Part II - Human Rights

Themes and Challenges

1. The changing understanding of the relationship between state sovereignty and human rights
2. issues of compliance and non-compliance in relation to human rights
3. the development of human rights as a reflection of changing values and ethical standards
4. the role of law reform in protecting human rights
5. the effectiveness of legal and non-legal measures in protecting human rights.

Relevant PEARRJAM criteria:

- Protection of individual rights
- Enforceability
- Accessibility
- Resource efficiency
- Responsiveness
- Justice being achieved
- Application of the rule of law
- Meeting the needs of society

1. The nature and development of human rights

- Relevant legislation and cases

International treaties, protocols, conventions

- *Treaty of Versailles (1919)*
- *Charter of the United Nations (1945)*
- *Convention on the Prevention and Punishment of the Crime of Genocide (1948)*
- *The Universal Declaration of Human Rights (1948)*
- *Geneva Conventions (1949)*
- *Convention relating to the Status of Refugees (1951)*
- *International Convention on the Elimination of All Forms of Racial Discrimination (1965)*
- *International Covenant on Civil and Political Rights (1966)*
- *International Covenant on Economic, Social and Cultural Rights (1966)*
- *Protocols to the Geneva Conventions (1977)*
- *Convention on the Elimination of All Forms of Discrimination against Women (1979)*
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) Declaration on the Right of Peoples to Peace (1984)*
- *United Nations Convention on the Rights of the Child (1989)*
- *United Nations Declaration on the Rights of Indigenous Peoples (2007)*
- *Treaty on the Prohibition of Nuclear Weapons (2017)*

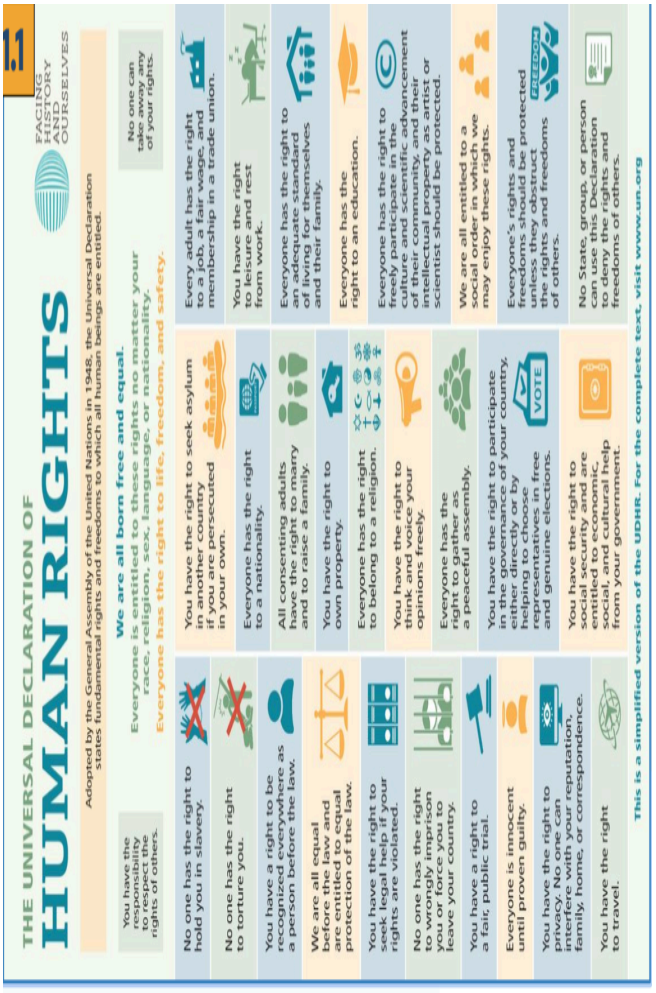
Possible HSC Questions

1. *The changing understanding of the relationship between state sovereignty and human rights*
2. *Issues of compliance and non-compliance in relation to human rights (2016 HSC Q 23)*
3. *The development of human rights as a reflection of changing values and ethical standards*
4. *The role of law reform in protecting human rights*
5. *The effectiveness of legal and non-legal measures in protecting human rights (2017 HSC Q 23)*

1. - Definition of human rights

Human rights are the rights which every human being is entitled to enjoy and have protected. The struggle to protect and preserve human rights is underpinned by moral and philosophical arguments regarding human dignity. They are:

- the basic rights and freedoms that belong to all human beings - Universal
- Inherent - they exist because we are humans
- about recognising and respecting the inherent value and dignity of all people
- able to transcend culture, ethnicity, religious orientation and nationality
- not granted by governments, nor can be taken away - Inalienable
- able to reflect community values, so the concept of human rights continues to evolve as community values develop



