

# **The indigenous right of self-determination and the capability approach**

## **A case study in Australia**

*When we try to pick out anything by itself,  
we find it hitched to everything else  
in the universe (John Muir)*

### **Introduction**

This paper will explore a way of understanding indigenous peoples' right of self-determination in the Australian context. The analysis provided in this paper is part of a broader study on the practice of self-determination by indigenous peoples in the context of the processes of globalization.

The analysis of the concept of indigenous self-determination is based on the assumption that a paradigm is needed in light of the ongoing processes of political and economic globalization that affect both state institutions and indigenous peoples embedded in them.

In this paper I will try to sketch the theoretical foundations for the elaboration of a paradigm that would enable a better understanding of both the formal recognition of the principle of indigenous self-determination and its substantive exercise by indigenous peoples.

In particular, the overarching goals of my research are first, to grasp the extent to which the internationally recognized indigenous right of self-determination is currently enjoyed by indigenous populations; second, to identify the reasons behind its ineffective or limited implementation; and third, to formulate more appropriate criteria which the policy-decision making process should refer to in order to efficiently address indigenous claims of self-determination.

The starting point is the adoption of Amartya Sen's capability approach as a theoretical framework to interpret indigenous peoples' right of self-determination. It indeed provides a fruitful perspective from which to interpret its diverse dimensions. However, it is not my intention to enter into a detailed analysis of the conceptual apparatus that distinguishes Sen's capability approach – since it has been extensively treated in scholarly literature –, rather to focus on it as a way of thinking about self-determination.

Accordingly, the first issue to discuss is how the right to self-determination can be framed into the capability approach or, better, how the capability approach can be used as a lens 'to see' the indigenous right to self-determination.

It is evident that in order to tackle this issue we first need to consider the nature of the concept of indigenous peoples' self-determination, its content and fundamental features.

# 1. The principle of self-determination and Indigenous peoples

Any discussion on indigenous self-determination has to take into account as a foundational benchmark the recognition of the right of self-determination as such under international law. It is thus essential to define the right of self-determination generally in order to further identify the specific dimension that it acquires for indigenous peoples.

Recognized in the United Nation Charter<sup>1</sup> and other major international legal instruments<sup>2</sup>, self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm (Gross Espiell 1979; Hannum 1990).

One of the most debated key issues related to the principle of self-determination has been the interpretation of the term *peoples* as beneficiaries of self-determination.

The recognition asserted in fundamental international instruments that “[a]ll peoples have the right of self-determination”<sup>3</sup> has been interpreted for a long time to exclusively apply to two specific segments of humanity, namely the whole population of an independent state and a colonial territory entitled to independent statehood. This broadly accepted interpretation finds justification in the specific historical contexts in which the right of self-determination was first articulated as principle of international relations. I refer to the claim of self-determination that served to justify, on one hand, the break-up of the empires during World War I and the consequent re-division of Europe,

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<sup>1</sup> U.N. Charter art.1, para. 2.

<sup>2</sup> International Covenant on Economic, Social and Cultural Rights, Dec.16, 1966. GA Res. 2200 (XXI), art.1 (1), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, Dec. 16, 1966, GA Res. 2200 (XXI), art.1 (1), 999 U.N.T.S. 171 (entered into force Mar.23, 1976). The self-determination provision common to the international human rights covenants reads: “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”; Self-determination is affirmed by substantially the same language in other U.N.-sponsored international instruments, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res. 2625, Oct.24, 1970, U.N. Doc. A/8028 (1971); African Charter on Human and Peoples’ Rights, June 27, 1981, Organization of African Unity, art.20,21 *I.L.M.* 59 (1981) (entered into force Oct.21, 1986); Final Act of the Conference on Security and Cooperation in Europe (Helsinki), Aug.1, 1975, principle 8, 14 *I.L.M.* 1292 (1975).

<sup>3</sup> See notes 1-2.

and on the other hand, the process of decolonization and the emergence of a new political order through the recognition of new sovereign states.

This dualist application of the principle of self-determination has limited its scope to the aggregate populations of independent states and to those of classical colonies. Accordingly, this interpretation has rendered it impossible to apply the right of self-determination to sub-state groups that increasingly in the post-colonial era have articulated their claims in terms of self-determining powers<sup>4</sup> (Anaya 1996: 76,77)

Such limited vision of the *peoples* entitled to self-determination resembles the traditional western theoretical perspective that views states according to the post-Westphalian model of mutually exclusive sovereign territorial entities and that limits humanity to the individual and the state as its unique constitutive elements.

This underlying state-centered perspective has strongly influenced the debate concerning the recognition of the right of self-determination to indigenous peoples. Turmoils, destabilization of the international system of sovereign states have been invoked as inevitable consequences of articulating indigenous people's rights discourse in terms of self-determination.

Notwithstanding the long stance against the recognition of self-determination to indigenous peoples, the acknowledgment of the principle of self-determination as a human right in several human rights instruments has extended the breath of its applicability<sup>5</sup>. Its incorporation within the international human rights framework entails, as all human rights norms, to be presumptively universal in scope as concerning all segments of humanity<sup>6</sup>, and benefiting all "human

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<sup>4</sup> See Higgins, R (1993) 'Post-modern Tribalism and the Right to Secession, Comments' in Brolmann, C et al. (eds.) *Peoples and Minorities in International Law*, M. Nijhoff Publishers, Boston.

<sup>5</sup> See *The right of Self-determination: Historical and current developments on the Basis of United Nations Instruments*, UN Doc. E/CN.4/sub.2/404/Rev.1, at 31, para. 220 (1981) (Aureliu Cristescu, special rapporteur) ("The Principles of equal rights and self-determination of peoples is part of the group of human rights and fundamental freedoms"); Hannum, H (1992), "Self-determination as a Human Right" in Claude, R & Weston, B H (eds.) 2<sup>nd</sup> ed., *Human Rights in the World Community: Issues and Action*, University of Pennsylvania Press, Philadelphia.

