on laws being administered by the respective nationalities and their councils at a national, regional and community basis. By doing so one ensures that the state communicates with each community in the language of the community. *K. Renner*, in: E. J. Nimni (note 9), 35 et seq. *Renner* did not address the cost, practicality and duplication that may arise from such an arrangement.

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ship.[84] The equality principle between constituent units of a state also finds its way into federalism theory whereby the territorial units that make up a federation, are often equally represented in the second house of the federation regardless of the population size of those units.[85]

Renner and *Bauer* therefore had a type of domestic "confederation" of nationalities in mind whereby each nationality had equal rights vis-à-vis the other nationalities.

Renner and *Bauer*'s proposition that the constituent units of the state are the respective nationalities who reside within the state, is not consistent with contemporary liberal democratic theory which holds that it is the individual that is the principal constituent unit of political society. The individual's freedoms and rights that have become closely associated with post-World War Two international and constitutional law and are intimately interwoven with the ability of individuals to exercise their political rights without regard to language, culture, religion or creed. The equality principle in contemporary international law and constitutional law applies to the relationship between individuals and not, as *Bauer* and *Renner* proposed, to equality between nationalities.[86]

Whereas *Bauer* and *Renner*'s model constrained individual freedoms with the effect that an individual's political rights were to be exercised *within* the confines of a chosen nationality,[87] contemporary constitutional law emphasises individual freedoms, the equality of individuals, and the freedom to exercise rights *regardless* of language, culture or religious affiliation. This dichotomy remains an essential unresolved issue, both in theory and in practice, in the *Renner/Bauer* propositions as far as the application of national cultural autonomy to contemporary circumstances is concerned.

The important contribution by *Bauer* and *Renner* is, however, that language and cultural identity is relevant to public law and the institutions of

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[84] Refer for example to the founding statutes of confederal arrangements such as the European Union, the African Union and Association of South East Asian Nations.

[85] Refer for example to the composition of the second houses in the USA, South Africa, Australia, Mexico, Switzerland and Nigeria.

[86] As *Wong* observes, the *Bauer-Renner* view of identity is open to criticism since it "assumes cultures are fixed, pre-determined, deterministic, and singularly defined". Such a unidimensional view of identity is false and "masks internal differences and antagonisms" that might exist within groups. (note 72), 59 et seq.

[87] According to *Renner* "the primeval polity is a personal association based on blood relations" and that individuals attain ultimate freedom by exercising their rights through those relations. *K. Renner*, in: E. J. Nimni (note 9), 27. He says that this principle was acknowledged within the Roman Empire where judges resolved disputes in accordance with the legal system that applied to the disputing parties. In this way multiple legal systems coexisted within the same territorial jurisdiction.

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government developed to serve the general population. Although contemporary society often views questions of ethnic identity to be resolved solely within the private sphere, *Bauer* and *Renner* pointed out that those identities also have relevance to public law.

4. How Important Is an Own Territory for Nationalities to Make Decisions about Their Culture?

The essential contribution of *Bauer* and *Renner* to the management of the multi-ethnic state is their proposition that since nationality is a spiritual concept, territory is not a prerequisite for self-governance.

Renner put the limitations of territorial organisation of governmental power succinctly as follows:

> "The territorial principle can never produce compromise and equal rights; it can only produce struggle and oppression, because in essence it is domination."[88]

Bauer and *Renner* did not reject territory for purposes of self-government by nationalities in appropriate circumstances,[89] but they did not see control over an own territory as a *sine qua non* for a nationality to acquire a juristic identity for self-government.[90]

The essence of the *Bauer-Renner* propositions was to shift the focus from *territorial* autonomy to *cultural* autonomy in appropriate cases such as the Empire faced.[91] Territorial control implies a jurisdiction that binds all indi-

[88] *K. Renner*, in: E. J. Nimni (note 9), 28.