Human Rights have only officially existed since the passing of the Universal Declaration of Human Rights (UDHR) in 1948

2. - Developing recognition of human rights

Some rights had started developing over history:

- Ancient Babylonia (1754 BCE): the Code of Hammurabi includes the presumption of innocence and the right to give evidence
- Ancient Persia (539 BCE): the Cyrus Cylinder promises some religious freedoms

- Ancient Greece (4th - 3rd Century BCE): Plato and Aristotle and other philosophers started suggesting certain rights
- Medieval Britain (1215): The Magna Carta outlines the right to a fair trial with a jury and the rule of law
- The Enlightenment (18th Century): Writers like Kant and Locke suggest rights are key
- The Declaration of Independence 1776
- The French Declaration on the Rights of Man 1789

- Human rights have developed over a long period of time, with key events contributing to their development
- Widespread acknowledgment of the concept of human rights is a relatively recent phenomenon.
- Music is often used to raise awareness of human rights (eg. Bob Marley)
- Over centuries the idea that people had 'rights' that no one could take away developed.
- The Magna Carta was the first attempt to establish this notion and this has been built on by various documents such as the Rights of Man, and culminates with the UDHR and the International Bill of Rights.
- The Magna Carta gave rights to the Nobles of the day, but was an important step in acknowledging rights that people should have.
- More importantly it meant that even the King must follow the law (Rule of Law - Nobody is above the law). Such an articulation of the rule of law is important in the development of Human Rights.
- This notion is critical to the idea of the rule of law rather than the rule of man. Historically and across different cultures various rights have been articulated in law, although often with significant restrictions and limitations.

Describe the means by which human rights are protected under Australian law with an example of each.

In Australia, human rights are recognised and protected under various sources, namely international treaties, the Australian Constitution, common law and statute law of the Commonwealth, states and territories. As such, human rights enlisted in international treaties are ratified or incorporated into Australian law, like the ratification of the Rome Statute of the ICC in 2002 through the International Criminal Court Act 2002 (Cth). Otherwise, legislation like the Racial Discrimination Act 1975, Sex Discrimination Act 1984 or Marriage Amendment (Definition and Religious Freedoms) Act 2017 uphold the basic human rights enlisted in the UDHR.

Abolition of slavery

Types of slavery:

- Chattel slavery Slaves are exchanged for products or money, and expected to perform labour and sexual favours; their children are expected to do the same
- Debt slavery or bondage Extreme poverty forces parents to offer themselves or children as collateral against a loan, forced to work until debt paid off which is impossible due to inflation
- Forced labour Individuals are lured by the promise of a good job but instead find themselves subject to slaving conditions, working without payment and enduring physical abuse, in harsh and hazardous conditions
- Sex slavery Women and children are forced into prostitution; lured by false offers of a good job, then assaulted, drugged and forced to work in brothels.

The slavery abolition movement represents a distinct shift in value and ethical standards. It was influenced by ideas of natural rights developed during the French and American revolutions. Global slavery remains a key issue today with more than 40 million people reported to be living in modern slavery. There is estimated to be 15,000 slaves existing in Australia (2016 Walk Free Survey), though this number has increased greatly.

Slavery is a type of forced labour in which a person is considered to be legal property of another individual. Abolition is the action of abolishing a system, practice or institution

A history of slavery

- • Transatlantic slave trade - The trading of African people by Europeans, who transported them as slaves from Africa to around the world.
    - Operated from the 17h century - 19th century.
    - European ships would trade products for slaves in West Africa.
    - Estimated 12 million Africans were shipped from Africa to the Americans during this time.
- In the 18th century, rationalist thinkers began to criticise slavery.
- Later on, In Britain, slavery became illegal in the common law of England in 1772
- In 1772 a judgement came along by the Court of Kings Bench of The Somerset Case (1772) - James
- Somerset (a slave) was forced to be taken from England to the colonies.
- Lord Mansfield disagreed and took authority as well as held a meeting over the case. After this many people held aims to abolish slavery.

Article 4 of the UDHR applies

- 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms

Article 8 of the ICCPR applies

- No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
- No one shall be held in servitude.
    a. No one shall be required to perform forced or compulsory labour;

Declaration of the National Anti-Slavery Convention

- Founded in 1833

- Was the nation's most important organisation dedicated to the abolition of slavery.

Recent declarations and treaties

Recent declarations have been passed in Australia such as in 2018, when the Australian government introduced the Modern Slavery Act. This requires certain entities to report on the risks of modern slavery within their operations and supply chains. This legislation aims to increase transparency and accountability regarding modern slavery practices.

