The Protection of Dispersed Minorities: Options for Aboriginal People in Australia

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Abstract

Self-determination of ethnic minorities within existing country boundaries is often associated with decentralisation of powers to regional or local areas where minorities reside. Decentralised territorial arrangements give minorities an opportunity to make decisions about matters that affect their language, culture and traditions. In many instances, however, territorial arrangements do not offer any effective mechanism for self-determination to minorities that live scattered across a country or minorities that do not form a majority at a regional or local level. Cultural Autonomy is a non-territorial form of autonomy that is designed to decentralise powers and functions to minorities for the very reason of their scattered living. Minorities can, pursuant to cultural autonomy, establish a public law institution which has the powers of a government; to make decisions; levy taxes; and implement policies in regard to their culture, language, laws, customs and traditions. This article explores how, in light of experiences of several European countries, the notion of cultural autonomy could be a practical solu-

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tion to the ongoing quest for self-determination by Aboriginal People in Australia.

I. Introduction

In a world where the notion of truly homogenous nation states is all but a distant memory, the challenge to protect ethnic minorities[1] within the borders of existing sovereign states is arguably more complex than ever. "Old" and "new" ethnic minorities[2] are in many instances agitating for some form of special recognition in order to accommodate their unique culture, language and traditions. One can agree with the observation that "one of the most fundamental questions of constitutional design in divided societies is how the constitution conceptualises the status of ethno-cultural collectives it seeks to accommodate and integrate".[3]

[1] "Ethnic minorities" is a generic term used in this paper to refer to language, cultural and/or religious minorities. In his much-quoted report for the United Nations, *Capotorti* proposes the following definition for "minority": "A group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from the rest of the population who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion and language." *F. Capotorti*, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UNO, UN Doc. E/CN.4Sub.2/384 (1977), 568. This definition is by no means perfect and has been the subject of much analysis and disputation. Refer for example to *B. de Villiers*, Language, Cultural and Religious Minorities: What and Who Are They?, University of Western Australia Law Review 36 (2012), 67 et seq.

[2] "Old" minorities refer to those groups that have been associated with a specific country for all or most of its modern history (for example Aboriginal People in Australia – although some contend that Aboriginal People should rather be treated not as a "minority" but as Indigenous People under international law), while "new" minorities refer to more recent arrivals of minority groups as a result of modern day migration (for example Italian, South African, Ethiopian and South Sudanese Australians). The idea of equating the demands of "new" minorities with those of "old" minorities has not received much traction. *Kymlicka* contends that the idea that some universal right exists that allows members of a (new) minority to obtain self-government wherever they reside in another country is "simply implausible". *W. Kymlicka*, National Cultural Autonomy and International Minority Rights Norms, Ethnopolitics 6 (2007), 379 et seq., at 382. *K. Medda-Windischer*, New Minorities, Old Instruments?, International Community Law Review 13 (2011), 361 et seq.

[3] *C. Grewe/M. Rieknert*, International Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared, Max Planck UNYB 15 (2011), 1 et seq., at 17. *S. Oeter*, The Protection of Indigenous Peoples in International Law Revisited – From Non-Discrimination to Self-determination, in: H. P. Hestermeyer/D. König (et al.), Coexistence, Cooperation and Solidarity, 2010, 477 et seq., at 500.

The Aboriginal People[4] of Australia find themselves in one of the world's most advanced, stable and respected liberal democracies, but yet their aspirations for special recognition and protection as the first people of Australia, remain, to a great extent, unfulfilled. Their desire to make decisions, through a form of domestic self-determination or self-government, about matters that affect their unique culture, traditions, language, customs and beliefs, is unmet. Traditional ways of informal self-determination through decentralisation to territorial entities, be it to states, regional or local governments, do not offer any promise of self-government to Aboriginal People since they live scattered across the country.

Aboriginal People is, potentially, an ideal group for what has become known internationally as "cultural autonomy" (also referred to in some literature and the legislation of some countries as "national cultural autonomy").

"Cultural autonomy", which is in practice applied in various ways, refers in essence to the "right of self-rule, by a culturally defined group, in regard to matters which affect the maintenance and reproduction of its culture."[5] The conceptualisation of cultural autonomy can be traced back to the late nineteenth, early twentieth century when new ideas about the building blocks of the modern state were being developed. Two leading ideologists, *Karl Renner* and *Otto Bauer*, contended that the nation comprised of ethnic minorities (nations as they called minorities) and that those minorities could, through special arrangements, be treated as corporate entities regardless of where the members of the group reside. In this way, it was proposed, the struggle for control over territory could be disposed of and multiple ethnic groups could share the same geographical space, while each had some degree of control over matters that affect their culture, language and traditions.[6]

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[4] There is no agreement in Australia as to the correct reference to its indigenous people. While some prefer to use the term "Indigenous People", others use the term "Aboriginal People"; while some Aboriginal People refer to themselves in accordance with their group of origin, for example *Wongai* (Western Desert Group) or *Noongar* (South West of Western Australia). For purposes of consistency the term "Aboriginal People" is used throughout this article – the reference includes the Torres Strait Islander people.

[5] *A. Eide*, Cultural Autonomy: Concept, Content, History and Rile in the World Order, in: M. Suski (ed.), Autonomy: Applications and Implications, 1998, 252. Also refer to the schematic demonstration of various forms of autonomy in *M. Tkacik*, Characteristics of Forms of Autonomy, International Journal on Minority and Group Rights 15 (2008), 369 et seq., at 372.

[6] *K. Renner*, Staat und Nation, 1899, reprinted as *K. Renner*, State and Nation, in: E. Nimni (ed.), National Cultural Autonomy and Its Contemporary Critics, 2005, 13 et seq.

Although the ideas of *Bauer* and *Renner* were lost in the turmoil of the two World Wars and the events surrounding them, there now seems to be acceptance in many democracies that the emphasis on the protection of individual rights as the sole mechanism for the protection of ethnic minorities, is inadequate and impractical. It is accepted that ethnicity is "normal" and that "ethnic political mobilisation should be expected as a normal and healthy part of everyday political life in a free and democratic society".[7]

The article commences by reflecting on the failure of existing constitutional mechanisms to deal adequately with the aspirations of dispersed ethnic minorities. It then explores the concept of cultural autonomy and refers to practical examples where the concept has been implemented; the essential building blocks of cultural autonomy; and the way in which those building blocks have been implemented in several countries. The article concludes with observations about the possible application of cultural autonomy to Aboriginal People.

II. Dispersed Minorities – The Failure of Existing Mechanisms

One of the most pertinent challenges that international and constitutional law face, is how to respond to the aspiration for self-decision-making by ethnic minorities, and in particular, minorities that live scattered throughout a country. This question is not only relevant to young and emerging democracies. The United Nations Commission on Human Rights in 2010 emphasised the importance of catering for the rights of ethnic minorities when it stated the following:

> "The participation of persons belonging to minorities in public affairs and in all aspects of the political, economic, social and cultural life of the country where they live *is in fact essential* to preserving their identity and combating social exclusion."[8]

Some of the main mechanisms that have been recognised in constitutional theory and implemented in practice to protect the rights of minorities[9] are

[7] *W. Kymlicka*, The Global Diffusion of Multiculturalism: Trends, Causes, Consequences, in: S. Tierney (ed.), Accommodating Cultural Diversity, 2007, 3.

[8] Emphasis added. Minority Rights: International Standards and Guidance for Implementation, United Nations (2010), Doc. HR/PUB/10/3, 12.

[9] For an overview refer to *J. A. Frowein/R. Bank*, The Participation of Minorities on Decision-Making Processes, HJIL 61 (2001), 1 et seq.

(a) various forms of territorial autonomy by way of federalism and decentralisation of powers and functions to regional and local government; (b) specially designed electoral systems and quotas to facilitate minority representation in legislative institutions; (c) formal and informal coalitions in the executive to allow ethnic minority participation in policy formulation and administration; (d) and the protection of individual rights by way of a bill of rights related to areas such as mother-tongue education, access to media, and freedom of association.[10]

These mechanisms are important in the range of options for minority protection, but the mechanisms often fall short to adequately recognise and accommodate the rights of dispersed minorities, especially in regard to the desire of those dispersed minorities to make decisions about their culture, language and traditions.

The reasons for the inadequacy of the afore-mentioned constitutional mechanisms to adequately protect the desire of dispersed minorities for autonomous decision-making can be summarised as follows:

(a) Although different forms of territorial autonomy have been used with success to protect minorities in federal and decentralised unitary systems, for example Canada, Switzerland, South Africa, India, Ethiopia and Nigeria, in all of those examples it is only those minorities that are concentrated in a geographical area that have been the recipients of territorial autonomy. The emphasis that federations and decentralised unitary systems often place on territorial protection of minorities, leaves minorities that do not have an "own"geographical area without effective recognition or protection.

(b) While specially designed electoral systems, such as those found in Mauritius, New Zealand, Germany, Croatia, Kosovo and Romania, facilitate to some extent minority representation in legislative institutions, the very emphasis on the numerical size of a group often continues to leave minorities disempowered. The underrepresentation by Aboriginal People in the parliaments of Australia since 1901 is clear evidence of the inability of the electoral system to advance their interests.[11]

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[10] Refer for example to *A. Lijphart*, Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries, 1999, 200 et seq.; *D. L. Horowitz*, Ethnic Groups in Conflict, 2000; *D. L. Horowitz*, Conciliatory Institutions and Constitutional Processes in Post-Conflict Societies, William and Mary Law Review (2008), 1213 et seq.; *M. Weller*, Creating Conditions Necessary for the Effective Participation of Persons Belonging to National Minorities, International Journal on Minority and Group Rights 10 (2004), 265 and *O. de Schutter*, The Framework Convention on the Protection of National Minorities and the Law of the European Union, in: K. Henrard (ed.), Double Standards Pertaining to Minority Protection, 2010, 71 et seq.

