# BERICHTE / REPORTS

## Privatised Autonomy for the Noongar People of Australia – a *sui generis* Model for Indigenous Non-territorial Self-government

By Bertus de Villiers*

**Abstract:** The Noongar people of the federal state of Western Australia have recently entered into what can be described as the most comprehensive settlement of a native title claim that spans an area of 200 000 square kilometres. The Settlement lays the foundation of a *sui generis* model for indigenous and minority self-determination in Australia and beyond. The Settlement sits between the spheres of public law and private law and provides for a form of non-territorial autonomy that is unique not only to Australia. The Noongar people are acknowledged as the traditional owners of the entire area, albeit that major other towns and cities are located in the area and the Noongar people only constitute very small minority. Whereas the topic of non-territorial self-government has been mainly explored in theory and in practice in the European domain, the Noongar Settlement shows how the principles that embody non-territorial autonomy may find root in other parts of the world. The potential relevance of the Noongar Settlement for non-territorial self-government of Aboriginal people or other minorities lies in four essential elements: firstly, creating for the Noongar people legal Corporations by statute for purposes of their self-government; secondly, decentralising powers and functions to the Corporations to enable them to perform the functions of a community government to its members; thirdly, to enable the elected Corporations to develop policies, make decisions and deliver pubic services on a personal rather than a geographical basis to the members of the community; and fourthly, to allow the Corporations to cooperate with and engage other levels of government within the system of intergovernmental relations in Australia. The Noongar Corporations, in effect, have the hallmarks of a fourth level government and represent a potential *sui generis* model for indigenous and minority non-territorial self-government.

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* Bertus de Villiers, Distinguished Visiting Professor, Law School, University of Johannesburg, South Africa, bertusdev@gmail.com.

## A. Introduction

Self-determination is a long sought after, but so far a mirage for the Aboriginal people of Australia.[1] Aboriginal people are caught up in a political system based on assimilation whereby majority rules apply and little room is left in public law for recognition of indigenous rights. Aboriginal people did not form part of the constitution making process of Australia (1891-1898); the Constitution does not recognise Aboriginal people in any particular way; and Aboriginal people do not have any special self-governing or power-sharing rights comparable to special arrangements nowadays often found in modern constitutions. Aboriginal people also do not have self-governing reserves akin to Indian reserves in the USA and Canada and the Sami in the Nordic countries where their laws and customs are applied.

The diminished status of Aboriginal people can be attributed to the circumstances and legal dogma that prevailed at the time of British settlement in 1788 when Australia was regarded as *terra nullius* under common law. The term *terra nullius* meant that the land was either regarded as uninhabited or to the extent that it had been inhabited that the indigenous people did not possess the required laws, customs or systems of societal organisation that qualified them for any form of recognition, negotiation or treaty of self-governance. In the 1971 Australian judgement of *Milirrpum* the question of traditional land rights in the form of native title of Aboriginal people was raised for the first time, but the court found that although the Aboriginal people at the time of settlement has a subtle and elaborate systems of social rules and customs that gave rise to a stable order of society, the court was bound by previous judgments and therefore did not acknowledge the existence of native title.[2] In the famous *Mabo*-judgement in 1992 the High Court of Australia reversed the *Milirrpum* judgement that native title did not exist in Australia and rejected the *terra nullius* fiction.[3] The Court found that Aboriginal people did indeed have relative sophisticated systems of traditional laws and customary rules that regulated ownership, use, access and control of their traditional lands. These traditional rights, called native title, continue to exist unless extinguished by way of legislation.

The status of Aboriginal people in public law is not dissimilar to that of many other indigenous communities in the world. The unique laws, customs and traditional practise of indigenous peoples are often subsumed by laws and policies introduced by settler communities. In some instances, however, domestic courts have in recent times adopted an interpretation that recognise the right of indigenous people to be consulted prior to their traditional lands being used by non-indigenous people for a specific purpose, such as mining or

1 In this article the term Aboriginal people is used as a collective noun to describe the traditional owners of the land of Australia, including the islands to the north of Australia of which the traditional owners are the Torres Strait Islander People.

2 *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141 (27 April 1971) Supreme Court (NT).

3 *Mabo v Queensland (No 2)* [1992] HCA 23, (1992) 175 CLR 1 (3 June 2019).

agriculture.[4] There is, however, no universal, justiciably enforceable right to consultation; self-determination or self-government of indigenous people.[5]

Whereas members of some indigenous communities internationally reside in close proximity to each other in small local settlements for some form of localised self-government within a tribal arrangement, Aboriginal people in Australia generally speaking live intermingled with the rest of the population. Aboriginal people do not live adequately in concentrated numbers for a form of local, territorial government. This is not dissimilar to many other indigenous peoples in the world whose members often live in sizeable numbers outside of traditional areas.[6]

Territorial forms of self-government are therefore not appropriate to accommodate the self-determination aspirations of Aboriginal people.[7] This statement may seem contradictory since Aboriginal People generally make reference to their own identity, culture and values in the context of the land from where they originate. The challenge in modern day Australia is, however, that traditional lands of Aboriginal people have often become the subject of other interests, be is urban development, mining, farming or pastoral use. The rights of Aboriginal people therefore in many instances co-exist with the rights of other communities and as a result Aboriginal people generally constitute a minority at the local level of government. Non-territorial arrangements may offer then an opportunity, as the Noongar Settlement does, to discharge powers and functions over the land to which they belong, but without the need to be in the majority. The options for non-territorial outcomes is, of course, only proposed in those instances where Aboriginal People do not constitute a local majority. In some of the more remote parts of Australia Aboriginal communities continue to constitute a majority on their lands and for those a form of territorial self-government is suitable.