Recent treaties include Australia agreements in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (commonly known as the Palermo Protocol). Additionally, Australia is a signatory to the International Labour Organization's Forced Labour Protocol, which aims to strengthen global efforts to eliminate forced labour.

Case A Melbourne Couple - 44M and 29F - are facing charges of modern-day slavery for allegedly keeping a female victim in domestic servitude at their Point Cook home from January to October 2022. Police allege that the couple exercised coercive control over the victim, subjected her to physical assault and restricted her movement. If convicted, they each face a maximum penalty of 25 years' imprisonment.

Trade unionism and labour rights

A trade union is an organisation of workers created to preserve and further their rights and interests. Trade unions first emerged during the Industrial Revolution in response to the appalling conditions, lack of safety, low wages and long working hours in the factories of the new industrial cities.

The Universal Declaration of Human Rights

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration, ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

<u>Origin of Australians union movement</u>

- "Workers are stronger when we stick together. For almost two hundred years, workers have come together in their unions to organise, take action, and win."
    - Began from the British invasion on ATSI peoples
    - They gathered at Rouse Hill, which they renamed Vinegar Hill in tribute to one of the most famous battles during the Irish revolution of 1798
    - In 1824, coopers went on strike, using a picket line for the first time in the country. In 1829 typographers on the Australian newspaper struck for higher wages.
    - Workers in other trades soon followed: bakers, shoemakers, carpenters, seamen, and even whalers. All protested against low wages and poor conditions by banding together and withdrawing their labour.

Similar to the movement to abolish slavery, campaigns to improve labour rights and conditions were waged over the 1800s. The Universal Declaration of Human Rights (1948) included labour rights in two of its 30 articles. In Europe, labour law as protection for workers, including demands for better conditions and the right to organise, arose with the Industrial Revolution and the introduction of mechanised manufacture. The Industrial Revolution, which occurred during the eighteenth and nineteenth centuries, began in the United Kingdom and spread to Europe, America, Australia and most of the rest of the

world. Major changes in the fields of manufacture, agriculture and transport redefined society and acted as the catalyst for changes to labour laws.

Media

- Unions welcome record pay rises for workers on new collective agreements (Media Release - April 3, 2024)
- ‘Roster justice’ needed so workers can plan their lives (Media Release - March 27, 2024)
- ACTU calls for 5% increase to minimum wages (Media Release - March 25, 2024)

Universal suffrage

Universal suffrage refers to the principle that every adult citizen, regardless of their gender, status, race, age, beliefs, or nationality, has the right to vote in political elections. It means that all eligible individuals have an equal opportunity to participate in the democratic process and have a say in choosing their representatives and leaders.

Historically, this right was limited by factors such as gender, status, race, age, beliefs, and nationality. Initially, only upper-class men were allowed to vote in the first countries that permitted suffrage. This exclusion was due to mistrust of the general population or assumptions that they could not understand government affairs. The demand for universal suffrage began in the 19th century across global democracies. In the United Kingdom, for example, voting rights were gradually extended from male landowners of a certain value to male householders and eventually males in rural areas. However, even after these amendments were made, only 60% of males had the right to vote.

Women who campaigned for suffrage were known as suffragettes. New Zealand became the first country in the world to grant women equal voting rights in 1893, followed by South Australia in 1894 and Australia as a whole in 1902. The contribution of women during World War I led to limited voting rights being granted in some countries like the United Kingdom. Indigenous Australians were given voting rights at Federation in 1901; however later interpretations by the government resulted in their denial of this right until 1962.

Representation of the People Act 1918 (UK)

The Representation of the People Act 1918 widened suffrage by abolishing practically all property qualifications for men and by enfranchising women over 30 who met minimum property qualifications. The enfranchisement of this latter group was accepted as recognition of the contribution made by women defence workers.

UDHR

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

ICCPR

- To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

C. To have access, on general terms of equality, to public service in his country.

Universal education

In Australia, all children have the right to attend a reputable school, regardless of their family's financial situation or place of origin. This is known as universal education. In Australia, it is mandatory for children to attend school from the age of six to sixteen. Public schools receive substantial funding from the government in order to remain affordable or free for families. Private schools also receive some funding from the government. Everyone should feel encouraged and welcomed at school, regardless of background or differences.

Australia's efforts to provide universal education date back to the era of colonialism, when the main objective was to educate the children of the settlers. Government-funded schools were established in the 19th century, but the restriction of enrolment remained for Australian Indigenous people and those living in remote areas. Public schooling expanded and regulations for education were introduced in the late 19th and early 20th centuries. With measures to end educational inequalities and provide access for all Australians, regardless of background, the post-World War II era saw a dramatic shift towards universal education and laid the groundwork for the comprehensive education system that exists today.