<sup>6</sup> Weston, B (1992) 'Human Rights' in Claude, R & Weston, B H (eds.) 2<sup>nd</sup> ed., *Human Rights in the World Community: Issues and Action*, University of Pennsylvania Press, Philadelphia.

beings *as human beings* and not sovereign entities as such". (Anaya 1996: 76)

Accordingly, it has been pointed out that "self-determination is identified as a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all peoples are equally entitled to control their own destinies" (Anaya 1996: 75).

This perspective challenges the widespread resistance to recognize self-determination outside the sphere of territorial sovereign entities. Such resistance indeed lies on the mistaken tendency of either wedding claims to self-determination to entitlements or attributes of statehood or equating self-determination with the decolonization regime.

The international community of states, however, has proved to move away from such a restricted interpretation of the right of self-determination. The debate on the recognition of the indigenous right of self-determination under international law - in the context of the United Nations standard-setting bodies concerning the international indigenous rights regime - has reached a turning point with the adoption of the Draft United Nations Declaration on the Rights of Indigenous Peoples<sup>7</sup>.

The Draft Declaration explicitly acknowledges the right of self-determination to indigenous populations. Inspired to the self-determination language of the international human rights covenants, it states:

"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" (art.3).

Furthermore, the U.N. draft declaration affirms the view that

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<sup>7</sup> Draft United Nations Declaration on the Right of Indigenous Peoples, adopted by the Sub-commission on Prevention of Discrimination and Protection of Minorities by its res. 1994/45, Aug. 26, 1994, aU.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994).

“Indigenous peoples have the right to participate fully, if they choose, at all levels of decision-making which may affect their rights” (art.19)

The incorporation of indigenous peoples’ right of self-determination in the realm of international human rights law suggests a move away from the state-centered perspective underlying the principle of self-determination. A state centered perspective is considered to be anachronistic (Anaya 1996: 78) in a post-colonial age characterized by processes of globalization at the legal, political and economic level.

This becomes evident if we consider that we inhabit a world very different from that, which gave birth and nourished the inception of the sovereign nation-state system. The legal and political space that each sovereign state had drawn as a certain and delimited area on which to wield its power is no longer determined exclusively by a land-based concept of sovereignty.

According to the Westphalian model, the identification of that space is determined by one fundamental element: the territory. The legal and political space determined by the sovereignty of the nation-state coincides with a real three-dimensional space, that is the territory claimed by the state, and recognized by the external states, as being its existential space.

In an increasing interconnected world, the relationship between sovereignty and territory loses its capacity of fully legitimating the nature of both every state governmental system and the international order of sovereign states. In a globalized world sovereign states are included in the same continuum, the global space, where each sovereign autonomy maintains its specificity and at the same time is influenced either by the other sovereign institutions or the global system as a whole.

In this way the sovereign states' three-dimensional legal and political space has been enriched with a fourth dimension where limits to sovereign powers shade into no clearly pre-established formula. The notion useful to apply to this fourth dimension is that of hybridity in which the peculiarity of each sovereign state coexists and is influenced by the heterogeneity of the world global system; hybridity at the legal, political, social and economic level.

In a worldwide scenario in which state boundaries fade in the interplay of global forces, to acknowledge the principle of self-determination to peoples defined exclusively by existing or perceived state borders means to ignore the multiple and interrelated spheres of human social and political associations that distinguishes the spectrum of humanity.

The recognition under international law of indigenous peoples' self-determination represents an important step toward the constitution and functioning of different levels and forms of government under which people live in an increasingly overlapping and integrated world.

Upon due consideration of these arguments, the overarching objective of my research is to interpret and 'measure' the extent to which the internationally recognized right of self-determination is effectively enjoyed by indigenous peoples. Thus, as I mentioned before, this paper draws some theoretical foundations for the elaboration of a paradigm that would enable a better understanding of both the formal recognition and practice of indigenous self-determination.

## 2. The indigenous right of self-determination and the capability approach

“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”<sup>8</sup>

This article identifies the normative framework of the principle of self-determination recognized to indigenous peoples. It echoes the *constitutive* and *ongoing* aspects in which the principle of self-determination as such is affirmed in major international human rights covenants.

Indeed, it can be seen as comprising a *constitutive* and an *ongoing* aspect (Anaya 1996: 80-85). The *constitutive* aspect, expressed in the provision that entitles peoples to “freely determine their political status”<sup>9</sup>, 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”<sup>10</sup>, 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 (Anaya 1996: 82)

The intertwining of the *constitutive* and *ongoing* aspects, even though echoing the same substantive aspects recognized under international law to the right of self-determination as such, are not sufficient to fully define the content of the same right recognized to indigenous peoples. The UN Draft articles, indeed, specify the

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<sup>8</sup> U.N. Draft Declaration art.3.

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights, art.1 (1); International Covenant on Civil and Political Rights, art.1 (1). The full text is quoted *supra*, at note 2. See also United Nations Friendly Relations Declaration, *supra* note 2.

<sup>10</sup> *Id.*

parameters under which the right of self-determination has to be read when applied to indigenous peoples.

Those parameters will not be analyzed in details here, rather the attention will be devoted to the combined meaning of two key articles, the above mentioned article 3 and article 19 that reads:

“Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights...” (art. 19)

These articles delineate the essence of indigenous peoples’ right of self-determination: freedom to choose and determine their own life at the political, economic, cultural and social level.

