Whither the Khoisan With the Khoisan Act 3 of 2019? Is the Noongar Settlement Down Under a Preferable Process?*

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> "The Khoisan regard land as Mother Earth, the God-given space where they have practised their culture for millennia. It is inextricably linked to their heritage in all its forms and without it the aboriginal people will not be able to reclaim their rightful place and dignity." (Boezak 2017)

SUMMARY

Self-determination is no longer seriously challenged as a right under international law. This has been confirmed by the International Court of Justice (ICJ) and in South African case law. Since the 1960s, the international-law debate relating to self-determination has, to a large extent, been dominated by claims of indigenous peoples to self-determination. This debate culminated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which has been overwhelmingly endorsed by members of the UN General Assembly. In practice, self-determination nowadays means internal self-determination, which must be distinguished from external self-determination, such as secession, which is extremely rare. Internal self-determination comprises the right of an indigenous people living in a sovereign state to determine freely their political status and freely pursue their economic, social and cultural development. The terms "indigenous people" and "indigenous community" have become synonymous with "ethnocultural people" or "ethnocultural community", and the distinctions between the two are no longer watertight. It is submitted that the main purpose of the Traditional and Khoi-San Leadership Act 3 of 2019 (Khoisan Act) is aimed at the Khoisan as an ethnocultural community, although this is not evident in the Preamble of the Act. In discussing the Khoisan Act, attention is paid to its serious deficiencies. A brief reference is made to the Hungarian Roma, where an institutionalised exercise similar to that of the Khoisan Act has been embarked upon. It is a moot point whether the Khoisan Act achieves its objectives. It is proposed that the perceived objectives of the Khoisan Act can be better achieved by following the example of the Noongar Settlement in Western Australia, which has become a valuable case study on the recognition of minority rights.

KEYWORDS: self-determination, Khoisan Act, Noongar Settlement, recognition of minority rights

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1 SELF-DETERMINATION: A BRIEF EXCURSUS

Common article 1 of the International Covenant on Civil and Political Rights[1] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights[2] (ICESCR) states:

> "All people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

This is mirrored in the International Labour Organization (ILO)'s Indigenous and Tribal Peoples Convention 169 of 1989 (known as ILO Convention 169), which recognises in its Preamble

> "the aspirations of [indigenous] peoples to exercise control over their own institutions, way of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the State in which they live."

It is also mirrored in the 2007 United Nations Declaration on the Rights of Indigenous Peoples[3] (UNDRIP). In the UN General Assembly, 144 states supported UNDRIP, and the four states not in favour later endorsed it. The inclusion of the right to self-determination of indigenous peoples in UNDRIP responds to the aspirations of indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision-making that affects them. Outside the ambit of UNDRIP, the right to self-determination can be found in various international instruments and the right is no longer seriously challenged as a legal right under international law.[4]

In the *Case Concerning East Timor (Portugal v Australia),*[5] the ICJ declared self-determination to be an essential principle of international law with an *erga omnes* character. This was confirmed in the ICJ advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[6] and in the South African case, *Saharawi Arab Democratic Republic v Owner and Charterers of the Cherry Blossom.*[7]

The broad definition of the right to self-determination in common article 1 of the ICCPR and the ICESCR is not clear. It can be assumed that the right is not confined to a decolonisation context but also applies outside the colonial context. A distinction must be drawn between *external* self-determination, which mainly belonged to colonial people seeking independence and the right to *internal* self-determination,[8] which comprises

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1 United Nations General Assembly (UNGA) 999 UNTS 171 (1966). Adopted: 16/12/1966; EIF: 23/03/1976.

2 UNGA 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976.

3 UNGA A/RES/61/295 (2 October 2007).

4 Dugard *Dugard's International Law* (2018) 149; Bennet and Strug *Introduction to International Law* (2022) 209.

5 [1993] ICJ Rep 90 par 29.

6 [2004] ICJ Rep 136 par 155.

7 2017 (5) SA (ECP) 116.

8 Dugard *Dugard's International Law* 151.

the right of a *people within* a sovereign state to determine freely their political status and freely pursue their economic, social and cultural development. In *Reference re Secession of Quebec,*[9] the Canadian Supreme Court, in interpreting the word "people", held that "it is clear that a 'people' may include only a portion of the population of an existing state". It can thus be accepted that a minority living in an established state, occupying a distinct territory or not, sharing a common identity, language, culture, history and traditions can constitute a "people".

Two decisions of the African Commission on Human and Peoples' Rights[10] (ACHPR) accept that a group of persons with a common culture, language and history, occupying a distinct territory, may constitute a "people" for the purpose of self-determination.

In the *Quebec case*,[11] the court found that the right to self-determination of a "people" is, in normal circumstances, fulfilled through *internal* self-determination. Furthermore, *external* self-determination, such as secession, only arises in extreme cases, such as when a seceding region in geographical or constitutional terms separates owing to a denial of the right of internal self-determination, accompanied by the violation of human rights and the exhaustion of attempts to achieve internal self-determination.

2 INDIGENOUS AND ETHNOCULTURAL COMMUNITIES

Since the 1960s, the international-law debate relating to self-determination has, to a large extent, been dominated by claims of *indigenous* communities to self-determination. This debate, especially regarding indigenous communities, culminated in UNDRIP, which in article 3 affirms that "Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development". UNDRIP here echoes common article 1 of the ICCPR and ICESCR.[12]

The definition of indigenous people is not settled and has led to much academic debate. It is outside the ambit of this article to dwell on an extensive exposition of the term "indigenous". The author is thus brief in this regard. Many volumes have been written, attempting to get a consensus on who qualifies as indigenous.[13] For current purposes, this article follows the proposals of the UN Study of the Problem of Discrimination Against

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9 *Reference re Secession of Quebec* 1998 37 ILM 1340 par 124.

10 See *Katangese Peoples' Congress v Zaire* ACHPR Comm. No. 75/92 (1995); *Kevin Mgwanga Gunme v Cameroon* ACHPR Comm. No. 266/2003 (2008–2009); *Brookfield Waitangi and Indigenous Rights* (2006) 76.

11 *Reference re Secession of Quebec supra* par 138.

12 Barrie "The United Nations Declaration on the Rights of Indigenous People" 2013 *Journal of South African Law* 292.

13 Anaya *Indigenous Peoples in International Law* (2004); Kingsbury "Indigenous People in International Law" 1998 92 *AJIL* 414; Gilbert *Indigenous Peoples' Land Rights Under International Law* (2016); Charters "Indigenous Peoples and International Law and Policy" 2007 18 *Public Law Review* 27; Barsh "Indigenous People: An Emerging Object of International Law" 1986 80 *AJIL* 369.

Indigenous Populations[14] The gist of these proposals can be reduced to the following. Indigenous peoples have historical continuity with pre-invasion and pre-colonial societies that have subsequently developed on their territories. They consider themselves distinct from other sectors of the societies now prevailing in the territories where they find themselves. They form, at present, non-dominant sections of the community. They have in the past or present experienced a pattern of subjugation, dispossession, exclusion and marginalisation. They are determined to preserve their ethnic or separate identity as the basis for their continued existence as a people in accordance with their own cultural patterns.

This broad definition of *indigenous people* can also be applied to an *ethnocultural* minority or people and is an indication that the distinction between the two terms is *not* watertight. Rights claimed by indigenous people and ethnocultural communities have many common themes. Both base their claim to self-determination on their original occupation of the land of their origin and their traditional laws and customs. Both claim special rights and policy measures protecting and promoting their culture, language and traditions.

The distinction between the terms "indigenous people" and "ethnocultural minority" is basically informed by political expediency rather than by principle. Tomaselli[15] suggests that "indigenous" should be a matter of self-identification by which indigenous peoples identify themselves. The same approach should be followed regarding ethnocultural communities. In the Canadian decision, *Matson et al v Canada*,[16] the court recognised the importance of self-identification of an indigenous community. The court referred to decisions of the Inter-American Court of Human Rights that accepted the self-identification of an indigenous community as a social and historical fact that is part of its "autonomy"; therefore, states must respect the decision made by a community about how it identifies itself. It is submitted that this also applies to an ethnocultural community.

Integrating and accommodating indigenous or ethnocultural communities into a functional state is no easy task. Assimilation or status of either group will depend on their histories, their locations and the specific countries in which they find themselves.

3 THE KHOISAN

The Khoisan contend that they are the real indigenous people of South Africa and that the African tribes that arrived after them should not be seen as indigenous.[17] (In South African discourse, "indigenous peoples" is

[14] Martinez Cobo *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (Last Part) Submitted by the Special Rapporteur* (30 September 1983) E/CN.4/Sub 2/1983/21/Add 8.

[15] Tomaselli *Indigenous People and the Right to Political Participation* (2016) 39.

[16] CEDAW/C/81/D/68/2014/ (2022) par 18.41.

[17] Sapignoli and Hitchcock "Indigenous People in South Africa" 2013 102 *The Round Table* 335.

synonymous with "traditional peoples" and, for purposes of this article, interchangeable.)[18]

The San were hunter-gatherers who were essentially migratory and did not build permanent settlements. The San came into contact with the Khoi, who were essentially pastoralists. This resulted in a conflict of interests. The Khoi started competing with the San for game, and this set up a deadly cycle of raids and counter raids. The Khoi began to form themselves into larger and better-organised groups in order to counter the cattle-raiding of the San. The San, in turn, eventually fled the continual fighting into less hospitable areas or made peace with the Khoi and entered their society as servants, herders, hunters or warriors. Many of these San married Khoi women and were gradually accepted as fully-fledged members of the Khoi communities. This process of assimilation of San and Khoi was facilitated by the fact that they both essentially shared the same primal hunter-gatherer heritage, and their languages were related.[19] Reference to the two groups inevitably led to the term "Khoisan".