Most recently a ground-breaking agreement was entered into between the state of Western Australia and the Noongar Aboriginal people. The so called Noongar Settlement has

4 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC) (25 October 2018); *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya, 273 of 2003* and *Mabo v Queensland*, note 4.

5 The *United Nations Declaration on the Rights of Indigenous People* reference to self-determination is at best aspirational and its practical effect depends on the measures adopted by sovereign states. There is no universal normative standard to which self-determination or self-government can be measured or on which it can be based.

6 *Raphaëlle Mathieu-Bedard*, Non-territorial Indigenous Self-Governance in Canada and the United States, Flensburg 2017.

7 *Bertus De Villiers*, Self-determination for Aboriginal People – Is the Answer Outside the Territorial Square?, The University of Notre Dame Australia Law Review 15 (2014), p.74-106.

been described as akin to a modern day treaty[8] and a potential template for other parts of Australia and even beyond the shores of the country.[9]

The Noongar Settlement represents a legal basis for limited self-government for the Noongar people on a non-territorial basis by way of private, corporate legal entities. In this way the Noongar community becomes a legal person via the instrument of a legal corporation.

The corporate entities, called Aboriginal Corporations, created by the Noongar Settlement and the powers exercised pursuant to the Settlement exist parallel to local governments. In some respects, the Noongar Settlement can be regarded as a fourth level of government since the Noongar Corporations exercise public powers, for the common good of the Noongar people, on the basis of freedom of association on a non-territorial basis. The Noongar Settlement affects around 30 000 Aboriginal persons and has application over an area of around 200 000 square kilometres which includes major urban areas such as Perth, Geraldton, Albany and Bunbury.

This article reflects on the theoretical scope of non-territorial autonomy and then applies those principles to give content to the right to self-determination under the United Nations Declaration on the Rights of Indigenous People, where after the key elements of the Noongar Settlement are analysed.

The conclusion reached is that the Noongar Settlement represents a form of non-territorial self-government.[10] The Settlement sits between public law institutions and private associations as a *sui generis* arrangement.[11] The Noongar Corporations have the potential to become a form of government to the Noongar people and to deliver key socio-economic and cultural services to the community in parallel to the services they receive from the local and state governments.

8 *Harry Hobbs and George Williams*, The Noongar Settlement: Australia's First Treaty, Sydney Law Review 40 (2018), p. 1-42.

9 *Bertus De Villiers*, Chasing the Dream – Self-Determination on a Non-Territorial Basis for the Noongar Traditional Owners in the South West of Australia, International Journal on Minority and Group Rights 27 (2019), p. 1-23.

10 It must be noted that whereas the Noongar Settlement is restricted to a geographical region, the manner in which the powers and functions of the Corporations are exercised are not defined by territory but rather in a non-territorial, personal manner. This in effect means that only those Noongar persons who utilise or attend services of the Corporations are bound thereby. A determination of native title is not akin to a reserve where a community exercise exclusive rights. Native title rights, even if determined, are generally exercised concurrently with several other rights, for example ongoing public access; mining; fishing and pastoral activities.

11 *Sui generis* is a Latin term that denotes something of a unique character or special kind that does not fall within the scope of existing definition or description. In this case *sui generis* refers to the creation of Noongar legal Corporations that sit between the spheres of public and private law.

## B. A Succinct Overview of the Profile of Aboriginal People

The term "Aboriginal people" refers to a collection of indigenous communities that share certain communalities as the original inhabitants of Australia, but who also have distinct languages, laws, culture and customs in regard to the continent they occupy.[12] In fact, it may be more accurate to refer to Aboriginal "peoples" since it is estimated that at the time of settlement in the late eighteenth century there were around 250 indigenous languages spoken with a further 800 dialects. Today there are around 150 remaining indigenous languages, most of which are endangered and few are fluently spoken.[13]

The diversity of languages, customs and traditional laws make it impractical to design a centralised system of self-government for Aboriginal people. Whatever institutions are designed, the diversity that characterises Aboriginal people and the unique relationship of Aboriginal peoples to their land should be reflected within those institutions. In this sense, the many international examples of non-territorial forms of autonomy, self-government and self-organisation are potentially relevant to the Aboriginal people of Australia.

Aboriginal people constitute around 2.6% of the population of Australia at 798 000 persons.[14] Approximately 10% of Aboriginal people speak an Aboriginal language at home, but with English being the predominant language. Each state and territory has a sizeable number of Aboriginal inhabitants:

State of residence

| | |
|---|---|
| New South Wales | 216,176 |
| Queensland | 186,482 |
| Western Australia | 75,978 |
| Northern Territory | 58,248 |
| Victoria | 47,788 |
| South Australia | 34,184 |
| Tasmania | 23,572 |
| Australian Capital Territory | 6,508 |

Aboriginal people in a cultural context refer to the area from where they originate as their "country". Whereas in a general political sense Aboriginal people collectively aspire in the national political discourse for a form of self-determination, at a practical level the identification of a particular Aboriginal community is generally associated with a special part of

12 Whereas the term "Aboriginal people" is most widely used in Australia, other terms used are "First Nations" and "Indigenous People". Federal and state legislation tend to use the term Aboriginal people.

13 *AIATSIS*, Indigenous Australian Languages, Canberra 2019, https://aiatsis.gov.au/explore/chapters/indigenous-australian-languages (last accessed on 7 January 2020).

14 *Australian Bureau of Statistics*, Aboriginal and Torres Strait Islander population projected to reach 1 million by 2028, Canberra 11 July 2019, https://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbyCatalogue/5D8264F4B083F282CA25762A002726E3?OpenDocument (last accessed on 29 May 2020).

