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

Acknowledgments...........................................................................................................i
Synopsis ..........................................................................................................................ii
List of figures...............................................................................................................iv
List of abbreviations...................................................................................................v

Introduction.....................................................................................................................1

Part 1

Indigenous peoples’ quest for self–determination

Chapter 1: Indigenous peoples in international law: a historical overview...............11

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 20th 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

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

3.1 The United Nations system

3.1.1 The United Nations treaty-based human rights system and indigenous claims to self-determination

(i) The Human Rights Committee

(ii) The Committee on the Elimination of Racial Discrimination

(iii) The Committee on Economic, Social and Cultural Rights

3.1.2 The United Nations Charter-based human rights implementation system

3.2 Regional human rights implementation systems and indigenous peoples’ claims to self-determination

3.3 Conclusion

Part 2

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

Chapter 4: The capability approach

4.1 General overview

4.2 Basic concepts

4.2.1 Freedom

4.2.2 Functionings and Capabilities

4.2.3 Information pluralism: well-being freedom, agency freedom, well-being achievement, and agency achievement

4.3 Current debate: strengths, limits and criticisms
Chapter 5: The normative level. The indigenous capability rights–based normative system

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

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

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

5.4 The role of institutions and the enjoyment of the right to self-determination

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

6.1 The space of evaluation: agency freedom and agency achievement

6.2 The policy process: indigenous valued choices and agency

6.3 Criteria to operationalise the collective and individual right to self-determination
   through development policies

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

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

6.4 Conclusion
Part 3

The indigenous capability right to health

Chapter 7: Development and the health challenge for indigenous peoples

7.1 The world community’s development agenda and the rights of indigenous peoples

7.2 The health challenge of the world’s indigenous peoples

7.3 The health status of Aboriginal and Torres Strait Islander peoples in Australia

Chapter 8: The health challenge for indigenous people of Australia

8.1 Australia’s health policy to address Aboriginal and Torres Strait Islander peoples’ health disadvantage

8.2 The Human Rights Equal Opportunity Commission’s response to Australian governments’ health policy for Indigenous Australians

8.3 The ‘indigenous capability rights system’ and Aboriginal and Torres Strait Islander health policy

Chapter 9: The indigenous capability right to health: towards the acknowledgment of Aboriginal traditional medicine

9.1 The sinking into oblivion of Aboriginal traditional medicine and traditional healers

9.2 The indigenous capability right to health

9.3 Spirituality and rationality: understanding the ‘cultural divide’

9.4 Conclusion

Conclusions

Bibliography
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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**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
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<tr>
<td>ACC</td>
<td>Aboriginal Coordinating Council</td>
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<tr>
<td>AHMAC</td>
<td>Aboriginal Health Ministers’ Advisory Committee</td>
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<tr>
<td>AIDA</td>
<td>Australian Indigenous Doctors Association</td>
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<tr>
<td>AIHW</td>
<td>Australian Institute of Health and Welfare</td>
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<tr>
<td>AMA</td>
<td>Australia Medical Association</td>
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<tr>
<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
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<tr>
<td>CHR</td>
<td>Commission on Human Rights</td>
</tr>
<tr>
<td>CIS</td>
<td>Commonwealth of Independent States</td>
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<tr>
<td>COAG</td>
<td>Council of Australian Governments</td>
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<tr>
<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>ECOSOC</td>
<td>Economic and Social Council</td>
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<td>ESC</td>
<td>Economic, Social and Cultural Rights Committee</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
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<tr>
<td>FCNM</td>
<td>Framework Convention for the Protection of National Minorities</td>
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<tr>
<td>GA</td>
<td>General Assembly</td>
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<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
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<tr>
<td>HREOC</td>
<td>Human Rights and Equal Opportunity Commission</td>
</tr>
<tr>
<td>IACHR</td>
<td>Inter–American Commission on Human Rights</td>
</tr>
<tr>
<td>IADB</td>
<td>Inter–American Development Bank</td>
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<tr>
<td>ICCPR</td>
<td>Covenant on Civil and Political Rights</td>
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<td>ICCT</td>
<td>Indigenous Communities Coordination Taskforce</td>
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<td>ICEARD</td>
<td>International Covenant on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICESCR</td>
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<td>IFAD</td>
<td>International Fund for Agricultural Development</td>
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<td>International Court of Justice</td>
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<td>IFC</td>
<td>International Finance Corporation</td>
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<td>International Labour Organization</td>
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<td>International Monetary Fund</td>
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<td>IITC</td>
<td>International Indian Treaty Council</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<td>MDGs</td>
<td>Millennium Development Goals</td>
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<td>NAHSWP</td>
<td>National Aboriginal Health Strategy Working Party</td>
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<td>NATSIHC</td>
<td>National Aboriginal and Torres Strait Islander Health Council</td>
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<tr>
<td>NGOs</td>
<td>Non-governmental organizations</td>
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<tr>
<td>OAS</td>
<td>Organization of American States</td>
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<td>PRSPs</td>
<td>Poverty Reduction Strategy Papers</td>
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<tr>
<td>SC</td>
<td>Security Council</td>
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<tr>
<td>SCRGSP</td>
<td>Steering Committee for the Review of Government Service Provision</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCTAD</td>
<td>UN Conference on Trade and Development</td>
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<td>UNDAF</td>
<td>Common Country Assessment and United Nations Development Assistance Framework</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNFPA</td>
<td>United Nations Population Fund</td>
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<tr>
<td>UNHCHR</td>
<td>Office of the United Nations High Commissioner for Human Rights</td>
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<tr>
<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
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<td>UNIFEM</td>
<td>United Nations Development Fund for Women</td>
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<td>UNPFII</td>
<td>United Nations Permanent Forum on Indigenous Issues</td>
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<td>US</td>
<td>United States</td>
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<td>WB</td>
<td>World Bank</td>
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<td>WG</td>
<td>Working Group</td>
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<td>WGIP</td>
<td>Working Group on Indigenous Populations</td>
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<td>WHO</td>
<td>World Health Organization</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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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’

The question posed by the young Arakmbut man continues to be of primary significance. Indigenous peoples, currently estimated at over 370 million living in 70 different countries, represent about 5% of the world population and over 15% of the poor. 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. This thesis argues that indigenous peoples’ claims to self-determination

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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 No 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).
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.
extend beyond the legal and political domains within which they have been traditionally discussed, interpreted and implemented.

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.
PART 1

Indigenous peoples’ quest for self-determination

‘when I think of self-determination I think...of hunting, fishing, and trapping, I think of the land, of the water, the trees, and the animals. I think of the land we have lost. I think of all of the land stolen from our people. I think of hunger and people destroying the land. I think of the dispossession of our peoples of their land’

Ted Moses
Chapter 1

Indigenous peoples in international law: a historical overview

This chapter provides a historical overview of the fundamental stages through which the status and rights of indigenous peoples have developed within the international system. The aim of this chapter is twofold: to provide an indispensable historical background to understand the contemporary regime of international law as it relates to indigenous peoples; and to identify within this historical account those significant elements which justify the need to explore the interface between indigenous rights and development policy.

It will be shown that the development of international norms concerning indigenous peoples has been influenced by colonial processes and the creation and persistence of certain structures which have had, and continue to have, an enormous impact on the status and claims of indigenous peoples within the international system.

This thesis suggests that the creation and replication of those structures within the international system, continue to operate today at the interface between indigenous rights discourse and development processes. Accordingly, the analysis proposed in the following historical account provides a fundamental background to support the argument of this thesis, that there is a potential for development policies to be an effective vehicle for the fulfillment of indigenous peoples’ right to self-determination.
The historical overview demonstrates that the legal discourse and practice concerning the status and rights of indigenous peoples under international law, are of fundamental importance not only in the context of indigenous issues. The development of international norms dealing with indigenous peoples has significantly influenced cornerstone concepts on which the structure of the international legal system has been constructed.

The origins of international law, indeed, stem from the encounter between European powers and a non-European world, from the European-led attempt to craft a system that could deal with the colonial encounter. As a result, it is necessary to gain a thorough understanding of the colonial encounter and the ensuing process of colonialism in order to come to terms with the fundamental principles according to which the contemporary international legal system deals with indigenous peoples and their claims.

To this end, this thesis distances itself from the traditional approach to international law, which is constructed upon the ultimate question of how order is created among sovereign states. According to this approach, international legal doctrine and institutions are perceived as the product of the continuous search for order among sovereign powers. The process of colonization is seen as the encroachment of a fully articulated Eurocentric international legal system upon non-European territories.\(^1\) As a result, the colonial encounter is perceived as the uneven confrontation between sovereign states and a non-European world missing, or only

\(^1\) See, eg, Mohammed Bedjaoui, *International Law: Achievement and Prospects* (Boston: Martinus Nijhoff, 1991) 7: 'The New World was to be Europeanized and evangelized, which meant that the system of European international law did not change fundamentally as a result of its geographic extension to continents other than Europe'.
partially holding, sovereign attributes. According to this conventional historical perspective the European doctrine of sovereignty was progressively applied to the peripheral colonial territories.\(^2\)

The thesis embraces an alternative approach\(^3\) which challenges such a perspective on the ground that it fails to take into consideration both the historical dimension of sovereignty, and the fundamental role that colonialism has played in the development of international law. It is indeed maintained that the colonial encounter shaped the underlying principles of international law, such as the doctrine of sovereignty, which was not extended, as it developed in Europe, to the colonies, but instead it emerged out of the colonial encounter.\(^4\)

This alternative approach claims that colonialism has played a central role in the development of international law as it has moulded fundamental structures of the international legal order. Many legal doctrines were created in the attempt to establish an international legal system able to explain the relation between European and non–European polities in the colonial encounter.\(^5\)

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\(^3\) Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge, UK; New York: Cambridge University Press, 2004). The relation between colonialism and international law is thoroughly examined through a compelling historical overview spanning from the origin of international legal thought in the sixteenth century to the present. Anghie argues that colonialism has been central to the development of international law and not, as conventional histories hold, a peripheral episode overcome by the decolonization process. Fundamental to this approach have been the groundbreaking contributions of post–colonial scholars, such as Edward Said, Orientalism (New York: Pantheon Books, 1978); Edward Said, Culture and Imperialism (New York: Knopf, 1993); Homi Bhabha, The Location of Culture (London: Routledge, 1994); Gayatri C Spivak, A Critique of Postcolonial Reason (Cambridge, MA.: Harvard University Press, 1999), among others.


\(^5\) Anghie, above n 3, 3.
This approach is based on three fundamental notions: first, international law arose to regulate relations between civilizations and peoples, not relations between states; second, colonialism was justified by the ‘civilizing mission’ that European powers launched in order to rescue the uncivilized, backward, undeveloped non-European populations; third, colonialism has not been marginal, nor was it an unfortunate episode that has been overcome by the decolonization process and the constitution of former colonies into sovereign and independent states.6

This approach informs the following historical overview which is structured in five major developments in legal thought and practice, spanning from the first European encounters with indigenous peoples to the establishment of the contemporary international system. Five phases can be distinguished:

(i) the natural law framework;
(ii) the emergence of the state-centred system and the ‘law of nations’;
(iii) the positivistic construct of international law;
(iv) the early 20th century: from positivism to pragmatism; and
(v) the United Nations system and indigenous peoples.

6 Ibid.
1.1 The natural law framework

The European encroachment on the Western Hemisphere constitutes the historical context within which early international norms and jurisprudence concerning indigenous peoples originated.

The encounter with the indigenous peoples of the ‘new world’ prompted European theorists to investigate the relationships between European powers and non–European populations. Renaissance European theorists like Bartolomé de las Casas\(^7\) and Francisco de Vitoria\(^8\) began to question the legality and morality of European claims to the newly discovered lands. While Bartolomé de las Casas focused on denouncing the atrocities committed by the Spaniards on the natives, Vitoria’s thinking shaped the contours of western legal thought and the early European jurisprudence dealing with indigenous peoples.

Vitoria’s creation of a new system of international law based upon natural law, emerged out of his inquiry into the legal status of the Indians of the newly discovered lands. This explains why Vitoria’s perspective and concepts about Spanish–Indian relations are fundamental to understanding the conceptual structures that characterize

\(^7\) Bartolomé de las Casas (1474–1566), a Dominican cleric who lived as a missionary among the Indians, strenuously defended native peoples against the violent Spanish colonization. In his *Histories of the Indies*, he attacks the harsh treatment of Indians and particularly the *encomienda* system that conferred Spanish colonizers tracts of land and forced labour by Indians living on them. For a detailed account of Bartolomé de las Casas’ views of Spanish colonization and the *encomienda* system, see Lewis Hanke, *The Spanish Struggle for Justice in the Conquest for America* (Philadelphia: Pennsylvania U.P., 1959); Leslie C Green and Olive Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989).

\(^8\) Francisco de Vitoria (1486–1547), professor of theology at the University of Salamanca, set out the legal parameters according to which the relations between Europeans and non–Europeans were to be regulated. He is considered one of the first founding fathers of modern international law: see, Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, rev ed, 1954); Harold Damerow, *A Critical Analysis of the Foundations of International Law* (Ph.D. Thesis, Rutgers University, 1978).
the international regime on indigenous peoples as well as the origins of international law.

There is no doubt that colonialism is the central issue in Victoria’s writings. Considered as one of the founding texts of international law, his two lectures *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros* are fundamentally concerned with the colonial relationship between the Indians and the Spanish.

Contrary to traditional approaches that interpret Vitoria’s works as applying existing legal doctrines developed in Europe to establish the legal status of the Indians, Vitoria’s jurisprudence only partially relies on traditional doctrines of international law.

The encounter with the Indians was novel and the legal issues that evolved from it were unique. The sixteenth–century Spanish jurist does not deal with the Spanish–Indian relations according to the classical problem that confronts the discipline of international law, which is establishing order among sovereign entities. Vitoria rather focuses on a prior set of issues, such as who can be considered as sovereign; what are the rights and duties of the Spanish and the Indians; and what criteria are to be applied to determine it.

In dealing with these issues, Vitoria created a new system of international law based upon a notion of natural law, which inherited from medieval scholasticism and

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ecclesiastical humanism. Vitoria elaborated a universally binding system of law by departing from the traditional framework that had been developed and applied by the Church to regulate relations between Christians and Saracens. Vitoria refused to justify Spanish title on the Indies by adopting the underlying principles of medieval jurisprudence: the primacy of divine law over human and natural law and Pope’s universal jurisdiction.

Vitoria proposes a secular version of international law by replacing the universal system of divine law articulated by the Pope with a universal system of natural law governed by secular sovereigns.

The creation of a universal system of natural law is directly connected to the problem of addressing the legal status and rights of indigenous peoples and the need to create a common legal framework applicable to both Indians and Spaniards. The construction of an overarching secular system of law and the determination of Indians’ status are articulated through the discussion of different and interrelated issues.

11 See, Green and Dickason, above n 7, 163–173; Nussbaum, above n 8, 38–39. In Medieval scholasticism, natural law is interpreted as the rational, although imperfect, human expression of the timeless law of God. The philosophy of Tomas Aquinas emerged within the scholastic thinking, which combined the Aristotelian view of natural law as intrinsic in the inborn rationalism of human nature with the divine law of Christianity.


13 Pope Alexander VI’s Papal Bull, which divided the world into Portuguese and Spanish spheres, exemplifies Pope’s universal authority. European sovereigns relied upon Pope’s authority to legitimize their encroachments over heathen lands by virtue of his divine mission to spread Christianity. See, Anthony Pagden, Lords of All the World, Ideologies of Empire in Spain, Britain and France c. 1500–c.1800 (New Haven: Yale University Press, 1995).

14 Natural law is seen as a ‘suprasovereign normative order’ independent and superior to any other temporal authority (such as monarchy, state or nation) as well as to positive law. It applied to the whole sections of humanity and human relations: see, James S Anaya, Indigenous Peoples in International Law (Oxford: Oxford University Press, 1996) 17.
In the first place, Vitoria assesses whether the Indians are to be considered holders of prior rights to property and ownership. For this purpose, Vitoria reformulates the relation between divine, human and natural law. Vitoria declares the inapplicability of divine law to questions of property and ownership and posits them in the realm of secular legal systems – whether natural or human law. As a result, Indians cannot be denied their rights by virtue of their status as unbelievers, sinners, or heretics:

Unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural law or human law; therefore they are not destroyed by want of faith.\(^\text{15}\)

Accordingly, Indians were recognized as having original rights and dominion over their lands while the Pope’s universal authority was severely undermined.\(^\text{16}\)

In the second place, Vitoria discusses the fundamental issue of Indian personality. A principle of human rationality dominates the description of Indians’ personality: ‘the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason’.\(^\text{17}\)

The characterization of the natives as human and rational is fundamental for the elaboration of a universal system of law. Considering that ‘[w]hat natural reason has established among all nations is called *jus gentium*',\(^\text{18}\) Vitoria conceives a natural law system of *jus gentium* of universal applicability. Both Indians and Spaniards are bound by the *jus gentium* because of their rationality. Consequently, natural law

\(^{15}\) De Vitoria, *De Indis*, above n 9, 123.

\(^{16}\) Ibid 125, note x: ‘From all this the conclusion follows that the barbarians in question cannot be barred from being true owners, alike in public and private law, by reason of the sin of unbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and land’.

\(^{17}\) De Vitoria, *De Indis*, above n 9, 127.

\(^{18}\) Ibid 151.
comes to replace divine law as the source of international law regulating the relations between the Spanish and the Indians.

The normative framework founded on the universal applicability of *jus gentium* only seemingly places the Spaniards and the Indians on an equal level. The Indian personality is characterized by a fundamental incongruity: the ontologically ‘universal’ coexists with the historically and socially ‘local’. Indians are part of the universal sphere like all other human beings by virtue of their use of reason, but they differ from the Spaniards because of their cultural and social practices. Indians’ customs are considered at odds with Spanish practices, which have a universal applicability. A cultural and social gap is created between the Indians and the Spaniards, a gap that can be eliminated with the adoption or imposition of Spanish practices on Indians since they have the potential by virtue of their capacity of reason.

Therefore, while recognizing inherent rights to native peoples by virtue of their fundamental human rationality and rebuffing Spanish title by papal grant or by discovery, Vitoria elaborates the principle of ‘just’ war that would legitimise Spanish authority over Indian lands. War is the means through which the Indians are converted into Spaniards and their lands into Spanish territories; it is through war that the Indians can achieve their full human potential.

Accordingly, native peoples could lose their rights as a consequence of a ‘just’ war waged against them: title by conquest was therefore legitimised. The imposition of Spanish authority on the Indians is endorsed upon the cultural differences between the European and non–European worlds. The normative dichotomy applicable to European encounters with non–European peoples is indeed based on both a moral
standard of common rationality as well as a Eurocentric biased perception of native peoples.  

The ‘justness’ of a war is indeed determined according to European criteria of civilization, a ‘Eurocentrically and Christianocentrically understood consensus of the whole world in harmony with the West’s vision of reason and truth’.  

Cultural difference is the fundamental problem that Vitoria faces in dealing with European–non European relations. Vitoria accurately scrutinises the social and cultural customs, rituals, and ways of life of the Spanish and the Indians to conclude that these societies constitute two different cultural systems. Once the difference is postulated in terms of cultural and social practices, Vitoria attempts to bridge such culturally defined difference by creating his system of *jus gentium*. The universal law of *jus gentium* is deemed to apply also to the Indians who can comprehend and be bound by it by virtue of their capacity of reasoning. However, the cultural difference – customs, rituals, practices – that distinguishes the Indians from the Spaniards is understood as Indians’ non compliance with universal standards, which is indeed Spanish cultural identity. Culture difference therefore justifies the imposition of sanctions, such as waging ‘just’ wars, by the sovereign Spanish upon the non–sovereign Indians. Spanish cultural and social practices are idealized and universalized as to become universally binding. Accordingly, it is suggested that the doctrine of sovereignty – the complexity of rules that determines what entities are

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19 This normative construct was put forward also by other European theorists, such as Francisco Suarez (1548–1617), Domingo de Soto (1494–1560), Alberico Gentilis (1552–1608), and Balthasar Ayala (1548–1584).  
sovereign, their prerogatives, and limitations – acquired its character from Vitoria’s efforts to address the colonial encounter in terms of the cultural difference between the European and non-European societies.\textsuperscript{21}

The cultural divide is at the heart of the development of international legal structures. The dichotomy between a civilised and uncivilised world crystallised so that legal doctrines have been articulated in order to civilise the ‘uncivilised’. It is argued that at the core of the development of many international doctrines is a ‘dynamic of difference’, that is ‘the endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilized and the other as ‘particular’ and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society’\textsuperscript{22}.

Vitoria’s principles at the core of the colonial encounter are not so much the question of order among sovereigns, but rather the ‘civilising mission’, and the related issue of ‘culture difference’. The ‘civilising mission’ was the imperial project that ‘justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe’.\textsuperscript{23} In the context of this project and the ensuing international system of law, the idea of ‘culture difference’ played a crucial role. The idea that fundamental cultural differences existed between European and non-European societies justified the conquest of those backward societies as well as the means that European powers adopted to subjugate them.

\textsuperscript{21} Anghie, above n 3, 15–31.
\textsuperscript{22} Ibid 4.
\textsuperscript{23} Ibid 3.
The early principles developed within the naturalist framework influenced future official behaviour patterns of European countries in dealing with non-European populations, the legal status of indigenous peoples within the ‘law of nations’ and later political thinkers.\footnote{Hugo Grotius, in his treatise \textit{On the Law of War and Peace} (1625) – even though not addressing in a specific manner indigenous peoples’ rights – recognised the capacity to enter into treaty relations as stemming from the natural rights of all peoples. Furthermore, Grotius endorsed a secularised version of the theory of ‘just war’.


1.2 The emergence of the state–centred system and the ‘law of nations’

The Treaty of Westphalia in 1648 inaugurated the emergence of modern international law. The Treaty sanctioned a state–centred international system in which the hegemony of independent states was recognised by virtue of territorial control, and such hegemony has shaped all areas of international law since.26

The Westphalian era was the period of Thomas Hobbes, Christian Wolff, and Samuel Pufendorf27 who significantly contributed to the evolution in natural law thinking. The naturalist frame evolved from a superior and universal normative order applying across the whole humanity into a dualist system: the natural rights of individuals and the natural rights of states.28 The Leviathan epitomised Hobbes’ theory of a dichotomized humanity composed of individuals and states, which are both natural rights holders. Pufendorf and Wolff shared Hobbes’ dichotomy and started moving towards the development of a body of law dealing solely with states, which would consolidate as the ‘law of nations’.29

Emmerich de Vattel’s treatise The Law of Nations, or The Principles of Natural Law (1758) marked the complete elaboration of the Westphalian–derived concept of the ‘law of nations’, defined as ‘the science of the rights which exist between Nations or States, and of the obligations corresponding to these rights’.30

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28 Anaya, above n 14, 20.
29 For a comprehensive account of the historical evolution of the ‘law of nations’: see, Nussbaum; Damerow, above n 8.
Vattel’s normative construct embraced the universal applicability of natural law, but had a different significance when referring to states and to individuals. The recognition of rights to the individual and sovereign–like rights to the state posed the theoretical premise for the supremacy of nation–states based upon the doctrine of state sovereignty. Sovereignty – with its corollaries of exclusive jurisdiction, territorial integrity, and non–intervention in domestic affairs – would develop as a fundamental principle of international law.

Vattel’s individual–state dichotomy has significantly influenced western legal discourse. This is particularly true in the context of the treatment of indigenous peoples under international law. The theory and jurisprudence related to the status of indigenous peoples were to be defined according to the principles governing the ‘law of nations’. Therefore, by virtue of the individual–state construction, the composite array of intermediate human groupings acknowledged within the early naturalist framework, was reduced to the two categories of individual and state.

31 Ibid preface (5a). De Vattel clearly states: ‘the Law of Nations is in its origin merely the Law of Nature applied to Nations. Now the just and reasonable application of a rule requires that the application be made in a manner suited to the nature of the subject; but we must not conclude that the Law of Nations is everywhere and at all points the same as natural law, except for a difference of subjects, so that no other change need be made than to substitute Nations for individuals. A civil society, or a State, is a very different subject from an individual person, and therefore, by virtue of the natural law, very different obligations and rights belong to it in most cases. The same general rule, when applied to two different subjects, cannot result in similar principles, nor can a particular rule, however just for one subject, be applicable to a second of a totally different nature. Hence, there are many cases in which the natural law does not regulate the relations of States as it would those of individuals. We must know how to apply it conformably to its subjects; and the art of so applying it, with a precision founded upon right reason, constitutes the Law of Nations as a distinct science’.

32 Ibid 6. Vattel states that ‘Nations [are] free and independent of each other, in the same manner as men are naturally free…[and accordingly] each Nation should be left in the peaceable enjoyment of that liberty which she inherits from nature’.

As a result, indigenous peoples would have been recognised as independent communities, to enjoy rights and duties under the ‘law of nations’, only if qualifying as nation–state. The chance to be included in the system of states would have been slight, since indigenous communities had to satisfy the requirements of statehood based on European forms of political and social organizations. These constituted a political and legal order substantially different from pre–contact native political and social structures. The European model was characterized by exclusive dominion over the territory with a hierarchical and centralized authority, whereas non–European communities were largely structured according to kinship or tribal relations, with decentralized authorities and a shared control over territories.\(^{34}\) The alternative option to the recognition as distinct communities would have been to be acknowledged exclusively as individuals.

Vattel’s theory significantly influenced the early jurisprudence concerning the status and rights of indigenous peoples under the ‘law of nations’. In particular, the ambiguity that permeates the criteria according to which states maintain their independence affected early United States Supreme Court’s landmark decisions\(^ {35}\) on the status of Native Americans. In Vattel’s view, even though a state arranges to be under the protection of another political authority, it does not lose its sovereignty and independence if it maintains its self–government powers. However, it is also asserted

\(^{34}\) Anaya, above n 14, 22. See also, Duane Champagne, *Social Order and Political Change: Constitutional Governments among the Cherokee, the Choctaw, the Chickasaw, and the Creek* (Stanford, Cal.: Stanford University Press, 1992).

\(^{35}\) These U.S. Supreme Court decision are also known as Chief Justice John Marshall’s trilogy. They are: *Johnson v. M’Intosh* 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832).
that when ‘a people…has passed under the rule of another, [it] is no longer a State, and does not come directly under the Law of Nations’. 36

In a similar vein, Justice Marshall’s trilogy 37 mirrors this ambivalence in addressing the status and rights of indigenous peoples. Early nineteenth–century jurisprudence dealing with questions about Native Americans’ status and rights were indeed articulated in accordance with Vattel’s theory of international law.

In Johnson v. M’Intosh 38 indigenous peoples are denied the status of nations or states as well as the right of group autonomy and the right to their lands. Characterizing native people as ‘fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest’, 39 Marshall justified United States’ title to Indian land by discovery:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. 40

Marshall’s jurisprudence, encompassing natural law and the law of nations, 41 revealed tensions and ambiguity. In Cherokee Nation v. Georgia 42 Indian tribes are

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36 De Vattel, above n 30, 12.
38 21 U.S. (8 Wheat.) 543 (1823).
39 21 U.S. at 590. Marshall seems to share de Vattel’s preference for sedentary societies, holding that cultivating the soil gave a greater right to land than hunting and gathering. Resembling the Locke’s natural law duty to cultivate land, Vattel stated that “[e]very Nation is…bound by the natural law to cultivate the land which has fallen to its share…Those who sill pursue this idle mode of life…[of searching] to live upon their flocks and the fruits of the chase…may not complain if other more industrious Nations, too confined at home, should come and occupy part of their lands’. Above n17 at 37-38.
40 21 U.S. at 591.
recognized as ‘domestic dependent nations’, that is, political entities whose status is accepted within the law of nations, but they do not qualify as foreign states under Article III of the U.S. Constitution. Indian tribes enjoyed the right to consent to the protection of other sovereigns – a prerogative of nationhood under the law of nations – but in their relation to the United States they were regarded as ‘ward to his guardian’.

The status of Indian tribes as nations within U.S. borders was reiterated in *Worcester v. Georgia*. As subjects within the law of nations, Indian tribes were recognized ‘original natural rights’ to their ancestral lands. However, they could be divested of their rights – as any other sovereign state – by voluntary cession or actual conquest. The acquisition of title by discovery alone was therefore excluded, while the US protectorate over Indian nations was determined by treaty–making processes. The thorough discussion of the discovery doctrine in *Worcester*, redefined the terms under which European encroachment upon indigenous peoples’ lands were to be regulated. It was held that the principle of discovery granted the right of acquiring lands from the natives to the first European power claiming authority over those lands, and the obligation upon Indian tribes not to confer rights to other powers. Through the discovery principle, Marshall distinguished and subordinated positive customary law regulating relations among states to the natural rights of native people. States are still considered as one ‘subset of humanity’: as such

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43 30 U.S. at 17.
44 30 U.S. at 17.
their discovery agreements based upon consent do not interfere with the inherent natural rights of the Indians.\textsuperscript{47}

It is important to highlight, however, that the recognition of the Cherokee as subject of international law was determined by their particular form of political and social organization that partly resembled European political bodies. Most Indian tribes, though, were still considered as ‘an unsettled horde of wandering savages not yet formed into civil society’.\textsuperscript{48} In other words, the predominant inclination of eighteen–century political theory and jurisprudence was to deny native peoples the status of subjects of international law unless they matched European criteria of nationhood:

\begin{quote}
The legal idea of the state necessarily implies that of the habitual obedience of its members to those persons in whom superiority is vested, and a fixed abode, and defines territory belonging to the people by whom it is occupied.\textsuperscript{49}
\end{quote}

This inclination became imperative in the late 19\textsuperscript{th} and early 20\textsuperscript{th} century, when positivism superseded the natural law framework. The positivist strain inaugurated the era in which ‘the law of nations, or international law, would become a legitimizing force for colonization and empire rather than a liberating one for indigenous peoples’.\textsuperscript{50}

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\textsuperscript{47} Anaya, above n 14, 25.
\textsuperscript{48} Henry Wheaton, Elements of International Law (Boston: Little, Brown and Co., 8\textsuperscript{th} ed, 1866) 26.
\textsuperscript{49} Ibid.
\textsuperscript{50} Anaya, above n 14, 26.
\end{flushright}
1.3 The positivist construct of international law

The positivist approach to international law marks the decline of the status and inherent rights recognised to indigenous peoples by natural or divine law. The major development in the positivist scheme is the rejection of the Vattelian perspective of the law of the nations as encompassing natural law and universally applying to all political entities. As a result, the positivist construct sees international law as the ‘law between states and not above states, finding its theoretical basis in their consent’. 51

International law becomes the exclusive realm of states, which are acknowledged as the only subjects of international law. International legal norms are deemed to regulate exclusively the rights and duties of states. In this way, sovereign states are at the same time law–makers, rights–holders, and duty–bearers of international norms.

The legal doctrine and jurisprudence developed in line with the positivist fabric of international law excludes indigenous peoples from the realm of the subjects of international law.

The exclusion of indigenous peoples from among the subjects of international law is grounded on positivist reasoning. Influential late nineteenth–century international jurists, including John Westlake, 52 James Lorimer, 53 William E. Hall, 54 Thomas Lawrence, 55 and twentieth–century jurists like Lassa Oppenheim 56 and M. F.

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52 John Westlake, Chapters on the Principles of International Law (Cambridge: Cambridge University Press, 1894).
Lindley,\(^57\) took distance from naturalism to reconstitute the entire system of international law on positivism. Whereas within the naturalist framework sovereign states were bound by the principles of natural law, positivism is based on the notion of sovereign states as the highest authority and principal actors of international law.\(^58\) Sovereign states are bound only by the rules which regulate relationships among them that they had agreed upon either explicitly or implicitly.\(^59\) Positivist jurisprudence is therefore constructed upon the primacy of sovereign states and on the notion that states are bound only to what they have consented.

The historical context within which positivism developed, particularly in the latter half of the nineteenth–century, sees an intensification of the expansion of European colonial empires. Positivist jurists were thus confronted with the task of accounting for the expansion of Europe and articulate the legal basis on which the colonial encounter was to be jurisprudentially explained. The methods and techniques developed by positivist jurists ignored the naturalist frame that had regulated preceding centuries of contact between European and non–European peoples. The naturalist international system of law upheld that a universal international law arising from human reason applied to all peoples, whether Europeans or non–Europeans. By

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\(^58\) Positivism can be considered as an elaboration of the framework articulated by early jurists like Francisco de Vitoria. He distinguished between ‘natural law’ and ‘human law’, the former being a set of transcendental principles identifies trough the use of reason, the latter being elaborated by secular political authorities.

contrast, positivist international law discriminated between civilised and uncivilised states and applied merely to civilised sovereign states.

A ‘dynamic of difference’ animated the positivist jurisprudence dealing with the colonial confrontation within the international legal system: positivist jurists postulated a gap in terms of cultural difference between the civilised European and uncivilised non–European worlds.60

The differentiation between civilized and uncivilized ‘was a fundamental tenet of positivist epistemology and thus profoundly shaped the concepts constituting the positivist framework’.61 Even though naturalist jurists like Vitoria acknowledged cultural differences, it was maintained that all societies were bound by a universal natural law. By contrast, in the positivist frame of thought the cultural gap could not be overcome through universal natural law, but only with the imposition of European international law over the uncivilized non–European societies:

Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origins.62

Once the uncivilized world was put outside the realm of the international legal system, positivist concepts and methodologies were elaborated to bridge the gap and allow non–European entities to enter the sphere of international law. Accordingly, a ‘racialised scientific lexicon of positivism’ guided the assimilation process through which non–European peoples were to be brought within the realm of international

60 Anghie, above n 3, 36–40. This argument reiterates the significance that the colonial confrontation has for understanding the nature of nineteenth–century international law.
61 Ibid 56.
62 Wheaton, above n 48, 15.
The test of ‘civilization’, advanced by Westlake to determine whether people qualified to be part of the international system of states, exemplifies such a positivist project. It is not surprising that to qualify as ‘civilised’ required possessing a European–like form of government and a sedentary lifestyle.64

Ideas of culture became crucial for the same doctrine of sovereignty, which in turn was identified with a certain set of cultural practices to the exclusion of others. The categorization into civilized and uncivilized entities was intimately linked to the identification of the ‘sovereign’ and the definition of ‘sovereignty’. In other words, cultural difference had to be translated into legal difference. Positivist jurisprudence had to explain, consistently and coherently, why barbarian nations, ‘a wandering tribe with no fixed territory to call its own’, a ‘race of savages’ and a ‘band of pirates’ could not qualify as sovereign.65

Territorial control is identified as the fundamental criterion according to which an entity could be recognized as sovereign. The failure to exercise control over territory would prevent any entity from being considered as sovereign:

International law regards states as political units possessed of proprietary rights over definite portions of the earth’s surface. So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organized and civilized, to come under its provisions.66

In cases where the requirement of control over territory was met, such as some Asian and African states, positivist jurists resort to the concept of society. The international legal status was therefore determined by cultural requirements, which

63 Ibid 66.
64 Westlake, above n 52.
65 Lawrence, above n 55, 58.
66 Ibid 136.
would allow those entities to be part of the international society, or the ‘family of nations’. In the positivist reasoning, sovereignty and society represented the two tests and, more importantly, regardless of their formal sovereign status, the decisive issue was whether an entity could be considered as a member of the civilized international society. For instance, the primacy of cultural difference in identifying international legal personality is exemplified in the assessment of indigenous tribes:

Yet none of these communities would be subject to International Law, because they would want various characteristics, which, though not essential to sovereignty, are essential to the membership of the family of nations.  

Notwithstanding the centrality that the doctrine of sovereignty holds within the positivist frame, the essential foundation of positivist jurisprudence is the concept of society with its European–like features. Thus, non–European entities are denied sovereign status because they are excluded from the civilized family of nations. The European society provided the model to which all non–European societies, whether relatively advanced or completely backwards, had to emulate in order to progress.  

Furthermore, the concept of society was adopted as the fundamental reasoning to deny any previous sovereign status acknowledged to non–European states. Once the non–European world was expelled from the realm of legality on the basis of the civilized–uncivilized dichotomy, positivists elaborated different doctrines and


67 Ibid 58.
68 Positivist jurists articulated several classifications among non–European societies, such as between Asian states who were considered to a certain extent civilized but ‘different’, and ‘tribal peoples’ who were identifies as being entirely backwards: see, Westlake, above n 52, 102, 142–155.
techniques by which the uncivilized societies were to be readmitted to the realm of international society and international legal system.\(^{69}\)

\(^{69}\) It is explained that four methods of assimilation were identified: treaty-making, colonization, compliance with standard of civilization, and protectorate: see, Anghie, above n 3, 52-66. As for colonization, the issue of native personality played a significant role in determining whether colonization has properly occurred and how sovereignty was acquired over non-European peoples. Discovery, occupation, conquest, and cession were among the traditional doctrines adopted. For a comprehensive and detailed account of these doctrines: see, Hall, above n 54; Oppenheim, above n 56; In particular on conquest: see, Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (New York: Oxford University Press, 1996).
1.4 The early 20th century: from positivism to pragmatism

The jurisprudence of ‘personality’, which deals with the question of defining the proper subject of international law, continued to be a central concern for early twentieth-century positivist jurists.70

The positivist construction of international law during the early part of the twentieth-century continued to undermine the legal status of indigenous peoples within the international legal system. This period was indeed characterized by the positivist denial of indigenous peoples as subjects of the international system. Proponents of international law continued to maintain that not only did indigenous peoples lack international legal personality, they also had no status or rights under international law. Their exclusion from the international arena was grounded upon Eurocentric notions of the law of nations.71 Indeed, the positivist doctrine of effective occupation of territory and the theory of recognition of statehood significantly affected the legal status and rights of native peoples under international law. Indigenous peoples were excluded because they were not recognized by the ‘family of nations’.72

70 See, Oppenheim, above n 56.
71 See especially, Hall, above n 54, 47: ‘It is scarcely necessary to point out that as international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilized, such states only can be presumed to be subject to it as are inheritors of that civilization’.
72 Oppenheim, above n 56, 134–135: ‘As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not imply membership of the Family of Nations…Through recognition only and exclusively a State becomes an International Person and a subject of International Law’.
International tribunal decisions during the 1920s and 1930s testify to this development. In *Cayuga Indians (Great Britain) v. United States*,\(^73\) it is ruled that a ‘tribe is not a legal unit of international law’.\(^74\) In the dispute over the Island of Palmas between Netherlands and United States, the decision favoured the Netherlands because of its effective occupation and proved authority on the island.

Furthermore, the validity of treaties was dismantled as judicial reasoning pointed out that ‘contracts between a State…and native princes of chiefs of peoples not recognized as members of the community of nations…are not, in the international law sense, treaties, or convention capable of creating rights and obligations’.\(^75\)

The ruling on the legal status of Eastern Greenland by the Permanent Court of International Justice\(^76\) is another clear example of the way in which the positivist construct of international legal norms was operationalised. The competitive claims asserted over Inuit’s territory by Norway and Denmark were resolved with the acknowledgment of the actual and prior establishment of sovereignty by the two European states; Inuit’s presence and their claims were utterly ignored by the Court.

The myth of terra nullius gave the green light to the family of nations to construct an international legal discourse that would guide and legitimise the process of European colonization. Considering native lands as legally unoccupied – terra nullius – allowed the wiping out of any indigenous sovereign status and rights under international law. Discovery was then sufficient to legitimise colonial claims on

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\(^73\) *Cayuga Indians (Great Britain) v. United States*, VI R. Int’l. Arb. Awards 173 (1926).

\(^74\) *Cayuga Indians (Great Britain) v. United States*, VI R. Int’l. Arb. Awards 173 (1926) 127.


\(^76\) *Legal Status of Eastern Greenland (Den. V. Nor.)*, 1933 P.C.I.J. (ser.A/B) No. 53.
native territories and to avoid any native assertion over the same lands. Colonialism patterns were therefore legitimised at the expense of indigenous peoples’ sovereign rights to distinct identity, land, and self–government.

The ‘dynamic of difference’ through which positivism articulated an international legal system divided into European civilized and non–European uncivilized peoples, assumed a different colour with the creation of the League of Nations. The emergence of international institutions in the form of the League of Nations in 1919, and the introduction of the Mandate System determined a fundamental shift in the perception of native peoples within the international legal system.

The positivist regime of the nineteenth–early twentieth centuries is replaced by the new pragmatist regime on which the Mandate System is constructed. Pragmatism furthered a new theory of international law based on ‘the social psychology, the economics, the sociology as well as the law and politics of today’. In other words, positivism is criticized and rejected because of its formalism, that is, the autonomy and independence of law from ethics and sociology. By contrast, international law is

77 See, eg, Oppenheim, above n 56; Westlake, above n 52.
78 The creation of an international institution like the League of Nations marks a monumental change in international law. In an international system dominated by sovereign states as the only actors of international law up to the beginning of the twentieth–century, the League of Nations emerges as a new actor recognized under international law.
79 ‘[T]he Mandate System was an extraordinary innovation in the field of international law; it furthered the cause of international justice in extremely significant ways’: Anghie, above n 3, 191. The Mandate System inaugurated a diametrically opposite approach to the colonial problem. Whereas positivist international law promoted the exclusion of non–European peoples from the family of nations, the Mandate System promoted self–government and tried to integrate to a certain extent previously colonized peoples into the international system as sovereign states. An extensive literature has been developed about the Mandate System. See, eg, Quincy Wright, Mandates Under the League of Nations (Chicago: University of Chicago Press, 1930); Norman Bentwich, The Mandates System (London: Longmans, Green, 1930); Duncan H Hall, Mandates, Dependencies and Trusteeship (Washington D.C.: Carnegie Endowment for International Peace, 1948).
80 Roscoe Pound, ‘Philosophical Theory and International Law’ (1923) 1 Biblioteca Visseriana Dissertationum Ius Internationale Illustrantium 71, 76.
to be based on the social sciences – political science, international relations and sociology. International law needs to be forged by social development and mirror the realities revealed by the social sciences in order to further social goals.\(^{81}\)

The science of economic development acquires fundamental significance for twentieth–century international law. International law indeed starts to discard issues of racial superiority\(^{82}\) and adopt a new set of concepts perceived as neutral and universal since they are based on the science of economics.\(^{83}\)

Accordingly, the ‘dynamic of difference’ articulated in terms of the distinction between the ‘civilized’ and the ‘uncivilized’, is transformed into the distinction between the ‘backward’ and ‘advanced’. The concept of ‘backwardness’ indicates primarily lack of economic progress, followed by lack of self–determination and Europeanization.\(^{84}\)

The racial and cultural concepts that explained the ‘dynamic of difference’ between European and non–European societies are replaced with economic categories. Twentieth–century international law and institutions shifted from a race–based discourse to an economics–based discourse. In so doing, the ‘civilizing mission’ based on racial categories is rejected as unacceptable and unscientific. By contrast, the neutral and scientific discourse of economics justifies the civilizing

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\(^{81}\) This approach to international law was mostly furthered by American scholars who required a sociological jurisprudence not only in the domestic sphere but also in the international arena. See, Samuel J Astorino, ‘The Impact of Sociological Jurisprudence on International Law in the Inter–War Period: the American Experience’ (1996) 34 Duquesne Law Review 277.


\(^{83}\) Anghie, above n 3, 189.

\(^{84}\) Wright, above n 79, 584.
mission of international institutions aiming at transforming and improving the welfare of economically deprived peoples.  

Economic development significantly influenced policy-making and policy choices of the League of Nations. In particular, the concept of labour played in the mandate system the same role that the ‘universal human being’ did in Vitoria’s naturalist framework. The discipline of economics was thus perceived as universally valid since it incarnated the processes through which native peoples could be civilized.

It is suggested that the contemporary discipline of development originated with the Mandate System in many respects, and that contemporary international law and institutions still bear the legacy of the Mandate System at the theoretical and practical level.

The Mandate System created a novel system of control and management which relied upon a new and more sophisticated model of legitimation, that is the concept of ‘science’. It has been argued that ‘the new ‘science of colonial administration’ that the mandates brought into being is, in its most important elements, the new ‘science

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86 The law of labour is a law of nature, which no one should be allowed to evade. And if this is true of organised and highly developed societies, the same must be admitted for peoples on the road to civilization and for countries which are on the threshold of development’: Permanent Mandates Commission, Seventh Session, at 201.
87 Anghie, above n 3, 252–254.
88 Ibid 118–119.
of development’ which provides the legitimating foundation of contemporary development institutions such as the [World] Bank’. 89

The Mandate System was established as a central institution which had the central authority to gather massive amounts of information from the peripheries; to examine this information through the universal discipline of economics; and to construct an ‘ostensibly universal science’. 90 The universal science of economic development would allow to evaluate and establish the modalities through which all societies could reach economic development. This new legitimation was the foundation of the new system of control and management carried out through the Mandate System.

According to this system, the transformation of colonial lands was no longer pursued by colonial powers through the advancement of their own interests, but rather by a ‘disinterested’ and ‘neutral’ central institution that would acquire the native knowledge and practice to elaborate scientific–based policies to guarantee the development of the indigenous peoples. 91 It is claimed that these elements, which emerged for the first time in the Mandate System, are core aspects of the contemporary science of development. 92 In particular, it is emphasised that the

89 Ibid 264.
90 Ibid.
91 Ibid.
92 Ibid 265–267. It is argued, for example, that ‘the current [World] Bank concern to promote ‘good governance’ and ‘democratization’ resembles in important respects the Mandate preoccupation with promoting ‘self–government’; in each case, these projects of creating government are secondary to economic considerations, in that they seek to further economic policies which are in the interests of the metropolitan powers’. See also, James T Gathii, ‘Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law’ (1999) 5 Buffalo Human Rights Law Review 107; James T Gathii, ‘Retelling Good Governance Narratives on Africa’s Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States’ (2000) 45 Villanova Law Review 971.
production of knowledge has become central in international institutions’ endeavours towards developing countries.\textsuperscript{93}

The point that needs to be emphasised is that the ‘dynamic of difference’ (articulated in the nineteenth-century in terms of race) which is reproduced in the constitution of the Mandate System, is found on the concept of ‘developed’ versus ‘underdeveloped’. It is argued that the dynamic of developed versus undeveloped peoples has been inherited in the contemporary international system, and continues to give impetus for international law and international institutions to alleviate poverty and bring about development.

Within such a context, this thesis explores the contemporary world’s development agenda in relation to indigenous peoples. In particular, the assertion according to which the reproduction of colonial relations and systems of control have been resisted by the people to whom they are applied, finds a good example in the relations between indigenous peoples and international institutions. It will be shown how indigenous peoples are actively trying to resist a development agenda which does not benefit them, and which is often considered extraneous and detrimental to their aspirations.

Moreover, the analysis of the intersection between indigenous rights and development processes proposed in this thesis, will reveal the fundamental importance of theoretically and practically applying the principle of indigenous self-determination in development policies for indigenous peoples. It will be demonstrated that the integration of the principle of indigenous self-determination

into development policies would potentially serve as a vehicle to put an end to the ‘civilizing mission’ which has underlined international law and to minimize the ‘dynamic of difference’ reproduced in today’s international system.

To conclude the discussion on the early 20th century period, it is important to underline that the creation of the League of Nations marked another fundamental development for indigenous peoples. The newly formed international institution became the first international forum to which indigenous peoples tried to appeal to raise awareness of their existence and to assert their inherent rights.  

During the period of the League of Nations, at least four attempts were made by indigenous leaders to appeal before the international community through the League of Nations. Those cases testify the reaction of native peoples who tried to resist the imposition of an international legal system that denied them any international legal personality or right to access international tribunals. However, there was no response by the League of Nations, no redress occurred as there were no provisions on minority rights in the Covenant of the League of Nations.  

It is in the second half of the twentieth–century that indigenous peoples began to increasingly assert their existence and voice their claims within the international legal

95 For a detailed account of these cases: see, ibid 69–73.
97 It seems that New Zealand and Australia demanded to not include minority rights in the Convention in order to elude any international scrutiny of their handling of Maori and Aborigines. See, Warwick A McKean, Equality and Discrimination under International Law (Oxford: Clarendon Press; New York: Oxford University Press, 1983).
system. The creation of the United Nation system and the emergence of international human rights law inaugurated a new era for indigenous peoples and international relations.
1.5 The United Nations system and indigenous peoples

The legal status of indigenous peoples in the last half of the 20th century is affected by significant events: the emergence of the United Nations system, the elaboration of an international human rights framework, the decolonization process, and the emergence of non-state actors in the international arena.

The creation of a new world system under the auspices of the United Nations, initiated a new era for the advancement of indigenous peoples within the international system. The UN Charter constructs an international system regulated substantively by statist precepts, such as the ‘sovereign equality’ and ‘territorial integrity’ of member States, as well as the principle of non-intervention into sovereign states’ domestic affairs.\(^98\)

The novelty is that non-statist principles are also introduced among the main purposes of the organization: promotion of ‘equal rights and self-determination of peoples’;\(^99\) ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’;\(^100\) and ‘conditions of economic and social progress and development’.\(^101\) Those non-statist principles open up the development of an international human rights system, which expands the competency of international law over spheres previously considered the prerogative of sovereign states.

\(^{98}\) UN Charter, art. 2, paras. 1, 4, 7.
\(^{99}\) UN Charter, art. 1, para. 2.
\(^{100}\) UN Charter, art. 1, para. 3.
\(^{101}\) UN Charter, art. 55.
It can be argued that the inception of the international human rights system has tempered, to a certain extent, the positivist construct of international law. International human rights law can be seen as a return to ‘the classical–era [of] naturalism, in which law was determined on the basis of the visions of what ought to be, rather than simply on the basis of what is, and which contextualized the state as an instrument of humankind rather than its master’.  

International human rights law can be considered one of the most important and revolutionary developments of international law and international relations during the UN period. The international normative order enlarges its scope from mere assessment of state conduct vis–à–vis other sovereign states, to the regulation of states’ behaviours within their own territories. Human rights law goes beyond states’ national boundaries as international human rights standards apply universally to the entire spectrum of humanity.

A significant implication of this normative order is the emergence of non–state actors in the international arena. International law is perceived to increasingly address and to be moulded by non–state entities. As Anaya notes, ‘[i]ndividuals, international organizations, transnational corporations, labour unions, and other non–governmental organizations participate in procedures that shape the normative content of international law’. Accordingly, humanistic precepts and moral objectives inform multilateral deliberative processes carried out both by states and non–state actors who

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102 Anaya, above n 14, 40.
103 Ibid.
are allowed, in different levels and forms, to participate in the shaping of the international normative system.\textsuperscript{104}

Indigenous peoples, as a specific segment of the global civil society, have been part of this process, especially over the last two decades. Indigenous peoples have gradually acquired visibility within the United Nations system at three different levels: institutional, normative, and procedural.

At the institutional level, indigenous peoples have been increasingly participating as a category of non–state actors, in the international arena at several different international fora.\textsuperscript{105} More importantly, since the 1980s they have begun to actively participate in standard–setting and consciousness–raising processes in the context of different UN bodies. The Sub–Commission’s Working Group on Indigenous Populations,\textsuperscript{106} the Human Rights Commission’s open–ended inter–sessional Working Group for the elaboration of the UN Draft Declaration on the Rights of Indigenous Peoples,\textsuperscript{107} the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,\textsuperscript{108} and the latest Permanent Forum on

\textsuperscript{104}Although UN membership is limited to states, the UN Charter sets out significant levels and forms of non-state participation in the organization’s deliberative processes. It indeed allows non-governmental organizations to affiliate with the UN Economical and Social Council, the parent body of the United Nations’ human rights and social policy organs (Art.56).

\textsuperscript{105}See, eg, \textit{UN Conference on Environment and Development}, Rio de Janeiro 1992, which adopted \textit{Agenda 21} whose chapter 26 grants a central place to indigenous populations who need to be included in an environmental agenda; \textit{World Conference on Human Rights}, Vienna, 1993, which adopted the Vienna Declaration and Programme of Action whose paragraph 20 (Part 1) is dedicated to indigenous peoples. Its recommendations have been fundamental for the creation of the UN Permanent forum on Indigenous Issues, among others.

\textsuperscript{106}UN ESCOR Res. 1982/34 (1982).


Indigenous Issues,\textsuperscript{109} are the main institutional mechanisms specific to indigenous peoples created within the UN system.

At the normative level, an emerging body of normative precepts specific to indigenous peoples has been developed within the international human rights framework. The second chapter of the thesis will analyse the emerging corpus of legal precepts concerning indigenous peoples. The right to self-determination will be the focus of this discussion, as it constitutes the core precept in the indigenous rights discourse.

At the procedural level, the emergence of legal norms concerning indigenous peoples within the international human rights framework requires us to investigate whether and to what extent the procedural mechanisms established under the international human rights monitoring system have dealt with indigenous claims. In particular, the third chapter will explore how indigenous claims to self-determination have been addressed by existing international human rights implementation mechanisms, and to what extent they have been effective.

