

# Implementing the United Nations Declaration on the Rights of Indigenous Peoples at the local level: Gugu Badhun Self-Determination

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## Abstract

Following the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by UN General Assembly resolution in 2007, discussion between member states and Indigenous peoples within international policy fora have transitioned to themes of implementation. Member states, international human rights scholars and Indigenous activists have been working to define what domestic implementation of the articles and principles within the Declaration looks like. The published literature and UN reports largely deal with the interaction between a member state and its Indigenous peoples at the federal and regional level and rely heavily on a top-down approach to implementation. Since the adoption of the Declaration by the General Assembly, UN member states have grappled with both the operational practicalities and the domestic political will of governments which would see the implementation of the Declaration realised particularly at the local or micro-community level. This paper examines the literature to determine if there are examples of implementing the articles and principles within the Declaration – specifically self-determination at the local level. This literature review provides the argument for a future research project that will attempt to translate the abstract to the practical by documenting a case study to articulate within the context of the Declaration what the principle of ‘self-determination’ means to a local level Aboriginal Nation, the Gugu Badhun.

**Keywords:** self-determination, nation-building, Indigenous peoples, states, Aboriginal Nation; Indigenous rights.

## Introduction

The United Nations Declaration on the Rights of Indigenous Peoples [“The Declaration”] was adopted by the United Nations [UN] General Assembly on 13 September 2007 when the majority of member states voted to support it through resolution (GA Res. 61/75). Since the adoption of the Declaration in 2007, a number of books, journal articles and reports have been published on the topic of the Declaration. International human rights scholars and activists such as Xanthaki (2007), Anaya (2009), Burger (2009), Clavero (2009), Charters (2009), Dorough (2009),

Littlechild (2009), Rodriguez-Pinero (2009), Stavenhagen (2009) and more recently Gunn (2012) and Ornelas (2014) have written about the articles and principles within the Declaration and the next stage in advancing Indigenous human rights – the challenge of implementation. The published literature and UN Reports largely deal with the interaction between a member state and its Indigenous peoples at the federal and regional level and rely heavily on a top-down approach to implementation.

Since the adoption of the Declaration by the General Assembly, UN member states have grappled with both the operational practicalities and the domestic political will of governments which would see the implementation of the Declaration realised particularly at the local or micro-community level. In this paper, I engage with the definition of self-determination as it is framed within the Declaration. However, the concept itself is multifaceted, and it is outside the scope of this paper to engage with all of the meanings of self-determination. A future research project will attempt to translate the abstract to the practical by documenting what self-determination means to the Gugu Badhun Nation within the context of the Declaration. The research project will investigate both local level interpretations of self-determination defined by local custom, culture and socio-political context (emic) as well as the etic approaches to describing self-determination which may be considered general or universally true (Morris et al 1999) for Indigenous peoples around the globe.

Complicated by the non-binding nature of the Declaration, application of the articles and principles of the Declaration relies on hierarchical, top-down approach to international law and domestic policy implementation. Without the binding nature of a state-level treaty, the slow movement and progression towards implementation internationally means that Indigenous people must take a more proactive approach in the advancement of their own individual and collective human rights in the true spirit of self-determination, as per Article 3 of the Declaration. Aboriginal and Torres Strait Islander peoples thus need to take matters into their own hands and undertake a bottom-up approach to implementing the Declaration, as a demonstration of collective agency. This approach is what Ortner (2006, p.147) refers to as the agency of projects, which is “not necessarily about domination and resistance... it is about people having desires that grow out of their own structures of life, including very centrally their own structure of inequality”.

An examination of the literature is necessary to determine if there are local or micro-community level examples of implementing the articles and principles within the Declaration, specifically self-determination, in order to support a potential research project which aims to provide both a theoretical framework (etic) and local level case studies (emic) for practical application of self-determination within a discrete Aboriginal Nation.

### **Self-determination - a right and a principle**

The four main principles that underpin the Declaration are (1) self-determination; (2) participation in decision-making, supported by free, prior and informed consent and good faith; (3) respect for and protection of culture; and (4) equality and non-discrimination (AHRC 2010). The principles provide guidance on the practical application of the Articles within the Declaration. The Articles are the ‘what’ of the Declaration, and the Principles are the ‘how’.