Australia. According to Aboriginal customary law a community or an individual who belongs to a community may only speak for and is responsible to care for the country from where their apical ancestors originate.

The Noongar Settlement reflects this reality of Aboriginal land ownership. The Noongar Settlement seeks to recognise a wide set of rights of the Noongar people; bestow them with certain benefits; and grant them powers of self-government albeit in a *sui generis* manner. The Noongar Settlement does not seeks to establish public law institutions of self-government, but yet the private Corporations established pursuant to the Noongar Settlement may be used as vehicles to deliver public services to the Noongar community; manage public lands; engage in nature conservation; offer social services; undertake various under functions that fall within the domain of public law institutions; and make policy inputs about matters that affect the Noongar people.

## C. What is Meant by Self-Determination for Aboriginal People?

The terms "self-determination" or "self-government" are often used interchangeably in political discourse in Australia (and beyond), but with little if any agreement as to its meaning and practical application.[15] There is no justiciable right in international law to self-determination for domestic minorities or for indigenous people.[16] The closest to a universal norm for self-determination is found in the United Nations Declaration on the Rights of Indigenous People (UNDIP),[17] but the Declaration is non-binding; it does not define the term self-determination; and it does not contain a normative standard for institutions and structures that must arise from the right to self-determination.[18]

The UNDIP does however contain important principles such as the right to autonomy and self-government; the rights to maintain and develop educational, cultural and political institutions; and the right to promote and develop institutional structures to promote the unique culture, customs, laws and traditions of indigenous people.[19] These rights are not justiciable in a legal sense, but they do lay the groundwork for institutional and policy developments in signatory countries.

15 *Alexandra Tomaselli*, Indigenous Peoples and their Right to Political Participation, Baden-Baden 2019. Tomaselli (173) refers to the various facets of self-determination collectively as 'composite rights'.

16 *S. James Anaya*, Indigenous Peoples in International Law, Oxford 2004.

17 Article 3 of the UNDIP: "Indigenous peoples have the right of self-determination."

18 *Stefan Oeter*, The protection of Indigenous Peoples in International Law Revisited – From Non-Discrimination to Self-Determination, in: Holger Hestermeyer / Doris Konig (eds.), Coexistence, Cooperation and Solidarity, Leiden 2012, p. 477-501.

19 See for example articles 4, 5, 20(1) and 34 of the UNDIP.

The manner and form in which indigenous self-determination is recognised, is however ultimately within the discretion of sovereign states.[20]

There is currently a process underway in Australia to give to Aboriginal people a special advisory status in their interaction with the federal government and parliament.[21] This is not the first time such a venture has been undertaken. There have been several attempts in Australia to give to Aboriginal people an advisory role whereby they could comment on and make inputs into policy and legislative initiatives at the national level. These advisory bodies have without exception ended in disappointment and failure.[22] The most recent initiative is called *The Voice*, whereby it is proposed that Aboriginal people would be granted an elected body with powers to give advices to the federal government and parliament.[23] The Voice, even if successfully implemented, is however not intended to address the demand for self-determination or self-government of Aboriginal people.

The one area where creative progress has been made in Australia in the search for a form of self-determination for Aboriginal people has been *within* states where Aboriginal traditional owners have entered into various types of agreements with state and local governments about matters that affect the local Aboriginal community. These agreements principally arise from native title settlements where the rights of a community to their traditional lands are recognised and rights of consultation in regard to land, as well as management and control of land form part of the settlement of the native title claim. The native title rights, depending of the nature of the rights that form part of the so called bundle of rights, can give local Aboriginal communities a measure of self-administration in areas such as control of access to their lands; environmental protection; housing; mining; and cultural and customary rights.[24] These agreements cannot be regarded as public law rights to self-government, but the agreements are of more substance than mere civil law contracts. The native title agreements are generally registered as an Indigenous Land Use Agreement (ILUA) under the 1993 Native Act and could perhaps best be described as a form of statutory contract.

20 Sterio explains that self-determination in international law can be effected in several ways of which secession is an "extreme case". Internal or domestic forms of self-determination are self-government, autonomy, and free association. *Milena Sterio*, The Right to Self-Determination under International Law, London 2012, p. 18. Also see *Marc Weller*, Escaping the Self-Determination Trap, Leiden 2008.

21 *Bertus De Villiers*, An Advisory Body for Aboriginal People in Australia – One Step Forward and Two Back?, Verfassung und Recht in Übersee 50 (2017), p. 259-280.

22 *Bertus De Villiers*, An ancient people struggling to find a modern voice – experiences of Australia's indigenous people with advisory bodies, International Journal on Minority and Group Rights 26 (2017), p. 1-21.

23 *Bertus De Villiers*, The Recognition Conundrum – Is an Advisory Body for Aboriginal People Progress to Rectify Past Injustices or Just Another 'Toy Telephone', Journal on Ethnopolitics and Minority Issues in Europe 17 (2018), p. 1-28.

24 *Melissa Perry/Stephen Lloyd* (eds.), Native Title Law, Sydney 2018.

Self-determination for Aboriginal people therefore has two objectives, firstly the ability to manage and control the land that they regard as their country, and secondly to be able to make inputs and participate in the formulation of policy in regard to matters that affect Aboriginal people.