In the 15th century, European strangers entered this world seeking a sea route to the East. Like the Aborigines of Australia, the Khoisan found themselves at the mercy of these newly arriving communities. As time passed, they progressively lost their traditional lands and, owing to integration and assimilation, had to forsake their traditional lifestyles, cultures and systems of governance. Their presence consequently decreased except in the western parts of southern Africa.

In 1660, Jan van Riebeeck, leader of the first Dutch settlers to land at the Cape of Good Hope, planted a White Almond hedge, the remains of which can still be seen. The purpose of this hedge was to keep out the Khoisan cattle herders who inhabited this southernmost tip of the African continent. Van Riebeeck's orders were to barter cattle from the Khoisan and otherwise not to interact with them at all. This laid the foundation for the well-known history of South Africa, which entered a new phase when Nelson Mandela was released from prison and South Africa became a constitutional state.

Soon after the enactment of the 1996 Constitution,[20] President Mandela stated that the status of the Khoisan warranted closer attention. The National Khoi and San Council was subsequently established in 1999, serving as a forum to discuss the statutory recognition of the Khoisan. Three decades later, this discussion culminated in the Traditional and Khoi-San Leadership Act[21] (Khoisan Act). The Khoisan Act is relevant to traditional *and* Khoisan communities, but this article focuses on aspects of the Act having specific relevance to the Khoisan.

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18 Stavenhagen *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (18 January 2006) E/CN.4/2006/78/Add. 1.

19 Hausman *Holocene Human Evolution in Southern Africa: The Biocultural Development of the Khoisan* (D Phil thesis, State University of New York) 1980; Elphick *Khoikhoi and the Founding of White South Africa* (1985).

20 Constitution of the Republic of South Africa, 1996.

21 3 of 2019.

4 BACKGROUND TO THE KHOISAN ACT

As a result of pressure from the Congress of Traditional Leaders in South Africa, a Council of Traditional Leaders was established in terms of section 184 of the 1993 Constitution. This Council became the National House of Traditional Leaders by virtue of section 10 of the National House of Traditional Leaders Act of 1997. The Khoisan were *not* represented in this National House, and there was no provision for them to comment on national legislation directly affecting them. The Khoisan consequently formed an informal body to decide whether they desired to join any constitutional structure.[22]

It became clear that there was a need to accommodate the Khoisan in a more formal structure, preferably in a forum of its own. In 2003, the Traditional Leadership and Governance Framework Act[23] (TLGFA) was enacted. It provided for the recognition of traditional leaders and traditional communities. The Khoisan Act has replaced the TLGFA and the National House of Traditional Leaders Act. One of the reasons proffered for why it took so long to get Parliament eventually to accept the Khoisan Act was that the Khoisan, over the years, have become so integrated with the rest of the population that they have lost their distinct existence as an indigenous or ethnocultural community. Furthermore, they consequently became classified as "Coloured" under the apartheid racial classification system. The Khoisan Act now makes it possible for the Khoisan to re-establish their status as an ethnocultural or an indigenous people.

5 THE KHOISAN ACT

The Khoisan Act (commencing on 1 April 2021) in the Preamble provides for: the recognition of Khoisan communities; functions of Khoisan leaders; the establishment of councils, the National House and provincial houses; and a Commission on Khoisan Matters. It is the product of many years of consultation and, in the words of Boezak, seeks to "enable the Khoisan to promote, preserve and develop their cultural heritage with state funding and to make use of the State's infrastructure."[24]

The special recognition of the Khoisan through the Khoisan Act did not come easily to the government, which would have preferred not to give any special status to any community, be they indigenous or ethnocultural.

The Khoisan Act consists of 64 pages and five chapters and is approached here with a very broad brush, with references only to its main features and perceived deficiencies.

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22 Du Plessis and Scheepers "House of Traditional Leaders" 2015 3 *PER* 93.
23 41 of 2003.
24 Boezak "The Cultural Heritage of South Africa's Khoisan" in Xanthaki (ed) *Indigenous Peoples' Cultural Heritage, Rights, Debates, Challenges* (2017) 253.

5 1 Khoisan person

The Khoisan Act in section 1(1) refers to a "Khoi-San person" as someone who lives in accordance with the customs and customary law of the Cape-Khoi, Griqua, Koranna, Nama or San people, or any subgrouping thereof, and is consequently a member of a particular Khoisan community. This definition refers to several indigenous communities; it is a moot point whether the use of such a generic term as "Khoi-San person" is endorsed by all the subgroups referred to.

5 2 Khoisan community

Section 5(1) of the Khoisan Act states that a Khoisan community may apply to the Premier of a province to be recognised as a Khoisan "community" if it:

> "(i) has a history of self-identification by members of the community, as belonging to a unique community distinct from all other communities;
> (ii) observes distinctive established Khoisan customary law and customs;
> (iii) is subject to a system of hereditary or elected Khoisan leadership with structures exercising authority in terms of customary law and customs of that community;
> (iv) has an existence of distinctive cultural manifestations;
> (v) has a proven history of existence of the community from a particular point in time up to the present, and
> (vi) occupies a specific geographical area or various geographical areas together with other community members."

5 3 Khoisan council

Once the Premier has recognised a Khoisan community, that community must, by notice in the *Provincial Gazette,* establish a Khoisan council consisting of a number of members determined by the Minister according to a formula to be published in the *Government Gazette* within two years of the commencement of the Khoisan Act. The composition of such a council is extremely complex, and the details for our purpose are not important.

The Premier concerned must indicate the administrative seat of such a council in the relevant *Provincial Gazette*. The decisions of this council apply to members of the community for which it was established.

The jurisdiction of the councils is wide and includes so-called *territorial* and *non-territorial* jurisdiction, as the Khoisan live intermingled with other members of society and do not necessarily have their own lands and reserves.[25] The functions of the councils mostly comprise administration; development, advising local government; consulting with the government about interventions that may be required; entering into agreements on behalf of the community (discussed *infra*); and promoting cooperative government.

A brief word is needed on non-territorial and territorial jurisdiction. Non-territorial autonomy has no settled definition. It is a catch-all phrase for a wide range of self-decision, self-government and self-management. It seeks

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[25] De Villiers (Indigenous Rights in the Modern Era (2023)) 188 gives an extensive description of territorial and non-territorial jurisdiction.

to grant a form of self-government to communities on the basis of their *membership* of a minority group and not their *place of residence*. Its application is at best a work in progress. The application of non-territorial government has been seen in Europe – for example with the Roma in Hungary, briefly discussed below. It can range from constitutional guarantees to self-government to administrative measures to facilitate day-to-day self-management.

5 4 National, provincial and local houses

According to Chapter 3, national, provincial and local houses may be established to represent Khoisan leadership at national, provincial and local levels. The duties of these houses are set out in sections 26 to 50.

The National House "must", according to section 36(2), consider parliamentary Bills that directly affect Khoisan communities and that are referred to it in terms of section 39(1) by the parliamentary secretary; and "may" advise the government in respect of matters that concern the Khoisan. Any member of the national cabinet who is responsible for development programmes that "may" affect Khoisan communities "must" consult the National House before implementation. Parliamentary Bills referred to the National House that directly affect the Khoisan community's customary law or customs "must" be commented on by the National House within 60 days of referral. This is an extremely limited time in which the National House can consider its comments and leads to serious criticism of section 39 of the Khoisan Act.[26]

The general objectives of the National House are: to represent Khoisan leadership and their communities; to advance the aspirations of the Khoisan at the national level, and to participate in international matters that have to do with customs, traditions and matters of common interest that may influence the government's legislative processes. The National House is composed of Khoisan leaders who are delegates from the provincial houses. Provincial houses may be established by the Premier of a province in terms of provincial legislation and have the same functions as the National House, but within their provincial jurisdiction. Local houses may be established by the Premier of a province by notice in the *Provincial Gazette* for the area of jurisdiction of a municipality.

5 5 The controversial section 24 of the Khoisan Act

Section 24 of the Khoisan Act is the most controversial provision of the Act. It authorises a Khoisan council to enter into agreements or partnerships with municipalities, government departments and external parties, including investors and mining companies. This authorisation provides legislative

[26] See the ICCPR, ICESCR and UNDRIP for the international standards relating to consultation with indigenous peoples.

impetus to what John and Jean Comaroff have referred to as "Ethnicity Inc." – the commercialisation of traditional groups.[27]

A key issue of contestation is in section 24(3) of the Khoisan Act, which states that the partnerships or agreements entered into by a council must be beneficial to the community represented by the council. Who makes the decision on whether the agreement is *beneficial to the community* – the council or the *directly* affected holders of customary land rights themselves? Where land rights are an issue, who will be the most closely affected if mining companies are involved – those holding the land rights or the council?

In 2019, there were two important decisions that reflected on the land rights of indigenous peoples, and which mandated the consent of such indigenous land owners before mining operations can commence. These are *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd*[28] and *Baleni v Minister of Mineral Resources*.[29] Section 24 of the Khoisan Act threatens to undo the progress made by *Maledu* and *Baleni,* which aimed to protect the land rights of rural citizens; instead, the Act once more relegates rural dwellers (Khoisan or not) to a subservient status as the subjects of chiefs.[30] According to the Alliance for Rural Democracy, many traditional chiefs are already claiming that they have the *sole* authority to represent people living within their tribal jurisdiction and that this claim is legally backed by the signing of the Khoisan Act. According to Heywood, "the Khoisan Act hampers the struggles to resist local land grabs led by an unholy alliance of senior ANC politicians, traditional leaders and mining companies."[31]

According to Clarke, the Khoisan Act has handed Khoisan (and other) traditional leaders "powers that have an ominous State Capture ring to them. The president has given footholds to those with a State Capture agenda in the former homelands areas, normally out of sight and mind of the media and public scrutiny."[32] David Lewis of the Corruption Watch NGO sees the Khoisan Act as another indicator that South Africa's much vaunted democracy ends at the boundaries of the big cities and that South Africa's rural population does not enjoy the same effective rights as the rest of the population.[33] Other commentators refer to President Ramaphosa's betrayal of rural citizens by signing Bantustans back to life through a law that

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27 Comaroff and Comaroff (eds) *The Politics of Customs: Chiefships, Capital and the State in Contemporary Africa* (2019). This issue has been extensively dissected by Ubink and Pickering ("Shaping Legal and Institutional Pluralism: Land Rights, Access to Justice and Citizenship in South Africa" 2020 36 *SA Journal on Human Rights* 178) and Claassens and O'Regan ("Citizenship and Accountability: Customary Law and Traditional Leadership Under South Africa's Democratic Constitution" 2021 47 *Journal of South African Studies* 155).

