

INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION
AND
DEVELOPMENT POLICY

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*To my mum and daddy
for giving me life and freedom*

Table of contents

<i>Acknowledgments</i>	<i>i</i>
<i>Synopsis</i>	<i>ii</i>
<i>List of figures</i>	<i>iv</i>
<i>List of abbreviations</i>	<i>v</i>

Introduction	1
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Part 1

Indigenous peoples' quest for self-determination

Chapter 1: Indigenous peoples in international law: a historical overview	11
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1.1 The natural law framework.....	15
1.2 The emergence of the state-centred system and the 'law of nations'.....	23
1.3 The positivistic construct of international law.....	29
1.4 The early 20 th century: from positivism to pragmatism.....	35
1.5 The United Nations system and indigenous peoples.....	44

Chapter 2: Indigenous peoples' right to self-determination	48
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2.1 Indigenous rights and the international human rights system.....	48
2.1.1 International Labour Organization's Conventions on indigenous peoples.....	50
2.1.2 The United Nations Declaration on the Rights of Indigenous Peoples.....	53
2.1.3 The Draft American Declaration on the Rights of Indigenous Peoples.....	65
2.2 The principle of self-determination.....	72
2.3 Indigenous peoples' right to self-determination.....	82

Chapter 3: Indigenous peoples’ claims to self–determination and the international human rights implementation system.....	103
3.1 The United Nations system.....	104
3.1.1 The United Nations treaty–based human rights system and indigenous claims to self–determination.....	104
(i) The Human Rights Committee.....	106
(ii) The Committee on the Elimination of Racial Discrimination.....	116
(iii) The Committee on Economic, Social and Cultural Rights.....	123
3.1.2 The United Nations Charter–based human rights implementation system.....	132
3.2 Regional human rights implementation systems and indigenous peoples’ claims to self–determination.....	139
3.3 Conclusion.....	149

Part 2

The capability approach and indigenous peoples’ right to self–determination

Chapter 4: The capability approach.....	160
4.1 General overview.....	160
4.2 Basic concepts.....	166
4.2.1 Freedom.....	166
4.2.2 Functionings and Capabilities.....	171
4.2.3 Information pluralism: <i>well–being freedom, agency freedom, well–being achievement, and agency achievement</i>	175
4.3 Current debate: strengths, limits and criticisms.....	179

Chapter 5: The normative level. The indigenous capability rights–based normative system.....185

5.1 The ‘goal rights system’ and the ‘indigenous goal rights system’186

5.2 Indigenous rights within the ‘indigenous goal rights system’:
the significance of freedom in the integrated process of self–determination.....190

5.3 Indigenous rights as ‘capability rights’: from the ‘indigenous goal rights system’
to the ‘indigenous capability rights system’.....196

5.4 The role of institutions and the enjoyment of the right to self–determination.....204

Chapter 6: The practical level. A methodological approach to development policies for indigenous peoples.....210

6.1 The space of evaluation: *agency freedom* and *agency achievement*.....211

6.2 The policy process: indigenous valued choices and agency.....217

6.3 Criteria to operationalise the collective and individual right to self–determination
through development policies.....223

6.3.1 Acknowledgment and integration of indigenous knowledge systems
within the design, implementation and evaluation of development policies.....225

6.3.2 Recognition and adoption of the principle of ‘free, prior and informed
consent’230

6.4 Conclusion.....240

Part 3

The indigenous capability right to health

Chapter 7: Development and the health challenge for indigenous peoples.....	243
7.1 The world community's development agenda and the rights of indigenous peoples.....	246
7.2 The health challenge of the world's indigenous peoples.....	253
7.3 The health status of Aboriginal and Torres Strait Islander peoples in Australia.....	257
Chapter 8: The health challenge for indigenous people of Australia.....	262
8.1 Australia's health policy to address Aboriginal and Torres Strait Islander peoples' health disadvantage.....	262
8.2 The Human Rights Equal Opportunity Commission's response to Australian governments' health policy for Indigenous Australians.....	277
8.3 The 'indigenous capability rights system' and Aboriginal and Torres Strait Islander health policy.....	288
Chapter 9: The indigenous capability right to health: towards the acknowledgment of Aboriginal traditional medicine.....	302
9.1 The sinking into oblivion of Aboriginal traditional medicine and traditional healers.....	302
9.2 The indigenous capability right to health.....	322
9.3 Spirituality and rationality: understanding the 'cultural divide'.....	332
9.4 Conclusion.....	340
Conclusions.....	343
Bibliography.....	355

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To my family, with all my love.