\textsuperscript{109} UN ESCOR Res. 2000/22.
Chapter 2

Indigenous peoples’ right to self-determination

2.1 Indigenous rights and the international human rights system

It has been argued that an emerging body of normative precepts specific to indigenous peoples has been developed within the international human rights framework. This chapter will explore how indigenous peoples have articulated their demands, what the rights are that they are claiming, and how the international legal system is incorporating these demands into international human rights instruments. In particular, the analysis of the normative content of indigenous claims will focus on indigenous peoples’ right to self-determination. It will be shown how the right to self-determination lies at the heart of the emerging normative system of indigenous rights.

Universal and regional instruments relating to indigenous peoples’ rights have been adopted, or are presently under examination before different international instances. These instruments include: the International Labour Organization (ILO) Convention No.107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi–Tribal Populations in Independent Countries, and the ILO

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Convention N°169 on Indigenous and Tribal Peoples;\textsuperscript{2} the Draft American Declaration on the Rights of Indigenous Peoples;\textsuperscript{3} and the United Nations Declaration on the Rights of Indigenous Peoples.\textsuperscript{4} It will be argued that all these instruments contribute, to a varying extent, to the emergence of indigenous rights as a \textit{sui generis} legal genre.


2.1.1 International Labour Organization’s Conventions on indigenous peoples

ILO Conventions 107 and 169 represent a notable contribution for the elaboration of a body of substantive norms relating to indigenous peoples and indigenous claims. The International Labour Organization (ILO)\(^5\) has been at the forefront in bringing indigenous peoples’ issues to the attention of the international community.\(^6\) Both Conventions are indeed unique within international treaty law: they constitute the only international instruments on indigenous rights binding on ratifying state parties.

ILO Convention 169 revises Convention 107, so that Convention 107, which is still binding on those state parties who have not yet ratified Convention 169, is currently closed to ratifications.\(^7\) Convention 169 marks a significant shift in ILO’s approach to indigenous and tribal peoples.\(^8\) It abandons the integrationist and patronizing attitude embedded in Convention 107, to embrace an approach towards

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\(^5\) The International Labour Organization (ILO) is one of the twelve specialized agencies of the UN, pursuant to articles 57 and 63 of the UN Charter.

\(^6\) Indigenous peoples’ issues have been a central concern for the ILO since the 1920s when studies on the labour conditions of indigenous and tribal workers, as well as forced labour of ‘native populations in colonies’ were initiated. These studies constituted the basis for the adoption of several Conventions, such as the Forced labour Convention N°29, 1930; the Recruiting of Indigenous Workers Convention, N°50, 1936; the Contracts of Employment (Indigenous Workers) Conventions, N°64, 1939. For a detailed list of recommendations, conventions, special technical meetings concerning indigenous peoples undertaken by the ILO, see the Martinez–Cobo Report, UN Doc. E/CN.4/Sub.2/1982/2/Add.1, 16 May 1982, paras 31–134.


indigenous and tribal peoples founded on respect for their existence, ways of life, identity, traditions and customs. ILO Convention 169 covers a wide range of subjects, including provisions on health, education, traditional occupations, social security. Particularly and more importantly, it recognizes the rights to traditionally owned or occupied land and also, for the first time in international law, to the natural resources connected to these lands; it promotes the highest degree of self-government and autonomy possible within nation states and it establishes obligation by states parties to ‘consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly’.9 Furthermore, indigenous and tribal peoples ‘shall have the right to decide their own priorities for the process of development…to exercise control…and participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly’.10

Convention 169 has attracted criticism, including: the lack of direct and ongoing participation by indigenous peoples’ representatives in the standard–setting process;11 the concession of too much autonomy to a specific group within national boundaries; not granting indigenous and tribal peoples full decision–making power; the omission of any reference to indigenous peoples’ right to self–determination.12

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9 ILO Convention 169, art. 6(1).
10 ILO Convention 169, art. 7(1).
Even though Convention 169 is implemented within the competence of the ILO, its normative prescriptions are connected to the overarching human rights framework, and its influence has extended beyond the actual number of ratifications. The Convention has stimulated debate and studies on the situation and discrimination suffered by indigenous peoples in countries which had been denying their existence, such as Cambodia, Laos, Thailand, the Central African Republic, and Vietnam.\(^\text{13}\) It has also provided an important source to help define indigenous rights within national jurisdictions.\(^\text{14}\) As for the implementation mechanisms set out within the ILO, it will be shown in the next chapter how the ILO monitoring mechanisms and its technical assistance programs have been significant in addressing indigenous issues and in stimulating awareness in several countries.


\(^{14}\) In Colombia, for instance, several court decisions have directly relied on Convention 169 to decide on indigenous issues and indigenous rights.
2.1.2 The United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples is the most comprehensive universal statement of the aspirations and rights of world’s indigenous peoples ever developed.

The UN Working Group on Indigenous Populations, in accordance with the mandate given to it by the UN Economic and Social Council,\(^\text{15}\) began to exercise its standard–setting function by working on a draft text about the rights of indigenous peoples.\(^\text{16}\) In 1993, the WGPI concluded its decennial drafting process by adopting a final text\(^\text{17}\) which was forwarded to the Sub–Commission on Prevention of Discrimination and Protection of Minorities (now the Sub–Commission on the Promotion and Protection of Human Rights). The Sub–Commission rapidly adopted the text of the Draft Declaration in 1994,\(^\text{18}\) and forwarded it to the UN Commission on Human Rights for approval. An open–ended inter–sessional working group was established in 1995 by the Commission on Human Rights\(^\text{19}\) to elaborate the text of the UN Declaration for final adoption by the General Assembly.\(^\text{20}\) The most recent

\(^{15}\) ECOSOC Resolution 1982/34, 7 May 1982.


\(^{20}\) The UN Draft Declaration was expected to be adopted by the end of the First International Decade of the World’s Indigenous Peoples (1995–2004). The International Decade of the World’s Indigenous Peoples (1995–2004) was proclaimed by the UN General Assembly by Resolution 48/163 of 21
development in the standard–setting process has been the adoption of the United Nations Declaration on the Rights of Indigenous Peoples\textsuperscript{21} by the newly created UN Human Rights Council.\textsuperscript{22} The Human Rights Council adopted the UN Declaration as proposed by the Chairperson–Rapporteur of the Working Group of the Commission on Human Rights\textsuperscript{23} established in accordance with paragraph 5 of the General Assembly resolution 49/214 (23 December 1994).

The UN Declaration is to become, if approved, an internationally recognized legal non–binding instrument setting the minimum standards for the survival, dignity and well–being of the world’s indigenous peoples. The UN Declaration does not simply make a replica of international human standards established in the Universal Declaration of Human Rights and in major human rights Covenants. The UN Declaration reaffirms universal and fundamental human rights; it accurately specifies their normative content as they apply to indigenous peoples, and it spells out fundamental collective and individual rights specific to indigenous peoples.

The UN Declaration consists of a preamble and 46 articles which cover a wide range of human rights and fundamental freedoms related to indigenous peoples.


\textsuperscript{22} GA Res. 60/251, UN GAOR, 60\textsuperscript{th} sess, UN Doc. A/Res/60/251 (2006). The result of the vote was as follows: In favour (30): Azerbaijan, Brazil, Cameroon, China, Cuba, Czech Republic, Ecuador, Finland, France, Germany, Guatemala, India, Indonesia, Japan, Malaysia, Mauritius, Mexico, Netherlands, Pakistan, Peru, Poland, Republic of Korea, Romania, Saudi Arabia, South Africa, Sri Lanka, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, Zambia. Against (2): Canada, Russian Federation. Abstentions (12): Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, Philippines, Senegal, Tunisia, Ukraine. Absent (3): Djibouti, Gabon, Mali.

The preamble is ‘beautifully drafted [and] contains many of the sentiments and values that mankind hold highest’. The preamble affirms general and fundamental principles infused throughout all the Declaration’s provisions. The principle of equality is clearly acknowledged: ‘indigenous peoples are equal to all other peoples’. Cultural diversity is advocated to replace any principle of racial superiority or evolutionary theories: indigenous peoples ‘contribute to the diversity and richness of civilizations and cultures’ and any doctrine or policy inspired to concepts of racial superiority are ‘scientifically false, legally invalid, morally condemnable and socially unjust’.

The content of the text is rich and articulate. The UN Declaration covers a wide range of rights and freedoms of indigenous peoples, which can be summarized as follows: freedom from discrimination, rights to self-determination, equality, participation in the life of the State, and nationality; cultural integrity, identity, threats to the survival of indigenous peoples as distinct peoples; the spiritual, linguistic and cultural identity of indigenous peoples; education, information and labour rights; participatory rights, development, rights and needs of the youth, elderly, women and children, health and other economic and social rights; land and resource rights; the exercise of self-government and indigenous institutions; measures to give effective implementation to the UN Declaration, limitations to the

25 UN Declaration, arts. 1–6.
26 UN Declaration, arts. 7–10.
27 UN Declaration, arts. 11–13.
28 UN Declaration, arts. 14–17.
29 UN Declaration, arts. 18–24.
30 UN Declaration, arts. 25–32.
31 UN Declaration, arts. 33–36.
exercise of indigenous rights according to international human rights obligations, and general concluding provisions.\textsuperscript{32}

It is important to highlight that indigenous peoples and indigenous claims are within the fabric of international law and international human rights law. Indigenous peoples are, first of all, beneficiaries of the fundamental rights and freedoms recognized in the UN Charter, the Universal Declaration of Human Rights (UDHR), and international human rights law.\textsuperscript{33} It is evident that – if and when the UN Declaration is approved by the UN General Assembly – the legal precepts embedded in the text will become part of international human rights law.

It can be argued that the UN Declaration represents a landmark human rights instrument within the fabric of international human rights law, in at least two respects. First, it is the first international instrument which has developed through a standard–setting process with the broadest participation of civil society within the UN system. Indigenous representatives, NGOs with or without consultative status to the UN Economic and Social Council (ECOSOC), scholars, experts, governments’ representatives, international institutions and agencies have all been intensely participating in the long standard–setting process.

Second, and more important, the UN Declaration stands out within the corpus of international human rights instruments as it recognizes and establishes collective rights to an unprecedented degree in human rights law.

The predominant affirmation of indigenous claims in terms of collective rights is connected to the assertion of indigenous peoples as a collective subject. The right–

\textsuperscript{32} UN Declaration, arts. 37–46.
\textsuperscript{33} UN Declaration, art.1.
holder of the UN Declaration’s provisions is indeed primarily identified as a collective subject: ‘indigenous peoples have the right…’,\(^{34}\) ‘indigenous peoples have the collective right…’,\(^{35}\) or ‘indigenous peoples shall not be…’\(^{36}\) The predominant collective subject is in some provisions accompanied by the individual subject: ‘indigenous peoples have the collective and individual right…’,\(^{37}\) or differently phrased as ‘indigenous peoples and individuals have the right…’;\(^{38}\) whereas only one provision is articulated exclusively in terms of individual rights.\(^{39}\)

The assertion of indigenous peoples as a collective subject stands at the core of the UN Declaration. Ambiguities, however, are deemed to arise if one considers that indigenous peoples, the UN Declaration’s collective right–holder, are concurrently the right–holder of the international legal prescriptions under the UN Charter, the UDHR and international human rights law.\(^{40}\) As a result, indigenous peoples locate themselves within the fabric of international law and human rights law, but at the same time, they push forward the boundaries of legal interpretation of human rights standards. The UN Charter loosely refers to peoples’ rights, whereas they are completely absent in the UDHR and included, to a very limited extent, in human rights instruments generally. By contrast, the UN Declaration clearly states that indigenous peoples are the right–holders of the entitlements set out in its text.

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\(^{34}\) See, eg, UN Declaration, arts. 1, 5, 32, 34.

\(^{35}\) UN Declaration, art. 7.

\(^{36}\) UN Declaration, art. 10.

\(^{37}\) UN Declaration, art. 7.

\(^{38}\) UN Declaration, arts. 2, 8, 9.

\(^{39}\) UN Declaration, art. 6.

\(^{40}\) UN Declaration, art. 1.
Indigenous rights are indeed expressed and understood primarily as collective rights.\footnote{As an indigenous representative from the Grand Council of the Crees of Quebec stated: ‘Indigenous peoples need the recognition and protection of their collective rights. When human rights are attacked, when racial discrimination is practiced, it is directed against groups. Individuals suffer the pain, that is true. But they suffer because they are perceived by their attackers as members of a group’, Intervention of 25 October 1996.}

The deliberate and strong-minded choice to acknowledge the collective nature of indigenous rights is significant within the corpus of international human rights law. The individualistic approach to human rights standards has been dominating human rights discourse since the inception of earliest international human rights documents.\footnote{The first human rights instruments are also referred to as the Bill of Rights: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights.} The international legal system has traditionally prioritised the rights of the individual\footnote{Richard A Falk, \textit{Human Rights Horizons} (New York: Routledge, 2000) 127.} so that indigenous peoples’ claims challenge the historically individual nature of western human rights discourse.

The presence of collective and individual rights in the UN Declaration poses significant issues: the prior question of the acceptability of collective rights within international human rights law, and the relationship between collective and individual rights. These issues have given rise to heated debates in scholarly literature, in the discussions of the Commission of Human Rights’ Working Group on the Draft Declaration, and continue to attract particular attention because of their impact on international legal norms and human rights discourse.

The UN Declaration constitutes the first emerging legal instrument where the coexistence of these two categories of rights are clearly acknowledged; an instrument which challenges conservative views on collective rights and where the complexity of
balancing individual and collective rights courageously stands at the core of the UN Declaration.

Concerns about the need to ensure a balance between individual rights and collective rights have been central in many debates at the WGIP and the Human Rights Commission’s Working Group. A number of governments have expressed concerns about ‘a possible imbalance between individual and collective rights’ and the potential encroachment on individual rights: ‘human rights by nature were individual…collective rights might be exercised in a manner that would be detrimental to the enjoyment of individual rights’.

In particular, debates focused on the limits that need to be put on indigenous self-government to protect the human rights of individual members. A related suggestion by the Canadian government delegation was accepted and introduced in article 44, which states that ‘all the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals’. Furthermore, article 34 has been welcomed by several governments as it prescribes a specific guarantee for individual rights:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.


46 See, for instance, the statements of the representative of France, Sweden, Canada and Brazil, UN Doc. E/CN.4/1997/102, paras. 225, 228, 231, 233, respectively.
Some indigenous representatives have opposed this article on the ground that it limits the exercise of the right to self-determination in a discriminatory way, considering that no other peoples have been subjected to the same limitations.\(^{47}\) On the other side, the wording of article 34 has been considered limited, if the aim is to ensure the respect of individual human rights among collective rights, as it should be applied to all rights contained in the UN Declaration.\(^{48}\) It is also suggested that indigenous peoples could borrow the language that international bodies have used to strike the balance between the priorities of the collective and the individual: necessity, proportionality, equity and balance of rights.\(^{49}\) The suggestion should be investigated, as it is not specified how these principles would apply in indigenous contexts.

At the procedural level the UN Declaration has had a significant impact on states–indigenous relations. It has allowed, for the first time in UN history, continuous and direct dialogue between government delegations and the beneficiaries of the UN Declaration’s provisions. As the High Commissioner for Human Rights noted, ‘the working group represented an unusual standard-setting activity by which governmental delegations had an opportunity to talk directly with the beneficiaries of the UN Declaration; it represented the acknowledgment of a new generation of rights’.\(^{50}\)

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\(^{49}\) Ibid.

Further, the positivist approach to international regulation has been challenged by a more flexible and informal approach carried out by indigenous delegations. The role of compulsive codifiers played by states, which have approached the document as a statute prescribing precise rights and duties for all parties involved, has clashed with indigenous peoples’ attitudes in considering the UN Declaration as ‘an international declaration of constitutive principles, and not a convention specifying binding entitlements and obligations’.51

The WGIP and the WG on the Draft Declaration changed the UN positivist rules related to who could speak, present and participate at their meetings, with the final result being to give voice to indigenous representatives, simplify processes and enable a form of supervised negotiation between indigenous peoples and states.52

It is interesting to note that states, while showing willingness to extend access and participation of indigenous peoples on an exceptional basis, refrain from institutionalizing these ‘concessions’. These innovations are seen as ‘concessions’ only because the international society is conceived of as nothing more than the interstate system. If the international society is conceived of ‘as inclusive of, but

52 The representation of indigenous participants at the United Nations, for instance, has represented a problematic issue when related to the formally designated and identifiable delegates of states. Indigenous communities’ modes of representation have very little to do with the ballot box, the dominant trope of liberal democracies. Informal processes are crucial in indigenous designation of representatives for two reasons: ‘first, encourage ongoing discussion and consensus rather than an abrupt act of decision-making; and, second, retain tactical flexibility for the community by not, for example, formally and prematurely committing it to a particular position or spokesperson, but instead reserving for it the option of signaling post-hoc approval or disapproval of a particular act of representation’: Ibid 46. However, the informality and fluidity that characterizes indigenous representatives, as opposed to the formal delegation of authority is questioned also as to its capacity to represent their communities at home and give voice to their claims.
increasingly larger than, the interstate system, then the innovations made were not concessions at all, but necessary and healthy adaptations’. 53

At the normative level, it can be argued that the UN Declaration is imbued with the fundamental principle of self-determination. Indigenous peoples’ right to self-determination represents the cornerstone of the UN Declaration and all indigenous rights embedded in it. The adoption and pervasiveness of the principle of self-determination in the UN Declaration gives rise to challenging issues under international law at the conceptual, normative, and procedural level. Indigenous peoples’ aspiration to self-determination involves different interrelated issues that necessitate a separate discussion to be provided in the following sections.

What is important to consider here is that despite the difficulties relating to states’ recalcitrancy to endorse and acknowledge indigenous peoples’ right to self-determination, indigenous peoples have always strongly upheld the recognition of the right to self-determination as fundamentally entrenched in any declaration of indigenous rights.

The UN Declaration is considered to ‘stand[s] in its own right as an authoritative statement of norms concerning indigenous peoples on the basis of generally applicable human rights principles; and it is also a manifestation of the movement in a corresponding consensual nexus of opinion on the subject among relevant actors’. 54

Although some indigenous representatives express their discontent with the final outcome as not going far enough, while some government representatives believe that

53 Lâm, above n 51, 174.
it goes too far, the UN Declaration is considered to represent a widening common
ground among indigenous peoples and governments experts in relation to indigenous
peoples’ rights.  

The UN Declaration is indeed seen as a compromise between indigenous
participants’ demands and indigenous aspirations. Kenneth Deer, a Mohawk who has
been long active at the WGIP, describes the UN Declaration as follows:

The Draft Declaration still belongs to the United Nations and not to
indigenous peoples. The draft Declaration has its flaws and weaknesses; it is
not perfect. It also holds some dangers. However, I believe it is the best we
could have done within the parameters and the restrictions we had to work
with.  

Notwithstanding its shortcomings, the UN Declaration remains a groundbreaking
and remarkable tribute to a new generation of international consensus on indigenous
peoples’ rights both at the international and regional institutional level.  

The adoption of the UN Declaration by the General Assembly will indicate the
commitment of the international community to recognize and protect the individual
and collective rights of indigenous peoples. Even though the final Declaration will
not be legally binding on States, it will carry considerable moral force.

It can be argued that, besides the deriving legal obligations, the significance of the
UN Declaration lies in the awareness–raising process it has been carrying out over
decades of discussions, debates and controversies. The observance of the rights of

55 Ibid 52–53.
56 Kenneth Deer, ‘Autochtones et Quebecois: La Rencontre des Nationalismes’ in Pierre Trudel (ed),
The UN Draft Declaration on the Rights of Indigenous Peoples (Montreal: Recherches Amerindiennes
au Quebec, 1995) 19, 22.
57 For a detailed discussion of measures adopted and international and regional institutions concerning
indigenous peoples: see, Russel Lawrence Barsh, ‘Indigenous Peoples in the 1990s: from Objects to
indigenous peoples, and in general of all peoples, ultimately depends upon changes in community attitudes, tolerance and better understanding of the issues and concepts underlying human rights standards. It is therefore important that indigenous peoples continue to participate in the drafting process to ensure that the final text will truthfully mirror their visions, aspirations and human rights on an individual and collective level. The discussion of concepts in the UN Declaration over the coming years will continue to raise awareness within the international community, international institutions and civil society about the plight and aspirations of indigenous peoples in today’s world.
2.1.3 The Draft American Declaration on the Rights of Indigenous Peoples

The Draft American Declaration on the Rights of Indigenous Peoples’ represents a regional effort to articulate a comprehensive statement of the rights of the indigenous peoples of the American continent. Articulated within the Organization of American States (OAS), the Draft American Declaration was first approved in 1995 by the Inter–American Commission on Human Rights as the ‘Draft of the Inter–American Declaration on the Rights of Indigenous Peoples’. It was revised to a ‘Proposed American Declaration on the Rights of Indigenous Peoples’ and approved in 1997 by the IACHR, then submitted to the OAS General Assembly.

The revision and discussion process within the OAS institutions was characterized, in its earlier stages, by a limited participation of indigenous peoples. The General Assembly would request the Permanent Council to examine the text and governments to submit observations. It was only in 1999 that a wider participation of indigenous representatives was allowed, when the Committee on Juridical and Political Affairs accepted their participation in the meeting of government experts. This decision, even though indigenous participation was limited to part of that meeting, marked an innovative practice within the OAS context. Since 1999, the Working Group to Prepare the Draft American Declaration on the Rights of

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58 It is also referred to as the OAS Draft Declaration.
59 OEA/Ser/L/V/II.90, Doc. 9 rev.1, 21 September 1995.
60 Approved by the Inter–American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session.

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Indigenous Peoples, set up by the OAS General Assembly in 1999, has been characterized by an increasing participation of indigenous peoples in its revision and drafting process. Specific mechanisms have indeed been established ‘to ensure continued transparency and effective participation by representatives of indigenous peoples during the negotiations in the quest for points of consensus’.

At present, the Draft American Declaration is under discussion by the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples. The latest version of the OAS Draft Declaration appears more limited in scope compared to the UN Declaration and is adapted to regional circumstances. The limited ambitions of the Draft American Declaration are seen as a drawback, but also as a potential strength.

As for the right–holders of the OAS Draft Declaration, it can be argued that even though there is not the explicit reference to the individual and collective dimension of

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62 AG/Res. 1610 (XXIX-0/99), paras. 3, 4, 7 June 1999. Advisory services are indeed provided by the Inter–American Indian Institute.
67 Thornberry, above n 48.
the rights set out in the UN Declaration, *indigenous peoples* are referred to as the collective subject of the rights claimed in the Draft American Declaration.\(^68\) The use of the term ‘indigenous peoples’ has been repeatedly debated in the Working Group’s meetings. For instance, indigenous representatives have argued at this regard that:

they were neither ethnic minorities nor racial minorities nor populations...They defined themselves as peoples, or collectives, autonomous entities, with age−old languages, whose organization, shaped by lands, waters, forests, and other natural resources, afforded them a special world view and a unique social structure.\(^69\)

The current version of the Draft American Declaration\(^70\) broadly refers to ‘indigenous peoples’ as its right−holders. Some examples of those provisions include:

the recognition of collective rights;\(^71\) special guarantees against racism and racial discrimination;\(^72\) the right to have juridical personality recognized within domestic systems;\(^73\) protection against genocide;\(^74\) and the right to belong to indigenous peoples.\(^75\)

At the normative level, it is important to highlight the move from the integrationist approach adopted in the earlier stages of the OAS Draft Declaration’s

\(^68\) OAS Draft Declaration, art. 1. The definition of the beneficiaries of the American Declaration set out in art.1 (2) is an adaptation of the formula of ILO Convention 169, as it focuses on self−identification, their distinctiveness in their social, cultural and economic conditions, as well as the maintenance of specific customs and traditions.


\(^71\) OAS Draft Declaration, art. VI.

\(^72\) OAS Draft Declaration, art. XI.

\(^73\) OAS Draft Declaration, art. IX.

\(^74\) OAS Draft Declaration, art. X bis.

\(^75\) OAS Draft Declaration, art. VIII.
revision process\textsuperscript{76} towards the recognition of indigenous peoples’ right to self-determination.\textsuperscript{77} Emphasis was indeed placed on cultural integrity as opposed to self-determination which has always been the core principle within the UN Declaration. This inclusive perspective called on indigenous peoples to strengthen ‘the institutions of the state and in establishing national unity based on democratic principles’.\textsuperscript{78} The current version of the OAS Draft Declaration departs from such integrationist approach by calling on states to ‘recognize and respect the multiethnic and multicultural [and multilingual] character of their societies’\textsuperscript{79} and by rejecting any attempt at assimilation.\textsuperscript{80}

The inclusion of the right to self-determination\textsuperscript{81} represents one of the major advancement in the revision process. Article III of the current OAS Draft Declaration states that,

\begin{quote}
Within the States, the right to self-determination of the indigenous peoples is recognized, pursuant to which they can define their forms of organization and promote their economic, social, and cultural development.\textsuperscript{82}
\end{quote}


\textsuperscript{78} OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.1/99, preamble, para. 1.

\textsuperscript{79} OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr. 1, art. II.

\textsuperscript{80} OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr. 1, art. X.


\textsuperscript{82} OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. III. For a broad overview of the proposed language for this article, including the proposal by the indigenous caucus see, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Ninth Meeting of Negotiations in the Quest for Points of Consensus, \textit{New Compendium Proposals for
Article III clearly situates indigenous peoples’ right of self-determination within the boundaries of nation states. Specific provisions are set out to prevent any threat to the primacy of states’ sovereignty:

Nothing in this Declaration shall be constructed so as to authorize or foster any action aimed at breaking up or diminishing, fully or in part, the territorial integrity, sovereignty and political independence of the states, or other principles contained in the charter of the Organization of American States. 83

It can be argued that the current Draft American Declaration shows indigenous peoples’ effort to substantiate the recognition of their right of self-determination through provisions, such as the ‘right to autonomy or [and] self-governement’; 84 the ‘right to maintain and develop their own decision-making institutions…[and] the right to participate fully and effectively without discrimination in decision-making at all levels…’, 85 the recognition of indigenous law and legal systems, 86 as well as their traditional institutions and practices. 87

In particular, article XX lists the domains where indigenous peoples’ autonomy or [and] self-governement can be exercised. These include, inter alia, ‘culture, language, spirituality, education, [information, means of communications], health, housing, employment, social well-being, maintenance [of economic security], [of jurisdictional functions in matters of territory], family relations, economic activities, administration

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83 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. IV.
84 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XX (1).
85 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XX (2).
86 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXI.
87 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXII.
of land and resources, environment and [entry of non-members]; [and to determine with States the ways and means of financing {the exercise of these rights} these autonomous functions]'.

It can be argued that these provisions are strengthened by the recognition and inclusion of the principle of ‘free, prior and informed consent’ in the OAS Draft Declaration. The principle of ‘free, prior and informed consent’ permeates the Draft American Declaration that qualifies it as an indispensable element for the real enjoyment of various fundamental rights: the right to indigenous spirituality; the right to health; the right to protection of a healthy environment; the right to indigenous legal and organizational systems; the right not to be forcibly transferred and relocated; the right to protection of cultural heritage and intellectual property; the right to development; the right to peace, security and protection in the event of armed conflict.

The incorporation of the principle of ‘free, prior and informed consent’ within international legal standards on the rights of indigenous peoples is very significant. In the second and third part of this thesis, it will be shown the principle of ‘free, prior and informed consent’ constitutes a fundamental criterion for the implementation of indigenous peoples’ right of self–determination through development policies.

88 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XX (1).
89 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XV.
90 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XVII.
91 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XVIII.
92 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXII.
93 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXV.
94 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXVIII.
95 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXIX.
96 OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXX.
The Draft American Declaration concludes with general provisions about states’
duty to ‘ensure the full enjoyment of the civil, political, economic, social, cultural,
and [spiritual] rights…’ \(^97\) and ‘promote…the adoption of the legislative and other
measures that may be necessary to give effect to the rights included in this
Declaration’; \(^98\) indigenous peoples’ right to ‘effective and appropriate remedies,
including prompt judicial remedies, for the reparation of all violations of their
collective and individual rights’ \(^99\). It is finally set out, like in the UN Declaration,\(^{100}\)
that the rights contained in the Draft American Declaration constitute ‘the minimum
standards for the survival, dignity and well–being of the indigenous peoples of the
Americas’ \(^{101}\).

\(^{97}\) OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXXI (1).
\(^{98}\) OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXXI (2).
\(^{99}\) OAS Draft Declaration, OEA/Ser.K/XVI; GT/DADIN/doc.283/07 corr.1, art. XXXIII.
\(^{100}\) UN Declaration, art. 42.
\(^{101}\) OAS Draft Declaration, art. XXXIX.
2.2 The principle of self-determination

The principle of self-determination is the keystone among indigenous claims. The UN Declaration openly states the right of indigenous peoples to self-determination as the foundation of all indigenous claims:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.\(^{102}\)

The clause on self-determination has been also the most controversial issue during the drafting process. It is pointed out indeed that the ‘[i]nternational legal recognition of the right of indigenous peoples to self-determination as distinct peoples has been the most strident and persistent demand voiced before the WGIP’.\(^{103}\)

The right to self-determination, claimed as early as 1983 in a document submitted by the International Indian Treaty Council (IITC) as one of the rights to be recognized by the WGIP,\(^{104}\) has been repeatedly demanded since the early stages of the WGIP’s drafting process. In 1984, the World Council of Indigenous Peoples\(^{105}\)

\(^{102}\) UN Declaration, art. 3.


\(^{104}\) See, Julian Burger, *Report from the Frontier: the State of the World’s Indigenous Peoples* (London: Zed Books, 1987) 56, in which it is reported that the IITC declared: ‘Indigenous nations and peoples who so desire should be granted the full rights and obligations of external self-determination...Indigenous nations and peoples who wish to limit themselves to the exercise of internal self-determination only should be granted the freedom to do so’.

\(^{105}\) The World Council of Indigenous Peoples submitted its own provision of self-determination: ‘All indigenous peoples have the right to self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic, social, religious and cultural development’: ibid 270. This provision reproduces (except for the words ‘may’, ‘indigenous’ and ‘religious’) the standard UN formulation of the right of self-determination first expressed in the 1960 General Assembly’s *Declaration on the Granting of Independence to Colonial Countries and Peoples*. 

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and some indigenous groups, jointly submitted a statement pinpointing their conception of indigenous peoples’ right of self-determination to the WGIP:

All Indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. This includes the right to freely determine their political status, freely pursue their own economic, social, religious and cultural development, and determine their own membership and/or citizenship, without external interference. No State shall assert any jurisdiction over an indigenous nation or people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned…Indigenous nations and peoples are subjects of international law. Treaties and other agreements freely made with indigenous nations or peoples shall be recognized and applied in the same manner and according to the same international laws and principles as treaties and agreements entered into with other States…Indigenous nations and peoples may engage in self-defense against State actions in conflict with their right to self-determination.

While this statement was submitted at a time when both the WGIP and indigenous organizations were still casting about for a legal and political language by which to formulate their positions, it ‘captured a key creative moment in the history of international society, a moment when a group of new actors on the international scene were grasping to restructure, with the aid of international law, their relations with their encompassing states’, towards a ‘new form of association of peoples with states’.

The adoption of the right of self-determination has being strenuously defended by indigenous peoples in international fora against strong critiques of its appropriation. Some have indeed argued that the universal wording (‘all peoples’ have the right to


Indian Law Resource Center, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference, Four Directions Council.

Burger, above n 104, 271.

Lâm, above n 51, 54.
self–determination) should not be literally interpreted, while others have claimed self–determination as a dead end for indigenous aspirations and that indigenous peoples should abandon self–determination claims on the ground that their survival and flourishing can be promoted through individual human rights. According to this position, individual human rights are considered to be more appropriate to the contemporaneous human rights framework and less likely to cause governments’ apprehension.

Despite these various opinions, indigenous peoples have tirelessly expressed their demands in terms of self–determination. The right of self–determination continues to be the most important as well as the most controversial precept within the context of international law and indigenous rights. It can be argued that conceptual, normative and procedural difficulties arise when a general principle of international law such as the principle of self–determination, is embraced by a section of states’ populations, namely indigenous peoples.

Indigenous understanding of and aspirations to self–determination intermingle with the political and legal dimensions of the principle of self–determination as it has historically developed in international law. The notion of self–determination, indeed, has evolved over time from a political postulate to an international legal standard of fundamental importance within the realm of international law.

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Emerging in the second half of the eighteenth century, the concept of self–determination was significantly influenced by the political and philosophical ideas underlying the American and French Revolutions.\textsuperscript{112} Natural law theory justified the rejection of the ‘Divine Right of Kings’\textsuperscript{113} to sanction the will of people as the source of any legitimate governmental power.\textsuperscript{114}

It is only in the aftermath of World War 1 that the principle of self–determination acquires an international dimension. The Wilsonian and Leninist versions of self–determination\textsuperscript{115} dominated the international political scene: self–determination was proclaimed as the key principle in international relations. Notwithstanding its significance, the principle of self–determination did not become part of the body of international legal norms, or a right under international customary law, in fact, self–

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114 See, Cassese, above n 111, 11: ‘the American Declaration of Independence (1776) and the French Revolution (1789) marked the demise of the notion that individuals and peoples, as subjects of the King, were objects to be transferred, alienated, ceded, or protected in accordance with the interests of the monarch’.

115 Vladimir Ilyich Lenin’s conception of self–determination was based on socialist political philosophy according to which self–determination was a means to realize the dream of worldwide socialism. Accordingly, emphasis was placed on the external dimension of self–determination, which is the right of oppressed nations to political separation or secession. On the other hand, US President Woodrow Wilson conceived self–determination primarily in its internal dimension, as a concept tantamount to democracy. The Wilsonian notion stemmed from Western democratic theory: ‘it was the logical corollary of popular sovereignty; it was synonymous with the principle that governments must be based on the consent of governed’: Cassese, above n 111, 19.
determination remained an international political postulate. The inconsistent application of the principle by the Peace Conference (the uneven criteria to which the redrawing of the map of post-war Europe was inspired) as well as the juridical interpretation released over some cases, confirmed the exclusively political dimension of the principle.

The shift from a political postulate to an international legal norm occurred with the establishment of the United Nations system in 1945. The UN Charter enunciates in article 1(2) and 55 the principle of self-determination as one of the fundamental pillars upon which the newly formed international order would rest. The UN

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116 In the same manner, from this period until World War II, the ‘entitlement’ to be self-determined was ethically rather than territorially or legally defined by the Peace Conference. The suitable subjects believed to be entitled to self-determination were then politically conscious ethnic groups (referred to as ‘nations’ if already independent, or ‘nationalities’ whose common identity was put primarily in terms of their language or culture). Therefore, the term ‘national self-determination’ often used to define self-determination in this period refers to the influence the theory of nationalism had on the interpretation of self-determination: see, Raič, above n 112, 193.

117 Ibid 190. Raič points out that ‘…despite Wilson’s sincere motives and ideas, self-determination was applied in an arbitrary manner by the Allied Powers. Political, strategic and economic interests and arguments often prevailed over self-determination. Communities which had been loyal to the Allied Powers…were permitted to form their own States, while other claims were ignored…’

118 ‘In cases of territorial readjustment which involved complex issues of nationalities (or other factors), the concept of self-determination was sometimes reflected in the use of plebiscites to determine the wishes of the population. But in this context…, self-determination was inconsistently applied, which is evidenced by a number of cases…’: ibid. This ‘double standard’ policy can be also witnessed in the no application of the concept of self-determination to the territories of the Allied Powers since only the defeated states were considered to have subjugated their populations.

119 In the Aaland Islands case, the International Committee of Jurists appointed by the Council of the League of Nations to determine whether the inhabitants of the Aaland Islands, under international law, were free to secede from Finland, affirms that the concept of self-determination could not be considered an international legal norm. In particular, it noted that even if the principle was an integral part of ‘modern political thought’, it was not mentioned in the Covenant of the League of Nations and its recognition ‘in a certain number of international treaties [could] not be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations’. For more details see, ‘Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question’, Official Journal of the League of Nations, Special Supplement N 3, October 1930, 5.

120 Article 1(2) provides that one of the purposes of the United Nations is ‘to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measure to strengthen universal peace’; Article 55 states that ‘[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of
Charter, however, neither defines the content of self-determination, nor specifies the ‘subjects’ entitled to it. ‘Peoples’ are loosely referred to as the holders of the right to self-determination with no further specification.

As a result, different opinions have been flourishing as to the proper content of and the ‘holders’ of self-determination under international law. As for the content, it has been argued that ‘Article 1(2) merely laid down one of the many lofty goals of the Organization’ and that ‘self-determination, conceived of as a postulate deeply rooted in the concept of the equal rights of peoples…, was considered to be a means of furthering the development of friendly relations among States: it would foster universal peace’. 121 In a similar vein, the International Court of Justice (ICJ) stated that the principle of self-determination stated in the UN Charter sets out a very general and overarching standard of behaviour for international relations, which is basically the ‘need to pay regard to the freely expressed will of peoples’. 122

The precept of self-determination, although defined in a quite weak and loose form in the UN Charter, would experience an unprecedented evolution over the years from a legal principle intended to guide the UN to a precept directly binding on states. 123

In the decades following the adoption of the UN Charter, the emphasis on the interpretation of the principle of self-determination shifted from a goal to be pursued for peaceful relations to a postulate of anti-colonialism. Decolonization came at the

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121 Cassese, above n 111, 43.
122 Western Sahara case, ICJ Reports 1975, 33 (paras 58 and 59).
123 Cassese, above n 111, 43.
forefront of the international political agenda in the era after World War II. Consequently, the principle embodied in Article I(2) of the UN Charter was perceived as a legal entitlement to decolonization, whereas Chapter XI (‘Declaration Regarding Non–Self–Governing Territories’) and Chapter XII (‘International Trusteeship System’) – where the principle is not explicitly mentioned but implied in the provisions – constituted the background for the evolution of the political precept of self–determination into a positive legal right in the field of decolonization.\footnote{Ibid 44–47; Raič, above n 112, 199–225.}

Consequently, the international legal regulation between the early 1950s and late 1960s focused primarily on colonial peoples as the holders of self–determination. The acquisition of \textit{external} self–determination dominated the development of international customary law\footnote{The bulk of international legal standards moulded by member states’ pronouncements at the national and international level (eg, declarations of government representatives in national parliaments, pronouncements in relation to UN resolutions), states actual behaviour, and the ruling of international courts [\textit{Namibia}, ICJ, Reports (1971), 31; \textit{Western Sahara}, ICJ, Reports (1975), 32] – what constitute the ‘bulk of usus and opinion juris in the matter’: Cassese, above n 111, 70.} dealing with colonial peoples. This cluster of international norms not only identified colonial peoples as the holders of self–determination, but also specified the objectives (independent statehood, integration, association with another state) and the techniques to be used (plebiscites or referendum).\footnote{The general consent among states about the idea that non–self–governing territories should have the opportunities to freely choose their international status was reflected in three resolutions adopted by the UN General Assembly: GA Resolution 1514(XV), 14 December 1960 (Declaration Granting Independence to Colonial Countries and Peoples); GA Resolution 1541(XV), 15 December 1960; GA Resolution 2625(XXV), 24 October 1970 (Declaration on Friendly Relations).}

On the contrary, according to Cassese, customary norms dealing with \textit{internal} self–determination, only defined the subjects entitled to self–determination, which is
peoples under foreign military occupation and racial groups, with no reference to possible procedures or methods of acquisitions.

The international treaty law-making process in the early UN period is instead characterized by a broader interpretation of the principle of self-determination. States began to embark upon treaty-making primarily to turn general principles laid down in the UN Charter into legally binding treaty provisions, and adopted in 1996 two major international human rights treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These landmark Covenants, adopted to set out in legally binding terms the human rights proclaimed in the 1948 Universal Declaration of Human Rights, embody a notion of self-determination which goes beyond the widespread understanding among world community as an anti-colonial principle. The common article 1 of the Covenants reads as follows:

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

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual

\[127\] UN Declaration on Friendly Relations of 1970 in which ‘subjection of peoples to alien subjugation, domination and exploitation’ is considered to give rise to the right of self-determination. For a detailed account of issues related to such definition and its implications: see, Cassese, above n 111, 90–99.

\[128\] According to Cassese’s analysis on states’ practice and UN practice on customary rules on internal self-determination, ‘the right of internal self-determination embodied in the 1970 Declaration is a right conferred only on racial or religious groups living in a sovereign state which are denied access to the political decision-making process; linguistic or national groups do not have a concomitant right’:

\[129\] 999 UNTS 171.

\[130\] 993 UNTS 3.

\[131\] GA Res. 217 A (III), 10 December 1948.

\[132\] For a comprehensive analysis of the drafting process of art.1 on self-determination: see, Cassese above n 111, 47–66.
benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The States Parties to the present Covenant, including those having responsibilities for the administration of Non–Self–Governing and Trust Territories, shall promote the realization of the right of self–determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

In an attempt to contrast the anti–colonial momentum supported by socialist and developing countries, western states succeeded in adopting two key principles to interpret self–determination: first, self–determination should not be confined to colonial countries but should be a universal doctrine; secondly, self–determination should concern the internal structure of states since governments’ authority is to be based on democratic consent.

The Covenants constitute a significant development as to the content of self–determination. First of all, external self–determination was articulated in a way to include not only the right to achieve independent statehood – as in the traditional approach – but also the obligation on member states to refrain from interfering with the independence of other states and from occupying a foreign territory. Second, the Covenants proclaimed for the first time the right of the whole population of a state party to freely choose its rulers (internal self–determination). In addition, self–determination acquired an ‘economic dimension’ as including the right to control natural resources.\(^{133}\)

The Covenants bring the principle of self–determination within the international human rights framework; the precept of self–determination is integrated in the fabric

\(^{133}\) Ibid 65–66.
of human right norms as an overarching right, a ‘meta-language’ which holistically amalgamates human rights principles.\(^{134}\)

2.3 Indigenous peoples’ right to self–determination

The UN Declaration boldly asserts indigenous peoples’ right to self–determination, faithfully wording the clause like article 1 of the ICCPR and ICESCR Covenants:

Indigenous peoples have the right of self–determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.135

The claim of indigenous peoples to be entitled to the right of self–determination recognized to ‘all peoples’ in the UN Charter and in the Covenants, has been the most controversial issue in the UN Declaration drafting process and, in general, in the realm of international law.

The friction between states’ recalcitrance to recognize self–determination for indigenous peoples and indigenous aspirations to be endowed with such a right arises from a fundamental clash between a positivist statist–centred approach and a peoples–centred approach to self–determination.

Whereas indigenous peoples have invoked the right to self–determination in terms of their ‘desire to continue as distinct communities free from oppression…in virtually all instances denying aspirations to independence’,136 governments have continued to frame it according to a positivist approach to international system. This contrast is exemplified in an indigenous declaration about self–determination in the context of ILO Convention 169. The declaration has been articulated to argue against the

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135 UN Declaration, art. 3.
136 Anaya, above n 54, 48.
safeguard provision in Convention 169, which is so phrased to separate the term ‘peoples’ from mainstream legal interpretations: ‘[t]he use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law’.\footnote{ILO Convention 169, art.1(3)}

The indigenous statements clearly point out that ‘we define our rights in terms of self–determination. We are not looking to dismember your states and you know it. But we do insist on the right to control our territories, our resources, the organization of our societies, our own decision–making institutions, and the maintenance of our own cultures and ways of life’.\footnote{Statement by the National Coalition of Aboriginal Organizations, Australia, during the 75th session of the International Labour Conference, 13 June 1988, at 2.}

The consistent resistance from the part of states can be explained by states’ shifted ‘locus of the term self–determination from peoples to territories, and thereafter inevitably states’.\footnote{Lâm, above n 51, 180.}

The positivist individual/states dichotomy and the historical legacy of recognising the right to self–determination to certain categories of peoples, is central in the controversial acceptance of indigenous peoples’ right to self–determination and their inclusion in the realm of the subjects of international law. As Lâm argues,‘[t]he struggle over the clause is a struggle over the continuing validity of positivism in the international legal order’.\footnote{Ibid 172.} The emergence of indigenous peoples as a new locus of subjectivity in international law is the most challenging issue in the international legal discourse since ‘the jurisprudential starting–point of the rights of peoples is a direct
assault upon positivist and new–positivist views of international law as dependent upon states practice and acknowledgement.\textsuperscript{141}

The recently approved text of the UN Declaration provides for a safeguard norm which limits the exercise of indigenous peoples’ right to self–determination as follows:

Indigenous peoples, in exercising their right to self–determination, have the right to autonomy or self–government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.\textsuperscript{142}

As the debate about the admissibility and legitimacy of the right to self–determination of indigenous peoples continues to characterize the process towards the final adoption of the UN Declaration by the General Assembly, significant contributions can help disentangle the main issues involved in the legal interpretation of the indigenous right to self–determination under international law. Benedict Kingsbury, for instance, proposes a relational approach to self–determination which aims to reconstruct the norm within the realm of international law and facilitate an agreement on the political–legal formulation of the indigenous right to self–determination.\textsuperscript{143} The shift ‘from an end–state approach to a relational approach to self–determination’\textsuperscript{144} is suggested as a pathway to overcome the impasse on the acceptance of the international precept for indigenous peoples.

\textsuperscript{142} UN Declaration, art.4.
\textsuperscript{144} Ibid 22.
The decolonization model – the realization of an ‘end–state’ in the form of independence or occasionally some other political arrangements – was the referent adopted by the international indigenous movement in its formative period to define self–determination as a legal concept.\textsuperscript{145} Even though part of the international indigenous movement has been reluctant to move away from the end–state model,\textsuperscript{146} Kingsbury argues that ‘[w]hile the international indigenous movement may well adhere to this theoretical position, it is not viable as an express formulation for a UN Declaration on the Rights of Indigenous Peoples to be adopted by states, nor does it embody the current preoccupations of most internationally active indigenous peoples’.\textsuperscript{147}

It is indeed suggested to disengage from the ‘end–state independence–oriented focus’ and embrace a relational approach to self–determination. The ‘end–state–independence–oriented’ focus, borrowed from the European decolonization model, has diverted the attention from the development of legal principles which would regulate enduring relations between indigenous peoples and states.\textsuperscript{148}

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  \item See, for instance, some indigenous representatives’ statements: Michael Dodson, ‘Towards the Exercise of Indigenous Rights: Policy, Power and Self–Determination’ (1994) 35(4) \textit{Race & Class} 65, 74: ‘Finally, even where a state meets the obligations required under the declaration [on Friendly Relations], there will be some indigenous peoples whose right to self–determination will never be satisfied until they have a free and independent state of their own. And it would be a violation of those peoples’ right to self–determination for anyone else to say that this is not an acceptable way for them to exercise that right’; see also, \textit{Baguio Declaration}, adopted at Baguio City, Philippines, 18–21 April 1999: ‘…although autonomy and self–government may be a way through which many indigenous peoples which to exercise their right of self–determination…these are not the only ways by which indigenous peoples may exercise this right…they have the right to establish their own government and determine its relations to other political communities’.
  \item Kingsbury, above n 143, 26.
  \item See also, F Kirgis, ‘The Degrees of Self–Determination in the United Nations Era’ (1994) 88 \textit{American Journal of International Law} 304.
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By contrast, a relational approach would enable one to focus on the relations between states and indigenous peoples, and to reconstruct the terms and dynamics of their relational interactions. It is argued that the UN Declaration, within the realm of contemporary legal instruments, is considered to include elements relevant to a relational reconstruction of the right of self-determination. The UN Declaration provisions capture important issues which have the potential to reconstruct indigenous self-determination in relational terms. However, it is maintained that the UN Declaration does not sufficiently address these issues in their relational aspects.

To illustrate, article 33 establishes that ‘[i]ndigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards’. This provision, however, does not address the relationship between state institutions and indigenous institutional structures and practices, neither is the role of state institutions (particularly courts and administrative agencies) articulated in relation to the required domestic incorporation of the UN Declaration’s indigenous rights so that indigenous peoples can practically benefit from those rights.

The right to self-determination is not stated in relational terms, even though the shaping of relationships with states has been one of the most important aspirations of the indigenous peoples’ movement. Quite surprisingly, it is stated that ‘[t]he dynamic of the UN process has been rather the opposite, treating self-determination as an end–
state issue, and separating the debate on self–determination from the structuring of relationships’.\textsuperscript{149}

The only element connected to self–determination is the provision concerning ‘autonomy or self–government’ as the possible modalities for indigenous peoples to exercise the right of self–determination:

Indigenous peoples, in exercising their right to self–determination, have the right to autonomy or self–government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions’.\textsuperscript{150}

Notwithstanding the variety of autonomous regimes that indigenous peoples can operate, mostly depending on geographical and demographic settings, autonomy is primarily understood as a relationship. Relations between the state, its institutions and indigenous autonomous entities are at the core of the majority of indigenous peoples’ autonomous regimes. Accordingly, a governance framework is required to establish the terms and the legal procedures according to which the relationships between states and indigenous autonomous entities would be regulated.\textsuperscript{151}

The fundamental principle underpinning the UN Declaration is that indigenous peoples have the right to maintain and strengthen their distinct characteristics and legal systems, while retaining the right to participate fully in the life of the state.\textsuperscript{152} It is pointed out that the terms of the relationships giving effect to these provisions are not established. It is maintained that considering self–determination in relational

\textsuperscript{149} Kingsbury, above n 143, 29.
\textsuperscript{150} UN Declaration, art. 4.
\textsuperscript{151} Kingsbury, above n 143, 27–29.
\textsuperscript{152} UN Declaration, arts. 4,8,12–14,19–21,23.
terms would facilitate, at least partially, the achievement of a global agreement on political and legal formulations of indigenous peoples’ right to self–determination.¹⁵³

Kingsbury’s relational approach offers interesting insights which demand further investigation on what kind of modalities might be adopted to realize in practice the right to self–determination. This thesis argues that the suggested relational approach to the implementation of indigenous peoples’ right to self–determination is fundamental to gain a deep understanding of the implementation of indigenous self–determination. A relational–driven approach underlies the study undertaken in the second part of the thesis where the potential enjoyment of self–determination through the adoption of an adequate normative and practical approach to development policies is explored.

The indigenous capability rights–based normative framework and the methodological approach developed in the second part of the thesis are constructed upon a human rights–based approach. In this regard, James Anaya provides a fundamental contribution for the understanding of indigenous peoples’ right to self–determination from a human rights perspective.¹⁵⁴

The principle of self–determination is embedded within the human rights framework of contemporary international law. It is indeed argued that the right to self–determination ‘entails a universe of human rights precepts extending from core

¹⁵³ Kingsbury, above n 143, 36–37.
values of freedom and equality and applying in favour of human beings in relation to the institutions of government under which they live.\textsuperscript{155}

Anaya critically takes distance from the traditional categorization of self-determination into the external–internal dichotomy. Even though this dichotomy continues to inform the legal and political discourse of the principle of self-determination, as well as the norms crystallized in international law,\textsuperscript{156} the terms ‘internal’ and ‘external’ do not appear as qualifiers of self-determination in any international law instrument.\textsuperscript{157}

Anaya, instead, distinguishes between \textit{substantive} self-determination and \textit{remedial} self-determination. It is suggested that whereas substantive self-determination is constituted of the two normative strains of \textit{constitutive} and \textit{ongoing} self-determination, \textit{remedial} self-determination refers to the prescriptions necessary to implement the norm or to remedy violations of the norm. The external/internal

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\textsuperscript{155} Anaya, \textit{Self–Determination as a Collective Human Right under Contemporary International Law}, above n 154, 9.
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\textsuperscript{156} For instance, the anti–colonialist movement at the Bandung Conference in 1955, determined the articulation of customary rules on self-determination in terms of its \textit{external dimension}, that is the determination of the international status of a territory and a people, as opposed to \textit{internal self–determination} which refers to the relationship between the government of a state and the people of that state.
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dichotomy is therefore replaced by the distinction into a *constitutive* aspect and an *ongoing* aspect of substantive self-determination.\(^{158}\)

Constitutive self-determination ‘requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed’.\(^{159}\) The collective will of the peoples therefore is the necessary requirement for the creation and change of a political order. This aspect reflects the common provision in the international human rights Covenants and other instruments according to which peoples ‘freely determine their political status’\(^{160}\) by virtue of the right of self-determination.

Ongoing self-determination, instead, ‘requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis’.\(^{161}\) The ongoing aspect of self-determination encapsulates the notion expressed in the common provision to the international covenants and other instruments, according to which peoples are to ‘freely pursue their economic, social and cultural development’.\(^{162}\) It follows that the governing institutional order is required to enable individuals and groups to make meaningful choices about their life on a continuous basis.


\(^{159}\) Ibid.

\(^{160}\) ICCPR, Article 1(1); ICESCR, Article 1(1).


\(^{162}\) ICCPR Article 1(1); ICESCR Article 1(1).
It is maintained that to equate self-determination with a right to independent statehood is misguided ‘not only because it obscures the human rights character of the self-determination norm, but also because it fails to distinguish the substance of the norm from the context-specific remedial entitlements that may follow violations of the norm’.

Wedding self-determination with the decolonization regime is misleading and mistaken because the measures undertaken to dismantle the colonization regimes did not embody the substance of self-determination. Instead, they represented the mechanism adopted by the international community for a \textit{sui generis} deviation from its implementation.