[11] *Chris Graham*, an Aboriginal leader calling for self-determination, observed the following in the wake of the 2013 federal election in Australia: "Aboriginal people want self-

(c) Although formal and informal coalitions in the executive have been used with great success to include ethnic minorities in countries such as Switzerland, Nigeria, Canada, South Africa, Northern Ireland and India in policy formulation, the consistency of participation by minorities often remains uncertain since no legal guarantees are given for the minority to be represented in cabinet or, in exceptional cases where guarantees are given, those guarantees generally lapse after a period of time. The absence of effective representation of Aboriginal People from the executives of state, territory and Commonwealth governments in Australia since Federation in 1901 illustrates the politically weak position of Aboriginal People in Australian polity.

(d) The effective protection of individual rights is essential for minority groups, however, individual rights do not necessarily extend to collective rights of minorities and particularly not to a collective right to a form of autonomous decision-making. Individual rights are often formulated in the negative which means there is no obligation on the state to assist minority groups to protect and promote their language, traditions or culture. Minorities without financial resources are therefore regularly marginalised and neglected.

In short, existing constitutional theory and techniques fall short to recognise and accommodate the desire of dispersed minorities to make autonomous decisions about aspects of their language, culture and traditions. [12]

III. What Is Cultural Autonomy?

Cultural autonomy, also referred to as non-territorial autonomy, involves the decentralisation[13] of decision-making and administrative powers to cul-

determination, and every step Australia takes - from an *Abbott* (Prime Minister) hand-picked council to constitutional recognition within a document designed to deny Aboriginal sovereignty – is a step further from where Aboriginal people want to be. Genuine self-determination – where a distinct people choose their own leaders, make their own laws, govern their own lives – never comes easily, nor quickly. It took Australia more than 100 years to even make a dent in it. It is, however, the only solution that has ever worked for nations facing the same problems we face – the displacement and brutalisation of a First Peoples." <http://www.abc.net.au>.

[12] *M. Weller*, Effective Participation of Minorities in Public Life, in: M. Weller (ed.), Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies, 2007, 477.

[13] In this article "decentralisation" refers to the "transfer of authority and responsibility for public functions from the central government to intermediate and local governments or quasi-independent government organisations and/or the private sector". World Bank, "Different Forms of Decentralisation", <http://www1.worldbank.org>. It is acknowledged that within the generic term "decentralisation" there are several ways to unbundle powers that include devolution, deconcentration, delegation and privatisation, but those sub-categories of

tural councils (or equivalent bodies) established by ethnic minorities on a non-geographical basis, to enable them to make decisions concerning the protection and promotion of their culture. *Osipov* describes cultural autonomy as follows:

> "Generally speaking, the term National Cultural Autonomy and similar notions encompass a broad range of institutional setups which envisage self-organization and self-administration of ethnic groups for the fulfilment of *public functions* in the ways other than territorial dominance and administration of a certain territory."[14]

The self-governing or autonomous cultural councils, which have public law status as *legislatures* ("independent public authority"[15]), are not mere non-governmental private organisations (NGOs), but are statutory created institutions of governance that are empowered to make binding decisions (with the effect of laws or by-laws) and administer those decisions about matters that affect the language, identity and culture of the community. At a practical level cultural autonomy offers to a minority group the opportunity to exercise "some kind of self-government – usually through representative bodies, the members of which are elected by and from the members of the minority concerned."[16] The application of cultural autonomy is particularly "adequate for minorities who live dispersed in the country but have a strong political will for self-government and articulate their claims as such."[17]

In the Australian context a cultural council/s for Aboriginal People, in contrast with an NGO, would have the status and functions of a government, with public law recognition similar to a local or state government, but

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decentralisation are not the subject of this study. Use of the term "decentralisation" for purposes of this article will suffice.

[14] Emphasis added. *A. Osipov*, Non-Territorial Autonomy During and After Communism: In the Wrong or Right Place?, Journal of Ethnopolitics and Minority Issues in Europe 12 (2013), 7 et seq., at 8.

[15] "A non-territorial jurisdiction (cultural autonomy) exists when independent *public* authority is exercised in respect of certain individuals throughout the state irrespective of the fact that those individuals are residing in territorial jurisdictions in which other individuals are subject to similar public authority from territorially delineated jurisdictions." *M. Suski*, Personal Autonomy as Institutional Form – Focus on Europe against the Background of Article 27 of the ICCPR, International Journal on Minority and Group Rights 15 (2008), 157 et seq., at 162.

[16] *R. Hofmann*, Political Participation of Minorities, European Yearbook of Minority Issues 6 (2006/2007), 11.

[17] *K. Gal*, Minority Governance on the Threshold of the Twenty-First Century, in: K. Gal (ed.), Minority Governance in Europe, 2002, 8.

with its jurisdiction defined by the type of services it offers rather than by geographical considerations.[18]

The main building blocks (as discussed below) of cultural autonomy are as follows:

(a) A cultural council is created *by law*;
(b) the cultural council is an *organ of government*;
(c) the source of power of the cultural council is the *Constitution* or an *Act of Parliament*;
(d) the *jurisdiction* of a cultural council is non-territorial and applies to individuals regardless of where the members of the ethnic minority group live;
(e) the *membership* of a cultural council is open to all individuals who associate with the ethnic minority group;
(f) the composition and functioning of a cultural council, as an organ of government, is based on the principles of *representative, responsible and accountable government*;
(g) the *powers and functions* of a cultural council relate to those matters that form an intimate part of the ethnic group's language, traditions, customs and beliefs;
(h) the *sources of revenue* of the cultural council are varied and include the power to tax its members; to levy charges for services rendered; to obtain loans; to share in revenue distribution; to undertake activities as an agent of another government; and to receive grants-in-aid from domestic and international sources;
(i) the *judiciary* oversees the functioning of a cultural council in the same way the judiciary oversees the functioning of other organs of government; and
(j) the creation of a cultural council *does not diminish* the right of individuals to participate in the public and political life of the rest of the nation.

The main building blocks of cultural councils as identified above, will now be expanded by reference to selected case studies and consideration will be given to the potential for cultural autonomy to be applied to Aboriginal People. Examples of countries that have in recent years experimented with aspects of cultural autonomy are the Russian Federation, Estonia, Belgium, Hungary and Kosovo.

[18] *B. de Villiers*, Protecting Minorities on a Non-Territorial Basis – Recent International Developments, Beijing Law Review 3 (2012), 170 et seq., at 172. For a general overview refer to *H. Hannum*, Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights, 1990; *R. Lapidoth*, Autonomy: Flexible Solutions to Interstate Conflicts, 1997; *M. Suksi* (ed.), Autonomy: Applications and Implications, 1998; *Y. Ghai* (ed.), Autonomy and Ethnicity: Negotiating Competing Claims, 2000; *K. Myntti*, A Commentary to the Lund Recommendations on the Effective Participation of National Minorities in Public Life, 2001; *K. Gal* (ed.), Minority Governance in Europe, 2000; *S. C. Roach*, Cultural Autonomy, Minority Rights and Globalization, 2005, and *E. Nimni*, National-Cultural Autonomy as an Alternative to Minority Territorial Nationalism, Ethnopolitics 6 (2007), 345 et seq.

IV. Building Blocks of Cultural Autonomy

Comparative research enables us to learn from each other's experiences, to identify common traits and trends, and to build upon what has gone before us. While it is acknowledged that the constitutional arrangements and circumstances of each country are unique, there is, however, no need to reinvent the wheel each time a new challenge for institutional design is encountered. Even a well-established democracy such as Australia may benefit from the experiences of other countries – in the same way as other countries benefit from Australian experiences.[19]

The main building blocks of cultural autonomy and the way in which those appear in constitutional law of selected case studies are:

Establishing a Cultural Council

A cultural council is an organ of government, similar to local or regional governments. A cultural council is not an NGO which exists in civil law and does not have the status or powers of government. A cultural council has the authority to make decisions with the effect of laws or by-laws over its members wherever they reside in a country or within a region of a country. The autonomy of the ethnic minority and its ability to manage and control its own affairs through a cultural council are therefore not dependent upon the members of the group forming a majority at a regional or local level.[20] In fact, the very reason to create a cultural council for purposes of some form of collective autonomy, is because the members of a community are geographically scattered.

The experiences of Estonia, Kosovo, Hungary and Belgium are instructive about how a cultural council can be established for the whole or part of a country. In Belgium, cultural councils have only been established for the capital city, Brussels. In Estonia, Kosovo and Hungary cultural councils have been established for the whole country.

The first phase of cultural autonomy in Estonia lasted from 1920 to 1939. The minority groups that could qualify for the cultural autonomy during those early years were the Russians, Germans, Jews and Swedish.[21] The first

[19] Refer for example to the following concise, albeit very useful table, in which some of the key mechanisms to protect minorities in several countries are highlighted: Council of Europe, Laws and Policies to Support Main National Cultural Minority Groups, 2011, Compendium: Cultural Policies and Trends in Europe, <http://www.culturalpolicies.net>.

[20] *A. Legare/M. Suksi*, Introduction: Rethinking the Forms of Autonomy at the Dawn of the 21st Century, International Journal on Minority and Group Rights 15 (2008), 144.