Synopsis

Indigenous Peoples' Right to Self-Determination and Development Policy

This thesis analyses the concept of indigenous peoples' right to self-determination within the international human rights system and explores viable avenues for the fulfilment of indigenous claims to self-determination through the design, implementation and evaluation of development policies.

The thesis argues that development policy plays a crucial role in determining the level of enjoyment of self-determination for indigenous peoples. Development policy can offer an avenue to bypass nation states' political unwillingness to recognize and promote indigenous peoples' right to self-determination, when adequate principles and criteria are embedded in the whole policy process.

The theoretical foundations of the thesis are drawn from two different areas of scholarship: indigenous human rights discourse and development economics. The indigenous human rights discourse provides the articulation of the debate concerning the concept of indigenous self-determination, whereas development economics is the field within which Amartya Sen's capability approach is adopted as a theoretical framework of thought to explore the interface between indigenous rights and development policy. Foundational concepts of the capability approach will be adopted to construct a normative system and a practical methodological approach to interpret and implement indigenous peoples' right to self-determination.

In brief, the thesis brings together two bodies of knowledge and amalgamates foundational theoretical underpinnings of both to construct a normative and practical framework. At the normative level, the thesis offers a conceptual apparatus that allows us to identify an indigenous capability rights-based normative framework that encapsulates the essence of the principle of indigenous self-determination. At the practical level, the normative framework enables a methodological approach to indigenous development policies that serves as a vehicle for the fulfilment of indigenous aspirations for self-determination.

This thesis analyses Australia's health policy for Aboriginal and Torres Strait Islander peoples as an example to explore the application of the proposed normative and practical framework. The assessment of Australia's health policy for Indigenous Australians against the proposed normative framework and methodological approach to development policy, allows us to identify a significant vacuum: the omission of Aboriginal traditional medicine in national health policy frameworks and, as a result, the devaluing and relative demise of Aboriginal traditional healing practices and traditional healers.

List of figures

Figure 4.1 A stylised non–dynamic representation of a person’s capability set and her social and personal context.....	174
Figure 5.1 The indigenous capability rights system.....	198
Figure 5.2 The enjoyment of indigenous peoples’ right to self–determination through the lens of the capability framework.....	208
Figure 6.1 The policy process.....	222
Figure 7.1 Health in the Millennium Development Goals.....	254
Figure 9.1 Framework outlining ‘traditional’ Aboriginal health beliefs.....	313
Figure 9.2 Model of Aboriginal behavioral patterns of seeking medical assistance.....	315

List of abbreviations

ABS	Australian Bureau of Statistics
ACC	Aboriginal Coordinating Council
AHMAC	Aboriginal Health Ministers' Advisory Committee
AIDA	Australian Indigenous Doctors Association
AIHW	Australian Institute of Health and Welfare
AMA	Australia Medical Association
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
CHR	Commission on Human Rights
CIS	Commonwealth of Independent States
COAG	Council of Australian Governments
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ESC	Economic, Social and Cultural Rights Committee
FAO	Food and Agriculture Organization of the United Nations
FCNM	Framework Convention for the Protection of National Minorities
GA	General Assembly
HRC	Human Rights Committee
HREOC	Human Rights and Equal Opportunity Commission
IACHR	Inter-American Commission on Human Rights
IADB	Inter-American Development Bank
ICCPR	Covenant on Civil and Political Rights
ICCT	Indigenous Communities Coordination Taskforce
ICEARD	International Covenant on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFAD	International Fund for Agricultural Development
ICJ	International Court of Justice