28 2019 (2) SA 1 (CC).

29 2019 (2) SA 453 (GP).

30 Delius "Why the ANC Is Bent on Conferring Colonial and Apartheid Era Rights on Rural Chiefs" (2019-04-25) *Daily Maverick*; Claassens "Contested Power and Apartheid Tribal Boundaries" 2011 *Acta Juridica* 174.

31 Heywood "The Traditional Khoisan Leadership Bill: President Signs Away Rural Peoples' Rights" (2019-11-29) *Daily Maverick*.

32 Clarke "Will Traditional Leaders Now 'Ace' the ANC?" (2019-11-29) *Daily Maverick*.

33 See Phakati "Ramaphosa Erred in Signing the Khoi-San Leadership Bill, Say Civic Groups" (2019-12-02) *Business Day*.

represents the strengthening of the ANC's patronage network through tribal authorities.[34]

The Khoisan Act, when it was at a Bill stage was criticised by the Motlanthe High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change,[35] which found that the Bill denied people living in areas under traditional leaders several constitutional rights, distinguishing them from those living in the rest of the country who enjoy the full benefits of post-apartheid citizenship.[36] The president's own Advisory Panel on Land Reform found that the Khoisan Act was possibly unconstitutional by entrenching Bantustans and removing the right to equal citizenship in a unitary state and reinforcing the powers of traditional authorities over customary and family land and resource rights.[37] In practice, it became almost impossible for ordinary community members in the North West (the source of great mining wealth) to hold their traditional leaders accountable. This ran contrary to their customary law, which emphasised the role of councils and customary structures to mediate and shape chiefly power. The effect was the blocking of state courts and traditional governance institutions as channels of resistance by ordinary citizens. This potentially limited rural citizens' rights to access courts under the Constitution. According to Ubink and Pickering, who cite *Pilane v Phetho*,[38] traditional leaders had no lawful authority to be the sole representatives of traditional communities, and as such, to make deals regarding traditional land *without* community involvement.[39] The Khoisan Act, however, seeks to give them such powers precisely because *they do not have them* at present. They conclude that the re-imposition of contested tribal identities has led to a renewed denial of citizenship rights to rural South Africans. Furthermore, their residence in so-called traditional communities impedes their enjoyment of the same political and property rights as the rest of the population in South Africa.

Section 24(3)(*c*), in particular, requires closer investigation. The courts in *Baleni v Minister of Mineral Resources* and *Maledu*[40] held that the full, prior

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34 Mondi "Exit to the Left: Ramaphosa Signs Bantustans Back to Life in Khoi-San Leadership Bill" (2019-12-04) *Business Day*.

35 High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change* (November 2017).

36 Motlanthe High Level Panel Report 19.

37 *Ibid*.

38 [2011] ZANWHC 63. In *Pilane,* the Constitutional Court interdicted mining companies from impairing the rights of community members to freedom of expression.

39 Ubink and Pickering 2020 *SA Journal on Human Rights* 184–198.

40 *Baleni v Minister of Mineral Resources supra*; *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd supra*. See Barrie "The Introduction of 'Free, Prior and Informed Consent' to the Land Reform Legal Lexicon" 2023 vol 44 4 *Obiter* 1 In *Sarayaku People v Ecuador* Inter-American Court of Human Rights 27/6/2012 Series C no. 245, the court held that the rights of indigenous people must not be ignored in any activity or agreement reached with private individuals that could affect their rights and interests. See ; Meyer "Baleni v Minister of Mineral Resources 2019 2 SA 453 (GP)" 2020 23 *PER* 1; Mukwevho "The Evolution and Development of the Principle of Free Prior and Informed Consent in South Africa" 2022 38 *SA Journal on Human Rights* 144; Mensi "The South African High Court *Baleni* Judgment: Towards an Individual Right to Consent?" 2022 6 *African Human Rights Yearbook* 375.

and informed consent (FPIC) of customary communities whose rights are protected by the Interim Protection of Informal Land Rights Act[41] (IPILRA) is required for a mining right to be granted in terms of the Mineral and Petroleum Resources Development Act[42] (MPRDA). The Khoisan Act, as has been set out above, allows a Khoisan council to enter into partnerships or agreements with third parties, such as, for example, mining companies. It only requires that there be "prior *consultation* with the relevant *community*" and a majority decision in favour of the partnerships or agreement by "those present at the consultation". Unlike IPILRA, which grants decision-making power to *directly affected informal land rights holders*, the Khoisan Act shifts such power to the relevant *community* represented by its council. As a result, in cases where only a small portion of the community is directly affected by mining, the *directly affected* right holders can be outvoted by the majority of unaffected community members. Moreover, by including the phrase "notwithstanding the provisions of any other law", section 24(3) of the Khoisan Act attempts to circumvent the FPIC protections contained in IPILRA. This demands constitutional scrutiny.

5 6 Commission on Khoi-San Matters

According to section 51 of the Khoisan Act, a Commission is brought into being. This Commission must investigate and make recommendations to the Minister responsible for traditional and Khoisan leadership and governance on the recognition of Khoisan communities and hereditary senior Khoisan leaders. A recommendation of the Commission must be agreed upon by at least two-thirds of the members of the Commission.

5 7 Unanswered questions

Besides the above critical comments on the Khoisan Act, serious questions remain and need answers:

- There is no obligation on the government to consult actively with the Khoisan – practically nothing more than an obligation to refer Bills for comment to the National House should the Khoisan be directly affected. It is for the government to decide in its wisdom if the Khoisan are directly affected. Should a member/members of the National House not have a seat/seats on the relevant parliamentary committee discussing the Bill?
- Should a forum not be established where members of the National House have discussions with the President, Cabinet and Parliament on a regular basis on matters of common concern?
- Should the relationship between the Khoisan houses and the councils not be more precisely defined?
- Should the chairperson of a Khoisan provincial house not be allowed to address provincial legislatures on an annual basis on Khoisan issues?
- Can the process of appointing Khoisan leaders in sections 7–14 not be made less complex? As it stands, it could lead to much confusion.

41 31 of 1996.
42 28 of 2002.

- Is it not advisable that an independent body, such as the judiciary, should recognise Khoisan "communities"? At present, it is in effect the government acting through the Premier of a province who recognises Khoisan "communities". This could cause recognition of these "communities" to become discredited, as the "community" could be perceived to be closely aligned with the government.[43]
- What weight should be allocated to advice given by the Khoisan houses? What are the consequences of a refusal to accept such advice or a total lack of consultation?
- The complex process of recognising Khoisan leaders could lead to a highly bureaucratic, political and corrupt situation.[44] Does the generous financial support usually given to traditional leadership on this continent, stretching back to the colonial era, not demand a simpler, more transparent process?
- Section 24(3) of the Khoisan Act, which allows partnership agreements by a Khoisan council after "consultation" with the community, gives no indication of how this consultation must take place and how transparency must be attained.
- Does the Khoisan Act, by promoting an ethnic identity not weaken a common national identity?[45] Veracini and Verhuyst warn against post-apartheid refashioning and the co-optation of traditional leadership.[46]
- Why is there no legally enforceable obligation at any level of government to negotiate with any of the Khoisan houses ?
- When precisely does a Bill, according to section 39(1)(*a*), "directly affect a Khoisan community" or "pertain to their customary law or customs" and which "must" then be referred to the National House? This clearly needs greater elucidation.
- The Khoisan Act is silent about how a council must interact with a Khoisan community. Are there any checks and balances between a Khoisan council and its community?
- Is it unreasonable to be concerned about the transparency and responsiveness of the internal consultation processes of the Khoisan? The Khoisan Act is silent on this. Is there not a risk that reliance on "traditional" forms of coming to decisions may be an excuse for a lack of consultation, lack of transparency and the exclusion of certain voices, such as those of women?
- Greater clarity is needed relating to a council's *territorial* and *non-territorial* jurisdiction. Does such jurisdiction mean that a Khoisan person can opt out of a system of laws, customs and authority through freedom of association to avoid being subject to a territorial jurisdiction imposed by the Khoisan Act? Is a person who lives outside an area of a Khoisan

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43 Mulinge and Lesetedi "Interrogating Our Past: Colonialism and Corruption in Sub-Saharan Africa" 1998 3 *African Journal of Political Science* 15.

44 Claassens and O'Regan 2021 *Journal of South African Studies* 163.

45 See Baloyi "Khoi San Leadership Act" (2019) *The South African* 30. Raber ("State Shows Contempt for Rural People With Traditional Khoi-San Leadership Act" (2019-12-07) *Mail and Guardian*) sees the Khoisan Act as creating a new form of apartheid, a racial homeland system, a victory for Bantustan politics and ethnicity, and a shot in the arm for xenophobia.

46 Veracini and Verhuyst "South Africa's Settler-Colonial Present: Khoisan Revivalism and the Question of Indigeneity" 2020 46 *Social Dynamics* 259.

community still bound by Khoisan customary law of succession and family law if they so choose?