[89] *Wong* emphasises that territorial autonomy and non-territorial autonomy are not mutually exclusive. She refers to the existence and functioning of the Millett system to illustrate how the autonomy of religious minorities were exercised on territorial and personal (non-territorial) ways: *M. Wong* (note 72).

[90] *Renner* described the nation-state as the ideal state with the least possible grounds for friction, but in the absence of a nation state the non-territorial principles he and *Bauer* proposed were the best available option. *K. Renner*, in: E. J. Nimni (note 9), 30; He was of the view that in a multi-nationalist state the presence of territorial autonomy would heighten rather than reduce inter-nationality conflict.

[91] This view finds resonance in the contemporary work of proponents of NTA such as *Kymlicka, Osipov, Nimni* and *Taylor* who contend that the political space of the state need not overlap with cultural identity. In fact, it is unlikely for the two to overlap and hence the notion of nation-state is the exception rather than the rule. As a result of these new circumstances, there is a "need to further study how NTA may be used by minorities to articulate their own claims". *F. Prina* (note 45), 5.

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viduals within the area of influence,[92] while cultural autonomy implies a personal jurisdiction that only binds those that associate with the nationality, its legal entity and the services it offers.[93] To *Renner* territorial autonomy constrained individual liberty because the individual had to comply with the majority within the territory regardless of the nationality to which the individual belonged.[94]

Whereas liberal democratic theorists see regional and local autonomy in federal and decentralised unitary systems as ethnically "neutral", *Renner* saw territory as potentially ethnically "biased" and based on domination through majority rule. *Bauer* and *Renner* were of the view that if nationalities were protected on a personal basis, ongoing state creation to find a territorial home for each nationality would become unnecessary. The administrative area of the state would therefore be intact regardless of the respective nationalities securing self-governance. Whereas in western Europe the concept of "nation-state" was endorsed, *Renner* and *Bauer* sought to separate the concept of "state" and "nation" in the Empire.[95]

As discussed above, the practical circumstances in which *Renner* and *Bauer* found themselves were such that the Empire experienced massive movement of people, large scale urbanisation, and high levels of heterogeneity and integration even at local and community level. Their propositions were directed to find a theoretical solution for the practical circumstances faced by the Empire. The utility of territorial based organisation of government powers, be it at regional or local levels, was well known to *Renner* and *Bauer*, but the territorial models such as those of the USA and Switzerland did not, according to them, adequately address the challenges of the Empire. They realised that an overemphasis on territorial dominance and subsequent inter-nationality competition for control of territory could destabilise the Empire. From those circumstances arose the concept of non-territorial juristic persons for nationalities with autonomy to make and administer decisions on behalf of their members regardless of how intermin-

[92] *Renner* says territorial domination invites an attitude of "if you live in my territory, you are subject to my domination, my law and my language". This is an expression of domination, not of equality. *K. Renner*, in: E. J. Nimni (note 9), 27.

[93] The "novelty" of NTA is found in the personal rather than territorial jurisdiction of its decision-making institutions; *D. J. Smith*, National Cultural Autonomy, in: K. Cordell/S. Wolff (eds.), Routledge Handbook of Ethnic Conflict, 2010, 278 (279).

[94] *Renner* says the concept of autonomy only by means of territory is "anti-national" since it abandons those who move outside their traditional territories and leaves them open to the domination by others. *K. Renner*, in E. J. Nimni (note 9), 28.

[95] *E. J. Nimni* (note 29), 292.

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gled they live with members of other nationalities.[96] The "personality rather than the territorial principle should [therefore] form the basis of regulation."[97]

Closely related to the non-territorial autonomy of nationalities, *Bauer* and *Renner* also envisaged the decentralisation of political parties whereby it was proposed that nationalities would be more likely to exercise self-determination if they could vote for the "own" political parties.[98]

Renner and *Bauer* were well aware of the territorial benefits but also limitations of (territorial) federalism. At the time of their writings federations such as the USA, Switzerland and Canada had been in existence for some time and the young federation of Australia was being formed. *Bauer* and *Renner* were concerned that territorial federalism would not, given the realities of the Austro-Hungarian Empire, suffice to address the competition between nationalities of which the members lived intermingled. The many nationalities that made up the Empire were too integrated, too urbanised; and too fused with each another for neat, territorial solutions based on local and regional government to be found.

