IN SEARCH OF POLITICAL INTEGRITY: COMPLIANCE OF AUSTRALIAN LAW IN INTERNATIONAL HUMAN RIGHT LAW IN REPRESENTING INDIGENOUS PEOPLES

IN POTRAZI POLITIČKOG INTEGRITETA: USKLAĐENOST AUSTRALIJANSKOG ZAKONA O LJUDSKIM PRAVIMA SA MEĐUNARODNIM ZAKONOM O LJUDSKIM PRAVIMA U PREDSTAVLJANJU AUTOHTONIH NARODA

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Abstract

This paper articulates the human rights violation of the minority group of Aborigines Community in Australia. Australia has ratified the International Committee for Elimination of Racial Discrimination (ICERD), and the International Covenant on Civil and Political Rights (ICCPR), and other human rights doctrines that protect the rights of Aborigines and Torres Strait Islanders; however the Government of Australia from its inception have done little to ensure that those political protections are effective in ensuring the genuine protection of the rights of indigenous peoples. Most frequently cited is the failure of international laws to ensure the land and self-determination rights of these peoples. However, domestic law could undoubtedly ensure that these rights are in place, if the desire to do so is present within the Australian government.

Keywords: Minority Rights, United Nations, Human Rights and Self determination

“Citizenship has not delivered Indigenous Australians the same quality of life other Australians expect. Basic human rights involve health, housing, education, employment, economic opportunity, and equality before the law, and respect for cultural identity and cultural diversity. These human rights must be capable of being enjoyed otherwise they are empty gestures”.

Jackie Higgins

The notion that fundamental, universal protections should exist for all human beings is the central tenet of human rights law. (Wright, 2001) While gross violations of these laws continue to pervade the global landscape in the form of genocides, sanctioned rapes, and other manifestations of inhumanity, it is the more subtle violations of human rights law that are able to fly under the proverbial radar of international regulation. The indigenous peoples of Australia have long been the subject of international inquiries regarding human rights’ abuses, and yet the nation’s government fervently denies any recent instances of non-compliance of state law with international law. This inquiry examines the genuine level of compliance of Australian law with international law regarding the rights and representation of indigenous peoples, affording critical attention to channels through which both national and international laws are most frequently violated. In essence, argued is it that while Australian law is largely compliant with international law with respect to the land, education, and health rights of Aborigines and Torres Strait Islanders, these are also the most frequent media for challenging the political integrity of indigenous peoples, socially immobilizing them and rendering them formidably underrepresented within their native nation’s government.

1. Reconciling International Human Rights Law with State Sovereignty

Western culture has favoured the protections of equality and liberty throughout the twentieth century. Ironically, however, it was through the oppression and inequality common to colonisation that spread Western ideals so rapidly throughout the world. (Wright, 2001) The United Nations and other regulating bodies have, particularly during the latter half of the twentieth century, attempted to reconcile Western nations’ birth defects of murder, slavery, dishonesty, and thievery with legal protections that would preclude those very actions within the modern world. Universal declarations of human rights demanding that indigenous peoples be afforded the same rights as the majority
populations have become commonplace throughout contemporary Western nations and the violations of those rights that occurred during nation-building have been recognized.

However, the more subtly pervasive violations of human rights continue to permeate even the most ostensibly compliant nations. A lack of political representation precludes minority populations from demanding their right to land, education, and healthcare in a myriad of nations. (Wright, 2001)

In Australia, as in other nations with a dark history of colonisation, the social immobility of the indigenous peoples has become not only commonplace but a persistent channel for maintaining the sovereignty of the majority population. In her text entitled International Human Rights, author Shelly Wright contends that “human rights, supposedly 'universal' in application, have suffered through lack of implementation and enforcement, neglect or, more controversially, through a lack of cultural 'fit' (or so it is sometimes argued) between mainly civil and political rights and the demands of new national orders.” (Wright, 2001) Australia struggles with ways in which to best reconcile its modern, sociopolitical infrastructure with the genuine protection of human rights for its native peoples. In many ways, international protection of universal human rights, like that of environmental rights, exists in opposition to state sovereignty. This not only makes it plausible for states such as Australia to seem compliant whilst concurrently socially immobilizing indigenous populations; it makes it necessary for the nation to do so.

Not surprisingly, Australia has a long history of grossly violating the rights of its indigenous peoples during its period of nation-building. (Cora, 2001, pp. 21) Even decades after Universal Declaration of Human Rights (UDHR) was adopted by the United Nations, Australia failed to recognize that Aborigines and Torres Strait Islanders were “born free and equal in dignity and rights” to the majority, Eurocentric population. (Banks, 2009, pp. 100) However, like American attempts to politically heal the scars inflicted on Native Americans, Australian law has made significant strides during recent decades in ensuring, however ostensibly, that indigenous peoples have equal access to education and healthcare whilst having their land rights protected. (Dobozy, 2003, pp. 31)
2. International Human Rights Law and Domestic Compliance