[21] *V. Raud*, Estonia: Reference Book, 1953, 41.

phase of cultural protection in Estonia was regarded as one of the most successful in Europe. The minority protection arrangements were disbanded as a result of the Marxist take-over of the country in 1939.[22] It was said at the time that "the pride of the Estonian nationhood was its treatment of national minorities".[23]

The second phase of cultural autonomy, which is akin to Estonia's previous pre-World War Two experiences, commenced with Estonia's return to democracy after the fall of the Berlin Wall. The enactment of the *Law on Cultural Autonomy for National Minorities* on 28 November 1993[24] (Estonian Act on Cultural Minorities) and the *Estonian Language Act 1995*[25] set the framework for the protection of minorities.

The essence of both these statutes is to recognise the right of national ethnic minorities to protect, promote and preserve their identity, language and culture. The respective ethnic communities can decide to establish cultural councils for decision-making over aspects of their culture, language and identity. No community is forced to register a cultural council and no individual is obliged to belong to or to attend the services of a cultural council. So far two groups, the Finnish and Swedish, have taken up full cultural autonomy.[26] Some groups have thus opted for informal, cultural associations akin to NGOs for purposes of management of their schools and cultural activities.[27]

In Kosovo a key element of the settlement that led to the independence of the country was the acknowledgement that non-territorial ways had to be found to protect the rights and interests of the respective ethnic communities.[28] An integral part of the democratisation process in Kosovo is the

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22 For a detailed overview of this period of cultural autonomy refer to *D. J. Smith/J. Hiden*, Ethnic Diversity and the Nation State: National Cultural Autonomy Revisited, 2012, 46 et seq.

23 *E. Nodel*, Estonia: Nation on the Anvil, 1963, 176.

24 <http://www.unhcr.org>.

25 Passed 21.2.1995. The Language Act recognises the right of national minorities to use their own language; to communicate in the language; to use the language in official affairs if the majority of a local community speaks the language. Refer to articles 11; 14 and 15 of the Language Act. <http://www.eui.eu>.

26 *V. Poleshchuk* (ed.), Chance to Survive: Minority Rights in Estonia and Latvia, 2009, 63.

27 For a discussion about reasons why the Russian community has not taken up self-government refer to *A. Aidarov/W. Drechsler*, The Law and Economics of the Estonian Law on Cultural Autonomy for National Minorities and of Russian National Cultural Autonomy in Estonia, Halduskultuur – Administrative Culture 12 (2011), 43 et seq.

28 *M. Weller*, The Kosovo Constitution and provisions for the protection of minorities in Europe, European Yearbook of Minority Issues 6 (2006/2007), 485 et seq.

recognition of "community" rights.[29] The arrangements in Kosovo comprise several elements, but key amongst those is the ability of ethnic minorities to establish cultural councils for purposes of self-government. [30]

Belgium has cultural councils with non-territorial powers in the capital city, Brussels. The two language communities, the Dutch and French, each has a cultural council for Brussels. The rest of the country comprises territorial arrangements. Belgium has been described as a "double federation" since it provides autonomy for regions and communities.[31]

The constitutional arrangements for Brussels have been a major point of contention between the Dutch and the French. While the Dutch see Brussels as "their" city since it is situated in the geographical area of Flanders, the majority population of Brussels is French and hence detailed arrangements were required for the sake of national unity, to accommodate concerns by the Dutch community in Brussels for their rights and interests to be protected. Brussels is bilingual, with the Dutch and French languages being protected on an equal footing.[32] According to *Pas*, the "combination of the regional and community identity is probably the most remarkable and positive achievement of Brussels and Belgium system."[33]

The jurisdiction of the two cultural councils in Brussels is non-territorial. Each community has an elected cultural council that functions as an organ of government with law-making powers and the ability to administer its decisions, raise taxes, enter into international treaties, and function like any other territorial government.[34]

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[29] For a useful overview refer to *G. Stevens*, Filling the vacuum: Ensuring protection and legal remedies for minorities in Kosovo, 2009.

[30] a31 Estonian Act on Cultural Minorities. High Commissioner of the Organization for Security and Cooperation in Europe, *K. Vollebaek,* Minority Rights in Kosovo, Conference on Minority Rights in Practice, Pristina 11.9.2008, 2.

[31] *K. Deschouwer*, The Politics of Belgium: Governing a Divided Society, 2012, 54.

[32] By referring to "Brussels" it includes Brussels and the 19 surrounding municipalities with a total population of about 1 million. The Flemish community insisted that the "spread" of Brussels into the area of Flanders had to be curbed and therefore the bilingual area of Brussels is limited to the city plus 19 municipalities. Any expansion beyond this area falls within the unilingual area of Flanders.

[33] *W. Pas*, A Dynamic Federalism Built on Static Principles: The Case of Belgium, in: G. A. Tarr/R. F. Williams/J. Marko (eds.), Federalism, Subnational Constitutions, and Minority Rights, 2004, 164.

[34] The two communities could decide whether they wanted to establish a separate cultural council for Brussels, or whether they wanted their regional government to also constitute as cultural council for Brussels. For purposes of this article it is sufficient to note that both communities have an elected body that discharges functions of a cultural council for Brussels.

In Hungary the Law on National Minorities (enacted in 1993 and amended in 2011 by the Act on the Rights of Nationalities)[35] recognised the right of minorities to establish local and national bodies for purposes of self-government.[36] A total of 13 ethnic minorities are recognised for self-government.[37]

Each ethnic community has the right to establish institutions of local and national "self-government" and to cooperate with each other as well as with other local governments.[38] An institution for self-government is described as a "legal entity" which is recognised in public law.[39] The cultural self-governments not only have wide ranging powers on which they act autonomously, they also offer the opportunity to the communities to comment and be consulted in regard to national legislation that may affect the minority.[40] The self-government arrangements commence at a local level,[41] but each group also has a national council which coordinates national activities of each community.

Establishing cultural councils for Aboriginal People would require a quantum leap in Australian constitutional philosophy and traditions. The Australian liberal democratic philosophy and traditions do not have experience to deal with aspirations of minority groups by way of special institutions or collective rights.[42] Although Aboriginal People is not an homogenous group and comprise many language groups, albeit with overlapping customs and beliefs, the mechanism of a cultural council could be used by Aboriginal People at a federal, state or local level to obtain some form of

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35 Law on Rights of National and Ethnic Minorities, Act LXXVII of 1996. <http://www.minelres.lv> and the Act CLXXIX of 2011 on the Rights of Minorities <http://www.venice.coe.int> (Hungarian Law on the Rights of Nationalities).

36 aa 2(2); 2(3) and 50 Hungarian Law on Rights of Nationalities. See *M. R. Geroe/K. Gump*, Hungary and the New Paradigm for the Protection of Ethnic Minorities in Central and Easter Europe, Colum. J. Transnat'l L. 32 (1995), 673 et seq.

37 Appendix 1 of the Hungarian Law on Rights of Nationalities.

38 aa 2(1)(b); 2(2); and 50 Hungarian Law on Rights of Nationalities.

39 a50 Hungarian Law on Rights of Nationalities.

40 a50 Hungarian Law on Rights of Nationalities.

41 Literally hundreds of self-governing bodies have been established at local level. It was estimated that in 2000 already more than 800 self-governments had been established. Ministry of Foreign Affairs, Fact Sheets on Hungary: The National and Ethnic Minorities of Hungary, 2000, 4.

42 As is observed by *Ghai*: "Constitutional settlement in multi-ethnic societies require the balancing of interests. This balancing is particularly important if there are prior, existing disparities of economic, social or political resources, and particularly if these disparities are the result of state policies. *Y. Ghai*, Ethnicity and Competing Notions of Rights, in: C. Harvey/A. Schwartz (eds.), Rights in Divided Societies, 2012, 51 et seq., at 83.

autonomy to make decisions over matters that directly affect their culture, laws and customs.

Cultural Council as an Organ of Government

A cultural council is an organ of government and functions pursuant to public law. While the resolutions of an NGO do not have the force of law,[43] decisions of a cultural council have the effect of a law; they can be called laws or by-laws; and they are enforced through public law mechanisms in a similar way than the laws of a local or state government.

The experiences of the Russian Federation, Hungary, Estonia and Brussels are instructive as to how decisions by cultural councils can be distinguished from resolutions of ordinary NGOs.

The Russian Federation is territorially organised to accommodate, in an indirect manner, its ethnic diversity by way of territorial, federal states and other autonomous regions.[44] The rights of minorities are so closely associated with these territorial arrangements that it has been said that "individuals belonging to a recognized ethnic minority *can only* enjoy their minority rights when they live on a territory governed by the minority."[45] Account must however be taken that of the close to 150 nationalities in the Russian Federation, only a relative few have some form of territorial autonomy by way of the organisation of the federal states and autonomous territories.[46]

The Russian Federation enacted in 1996 and amended thereafter, the *Federal Law on National and Cultural Autonomy*[47] (Russian Law on Cultural Autonomy) in an attempt to grant some form of autonomy to those minorities that live dispersed without an "own" geographical region or state. The

[43] Some authors refer to the type of powers falling within the scope of a non-governmental cultural council as "functional autonomy". *H. J. Heintze*, On the Legal Understanding of Autonomy, in: M. Suski (note 5), at 23 et seq.

[44] *J. Henderson*, The Constitution of the Russian Federation, 2011, 94 et seq. Also see *M. Suksi*, Functional Autonomy: The Case of Finland with Some Notes on the Basis of International Human Rights Law and Comparisons with Other Cases, International Journal on Minority and Group Rights 15 (2008), 195 et seq. about examples of "functional autonomy" in Finland.

[45] *I. Busygina/A. Heinemann-Gruder*, Russian Federation, in: L. Moreno/C. Colino (eds.), Diversity and Unity in Federal Countries, 2010, 263, (author emphasis).

