

THE EFFECTIVENESS OF NATIONAL HUMAN RIGHTS INSTITUTIONS: THE AUSTRALIAN HUMAN RIGHTS COMMISSION AND IMMIGRATION DETENTION CENTRES

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National Human Rights Institutions (NHRIs) are often presumed not to be effective because they lack enforcement powers. Illustrated by the case study of the Australian Human Rights Commission and its involvement with Australia's policy of off-shore immigration detention centres, this paper argues that it is partially because of their non-enforcement powers that NHRIs can be effective. By applying the spiral model alongside a post-colonial critique of saviour status often encoded in that model, I propose four distinct ways of NHRI effectiveness can be identified. These are community input, popular mobilization, engagement with domestic law, and engagement with regional and international frameworks. This means the absence of enforcement powers ultimately is a valuable component of institutional design contributing to further human rights protection.

The Australian Case

In 2015 the AHRC released *The Forgotten Children: National Inquiry into Children in Immigration Detention*, a report detailing horrific and harmful conditions for children in immigration detention centers (AHRC, 2014, 17). The detention was deemed arbitrary, as more proportionate approaches were available but not selected (AHRC, 2014, 25). This national inquiry was launched by Gillian Triggs, the human rights commissioner at the time, on her own initiative as part of AHRC's mandate to align international human rights obligations and domestic laws and practices (AHRC, 2014, 12). The report found that the past and current governments breached the Convention on the Rights of the Child (CRC), which Australia had signed but not yet ratified (AHRC, 2014, 11). The report was intentionally delayed to avoid politicization during elections at the time, although the topic had been reviewed by the AHRC since the 2000s (Von Doussa, 2005, 11). An exclusive release to the government did not alter the situation, and thus the AHRC released the report to the general public, resulting in significant backlash where Triggs was asked to step down and accused of spreading politically motivated untruths (Medhora & Doherty, 2015). The report was part of spawning protests throughout the country demanding closure of the detention centers (Davidson, 2015), and though the government did change many of its policies, the centers remain active.

Against NHRIs

As these centers are still in operation in slightly different manifestations but with similar human rights violations, the example of the AHRC contributes to arguments that NHRIs fail because they cannot enforce their proposals and ideas (Carver, 2010, 25). This regulative critique claims that inquiries and reports of NHRIs are nothing more but purely ritualistic practices or false positives, which is to say that NHRIs only perform compliance with human rights by creating tokenistic institutions that cannot enforce concrete change and divert scrutiny away from the state (Charlesworth, 2017, 365; Simmons, 2009, 354). This is heightened for established democracies, which based on assumed general ethical state practice, can get away with weaker human rights institutions (Finkel, 2012, 294). This ritualistic appearance is strengthened as NHRIs

are part of the state structure and thus always implicated in what states do and are potentially regarded with suspicion by those distrusting the state, which often are communities most vulnerable to rights violations (Qafisheh, 2013, 83). Worse than not being able to enforce anything, NHRIs publicize harmful state practices and are thus antagonistic to domestic power, potentially resulting in retaliation tactics (Linos & Pegram, 2017, 680). NHRIs have a high democratic deficit as there is no electoral input and its accreditation is received through distant technocratic bodies. NHRIs are also in a position to absorb funding in an already crowded and competitive human rights organizational field, which adds a layer of significance and urgency to the question of their effectiveness and budget allocation (Goodman & Pegram, 2012, 4). It is difficult to proof the positive relationship between NHRIs and human rights protection (Cardenas, 2009, 35), but I counter that their seeming toothlessness is part of what allows their effectiveness.

The Spiral Model

The spiral model is a theoretical approach attempting to make legible how societies might resist and accept human rights. The model presents a trajectory that through interconnected different stages, which include different legal and non-legal actions such as the establishment of an NHRI or critical public reports from civil society organizations, states go through different phases. The first phase is one of rejection of human rights obligations and high rates of violations, and the final phase is one of institutional internalization of human rights norms and obligations. These interactions are charted between three actors, which are society, state, and international actors. Each of these actors has different strategies to foster human rights socialization that incrementally transforms repressive regimes with sometimes initial cosmetic changes into those that have internalized human rights (Risse & Sikkink, 1999, 11). As the spiral continues, positive human rights attitudes are cemented in law and institutions, and human rights volatility is reduced regardless of regime changes (Risse & Sikkink, 1999, 17). To apply this model, I focus on migrant detention, rather than Australia as a whole, for that is beyond the scope of this argument. The third stage seems fitting, as accountability mechanisms like the