## D. Is Non-Territorial Self-Government Relevant to Aboriginal people?

Non-territorial self-government involves in essence that decision-making and/or administrative powers are decentralised to a legal entity representative of an ethnic minority to enable such an entity to make policies; enact by-laws and administer policies for the members of the minority regardless where they reside.[25] The jurisdiction of the entity is not defined by way of territory but rather by way of function. Persons who attend the services of the entity, for example schools, libraries and cultural events, are therefore within the jurisdiction of the entity regardless where they reside.[26] In recent years there has been a notable increase in scholarly discussion about the merits of cultural autonomy, particularly as a result of the challenges experienced with the protection of minorities within the new, decentralised democracies of central and eastern Europe.[27]

Since the proposition that non-territorial self-government is generally applicable to cultural and linguistic minorities, it has also been described as "cultural autonomy" since it seeks to give to minorities powers of self-government in regard to matters that affect their language, culture, and traditions. Osipov aptly describes cultural autonomy as follows:

> *"Generally speaking, the term National Cultural Autonomy and similar notions encompass a broad range of institutional setups which envisage self-organization 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."*[28]

25 In this article "decentralisation" refers to the "transfer of authority and responsibility for public functions from the central government to intermediate and local governments or quasi-independent government organisations and/or the private sector." (*World Bank*, Different Forms of Decentralisation, http://www1.worldbank.org/publicsector/decentralization/what.htm#1, accessed on 28 January 2020). It is noted that within the term "decentralisation" there are different forms of unbundling of powers, for example devolution, deconcentration, delegation and privatisation. In the case of the Noongar Settlement, it is yet too early to ascertain what type of decentralisation or combination of different forms of decentralisation would be used.

26 *Bertus De Villiers*, Community Government for Cultural Minorities – Thinking beyond 'Territory' as a Prerequisite for Self-Government, International Journal on Minority and Group Rights 18 (2018), p. 1-30.

27 See for example *Hurst Hannum*, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights, Philadelphia 1990; *Markku Suksi* (ed.), Autonomy: Applications and Implications, The Hague 1998; *Tove H. Malloy*, National Minority Rights in Europe, Oxford 2005; *Tove H. Malloy / Francesco Palermo* (eds.), Minority Accommodation through Territorial and Non-Territorial Autonomy, London 2015.

28 *Alexander Osipov*, Non-Territorial Autonomy during and after Communism: In the Wrong or Right Place?, Journal of Ethnopolitics and Minority Issues in Europe 12 (2013), p. 23.

Non-territorial self-government has in literature been principally the focus of attention by European scholars and in practice the concept has had limited application to parts of central and eastern Europe. The concept continues to receive substantial attention within the European domain. In Australia little has been published on the topic of non-territorial self-government for Aboriginal people. In few other jurisdictions non-territorial autonomy has been explored, except perhaps in South Africa.[29] In this regard the words of Max van der Stoel ring true when he observed that "insufficient attention has been paid to the possibilities of non-territorial autonomy" by modern constitutional designers.[30]

Suski draws a distinction between public functions that are discharged by a cultural community under a form of cultural autonomy compared to activities and events that may be undertaken by private initiatives such as clubs or voluntary associations. Suski describes non-territorial form of self-government as

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

The essential differences between the legal status of an institution rising pursuant to cultural autonomy compared to ordinary non-governmental organisations like clubs are that (i) the former is, in essence an organ of government, whereas the latter is a private association; (ii) the former can make and administer by-laws whereas the latter self-organise by way of private resolutions; and (iii) the former operates within the public sphere whereas the latter operate in the private sphere.[32]

At a practical level cultural autonomy offers to a minority the opportunity to exercise "some kind of self-government – usually through representative bodies, the members of which are elected by and from the members of the minority concerned."[33]

The potential relevance of non-territorial self-government for Aboriginal people lies in four essential elements, namely having an elected organ under public law with a form of government; decentralisation (in the widest meaning of the term) to the legal entity public

29 *Bertus De Villiers*, Section 235 of the Constitution: Too Early or Too Late for Cultural Self-Determination in South Africa?, South African Journal on Human Rights 25 (2014), p. 458-483.

30 *Max Van der Stoel,* Peace and Stability through Human and Minority Rights: Speeches by the OSCE High Commissioner on National Minorities, Baden-Baden 1999, p. 172.

31 *Markku Suksi*, Personal Autonomy as Institutional Form – Focus on Europe against the Background of Article 27 of the ICCPR, International Journal on Minority and Group Rights 15 (2008), p. 163.

32 *Bertus De Villiers*, Community Government for Minority Groups: Revisiting the Ideas Renner and Bauer towards Developing a Model for Self-Government by Minority Groups under Public Law, Heidelberg Journal of International Law 76 (2016), p. 1-40.

33 *Rainer Hofmann*, Political Participation of Minorities, European Yearbook of Minority Issues 6 (2006/7), p. 11.

powers and functions; the organ can formulate policies, enact by-laws and deliver public services on a personal rather than a geographical basis; and the organ can cooperate with and engage other levels of government as part of a system of intergovernmental relations.

The *Corporations (Aboriginal and Torres Strait Islander) Act 124 of 2006* (CATSI Act) in Australia is specifically designed to enable Aboriginal communities to become incorporated for a specific purpose.[34] The purpose of such a Aboriginal corporation may be cultural; commercial; educational; or any other relevant objective.[35] Becoming incorporated under the CATSI Act is only available to Aboriginal people and the assistance provided by the federal government, including legal advice, is also limited to Aboriginal people. For example, federal funds are made available to assist in the management of the Aboriginal corporations; training of members and directors; to ensure transparency of activities of corporations; proper recordkeeping and reporting; and implementing proper corporate governance procedures by corporations.[36]

The relevance of the CATSI Act for purposes of this article is that the Act provides a potential legal instrument whereby Aboriginal people could establish a legal entity under statute for purposes of a form of self-determination that is not be constitutionally enshrined, but it would enable Aboriginal communities to protect and promote their laws and culture; to look after their places of historical importance; to undertake socio-economic activities, and most importantly for current considerations, to contract with local and state governments to act as agent for those governments in the delivery of services to Aboriginal people. It is particularly in cases where a successful determination of native title has been made that the CATSI Act can provide a vehicle under which a form of corporate self-government could be achieved. [37]

The convergence between Aboriginal corporations under the CATSI Act and the concept of non-territorial self-government is therefore that Aboriginal corporations exist to serve *their members* not to service a particular territorial jurisdiction; Aboriginal corporations are principally involved in cultural, community and socio-economic activities of their members; Aboriginal corporations are elected by their members and are accountable to the

34 CATSI Act (Corporations Aboriginal and Torres Strait Islander Act 124 of 2006), https://www.legislation.gov.au/Details/C2017C00055 (last accessed on 18 May 2020).