[46] Refer to *B. Bowring*, The Tartars of the Russian Federation and National-Cultural Autonomy: A Contradiction in Terms?, Ethnopolitics 32 (2007), 417 et seq. Also see *V. Filipov*, Equity, Exit and National Identity in a Multinational Federation: The "Multicultural Constitutional Patriotism" Project in Russia, Journal of Ethnic and Migration Studies 26 (2000), 218 et seq.

[47] Federal Law on National and Cultural Autonomy, 17.6.1996, No. 74-FZ as amended by Act No. 58-FZ, signed 29.6.2004.

Russian Law on Cultural Autonomy provides that a cultural Association formed by a minority group may be registered with the federal government for purposes of national cultural autonomy and receive government funding for all or some of its activities.[48] The objects of the "voluntary self-organization" Associations are to preserve the identity, develop the language, offer education and promote the culture of the ethnic minority for whom the Association is established.[49]

The Russian Law on Cultural Autonomy defines "national cultural autonomy" as follows:

> "The national-cultural autonomy in the Russian Federation is the form of the national-cultural self-determination which is the social association of citizens of the Russian Federation who consider themselves to belong to certain ethnic communities on the basis of their voluntary self-organization with the aim of the independent solution of the issues related to preservation of their identity, development of language, education, and national culture."[50]

The principles upon which the Associations function are freedom of association of those persons belonging to minorities; self-organisation of the Associations; a combination of private initiative and government support; and respect for the language, culture and identity of the respective nationalities.[51]

It is, however, emphasised that the right to autonomy does not equate to a right to "national-territorial self-determination".[52] This precaution is intended to discourage demands by minorities to increase the number of federal states (as has happened in Nigeria), or the re-demarcation of states along language lines (as has happened in India), or to move towards secession of existing states or regions (as has happened in Kosovo).[53]

A cultural Association in the Russian Federation is not a public law authority, but it functions within the domain of private law as an NGO. It was estimated that by 2011 more than 900 national cultural Associations

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48 a4 Russian Law on Cultural Autonomy.

49 a1 Russian Law on Cultural Autonomy. For a critical assessment of the arrangements refer to *E. Filippova*, (2008) National-Cultural Autonomies in Post-Soviet Russia: A Dead-End Political Project, Association for Study of Nationalities Conference, Paris, 4.7.2008, <http://www.academia.edu>.

50 a1 Russian Law on Cultural Autonomy.

51 a2 Russian Law on Cultural Autonomy.

52 a4 Russian Law on Cultural Autonomy.

53 For a discussion refer to *B. de Villiers*, Creating Federal Regions – Minority Protection versus Sustainability, HJIL 72 (2012), 309 et seq.

had been established and registered in the Russian Federation.[54] The Associations can be established on a local, regional or at a national level.[55] There is no statutory limit to the number of Associations that can be registered at a local level per ethnic community, although only one Association may be recognised per group at a national level.[56]

The Act on Cultural Autonomy in Estonia grants collective cultural autonomy to ethnic national minority groups.[57] "Cultural autonomy" is defined as "the right of individuals belonging to a national minority to establish cultural autonomy in order to achieve the cultural rights given to them by the Constitution."[58] The cultural autonomy of a group is awarded to a legal entity, a Cultural Council, which has the power to make decisions and administer those decisions on behalf of the community.[59] The jurisdiction of the Cultural Council is exercised on a personal/individual rather than on a territorial basis.[60] The decisions of a Cultural Council are therefore applicable to the services offered by a Cultural Council and thereby on individuals who utilise the services.

In the case of Brussels, the cultural councils are public law entities and their decisions are given legal effect through the services they offer to the public.[61] There is no difference at law between the legal effect of a law of a region and a law of a cultural council. The typical powers and functions that

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[54] *A. Osipov* (note 14), 11. See also *A. Osipov*, National Cultural Autonomy in Russia: A Case of Symbolic Law," Rev. Cent. & E. Eur. L. 18 (2010), 37.

[55] a25 Russian Law on National and Cultural Autonomy.

[56] a5 Russian Law on National and Cultural Autonomy. *E. Filippova* (note 49) observes as follows: "Among the most active, in the NCA-building, ethnic communities one should mention Jews with 90 NCAs in 51 territorial units, Tatars (108/34) and Germans (95/32). Hence more than a half of all existing local and regional NCAs fall to the share of these three ethnic groups." *Torode* notes that since only one association can exist nationally for each ethnic group, there has been a "race to the top" by competing associations from the same ethnic group attempting to be the first to obtain national registration. *N. Torode*, National Cultural Autonomy in the Russian Federation: Implementation and Impact, International Journal on Minority and Group Rights 15 (2008), 179 et seq., at 184.

[57] a11 Estonian Act on Cultural Minorities. Refer to *M. Suski*, On the Constitutional Features of Estonia, 1999.

[58] a2(1) Estonian Act on Cultural Minorities.

[59] a26 Estonian Act on Cultural Minorities determines as follows: "Institutions of cultural autonomy are independent legal persons, may own real property and are liable for their financial obligations." There is some controversy, which is not the subject of this article, whether the Cultural Councils can in fact obtain independent status of legal persons. See for example the Third Report Submitted by Estonia Pursuant to Art. 25, Para. 1 of the Framework Convention for the Protection of national Minorities, ACFC/SR/III (2010) 006, 6-7.

[60] a6 Estonian Act on Cultural Minorities.

[61] For a discussion refer to *K. Deschouwer*, Getrennt zusammenleben in Belgien und Brüssel, Jahrbuch des Föderalismus 3 (2002), 275 et seq.

form part of the cultural autonomy of the cultural councils are referred to as "personal" matters and relate to the culture, language, education, sport, welfare and identity of the respective language communities. "Personal" matters concern the culture and identity of the respective language communities, in contrast to "regional" competencies that refer to infrastructural and physical services for a geographical area.

The members of the Dutch and French communities in Brussels can choose to exercise their cultural autonomy by way of a separate cultural council for Brussels or they could opt for the regional assembly that is responsible for their linguistic region, to have a dual function – that of territorial and non-territorial decision-making.[62]

In Hungary the minority ethnic communities are also entitled to establish cultural councils for purposes of self-government.[63] The self-government councils function in the domain of public law and their decisions are binding on the members. The cultural councils can operate at a local level, with defined powers and functions, or at a national level where their functions and powers are also defined. The self-government councils are therefore "governments" and the decisions are binding and enforceable on persons who associate with or who attend the services provided by a cultural council.

These experiences highlight two important principles should Aboriginal People consider a form of non-territorial autonomy:

First, if the NGO-option of the Russian Federation is pursued by Aboriginal People, legislation could be enacted at Commonwealth or State level to formally recognise a special category of NGO that is formed specifically to promote and protect the identity of an Aboriginal cultural community. Such special legislation could include specific reference to self-government and autonomy of an Aboriginal culture group; the role of the NGO as potential agent to effect service delivery for government; and the right of the corporation to comment, make submissions and be consulted in regard to policies that may promote Aboriginal culture, and an undertaking of gov-

62 For a discussion refer to *K. Deschouwer* (note 31), 58 et seq. where he discusses the intricacies of the Belgium arrangements.

63 The Fundamental Law of Hungary provides as follows: "a29(1) Nationalities living in Hungary shall be constituent parts of the State ... (2) Nationalities living in Hungary may set up local and national self-governments." a50 of the Hungarian Law on the Rights of Nationalities recognises the right of the communities to set up local and national self-government institutions. <http://www.kormany.hu>. Also see in general *G. A Toth* (ed.), Constitution for a Divided Nation: On Hungary's 2011 Fundamental Law, 2012.

ernment to support financially the NGOs to promote the culture of Aboriginal People.

Second, if a statutory cultural council for Aboriginal People is established as in Brussels, Hungary, Kosovo and Estonia such a council would be a formal organ of the government; it would function within the realm of public law; its decisions would have the status of laws; and it would recognise that Aboriginal people do in fact have non-territorial, autonomous *self-government*. A cultural council would place Aboriginal self-management at the same level as local and state governments as far as the legality, credibility and legitimacy of legislation is concerned.

Source of Power of a Cultural Council

The source of powers and functions of a cultural council can be the Constitution or an Act of Parliament. The statutory instrument decentralises powers to the cultural council. The source of power of a cultural council is therefore similar to that of state or local governments that derive their powers from the Constitution or an Act of parliament.

The cultural Associations in the Russian Federation are registered in accordance with a special statute, but the Associations are described as "voluntary self-organizations".[64] The Russian Law on Cultural Autonomy does not decentralise any legislative powers or functions to the Associations, although the door is left open for any level of government to grant administrative powers to Associations in the fields of education and culture.[65] The Associations therefore do not function primarily as "governments", although it is open to any government department to privatise some functions by contracting with an Association to deliver the service on behalf of government. The cultural Associations are therefore NGOs of a special character. Provision is also made for Associations to give advice to all levels of government in regard to matters that affect their community.[66]

In Belgium, the Constitution and the special legislation that gives effect to the cultural councils are the source of powers of those councils. The councils receive original powers and therefore constitute, in effect, separate "levels" of government albeit on a non-territorial basis. The cultural councils are public law entities in the same way as local and regional governments.

64 a1 Russian Law on National and Cultural Autonomy.
65 a4 Russian Law on National and Cultural Autonomy.
66 a7 Russian Law on National and Cultural Autonomy.

In Hungary the Law on Rights of Nationalities recognises the groups that are entitled to establish cultural self-governments[67] and sets out the powers and functions of the community governments. A wide range of powers are decentralised to the communities, for example aspects of education; promotion and protection of language; historic days and insignia; museums; theatres; and provision of legal advice.