Although *Renner* and *Bauer* did not exclude territorial self-determination as an option for organising governmental power,[99] they proposed to add a model for autonomy of nationalities regardless of the absence of a territorial base.[100] Within the context of their proposal it was feasible for nationalities to have as a decision-making institution the legal person, but at the level of administration or implementation of policies some

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[96] *G. Brunner* (note 65), 301, comments about the shortcomings of territorial forms of autonomy in several of the previous Communist countries, and concludes that "the disadvantages of territorial autonomy can be avoided by applying the personal principle … This solution is independent of territorial distribution of the minority and follows the principle of individual self-determination since it is up to each individual to decide his membership in the corporation."

[97] *K. Renner*, in: E. J. Nimni (note 9), 29.

[98] *T. Nieguth*, An Austrian Solution for Canada? Problems and Possibilities of National Cultural Autonomy, Canadian Journal of Political Science 42 (2009), 1 et seq.

[99] *Renner* spoke about the positive aspects of a nationality having a territorial area as an "organizational principle" for purposes of administering laws, but he stressed that the autonomy of the nationality should not be linked to territory but rather to the existence of the nationality as a cultural entity; *K. Renner*, in: E. J. Nimni (note 9), 29.

[100] The importance of some territorial base for purposes of protecting identity is raised by *Bauböck* who proposes that national minorities that seek to maintain a distinct language, culture and political institutions will "often be unable to maintain these without territorial autonomy". *R. Bauböck,* Territorial or Cultural Autonomy for National Minorities, Österreichische Akademie der Wissenschaften, Forschungsstelle für Institutionellen Wandel und Europäische Integration 11 (2001).

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level of geographical proximity of members of the nationality would facilitate the provision of services.[101]

Self-determination to *Bauer* and *Renner* was possible in non-territorial ways, and this is where they had a different approach to many contemporary writings on self-determination and autonomy. In modern day constitutional and international law self-determination and autonomy inevitably have territorial prerequisites and as a consequence minorities without a territorial "homeland" continue to face the challenge of majoritarian systems which *Bauer* and *Renner* attempted to avert. The contemporary emphasis on the territorial-dimension of self-determination has not only removed from the agenda the *Bauer* and *Renner* propositions of cultural personal autonomy, it has introduced territorial control and dominance as a *sine qua non* for self-government.[102] It is not surprising that so much conflict and violence occurs in the competition for territorial control.

Another key element of the *Bauer*/*Renner* proposition was that the Empire would not have a majority elected sovereign parliament where one nationality would dominate other nationalities by virtue of size, with the other nationalities having "minority rights". In their theory, there was no rationale to secure "minority rights" because nationalities had equal rights regardless of their numerical size. No single nationality would therefore be subservient to another nationality.[103]

The challenge faced by *Renner* and *Bauer* to address the quest for self-government by minorities on a non-territorial basis, remains relevant to contemporary constitutional law and theory. Although the simplicity of-

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[101] Although *Renner* and *Bauer* is perceived to have rejected in its entirety the concept of territorial autonomy, it is not an accurate reflection of their views. They saw non-territorial autonomy as an option to pursue within the highly integrated state of the Empire, but even so, they continued to see the merit of autonomy at a local level where communities lived in high concentrations and density. In this way, their ideas may also bear relevance to modern day indigenous groups who seek self-determination but in a manner that may have to involve territorial and non-territorial elements; *P. Patton*, National Autonomy and Indigenous Sovereignty, in: E. J. Nimni (note 9), 112.