35 Indigenous People may also incorporate organisations under other legislation (for example the Companies Act), but the CATSI Act establishes a special basis for information and provides support to communities. Around 3000 Aboriginal corporations have been registered under the CATSI Act.

36 See the online tools to assist members of Aboriginal corporations to manage their affairs under the CATSI Act (CATSI factsheet). *CATSI* Factsheets at http://www.oric.gov.au/resources/factsheets (last accessed on 19 April 2020).

37 The federal *Native Title Act 1993* requires that upon successful determination of a claim for native title, the title is held in trust by an Aboriginal corporation (Registrar, 2010).

members and to the registrar of Aboriginal corporations;[38] and the Aboriginal corporations may make policy inputs, undertake activities and deliver services to their members on behalf of government departments on the basis of agency or delegation.[39]

In summary, the application of cultural autonomy for purposes of self-government by Aboriginal people is relevant since the concept is adequate for minorities who live dispersed in the country but have a strong political will for self-government and articulate their claims as such. The community is entitled to different, wide-ranging rights in political, economic and social life, although these rights have so far usually been limited to matters of culture, language, religion and education.[40]

## E. Sui Generis Self-Government for the Noongar People

### *I. Overview*

The Noongar people reside in the south western part of Australia in the federal state of Western Australia. The Noongar people comprises several sub-family groupings, but for purposes of pursuing their native title claim and self-determination the respective groupings entered into a unified negotiation process with the local, state and federal governments.[41] The respective sub-family groups have connection to particular parts of the Noongar area.[42] The population size of the total Noongar community is around 30 000 and the area they regard as their ancestral country is about 200 000 square kilometres in size.[43] Their ancestral land is nowadays co-inhabited by around two million non-Aboriginal persons, with major cities, towns, villages and farms therein.

38 *Registrar of Aboriginal Corporations*, Interaction between the Corporations (Aboriginal and Torres Strait Islander) Act 2006 and the Native Title Act 2993, Canberra 2010 at http://www.oric.gov.au/sites/default/files/documents/06_2013/ORIC_InteractionCATSI-NTA_2010-01.pdf (last accessed on 20 March 2020).

39 See *De Villiers*, note 24 for a comparison between the Aboriginal corporations in Australia and the non-governmental cultural associations that can be established by cultural minorities under Russian law.

40 *Kinga Gál*, Minority Governance on the Threshold of the Twenty-First Century, in Kinga Gál (ed.), Minority governance in Europe, Budapest 2000; and *Yash Ghai* (ed.), Autonomy and Ethnicity: Negotiating Competing Claims, Cambridge 2000.

41 South West Native Title Settlement at https://www.dpc.wa.gov.au/swnts/Documents/Fact%20Sheet%20-%20Noongar%20Corporations%20-%20September%202017.pdf (last accessed on 28 January 2020).

42 *ABC*, Australia's Biggest Native Title Settlement, worth $1.3b, Registered Three years after Deal Struck, 17 October 2018 at https://www.abc.net.au/news/2018-10-17/australia-biggest-native-title-claim-worth-$1.3b-registered/10386774 (last accessed on 20 March 2020).

43 This area is larger than the territory of countries such as Belgium; Ireland, Austria, Portugal, Hungary and Greece. See https://www.nationmaster.com/country-info/group-stats/European-Union/Geography/Area/Total (last accessed on 12 May 2020).

The Noongar people find themselves, as many indigenous people do, as an indigenous and cultural minority on the land of their ancestors. Due to their small numbers, the scattered pattern of their residence, and the displacement they have suffered since settlement, the Noongar people do not control any local governments and their political and policy influence at a local, state and federal level is minimal.

The question for purposes of this article is whether a form of non-territorial self-government may hold any promise for the Noongar people specifically or Aboriginal people in general?

It is the proposition of this article that the avenue for potential limited self-government for the Noongar people runs along the course of land claims, or native title as it is called in Australia. A determination of native title is an acknowledgment under Australian law that the traditional proprietary rights to land that the Noongar people had at the time of settlement, continue to exist and must be respected and honoured. Those rights to land also embody a system of custom and law according to which land was managed; social interaction was regulated; and laws and customs were maintained. A determination of native title is therefore a potential basis for an Aboriginal community to impose a form of self-government arising from their native title albeit that they do not exclusive occupy the area. A determination of native title may also grant a basis for an Aboriginal community to offer services to its members even if they do not reside within the area where native title has been determined.

The Noongar people in the 1990s lodged their first native title claims. Initially, in order to register a claim, the respective Noongar families lodged their own family claims for relatively small areas, but over time these claims became amalgamated until there was what is now known as the single Noongar claim for the entire area.