5 8 Khoisan ethnocultural self-determination

It is submitted that the Khoisan Act is aimed at the *ethnocultural self-determination*[47] of the Khoisan, and this should be clearly spelt out in the Preamble. De Villiers states that, in general,

> "indigenous peoples' claim to self-determination relates principally to their original occupation of the land giving rise to sovereignty pursuant to their traditional laws and customs."[48]

It is doubtful that this was the aim of the Khoisan Act. Rather, it is suggested that the aim was related to protecting Khoisan *ethnocultural* minority rights or policy measures to promote their culture, traditions and, where possible, their language.

The Khoisan, as an ethnocultural community, have historical continuity with the pre-invasion and pre-colonial societies that developed on their territories; they generally seek the right to practise their customary laws and the right to protect their traditional knowledge, intellectual property and cultural heritage. These rights are a manifestation of *internal* self-determination as determined by section 235 of the 1996 South African Constitution, which grants such rights to communities sharing a common cultural and language heritage within the territorial entity of South Africa, as determined by national legislation.

5 9 The Khoisan Act in a nutshell

The Khoisan Act in a nutshell is aimed at giving the Khoisan as an "indigenous people" or as an "ethnocultural minority" (the two terms are for all practical purposes synonymous) the following: "self-determination" in the sense of their being actively involved in determining their own future; the right not to be discriminated against; the right to enjoy their language, culture and heritage; the right to be involved in the making of decisions that affect their lives and the right to be involved in the management of their own affairs and own communities. These rights can be distinguished from "external self-determination" and can be described as "*internal* self-determination", which manifests itself *within* the structures of the South African state. It is not about separation.

The Khoisan Act must be read in concert with mineral-resource legislation, which can be interpreted to place the control over mineral income in the hands of a small elite. This demands a further discussion on the regulation of mineral resources and rural land rights in South Africa. It is submitted that section 24 of the Khoisan Act should be interpreted so as to

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47 Boezak in Xanthaki (ed) *Indigenous Peoples' Cultural Heritage, Rights, Debates, Challenges* 253.

48 De Villiers *Indigenous Rights in the Modern Era* 20.

redress the gross economic inequality experienced under the apartheid regime.

Criticism of the Khoisan Act must not be seen to be anti-traditional leadership or anti-customary law but rather a manifestation of resistance to autocratic distortions of customary law relating to traditional authorities.

There is no clear definition or consensus about the leadership and authority structures of the various Khoisan communities. This may explain why they were not initially incorporated into the constitutionally recognised structures of traditional leadership.

6 THE HUNGARIAN ROMA

As it is similar to the Khoisan Act and for comparative purposes, brief mention is now made of the institutionalised exercise in Hungary regarding its Roma population. The Roma population (315 000) sees a form of self-government as being necessary for their economic and social survival. The Hungarian government has consequently introduced self-governing arrangements for various Roma communities. These have improved the rights of the Roma minority, given them an input on matters affecting them, and raised a greater awareness of their rights.[49] The Roma self-government entities "must" be consulted in matters that affect the Roma, and the Roma "may" make representations to governmental bodies about policies that may have an impact on them.

According to section 2(2) of Hungary's Nationalities Act 2011, recognised nationalities (such as the Roma) may establish institutions of non-territorial self-government. The jurisdiction of these nationality self-governments is defined *not* by territory, but by the services they offer to members of their community. The jurisdiction is thus *non-territorial* and not determined by the locality or residence of a person. This enables minorities freely to express, preserve and develop their ethnic, cultural and linguistic identity.

One of the key objectives of the Nationalities Act is to enable the respective nationalities to register *bodies corporate* in the form of self-governments for the purposes of administering matters relevant to their language, cultures, customs and traditions. This is similar to a legal mechanism introduced in Western Australia with the aim of contributing to the societal welfare of the Noongar (discussed *infra*).

The nationality self-governments are not intended to compete with or substitute formal, defined government entities, but rather to work alongside them, serving the interests of their respective nationalities. The Roma in particular have, through their self-governments, constantly sought to elevate the socio-economic needs of their communities.

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[49] Yupsanis "Cultural Autonomy for Minorities in Hungary" 2019 26 *International Journal on Minority and Group Rights* 1; Barany "Ethnic Mobilization and the State: The Roma in Eastern Europe" 1998 21 *Ethnic and Racial Studies* 308; De Villiers *Navigating the Unknown* (2022) 83.

Through the European Court of Human Rights, a jurisprudence around the ethnocultural rights of the Roma has developed.[50] The Council of Europe has also intervened to prescribe standards for dealing with minorities in the European Charter on Regional and Minority Languages of 1992[51] and the European Framework Convention for the Protection of National Minorities 1995.[52] This latter Convention is the first legally binding multilateral instrument devoted to the protection of minorities in Europe, and it established the first comprehensive catalogue of minority rights in hard law.

This brief reference to the Roma in Hungary shows that self-governing entities cannot be discounted as mere window dressing. Although *sui generis* in nature, such entities evolve in relation to the socio-economic and cultural needs of the Roma. The Hungarian approach to its Roma communities thus holds lessons for the future of the Khoisan in South Africa when applying and interpreting the Khoisan Act.

7 AUSTRALIAN ABORIGINAL PEOPLE

The term "Aboriginal" is the term normally used to refer to the indigenous people of Australia. The term "aboriginal" has different nomenclatures in English and is synonymous with the term "indigenous", and is used depending on the context and the country. In the section on the Khoisan (*supra*), the term "indigenous" was used as it is the more usual term in South Africa in the context in which it was used. In this section, the term "Aboriginal" is used to refer to the indigenous people of Australia. In a particular area, a specific Aboriginal community, such as, for example, the Noongar, may be discussed, and in such an instance, a specific reference to the Noongar will be made. As this suggests, in reality the Aboriginal people of Australia are composed of many different communities who make up the larger Aboriginal community. One such community, the Noongar, will demand our full attention at a later stage.

7 1 *Mabo (No 2) v Queensland*[53]

Much has been written about *Mabo (No 2),* and it has been dissected from every jurisprudential and academic point of view.[54] Of relevance here is the reference in *Mabo (No 2)* to the concept of "native title". First, a very brief

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50 *Moldovan, Rostas et al v Romania (No 2)* (2005) 44 EHRR 16; *Nachova v Bulgaria* (2004) 39 EHRR 37; *DH v The Czech Republic* (2006) 43 EHRR 41.

51 CETS No 148.

52 ETS No 157. See Eide "The Framework Convention in Historical Perspective" in Weller (ed) *The Rights of Minorities: A Commentary on the European Framework for the Protection of National Minorities* (2005) 46; Weller "Minority Consultative Mechanisms" 2007 7 *European Yearbook on Minority Issues* 425.

53 [1992] HCA 23, (1992) 175 CLR 1.

54 For an overview of *Mabo (No 2)*, see Barrie "The *Mabo* Decision and the 'Discovery' of Native Title in Australia and Beyond" in De Villiers, Marko, Palermo and Constantin] *Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts* (2021) 7; Genovese and Reilly *Rights and Redemption* (2008) 37–60; Gregory "Re-Writing History: *Mabo v Queensland: The Decision*" 1992 17 *Alternative Law Journal* 157; Nettheim "The *Mabo* Response in Australia: Reconciliation or Continuing Conquest" 1994 10 *Anthropology Today* 8.

discussion of *Mabo (No 2)* is called for. Notwithstanding 40 000 years of habitation by Aboriginal people, it was consistently accepted that *terra nullius*[55] was the legal basis for Australia's colonisation. Any legal rights of Aboriginal people were ignored by the common law. It is suggested that this view could have emanated from Blackstone, who was of the view that if "an uninhabited country is discovered and planted by English subjects, all the English laws are immediately there in force".[56] From the early 1800s, the *terra nullius* doctrine was consistently invoked by Australian courts to deny Aboriginals title to land since Aboriginal people lacked any recognisable system of land tenure – this despite some courts such as *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia*[57] holding that at the time of colonial settlement, the Aborigines had an elaborate system of social rules and customs and a stable and orderly society.

It was only in 1980 when Mabo and his fellow claimants commenced proceedings against the State of Queensland and the Australian Commonwealth that Australian courts were required to determine whether Aboriginal customs and traditions (incorporating rights to, and interests in, land) delivered enforceable property rights under the common law. The *Mabo* litigation lasted 10 years and resulted in two separate decisions of the Full Bench of the High Court. In *Mabo (No 2)* on 3 June 1992, the court held by a six-to-one majority that the common law *did* recognise the *pre-existing* rights of the Aboriginal people to land. *Mabo (No 2)* introduced the jurisprudential term "native title" to the Australian legal lexicon relating to land claims by Aboriginal people. To prove the existence of native title, however, it had to be proved that there has been a *continuous* traditional connection to a specific area of land from the time of the assertion of British sovereignty to the present. To determine a native-title claim, the law thus does not rely on its ordinary resources, such as previous jurisprudential pronouncements, but on a vast network of archival and anthropological resources *outside* of the law. The question of native title requires the law to turn its gaze to what has *survived* the dispossession of Aboriginal peoples of Australia; *Mabo (No 2)* pronounced on the *illegitimacy* of such dispossession and wrote it into law. Aboriginal peoples' pre-existing and continuous rights to land are *Mabo No 2*'s contribution to the Australian legal system.

Prior to *Mabo (No 2)*, the legal assumption was that the assertion of British sovereignty had extinguished all Aboriginal rights to land. Once *Mabo (No 2)* proved this assumption to be false, the facts of Aboriginal survival and their continuing connection to land have become the focus of native-title claims.