The source of power of a cultural council for Aboriginal People can take several forms, namely: first, the Commonwealth Constitution may be amended to make specific reference to the right of Aboriginal People to establish cultural councils; second, federal or state legislation may be enacted to establish and decentralise certain powers and functions to cultural councils; and third, government ministries may delegate the implementation of certain legislation and policies to a cultural council as an agent on behalf of the delegating authority.

Jurisdiction of a Cultural Council

The characteristic that most defines the nature of a cultural council is that its jurisdiction to implement decisions is not by reference to territory. The jurisdiction is personal since decisions only affect those persons that associate with and attend the services offered by the cultural council. The element of choice by individuals is essential to the operation of a cultural council – an individual is only affected by the decisions of a cultural council if he/she chooses to associate with, or attend, or receive the services offered by the council.

The presumption that the jurisdiction of government should inevitably be territorial-based is, for historical reasons, deeply imbedded in liberal democratic theory and practice. As a result, the concepts of federalism and decentralisation are widely applied on a territorial basis for the indirect protection of minority groups.[68] Cultural councils are established for the very reason that territorial arrangements do not always suffice due to the dispersed living patterns of an ethnic community. The strength of a cultural council, rather than the weakness as some would suggest, is that decisions of a cultural council apply to members of the ethnic community regardless where they reside. The emphasis of territorial "control" or "dominance" for purposes of self-determination is thereby averted.

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67 Appendix 1 to the Hungarian Law on Rights of Nationalities.

68 Territorial autonomy is often seen as international "best practice" to protect minorities albeit in an indirect way. *W. Kymlicka* (note 2), 385.

The nature of jurisdiction of a cultural council is well demonstrated in the experiences of Brussels and Hungary.

In Brussels, where the Dutch and French communities live intermingled with nationalities from many other countries, the respective cultural councils exercise their jurisdiction through the services on offer to the public. Each of the cultural councils offers a variety of services, for example education, medical services, cultural activities, sports and recreation, to the general public. Individuals who attend the services of a specific cultural council are therefore subject to the decisions of that council, the standards of services on offer, the charges that are levied, and the language in which the services are offered. The services of a cultural council are accessible by any individual regardless of where they reside in Brussels and to whichever language community they belong.

A similar approach has been taken to self-determination institutions in Hungary. The institutions at local and national level offer a wide range of services to members of the specific ethnic community. Those services are available to members of the specific community who chose to attend, receive and utilise the service. Other individuals may also attend the educational services on offer by a specific community, provided that the needs of the ethnic community had been fulfilled and the resources are available to accommodate the additional person/s. There is however no obligation on any person, including a member of an ethnic community, to attend the services offered by the cultural council of that community.[69] It is only by attending a facility or by receiving a service that the individual is brought within the jurisdiction of the council. If a member of a specific ethnic community chooses not to attend the services on offer by that community, he/she is not affected at all by the decisions of the cultural council.[70] An individual is however required to register as a voter of a specific community to qualify for elections for that community.[71]

Although the notion of non-territoriality of decisions at first glance seems to be complex, in practice there are many examples where cultural organisations and cultural councils offer services to their members – both as NGOs and as cultural council governments – on a non-territorial basis. In fact, non-territorial arrangements may in some instances be *less* complex and it may reduce conflict since the competition for territorial control is

[69] aa 17 and 14 Hungarian Act on Rights of Nationalities.

[70] Any other person, even if they are not a member of a specific community, may attend educational services offered by the community, provided that the needs of the community have been satisfied and capacity is available to accommodate the non-member. a28 Hungarian Act on Rights of Nationalities.

[71] a53 Hungarian Act on Rights of Nationalities.

removed.[72] Although some analysts may criticise non-territoriality for emphasising ethnicity, territorial dominance and de facto ethnic control have also been the cause of countless conflicts, including inter-ethnic persecution and violence.

The non-territoriality of cultural councils may suit Aboriginal People particularly well since their residential patterns are often scattered and intermingled with other Australians. A cultural council with a non-territorial jurisdiction may provide services in fields such as education, welfare, recreation, language and customs on a personal basis to whoever attends and participates in those activities and receive the services.

Membership of an Ethnic Community and Cultural Council

The question of how to determine membership of an ethnic community or a cultural council can be challenging. Association with an ethnic community is complex from a sociological and legal perspective. There is no agreed definition of "ethnic group" or "minority" in international law that settles the question. The definitional challenge is well summarised by *Sabanadze* when she observes that:

> "Another challenge is to operate without a legally-binding definition of a national minority. The question who qualifies as a minority (as well as who qualifies as part of the in-group) and what are the main defining characteristics (including time, numbers, etc) have been unresolved [in international law]."[73]

The point of departure to settle questions of membership is the individual's freedom of choice and freedom of association. A system of minority protection must rely on freedom of association by individuals to decide whether they wish to associate with a specific ethnic community and comply with the decisions of the cultural council of that community. International law does not tolerate arrangements where individuals are forced to exercise rights through cultural councils; where membership of an ethnic group is forced upon an individual; or where an individual is being discriminated against for associating or not associating with a specific ethnic group.

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[72] *D. J. Smith/J. Hiden* (note 22), 110 observe that the democratisation process in eastern and central Europe has been more stable as a result of cultural autonomy than the case would have been had nations opted solely for traditional territorial models of autonomy through territorial decentralisation.

[73] *N. Sabanadze*, Constraints and Challenges in Minority Protection: Experience of the OSCE High Commission on National Minorities, in: I. Boerefijn/L. Henderson/R. Janse/R. Weaver (eds.), Human Rights and Conflict: Essays in Honour of Bas de Gaay Fortman, 2012, 107 et seq., at 125.

Membership of a cultural council may, because of its legal status, be easier to determine than membership of an ethnic minority. In general, the membership of a cultural council comprises three elements – firstly, a *descriptive* element that describes the community for whom the council is established so as to determine what makes the community unique and what characteristics are shared by the members of the community. Secondly, an *expressionist* element whereby a community expresses a desire and willingness, by way or referendum of other mechanism, to exercise cultural autonomy. Thirdly, an *associational* element whereby an individual may register to be part of the cultural council; participate in and practice the laws and customs of the group; and is regarded by other members as forming part of the community.[74]

In some countries the groups which are the subject of protection are specifically identified by law; while in other countries groups can identify themselves.

In Kosovo, "community" is defined by the Constitution of Kosovo as "inhabitants belonging to the same national, linguistic, or religious group traditionally present on the territory of Kosovo."[75] The Comprehensive Proposal for the Kosovo Status Settlement[76] recognises as a key element for stability the right of communities to autonomous decision-making.[77] The recognition of the principles contained in the Settlement is of special importance since the United Nations endorsed it and thereby gave international endorsement to the concept of autonomous decision-making of an ethnic community on a non-territorial basis.

In the Russian Federation recognition is given to national cultural Associations, but there is no prescription in legislation as to how the cultural communities identify themselves or how disputes about membership of an Association are resolved.[78] The Russian Law on Cultural Autonomy only

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[74] *M. N. Shaw*, The Definition of Minorities in International Law, in: Y. Dinstein/M. Tabory (eds.), The Protection of Minorities and Human Rights, 1992, 28 and *J. Packer*, On the Content of Minority Rights, in: J. Raikka (ed.), Do We Need Minority Rights, 1996, 121.

[75] a57(1) Constitution of Kosovo. <http://www.assembly-kosova.org>. Note that by referring to communities that are "traditionally" present in Kosovo, is a not to subtle way to exclude recent immigrant arrivals who may wish to claim the same form of community protection.

[76] 2.2.2007. For the text of the Settlement refer to <http://www.kuvendikosoves.org>.

[77] The first principle is that Kosovo "shall be a multi-ethnic society" and secondly that Kosovo shall protect the rights of "all its Communities". aa1.1 and 1.2 of the Comprehensive Proposal for the Kosovo Status Settlement.

[78] There is no limitation on the number of Associations that can be established; there is no requirement for individuals to register with an Association; and there is no oversight to determine whether the claim of an Association to represent a specific community, is credible.

concerns itself with the establishment of the Associations; their objects; functions and powers – while the important issues of self-identification and membership of an Association are left to the respective Associations to work out. Provision is merely made for citizens who "consider themselves to belong to a definite ethnic community" to establish an Association.[79] The process is, however, subject to judicial oversight.[80] The risk in the Russian Federation is, however, that since there is no limitation on the number of Associations that can be established at a local level, there could be a fragmentation or proliferation of Associations where more than one Association purports to represent the same community or where Associations compete as to who is the "real" voice of the community at a national level.[81]

In Brussels only two communities, the Dutch and the French, are the recipients of cultural autonomy. These communities are identified by law and individuals are not required to express any association with a specific community. No other language or cultural community in Brussels can apply for, or obtain any form of cultural self-government in the capital city. As far as membership of a specific cultural community is concerned the principle of freedom of association applies, which means no individual is required to declare their language affiliation; an individual may vote for any candidate of either of the language communities in an election; and an individual may attend any service of offer regardless of the cultural council that offers the service. Each adult can, however, decide for which community-list they vote, provided that a person may only vote once. An individual is not obliged to vote for the same community in each election.[82]

Although the Constitution recognises the two cultural communities that exercise jurisdiction in Brussels, no individual is obligated to attend the services of a specific cultural council or to register with a cultural council. Since it would be so difficult and controversial to "classify" individuals into one of the linguistic communities, it was decided as part of the federalisation process to categorise the cultural institutions that offer services to the

79 a5 Russian Law on Cultural Autonomy.

80 a6 Russian Law on Cultural Autonomy.

81 On the other hand it must also be recognised that the notion of a truly homogenous culture group is probably only realisable in theory and not in practice. See for example *W. Kemp*, Applying the Nationality Principle: Handle with Care, Journal of Ethnopolitics and Minority Issues in Europe 4 (2002).