In the context of indigenous peoples, it is pointed out that even though indigenous populations are considered beneficiaries of the right of self-determination in its remedial aspect, since they have suffered violations of substantive self-determination (such as populations subject to colonial or apartheid regimes), the remedial regime does not aim at the formation of new states. In a world of complex interdependencies and multifaceted cultural patterns, secession, separation and independent statehood are considered as an unworkable solution. In fact, the efforts to remedy indigenous peoples’ violations that have been developed in the international arena tend to be ‘context specific arrangements to ensure the survival of these peoples’ own historically rooted cultures and institutions within the framework of the states in which they live’.

This process is also supported by Erica–Irene Daes, former Chairperson–Rapporteur of the UN Working Group on Indigenous Populations, who

\begin{footnotesize}
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  \item Anaya, \textit{Self–Determination as a Collective Human Right under Contemporary International Law}, above n 154, 12.
  \item Ibid 12–14.
  \item Ibid 13.
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describes it as ‘a kind of state-building, through which indigenous peoples are able to
join with all the other peoples that make up the state on mutually-agreed upon and
just terms, after many years of isolation and exclusion’. 166

In Anaya’s view, self-determination, in its constitutive and ongoing dimension, is
understood as ‘a right that benefits all segments of humanity, by virtue of their
humanity’. 167 The fact that all peoples are entitled to self-determination denotes the
collective character of the norm and affirms the value of community bonds. However,
this does not mean that all peoples are entitled to change the status quo of political
and legal systems.

Remedial self-determination, the legal entitlement to change the status quo, is
acknowledged only in those groups who have suffered a violation of the precept to
remedy violations from the norm. And the remedy, most importantly, has to be
determined through a ‘case-by-case approach’ in order to properly address the
numerous groups who call for the right to self-determination. 168

The most important difference is that substantive self-determination – the
universe of values that constitute the norm – applies universally, while the remedial
prescriptions are context-related. Remedial measures vary according to the
circumstances characterizing the deviation from the enjoyment of the right to self-
determination.

166 Erica–Irene Daes, ‘Some Considerations on the Rights of Indigenous Peoples to Self–
167 Anaya, Self–Determination as a Collective Human Right under Contemporary International Law,
above n 154, 17.
168 Ibid 18.
In summary, indigenous peoples’ right to self–determination is perceived as a collective human right to which indigenous populations are entitled in its substantive and remedial aspect. The entitlement of indigenous peoples to self–determination is grounded on a broader and more flexible view of the term ‘peoples’ and on the interpretation of self–determination as a fundamental human right:

The term ‘people’ should be understood in a flexible manner, as encompassing all relevant spheres of community and identity…Second, like all human rights, self–determination derives from common conceptions about the essential nature of human beings, and it accordingly applies universally and equally to all segments of humanity. Third, as a human right, self–determination cannot be viewed in isolation from other human rights norms, but rather must be reconciled with and understood as part of the broader universe of values and prescriptions that constitute the modern human rights regime.  

A human rights–based approach to indigenous self–determination is also defended by John Henriksen who points out that ‘indigenous peoples consider the right of self–determination as a collective human right which is a fundamental condition for the enjoyment of all other human rights of indigenous peoples, be they civil, political, economic, social or cultural’.  

Furthermore, the enjoyment of self–determination by indigenous peoples is closely related to the notion of human security. Indigenous peoples’ human security is indeed perceived as encompassing physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects, as well as the subjective feeling of security – what is referred to as the relative aspects of human security. The right of self–determination is conceived of as including all these interdependent

\[169\] Ibid 5–6.  
aspects. As a result, indigenous peoples’ enjoyment of self-determination cannot be thought of without assuring the recognition and implementation of all elements that make up their human security. \(^{171}\)

The overarching nature of the right to self-determination is also stressed by Ted Moses who acknowledges that ‘the very survival of indigenous peoples depends directly on respect for the rights contained in that concept’. \(^{172}\) Accordingly, self-determination is conceived of as a ‘prerequisite’ for the enjoyment of all other human rights and freedoms. This conceptualization of indigenous self-determination follows the findings of an important UN study, in which it is stated that ‘human rights and fundamental freedoms can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a human right and a prerequisite for the enjoyment of all the other rights and freedoms’. \(^{173}\)

It can be argued that important insights can also be drawn from a conceptualization of self-determination as a ‘process’. According to this perspective, ‘the process of achieving self-determination is endless’. \(^{174}\) In a world where social and economic conditions, as well as cultures and aspirations are ever-changing, peoples ‘must continually renegotiate the terms of their relationships’ in order to live

\(^{171}\) Ibid 138–139.


together in peace.\textsuperscript{175} This view is shared by others, such as Henriksen who emphasizes that from an indigenous perspective, ‘the right to self-determination should be regarded as a ‘process right’ rather than the right to a predefined outcome’.\textsuperscript{176}

Freedom, integrity and respect are the most frequent words used by indigenous peoples to translate self-determination. Thus ‘self-determination means the freedom for indigenous peoples to live well, to live according to their own values and beliefs, and to be respected by their non-indigenous neighbors’.\textsuperscript{177} In light of her long experience as Chairperson of the WGIP, Daes emphasizes that ‘the underlying goal of self-determination for most indigenous peoples, has not been the acquisition of institutional power. Rather, the goal has been to achieve the freedom to live well and humanely – and to determine what it means to live humanely. No government has ground for fearing that’.\textsuperscript{178}

For the purposes of this analysis, it is important to bear in mind what Daes refers to as the ‘true test of self-determination’. It is suggested that ‘the true test of self-determination is not whether indigenous peoples have their own institutions, legislative authorities, laws police or judges…’, but ‘whether indigenous peoples themselves actually feel that they have choices about their way of life’.\textsuperscript{179}

This perspective suggests a subjective approach to the fulfillment of self-determination for indigenous peoples. The enjoyment of self-determination cannot

\textsuperscript{175} Ibid.
\textsuperscript{176} Henriksen, above n 170, 139.
\textsuperscript{177} Daes, above n 174, 79.
\textsuperscript{178} Ibid 80.
\textsuperscript{179} Ibid 80–83.
only be determined through, or implied from, the existence of self–governing or autonomous administrative institutions. The spirit of self–determination is achieving indigenous peoples’ real goals, rather than merely creating the appearance of indigenous self–government of local administration. It is pointed out that ‘the amount of power and money transferred to indigenous institutions is not a measure of self–determination. The indigenous peoples must feel secure in their right to make choices for themselves – to live well and humanely in their own ways’.\(^\text{180}\)

A related characteristic which has been emphasized in the literature, is that the right of self–determination ‘pertains not only to political status, but equally to economic, social and cultural development….\(^\text{181}\)It is a complex of closely woven and inextricably related rights which are interdependent, where no one aspect is paramount over any other’.

Also Cassese, in the context of the ICCPR and ICESCR, refers to the different dimensions of self–determination – the political, economic, social and cultural – when pointing out that ‘each of these forms of self–determination refers to a different set of provisions’.\(^\text{182}\)

The thesis maintains that it is fundamental to consider the principle of self–determination as a concept of sweeping scope, which encompasses all aspects of peoples’ human development. This assertion is grounded on the crucial connection

\(^{180}\) Ibid 80.
which the Declaration on the Right to Development\(^{183}\) establishes between the right to self-determination and the right to development. It is stated that ‘[t]he human right to development…implies the full realization of the right of peoples to self-determination’.\(^{184}\) The right to development is indeed defined as ‘an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized’.\(^{185}\)

The interdependence of the right to self-determination with other rights can be grasped when one considers the wording of common Article 1 of the ICCPR and ICESCR, where it is stated that ‘by virtue of that right…’. This wording suggests that other rights flow from the right of self-determination, which constitute its content and an integral part of this fundamental right and its architecture. Similarly, Cassese argues that ‘[I]nternal self-determination is best explained as a manifestation of the totality of rights embodied in the Covenant [on Civil and Political Rights]’.\(^{186}\)

The same line of argument is claimed by Ted Moses who suggests that, considering that all human rights and fundamental freedoms are ‘universal, indivisible, interdependent and interrelated’,\(^{187}\) these rights ‘may not be stripped


\(^{184}\) Declaration on the Right to Development, art. 1(2).

\(^{185}\) Declaration on the Right to Development, art. 1(1).

\(^{186}\) Antonio Cassese, Self-determination of Peoples, above n 111, 53.

\(^{187}\) Vienna Declaration and Programme of Action, adopted 25 June 1993 by the United Nations World Conference on Human Rights, UN doc. A/CONF.157/23; reprinted in 32 I.L.M. 1661 (1993), Part I, para. 5: ‘All human rights are universal, indivisible interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various
away or otherwise removed from the right to self–determination’. In particular, it is indicated that for indigenous peoples the right to use and benefit from natural resources lies at the core of the overarching right to self–determination.

This right, enshrined in article 1(2) of both Covenants, as well as in article 25 of the ICESCR and article 47 of the ICCPR, is considered to embody the source of subsistence and life itself. No exception is allowed, no people can be denied their own means of subsistence. This prohibition has particular significance for indigenous peoples. It is clearly stated that,

We have the right to benefit from the resources of the land as an expression of our right of self–determination. We may not be denied a means of subsistence; moreover, we may not be denied our own means of subsistence. We have the right to use our lands and waters to live by our own means as we always have, and by whatever means we deem necessary to address contemporary challenges. Self–determination protects our right to subsist, and it protects as well our right to subsist based on our own values and perspectives. In view of the profound relationship we have with our lands, resources and environment, subsistence for indigenous peoples has vital economic, social, cultural, spiritual and political dimensions.

It is indeed emphasized that the most evident violation of indigenous peoples’ right to self–determination has been ‘the denial of our own means of subsistence by those who came to live in our land’.

historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Moses, above n 172, 158.


Art. 1(2) states that ‘All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence’.

ICESCR, art. 25 and ICCPR, art. 47: ‘Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural resources’.

Moses, above n 172, 161.

Ibid 162.
In other words, self-determination cannot be reduced only to its political aspects, such as the right to vote, right to self-government, or the right to belong to political parties:

We cannot give up our own right to our own means of subsistence or to the necessities of life itself. As human rights, these rights are inalienable. In particular, our right of self-determination contains the essentials for life – the resources of the earth and the freedom to continue to develop and interact as societies and peoples.\textsuperscript{194}

It is evident the centrality and fundamental significance that the right to self-determination has within the indigenous rights discourse. The urgency for indigenous peoples to recognize the right to self-determination has been repeatedly and forcefully voiced, especially during the drafting process of the UN Declaration on the Rights of Indigenous Peoples: ‘self-determination is the critical and essential element of the Draft Universal Declaration on the Rights of Indigenous Peoples. Discussion on the right of self-determination has been and still is the \textit{sine qua non} of our participation in the drafting process. The right of self-determination must therefore be explicitly stated in the declaration.’\textsuperscript{195}

Indigenous peoples’ quest for self-determination though, has been clashing with governments’ scepticism, fear and uncertainty to endow indigenous peoples with the right to self-determination. It has been outlined that a ‘vicious circle’ has characterized the impasse on the recognition of self-determination for indigenous peoples: the impossibility of grasping the concrete implications of indigenous

\textsuperscript{194} Moses, above n 172, 164.  
peoples’ right to self–determination without further work of a technical nature as well as the difficulty of alleviating states’ fears without a better understanding of the meaning of self–determination in actual practice.\textsuperscript{196}

It is argued that a deeper mutual understanding of the fears and aspirations of indigenous peoples and governments is required in order to resolve unnecessary conflicts. In particular, it is reiterated that the ‘nation–state concept’ is not necessarily the natural way of implementing or exercising the right of self–determination for the vast majority of the world’s peoples. In this context, the international community, particularly the United Nations system, is deemed to play a significant role in facilitating a progressive and forward–looking discourse on the conceptualization and implementation of indigenous peoples’ right to self–determination.\textsuperscript{197}

The analysis of the right to self–determination proposed in this thesis, the articulation of a normative ‘indigenous capability–rights system’ and a methodological approach to implement the ‘integrated process of self–determination’ through development policies, responds to the need to find a pathway of mutual understanding and real implementation of indigenous self–determination.

To this end, it is necessary to have a comprehensive understanding of the indigenous right to self–determination in its fundamental elements within the current human rights framework. It has been argued that the right to self–determination can be distinguished between its ‘substantive’ and ‘remedial’ aspect.\textsuperscript{198} Whereas ‘substantive’ self–determination refers to the universe of values which form the

\textsuperscript{196} Daes, above n 174, 79.
\textsuperscript{197} Henriksen, above n 170, 141.
\textsuperscript{198} Anaya, above n 154, 12–15.
essence of the norm, ‘remedial’ self-determination refers to the prescriptions which may be laid down to remedy a violation of the norm.\footnote{Ibid.}

The analysis presented in this chapter has basically investigated the substantive aspect of indigenous peoples’ right to self-determination. The essence of self-determination has been identified as the universe of indigenous peoples’ values which are deemed to be incorporated in the emerging legal precepts voiced within the current human rights framework. It has also been maintained that while ‘substantive’ self-determination applies universally, ‘remedial’ self-determination comprises context-related remedial prescriptions which only apply to peoples who have suffered violations of substantive self-determination.

It is thus necessary to scrutinize the ‘remedial’ aspect of indigenous peoples’ self-determination. In other words, there is a need to investigate how the international human rights implementation machinery has been dealing with indigenous claims to self-determination. Accordingly, the next chapter will explore whether and to what extent the ‘remedial machinery’, set out for the protection of international human rights standards, can be considered an adequate and effective system for the advancement of indigenous peoples’ right to self-determination.

This analysis will attempt to identify the structural, procedural and substantive limits which hamper the human rights system to effectively address indigenous claims. It will be argued that the international human rights system cannot be considered the exclusive domain in which indigenous claims can be addressed. The international legal arena can be complemented with a normative and procedural

\footnote{Ibid.}
framework specific to indigenous rights in which a human rights–based approach is blended with development policy processes.
Chapter 3

Indigenous peoples’ claims to self–determination and
the international human rights implementation system

Even though the indigenous peoples’ right to self–determination has not yet become an internationally recognized legal standard, claims related to alleged violations of self–determination have been brought before different international bodies. International and regional human rights implementation mechanisms devised to monitor general human rights standards, have been used to tackle indigenous demands to self–determination and recommend measures of redress.

It is maintained that the adaptation of human rights standards to address indigenous claims plays a fundamental role in legal theory and judicial practice. In this chapter, it will be discussed to what extent the adaptation of universal human rights standards to indigenous claims is adequate to address their claims, and whether the international implementation machinery constitutes an effective procedural scaffold to implement and monitor the realization of indigenous peoples’ right to self–determination. International human rights mechanisms and procedures relevant to indigenous peoples’ claims to self–determination will be reviewed at the international and regional level.

3.1 The United Nations system

3.1.1 The United Nations treaty–based human rights system and indigenous claims to self–determination

The UN treaty–based monitoring system consists of seven international human rights treaties. Each Convention establishes a specific Committee to supervise state parties’ compliance with treaties provisions. The mechanisms through which the Committees function include: the reporting–monitoring procedure; the complaint procedure; the state–to–state reporting; the enquiries procedures.

Indigenous individuals and groups have brought their claims before some of the human rights Committees. The UN treaty–based implementation mechanisms which have been of most relevance to indigenous peoples’ claims to self–determination are those connected to the International Covenant on Civil and Political Rights, the International Covenant on the Elimination of All Forms of Racial Discrimination, and, to a lesser degree, the Covenant on Economic, Social and Cultural Rights.

Among the case law on indigenous allegations, the focus will be on indigenous claims to the right to self–determination and the way in which the treaty–based


implementation system has been dealing with these claims. The analysis of the modus operandi aims at identifying foundational, structural or procedural limits to the real enjoyment of self-determination.
(i) The Human Rights Committee

The practice of the Human Rights Committee (HRC) – the body established under the International Covenant on Civil and Political Rights\(^5\) to monitor its implementation – provides important insights into the evolving interpretation of indigenous peoples’ right to self-determination under the ICCPR.

General comments,\(^6\) views of states’ reports,\(^7\) and cases decided pursuant to the individual communication procedure under the First Optional Protocol,\(^8\) are the instruments through which legal standards set in the ICCPR are monitored.

The Human Rights Committee’s case law shows a creative approach to the interpretation of the Covenant’s provisions as they relate to indigenous claims, and in particular of the right to self-determination. The Human Rights Committee’s interpretation of ICCPR article 1 provides a key contribution to determine the parameters of the right to self-determination as referred to indigenous peoples.\(^9\)

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\(^6\) General Comments address specific articles of the Covenant or general issues concerning its implementation. The Human Rights Committee has developed this practice. General Comments mirror the HRC’s experience and provide a precious body of material for the interpretation of the Covenant.
\(^7\) Pursuant to article 40, States parties are required to submit periodic reports to the Human Rights Committee on measures they have adopted to give effect to the rights recognised in the Covenant and on progress made in the enjoyment of those rights. The periodicity for submission of reports, other than initial reports, is five years. UN Doc. CCCPR/C/19/Rev 1.
\(^8\) The First Optional Protocol to the ICCPR was adopted on the 19 of December 1966, entered into force on 23 March 1976. States which become party to the Protocol recognises the competence of the Committee to receive and consider communications from individuals claiming to be victims of any of the rights set out in the Covenant. Individuals may submit a communication to the Committee once ‘all available domestic remedies’ have been exhausted (art.2).
The article does not specify who are the ‘peoples’ entitled to the right to self-determination, nor does it include a reference to indigenous peoples as beneficiaries of the provision.

It will be explored how the Committee has responded to indigenous claims to self-determination, to alleged violations of self-determination, and how the Human Rights Committee (the Committee) has considered the conduct of states in relation to the recognition and promotion of indigenous self-determination within their boundaries.

The lack of a definition of ‘peoples’ in the ICCPR has not led the Human Rights Committee to give canonical declarations as to which ‘peoples’ are contemplated by article 1 of the ICCPR. The issue of whether only the entire population of a state party can be considered as ‘peoples’, or whether distinct peoples coexist within states’ boundaries, has been left open to different interpretations.

In this regard, it is important to consider the Human Rights Committee’s comment on the right to self-determination, as it is stated in article 1 of the ICCPR and the ICESCR:

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.\(^\text{10}\)

A fundamental assumption is implied. Article 1 does not create or establish the right of self-determination, rather it confirms that the right exists and it is possessed

\(^{10}\) Human Rights Committee, General Comment 12(21) on Article 1, UN Doc. A/39/40, para 1, 142–143.
by all peoples. As a result, the right to self-determination is deemed to apply ‘to all peoples in all territories, not just colonial territories, and to all peoples within a state’.¹¹

As for indigenous peoples, the current approach by the Human Rights Committee is to qualify as ‘peoples’ certain indigenous communities within the boundaries of some states parties, pursuant of article 1 to the ICCPR.¹²

This approach has been first adopted in response to the Canadian report,¹³ which prompted the Committee to deliver its concluding observations¹⁴ on the status of aboriginal peoples in Canada. In line with the recommendations of the Royal Commission on Aboriginal Peoples (according to which aboriginal self-government would fail without larger portions of land and resources), and the landmark decision in the Quebec Secession case of the Supreme Court of Canada,¹⁵ the Committee stated that ‘the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence’.¹⁶ Furthermore, the Committee

¹³ Fourth Periodic Report of Canada, UN Doc. CCPR/C/103/Add.5. The reporting-monitoring procedure, set out in article 40 of the ICCPR, requires states parties to submit periodic reports on the implementation of treaty provisions to the corresponding Committee which will then review states’ report and make no legally binding observations.
¹⁵ In the Quebec Secession Case decided in 1998, the Supreme Court of Canada declared that: ‘[i]t is clear that ‘a people’ may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to ‘nation’ and ‘state’. The juxtaposition of these terms is indicative that the reference to ‘people’ does not necessarily mean the entirety of a state’s population’. Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, para. 8.
recommended that ‘the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant’.\textsuperscript{17}

This audacious pronouncement opened up the admissibility of different ‘peoples’ within a country as beneficiaries of the right to self–determination. The Committee has indeed revealed a consistent approach in acknowledging some indigenous groups as ‘peoples’ in other states parties’ reports.\textsuperscript{18}

The recognition of some indigenous groups as holders of the right to self–determination under article 1 of the ICCPR is far from being comprehensive. Limitations can be particularly detected in cases brought to the Human Rights Committee under the individual complaint procedure established in the First Optional Protocol. The practice of the Committee shows a strict interpretation of the ‘victim requirement’ provided in article 1 of the Protocol, according to which the Committee may consider ‘communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant’.

The right to self–determination is strictly interpreted by the Committee as a collective right pertaining to ‘all peoples’. The Committee observed that its jurisdiction, in accordance with the Protocol, ‘cannot be invoked by an individual when the alleged violation concerns a collective right…the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right

\textsuperscript{17} Concluding Observations on Canada, UN Doc. CCPR/C/79/Add.105, para. 8.
\textsuperscript{18} See, eg, Concluding Observations on Mexico, UN Doc. CCPR/C/79/ADD.109, para.19 (in the Fourth Periodic Report of Mexico, UN Doc. CCPR/c/123/Add.1, the government of Mexico refers to the right of ‘communities’ to self–determination which is echoed by the Human Rights Committee in its concluding observations); Concluding Observations on Norway, UN Doc. CCPR/C/79/Add.112 (1999); Concluding Observations on Australia, UN Doc. CCPR/CO/69/AUS (2000); Concluding Observations on Sweden, UN Doc. CCPR/CO/74/SWE (2002).
to self-determination enshrined in Article 1 of the Covenant, which deals with rights
conferred upon peoples, as such’. 19 As a result, individuals cannot lodge claims as
victims of a violation of the right to self-determination under article 1 of the ICCPR.

The Committee’s practice to refuse allegations by individuals as victims of
breaches of group rights implies that violations of people’s rights can not be
translated into violations of individuals’ rights, and that groups and individuals
belong to distinct and separate spheres. This proposition is contested on the ground
that if self-determination and other human rights are in a relation of ‘interdependence
and reciprocity’, 20 a breach of the collective right will have implications for the
individuals and vice versa. It is also suggested that violations of collective rights may
be dealt with by specific procedures or with mechanisms complementary to those set
out for individual rights, or even defer them to political processes. 21

Therefore, the complaint procedure presents a procedural hindrance to the
protection of indigenous self-determination: the Optional Protocol cannot extend to
article 1 because individuals cannot claim collective rights. The procedural hindrance
is in turn connected to the substantive and problematic issue of the relation between
collective and individual rights.

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19 See, Bernard Ominayak, Chief of the Lubicon Lake Bank v. Canada (Communication 167/1984),
40, UN Doc A/38/40, 1–30.
20 General Comment 12, para. 1. The Committee asserted the interdependence between the right to
self-determination and other rights in considering the Third Periodic Report of Peru
(CCPR/C/83/Add.1 and HRI/CORE/Add.43/Rev.1): ‘The Committee considers that, in conformity
with international law, Article 1 of the Covenant does not authorize the State to adopt a new
constitution that may be incompatible with its other obligations under the Covenant’ – A/52/40, para.
153.
21 Thornberry, above n 13, 129.
Notwithstanding the restraints that such an interpretation puts on individual
claims under article 1, the Committee has advanced in a conspicuous case law the
interdependence between the right to self-determination and other human rights. In
_Apirana Mahuika et al. v. New Zealand_, for instance, the Committee noted that ‘the
provisions of article 1 may be relevant in the interpretation of other rights protected
by the Covenant, in particular article 27’.  

The interpretative effect of the right to self-determination is particularly
important for indigenous claims, especially the interdependent relation between
article 1 and article 27, which provides that

> In those States in which ethnic, religious or linguistic minorities exist,
> persons belonging to such minorities shall not be denied the right, in
> community with the other members of their group, to enjoy their own
culture, to profess and practise their own religion, or to use their own
language.

The _Lubicon Lake Band_ case, exemplifies the interdependence of the right of
self-determination with article 27. The Committee stated that ‘[a]lthough initially

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Human Rights Committee, GAOR, 43rd Sess, Suppl No. 40 (A/43/40), 221–230, para. 6.3; _Apirana
Mahuika et al. v. New Zealand_ (Communication No. 547/1993), View adopted 27 October 2000,
Rights Committee, Vol. II, GAOR, 55th Sess, Suppl No 40 (A/55/40), 140–160, para. 10.3: ‘Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected
23 _Apirana Mahuika et al. v. New Zealand Communication No. 547/1993), Views adopted 27 October
24 _Bernard Ominayak, Chief of the Lubicon Lake Band v Canada_ (Communication 167/1984), Views
couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27.”

The interdependence between self-determination and article 27 was realized by connecting the resource dimension of the right to self-determination to the right of minorities ‘to enjoy their own culture’ established in article 27. The communication claimed the violation of the Lubicon Lake Band’s right to dispose of its natural resources and deprivation of its means of subsistence through governmental expropriation of Band’s territory to the benefit of private corporate interests. The Committee – having declined the case under article 1 – found a breach of article 27:

the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.

The resource dimension of the right to self-determination is therefore embedded into the notion of ‘culture’. In its General Comment No 23, the Committee states that:

With regard to the exercise of the cultural rights protected under article 27, Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land and resources, especially in the case of indigenous peoples. That right may

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26 ‘All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence’ art.1(2).
28 This case is exemplificative since the factual background concerned the competing use of resources and land in territories traditionally used by the Lubicon Band for hunting and fishing. The Committee recognized that the failure to assure the band a land base to which it had a strong claim, as well as the external exploitation of gas, oil and timber have depleted and destroyed their resource basis.
include such traditional activities as fishing or hunting and the right to live in reserves protected by law.\textsuperscript{30}

The interpretation of ‘culture’, as comprising traditional forms of indigenous economic life, appears in other cases\textsuperscript{31} where the Committee has affirmed two important general principles. First, protection under article 27 refers to traditional means of livelihood as well as their adjustment to modern times;\textsuperscript{32} second, meaningful consultation (or participation) of the group\textsuperscript{33} and sustainability of the indigenous or minority economy\textsuperscript{34} are the criteria to be adopted to determine the denial of the right to enjoy one’s own culture according to article 27.

The intermingling between self–determination and indigenous peoples’ culture is fundamental for an in–depth understanding of the meaning and exercise of indigenous peoples’ right to self–determination. It will be argued that the real enjoyment of indigenous peoples’ self–determination is connected to the capacity of

\begin{footnotesize}
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\item Human Rights Committee General Comment No. 23 (50), reproduced in UN Doc. HRI/GEN/1/Rev.5 (1994), para. 7.
\item \textit{Ilmari Länsmann \textit{et al. v. Finland}} (Länsmann No. 1) (Communication 511/1992), Views adopted 26 October 1994, Report of the Human Rights Committee, Vol. II, GAOR, 50\textsuperscript{th} Sess, Suppl. No. 40 (A/50/40), para. 9.3: ‘The right to enjoy one’s culture cannot be determined \textit{in abstracto} but has to be placed in context. In this connection, the Committee observes that Article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party’s submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking Article 27 of the Covenant’.
\end{itemize}
\end{footnotesize}
the international system to transform the ‘cultural divide’ between non–indigenous and indigenous peoples into a ‘cultural interface’.

The Human Rights Committee’s pronouncements show that most indigenous claims to self–determination are articulated in terms of lack of, denial of or deprivation of a range of other rights, such as the rights to natural resources, land, means of subsistence, or cultural practice.

The overarching and multidimensionality of the right to self–determination can be grasped from the wording of article 1 of ICCPR, which pinpoints the fundamental dimensions of the concept of self–determination. The political dimension and the resource dimension are clearly stated in the first paragraph, when recognizing peoples’ right ‘to freely determine their political status and freely pursue their economic, social and cultural development’. Whilst paragraph 2 expands on the resource dimension when affirming the right of people to ‘freely dispose of the natural wealth and resources’ and prohibiting to deprive people of their means of subsistence, paragraph 3 sets out the so called solidarity dimension, that is the collective duty of states parties to support self–determination beyond their territorial boundaries.

35 It is worth specifying that the political dimension includes an external element – sovereignty – and an internal element – governance. Both are deemed to be linked to article 25, which requires democratic governance. Ibid.


37 Ibid 10.

38 The HRC has relied on this provision in the reporting procedure under article 40, about measures to be adopted by states parties to uphold self–determination of the Palestinian people and in South Africa: see, Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (Kehl, Germany; Arlington, Va., US: N.P. Engel, 1993) 23.
Accordingly, the operationalization of indigenous self–determination must take into account the multidimensionality and context–related determination of specific social, economic, political, health practices.

The Human Rights Committee’s case law demonstrated that the ICCPR does not position indigenous peoples as a distinct category between minorities and groups, nor does it recognize them as ‘peoples’. The Human Rights Committee does not grant indigenous peoples the right to self–determination, however it has paved the way for indigenous peoples as beneficiaries of the right to self–determination.\footnote{Thornberry, above n 9, 4.}
(ii) The Committee on the Elimination of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICEARD) has provided the framework within which the Committee on the Elimination of Racial Discrimination (CERD or the Committee) has articulated the relation between the elimination of racial discrimination and the recognition of indigenous rights. Among CERD’s case law, two General Recommendations have relevance for indigenous peoples: General Recommendation XXI on self-determination and General Recommendation XXIII on indigenous peoples.

General Recommendation XXI establishes CERD’s competence to examine issues of self-determination, although the Convention does not include the right to self-determination within the Committee’s jurisdiction. General Recommendation XXI, which draws on several international instruments, sets out the interpretative parameters of the right to self-determination and how it relates to the whole Convention. Three interesting elements can be detected in the recommendation.

The first element is the distinction between internal and external self-determination. Whereas internal self-determination is defined as the right of peoples to pursue their development without external interference, external self-

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40 GA Res 2106(XX), 660 UNTS, 195, adopted on 21st December 1965, entered into force on 4th January 1969 [hereinafter ICEARD or the Convention].
determination refers to the right of peoples to determine their political status and their right to a place within the international community.

The second aspect is the special attention given to ‘the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the government of the country of which they are citizens’.\(^{44}\) This statement holds particular relevance for indigenous peoples who are deemed to fall into the category of ‘ethnic groups’.

The third element refers to the denial of a right to secession, unless free agreement among all parties involved is reached. It is indeed stated that ‘international law has not recognized a general right of peoples to unilaterally declare secession from a State’.\(^{45}\)

General Recommendation XXI is considered to be relevant for CERD’s interpretation of indigenous claims to self–determination. It is argued that the suggested connection between the internal aspect of self–determination and other norms of the Covenant, has a significative potential to address indigenous peoples’ claims to self–determination. Further, the statement on secession does not impact negatively on indigenous claims to self–determination because most indigenous groups do not see secession as an aspirational or stated right.\(^{46}\)


On the other hand, General Recommendation XXIII is a response to CERD’s growing concern with indigenous peoples’ issues within the parameters of the Convention. The parameters outlined in the recommendation guide CERD’s deliberations on states’ reports concerning issues of discrimination involving indigenous peoples.

It is maintained that this Recommendation can have an indirect impact on the advancement of the indigenous right to self-determination, if indigenous peoples’ right to preserve their own culture and identity is considered as an intrinsic element of self-determination.

CERD has recognized the ongoing threat posed by the actions undertaken by states and commercial enterprises against the preservation of indigenous identity and culture. Loss of land and resources are only an example of different forms of discrimination experienced by indigenous peoples. Accordingly, the Committee has called on governments to ‘recognize and respect indigenous culture, history, language and way of life as an enrichment of the State’s cultural identity and…to promote its preservation’. Recommendation XXIII reinforces this position by urging states to

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provide for ‘a sustainable economic and social development compatible with
[indigenous peoples’] cultural characteristics’. 48

The intention of CERD to support indigenous rights through Recommendation
XIII, seems even more evident when the Committee states that ‘no decisions directly
relating to [indigenous] rights and interests are taken without their informed consent’.
It is argued that the Committee’s requirement of indigenous peoples’ consent to
measures impacting on their rights, is the most powerful contribution to the
recognition and realization of indigenous self–determination.

The principle of ‘free, prior and informed consent’ is considered fundamental for
the exercise of the indigenous peoples’ right to self–determination. This thesis argues
indeed, that the recognition and inclusion of the principle of ‘free, prior and informed
consent’ is one of the core criteria that should be adopted in development policies for
indigenous peoples. It will be demonstrated how indigenous peoples’ enjoyment of
self–determination cannot be thought of without the full consultation, participation
and informed consent of affected indigenous peoples, either individually or
collectively.

The ‘consensus formula’ proposed by CERD, however, is very contentious. It
has triggered heated debates as to the danger of providing indigenous communities
with a right to veto: ‘there were many…cases where a small community could hinder
the taking of decisions that would be of benefit to all citizens. The Committee should
be careful not to innovate’. 49 In response to this critique, it was pointed out that ‘[i]n

48 CERD, General Recommendation XXIII Concerning Indigenous Peoples, UN Doc.
49 CERD member Diaconu, CERD/C/SR.1235, para. 69.
the recommendation there needed to be a distinction between two situations: one concerning all the citizens of a country and another concerning indigenous persons directly. In the latter case, they should have the right of veto and the text, as drafted, dealt adequately with the issue’.\(^\text{50}\) In this regard, it has been argued that states’ complaints are likely, when CERD grants indigenous peoples a veto power on states’ fundamental deliberations.\(^\text{51}\)

It is interesting to note that the Committee’ Recommendation XIII is deemed to be more powerful than article 7 of ILO Convention 169. This article, as regards the veto issue, is interpreted as requiring ‘that there be actual consultation in which these peoples have a right to express their point of view and a right to influence the decision. This means that governments have to supply the enabling environment and conditions to permit indigenous and tribal peoples to make a meaningful contribution’.\(^\text{52}\) Even though this statement places significant constraints on measures or actions affecting indigenous groups, CERD’s proposition is far stronger and compelling:

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only where this is for factual reasons not possible, [should] the right to restitution...be substituted by the right to just, fair and prompt compensation. Such

\(^{50}\) CERD member Aboul–Nasr, CERD/C/SR.1235, para. 72.

\(^{51}\) CERD member Aboul–Nasr, CERD/C/SR.1235, para. 78.

compensation should as far as possible take the form of lands and territories.\textsuperscript{53}

It is also important to highlight that the Committee frames the consensus formula into a collective dimension of indigenous rights. CERD calls on states to recognise and protect ‘the rights of indigenous peoples’ and to ensure that ‘indigenous communities can exercise their rights’.\textsuperscript{54}

Upon due consideration of these viewpoints, it can be argued that CERD’s understanding and interpretation of the situation of indigenous peoples have the potential to contribute positively to the advancement and respect of indigenous rights and self–determination. It has been shown that different forms of discrimination suffered by indigenous peoples are significantly connected to issues of self–determination and development. The requirement of indigenous peoples’ ‘free, prior and informed consent’ and the need for a sustainable development which is compatible with indigenous peoples’ cultures, demonstrate a strong interlace between indigenous aspirations to self–determination and the role that development policies play in indigenous peoples’ lives.

The interface between indigenous peoples’ right to self–determination and development policies represents the core of the analysis undertaken in this work. The second and third part of the thesis will discuss significant issues involved in the articulation of a normative framework and a methodological approach to


\textsuperscript{54} Thornberry, above n 46, 33–34. It is also outlined that the Committee refers to ‘members of indigenous peoples’ when dealing with equality, discrimination, and effective participation (emphasis added).
development policies aiming at the fulfilment of indigenous peoples’ right to self-determination.
(iii) The Committee on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights\textsuperscript{55} is another important human rights instrument within the UN treaty–based system. Even though there is no specific provision on indigenous groups or a clause on minority rights, the Convention on Economic, Social and Cultural Rights has proved a useful instrument for indigenous peoples. Indigenous groups, among all people to whom it applies, are the most vulnerable to violations of economic, social and cultural rights. States’ reports regularly include the situation of indigenous peoples and the Committee on Economic, Social and Cultural Rights (ESC Committee) refers to those circumstances when commenting on states’ reports.\textsuperscript{56}

Treaty law provisions contain a variety of rights that are all potentially relevant to indigenous peoples. The ESC Committee’s practice has focused on a set of rights that have been of particular interest to indigenous groups, such as the right to self–determination, health, culture, housing, labour, education, and anti–discrimination provisions.

Article 1 of the ICECSR sets out the right to self–determination in identical terms to article 1 of the ICCPR. A significant remark about the ESC Committee’s interpretation of the right to self–determination is the emphasis on its resource dimension and the pursuing of economic, social and cultural development. It is


clearly indicated that self-determination does not concern only political processes but the right of peoples to ‘freely pursue…economic, social and cultural development’ and the prohibition to be deprived of their means of subsistence.\textsuperscript{57} The ESC Committee has specifically inquired on indigenous self-determination issues on several occasions, including the right of Australia’s aboriginal peoples to self-determination.\textsuperscript{58}

The exercise of self-determination through social, cultural and economic development has particular significance for indigenous groups. In addressing issues related to the promotion and protection of the rights to health, culture, education, and housing, the ESC Committee has touched upon features which are especially peculiar for indigenous peoples.

Land loss and subsistence aspects of self-determination are considered the main contributions made by the ESC Committee in relation to indigenous peoples.\textsuperscript{59} The need to ensure adequate resources and land bases to indigenous communities, has been advocated in different cases. According to article 11 of the ICECSR, everyone has ‘the right to an adequate standard of living…including adequate food, clothing and housing and to the continuous improvement of living conditions’,\textsuperscript{60} as well as ‘the fundamental right …to be free from hunger’.\textsuperscript{61}

Commenting on the right to adequate housing, the ESC Committee identified important links between some relevant characteristics attached to the right and

\begin{itemize}
\item E/C.12/Austral/1 (23 May 2000), para. 3. See also, E/C.12/Q/SUD/1 (13 December 1999), para. 10; E/C.12/Q/Georg/1 (28 March 2000).
\item Thornberry, above n 9, 198.
\item ICESCR, art. 11, para. 1.
\item ICESCR, art. 11, para. 2.
\end{itemize}
indigenous land claims. Availability of services, accessibility and habitability, security of tenure, location, relocation, and forced eviction, have been found to be interconnected to basic land rights and resources issues. In relation to Paraguay, for instance, the Committee observed that ‘the main reason for hunger and malnutrition among the indigenous population and the deprivation of their rights is linked to the severe problem of obtaining access to traditional and ancestral lands’. It consequently recommended that the government of Paraguay pays particular attention to the land problem. The ESC Committee went on to recommend the restitution of traditional lands.

Critical observations were also expressed about ‘the gross disparity between aboriginal peoples and the majority of Canadians with respect to the enjoyment of Covenant rights’ and ‘the direct connection between aboriginal marginalization and the ongoing dispossession of aboriginal peoples from their lands’. Accordingly, the Committee recommended ‘concrete and urgent steps to restore and respect an aboriginal land and resource base adequate to achieve a sustainable aboriginal economy and culture’.

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Issues of a resource base and subsistence have been clearly affirmed in other cases. Particular concern was expressed in regard to the indigenous peoples of the Russian Federation.  

The Committee expresses its concern at the situation of the indigenous peoples of the Russian Federation, many of whom live in poverty and have inadequate access to food…The Committee is particularly concerned for those whose food supply is based on fishing and an adequate stock of reindeer, and who are witnessing the destruction of their environment by widespread pollution. It is alarmed at reports that the economic rights of indigenous peoples are violated with impunity by oil and gas companies which sign agreements under circumstances which are clearly illegal, and that the State party has not taken adequate steps to protect the indigenous peoples from such exploitation.

In General Comment Nº 12 on the Right to Adequate Food, the ESC Committee interprets article 11 in terms of availability and accessibility to food in a way that is sustainable and without prejudging the enjoyment of other human rights. Indigenous peoples are seen as among the most vulnerable groups, especially because the ‘access to their ancestral lands may be threatened’.  

Recognizing that threats to the food security of indigenous peoples can come from the states or other entities not properly regulated, the ESC Committee calls on governments to play an active role in providing special programs aiming at strengthening access to and use of resources.

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The ESC Committee’s observations on the right to health\textsuperscript{75} have paid particular attention to indigenous peoples and their enjoyment of an adequate standard of health:\textsuperscript{76}

These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services...vital medical plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should...be protected. The Committee noted that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development–related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.\textsuperscript{77}

It is evident that specific measures are needed in order to assure and improve access to health services and health care. Interestingly, the ESC Committee validates traditional healing systems, calling on States not to hinder traditional preventive care\textsuperscript{78} but to oppose to ‘harmful social or traditional practices’.\textsuperscript{79}

Recommendations on the fulfilment of the right to culture\textsuperscript{80} have particular significance in indigenous contexts. The right of everyone to ‘take part in cultural life’\textsuperscript{81} has prompted the ESC Committee to require states to report on the availability

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\textsuperscript{75} ICESCR, art. 12.
\textsuperscript{78} General Comment N° 14, The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, 11 August 2000, para. 34.
\textsuperscript{80} ICESCR, art. 15.
\textsuperscript{81} ICESCR, art. 15.1(c).
\end{flushright}
of resources for cultural development,\textsuperscript{82} how cultural identity is encouraged and supported,\textsuperscript{83} and on the promotion of ‘the cultural heritage of national ethnic groups and minorities and of indigenous peoples’.\textsuperscript{84}

Numerous discussions have taken place in regard to the meaning of ‘culture’ as provided in article 15. Even though the ESC Committee has not articulated a specific Comment on this issue, practice seems to confirm a broader acceptance of the concept of culture as a community–driven process of constant creation and development,\textsuperscript{85} as opposed to a ‘traits/characteristics’ approach.\textsuperscript{86}

The understanding of culture as way of life and as a process of community self–creation has relevant impact on indigenous peoples’ individual and communal identity.\textsuperscript{87} Firstly, it sanctions the collective dimension of the right to culture. Although article 15 is phrased in individualistic terms, the practice of the ESC Committee supports the view that its provisions indicate individual as well as collective rights.\textsuperscript{88} During talks about article 15.1(c), which promotes authors’

\begin{footnotesize}
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\item United Nations, \textit{Manual on Human Rights Reporting}, above n 57, 149–151 para. 1(a). As for budgetary resources for indigenous culture, the ESC Committee expressed its concern for Aboriginals and Torres Strait Islanders due to a lack of ‘sufficient opportunities fully to involve themselves in creating awareness of their cultural heritage’: E/1004/23, para. 153.
\item Ibid para. 1(c).
\item Ibid para. 1(d).
\item See, eg, the Länsman cases before the ICCPR.
\item See, eg, E Tylor, \textit{Primitive Culture} (London: Murray, 1871) vol I, 1: according to this approach, culture can be defined as ‘[t]hat complex whole which includes knowledge, belief, art, morals, law, custom and other capabilities and habits acquired by man as a member of society’. This approach has been criticized for promoting a static conception of culture.
\item For further discussion about different understanding of culture, in particular the distinction between the Western–centric ‘high’ culture, mass or globalized culture, and culture as a way of life: see, R O’Keefe, ‘The “Right to Take Part in Cultural Life” under Article 5 of the ICESCR’, (1998) 47 \textit{International and Comparative Law Quarterly} 904; A Xanthaki, ‘Indigenous Cultural Rights in International Law’ (2000) 2(3) \textit{European Journal of Law Reform} 343.
\end{enumerate}
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material and moral interests, attention was given to traditional knowledge in these
terms:

‘Cultural property’...means more than ‘intellectual property’ because
account must be taken not only of what is produced by an artist, a
scientist or a writer, but also of what is produced by a cultural
community, by the custodians of a heritage or by a people. Each
creative activity is based on a common cultural capital – this explains
why individual creativity and collective property must be protected at
the same time. This means establishing a close link between article 15,
paragraphs 1 (b) and (c), as two aspects of the protection of the right to
take part in cultural life.89

Secondly, it favours a more comprehensive and holistic conception of culture. In
the case of Honduras, for instance, the ESC required information on the provisions
adopted ‘to protect the cultural identity of indigenous ethnic groups, and to preserve
their habitat, natural resources, languages, customs and traditions’.90 A similar
holistic observation was made in regard to the Ainu culture,91 where the preservation
of the ‘kastom and wantok culture’ of the indigenous population in the Solomon
Islands was acknowledged together with the important role played by the traditional
extended family system in cases of economic crises.92

The many dimensions of the term ‘culture’ and the meanings attached to the
phrase ‘to take part in cultural life’, suggests the promotion of indigenous culture
without jeopardizing their access to the ‘outer world’ on non–discriminatory
grounds.93

E/C.12/2000/16, 16 October 2000, para. 6. See also, Aboriginal and Torres Strait Islander Commission
(Australia), Protecting the Rights of Aboriginal and Torres Strait Islander Traditional Knowledge,
91 E/C.12/Q/JAP/1, 24 May 2000, para. 45.
93 Thornberry, above n 9, 197.
Cultural aspects are taken into consideration also in connection with the promotion of other rights. In the General Comment on the right to adequate housing, for instance, the ESC Committee clearly endorses ‘cultural adequacy’ as a fundamental element of housing policy. Housing policy ‘must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed’. 94

The availability of bilingual teaching in the mother tongue of the students has been advocated to make sure that ‘children belonging to linguistic, racial, religious or other minorities, and children of indigenous people, enjoy the right to literacy and education’. 95 The ESC Committee, commenting on languages programs in Peru, 96 pointed out that ‘they help to preserve indigenous languages and to strengthen the cultural identity of the groups speaking the languages concerned’. In the case of Mexico, for instance, the ESC Committee expressed concerns about the difficulties experienced by the indigenous populations in maintaining their culture and teaching their languages; 97 whereas it lauded Finland for promoting the teaching of the Saami and Roma languages. 98 Further, the ESC Committee clearly stated that

States have obligations to respect, protect and fulfil each of the ‘essential features’ (availability, accessibility, acceptability and adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private.

94 General Comment No. 4 (1991), para. 8 (g).
95 ICESCR, art. 13.

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schools...fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all.  

This comment has considerable relevance for the enjoyment of indigenous peoples’ right to education. Non-discrimination in access to education is implied in the notions of ‘availability’ and ‘accessibility’, while the notion of ‘acceptability’ requires education be ‘relevant, culturally appropriate and of good quality’.  

The notion of culturally appropriate education is particularly significant for indigenous peoples: the comment mirrors an increasing acceptance of cultural diversity in international law.

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99 General Comment N° 13 (Article 13), Report on the Twentieth and Twenty–First Sessions, E/2000/22; E/C.12/1999/11 Annexes IV and VI respectively, para. 50. The ESC Committee affirms that article 13 is ‘the most wide–ranging and comprehensive article on the right to education in international human rights law’, para. 2.


101 The ESC Committee maintains the argument of culturally appropriate education based on a non–discriminatory basis, by validating Article 2 of the UNESCO Convention against Discrimination in Education, which admits separate systems of education under particular circumstances. Separate education systems are not discriminatory ‘if participation in such systems...is optional and if the education provided conforms to such standards as may be laid down by the competent authorities, in particular for education at the same level’ (General comment N° 13, para. 33).
3.1.2 The United Nations Charter–based human rights implementation system

The influence of the UN Charter–based human rights implementation system on indigenous peoples’ claims to self-determination has not been as significant as the pronouncements of the treaty–based human rights Committees previously discussed.

The Human Rights Commission, recently replaced by the Human Rights Council, and its Sub–Commission on Promotion and Protection of Human Rights, represent the main non–treaty monitoring bodies which have regularly come to incorporate issues concerning indigenous peoples into their agenda. Dealing primarily with general human rights issues, the Commission and the Sub–commission have considered a more limited number of reports concerning indigenous issues, submitted by states and NGOs in consultative status.102

It is important to remember that the Human Rights Commission (unlike its Sub–commission and the Working Group on Indigenous Populations which are composed of independent human rights experts) has been mainly a political body. Its members are government representatives so that political factors have played a crucial role in its deliberations. It is argued that Human Rights Commission’ deliberations, even though politically driven, have had a greater force for the promotion of indigenous

rights since the Commission occupies a higher place in the hierarchy of the UN system.  

The Commission and its Sub–Commission have received and acted upon allegations of human rights violations pursuant to Economic and Social Council Resolution 1235 (XLII) of 1967. Resolution 1235 empowers the Commission and the Sub–Commission to ‘examine information relevant to gross violations of human rights and fundamental freedoms’ and ‘to make a thorough study of situations which reveal a consistent pattern of violations of human rights’. Communications of alleged human rights breaches come from different sources. The UN Secretariat receives information from individuals or groups and forwards it to the Commission, whereas NGOs in consultative status at the UN can directly communicate with the HRC and the Sub–commission through written or oral statements. In general, responsive actions on alleged violations are rare and discretionary; also resource constraints heavily limit their actions.  

Notwithstanding these limitations, the Human Rights Commission and the Sub–commission have adopted resolutions under procedure 1235 to address specific countries in which gross and persistent violations of human rights were being carried out. Indigenous peoples of Guatemala, for instance, have been the focus of concern.

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for suffering gross and prolonged human rights abuses during the 1980s and 1990s.
The CHR and the Sub–commission acted upon those allegations calling on the
government of Guatemala ‘to strengthen the policies and programs relating to
[indigenous peoples’] situation…taking into account their proposals and aspirations’.  

The HRC and the Sub–commission have also initiated operational fact–finding
missions and advisory services in cases of alleged human rights violations not strictly
considered part of the category of ‘gross violations’. For instance, the resettlement
policy involving Hopi and Navajo families in Arizona, or the problematic situation
concerning indigenous groups in Mexico prompted the Sub–commission to authorise
investigations on these issues. The investigation on the relocation policy led the sub–
commission to condemn the forced resettlement of indigenous family and recommend
a useful solution of the controversy.  
The enquiry on the situation of indigenous peoples in Chiapas and other parts of the country resulted in a detailed report with
recommendations dealing with issues of land, self–government and socioeconomic
problems.  

106 Human Rights Commission Res. 1991/51 (5 March 1991). See also, Sub–Commission on
Prevention of Discrimination and Protection of Minorities Res. 1992/18 (urging Guatemala ‘to respond
to the requests and proposals of the indigenous peoples through the adoption of practical measures to
improve their economic, social and cultural conditions’); Sub–Commission on Prevention of
Discrimination and Protection of Minorities Res. 1994/23 (urging the government of Guatemala to
‘strengthen in particular policies and programmes concerning the indigenous population’).

107 The Sub–commission appointed two sub–commission members who compiled two separate reports.
Mr Carey’ report recommended that the sub–commission should not take position on the controversy: see, UN Doc. E/CN.4/Sub.2/1989/35 (pt.2), whereas Mrs. Daes urged a moratorium on future
relocations and recommended to use UN advisory services in order to solve the dispute: see, UN Doc.

108 Report submitted by Mrs. Erica–Irene Daes, Chairperson–Rapporteur of the Working Group on
Indigenous Population, on her visit to Mexico (January 28–February 14, 2000), UN Doc.
The Human Rights Commission and the Sub–commission are also empowered to receive from non–governmental organizations and individual ‘communications’ about ‘situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights’. Procedure 1503 establishes a machinery to allow individuals and groups to directly call on the Human Rights Commission to deliberate on breaches of human rights. It is argued that Resolution 1503 put in place a ‘petition–information’ system rather than a ‘petition–redress’ system like those established in other complaint procedures. The aim of procedure 1503 is that of using ‘complaints as…evidence which might, if accompanied by a sufficient number of related cases, spur the United Nations into action of some kind’ rather than assessing and resolving each complaint.

Indigenous peoples have also submitted petitions to the Commission under the Resolution 1503 procedure, so as to stimulate its scrutiny on governments’ practice. The petition submitted by the Indian Law Resource Centre on behalf of various Native American nations about the alleged violation by US government policies of aboriginal property rights, resulted in the inclusion of the US in the list of states under scrutiny by the Commission.

It will be interesting to see whether the current Human Rights Council will play a major role in addressing indigenous claims, and whether the review of the procedures

110 A comprehensive analysis of the 1503 procedure and its machinery can be found in Rodley, above n 49, 64–70.
112 Notwithstanding the rule of confidentiality of procedure 1503, it became known that the US government was urged by the commission to answer the allegations submitted. The rule of confidentiality is stated in ECOSOC Res 1503(XLVIII), para 8.
and mechanisms of the former Human Rights Commission will impact on the mechanisms for indigenous complaints to the UN and, more generally on the advancement of indigenous peoples’ claims. The new structures to be established under the Human Rights Council include the future successor to the Working Group on Indigenous Population (WGIP). The WGIP has been among the most important specific procedures and mechanisms established within the UN charted–based human rights monitoring system to deal with indigenous issues. These include the Human Rights Commission’s open–ended inter–sional working group for the elaboration of the UN Declaration on the Rights of Indigenous Peoples,\textsuperscript{113} the Permanent Forum on Indigenous Issues,\textsuperscript{114} and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.\textsuperscript{115}

While the role and activities of the Permanent Forum on Indigenous issues will be discussed in the third part of the thesis, with particular reference to its engagement in the world community’s development agenda, it is important to outline the role of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

In 2001, The Human Rights Commission authorised the appointment of the special rapporteur who is vested with the authority to: a) gather, request, receive and exchange information and communications from all relevant sources on breaches of

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{113}] UN Doc. E/CN4/Sub2/1994/2/Add.1 (1994).
\item[\textsuperscript{114}] UN ESCOR Res 2000/22.
\end{itemize}
\end{footnotesize}
human rights against indigenous people, their communities and organizations; and b) formulate recommendations and proposals to prevent and remedy those violations.116

The appointment of a special rapporteur on the situation of human rights and fundamental freedoms of indigenous people is a response to the growing international concern regarding the marginalization and discrimination against indigenous people worldwide. The mandate represents a significant moment for the on–going pursuit of indigenous peoples to safeguard their human rights and is complementary to those of the WGIP and the Permanent Forum on Indigenous Issues and aims at strengthening the mechanisms of protection of the human rights of indigenous peoples.