The recognition of self-determination under international law in terms of freedom to choose prompts us to consider carefully the extent to which such freedom is actually enjoyed by indigenous communities in today world system. If we shift the focus from the formal recognition to the actual enjoyment of self-determination, it becomes urgent to dwell on some crucial questions, such as: what space is effectively available to indigenous peoples and their right of self-determination in a politically and economically interconnected world? How much space is left to their right to self-determination in the interplay of global and national forces? To what extent do indigenous peoples retain the right to freely determine their choices? What factors may determine the extent of their freedom of choice?

These questions appear to be of fundamental importance if one wants to grasp the actual dimension of self-determination in today indigenous communities.

This paper attempts to tackle some issues underlying these questions through the adoption of Sen’s capability approach as a theoretical framework, as a way of thinking about indigenous peoples’ right of self-determination. The rationale that justifies the adoption of Sen’s capability approach as a framework of thought mainly lies in the

substantive parallel that can be drawn between Sen's conceptualization of development and the concept of indigenous self-determination.

The envisioning of development "as a process of expanding the real freedoms that people enjoy" (Sen 1999: 3) resembles the essence of indigenous self-determination that is basically expressed in terms of freedom to choose.

It is well known how Sen's interpretation of development as a process aimed at enlarging people's freedom has been the engine for moulding an alternative theory, namely the capability approach, that moves the focus from utilitarian and resources-based perspectives to people's capabilities to achieve when considering normative evaluations.

I will not review the capability approach, its components and different applications elaborated in literature, rather I will present what concepts of Sen's capability approach can be considered of fundamental importance as a way of thinking about indigenous right of self-determination. In a second moment, I will analyze to what extent the capability approach can be adopted to grasp the meaning of aboriginal peoples' conceptualization of self-determination.

## 2.1 Functionings and capabilities, freedom to choose

The concepts of *functionings* and *capabilities*, core constituents of Sen's capability approach, may be conceived as alternative interpretative means when considering the right of self-determination.

Sen's focus on capabilities as a more appropriate space for many evaluative purposes emphasises the centrality that people's 'doings and beings' - what people are able to do and to be - acquire in evaluative exercises. In particular, the clear distinction put forward between functionings and capabilities enlarges the horizon of theoretical and practical evaluation processes.

In Sen's words, a capability set 'represents 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' (1992: 40). Accordingly, '[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' (1999: 75).

Sen clearly states that the evaluative focus of the capability approach can be either on *achieved functioning*, the specific 'doings and beings' that one has successfully pursued and realised, or on the *capability set*, the 'substantive freedoms to choose a life one has reason to value' (1999; 74-75).

The articulation of these two concepts acquires peculiar significance when one tries to adopt the capability approach's nomenclature to interpret the right of indigenous self-determination.

It has been argued before how the *constitutive* and *ongoing* elements recognized under international law<sup>11</sup> constitute the normative frame of indigenous people's right of self-determination. This basic frame helps identifying the principle of indigenous self-determination as

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<sup>11</sup> "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" UN Draft Declaration art.3.

'a configurative principle or framework complemented by the more specific human rights norms...' (Anaya 1996: 77).

The essence of the principle of indigenous self-determination is indeed expressed by the totality of the body of international norms developed as benchmarks for ensuring indigenous peoples of self-determination. Indeed, as Anaya (1996:97) points out, '[t]his body of international norms indicates the minimum range of choices to which indigenous peoples are entitled'.

Accordingly, if one applies Sen's terminology to the principle of indigenous right of self-determination, those constitutive international norms can be interpreted in terms of *capabilities* and, in turn, the formal recognition of indigenous peoples' right of self-determination as the set of capabilities to which indigenous peoples are entitled.

Such entitlement, however, is inadequate to grasp the actual enjoyment of self-determination by indigenous peoples since it covers the nominal dimension of the right of self-determination without taking into account the extent to which such right is actually exercised by indigenous communities.

An accurate evaluation would then require going beyond the analysis of self-determination as formal entitlement to the various human rights precepts embedded in the principle of indigenous self-determination. It is necessary to consider the substantive dimension of self-determination in order to evaluate the extent to which the formal entitlement is translated into a real enjoyment of the totality of human rights precepts embedded in the right of self-determination.

If we then consider substantive self-determination it is very important to distinguish a double level of analysis. Substantive self-determination can be conceived either as the combination of indigenous people's *achieved functionings* or as the combination of indigenous people's *achievable functionings*.

Focusing on indigenous people's *achieved functionings* means to consider their actual 'doings and beings', their actual achievements; whereas focusing on *achievable functionings* means to consider the

alternative functioning combinations (being and doings) from which they can choose, that is their actual 'freedom to achieve' substantive self-determination.

The significance of these two levels of analysis acquires special meaning if we pursue a deeper investigation of the principle of self-determination as 'a universe of human rights' (Anaya 1996: 75), or as 'the river in which all other rights swim' (Dodson 1993).

The right of self-determination is indeed perceived as "a configurative principle or framework complemented by the more specific human rights norms" (Anaya 1996: 77) developed as benchmarks for ensuring indigenous peoples of self-determination.

This body of international human rights norms embedded in the right of self-determination have been included in the following categories: social welfare and development, non-discrimination, lands and resources, cultural integrity, and self-government<sup>12</sup> (Anaya 1996: 97).

Accordingly, if we distinguish the specific human right norms that make up every category, it is possible to draw the spectrum of the totality of norms that identify the social-economic-political dimensions of indigenous people's self-determination.

This spectrum can be read not just as formal self-determination, the set of capabilities to which indigenous peoples are entitled according to the international system, but also as substantive self-determination.

It has been mentioned how substantive self-determination can be conceived either as the combination of indigenous people's *achieved functionings* or as the combination of indigenous people's *achievable functionings*.