82 *Deschouwer* observes as follows: "This is indeed the logic of the Brussels institutions. At the level of the institutions, everything is strictly divided into language groups. At the level of citizens, there is no formal division. There is no subnationality." *K. Deschouwer* (note 31), 63.

public into one of the two language groupings.[83] The right of individuals – including foreigners who are resident in Brussels - to associate with or receive the services on offer by a linguistic community's cultural council, is thereby protected.[84] Individuals can therefore choose which of the services of the respective communities they use, and no individual can be prevented from attending or receiving the services on offer of another community (although the language in which those services are offered will be of one specific community). A person can attend a Flemish school, but be treated in a French hospital provided that he/she accepts that the language of service will be that of the community who manages the facility.[85] The choice by an individual to attend the services of a specific community is not binding and not permanent.

In Hungary 13 ethnic communities are recognised in the Law on Rights of Nationalities for purposes of self-government.[86] The Law on Rights of Nationalities identifies the respective groups and no other communities can qualify for self-government. Individuals who wish to participate in elections of a community self-government, is required to register so as to prove that he/she belongs to the group.[87] No person is obliged to register as a voter for a specific community and a person may attend services of a specific community even if the person is not registered as a voter for that community.[88]

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[83] Coudenberg Groep, The New Belgium Institutional Framework, 1989, 32. Each institution that renders a community service is therefore categorised as French or Dutch speaking and provides its services in one language.

[84] *Janssens* observes as follows about persons not necessarily attending the services of the language community to whom they belong: "Someone's linguistic background is not always decisive for the school attended by their children, you can hardly brand French-speaking children in Dutch speaking schools as Dutch speakers or members of the Flemish Community, even though their choice of school in the context of Brussels is not contradictory and they do actually belong to the target group of the policy of the Flemish Community. The same diversity can be seen in the participation in cultural initiatives and infrastructure that is open to all the people from Brussels, regardless of their language background." *R. Janssens*, Language Use in Brussels and the Position of Dutch: Some Recent Findings, Brussels Studies 13 (2008), 2, <http://www.briobrussel.be>.

[85] Refer for example to the following webpage maintained by the Flemish Commission in which it explains the benefits for non-Dutch speakers to attend Dutch schools: <http://www.onderwijsinbrussel.be>.

[86] Appendix 1 Hungarian Law on Rights of Nationalities. Those groups are Bulgarian, Gypsy, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian.

[87] a53 Hungarian Law on the Rights of Nationalities. Prior to 2005 any person at a local level could participate in elections of ethnic communities, but since this arrangement was controversial and gave rise to abuse, individuals now have to register as belonging to a specific ethnic community to vote in its elections.

[88] a53(2) Hungarian Law on the Rights of Nationalities. *B. Dobos*, The Development of Cultural Autonomy in Hungary, Ethnopolitics 6 (2007), 451 et seq.

Individuals who do not belong to a specific nationality may attend the educational facilities offered by the nationality provided the capacity exists, the need of the nationality has been satisfied, and the service is offered in the language of the nationality.[89] It is estimated that more than 1 200 minority self-governments have come into being in Hungary since the mid-1990s.[90]

In Kosovo, an individual also has the right to choose if he/she wishes to be treated as a member of an ethnic community or not.[91] Individuals are protected against discrimination regardless of their decision to belong or not to belong to a particular community. A positive obligation is placed on the state to assist communities to fully realise their rights and the promotion of their culture and traditions.[92] These collective rights of communities are in addition to the individual rights and freedoms guaranteed in the Constitution. Ethnic communities may form associations and those associations are entitled to the protections and rights set out in Chapter 3 of the Constitution. The obligation of the state to take positive steps to assist ethnic communities involves financial and non-financial support to communities. A list of the names of communities that receive automatic protection are listed,[93] but the door is left open for other communities to also qualify for recognition. The communities the automatic recipients of recognition are Kosovo Serb, Roma, Ashkali, Egyptian, Gorani, Bosniak and Turk.[94]

In Estonia a combination of statutory recognition and self-identification is used to identify minorities. At the time of the enactment of the Estonian Act on Cultural Minorities, there were an estimated 14 major ethnic minority groups residing in Estonia,[95] but not all of those could automatically qualify for cultural autonomy. Once a national minority is recognised, such a group qualifies for the autonomy arrangements,[96] but no group is obligat-

89 a28 Hungarian Law on the Rights of Nationalities.

90 *D. J. Smith/J. Hiden* (note 22), 114.

91 a57(1) Constitution of Kosovo.

92 "The Government shall particularly support cultural initiatives from communities and their members, including through financial assistance." a48(1) of the Constitution of Kosovo.

93 a64(2) Constitution of Kosovo.

94 Chapter 3 Constitution of Kosovo and a1(4) of the Law on the Promotion and Protection of the Rights of Communities and their Members in Kosovo Law, 3/L-047 <http://www.gazetazyrtare.com>.

95 <http://old.estinst.ee>.

96 There is an interesting similarity between the phasing in of community autonomy arrangements in Estonia and the asymmetry of regions in Spain, Italy and Iraq where historic regions could gain autonomy prior to other, newly created regions. In Estonia, there is no obligation on national minorities to take up cultural autonomy and even if they wish to do so, the extent of the powers is the subject of negotiation with each group. In Hungary provisions are also made for the powers and functions of the cultural councils to vary. a76(2) Hungarian Law on the Rights of Nationalities.

ed to take up autonomy. A group may therefore qualify for autonomy, but the members may not mobilise to register a cultural council. The communities that automatically qualify are the German, Russian, Swedish and Jewish communities.[97] Two communities, the Finnish and Swedish, have so far taken up the opportunity for self-government. Other minorities, such as the Ukranians and Belarussians who may wish to quality for cultural autonomy, must demonstrate that they have at least 3000 members before they can apply for self-government.[98]

If these experiences are applied to potential self-government of Aboriginal People by way of cultural councils, the following guidelines can be suggested:

> "The Aboriginal community, the subject of any protection, must be identified and defined by statute. International experience shows that the use of generic terms such as 'indigenous', 'aboriginal' or 'minority' may serve a beneficial purpose from a socio-political perspective and public discourse, but such terms are vague and unhelpful from a legal perspective.[99] Finding a universally acceptable and applicable definition for 'minority' is probably a bridge too far since it attempts to 'define the undefinable'.[100] The most practical, so it seems from these experiences, is to describe the minorities in a statute with reference to the population composition of each country. This has been done in Belgium, Estonia, Kosovo and Hungary. In Australia the identification of the relevant Aboriginal group/s may be done in a similar way as the Federal Court has described communities for purposes of the recognition of native title[101] or a definition could be

[97] a2(2) Estonian Act on Cultural Minorities. The Russian community is the largest of the national minorities and has an extensive network of schools and cultural activities to service the needs of their community. The Russian minority has, so far, opted to pursue their rights by way of independent NGOs rather than to register a cultural council. Cultural Autonomy in Estonia – Bane or Boon for Indigenous Cultural Survival, 21.1.2010, EESTI EDU, <http://www.eesti.ca>.

[98] a2(2) Estonian Act on Cultural Minorities.

[99] Note that even in a case where the word "minority" is used in a constitution, such as in the Constitution of India, the courts have been unable and unwilling to provide an ultimate definition of the meaning thereof. aa29 and 30 of the Constitution of India. The Government Resolution of 12.1.1978 which established a Minorities Commission for India, also failed to define the term "minority" although it was declared that "there persists among the Minorities a feeling of inequality and discrimination". Home Ministry Notification No II-160/2/2/77-MD of 12.1.1978. In the Kerala-matter at 75 (*In re Kerala Education Bill*, AIR 1958 SC 959: 1959 SCR 995) the Supreme Court of India emphasised that the definition of "minority" must be seen within the context of the state in which the group claiming to be a minority, is situated. *TMA Pai Foundations and Others v. State of Karnataka and Others*, 8 SCC 481 (2002).

[100] *G. Guliyeva*, Defining the Indefinable: A Definition of "Minority" in EU Law, European Yearbook of Minority Issues 9 (2010), 189 et seq.

[101] In order to lodge a successful native title claim over ancestral land, Aboriginal People are required to describe the community that claims the land with great accuracy and with

used that is formulated after wide consultation with the Aboriginal community concerned."[102]

It is envisaged that in Australia, where Aboriginal People as a national community share many communalities, but where there are also many stark differences between various sub-groupings, an important question will be whether a singular cultural council is established for all Aboriginal People, or whether cultural councils are established for several Aboriginal communities based on their own local language, culture and traditions. Two general options can be put forward: firstly, for a single, national cultural council for Aboriginal People but with regional offices that can deal with the needs and aspirations of communities at a local level; or, secondly, for local cultural councils to be established and for these to form a national alliance for purpose of common objectives.

The way in which membership of a cultural council for Aboriginal People is determined may present challenges. As a general principle a dual test applies when a cultural council is formed, namely self-identification by an individual with a specific community, and also acceptance by the community of such an individual as being a member of the community. In the Russian Federation decisions regarding membership of the cultural Associations are left to the Associations to determine; in Estonia a process of self-identification applies where a person who identifies with a community is entitled to vote for and participate in the affairs of the cultural council; in Hungary a person has to register to vote for a cultural council; while in Brussels individuals are free to vote for any of the cultural councils provided that an individual vote only once, and individuals can attend the services of either of the communities. In all these examples the emphasis is on the individual's freedom of choice where (a) no person is forced or prohibited to associate with an ethnic community; (b) no person is discriminated

reference to their ancestors who used to occupy the land. Refer for example to the way in which the Federal Court of Australia defined a group of Aboriginal native title holders in a determination of native title: "The native title holders for the Determination Area are the Quandamooka People who are the biological descendants, of the following people: – ... (names of main families) who identify as and are accepted by other Quandamooka People as Quandamooka People according to Quandamooka traditional law and custom." *Delaney on behalf of the Quandamooka People v. State of Queensland*, (2011) FCA 741, 4.7.2011.

