INDIGENOUS PEOPLES’ RIGHT TO SELF–DETERMINATION

AND

DEVELOPMENT POLICY

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To my mum and daddy
for giving me life and freedom
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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.
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<tr>
<td>ABS</td>
<td>Australian Bureau of Statistics</td>
</tr>
<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>
</tr>
<tr>
<td>CERD</td>
<td>Committee on the Elimination of Racial Discrimination</td>
</tr>
<tr>
<td>CHR</td>
<td>Commission on Human Rights</td>
</tr>
<tr>
<td>CIS</td>
<td>Commonwealth of Independent States</td>
</tr>
<tr>
<td>COAG</td>
<td>Council of Australian Governments</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
</tr>
<tr>
<td>ECOSOC</td>
<td>Economic and Social Council</td>
</tr>
<tr>
<td>ESC</td>
<td>Economic, Social and Cultural Rights Committee</td>
</tr>
<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
</tr>
<tr>
<td>FCNM</td>
<td>Framework Convention for the Protection of National Minorities</td>
</tr>
<tr>
<td>GA</td>
<td>General Assembly</td>
</tr>
<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
</tr>
<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>
</tr>
<tr>
<td>ICCPR</td>
<td>Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICCT</td>
<td>Indigenous Communities Coordination Taskforce</td>
</tr>
<tr>
<td>ICEARD</td>
<td>International Covenant on the Elimination of All Forms of Racial Discrimination</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>IFAD</td>
<td>International Fund for Agricultural Development</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</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
extend beyond the legal and political domains within which they have been traditionally
discussed, interpreted and implemented.

1 Andrew Gray, Indigenous Rights and Development: Self-determination in an Amazonian Community
2 There is not one internationally agreed definition of indigenous peoples. However, the “Cobo-definition” (UN
(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).
Review, Report N. 25332, 10 January 2003, Operations Evaluation Department, Country Evaluation and
Regional Relations (OEDCR).
4 A detailed discussion about the principle of self-determination and indigenous peoples’ claims to self-
determination will be presented in Part 1 of this thesis.
This thesis analyses the concept of indigenous peoples’ right to self-determination from an alternative perspective. This study situates indigenous self-determination at the interface between international human rights law and development policy processes. The theoretical foundations of this thesis are drawn from two different areas of scholarship: indigenous human rights discourse and development economics. The indigenous human rights discourse informs the debate concerning the concept of indigenous self-determination, whereas development economics is the field within which Amartya Sen’s capability approach is adopted as a theoretical framework of thought to construct a normative system and a practical methodological approach to interpret and implement indigenous peoples’ right to self-determination.

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

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

This argument is articulated through an original approach with a twofold line of investigation: a study of the concept of indigenous self-determination within the international human rights system and the exploration of viable avenues for the fulfilment of indigenous claims to self-determination through the design, implementation and evaluation of development policies.
This approach requires the development and integration of three main ‘building blocks’ which are deemed to constitute the nomenclature of this thesis: an enquiry into the concept of indigenous self-determination within the international human rights system; the articulation of an adequate normative framework which encapsulates the essence of the principle of indigenous self-determination; and the elaboration of a methodological approach to development policies which adopts the normative framework as its fundamental underpinning.

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

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

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

The historical overview delineates the key phases through which the status and rights of indigenous peoples have developed within the international system. It will be demonstrated how the emergence of international norms relating to indigenous peoples is linked to processes which go beyond the international legal arena strictu sensu. The creation and replication of these processes within the international system will be considered as a
fundamental element to justify the need to investigate the interface between indigenous rights and development policy. This historical account provides the backbone in support of the main argument of the thesis, that there exists a realistic potential for development policies to be a powerful means to facilitate the implementation of indigenous peoples’ right to self-determination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

First of all, it is argued that current Australian health policy frameworks fail to recognise and instil the most important principle in indigenous discourse: the principle of self-determination. Second, the proposed approach enables us to identify a significant vacuum in national health policy frameworks: the omission of Aboriginal traditional medicine and the sinking into oblivion of Aboriginal traditional healing practices and traditional healers. Finally, it contributes to an in-depth understanding of the ‘cultural divide’ which is often
perceived as the major obstacle underlying the relationships between indigenous and non–indigenous peoples. It will be argued that the fundamental tension which seems to underpin indigenous/non–indigenous peoples’ relations lies at the ontological level.

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