The first report presented to the Commission on Human Rights acknowledges relentless patterns of discrimination and breaches of human rights against indigenous peoples ‘everywhere’. The Rapporteur emphasises ‘the problem of a ‘protection gap’ between existing human rights legislation and specific situations facing indigenous people’.117

Fundamental themes were identified as deserving special scrutiny in his future work, such as the impacts of development projects on indigenous communities; indigenous cultural rights; implementation of domestic laws to protect indigenous rights and the relation between states’ law and indigenous customary law; discriminations against indigenous individuals; indigenous children; participation in policy decision–making process.118

Of particular interest is the study on the impact of development projects on indigenous communities. Information received on several cases concerning violations of human rights experienced by indigenous peoples triggered the Rapporteur to explore the impact of large-scale development projects. As a result, on-site visits have been carried out in different countries, such as in the Philippines and Guatemala.\footnote{119}

In the Philippines, several breaches of human rights were identified as a result of development projects, such as building of dams, large-scale logging concessions, commercial plantations, and mining. The Rapporteur articulated recommendations on actions to be taken in order to remedy those violations.\footnote{120}

The role of the special rapporteur is considered of crucial importance in the awareness-raising processes of the situation of indigenous peoples’ worldwide and the protection of their human rights. The significance of the special rapporteur’s work is being particularly emphasised during different sessions of the UN Permanent Forum on Indigenous Issues. In particular, the Forum has called for the dissemination and full implementation of the recommendations of the Special Rapporteur’s reports on the relationships of indigenous peoples and land rights, and on permanent sovereignty of indigenous peoples over their natural resources.\footnote{121}

\footnote{120}{UN Doc. E/CN.4/2003/90/Add.3 (2003), paras. 29–56, 67.}
3.2 Regional human rights implementation systems and indigenous peoples’ claims to self-determination

Regional human rights implementation systems have been developed in specific regions of the world for the protection and promotion of human rights. There are three substantial international conventions directed at the protection of human rights in Europe,\(^{122}\) Africa\(^{123}\) and the Americas.\(^{124}\) Each of these regional arrangements spells out its own collection of rights and duties, establishes its own investigation and reporting systems, as well as complaint procedures.

It is argued that both the European and African human rights instruments have significant potential to address indigenous issues and advance mechanisms to redress violations of indigenous peoples’ rights. Even though the European instruments, for instance, do not set out specific rights for indigenous peoples, the individual rights mechanisms of the ECHR and the reporting mechanism of the FCNM, have been used by indigenous groups.\(^{125}\) This section will focus exclusively on the Inter-American system because of its more prominent relevance in addressing indigenous claims.

The Inter-American system is a complex and evolving structure of interrelated normative instruments and monitoring institutions within the Organization of


\(^{125}\) See, Thornberry, above n 9, 290–317.
American States (OAS). The Organization of American States is an international regional body created at the Ninth International Conference of American States held in Bogotá in 1948. Its normative frame and mechanisms have been playing a significant role in the recognition and advancement of indigenous peoples. Many of the world’s indigenous peoples are indeed within the jurisdictions of some of OAS’s thirty-five member States.\textsuperscript{126}

The fundamental instruments of the OAS are the constitutional OAS Charter and the American Declaration on the Rights and Duties of Man, adopted in 1948. Both the Charter and the American Declaration do not have an indigenous imprint. The Charter\textsuperscript{127} of the Organization of American States does not address indigenous rights, neither has it mentioned indigenous peoples. The promotion and protection of indigenous culture and values can be included within the general obligation of States to ‘consider themselves individually and jointly bound to preserve and enrich the cultural heritage of the American peoples’.\textsuperscript{128} However, the Charter’s provisions on integration have the potential to weaken indigenous identities and values – states commit to foster the incorporation and participation of ‘the marginal sectors of the population, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community’.\textsuperscript{129}

\textsuperscript{126} Argentina, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, United States of America and Venezuela.


\textsuperscript{128} OAS Charter, art. 48.

\textsuperscript{129} OAS Charter, art. 45f.
The American Declaration sets out a wide-ranging bundle of civil and political rights as well as economic, social and cultural rights. It is argued that the latter are particularly significant for indigenous peoples despite the uncertainty about the immediate or progressive nature of the corresponding States’ obligations.\textsuperscript{130} The normative force of the American Declaration has been enhanced by the jurisprudence of the Inter–American Court of Human Rights and the Inter–American Commission of Human Rights. By asserting that the Declaration ‘is the text that defined the human rights referred to in the [OAS] Charter’,\textsuperscript{131} the Court has paved the way to apply the Declaration to all States, including those which have not ratified the Inter–American Convention. This view has been endorsed by the Inter–American Commission which has interpreted the Declaration ‘as an indirectly binding legal text’:\textsuperscript{132} human rights obligations of those States, therefore, stem from their membership to the Organization of American States.

The 1948 Bogotá Conference also adopted the Inter–American Charter of Social Guarantees which comprises a provision on indigenous peoples:

In countries where the problem of an indigenous population exists, the necessary measures shall be adopted to give protection and assistance to the Indians, safeguarding their life, liberty and property, preventing their extermination, shielding them from oppression and exploitation, protecting them from want and furnishing them an adequate education. The State shall exercise its guardianship in order to preserve, maintain and develop the patrimony of the Indians or their tribes; and it shall foster the exploitation of the natural, industrial or extractive resources or any other sources of income proceeding from or related to the aforesaid patrimony, in order to ensure in due time the economic emancipation of the indigenous groups. Institutions shall be created for the protection of

\textsuperscript{130} Thornberry, above n 9, 268–269.
\textsuperscript{131} Advisory Opinion No. 10 (1989), I/A Court H.R. Series A No. 10, para. 45.
Indians, particularly in order to ensure respect for their lands, to legalize their possession thereof, and to prevent encroachment upon such lands by outsiders.\textsuperscript{133}

The provision reflects a paternalist and integrationist approach to indigenous peoples who are, first of all, considered as a ‘problem’ to be solved. Whereas States are called on to ‘protect’ them through a ‘guardianship’ relation, there is no mention of indigenous entitlements to certain rights. The paternalist approach is striking in the emancipating mission that States should carry out through the exploitation of the natural resources in their territories.

In 1978 the American Convention on Human Rights came into force, legally binding OAS’s member States, except the United States and Canada, to promote and respect fundamental rights as well as upholding responsibilities towards family, community, and mankind. The American Convention does not include a specific reference to indigenous peoples or indigenous rights.

The lack of a specific normative human rights instrument (either treaty or declaration) dealing with indigenous rights within the Inter–American system, apart from the Draft American Declaration on Indigenous Rights currently under examination, appears surprising given the large number of indigenous peoples in the Americas.

Indigenous claims are addressed through the monitoring mechanisms and procedures established \textit{erga omnes} by the American Convention on Human Rights. Convention rights are indeed monitored and protected by the Inter–American

\textsuperscript{133} Final Act of the Ninth International Conference, Resolution XXIX, \textit{Annals}, 129.
The Inter–American Commission has dealt with indigenous claims through its main methods of operation: the petition or complaint procedure and country report. Grave allegations of violations of human rights were lodged against governments under the complaint procedure. Genocide, torture, murder, sale of children, inhuman conditions of work, have been among the allegations brought before the Inter–American Commission against Paraguay for their treatment of the *Aché Indians of Paraguay* case. The Commission, having its request of information been ignored by Paraguay, presumed the validity of the alleged facts and denounced the violation of the fundamental rights to life, protection of the family, health and well–being, liberty and security, work and fair remuneration. Despite this denouncement and the request to Paraguay to adopt strong measures to protect the Aché population, the Commission’s approach appeared contradictory. It asserted that the genocide of the Aché Indians was not caused by governmental policies which, instead, aimed to assimilate and protect them. The Inter–American Commission’s approach to indigenous claims in the early stages has been criticised

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134 *Inter–American Convention on Human Rights*, art. 33.
135 *Inter–American Convention on Human Rights*, art. 44: ‘[a]ny person or group of persons, or any non–governmental entity legally recognized in one or more member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State party’.
136 *Inter–American Convention on Human Rights*, art. 41d: The Commission is granted the authority ‘to request governments of the member States to supply it with information on the measures adopted by them in matters of human rights’.
138 Ibid 37.
139 Ibid 36.
for not having addressed fundamental issues such as competing land claims.\textsuperscript{140} However, it has also been argued that the normative framework – the American Declaration and the American Convention – within which the Inter–American Commission acted was limited as far as indigenous issues were concerned.\textsuperscript{141}

The Inter–American Commission expanded the normative horizon in later cases, such as in the *Yanomani of Brazil*.\textsuperscript{142} In this case, violations of human rights to life, liberty, movement, residence, and health were condemned not only by virtue of the American Declaration, but also by virtue of a progressive interpretation of article 27 of the ICCPR.\textsuperscript{143} The Inter–American Commission interpreted the provision as an international law group right to special protection ‘in general, for all those characteristics necessary for the protection of their [ethnic groups including the Yanomani] cultural identity’.\textsuperscript{144} Accordingly, having acknowledged efforts made by Brazil to protect the Yanomani, it recommended that the Brazilian government adopt further adequate and strong measures and establish a Yanomani Park.\textsuperscript{145}

Individual complaints about alleged gross human rights abuses, violence, ethnocide, forced relocation committed by the Nicaraguan government against the


\textsuperscript{142} Case No. 7615 (Brazil), IACHR Annual Report 1984–85.


\textsuperscript{145} For background information about the initiative to constitute the Yanomani Park: see, Gomez, above n 143, 190–191.
indigenous peoples of the Nicaraguan Atlantic coast, stimulated further action. The Inter–American Commission investigated the alleged violations and released its final Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin. 

The Report attempts to balance the individualistic imprint of the American Declaration and Convention with the indigenous claims to recognition of collective rights. Acknowledging petitioners’ rights according to the individualist approach of the American Declaration and the American Convention, the IACHR emphasized that ‘for an ethnic group to be able to preserve its cultural values, it is fundamental that its members be allowed to enjoy all of the rights set forth in the American Convention…since this guarantees their effective functioning as a group, which includes preservation of their own cultural identity’. Further, recalling article 27 of the ICCPR ‘which reaffirmed the need to protect ethnic groups’, the IACHR articulated a special section on ‘Special Protection of the Miskitos as an ethnic group’. However, the Inter–American Commission took a neutral position in regards to the legitimacy of indigenous claims to ancestral lands: it recommended a

\[146\] The indigenous peoples of the Nicaraguan Atlantic coast include the Miskito, Sumo and Rama populations.


\[148\] The human rights violations suffered by the indigenous groups were explained as follows: ‘The principal reason for the Indian rights crisis in Nicaragua is the antagonism created by the Sandinista government’s policy which denies the ethnic identity of our Indian peoples. It follows that the recognition of Indian rights to their territory and their autonomy is also denied. The government’s policy requires assimilation of minorities to the philosophy and culture of those who control the government in Managua, thus converting us into peasants and mestizos without definition and aboriginal rights’: coordinator–General of Misurasata, IACHR Annual Report, above 144, 22.

\[149\] The IACHR reaffirmed the individual rights to life, personal liberty and security, residence and movement, property, and due process.

\[150\] IACHR Annual Report, above n 144, 81.

\[151\] Ibid 76.

\[152\] Ibid 76–82.
fair compromise that would respect indigenous aspiration and maintain the territorial integrity of Nicaragua.¹⁵³

The issue of territorial integrity held a significant place within IACHR debates about indigenous claims to the right to self-determination. Despite the Miskito clearly spelling out that ‘the autonomy or self-determination which we sought did not mean separatism or complete independence’, discussions focused on the threat of secession that any recognition of indigenous self-determination could pose. Secession was then perceived as the only modus operandi of the indigenous right to self-determination, leading the IACHR to adopt a conservative approach to indigenous claims to self-determination. It firmly concluded that the exercise of self-determination can never affect the territorial integrity of States¹⁵⁴ and that international law does not recognize any right to self-determination or autonomy to ethnic groups.¹⁵⁵ The limited nature of the Declaration on Principles of International Law,¹⁵⁶ one of the normative instruments on which the interpretation of the Commission was founded, is challenged for not excluding in absolute terms the disintegration of territorial integrity as a consequence of the exercise of self-determination.¹⁵⁷ Either way, the IACHR did not consider the concept of self-determination as expressed by the involved indigenous groups, a concept which denied any secessionist aspiration. It called upon Nicaragua to set up an institutional system able to promote pacific coexistence between ethnic groups and government;

¹⁵³ Ibid 127.
¹⁵⁴ The Declaration on Principles of International Law provided the normative basis to such assertion.
¹⁵⁵ IACHR Annual Report, above n 144, 78–81.
¹⁵⁶ Hannum, above n 143, 331.
¹⁵⁷ Thornberry, above n 9, 278.
not to impose forced assimilation; and to safeguard the cultural identity of Nicaragua's indigenous peoples.\textsuperscript{158}

The Inter–American Commission’s monitoring mechanisms have the potential to facilitate the recognition of indigenous rights. The complaint procedure can operate as a vehicle to implement norms concerning indigenous peoples not included in the American Declaration and Convention, as the Yanomani and Miskito cases show. Even though no formal resolutions have been released in many early indigenous cases,\textsuperscript{159} important issues continue to be brought up under the complaint procedure.

The friendly settlement procedure provides a further instrument through which the Inter–American Commission can potentially impact upon the recognition of indigenous rights. The Enxet Communities case in Paraguay, for instance, has been referred to as ‘the first agreement in the inter–American human rights system which restores land rights to an indigenous community’.\textsuperscript{160} The friendly settlement facilitated by the Inter–American Commission authorized the transfer of lands to the community concerned.\textsuperscript{161}

Further legal practice has been affected by the ongoing normative process carried out in the UN and OSA drafts. The Inter–American Commission on Human Rights, for instance, has promoted the juridical implementation of the indigenous agenda by referring cases to the Inter–American Court of Human Rights and negotiating agreements favorable to indigenous claims. The Mayagna Indian Community of

\begin{footnotes}
\footnotetext[158]{IACHR Annual Report, above n 144, 81–82.}
\footnotetext[159]{Davis, above n 140, 8–9.}
\footnotetext[161]{IACHR Annual Report 1998, ch. II, section 2D.}
\end{footnotes}
Awas Tingni v. Nicaragua\textsuperscript{162} is only one of the cases that the IACHR has referred to the Inter–American Court of Human Rights. Among several settlements to which the IACHR actively participated, it is worth citing the Guatemala’s arrangement where compensation was adjudicated not only to victims and families but also to the entire indigenous community.\textsuperscript{163} In another case, Paraguay granted two indigenous communities the effective exercise of indigenous rights on ancestral lands.\textsuperscript{164}

\textsuperscript{162} The Awas Tingni is a case brought against the state of Nicaragua for approving logging activities involving indigenous issues, such as natural resources, land control and development projects.\textsuperscript{163} Case No 11212 (Report 19/97, 1997). Reparations to the community were made in the form of schools and diverse development projects.\textsuperscript{164} Case No 11713, friendly settlement of 25 March 1998.
3.3 Conclusion

The first part of the thesis has discussed the fundamental principles, structures and mechanisms concerning indigenous peoples and their claims within the international legal system.

The historical background discussed in the first chapter has articulated the fundamental stages through which the status and rights of indigenous peoples have developed within the international system. The overview has provided an indispensable historical background to understand the contemporary regime of international law as it relates to indigenous peoples. It has been argued that this regime is characterized by an increasing participation of indigenous peoples in the contemporary international arena, an emerging corpus of normative precepts specific to indigenous peoples, and the adaptation of international human rights procedures and mechanisms to address indigenous claims.

Indigenous claims to self–determination have been the focus of the discussion on the ground that self–determination constitutes the core precept within the indigenous rights discourse. The discussion on the development, interpretation and application of the principle of self–determination under international law, has provided critical insights about the ramifications that the adoption of self–determination – a general principle of international law – may have when applied to indigenous peoples.

The analysis of the emerging corpus of indigenous rights raises two fundamental issues: the admissibility and legitimacy of indigenous rights as a new legal category,
and the adequacy of the international human rights implementation system to address indigenous claims to self-determination.

While opinions differ as to the admissibility of a new category of indigenous rights and its legitimacy as a ‘new generation’ of rights, the existence or emergence of international legal standards specific to indigenous peoples cannot be denied.

It is indeed argued that, even though international normative instruments on indigenous rights have not been adopted yet, a corpus of customary norms on the meaning of indigenous peoples, as well as the existence of indigenous rights, have been crystallized within the international legal system. It is maintained that a body of customary international law on indigenous rights has developed through different processes within the international legal system. These processes include the interpretation of general human rights standards by authoritative bodies (such as, the human rights treaty–based Committees, the Human Rights Commission, and various regional human rights institutions), the debates and discussions which have been animating the drafting process of the UN Declaration on the Rights of Indigenous Peoples and the OAS Draft Declaration on the Rights of Indigenous Peoples, as well as various processes within the competence of ILO Convention 169.

The development of customary norms concerning indigenous peoples has primary significance because it indicates that there exists within the international community a broad–shared understanding of indigenous peoples as a legal category and of the

content of indigenous rights. Irrespective of formal consent–based legal instruments, customary law binds the whole world community of states and institutions to conform to a certain practice in their dealing with indigenous peoples.\textsuperscript{166}

In particular, it is suggested that the adoption of \textit{avant–garde} opinions or recommendations by international bodies can contribute to the recognition of indigenous peoples’ right to self–determination under international human rights law, as well as contribute to a deeper understanding of the substantive content of the norm and the remedial measures through which it can be addressed.

In the debate about the admissibility of a new legal category, Thornberry claims that evidence of the emergence of a new legal category specific to indigenous rights has increasingly been given in normative contexts, legal practice and juridical reasoning.\textsuperscript{167} It is maintained that the UN Declaration on the Rights of Indigenous Peoples and the OAS Draft Declaration on the Rights of Indigenous Peoples, have started to establish the normative foundations for the existence of indigenous peoples and indigenous rights as a distinctive legal category, despite a certain degree of uncertainty as to definitions and boundaries. The content and the legal–political ramifications of these drafts, highlight that the UN and OAS normative texts significantly contribute to create a shared comprehension of the legal issues that cannot be dealt with through adaptation of general legal categories.

\textsuperscript{166} Ibid.

In Kingsbury’s view, ‘[i]ndigenous peoples are in the process of developing a specific discourse from the general legal corpus’. Accordingly, indigenous peoples’ right to self-determination needs to be specifically defined according to indigenous concerns, such as protection of lands, respect of their histories, traditions and worldviews. It is argued that the specificity of indigenous peoples’ self-determination requires the encapsulation of indigenous identity and serves as a vehicle to enable indigenous peoples to live their own way:

[S]elf-determination is an aspirational concept which embraces a widening spectrum of political possibilities, from self-management by indigenous peoples of their own affairs to self-government by indigenous peoples of their own communities or lands. Self-determination is a dynamic right under the umbrella of which…peoples will continue to seek increasing autonomy in decision-making.

In discussing the admissibility and legitimacy of a specific legal category of indigenous rights, Kingsbury distinguishes and discusses five conceptual foundations on which legal claims have been brought by indigenous peoples:

(a) human rights and non-discrimination claims;
(b) minority claims;
(c) self-determination claims;
(d) historic sovereignty claims;
(e) claims as indigenous peoples (including claims grounded on treaties or other compacts between indigenous communities and states).

170 Kingsbury, above n 168, 69–110.
This five-fold theoretical distinction helps locate indigenous peoples’ legal claims within international legal norms and practice. This categorization poses some fundamental questions. First, whether and to what extent the conceptual categories which have been borrowed from the existing international legal framework, and not purposely crafted for indigenous peoples’ issues, have been able to address the unique nature of native peoples’ claims. Second, whether and to what extent, these diverse claims may constitute a comprehensive legal structure. Finally, and most importantly, whether a new category of legal claims specific to indigenous peoples has emerged. In other words, Kingsbury questions whether a new category of indigenous rights demands recognition under international law.

Kingsbury claims that a thorough analysis of the legal claims brought by indigenous peoples demonstrates that ‘a category of claims made by indigenous peoples is emerging as a distinct conceptual structure, although it is certainly not the case that any claim by an indigenous group or person therefore falls into this category’.

In this regard, Kingsbury argues that alternative conceptual categories of international and domestic law are necessary to adequately tackle issues, which are specific to indigenous peoples. It is maintained that the adaptation of established categories is inadequate to fully address those specific issues (such as issues of

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171 Ibid 70. Kingsbury specifically refers to the first four categories (human rights and non-discrimination, minority, self-determination, and historic sovereignty).
172 Ibid 106.
culture, distinct histories and identities), so that it is necessary to search for principles that go beyond the individual human rights and non-discrimination framework.\(^{173}\)

Thus, a normative and institutional framework based on indigenous peoples and indigenous rights as a specific legal category\(^{174}\) is required in order to address the following normative elements:

a) the legal regime for restitution of traditional lands and territories;

b) historically and culturally grounded entitlements and responsibilities with regard to natural resources, religious sites, and spiritual or guardianship relationships with particular land, water, and mountains;

c) entitlements and responsibilities based on treaties or other agreements to which the indigenous people are a party;

d) certain constitutional arrangements for participation and political structures for membership and self-government;

e) duties in relation to ancestors and future generations;

f) continuance of certain kinds of economic practices; and

g) entitlements and responsibilities in relation to traditional knowledge.\(^{175}\)

This thesis supports the need to elaborate a specific framework which is able to embrace these emerging concepts peculiar to indigenous issues. The analysis of the international human rights mechanisms discussed in this chapter, helps clarify the

\(^{173}\) Ibid 78.


\(^{175}\) Ibid 103.
contributions and limits of the international human rights system in addressing indigenous claims and advancing indigenous peoples’ right to self-determination.

It can be argued that international and regional human rights implementation procedures are significant in two respects: they facilitate a dialogue with governments on principles and procedures that have impact on the theoretical and practical recognition of self-determination to indigenous peoples within national boundaries; and they contribute to the development of customary rules on indigenous rights.

The international human rights ‘remedial machinery’, however, is limited in different respects. Limits can be detected at the substantive and procedural level. At the substantive level, the fundamental statist-centred imprint common to the whole human rights implementation system, hinders the advancement and fulfillment of indigenous aspirations to self-determination. Recommendations or prescriptions delivered through these mechanisms lack any legally binding force: reverence is paid to states’ willingness whether to implement those measures through domestic mechanisms or not. Statist-centred parameters, such as the positivist interpretation of indigenous self-determination with its emphasis on territorial integrity and threat of secession, continue to hamper the recognition of the right to self-determination for indigenous peoples.

Juridical practices reveal states’ short-sighted positivist approach to indigenous self-determination. The cases discussed demonstrate that the ‘state of affairs’ of the exercise of indigenous self-determination mostly concern issues related to means of subsistence, land, respect of identity, enjoyment of culture, and the exercise of health practices. The enjoyment of self-determination is substantiated in the actual
fulfillment of rights which are embedded in the overarching right to self-determination.

At the procedural level, the human rights monitoring/implementation system primarily offers avenues of redress of alleged violations of human rights. This implies that infringements of the norms have occurred. Accordingly, indigenous peoples’ right to self-determination is addressed in cases where a violation may have taken place or is about to occur. The limit of this system is that implementation measures which positively contribute to the real exercise of self-determination are mostly connected to a remedy measure of the norm.

This thesis argues that international human rights mechanisms do not provide an agent-driven approach to the fulfilment of indigenous aspirations to self-determination. ‘Victims’ need to be defended, at times compensated, and their situations redressed, whereas states are the duty-bearers of the prescriptions delivered, as they are called upon to refrain from, or engage in, some kind of redressing measure.

The operation of this system implies a passive role of the right-holders who, in this case, are indigenous individuals and peoples who claim the right to self-determination. The empowerment of the ‘victims’ is residual – domestic measures have to be exhausted before lodging complaints to human rights committees – and endorsed in a passive modality as the practical resolution is left to states’ political willingness and modus operandi. Victims, who are also the right-holders, do not actively take part in the implementation–remedial process; they are the passive recipients of international and national institutional prescriptions.
It can be argued that the human rights monitoring/implementation system is basically a ‘remedial machinery’. International human rights remedial mechanisms are important, but not sufficient to holistically implement indigenous peoples’ self-determination in its multidimensionality. There is a need for a system which effectively promotes an agent–driven implementation process. In this context, agents are the individual and collective holders of the right to self–determination in question. Indigenous individuals and communities need to be actively engaged in the implementation process, the right–holders need to be actively empowered with a positive capability to realise their own self–determination before they become ‘victims’ of violations. In other words, there is a need for a system which promotes an agent–driven fulfilment of indigenous self–determination.

Accordingly, this thesis argues that the international human rights system cannot be considered the exclusive domain in which indigenous claims can be addressed. It is maintained that development policy processes play 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 are embedded in the whole policy process.

The thesis proposes to extend the analysis from the international legal framework, to development policy processes in order to construct a normative indigenous rights–based framework and a methodological approach to development policies for indigenous peoples imbued with the principle of self–determination. For this purpose, Amartya Sen’s capability approach will be adopted as a theoretical framework of thought to explore the interface between indigenous rights and development policy.
In the second part of the thesis, the foundational theoretical underpinnings of these two bodies of knowledge will be amalgamated at the normative and practical level. At the normative level, a conceptual apparatus will be articulated, which 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, this normative framework enables us to construct a methodological approach to indigenous development policies that serves as a vehicle for the fulfilment of indigenous aspirations to self–determination.
Part 2

The capability approach

and

indigenous peoples’ right to self-determination

_Devvelopment can be seen as a process of expanding the real freedoms that people enjoy_

Amartya Sen
Chapter 4
The capability approach

4.1 General overview

The capability approach is a normative framework of thought developed by the economist and philosopher Amartya Sen. The origin of the capability approach can be traced back to 1979, with the presentation of the seminal lecture ‘Equality of What?’ at Stanford University.\(^1\) On this occasion, Sen began exploring an alternative way of evaluating inequality which would distance itself from traditional approaches while pioneering an alternative understanding of individual well-being and social arrangements.

The capability approach suggests an alternative evaluative system which focuses on an informational base which goes beyond those proposed in traditional economic analysis and practical ethics, such as welfare economics\(^2\) and utilitarianism.\(^3\) The


\(^2\) Des Gasper elaborates on Sen’s criticism of traditional approaches outlining that ‘in mainstream economics, well-being or welfare is conceived as a homogeneous ‘utility’ which reflects only consumption and that only insofar as it fulfils prior preferences. Besides that view of well-being – (A), preference-fulfilment – another version of utilitarianism is common in every day life and philosophy: in this view (B), welfare equals – ‘utility’ seen instead as feelings of satisfaction’: see, Des Gasper, ‘Sen’s Capability Approach and Nussbaum’s Capabilities Ethic’ (1997) 9(2)*Journal of International Development* 281, 283.

\(^3\) Utilitarianism in ethics is the principle of valuing things or actions according to their contribution to the overall good, which is seen as the sum of the individual utilities experienced by all persons in the relevant community. This principle finds one particular expression in mainstream policy economics, when it is operationalised in terms only of money-backed demand and market commodities. Utilitarian ethics is, in turn, only one product of utilitarian social theory, an individualistic and rationalistic approach to social thought, which focuses on (i) individuals, whose interactions are considered to constitute society; and who (ii) experience utility (the physical equivalent of profits), which they (or a benevolent state) (iii) calculate as to how to maximize. See, Des, above n 2, citing T Parson, *The Structure of Social Action* (New York: Free Press, 1937).
informational bases which Sen indicates to be inadequate include ‘the “economic” concentration on the primacy of income and wealth (rather than on the characteristics of human lives and substantive freedoms); the “utilitarian” focus on mental satisfaction (rather than on creative discontent and constructive dissatisfaction); the “libertarian” preoccupation with procedures for liberty (with deliberate neglect of consequences that derive from those procedures)…’

Sen’s critique of those traditional approaches emphasises the need to extend the evaluative framework in the assessment of individual well–being and social arrangements from wealth, or income, desire fulfilment or primary goods, to the lives that people are able to lead. It is indeed argued that ‘…we generally have excellent reasons for wanting more income or wealth. This is not because income and wealth are desirable for their own sake, but because, typically, they are admirable general purpose means for having more freedom to lead the kind of lives we have reason to value’.  

The distinction between the means and the ends of well–being, development and justice, is a key analytical factor for the articulation of a freedom–centred normative

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6 Sen, above n 4, 14.
framework which takes distance from utilitarian and resources–based approaches. Income, resources or primary goods are the means – and not the ends – of people’s well–being. Freedoms, or the valuable opportunities that people enjoy to lead the kind of life they value, constitute the ends of people’s well–being.

The capability approach presents Aristotelian roots as well as some aspects of Adam Smith’s and Karl Marx’s works. Notwithstanding those similarities, the corpus of the capability approach in its present form, has been gradually developed over time in a conspicuous literature and furthered by a growing number of scholars. Among them, Martha Nussbaum has adopted and elaborated a rich version of the capability approach she describes as a ‘partial theory of justice’.

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9 See, eg, Aristotles, The Nicomachean Ethics, (trans by D. Ross Oxford: Oxford University Press, rev ed, 1980, book I, section 5) 7: ‘wealth is evidently not the food we are seeking; for it is merely useful and for the sake of something else’.


The capability perspective has significantly influenced different disciplines, including development studies, political philosophy, justice and social ethics, and welfare economics. Discussed in philosophical terms and applied in several empirical studies, the capability approach has come to represent an alternative...


evaluative framework for a variety of issues, ranging from well-being, inequality and poverty,\textsuperscript{17} to liberty and freedom,\textsuperscript{18} gender bias and sexual division,\textsuperscript{19} human development and development policies,\textsuperscript{20} among others.

This introductory overview provides only a glimpse of the breadth of the capability approach and its applications to different fields of study. The following sections of this chapter will review the foundational concepts of the capability framework and highlight the main issues of the current debate on the capability approach. The significance of these concepts in relation to the analysis of indigenous peoples’ self-determination will be foreshadowed. It will be shown how those

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concepts constitute the backbone of both the indigenous normative framework
developed as the ‘indigenous capability rights system’ and the methodological
approach for development policies for indigenous peoples.
4.2 Basic concepts

4.2.1 Freedom

Freedom is the foundational pillar on which the capability approach is developed. A freedom–centred perspective characterises and distinguishes the capability framework from other evaluative approaches. In fact, a freedom–oriented approach is deemed to provide a more adequate foundation to evaluative systems. 21 Freedom comes to replace the foundational role that utility has had in traditional welfare economics, 22 in the so–called ‘new welfare economics’, 23 and in some articulation of contemporary welfare economics. 24

The understanding of the ‘opportunity aspect’ and the ‘process aspect’ of freedom is fundamental in order to adequately grasp the complex concept of freedom. 25 While either perspective has been alternatively adopted in political, social and philosophical


22 In traditional welfare economics utilities or welfares are adopted as the only variables of intrinsic significance. See for example, some pioneering works: Francis Edgeworth, Mathematical Physics: An Essay on the Application of Mathematics to the Moral Sciences (London: Kegan Paul, 1881); Alfred Marshall, Principles of Economics (New York: Mcmillan, 1890); Arthur C Pigou, The Economics of Welfare (London: Mcmillan, 1920); Frank P Ramsey, Foundations of Mathematics and Other Logical Essays (London: Kegan Paul, 1931).

23 The ‘new welfare economics’ emerged as a dominant school which criticized the utilitarian formulation, particularly for the difficulties in making interpersonal comparisons of utilities. Notwithstanding this criticism, the ‘new welfare economics’ continued to pay attention only to utility information.

24 Contemporary welfare economics is characterized by the adoption of a wide range of criteria which go beyond the notion of economic progress to comprise notion of equity and efficiency. These measures include ‘basic need fulfilment’, ‘levels of living’, ‘quality of life’ and of particular importance ‘human development’ indicators. Some of these measures are still founded on utility, such as ‘need fulfilment’ (see, Pigou, The Economics of Welfare, above n 22).

literature, Sen defends the concurrent legitimacy of the ‘opportunity’ aspect as well as the ‘process’ aspect of freedom.

The ‘opportunity aspect’ of freedom is concerned with the ‘ability to achieve’, that is, the substantive opportunities for a person to achieve valued objectives and goals. Thus, assessing opportunities means to focus on one’s actual ability to achieve what one has reason to value, to focus on what the real opportunities of achievement are for the persons involved.

The ‘process aspect’ of freedom concerns the freedom involved in the process itself, for instance whether one is free to choose, and if others have hindered or interfered with the process aspect of freedom. In other words, whereas the ‘opportunity’ aspect focuses on our ability to achieve, the ‘process’ aspect of freedom is concerned with the processes involved, with the processes through which our achievements are pursued.

It is therefore argued that the value of freedom can be justified on two grounds. First, additional freedom enhances one’s opportunity to achieve what is valued; second, the process through which valued objectives are pursued may be important for the same assessment of freedom. The ‘opportunity’ and ‘process’ aspects of freedom are distinct but also interdependent: neither can subsume the other, while

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26 Some, by relating the significance of freedom to ‘flexibility’, have been concerned with the opportunity aspect of freedom: see, eg, David Kreps, ‘A Representation Theorem for ‘Preference for flexibility’” (1990) 47 Econometrica 565; David Kreps, Notes on the Theory of Choice (Boulder, Colo.: Westview Press, 1988). Similarly, economists have mostly focused on opportunities when they have considered freedoms: see, eg, Milton Friedman and Rose Friedman, Free to Choose: a Personal Statement (London: Secker & Warburg, 1980). Others have instead focused on the process aspect, such as those who have concentrated on the rightness of libertarian procedures: see, eg, Robert Nozick, ‘Distributive Justice’ (1973) 3 Philosophy and Public Affairs 45; Robert Nozick, Anarchy, State and Utopia (New York: Basic Books, 1974).


28 Ibid.
overlaps may occur between the two aspects. The ‘process’ aspect has an important impact on the ‘opportunity’ aspect when, for instance, one values free choice or a fair process in achieving one’s own goals – e.g., wanting to win a competition fairly, rather than winning regardless of the modalities through which the successful outcome came about. This example illustrates a case in which the procedure of free decision is a fundamental requirement for freedom itself, despite the person’s successful outcome in achieving what he or she values.

The ‘opportunity’ and ‘process’ aspects of freedom are of primary significance for the normative interpretation of the indigenous right to self–determination and for the articulation of a methodological approach to development policies aimed at the real fulfilment of indigenous peoples’ aspirations to self–determination. The construction of an ‘indigenous capability rights system’ as a normative framework within which development policies for indigenous peoples should be framed, adopts the freedom–centred understanding of well–being and development processes promoted in the capability approach. Development is indeed conceptualized as ‘a process of expanding the real freedoms that people enjoy’. The enhancement of freedoms is thus understood both as the primary end and the principal means of development. Accordingly, freedoms play respectively a twofold role: a ‘constitutive role’ and ‘instrumental role’.

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29 Ibid.
31 Sen, Development as Freedom, above n 4, 8, 14–15. Sen clearly explains that ‘development has to be more concerned with enhancing the lives we lead and the freedoms we enjoy. Expanding the freedoms that we have reason to value not only makes our lives richer and more unfettered, but also allows us to be fuller social persons, exercising our own volitions and interacting with and influencing the world in which we live’.

32 Ibid 36.
The constitutive role of freedom refers to the ‘intrinsic importance of human freedom as the preeminent objective of development’.\textsuperscript{33} In such a constitutive aspect, development involves the enlargement of substantive freedoms of individuals by virtue of their crucial importance in enriching human life.\textsuperscript{34}

The instrumental role of freedom\textsuperscript{35} refers to the way in which different freedoms contribute to the enhancement of human freedom in general\textsuperscript{36} and how freedoms interrelate with one another, so that one kind of freedom can help promote the expansion of other kinds of freedoms.\textsuperscript{37}

The instrumental role of freedoms and their interconnectedness has a significant bearing on the process of development. The expansion of people’s substantive freedoms to lead the lives they have reason to value, has to be conceived of as an ‘integrated process’ in which freedoms connect with one another.\textsuperscript{38}

The ‘integrated process’ through which freedoms impact on each other while promoting the overall freedom people enjoy in achieving what they value, will be adopted to comprehend how the freedoms underlying indigenous rights interact in a whole and interconnected system, that is the ‘indigenous capability rights system’.

The adoption of these concepts will be properly discussed in the following chapters. The interpretation of the whole integrated system of indigenous rights

\textsuperscript{33} Ibid 37.
\textsuperscript{34} Substantive freedoms include ‘elementary capabilities like being able to avoid such deprivations as starvation, under–nourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on’: Ibid 36.
\textsuperscript{35} Sen identifies five types of instrumental freedoms: political freedoms, economic facilities, social opportunities, transparency guarantees and protective security. For a detailed description of those instrumental freedoms: see, ibid 38–42.
\textsuperscript{36} Sen, Development as Freedom, above n 4, 37.
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid 8, 10.
through the lens of these conceptual categories requires introducing the following core concepts: *functionings, capabilities, and information pluralism.*
4.2.2 Functionings and Capabilities

The expansion of people’s freedom to enjoy ‘valuable beings and doings’ \(^{39}\) is the foundational concept within the capability framework of thought. What is meant by ‘valuable beings and doings’? Two concepts are developed in order to comprehensively capture their meaning within the capability perspective: *functionings* and *capabilities*.

*Functionings* and *capabilities* stand at the heart of the conceptual apparatus of the capability approach. They are constitutive conceptual categories which are interrelated and complementary, yet clearly distinct:

A functioning is an achievement, whereas a capability is the ability to achieve. Functionings are, in a sense, more directly related to living conditions, since they are different aspects of living conditions. Capabilities, in contrast, are notions of freedom, in the positive sense: what real opportunities you have regarding the life you may lead.\(^ {40}\)

*Functionings* are indeed regarded as ‘the various things a person may value doing or being’.\(^ {41}\) This generous definition understands ‘beings and doings’ as ranging from elementary functionings to complex activities or personal states of being: being nourished, being in good health, being free from avoidable disease, as well as being happy, being self–confident, being able to take part in the life of the community, achieving self–respect, or appearing in public without shame.\(^ {42}\) Therefore, *achieved functionings* are those particular functionings that one has successfully realized:

\(^{39}\) Ibid 75; Sen, *Inequality Re–examined*, above n 11, 39; Sen, *Development as Capability Expansion*, above n 11.


\(^{41}\) Sen, *Development as Freedom*, above n 4, 75.

living is indeed understood as a set of interrelated achieved functionings which are constitutive of a person’s being.43

Capabilities,44 on the other hand, refer to ‘the various combinations of functionings (beings and doings) that the person can achieve. Capability is, thus, a set of vectors of functionings, reflecting the person’s freedom to lead one type of life or another…to choose from possible living’.45

The concept of capability serves to incorporate freedoms within the normative framework: ‘[w]hile the combination of a person’s functionings reflects her actual achievements, the capability set represents the freedom to achieve: the alternative functioning combinations from which this person can choose’.46

Functionings and capabilities are both considered to be valid informational bases for evaluative purposes. The choice to focus on the level of achieved functionings or on capabilities will depend upon the type of evaluative analysis that one intends to pursue.47

The important point is that the distinction between capabilities, functionings, and means to achieve in the capability approach has a significant bearing for evaluation

43 Sen, Inequality Re–examined, above n 11, 39; Sen, Development as Freedom, above n 4, 73.
44 The terms capabilities, capability and capability set are used interchangeably. Robeyns clearly provides some useful terminological remarks as to clarify the use of these terms. It is explained that in Sen’s first writings, the term ‘capability’ is synonymous with a ‘capability set’ which consists of a combination of potential or achievable functionings. As a result, one’s capability is equivalent of one’s opportunity set. The use of ‘capabilities’ is widespread in the work of many scholars, including Martha Nussbaum, as well as in Sen’s most recent writings where the terms ‘capability’, ‘capability set’ and ‘capabilities’ are used interchangeably. See, Ingrid Robeyns, ‘The Capability Approach: a Theoretical Survey’ (2005) 6(1) Journal of Human Development 93, 100–101.
45 Sen, Inequality Re–examined, above n 11, 40.
46 Sen, Development as Freedom, above n 4, 75.
47 For instance, it is argued that in cases of severe material and bodily deprivation in very poor contexts, it seems sensible to focus on the level of achieved functionings instead of capabilities: see, Robeyns, above n 44, 101.
processes. Means to achieve, or ‘capability inputs’, include goods and services\textsuperscript{48} whose characteristics enable some sort of functioning. The bicycle, for instance, allows one to be able to move faster than walking; in other words, as Robeyns exemplifies, the bicycle enables the functioning of mobility.\textsuperscript{49}

The capability to achieve specific functionings is influenced by several factors which are defined as conversion factors. These conversion factors consist of personal, social and environmental conversion factors. Personal conversion factors include for example physical conditions, sex, and intelligence; social conversion factors may consist of societal hierarchies, power relations, public policies, and various forms of discrimination. Environmental conversion factors comprise geographical location, climate, and so on.

The important point is that the capability approach does not disregard resources, commodities or other means. However, their importance and availability is acknowledged not because they are considered as the ends of well-being or development, but because they are regarded as ‘instruments for the enhancement of human freedom…rather than valuable in themselves’.\textsuperscript{50} Policy analyses and other evaluative exercises need to go beyond the evaluation of what one owns or uses, because this kind of information does not reveal whether and what functionings one achieves.

\textsuperscript{48} Good and services are not deemed to be exclusively exchangeable for income or money. This view would restrict the analysis to market-based economies.


As a result, capabilities (freedom to achieve) and functionings (the actual ‘being and doings’ realized) represents the primary spaces of evaluation for individual and collective advantage, while special consideration has to be given to personal, social and environmental factors as well as to the whole social and institutional context for their significant influence on people’s capability sets and decision-making processes.

Figure 4.1 illustrates the core constitutive concepts discussed and their interconnections.51

Figure 4.1 A stylised non-dynamic representation of a person’s capability set and her social and personal context.


4.2.3 Information pluralism: well–being freedom, agency freedom, well–being achievement, and agency achievement

The capability framework can be conceived of as an ‘information–pluralist approach’ since it focuses on the admissibility and use of different types of information in evaluations. The capability approach is indeed founded on a methodological rejection of informational monism to moral analysis – considered as a ‘crude prejudice’ – as the only acceptable approach.

A pluralist–information based approach is advocated as a response to the inadequate ‘informational parsimony of utilitarianism’. Sen criticizes the informational foundation on which utilitarianism is based, arguing that the widespread acceptance of utilitarianism can be explained by what Scanlon has called ‘philosophical utilitarianism’. This is defined as ‘a particular philosophical thesis about the subject matter of morality, namely the thesis that the only fundamental moral facts are facts about individual well–being’.

Conversely, Sen argues about the inadequacy of considering individual well–being as the only informational base to moral evaluations: ‘the question is not whether well–being is an intrinsically important variable for moral analysis, but

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53 Ibid 186.
54 Ibid 175. It is explained that utilitarian consequentialism, for instance, requires ‘a set of informational constraints in the form of invariance restrictions linked to specific information types’. Sen provides as example ‘act utilitarianism’. It can be factored into: (1) act consequentialism (the goodness of an act is given by the goodness of its consequent states of affairs), (2) welfarism (the goodness of a state of affairs is given by the goodness of the utility information regarding that state), and (3) sum ranking (the goodness of utility information is given by the sum total of the utilities in question). See also, A K Sen, ‘Utilitarianism and Welfarism’ (1979) 76(9) Journal of Philosophy 463.
55 Thomas Scanlon, ‘Contractualism and Utilitarianism’ in Amartya Sen and Bernard Williams (eds), Utilitarianism and Beyond (Cambridge: Cambridge University Press, 1982) 108.
whether it is uniquely so’. The intrinsic importance of well-being should not entail the exclusion of other aspects of human nature. In fact, although well-being and its maximization are fundamentally important in people’s life, it is suggested that ‘[t]here are goals other than well-being, and values other than goals’.

Accordingly, acknowledging that the moral foundation of well-being is ‘informationally extremely restrictive’, Sen embraces and elaborates the primacy role that the concept of ‘agency’ plays in Rawls’ ‘Kantian constructivism’. According to this perspective, persons are seen as ‘having the moral power to have a conception of the good’.

Well-being and agency are therefore equally included within the capability framework as they constitute two different, yet related aspects of a person. The well-being aspect refers to personal well-being related to one’s own life, whether defined in elementary ways (‘doings and beings’ related to activities or states of existence, like being well-nourished, being free from malaria, eating, seeing) or more complex ways (not being ashamed, or self-esteem). The agency aspect refers to a person’s conception of the ‘good’ in terms of the totality of goals one has reasons to adopt, whether or not they include the advancement of personal well-being.

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57 Ibid.
58 Ibid.
60 Sen, Well–Being, Agency and Freedom: the Dewey Lectures, above n 21, 169, 186; Sen, Capability and Well–Being, above n 21, 35.
61 Ibid 197.
62 Ibid 190; Sen, Inequality Re–examined, above n 11, 56–57.

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The well–being aspect and agency aspect of individuals define two distinct spaces of evaluation which present an internal plurality. Well–being and agency can indeed be seen in terms of freedom or in terms of achievement. In other words, the evaluation of individual advantage can be realized in at least four spaces: well–being freedom, well–being achievement, agency achievement, and agency freedom.

Well–being freedom refers to the freedom to achieve valuable ‘beings and doings’ (functionings) which are constitutive of one’s own well–being, whereas well–being achievement refers to the actual bundle of achieved functionings constitutive of personal well–being. Whereas well–being freedom is determined in the space of capabilities – as it relates to ‘a person’s capability to have various functioning vectors and to enjoy the corresponding well-being achievements’ – well–being achievement is determined in the space of functionings, as achievement is reflected by actual functionings.

Agency freedom identifies a broader evaluative space than well–being freedom as it mirrors a more comprehensive concept of freedom. Evaluations in the space of agency freedom need to consider ‘what the person is free to do and achieve in pursuit of whatever goals or values he or she regards as important’.

Consequently, agency achievement entails a broader evaluative exercise than well–being achievement, as it includes one’s success in achieving one’s own overall goals. The space of functionings may be rather restrictive since a person’s goals can

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64 Sen, Capability and Well–Being, above n 21, 35, 49.
65 Sen, Well–Being, Agency and Freedom: the Dewey Lectures, above n 21, 203; Sen, Inequality Re–examined, above n 11, 83.
66 Sen, Inequality Re–examined, above n 11, 83.
include objectives that go beyond the person’s state of being. If a person, for example, values the independence or prosperity of her own country, the evaluation of state of affairs should be pursued in light of these goals, and not only in relation to the extent to which these achievements would contribute to the person’s own well-being.68

These four spaces of evaluation will be considered as part of a methodological approach to development policies for indigenous peoples. It will be discussed how those spaces, despite being separate and distinct, interdependently relate to each other, giving rise to different movements in different directions. Upon due consideration of their significance for the whole policy process, it will be argued that agency freedom and agency achievement should be adopted as the fundamental reference spaces respectively for the design and evaluation of self-determined development policies for indigenous peoples.

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68 Sen, Inequality Re-examined, above n 11, 56.
A heated debate has arisen about the capability approach which involves several theoretical and practical issues. This thesis provides a contribution to this debate as it aims at adopting foundational concepts of the capability approach to interpret the collective and individual right of indigenous peoples to self-determination. It is therefore important to briefly outline the main issues which are discussed among capability theorists and practitioners.

Part of the debate focuses on key characteristics of the capability framework which are either supported or criticized. The complexity, vagueness and incompleteness of the capability framework are among the main attributes which have been praised or alternatively criticized. While some scholars consider the complexity, vagueness and incompleteness as major strengths of the capability framework, others have criticized these attributes.


approach and have elaborated alternatives to incorporate these features, others interpret those attributes as serious weaknesses which impinge upon the possibility to operationalise the capability approach.\textsuperscript{73}

The operationalization of the capability approach remains one of the thorniest issues to be debated; operational concerns cover indeed a wide range of measurement issues and diverse empirical questions.\textsuperscript{74} In this regard, it is important to highlight that criticisms regarding the possibility to implement the capability approach at the operational level,\textsuperscript{75} need to take into account that the capability approach has never been proposed as fully operational or as an exact \textit{formula}.\textsuperscript{76} On the other hand,
several empirical studies in line with the capability perspective have been realized so as to prove the possibility to implement the capability framework. Among those empirical works, it is imperative to mention the application of core concepts of the capability approach in the Human Development Reports for poverty analyses and development policies. The concept of human development and the articulation of human development indexes, provide a clear example of the distinctiveness of the capability approach when applied for empirical purposes.

Theoretical issues include the question of whether or not there should be a list of fundamental capabilities. More specifically, questions have arisen as to which capabilities are to be considered relevant, who is entitled to determine them, and under which procedures and circumstances. The issue of the admissibility of a list


of relevant capabilities finds Amartya Sen and Martha Nussbaum in two diametrically opposite positions.

Sen’s position on this matter is clearly against any final and predetermined list of capabilities, since the selection of capabilities as well as the weighting of those capabilities relative to each other, are inescapably the result of value–judgment processes. The determination of relevant capabilities cannot be anything other than context–related, as the bundle of relevant capabilities will depend upon the purposes of the evaluative exercise at hand.

In responding to criticisms for not having committed himself to a particular list of capabilities, Sen argues that the crucial issue is not the listing of core capabilities, but rather the sanctioning of a predetermined list of capabilities. It is maintained that the key role in the identification of the relevant capabilities is played by the democratic process. Public discussion and reasoning are the primary elements through which it is possible to articulate different lists of capabilities for different purposes. This argument has led different scholars to investigate the procedures and principles through which the selection of capabilities may come about.

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83 Sen, Inequality Re–examined, above n 11, 42–46; Sen, Development as Freedom, above n 4, 76–85.
86 See, Sen, Rationality and Freedom, above n 27.
considering that it may be difficult to ensure the democratic participation of all parties involved.

Nussbaum, on the other hand, proposes a specific list of central human capabilities which provides ‘the underpinnings of basic political principles that can be embodied in constitutional guarantees’. 89 The list identifies those basic human capabilities that are deemed to be of fundamental importance in any human life.