Accordingly, the spectrum of human rights norms embedded in the right of self-determination can be seen either as *achieved functionings*, or as *alternative functioning combinations* (being and doings) from which

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<sup>12</sup> For a detailed analysis of the relevant conventional and customary law concerning each of these categories see Anaya, J (1996) *Indigenous Peoples in International Law*, ch. 4, Oxford University Press, Oxford.

indigenous peoples can choose, that is their actual 'freedom to achieve' substantive self-determination.

To consider human rights norms as *achieved functionings* means to consider how indigenous people are doing in relation to them; it means to look at their actual 'doings and beings', their actual achievements in the economic, social, cultural or political dimension expressed by those norms.

This kind of analysis might be pursued by looking at indicators or combination of indicators, largely developed in literature, that are able to capture the actual achievements in the specific social-economic-political dimensions that express each human right precept that, in turn, constitute the essence of indigenous people's self-determination.

On the contrary, to see the spectrum of human rights norms embedded in the right of self-determination as the *alternative functioning combinations* (being and doings) from which indigenous peoples can choose, it means to assess their actual 'freedom to achieve' substantive self-determination.

An example might clarify these concepts. If we consider development and social welfare - one of the categories embedded in the right of self-determination - we can distinguish some human rights norms comprised in it, such as the right to health, nutrition, sanitation, education, employment, shelter, etc. These norms can be considered as part of a double-faced spectrum: we can interpret them in terms of *achieved functionings* or in terms of *achievable functionings*.

Assessing them in terms of *achieved functionings* would mean to capture the actual achievements in those dimensions. In other words, it would mean to analyze them by looking at indicators able to measure their levels of achievements, such as life expectancy, school attainment, employment/unemployment rate, income, calories, social exclusion rate, etc.

Assessing them in terms of *achievable functionings*, or alternative *functioning combinations* (being and doings) from which indigenous

peoples can choose, it would mean to look at their actual 'freedom to achieve' substantive self-determination.

It is important to say that either way we would assess substantive self-determination. However, considering substantive self-determination and its constitutive human rights norms in terms of achieved functionings would mean to take a picture of the extent to which formal self-determination is effectively achieved in the multidimensionality of its constitutive norms. It would mean to assess the *status quo* of the enjoyment of self-determination no matter what factors intervened and what role they played in determining it.

In other words, this approach would limit the analysis to the end result of the complex intertwining of formal recognition of self-determination and the economic, social, political, cultural, personal factors, which in Sen's theory are identified as 'convector factors'. In brief, it would not tell us anything about the real choices available to indigenous peoples, what are their actual opportunities to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>13</sup>

Accordingly, in the following sections I will discuss the significance of interpreting the right of indigenous self-determination and the spectrum of its constitutive human rights precepts in terms of a capability set, the bundle of choices actually available to indigenous peoples. The analysis will focus on the possibility to assess substantive self-determination in the space of capabilities through a 'relation mapping' methodology.

A schematic representation might help to clarify the interpretation of the principle of indigenous self-determination in its formal and substantive dimension through the adoption of Sen's capability framework.

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<sup>13</sup> U.N. Draft Declaration art.3.

# SUBSTANTIVE SELF-DETERMINATION

**Achievable  
Functionings**

M R  
a e  
p l  
p a  
i t  
n i  
g o  
n n  
s

## FORMAL SELF-DETERMINATION



**Achieved  
Functionings**

Emp/Unemp rate  
Life Exp.  
School att.  
Calories  
Social excl. rate  
.....  
.....

Table 1. A schematic representation of the principle of self-determination in its formal and substantive dimension

### **3. The capability approach, value judgements and Aboriginal ontology**

The analysis undertaken so far has emphasized the significance of interpreting the right of self-determination and its constitutive human rights precepts in terms of a capability set, '...the alternative *functioning combinations* (being and doings) from which [indigenous peoples] can choose' (Sen 1999: 75). In other words, it is argued that the most appropriate evaluative space to assess substantive self-determination is the space of capabilities, the bundle of choices actually available to indigenous peoples.

Accordingly, the political goal toward which policy-makers should focus is "the ability of people to choose to function in certain ways, not simply their actual functionings" (Nussbaum 2000: 101).

It follows that social arrangements should be evaluated according to the extent of freedom people have to promote or achieve objectives they value. Policy makers should aim to equalize the capability each has to enjoy valuable activities and states of being (Sen 1992a, 1996g).

It becomes clear that the conceptualization of freedom as 'the *real opportunity* that we have to accomplish what we value' (1992a: 31) identifies value judgments as inescapable in the process of specifying capabilities and freedoms. In fact, 'increases in choices *per se* do not necessarily lead to an increase in freedom, in part because the options added may not be ones we value anyway, and in part because we may lose the option to live 'a peaceful and unbothered life' (Sen 1992a: 63) (Alkire 2001: 7)

Therefore, values issues acquire a particular meaning once we have identified capabilities as key element in the context of indigenous self-determination.

If the appropriate space to assess substantive self-determination is the space of capabilities, that is the bundle of choices actually available to indigenous peoples, and if the political goal is enabling

them to choose to function according to their will, two issues require particular attention.

First, how can we identify the set of capabilities that indigenous people consider being valuable? Second, how can indigenous people be empowered with such a set of choices in order to be able to “freely determine their political status and freely pursue their economic, social and cultural development”<sup>14</sup>?

Answering these questions requires a further investigation into the concept of capability. In this context, two key aspects acquire particular importance: ‘the principle of one person as end’ and the relationship between capabilities and rights.