[102] See for example *Roach* who suggests that "the concept of autonomy involves the devolution of state power to the provincial level …"; *S. C. Roach*, Minority Rights and the Dialectics of the Nation: Otto Bauer's Theory of the Nation and Its Contributions to Multicultural Theory and Globalisation, Human Rights Review 6 (2004), 91 (91); This adherence to territorial decentralisation as the only feasible form of organisation of state powers is, unnecessarily rigid, impractical and not consistent with legal theory. The predominance of territorial forms of organisation of state powers in practice, does not mean that legal theory cannot evolve to also accommodate non-territorial forms of decentralisation. The fact that non-territorial autonomy has been applied in practice in its various forms, demonstrates the constraints that some legal theorists have placed onto themselves.

[103] *E. J. Nimni* (note 55), xix.

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fered by territorial arrangements in contemporary majoritarian systems is attractive in principle, the practical situation in which many countries find themselves highlights the limitations of simple majoritarian thinking and practice. Many young and emerging democracies face instability as a result of minorities feeling excluded, discriminated against and disempowered by simple majoritarian systems.[104] Although territorial forms of autonomy have been used widely in countries such as India, Nigeria, South Africa, Indonesia, Brazil and Ethiopia, to indirectly accommodate the rights of minorities, there remain many minorities who as a result of them not having a territorial base or due to their members living intermingled with the rest of the population, are excluded from effective representation and a lack of self-governance. According to *Kymlicka*, *Renner* and *Bauer* would have "regretted" the modern day trend towards territorial autonomy as the principal basis for self-government, because in their view it is a recipe for increased conflict.[105]

Liberal democratic theory offers little hope to such territory-deprived minorities unless the minorities can secure themselves a territorial base or if they are, by the grace of the majority, accepted into a form of coalition or partnership.

The principle challenge as expressed by *Renner* and *Bauer* was how to give to each nationality a legal personality that would enable it to make decisions of government pursuant public law. *Bauer* and *Renner* were aware of the multitude of civic and private forums (NGOs as we call them today) and organisations that nationalities had for purposes of servicing the interests of their members, but those NGOs were not within the sphere of "government" and not recognised as public law authorities. Hence *Bauer* and *Renner*'s proposal was to establish legal persons for nationalities with the power of *government* in the sphere of public law.

The question is whether the propositions by *Bauer* and *Renner* provide a sound philosophical basis of relevance to contemporary society for a minority group to obtain a form of self-government on a non-territorial basis through the registration of a juristic person.

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[104] *S. C. Roach* (note 102), 92, cautions, however, that the emphasis on "nationality" as a basis for the organisation of political rights may also contribute to "cultural pride" and "ethnic nationalism". While the concern of *Roach* is meritorious, the practice has also shown that territorial arrangements can give rise to "cultural pride" and "ethnic nationalism". Both territorial and non-territorial models of decentralisation run the risk of encouraging and rewarding ethnic mobilisation.

[105] *W. Kymlicka,* Renner and the accommodation of sub-state nationalisms, in: E. J. Nimni (note 9), 139; *Kymlicka* emphasises at 142 that even if non-territorial autonomy is pursued, it should ideally be linked with a form of territorial autonomy.

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The case put forward by *Renner* and *Bauer* is meritorious and relevant to contemporary constitutional law theory and practice. The reasons for this conclusion are principally threefold: firstly, the organisation of governmental power need not as a matter of principle be limited to territorial arrangements; secondly, the existence of juristic persons for minority groups need not be limited to private and civil law since those such associations could also be recognised in public law; and thirdly, the nature of competences that could be included within the powers and functions of such a public law juristic persons are relevant to the personal identity, language and cultural attributes of individuals and can be rendered wherever members of the minority group congregate, where they reside, or what services they attend.