The list of ‘central human capabilities’ is deemed to play a significant role in a pluralistic society since it is conceived of as a set of goals – a subset of social goals – and as a system of side-constraints that urge to be secured no matter what else is pursued. 90 While these central capabilities are considered instrumentally and intrinsically valuable, they do not constitute a complete theory of justice: they provide the basis for determining a minimum threshold level that social and political institutions are called to promote. 91

This thesis suggests a ‘middle-way’ position between Sen’s context–related approach and Nussbaum’s perspective on central human capabilities of universal applicability. In the next chapter, it will be shown how the articulation of the ‘indigenous capability rights system’ may provide a sui generis ‘list’ which comprises the bundle of indigenous rights included in the UN Declaration on the Rights of Indigenous Peoples. It will be argued that the legal precepts emerging in the

89 Martha C Nussbaum, Women and Human Development, above n 12, 74; Martha C Nussbaum, Capabilities as Fundamental Entitlements: Sen and Social Justice, above n 15, 40. The list of ‘central human capabilities’ consists of the following ten categories: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one’s environment. The list is considered to include highly general capabilities and open to revision.
91 Nussbaum, Women and Human Development, above n 12, 75.
UN Declaration on the Rights of Indigenous Peoples indicate core values of ‘partially universal’ applicability. Those international standards, in fact, do apply globally to a specific segment of the world’s population, that is, indigenous peoples. However, this thesis argues that a context–related process of implementation is required to operationalise the all–encompassing normative system of indigenous rights proposed in this work. The methodological approach to development policies for indigenous peoples will be constructed on principles and criteria which require a context–related analysis of the situation and issues that the policy aims to address. Indigenous individual and collective choices and decision–making processes are among the fundamental elements that need to be taken into consideration and included in the whole policy process.
Chapter 5

The normative level. The indigenous capability rights–based normative system

This chapter will discuss the fundamental conceptual categories developed in Sen’s capability approach and applied to construct the indigenous capability rights–based normative framework. There are four main concepts:

a) the conceptualization of the ‘goal rights system’ and the construction of an ‘indigenous goal rights system’;

b) indigenous rights within the ‘indigenous goal rights system’: the significance of freedom in the integrated process of self-determination;

c) indigenous rights as capability rights: from the ‘indigenous goal rights system’ to the ‘indigenous capability rights system’;

d) the role of institutions and the enjoyment of the right of self-determination.
5.1 The ‘goal rights system’ and the ‘indigenous goal rights system’

The ‘goal rights system’ represents the conceptual pillar upon which the indigenous rights–based normative system is developed. The ‘goal rights system’ is an alternative theory of human rights which is constructed upon a critical scrutiny of the welfarist consequentialism approach – which includes inter alia utilitarianism – and the constraint–based deontology.¹ These traditional theories of human rights present different inadequacies whose common limitation is ‘the denial that realization and failure of rights should enter into the evaluation of states of affairs themselves and could be used for consequential analysis of actions’.²

Welfarist consequentialism defends an instrumental conceptualization of rights. Rights are not intrinsically valuable: any right–based rule, institution, or convention is considered useful for the achievement of other goals. Utilitarian ethical evaluation can be considered an example of this instrumental approach. Indeed, the goodness of a state of affairs is evaluated simply by the sum of personal utilities in that state.³

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² Sen, Rights and Agency, above n 1, 6: Sen underlines the pitfalls of both approaches for a moral theory claiming that ‘the welfarist instrumentalist [views] rights in terms of their consequences for right–independent goals and the constraint–based deontologist [reflects] rights without consequential justification as constraints on actions’.
The constraint–based deontological approach interprets rights as constraints on actions, which must not be violated despite the fact that a violation would bring about a better state of affairs. Rights are deemed to have an intrinsic value and to affect directly the evaluation of actions: ‘[r]ights do not determine a social ordering instead set the constraints within which a social choice is to be made, by excluding certain alternatives, fixing others, and so on’.\(^4\)

The alternative system proposed is an ‘integrated’ approach which rejects utility–based ethics, while adopting the ‘consequence sensitivity’ of utilitarianism in ethical reasoning.\(^5\) Sen articulates a system that demands the ethical recognition of human rights, a moral theory which recognizes the fundamental significance of rights and freedoms. This moral theory demands the incorporation of rights in the evaluation of state of affairs and it also takes into account the influence that these rights have on the choice of actions through the evaluation of the consequent states of affairs.\(^6\) The ‘goal rights system’ is indeed defined as ‘[a] moral system in which fulfilment and non–realization of rights are included among the goals, incorporated in the evaluation of states of affairs, and then applied to the choice of actions through consequential links’.\(^7\)

Two concepts embedded in this moral system are particularly significant. First, the goal–included view of rights does not rule out the instrumental relevance of rights. The ‘goal rights system’ allows the incorporation of right–based

\(^7\) Ibid 15.
considerations in the goals themselves as well as the adoption of instrumental considerations. The fulfilment of instrumental rights (which can be either rights or non-rights goals) may help promote the goals that a society values; whereas the fulfilment of certain rights are justified on deontological grounds without any reference to the consequences that would follow should they be respected. The fulfilment of rights, whether intrinsically or instrumentally worthwhile, is conceived of as central within the social and political structure of a society and as being among the goals the society is to pursue.

Second, goal rights systems are considered to ‘form a wide class, rather than represent some unique moral position’. Variations may relate to the set of rights to be included and the form they may take; whether and what non-right values can be accepted; what weights are to be applied; and how choice of actions are related to the evaluation of outcomes.

The potential diversity of goal rights systems admits some flexibility as to the conceptualization of different goal rights systems. Thus, I have explored the possibility of identifying a goal rights system specific to a segment of civil society, namely indigenous peoples. The conceptualization of an ‘indigenous goal

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8 Ibid 16.
9 This approach frees the system of rights from the limits of constraint–based obligations. According to this view rights are formulated in ‘negative’ form as they are concerned with one’s freedom to exercise them without interference by others. These ‘negative rights’ bind others negatively (no interference), while they do not impose any obligation in promoting others’ enjoyment of rights. It is evident that this approach, by defining obligation exclusively in terms of constraints, rules out a rights–based approach towards positive freedoms. On the contrary, in the goal rights system due weight is given to negative freedoms as well as to positive freedoms. See, Nozick, Anarchy, State, and Utopia, above n 4; Isaiah Berlin, ‘Two Concepts of Liberty’ in his Four Essays on Liberty (London; New York: Oxford U.P., 1969), discussing the classic distinction between ‘positive’ and ‘negative’ freedoms.
10 Sen, Rights and Agency, above n 1, 15.
11 Ibid.
rights system’ is the fundamental pillar on which the normative framework to interpret indigenous peoples’ right to self–determination is articulated.

The formulation of the ‘indigenous goal rights system’ poses some fundamental issues: (a) what rights are to be included; (b) what form those rights assume; (c) what kind of obligations and/or duties they generate; and (d) who are the duty–bearers of such obligations.

These issues will be tackled in the following sections.
5.2 Indigenous rights within the ‘indigenous goal rights system’: the significance of freedom in the integrated process of self-determination

The conceptualization of an ‘indigenous goal rights system’ requires the identification of rights that are to be included in this system. It is argued here that international human rights law is the domain where the bundle of rights which constitute the ‘indigenous goal rights system’ can be determined.

The international human rights system provides the framework within which indigenous peoples have been articulating their claims and aspirations. It has already been discussed that a corpus of international legal standards concerning indigenous peoples and their rights has developed under international human rights law. The UN Declaration on the Rights of Indigenous Peoples, in particular, represents a landmark human rights instrument within the fabric of international human rights law. It is indeed the fundamental and most comprehensive document of indigenous rights, which is to become an internationally recognized legal instrument setting the minimum standards for the survival, dignity and well-being of the world’s indigenous peoples.

The totality of indigenous peoples’ individual and collective rights set out in the UN Declaration is deemed to constitute the ‘indigenous goal rights system’. Those indigenous rights form a whole and unique system whose strength and inner coherence lies in the integrated process through which all indigenous rights interdependently connect and impact on each other. At the centre of the ‘indigenous goal rights system’ lies the right to self-determination, which is, as it has been discussed, the fundamental precept in indigenous rights discourse.
The normative value of the ‘indigenous goals rights system’ can be adequately appreciated if a freedom-centred perspective is applied to it. It has been explained how Sen’s capability approach is primarily a freedom infused approach. Freedoms refer to the human condition as freedoms constitute the ‘primary descriptive characteristics of the conditions of persons’. Accordingly, the ‘process of expanding the real freedoms that people enjoy’ represents the central focus of the capability approach. Moreover, the enhancement of freedoms is understood both as the primary end and the principal means of development. According to this distinction, freedoms play respectively a twofold role: a ‘constitutive role’ and an ‘instrumental role’.

The constitutive role of freedom refers to the ‘intrinsic importance of human freedom as the pre-eminent objective of development’. In such a constitutive aspect, development involves the enlargement of substantive freedoms of individuals by virtue of their crucial importance in enriching human life.

The intrinsic importance of freedom, however, has to be distinguished from the effectiveness of freedom as a means. It is indeed argued that ‘[t]he instrumental role of freedom concerns the way different kinds of rights, opportunities, and entitlements contribute to the expansion of human freedom in general, and thus to promoting development’. In addition, the expansion of

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14 Ibid.
15 Ibid.
16 Ibid 37.
17 Substantive freedoms are exemplified as including ‘elementary capabilities like being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on’; Ibid 36.
18 Ibid 37.
The distinction between instrumental and intrinsic freedoms, as well as the integrated process through which freedoms interact, provide insights for an understanding of the content of the indigenous right to self-determination in the contemporary political and legal discourse. The tension between ‘primary end’ and ‘principal means’, and ‘constitutive role’ and ‘instrumental role’ of freedoms, may be applied to the understanding of the right of indigenous peoples to self-determination.

Article 3 of the UN Declaration states that

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This article spells out the terms under which the principle of self-determination is to be recognized for indigenous peoples. The reading of this article through the conceptual apparatus of the capability framework not only suggests a freedom-centred perspective underlying the concept of indigenous self-determination, but it also indicates the right of self-determination as having a twofold nature.

This dual nature can be grasped from the wording of article 3. The first sentence is straightforward in its recognition of the right of indigenous peoples to self-determination, as a fundamental right intrinsically valuable in itself. The

\[19\] Ibid 8.
article continues by defining the right as a *conditio* for the free determination and enjoyment of political, civil, cultural and economic rights.

The right to self–determination is indeed conceived of as playing a constitutive as well as an instrumental role within the ‘indigenous goal rights system’.

It is configured as being intrinsically as well as instrumentally valuable for the enjoyment of political, civil, cultural and economic rights.\(^{20}\)

The intrinsic value of the right of self–determination has been broadly expressed in indigenous scholarly literature. The inherent value of self–determination is expressed as the substantive ‘freedom for indigenous peoples to live well, to live according to their own values and beliefs, and…to determine what it means to live humanely.’\(^{21}\)

The essence of indigenous peoples’ right of self–determination is indeed articulated primarily in terms of freedom to choose and determine one’s own life at the political, economic, cultural and social level. ‘The true test of self–determination’, it is suggested, ‘is whether indigenous peoples themselves actually feel that they have choices about their way of life.’\(^{22}\)

\(^{20}\) This line of argument echoes the constitutive and ongoing aspects in which the principle of self–determination is recognized under international law in major international human rights Covenants. A brilliant analysis of the right to self–determination for indigenous peoples is proposed in: James S Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 1996) 80–85. It is argued that the right to self–determination can be seen as comprising a ‘constitutive aspect’ as well as an ‘ongoing aspect’. The ‘constitutive aspect’, expressed in the provision that entitles peoples to ‘freely determine their political status’, imposes requirements of participation and consent in the procedures leading to inception or change of the political order under which peoples live. The ‘ongoing aspect’ articulated in the principle that people are entitled to ‘freely pursue their economic, social and cultural development’, requires a governing institutional order under which individuals and groups are able to make substantial choices concerning all spheres of life on a continuous basis. It is maintained, however, that the right of self–determination when applied to indigenous peoples is loaded with specific significance. The intertwining of the ‘constitutive’ and ‘ongoing’ aspects, even though echoing the same substantive aspects recognized to the right of self–determination as such, are deemed to be insufficient to fully define the content of the same right recognized to indigenous peoples.


\(^{22}\) Ibid 80–83.
It has been discussed in the previous chapter the crucial importance and intrinsic value that the ability to make valuable choices has in the capability approach.

The instrumental value of the right to self-determination has also been acknowledged by different scholars. According to Henriksen, ‘indigenous peoples consider the right of self-determination as a collective human right which is a fundamental condition for the enjoyment of all other human rights of indigenous peoples, be they civil, political, economic, social or cultural’. In addition, Moses argues that ‘the very survival of indigenous peoples depends directly on respect for the rights contained in that concept’. It is therefore evident how the right to self-determination is conceived of as a ‘prerequisite’ for the enjoyment of all other human rights and freedoms. This conception follows the findings of a United Nations’ study in which it is stated that ‘human rights and fundamental freedoms can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a human right and a prerequisite for the enjoyment of all the other rights and freedoms’. The conceptualization of the right of self-determination needs to encapsulate indigenous identity and serve as a vehicle to enable them to live according to their own way.

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Upon due consideration of these perspectives, the indigenous right of self-determination can be envisaged as the substantive and overall freedom to choose the life indigenous peoples, individually or collectively, have reason to value. Being also a prerequisite for the fulfilment of all other human rights, the enjoyment of self-determination can be perceived as an integrated process in which all indigenous rights, considered as interdependent freedoms, interconnect and impact on each other. Thus, the ‘indigenous goal rights system’ is a whole integrated system where the right to self-determination lies at the centre of a coherent system of reciprocal interrelations among all other indigenous rights.

Considering that ‘the importance of human rights relates to the significance of the freedoms that form the subject matter of these rights’,26 the indigenous right to self-determination and its ancillary rights are primarily understood in terms of freedoms. As a result, if development is the ‘process of expanding the real freedoms that people enjoy’,27 development policies for indigenous peoples should aim at enlarging the real freedoms underlying all indigenous rights encompassed into the ‘indigenous goal rights system’. Therefore, the ‘indigenous goal rights system’ constitute the core element for development policy making.

In order to better translate the enlargement of indigenous freedoms into practical policy measures, a capability–based perspective can be applied to indigenous rights. In the following sections it will be discussed how the conceptual passage to a capability–based form of indigenous rights has significant implications on the design, implementation and evaluation of development policies.

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

If the capability perspective is applied to indigenous rights, the ‘indigenous goal rights system’ assumes the form of a peculiar ‘indigenous capability rights system’. The conceptualization of ‘capability rights’ is realized by conceiving goal rights primarily as a relation between the right–holder and some ‘capability’ to which he or she is entitled to, instead of a relation between two parties.28

What does it really mean to apply a capability perspective to indigenous rights? First of all, conceiving indigenous rights in terms of capability rights means to focus on the ‘opportunity’ aspect29 of the freedoms underlying those indigenous rights. It means to see indigenous rights primarily in terms of ‘capability to function’,30 the ‘opportunity to achieve valuable combinations of human functionings’.31 The focus on what a person is able to do or to be, suggests a practice–dependent conception of freedom, since a person’s freedom is assessed by the extent to which he or she is able to choose valuable alternative combinations of functionings. Securing negative freedom – the removal of

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29 For a detailed account of the distinction between the ‘opportunity’ and ‘process’ aspect of freedoms: see, Sen, Rationality and Freedom, above n 1; Sen, Elements of a Theory of Human Rights, above n 1.

30 See, Sen, above n 1; Nussbaum, above n 28.

31 Sen, Elements of a Theory of Human Rights, above n 1, 332.
external hindrances to doing what a person values – is only one aspect of human freedom. To have the capability to do $x$ means to be free from external obstacle in achieving $x$, but also to have the material and institutional resources to achieve $x$, that is, to have the ‘effective power to achieve chosen results’.\textsuperscript{32}

The characterization of indigenous rights as ‘capabilities to function’ leads to seeing the ‘indigenous capability rights system’ as the overall set of capabilities that indigenous peoples should enjoy in order to be fully self-determined agents. It means focusing on the space of substantive freedoms or real opportunities that indigenous peoples, individually and collectively, should enjoy to lead the kind of life they value and to accomplish what they value.\textsuperscript{33}

Figure 5.1 schematically depicts the ‘indigenous capability rights system’ whose core is the integrated process of self-determination.\textsuperscript{34}

\textsuperscript{32} Sen, \textit{Rights as Goals}, above n 1, 208.
\textsuperscript{34} Figure 5.1 includes only a set of the indigenous rights stated in the UN Declaration on the Rights of Indigenous Peoples. The relations between those rights as depicted in the diagram are exemplificative of the broader interrelated impacts that all indigenous rights have on each other.
Figure 5.1 The indigenous capability rights system.
Questions may arise as to whether the ‘indigenous capability rights system’ constitutes a ‘list’ of central basic capabilities for indigenous peoples. In the debate about the admissibility of a ‘list’ of capabilities and how it may be defined, the ‘indigenous capability rights system’ may constitute a ‘middle–way’ position. It has been discussed how Nussbaum’s list of ‘central human capabilities’ identifies those basic human capabilities that are deemed to be of fundamental importance in any human life: the list indeed provides the ‘basic social minimum in the area of the central capabilities [that] should be secured to all citizens’. Nussbaum’s account focuses on how a list of basic human rights should function in a pluralistic society. It is argued that the list of ‘central human capabilities’ provides a moral basis of central constitutional guarantees. The list provides the basis for determining a minimum threshold level that social and political institutions are required to guarantee.

The position of this thesis is that the bundle of capability rights embedded in the ‘indigenous capability rights system’ may be considered as a \textit{sui generis} ‘list’. This ‘list’ does not present attributes of generality and universality, as it takes into account the specificity of indigenous peoples as a peculiar segment of civil society, defining accurately the collective and individual dimension of their rights. The legal precepts emerging in the UN Declaration indicate core values of universal applicability to indigenous peoples, but a context–related process of implementation is required to operationalise this system.

\textsuperscript{35} It has been discussed in the previous chapter how Nussbaum’s list of ‘central human capabilities’ differs from Sen’s context–related understanding of capabilities.


\textsuperscript{37} Ibid 75; Nussbaum, \textit{Capabilities and Human Rights}, above n 28, 299–300.
The selection and admissibility of the indigenous rights set out in the UN Declaration as a consistent system – or ‘list’ – of ‘capability rights’, is mainly grounded on the fact that those rights constitute an internationally accepted normative framework to protect and promote indigenous rights worldwide. The process through which the UN Declaration has been articulated and adopted can be considered as a unique ‘democratic process’ carried out in the international arena with the participation of the would-be duty-bearers and right-holders of the international standards included in the UN Declaration.

Indigenous rights have been developed and agreed upon within the UN system through processes and procedures which have allowed the broadest participation of civil society ever experienced previously within the UN system. The ‘list’ of indigenous rights included in the UN Declaration is the result of an ongoing public discussion and engagement by all parties involved. States, indigenous and non-indigenous non-governmental organizations, indigenous peoples’ representatives and organizations, have all participated in the drafting process for over two decades. The process through which those indigenous rights have been elaborated, legitimizes their inclusion among the goal rights that a society – internationally and nationally – should focus on for the protection and promotion of indigenous peoples’ rights worldwide.

The universal breadth of indigenous rights, however, does not translate into a uniform application of those rights. In other words, the ‘indigenous capability rights system’ cannot be understood in absolute terms. A context-related approach must guide the operationalization of the capability rights embedded in the system. At least
a twofold weighting process is required: a) weighting between different indigenous rights; b) weighting between indigenous rights and non–indigenous rights.

It is evident that a context–related approach requires two main elements: a thorough analysis of the specific political, social and economic context in which indigenous policies will be operating; and the adoption of participatory approaches\(^{38}\) which allow us to carry out adequate ‘weighting processes’ and minimize potential frictions or conflicts.\(^{39}\) The engagement and participation of local communities or individuals concerned in decision–making, implementation and evaluation policy processes is essential to broaden peoples’ freedoms to be or to do what they value.

The conceptualization of a rights–based normative framework specific to a section of civil society – indigenous peoples – whose constituting rights are interpreted in terms of ‘capabilities to function’, affects the way in which policy goals are to be made and how the evaluation of state of affairs is to be pursued. It is clear


\(^{39}\) The significance of participatory methods will be discussed in the next chapter within the context of the principle of ‘free, prior and informed consent’.

201
that a focus on the set of peoples’ real opportunities is in line with the rejection of
theories of formal equality which have been proposed as the political objective to
deal with and address indigenous issues. The theoretical sphere of rights’
entitlements is superseded by a more practical approach based on the set of real
opportunities available to indigenous people in their specific socio-economic and
political context. This claim is also emphasized in Nussbaum’s writings. The
emphasis on central human capabilities and governments’ responsibility to provide
adequate measures to put people in a position of ‘capability to function’, restates the
inadequacy – as a political goal – to exclusively pursue formal equality of
individuals’ entitlements.

The enjoyment of indigenous rights can be made possible only if effective policy
measures are put in place to make indigenous peoples, individually or collectively,
truly capable of exercising their rights. This proposition leads one to tackle the other
two issues which are indispensable in comprehending the implications deriving by
endorsing a capability–based approach to indigenous rights: (c) what kind of
obligations/duties or processes they generate, and (d) who are the duties–bearers of
such obligations or the key players of these processes. It has been argued that the
formulation of an ‘indigenous goal rights system’ poses four fundamental issues: (a)
what rights are to be included, (b) what form those rights assume, (c) what kind of
obligations and/or duties they generate, and (d) who are the duties–bearers. Whereas
the two previous sections have addressed (a) what rights are to be included, and (b)

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what form those rights assume, issue (c) and (d) will be addressed in the discussion of the role that institutions play in the overall policy process.
5.4 The role of institutions and the enjoyment of the right to self–determination

The understanding of indigenous rights in terms of ‘capability rights’ could mistakenly lead to an underestimation of the role that institutions play in achieving the real fulfilment of indigenous rights entitlements. It has been discussed how ‘capability rights’ entail a relation between the right–holder and a ‘capability’ to which the right–holder is entitled. As a result, the distinction between ‘positive freedoms’ and ‘negative freedoms’ blurs with the two–parties relation which underlies such a distinction. It may therefore seem that institutions, usually playing a key role as duties–bearers of rights entitlements, tend to lose their significance.

On the contrary, institutions maintain a central significance as they play a fundamental role in the enhancement of human capabilities:

Individuals live and operate in a world of institutions. Our opportunities and prospects depend crucially on what institutions exist and how they function. Not only do institutions contribute to our freedoms, their roles can be sensibly evaluated in the light of their contributions to our freedom.\footnote{Sen, Development as Freedom, above n 13, 142.}

Institutions\footnote{Institutions are understood in their broadest sense: see, Deepa Narayan et al, Voices of the Poor: Can Anyone Hear Us?, above n 38, 8: ‘Institutions comprise a wide variety of formal and informal relationships that enhance societal productivity by making people’s interactions and cooperation more predictable and effective…institutions can be understood as complexes of norms and behaviours that persist over time by serving some socially valued purposes [and] providing shared understanding of the cultural meaning of activities’ (citing, Norman Uphoff, Local Institutional Development: an Analytical Sourcebook with Cases (West Hartford, Conn.: Kumarian Press, 1986); William J Chambliss, Power, Politics, and Crime (Boulder, Colo.: Westview Press, 1999).} significantly influence whether and the extent to which peoples strive in their lives. The institutional domain is characterized by the coexistence of a
diverse range of indigenous and non–indigenous institutions, including state and civil society institutions, and international inter–governmental institutions.

Institutions play a crucial role as the apparatus in which decision–making powers reside, as well as primary vehicle for development policy initiatives. Accordingly, indigenous peoples’ chance to gain a satisfactory level of self–determined well–being is inextricably linked with the structures and processes put in place by a wide range of international, national and local institutions. Their importance can be seen in four ways. First, they determine the set of indigenous rights in the form of formal entitlements, by setting the legal and political context within which indigenous peoples are embedded. Second, they determine the set of real opportunities available through policy initiatives and policy measures. Third, institutions are the expression of peoples’ choices. Finally, institutions determine the allocation of resources, that are the means necessary to carry out policy initiatives and policy measures in indigenous affairs.

In brief, institutions exercise a continuous influence on the processes through which the enjoyment of self–determination is deemed to be brought about. Through social, political and economic apparatuses (such as health care systems, education)

43 State and civil society institutions are the two main categories of institutions articulated and analysed in Narayan et al, Voices of the Poor: Can Anyone Hear Us?, above n 38, 8–13, 82–173. It is argued that state institutions comprise national, regional and local governments, the judiciary, the police, as well as health clinics, schools, extension workers, traditional authority, among others. Civil society institutions include non–governmental organizations, religious and ethnic associations, trade unions, caste associations, community–based organizations, neighbourhoods, kinship networks, traditional leaders, sacred sites, etc…

44 Examples of these institutions include the World Bank (WB), the International Monetary Fund (IMF), the Inter–American Development Bank, UN development agencies, such as UNDP and others.

45 See, eg, Tim Rowse, Indigenous Futures; Choice and Development for Aboriginal and Islander Australia (Sydney: University of New South Wales Press, 2002).
institutions play a vital part of the process through which ‘means to achieve’ are transformed into available opportunities, and thereby into the achievement of different levels of quality of life. It is indeed upheld that ‘institutions affect people’s opportunities by establishing and maintaining their access to social, material, and natural resources. They also reinforce capacities for collective action and self-help, while their absence can contribute to immobilization and inertia’.  

The expansion of people’s capabilities to lead the kind of lives they value is in fact interpreted in a ‘two-way relationship’. It is argued that ‘capabilities can be enhanced by public policy, but also that the direction of public policy can be influenced by the effective use of participatory capabilities by the public’.  

It follows that the enjoyment of the indigenous right to self-determination can be understood as a process where different factors interrelate in a complicated web of relations: institutions, means to achieve (such as, resources allocated), exogenous and endogenous factors (social, personal, environmental), opportunities available as well as individual and collective choices. Those factors interrelate with each other in a web of interactions that heavily influence the final outcome, which is the level of quality of life.

The argument is that if the assessment of indigenous peoples’ quality of life is carried out according to appropriate principles and criteria, the level of indigenous peoples’ quality of life may be assumed as the closest proxy to the level of the enjoyment of the right to self-determination. As a result, the level of achievement in

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46 Narayan et al, *Voices of the Poor: Can Anyone Hear Us?*, above n 38, 9.
different areas of development – such as health, education, and economic development – can indicate the extent to which indigenous peoples’ aspirations to self-determination are fulfilled in those particular areas.

Figure 5.2 describes the process through which one can conceptualize the enjoyment of indigenous peoples’ right to self-determination through the lens of the capability framework. The enjoyment of self-determination is imbued within the process of development as it is conceptualized according to the capability conceptual framework. The main determinants of the process are represented and their interrelations enlightened. In particular, it is important to note the centrality that the ‘indigenous capability rights system’ occupies, lying at the intersection between ‘institutions’ and ‘policy’.

Figure 5.2 attempts to underline how the effectiveness of institutions in the implementation of indigenous rights is inextricably linked to the design, implementation and evaluation of adequate policies which must be imbued with the principle of self-determination.
Figure 5.2 The enjoyment of indigenous peoples’ right to self-determination through the lens of the capability framework.
Accordingly, this thesis argues that development policies towards indigenous peoples may play a key role for the effective realization of indigenous self-determination. For this reason, it is imperative to adopt a methodological approach to policies which facilitates the enhancement of indigenous peoples’ freedoms which underlie the ‘indigenous capability rights system’ and the integrated process of indigenous self-determination.

The next chapter will discuss the articulation of a methodological approach to development policies which attempts to be responsive to these issues, in particular to the quest of self-determination voiced by the world’s indigenous peoples.
Chapter 6

The practical level. A methodological approach to development policies for indigenous peoples

The normative framework discussed in the previous chapter functions as the theoretical underpinning for the elaboration of a methodological approach to development policies which actualize the integrated process of indigenous self-determination. The ‘indigenous capability rights system’ represents the core normative frame on which this methodological approach rests.

The approach suggested may be considered as a guide for the engineering of development policies which aim at fulfilling the indigenous right of self-determination and adequately augment indigenous peoples’ freedoms embedded in the ‘indigenous capability rights system’.

This thesis argues that the construction of an adequate approach for the design, implementation and evaluation of indigenous self-determined development policies, requires addressing three main issues:

a) the most appropriate space of evaluation for the assessment of indigenous individual and collective advantage;

b) the value and role of indigenous choices within the policy process;

c) what criteria are to be incorporated in order to operationalise the collective and individual right to self-determination through development policies.
6.1 The space of evaluation: *agency freedom* and *agency achievement*

It has been argued that the level of indigenous peoples’ quality of life can be considered as a proxy for the level of the enjoyment of the right to self-determination, only if the level of the quality of life is assessed against appropriate principles and criteria. In view of that, development policies for indigenous peoples are to be tailored according to criteria and principles which are able to reflect and operationalise the right to self-determination.

It has been discussed how the ‘indigenous capability rights system’ is the set of actual capabilities that should be available to indigenous peoples, that is, the actual freedoms they should enjoy to lead a life founded on self-determination. The enlargement of the overall freedom to choose a self-determining course of life is considered to be the main goal of indigenous development policies.

This proposition triggers a fundamental inquiry: how do we assess whether and the extent to which indigenous peoples enjoy the actual freedoms to make valuable choices and achieve the actual ‘functionings’ incorporated within the system of indigenous capability rights?

First of all, we need to determine the most appropriate space for evaluation. To this purpose, the principle of information pluralism\(^1\) adopted in the capability approach, is embraced as a foundational concept for the evaluation of indigenous peoples’ state of affairs. As a result, the evaluation of indigenous individual advantage and collective arrangements can be carried out in the four spaces:

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\(^1\) It has been discussed in the previous chapter how the capability approach is founded on a methodological rejection of informational monism to moral analysis as the only acceptable approach. The capability perspective is as an ‘information–pluralist approach’ since it focuses on the admissibility and use of different types of information in moral evaluation: see, Amartya K Sen, ‘Well–being, Agency and Freedom: the Dewey Lectures 1984’ (1985) 82(4) *The Journal of Philosophy* 169, 186–205.
identified within the capability framework: ‘well–being achievement’; ‘well–being freedom’; ‘agency achievement’; and ‘agency freedom’.²

It is important to remember that ‘well–being’ and ‘agency’ constitute two different, yet related aspects of a person.³ Whereas the well–being aspect refers to personal well–being related to one’s own life,⁴ the agency aspect refers to a person’s conception of the good in terms of the totality of goals one has reason to pursue, whether or not they include the advancement of personal well–being.⁵ It is important to consider the moral significance of the agency role in people’s personal life since it goes beyond consideration of personal well–being, whose moral foundation is deemed to be ‘informationally extremely restrictive’.⁶

In turn, ‘well–being’ and ‘agency’ can be seen in terms of either achievement or freedom. ‘Well–being achievement’ refers to the ‘wellness of the person’s state of being’⁷ and it is determined in the space of achieved functionings, the actual beings and doings one accomplishes.⁸ By contrast, ‘well–being freedom’ is determined in the space of capabilities, since it relates to ‘a person’s capability to

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³ Sen, Well–being, Agency and Freedom, above n 1, 169, 186; Sen, Capability and Well–Being, above n 2, 35. It is important to specify that even though these concepts have been articulated in the capability approach in individualistic terms, this does not prevent the capability framework from being applied to collective entities. It will be demonstrated the efficacy of the capability framework to address the collective and individual right of indigenous peoples to self–determination.
⁴ Doings and beings related to activities like eating, seeing or reading, or states of existence like being well–nourished, not being ashamed, being free from malaria: see, Sen, Well–being, Agency and Freedom, above n 1, 197.
⁶ Sen, Well–being, Agency and Freedom, above n 1, 186.
⁷ Sen, Capability and Well–Being, above n 2, 36.
⁸ A person’s ‘well–being achievement’ may also be seen as a functionings vector: see, A K Sen, Development as Freedom (Oxford: Oxford University Press, 1999) 75.
have various functioning vectors and to enjoy the corresponding well–being achievements’. ⁹

‘Agency freedom’, instead, involves a broader concept of freedom, as it implies ‘what the person is free to do and achieve in pursuit of whatever goals or values he or she regards as important’. ¹⁰ As a result, ‘agency achievement’ includes one’s success in achieving one’s own overall goals. This is clearly a broader exercise since the space of functionings may turn out to be rather restrictive since a person’s goals can include objectives that go beyond the person’s state of being. ¹¹

Upon due consideration of these different spaces of evaluation, ‘agency freedom’ and ‘agency achievement’ are respectively considered the most appropriate evaluative spaces for the design and evaluation of freedom–centred development policies tailored to fulfill indigenous peoples’ aspirations to self–determination.

This proposition rests on two grounds. First, the concept of agency is more comprehensive than that of ‘well–being’ as it allows us to better comprehend the complexity of indigenous peoples’ individual and collective choices as well as the multifaceted impact that those choices have on the whole policy process and on policy outcomes. It will be illustrated how the adoption of the concept of agency in policy evaluations enables us to incorporate goals or obligations other than personal well–being. The inclusion of these goals or obligations will be of crucial

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⁹ Sen, Well–being, Agency and Freedom, above n 1, 203; Sen, Inequality Re–examined, above n 5, 83.
¹⁰ Sen, Well–being, Agency and Freedom, above n 1, 203.
¹¹ For instance, if a person values the independence or prosperity of his own country, ‘her agency achievement would involve evaluation of states of affairs in the light of those objects, and not merely in the light of the extent to which those achievements would contribute to her own well–being’: Sen, Inequality Re-examined, above 5, 56.
significance for the understanding of the multidimensionality of indigenous capability rights.

Second, focusing on agency requires an acknowledgement of the relationship between the agency and the well-being aspects of people, both in the space of ‘freedom’ and in that of achievement, as well as the impact that such a relationship has on the whole policy process.

It has been previously pointed out that the relationship between the agency and well-being aspects of people relates to the fact that agency and well-being, although different aspects of a person, are not unrelated: they are as separate and distinct as interdependent. In other words, the interrelations and connections between well-being and agency do not make them congruent, or isomorphic in the sense of generating the same orderings. On the contrary, it is possible to identify several and dissimilar interconnections. For example, because a person may value things different from personal well-being, the agency aspect can orientate a person’s choices towards a different direction than personal well-being. On the other hand, the achievement of well-being may be one of the agent’s goals, or it can be the case that the pursuit of non-well-being goals may bring about dissatisfaction and thus a decrease in well-being. Another case to consider is that more freedom (either to have well-being or to achieve one’s agency goals) may lead a person to achieve more in terms of either well-being or agency success. However, it may happen that while freedom increases, achievement decreases, and vice versa.

The distinction between the well-being and agency aspects of a person also explains the possibility of an opposite movement in well-being and freedom.

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13 Ibid 190.
Freedom – both well-being freedom and agency freedom – and well-being do not always move in the same direction. An enhancement of agency freedom may lead to a reduction of well-being freedom, and correspondingly to a decline in well-being achievement.\textsuperscript{14} It may happen that an increase in well-being freedom, when accompanied by other changes that shift one’s choices towards pursuing other non-well-being objectives, corresponds to a decline in well-being achievement. This is the case when the change that causes an increase of well-being freedom can also allow a person to pursue other non-well-being goals more forcefully, possibly leading to a deterioration in the level of well-being one chooses to achieve.\textsuperscript{15} This case will be discussed in more detail in the third part of the thesis, with specific reference to a childbirth and maternal health policy carried out in Australia for Aboriginal and Torres Strait Islander peoples.

The acknowledgment of the interplay between agency and well-being – in their freedom and achievement dimensions – can shed light on adequate methods that can be adopted for policy design and policy evaluation strategies. On the one hand, the different movements in well-being and agency freedom allow us to gain a deeper insight into individual and collective decision-making processes as the entire array of choices is taken into consideration. On the other hand, the different movements in well-being and agency achievement allow us to undertake a realistic assessment of policy outcomes.

\textsuperscript{14} For instance, if a person, whose goal is preventing a crime, happens to be on that crime scene, her agency freedom is increased (she can do something to stop the crime to occur) but her well-being achievement and freedom can decline. The person may get wounded (decline in her own well-being) or the absence of an escape from the scene may lead to a diminished ability to pursue personal well-being (well-being freedom) vis-à-vis the increased ability to stop the crime (agency freedom).

\textsuperscript{15} Sen, \textit{Well-Being, Agency and Freedom}, above n 1; Sen, \textit{Inequality Re-examined}, above n 5.
The selection of ‘agency freedom’ and ‘agency achievement’ as the most appropriate spaces of evaluation, constitutes the first step towards the construction of a methodological approach to self-determined development policies for indigenous peoples. In the next section, I will discuss the significance that indigenous individual and collective choices hold within the whole policy process. In particular, it will be stressed how and the extent to which those valued choices impact upon the design, implementation, evaluation of policies, and most importantly, on policy outcomes.
6.2 The policy process: indigenous valued choices and agency

Indigenous peoples make choices, individually or collectively, and their choices impact ultimately on policy outcomes. As Tim Rowse points out,

It is not necessary to suppose that Indigenous Australians are simply driven by the inexorable logic of ‘modernity’…or by the noble imperatives of ‘tradition’. Indigenous Australians, like other human beings, make choices, and their agency must be taken into account by any policies that are intended to effect changes in the ways they live.\(^\text{16}\)

Indigenous peoples’ choices are a fundamental ingredient for a methodological approach to self-determined development policies. We have seen that the integrated process of self-determination lies at the core of the normative system of indigenous capability rights. The centrality that the right to self-determination has is strictly linked to the freedom of choices that indigenous peoples enjoy. As such, the implementation of the integrated process of self-determination through policy processes poses a fundamental issue: ‘what kinds of subjects of choice are [indigenous peoples] supposed to be?’\(^\text{17}\)

It has been argued that ‘the ‘self’ in ‘self-determination’ [has] three levels of existence: the individual/person/citizen, the family/household and the organized communal agency’.\(^\text{18}\) These three sources of decision-making – the individual, familial and collective – play a fundamental role in determining the final outcomes of development processes.\(^\text{19}\)

\(^{16}\) Tim Rowse, *Indigenous Futures; Choice and Development for Aboriginal and Islander Australia* (Sydney: University of New South Wales Press, 2002) 5.

\(^{17}\) Ibid. In this work the question is specifically referred to Indigenous Australians.

\(^{18}\) Ibid 19. In this thesis I have reduced the three ‘subjects of choice’ to two categories: the ‘individual’ and the ‘collective’, which is clearly a simplification. The ‘individual’ comprises the ‘individual/person/citizen’ and the ‘collective’ incorporates the ‘family/household’ and the ‘organized communal agency’.

\(^{19}\) Rowse exemplifies this point arguing that ‘the outcomes of programs to increase indigenous training, employment and income are affected by choices that indigenous people make. Indigenous choice is not the whole story, but it is of some significance’: ibid 10.
Straddling the indigenous and non–indigenous realm, indigenous peoples – both collectively and individually – are continually engaged in value judgment and decision–making processes resulting in diversified bundle of choices. As a result, a methodological approach to indigenous policy–making cannot be thought of without incorporating such processes and evaluating the implications on policy outcomes. The inclusion of indigenous individual and collective choices within the policy process enables a clearer understanding of the dynamics underlying the whole policy process.

Figure 6.1 describes the policy process as a continuous flux which stems from ‘institutions’ which are the main players in policy decision–making. The policy is thus articulated into the three main stages of policy design, policy implementation, and policy evaluation. The policy outcomes assessed in the evaluation stage will therefore inform the key players in policy decision making – ‘institutions’ – in the design of successive policies.

Individual and collective choices are embedded in the policy process at the implementation stage. Choices are defined as ‘functional’ or ‘dysfunctional’ in relation to the impact that they have on policy outcomes. ‘Functional’ and ‘dysfunctional’ choices are behaviors, attitudes, actions, or states of being which impact upon policy results respectively in a positive or negative manner. The key issue is that the impact on policy outcomes is not as straightforward as it may seem. In fact, ‘functional’ and ‘dysfunctional’ choices can have dissimilar impacts on the well–being and agency aspect of people. The real challenge for policy makers is thus to explore what ‘dysfunctional’ choices are really telling us in terms of policy failures or policy success.

20 It is implied that individual and collective choices are, in turn, influenced by policies measures. The matter of concern is to unravel the value of indigenous choice within development policies.
This intricacy requires us to adopt *agency achievement* as the space of evaluation as to consent to observe both the achievement in the well-being and agency aspects of people. The evaluation stage must therefore include ‘well-being achievement’ and ‘agency achievement’ as spaces of evaluation. A realistic policy evaluation strategy needs to take into consideration movements in the space of ‘well-being achievement’ as well as that of ‘agency achievement’, and explore different impacts that an increase or decrease in ‘agency achievement’ can have on ‘well-being achievement’ and vice versa.

Accordingly, policy outcomes should be benchmarked against indicators of ‘well-being achievement’ and ‘agency achievement’. Focusing only on the level of ‘well-being achievement’ is a partial evaluative exercise; it leaves out the impact that individual and collective choices have on other aspects of people’s lives, all those aspects different from personal well-being. ‘Agency achievement’, being a broader ‘space’ for evaluation which includes ‘well-being achievement’, should be adopted as benchmark for evaluation of development policy for indigenous peoples.

This evaluative exercise would provide a better comprehension of policy results and a solid basis for development strategies in indigenous contexts. It would emphasize the value and impact that value-judgments and decision-making processes have within the policy process. Policy assessments that are blind to value-judgment processes are inadequate to inform policy-makers in the design of adequate policy for indigenous peoples. It can be seen that if policy outcomes do not coincide with what indigenous peoples value, individually or collectivity, policies are destined to fail or to reach a limited level of compliance. ‘Institutions’ engaged in development policies for indigenous peoples should explore policy
alternatives which promote an increased level of ‘well–being achievement’ together with an increased level of ‘agency–achievement’.

If the adoption of ‘agency achievement’ in policy evaluation strategies helps the valuation and assessment of the different impacts that people’s choices can have on policy outcomes, the adoption of ‘agency freedom’ helps understanding, and to a certain extent explains, the origins and motivations behind ‘functional’ and ‘dysfunctional’ choices. Because individual and collective agents may value goals other than personal well–being, policy–decision making strategies need to refer to a space which is conceptually able to encompass those diverse factors. ‘Agency freedom’ provides a conceptually broader space within which it is possible to include the overall set of valuable capabilities related to personal well–being, as well as the set of non–personal well–being factors (such as obligations, duties). Adopting agency freedom in the design of policies may contribute to achieving the main goal of indigenous development policies: the enlargement of the overall freedom to choose a course of life built on the exercise of self–determination.

In summary, ‘agency freedom’ and ‘agency achievement’ broaden the boundaries of the spectrum of policy options for the design, implementation and evaluation of adequate self–determined development policies. ‘Agency freedom’ and ‘agency achievement’ facilitate the inclusion of indigenous valued choices within the whole policy process as to allow a deeper comprehension of their underlying dynamics and impacts on policy outcomes. They are indeed conceptualized as the most relevant reference spaces within which we can assess whether, and the extent to which, indigenous peoples – individually or
collectively – enjoy the actual freedoms to make valued choices and achieve the actual functionings to lead a ‘self–determined’ life.

This line of argumentation will be adopted to explore Australia’s health policy frameworks for Aboriginal and Torres Strait Islander peoples. It will be demonstrated how the adoption of these concepts would provide policy makers with an adequate tool to incorporate the principle of indigenous self–determination in health policy for Indigenous Australians. In particular, the example of childbirth and maternal health policy discussed in chapter 8, will illustrate the significance of adequately understand the meaning and ramifications of the so–called ‘functional’ and dysfunctional’ choices, and the related importance of assessing peoples’ choices against agency achievement and agency freedom.
Figure 6.1 The policy process.
6.3 Criteria to operationalise the collective and individual right to self–
determination through development policies

This thesis suggests that two criteria need to be adopted in order to facilitate
the operationalization of the collective and individual right to self–determination
through development policies:

a) the acknowledgment and integration of indigenous knowledge systems
within the design, implementation and evaluation of development
policies in order to facilitate the expansion of the ‘opportunity aspect’
of freedoms in relation to indigenous rights;

b) the recognition and adoption of the principle of ‘free, prior and
informed consent’ in order to enhance the ‘process aspect’ of freedoms
underlying indigenous rights.

It can be argued that the recognition and integration of indigenous knowledge
systems and the adoption of the principle of ‘free, prior and informed consent’ in
development policies constitute fundamental elements for the implementation of a
freedom-oriented understanding of self–determined development policies.

It will be demonstrated in the following sections how the application of these
two criteria may contribute to the enhancement of the ‘opportunity aspect’ of
freedoms as well as the ‘process aspect’\(^\text{21}\) of the freedoms embedded within
indigenous capability rights. The expansion of these freedoms will therefore
impact upon the fulfillment of the indigenous right to self–determination, and in
turn the enjoyment of self–determination will enhance the different indigenous

\(^{21}\) See chapter 4. For a detailed account of the distinction between the ‘opportunity’ and ‘process’
Rights*, above n 1.
rights. It is argued that the whole and integrated process of indigenous self-
determination should always be considered as the core theoretical underpinning of
development policies.
6.3.1 Acknowledgment and integration of indigenous knowledge systems within the design, implementation and evaluation of development policies

The acknowledgment and integration of indigenous knowledge systems or indigenous knowledge within the design, implementation and evaluation of development policies is considered a fundamental criterion for the fulfillment of indigenous peoples’ right of self-determination through development policies.

It has been argued that conceiving indigenous rights in terms of ‘capability rights’ entails focusing on the ‘opportunity’ aspect of the freedoms underlying those indigenous rights. In other words, it sees indigenous rights primarily in terms of ‘capability to function’, that is in terms of the ‘opportunity to achieve valuable combinations of human functionings’. It has also been discussed that the ‘opportunity’ aspect, according to Sen’s capability framework, is one of the two fundamental aspects which characterize freedom.

Accordingly, the focus on what a person is able to do or to be suggests a practice–dependent conception of freedom, since a person’s freedom is assessed by the extent to which he or she is able to choose valuable alternative combinations of functionings. The act of choice and the spectrum of valued choices are therefore considered fundamental within the whole policy process.

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22 Indigenous knowledge or indigenous knowledge systems are considered to be included within the more general term ‘traditional knowledge’, which refers to the ‘knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles’ as well as ‘indigenous and traditional technologies’ (Convention on Biological Diversity, Articles 8(j) and 18.4).

23 See discussion in chapter 5.

24 Sen, Elements of a Theory of Human Rights, above n 1, 332.

25 See discussion in chapter 4. It has been highlighted that the ‘opportunity’ aspect of freedom focuses on people’s ability to achieve, while the ‘process’ aspect of freedom is concerned with the processes involved, that is the processes through which people’s achievements are pursued.
In the methodological approach described in the previous sections, indigenous individual and collective valuable choices are included within the policy process. The inclusion of individual and collective decision–making processes has shown the complexity of the dynamics which may underline these processes and the different impacts that the deriving choices can have on policy outcomes.

It is suggested that the inclusion of indigenous knowledge systems within the policy process operates at two levels in facilitating the fulfillment of indigenous peoples’ right of self–determination through development policies: a) it allows policy makers to gain a deeper understanding of both the dynamics which underpin decision–making processes and the motivations behind the individual or collective acts of choice; b) it contributes to the enhancement of indigenous peoples’ ‘opportunities’ or ‘capabilities’ to achieve valuable combinations of human functionings. The inclusion of potential ‘beings and doings’ which derive from indigenous knowledge systems makes possible the expansion of the actual freedoms to make the most valued choices and achieve the actual functionings to lead a life built on the exercise of self–determination.

The significance of indigenous knowledge has gained increasing attention over the last years. In particular, the UN Permanent Forum on Indigenous Issues

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(PFII) has considered the preservation, promotion and protection of indigenous traditional knowledge as a major issue of concern since its first session in 2002. In its fifth session the UN Permanent Forum has endorsed the recommendations\textsuperscript{27} of the \textit{Report of the International Technical Workshop on Indigenous Traditional Knowledge}\textsuperscript{28} convened in Panama City in September 2005, pursuant to the Permanent Forum’s recommendation at its fourth session. The significance of indigenous knowledge systems is indeed repeatedly emphasized:\textsuperscript{29}

Indigenous traditional knowledge not only sustains indigenous and local communities in their daily lives, but is also a key element of their identity and self-determination. Such knowledge of indigenous communities, which reflects their holistic worldviews, also contributes to the world’s cultural and biological diversity and is a source of cultural and economic wealth for the communities and for humanity as a whole.\textsuperscript{30}

This thesis urges a serious revaluation of indigenous knowledge systems and their inclusion in development policies. This position is justified on the following line of reasoning.

It is argued that the contemporary world’s system continues to be characterized by a ‘dynamic of difference’ which reproduces a particular kind of...
colonial relationship among different peoples. It is maintained that this particular type of colonialism is reproduced through the devaluation and rejection of knowledge systems, such as indigenous knowledge systems, which differ from those of the dominant sections of the world’s population.

It has been argued that colonialism has from the beginning transformed the plurality of knowledge systems into a hierarchy of knowledge systems. In other words, ‘...the horizontal ordering of diverse but equally valid systems was converted into a vertical ordering of unequal systems, and the epistemological foundations of Western knowledge were imposed on non–western knowledge systems with the result that the latter were invalidated’.31 As a result, indigenous knowledge systems were defined as inferior and unscientific compared to the western systems of knowledge which were therefore accepted as the only scientific and valid systems.32

The thesis argues that this hierarchy of knowledge systems and, as I like to call it – colonialism of the mind – is still present in different contexts, such as at the interface between the indigenous and non–indigenous population of Australia. The analysis carried out in the third part of the thesis on Australia’s health policy for Aboriginal and Torres Strait islander peoples will demonstrate the persistence of this kind of ‘colonialism of the mind’ in the tension between the predominance of the scientific-based medical system and the rejection or omission of Aboriginal traditional medicine and traditional healers.

Development policies are considered one of the major techniques through which the gap between developed and underdeveloped or developing peoples is to

31 Vandana Shiva, ‘Cultural Diversity and the Politics of Knowledge’ in George Sefa Dei, Budd L Hall and Dorothy G Rosenberg (eds), Indigenous Knowledges in Global Contexts; Multiple Reading of Our World (Toronto: University of Toronto Press, 2000) vii.
32 Ibid.
be closed. As a result, this thesis argues that it is imperative to acknowledge and include indigenous knowledge systems within development policies in order to close the gap created by a ‘dynamic of difference’ which reproduces colonial attitudes.

The decolonization of mind is therefore urged to truthfully abandon colonial processes, and stop the deleterious consequences that the devaluation of indigenous knowledge system is producing on indigenous communities. It will be shown how the exclusion of Aboriginal and Torres Strait Islander peoples’ traditional healing system from Australia’s health policy frameworks is negatively impacting on the health status of Indigenous Australians.
6.3.2 Recognition and adoption of the principle of ‘free, prior, and informed consent’

The principle of ‘free, prior and informed consent’ constitutes a cornerstone principle for the protection and fulfilment of indigenous rights. The building of the consensus on ‘free, prior and informed consent’ among indigenous peoples has been crucial in the standard–setting process leading to the adoption of the legal standards within the UN Declaration on the Rights of Indigenous Peoples. The principle has been endorsed by the Human Rights Council through the adoption of article 19 of the UN Declaration, which provides that

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

This article primarily regulates the application of the principle of ‘free, prior and informed consent’ within the context of states’ domestic jurisdictions for cases where ‘legislative or administrative measures’ may impact upon indigenous peoples. The significance of the principle of ‘free, prior and informed consent’, however, extends beyond national boundaries, as it is deemed to constitute a fundamental element for the implementation of development policies by intergovernmental institutions, UN agencies and funds, international development agencies, and international financial institutions, that take into consideration and respect indigenous rights.33

33 Report of the International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance, presented to the fifth session of the UN Permanent Forum on Indigenous Issues, New York, 15–26 May 2006, UN Doc E/C.19/2006/7, paras 17,29,43,49, and 61 in which it is recommended that ‘In order to gain acceptance and legitimacy such processes [of dialogue and discussion directly with the communities concerned]
The UN Permanent Forum on Indigenous Issues has been advocating the recognition and implementation of ‘free, prior and informed consent’ since its first session, perceiving this principle as a major methodological challenge.\(^{34}\) In 2004, the Economic and Social Council, following the recommendation of the UN Permanent Forum at its third session, set out in its decision 2004/287 of 24 July 2004, a three–day international workshop on methodologies regarding free, prior and informed consent in relation to indigenous peoples.

The *International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*\(^{35}\) was held in January 2005 and should: involve the range of development partners on the ground; have the support of the Government; adhere to cultural imperatives for procedure; employ participatory methodologies and new technology; acknowledge the importance of women’s participation; be conducted in indigenous languages; and be in accordance with indigenous notions of time and space. The principle of free, prior and informed consent is also essential for indigenous peoples’ participation’; Indian Law Research Center and VIVAT International, *Report on the Millennium Development Goals and Indigenous Peoples: Redefining the Goals*, submitted to the Fifth Session of the UN Permanent Forum on Indigenous Issues, New York, 15–26 May 2006, UN Doc E/C.19/2006/5/Add.1, paras. 7,13; *Statement of the Forest Peoples Programme, Foundation for Aboriginal and Islander Research Action Aboriginal Corporation, Na Koa Ikaika o Ka Lahui Hawaii, Saami Council and Tebtebba Foundation*, submitted to the Fifth Session of the UN Permanent Forum on Indigenous Issues, New York, 15–26 May 2006, UN Doc E/C.19/2006/11, paras. 8,9;

\(^{34}\) UN Permanent Forum on Indigenous Issues, *Report on the Fourth Session, 15-26 May 2005*, UN Doc E/C.19/2005/, paras. 21,25,69,137. In para. 69 the UN Permanent Forum recommends ‘that Member States, the intergovernmental system, international financial institutions and the private sector respect and adhere to the principle of free, prior and informed consent in all matters affecting indigenous peoples’; UN Permanent Forum on Indigenous Issues, *Report on the Fifth Session, 15–26 May 2006*, UN Doc E/C.19/2006/11, paras. 11,35,36,88. In particular, para. 11 states that: ‘The Permanent Forum reaffirms and reiterates that self-determination, free, prior and informed consent and accountability form the basis of, and prerequisite for, any relationship that can be called a true partnership for development, and urges all States, indigenous peoples, United Nations bodies, international development agencies, corporations and the private sector, as well as civil society, to uphold these vital principles’;

reported its findings and recommendations to the fifth session of the UN Permanent Forum.\textsuperscript{36} The \textit{Report} provides a shared understanding of the principle of ‘free, prior and informed consent’,\textsuperscript{37} discusses the policy frameworks relevant to the principle at the inter-agency level — such as the Common Country Assessment and United Nations Development Assistance Framework (UNDAF), the Poverty Reduction Strategy Papers (PRSPs) and the Millennium Development Goals (MDGs)\textsuperscript{38} — analyses the methodologies for the application of the principle,\textsuperscript{39} draws lessons\textsuperscript{40} and identifies challenges in the application of the principle.\textsuperscript{41}

The \textit{Report} provides a detailed account of the meaning of the principle of ‘free, prior and informed consent’. It is important to dwell on the major features which have been identified in the shared understanding of the principle among the participants.\textsuperscript{42}

\textit{Free} is understood as implying ‘no coercion, intimidation or manipulation’.\textit{Prior} indicates that ‘consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes’.\textsuperscript{43} The term \textit{informed} requires that the information provided need to include the following elements:

\begin{itemize}
\item UNICEF,
\item United Nations Development Fund for Women (UNIFEM),
\item United Nations Working Group on Indigenous Populations (WGIP),
\item World Health Organization (WHO),
\item World Intellectual Property Organization (WIPO) and World Bank (WB).
\end{itemize}

\textsuperscript{37} UN Doc E/C.19/2005/3, paras. 46–50.
\textsuperscript{38} UN Doc E/C.19/2005/3, paras. 23–29.
\textsuperscript{39} UN Doc E/C.19/2005/3, paras. 42, 48, 68.
\textsuperscript{40} UN Doc E/C.19/2005/3, paras. 34–39.
\textsuperscript{41} UN Doc E/C.19/2005/3, paras. 20, 42.
\textsuperscript{42} UN Doc E/C.19/2005/3, paras. 46.
\textsuperscript{43} UN Doc E/C.19/2005/3, paras. 46.
a) the nature, size, pace, reversibility and scope of any proposed project or activity;

b) the reason(s) for or purpose(s) of the project and/or activity;

c) the duration of the above;

d) the locality of areas that will be affected;

e) a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;

f) personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);

g) procedures that the project may entail.44

In describing the meaning of consent, the Report identifies ‘consultation’ and ‘participation’ as fundamental elements for a consent–focused process. ‘Mutual respect’, ‘good faith’, ‘full and equitable participation’ are required in the consultation process. Moreover, participation of indigenous peoples should include freely chosen representatives as well as customary or other institutions. Importantly, it is specified that the consultation and participation process should include the ‘option of withholding consent’.45

It is also specified that the process of ‘free, prior and informed consent’ should be undertaken in a timely fashion, considering indigenous peoples’ modes of decision–making process; that representative institutions authorized to express consent on behalf of the indigenous peoples affected need to be clearly identified; that the information should be understandable and accessible to the people involved.

