

TRADITIONAL HUNTING

Cultural rights v animal welfare

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The traditional right to hunt has been recognised for some time now by Australian courts and by Parliament as one of the native title rights of Aboriginal and Torres Strait Islander peoples.¹ Concomitantly, growing community concerns have emerged about the cruelty of common traditional hunting practices.² These practices include harpooning and drowning of dugongs; harpooning of turtles or killing them with blows to the head; keeping sea turtles upside down and freshwater turtles in drums for lengthy periods; breaking the necks of muttonbird chicks; and breaking, severing or tethering animals' limbs as a means of control and storage.³ Increasingly, Indigenous communities are providing leadership by actively promoting more humane hunting methods.⁴

The welfare of animals subject to traditional hunting is treated inconsistently under the various State and Territory animal protection regimes. In Queensland, acts performed under Aboriginal tradition or Torres Strait Islander custom are exempt from the requirements of the *Animal Care and Protection Act 2001*.⁵ In contrast, the Northern Territory's *Animal Welfare Act 1999* specifically excludes the possibility of using cultural, religious or traditional practices as a defence to an act of cruelty.⁶ In other Australian jurisdictions, traditional hunting is not specifically mentioned and falls under the general provisions of the relevant animal protection legislation, or is exempt, along with other forms of hunting.⁷ The discrepancies between the application of animal protection laws to manifestly cruel Indigenous traditional hunting practices and to other forms of cruelty raise potential issues of discrimination.

Exemptions under animal protection legislation in Queensland

In its 1986 report, *The Recognition of Aboriginal Customary Laws*,⁸ the Australian Law Reform Commission warned of the undesirability of legal pluralism, a system which allows the enactment of special rules for particular groups, on the basis that pluralist systems can generate, rightly or wrongly, apprehension of discrimination.⁹

The *Racial Discrimination Act 1975* (Cth) (RDA), along with State and Territory anti-discrimination enactments, gives effect to a number of international agreements, and particularly to the *Convention on the Elimination of all Forms of Racial Discrimination* and to the *International Covenant on Civil and Political Rights*.¹⁰ Under these agreements and under the RDA,¹¹ the differential treatment of peoples on the basis of race is unlawful.

Differentiation of treatment, however, will not constitute discrimination if it is not 'invidious', or 'if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.¹²

As noted above, traditional hunting practices are exempt from the cruelty provisions of the *Animal Care and Protection Act 2001* (Qld),¹³ even though the same actions conducted outside the scope of traditional hunting would constitute severe offences under the Act. Furthermore, even in the jurisdictions where animal protection equally applies to traditional hunting, there appears to be a tendency by enforcement agencies to 'turn a blind eye' to the potential cruelty involved in traditional hunting because of the sensitive cultural issues raised and because of the difficulties in collecting evidence for prosecution.¹⁴ All in all, the immunity, at both legislative and procedural levels, may give rise to concerns that Indigenous people are treated more leniently than non-Indigenous people for cruelty to animals. It is argued below that such concerns are justified because allowing cruelty in traditional hunting practices, by exclusion or omission from legislation, goes beyond what is necessary for giving effect to native title rights.

Cruelty immunity a special measure?

The immunity from cruelty offences which is granted to Aboriginal and Torres Strait Islanders under the *Animal Care and Protection Act 2001* (Qld) has been described as a special measure consistent with the RDA.¹⁵ It is argued, however, that such description is misguided. The RDA allows for special measures¹⁶ in accordance with the *Convention on the Elimination of all Forms of Racial Discrimination* (art 1):

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

For most traditional practices, the method (as opposed to the purpose) of hunting animals has no particular cultural significance and is not immutable.¹⁷ New technologies such as motor vehicles, dinghies, firearms, metal spearheads, nylon fishing lines and refrigeration are now widely used by Indigenous hunters.¹⁸ Embracing

REFERENCES

1. *Yanner v Eaton* (1999) 201 CLR 351; *Native Title Act 1993* (Cth) s 223(2).
2. See, eg, Fernando Ponte, *It Has Nothing to Do with Hunting: An Examination of the Attitudes and Values Associated with the Recognition of Indigenous Hunting Rights* (PhD Thesis, James Cook University, 1996) 354–7; various submissions focusing on animal welfare made on the draft *Sustainable Harvest of Marine Turtles and Dugongs in Australia — a National Partnership Approach* (2005) prepared by the Marine and Coastal Committee Taskforce for the Department of Environment and Heritage.
3. For more details see Dominique Thiriet, 'Tradition and Change — Avenues for Improving Animal Welfare in Indigenous Hunting' (2004) 11 *James Cook University Law Review* 159, 164–7.
4. See the incorporation of humane standards in Hopevale Aboriginal Council and Melissa Nursey Bray, *Guugu Yimithirr Bama Wii: Ngawiya and Girrbihi (A Turtle and Dugong Hunting Management Plan)*, Prevention of Cruelty (1999) ch 14.
5. *Animal Care and Protection Act 2001* (Qld) s 8(1).
6. *Animal Welfare Act 1999* (NT) s 79(2).
7. *Animal Welfare Act 1992* (ACT); *Prevention of Cruelty to Animals Act 1979* (NSW); *Prevention of Cruelty to Animals Act 1985* (SA); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Welfare Act 2002* (WA).
8. Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) vol 2.
9. *Ibid* 123.
10. Henry J Steiner and Philip Alston, *International Human Rights in Context — Law, Politics and Morals* (2nd ed, 2000); Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (2000).
11. RDA s 9.
12. J Chesterman, 'Balancing Civil Rights and Indigenous Rights: Is There a Problem?' (2002) 8(2) *Australian Journal of Human Rights* 125, 135.