5. Why Should Nationalities Be Recognised in Public Law?

Renner and *Bauer* viewed nationalities as the cornerstone for political expression and governance of society. The rights of the nationality to make decisions, to represent its members, to administer laws, and to promote the interests of its language and culture were foremost in their thinking. Since governmental power could, for reasons explained above, not be effectively organised on a territorial basis in the Empire, the nationalities formed the pillars of government. *Renner* and *Bauer* were also of the view that the class differences that existed in their society could best be addressed through equality of nations and individual self-determination within the nationality. The legal entities, sanctioned by public law, established for nationalities could then advocate for the members of the nationality and promote real equality. It was therefore essential for the legal entities to operate unrestrained by territorial jurisdiction.[106]

The importance, role and function of nationalities were therefore not limited to the private sphere since nationalities had a governance function on behalf of their members.[107] By allowing nationalities to register a public law legal entity, such entity could as a legislature make laws and implement policies on behalf of the nationality and cooperate with the legal entities of other nationalities in matters of common concern. *Renner* saw the registra-

[106] The "participatory rights" on nationalities were therefore to be exercised via the respective public law legal entities; *A. Cassese,* Self Determination of Peoples, 1995, 353.

[107] Although civil law associations were well known in the time of *Bauer* and *Renner*, the proposed incorporation they preferred was based on the notion that nationalities had the right to govern themselves and therefore state institutions had to be established for such purpose.

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tion of a public law legal person for each nationality as an "indispensable prerequisite"[108] for the resolution of the inter-nationality challenges that faced the Empire.

In the same way that the constituent states that make up a federation have a legal persona in public law, *Bauer* and *Renner* proposed that the nationalities that make up the Empire should have a legal persona in public law.

Territory should therefore not according to *Bauer* and *Renner* be a prerequisite for organising government power under public law. The distinction that *Bauer* and *Renner* drew between the legal persona of non-governmental organisations and the legal persona of public law governmental institutions represents the core element of their propositions as far as the relevance for contemporary constitutional law is concerned.

In *Bauer* and *Renner*'s time there were, as today, many non-governmental organisations that worked for and represented the interests of their members. *Bauer* and *Renner* did not speak against such civil law corporations. They viewed such corporations as constrained because of their functioning was limited to the sphere of private law and the associations could not make decisions, formulate policy or administer laws as a government. The fact that private corporations had no status in public law and could not make decisions of *government*, was a serious shortcoming according to *Bauer* and *Renner*.

In 1917 the concept of cultural autonomy was further developed and explained as follows:

> "Each national group would create a separate movement. All citizens belonging to a given national group would join a special organisation that would hold cultural assemblies in each region and a general cultural assembly for the whole country. The assemblies would be given financial powers of their own: either each national group would be entitled to raise taxes on its members, or the state would allocate a proportion of its overall budget to each of them. Every citizen of the state would belong to one of the national groups, but the question of which national movement to join would be a matter of personal choice and no authority would have any control over his decision. The national movements would be subject to the general legislation of the state, but in their own areas of responsibility they would be autonomous and none of them would have the right to interfere in the affairs of the others."[109]

Nimni suggests that one of the main advantages of the theory of *Renner* and *Bauer* is that it

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108 *K. Renner*, in: E. J. Nimni (note 9), 20.

109 *V. Medem*, in: H. Minczeles, Histoire Générale du Bund, 1995, 279 et seq.

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> "constitutionally enshrined collective rights for national minorities so that minorities can be protected from any subversion of their status by a majority decision."[110]

Bauer and *Renner* were of the view that representation in itself within a single legislative institution would not provide each nationality with the security and certainty they require. Representation would expose smaller nationalities to majority rule by larger nationalities and that would be inconsistent with the equal treatment of all nationalities. Representation within common institutions would also not enable each nationality to make laws and administer laws about matters that affect the language and culture of the community. *Renner* put the concern with representation within a majority dominated institution as follows:

> "proportional representation, minority representation and curial voting are incomplete forms of realizing the basic idea [of equality of nations]. For they realize it merely through the electoral and procedural rules of the representative bodies. In this way, they guarantee the nation[ality] a legal influence only over legislation, not over administration … and this guarantee in itself is an inadequate one."[111]

Contemporary society is well acquainted with NGOs and the wide ranging services they offer. There are many examples of NGOs acting as agents for governments to administer policies and provide services, for example in fields of education, health and welfare. The decision-making power remains, however, with the public law delegating institution. *Bauer* and *Renner* proposed that the decision-making power could also be decentralised to the legal entities of nationalities, thereby constituting such a legal persona *as a legislature* – hence the use of the term Community Government in this article.