[102] Refer for example to the way in which the Noongar People of the south west area of Western Australia describe themselves in a draft agreement with the State Government of Western Australia. The proposed settlement confirms that there had been "extensive research into the ancestry" of the groups and both parties are satisfied that "the right people have been identified". Department of Premier and Cabinet of Western Australia, *South West Settlement: Questions and Answers*, July (2013).

against for associating with an ethnic community; and (c) no person is prohibited from using services that are available to the general population.

In Australia conflict within Aboriginal communities about membership of a specific community, clan or native title claim group is often rive and can be very divisive. There is a risk that if questions of membership are left entirely to the leaders of an Aboriginal community to determine, many individuals may be excluded or prevented from belonging to a cultural community as result of internal power-play; historical conflict; or lack of information about a person's background and history. If, however, there are no criteria for membership, there is a risk that some individuals may allege, without sufficient justification, membership of multiple Aboriginal groups. Arrangements should therefore be put in place in Australia where, similar to native title proceedings, individuals can decide with which group and cultural council they associate, but if an irreconcilable conflict about membership occurs, the dispute may be referred to the judiciary to mediate or determine.

Governing Institutions of Cultural Councils

Cultural councils are institutions of governance in the domain of public law. Cultural councils are the subject to similar democratic checks and balances and judicial oversight as legislative and executive institutions at national, state and local levels. The governing assembly of a cultural council is popularly elected by the members of the ethnic community; the legislative body must function in accordance with the principles of representative and responsible government; the executive organ is formed in a manner prescribed by law; and the principles underlying accountable, representative and responsible government apply to the functioning of the cultural council. The details that govern the composition of the cultural councils can be set out in the constitution or in legislation. Provision could also be made for a national electoral committee to ensure that democratic processes and the electoral regulations are adhered to by cultural councils.

A cultural council may, as in the Russian Federation, Hungary and Kosovo, establish regional and local offices from where the interests of its members can be served in various parts of the country. Cultural councils for a specific community can therefore internally function in a "federal" way with their different regional or local offices forming the national cultural council from where nation-wide activities are undertaken.

In Brussels, the cultural councils are elected by way of popular franchise in a similar way as the national and regional governments. The election of

the cultural councils is open to public scrutiny, and the electoral oversight that exists for national and regional elections also apply to cultural councils.[103] There is no electoral list in Brussels which requires individuals to register to vote for a specific cultural council. Individuals can vote for any of the councils regardless of the language that the voter speaks, provided that each person may only vote once.

In Estonia a National Register of Minorities is drawn up on which the names of members of a cultural community appear. The Register for each group is maintained by the groups themselves. The Register must contain the details of their members but those details are kept confidential and are not released to the national government. Members of the national minorities have the guaranteed rights to undertake various activities of which the following are examples: to form cultural institutions with the aim to promote and protect their identity; to practice their traditions and culture; to use their mother tongue within limits determined by law; and to publish and communicate in their language.[104] The elections of the cultural councils are overseen by the national electoral commission.[105]

In Hungary the basis to calculate the size and composition of the self-governments; the franchise requirements for voters; the conduct of elections and by-elections; and all other relevant requirements for the election and functioning of self-government are set out in detail by the Hungarian Act on the Rights of Nationalities.[106] The Act also sets out the way in which the self-governments are to function; the establishment of committees; and all other aspects about their proper exercise of power.[107] Provision is made for the oversight of councils by the national government and the judiciary so as to ensure that councils comply with their statutory mandates.[108]

If cultural councils are established for Aboriginal People, the democratic principles applicable to such councils would have to be similar as those that apply to federal, state and local governments in Australia. A statute on cultural councils, similar to the statutory framework that establishes state and local governments, should also set out the electoral arrangements, composition, functions and powers of cultural councils. In this way cultural councils would be subject to similar popular accountability and oversight; to regular democratic elections; to checks and balances; and to judicial oversight, as

103 See *K. Deschouwer* (note 31), 149 et seq.
104 a4 Estonian Act on Cultural Minorities.
105 a13(1) Estonian Act on Cultural Minorities.
106 aa52-70 Hungarian Law on the Rights of Nationalities.
107 aa582-123 Hungarian Law on the Rights of Nationalities.
108 aa 10, 146 and 149-152 Hungarian Law on the Rights of Nationalities.

apply to federal, state and local governments. The electoral commission can also be tasked to manage elections for cultural councils.

Powers and Functions of Cultural Councils

In the same way that a statutory instrument sets out the powers and functions of states and local governments in federations and decentralised unitary arrangements, the powers and functions of a cultural council can be set out in the national Constitution; in national legislation; or in legislation of a state. Such legislation defines the powers and functions; the limitations under which the powers are subject; how the powers and functions interact with those other governments; the way in which conflicts of laws are resolved; and any other relevant matter.

The powers and functions of a cultural council are generally related to those matters that directly impact on the cultural identity of the community, for example aspects of its language, education, history, monuments, historic days, symbols, laws and customs, and script. The range of powers and functions of cultural councils are therefore more specific than in the case of territorial forms of government because only matters that are of direct relevance to the community's identity, are subject to the authority of a cultural council.[109]

The community governments in Hungary have wide ranging powers that include all areas of relevance to the culture and identity of the ethnic communities. The "fundamental duty" of the self-governments is to "protect and represent the interests of nationalities by exercising the responsibilities and powers of self-governments.[110] The self-governments are therefore responsible for important matters on behalf of the community as a whole at a national level; and the right to make submissions to the national parliament about general legislation that may impact on the community. In general, individuals belonging to a recognised community are entitled to learn and speak their language; to practice and promote their customs and traditions; and to have their choice of belonging to a minority group protected. At the local level the powers of communities include aspects of education; local print and media; promotion of traditions, place names and scholarships for students. At the national level the powers of communities include nationwide cultural events, insignia, theatres and exhibitions; higher education and

[109] *T. H. Malloy*, The Lund Recommendations and Non-Territorial Arrangements: Progressive De-Territorialization of Minority Politics, International Journal on Minority and Group Rights 16 (2009), 665 et seq.

[110] a10 Hungarian Law on Rights of Nationalities.

legal services.[111] The organisations of national self-government may also submit opinions and advice to the national government on general legislation that may impact on the culture of a specific group.[112] The national government is also under a positive obligation to support the self-government of minorities by way of financial grants, particularly in the areas of education, publications and the national media.[113] Local government in Hungary is also organised for the promotion of self-governance for the benefit of communities that live concentrated in small, local areas.[114] In this way, local territorial and non-territorial governments have, to some extent, been integrated.

The powers and functions of the cultural Associations in the Russian Federation are, albeit within the limitations that those bodies function as NGOs, also wide ranging. For example, the Associations may promote mother-tongue education of their children by establishing schools, publish educational material, train teachers, and seek funding from their members as well as from government authorities. The Associations may establish libraries, museums, art centres, and other public facilities aimed at promoting their culture.[115] The federal government is also required to take into account the views and opinions of the Associations when policies and legislation that may affect them, are considered.[116] The Associations may also participate in international organisations; and maintain contacts with citizens and non-governmental organisations of other states.[117]

In Estonia the principle objectives of the cultural autonomy are to organise education in mother-tongue; to establish and manage educational facilities; to establish a fund for the promotion of culture and education; and to form institutions for the promotion of culture.[118] The institutions established for the cultural minority can take steps within the public field to promote and protect their language and culture by way of education in their mother-tongue, freedom to express themselves in their own language; the protection and promotion of their customs and cultural traditions. The language protection includes that the minority group may use their language in

111 a17, 22, 44, 48, 113, 115, and 121 Hungarian Law on Rights of Nationalities.
112 a35 Hungarian Law on the Rights of Nationalities.
113 a5, 20, 22(2), 23, 31, 42, 44 Hungarian Law on Rights of Nationalities.
114 *A. Zeqiri/V. Stephens/M. Zhou*, Implementation of the Decentralisation Process in Kosovo: Challenges and Perspectives, European Yearbook of Minority Issues 7 (2007/2008), 697.
115 aa11 and 13 Russian Law on Cultural Autonomy.
116 a14 Russian Law on Cultural Autonomy.
117 a4 Russian Law on Cultural Autonomy.
118 a5 Estonian Act on Cultural Minorities.

dealings with state and local authorities in areas where they constitute a sizeable number.[119]

The cultural councils in Brussels have autonomy over all matters that are of a "personal" nature to the respective language communities. This includes, but is not limited to education, health care, elderly care, sports and recreation, culture, language, and the right to conclude treaties and enter into international agreements about any of those areas of competence. Although the cultural Associations in the Russian Federation and Hungary may also establish international contacts,[120] the cultural councils of Brussels are entitled to enter into international treaties on subject matters that fall within their competencies.

In Kosovo the rights of members of communities to receive education in their own language, to establish educational institutions with the assistance of government, and to have access to public broadcast facilities for the promotion of their language and culture, are recognised.[121] The rights of communities also include the use and recognition of place and street names that are associated with the community; the display of community symbols; and access to public broadcast facilities in the language of the community. Collective rights are recognised for the communities in addition to the rights of individuals.[122] The government may delegate to community organisations additional functions as an agent of government.

Cultural councils for Aboriginal People could, in general, have three categories of powers and functions.

Firstly, as NGOs, the councils could undertake activities within the domain of private law that may be to the benefit of their community. This is consistent with the functions one would expect of an ordinary, civil law NGO. Such functions could include the promotion of culture, language, laws, customs and traditions. All the activities will, however, be consistent with those of an NGO and not those of a government.