Finally, mechanisms and procedures are required to verify that a true and fair consent process has been carried out. Monitoring mechanisms and procedures of

44 UN Doc E/C.19/2005/3, para. 46.
45 UN Doc E/C.19/2005/3, para. 46.
redress are also deemed necessary to ensure that the ‘equal opportunity’ of all parties involved has been respected, and that consent would be withdrawn in case the core elements of ‘free, prior and informed consent’ have not be respected.46

It can be argued that the principle of free, prior and informed consent has a particular relevance in the context of the analysis of the indigenous right to self-determination and its fulfilment through development policies.

It has been discussed in chapter 4 how the ‘opportunity’ aspect and the ‘process’ aspect of freedom are considered as equally essential within the capability framework. While the ‘opportunity’ aspect of freedom focuses on people’s ability to achieve, the ‘process’ aspect of freedom is concerned with the processes involved, that is the processes through which people’s achievements are pursued. In other words, the ‘process aspect’ of freedom concerns the freedom involved in the processes themselves.

Upon due consideration of these aspects and their significance, this thesis argues that the principle of ‘free, prior and informed consent’ crucially operates at the level of the freedom involved in the processes through which indigenous peoples participate in the design and implementation of development policies which impact upon their lives. It is suggested that the principle of ‘free, prior and informed consent’ plays a key role in enhancing indigenous peoples’ freedom to bring about their valued goals and objectives.

It is indeed maintained that the processes through which indigenous peoples, individually or collectively, pursue their valued goals and objectives, are fundamentally important for the fulfilment of their right to self-determination. The ‘process’ aspect of freedom, indeed, is deemed to have a significant impact

46 UN Doc E/C.19/2005/3, para. 46.
on the ‘opportunity’ aspect of freedom, so that the ability to achieve self-
determination through development policies is inextricably connected to the
freedom to consent to policies which impact upon indigenous peoples’ freedom to
enjoy self–determination in its multifaceted dimensions.

In this context, it is important to highlight the instrumental value that
processes of participation and consultation have vis–à–vis ‘free, prior and
informed consent’ of the indigenous peoples concerned in specific development
initiatives.

The participation and consultation of indigenous peoples in the formulation,
implementation and evaluation of development policies is strongly recommended
as a fundamental element to be guaranteed to indigenous peoples within the whole
policy process. Participation and consultation though, are to be considered as the
mechanisms through which the free, prior and informed consent of indigenous
peoples can be determined. Article 20 of the UN Draft reinforces this position, as
it clearly states that States are required to engage in a process of consultation and
cooperation in good faith with indigenous peoples ‘in order to obtain their free,
prior and informed consent’.

The far–reaching breadth of free, prior and informed consent vis–à–vis the
requirement of participation and consultation within the policy process, can be

UN Doc E/C.19/2005/, paras. 21, 25; UN Permanent Forum on Indigenous Issues, Report on the
Fifth Session, 15–26 May 2006, UN Doc E/C.19/2006/11, paras. 36,27. Para. 27 clearly states that
‘The United Nations is encouraged to support the full and effective participation of indigenous
peoples in efforts to achieve the Millennium Development goals at the national and local levels’;
Report of the International Expert Group Meeting on the Millennium Development Goals,
Indigenous Participation and Good Governance, UN Doc E/C.19/2006/7, paras. 10–39; Paul L H
A Chartrand, Contribution for the Workshop on the MDGs, Indigenous Participation and Good
Governance, UN Doc PFII/2006/WS.3/4 (2006); Report of the International Workshop on
Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, UN Doc
E/C.19/2005/3, paras. 56–60; Statement of the Forest Peoples Programme, Foundation for
Aboriginal and Islander Research Action Aboriginal Corporation, Na Koa Ikaika o Ka Lahui
grasped if one considers the debate arisen from the claims to adopt the principle of free, prior and informed consent within international financial institutions.

International financial institutions\(^48\) play a key role in the world’s development agenda, as they provide and allocate a significant proportion of funding for development projects and sectoral loans, as well as affecting the formulation of national structural adjustment programs, fiscal and macroeconomic policies, trade and investment policies, which in turn directly or indirectly, affect indigenous peoples. In the context of the policy revisions on indigenous peoples that some international financial institutions are undertaking,\(^49\) the principle of free, prior and informed consent has sparked heated debates.

The World Bank, for instance, has been requested to consider the *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*\(^50\) as a guide for the revision and implementation of its policies concerning indigenous peoples.\(^51\)

At the fourth session of the Permanent Forum, concerns were raised in regard to the World Bank’s revised Policy on Indigenous Peoples endorsed by the Board of Executive Directors on the 10th of May 2005. Operational Policy and Bank

\(^{48}\) International financial institutions include multilateral bodies, such as the World Bank Group (WB), the International Monetary Fund (IMF), regional development banks, UN programs and funds, bilateral donor agencies, private commercial banks and national export credit agencies, see *Statement of the Forest Peoples Programme, Foundation for Aboriginal and Islander Research Action Aboriginal Corporation, Na Koa Ikaika o Ka Lahui Hawaii, Saami Council and Tebtebba Foundation*, UN Doc E/C.19/2006/5, para. 3.

\(^{49}\) International financial institutions which have revised or are in the process of revising their policies comprise the World Bank, the Asian and Inter–American Development Banks, and the International Finance Corporation (IFC). Institutions without a formal operational policy on indigenous peoples include the International Monetary Fund, the Global Environment Facility, the African Development Bank, many commercial banks, most bilateral donors and export credit agencies.

\(^{50}\) UN Doc E/C.19/2005/3.

Procedure 4.10 replace OD 4.20 and apply to all projects for which a Concept Review takes place on or after July 1, 2005.

Concerns were raised by representatives of indigenous organizations and members of the Permanent Forum in regard to the requirement of a process of ‘free, prior and informed consultation’ rather than a process of ‘free, prior and informed consent’ of the affected indigenous people. Section 1 of OP 4.10 states that:

…For all projects that are proposed for Bank financing that affect Indigenous Peoples, the bank requires the borrower to engage in a process of free, prior and informed consultation. The Bank will provide project financing only where free, prior and informed consultation results in broad community support to the project by the affected Indigenous Peoples. Such Bank–financed projects include measures to: (a) avoid potentially adverse effects on the Indigenous Peoples’ communities; or (b) when avoidance is not feasible, minimize, mitigate, or compensate for such effects…

Indigenous representatives raised two main issues in relation to this revised policy. First, that the requirement of a ‘free, prior and informed consultation process’ reduces indigenous peoples’ rights to a mere technical procedure. The policy requires the World Bank to ascertain that the borrower has gained the ‘broad support from representatives of major sections of the community’ with no guarantees as to what information will be disclosed or when and how such verification will be conducted, or by whom and how the collective decision–making processes and structures of the affected indigenous people will be recognized and respected.

Second, it has been emphasized that the new policy shifts from a philosophy of mitigating impact, to ‘an increased awareness of the need to proactively promote Indigenous Peoples participation in development-related activities and to protect Indigenous Peoples’ rights to their lands, resources, identities and culture’. However, OP 4.10 still prescribes that when avoidance of potentially adverse effects on indigenous communities is not feasible, measures will be adopted to ‘minimize, mitigate, or compensate for such effect…’. Indigenous representatives call on the World Bank to ‘prohibit under any and all circumstances the forced relocation of Indigenous Peoples and their communities in the furtherance of World Bank projects’.

While the debate continues, the Permanent Forum has called on the World Bank to ‘further explore inter-agency mechanisms to support the inclusion of indigenous peoples in national poverty reduction strategies’ and ‘to ensure the effectiveness of their mechanisms to protect the rights of indigenous peoples’.

The recognition and adoption of the principle of free, prior and informed consent in development policy processes constitutes a fundamental criterion that needs to be considered to facilitate the fulfillment of the collective and individual right to self-determination. The principle operates as a valid mechanism to put

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57 The significance of the incorporation of free, prior and informed consent in the policies, especially within international financial institutions, is reinforced by the recommendation submitted to the Permanent Forum to organize a workshop to elaborate indicators on free, prior
in place freedom–centred development policies and help promote the enjoyment of the integrated process of self–determination. The principle of ‘free prior and informed consent’ allows us to guide the process of decision–making and incorporate individual and collective choices within the policy process.\textsuperscript{58}

It is, however, important to highlight that the exercise of ‘free, prior and informed consent’ by indigenous peoples in decisions, matters or projects which impact upon them, must be balanced with the respect of the rights and freedoms of other peoples who may be differently involved in the questions at hand. It can be argued that the principle expressed in article 45 of the UN Declaration concerning limitations to the exercise of the indigenous rights set out in the UN Declaration, can be extended to the application of the principle of ‘free, prior and informed consent’:

\ldots The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, in accordance with international human rights obligations. Any such limitations shall be non–discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

The limitations on indigenous peoples’ free, prior and informed consent must indeed be determined in accordance with international human rights law.

\textsuperscript{58} It is required that development projects ‘effectively uphold indigenous peoples’ rights and strengthen the development choices of indigenous peoples’: Ibid.
Conclusion

Part 2 of this thesis has analysed indigenous peoples’ right to self-determination by exploring the interface between indigenous rights and development policy. Amartya Sen’s capability approach has been adopted as a normative framework of thought to articulate a normative framework for indigenous rights that functions as the fundamental underpinning of the proposed methodological approach to development policies for indigenous peoples.

Whereas chapter 4 has provided a general overview of the capability approach and described its foundational concepts, chapter 5 and 6 have adopted key conceptual categories of the capability approach to construct, respectively, an indigenous rights-based normative framework specific to indigenous peoples and a methodological approach to development policy for indigenous peoples.

It becomes evident that this thesis promotes a value-informed pragmatism in indigenous policy-making which is based upon an indigenous capability rights-based approach to development. In summary, a methodological approach to development policies for indigenous peoples may consist of the following elements:

a) operationalization of the ‘indigenous capability rights system’ by international, national and local institutions through the enlargement of indigenous peoples’ substantive freedoms or real opportunities to lead a life they have reason to value;

b) adoption of agency freedom as a reference ‘space’ for the design of policy strategies;
c) adoption of agency achievement as reference ‘space’ for policy evaluation strategies;

d) inclusion of individual and collective value–judgment processes within the policy process;

e) analysis of the impacts that individual and collective choices have on policy outcomes;

f) policy outcomes benchmarked against the level of well–being achievement as well as the level of agency achievement;

g) recognition and inclusion of indigenous knowledge in the design, implementation and evaluation of development policies to facilitate the expansion of the ‘opportunity aspect’ of freedoms in relation to indigenous rights;

h) adoption of the principle of ‘free, prior and informed consent’ to enhance the ‘process aspect’ of freedoms underlying indigenous rights.
PART 3

The indigenous capability right to health

*Always was always will be*

Jackie Huggins
Chapter 7
Development and the health challenge for indigenous peoples

The second part of the thesis has elaborated a normative framework to interpret indigenous peoples’ right to self-determination and a methodological approach to development policies aimed at fulfilling the indigenous right to self-determination.

The application of the capability approach’s theoretical framework to interpret indigenous peoples’ right to self-determination has demonstrated that the level of indigenous peoples’ quality of life may be assumed as the closest proxy to the level of the enjoyment of the right to self-determination, if appropriate principles and criteria are applied to determine the level of indigenous peoples’ quality of life.

Accordingly, a normative framework specific to indigenous rights and a methodological approach to development policy have been constructed upon principles and criteria whose adoption, it is argued, would enhance the capability for indigenous individuals and communities to enjoy the right to self-determination.

This thesis argues that the proposed normative and practical frameworks have the potential to complement the international legal domain in addressing and advancing indigenous aspirations to self-determination. These normative and procedural frameworks 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.

The thesis argues 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.

Moreover, the integration of the principle of indigenous self–determination into development policies is considered as a potential vehicle to put an end to the ‘civilizing mission’ which has characterized the development of international law through the reproduction of a differently coloured ‘dynamic of difference’.

The third part of this thesis aims at demonstrating how the adoption of the proposed normative and practical framework would facilitate the decolonization of development policies through the integration of the principle of indigenous self–determination. This principle has been embedded within the normative and practical frameworks through the adoption of foundational concepts drawn from Sen’s capability approach.

This line of argumentation will be discussed in this part of the thesis by eliciting one of the indigenous capability rights included in the ‘indigenous capability rights system’: the right to health. Chapter 7 will provide a general overview of the intersection between indigenous rights and development policies in order to underline the current engagement of indigenous peoples with the world community’s development agenda.
This analysis will focus on the health challenge of the world’s indigenous peoples and, in particular, on the health status of Aboriginal and Torres Strait Islander peoples of Australia. Australia’s health policy will be questioned as to its adequacy to address Indigenous Australians’ health status and instil the principle of indigenous self-determination. In summary, this part of the thesis will explore viable avenues to conceptualize and implement health policy frameworks which aim to fulfil indigenous aspirations to self-determination.
7.1 The world community’s development agenda and the rights of indigenous peoples

Development policy is indicated as a potential pathway towards self-determination for indigenous peoples. The construction of a methodological approach to development policies has been anchored on a rights-based conceptual framework with indigenous individual and collective rights being its foundational constituents.

This line of argument is concordant with the human rights approach to development which has been articulated and broadly accepted within the international community over recent years.\(^1\) It is indeed outlined that ‘[t]he promotion of human development and the fulfilment of human rights share, in many ways, a common motivation, and reflect a fundamental commitment to promoting the freedom, well-being and dignity of individuals in all societies.’\(^2\)

The UN and its development agencies, funds and programs, as well as international development agencies, multilateral development banks, and many bilateral donors have been engaging with the concept of human–rights based

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development and have made rights–based development programming a priority over the last years.\(^3\)

A rights–based definition of development is set out in the Declaration on the Right to Development.\(^4\) It clearly identifies development as an integrated and comprehensive economic, social, cultural and political process grounded on the respect and implementation of international human rights standards.\(^5\) As the UN Secretary–General highlights,

A human rights–based approach ensures that human standards, as established in international law, are applied as a criterion for policy orientation and the solution of problems in specific areas. It introduces a normative basis, which is obligatory for State Parties, and thus requires a legislative response at the State level. A rights approach implies that beneficiaries of policies and activities are active subjects and claim holders


\(^4\) ‘The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized’ Article 1(1), UN General Assembly resolution 41/128 of 4 December 1986.

\(^5\) United Nations, The Human Rights–based Approach to Development Towards a Common Understanding Among the UN Agencies (New York: United Nations, 2003) 2: ‘in a human rights based approach human rights determine the relationship between individuals and groups with valid claims (right–holders) and State and non–state actors with correlative obligations (duty–bearers). It identifies right–holders (and their entitlements) and corresponding duty–bearers (and their obligations) and works towards strengthening the capacities of rights–holders to make their claims, and of duty–bearers to meet their obligations’. 247
and stipulates duties or obligations for those against whom such claims can be held (duty bearers).  

The significance of a rights–based approach to development has been strongly reinforced and voiced by indigenous representatives. As the chairperson of the UN Permanent Forum on Indigenous Issues stated, ‘for indigenous peoples, it is not feasible to talk of development without talking about respect for their basic collective and individual human rights’, such as their ‘basic rights to lands and resources, culture and identity, and self–determination’. 

The intersection between indigenous rights and development policy has indeed become a core issue in the ongoing debate between indigenous peoples, their organizations and representatives, and UN development agencies, intergovernmental bodies, non–governmental organizations and multilateral development banks.

This dialogue has catalyzed discussion by the UN Permanent Forum on Indigenous Issues, which has taken a leading role in bridging the UN and international community’s development agenda and the development agenda of indigenous peoples. The latest engagement of the Permanent Forum on strategies to

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achieve the Millennium Declaration Goals (MDGs), signals the increasing participation of indigenous peoples to the renewed commitment by the international community to achieve time-bound development goals and targets.

In light of the denounced absence of indigenous peoples and indigenous issues in the conceptualization of the MDGs and in their respective implementation and evaluation strategies, the UN Permanent Forum on Indigenous Issues warns against the potential negative impacts that the achievement of those goals and targets may have on indigenous peoples’ lives and survival. Because the articulation of the Goals, targets and indicators did not include the consultation with or participation of

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11 The Millennium Declaration Goals reflect an unprecedented commitment by the world’s leaders (the Millennium Declaration was signed by 189 countries) to tackle the most basic forms of injustice and inequality in our world: poverty, illiteracy and ill-health.


13 Permanent Forum on Indigenous Issues, Report on the Fourth Session, 16–27 May 2005, UN Doc E/C.19/2005/9, para. 5: ‘some Millennium Development Goals processes may lead to accelerated loss of lands and natural resources for indigenous peoples, and thus of their means of subsistence and their displacement, as well as to accelerated assimilation and erosion of their culture’; See also, Victoria Tauli Corpuz, Indigenous Peoples and the Millennium Development Goals, (2005) 7(1) Indigenous Perspectives 8, at 9: ‘Indigenous peoples are invisible in the MDGs. A review of MDGs in some countries shows that they are not even mentioned or referred to’; Joji Cariño, ‘Indigenous Peoples, Human Rights and Poverty’ (2005) 7(1) Indigenous Perspectives 28, 29: ‘[there is] no indication at all about how the [MDGs] relate to indigenous peoples… For example, water and energy development through the building of large dams for water and energy, could flood our lands or result in involuntary displacement, unless rights–based participatory approaches, including respect for our right to free, prior and informed consent is secured as part of the development process’; Indigenous Peoples Statement to UN CSD High Level Segment: ‘Indigenous peoples fear that culturally insensitive implementation of the Johannesburg Plan of Implementation, Millennium Development Goals and country–wide Poverty Reduction Strategies could lead to further impoverishment and marginalization’.

249
indigenous peoples, many criteria essential for the well-being of indigenous peoples have not been captured.

In the effort to articulate a coordinated agenda between the dominant development paradigm and indigenous perspectives on development, broad consensus has been expressed on the essential need to ground the MDGs on a rights-based approach to development. States, the United Nations system, other intergovernmental organizations, international financial institutions are called on to operationalise the human rights-based approach to development by framing the MDGs, poverty reduction strategies and programs within such a human rights focused perspective.

In the effort to make the MDGs relevant to indigenous peoples, the ‘indigenous capability rights system’ – conceived of as the integrated process of indigenous rights imbued with the principle of self-determination – may offer a valuable conceptual

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14 UN Permanent Forum on Indigenous Issues, Report on its Fourth Session, UN Doc E/C.19/2005/9, para. 15: ‘…poverty indicators based on indigenous peoples’ own perception of their situation and experiences should be developed jointly with indigenous peoples’.
framework to inform adequate policy processes free from the spectrum of a ‘development aggression’.  

Destruction or loss of ancestral territories and resources, displacement, ecosystem degradation, disregard for indigenous political, economic and socio–cultural systems and institutions, denigration of indigenous worldviews and values are among the traumatic experiences suffered from development projects, policies and programmes. ‘Development aggression’, indeed, ‘refers to the imposition of so-called development projects and policies without the free, prior and informed consent of those affected, under the rubric of modernization or nation–building’.  

There is an urgent need to integrate indigenous people worldviews, perspectives and practice in development–related issues. Alternatives to the ‘development aggression’ model are proposed: the development of more holistic strategies, programmes and projects; establishing indigenous people–sensitive indicators; holding dialogues or workshops/seminars on how to implement the development of indigenous peoples with respect for their identity and culture; data disaggregation;  

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20 These phenomena are usually associated with large-scale commercial extraction of minerals, oil and gas, building of highways, hydroelectric dams, jogging, industrial forest plantations, chemically intensive agriculture. See, eg, Roger Plan, Issues in Indigenous Poverty and Development (Washington, D.C.: Inter–American Development Bank, 1998) 4: ‘…the situation appears to have been particularly serious in those countries where the development of cash crops for export (such as coffee) led to demands for indigenous labour as well as to pressure on their lands. In Guatemala and parts of Mexico, where the coffee economy grew particularly rapidly, indigenous peoples lost much of their communal lands…’  


ensuring the effective participation of indigenous peoples in various processes and activities of states and intergovernmental bodies; operationalization of the human rights–based approach to development; analysis and implementation of the MDGs from the viewpoint of indigenous peoples; and setting up and replicating model projects and good practices.23

The respect of indigenous perspectives on development, indigenous identity and indigenous rights24 are essential not only for the achievement of the Millennium Development Goals, but are also fundamental to indigenous–non indigenous peoples relationships at the international and national level.

23 UN Doc E/C.19/2006/9, para. 12.
24 See, Report of the Meeting on Indigenous Peoples and Indicators of Well-being, Ottawa, 22–23 March 2006, presented to the Fifth Session of the UN Permanent Forum on Indigenous Issues, New York, 15–26 May 2006, UN Doc E/C.19/2006/CPR.3, paras. 22–33, in which it is stated that indigenous rights, identity, land, way of living, and indigenous perspective on development are essential to formulate indicators of development able to capture indigenous view of well–being, as ‘the general approach of states to the development of indicators and measurement is a deficit model to indigenous socio–economic need and development’.
7.2 The health challenge of the world’s indigenous peoples

‘It is my aspiration that health will finally be seen not as a blessing to be wished for, but as a human right to be fought for’

UN Secretary–General, Kofi Annan

The urgency to acknowledge indigenous concepts of development and integrate a human rights approach to development, acquires particular significance in the area of health. Health constitutes a major challenge within the world community’s development agenda. Health–related MDGs, targets and indicators are indeed a high priority issue in the worldwide development enterprise. Health is indeed at the core of the MDGs: it is not only represented in three of the eight goals, but it also contributes significantly to the achievement of all other goals, particularly those relating to the eradication of extreme poverty and hunger, education, and sex equality.25

Figure 7.1 shows the predominance of health related issues within the global agenda agreed upon by the international community at the 2000 World Summit. It can be seen that the shaded areas in figure 7.1 refer to health–related issues.

Figure 7.1 Health in the Millennium Development Goals.

<table>
<thead>
<tr>
<th>Health Targets</th>
<th>Health Indicators</th>
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<tbody>
<tr>
<td><strong>Goal 1: Eradicate extreme poverty and hunger</strong></td>
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<tr>
<td><strong>Target 1</strong> Halve, between 1990 and 2010, the proportion of people whose</td>
<td>4. Prevalence of underweight children under five years of age</td>
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<td>income is less than one dollar a day</td>
<td>5. Proportion of population below minimum level of dietary energy consumption</td>
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<tr>
<td><strong>Target 2</strong> Halve, between 1990 and 2015, the proportion of people who</td>
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<tr>
<td>suffer from hunger</td>
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<tr>
<td><strong>Goal 2: Achieve universal primary education</strong></td>
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<tr>
<td><strong>Target 3</strong> Ensure that, by children everywhere, boys and girls, will be</td>
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<tr>
<td>able to complete a full course of primary schooling</td>
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<td><strong>Goal 3: Promote gender equality and empower women</strong></td>
<td></td>
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<tr>
<td><strong>Target 4</strong> Eliminate gender disparity in primary and secondary education,</td>
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<td>preferably by 2005, and at all levels of education no later than 2015</td>
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<td><strong>Goal 4: Reduce child mortality</strong></td>
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<tr>
<td><strong>Target 5</strong> Reduce by two-thirds, between 1990 and 2015, the under-five</td>
<td>13. Under-five mortality rate</td>
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<td>mortality rate</td>
<td>14. Infant mortality rate</td>
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<td></td>
<td>15. Proportion of one-year-old children immunized against measles</td>
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<td><strong>Goal 5: Improve maternal health</strong></td>
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<tr>
<td><strong>Target 6</strong> Reduce by three-quarters, between 1990 and 2015, the maternal</td>
<td>16. Maternal mortality ratio</td>
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<tr>
<td>mortality ratio</td>
<td>17. Proportion of births attended by skilled health personnel</td>
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<td></td>
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<tr>
<td><strong>Goal 6: Combat HIV/AIDS, malaria and other diseases</strong></td>
<td></td>
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<tr>
<td><strong>Target 7</strong> Have halted by 2015 and begun to reverse the spread of HIV/AIDS</td>
<td>18. HIV prevalence among pregnant women aged 15-24 years</td>
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<td></td>
<td>19. Condom use rate of contraceptive prevalence rate</td>
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<td></td>
<td>20. Ratio of school attendance of orphans to school attendance of non-orphans</td>
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<td></td>
<td>aged 10-14 years</td>
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<tr>
<td><strong>Target 8</strong> Have halted by 2015 and begun to reverse the incidence of malaria</td>
<td>21. Prevalence and death rates associated with malaria</td>
</tr>
<tr>
<td>and other major diseases</td>
<td>22. Proportion of population in malaria-risk areas using effective malaria</td>
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<td></td>
<td>prevention and treatment measures</td>
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<td></td>
<td>23. Prevalence and death rates associated with tuberculosis</td>
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<td></td>
<td>24. Proportion of tuberculosis cases detected and cured under DOTS (Directly</td>
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<td></td>
<td>Observed Treatment Short-course)</td>
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<td><strong>Goal 7: Ensure environmental sustainability</strong></td>
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<td><strong>Target 9</strong> Integrate the principles of sustainable development into</td>
<td>29. Proportion of population using solid fuels</td>
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<td>country policies and programmes and reverse the loss of environmental</td>
<td></td>
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<tr>
<td>resources</td>
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<td><strong>Target 10</strong> Halve by 2015 the proportion of people without sustainable</td>
<td>30. Proportion of population with sustainable access to an improved water source,</td>
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<tr>
<td>access to safe drinking-water and sanitation</td>
<td>urban and rural</td>
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<tr>
<td><strong>Target 11</strong> By 2020 to have achieved a significant improvement in the lives</td>
<td>31. Proportion of population with access to improved sanitation, urban and rural</td>
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<td>of at least 100 million slum dwellers</td>
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<td><strong>Goal 8: Develop a global partnership for development</strong></td>
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<tr>
<td><strong>Target 12</strong> Develop further an open, rule-based, predictable, non-</td>
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<td>discriminatory trading and financial system</td>
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<td><strong>Target 13</strong> Address the special needs of the least developed countries</td>
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<td><strong>Target 14</strong> Address the special needs of landlocked countries and small</td>
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<td>island developing states</td>
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<td><strong>Target 15</strong> Deal comprehensively with the debt problems of developing</td>
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<td>countries through national and international measures in order to make debt</td>
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<tr>
<td>sustainable in the long term</td>
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<tr>
<td><strong>Target 16</strong> In cooperation with developing countries, develop and implement</td>
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<td>strategies for decent and productive work for youth</td>
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<tr>
<td><strong>Target 17</strong> In cooperation with pharmaceutical companies, provide access to</td>
<td>45. Proportion of population with access to affordable essential drugs on a</td>
</tr>
<tr>
<td>affordable essential drugs in developing countries</td>
<td>sustainable basis</td>
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<tr>
<td><strong>Target 18</strong> In cooperation with the private sector, make available the</td>
<td></td>
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<tr>
<td>benefits of the new technologies, especially information and communications</td>
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</tbody>
</table>

Child mortality, maternal health, HIV/AIDS, malaria and other diseases\textsuperscript{26} are among the most arduous challenges the international community is fighting against.

The 2005 World Health Organization’s report on progress towards health–related MDGs and targets, indicates that ‘we are slightly more than halfway towards the MDG target date of 2015 (targets are set against 1990 baselines)’ and that ‘health outcomes are unacceptably low across much of the developing world…the Sub–Saharan Africa is worst affected, but there are extreme and acute pockets of ill–health in all regions’.\textsuperscript{27} Evidence shows that none of the poorest regions of the developing world is on track to meet the child mortality target, whereas declines in maternal mortality rates have been limited to countries with lower levels of mortality. In brief, data suggests that if trends observed so far continue, the majority of poor countries will not meet the health MDGs.\textsuperscript{28}

Progress towards the MDGs is assessed for the world as a whole and against three different country groupings: ‘developing’ regions, transition economies of the Commonwealth of Independent States (CIS) in Asia and Europe, and the ‘developed’ regions.\textsuperscript{29} It is evident that serious questions arise as to the evaluation of segments of

\textsuperscript{26} Millennium Development Goal 4: Reduce child mortality. Target 5: Reduce by two thirds, between 1990 and 2015, the under–five mortality rate. Millennium Development Goal 5: Improve maternal health. Target 6: Reduce by three–quarters, between 1990 and 2015, the maternal mortality ratio. Millennium Development Goal 6: Combat HIV/AIDS, malaria and other diseases. Target 7: Have halted by 2015 and begun to reverse the spread of HIV/AIDS. Target 8: Have halted by 2015 and begun to reverse the incidence of malaria and other major diseases.


\textsuperscript{28} Ibid 13.

\textsuperscript{29} Ibid 7–30; United Nations, \textit{The Millennium Development Goals Report 2005} (New York: United Nations Department of Public Information, 2005). The MDGs Report outlines that the regional sub–groupings are based on United Nations geographical divisions, with some modifications necessary to create, to the extent possible, groups of countries for which a meaningful analysis can be carried out. A complete list of countries included in each region and sub–region is available at www.millenniumindicators.un.org.
disadvantaged populations, such as indigenous peoples, within countries or regions, especially in the ‘developed’ ones.

The World Health Organization recognizes that ‘[w]hile the pursuit of the Millennium Development Goals and poverty reduction strategies carry the potential for assessing the major health problems faced by indigenous peoples, they do not necessarily capture the specificities of indigenous peoples and their visions of health’. The integration of indigenous concepts of health in international and national development frameworks is essential to ensure that the Millennium Development Goals, targets and indicators, poverty reduction strategies, international and national policies tackle the major health problems faced by indigenous peoples. Development frameworks need to capture the specificities of indigenous peoples and their visions of health in order to pursue policy implementation processes that promote and respect indigenous peoples’ health and human rights.

In light of the health challenge confronting the world’s indigenous peoples and the international policy debate, I will focus my investigation on the health status of Aboriginal and Torres Strait Islander peoples in Australia and discuss the current Australian national government’s health policy towards Indigenous Australians.

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32 In Australia, a federal system of government was established by the Australian Constitution of 1901. Under this system, powers are distributed between a national government (the Commonwealth) and the six States (three Territories – the Australian Capital Territory, the Northern Territory, and Norfolk Island have self-government arrangements). The Constitution defines the boundaries of law–making powers between the Commonwealth and the States/Territories. The analysis of Australia’s policy in indigenous affairs, and in particular health policy for Indigenous Australians, will focus on the Federal government’s policy on the basis of its prominence in national affairs as well as its leadership role in shaping States and Territories’ policy agendas.
7.3 The health status of Aboriginal and Torres Strait Islander peoples in Australia

The urgency to consider Australia’s health policy for its indigenous population, stems from the appalling health status suffered by Aboriginal and Torres Strait Islander peoples. Ranked among the wealthiest countries in the world, Australia has also been listed within the first five countries enjoying the highest human development index.\(^{33}\) In a country where people enjoy the second highest life–expectancy among OECD countries, and one the highest standards of living and well–being, Aboriginal and Torres Strait Islander peoples suffer health conditions comparable to some of the poorest countries in the world. The gap between indigenous and non–indigenous Australians in health status can be rapidly grasped by considering some key data.

The life expectancy at birth for Aboriginal and Torres Strait Islander peoples is estimated to be 59.4 years for males and 64.8 for females, compared with 76.6 years for males in the total population and 82 years of females in the total population.\(^{34}\) A

\(^{33}\) United Nations Development Programme, Human Development Report 2005 (New York: Oxford University Press, 2005) 214: ‘The Human Development Index (HDI) is a composite index that measures the average achievements in a country in three basic dimensions of human development: a long and healthy life, as measured by life expectancy at birth; knowledge, as measured by the adult literacy rate and the combined gross enrolment ratio for primary, secondary and tertiary schools; and a decent standard of living, as measured by GDP per capita in purchasing power parity (PPP) US dollars’. For more details on how the index is constructed and calculated, see Technical note 1, at 340. Between 2000 and 2005, Australia has respectively been ranked at the fourth (2000), second (2001), fifth (2002), fourth (2003), third (2004),and third (2005) position among all countries in the world.

significant gap of approximately 17 years for both males and females exists between the indigenous and non–indigenous population of Australia.\textsuperscript{35}

The infant mortality rate for Aboriginal and Torres Strait Islander infants was three times that of non–indigenous infants in the period 1999–2003.\textsuperscript{36} Babies with an indigenous mother were twice as likely to be low birth weight babies (weighing less than Kgs. 2,500 at birth) as babies with a non–indigenous mother.\textsuperscript{37} In 2002–03, the hospital separation rate (admission) for indigenous children aged less than four years for infectious diseases (111 per 1000 people) was more than twice the rate of other children (48 per 1000 people).\textsuperscript{38}

In 2003–04, Indigenous Australians were up to twice as likely to be hospitalised for mental and behavioural disorders as other Australians. Hospitalisation rates for assault or intentional self–harm for indigenous Australians were 7 times more likely, and females 31 times as likely as for males and females in the general population; whereas the hospitalization rate for intentional self–harm was twice as high.\textsuperscript{39}

Aboriginal and Torres Strait Islander peoples suffer disproportionately from a range of chronic and communicable diseases, such as trachoma, rheumatic heart disease, scabies and skin infections, and otitis media. In areas with severe trachoma, for instance, one in five of Aboriginal and Torres Strait Islander peoples have in–turned lashes, and about half of them are blind or are likely to become blind

\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid 150.
\textsuperscript{37} Ibid 79. The estimate refers to the period 2000–02.
\textsuperscript{39} Ibid 131.
The highest incidence rate of rheumatic heart disease in the world is among Aboriginal people living in the Kimberly regions and the ‘Top End’ of the Northern Territory. Hospitalisation for indigenous males was six times as high, and among females was eight times as high, as the rates among the non–indigenous population, whereas females die at 22 times and males at 16 times the rates in the non–indigenous population. High rates of hearing loss is striking in some remote communities where up to 40% of children will have developed a chronic ear infection leading to hearing loss by the age of ten. Hearing loss, partial or total, is more likely to be reported by indigenous Australians in all age groups from infancy to 55 years of age. For instance, in children aged 0–14 years, 7% suffer hearing loss compared with 2% of the non–indigenous population.

This data offers only a glimpse of the devastatingly poor health conditions of Indigenous Australians, conditions which are even more shocking if compared to the high health status of the non–indigenous population.

Numerous questions have arisen as to the causes of the widespread indigenous ill–health and the adequacy of Australian governmental institutions’ responses to tackle the indigenous health crisis. International and national literature underline

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45 Australian Bureau of Statistics, Population Characteristics: Aboriginal and Torres Strait Islander Australians 2001, ABS cat. No. 4713.0 (Canberra: Commonwealth of Australia, 2003); Steering
the tremendous incidence that social determinants have on people’s health status. Poor social and economic circumstances significantly affect peoples’ health throughout their life.46

It is widely recognized that socio–economic factors heavily impact on the health status of Aboriginal and Torres Strait Islander peoples: these include education, income, employment and occupation, housing, legal exclusion, and different risk factors.47 For instance, according to the 2001 Census,48 educational outcomes are twice as likely as non–indigenous Australians to have left school before completing year 10 (age 16 years) and as half as likely to have completed year 12 (age 18 years). In 2002, only 30% of Indigenous households were in homes owned by or being purchased by their occupants, compared with 71% of other Australian households.49

Addressing the socio–economic determinants of health can have a significant impact on addressing the health status of Aboriginal and Torres Strait Islander peoples. According to the World Health Organization’s Report, Social Determinants...
of Health: the Solid Facts, policies which approach health through its social
determinants can significantly lead to healthier individual behaviours.\textsuperscript{50}

It is not my intention in this work to review and critically analyse how and the extent to which the socio-economic factors impinge upon the ill-health status of Indigenous Australians. It suffices to acknowledge the impact of these factors within the complex health crisis Aboriginal and Torres Strait Islander peoples continue to face.

The question that this thesis intends to address is why are we still witnessing the appalling health conditions in one of the richest countries in the world? The discussion in the following chapters will attempt to disentangle the problematic policy issues involved in the current Australian governments’ approach to indigenous health policy in light of the normative and practical frameworks developed in the previous chapters.

It will be argued that the interpretation of indigenous peoples’ right to self-determination through the conceptual categories of the capability approach, allows us to address the mismatch between indigenous peoples’ claims to self-determination and Australia’s ‘practical reconciliation’ approach to tackle the socio-economic disadvantage of Aboriginal and Torres Strait Islander peoples.

\textsuperscript{50} WHO, Social Determinants of Health: the Solid Facts, above n 44.


Chapter 8

The health challenge for the indigenous people of Australia

8.1 Australia’s health policy to address Aboriginal and Torres Strait Islander peoples’ health disadvantage

The urgency to consider the health policy for Aboriginal and Torres Strait Islander peoples stems from the appalling health status suffered by Aboriginal and Torres Strait Islander peoples. The health inequality of Aboriginal and Torres Strait Islander peoples is undoubtedly perceived as a national emergency across all levels of Australia’s governmental institutions.¹

The current inter–governmental commitments to address Aboriginal and Torres Strait Islander peoples’ health inequality is part of the Australian governments’ overarching goal to tackle Indigenous Australians’ economic and social disadvantage. These commitments need to be framed within the current federal government’s approach to indigenous affairs.

Since the late 1990s, the federal government began to adopt ‘practical reconciliation’ to identify the national indigenous policy. Labelling the pursuit of indigenous rights as ‘symbolic reconciliation’, the current conservative Coalition government inaugurated a politics of ‘practical reconciliation’ whose main concern is the improvement of indigenous socio–economic disadvantage.

In 2000, the Council of Australian Governments (COAG) endorsed a ‘Reconciliation Framework’ based on a ‘whole–of–government’ approach to indigenous affairs. ‘Coordination’ between government portfolios, ‘partnership’ and ‘shared responsibilities’ with indigenous communities are the fundamental principles guiding the ‘practical reconciliation’ process between Australian governments and Indigenous Australians. This ‘Reconciliation Framework’ identifies three priority areas for government action: a) to invest in community leadership initiatives; b) to review programs and services in order to ensure that practical measures are delivered to support families, young people, and children and to address urgent issues, such as family violence, or drug and alcohol dependency; c) to promote economic independence by strengthening relations between indigenous communities and the business sector.

Accordingly, eight whole–of–government community trials were established in order to improve coordination among different levels of government, different governmental agencies, and with indigenous communities. The approach proposed under the COAG initiative aims to be flexible to respond to the specific needs of local communities and achieve better outcomes. In particular, the method operates at two levels: a) governments are required to work together better at all levels and across all

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2 Council of Australian Governments, Communiqué, 3 November 2000.
3 Ibid.
4 The eight trial sites include the Murdi Paaki Region (New South Wales); Wadeye (Northern Territory); Shepparton (Victoria); Cape York (Queensland); Anangu Pitjantjatjara Lands (South Australia); East Kimberly Region (Western Australia); Northern Tasmania (Tasmania); and the Australian Capital Territory. For an analysis of the government coordination mechanisms and the performance monitoring framework for these trial sites: see, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2003 (Sydney: Human Rights and Equal Opportunity Commission, 2004) 227–250.
5 Council of Australian Governments, Communiqué, 5 April 2002.
departments and agencies; b) governments and indigenous communities are expected to work in partnership and share responsibility for achieving outcomes and building the capacity of people in communities to manage their own affairs.\(^6\)

The ‘whole–of–government’ approach which dominates policy frameworks and official reports at the Commonwealth and State level, is presented as a response to the main criticisms of governments’ failure to adequately address indigenous issues and to promote effective arrangements in indigenous affairs.

The Australia’s federal system has been considered as a major source of difficulties in formulating effective policy–making and implementing adequate service delivery for Indigenous Australians.\(^7\) Australia’s federalism has been indeed considered as a two–edges sword: it operates as an effective safeguard against the concentration of power on a single central government, because powers and responsibilities are shared between Commonwealth, State and Local governments, however, overlapping responsibilities can significantly undermine the soundness of policy–making strategies and the efficacy of service delivery to Indigenous Australians.\(^8\)

Coordination within each government, and between different levels of government is an important element that can impinge upon the efficacy and effectiveness of indigenous policy–making and service delivery. It has been claimed that duplications between Federal and State departments, or the vacuum created by

\(^6\) For further details: see, Indigenous Communities Coordination Taskforce (ICCT), available online at <www.icc.gov.au>. The ICCT has been established within the Department of Immigration, Multicultural and Indigenous Affairs in order to support the Secretaries Group and federal government agencies involved in the trials.


\(^8\) Ibid 31.
blurring responsibilities among different levels of government have been among the most problematic hindrances in meeting the needs of Aboriginal and Torres Strait Islander individuals and communities. To illustrate, the Commonwealth Department of Health pointed out that ‘a major impediment to reform in Aboriginal health has been a lack of coordination between Federal and State governments, with consequent ‘buck–passing’ and difficulties in the relationship between governments and Aboriginal organisations’. For instance, it has been reported that one Aboriginal community–controlled health organisation, which provides health services to a population of about a thousand people, could have been reporting to twenty or thirty Federal and State government agencies.

The lack of coordination within governments, both at the federal and state level, has led to a fragmentation among different portfolios and the creation of single purpose structures – what have been called ‘bureaucratic silos’ – which operate side–by–side, but they are not interconnected. As a result, dependency, lack of indigenous participation and inflexibility have been inserted into Australia’s governmental nomenclature.

A ‘top–down’ approach has characterised governments’ policies to indigenous affairs, whereby priorities, needs, resource allocations, and guidelines for expenditure have been decided by the different Commonwealth, State and Territory government

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9 Brennan et al, above n 7, 31–32.
10 Office of the Medical Advisor (Commonwealth Department of Health and Aged Care), General Practice in Australia: 2000 (Canberra: Commonwealth Department of Health and Aged Care, 2000) 4.
agencies. This has consequently determined an ‘in–built dependency’\textsuperscript{13} for indigenous communities and organizations which are ‘dependent on annual grant funding arrangements from one or more…government departments and agencies…[and] dependent on changing government priorities and budget allocations’.\textsuperscript{14} In the area of health, for instance, governments’ short–term and piecemeal approach to funding has severely undermined the possibility of consistent improvements in health service delivery and social determinants of health. Changes in government directives has led to the so–called ‘body parts funding’, whereby governments’ emphasis has been shifting from one disease to another, causing a related shift in resource allocations which hampers the holistic approach to health management as voiced by many Indigenous organizations and experts.\textsuperscript{15}

The exclusion of Indigenous Australians from policy decision–making processes has negatively impacted upon the success of governments’ policies and service delivery initiatives. Australia’s governance framework has disempowered Aboriginal and Torres Strait Islander peoples through a strong governmental control which has significantly undermined indigenous institutions’ governance capacity. Participation, decision–making capacity, and governance in indigenous communities are key ingredients for a real empowerment of indigenous peoples to fully and responsibly participate in the making of their lives and the betterment of their well–being.\textsuperscript{16}

Evidence has shown that there is a direct relation between community decision–


making and the improvement of economic and human development, such as in the
area of health, housing, or justice. This relation will be further discussed in this
paragraph with specific reference to the interface between Indigenous Australians’
right to self-determination and the federal government’s ‘practical reconciliation’
approach to indigenous affairs.

The lack of indigenous decision-making in policy-design has facilitated the
enduring presence of the principle of ‘one-size-fits-all’ within Federal, State and
Territories governmental agencies. The disregard of the geographical, economic, and
cultural diversity of Indigenous Australia, as well as local priorities, has further
contributed to the failure of governments’ policy to address indigenous issues.

As it has been admitted by the Secretary of the Department of Prime Minister and
Cabinet, ‘[o]ne of our key failings…in terms of public policy is the failure to have a
whole-of-government approach to issues’. As a result, the current ‘whole-of-government’ approach aims at overcoming the
aforementioned failings. The ‘whole-of-government’ approach goes hand-in-hand
with the pursuit of ‘practical reconciliation’ which focuses on the adoption of
practical measures to better the socio-economic conditions of Indigenous Australians.
Determined to reverse the trend from the pursuit of indigenous rights to the pursuit of
better social outcomes for Indigenous people, the government has eagerly supported

17 See, Harvard Project on American Indian Economic Development, Honouring Nations: Tribal
Governance Success Stories, 1999 (Cambridge, MA: Harvard University, 1999); Harvard Project on
American Indian Economic Development, Honouring Nations: Tribal Governance Success Stories,
2000 (Cambridge, MA: Harvard University, 2000); Harvard Project on American Indian Economic
Development, Honouring Nations: Tribal Governance Success Stories, 2002 (Cambridge, MA:
Harvard University, 2003).
19 Senate Select Committee on the Administration of Indigenous Affairs, Hansard, 8 February 2005, 8.
the elaboration of the Indigenous statistical archive to measure ‘practical reconciliation’.\(^\text{20}\)

In 2002, in accordance with the commitment to ‘practical reconciliation’, the Council of Australian Governments commissioned the Steering Committee for Government Service Provision to develop a reporting framework on key indicators of indigenous disadvantage.\(^\text{21}\) As a result, the *National Reporting Framework for Overcoming Indigenous Disadvantage* was articulated to serve the purpose of measuring governmental commitments to address indigenous disadvantage.\(^\text{22}\) The framework reports on a wide range of indicators measuring the progress in the short, medium and long term. The report framework is meant to ‘help to measure the impact of changes to policy settings and service delivery and provide a concrete way to measure the effect of the Council’s commitment to reconciliation through a jointly agreed set of indicators’.\(^\text{23}\)

The joint commitment of Australian governments to improve indigenous disadvantage, including health inequality, is reiterated in the formulation of the *National Framework of Principles for Government Service Delivery to Indigenous Australians*. This framework sets the fundamental principles which are to guide government actions in indigenous affairs: sharing responsibility, harnessing the

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268
mainstream, streamlining service delivery, establishing transparency and accountability, developing a learning framework and focusing on priority areas.\textsuperscript{24}

In particular, ‘partnership’, ‘shared responsibility’ and ‘mutual obligations’ are the key principles of the current ‘whole–of–government’ approach to Australia’s indigenous policy. They are the principles which define the relationship between governmental institutions and indigenous communities. Under this new arrangements and principles, ‘Shared Responsibility Agreements’ have been negotiated with different indigenous communities across the country. These agreements intend to coordinate government initiatives and service delivery across regions and require Indigenous Australians to comply with agreed obligations in return for government funding.\textsuperscript{25}

The ‘whole–of–government’ and ‘practical reconciliation’ approach to indigenous affairs raises several issues. Questions include the capacity of governments to make those partnership agreements really work; whether adequate funding will support these agreements in a way that they will not be a ‘window–dressing’ experiment, but rather legitimized and supported by the communities that are expected to comply with them; or whether monitoring and evaluation processes put in place according to the new arrangements are adequate.\textsuperscript{26}


\textsuperscript{25} For further details see, Indigenous Communities Coordination Taskforce (ICCT), available online at <www.icc.gov.au>. In particular, see Indigenous Communities Coordination Taskforce, \textit{Shared Responsibility, Shared Future is Important Business for Us All}, available online at <www.icc.gov.au>. For a list of obligations agreed in Shared Responsibility Agreements as to 30 June 2005: see, Aboriginal and Torres Strait Islander Social Justice Commissioner, \textit{Social Justice Report 2005}, above n 1, 343–362.

\textsuperscript{26} Brennan et al, above n 7, 42–43. See also, Aboriginal and Torres Strait Islander Social Justice Commissioner, \textit{Social Justice Report 2005}, above n 1, 193–224.
The most important issue, however, is the evident abandonment of both a rights-based approach and, more importantly, the principle of self-determination claimed by the world’s indigenous peoples. The policy of ‘practical reconciliation’ is clearly advanced at the expense of Indigenous Australians’ rights agenda and the recognition of indigenous self-determination.27

The policy of ‘practical reconciliation’ clearly distinguishes itself from what has been labelled ‘symbolic reconciliation’. This distinction poses an irreconcilable dichotomy between a rights-based approach to indigenous policy and an indigenous policy which focuses exclusively on practical measures to overcome the economic and social disadvantage suffered by Aboriginal and Torres Strait Islander peoples. The underlying proposition is that the indigenous rights’ agenda and the betterment of the indigenous disadvantage are mutually exclusive.

The most that indigenous peoples can aspire to in their relationships with Australian governments, is their ‘participation at all levels’ in order to build strong partnerships.28 Participation of Indigenous Australians’ communities and organizations within the Federal, State, and Local administrative nomenclature cannot be considered as the end-objective between governmental institutions and Indigenous Australians.

It has been discussed in chapter six of the thesis that processes of participation and consultation are instrumental in the achievement of the ‘free, prior and informed consent’ of indigenous communities involved in specific policies, programs or

27 Ibid.
development initiatives. In turn, the adoption of the ‘free, prior and informed consent’ in policy–making strategies, as it has been discussed in the context of the proposed methodological approach to development policies, is conceived of as an indispensable criteria for the realization of self–determined policies.

Procedural issues seem to dominate, overshadow and take the place of substantive issues, such as the right to self–determination of Aboriginal and Torres Strait islander peoples. The ‘participation and partnership’ model proposed by Australia’s federal government is not in accordance with the internationally voiced rights–based approach to development policy–making and the demands of self–determination.

The principle of self–determination needs to be included into the newly ‘governmental machinery’ put in place to deal with indigenous issues. Once self–determination is adopted as the foundational pillar upon which administrative, political and legal arrangements are formulated to deal with Indigenous Australians’ issues, then the realization of all other indigenous rights, including socio–economic rights (right to health, housing, education, etc.) would follow as they are embedded within the right to self–determination. The ‘integrated process of self–determination’, which lies at the core of the ‘indigenous capability rights system’, must constitute the foundational underpinning of policy frameworks and programs to tackle indigenous issues.

The foundational role that self–determination plays for the betterment of the economic and social disadvantage of Indigenous Australians, is supported by the significant findings of the Harvard Project on American Indian Economic

29 The meaning and significance of the ‘indigenous capability rights system’ and the ‘integrated process of self–determination’ have been discussed in part 2 of this thesis.
Development carried out among Native Americans in the United States.\textsuperscript{30} This research project reveals that indigenous self–determination, decision–making, and self-government represent essential bases to improve the socio–economic conditions of indigenous peoples.\textsuperscript{31} As Stephen Cornell points out, ‘the refusal to come to grips with indigenous demands for self–determination cripples the effort…to overcome indigenous poverty’.\textsuperscript{32} It is also argued that, notwithstanding substantial differences among the US and Australia (as well Canada and New Zealand),\textsuperscript{33} the lessons and insights from the empirical study carried out in the United States can be of relevance for tackling Aboriginal and Torres Strait Islander peoples’ socio–economic disadvantage.\textsuperscript{34}

The problematic dichotomy between the pursuit of indigenous rights and the advancement of Indigenous Australians’ poor socio–economic status, will be analysed with specific reference to the current Commonwealth’s health policy framework for Indigenous Australians.