‘Self-Determination’, ‘non-discrimination’ and ‘cultural integrity’ are central rights and principles of the Declaration. Article 3 states that “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” (United Nations 2008). The very same wording is found in Article 1 of the International Covenant on Civil and Political Rights. Further, Article 4 of the Declaration states that “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.”

The United Nations Educational, Scientific and Cultural Organisation [UNESCO] says that self-determination is a “...right of a group of peoples to meet the human needs of that group, including the means to preserve that group’s identity and culture” (UNESCO 1999, p.19). Self-determination is a process of choice and decisions that enable Aboriginal people to determine their own futures, growth and development. The use of a generic definition for self-determination is problematic and practical application of the concept of self-determination is used simultaneously as a political concept, label of domestic government policy and a human right within international law. This literature review has primarily researched the application of the concept of self-determination within the framework of the Declaration.

### **Self-Determination at the International Level**

In terms of the Declaration’s legal significance in international law, a UN General Assembly resolution by itself does not have a binding effect, unless it can be demonstrated that the Declaration itself, or the individual articles within it reflect existing customary international law (Anaya 2000). A General Assembly resolution via majority vote can, however, provide the impetus for the creation of new customary law. The Statute of the International Court of Justice defines international customary law as “...evidence of a general practice accepted as law” (Article 38). Professor James Anaya, former United Nations Special Rapporteur on the Rights of Indigenous Peoples pointed out that the Declaration’s principles of ‘self-determination’, ‘non-discrimination’ and ‘cultural integrity’ exist within contemporary international customary law (Anaya 2000).

A search for literature using the Declaration as a framework for describing self-determination at the local level within the CANZUS group (Canada, Australia, New Zealand, United States of America [USA]) has provided limited examples. Werther’s (1992) study provides a pre-Declaration analytical and theoretical framework for understanding the dynamics of political change and self-determination when indigenous people assert claims of aboriginal status in six different democratic states (Australia, Canada, Greenland, Norway, Sweden and USA). Hawksley and Howson (2011) bring together perspectives of three Maori activists and their push for self-determination that promotes a separateness that to some extent challenges the idea of nation-state unity. Canadian Scholars such as Berlinger (2011) provide a narrative on self-determination and the Declaration in an urban context. Pulitano (2012) examines the relevance of international law in advancing indigenous peoples’ struggles for self-determination and cultural flourishing.

### **Self Determination at the National Level**

Australia is a party to seven core international human rights treaties. The right to self-determination is contained in Article 1 of the International Covenant on Civil and Political Rights [ICCPR] and Article 1 of the International Covenant on Economic, Social and Cultural Rights (Attorney General’s Department 2015). This right is also contained in Article 3 of the Declaration on the Rights of Indigenous Peoples. The Declaration does not create legally binding obligations, but informs the way governments engage with and protect the rights of Indigenous people.

The Australian Human Rights Commission [AHRC] released the ‘Community Guide to the United Nations Declaration on the Rights of Indigenous Peoples’ to assist Government and Aboriginal and Torres Strait Islander communities’ engagement and interaction (AHRC 2010). Within the 2011 AHRC Social Justice Report (2011a, p.48) and Native Title Report (2011b, p.14), the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda recommended the “Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the [Declaration] are given full effect.” Most recently the combined Social Justice and Native Title Report (AHRC

2014) highlighted that a national implementation strategy is yet to be developed and reiterated the 2011 recommendations that the Australian Government engage with Aboriginal and Torres Strait Islander peoples on the National Implementation Strategy in order to give effect to the Declaration and its articles and principles.

The Australian Government is yet to progress this AHRC recommendation and could look to the United Nations Inter-Parliamentary Union's [IPU] recently published *Handbook for Parliamentarians* for guidance. The handbook is intended as a practical tool for domestic implementation of the Declaration. It provides a number of checklists and practical examples of how the provisions of the Declaration have been implemented at the national, state and local government levels. The first section of the handbook provides information for Parliamentarians on the concepts of 'self-determination' and 'free, prior and informed consent' and outlines that it is the Government's duty to consult and engage with Indigenous Peoples on any legislative or administrative measures that affect them. The second section provides frameworks for Parliamentarians to assess the situation of Indigenous peoples in their state as a benchmarking exercise for effective implementation and provides a number of checklists to analyse government engagement with the Declaration structured around the primary functions of Parliaments (IPU 2014).