The ‘principle of one person as end’ is strongly emphasized by Nussbaum when she argues in agreement with Sen that ‘the capability we strive for should be understood to be valuable for each and every person, and that is the capability of each that we should consider...’ (2000: 12). In other words, “[t]he capability approach is fully universal: the capabilities in question are important for each and every citizen, in each and every nation, and each is to be treated as an end” (2000: 6)

By the same token, policy makers should aim to equalize the capability *each* has to enjoy valuable activities and states of being (Sen 1992a, 1996g); indeed, ‘the ultimate political goal is always the promotion of the capabilities of each person’ (Nussbaum 2000: 74).

The importance of the entitlement of capabilities for each and every person acquires further importance when a close relation is drawn between capabilities and human rights.

Human rights are indeed interpreted as *combined capabilities*, that is ‘internal capabilities combined with suitable external condition for the exercise of the function’ (Nussbaum 2000: 84) so that ‘to secure rights to citizens ...is to put them in a position of combined capability to function’ (Nussbaum 2000: 98)

In this context, capabilities “cover the terrain covered by both the so-called first-generations (political and civil liberties) and the so-called

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<sup>14</sup> UN Draft Declaration art.3.

second-generation rights (economic and social rights). And they play a similar role, providing the philosophical underpinning for basic constitutional principles". (Nussbaum 2000: 97)

At this point it becomes crucial to consider whether it would be accurate to apply such conceptions *sic et simpliciter* to indigenous right of self-determination.

In my opinion, some considerations need to be made. First, the conceptualization of rights as *combined capabilities* to which each individual is entitled refers exclusively to first and second-generation rights<sup>15</sup>. Accordingly, the parallel drawn between capabilities and human rights reinforces the 'principle of one person as end' as well as the individual entitlement of capabilities/human rights against political institutions whose duty is to guarantee those rights to every citizen.

In this regard, it seems appropriate to investigate to what extent such conceptualization can be applied to another type of human rights, namely third-generation rights, or also defined as collective rights<sup>16</sup>. In other words, how can we justify the 'principle of each person as an end' and the individualistic-based entitlement to capabilities/rights when dealing with collective rights, such as the right of indigenous self-determination?

The centrality of these fundamental concepts in Sen's theory, their claimed global applicability - "[t]he capability approach is fully universal..." (Nussbaum 2000: 6) -, and the system of thought on which they are founded require a careful consideration when investigating substantive self-determination as a set of capabilities valuable to indigenous people.

The importance to carefully consider the framework of thought lying behind Sen's theory became evident when I started talking about my idea of applying the capability approach as a way of thinking about

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<sup>15</sup> Universal Declaration of Human Rights 1948, artt.1-21 (civil and political rights); artt.22-30 (economic, social and cultural rights). International Covenant of Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966.

<sup>16</sup> The category of third-generation rights includes the rights to self-determination, peace, environment, development.

indigenous self-determination to my friend Cleonie Quayle, Aboriginal co-ordinator and teacher at Tranby Aboriginal College in Sydney.

What appeared evident since the beginning of our conversations was a kind of difficulty in adopting the consequential order and the rationale behind the schematic representation that clearly identifies the capability theory's core components and their interrelations<sup>17</sup>.

The more we tried to look through the logical sequence from individual entitlement to the vector of achieved functionings, through the process of choice and interactions of convector factors, the more became clear her uneasiness in following the frame of thought underlying the capability theory.

Considering that normative frameworks always depend on explanatory or ontological view of human nature and society, her observations pushed me to critically consider the idea that 'Sen's capability approach does not defend one particular worldview' (Robeyns 2003: 7).

She started drawing a spiral with no beginning and no end, and explained that a specific conceptualization of time and space characterizes Aboriginal way of thinking. The concept of time as a coexistent interconnected continuum of past, present and future contributes to determine a specific ontological status of the Aboriginal world that cannot be left out of consideration.

As it has been put by Elkin, "[b]ut what is time? To us is a series of then and now, the now almost immediately becoming then. To the Aborigines, however, time is now. Then is a past...that past, however, is present, here and now"<sup>18</sup> (1964: 234)

Indeed, what Cleonie has seen in the representation of the capability approach is a way of thinking framed into a linear time line, in which the focus on the single individual, and a fragmentation of different components do not reflect Aboriginal system of thought.

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<sup>17</sup> See Robeyns, I (2000) at 5.

<sup>18</sup> Elkin, A.P., (1964) *The Australian Aborigines: How to Understand Them*, fourth edition Sydney: Angus and Robertson, 234.

During our conversations about substantive self-determination as a set of actual choices, it became clear that without taking into consideration Aboriginal ontology any attempt to identify valuable choices would fail. The Aboriginal concept of being provides an indispensable benchmark to properly understand Aboriginal well-being in the context of self-determining processes.

In this paper I will not enter into a detailed analysis of Aboriginal ontology. However, it is important to emphasize how Aboriginal concepts of time and space characterize a fundamentally place-based philosophy - also called '*geosophy*' (Swain 1993: 25) - where one's life is part of an interconnected and parallel web of relations in an endless circle of time and space.

Upon due consideration of the complexity of issues involved, it has become clear that the framework of thought underlying the capability approach needs to be adapted in order to take into consideration both the collective character of the right of indigenous self-determination and Aboriginal ontological and cosmological worldview.

In the Aboriginal context, the 'principle of every person as end', cannot be justified on the simplistic assumption according to which "...there is a type of focus on the individual person as such that requires no particular metaphysical tradition, and no bias against love and care. It arises naturally from the recognition that each person has just one life to live, not more than one" (Nussbaum 2000: 56)

The flourishing of Aboriginal people empowered with the right of self-determination cannot be thought in terms of the flourishing of each individual disconnected from a coextensive flourishing of the community, society and environment.