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55 In previous centuries, large portions of the world were uninhabited, unclaimed or inhabited by communities regarded as being primitive or unorganised by European states. Such territory was designated as *terra nullius* – land belonging to no one. Such territories could be acquired by means of discovery and thereafter by occupation. Nowadays, no *terra nullius* remains. The concept is heavily criticised for its disregard of the claims of indigenous peoples. See Chowdree and McIntyre "Restitution of Land in Two Jurisdictions: Australia and South Africa" 1997 114 *SALJ* 187.

56 Blackstone *Commentary on the Laws of England* (1765) 105. For a modern view of the various modes of acquisition of territory, see Dugard *Dugard's International Law* 188–205 and the *Eritrea/Yemen Arbitration* 22 RIAA 209 (1998) 239; 144 ILR 1.

57 [1971] FLR 141.

7 2 Native title

In a nutshell, the High Court in *Mabo (No 2)* held that native (Aboriginal) title to land survived the Crown's acquisition of sovereignty and radical title; and that the rights and privileges conferred by native title were *unaffected* by the Crown's acquisition of the radical title. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the Aboriginal peoples who, by those laws and customs, have a *connection* with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty, provided the general nature of the connection between the Aboriginal peoples and the land remains. Native title to an area of land that a clan or group is entitled to enjoy under the laws and customs of an Aboriginal people is extinguished if the clan or group ceases to acknowledge those laws and to observe those customs (as far as is practicable), or loses its connection with the land, or on the death of the last of the members of the group or clan. Native title can be surrendered to the Crown voluntarily. If the native title to any parcel of land is extinguished, the Crown becomes the absolute beneficial owner.

As De Villiers states,[58] in *Mabo (No 2),* the High Court of Australia for the first time held that native title *continued* to exist under common law and that, to the extent that native title had not been extinguished, it continues to exist to the present day and is therefore recognised by common law. The court accepted that Aboriginal people had at the time of settlement, and continue to have, sophisticated systems of traditional laws and customary rules that regulate ownership, use, access and control of their traditional lands. These traditional rights, called native title, continued to exist unless otherwise extinguished by way of a clear intent of the Australian Government, for example, by way of legislation granting freehold to land. The content of the native-title rights is determined, not by the common law, but by the native-title system itself. The specific rights arising from native title may therefore vary from community to community.[59] Common law and native title, therefore, continued to exist alongside each other except when native title was extinguished by a clear intention. The content of the bundle of rights that comprises native title is therefore not ascertained with reference to the common law, but with reference to native title and the evidence of Aboriginal people. On this point, the *Mabo (2)* court described the unique complexity of native title and Aboriginals' relationship to land as follows:

> "Under the laws or customs of the relevant locality, particular tribes or clans were either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined. The special relationship between a particular tribe or clan and its land was recognised by other tribes or groups within the relevant local native system and was reflected in differences in dialect over relatively short distances. In different ways and to varying degrees of intensity, they used their homelands

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58 De Villiers *Navigating the Unknown* 113.
59 See *Wik Peoples v Queensland* [1996] 183 CLR 1.

> for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession."[60]

In *Fejo v Northern Territory*,[61] the unique status of native title was formulated as follows:

> "Native title has its origin in the traditional laws acknowledged and the customs observed by the indigenous people who possess the native title. Native title is neither an institution of the common law nor a form of common law tenure but is recognised by common law."[62]

Simply put, native title is not "title" in the same sense as is, say, freehold title. Determinations of native title recognise the rights and interests that the relevant Aboriginal people have under their traditional laws and customs. These rights and interests are not the same as, or analogous to, the indices of real property tenures. The term "title" is artificial and can mislead. It is a convenient expression to use as it is used and recognised by the law of Australia. The native-title rights and interests, in practical terms, confer possession, occupation, use and enjoyment of the specific land to the exclusion of others.

Native title is not a form of customary law under common law: native title is an expression of *sovereign* Aboriginal law and exists as a legal system that is *parallel* to common law. Common law recognises native title but does not create it. Native title thus has a *sui generis* status. Native title is not a right to land, but comprises discrete rights to the use of land; it is vulnerable to extinguishment by almost all subsequent interests in the land that have been granted. The requirements for proof of native title are extremely onerous. In many instances, the assistance of historians is required to provide proof in establishing a native-title claim.

Current demographic information shows that many, possibly most, Aboriginal Australians will not benefit directly from native title. The reason is that many Aboriginal people live in the major cities and regional areas where little, if any, land is available for native-title claims. In many parts of Australia, Aboriginal groups will find it difficult, if not impossible, to demonstrate that their relationship with their traditional lands meets the standard of proof required for a determination that native title exists. In some areas where Aboriginal people may have maintained strong traditional connections, few, if any, native-title rights and interests will have survived the cumulative effects of various dealings in relation to the land.

7 3 Native Title Act

Following the recognition of native title in *Mabo (No 2)*, the Federal Parliament enacted the Native Title Act 1993. This Act lies at the core of the

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60 *Mabo (No 2) supra* par 37.

61 (1998) 195 CLR 96; 156 ALR 721. For the development of the case law about the nature of native title, see *Yarmir (Commonwealth v Yarmir)* (2001) 208 CLR 1; *Yorta Yorta Aboriginal Community of Victoria* (2002) 214 CLR 422; *Western Australia v Ward* (2002) 213 CLR 1 and *Wilson v Anderson* (2002) 213 CLR 401.

62 *Fejo v Northern Territory supra* par 46.

recognition of native title and sets out the practical operation of native title. It regulates native title from the stage that a claim of native title is lodged to the end of the process where the Federal Court has to determine the validity of the claim, and a prescribed Aboriginal body corporate is formed to be the holder that acts in trust of the title. This process is discussed *infra*.

7 4 The CATSI Act

To enable Aboriginal people to manage and control their own affairs, especially in relation to native title, Parliament enacted the Corporations (Aboriginal and Torres Islander) Act[63] (CATSI Act). An Aboriginal community can become *incorporated*[64] under the Act. This is designed as a legal mechanism for Aboriginal people to register corporations to manage and control their own affairs, particularly in regard to native title. The Preamble to the CATSI Act sees the Act as a special measure for the advancement and protection of the Aboriginal people. The corporations contribute to the societal welfare of the Aborigines, and take part in processes of economic and social development. The aims of the corporations must not be for profit and must operate under the supervision of Chapter 3 of the Federal Registrar of Aboriginal Corporations. The objects of the corporations may include social, cultural, linguistic or general economic betterment of the Aborigines.[65] Grants are available to assist Aboriginal people with corporate management, training of directors, ensuring transparency and proper governance procedures. Annual reports must be made to the Registrar of Aboriginal Corporations and must be accessible to members of the corporation.

To make corporations representative of their communities, only Aboriginal people may register a corporation under the CATSI Act. The corporations are *elected* by their communities and can be held accountable by their communities. The corporations are subject to *judicial oversight* and are subject to *administrative review*. If native title is determined to exist by the Federal Court, the Aboriginal "owners" of the native title must be incorporated under the CATSI Act for the title to be held in *trust* by the corporation. The corporation holding the native title is known as the "native title prescribed body corporate" for a specific community. The founding constitution of the corporation must be set out, as must: the area of native title that has been determined and how the title is to be controlled and managed; the objectives of the corporation; how consultation is to take place with corporation members; and the corporate management requirements of

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63 124 of 2006.

64 S 56(2) of the CATSI Act. The most quoted discussion of a corporation in South Africa remains that found in *Morrison v Standard Building Society* 1932 AD 229. A corporation is a purely legal conception without physical existence. It cannot itself perform acts or form intentions. The necessary acts must be performed, intentions formed, and rights exercised for it by natural persons, who generally act as agents of the corporation. A corporation is invariably formed for some special purpose or object only, which must not be of an illegal nature.

65 De Villiers (*Navigating the Unknown* 118; "Self-determination for Aboriginal People – Is the Answer Outside the Territorial Square?" 2014 16 *The University of Notre Dame Australian Law Review* 74) gives a more extensive exposition of the CATSI Act and the corporations originating under the Act.

relevance to the corporation. As a legal entity, the corporation may undertake legal actions; commence commercial activities; enter into agreements and undertake cultural and linguistic programmes. The corporation may manage the community's land interests, protect the community's heritage and protect and promote the community's language, culture and identity.

The corporation may enter into service and agency agreements with government departments and local government in order for the corporation to provide services to members of the community on a delegated or agency basis regarding houses, land management, infrastructure and health care. The act of incorporation gives corporations a *legal persona* that can then act on behalf of the collective or entire community. An Aboriginal corporation in effect operates in the sphere of private law; it is a *legal persona* that can sue and be sued, the directors are liable to its members; services are offered to the members wherever they reside, thereby giving the corporation a *personal* rather than a *territorial* jurisdiction.

In summary, the effect of the Native Title Act is that it was enacted by the Federal Parliament to provide a statutory base for regulating native title; it has shown potential to serve as a basis for Aboriginal *self-government* and the giving of advice and consultation. It has shown that Aboriginal corporations incorporated pursuant to CATSI can be used for *self-identification* objectives by providing a wide range of cultural, linguistic, social and other services to their members. The Native Title Act does not challenge the sovereignty of the Australian Constitution nor the jurisdiction of the federal, state or local governments over the native-title areas. The Aboriginal corporations are a form of *sui-generis* self-government that runs in *parallel* with other levels of government. The jurisdiction of the corporations is more *personal* than *territorial*. The corporations nestle between public and private law, being neither mere associations nor formal organs of government. The Aboriginal community's corporations have, for all practical purposes, emerged as a fourth level of government with non-territorial personal jurisdiction.