The concept of a legal persona that is recognised in public law and which can make laws for its members may raise complex questions, but as a matter of principle there are insufficient conclusive reasons in constitutional law why such a model could not be further expanded or pursued for application in appropriate cases, even if only for purposes of a transition or temporary period. In the same way that territorial forms of government, be it regional or local governments, are recognised in public law, a legal entity that represents a minority group can be recognised and clothed with power similar to a legislature.

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110 *E. J. Nimni* (note 9), 204.

111 *K. Renner*, State and Nation, in: E. J. Nimni (ed.), National Autonomy, 2003, 1.

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Whether the jurisdiction of a legislature is territorial or non-territorial is not an insurmountable challenge, albeit that the scope of powers and functions may be more limited if a body only had personal jurisdiction and not territorial jurisdiction.

6. What Are Typical Powers that a Community Government Would Exercise?

Bauer and *Renner* did not propose an exhaustive list of competences that could be included in the powers and functions of the legal bodies for nationalities. They anticipated that typical functions would relate to areas that bear relevance to the identity of a nationality, namely language, culture, education, religion, private and family law, and so on. *Renner* emphasised that the nationalities should be responsible for "schooling, art and literature" but that account should be taken that national standards should apply to education.[112] His view was that the nationalities should undertake as many cultural activities as possible since the "personality principle can contribute the most to peace."[113]

In essence their model had at its primacy the right of individuals and of nationalities to maintain, protect and practice their distinct culture.[114] Juristic persons for each nationality would perform functions of teaching, schooling and other cultural matters. In addition to the cultural-relevant jurisdiction of the legal persons, the respective entities within the same territory would meet to make joint decisions in regard to non-cultural matters that were of a concern to all citizens.[115]

Although the precise demarcation of powers and functions would be challenging, it is not necessarily more complex than with territorial arrangements where powers and functions are decentralised to regional and local governments but with overlapping areas, framework legislation and concurrent powers.

The "personal" jurisdiction of the cultural legal entities was therefore separate from the "territorial" jurisdiction of the state, which prevents con-

112 *K. Renner*, in: E. J. Nimni (note 9), 38.

113 *K. Renner,* in: E. J. Nimni (note 9), 38; He emphasised that even if members of a nationality were not in adequate numbers for an own nationality school, the opportunity should exist for them to be taught in their language as part of their attendance of another school; *K. Renner*, in: E. J. Nimni (note 9), 44.

114 *D. J. Smith* (note 36), 29.

115 *O. Bauer,* The Question of Nationalities and Social Democracy, 2000, 284 et seq.

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flict between the two spheres of government. *Bauer* and *Renner* were critical of the "central-atomist" principle upon which liberal democracies are built because that only allows for two legal entities to participate in governance, namely the individual and the state as a collective of all individuals. *Bauer* and *Renner* rejected the notion that nationality is only of relevance to civil law and that self-government could only be exercised in territorial forms.[116]

The thoughts of *Bauer* and *Renner* were not dissimilar to the distribution of powers that are found in federal and decentralised unitary systems. In those systems the general principle of subsidiarity dictates that matters should be dealt with at the lowest possible level and that a matter is only disposed up by a higher level if the subject cannot effectively be regulated at the lower level. While this principle generally applies to multitiered territorial forms of government, there is not according to *Bauer* and *Renner* any compelling reason why similar principles could not apply to the division of powers between Community Government and a joint entity. All those matters that relate to the language, culture, religion, identity and customs of a nationality could fall within the jurisdiction of the Community Government, while the remainder of matters would fall within the joint authority of Community Governments acting together.