It is not a simple process for native title to be determined. The following criteria must, in short, be met for any claim group to establish native title: the community bear the onus of proof to satisfy the court that they are connected to the land being claimed[44] and that they are related to the apical ancestors that resided on the land at the time of settlement;[45] that they continue to hold and practice the customs and traditions of their apical ancestors albeit within the context of contemporary society which allows for adjustment and mod-

44 The connection to traditional lands need not be physical by the community actually living on the land, but it must be spiritual and the knowledge transmitted but be evidenced of the knowledge, understanding and caring of the land in question. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.

45 See *Western Australia v Ward* (2000) 99 FCR 316; *Daniel v Western Australia* [2003] FCA 666 (3 July 2003) [146]; and *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1.

ernisation;[46] and that the bundle of rights they claim continue to exist.[47] The essence for a successful claim is that the native title rights must have originated from a normative system of Aboriginal law and custom which regulated the traditional observance of laws and customs up to the time of British settlement.

After protracted litigation[48] the parties to the Noongar native title claim entered into settlement negotiations. The federal government and the state government of Western Australia played an essential role in these negotiations. The negotiations commenced around December 2009 and continued until 2016 when the Parliament of Western Australia enacted the *Noongar Recognition Act* and the *Noongar Land Administration Act*,[49] together with an Indigenous Land Use Agreement for each of the six sub-areas that together constitute the Noongar area. The full Settlement only became legally effective in late 2019 after all legal processes, including ongoing litigation had been completed.[50] These legal instruments together are referred to as the Noongar Settlement.

This Settlement is ground-breaking in many respects and can be regarded as the most comprehensive native title settlement and self-governing arrangements for an Aboriginal community yet in Australia.

The Settlement is, in a nutshell, unique for several reasons, for example: it acknowledges the Noongar people's rights to a large part of the state that formed their ancestral country; it extinguishes native title and replaces it with statutory rights that exceed the scope of traditional native title rights; it acknowledges the wider Noongar community as well as the sub-groupings that make up the community as traditional owners of the land; it grants a package of rights and compensation to facilitate Noongar self-determination; and each of the sub-groupings as well as the combined Noongar community have registered an Aboriginal Corporation under the CATSI Act to manage, coordinate and conduct their affairs. These Corporations discharge their functions alongside local governments and provide services specifically to Noongar persons – hence the applicability of *non-territorial* jurisdiction.

It is the proposition of this article that the seven Noongar Corporations form a *sui generis*, de facto fourth level of government, although not being so called, whereby the Noongar people can manage and control their own cultural, heritage and linguistic interests

46 Native Title Act, a223(1)(a)-(b).

47 For a useful overview of requirements to prove native title see *Nick Duff*, What's Needed to Prove Native Title? Finding Flexibility in the Law of Connection, Canberra 2014, at https://aiatsis.gov.au/sites/default/files/products/discussion_paper/whats-needed-to-prove-native-title.pdf (last accessed on 15 February 2020).

48 *Bennell v State of Western Australia* (2006) FCA 1243 and *Bodney v Bennell* 2008 FCAFC 63.

49 *Land Administration (South West Native Title Settlement) Act 2016 (WA)* (Noongar Land Administration Act). Preamble item 3 of the Noongar Land Administration Act provides that the agreement compensates the Noongar people for the "loss, surrender, diminution, impairment and other effects" of their native title rights and interests.

50 *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238.

on a non-territorial basis, while at the same time the Corporations may enter into service and agency agreements with local, state and federal authorities to act as agent for the delivery of public services to Noongar individuals in areas such as health, education, infrastructure and conservation.

The main elements of the self-governing arrangement for the Noongar people will be described in the following.

### *II. Acknowledgement of Noongar Rights*

The Noongar Settlement is encapsulated in statute and is also registered Indigenous Land Use Agreements (ILUA) pursuant to the Native Title Act, 1993.[51] This means the rights of the Noongar people are not merely contractual in nature, but the Settlement has the form of a statutory agreement that binds future generations. Each of the six sub-areas of the Settlement has its own land use agreement which is registered under law as an ILUA.[52] This brings the Settlement and the Noongar Corporations established by it within the realm of public law.

The Noongar Recognition Act recognises the Noongar people as the traditional owners of the area; it acknowledges the special contribution they have made and continue to make to the heritage, cultural identity, community and economy of the state of Western Australia; and it confirms that the package of measures included in the Settlement are in full and final settlement of their native title claim.[53]

The respective ILUAs bind all persons and governments, even persons and entities who were not part of the agreement. The registration of the agreement is aimed to put third parties, now and into the future, on notice of the terms of the Settlement. The respective ILUAs acknowledge that the Settlement is "unprecedented" in Australia and that the Settlement "provides a significant opportunity for the Noongar people to achieve sustainable economic, social and cultural outcomes."[54]

51 An ILUA in essence sets out the rights and interests of the Aboriginal group in relation to a land or sea area. The registration of the ILUA puts non-parties and future generations on notice of the terms and conditions that apply to the specific land. For more information and fact sheets about Indigenous Land Use Agreements refer to http://www.nntt.gov.au/ILUAs/Pages/default.aspx (last accessed on 15 January 2020).

52 For convenience the Ballardong ILUA (in excess of 800 pages) is used as a reference in this article since the other five ILUAs contain similar terms and conditions (Ballardong Land Use Agreement). The native title rights are dealt with in accordance with s 24CB(e) and s 24EB(1)(d) Native Title Act. Ballardong Land Use Agreement. *Ballardong People Indigenous Land Use Agreement* at https://www.dpc.wa.gov.au/swnts/Documents/Ballardong%20People%20Indigenous%20Land%20Use%20Agreement-OCRd%20version.pdf (last accessed on 18 May 2020).