7 5 The native-title claim

For a finding that native title exists over specific land that is the subject of the claim, the claim must be authorised by an Aboriginal community. The person lodging the claim must be so authorised by that community. The area being claimed must be clear, the identity of the claimants must be clear, and it must be clear which specific rights and interests are being claimed. The apical ancestors to whom the community are linked must be named. If these requirements are complied with, the claim is registered with the Federal Court.[66]

[66] See Bartlett *Native Title in Australia* (2020) for details of the registration process.

7 6 Right to negotiate

Once a claim is registered, several procedural rights are conferred on the claimants, of which the right to negotiate is the most relevant. The Native Title Tribunal[67] is responsible for determining if the right to negotiate is applicable to a claim and if prior good-faith negotiations have taken place. This ensures that Aboriginal interests are protected from the moment a native-title claim is registered. The right to negotiate is a procedural right applicable to both Aboriginal people and land developers. Both parties are encouraged to negotiate *in good faith* to reach an agreement about access to land that is the subject of the native-title claim. This negotiation process represents a major shift from the pre-*Mabo (No 2)* situation when the *terra nullius* doctrine still held sway. The federal government has acknowledged that the Aboriginal people require substantial support in pursuit of their native-title claims and to consult with their community before being able to negotiate. This support includes legal advice, research, administrative support, obtaining instructions and authorisations and organising community meetings. An administrative regime has also been established, funded by the federal government, to assist Aboriginal people in their negotiations and managing their claims. Under section 203B of the Native Title Act, federally funded representative bodies have also been registered to manage the wider interests of Aboriginal communities in their regions and even at state and federal levels. It is not uncommon for Aboriginal groups to set up their own negotiating teams with administrative support to negotiate with developers. It is also not uncommon for mining companies to contribute to the cost of Aboriginal negotiators regarding research and legal advice. In this way, the parties demonstrate a "genuine desire to reach agreement … displaying an open mind and engage constructively."[68]

7 7 Indigenous land-use agreements

An amendment to the Native Title Act introduced in 1998 created a process for agreement as an alternative to negotiations, should negotiations fail. These agreements, known as Indigenous Land-Use Agreements (ILUAs), take effect after being endorsed by the Federal Court. A significant number of native-title claims that began as contested claims in the Federal Court ended as ILUAs. Some ILUAs have illustrated how historical evidence has been important in assisting parties to reach an agreement, and became the foundation for an agreement. Understanding the history of the Aboriginal/settler relations made an important contribution in achieving eventual agreements and created a better understanding of the culture and laws of the Aboriginal people. An excellent example of the use of ILUAs is to be found in the single Noongar native-title claim.

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[67] The Native Title Tribunal is an administrative tribunal that must resolve disputes about whether negotiations for access to land have been conducted in good faith.

[68] *Public Sector Union v Australian Broadcasting Commission* (1995) 36 Australian Indigenous Law Reports 372.

7 8 The single Noongar native-title claim

This claim raised the challenge of accommodating the traditional rights and interests of the Noongar,[69] an Aboriginal community that lived in an urbanised and industrial community. This claim concerned matters not dissimilar to challenges faced by various indigenous minorities, such as the Khoisan, who do not constitute a majority where they live and are found interspersed between other communities.

The single Noongar native-title claim was lodged by the South West Aboriginal Law and Sea Council, which is the native-title representative body for the Noongar people. Eighty applicants acting on behalf of *all* Noongar people (the Aboriginal people of the south-west of Western Australia) authorised the claim to determine their native-title rights and interests.

The single Noongar native-title claim covered the entire south-west portion of Western Australia, including the Perth metropolitan area and many major towns – an area of 6 000 square kilometres. The single Noongar native-title claim thus traversed an extremely large piece of territory. For the Noongar people, the south-western portion of Western Australia was "their country" in which they had historically resided and had had a cultural connection for thousands of years before the European settlement. They allegedly continued to observe the Noongar community's traditional laws and customs, particularly in relation to land. Owing to changes flowing from the historical existence and actions of European settlement in Western Australia, they sought a determination of native title in favour of all members of the Noongar community – hence a *single* claim.

After the single Noongar native-title claim was lodged, the South West Aboriginal Law and Sea Council applied to have the case adjourned so as to prepare for such a large claim. The Western Australia (state) government, with the support of the commonwealth (federal) government, pressed for the claim to be *confined* to the Perth metropolitan area alone and to continue without delay. The Western Australian government submitted that there was substantial interest in the early resolution of the proceedings regarding the Perth area. If not, the resolution of the matter could take many years. The single Noongar native-title claim commenced on 11 October 2005 in *Bennell*

[69] For an extensive background to the history of the Noongar, see Bains The Heart of Home: The Intergenerational Transmission of a Nyungar Identity (thesis, University of Western Australia) 1987; Toussaint Nyungars in the City: A Study of Policy, Power and Identity (thesis, University of Western Australia) 1987; Birdsall All One Family: Family and Social Identity Among Urban Aborigines in Western Australia (thesis, University of Western Australia) 1990; Tilbrook Nyungar Traditions: Glimpses of Aborigines of South-Western Australia 1829–1914 (1983); Bates The Passing of the Aborigines: A Lifetime Spent Among the Natives of Australia (1938); Berndt and Berndt (eds) Aborigines of the West: Their Past and Present (1980); Howard Aboriginal Politics in Southwestern Australia (1981); Makin A Socio-Economic Anthropological Survey of People of Aboriginal Descent in the Metropolitan Region of Perth (thesis, University of Western Australia) 1971; Haebich For Their Own Good: Aborigines and Government in the South West of Western Australia 1900–1940 (1988); Aveling (ed) Westralian Voices (1979); Marchant Aboriginal Administration in Western Australia 1886–1905 (1981).

v State of Western Australia,[70] heard by Wilcox J, and related to the preliminary question of native title in the Perth area alone (and not to the wider claim area of the south-western portion of Western Australia, which would later be the subject of separate proceedings). The case lasted 21 days. Expert anthropological evidence was given by various anthropologists. Thirty Noongar witnesses gave evidence at various significant Noongar sites. Linguistic experts gave evidence. One expert witness gave evidence over two days regarding the Noongar oral history, laws and customs. The works of various historians, which included statistical analyses and inquiries into historical material, were examined in detail.

The claimants, the Noongar Aboriginal people of south-west Western Australia, claimed a communal native title to a large area of Western Australia, including metropolitan Perth. It was submitted that at the advent of British assertion of sovereignty over the Swan River Colony in 1829, the single-Noongar-native-title-claim area was occupied and used by Aboriginal people who spoke dialects of a common language and who acknowledged and observed a common body of laws and customs. These people shared a commonality of belief, language, custom and material culture, which distinguished them from neighbouring groups or societies. Responsibility for particular areas of land or waters was exercised by subgroups or families, but the laws and customs under which the subgroups possessed those rights and interests were the laws and customs of the broader society. Today, it is no longer possible for all members of the claimant group physically to access many parts of the land and waters within the boundaries of the metropolitan Perth area. However, as the South West Aboriginal Law and Sea Council's legal team argued, the continuity of the acknowledgement and observance of traditional laws and customs does not require the claimants to show a continuing physical connection to the land. Noongar people can acknowledge and observe traditional laws and customs throughout periods during which, for one reason or another, they have not maintained a physical connection with the claim area. In trial proceedings, almost all witnesses gave evidence that established that colonisation and pastoral and industrial development had not broken their connection with their traditional land, and that, despite being in a heavily urbanised area, Noongar people continue to practise traditional ways.

The primary respondents to these proceedings were the state of Western Australia (the state) and the Commonwealth of Australia (the commonwealth). The state aggressively challenged many points in the application, which asserted the existence of a single Aboriginal group called "Noongar people" historically associated with the south-west of Western Australia. The state and the commonwealth argued that the relevant "society" at the advent of British assertion of sovereignty was not a single Noongar society but consisted of "unidentified" groups, possibly 12 or 13, corresponding roughly with the "tribes" identified on a well-known map of south-west Western Australia produced in 1974. In relation to the Perth area, the state's position was, in summary, that it denied the existence of an

[70] *Bennell v State of Western Australia* [2006] FCA 1243; (2006) WAD 6006 of 2003. See Host and Owen *"It's Still in My Heart, This Is My Country": The Single Noongar Claim History* (2009) for an extensive overview of *Bennell*.

identifiable society or community of Aboriginal people called the Noongar people who currently acknowledge and observe traditional laws and customs. It denied that the alleged “Noongar way” constitutes a distinct culture or normative system of laws and customs that distinguishes the claimant group from other Aboriginal or non-Aboriginal persons. Furthermore, the state argued that the word “Noongar” itself was a recent phenomenon that had emerged as a result of the breakdown of traditional laws and customs. It asserted that some of the professed knowledge and beliefs about the physical and spiritual significance of the land and waters in the Perth metropolitan area had been reconstructed from books or historical records and stories and beliefs sourced from areas outside the Perth metropolitan area. Regarding the traditional laws and customs of the Noongar people in the Perth area, the respondents declared that these had become limited to a few old men, who died without passing on the knowledge in a systematic way. They contentiously claimed that in relation to the Perth area throughout the nineteenth century, European settlement of the Perth metropolitan area caused Aboriginal people to cease to acknowledge and observe traditional laws and customs and to lose connection with their traditional estates by education and adoption of the ways of non-Aboriginal people; this occurred by removal to institutions and restrictions imposed on the movement and activities of Aboriginal people under legislation and government policy;[71] and by the influx of Aboriginal people *not* traditionally associated with the Perth metropolitan area into the Perth area.