AHRC appear as tactical concessions as their recommendations remain unimplemented and face significant governmental hostility. This could also imply backsliding, where Australia is repeating a similar episode from the 2000s when it changed its policy partially due to AHRC's reports. NHRIs expose uncomfortable truths which can destabilize national identity narratives hinged on international superior human rights adherence, and rather than changing policies Australia undermined its accountability mechanisms (Brodie, 2015, 1218). This challenges the assumption that states like Australia would be a predictable constant on the final stage with human rights firmly institutionalized throughout its systems. This stage resonates with the tactics employed by the AHRC as it focuses on moral consciousness raising through publicizing its reports (Risse & Ropp, 1999, 256) and thus casts the AHRC as a proactive state agent that through modes of investigation, persuasion, and publicity pushes Australia further towards the final stage of rule-consistent behavior. However, I argue that particular issues regarding the limited potential of political subjectivities and hybrid actors in the spiral model limit the illustration of the possible impact of NHRIs such as the AHRC.

There is a colonial logic underlying the usage of unitary state actors within the spiral model, which becomes particularly visible when its relevant international actors are defined through the necessity of interplay of domestic actors with international networks, specifically as a tool to trigger attention and intervention from western publics and governments (Risse & Sikkink, 1999, 5). This is pushed further as such networks are then seen to establish an essential openness to western ideals (Risse & Ropp, 1999, 272). Mutua argues that non-western states are often categorized in two roles; their civilians as helpless victims and their governments as barbarous savages. This contrasts the singular role for western states, which are cast as saviors able to bring human rights culture to other cultures inherently at odds with human rights (2001, 203). In the spiral model certain states are placed in the rule-consistent phase by virtue of their westernness, which is encoded in the claims that human rights violating states require international intervention by western states to further their own journey on the spiral. It assumes western states as unitary human rights abiding actors with an international savior role to play (Meuwissen, 2015, 477), yet as the example illustrates, it is Australia that needs saving.

An Alternative Model

To maintain the spiral model and illustrate the effectiveness of NHRIs, a possible route is to disaggregate the state. This means that different components of the state ought to be treated as separate actors with distinct but interconnected agency (Cardenas, 2009, 36). This polyvocality does not alter the overall obligations of the state but understands that different components possess different priorities and approaches (Meuwissen, 2015, 480). Shifting away from a singular state with an assumed savior role reveals four distinct ways NHRIs contribute to positive human rights change, despite of and sometimes due to non-enforcement powers.

Firstly, and in response to Mutua's argument that human rights are a Eurocentric force aimed at instilling a singular western culture (2001, 203), is that NHRIs are in the unique position to translate international human rights obligations into locally relevant frames, a process called vernacularization (Merry, 2006, 46). National inquiries are an instrumental relational exercise engaging with communities directly involved articulating how human rights apply to their contexts enabling formulations of systematic change (Brodie, 2015, 1226). This mobilizes the positionality of NHRIs on the intersection of civil and political society to mediate the unequal distribution of power of involved actors (Merry, 2006, 40). The research obligations of NHRIs grant it access to spaces other NGOs and entities might not have access to, for example for the Forgotten Children report both asylum seekers and employees at secretive detention centers were given a platform to vocalize their experiences (AHRC, 2014, 43). The inclusion of a non-citizen community detained on a different nation's territory challenges the colonial logic as it allows the AHRC to deconstruct a state to include the asylum seeker community. This inclusion allows the AHRC to respond, evaluate, and revise its recommendations accordingly in response to violations observed, and creates room to tailor universalistic notions to particular needs (De Búrca, 2017, 297) and fosters a sense of cultural ownership rather than international imposition. A significant design aspect to facilitate this more responsive and reflexive approach is that NHRIs should be able to initiate inquiries as they see fit (Brodie, 2015, 1233), so the NHRI can be responsive to communities regardless of

whether governments initiate steps. This fosters an additional accountability mechanism that is simultaneously horizontal as NHRIs are part of the state, but has vertical components by relying on community voices for its work (Peruzzotti, 2012, 249).