53 Noongar Recognition Act, Preamble.

54 Ballardong ILUA, Preamble.

The outcomes envisaged by the Settlement are therefore not limited to linguistic-cultural matters, but also aimed at the improvement of the socio-economic welfare of the Noongar people as a whole.

The underlying principle of the Settlement is that this is not merely a club or an association created for the Noongar people. This is a statutory recognition of the Noongar people for purposes of a form of self-determination under the guidance of the respective Corporations.

### *III. Legal Corporations for Noongar People and Sub-family Groups*

The Noongar Settlement entails that seven elected Corporations are established for the Noongar people – one Corporation for each of the six sub-family groupings and one Central Services Corporation for the six groupings to work together in common areas. The arrangement is, in effect, a private *quasi* federal arrangement whereby each of the sub-communities is responsible to provide services to their community, whereas the entire Noongar people work together in the overarching Corporation to coordinate activities and undertake projects and initiatives that are of relevance to the Noongar people. From a public law perspective the instruments of incorporation are in effect akin to a *sui generis* constitution.

The legal Corporations reflect the cultural and traditional linkage of the respective Noongar families to the sub-regions within the total settlement area. These arrangements reflects the historic reality that the Noongar People on the one hand shared a common language, law and customs, but on the other hand the caring of country was done at a local level for specific families.[55] The Central Services Corporation is responsible to coordinate the activities of the six sub-regional Noongar Corporations; to undertakes collective negotiations with federal, state and local government agencies; to initiate and coordinate major projects; to advocate on behalf of the Noongar people; to develop training and other material for leadership development; to undertake heritage protection and a heritage protocol for the entire region; to develop a cultural advice policy; to make investments; and in general to promote the interests of the Noongar People.[56]

The six Noongar Corporations are each governed by an elected council comprising two to four directors. The members of the Corporation elect the councillors.[57] A maximum of two additional directors are appointed by the elected directors for each Corporation for reason of their expertise in areas such as law, finance, business or social matters. The directors are responsible for the day to day governance and operations of the Corporation. Special meetings may be convened of members to vote on or discuss matters of importance to the community. Membership of each Corporation is open to any Noongar person, wherever

55 *Jackson McDonald*, Noongar Governance Structure Manual (2016) at https://www.dpc.wa.gov.au/swnts/Documents/Noongar%20Governance%20Structure%20Manual%2020-12-2016-JacMac.pdf (last accessed on 18 April 2020).

56 Ballardong ILUA, Schedule 10(4).

57 Voting for the directors of the Corporations is by postal vote in order to encourage participation.

they reside, who is connected to the apical ancestors who used to reside in the sub-region.[58] Membership of a Corporation and attendance of activities of a Noongar Corporation is voluntary; and no Noongar is obligated to receive any benefits, to accept a service or to participate in activities of a Corporation. A member may also resign from the Corporation.[59] Membership of a Corporation does not disqualify any person to vote for local governments or to receive services from local governments.

Each of the six Noongar Corporations nominate one director to the Central Services Corporation. The Central Services Corporation may in turn nominate an additional two directors for purposes of their expertise. The Central Services Corporation has strong federal characteristics and may only engage in activities that are delegated to it by the individual Corporations; or matters that fall outside the skills of the individual Corporations; or matters that require a common approach on behalf of all the Noongar people. The six sub-region Noongar Corporations are responsible to manage and implement the Settlement within their region.[60]Each Corporation can decide how to promote the traditional laws, culture and customs; measures to manage any lands that may fall within its jurisdiction; to participate joint management activities; to provide services to its members; to cooperate with state and local governments; to advocate on behalf of their members; and to undertake any activities on behalf of its members. The interaction between the six sub-regional corporations and the Central Corporations have strong elements of federal self-rule and joint rule embodied into its institutional design.

### *IV. Area of Noongar Settlement*

The Noongar Settlement is distinct from other native title determinations in the sense that in ordinary circumstances a native title determination can only be made in regard to an area where native title has not been extinguished, for example by the grant of freehold. Native title determination areas are therefore often like a Swiss cheese full of pockets and gaps with freehold, towns, cities, farms and infrastructure excluded from native title. The Noongar Settlement in contrast applies to the entire area of settlement. This more accurately reflects the fact that the entire area used to be the country or traditional land of the Noongar people. As mentioned above, the settlement area is divided into six sub-regions of which each is made up of the families whose apical ancestors originate from those areas.[61]

58 A membership-expression form for aspiring members is available for the detail of the person who wants to be admitted. See http://www.noongar.org.au/formal-docs (last accessed on 22 January 2020).

59 For general background information about the Corporations and operations see *South West Native Title Settlement,* note 42.

60 Ballardong ILUA, item 8(1).

61 The six ILUAs were registered on 17 October 2018. For more information about the registration of an ILUA see http://www.nntt.gov.au/Information%20Publications/11.Authorisation%20of%20Are

The Noongar area does not coincide with the jurisdictions of the respective local governments. Whereas the jurisdiction of local governments are discharged to all residents of the local government area, the services offered by the Noongar Corporations are of a personal rather than a territorial basis available to all those Noongar people who seek to utilise a service; attend a function; or receive a benefit. The Corporations and local governments therefore exist parallel and not to the exclusion of each other.

It is not surprising that the Settlement has been described as the first real "treaty" between an Aboriginal community and a government of Australia.[62] The Settlement entails in essence that contemporary and traditional systems of law and governance have agreed to a binding legal instrument that exhibits strong elements of a founding constitution.

### *V. Settlement Package*

The Settlement Package is the most elaborate settlement yet entered into in an Australian native title proceeding. What makes the package particularly relevant for purposes of this article is that it contains elements of traditional law and custom in regard to land, and also contemporary competencies in regard to housing; socio-economic development; joint management of national parks; training; advocacy; education; tourism and nature conservation.