The new arrangements for indigenous affairs, which have been tailored on the ‘whole–of–government’ and ‘practical reconciliation’ approach, provide the general indigenous policy framework within which a specific Aboriginal and Torres Strait Islander health policy framework has been advanced.

\begin{itemize}
\item \textsuperscript{30} Harvard Project on American Indian Economic Development, above n 17.
\item \textsuperscript{31} Ibid.
\item \textsuperscript{33} Ibid 200–201.
\item \textsuperscript{34} Ibid 210–217.
\end{itemize}
The National Strategic Framework for Aboriginal and Torres Strait Islander Health\textsuperscript{35} is the overarching Australian institutional policy document which asserts the commitment of all Australian governments to tackle the poor health status of the indigenous population. Governments, having acknowledged their failure to address the health crisis of Aboriginal and Torres Strait Islander peoples in the past,\textsuperscript{36} and their failure in implementing the previous National Aboriginal Health Strategy (NAHS),\textsuperscript{37} have articulated the new 10 years national strategic plan (2003–2013). The National Strategic Framework, constructed upon and complementing the NAHS’s guiding principles, seeks to support the institutional commitment towards the improvement of the health of Aboriginal Australians.

The main goal of the strategy is ‘to ensure that Aboriginal and Torres Strait Islander peoples enjoy a healthy life equal to that of the general population that is enriched by a strong living culture, dignity and justice.’\textsuperscript{38} For this purpose, four particular objectives are established to monitor the fulfilment of the main goal:

a) increase the life expectancy to a level comparable with the non–indigenous population;

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\textsuperscript{35} National Aboriginal and Torres Strait Islander Health Council (NATSIHC), National Strategic Framework for Aboriginal and Torres Strait Islander Health: Framework for Action by Governments (Canberra: NATSIHC, 2003) [hereinafter the National Strategic Framework].
\textsuperscript{36} Ibid 4.
\textsuperscript{37} National Aboriginal Health Strategy Working Party, A National Aboriginal Health Strategy (Canberra: National Aboriginal Health Strategy Working Party ,1989). See, Aboriginal and Torres Strait Islander Commission, The National Aboriginal Health Strategy: An Evaluation (Canberra: ATSIC, 1994). The evaluation highlights the main causes of the failed implementation: underfunding by governments in rural and remote areas; lack of accountability for implementation; lack of political will and commitment from all governments and ATSIC; lack of coordination between the mainstream health system and Aboriginal and Torres Strait Islander peoples; the strategy did not include other portfolios, such as education, housing, local governments, among others.
\textsuperscript{38} NATSIHC, National Strategic Framework, above n 35, 7.
\end{flushright}
b) decrease mortality rates in the first year of life and decrease infant morbidity by reducing relative deprivation and improving the quality of life;

c) decrease of all-causes of mortality rates across all ages;

d) strengthen the service infrastructure in order to improve the access of indigenous population to health services and address the major health challenges afflicting the indigenous population, such as chronic disease (cardiovascular, renal, respiratory diseases), communicable disease, substance misuse, trauma, suicide, mental disorder, injury and poisoning, family violence (child abuse and sexual assault), maternal, child and male health.\textsuperscript{39}

Due to different circumstances and priorities of the Commonwealth, States and Territories’ jurisdictions, the National Strategic Framework does not establish benchmarks, specific targets and timeframes.\textsuperscript{40} It generally indicates key result areas:

a) achieve a more effective and responsive health system. This includes the development of a health workforce, a focus on community controlled health care services, the health system delivery framework, and a focus on emotional and social well-being; b) influence the health impacts of the non-health sector. This concerns wider strategies, like environmental health, that impact on health; c) provide the infrastructure to improve the health status. This includes more appropriate data, research, resources and finance, and accountability.\textsuperscript{41}
Nine fundamental principles are deemed to guide the implementation and achievement of the national health policy’s goal and aims: cultural respect; a holistic approach; health sector responsibility; community control of primary health care services; working together; localised decision making; promoting good health; building the capacity of health services and communities; accountability.\textsuperscript{42}

These principles are required to underlie the implementation and monitoring health plans that will be putting in place. The operationalization of indigenous health policy is indeed realized according to the ‘whole–of–government’ approach which underpins the new arrangements for administering Aboriginal and Torres Strait Islander’s affairs. A ‘whole–of–government’ machinery has been put in place to achieve the National Strategic Framework’s goal and aims. Different processes have been initiated to implement Aboriginal and Torres Strait Islander’s health policy framework: the elaboration of a national performance monitoring frame,\textsuperscript{43} the negotiation of bilateral agreements between the Commonwealth, States and Territories, the setting up of health fora at state level, and the elaboration of regional plans defining specific needs and priorities.\textsuperscript{44}

\textsuperscript{42} Ibid 2–3.
\textsuperscript{43} A new ‘Aboriginal and Torres Strait Islander Health Performance Framework’ is being elaborated to measure the performance of the whole health system in relation to Aboriginal and Torres Strait Islander health. It will substitute the current ‘National Performance Indicators’ from 2006. The new Health Performance Framework is consistent with the COAG principles for service delivery and incorporates most of the health related performance indicators from the National Reporting Framework on Indigenous Disadvantage. The Framework is structured in three tiers. Tier 1: Health Outcomes (including measures of health conditions, life expectancy and mortality); Tier 2: Determinants of Health (including measures of socio–economic factors, risk factors and environmental factors). Tier 3: Health System Performance (including measures of the effectiveness of the health system by measuring inputs and intermediate outcomes of the health system, such as antenatal care, immunisation, screening, etc.). See, Aboriginal and Torres Strait Islander Social Justice Commissioner, \textit{Social Justice Report 2005}, above n 1, 38–39.
\textsuperscript{44} \textit{Social Justice Report 2005}, above n 1.
Aboriginal and Torres Strait Islander Health Framework Agreements are negotiated between the Commonwealth and each State and Territory with the common objective to: a) increase the amount of resources in relation to the specific need of the indigenous communities; b) improve access to mainstream and indigenous specific health and health-related programs; c) set out joint planning processes to ensure the participation of Indigenous Australians in decision-making; d) improve evaluation methods and data collection.45 Each jurisdiction will therefore develop its own strategic implementation plan which will include ‘accountabilities for progressing the action areas, timeframes and reporting mechanism’.46

There is no doubt that a thoroughly engineered machinery seems to have been put in place to address the Indigenous Australians’ health crisis.

Is it really so?

45 NATSIHC, National Strategic Framework, above n 35, 23.
46 Ibid 4.
8.2 The Human Rights Equal Opportunity Commission’s response to Australian governments’ health policy for Indigenous Australians

The most comprehensive appraisal of governmental health policy for Indigenous Australians is articulated in the recent Social Justice Report 2005.\(^{47}\) The Human Rights and Equal Opportunity Commission (HREOC) represents the peak body entrusted with the authority to promote and protect human rights in Australia. Within it, the Aboriginal and Torres Strait Islander Social Justice Commissioner advocates and promotes Indigenous Australians’ rights by reporting to the federal Parliament on key human rights issues facing Aboriginal and Torres Strait Islander peoples and making recommendations to bring about changes in government policies and programs to ensure the enjoyment of indigenous rights.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has critically analysed Australian government’s policy response to the health crisis of Aboriginal Australians.\(^{48}\) The key aspects of the analysis are commented upon in detail in order to detect issues in the national debate and pinpoint possible vacuums.

The human rights–based approach to health policy for Indigenous Australians and the recommendations suggested to the federal Parliament are assessed against the methodological approach for indigenous development policies constructed upon the ‘indigenous capability rights system’.

A ‘spectacular failure’ seems to have characterized Australian governments’ health policies over the last thirty years. Notwithstanding some improvements in

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\(^{48}\) Ibid.
specific areas since the 1970s, such as the drop of infant mortality rates, progress on the whole continues to be inconsistent and slow.49

Health inequality between Aboriginal and Torres Strait Islander peoples and other Australians is identified as the major concern and challenge for Australian health policies and programs. The health inequality gap remains substantial as the improvements occurred over the years in some areas have not been sufficient to reduce the gap, especially if one considers the concomitant significant advances experienced by the non–indigenous population.50

In light of this situation and current governments’ policy, the Aboriginal and Torres Strait Islander Social Justice Commissioner proposes a human rights–based approach to Aboriginal and Torres Strait Islander peoples’ health. The suggested human rights–based framework provides a more comprehensive conceptual tool to grasp the health inequality gap and address the main challenges confronting current governmental policy.

The framework is instrumental to the achievement of two main overarching goals recommended to the Australian governments in order to address the health status of Indigenous Australia: a) ‘achieving equality of health status and life expectation between Aboriginal and Torres Strait Islander and non–Indigenous people within 25 years’;51 b) ‘achieving equality of access to primary health care and health infrastructure within 10 years for Aboriginal and Torres Strait Islander people’.52

50 Ibid 10.
51 Ibid. Recommendation 1.
52 Ibid. Recommendation 2.
The human rights approach to Aboriginal and Torres Strait Islander health is adopted as the framework against which the current governmental health policy is assessed. The human rights perspective informs the identification of the strengths and failings of the current institutional framework for Aboriginal and Torres Strait Islander health. In general terms, a human rights–based approach is advocated as it aims to go beyond the rhetorical recognition of the health inequality gap and formal governmental commitments to overcome that gap outside a specific timeframe. The system of human rights standards provides the set of principles which are to guide the whole policy process (design, delivery, implementation, monitoring and evaluation) of health strategies and programs.

The Report clearly states the advantages of upholding a human rights–based framework to indigenous health: the adoption of a human rights perspective allows us to import significant principles into the understanding of health and elaboration of health policies for Indigenous Australians.

First of all, a human rights–based approach enables a substantial shift from the understanding of the health status of Indigenous Australians in terms of a mere inequality gap to the conception of Indigenous health status in terms of right entitlements. The internationally recognized right to health, and the principles embedded within it, come to establish the standard to which the Australian government has agreed to comply with. As a result, the health inequality between Indigenous and non–Indigenous Australians is perceived as non–compliance by the

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53 Australia has ratified both the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on the Rights of the Child, which set out the right to health for all, respectively, in art. 12 and art. 24.
Australian government with the obligation to ensure ‘the right of everyone to the
enjoyment of the highest attainable standard of physical and mental health’.

The ‘non–discrimination principle’ set out in article 2(2) of ICESCR requires that
State parties ‘guarantee that the rights…will be exercised without discrimination of
any kind as to race, colour, sex, language, religion, political or other opinion, national
or social origin, property, birth or other status’. States’ accountability to comply with
human rights standards – in this case the right to health – without any discrimination
is reinforced by the ‘progressive realization principle’ according to which ‘[e]ach
State Party undertakes to take steps…to the maximum of its available resources, with
a view to achieving progressively the full realization of the rights recognized…by all
appropriate means, including particularly the adoption of legislative measures’.

The non–discrimination and progressive realization principles establish States
parties’ obligation to redress cases of unequal enjoyment of the human right to the
highest attainable standard of health. The HREOC’s Report in fact, highlights that
under a human rights perspective, Aboriginal and Torres Strait Islander health
outcomes need to be treated as a matter of legal obligation and therefore evaluated
against international human rights norms. The UN Committee on the Rights of the
Child and the UN Committee on the Elimination of Racial Discrimination have

54 International Covenant on Economic, Social and Cultural Rights, art. 12; see also, International
Covenant on the Rights of the Child, art. 24.
55 International Covenant on Economic, Social and Cultural Rights, art. 2(1).
recently expressed concern and recommended that the Australian government redress the health disadvantage of Indigenous Australians.\textsuperscript{57}

More particularly, the criteria and factors drawn from the internationally defined right to the highest attainable standard of health,\textsuperscript{58} inform the HREOC’s assessment of the current government health policy and strategic plans for Aboriginal and Torres Strait Islander peoples. Positive aspects and drawbacks are identified and a strategic campaign for achieving Aboriginal and Torres Strait Islander health equality within a generation is proposed. It is important to consider both Social Justice Commissioner’s critique of government health policy as well as the goals and means through which the HREOC’s health equality campaign is meant to be pursued. Those insights will be weighed against the alternative methodological approach discussed in the second part of the thesis.

The positive aspects refer to the commitments undertaken by all Australian governments to address the unacceptable health status of Aboriginal and Torres Strait Islander peoples and achieve health equality. The National Strategic Framework is praised for providing a national health policy framework required under international human rights law to fulfil Australia’s obligations towards the right to health. Further, the commitments undertaken are considered consistent with the human rights based approach to health in different respects. First, the goal of achieving health equality is to be pursued through equality in access to primary health care and health


infrastructures. Secondly, the holistic view of health is shared and agreed upon by all governments, who have committed to address a wide range of sectors and issues outside the health sector.\textsuperscript{59} Third, the ‘whole of government machinery’ to implement the national health policy – which includes bilateral health agreements between the Commonwealth, States and Territories, regional plans, development of a national performance monitoring framework with health benchmarks and targets – is deemed to respond to States’ obligations to implement and monitor the progress of the national health policy adopted.\textsuperscript{60} Fourth, ‘participation’ and ‘partnership’ with Aboriginal and Torres Strait Islander peoples in articulating regional plans and participating in health forums, meet the requirement to ensure the participation of indigenous peoples in decision–making processes potentially affecting their development.

On the other side, the Report highlights the failings of current Australian government’s health policies and proposes strategies for improvements. The failure of Australian governments to close the health inequality gap can be summarised as follows: a) lack of equal access to primary health care, health infrastructure, and the inaccessibility to mainstream programs;\textsuperscript{61} b) a lack of realistic timeframes within which to carry out governments’ commitments and health strategies; c) insufficient funds to meet the goals and aims of the National Strategic Framework and the recognition that the Aboriginal and Torres Strait Islander health system continue to be

\textsuperscript{59} UNCESCR, \textit{General Comment 14}, above n 58, para.11.
\textsuperscript{60} UNCESCR, \textit{General Comment 14}, above n 58, para.43(f).
underfunded; d) the mismatch between the recognition of the indigenous health crisis in holistic terms and the articulation of health strategies lacking an holistic approach and ignoring the impact that other policy sectors have on the health status of Indigenous Australians’. 62

It is argued that the lack of equal access to primary health care, health infrastructure and mainstream programs reveals the inequality of opportunity suffered by Aboriginal and Torres Strait Islander peoples to enjoy the highest attainable standard of health. It poses issues of compliance with the fundamental and interrelated factors encompassed in the right to health: availability, accessibility, and acceptability. 63

In terms of ‘availability’, it is reported that health services, especially in rural and remote areas, are not available for the indigenous population as much as for the non-indigenous population. For instance in 2002, there were twice as many medical practitioners per person in major cities than in remote areas and ten times the number of specialists. 64

In terms of ‘accessibility’, it is reported that 174 communities lived over 100 kilometres from both a hospital and a community health centre, while over 151 communities lived over 100 kilometres from the nearest first aid clinic. 65 The lack of access to transport exacerbates the situation with 23% of households with Aboriginal

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63 UNCESCR, General Comment 14, above n 58, para.12.
and Torres Strait Islander persons not having access to a motor vehicle, compared to 10% of the non–indigenous population.\textsuperscript{66}

As for ‘acceptability’, there is evidence that Aboriginal and Torres Strait Islander persons tend not to use mainstream health care even when they are available and accessible, such as in urban areas.\textsuperscript{67} As a result, Indigenous-specific health services are recognized to be fundamental for improving indigenous health status. The impact that community controlled health services have had on health outcomes is considerable: early detection and reduced complications of chronic diseases and mental illness; improved maternal and child health outcomes such as drop of infant mortality rate and low birth weight babies; decrease in environmental and social risks, such as reduced alcohol consumption; better communicable disease control through vaccination, etc…\textsuperscript{68} Support and expansion of Aboriginal and Torres Strait Islander community controlled organizations is therefore strongly recommended,\textsuperscript{69} particularly in order to improve primary health care access.

The support for indigenous–specific health services is recommended in combination with improving the accessibility of mainstream primary health care services so as to achieve equal access to primary health care services and health infrastructure for Aboriginal and Torres Strait Islander peoples. In this regard, cultural appropriateness is drawn on as a key ingredient to ensure that the mainstream

\textsuperscript{66} National Aboriginal and Torres Strait Islander Social Survey 2002, cited in Social Justice Report 2005, above n 1, 63.
\textsuperscript{68} Dwyer et al, above n 64, 91–106.
\textsuperscript{69} Social Justice Report 2005, Recommendation 3, above n 1, 97.
health care system is responsive to Aboriginal and Torres Strait Islander cultural needs and provides ‘assurances of cultural safety’.\(^70\)

The improvement of mainstream health service delivery and support for Aboriginal community controlled health organizations are related to another important issue: the increase of resources to fund health programs and service delivery for Aboriginal and Torres Strait Islander health. The *Report on Indigenous Funding 2001* has interestingly found that health plans for Aboriginal and Torres Strait Islander peoples have failed because of Australian governments’ unwillingness to fund health programs according to a need–based approach.\(^71\) Shortfall of resources continues to inflame the national debate on adequate measures to address the Indigenous health crisis.\(^72\) The Australian Medical Association (AMA) estimated a $460 million annual shortfall in primary health care spending for Aboriginal and Torres Strait Islander peoples. AMA urges the federal government to close the gap between spending and need within five years, to set standards for primary health care provisions in collaboration with the National Aboriginal Community Controlled


\(^{71}\) Commonwealth Grant Commission, *Report on Indigenous Funding 2001*, above n 11. In 2004, Access Economics reported that the shortfall between spending and actual need is very large. It calculated a shortfall in primary care spending of $400 million or $806 per capita.

\(^{72}\) Australian Institute of Health and Welfare and Commonwealth Department of Health and Ageing, *Expenditures on Health for Aboriginal and Torres Strait Islander People, 2001–02*, Health and Welfare Expenditure Series No.23, July 2005. It is reported that despite the very poor health status of Australia’s Aboriginal and Torres Strait Islander peoples, health expenditure per person was only slightly above that for the much healthier non–Indigenous population. Overall, the fastest growing health spending programs (such as, PBS and Medicare) are the programs to which Indigenous peoples have too little access.
Health Organization (NACCHO) and other indigenous representatives, and fund these at actual cost.\textsuperscript{73}

This recommended measure acquires particular significance if one considers Australia’s obligations under human rights law. It is indeed established that ‘[a] government which is unwilling to use the maximum of its available resources for the realisation of the right to health is in violation of its obligations’.\textsuperscript{74} With a budget surplus of $13.6 billion as at 30 June 2005 at the Federal level, resource constraints cannot justify a pretended ‘inability’ to take action and address the indigenous health crisis.\textsuperscript{75}

Furthermore, the increase of resources needs to be accompanied by two other important measures: setting time bound health targets and benchmarks\textsuperscript{76} and coordination among different portfolios and with the recently introduced arrangements for indigenous affairs.

Support for Aboriginal community controlled health organizations, improvement of mainstream health service delivery, fund increase and coordination, are all important measures that Australian governments need to consider when engaging with the design, implementation, monitoring and evaluation of Aboriginal and Torres Strait Islander health policies. These measures gain considerable value as they are framed within a human rights approach, so that they are correlated to Australia’s legal


\textsuperscript{74} UNCESCR, \textit{General Comment 14}, above n 58, para.14.

\textsuperscript{75} \textit{Social Justice Report 2005}, 67–69. It is recommended that time bound targets and benchmarks should be based on the ‘Overcoming Indigenous Disadvantage Framework’ and the ‘Aboriginal and Torres Strait Islander Health Performance Framework’: see above.

obligations under international human rights law. There is no doubt that the human rights perspective to indigenous health suggested by the Social Justice Commissioner is of great significance for the articulation of meaningful and effective health policy for Indigenous Australians. The international human rights system provides an indispensable framework within which national policies towards indigenous peoples should always be assessed.

Having recognised that, what can we add more to the criticism already provided? It will be discussed whether and how the ‘indigenous capability rights system’ and the methodological approach for indigenous policies articulated in the second part of the thesis may provide valuable insights to better entangle core issues of the policy debate.
8.3 The ‘indigenous capability–rights system’ and Aboriginal and Torres Strait Islander health policy

This thesis argues that the ‘indigenous capability rights system’ and the methodological approach to indigenous policy–making constructed upon it,\(^7\) convey theoretical and practical insights for the realization of a self–determined right to health through development policies. for indigenous peoples.

It is maintained that the adoption of the methodological approach to development policies articulated in this thesis would reconcile the fundamental dichotomy underpinning the current Australian indigenous policy, that is the dichotomy between ‘symbolic reconciliation’ and ‘practical reconciliation’. The methodological approach provides adequate tools to pursue Indigenous Australians’ rights agenda and the improvement of indigenous socio–economic disadvantage in a consistent and concurrent way.

The Australian health policy framework is indeed 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.

This thesis argues that current Australian health policy frameworks fail to recognise and instil the most important principle in indigenous discourse: the principle of self–determination. As a result, foundational elements are left out, and this omission impinges negatively on policy strategies and policy outcomes. It is maintained here that the ‘indigenous capability rights system’ and the methodological

\(^7\) The ‘indigenous capability rights system’ and the methodological approach to indigenous policy making have been discussed respectively in chapters 5 and 6 of Part 2.
approach to indigenous policy–making provides a more comprehensive conceptual framework which can inform governmental and non–governmental policy–making strategies concerning indigenous peoples. The ‘indigenous capability rights system’ provides a theoretical framework which encapsulates the following essential elements:

a) a goal–included view of indigenous rights;

b) an encompassing system of indigenous rights centred on the right to self–determination;

c) a freedom–centred conception of indigenous rights; and

d) indigenous rights understood as ‘capability rights’.

Substantial implications can be drawn from the adoption of this normative framework.

First, a goal–included view of indigenous rights underlies the critical role that institutions are called on to play in policy–making processes constructed upon a human rights–based approach. In light of Sen’s conceptualization of a ‘goal rights system’, the fulfilment of Aboriginal and Torres Strait Islanders’ rights, whether intrinsically or instrumentally worthwhile, must be conceived of as central within the social and political structure of the Australian society, as being among the goals the society is to pursue.

78 See, Amartya K Sen, ‘Rights and Agency’ (1982) 11(1) Philosophy and Public Affairs 15. The ‘goal rights system’ is indeed defined as ‘[a] moral system in which fulfilment and non–realization of rights are included among the goals, incorporated in the evaluation of states of affairs, and then applied to the choice of actions through consequential links’.
Second, indigenous peoples’ right to health can be conceptualised in terms of the collective and individual capability right to enjoy a self-determined health. The whole and integrated system of ‘indigenous capability rights’ leads one to conceive the indigenous capability right to health as essentially imbued with the principle of self-determination. A freedom-centred perspective characterises the indigenous capability right to health, which is seen primarily as the enlargement of the substantive freedoms underlying the right to health and the related freedom to make valuable choices.

Indigenous peoples are, individually and collectively, considered as active agents of policy strategies. They are actively embedded in the whole policy process as self-determining agents. The understanding of indigenous rights in terms of ‘capability rights’ entails focusing on peoples’ ‘opportunity freedom’ to freely choose the course of their life and achieve what they value. This inextricably leads to incorporate the continuous process of choices peoples are engaged with in the actual implementation of policy directives in their daily life.

It is claimed here that the principles and policy measures informing Australia’s health policy frameworks for Aboriginal and Torres Strait Islander peoples do not take into consideration fundamental elements which are strictly entrenched in the concept of a self-determined health policy, such as:

a) individual and collective value-judgment processes and the related decision-making processes that indigenous peoples undertake in the policy process;

b) broader conceptual spaces able to encompass Aboriginal worldviews, knowledge systems, and life principles. Those spaces should guide the
The methodological approach to policy-making discussed in the second part of the thesis, allows us to encompass these fundamental elements in the design, implementation and evaluation of health policy, which aim at the fulfilment of indigenous peoples’ self-determined right to health.

The approach is adopted to operationalise the ‘indigenous capability rights system’ with specific reference to the capability right to health. The enlargement of substantive freedom or real opportunities that Aboriginal and Torres Strait Islander peoples have to lead a self-determined, functional and healthy life is the goal that Australia’s health policy should engage with. For this purpose, the following elements should be taken into consideration:

a) adoption of agency freedom as reference space for policy–decision making strategies;

b) adoption of agency achievement as reference space for policy evaluation strategies;

c) inclusion of individual and collective value–judgment processes in the whole policy process and evaluation of the impact that peoples’ choices have on policy outcomes;

d) policy outcomes benchmarked against the level of well–being achievement and agency–achievement.

To illustrate the significance of these elements, an example of health policy concerning women’s health and childbirth will be assessed against this methodological approach and its constituents.
The case in point concerns a childbirth policy adopted in the remote communities of Mornington Island, Cooktown, Hopevale and Wujal Wujal in North Queensland. The Human Rights and Equal Opportunity Commission carried out two inquiries into the provisions of health and medical services for Aboriginal communities and investigated the impacts of the adopted childbirth policy.  

The childbirth policy entails the removal of expectant mothers from their communities to give birth to their children in order to provide Aboriginal women a safe environment – hospitals – to reduce maternal mortality rate. Maternal mortality rate is therefore the indicator against which the policy outcome of improving women’s health – an aspect of their well–being – has been benchmarked.

Has this policy been successful?

If we assess this policy in the space of women’s well–being achievement, we can certainly say that the policy has been successful since the maternal mortality rate plummeted. However, according to the methodological approach described in the second part of the thesis, a realistic policy evaluation must take into consideration at least two other issues:

1) whether Aboriginal women have been given the opportunity to choose where and how to give birth to their children, and

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80 Dr. Streatfield, Brisbane Hearing, transcript at 517, cited in HREOC, Report on Provision of Health and Medical Services, above n 79, 28.
2) whether the childbirth policy has had impacts on other spheres of Aboriginal women’s lives, which is valued as much as their personal well-being assessed in terms of maternal mortality rate.

As for the first issue, the Human Rights and Equal Opportunity Commission found that:

There can be no doubt that there has been, and continues to be, a disregard for the choices of Aboriginal women in relation to childbirth\(^{81}\)

…the rights of Aboriginal women to choose where and how they give birth have been disregarded\(^{82}\)

The question we should ask is: what would they have chosen if they had been given the opportunity to choose?

Evidence given during the Inquiries reveals that Aboriginal women (and also men) demand to have their babies on their land and in their communities.\(^{83}\)

Is this a ‘functional’ or a ‘dysfunctional’ choice?

From a non-indigenous medical perspective, choosing to give birth in their communities would be considered as a ‘dysfunctional choice’. According to the Regional Director of Obstetrics and Gynaecology, allowing women to remain on Mornington Island for childbirth would have the effect to place women at significant risk, given the high rate of complication\(^{84}\) that requires specialised care – that means

\(^{81}\) HREOC, Report on Mornington, above n 79.

\(^{82}\) HREOC, Report on Provision of Health and Medical Services, above n 79.

\(^{83}\) Dr. Streatfield, Brisbane Hearing, transcript at 501, cited in HREOC, Report on Provision of Health and Medical Services, above n 79.

\(^{84}\) Complications include, or arise from, serious infections, labours needing augmentation, post partum haemorrhaging requiring transfusion, caesarean section and diabetes. The high rate of complications is partly explained by antenatal problems related to high rates of diabetes and anaemia prior to pregnancy which in turn relates to poor nutrition.
their transfer to hospital miles away. Correspondingly, the removal and transfer of Aboriginal women from their land and communities is perceived as the ‘functional choice’ to secure their health when giving birth to their babies.

Why would Aboriginal women opt for a ‘dysfunctional choice’ – giving birth on their land and in their communities – that would put at risk their own well-being and that of their babies? Is this an ‘irrational behaviour’? Is such a negative impact on their well-being achievement a comprehensive and realistic assessment?

Evidence from the HREOC’s inquiries highlights important issues that need to be taken into consideration:

The problem is with having the women come down here [to Cairns]. They have to come down about two months before the baby is due, which means they leave children and other family members behind…That is a burden on the family, plus it also makes the women lonely as well and she worries. Sometimes family relationships can break up.  

The safety aspect must be balanced against the cultural appropriateness and the social effects it has on that family and that community…A lot of Aboriginal people feel it takes away their birth rights and land rights because on their birth certificate it says born in Cairns, instead of born at Hopevale, Wujal Wujal, etc…

Furthermore, discussions with Aboriginal women during the HREOC’s visits revealed several concerns in relation to the style, environment, staffing and cultural deficiencies associated with childbirth practices of western medicine.

85 HREOC, Report on Mornington, above n 79, 29. It would be difficult to predict who might need to be transferred and such transfer may not be possible during the wet season.
86 Barbara Miller, Aboriginal Coordinating Council (ACC), Cairns Hearing, transcript at 330, quoted in HREOC, Report on Provision of Health and Medical Services, above n 79, 27.
87 Ibid. Barbara Miller, transcript at 330.
Difficulties created by the orthodox approach to childbirth are also reported in indigenous communities from the Northern Territory. A report compiled by the Central Aboriginal Congress dealing with childbirth policy, states that:

Hospital birth, for a number of reasons, is often regarded with great trepidation, and is usually a highly traumatic one. Hospital deliveries are alien to Aboriginal women and constitute a great injustice. Aboriginal women not only hold radically different beliefs on births from whites, but must also deliver their babies in a silent, fearful and unknown world. The loneliness of Aboriginal women is exacerbated by the absence of warm, supportive women, the use of English during labour and by unknown and terrifying technology.

In particular, the report signalled several cultural differences in:

a) assisting at child birth:

Only the women participate and help in childbirth, and for the Aboriginal women to be attended by white male doctors in compromising positions is a cultural shame.

b) the threatening nature of the hospital environment

Their isolation is intensified by the absence of medical staff who can communicate in their language and by the absence of interpreters…

Not surprisingly, fear frequently compels the Aboriginal women to abscond…

c) on procedures, medicines and communication

Aboriginal women are condemned to idiocy in the absence of knowledge and understanding of the various procedures, operations and medications used in western obstetrics.

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89 The Central Aboriginal Congress is an Aboriginal community controlled health care service based in Alice Springs, Northern Territory. Information about its health services and programs are available at <www.caac.org.au>.


91 Ibid.

92 Ibid 7.
d) and other cultural issues, like

According to Grandmother’s law, the placenta is buried where the baby is born on the ground, linking the spirit child, woman and country. The hospital staffs [generally] dispose of the baby bag. To Aboriginal women this is sacrilege.\textsuperscript{94}

The HREOC’s Report on Mornington Island expressed concern about the lack of understanding of the broad and complex issues surrounding the desire by Aboriginal women to have their children on their land. The Report notes that ‘[t]he prioritising of technical solutions to the neglect of cultural issues may in fact be promoting ill health in other spheres through cultural distress’. It further stressed that ‘…the categorization of birth as simply a medical problem underplays the cultural significance of the event for Aboriginal people.’\textsuperscript{95}

The significance of the cultural dimension of childbirth and maternal health has been broadly emphasized in literature.\textsuperscript{96} In particular, the UN Permanent Forum on Indigenous Issues has called on relevant United Nations agencies and funds, such as

\begin{itemize}
\item \textsuperscript{93} Ibid.
\item \textsuperscript{94} Ibid 7–8.
\item \textsuperscript{95} HREOC, \textit{Report on Mornington}, above n 79, 63.
\end{itemize}
the World Health Organization (WHO), the United Nations Children’s Fund (UNICEF), the United Nations Population Fund (UNFPA), as well as regional health organizations and governments to ‘fully incorporate a cultural perspective on health services aimed at providing indigenous women with quality health care, including emergency obstetric care, voluntary family planning and skilled attendance at birth’. 97 In particular, the UN Permanent Forum has stressed the importance of the roles of traditional midwives and the need to re-evaluate and expand their roles ‘so that they may assist indigenous women during their reproductive health processes and act as cultural brokers between health systems and the indigenous communities’ values and worldviews’. 98

The childbirth and maternal health policy reported has shown the socio-cultural ramifications of childbirth and maternal health policies insensitive to Aboriginal and Torres Strait Islander’s cultural perspective. Indigenous Australians’ worldview on health and communities’ values are essential elements that need to be acknowledged and imbedded within the whole health policy process. The childbirth and maternal health policy discussed gives the opportunity to demonstrate how the methodological approach described in the second part of the thesis may contribute to a more comprehensive analysis of policy-making processes and to the identification of hidden failings in policy assessments. It is argued that the adoption of this methodological approach would support the design, implementation and evaluation of

98 Ibid.
freedom–centred policies imbued with the fundamental principle of indigenous self–determination.

It has been claimed that *agency achievement* provides a more adequate space for the evaluation of policy outcomes. In fact, *agency achievement* entails a broader evaluative exercise since it allows us to include non personal well–being–related objectives in the evaluation of policy outcomes. It also requires an assessment of different movements in *well–being achievement* vis–à–vis *agency achievement*.

The removal of Aboriginal women to give birth to their babies has led to an increase in personal *well–being achievement*, since the maternal mortality rate dropped, but it has also caused a decrease in their *agency achievement*. Fulfilment of social practices, obligations towards land, families, and communities have been disregarded, causing not only a decrease in *agency achievement* but also a decrease in other aspects of women’s *well–being achievement*, such as distress, shame, loss of self–esteem and other aspects related to having babies in a unknown environment.

If ‘the true test of self–determination is…whether indigenous peoples themselves actually feel that they have choices about their way of life’,99 indigenous development policies should aim at enlarging the overall and actual freedom to make valuable choices, the overall capability to achieve whatever indigenous peoples decide, individually or collectively, to pursue as responsible agents.100

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Accordingly, because individual and collective agents may value goals other than personal well-being, policy decision-making strategies need to refer to a space which is conceptually able to encompass those diverse factors. Because well-being freedom cannot reflect the person’s overall freedom as an agent – since it is freedom to achieve a specific aim: personal well-being – agency freedom provides such a space. It is indeed a conceptually broader space within which it is possible to include the overall set of valuable capabilities related to personal well-being as well as the set of non-personal well-being factors (obligations, duties, or social practices).

As such, the adoption of agency freedom as the reference space for policy design enables a better understanding of value-judgment and decision-making processes underlying the individual and collective act of choice. It can help understanding, and to a certain extent explain, the motivations behind ‘functional’ and ‘dysfunctional’ choices or, in other words, to make sense of the so-called ‘deviational behaviours’.

Agency freedom is conceptually able to encompass what Nakata calls the ‘cultural interface’, that is ‘the intersection of the Western and Indigenous domains’, the place where different systems of thought coexist, the place where ‘knowledge systems as they operate in people’s daily lives will interact, develop, change and transform’.101 This ‘cultural interface’ can be thought of as a ‘negotiation area’, a place of ‘constant tension and negotiation of different interests and systems of knowledge…’, ‘the place where we live and learn, the place that conditions our lives, the place that shapes out

futures and...the place where we are active agents in our own lives – where we make decisions – our lifeworld’.  

The adoption of *agency freedom* in policy design, and its conceptualization as a negotiation area in which different knowledge systems coexist, allows us to embed within the policy process one of the fundamental criteria analysed in the second part of the thesis: the acknowledgment and integration of ‘indigenous knowledge systems’ in indigenous policy strategies. The acknowledgment and integration of indigenous knowledge systems within the design, implementation and evaluation of development policies is considered a fundamental criterion for the fulfillment of indigenous peoples’ right to self-determination through development policies.

The proposal to incorporate this criterion in the Australian policy context triggers two important questions: what does it mean to integrate an ‘indigenous knowledge system’ in Australia’s health policy frameworks and plans for Aboriginal and Torres Strait Islander peoples? How can Indigenous Australians’ capability right to health be configured?  

The next chapter investigates the implications of acknowledging and including Indigenous Australians’ ‘indigenous knowledge system’ into governmental health policy strategies. The integration of Aboriginal and Torres Strait Islanders’ traditional medical system will enable to gain a deeper understanding of Aboriginal and Torres Strait Islanders’ traditional medical knowledge systems.

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102 Ibid.  

103 In the United Nations Educational, Scientific and Cultural Organization’s *Declaration of Science and the Use of Scientific Knowledge* it is stated that ‘traditional and local knowledge systems as dynamic expressions of perceiving and understanding the world, can make and historically have made, a valuable contribution to science and technology, and that there is a need to preserve, protect, research and promote this cultural heritage and empirical knowledge’. UNESCO, *Declaration of Science and the Use of Scientific Knowledge. Science for the Twenty–First Century*, available at <http://www.unesco.org/general/eng/programmes/science/wcs/eng/declaration_e.htm>
Strait Islander peoples’ health and to identify the foundational elements which constitute the ‘indigenous capability right to health’. 
Chapter 9

The indigenous capability right to health: towards the acknowledgment of Aboriginal traditional medicine

9.1 The sinking into oblivion of Aboriginal traditional knowledge and traditional healers

Australian governments’ health policy frameworks and the Human Rights Equal Opportunity Commission’s appraisal of government policy present a fundamental vacuum: the omission of Aboriginal traditional medicine and traditional healers.

In my view, the recognition of the value and significance of traditional medicine and traditional healers is crucially important for the improvement of the health status and survival of Aboriginal and Torres Strait Islander peoples. As such, traditional healing practices and traditional healers are indispensable and urgently needed in the elaboration of adequate health policy frameworks and strategies to address the appalling health status of Aboriginal Australians.

It has been argued that the capability perspective leads one to see indigenous rights primarily in terms of ‘capability to function’, that is in terms of the substantive freedoms that indigenous peoples enjoy to lead the kind of life they value. Accordingly, a person’s freedom can be assessed by the extent to which he or she is able to choose valuable alternative combinations of functionings.

The argument discussed here is that if we apply this approach in the analysis of Indigenous Australians’ health, Aboriginal and Torres Strait Islanders’
expansion of substantive freedom to make valuable choices and to choose valued alternative combinations of functionings, cannot be thought of without the recognition and inclusion of traditional medicine and traditional healers in health policy–making.

It is desolately interesting to note that predominant debates on health policy strategies to tackle the Aboriginal and Torres Strait Islander health crisis, fail to even consider the existence of Aboriginal traditional medicine. The sinking into oblivion of Aboriginal traditional healers and their healing practices is starkly obvious in health policy debates, policy frameworks, plans and programs.

The National Strategic Framework does not mention traditional medicine and traditional healers, nor are the value of traditional Aboriginal healing systems and healing practices acknowledged or incorporated into policy health plans and programs. Scattered references to traditional healing practices appear in the context of ‘cultural appropriateness’ requirements. The Human Rights Equal Opportunity Commission’s Report, for instance, mentions traditional Aboriginal and Torres Strait Islander peoples’ healing practices only once, when referring to the Cultural Respect Framework for Aboriginal and Torres Strait Islander Health.1 This report is referred to as it proposes to enhance mainstream health system accessibility by delivering ‘cultural safety’ to Indigenous Australians.2 The Cultural Respect Framework embeds the legitimization of traditional healing practices within the concept of ‘cultural respect’ and ‘cultural safety’.3 As a result, examples of culturally respectful health strategies include the possibility

1 Australian Health Minister’s Advisory Committee, Cultural Respect Framework for Aboriginal and Torres Strait Islander Health, 2004–2009 (Canberra: Commonwealth of Australia, 2004).
3 Ibid 11.
for Aboriginal and Torres Strait Islander patients to access, when requested, traditional healers in public hospitals.  

The superficial reference in the HREOC’s Report indicates that no due attention is paid to the value and significance of Aboriginal traditional medicine and traditional healers. The acknowledgment, promotion and support of Aboriginal traditional healing systems and traditional healers is not included in the Report’s recommendations, neither as a goal nor as a means for policy strategy through which the campaign to achieve health equality within a generation is to be realised.

It is interesting to note that the Report supports a campaign to increase the size of Aboriginal and Torres Strait Islander health workforce. Recruitment and retention of Aboriginal and Torres Strait Islander health professionals is set as a key step to address the indigenous workforce representation shortfall and to achieve an equitable distribution of primary health care. There is no doubt that an increase of indigenous medical personnel would impact positively on the whole health care system, particularly in terms of ‘cultural safety’. It is imperative though, to notice that while there are recruitment campaigns to encourage

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4 Ibid.  
5 In 2001 there were 90 Indigenous Australian doctors compared to 48,119 registered doctors in Australia. While Aboriginal and Torres Strait Islander people held 67% of positions in Aboriginal Community Controlled Health Services, 98% of the doctors and 87% of the nurses were non–Indigenous: see, Australian Institute of Health and Welfare and Australian Bureau of Statistics, *The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander Peoples 2005*, ABS cat. No. 4704.0 (Canberra: Commonwealth of Australia, 2005) 63. See also, Aboriginal Health Ministers’ Advisory Committee (AHMAC), *Aboriginal and Torres Strait Islander Health Workforce National Strategic Framework* (Canberra: Commonwealth of Australia, 2002).  
Aboriginal youth to enter the medical profession, there is no campaign to encourage Indigenous Australians to value, discover – or rediscover – their own traditional healing practices and the role traditional healers play within Aboriginal and Torres Strait Islander communities across Australia. In my view, there should be a campaign to acknowledge and make people aware of the value of Aboriginal traditional medicine as well as the role that Aboriginal traditional healers play in maintaining, protecting and restoring the well-being of indigenous individuals and communities.

The absence of Aboriginal traditional medicine is unacceptable. Traditional medicine is a pulsing reality. As Mrs Curtis, one of the most experienced ngangkari – traditional healers – of the Anangu people of Central Australia, indicated:

I have spent a great deal of my life healing people...I give healing treatments to everybody: to men, women, children, old women, old men, young women and young men. They all come and ask me for help....I travel a lot giving treatments, especially where there are infections going around and people have fevers and high temperatures... people who can’t visit ngangkari for healing treatments can run into serious trouble health-wise.

Traditional healing practices are of great significance and have the potential to play a key role in health policy frameworks, strategies and programs for the

7 See, eg, Australian Indigenous Doctors Association (AIDA), Healthy Feature; Defining Best Practice in the Recruitment and Retention of Indigenous Medical Students (Sydney: AIDA, 2005); G Phillip, Indigenous Health Curriculum Framework, (Melbourne: VicHealth Koori Health Research and Community Development Unit 2004); AHMAC, The Aboriginal and Torres Strait Islander Health Workforce National Strategic Framework, above n 5: it identifies two objectives concerning Aboriginal and Torres Strait Islander medical workforce: 1) ‘to increase the numbers of Aboriginal and Torres Strait Islander people working across all the health professions; 2) to improve the effectiveness of training, recruitment and retention measures targeting both non-Indigenous Australian and Indigenous Australian health staff working within Aboriginal primary health care’.

betterment of Aboriginal and Torres Strait Islander health status. The total disregard for traditional medicine, particularly by Aboriginal and Torres Strait Islander youth, would not only worsen the health crisis, but also undermine the existence of Aboriginal and Torres Strait Islander culture and identity:

We want to see the valuable skills of ngangkari remain of value into the future. We want to see the valuable skills of ngangkari still working right into the next century. We don’t want to lose our own healers or see their skills disappear. They are precious to us.9

Dickie Minyintiri, an Anangu traditional healer stresses that:

I am trying to tell as many of the young people about ngangkari work before I get too old. It is important that they know about bush doctors. I’d really like them to all know how important it is.10

The promotion of traditional medicine, in particular a possible ‘recruitment campaign’, must be guided by and constantly carried out according to the principle of self-determination. Medicine, perhaps more than any other area of indigenous knowledge, is a sacred domain which needs to be respected and acknowledged according to Aboriginal and Torres Strait Islander self-determined modes of being.

There are no universities or medicine schools providing courses to become a traditional healers or to learn about traditional healing practices. Training, ‘selection requirements’ and skills respond to a system of knowledge ontologically different from the mainstream Western-based medical paradigm. As the ngangkari Dickie Minyintiri reveals ‘I learnt my ngangkari skills from my grandfather and my older brother when I was a small child. They taught me how to touch in the healing way…Grandfather was the man who gave me so much.

9 Elsie Wanatjura: NPYWC, Ngangkari Work, above n 8, 14.
He’d teach me and give me knowledge and power’.\textsuperscript{11} Further, Elsie Wanatjura points out how ‘whitefella doctors learn from paper; Ngangkaris learn from the spirits. Years and years and years of learning’.\textsuperscript{12} And more, ‘Ngangkaris work the same as doctors. We are equal in our work. The only difference is that doctors and nurses learn their jobs at university. This is the way white people get most of their learning, regardless of what they do.\textsuperscript{13}

The recognition and introduction of the role and work of Aboriginal and Torres Strait Islander traditional healers in health policy thinking would impact significantly on policy decision–making strategies and policy outcomes.

An example may be considering how unequal access to health care would be differently addressed: it is naïve to set as a policy outcome the achievement of equality in the provision of health infrastructures, equal access to health care, or same number of medical professionals in rural and remote communities as compared to urban areas.

It is argued here that it would be more appropriate to design policies which recognize and enhance the freedom and opportunities for traditional healers to practice their medicine according to their own worldview in a self–determined way. The unequal access to health care, thus, would not be addressed by providing the same level, qualitatively and quantitively, of mainstream health service in indigenous communities. The goal of increasing accessibility would be addressed by supporting the delivery of traditional medical practices and traditional healers.

\textsuperscript{12} Elsie Wanatjura, Emotional and Social Well Being Project Worker, Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council, \url{<http://waru.org/organisations/npywcnpy_wellbeing.php>} (accessed 3 April 2006).
\textsuperscript{13} Andy Tjilari and Rupert Peter: NPYWC, \textit{Ngangkari Work}, above n 8, 20.
An initiative worth mentioning for promoting and supporting traditional healing practices and the role of traditional healers is the ‘Emotional and Social Well–Being Project’ carried out by the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council in Alice Springs. The NPY Women’s Council welcomed the proposal in 1997 by the Office of Aboriginal and Torres Strait Islander Health, to create a regional centre in order to offer Aboriginal health workers education and training about mental health. The NPY Women’s Council, while expressing interest in learning about mainstream concepts and strategies about emotional and social well–being, also insisted on employing ngangkari – traditional healers – as consultants in traditional healing practices.

The Council stressed that it ‘was more important to promote and support traditional Anangu healing practices and cultural values’. Eventually in 2000, the NPY Women’s Council could employ two traditional healers to work full time in the tri–state cross border areas of Western Australia, Northern Territory and South Australia.

This initiative is significant as it provides an alternative policy strategy which basically constructs a bridge between non–Anangu health workers and Anangu traditional healers. The project aims to develop training in mental health issues for Anangu workers that is relevant, effective and culturally appropriate, while also ensuring that non–indigenous mental health staff working with Anangu are well

14 The Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Corporation covers a 350,000 square kilometres area of the cross border region of Western Australia, South Australia, and the Northern Territory.
15 Western Desert language–speaking persons. Aboriginal people in Central Australia speak numerous dialects, such as Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara.
16 NPYWC, Ngangkari Work, above n 8, 12.
17 The funding for the employment of the two ngangkari is provided by the Mental Health Unit, South Australian Department of Human Services.
informed about the role of traditional healing. Many traditional healers\textsuperscript{18} are indeed eager to practise in the health clinics in front of non–Aboriginal doctors and nurses, and when interest and respect is shown ngangkari elucidate their treatments to non–Aboriginal health personnel.\textsuperscript{19}

The lack of knowledge about ngangkari’s role and work among non–Aboriginal people in states and federal government departments, as well as among non–Aboriginal health workers and medical practitioners, is deemed to be the root cause of the difficulty in getting funds to health programs supporting and promoting traditional healers.\textsuperscript{20} Dickie Minyintiri, for instance, explains that doctors and nurses in the clinic know about his work but they do not understand, as most people, this kind of work.\textsuperscript{21} It is explained that other Aboriginal traditional healers would like to be part of similar programs, and it is deplorable that no funding is available and that ‘the most highly skilled ngangkari out here in the bush don’t even have enough money to buy food’.\textsuperscript{22}

The NPY Women’s Council project should be taken into consideration as a model for more adequate health policy frameworks at federal, state and local level. The point is that there is no nationwide framework which encompasses the acknowledgment of traditional medicine as a priority issue, which recognizes the value of traditional healing practices, and which promotes and supports Aboriginal and Torres traditional healers.

The question we should engage with is what lies behind this vacuum? Why is there no mention in national policy debates and frameworks of the value of

\textsuperscript{18} The NPY Women's Council only employ two ngangkari.
\textsuperscript{19} Elsie Wanatjura: NPYWC, \textit{Ngangkari Work}, above n 8, 15.
\textsuperscript{20} \textit{Ngangkari Work}, above n 8, 14–15.
\textsuperscript{21} Ibid 25.
\textsuperscript{22} Andy Tjilari and Rupert Peter: NPYWC, \textit{Ngangkari Work}, above n 8, 20.
Aboriginal traditional medicine and the role and daily work carried out by traditional healers?

An answer to this question may be found in the fact that the delivery of health care ignores the ‘health interface’ in which Aboriginal Australians live daily. The encounter with the mainstream medical system is complex, confusing and at times disrupting for Aboriginal and Torres Strait Islander peoples.\(^{23}\)

Ralph Folds, for instance, observes that Pintupi adopt western medicine not because they accept its foundational principles, but because it occasionally cures illnesses that white people brought to them.\(^ {24}\) Some aspects of western medicine have been incorporated into Pintupi life and belief systems without abandoning their own understanding and explanation of illness, its causes and proper treatments.\(^ {25}\) For example, even though women give birth in hospitals, their newborn babies are ‘smoked’ in order to be protected from diseases. Technology may also give rise to serious problems, as in the case of a life-support system, where it is unthinkable for Pintupi people that doctors may discuss with relatives turning off a life-support system. Since relatives cannot take part in the death of their own, casualties may occur as relatives literally worry themselves to death.

A widespread illness is often considered to be caused by the absence of a ngangkari in the settlement, and it is common for Pintupi to consult with a ngangkari before going to the clinics or to a doctor and nurses. In some cases,\(^ {23}\)

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\(^{23}\) It is difficult to estimate the extent to which Indigenous Australians are actually exposed to both the western mainstream medical system and traditional one. The degree to which Indigenous Australians make use of these two systems vary enormously depending on geographical locations (living in urban, rural or remote areas) and individual and communities’ circumstances.


\(^{25}\) Ibid 135.
people remain sick for weeks without going to hospitals because they can not find the ‘right’ ngangkari.26

In Northern Territory,27 specifically at Yirrkala, evidence shows that Aboriginal people choose western medicine to cure the majority of their illnesses, but the causes of such illnesses are explained according to their traditional belief system.28

A framework outlining traditional Aboriginal health beliefs has been elaborated29 by bringing together different health–related beliefs which have been identified in different indigenous communities across Australia.30 Considering

27 The Northern Territory occupies one sixth of the Australian land mass. It has a population of just under 200,000 of which 28% are Aboriginal. The vast majority of the Aborigines live in small remote communities scattered across the Territory.
29 Patrick Maher, ‘A Review of Traditional Aboriginal Health Beliefs’ (1999) 7 Australian Journal of Rural Health 229, 230–231. This framework is proposed as a representative sample which summarizes health–related beliefs held by Aboriginal people throughout Australia. It does not describe the beliefs of any particular community because there are variations between and within communities. It is also pointed out that specific health beliefs can have been overlooked and that there is no material about health beliefs of Indigenous Australians living in urban areas.
This framework is useful to appreciate the singularity of Aboriginal health beliefs and to gain a better understanding of the significant cultural differences between western medicine and traditional Aboriginal medicine.

The first characteristic that needs to be taken into account is that traditional health beliefs are connected with several aspects of Indigenous Australians’ life, such as kinship obligations and land. Social and spiritual dysfunctions have a central role in causing diseases so that ‘individual well-being is always contingent upon the effective discharge of obligations to society and the land itself’. The priority given to social relationships suggests that social obligations or responsibilities may take precedence over one’s own health.

The Aboriginal model of illness causation sees ailments classified into five main categories: natural, environmental, direct supernatural, indirect supernatural and western or emergent causes. These categories are not mutually exclusive as possible multiple causes can be identified in relation to a specific case.

It is important to note that supernatural intervention and sorcery are considered the main causes of serious illnesses and they are considered of fundamental importance because they provide meaningful explications about the death or illness of a specific person, and why it happened at a certain time.

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Too Much Sweet, the Social Relations of Diabetes in Central Australia, (Darwin: Menzies School of Health Research, 1997).