By a number of laws and treaties, Australia has committed to provide universal access to education. With a focus on equality and inclusivity, the Education Act of 2013 guarantees all Australians access to education. Furthermore, Australia is part of international agreements that support the right to education, such as the Convention on the Rights of the Child and the Universal Declaration of Human Rights. Furthermore, programmes like the Indigenous Education Strategy seek to promote cultural understanding and reconciliation by addressing educational inequalities for Aboriginal and Torres Strait Islander peoples.

UDHR

Universal education is covered in Article 26 of the Universal Declaration of Human Rights (UDHR). it says, "Everyone has the right to education,". At the very least, free primary and basic education is required. It will be mandatory to receive an elementary education. Higher education must be open to everybody on the basis of merit, and technical and professional education must be widely accessible."The basic significance of education as a universal right is emphasised in this article, along with its accessibility, excellence, and nondiscriminatory character. It acts as a fundamental principle for nations such as Australia, guaranteeing inclusive and equal educational institutions for every person.

ICCPR

The right to education in the international covenant on civil and political rights (ICCPR) is mentioned in passing in Article 13 of the ICCPR. It says, "The States Parties to the present

Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms." This article highlights the value of education in promoting human dignity, rights and freedoms, all of which are consistent with the ideals of universal education, even if it does not use the term "universal education" directly.

ICESCR

Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) says that everyone has the right to go to school. It means that schools should be open to everyone, no matter who they are. This includes primary, secondary, and higher education, depending on what people are interested in. The article also says that education should help people grow as individuals and respect others' rights. It's not just about learning facts but also about understanding each other and getting along. Governments need to make sure that schools are good quality and that everyone can go, even if they are poor, live far away, or have a disability. In simple terms, Article 13 is all about making sure that everyone has the chance to learn and grow, without facing discrimination, and that governments work to make this happen.

Recent declarations, treaties, cases and media issues

Not many significant announcements concerning ensuring that every Australian child receives a quality education have been made recently. Nonetheless, no matter where they live or how wealthy their family is, all children should have the opportunity to attend a top school and receive an education, according to the government and those in authority. Recent news about education in Australia might include talking about whether schools are getting enough money from the government. They could also be discussing changes to what kids are taught in school, especially if some people disagree with those changes. Another topic could be how some kids from different families or areas don't have the same opportunities in school, which people think isn't fair. The COVID-19 pandemic has also affected schools, so news might cover things like how students are learning during lockdowns and what support they're getting.

Self determination

- The right to self determination differs from individual rights, it is a collective right.
- The collective right to self determination means that people of a territory or national grouping have the right to;
    - determine their own political status
    - choose how it will be governed without undue influence from another country.

Political self determination is an issue that has been fought for throughout history by peoples against various powers and regimes - closely related to Nationalism

Nationalism as a force in global affairs grew after the French Revolution and it was one of the causes of World War I. This is why self-determination was recognised in the Treaty of Versailles (1919). Self-determination was also recognised in The Atlantic Charter (1941) and the Declaration of the United Nations (1942).

ICCPR

Article 1 of the Covenant states:

- 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.
- All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
- The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

ICESCR

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a treaty adopted by the United Nations General Assembly in 1966 that outlines economic, social and cultural rights for individuals. Article 1 of the ICESCR emphasises the principle of self determination , stating:

- 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.

This article highlights the importance of self-determination for all peoples, affirming their right to freely choose their political status and pursue economic, social and cultural development without external input. The inclusion of self-determination in the ICESCR reflects a commitment to upholding the rights of individuals and communities to determine their own mindset and improve their living conditions in accordance with their cultural and social values. Basically, it allows people to decide how to use their natural resources for their own benefit, without being deprived of what they need to live; control of their own future and improve their lives according to their own values.

Cases/Media issues

- Kurdish Independence Referendum (Iraq): A referendum on the Kurdish region independence was held in September 2017 by the Kurdistan Regional Government (KRG) in Iraq. The vote expressed the Kurdish people's wish for self-determination and their desire to create an independent state, despite opposition from the Iraqi government and surrounding nations.
- Catalan Independence Movement (Spain): Self-determination debates have been centred on the Spanish region of Catalonia. A controversial independence referendum was held in Catalonia in October 2017, with a majority vote in favour of independence. The unlawful nature of the referendum was declared by the Spanish government, sparking political disputes and discussions over Catalonia's independence.