A salient critique of international human rights law is that, since its post-World War II inception, it has failed to embrace genuinely democratic methods during ratification and, therefore, need not be legally imposed on even UN member states. (Mcginnis & Ilya, 2009, pp. 1739) While the so-called “first generation” of human rights is deeply engrained in most Western nations, the second incarnation of human rights is predominantly socioeconomic in nature; these trends suggest that Western states are less likely to genuinely enforce the second generation of human rights laws, such as the right to housing or education, within domestic law. (Mcginnis & Ilya, 2009, pp. 1740)

According to John McGinnis in his article entitled “Democracy and International Human Rights Law,” describes how international human rights laws can enter the sphere of national law:

International human rights law can enter the domestic sphere in a variety of ways. First, advocates have suggested that domestic courts apply international human rights law directly, incorporating it into a domestic regime without the decisions of the democratic legislative processes. Second, international human rights law can displace the domestic lawmaking process indirectly by being used as a rule of construction in determining the meaning of constitutions and statutes. Finally, the authority of international human rights law can be used to justify changes in domestic law enacted through the ordinary legislative process. (Mcginnis & Ilya, 2009, pp. 1741)

In most instances and with specific respect to Aborigines and Torres Strait Islanders, Australia has taken the most direct route of incorporation of international law into domestic law, doing so voluntarily and without legislative warrant. (Mcginnis & Ilya, 2009, pp. 1741)

The UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) are all reflected within the realm of Australian, domestic law. (Keith, 1997, pp. 401) However, states are responsible for constructing their own level of compliance with these laws. (Sthanke, 1999, pp. 251) While Australian indigenous people do indeed have ostensible political representation, for instance, including the right to vote and several councils on which sit only those of Aboriginal or Torres Strait Islander descent, these peoples continue to flounder in terms of social and economic status. (Brace, 2001, pp. 14)
3. The Political Representation of Australia’s Indigenous Minorities

Australia’s indigenous peoples are among the most socially immobile, minority populations in the Western world. (Brace, 2001, pp. 15) Their health is generally poor, and their income, education, and housing opportunities are markedly low. (Brown, 2002, pp. 162-163) The life expectancy of Aborigines and Torres Strait Islanders is two decades lower than that of the majority population, and infant mortality is four times higher among these minority populations. Despite the existence of the National Aboriginal Community Controlled Health Organisation (NACCHO), which ostensibly protects the health and well-being of indigenous populations, the healthcare for these minorities is not only shockingly poor within one of the most healthy Western nations; it is getting worse. (Brace, 2001, pp. 15)

Undoubtedly, the indigenous agenda is not being reflected within the realm of Australian politics, leaving the human rights of these peoples to be severely and consistently challenged. (Smith & Graeme, 2000, pp. 3) The failure to effectively address the plight of these minorities within the political realm, however, does not directly violate international human rights laws, which is, essentially, an integral part of the problem. International law does not demand authentic representation of minorities; meaning, while Aborigines and Torres Strait Islanders hold the right to vote and have a range of shallow protections in place for their human rights, there is no legal way to ensure that they actively participate within their government. (Smith & Graeme, 2000, pp. 3) While these minorities have the illusion of political representation, they have no genuine, political integrity.

NACCHO’s reports during the early 1990s revealed that over one-third of Aboriginal people were consistently worried about having enough food, and that twenty percent of children under age two within the Northern Territory were malnourished. (Brace, 2001, pp. 15) In addition, sexual abuse against children was supposedly rampant within this region. The laws that claimed to be targeted at remedying these ills were attacked by the UN for fundamentally discriminating against Aborigines, as indigenous populations had little to no political voice in passing radical changes to the penal codes in the Northern Territory, outlawing pornography and extending prison sentences for violations. (Brace, 2001, pp. 16)
Concurrently reflective of the lack of political representation for the nation’s indigenous minorities is the gross disparity in education, with less than twelve percent of these peoples moving on to higher education and only slightly more of them completing their primary education. (Brace, 2001, pp. 15) Despite a range of attempts to remedy the poor access to education had by minority populations, statistics are not improving. (Debozy, 2003, pp. 31) Scholars attribute this directly to a fundamental failure in representing indigenous peoples within Australian government. (Brace, 2001, pp. 15)

Historically, indigenous peoples have not been consulted when weighted decisions were made that directly affected their quality of life, let alone afforded a political voice. (Brock, 1997, pp. 120) However, the ways in which Aboriginal and Torres Strait Islander people have been fundamentally, institutionally discriminated against in terms of land rights continue to persist contemporarily, at the dawn of the twenty-first century. (Beresford, 2001, pp. 40) The number of evictions served to indigenous families by Western Australia’s housing authority HomesWest during the 1990s prompted intervention by the Human Rights and Equal Opportunity Commission. The resulting inquiry founded a fundamental level of cultural insensitivity within the housing authority, citing that discrimination persists with respect to the land and housing rights of indigenous peoples. (Beresford, 2001, pp. 41)