Individual well-being is the result of a balanced relationship between individuals, community and environment. As Cleonie put it 'if my community is not happy, if my environment is not happy I cannot function". In this way, the passage from individual entitlement (vector of resources/goods: means to achieve), to the vector of achieved

functionings through the influence of convector factors and the process of choice based on individual capability set (vector of potential functionings: freedom to achieve), loses its direct linearity.

The core components of Sen's theory acquire a fluid dimension: means to achieve, convector factors, set of choices, well-being are all together in the same continuum; they impact on each other in a web of interrelated and interdependent relations. Convector factors can become means to achieve and vice versa means can become convector factors in a continuum of parallel and interconnected dimensions.

We can consider the example of the bicycle cited by Robeyns (2000: 5) in that is shown how the relation between the good (bicycle) and the functioning to achieve certain beings and doing (to be mobile) is influenced by personal and social factors.

In an aboriginal community the terms of such relation, means to achieve and achieved functionings change. If an individual has not a bicycle his functioning to be mobile can be achieved through the community since the community itself feels as part of its responsibility to provide that bicycle to those who need it.

The community or better the harmonic relationship between individuals and community represents the means to achieve certain individual functionings. The individual entitlement (resources) cannot always represent the means to achieve.

Accordingly, the linearity and the consequential order that explain the capability approach acquire a kind of flexibility that is better represented by combining capability theory's core constituents into the Aboriginal system of thought represented by the so-called circular time line.

The following representations might clarify this passage.

**Individual  
Entitlement**

**Individual  
capability set**

**Well-being  
standard of living**

Vector of  
Commodities,  
Good and resources  
(Characteristics)

Vector of  
Potential  
functionings  
(or capabilities)

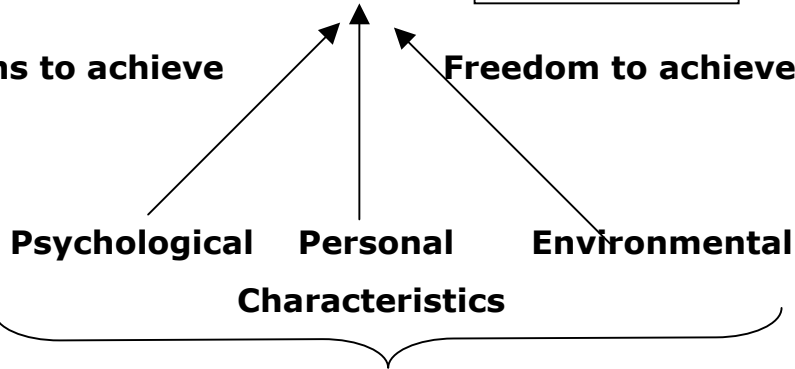
*Choice*

One vector  
of achieved  
functionings

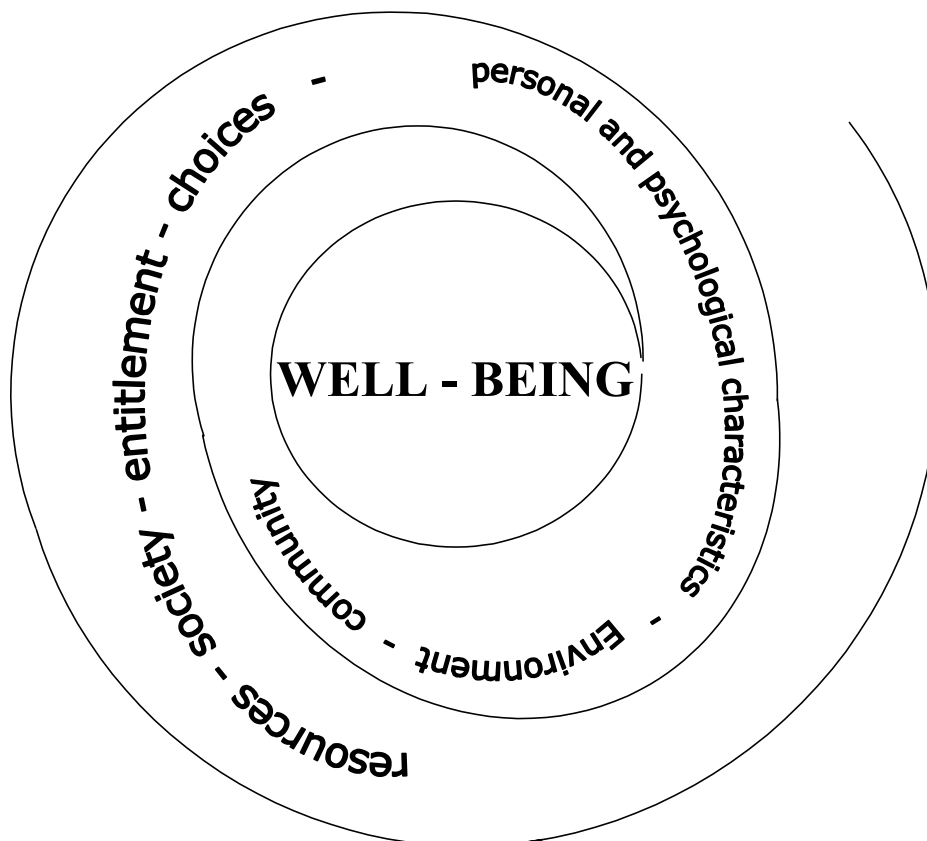
**Means to achieve**

**Freedom to achieve**

**Achievement**



**CONVECTOR FACTORS**



## **4. Operazonaling the capability approach as applied to indigenous right of self-determination**

### **4.1 The capability approach and systems theory: from asset mapping to relation mapping**

The attempt to identify the set of capabilities that indigenous people consider being valuable in order to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>19</sup>, has led to investigate into the framework of thought underlying the capability approach.