Environmental rights

- Environmental rights are unlike individual rights, or even collective rights, but are argued to relate to many existing agreed rights.
- Supporters of environmental rights argue that these rights cannot be fully realised without the right to a healthy, safe and adequate environment.
    - The African Charter on Human and Peoples' Rights, which came into force in 1981 and has been adopted by 53 African states, includes the right to a satisfactory environment under Article 23.
    - The Organization of American States, includes in its second protocol, which opened for signature in 1988, the explicit right to a healthy environment and the obligation of all state parties to protect, preserve and improve the environment.
    - The Stockholm Declaration (1972), the Rio Declaration (1992) and the Kyoto Protocol (1997) are all attempts by the international community to deal with environmental problems, such as global warming, the spread of epidemics, marine pollution, the depletion of the ozone layer and atmospheric pollution.
- Another area in which environmental rights are being dealt with under international law is in the International Criminal Court (ICC).

Peace rights

Peace rights are entitlements afforded to all people to live free from all forms of conflict, war or any type of oppression. This ties in with their rights to:

- Live
- Security
- peaceful assembly/association
- freedom of expression
- political participation
- right to education
- cultural/religious freedom
- development

These rights ensure the livelihood and wellbeing of all people. Without peace rights, people wouldn't be able to function in society when they're deprived of any of these entitlements above.

Peace rights were responses to the aftermath of WW2. With the defeat of fascism in Europe and Asia, there were demands for peace rights as a result of the destructive nature of WW2 and systemic abuses under fascist regimes, which includes:

- political repression
- war crimes
- disrupting self-determination
- genocide and other crimes against humanity.

There were a number of attempts to establish universal peace rights in the past, though a lot were in vain. During the late 18th and early 19th centuries, revolutionary/ Napoleonic France had created some of the most influential on modern day peace rights, including the 'Declaration of the Rights of Man' and the 'Napoleonic Code'.

The Paris Peace Conference was set in 1919 where the Allies proposed a series of terms to the Axis powers with regards to peace. Some famous examples of the treaties set at the Conference were the Treaty of Versailles and the Treaty of Saint-Germain. Subsequently, the League of Nations was created with a principal mission to create world peace. However, the start of World War 2 by fascist powers led to the dissolution of the League of Nations. At the end of WW2, the United Nations was established.

<u>UDHR</u>

The Universal Declaration of Human Rights (UDHR) was composed and signed by a number of member states of the newly formed United Nations in 1948, right after WW2. It outlines a number of rights people are entitled to, including:

- Article 3 - the right to life, liberty and security
- Article 9 - no arbitrary arrest, detention and exile
- Article 13 - freedom of movement

ICCPR

Article 6 prohibits the threat or use of weapons of mass destruction. It also encourages member states to actively work towards combating the threat of nuclear proliferation, and of other weapons of mass destruction. The act of war also violates the fundamental right to live in Article 6, article 7 with the treatment of POWs, article 9 with the dubious security of people in war-stricken zones, etc.

ICESCR

- Article 25; Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources.
- In the preamble, it recognises the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.
- It also establishes the importance of education in article 13 as fundamental to the establishment of world peace.

Recent issues

- French Protests: As a result of President Macron's unpopular decision to raise the retirement age from 62 to 64, sparking a wide range of protests, especially in Paris. The responses by the French government ranged from arbitrary arrest to violent confrontation.
- Rise of the Italian far-right: In Europe, there has been a concerning rise in anti-immigrant and racist sentiment. After Giorgia Meloni election, leader of Fratelli d'Italia, the Italian government created naval blockades. halting immigration and asylum seekers.
- Russia-Ukraine: In early January, 2022, the Russian military crossed the borders of Ukraine and Russia, which has sparked a number of controversies regarding the self-determination of the Ukrainian people, as well as war crimes committed by both sides of the conflict.

The Right to Peace - Australia

- What is it?

  The right of citizens to expect their government to do all in its power to maintain peace and work towards the elimination of war.
- What should the government do?
  - eliminate the threat of war, particularly nuclear war
  - renounce the use of force in international relations
  - settle international disputes by peaceful means on the basis of the UN Charter.
- Are we upholding it?

  While Australia has committed to a 'two-state' solution with regards to Israel and Palestine, their supplication of military aid violates the inherent right to peace shared by the Palestinian and Israelites.

Case - Palestine

- The state of Israel was founded in 1948, formally expelling a large number of Palestinians from their homes to give land to European Jews. This is based on the 'law of return' where Jews should 'return to their homeland', though it resulted in crimes against the Palestinian people
- One of the most well-known, yet controversial discussions on peace in the contemporary world is the Israeli-Palestinian conflict.
- The Israeli Defence Force (IDF) has committed a number of crimes, ranging from the arbitrary arrest of Palestinians to the mass killing of civilian populations.
- As seen with the blockade and conflict within the Gaza Strip, there have been implications on the right to live, wellbeing, health as well as the right to peace and justice. The West Bank has also seen the discrimination against Palestinians by the Israeli state, described by South Africa in the ICJ, as 'apartheid'.