Although *Bauer* and *Renner* did not fully develop their proposal into a statutory framework, several countries such as Hungary, Estonia, Belgium, and the Russian Federation have embarked upon the creation of cultural councils and have incorporated the following powers within the sphere of such councils: aspects of education; mother-tongue training and education; arts and culture; libraries, media, radio and TV; dispute resolution; international relations; place names; monuments; historic days; symbols and other matters that directly relate to the recognition, protection and promotion of the identity, language, culture and traditions of a minority.[117]

116 *O. Bauer* (note 9), 227.

117 For a more detailed discussion of practical application in these countries refer to *B. de Villiers,* Self-Determination for Aboriginal People – Is the Answer Outside the Territorial Square?, The University of Notre Dame Australia Law Review 16 (2014), 74 et seq.; *B. de Villiers,* Section 235 of the Constitution: Too Early or Too Late for Cultural Self-Determination in South Africa?, SAJHR 20 (2014), 458 et seq.

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VI. Conclusion

The proposals developed by *Bauer* and *Renner* remain relevant to contemporary challenges to recognise and protect the rights of minorities. It is particularly in the domain of autonomy and self-government that *Bauer* and *Renner* offer valuable insights into the way in which minorities could register public law legal persons called for example Community Governments, with the power and functions of government. There are several examples where, in one form or another, efforts are underway to give practical effect to the ideas of *Bauer* and *Renner* within civil and public law.

As far as demands by minorities for self-government in public law are concerned, the *Bauer*/*Renner* proposals demonstrate convincingly that non-territorial self-government may be feasible to a community if the following requirements can be met:

- The community shares a common language, cultural and religious identity;
- The community expresses the desire to attain a level of self-government;
- Territorial forms of autonomy are not adequate since the members of the community are not locally or regionally concentrated;
- The community may pursuant statutory instrument register a public law Community Government with jurisdiction over cultural activities of relevance to the community;
- Membership of the Community Government is based on freedom of association;
- The status of the Community Government is similar to that of a sphere of government;
- The Community Government functions in accordance with democratic principles of representation, accountability and judicial oversight;
- The powers and functions of the Community Government are matters that are of direct relevance to the language, customs and traditions of its members;
- The jurisdiction of the Community Government is non-territorial which means its decisions are applicable to individuals wherever they reside or attend services offered by the Community Government;
- No community may be obliged to establish a Community Government;
- No community or individuals may be excluded from general political processes as a result of a Community Government being established; and
- The arrangement may be permanent, temporary or as part of a political transition.

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The registration of a public law, non-territorial "government" may not be a simple process[118] and may not be a preferred or practical option for each minority. It is, however, a relevant option that should not be discounted merely because it has not had wide application or because it raises complex questions. Decentralisation to territorial entities is not without complexity (as has been witnesses by countries that had to create regions and settle the powers of such regions)[119] and so would be the case of decentralisation to a Community Government.

Non-territorial autonomy offers the advantage of accommodating minorities without the violence, genocide and conflict that so often characterise territorial organisation of governmental powers. Non-territorial autonomy may deepen democracy; expand the protection of civil liberties; and enhance a common patriotism by removing territorial control and dominance as a prerequisite for self-governance.

Contemporary constitutional law and practice stand to gain by revisiting and adjusting where necessary the ideas of *Bauer* and *Renner*.

[118] *Renner* cautioned that "it is seldom the case that principles are realized in practice in a pure form". *K. Renner*, in: E. J. Nimni (note 9), 32; He cautioned that the strict application of the "territorial principle" is cruel, but at the same time he acknowledged that the personality principle may not always be practical in its pure form.

[119] See *B. de Villiers,* Creating Federal Regions – Minority Protection Versus Sustainability, HJIL 72 (2012), 310 et seq.

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