On 25 August 2006, three weeks before Wilcox J was to hand down his judgment – 10 months after the trial commenced and a full two years after the making of the order for a separate proceeding (separating the Perth metropolitan area from the wider claim area of the south-west) and the commencement of the trial at the state’s insistence – the respondents filed a notice of motion seeking to: a) *terminate* the whole separate procedure related to the Perth area alone; b) have a new trial before a different judge; and c) have the single Noongar claim application struck out under section 84C of the Native Title Act for lack of authorisation by all relevant Noongar native-title holders. Wilcox J indicated that he was surprised to receive such a motion, that the respondent's legal advisers had acted discourteously to the court and that the motion represented a complete "U-turn" by the state. Wilcox J noted that this would inevitably involve a further prolonged delay in resolving the issue of native title in the Perth region.[72]

Wilcox J *rejected* the respondent's application for termination of the case and on 19 September 2006 delivered his judgment. He found that the Aboriginal Noongar people inhabited Perth at the date of the settlement of the British and were members of a single Noongar community that acknowledged and observed its traditional laws and customs. He held:

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[71] This raised the question of possible genocide. See UNGA *Convention on the Prevention and Punishment of the Crime of Genocide* (9 December 1948) 78 UNTS 277. On genocide in general, see Sands *East West Street: On the Origins of Genocide and the Crimes Against Humanity* (2016); Schabas *Genocide in International Law* (2000) 223; *Prosecutor v Krstić (Srebrenica – Drina Corps)* IT 98-33-T (Judgment 2 Aug) par 580, 2001 40 ILM 346; Clavero *Genocide-Ethnocide 1933-2007* (2008) 225.

[72] *Bennell v State of Western Australia supra* par 896.

a) that native title, subject to extinguishment,[73] existed in that part of the application that encompassed the city of Perth and surrounding non-urban areas; b) that the native title was held by the Noongar people as a single, communal title; and c) that the native-title rights and interests were exclusive rights to occupy, use and enjoy. The finding of native title over a settled urban area, over the capital city of Western Australia, Perth, was historic. What the court held in effect was that the Noongar people existed as an identifiable community, that they had a continuity of connection to land in the south-west of Western Australia, and that they continued to practise their traditional culture.

The respondents *appealed* Wilcox J's decision. They argued that Wilcox J had wrongfully identified a single Noongar society at the advent of British assertion of sovereignty, they denied that there was a continuity of traditional laws and customs, they denied that any connection to the Perth metropolitan area had been proved, and they asserted that Wilcox J had made errors of law and fact. They submitted that for native title to exist, a "society" had to indicate that its observance of laws and rules were vital to it, that the members of the "society" were united in its common observance of those laws and customs *continuously* through time and only those traditional laws and customs that existed at the time of British acquisition of sovereignty were relevant. The appeal was heard over three days in the Federal Appeal Court before Finn, Sundbery and Mansfield JJ. The Federal Appeal Court on 23 April 2008 in *Bodney v Bennell*[74] (per Finn J) upheld the appeal that Wilcox J had committed errors of law by misapplying section 223(1)(*b*) of the Native Title Act relating to the connection and continuity of the traditional laws and customs of the Noongar people, particularly in relation to the Perth metropolitan area. The Federal Appeal Court was of the view that it had to be established that, since British sovereignty, each Noongar generation had acknowledged and observed their laws and customs *substantially uninterrupted*. The single Noongar native-title claim was not dismissed but referred *back* to the next Federal Appeal Court sitting for a rehearing of the entire proceedings. On the face of it, the *onus* on the Noongar claimants outlined in the respondent's appeal and subsequent full-bench decision of the federal appeal court was an extremely burdensome one. The Noongar people had to prove not only that they existed as a distinct cultural group, but also as a society that had a demonstrated, recorded cultural activity *uninterrupted for* each generation since 1829. For the Noongar community, who had survived policies and legislation of the Western Australian government designed to eliminate their traditions, laws and customs, if not the people themselves, this onus was an extremely heavy one to bear. It was at this point that the Noongars decided to *settle* the matter with the Western Australian government.[75]

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73 For example, by way of legislation granting freehold to land.

74 (2008) FCR 84; 249 ALR 300; [2008] FCAFC 63.

75 Barrie "Land Claims by Indigenous People – Litigation Versus Settlement? Observations on the Richtersveld Litigation Route Followed in South Africa Versus the Noongar Settlement Route in Western Australia" 2018 *Journal of South African Law* 334.

7 9 The Noongar Native Title Settlement

In December 2009, as native-title representatives of the Noongar, the South West Aboriginal Law and Sea Council and the Western Australia government agreed to proceed by negotiation rather than continue with the litigation, and in July 2013 the government of Western Australia released the terms of the settlement offer whereby the Noongar people would exchange a native-title claim for a comprehensive package of benefits. This package included recognition of traditional ownership, land, a significant "future fund" and various other commitments. In February 2014, the Western Australian government released the Draft Noongar Recognition Bill for general comment. In October 2014, the Noongar negotiation team, the South West Aboriginal Law and Sea Council and the Western Australia government reached an agreement in principle based on the wording of the terms of the Draft Noongar Recognition Bill (the settlement). This draft bill recognised the Noongar people as the traditional owners of south-west Western Australia and acknowledged their unique contribution to the heritage, cultural identity and economy of the state. This settlement offer constituted a comprehensive package of tangible benefits for the Noongars and was in the form of six indigenous land-use agreements (ILUAs) for six specific claim areas.[76] As seen above, an ILUA consists of specific provisions relating to a native-title agreement and sets out the subject matter dealt with by the agreement and the parties thereto. An ILUA is contractually binding on all the parties and binds all native-title holders in the area covered by the agreement. An ILUA must be registered with the Native Title Tribunal before it can be effective. In *McGlade v Native Title Registrar,*[77] it was held that until *all* the relevant member groups of the Noongars in the area covered by the agreement gave their consent to their applicable ILUA, the settlement could not be registered by the Native Title Tribunal. The settlement (as set out in the Draft Recognition Bill) can be summarised as follows:

a) recognition that the Noongars are the traditional owners of the south-west of Western Australia, and that they have a body of law and customs that continues today;
b) agreement that the findings of Wilcox J in Bennell were to be translated and embodied in an Act of the Western Australian parliament.
c) transfer of 320 000 hectares of land under various tenures to the Noongar Boodja Trust;
d) funding streams consisting of A$50 million a year (indexed) over 12 years into a future fund and A$10 million a year (indexed) for the running of prescribed bodies corporate;

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[76] After commencing as contested claims, a number of significant claims ended in ILUAs. Examples are *Masig People v State of Queensland* [2000] FCA 1067; *Anderson v State of Western Australia* [2000] FCA 1717; *Smith v State of Western Australia* (2000) 104 FCR 494 and *Nangkiriny v State of Western Australia* (2002) 117 FCR 6. These claims have illustrated the importance of historical evidence in the formation of an agreement and assisted the parties in coming to an agreement. An agreed-upon history of a region provides a foundation for an agreement. In *Nangkiriny v State of Western Australia supra*, Justice North said that the historical evidence presented created an understanding between the parties that would otherwise not have existed (par 9).

[77] (2017) FCAFC par 504.

e) customary access to crown lands and customary use of natural resources, also known as a "bundle of rights";
f) joint management for conservation areas, protected areas and heritage sites;
g) an economic participation framework with the objective of growing Noongar businesses, increasing skills and boosting employment; and
h) a community development package, safeguarding and developing Noongar culture and specifically building capacity regarding leadership and focusing on youth, housing, health and education.

The ILUAs (comprising the settlement) are seen by all parties as being a *contract* as well as a *socio-political* experiment. In commemorating the tenth anniversary of *Mabo (No 2)* on 3 June 2002, Neate, the president of the Native Title Tribunal, aptly declared: "Agreement-making is clearly the preferred way to resolve many native title issues. The number and variety of agreements to date are tangible evidence that disagreements can be resolved without long, expensive disputes before courts or other arbitral bodies."[78]

With hindsight, it is highly probable that had the Noongar community initially been offered what they received in the eventual settlement, they would have agreed to the terms of the settlement without the drawn-out, expensive and politically sensitive litigation that eventually led up to the settlement.

7 10 The Noongar Settlement in a nutshell

The legal basis of the Noongar Settlement is set out in two statutes (the Noongar Recognition Act 2016[79] and the Noongar Land Administration Act)[80] and six ILUAs. The area of land that is subject to the Settlement is defined, but is not limited to areas where native title has been claimed. It is acknowledged that the Noongar people have a living cultural, spiritual, familial and social relationship with the land. The institutional arrangements brought into being for the Noongar exist in *parallel* with local governments in the area. This, in practice, leads to *co-equal* cultural sovereignty for the Noongar people. For daily services, the Noongar rely on local and state governments. For cultural matters, the Noongar people rely on Noongar institutions.

The self-governing institutions for the entire settlement area and for six sub-regions are contained in the six ILUAs and are incorporated under the CATSI Act as corporations that can act on behalf of their members. The six sub-regional corporations have established a central services corporation that coordinates the activities of the six sub-regional Noongar corporations. The central services corporation has a central protocol to develop a cultural advice policy and, in general, to promote the interests of the Noongar people. A Noongar person who desires to become a member of a

[78] Neate "A Wide Eyed Gaze at Native Title 10 Years After Mabo" in Ritter (ed) *The Native Title Market* (2009) 1023.
[79] Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA).
[80] Land Administration (South West Native Settlement) Act 2016 (WA).

corporation does *not* have to reside within a sub-region of the corporation, which means that a corporation provides its services to its members *irrespective* of where they live. This, in practice, has the effect that the corporations have a form of *non-territorial* but also *personal* jurisdiction. The functions of the corporations are: to promote the traditional laws, cultures and customs of their Noongar communities; to provide services to their members; and to cooperate at the local level with government agencies. The settlement provides for a heritage protocol that aims to ensure that places of historical, ethnological, spiritual and cultural importance for the Noongar people are protected. The Noongar Land Fund has been established to help Noongar communities acquire land, and the Noongar Land Estate has been established for purposes of cultural enjoyment and education, and related uses. A support programme has been established to develop Noongar entrepreneurial skills.