3. - Formal statements of human rights

Universal Declaration of Human Rights (UDHR)

- is a DECLARATION not a treaty.
- Therefore it is persuasive but not binding on its signatories (being signed)
- Between 1948 and 1966, the UN Human Rights Commission had to create a whole body of new international human rights law based on the UDHR that would be BINDING via treaties: the ICCPR and ICESCR
- UDHR is not observed by all nations, governments or individuals.
- Effectiveness is dependent on cooperation and goodwill of member states.
- The UDHR is not law as it lacks legal status, but has become so widely accepted it is part of international law.
- It served as a foundation for later human rights instruments – influential document.
- The issue of state sovereignty complicates the observance of human rights by some nations

- Pillar 1 (A1-2): Human rights belong to all human beings without discrimination
- Pillar 2 (A3-19): 1st Generation rights (right to life, security, civil liberties)
- Pillar 3 (A20-24): 2nd Generation rights (economic and social rights)
- Pillar 4 (A25-28): 3rd Generation rights (community and cultural rights)
- (A29-30): Limits to these duties and rights

International Covenant on Civil and Political Rights (ICCPR)

- the right to life
- freedom from torture and slavery.
- freedom of thought, conscience and religion.
- prohibition on war propaganda and advocacy of racial hatred

The International Covenant of Civil and Political Rights (ICCPR) was adopted in 1966 and came into force in 1976. All parties agree to respect all individuals' rights established under the Covenant. It is legally binding as a 'hard' law.

- The majority of states in the world are parties to the ICCPR.
- Relates to the treatment of the individual both as an individual and as a member of a wider society.
- Main function is to protect people from the actions of oppressive governments.
- Establishes first generation rights related to "civil-political" rights.
- These expand on many of the rights set out in the UDHR.
- Compliance monitored by Human Rights Committee which reports from complaints from member states

It also created the Human Rights Committee (Article 26), which can:

- Hear complaints brought by one country against another (never been used)
- Hear complaints from individuals brought against their own country (e.g. Toonen v Australia)
- Responsible for ensuring that each signatory country complies with its terms.
- The Committee makes reports every five years on a country to ensure they are in compliance with the ICCPR.These findings can have great force.
- If the Committee upholds the allegations of Human Rights abuse, the State must take measures to remedy the abuse.

Toonen v Australia (1994)

- What was Toonen's argument and what laws did he use to support his argument? Tasmania had laws against homosexual activity. Toonen argued that this was a violation of his right to privacy (Art. 17 of the ICCPR) AND that it discriminated on the basis of sexual preference (Art. 28).
- What did the Human Rights Committee find and order?

  Australia was found to be in breach of its obligations under the ICCPR.
- What did the Tasmanian and Federal Governments do?

  The Australian Federal government passed the Human Rights (Sexual

Conduct) Act 1994 (Cth) to override the Tasmanian law. However, the Tasmanian government refused to repeal its criminal law.

- What was the case before the High Court and what was the result?

  In the case of Croome v Tasmania, the High Court held the Tasmanian laws were illegal as they were inconsistent with the ICCPR and CTH law. Tasmania had to decriminalise homosexuality. The media attention to this issue brought by the cases cast a 'negative spotlight' on Tasmania.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

- The ICESCR was similar to the ICCPR. It was framed in 1966 and took 10 years to come into effect - in 1976.
- These rights were the second rights for citizens, concerned with the issues of financial, cultural and social wellbeing of citizens within a nation.
- The ICESCR is overseen by the UN Committee on Economic, Social and Cultural Rights.
- The ICESCR has been ratified by 166 states (by 2018).
- The USA and South Africa have signed but never ratified the covenant.
- Myanmar (Burma), Malaysia and Saudi Arabia have never signed it.
- Both the ICCPR and the ICESCR proclaim rights for all people and forbid discrimination, however the enforceability of the covenants is a continuing issue.
- Rights under ICESCR
  - Work, under just and favourable conditions with the right to join trade unions (6,7,8)
  - Social security and social insurance (9)
  - Family protections (10)
  - Adequate standard of living (11)
  - Highest attainable standard of physical and mental health (12)
  - Education, with free and compulsory primary education (13,14)
  - Participate in cultural life (15)

The United Nations has adopted more than twenty principal treaties further elaborating human rights. These include conventions to prevent and prohibit specific abuses such as torture and genocide and to protect specific vulnerable populations such as:

- Refugees (Convention Relating to the Status of Refugees, 1951)
- Women (Convention on the Elimination of All Forms of Discrimination Against Women, 1979) (CEDAW)
- Children (Convention on the Rights of the Child 1989 (CROC).