The main elements of the package are: the establishment of Noongar Land Estate to manage 320 000 hectares for the benefit of the Noongar people;[63]a grant of A$46 million over a period of 10 years to assist with the management and control of the land; access of Noongar people to state land for purposes of cultural and traditional activities; joint management of national parks and employment of Noongar people for management activities;[64] transfer of 121 houses for the benefit of Noongar families; an assistance package to develop business and commercial skills; the establishment of the Noongar Boodja Trust as an overarching trust to hold, manage and control all benefits that accrue from the Noongar Settlement on behalf of the Noongar people with A$50 million per annum for 12 years towards a future fund for the Corporations; and funding for offices for the seven Noongar Corporations from where all activities can be planned; coordinated and directed.[65]

### *VI. Nature of Jurisdiction of the Corporations*

The Corporations are defined by way of region since that is the area where the Noongar people traditionally exercised their rights and interests, but the services on officer can be

a%20Agreements.pdf (last accessed on 3 March 2019). See the respective ILUAs for the six areas at https://www.dpc.wa.gov.au/swnts/Pages/Publications.aspx (last accessed on 2 February 2020).

62 *Hobbs / Williams*, note 9, p. 23 describe the Noongar Settlement is a treaty which, in effect, restores an historical injustice within the context of a contemporary agreement.

63 Ballardong ILUA, 10(8).

64 Ballardong ILUA, 10(12).

65 Ballardong ILUA, 10(15).

attended by any Noongar person regardless of where they reside. The Corporations exist alongside local governments and include several local governments within the respective Noongar sub-regions.

The jurisdiction of the corporations is non-territorial in the sense that only those persons who choose to attend the activities; services or programmes of a corporation are affected by it. The contrast between territorial and non-territorial jurisdiction is simple: whereas all persons residing within a local government area are automatically bound by the by-laws of the local authority, the decisions, policies and measures of the Noongar Corporations only affect those who voluntarily submit to the authority of the Corporation by way of attendance of services or observance of customs.

Important to note is that a person is not required to elect between the services on offer by a local government and those on offer by a corporation. A Noongar person may participate in elections for the local government and the Noongar Corporation; they may attend services on offer by both; and they may at any time withdraw from participating in activities of a Corporation.

It is envisaged that as the Noongar Corporations develop in stature, credibility, experience and legitimacy, that they would also become agents for local, state and federal governments to perform functions and deliver services of a governmental nature to the Noongar people in areas such as health, education and welfare.

The powers and functions discharged by the Corporations are of *sui generis* nature. On the one hand, the Corporations do not have formal powers of government and are not recognised as governments under the constitution of the state of Western Australia. On the other hand, the Corporations are created by statute; the activities of the Corporations include socio-economic and land management policies; and the Corporations are to be included in the system of intergovernmental relations whenever the interests of the Noongar people are affected.

The groundwork has been laid for the Corporations to become cultural non-territorial legal entities that exist within an unexplored realm between public and civil law.

## F. Concluding Observations

The Noongar Settlement is unique in many respects. It is not only the first settlement of this type in Australia, it potentially sets a standard internationally for indigenous people and other minorities to be accorded statutory rights of self-government in a *sui generis* realm located between public and private law. It grants not only land rights but also rights in regard to socio, cultural and economic issues. The Settlement obliges the state government to provide substantial cash and other support to the Noongar people for at least a ten year period.

The Settlement provides for accountability of councillors of the Corporations to the Noongar people with oversight by the registrar of Aboriginal corporations. It provides for

Corporations that discharge functions on a non-territorial basis to all those who wish to utilise or attend the serves offered by the Corporations.

The Settlement sets out a typical federal structure whereby the six sub-regional corporations function on the basis of subsidiarity with only certain matters falling within the responsibility of the Central Services Corporation. The Central Services Corporation in turn comprises nominated members by the sub-regional Corporations and it discharges functions that cannot be effectively undertaken by the six sub-family Corporations.

The Noongar Corporations are in law less than governments but more than clubs or associations. They are *sui generis* in nature with the potential to become in fact organs of self-government for the Noongar people. The Settlement potentially prepares the ground for a system of informal cultural autonomy whereby the Noongar people can manage their own linguistic, cultural and heritage affairs, and also become involved in providing contemporary services to its members. In addition to the functions agreed upon, the corporations may also become agents or delegates of government departments to provide specific services in areas such as health, education and community welfare to its members. In addition to their functions, the Corporations may also make policy inputs to local, state and federal governments about matters of relevance to their members.

The Noongar Settlement is clearly intended and structured to provide a basis of self-government and autonomy to the Noongar people. The nature of objectives of the Noongar Settlement; the spirit underpinning the Settlement; and the sizeable contribution by the state of Western Australia to the ongoing operations and future fund of the Noongar, give rise to a *sui generis* constitution which is created under civil law but also operates in the field of public law.

The potential relevance of the Noongar Settlement for non-territorial self-government of Aboriginal people or other minorities lies in four essential elements:

- firstly, creating for the Noongar people as a whole and for their sub-groupings by statute legal Corporations for purposes of their self-government;
- secondly, decentralising powers and functions to the Corporations to enable them to perform the functions of a community government to its members;
- thirdly, to enable the elected Corporations to develop policies, make decisions and deliver pubic services on a personal rather than a geographical basis to the members of the community; and
- fourthly, to allow the Corporations to cooperate with and engage other levels of government within the system of intergovernmental relations.

The Noongar Corporations, in effect, have the hallmarks of a fourth level government and represent a potential *sui generis* model for indigenous and minority non-territorial self-government.