32 Maher, above n 29, 230.

33 See figure 9.1.

other words, they provide the ‘ultimate’ reason why a person became ill,\textsuperscript{35} answers that the western medical system is not able to provide.\textsuperscript{36}

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<table>
<thead>
<tr>
<th>Categories of illness causation</th>
<th>Categories of illness</th>
<th>Examples of resultant conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Natural</strong> (part of everyday life, generally result in temporary states of weakness)</td>
<td>Emotions (resentment, sulking, shame, worry, homesickness, grief, jealousy, anger, anxiety) Dietary factors Physical assault and injury</td>
<td>Loss of appetite, weight loss, listlessness, pain, suicide or attempted suicide Diarrhoea, coughs and lung complains, headaches Physical injuries</td>
</tr>
<tr>
<td><strong>Environmental</strong></td>
<td>Winds The moon Climate: excessive heat and cold</td>
<td>Pain, stomach ache, diarrhoea, chills Epilepsy or fitting in children Colds, aches, headache, respiratory complaints, diarrhoea</td>
</tr>
<tr>
<td><strong>Direct supernatural</strong> (transgression of the Law)</td>
<td>Breach of taboos: taboos of place-sacred sites; taboos of ritual/ceremonies; taboos of pregnancy taboos of relationship (parenthood, childhood, avoidance, incest, mortuary); taboos of menstruation Spirits of the dead</td>
<td>Multiple possible effects including: swellings, vomiting, diarrhoea, drowsiness, madness, death, nausea, lethargy, difficult pregnancy, injured foetus, deformed child, skin sores, epilepsy, neck pain with headache, leprosy, pneumonia, broken bones Weakness, vomit a lot and lose interest in living, influenza, sickness or death, madness</td>
</tr>
<tr>
<td><strong>Indirect supernatural</strong> Intervention (all illness attributed to sorcery is understood ultimately to be the result of social or religious offences, intergroup or intragroup conflict)</td>
<td>Boning, singing, painting</td>
<td>Multiple possible effects including: death, serious injury and illness, sterility, congenital defects, physical malformation</td>
</tr>
<tr>
<td><strong>Emergent/Western</strong> (conditions only known by Aboriginal society since colonisation)</td>
<td>Social and epidemiological changes which have occurred post colonisation of Australia</td>
<td>Alcohol-related illness, substance abuse, spina bifida, cerebral palsy, diabetes, heart disease, cancer, sexually transmitted disease, smallpox, measles, bronchitis, influenza, diarrhoea</td>
</tr>
</tbody>
</table>


\textsuperscript{35} Maher, above n 29, 232.

\textsuperscript{36} Ibid 230.
Traditional health beliefs operate as a form of social control: ‘good health is associated with strict adherence to approved patterns of behaviour and avoidance of dangerous people, places and objects’. Preventive care is therefore directly connected to the causes of illness according to the Aboriginal modalities of illness causation, so that preventive measures are founded on norms governing behaviours. These may include, looking after the land and not abuse one’s land or trespass on others’ territories; avoiding prohibited sacred sites or certain food in determined ceremonies or life crises; complying with obligations to others, and so on.

It is evident that when there is a strong persistence of these health–related beliefs, the ‘health interface’ cannot be ignored in normative policy frameworks, neither in the delivery of health care to Indigenous Australians.

The ‘health interface’ is a living reality, a negotiating domain where indigenous people interpret and constantly make choices. It is noted, for instance that ‘Pintupi are – inconveniently for policy – not a passive, dispirited people but vigorous participants busily interpreting and refashioning earnest western endeavours to simultaneously change and fossilize their culture’.

The ‘health interface’ involves the coexistence and tension between two different systems of medicine – western medicine and traditional Aboriginal medicine –, and different medical practitioners – indigenous traditional healers and western medical professionals. It is suggested that the poor compatibility between the belief systems underlying these two systems of medicine, has led to a

38 Maher, above n 29.
39 Folds, above n 24, 137.
‘strategy of domain separation’ to distinguish illness between western and Aboriginal causes.\textsuperscript{40} The perception of separated cultural domains brings about different behavioural patterns to deal with health–related issues, such as illness.

An interesting attempt to clarify how Aboriginal and Torres Strait Islander peoples navigate between those different domains is identified in figure 9.2.

\begin{figure}[h]
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\includegraphics[width=\textwidth]{figure92.png}
\caption{Model of Aboriginal behavioral patterns of seeking medical assistance}
\end{figure}


\textsuperscript{40} Maher, above n 29, 234.
This model tries to capture the different behavioural patterns of seeking medical assistance in case of illness. The ‘sequential’ behaviour indicates the use of one practitioner and then another one (for instance, consulting with the western doctor and then the traditional one, or vice versa); the ‘compartmental’ behaviour indicates the adoption of traditional medicine, for instance, when the ill–health conditions have a clear traditional explications; the ‘concurrent’ behaviour identifies the concomitant use of western and traditional forms of health care.

The fundamental assumption which lies beneath those patterns is that western medicine focuses principally on the identification and treatment of diseases. Western medicine can reduce the symptoms and explain the modalities and mechanisms of how ailments have arisen. Traditional medicine, instead, provides not only the ‘how’ but also the ‘why’ of sicknesses: traditional explanations provide meaningful reasons about the illnesses suffered. Traditional medicine is deemed to address the ultimate cause of sicknesses as well as personal, family and community issues surrounding illnesses.41

It is suggested that a combination of traditional and western medicine is usually adopted.42 However, in case of wounds caused by payback punishments, or acts of retributions, western medicine may not be considered,43 whereas when the root causes of illnesses are explained by supernatural interventions, western medicine is adopted to treat the symptoms and speed up the healing process, but it


42 Maher, above n 40; Elkin, above n 30.

cannot explain and remove the cause of those illnesses.\textsuperscript{44} It is also asserted that only western medicine can deal with diseases emerged after the contact with Europeans.\textsuperscript{45}

The attempt to understand the dynamics underlying the ‘health interface’ requires taking into consideration how the predominance of the western medical system has caused the devaluation and disregard of Aboriginal medicine and Aboriginal healers. The predominant western medicine paradigm has marginalised Aboriginal healing practices with serious consequences for the health status of Indigenous Australians.\textsuperscript{46}

In the case of the Yolngu people of Arnhem Land (Northern Territory), for instance, the new thinking and practices brought by Balanda – white people – has caused a great deal of confusion about health and healing practices. The contact with the predominant western culture over years has instilled uncertainty as to what body of knowledge is ‘real knowledge’, whether traditional healing practices are valid and whether Yolngu traditional healers are ‘real doctors’ or ‘witch doctors’.\textsuperscript{47}

It is noteworthy to report the reaction of a nurse at the Ramingining community clinic when a Yolngu traditional doctor cured and saved a baby girl after all attempts by the medical personnel failed to cure her: ‘it is a bad day when their evil work shows up the limitations of Western medicine. It’s one of our jobs here to get the people to have faith in Western medicine rather than the

\textsuperscript{44} Waldock, above n 43.
\textsuperscript{45} Ibid.
\textsuperscript{46} Richard Trudgen, \textit{Why Warriors Lie Down and Die: Towards an Understanding of Why the Aboriginal People of Arnhem Land Face the Greatest Crisis in Health and Education Since European contact: Djambatj Mala} (Darwin: Aboriginal Resource & Development Services Inc, 2000).
\textsuperscript{47} Ibid 142.
superstitious dealings of the ‘witch doctors’. Otherwise people always live in fear’.48

It is clear that the lack of a reciprocal understanding of two different systems of medicine continues to be the main cause of the devaluation of traditional healers and the rejection, crystallized over time, of their practices. Highly revered within Yolngu society in pre–contact time for mastering all health related matters, traditional Yolngu healers have been marginalized and ‘usurped’ in today’s Arnhem Land.49 According to Trudgen, there are no Yolngu traditional healers employed in a health clinic in Arnhem Land. There is one herbalist employed as a cleaner and one Aboriginal health worker who has been trained in the western medical system and traditional healing profession.50

The denigration of traditional healing practices and rejection by dominant culture has impacted on many Yolngu people, especially the youth, who dismiss traditional medicine and its practitioners as ‘“old hat”, unsophisticated, or irrelevant in the modern world’.51

The dismissal of traditional knowledge passed down from generation to generation for thousands of years and the labelling of the ‘Chief Medical Officers’ as ‘witch doctors’ is having serious implications. On one side, the loss of status has led many Yolngu people, especially the western–educated, to distrust their traditional doctors and completely rely on the dominant medical system with its ‘strange’ ways and a foreign language.52 On the other side, the disappearance of such precious knowledge appears more imminent. The growing number of young

48 Ibid 144.
49 Ibid 145.
50 Ibid 149.
51 Ibid 143.
52 Ibid 146.
Yolngu who accept the dominant cultural perspective and dismiss traditional practices as ‘rubbish’ or even ‘evil’, make it very difficult for Yolngu healers to pass down the knowledge, considering that one of the fundamental rules is that ‘knowledge of high value is not taught to those who do not appreciate its value’.  

Despite the fact that western non–indigenous medical health services have been superimposed on traditional Aboriginal health care systems, Aboriginal and Torres Strait Islander medicine has survived and is still extensively practised.  

The 1987 Review of Rehabilitation Services in the Northern Territory, for instance, has found that Aboriginal traditional healing practices are widely performed and the Territory Health Services have recognised the role of traditional healers.

Doctors and nurses might wonder why do Anangu keep asking for ngangkari help when they can access good health clinics these days and they can easily get a quick needle or a tablet? It is because ngangkari get straight to the problem and give immediate healing. Tablets can’t heal the spirit. Ngangkari can. Ngangkari can see right into the spirit and the

53 Ibid 149.  
55 Taylor M et al, Review of Rehabilitation Services in the Northern Territory (Canberra: Commonwealth Department of Community Services and Health, and Northern Territory Department of Health and Community Services, 1987).  
mind. Ngangkari see right inside the kurunpa – the spirit – and get straight to the heart of the matter.\textsuperscript{57}

Traditional Aboriginal medicine is part of Aboriginal culture and identity. It is maintained, in the case of Yolngu people, that the complex Yolngu health crisis could be overcome only when ‘Yolngu find a way to combine their traditional medical systems with the contemporary. Only when the two are working together, complementing each other, will we see advancement in the people’s health’.\textsuperscript{58}

The acknowledgment and inclusion of traditional Aboriginal medicine into Australia’s health policy frameworks and health service delivery can have important ramifications. First of all, it would promote a broad understanding of Aboriginal conceptions of health and illness; facilitate the understanding of the health–related beliefs which underlie western medicine and traditional Aboriginal medicine; contribute to a shared understanding between non-indigenous western health professionals and indigenous traditional practitioners; help comprehend the different behavioural patterns stemming from the coexistence and tension between two different systems of medicine. This understanding would then clarify the dynamics within the negotiation area which I have been referring to as the ‘health interface’, and help appreciate what, from a non–indigenous medical perspective, can be considered ‘irrational behaviours’.

The thesis argues that these elements should be seriously taken into consideration in the design, implementation and evaluation of health policies affecting Aboriginal and Torres Strait Islander peoples. The recognition and inclusion of traditional Aboriginal medicine has the potential to truly empower

\textsuperscript{57} Elsie Wanatjura (NPY Women’s Council Emotional and Social Well–being Project Officer): NPYWC, \textit{Ngangkari Work}, above n 8, 14.
\textsuperscript{58} Trudgen, above n 46, 149.
Aboriginal and Torres Strait Islander peoples, strengthen their self-esteem through the revaluation of their own identity and culture.

Support for this argument can be found in the increasing worldwide popularity and use of traditional medicine and complementary or alternative medicine, as well as in good practices carried out in other countries. These evidence may assist in the promotion and support of Aboriginal traditional medicine and traditional healers in Australia.


60 World Health Organization, *Report to the Fifth Session of the UN Permanent Forum on Indigenous Issues*, New York, 15–26 May 2006, UN Doc E/C.19/2006/6/Add.4, para. 2. The WHO Regional Office for the Americas participated in a study on maternity in Quechua women in Bolivia, that revealed the failure of health service to appreciate traditional maternal care practices of community midwives as an important factor in maternal and child mortality. An alternative strategy was proposed in order to eliminate the causes behind the poor rates of service usage for pregnant women: ignorance of traditional cultural practices, lack of communication, conflicts regarding objectives and allocation of resources for the maternal health programme. Central to the strategy was the rapprochement between public health services and traditional services, particularly the role of traditional midwives; L Germosen–Robineau and S Lagos–Witte, *The TRAMIL Program: Traditional Knowledge of the Use of Medicinal Plants in Central America and the Caribbean* (supported by UN Environment Programme & Global Environment Facility) (Ottawa: International Development Research Centre, 1997).
9.2 The indigenous capability right to health

How can the indigenous capability right to health be conceptualized?
The second part of the thesis has shown how a freedom–based approach characterizes the ‘indigenous capability rights system’. Accordingly, a freedom–centred perspective distinguishes the indigenous capability right to health, which is seen primarily as the enlargement of the substantive freedoms underlying the right. As a result, it is imperative to consider all freedoms embodied within the concept of Aboriginal and Torres Strait Islanders’ right to health and, by extension, indigenous peoples’ health worldwide. Consequently, the design and evaluation of indigenous health policy is called on to implement the capability right to health according to indigenous peoples’ understanding and worldviews of the freedoms embedded within it.

Certainly, it would be an oversimplification to assume that over 370 million indigenous peoples around the globe share the same health worldview. However, bearing in mind the distinctiveness of each and every indigenous community, it is possible to identify some remarkably common elements.

The UN Declaration on the Rights of Indigenous Peoples underlies the close association between individuals, communities, the natural environment and territories.\(^{61}\) Indigenous peoples’ ‘…distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters, coastal seas and other resources,’\(^{62}\) leads to view ‘illnesses’ not only related to

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\(^{61}\) UN Declaration, arts. 25, 27, 28.  
\(^{62}\) UN Declaration, art. 25.
individuals, but also to communities and the environment as a whole. The Inter–American Development Bank, in discussing indigenous health, notes that:

The individual's well being is linked to that of the community and the environment through practices that pursue spiritual equilibrium – an equilibrium between individuals, communities, and their environment.\(^63\)

Within the indigenous systems of knowledge, the multidimensional concept of individual well–being – physical, emotional, intellectual, psychological, and spiritual – must be complemented with community health and environmental balance. It becomes evident thus, that the diversified set of social practices – such as community and family obligations, land use, or resource management through which individual, community, and environmental health is pursued – must be included as core components of indigenous peoples’ health.

Accordingly, the indigenous capability right to health must be configured as the total set of capabilities relating to personal well–being as well as the total set of those components that directly relate to the health of family units, communities and the wider eco–systems.

Furthermore, the fulfilment of the indigenous right to health, conceived of as expansion of the substantive freedom to make valuable choices, cannot be thought of without the recognition of indigenous peoples’ traditional healing systems. Accordingly, Aboriginal and Torres Strait Islander peoples’ capability right to health must include Aboriginal traditional medicine and the role of traditional Aboriginal healers. The acknowledgment of two systems of medicine – the Aboriginal traditional medicine and the western medical system – as equally valuable, as well as their inclusion in health policy strategies, are both essential

for the enlargement of Indigenous Australians’ individual and collective freedom and the realization of a self-determined right to health.

The indigenous capability right to health must include the freedom to choose to benefit from traditional healing practices, traditional medicine and plants. The Committee on Economic, Social and Cultural Rights has also highlighted:

…indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medical plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.64

The thesis argues that the foundational flaw in addressing Aboriginal Australians’ health status is the recognition of the western medicine paradigm as the only system of medical knowledge to be accepted and applied in the delivery of health care. It is the model against which every aspect of health policy for Aboriginal Australians is being framed.

To illustrate, a thorough analysis of the concept of ‘cultural appropriateness’, for instance, may help clarifying this proposition. The concept of ‘cultural appropriateness’ in health care delivery tends to align the mainstream health care system to the ‘cultural needs’ of Aboriginal Australians. It is not my intention to

deny the importance of providing health infrastructures and services which are respectful and appropriate for Indigenous Australians in all different respects. However, the concept of ‘culturally appropriate’ should not be uncritically embraced, but rather carefully scrutinized as to what knowledge system is taken as a reference model. Trudgen, for instance, questions whether the so-called ‘culturally appropriate measures’ respond to the dominant culture, traditional worldviews, or western–educated Aboriginal people’s worldview.\(^65\)

The thesis suggests that the application of the concept of ‘culturally appropriate’ to mainstream health care services delivered to Indigenous Australians tends to sanction a one-way medical conceptual framework and medical response to illnesses. The inadequacy of the concept of ‘cultural appropriateness’ to fully address the ‘cultural needs’ or cultural diversity in the delivery of health care to Aboriginal Australians, can be better grasped if we consider the issue of ‘compliance’.

The issue of ‘compliance/non compliance’ in indigenous contexts is indeed illustrative of the predominance of the western medicine paradigm. It is argued that treatment failure as a result of ‘poor compliance’, has significantly weighed down Aboriginal Australian health care.\(^66\) Evidence shows that compliance, that is, adherence to western medical advice and services, is a key cause of the continuing dreadful state of health among Aboriginal and Torres Strait Islander

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\(^65\) Trudgen, above n 46.

peoples, especially in remote Indigenous health practice. The failure to use prescribed medication is reported to be a reality of daily life, a problem leading to continued or worsening Indigenous health outcomes.

Alternatively, it is suggested that Indigenous non-compliance is not the problem but rather a measure of the real issue: the dissonance between two different belief systems, those of Aboriginal patients and western medicine.

‘Strong compliance’, or healthy behaviour, occurs when there is a strong cultural affinity between patients and western medical advice and treatments, in particular, when the scientific concepts of cause and effect, as well as statistical relationships such as predictability, are shared. ‘Poor compliance’, or unhealthy behaviour, occurs when there is not a common understanding of those fundamental concepts underlying the western medical system. Difficulties arise when perceptions about the causes of ill health are different, when health practitioners offer an account of reality which is different from patients’ understanding and experience: the greater the dissonance between the western medical explanatory model and patients’ belief systems, the higher the impact on compliance.

The introduction of ‘culturally appropriate measures’ as a device to improve the accessibility of the mainstream health delivery system, can be considered as a

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69 McConnel, above n 66. See also, Maher, above n 29, 235: ‘[t]he lack of a common conceptual framework within which patient and practitioner can interact may result in decreased compliance and satisfaction’.
70 McConnel, above n 66.
71 Ibid; Maher, above n 29, 235.
means to increase compliance among Aboriginal and Torres Strait Islander peoples. The point I would like to make is that those measures operate only at one specific level of the ‘health interface’.

To clarify, we can consider ‘compliance’ as a rate or a fraction with a numerator and denominator. In the context of Aboriginal and Torres Strait Islander health, the numerator indicates adherence to medical advice, whereas the denominator is the medical advice given according to the western medical system. It follows that progress towards compliance can be achieved either by manipulating the numerator or the denominator.\(^\text{72}\)

Efforts to improve compliance have focused on the numerator, that is increasing indigenous peoples’ adherence, by encouraging patients to take responsibility for their health, increasing personal and community autonomy, and changing ‘institutional attitudes and behaviour’ to ensure ‘cultural safety’ through more ‘cultural appropriate’ measures aiming at accommodating Indigenous Australians’ ‘cultural needs’.\(^\text{73}\)

In all these ‘culturally appropriate measures’ the fundamental assumption is that the denominator, that is the western medical system, remains unchanged and unchallenged. In this way, western medicine is conceived of as a neutral construct, free from any ‘cultural traits’. In contrast, it is maintained here that cultural awareness should be applied not only to Aboriginal and Torres Strait Islander peoples, but also to the western system of medicine.

\(^{72}\) McConnel, above n 66.

Western medicine is deemed to have a culture, a set of attitudes, actions and a belief system. The most significant feature is that western medical culture is science–based: scientific and evidence based knowledge underpins the whole conceptual fabric of western medicine.

Accordingly, a scientific view of health, illness and disease not only informs the whole cognitive apparatus of the medical system, but also affects health professionals’ practices, attitudes, and advice given to patients. It is precisely the distance between Indigenous Australians’ health belief system and western medicine’s belief system, the root cause of the problematic issues in the cross-cultural health service delivery setting.

The immobility of the denominator indicates the foundational flaw of Australia’s policy framework to address Aboriginal Australians health status: the recognition and maintenance of the western medicine paradigm as the only system of medical knowledge accepted and applied in the delivery of health care.

It is proposed that the manipulation of the denominator, through the elevation of Aboriginal traditional medicine to the same level as western mainstream medicine, would have far–reaching significance and implications. It would represent a valuable alternative option not only to improve ‘compliance’, but to fulfil a self–determined right to health for Aboriginal Australians. There is an urgent need to integrate Aboriginal traditional medicine within Australia’s national health policy frameworks and strategies. As the traditional healers, Andy

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74 Maher, above n 29; McConnel, above n 66.
75 Maher, above n 29, 229.
Tjilari and Rupert Peter, declare ‘we want to work together to improve the health and well–being of Anangu’. 76

The integration of Aboriginal traditional medicine into Australia’s health policy frameworks would not be exceptional from a worldwide perspective. 77 Rather, it would harmonize Australian health policy with the growing international interest 78 and recognition of traditional medicine and complementary/alternative medicine. 79 The acknowledgment of Aboriginal

76 Andy Tjilari and Rupert Peter: NPYWC, Ngangkari Work, above n 8, 21.
77 Amazon Conservation Team, Shamans and Apprentices Programme: Promotion and Integration of Traditional Medicine, available at <http://www.amazonteam.org/northeast.html> (accessed 4 May 2006). This program promotes and supports the integration of traditional medicine in Suriname (South America) in which tribal healers operate and direct traditional medicine clinics built alongside primary care health outposts. Since the program’s inception in 2000, traditional healers have been practising on equal footing with western–trained health workers and have been restored to full honour in their communities. Operating at the interface of western medicine, shamanistic healing, public health, and conservation, the Programme has been recognized by UNESCO/Nuffic as a Best Practice for Indigenous knowledge, as well as a 2003 World Bank Development Marketplace Global Competition winner; Germosen–Robineau and Lagos–Witte, The TRAMIL Program: Traditional Knowledge of the Use of Medicinal Plants in Central America and the Caribbean, above n 60. This applied research programme about traditional popular medicine of the Caribbean basin aims to support health practices based on the use of medicinal plants. It contributes to the development of national health and education policies, and primary healthcare delivery that integrates safe and effective traditional remedies; In Ghana, president Kwame Nkrumah, has recognized traditional medicine of the Akan, the Yoruba and other native African peoples the medicine of the land. In Ghana there is one traditional healer for every group of 200 Ghana citizens while there is one orthodox medical practitioner for every 20,000 Ghana citizens: see, Rudolph Ryser, ‘Traditional Healers, HIV/AIDS and the Accra Declaration’ (2006) 2(2) Center for World Indigenous Studies and Center for Traditional Medicine Quarterly Newsletter 5.

78 The WHO outlines the widespread and increasing adoption of traditional and complementary/alternative medicine worldwide, especially over the last 20 years. It is reported that one–third of the world’s population and over half of the populations of the poorest parts of Asia and Africa do not have regular access to essential drugs. Being more accessible, traditional medicine is also more affordable, closer to patients’ ideology, and less paternalistic than conventional medicine. In Africa up to 80% of the population uses traditional medicine whereas in China traditional medicine accounts for around 40% of all health care delivered. Traditional and complementary/alternative medicine provides an important health care service to persons both with and without geographic or financial access to allopathic medicine’: see, WHO, Legal Status of Traditional Medicine and Complementary/Alternative Medicine: A Worldwide Review, above n 59, 3–4; WHO, WHO Traditional Medicine Strategy 2002–2005, above n 59.

traditional medicine would therefore contribute to the implementation of one of the fundamental rights which is set out in the UN Declaration:

Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medical plants, animals and minerals…

The 2006 Global Summit on HIV/AIDS, Traditional Medicine and Indigenous Knowledge (the Accra Summit) held in Ghana, offers an exceptional case where traditional healers, scholars, and conventional medical practitioners gathered to find a new policy framework for cooperation and collaboration between traditional healers and mainstream medical professionals to prevent and treat HIV/AIDS. The Accra Declaration firmly calls on the WHO, UN Joint Programmes on HIV/AIDS, associated organizations and all governments and world organizations to support traditional medical practices through:

(1) promotion of traditional medical practice through collaboration with and recognition by existing healthcare systems and introduction of traditional medicine into research and educational curricula at all levels with particular emphasis on the youth;

(2) institutionalization of Traditional Medical Practice within governments, with implementation of standardization and a code of ethics for Traditional Medical Practitioners;

(3) training and certification of Traditional Medical practitioners in safe practices, addressing both indigenous and academic areas, in accordance with customary laws;

(4) promotion of collaboration and three-way referrals between traditional and orthodox medical practitioners, i.e. Traditional Medical Practitioners–to–Traditional Medical Practitioners, Traditional Medical Practitioners–to–Conventional Medical Practitioner, Doctors–to–Traditional Medical Practitioners;

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80 UN Declaration on the Rights of Indigenous Peoples, art. 24(1).
81 In March 2006, the World Health Organization, UN AIDS, the Center for World Indigenous Studies, Africa first were joined by African indigenous health organizations in Accra (Republic of Ghana) for a five–days summit of traditional healers, orthodox heal service providers and organizational representatives.
(5) States parties, governments and multilateral organizations are urged to respect the customary laws and practices that define access and availability of indigenous cultural knowledge, and to ensure adequate and mutually acceptable exchanges. Governments and funding agencies are requested to commit resources and funding to achieve the states goals.\textsuperscript{82}

Furthermore, the acknowledgment of Aboriginal traditional medicine at the national level would prompt international institutions to revise those studies that ignore the existence of Aboriginal traditional medicine in Australia, one of the oldest medical systems in the world. It is unacceptable, for instance, that a worldwide review on traditional medicine undertaken by the World Health Organization takes absolutely no notice of Aboriginal traditional medicine and traditional healers in Australia.\textsuperscript{83}

The implementation of health plans by international organizations should carefully assess the existence of local healing practices and medical remedies and obtain the ‘free, prior and informed consent’ of peoples involved in policy initiatives. The implementation of plans which ignore traditional medical systems, healing practices and the role of traditional healers within the communities have the potential to create dependency instead of empowerment.

\textsuperscript{82} \textit{Accra Declaration}, Global Summit on HIV/AIDS, Traditional Medicine and Traditional Knowledge, held at the Ghana Institute of Management and Public Administration, Accra, Republic of Ghana, 15–18 March 2006.

\textsuperscript{83} World Health Organization, \textit{Legal Status of Traditional Medicine and Complementary/Alternative Medicine: A Worldwide Review}, above n 59,145–147. Traditional Chinese medicine is described in details as the primary alternative/complementary medicine in Australia. Emphasis on other traditional therapies includes traditional ayurvedic medicine, traditional European herbal medicine, traditional homeopathic medicine, and aromatherapy. There is no mention whatsoever of Aboriginal traditional medicine.
9.3 Spirituality and rationality: understanding the ‘cultural divide’

The discussion of Aboriginal traditional medicine within the Australia’s health policy debate has exemplified the ramifications that the inclusion of a specific ‘indigenous knowledge system’ can have on the formulation, implementation and evaluation of policy frameworks in the area of indigenous health.

This example offers the opportunity to gain a deeper understanding of the broader implications that the incorporation of ‘indigenous knowledge systems’ into development policies can have in relation to indigenous/non–indigenous peoples’ relationships. It is indeed argued that the core of the ‘cultural divide’ which is often perceived as the major obstacle in indigenous/non–indigenous relationships lies at the ontological level.

The coexistence and tension between two different systems of medicine – Aboriginal traditional medicine and western medicine – have highlighted the complexity of the ‘health interface’ in which Aboriginal and Torres Strait Islander peoples live. This complexity has been found to be mainly grounded in the different belief systems which underlie the two systems of medicine. As Ralph Fold has pointed out in the case of the Pintupi people,

When the dominant society sees two discrete systems of medicine, one spiritual and the other scientific, it assumes that the obvious advantages of a scientific approach must vanquish the other. However, Pintupi are open to exploring the advantages of both, adopting aspects of western medicine for their own reasons and on their own terms, without ever relinquishing the spiritual basis of their own health understandings.  

84 Folds, above n 24, 134.
In fact, scientific and evidence-based knowledge is the foundation on which the mainstream western medical system has been developed and validated, whereas the Aboriginal traditional medical system is imbued with the metaphysical and spiritual dimensions of reality.

Difficulties in acknowledging Aboriginal traditional medicine by the dominant society, resemble the difficulties in reconciling an ontology based on the scientific rational paradigm with an all-embracing spiritually imbued ontology. The case of western modern science\textsuperscript{85} vis-à-vis native science helps us to understand this tension.

It has been outlined that modern science can be seen as ‘…a collective rational perceiving of reality, which is shared and authorized by the scientific community’.\textsuperscript{86} However, if we take the view that science is culturally relative, that which is regarded as science will be determined by the culture/worldview/paradigm of the definer,\textsuperscript{87} it follows that other sciences exist besides the ‘Western science of measurement’.\textsuperscript{88} Native science and its paradigm exemplify the ontological essence of indigenous peoples’ worldviews:

The Native paradigm is comprised of and includes ideas of constant motion and flux, existence consisting of energy waves,

\textsuperscript{85} In this work, Western science is not conceived of as ‘an immaculate Western conception’. The contribution of non-Western societies, such as Chinese, Arab, and others, is acknowledged. See, Amartya Sen, \textit{Identity and Violence. The Illusion of Destiny} (New York: W.W. Norton & Company, 2006). The adjective “Western” generally refers to non-indigenous peoples.
\textsuperscript{86} M Ogawa, ‘Science Education in a Multiscience Perspective’ (1995) 79 \textit{Science Education} 583, 589.
\textsuperscript{87} Leroy Little Bear, JD, foreword in Gregory Cajete, \textit{Native Science. Natural Laws of Interdependence} (Santa Fe, New Mexico: Clear Light Publisher, 2000).
\textsuperscript{88} Ibid.
interrelationships, all thing being animate, space/place, renewal, and all things being imbued with spirit.\textsuperscript{89}

Native or Indigenous science refers to ‘the entire edifice of Indigenous knowledge’ since there is no word in native languages for ‘science’. Native science encompasses ‘a wide range of tribal processes of perceiving, thinking, acting, and ‘coming to know’. The foundational role that concept, logic, and rational empiricism play in western science, need to be integrated with the role of ‘sensation, perception, imagination, emotion, symbols, and spirit’. Indigenous science, as it has been discussed,\textsuperscript{90} seems to fill the gaps that Hayward identified in western science: ‘the sacredness, the livingness, and the soul of the world’.\textsuperscript{91}

It becomes evident therefore how spirituality is deeply inserted in indigenous ontology as ‘[a]ll things have spiritual energy’.\textsuperscript{92}

…“spirit” and energy waves are the same thing. All of creation is a spirit. Everything in creation consists of a unique combination of energy waves…what appears as material objects is simply the manifestation of a unique combination of energy waves. Conversely, all energy wave combinations do not necessarily manifest themselves in terms of material objects’.

The centrality of spirituality in indigenous peoples’ worldviews can be grasped if one considers what Deloria argued:

It is foolish to pretend on the basis of a wholly materialistic science (which can only measure quantities) that there is nothing spiritual and nonmaterial in our universe…It is this attitude, as much as anything, that

\textsuperscript{89} Ibid.
\textsuperscript{90} Ibid.
\textsuperscript{92} Donald L Fixico, \textit{The American Indian Mind in a Linear World; American Indian Studies and Traditional Knowledge} (New York: Routledge, 2003) 58.
distinguishes [Indigenous knowledge system] from the scientific endeavor.  

The tension between western science and native science is also perceived as a tension between ‘the white men’s linear philosophy’ and a ‘circular philosophy’.  

‘In circular philosophy’, Fixico explains, ‘all things are related and involved in the broad scope of Indian life…The Circle of Life is inclusive of all things, including the physical, metaphysical and spiritual world. All things consist of spiritual energy’.  

On the contrary, white man’s linear way of thinking and perceiving the world is based on empirical evidence. 

Scientific empiricism dominates the linear way of thinking. Indeed, whereas the linear mind is deemed to be based on a ‘human–to–human relationship’, the circular way of thinking entails an holistic perception of reality which involves human beings, animals, plants, the natural environment and the metaphysical world.  

Whereas the ‘linear mind looks for cause and effect…the Indian mind seeks to comprehend relationships’. More specifically, 

Linear thought is rationalizing how something originates at point A, is affected by some force or influence and transforms into point B, to point C, and so forth. Intuitiveness is less relevant to the linear mind of problem solving and philosophy. The problem for the linear mind is dealing with the abstract. 

The circular method is a circular philosophy focusing on a single point and using familiar examples to illustrate or explain the point of discussion…As each person or being relates to the focal point, and if lines were drawn to indicate this relatedness, the results would be the spokes of a wheel, and all the participants are encircled by the unity of this experience. This might be called an “Internal Model”.

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94 Fixico, above n 92. 
95 Ibid 42, 53. 
96 Ibid 2. 
97 Ibid. 
98 Ibid 8.
In other words, the ‘Western linear mind must pursue empirical evidence to prove something is true so that it can become factual in the scientific sense’;\textsuperscript{99} while, in contrast, the Indigenous ‘circular mind’ or ‘native mind–set is a combination of physical and metaphysical dimensions’.\textsuperscript{100}

The pursuit of empirical evidence and reasoned scrutiny highlights the centrality of rationality. Rationality, and the demands of rationality, have been central to a wide range of disciplines, including social choice theory,\textsuperscript{101} economics,\textsuperscript{102} philosophy and social sciences.

Rationality, understood as ‘the use of reasoned scrutiny’, is considered to be ‘central to the idea and assessment of freedom’.\textsuperscript{103} It is indeed sustained that ‘insofar as rationality can be seen as systematic use of reason, it is possible to argue that rationality is central to the understanding and assessment of freedom’.\textsuperscript{104}

\textsuperscript{99} Ibid 9.
\textsuperscript{100} Ibid 92.
\textsuperscript{103} Sen, \textit{Rationality and Freedom}, above n 102, 5.
\textsuperscript{104} Ibid 19.
Without denying the foundational significance of rationality, that is the ‘disciplined use of reasoning and reasoned scrutiny’\textsuperscript{105} or, in broader terms, ‘the discipline of subjecting one’s choices – of actions as well as of objectives, values and priorities – to reasoned scrutiny’,\textsuperscript{106} it is also important to consider and acknowledge the centrality that spirituality has in the whole encompassing indigenous ontology.

It is argued here that spirituality plays as fundamental a role as rationality in individual and collective decision-making processes.

As rationality can be conceived as ‘the use of reasoning to understand and assess goals and values…and the use of these goals and values to make systematic choices’,\textsuperscript{107} spirituality can be conceived of as the use of the spiritual perception of reality which is intrinsically embedded in indigenous peoples’ goals, values, and choices. In other words, the rational and spiritual aspects of human life cannot be considered as two separate domains. The spiritual and metaphysical dimensions are intertwined with the empirical and rational dimensions of life, and they all impact on indigenous peoples’ behaviours, decision-making processes, and choices.

This thesis argues that the formulation of development policies for indigenous peoples must include indigenous knowledge systems and indigenous perspectives at the deepest ontological level. The integration of the indigenous right to self-determination into development policies requires policy makers to acknowledge and respect the different perceptions that people have about reality, options and

\textsuperscript{105} Ibid 19. \\
\textsuperscript{106} Ibid 4. \\
\textsuperscript{107} Ibid.
choices; it requires policy makers to acknowledge those fundamental differences which are deemed to lie at the ontological level.

The spiritual dimension of reality is a core element of indigenous peoples’ worldviews. As such, the role that spirituality plays in indigenous peoples’ ontology is one of the most important distinctive factors in the ‘cultural divide’ that seems to prevail at the indigenous non–indigenous interface.

This can be seen, for example, in traditional native political thought. It has been argued that spirituality was the primary foundation of the Indian governmental order and the link of traditional social and political organization:

Through spirituality the natural order of things was revealed and man’s proper relationship to nature was established – a relationship of respect and preservation, not exploitation. Spirituality underlies the argument that Indian government has an obligation to maintain the faith for future generations.109

This line of argument is also maintained by Oren Lyons who states that ‘[t]he primary law of Indian government is the spiritual law. Spirituality is the highest form of politics, and our spirituality is directly involved in government’.110

Freedom–centred and valued choice–focused development policies need to reconcile an ontology based on the scientific rational paradigm with an all–embracing spiritually imbued ontology, in a spirit of mutual respect and understanding. The lack of this mutual understanding would undermine the

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108 This can be seen not only in the area of indigenous health. See, for instance, the recognition of ‘indigenous peoples’ right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and costal seas and other resources…’, *UN Declaration on the Rights of Indigenous Peoples*, art. 25.
possibility to theoretically, politically and practically conceived development policies imbued with the principle of indigenous self-determination.

It has been argued that ‘no one can know as much as Indians themselves about what policies are valid for them and that any analysis of Indian issues that ignores or neglects a systematic exploration of Indian viewpoints inspires suspicion. The Indian perspective must be heard and acknowledged for a meaningful dialogue to occur between Indians and non-Indians’. 111

The question that should be answered in relation to the future of indigenous–non-indigenous relations is: ‘cultural divide’ or ‘cultural interface’? The answer will depend on the capacity of the ‘linear mind’ and ‘circular mind’ to come to a reciprocal understanding and be able to respectfully coexist in different, yet interconnected ontological domains.

111 Leroy Little Bear et al, above n 109, ix.
9.4 Conclusion

The third part of the thesis has demonstrated how appropriate development policies can constitute an important vehicle for the fulfilment of indigenous peoples’ right to self–determination. The normative framework represented in the ‘indigenous capability rights system’ and the methodological approach developed in the second part of the thesis, have been applied in relation to indigenous peoples’ right to health.

Chapter 7 has discussed the interface between indigenous rights and development policy in the context of the growing participation of indigenous peoples in the world’s development agenda. The intense dialogue that the UN Permanent Forum on Indigenous Issues has established with a wide range of international and intergovernmental institutions, international financial institutions and development agencies, in relation to the formulation, implementation and evaluation of the MDGs, shows the significance impact that development processes are deemed to have on indigenous peoples worldwide.

In particular, the importance of health–related MDGs and the health challenge that indigenous peoples are facing at the global level have been emphasised. In this context, the analysis has focussed on the health status of Aboriginal and Torres Strait Islander peoples of Australia.

Chapter 8 has illustrated the health crisis which is affecting Indigenous Australians and it has analysed the current Australian governments’ policy framework to tackle the appalling health conditions suffered by the Australian indigenous population.
It has been argued that the adoption of the ‘indigenous capability rights system’ normative frame and the methodological approach to developing policies articulated in the second part of the thesis, would address the mismatch between indigenous peoples’ claims to self-determination and Australia’s ‘practical reconciliation’ approach to tackle the socio-economic disadvantage of Aboriginal and Torres Strait Islander peoples.

The thesis argues that the adoption of this methodological approach to development policies would reconcile the fundamental dichotomy underpinning the current Australia’s indigenous policy, that is, the dichotomy between ‘symbolic reconciliation’ and ‘practical reconciliation’. In other words, it is maintained that the indigenous rights’ agenda and the betterment of the indigenous socio-economic disadvantage are inextricably connected.

The adoption of agency freedom as the reference space for policy design, the adoption of agency achievement as the reference space for policy evaluation, the inclusion of individual and collective value-judgment processes in the whole policy process and evaluation of the impact that peoples’ choices have on policy outcomes, provide the fundamental nomenclature of such methodological approach to indigenous policy that would fulfil indigenous peoples’ aspirations to self-determination.

Chapter 9 has therefore explored the implications of applying one of the criteria deemed to be essential for the formulation and realization of self-determined development policies, that is the acknowledgment and inclusion of ‘indigenous knowledge systems’. As a result, a foundational flaw in addressing Aboriginal Australians’ health status has been identified, that is the lack of
support for, and devaluing of Aboriginal traditional medicine and traditional healers by state–sponsored indigenous health policies and practices.

The indigenous capability right to health has therefore been configured as the total set of capabilities relating to a) personal well–being; b) the total set of those aspects that directly relate to the health of family units, communities and the wider eco-systems; c) the freedom to maintain and access Aboriginal traditional medicines and health practices.

Finally, the analysis of the tension between the Aboriginal traditional medical system and the western medical system, has provided the ground to identify at the ontological level the fundamental tension which seems to underpin indigenous/non–indigenous peoples relations. It has been argued that the future of indigenous/non–indigenous relations will depend on the capacity of the ‘linear mind’ and ‘circular mind’ to come to a reciprocal understanding and be able to respectfully coexist in different, yet interconnected ontological domains.
Conclusions

‘What is self–determination?’ asks the young Arakmbut man.1 ‘Self–determination is the river in which all other rights swim’,2 replies the Australian aboriginal man. From the Amazon forest to the Australian continent, the quest for self–determination lies at the heart of indigenous peoples’ aspirations.

In light of the centrality of self–determination for indigenous peoples, this thesis has tried to present an in–depth understanding of the content of indigenous self–determination, to disentangle the main problematic issues related to the admissibility and legitimacy of the right of indigenous peoples to self–determination, and to originally contribute to the promotion of this right by proposing a normative framework specific to indigenous rights and a methodological approach to development policies aimed at the fulfilment of indigenous self–determination.

This study has navigated and constructively connected two key domains relevant to indigenous peoples’ right to self–determination: the indigenous rights discourse and development policy processes. The analysis of these two areas of scholarship has served to support the central argument proposed in this thesis: that development policy plays a crucial role in determining the level of enjoyment of self–determination for indigenous peoples. In fact, it has been argued that development policy can offer a viable pathway for the advancement of indigenous self–determination. Adequate development policies have the potential to overcome the limitations of the international human rights

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implementation machinery in relation to the effective realization of indigenous claims to self-determination, and to bypass states’ political unwillingness to recognise and promote indigenous peoples’ right to self-determination, when adequate principles and criteria are embedded in the whole policy process.

The argument has been consistently developed throughout the three parts of the thesis. Each part has discussed and elaborated a specific aspect of this line of argument, which has situated the indigenous right to self-determination at the intersection between the international human rights system and development policy processes.

Part 1 explored the right of indigenous peoples to self-determination within the international legal system. The analysis focused on three related issues: the historical dimension of indigenous peoples within the international system; the emergence of legal precepts specific to indigenous peoples – in particular the right to self-determination – within the international human rights framework; and the adaptation of international human rights implementation procedures to address indigenous claims to self-determination.

Chapter 1 traced the main phases through which the status and rights of indigenous peoples have developed within the international system. The historical account provided an essential background to comprehend the contemporary regime of international law as it relates to indigenous peoples. Some key points have been identified, which are of fundamental importance in the context of this study.

It has been argued that colonialism has significantly influenced the legal thought and practice concerning indigenous peoples. Colonial processes played a fundamental role not only in the development of international legal norms concerning indigenous peoples,
but also in the development of the fundamental structures and legal doctrines of the international system. It has been demonstrated that the colonial encounter between European and non–European peoples has been critical for the emergence of international law and the international system. Peoples, and not states, have been the fundamental concern of international law, which arose primarily to regulate relations between different civilizations, not relations between states. In this context, colonialism has not been justified by a fully developed legal doctrine, but by the ‘civilizing mission’ that European polities embarked on in order to rescue the uncivilized, backward, undeveloped indigenous populations of the newly discovered lands.

The historical overview has revealed that at the core of the development of many international doctrines is a ‘dynamic of difference’, which has been defined as ‘the endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilised and the other as ‘particular’ and uncivilised, and seeking to bridge the gap by developing techniques to normalize the aberrant society’.  

Different techniques have indeed been engineered to characterize and address the ‘dynamic of difference’ founded on the cultural divide which has been differently articulated throughout the historical development from Victoria’s naturalist framework, the positivist construct of international law, the early twentieth–century pragmatism, to contemporary discipline of development economics.

The ‘dynamic of difference’ is indeed at the heart of the ‘civilizing mission’ which has underlined the historical development of international law. The creation and consistent replication of the ‘dynamic of difference’ throughout the history of

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international law has provided a sound justification for the analysis and the argument proposed in this thesis.

It is maintained that the ‘dynamic of difference’ and the related ‘cultural divide’ continues to operate in the contemporary international system. The universalizing spin of the international human rights system coexists with the engineering of development processes which seek to bridge the gap between developed and under-developed or developing peoples, which include most of the world’s indigenous peoples.

It is therefore clear why this thesis argues that indigenous peoples’ claims of self-determination straddle the realm of international human rights law and development processes. The analysis and fulfillment of indigenous peoples’ right to self-determination need to be situated at the intersection between the international human rights system and development policy processes. The analysis of the indigenous right of self-determination, in its substantive and procedural aspects, within the international human rights system has demonstrated the need to go beyond the legal domain. The legal domain has been complemented with the analysis of development processes since development policies significantly impact upon indigenous peoples’ lives.

The thesis has demonstrated the fundamental importance of theoretically and practically applying the principle of indigenous self-determination in development policies for indigenous peoples. The line of argumentation has demonstrated that the integration of the principle of indigenous self-determination into development policies would potentially serve as a vehicle to put an end to the ‘civilizing mission’ which has characterized the historical development of international law, and to minimize the ‘dynamic of difference’ reproduced in today’s international system.
In particular, chapters 2 and 3 have demonstrated the peculiarity of indigenous self-determination and, more importantly, the inability of the international human rights implementation system to comprehensively address the indigenous right to self-determination in its multidimensionality.

Part 2 explored the possibility to extend the understanding of indigenous self-determination from the international legal arena to development processes. For this purpose, Amartya Sen’s capability approach has been adopted as a normative framework of thought to explore the interface between indigenous rights and development policy.

It has been discussed how the capability approach represents a revolutionary approach to the understanding of a broad range of issues, including individual well-being, poverty, justice, and development policy. The focus on the lives that people are able to live (rather than on the wealth, income, primary goods, or desire fulfillment), on the enlargement of peoples’ freedoms and valued choices, as well as on persons’ capabilities to do and be what they value, makes the capability approach an exceptional conceptual framework which this thesis has adopted to combine the indigenous rights discourse and development policy.

The adoption of Sen’s capability approach provided 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 has been demonstrated how the capability approach offers foundational conceptual categories which respond to indigenous aspirations to self-determination in a way that traditional development theories have not been able to.
Chapter 4 provided a general overview of the capability approach, described its foundational concepts and situated this study within the current debate on the capability approach. Chapters 5 and 6 adopted key conceptual categories of the capability approach to construct, respectively, an indigenous rights–based normative framework specific to indigenous peoples and a methodological approach to development policy for indigenous peoples.

The construction of the normative framework and methodological approach has been carried out by amalgamating foundational concepts of the indigenous rights discourse and the capability approach. Part 1 has provided the essential background needed to understand the status and rights of indigenous peoples within the international human rights system necessary to construct the normative framework and methodological approach. The normative framework and methodological approach are, indeed, deeply imbued with the essence of the indigenous right to self–determination as it has been developed within the indigenous rights discourse.

The normative framework has been identified as the ‘indigenous capability rights system’. This system has been constructed upon the understanding of the indigenous right to self–determination as the substantive and overall freedom to choose the life indigenous peoples, individually or collectively, have reason to value. Being also a prerequisite for the fulfillment of all other indigenous rights, the enjoyment of self–determination is perceived as an integrated process in which all indigenous rights, considered as interconnected freedoms, interconnect and impact on each other. As a result, the indigenous capability rights system is conceived as a whole integrated system in which
the right to self-determination lies at the centre of a coherent system of reciprocal interrelations among all indigenous rights.

The indigenous capability rights system establishes a fundamental cornerstone to interpret the theoretical dimension of the indigenous right to self-determination and its practical fulfillment through development policies. The understanding of indigenous rights in terms of ‘capability rights’ allows us to move from a ‘passive recipient-based approach’ to an ‘agent-driven approach’ to indigenous rights and development policies aimed at the implementation of indigenous self-determination.

The indigenous capability rights normative system provides the fundamental underpinning for the proposed methodological approach to development policies for indigenous peoples. Considering that development policy is primarily understood as the ‘process of expanding the real freedoms that people enjoy’, development policies for indigenous peoples should aim at expanding the real freedoms underlying all indigenous rights encompassed into the indigenous capability rights system.

The methodological approach discussed in chapter 6, articulates a freedom-infused policy process which aims at fulfilling indigenous aspirations to self-determination. The endorsement of a freedom-based approach to developing policies for indigenous peoples has been realized through the construction of a methodological approach which encompasses the following principles and criteria: adoption of agency freedom and agency achievement as the most adequate reference spaces respectively for the design and evaluation of development policies; inclusion of individual and collective value-judgment processes within the policy process; focus on individual and collective choices.

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and the analysis of their impacts on policy outcomes; benchmarking of policy outcomes against the level of *well-being achievement* and *agency achievement*; acknowledgment and integration of indigenous knowledge systems; and recognition and inclusion of the principle of ‘free, prior and informed consent’. It has been argued that the adoption of these principles and criteria in the design, implementation and evaluation of development policies would facilitate the implementation of the indigenous right to self-determination.

Part 3 of the thesis has demonstrated that appropriate development policies can constitute a powerful vehicle for the fulfillment of indigenous peoples’ right to self-determination. It can be argued that the proposed methodological approach can be useful in the context of the world’s development agenda in relation to indigenous peoples. The UN Permanent Forum on Indigenous Issues has recognised that the MDGs cannot be redefined or formally amended. As a result, emphasis is put on the need to interpret and apply development policies in a way that indigenous peoples can be included and benefit from these development processes.

Accordingly, this thesis maintains that the ‘indigenous capability rights system’ and the methodological approach constructed upon it, can function as a normative and practical frame within which development policies can be properly interpret for the betterment of indigenous peoples’ lives and well-being.

This line of reasoning has been carried out by benchmarking Australia’s health policy frameworks for Aboriginal and Torres Strait Islander peoples against the methodological approach suggested in the thesis. This application has produced fruitful insights that

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Australian policy makers may take into consideration to further Indigenous Australians’ quest for self-determination and improve the appalling health conditions suffered by Aboriginal and Torres Strait Islander peoples.

In particular, this thesis has stressed the crucial significance of considering and including indigenous peoples’ collective and individual choices within the whole policy process. The acknowledgement and integration of Indigenous Australians’ health-related indigenous knowledge system, one of the criteria suggested in the methodological approach, has been indicated as a fundamental criterion to be applied in order to enhance Indigenous Australians’ substantive freedom to choose valued health-related options.

This thesis has strongly denounced the lack of support for and devaluing of Aboriginal traditional medicine and traditional healers and urges Australia’s governmental institutions and policy makers to initiate actions for the acknowledgment and consistent inclusion of Aboriginal traditional medicine and traditional healers within Australia’s health policy frameworks.

In this regard, the thesis also urges international and regional specialized agencies, dealing with traditional medicine and complementary or alternative medicine (such as the World Health Organization), to reconsider those studies which have ignored the existence of Aboriginal traditional medicine and traditional healers in Australia. It is argued that this omission in international studies, such as the WHO’s worldwide review of traditional medicine — *Legal Status of Traditional Medicine and Complementary/Alternative Medicine: A Worldwide Review*[^7]— contributes to the sinking

into oblivion of the a precious body of knowledge with the related devaluation and
disappearance of an important feature of Indigenous Australians’ cultural identity.

The analysis of the ill–health and related socio–economic disadvantage of Australia’s
indigenous population, highlights two interesting issues. First, there is the absence and
disengagement of international development agencies in addressing the third–world–like
conditions experienced by most Indigenous Australians. International initiatives in
development policies tend to focus primarily on the needs of developing countries; and
while not denying the significance of and need for urgency in addressing the poverty and
disadvantage of developing countries, the world’s development agenda should pay more
attention to the situation of indigenous peoples living in developed countries. Second,
there is a tendency of developed countries, such as Australia, to articulate their policies
for their indigenous populations in terms of public policies and not as development
policies, even though their policies address ‘developing issues’ and problems of third–
world countries.

Accordingly, this thesis calls on international institutions and development agencies
to urgently consider the situation of chronically disadvantaged indigenous peoples in
developed countries and for national governments to address indigenous peoples’ issues
in terms of ‘development issues’.

To conclude, it can be argued that the originality of this thesis is its synthesis of two
bodies of knowledge which have never been brought together before in scholarly
literature. It is argued that the application of the capability approach to indigenous
peoples’ right to self–determination has contributed to further the reach of application of
the capability approach and advance the fulfillment of indigenous peoples’ right to self-determination.

This thesis has demonstrated the exceptional nature of the capability approach as a conceptual tool to analyse a complex principle such as indigenous peoples’ self-determination. The analysis carried out in this study has proved that the capability approach can be adopted to promote and support collective rights, and in this particular case, to address the collective aspirations of indigenous peoples to self-determination.

The thesis can also be considered as a contribution to the debates over whether the capability approach is excessively individualistic in its focus and the poor attention paid by the capability approach to groups and collective claims.  

In the specific context of Australia’s policy approach to indigenous affairs, it can be argued that the application of the capability approach to indigenous self-determination – particularly the construction of a methodological approach to development policies based on the indigenous capability rights framework – allows us to address the mismatch between ‘symbolic’ and ‘practical’ reconciliation, and to reconcile the mismatch between a rights–based approach and a practical approach to indigenous affairs. The application of the methodological approach to Australia’s health policy for Indigenous Australians has demonstrated that the concern for indigenous rights is not antonymous to the socio–

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economic disadvantage and deprivation of Australia’s native peoples. The two domains are not mutually exclusive, but rather mutually reinforcing.

It can be affirmed that one of the major contributions of this thesis is to have demonstrated that a sound application of the capability approach in development policies for indigenous peoples can enhance indigenous peoples’ aspirations to self-determination and advance its practical fulfillment. Furthermore, the analysis of the individual and collective right of indigenous peoples to self-determination has contributed to an expansion of the concept of the capability approach and the scope of its potential application.

Indigenous peoples’ quest for self-determination is among the most urgent issues that the international community is called on to address in a spirit of mutual respect and reconciliation for the survival of the world’s indigenous peoples.

…our right of self-determination contains the essentials for life

Ted Moses
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