1945: The UN is created and declares that all humans have rights (which are unspecified)

1948: The UDHR is agreed to by 48 of 58 states in the UN

1976: ICCPR and ICESCR become a binding version of the UDHR in international law

2. Promoting and enforcing human rights

Legal Measures (UN, IGOs and courts/tribunals/independent authorities) can both promote and enforce human rights. Non-Legal Measures (NGOs and the media) can only promote human rights.

- Relevant legislation and cases

Legislation

- *Racial Discrimination Act 1975 (Cth)*
- *Anti-Discrimination Act 1977 (NSW)*
- *Sex Discrimination Act 1984 (Cth)*
- *Australian Human Rights Commission Act 1986 (Cth)*
- *Disability Discrimination Act 1992 (Cth)*
- *Human Rights (Sexual Conduct) Act 1994 (Cth)*
- *International Criminal Court Act 2002 (Cth)*
- *International Criminal Court (Consequential Amendments) Act 2002 (Cth)*
- *Age Discrimination Act 2004 (Cth)*

International treaties, protocols and conventions

- *Charter of the United Nations (1945)*
- *The Universal Declaration of Human Rights (1948)*
- *International Covenant on Civil and Political Rights (1966) International Covenant on Economic, Social and Cultural Rights (1966) Treaty on the Non-Proliferation of Nuclear Weapons (1968)*

Cases

- *Mabo v Queensland (No 2) (1992) 175 CLR 1*
- *Toonen v Australia, CCPR/C/50/D/488/1992, UN Human Rights Committee, 4 April 1994*
- *Croome v Tasmania (1997) 191 CLR 119*
- *Lange v Australian Broadcasting Corporation (1997) 189 CLR 520*
- *ABC v Lenah Game Meats Pty Ltd [2001] HCA 63*
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*
- *International Court of Justice, 9 July 2004*
- *Roach v Electoral Commissioner [2007] HCA 43*
- *Giller v Procopets [2008] VSCA 236*
- *Australian Crime Commission v Louise Stoddart [2011] HCA 47*

1. - State sovereignty

A state is the basic unit of the international system = a country. A state should be distinguished from a nation- a nation is a people who share a common heritage, language, culture or race.

Montevideo Convention on the Rights and Duties of States 1933: Definition

A. a permanent population
B. a defined territory
C. a government AND
D. a capacity to enter into international relations.

Sovereignty is part of being a nation-state. The state has supreme control over its territory. The state has absolute control over its legal system. Each state has the right to choose whether or not to recognise other countries or IGOs (e.g. the UN). So each country is able to make its own decisions without outside interference.

Positives of state sovereignty	Negatives of state sovereignty
Acknowledges a state's control over their territories and jurisdictions.	A violation of human rights within a sovereign state is difficult and often impossible to be influenced by international law.
Prevents external influence over a state's laws and enforcement.	Enforcing military, legal and economic systems independent of influence may be extremely expensive.

2. - Role of:

The UN

The UN was established with the signing of the Charter of the United Nations in 1945, following World War II. It is the chief intergovernmental organisation involved in international law. The UN



has been central to international cooperation, treaty development, and protection of human rights. Its influence and institutions are wide-reaching.

Purpose - to encourage negotiation between sovereign states

Structure: When the United Nations was created in 1946, it had six main bodies:

- The General Assembly
- The Security Council
- The Trusteeship Council
- The Economic and Social Council
- The International Court of Justice.
- The Secretariat (Administration)

However, its structure has changed over the years. Also note that the HR Council is NOT the HR Committee - the council is a group of countries that operates under the General Assembly. The Committee is an advisory body that reports on the ICCPR.

State sovereignty remains a significant challenge to the effectiveness of the UN, especially in relation to peace and security. Its effectiveness is diminished as it is reliant on the political goodwill of nation-states. The UN lacks powers to compel countries to enact its resolutions into domestic law or follow a particular course of action, and this can be a real issue for human rights such as the death penalty.