How can we operazonalise the capability approach in order to identify valuable capabilities and address the policy making task of empowering indigenous people of substantive self-determination?

At first I thought of applying the ‘asset mapping’ methodology described by Jasek-Rysdahl (2001) as the closest application of Sen’ s concept of focusing on capabilities. ‘Asset mapping’ or ‘capacity inventory’ is basically a survey of households within a neighborhood aimed at making an inventory of residents’ capabilities in order to rebuild devastated communities. The capability asset mapping is then seen as a means to mobilise the community by empowering its residents. The information base shifts the focus from the needs and deficiencies of the communities to the capabilities (abilities, talents) of the individuals in the community (Kretzmann and McKnight 1993; McKnight 1995).

Notwithstanding the valuable contribution of this methodology, an in-depth study of it and the totality of issues discussed before reveal a common feature. In my opinion, both the framework of thought underlying the capability approach as well as the ‘asset mapping’ methodology mirror a specific worldview, that is the mechanistic Cartesian system of thought that has had a powerful impact on western science, philosophy, and on the general way of thinking.

The mechanistic Cartesian worldview and the principles of Newtonian physics have highly influenced our way of thinking. They shaped a fragmented conceptualization of the universe by developing a method of reducing complex phenomena to basic building blocs and looking for the mechanisms through which they interact.<sup>20</sup>

The 'principle of one person as end', the envisioning of each individual as the rights-holder (in Sen' s terminology capabilities/freedom-holder), and the individual capabilities asset mapping method can be seen as expressions of the western science and philosophy tradition found on the Cartesian paradigm.

In particular, capabilities asset mapping reflects one of the approaches to the understanding of nature adopted in western science and philosophy. These have been characterized throughout ages by a tension between the study of substance and the study of form.

As it has been clearly explained, "the study of matter involves the question, "What is it made of?" This leads to the notions of fundamental elements, building blocks to measuring and quantifying. The study of form asks, "What is the pattern?" And that leads to the notions of order, organization, and relationships. Instead of quantity, it involves quality; instead of measuring, it involves mapping" (Capra 1994: 4).

Asset mapping (as well as the principle of each as end) reflects the study of matter – of constituents and quantities - whereas I think a more appropriate method should be inspired to 'the study of form'.

Recent developments in physics might help identifying a new methodology. Indeed, the new conception of the universe that has emerged from modern physics has made clear the limits of the Cartesian worldview in different fields, such as physics, biology, psychology, medicine, social sciences<sup>21</sup>.

Quantum theory and relativity theories have been the two basic theories for the paradigm shift in modern physics. As Capra (1982: 83)

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<sup>19</sup> UN Draft Declaration art.3.

<sup>20</sup> See Capra , F (1982), *The turning point*, Flamingo, London; Capra , F (1975) *The Tao of Physics*, Wildwood House, London.

<sup>21</sup> For a complete account see Capra, F (1982), *The turning poin*, , pp. 93-279, Flamingo, London.

points out 'in modern physics the image of the universe as a machine has been transcended by a view of it as one indivisible, dynamic whole whose parts are essentially interrelated and can be understood only as patterns of a cosmic process'.

The bootstrap approach introduced in physics by Geoffrey Chew in the early 1960s has come to represent a philosophy of nature that departs from traditional way of thinking about the world in terms of fundamental constituents. The universe is seen as a 'dynamic web of interrelated events' (Capra 1982: 84).

The new vision developed in physics and in other fields has been translated into the so-called systems theory or theory of living systems.

Systems thinking represents a theoretical framework that can be applied to integrate academic disciplines and to discover similarities between phenomena at different levels of scale, including human communities and ecosystems.

The most important characteristic of system theory is that living systems are 'integrated wholes whose properties cannot be reduced to those of smaller parts. Although we can distinguish parts in any living system, the nature of the whole is always different from the mere sum of its parts' (Capra 1999: 2).

Capra (1999: 3) specifies how examples of these systems abound in nature. These may be social systems—a family, a school, a village—or ecosystems. All these living systems are wholes whose specific structures arise from the interactions and interdependence of their parts.

We can consider a living system, like ecosystems. Ecosystems, for instance, are not just a collection of species but a community, which means that its members all depend on one another. They are all interconnected in a vast network of relationships, the web of life.

Understanding ecosystems, then, leads us to understand relationships. This is a key aspect of systems thinking. It implies a shift of focus from objects to relationships. A vibrant community is aware of the multiple relationships among its members.

In the context of the study of substantive self-determination in Aboriginal communities, the conceptualization of living system might be helpful. It may provide a framework of thought that would take into consideration and combine the set of available capabilities as the most appropriate space to assess indigenous practice of self-determination with the ontological status of Aboriginal world. It could provide the basis for a holistic method that would focus more on relationships, interconnections; a method that would mark the shift from asset mapping to relation mapping.

In this regard, some concepts developed in systems theory might result useful, such as 'network patterns' and 'feedback loops', as well as the related concepts of non-linearity and self-organization.

All networks are in fact seen as nonlinear:

"..when you draw a network is that it is nonlinear; it goes in all directions. So the relationships in a network pattern are nonlinear relationships. Because of this non-linearity, an influence or message may travel around a cyclical path and come back to its origin". (Capra 1994: 6)

Non linear networks are related to feedback loops that are defined as:

"...circular arrangement of causally connected elements, in which an initial cause propagates around the links of the loop, so that each element has an effect on the next, until the last "feeds back" the effect into the first element of the cycle... Because of feedback, living networks can regulate themselves and can organize themselves. A community, for example, can regulate itself. It can learn from its mistakes, because the mistakes will travel and come back along these feedback loops... Because of feedback, a community has its own intelligence, its own learning capacity. So, networks, feedback, and self-organization are closely linked concepts. We can say that living systems are networks capable of self-organization". (Capra 1999: 7)

The emphasis on concepts such as networks, relationships, non-linearity, feedback, interdependence and interconnectedness identify a shift from a mechanistic to an ecological paradigm. This paradigm characterizes a system view of life applicable not just to natural sciences but also to social sciences, included economics that can be also seen as a living system.