Secondly, the administration of laws that impact directly on the culture and traditions of Aboriginal People, may be delegated by the relevant government department to the Aboriginal cultural councils to administer. The decision-making about those matters will remain with the existing legisla-

119 a52(2) Estonian Act on Cultural Minorities.

120 a21 of the Hungarian Law on the Rights of Nationalities provides that the nationalities may engage in "direct" international relations, but it does not explicitly refer that the power includes the right to enter into treaties.

121 aa58 and 59 Constitution of Kosovo. *G. Stevens* (note 29), 17.

122 a5 Law on the Promotion and Protection of the Rights of Communities and their Members in Kosovo.

tive institution, but the administration of an Act may shift in whole or in part to cultural councils.

Thirdly, the legislative capacity to make laws over certain matters can be decentralised to cultural councils. This would place cultural councils at the same status as local and state governments. Matters that could be decentralised are for example aspects of education; mother-tongue teaching; heritage; laws and customs; symbols; place names; utilisation of natural resources; media; place names; aspects of tourism; publications; art and culture; and cultural events.

Sources of Revenue of Cultural Councils

A cultural council that functions as an NGO is principally responsible for its own funding, while a cultural council that functions as a government requires more extensive sources of revenue since it renders a public, governance function. In similar vein as state or local governments, a cultural council can derive revenue from the following sources: taxation of its members; grants from other levels of government; revenue sharing with other levels of government; payment and levies for services rendered; borrowing from financial institutions; and grants and donations from private persons and entities.

The Russian Law on Cultural Autonomy anticipates that minorities may establish private cultural Associations for the purpose of pursuing their culture, language and identity and that the Russian Federation may financially support such Associations.[123] There is, however, no legal obligation on the Federation to support the Associations.[124] The lack of an obligation of state financial support is often seen as a serious constraint on the ability of the Associations to function properly.[125] Although the Associations must register in accordance with federal legislation so as to be regarded under the provisions of the Act,[126] registration does not guarantee government funding.

In Estonia the budget of a cultural council is made up of principally three main sources, namely government grants; taxes or membership fees from its

[123] *B. Bowring*, Legal and Policy Developments in the Russian Federation in 2007 in Regard to the Protection of Minorities, European Yearbook of Minority Issues 6 (2006/2007), 35.

[124] aa16 and 19 Russian Law on Cultural Autonomy. Although the Law on Cultural Autonomy recognises the obligation of the Federal Government to contribute financially to the activities of the Cultural Associations, no formula for calculating contributions is set in law.

[125] *D. Wirda*, Legislation of the Russian Federation Concerning Ethnic Minorities and Its Shortcomings, 2013, <http://www.eawarn.ru>.

[126] a6 Russian Law on Cultural Autonomy.

members; and grants from persons, companies and counties of the minority group's origin.[127] In Brussels most of the community funding is derived from federal government grants which are made up of transfers, shared taxes and payments for foreign students attending the educational facilities of the respective communities.

In Hungary the self-governing communities derive income from various sources.[128] The councils are entitled to raise levies from their members and charge for the services rendered; the national government is obliged to assist the councils financially by way of grants in aid, specifically in the field of education; the councils may borrow funds; contributions may be received from other countries and international agencies; and a one-off grant was given to each group to assist them with the setting up of their structures and institutions. According to *Osipov* the self-governing communities "are really functional" and undertake various programmes with the assistance of public funding.[129]

The following guiding principles can be identified should Aboriginal People establish cultural councils:

Firstly, if NGOs are established, such NGOs would be principally reliant on voluntary contributions of members for utilising the services the NGO offers and on discretionary government grants. This is a weak position for funding as has been shown in the Russian Federation.

Secondly, if cultural councils are established, the status of such councils as organs of government would require them to have a secure tax base; to participate in revenue sharing with federal, state and local governments; and to be able to access the capital market for funding. In essence, similar arrangements that are in place for the funding of state and local governments, would need to be put in place for cultural councils since a cultural council is a public law organ of government that requires security of funding to discharge its functions.

V. Relevance of Cultural Autonomy to Aboriginal People

It is the contention of this article that the topic of cultural autonomy deserves greater consideration, assessment and debate in Australia than has been the case up to now.

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127 a27 Estonian Act on Cultural Minorities.
128 Refer to aa124-142 Hungarian Law on Rights of Nationalities.
129 *A. Osipov* (note 14), 10.

It is acknowledged that Aboriginal People in Australia do not share a uniform view about a desire for a form of self-government or self-determination, nor do they agree on a political or constitutional agenda to promote their interests. In the most recent debates about the possible amendment of the Constitution of Australia to include in the Preamble reference to Aboriginal People as the traditional owners of the land, the research that paved the way for the debates did not explore the potential relevance of cultural autonomy.[130] The topic of cultural autonomy for Aboriginal People has slipped under the radar of political and constitutional discourse.

In light of international experiences with the theory and practice of non-territorial autonomy, the following basic principles can be identified for the establishment of cultural councils for Aboriginal People:

(a) The protection of ethnic minority groups such as Aboriginal People on a non-territorial basis remains one of the most challenging issues in international and constitutional law. It is widely recognised that existing democratic theory and models of democratic institutions do not always deal adequately or effectively with the rights and interests of dispersed minorities. Territorial arrangements in federations and decentralised unitary systems as an indirect way of protecting minorities are widespread, while non-territorial arrangements are prevalent in particular the new democracies of Europe.

(b) Non-territorial autonomy by way of a cultural council/s for Aboriginal People is a credible and viable mechanism to bestow a form of self-government on a minority group of which the members are not sufficiently concentrated for purposes of territorial self-government.

(c) The principle of non-territorial autonomy could give to Aboriginal People an opportunity to take greater control over decision-making and administration of policies and laws that affect their languages; culture, customs and identity. International experience shows that "minority consultation can no longer be achieved through the establishment of a single mechanism".[131]

(d) The jurisdiction of a cultural council is based on individuals and the services that are offered to those individuals, rather than the jurisdiction being of a territorial nature as in the case of state or local governments. Members of a minority group can therefore attend services offered by a cultural council and receive the

130 Refer to Discussion Paper: A National Conversation Aboriginal and Torres Strait Islander Constitutional Recognition, May, (2011), < http://www.recognise.org.au> and a very useful list of references about ongoing debates and relevant publications at <http://www.ilc.unsw.edu.au>.

131 *M. Weller*, Minority Consultative Mechanisms: Towards Best Practice, European Yearbook of Minority Issues 7 (2007/2008), 37.

benefit of programmes that are available by their cultural council, regardless of the fact that they live intermingled with other people.

(e) The powers and functions of a cultural council can be set out in the constitution or in enabling legislation. This is not dissimilar to the way in which federations and decentralised unitary systems set out the powers and functions of regional and local governments. The cultural council, being the recipient of legislative powers, is therefore distinguished from an NGO that functions in the private domain. The categories of powers of cultural councils could be similar to those of territorial governments, namely exclusive cultural powers and concurrent cultural powers.

(f) The typical functions that can be decentralised to a cultural council relate to matters that directly impact on the language, culture and identity of a community, for example aspects of education; promotion of language; aspects of media; cultural and festive days and events; cultural symbols; customary laws; place names, tourism, and heritage protection.

(g) In addition to its decision-making powers, a cultural council can also be the recipient of decentralised administrative matters, for example where the federal or a state government department requests a cultural council to administer legislation on behalf of the decentralising government.

(h) The legal status of cultural councils can range from a completely private non-governmental organisation to a formal tier of government.

(i) A challenging question would be how to define "Aboriginal People" or a sub-group of Aboriginal People for purposes of cultural autonomy. Aboriginal People do not form an homogenous entity; there are many language groups within the general categorisation of "Aboriginal People"; and there are groups that are "native title holders" or "native title claimants" within the Aboriginal community. Finding an appropriate definition for "Aboriginal People" in general, or any sub-group in particular, is principally a process of self-identification whereby the group that seeks to register a council should define its character and membership in a manner that is inclusive and non-discriminatory. This is not new to Aboriginal People. They have already gone to great length to define native title claimant or native title holding groups and that information could constitute a basis for group-definition for purposes of a cultural council.

(j) The decision of an individual to take up membership of a cultural community; to register as a voter for a cultural council; to participate in elections; or to attend services offered by a cultural council is personal and may not be forced on a person. The decision arises from his/her right to freedom of association; a person may not be obligated to attend a service offered by a cultural council; and no person should suffer any discriminatory action in regard to his/her choice to associate or not to associate with a group.

(k) It is essential that cultural councils are, in terms of their composition and functioning, subject to similar democratic norms and standards as the national, state

and local governments. This will ensure that councils exercise their duties in a manner that is representative, accountable and transparent. Mechanisms for checks and balances, including judicial oversight and the potential role of the electoral commission, can be built into the system of cultural councils to ensure that the democratic norms and standards applicable to other government levels, also apply to cultural councils.

(l) The funding arrangements for cultural councils as a tier of government must provide similar certainty as is the case for funding of state and local governments. A combination of income generation mechanisms may be used for example taxation; levies for services; grants in aid; loans; revenue sharing; and general grants and gifts. As an organ of government cultural councils must be funded so as to enable them to discharge their functions in the public good.

VI. Conclusion

Cultural or non-territorial autonomy is a concept that receives increased attention in democratic theory and practice. Aboriginal People may find cultural autonomy a useful option to consider in fulfilling their desire for a form of self-government. This article has shown that recognising the right of Aboriginal People to a form of self-government on a non-territorial manner by way of cultural councils is theoretically sound and consistent with international experiences.