A trust (the Noongar Boodja Trust) has been established to hold, manage and control all benefits that accrue from the Settlement on behalf of the Noongar community.

The Noongar Settlement has illustrated that an Aboriginal community has used an ILUA as an instrument to achieve a form of internal cultural self-determination to regulate access to their traditional land, manage and control such land, promote their culture, and pursue socio-economic objectives.

8 NOONGAR SETTLEMENT VS THE KHOISAN ACT

Taking into account the above criticisms of the Khoisan Act and having observed the successful implementation of the Noongar Settlement, it is a moot point whether the Khoisan Act successfully promotes, preserves and develops the internal self-determination and cultural heritage of one of the oldest cultures of the world. As Boezak puts it, the Khoisan may have their individual rights protected under the Constitution, but what about their collective rights?[81] The answer to this question is not an easy one. Some Khoisan have, over the years, lost their territorial base and become integrated with other citizen groupings. Nevertheless, the Khoisan Act indicates an implied intention to develop the Khoisan cultural heritage with state funding and with the use of the state's infrastructure. It is submitted that a global reading of the Khoisan Act reveals a clear intention to *revitalise* the Khoisan culture.

The Noongar of Western Australia appear to bear the closest similarity to the Khoisan's situation. As with the Khoisan, the Noongar live in urban and rural areas interspersed with other communities. The solution to the Noongar demands related to their culture, traditional rights and interests was found in the Noongar Settlement – discussed in some detail above. It is submitted that, for the Khoisan in pursuit of internal cultural self-determination, the Noongar Settlement presents a more viable and more practical route to follow than does the Khoisan Act. The Noongar Settlement is more in the nature of an *agreement* between the Noongars and the Western Australian

[81] Boezak in Xanthaki (ed) *Indigenous Peoples' Cultural Heritage, Rights, Debates, Challenges* 253.

government than provisions *imposed by statute* as in the Khoisan Act. Nowhere in the lengthy Preamble to the Khoisan Act is there any indication of consultations or negotiations with the Khoisan as a motivation for the Act.

9 CORPORATIONS: AN EXAMPLE TO FOLLOW

The single most meritorious mechanism in the Noongar Settlement, and which may be followed by the Khoisan in achieving ethno-cultural self-determination, is the use of *corporations*. As seen in the Noongar Settlement, Khoisan corporations can be established that manage and control the Khoisan's social, cultural, linguistic and related affairs. These corporations should comply with certain conditions:

- The Khoisan corporations must not be for profit and must operate under the supervision of relevant legislation.
- The government must assist the Khoisan with management skills, the training of directors and obtaining transparency and proper corporate governance procedures.
- Annual Khoisan corporate reports must be produced for the Registrar of Khoisan Corporations.
- Such reports must be accessible to members of a corporation. Membership of a corporation must be on a voluntary basis and confined to the Khoisan only.
- A Khoisan corporation must be accountable, and be subject to judicial oversight and judicial review. Accountability entails a relationship between a person or institution being held to account and those entitled to hold it to account. The mechanisms for holding a person or institution to account may vary, but often include a duty to disclose information and, at times, the capacity to impose sanctions. The sanctions could be political (such as being voted out of office) or legal (such as civil or criminal liability).
- The objects of the Khoisan corporations must set out how consultation will be conducted with corporation members and how corporate management will be conducted.
- As a legal entity, the Khoisan corporation may undertake legal actions, sue and be sued and undertake commercial activities. Any profits made must be held in trust for the Khoisan. The directors of the Khoisan corporations must be *democratically* appointed by members of the corporations. The Khoisan corporations may enter into agency and service agreements with local government to provide services to members of the corporations where reasonably possible. Service agreements may include land management, houses, infrastructure and health care. The jurisdiction of the Khoisan corporations must relate to its members *wherever* they reside and is thus personal, and not territorial.
- The Khoisan corporations must *not* challenge the jurisdiction of national, provincial or local governments. The Khoisan corporations are *sui generis* cultural self-determination institutions that exist in *parallel* with other levels of government. In practice, they are a fourth level of government for the Khoisan with a non-territorial but personal jurisdiction

over their members. The corporations can be seen as *community parliaments* making decisions relevant to the Khoisan's culture, traditions, customary laws and socio-economic interests. The corporations can enter into bilateral relationships with government and all its entities, for example, the local government. The State and its entities must liaise and consult with corporations to ensure that the Khoisan's cultural and socio-economic interests are considered. Agreements entered into between corporations and government entities can be categorised as *sui-generis* constitutional arrangements for self-government and cultural self-determination on a *non-territorial* basis.

10 KHOISAN CORPORATIONS AND UNDRIP

It is submitted that the Khoisan corporations should emphasise many more features of UNDRIP[82] than the Khoisan Act presently does. The Khoisan corporations could for example be mandated to focus on the following rights as enumerated in UNDRIP: indigenous people have the right to self-determination … and freely to pursue their cultural development (article 14); indigenous peoples in exercising the right to self-determination have the right to autonomy in their local affairs (article 4); indigenous peoples have the right to maintain their social and cultural institutions (article 5); shall provide effective mechanisms to prevent depriving indigenous peoples of their cultural values or ethnic identities (article 8(*a*)); indigenous people have the right to belong to an indigenous nation in accordance with the traditions and customs of the nation concerned (article 9); indigenous people have the right to practise and revitalise their cultural traditions (article 11); indigenous peoples have the right to develop and transmit their languages and histories to future generations (article 13); indigenous peoples have the right to participate in matters that affect them (article 18); indigenous peoples have the right to be actively involved in determining housing and other economic and social programmes affecting them (article 23); indigenous peoples have the right to protect and develop their cultural heritage (article 31); indigenous peoples have the right to determine their own identity (article 33) and indigenous peoples have the right to have access to financial and technical assistance from the State for the enjoyment of the rights contained in UNDRIP (article 39).

11 PROPOSALS

The Khoisan Act must be repealed and preferably replaced with a Khoisan settlement similar to the Noongar Settlement. The new Khoisan Settlement should encompass the following:

a) UNDRIP must be emphasised and be seen as a guiding principle.
b) Khoisan corporations with similar functions to the Noongar Settlement corporations must be introduced.

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[82] A/Res/61/295 (2009). See further *Declaration of Principles* of Indigenous Rights adopted in 1984 by the World Council of Indigenous Peoples UN Doc E/CN4/1983/22 Annex 2 (1985).

c) The Khoisan corporations must be democratically appointed, be accountable and be subject to judicial oversight and administrative review.
d) The Khoisan corporations must be mandated to achieve what has become known as "social corporate responsibility",[83] which can address the challenges of the Khoisan. The conceptualisation of corporate social responsibility has become quite embedded in Europe, where corporations are active in economic and social change. In Europe, corporations contribute much to improving the livelihoods of people and offer opportunities for people's social inclusion and self-realisation. From a macro perspective, corporations in Europe can be seen as being formed by, and embedded within, particular economic, social, cultural and institutional structures and belief systems. Established as a guiding principle for societal development at the UN Earth Summit in Rio de Janeiro in 1992, corporate social responsibility was taken up as a business concept in the mid-1990s. Corporate social responsibility demands ethical codes of conduct, ethical management systems, ethical accounting practices and ethical stakeholder engagement.
e) The Khoisan corporations must be mandated to ensure that their corporate practices lead to social benefits and become societal tools to provide a wide range of social and cultural services to the members of a corporation.
f) The Khoisan corporations must be mandated to act as a fourth level of government existing in parallel to other levels of government, and having a non-territorial but personal jurisdiction over the Khoisan members of the corporations relating to their social and cultural affairs.
g) How Khoisan community autonomy can be pursued in law and be given practical effect on a non-territorial, personalised basis must be illustrated.
h) Recognition must be given to the status of the Khoisan as indigenous people and as a permanent and distinct element of society.
i) A Khoisan trust must be established as the principal trust to hold, manage and control all benefits that accrue from the Khoisan settlement on behalf of the Khoisan.

12 CONCLUSION

In 2020, David Hill, chief of the Muscogee, was at the forefront of the litigation that led to landmark US Supreme Court decision *McGirt v Oklahoma*,[84] which related to the status of the First Nations. Similar decisions followed. Sara Hill, Attorney General of the Cherokee First Nation, observed that the effect of the *McGirt* case allows indigenous people in the

[83] See Barth and Wolff (eds) *Corporate Social Responsibility in Europe* (2009); Bowen *Social Responsibility of the Businessman* (1953); Zadek *The Civil Corporation. The New Economy of Corporate Citizenship* (2001); Matten and Moon "A Conceptual Framework for Understanding CSR" in Habisch (ed) *Corporate Social Responsibility Across Europe* (2005) 335–356.

[84] 140 S Ct 2412; 2007 L Ed 2d 985. Shortly thereafter, the Supreme Court followed this decision in *Sharp v Murphy* 140 S Ct 2412; 207 L Ed 1043.

United States to *preserve what was, to be a separate people with a separate identity and to create their own future*.[85]

It is submitted that if the intention is to preserve the Khoisan as an indigenous people with a separate identity who can create their own future, then the path followed in the Noongar Settlement in Western Australia appears to be a better route to follow than the cumbersome one suggested by the Khoisan Act.[86]

Few nations can lay claim that their journey with indigenous peoples and their rights is complete. South Africa, being a democracy of a mere 30 years, is no exception. The journey can be arduous, breakthroughs may be few, and the challenges are many. The Khoisan Act in a South African context is a small step that could be immensely improved by observing the Noongar Settlement.

[85] See Tushnet *The Oxford Handbook of the US Constitution* (2015) 695.
[86] See Barrie 2018 *Journal of South African Law* 344.