such new technologies has in no way diminished the cultural significance of the hunt. Likewise, the adoption of methods of killing animals in ways that ensure quick and painless death would not jeopardise the traditional status of the hunting practices.¹⁹ Thus, the laws and practices which allow Indigenous hunters to use cruel hunting methods that would otherwise be prohibited under relevant animal protection legislation, are not special measures. They do nothing to 'secure advancement' of Indigenous people nor do they ensure 'equal enjoyment of their human rights' (in this case the right to conduct traditional activities) as such rights could be equally enjoyed using alternative 'more humane' hunting techniques. Further, they provide traditional hunters with a 'separate right' in the form of a legislative or procedural immunity from animal welfare requirements. It should be noted, however, that similar immunity is available in some States to allow the slaughter of animals under a religious faith, for instance ritual Kosher and Halal slaughter.²⁰ I argue that in all these circumstances, the cruelty exemption is inconsistent with the object of art 1 of the Convention and as a result, this exemption falls short of what a special measure ought to achieve.

There may be a limited number of circumstances where the exemption could be regarded as a special measure. This would apply when a cruel method of killing has a traditional significance, and thus the cruelty is an inherent and traditional part of the practice. The label of 'special measure', however, could still be rejected as this term generally implies the law is merely an affirmative action measure temporarily in place until the effect of the discrimination has been removed.²¹ This clearly does not apply to any of these situations.

There is an important difference between animal protection laws which regulate the right to hunt and laws which recognise the native title right to hunt. The latter do not amount to discrimination even though they authorise Indigenous people to hunt protected species and to hunt them in protected areas, and this right is by and large denied non-Indigenous people.²² This is simply because native title is a pre-existing right of crucial cultural significance to Indigenous peoples.²³

Are animal protection laws discriminatory?

Could the discrimination argument be used in the reverse by claiming that, in jurisdictions where anti-cruelty standards are imposed on Indigenous as well as on non-Indigenous peoples, limitations to traditional hunting discriminate, either directly or indirectly, against Indigenous peoples because they hinder exercise of their cultural right? Clearly, legislation which limits native title rights generally breaches the RDA.²⁴ This is because native title is a property right and thus any limitation will perforce be discriminatory if not similarly applied to other property rights. However, for several reasons, anti-cruelty limitations that apply to traditional hunting practices in States other than Queensland do not amount to discrimination.

First, anti-cruelty legislation, although clearly affecting the right to hunt, does not limit the nature and the amount of property to be taken. It simply regulates how it should be taken (of course it is also acknowledged that the traditional right to hunt is more than a mere property right). Second, there is no direct discrimination as anti-cruelty legislation that may apply to traditional hunting applies equally — or equally fails to apply²⁵ — to hunting conducted by other cultural groups.

Third, while both the *International Covenant on Civil and Political Rights* and the RDA prohibit laws that impose restrictions on some groups based on race, art 18(3) of the Covenant entitles States to impose such limitations as are necessary to protect public safety, order, health or morals, or the fundamental rights and freedom of others. It is argued that any regulation which aims to limit cruel treatment of animals does so in the interest of moral consideration. Article 18(3) is not given effect in the RDA but there would be no impediment to State and Territory governments applying this principle. It is argued, therefore, that the imposition of anti-cruelty standards on Indigenous peoples amounts to neither direct nor indirect breach of the RDA.

State intervention

The question of whether the state should intervene to curb cultural practices deemed unacceptable to the majority because they conflict with human rights principles has been subject to public debate and, on occasion, court proceedings.

Disputed practices have involved the right of Indigenous men to consummate a traditionally arranged marriage against the human right of the child bride not to be subjected to sex;²⁶ the right of Indigenous men to 'discipline their women';²⁷ as well as Indigenous communities' right to dispense customary law against

13. *Animal Care and Protection Act 2001* (Qld) s 8(1).

14. Dominique Thiriet, 'Out of the 'Too Hard Basket' — Traditional Hunting and Animal Welfare', submitted to the *Macquarie Law Review*.

15. Letter from Cameron Dick, Senior Ministerial Policy Adviser, Office of the Minister for Primary Industries and Rural Communities to Dominique Thiriet, 15 May 2003.

16. RDA s 8(1).

17. Thiriet, above n 3, 171–2.

18. *Ibid.*, 168–9.

19. *Campbell v Arnold* (1982) 56 FLR 382; Jeremy Firestone and Jonathan Lilley, 'Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs', (2005) 8 *Journal of International Wildlife Law and Policy* 177; 216; also ALRC, n 8 above, 180–2.