The Declaration is not a treaty, and whilst not binding I argue that it should be Australian Government policy demonstrated through the action of endorsement and ongoing participation and interaction at the UN Permanent Forum on Indigenous Issues (Department of Foreign Affairs and Trade n.d.). The Law Council of Australia (2010, p.6) agrees with the non-binding status of the Declaration stating that: "...whilst lacking the status of a binding treaty, [it] embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for State parties' interaction with the world's Indigenous peoples". Peretko (2013) examines the political compatibility of Aboriginal self-determination and Australian Government sovereignty and finds ....

Following the adoption of the Declaration in 2007 by the Australian Government, critical themes of self-determination policy have appeared in literature that reviews the past 40 years of Australian Government policy and approaches to Indigenous self-determination (Davis 2012). Former government minister Gary Johns (2011) and anthropologist Peter Sutton (2009) are very critical of the policy era of self-determination (1970s – 1990s) which followed policy eras of protectionism and assimilation. They suggest that, as a government policy, self-determination for Aboriginal and Torres Strait Islander peoples and assertion of collective human rights failed miserably. Both authors call for a new way forward in Indigenous affairs policy that involves more individualist approaches to policy and program delivery. Critics of this position would argue that the problem was not with self-determination as a policy but rather, it was the program delivery approaches that failed (one or two references?).

Much commentary on the concept of self-determination by Indigenous Australian leaders and academics (Pearson 2001; Berhendt 2002; Anderson 2007) has been written prior to the Declaration's adoption by the Australian Government and in response to political situations. A number of contributions on this topic have also come from non-indigenous scholars (Martin & Finlayson 1996; Reid, Gunter & Smith 2005). The Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] published a book, pre-Declaration, with a number of leading scholars (Lois O'Donoghue, Margaret Reynolds, Henry Reynolds, Charles Perkins, Pat Turner, Garth Nettheim, Frank Brennan to name a few) contributing chapters that outline Indigenous and non-indigenous perspectives on self-determination in the Australian Aboriginal and Torres Strait Islander context drawing from regional and national experiences to support their arguments (Fletcher & AIATSIS 1994). None of these examples, however, neatly describe a

discrete Aboriginal Nation's perspective on participation decision making and exercising control over their local level decision making at a community level using the Declaration as a framework to progress self-determination. Cowan (2013) agrees that there is vast literature covering the development of the draft Declaration, however, there has been comparatively little analysis of what self-determination actually means—for indigenous peoples specifically and for all peoples more generally—now that it is unequivocally recognised in the Declaration.

### **Self-determination at the local level**

The AHRC's Community Guide (2010) emphasises that self-determination is a central right of the Declaration and that there is no pre-determined definition of what self-determination looks like. Aboriginal and Torres Strait Islander peoples are a diverse group with many different languages and cultures, which inevitably produce different worldviews. The Community Guide provides examples of what self-determination might look like in practice such as a nationally elected representative body or local self-government through community controlled councils. However, no examples were provided from a discrete Aboriginal nation's perspective in the process of decision making that goes to describe self-determination (UNESCO 1999) as:

1. **Choice** in determining how lives are governed and their own development paths;
2. **Participation** in decisions which affect their lives; and
3. **Control** over their own lives and futures including economic, social and cultural development.

### **Conclusion**

The four main principles that underpin the Declaration: self-determination; participation in decision-making, supported by free, prior and informed consent and good faith; respect for and protection of culture; and equality and non-discrimination (AHRC 2010) provide guidance on the practical application of the Articles within the Declaration. While these principles are understood conceptually within human rights theory, applying them practically at the local level has been a challenge because governments interpret these core principles purely in the context of international law through the state sovereignty lens and Indigenous peoples have not been able to describe or clarify what these core principles mean on a practical level and how government should work with Aboriginal communities to achieve them (Gooda & Kiss 2013). Using the principles (in particular self-determination) as a framework for effective implementation has been identified as a future research project with the Gugu Badhun nation. The gap in current literature supports a research project that will assist in describing what the principles mean at a practical level to the Gugu Badhun Nation's community development priorities and how governments, other Aboriginal and Torres Strait Islander Nations, and civil society should engage with the Gugu Badhun Nation. This work will assist in the creation of local-level case studies that can be fed upwards through national and international policy fora.

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