4. Compliance of Australian Law with International Human Rights Law

Australia represents a surprisingly non-unique case of overcompliance with international, human rights law. (Lightfoot, 2008, pp. 83) In her article entitled “Indigenous Rights in International Politics,” Lightfoot defines an overcompliant state “as one that paradoxically takes actions that recognize specific rights or a category of rights that go beyond, or even against, that state's international human-rights treaty obligations or its normative international commitments.” (Lightfoot, 2008, pp. 84) The author concurrently cites, however, that this overcompliance is politically shallow, affording the illusion that indigenous peoples are being adequately represented whilst concurrently slighting them with respect to a range of human rights. (Lightfoot, 2008, pp. 85)
5. Summation

Inherent within all discourse regarding the compliance of domestic law with international law is the barrier presented by the nature of human rights. In essence, if human rights are universal and natural, then their existence does not rely on any political process. Mcginnis & Ilya, 2009, pp. 1740) Furthermore, because human rights law is predominantly a restriction on the political processes of member states, they should not rely so heavily on democracy to enforce those rights. Mcginnis & Ilya, 2009, pp. 1740) However, as evident within Australia, it is possible to comply with human rights law whilst concurrently; politically condoning human rights violations, particularly those of the socioeconomic nature. By extension, political representation of minority populations may be the single, greatest human right in need of protection within the state.

International human rights law has been molded by its own criticism. While the realm of international law has long recognized the violations of human rights such as torture and genocide, it is the more subtle manifestations of human rights abuses that present the greatest barrier to equality within Western nations. In essence, the world does not so readily recognize a lack of authentic, political representation for minorities as a human rights violation as they would an incidence of ethnic cleansing, and rightly so. However, a fundamental recognition that states such as Australia can indeed comply with international law, and in some ways overcomply with that law, and yet fail to protect the rights of their indigenous populations is both urgent and necessary.

Thus far, the absence of such recognition can be attributed to another failure; international human rights law has yet to effectively address the resonating, detrimental effects of European colonisation. (Wright, 2001, pp. 214) The geography of the modern world was effectively born out of human rights violations, and, in many ways, its structure may continue to depend on the socioeconomic discrimination of minority populations. Wright contends in her aforementioned text that “human rights are about resistance to the demand for conformity and submission…. The powerful revival of difference as a fundamental characteristic of the quality called being human was an important development of the late twentieth century and is likely to remain a central issue for the twenty-first.” (Wright, 2001, pp. 215) The duel recognition by the United Nations that the narrow scope of international human rights law is ineffective in promoting the authentic, political representation of minority populations and
that states must be urged to embrace their minority populations as genuine assets to their own, collective humanity is crucial. In short, the needed scope of international human rights laws is becoming broader in the twenty-first century, and rightly so, but domestic laws have failed to effectively bridge the gap between domestic and international law. For the Aboriginal and Torres Strait Islander populations, merely complying with International, human rights law is not enough to extricate them from the culturally detrimental state of social immobility.

Minorities of Western nations are often precluded from achieving socioeconomic equality with the majority population due to institutional racism and other forms of discrimination. However, this discrimination is most frequently channeled through policy, rendering political representation of those minorities necessary in combating prejudices that limit access to employment, housing, education, and healthcare. In Australia’s case, councils and other political entities exist to ensure representation of the indigenous peoples; and yet, the opinions of these councils are widely trumped by those of other governmental agencies that do not adequately represent the Aborigine or Torres Strait Islander community, as they were in the aforementioned Northwest Territory interventions. (Brace, 2001, pp. 15)

While Australia can honestly demonstrate that channels for political representation exist, the state cannot demonstrate that authentic representation of indigenous minorities is indicated through policy. Conversely, the plight of indigenous peoples within Australia becomes worse every year, despite ostensible compliance with international laws regarding human rights, discrimination, and political representation. The right to vote and the existence of indigenous councils is obviously not enough to ensure that Aborigine and Torres Strait Islander rights are protected. By extension, radical change is needed to amend current domestic policy in order to ensure the authentic representation of indigenous minorities. Complying with international policies is not enough, as evidenced through the eroding state of indigenous peoples’ socioeconomic status. Affording more weight to council decisions and offering incentives for indigenous people to take an active role in the democratic process is a salient beginning. However, a reframing of domestic attention toward native populations as valuable members of Australian society, rather than a political burden, is concurrently critical.
Reference


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Apstrakt

Ovaj rad se bavi kršenjem ljudskih prava manjinske grupe aboridžanske zajednice u Australiji. Australija je ratificovala sporazum sa Međunarodnim komitetom za eliminaciju rasne diskriminacije (ICERD) i Međunarodni pakt o građanskim i političkim pravima (ICCPR) kao i drugih pravnih doktrina koještite prava Aboridžana u stanovnika Toresovo moreuza, međutim, australijska vlada je učinila veoma malo kako bi se osigurala politička zaštita i efikasna zaštita prava autohtonih naroda. Neuspeh se ogleda u tome što međunarodni zakoni nisu uspeli da obezbede zemljište i mogućnost samoopredeljenja ovom narodu. Međutim, domaći zakon može nedvosmisleno da obezbedi ova prava ukoliko postoji želja australijske vlade da to učini.

Ključne reči: manjinska prava, Ujedinjene nacije, ljudska prava i samoopredeljenje