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the right of the offender not to be physically harmed by payback wounding.²⁸ To address these difficult issues, Northern Territory courts may have regard to Aboriginal customary law when sentencing.²⁹ Controversy about state intervention has also applied to traditional practices of non-Indigenous minorities, such as female circumcision, promised brides and the wearing of the hijab. In many cases, actual or proposed legislative intervention to curb such traditional practices is supported not only by the majority but also within the minority communities.³⁰

All of the examples above refer to state intervention where conflicts occur between the rights of various groups of people. There are few precedents of state intervention when civil rights of some communities infringe on the (yet unrecognised) rights of animals.³¹

In relation to human rights, Kymlicka³² provides a useful model which balances the need for societal organisation with self-determination for minority groups when conflict arises. Kymlicka equates 'liberal principles' with civil rights' and argues that where a minority group chooses to deny the civil rights of some of its citizens contrary to the liberal principles held by the majority group, intervention by regulation is warranted (ie not discriminatory). It is only warranted, however, when the breach of civil rights reaches a certain threshold of unacceptability. Until this threshold is crossed, the majority group have to learn to live with the incompatibility of the minority group's practice with liberal principles.³³

These principles could be validly applied to the issue of traditional hunting if the phrase 'liberal principles' is interpreted broadly as referring to humans as a part of their environment. Under this broader interpretation, an intervention to regulate the treatment of animals subject to traditional hunting would be justified (ie not discriminatory) when practices have reached a point on the cruelty scale unacceptably inconsistent with animal welfare standards accepted by the majority. Similarly, intervention would be surely justified if, to take an extreme example, the minority group's cultural practices were responsible for destroying or polluting the environment to such an extent that it was entirely unacceptable to the majority.

Conclusion

It is clear on this analysis that laws and practices which exempt Indigenous people from anti-cruelty regulations when exercising their traditional right to hunt go beyond

what is required to comply with anti-discrimination principles. In such cases, legal pluralism is not justified. On the other hand anti-cruelty regulations, even when these somewhat limit the right to hunt, are justified and do not appear to discriminate against Indigenous hunters. Given growing community concerns, including from within Indigenous communities,³⁴ about cruelty in traditional hunting, legislative reform would be justified in all States and in the ACT to ensure that animal welfare requirements explicitly apply to traditional hunting as is currently the case in the Northern Territory, and that, in all jurisdictions, the laws are properly enforced.

Despite the legitimacy of state intervention in this case, it is doubtful that legislative reform imposed on Indigenous communities would be well received. The difficulties with enforcing the legislation in remote areas would also make significant improvements on the ground unlikely. Instead, it would be preferable if change could originate from, and be driven by, Indigenous communities, perhaps initially under the influence of concerned individuals. The change process which may include education programs targeting hunters should be assisted, rather than imposed, by government and non-government organisations where needed. This mode of achieving change will not only ensure meaningful animal welfare improvements but will also reinforce Indigenous communities' right to self-determination.

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20. See *Prevention of Cruelty to Animals Act 1979* (NSW) s 24(1)(c) and *Animal Care and Protection Act 2001* (Qld) s 45. The exemption is specifically excluded under the *Animal Welfare Act 1999* (NT) s 79(2). In other jurisdictions, the legislation generally provides an exemption for practices conducted according to a Code of Practice.

21. Chesterman, above n 12, 136.

22. Ponte, above n 2, 258.

23. Chesterman, above n 12, 137.

24. *Ibid* 139–40.

25. For instance, under the *Game and Feral Animal Control Act 2002* (NSW), wild pigs can be hunted by anyone with a bow and arrows.

26. See for instance *Holes v Jamilmira* [2003] NTCA 9; *The Queen v CJ* [2005] NTCCA 20; also Gerard Bryant, 'Promised Marriages — The Jackie Pascoe Case' (2003) 5(23) *Indigenous Law Bulletin* 20.

27. See for instance *Watson v The Queen* (1986) 22 A Crim R 308; also Hannah McGlade, 'Our Own Backyards', (2003) 5(23) *Indigenous Law Bulletin* 6; Alison Anderson, 'Women's Rights and Culture: an Indigenous Woman's Perspective on the Removal of Traditional Marriage as a Defence under Northern Territory Law' (2004) 6(1) *Indigenous Law Bulletin* 30.

28. ALRC, above n 8, vol 1, 43.

29. *Sentencing Amendment (Aboriginal Customary Law) Act 2004* (NT), Act No 1 of 2005.

30. See McGlade and also Anderson, above n 27.

31. *Animal Welfare Act 1999* (NT) s 79(2). The CSIRO's Model Code of Practice for the Welfare of Animals (Livestock at Slaughtering Establishments) provides guidance but is unenforceable.

32. Will Kymlicka, 'Multicultural Citizenship: A Liberal Theory of Minority Rights' (1995); see also Chesterman, above n 12, 140–1.

33. Chesterman, above n 12, 141.

34. Hopevale Aboriginal Council and M Nursey Bray, above n 4.