Secondly, vernacularized human rights frameworks, which are brought into the public conscience through NHRIs' publicity campaigns, can mobilize communities which in turn can help enforce NHRIs' recommendations through popular pressure (Uggla, 2012, 273). This highlights the particular hybrid positionality of the NHRIs that a disaggregated view of the state apparatus can capture, as NHRIs act as an additional bridge between civic society and different state components providing a relational capacity contributing to societal and political change (Brodie, 2012, 1223). This allows civic society to exercise its accountability role more frequently than just during electoral episodes, and contributes to a more expansive and participatory notion of social accountability (Borowiak, 2011, 108). This is visible in the continued protests occurring across Australia in response to its detention policies (Specia, 2018), which although not singlehandedly initiated by the AHRC, it aided in sustaining them and providing rhetoric and evidence. Popular mobilization contributes to responsible government, as it allows non-elected and non-partisan bodies to raise up controversial matters such as migration detention which governments might avoid, especially during election season (Finkel, 2012, 295). It is exactly within the remit and purpose of NHRIs to take on all human rights violations, regardless of marketability or palatability. Ultimately, and particularly through national inquiry processes, NHRIs can provide community networks with the motive – the evidence and research – required to mobilize especially in highly institutionalized systems like Australia's (Simmons, 2009, 361) and provide a powerful connection between state and society. For both first distinct ways that NHRIs are successful, non-enforcement powers enable these forms of effectiveness for otherwise NHRIs would simply multiply legislative bodies and cause disintegration of the state apparatus through internally competing politicized powers.

Thirdly, NHRIs bring international legal frameworks into domestic political and judicial spaces. As states exercise their sovereignty when signing treaties, NHRIs can take the initiative to urge ratification, provide systematic overviews, and push for implementation of its obligations (Cardenas,

2009, 37). The mandate of the AHRC allows it to apply treaties regardless of their ratification and implementation status in domestic law, which is different from other accountability mechanisms such as the judiciary and powerful as Australia operates under a dualist system, which normally means treaties are only applicable after integration with domestic law (Carver, 2010, 29). Australia has no constitution or bill of rights, and thus the AHRC is in the unique position to apply these laws without undermining the sovereignty of the state due to its lack of enforcement powers (AHRC, 2014, 10). Certain NHRIs, like the AHRC, provide assistance and advice to elected governments to ensure new laws are harmonized with international human rights law and thus contribute to legislative agenda-setting and political mobilization furthering the institutionalization of human rights (Cardenas, 2009, 36). The AHRC provides advice on the needs of refugees and children when considering new legislation affecting those communities, which current law and practice do not (AHRC, 2014, 85). This grants NHRIs significant influence in the interpretation of international human rights and domestic law, which could impact the universality of human rights, but also counter-balances governments subverting international human rights law. For example, the Australian government redefined what constitutes a refugee in order to fit domestic law, and the AHRC provided pushback to ensure compliance with international human rights law (AHRC, 2014, 15). The fact that the NHRI cannot legally enforce its advice removes the threat of co-opting or replacing power from governments, allowing its proposals to be more palatable (Meuwissen, 2015, 460). Absence of enforcement powers creates an additional safeguard for the independence of NHRIs, where safeguards are key to securing independence and institutional efficiency (Linos & Pegram, 2017, 630), because it insulates NHRIs from explicit partisan politics, threats of power usurpation, and permits singular dedication to human rights. Independence requires layers of safeguarding, as the AHRC demonstrates that controversial inquiries could launch politically charged attacks aiming to erode actual or perceived independence. The AHRC can also provide *amicus curiae* letters which can assist courts without co-opting the judiciary, allowing it to contribute to human rights inclusive legal developments which in common law courts with binding precedent is significant (Von Doussa, 2005, 8). Not having legal enforcement powers contributes to NHRIs being able to play particular roles domestically to bring

international human rights law into domestic state branches such as the executive and judiciary without replicating or controlling them.