IFC	International Finance Corporation
IITC	International Indian Treaty Council
ILO	International Labour Organization
IMF	International Monetary Fund
IITC	International Indian Treaty Council
MDGs	Millennium Development Goals
NAHSWP	National Aboriginal Health Strategy Working Party
NATSIHC	National Aboriginal and Torres Strait Islander Health Council
NGOs	Non-governmental organizations
OAS	Organization of American States
PRSPs	Poverty Reduction Strategy Papers
SC	Security Council
SCRGSP	Steering Committee for the Review of Government Service Provision
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	UN Conference on Trade and Development
UNDAF	Common Country Assessment and United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNHCHR	Office of the United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNPFII	United Nations Permanent Forum on Indigenous Issues
US	United States
WB	World Bank
WG	Working Group
WGIP	Working Group on Indigenous Populations
WHO	World Health Organization
WIPO	World Intellectual Property Organization

Introduction

*'What is self-determination?' asked the young Arakmbut man.
'Why do you ask?' I said.
'I have heard the word used by indigenous leaders in the town and have read it.
My father and the old men do not know what it is and so I am asking you'.
'Self-determination is about the right of indigenous peoples
to control their lives without unwanted outside interference'
'Oh, so that's what it is'¹*

The question posed by the young Arakmbut man continues to be of primary significance. Indigenous peoples,² currently estimated at over 370 million living in 70 different countries, represent about 5% of the world population and over 15% of the poor.³ Indigenous peoples' quest for self-determination represents the core precept in indigenous human rights discourse and, at the same time, a thorny issue for the whole international community which has to deal with the tension between indigenous claims to self-determination and its application under international law.

The principle of self-determination and the right of indigenous peoples to self-determination have been extensively discussed in scholarly literature within the legal and political arena.⁴ This thesis argues that indigenous peoples' claims to self-determination extend beyond the legal and political domains within which they have been traditionally discussed, interpreted and implemented.

¹ Andrew Gray, *Indigenous Rights and Development: Self-determination in an Amazonian Community* (Providence; Oxford: Berghahn Books, 1997) 1.

² There is not one internationally agreed definition of indigenous peoples. However, the "Cobo-definition" (UN Doc. E/CN.4/Sub.2/1986/872) as well as the ILO Convention on Indigenous and Tribal Peoples, 1989 N° 169 (art.1.1) provide a working definition which highlights the following characteristics: a) self-identification as indigenous; b) historical continuity with pre-colonial and/or pre-settler societies; c) strong link to territories; d) distinct social, economic or political systems; e) distinct language, culture and beliefs; f) form non-dominant sectors of society; g) resolve to maintain and reproduce their ancestral environments and distinctive communities. See also, B Kingsbury, ' "Indigenous peoples" as an International Legal Concept' in R H Barnes, A Gray and B Kingsbury (eds), *Indigenous Peoples of Asia* (Ann Arbor, Mich.: Association for Asian Studies, 1995).

³ World Bank, *Implementation of Operational Directive 4.20 on Indigenous peoples: An Independent Desk Review*, Report N. 25332, 10 January 2003, Operations Evaluation Department, Country Evaluation and Regional Relations (OEDCR).

⁴ A detailed discussion about the principle of self-determination and indigenous peoples' claims to self-determination will be presented in Part 1 of this thesis.

This thesis analyses the concept of indigenous peoples' right to self-determination from an alternative perspective. This study situates indigenous self-determination at the interface between international human rights law and development policy processes. The theoretical foundations of this thesis are drawn from two different areas of scholarship: indigenous human rights discourse and development economics. The indigenous human rights discourse informs the debate concerning the concept of indigenous self-determination, whereas development economics is the field within which Amartya Sen's capability approach is adopted as a theoretical framework of thought to construct a normative system and a practical methodological approach to interpret and implement indigenous peoples' right to self-determination.