The system approach indeed looks at the world in terms of relationships and integration; systems, both ecosystems and social systems, are integrated wholes: 'what is preserved in a wilderness areas is not individual trees or organisms but the complex web of relationships between them' (Capra 1982: 287). Indeed, it has been argued that 'we do not have solitary beings. Every creature is, in some sense, connected to and dependent on the rest' (Thomas 1975: 6). In other words, systems theory entails a new way of seeing the world and a new way of thinking, known as *systems thinking*, or *systemic thinking*. It means thinking in terms of relationships, connectedness, and context.

In particular, it is argued that the nonlinear nature of all systems dynamics is the very essence of 'systemic wisdom' (Bateson 1972 :434) and that this kind of wisdom is characteristics of traditional, non literate cultures.

Systems theory and its related concepts might provide a way of thinking able to combine an understanding of substantive self-determination in terms of the valuable set of capabilities available to indigenous people and a methodology whose focus on relationships, interconnections, interdependence would better mirror Aboriginal worldview and way of being.

The importance of looking at relationships when considering the set of valuable capabilities (set of valuable choices) to Aboriginal people can be shown by considering some aspects of the complex dynamics that characterizes contemporary indigenous policy.

It is argued that central to the social justice policy towards Indigenous Australian communities is 'the development of more prosperous, just and fairer society for every Australian' (Folds 2001: 70). It is then assumed that

those 'holistic' ideals accommodate any problems of culture clash since social justice is assumed to be "consistent with culture"<sup>22</sup>.

In a thoroughly study of the Pintupi – a western desert Aboriginal community – Ralph Folds emphasizes the difficulties in applying *sic et simpliciter* the 'self-evident' ideals of material improvement of indigenous life – core platform of the social justice policy – exalted as essential to indigenous lives (Folds 2001: 20).

The social justice's major goal of addressing inequality of outcome in terms of what an Aboriginal society lacks in comparison to other Australians is proved to be a blind strategy. As Folds points out, '[by] offering what is of value in the West to overcome the identified deficiencies, and caring far more that the gifts are used in ensuring Pintupi progress along official pathways, rather than enhancing the practice of their own lives, the possibility that the meanings of social justice are not the same in every culture is denied' (2001: 68).

Some examples might be useful to appreciate the fundamental importance of values issues when identifying valuable capabilities and addressing the policy making task of empowering Aboriginal people of substantive self-determination.

For instance, 'vehicles under intense competing demands by relatives fighting over them may be publicly burned to end the fighting which disrupts harmony with kin' (Folds 2001: 70). Indeed, 'family constellation are the cement of contemporary Pintupi life, so a society which aims at extending families, even to include withefellas, while maintaining strong mutual obligations between members, now confronts one offering salvation through opportunities for individuals in education, training and work. This disagreement about what defines success in life, is one of the fundamental clashes between Pintupi lives and the assumption of social policy aiming at equality' (Folds 2001: 48).

Furthermore, if we consider the role that work plays in the Pintupi community we realize how the assumption according to which 'all [indigenous Australians] want is the chance to work themselves out of

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<sup>22</sup> *Social Justice for Indigenous Australians* (1991-1992)

poverty'<sup>23</sup> ignores the fact that 'Pintupi are primarily a social people, and spending time with relatives is the very essence of a fulfilling life' (Folds 2001: 52).

Accordingly, 'if the workplace accommodates family life, like in the art industry where artists sit in their camps painting, they work for long periods tirelessly, whereas when their options are limited to performing work within the confines of inflexible western institutions unsympathetic of their paramount obligations to family they often choose to remain unemployed' (Folds 2001: 53)

In the clash of accountabilities that arise in choosing to accept a job under western criteria, most of Pintupi find more sensible to avoid conflicts by preferring to satisfy their family obligations unhindered, even though it means a more materially impoverished life. In this context, it is important to notice that 'work finds meaning within relationships that sustain it' (Folds 2001: 54).

Upon due consideration of these examples, it becomes clear that we need a methodology that take into consideration the set of valuable choices available to Aboriginal peoples in the complex dialectic between Aboriginal communities' way of being and mainstream society' s social justice values. A method that would allow to properly address the extent to which the collective right of self-determination is enjoyed by Aboriginal people.

In particular, to address the policy making task of empowering people of substantive self-determination requires the adoption of an analysis shifting from asset mapping to relation mapping; a methodology able to capture and weights relations, networks, interdependence and interconnectedness; a methodology capable of wedding freedom to choose and Aboriginal way of being.

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<sup>23</sup> Community Aid Abroad (1997 : 3)

## **CONCLUSION**

This paper has given a glimpse over some issues that arise when trying to adopt the capability approach as a theoretical framework to interpret indigenous right of self-determination.

In concluding this paper it is important to say that the issues discussed represent the starting point of further investigations into the development of a methodology able to assess indigenous peoples' substantive self-determination in the totality of its complexity.

This paper has sketched some theoretical principles in order to pursue a deeper analysis that will take into consideration the problematic intertwining of different issues, such as the legacy of colonialism in Aboriginal communities and the consequent dysfunctions brought in them, as well as the politics of the relations between Aboriginal communities and mainstream society.

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