Lastly, non-enforcement powers allow NHRIs to play a distinctive role as a bridge between the state and international networks (Carver, 2000, 19). NHRIs on the supranational plane have further disaggregated the state voice without jeopardizing state sovereignty exactly because it cannot legally ascend to or ratify treaties (Meuwissen, 2015, 481). NHRIs participated in treaty drafting, such as for the Convention on the Rights of People with Disabilities (CRPD), allowing input from vernacularized frames that multiply the knowledges from which new treaties will be written (Burdekin, 2007, 120). In review processes for several different treaty bodies including the CRC, NHRIs contribute independently, whereas for the Optional Protocol for the Convention Against Torture and the CRPD, a requirement is to appoint national monitoring mechanisms which communicate with the treaty bodies to secure implementation and often NHRIs are appointed for that role (Carver, 2010, 25). An additional route where specifically the AHRC and fellow Asian and Oceanic NHRIs are effective is through the Asia-Pacific Forum of National Human Rights Institutions (APF-NHRI), which provides regional support for NHRIs across different contexts to share best practices, secure cooperation, and facilitate transnational investigations (Burdekin, 2007, 98). An example is how different NHRIs collaboratively researched human trafficking, which is significant as there is no regional system and the region experiences high reluctance in human rights treaty ratification (Fitzpatrick & Renshaw, 2012, 168). As a result, there has been a policy convergence where context-specific yet similarly informed domestic legislation has been enacted which conforms to international standards and echoes back to protect vulnerable local communities (Fitzpatrick & Renshaw, 2012, 170). As NHRIs cannot enforce laws, the creation of this supranational network in a region of the world where there is none provides necessary network-building without threatening the sovereignty of the different states involved. A disaggregated view of states better captures how NHRIs move between governance planes – from domestic to international.

Australia persistently violates the rights of those in detention (Amnesty International, 2016) despite having a stable and efficient NHRI, and many other NHRIs around the world struggle with similar issues or are corrupt and politicized, casting a shadow of

doubt on their efficacy. However, many judiciaries also falter, yet judiciaries remain a self-evident necessity of any state (Carver, 2010, 31). These four points demonstrate how NHRIs are part of long-term incremental processes that can be situated in a modified spiral model that understands the hybridity of NHRIs as actors between international, regional, and domestic planes and as being both governmental and civil society based. Such a conception of NHRIs opposes the narrow cast of characters in the original spiral model, which relies on a colonial logic to pre-determine which rigidly demarcated states play which roles. NHRIs can remain part of an initial tactical concession by repressive regimes as the spiral model indicates, but that should be a starting point to add NHRIs as a distinct actor within the model that recognizes the fluidity and agency of these institutions.

Conclusion

I have argued that NHRIs are effective in furthering the internalization and institutionalization of human rights partially because they do not have enforcement powers, opposing the regulative argument that the inability to enforce decisions is an institutional design flaw. The spiral model theorizes that non-legal avenues can further human rights internalization and compliance, yet through a post-colonial critique it is evident that the model obscures certain dimensions as it explicitly relies on a colonial logic of states as unitary actors with western states as saviors. Australia and its human rights violations in immigration detention centers destabilize such perspectives. I propose to add a dimension to the spiral model that acknowledges the power in tactical concessions but disaggregates the state to allow NHRIs their own stream as a hybrid entity between the three different current streams in the model. This elucidates particular efficiency rooted in NHRIs' non-enforcing design which four different aspects illustrate; community input, popular mobilization, engagement with domestic law, and engagement with regional and international frameworks. Non-enforcement powers are essential to protecting the various bridge roles NHRIs play, for otherwise it would become a less democratic heavily politicized copy of government. NHRIs are not a panacea to all human rights violations nor do diverse NHRIs in even more diverse national contexts all have the exact same impact (Linos & Pegram, 2015, 8), but they can be an instrumental institution in furthering human rights. NHRIs are only effective

in a constellation of institutions, for if not a single institution had enforcement powers, nothing would get done, but as part of a network, a distribution of enforcement allows for greater protections. NHRIs can then provide specific human rights checks and balances vital to maintaining healthy democracies, especially in the current increasingly volatile and polarized political landscapes. The AHRC, alongside other human rights actors, may have not been able to as of yet halt Australia's dehumanizing immigration and detention practices, but other effectiveness benchmarks such as public awareness raising and regional standard setting are essential components of enacting change.

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