In other words, this thesis brings together two bodies of knowledge and amalgamates the foundational theoretical underpinnings of both to construct a normative and practical framework with which to interpret and implement the indigenous right to self-determination in the contemporary system.

The central argument of this thesis is that development policy plays a crucial role in determining the level of enjoyment of self-determination for indigenous peoples. It is maintained that development policy can offer an avenue to bypass nation states' political unwillingness to recognize and promote indigenous peoples' right to self-determination, when adequate principles and criteria are embedded in the whole policy process.

This argument is articulated through an original approach with a twofold line of investigation: a study of the concept of indigenous self-determination within the international human rights system and the exploration of viable avenues for the fulfilment of indigenous claims to self-determination through the design, implementation and evaluation of development policies.

This approach requires the development and integration of three main ‘building blocks’ which are deemed to constitute the nomenclature of this thesis: an enquiry into the concept of indigenous self-determination within the international human rights system; the articulation of an adequate normative framework which encapsulates the essence of the principle of indigenous self-determination; and the elaboration of a methodological approach to development policies which adopts the normative framework as its fundamental underpinning.

These three main ‘building blocks’ of the thesis will be comprehensively articulated in the first and second part of the thesis. In particular, the first part of the thesis will explore the concept of indigenous self-determination within the international human rights system, whereas the second part of the thesis will discuss the construction of an indigenous rights-based normative framework as well as a methodological approach to development policies embedded with the principle of indigenous self-determination.

The enquiry into the concept of indigenous self-determination within the international human rights system requires us to tackle some fundamental issues.

First of all, there is a need to historically situate indigenous peoples within the international system. To this end, the first chapter of the thesis provides an historical overview which allows us to gain a thorough understanding of the contemporary regime of international law as it relates to indigenous peoples.

The historical overview delineates the key phases through which the status and rights of indigenous peoples have developed within the international system. It will be demonstrated how the emergence of international norms relating to indigenous peoples is linked to processes which go beyond the international legal arena *strictu sensu*. The creation and replication of these processes within the international system will be considered as a

fundamental element to justify the need to investigate the interface between indigenous rights and development policy. This historical account provides the backbone in support of the main argument of the thesis, that there exists a realistic potential for development policies to be a powerful means to facilitate the implementation of indigenous peoples' right to self-determination.

The historical overview constitutes an indispensable background to gauge the contemporary regime of indigenous claims under international law. It shows how the second half of the twentieth-century marks a groundbreaking phase for the advancement of indigenous peoples' claims within the international legal system. The creation of the United Nations system and the emergence of international human rights law inaugurate a significant era for the status and claims of indigenous peoples within the international system. Significant developments have indeed occurred at the institutional, normative and procedural level.

At the institutional level, the increasing participation of indigenous peoples in the international arena has contributed to the establishment of specific bodies dealing with indigenous issues within the UN system. The standard-setting and consciousness-raising processes carried out within these and other bodies, have facilitated the emergence of a corpus of legal precepts specific to indigenous peoples.

The second chapter discusses the emerging body of normative precepts concerning indigenous peoples developed within the international human rights framework. It will be shown how the contemporary regime of indigenous claims is characterised by the centrality of indigenous peoples' quest for self-determination. Indigenous peoples' right to self-determination constitutes indeed the core precept within the indigenous rights discourse. As such, a detailed discussion of the principle of self-determination, as it has been developed and implemented under international law, is presented in order to appreciate the content and

implications of the recognition of the right to self-determination for indigenous peoples. The normative analysis of indigenous claims to self-determination within the international human rights framework will be followed by a scrutiny of how and to what extent existing international human rights implementation mechanisms have addressed indigenous claims to self-determination.

The third chapter will investigate whether the international human rights implementation machinery, established for the protection of international human rights standards of universal applicability, can be considered an effective procedural scaffold to implement and monitor indigenous peoples' claims to self-determination.

It is maintained that the adaptation of international human rights implementation procedures to address indigenous claims, present substantive and procedural limits which prevent the international human rights implementation system from effectively addressing indigenous claims and advancing indigenous peoples' right to self-determination.

Upon due consideration of these limitations, it will be argued that the international human rights system cannot be considered as the sole arena in which indigenous claims can be addressed. The international human rights monitoring/implementation system functions as an indispensable 'remedial machinery' which is, however, not sufficiently capable to holistically implement indigenous peoples' self-determination in its multidimensionality.

This thesis suggests that the international legal domain can be complemented with a normative and procedural framework specific to indigenous rights, in which a human rights-based approach is intermingled with development policy processes. It is argued that development policy processes play a fundamental role in determining the level of enjoyment of self-determination for indigenous peoples. Development policy can offer an effective avenue to overcome the statist-centred imprint of the human rights implementation system

and bypass states' political unwillingness to recognise and promote indigenous peoples' right to self-determination.

The normative and procedural frameworks proposed in this thesis, promote an agent-driven implementation process in which the individual and collective holders of the right to self-determination are empowered and actively engaged in the fulfilment of their aspirations to self-determination. These normative and procedural frameworks are deemed to provide the theoretical underpinnings for the elaboration of adequate development policies aimed at fulfilling indigenous peoples' right to self-determination.

These normative and procedural frameworks will be consistently developed in the second part of the thesis. The normative framework will be identified as the 'indigenous capability rights system', whereas the procedural framework will be articulated as a methodological approach to development policies.

The construction of the indigenous capability rights-based normative framework and the methodological approach to indigenous development policies will be undertaken by adopting Amartya Sen's capability approach. Sen's capability approach will indeed be adopted as a theoretical framework of thought to explore the interface between indigenous rights and development policy.

The adoption of Sen's capability approach is justified on the ground that it provides the opportunity to re-think development policies in a way that is philosophically, politically and practically more cognisant with indigenous demands for self-determination. It is argued that the capability approach offers foundational conceptual categories which respond to indigenous aspirations to self-determination, whereas traditional development theories have lacked this responsiveness. These foundational concepts include a freedom-centred understanding of development and peoples' well-being, a focus on peoples' valued choices

and the expansion of these choices, the complex and multidimensional understanding of peoples' well-being, among others.

Accordingly, these foundational concepts of the capability approach will be discussed in the context of the ongoing debate on the capability approach. These core concepts will be adopted and originally applied to articulate an 'indigenous capability rights system' imbued with the principle of indigenous self-determination, and a methodological approach to development policies aimed at fulfilling the indigenous right to self-determination.

Finally, the third part of the thesis will explore the application of the proposed normative and practical frameworks in relation to Australia's health policy for Aboriginal and Torres Strait Islander peoples. The aim of the third part of the thesis is to demonstrate that the adoption of the proposed methodological approach to development policy would enhance the capability for indigenous individuals and communities to enjoy the right to self-determination.

The Australian health policy framework is questioned as to its capacity to theoretically conceive and practically implement a deep, comprehensive and self-determined conception of Aboriginal and Torres Strait Islander peoples' health. The assessment of Australia's health policy for Indigenous Australians against the proposed normative framework and methodological approach to development policies, allows us to identify three main key points.

First of all, it is argued that current Australian health policy frameworks fail to recognise and instil the most important principle in indigenous discourse: the principle of self-determination. Second, the proposed approach enables us to identify a significant vacuum in national health policy frameworks: the omission of Aboriginal traditional medicine and the sinking into oblivion of Aboriginal traditional healing practices and traditional healers. Finally, it contributes to an in-depth understanding of the 'cultural divide' which is often

perceived as the major obstacle underlying the relationships between indigenous and non-indigenous peoples. It will be argued that the fundamental tension which seems to underpin indigenous/non-indigenous peoples' relations lies at the ontological level.

The application of the capability approach to indigenous peoples' right to self-determination appears to be an interesting and challenging conceptual experiment. It is hoped that this work will produce fruitful insights to further the reach of application of the capability approach and advance the fulfilment of indigenous peoples' right to self-determination.