Initiatives

1. UN Initiative: Millenium Development Goals (MDGs): In 2002, all the states of the UN agreed on a declaration to end poverty. These goals were set to be reached by 2015 and were known as Millennium Development Goals.
    - ➔ Eradicate extreme hunger
    - ➔ Achieve Universal primary education
    - ➔ Promote gender equality
    - ➔ Reduce child mortality
    - ➔ Improve maternal health
    - ➔ Combat HIV and other diseases
    - ➔ Ensure environmental sustainability
    - ➔ Promote global partnership for development

2. UN Initiative: Sustainable development goals (SDGs): There was uneven progress achieving the MDGs by 2015. So the agenda was reset after 2015 to SDGs. http://www.un.org/sustainabledevelopment/sustainable-development-goals/

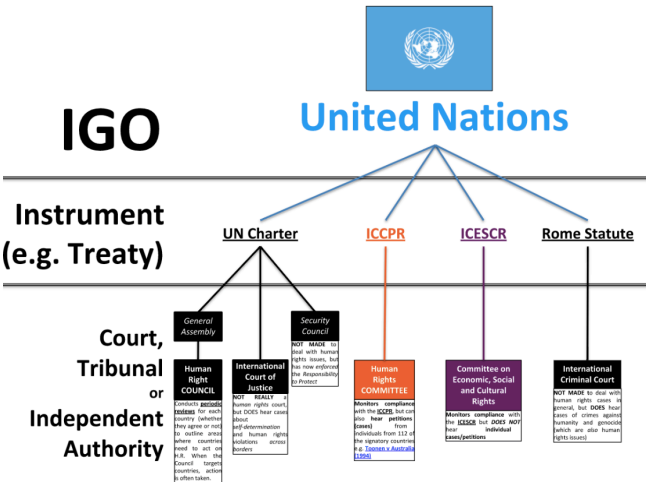
   - ➔ No poverty
   - ➔ Zero Hunger
   - ➔ Good health and wellbeing
   - ➔ Quality education
   - ➔ Gender equality
   - ➔ Clean water and sanitation
   - ➔ Affordable and clean energy
   - ➔ Decent work and economic growth
   - ➔ Industry, innovation and infrastructure
   - ➔ Reduced inequalities
   - ➔ Sustainable cities and communities
   - ➔ Responsible consumption and production
   - ➔ Climate action
   - ➔ Life below water
   - ➔ Life on land
   - ➔ Peace, justice and strong institutions
   - ➔ Partnerships

3. UN Initiative: R2P (Responsibility to Protect): At the UN World Summit 2005, the world community decided to adopt a new approach to international human rights abuses, which was known as 'R2P'. The doctrine aims to make the protection of human rights an integral part of BEING a sovereign state. In 2006, the Security Council by Resolution 1674 affirmed the doctrine regarding the responsibility to protect populations from:

   - ➔ Genocide
   - ➔ War crimes
   - ➔ Ethnic cleansing
   - ➔ Crimes against humanity

   In 2009, the UN Secretary General, supported by a resolution of the General Assembly, argued that there were 3 main points of the doctrine:

   - ➔ It was a responsibility of states to protect their populations from crimes
   - ➔ The international community was responsible for helping

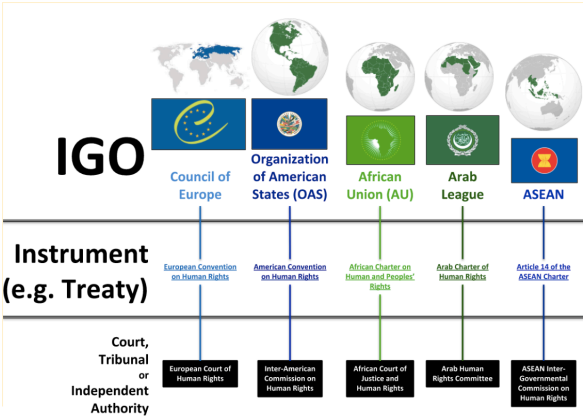


states develop their protective ability

➔ When a state fails to protect its citizens, then the international community must intervene to prevent harm.

Intergovernmental organisations

The UN is an example of an IGO, the world's largest. But there are OTHER IGOs. IGOs create human rights instruments. The ICC is also an intergovernmental organisation. They are also closely connected to courts, tribunals and independent statutory authorities, because that is how they enforce those human rights.



IGOs are international institutions created by agreement that are comprised of various member states (e.g. European Union, African Union, Commonwealth of Nations). Apart from the UN, several IGOs include human rights as part of their stated goals and can exert significant influence over their member states.

1. Commonwealth of Nations - made up of 54 members, including the United Kingdom, Australia and almost all former colonies of the British Empire, it operates within a framework outlined in the Singapore Declaration of Commonwealth Principles. The Commonwealth's stated aims include the promotion of democracy, the rule of law, human rights, individual liberty and good governance. Several members have been suspended due to serious or persistent violations and human rights abuses, including Zimbabwe in 2002 and Fiji on various occasions due to military coups.
2. African Union - established in July 2002, the African Union includes all African states; currently, 55 African countries are members, with the most recent addition, Morocco, being admitted as a member state in January 2017. Adherence to democratic principles and sound economic practice are expected of African Union members. Madagascar and Mali are currently suspended due to

coups d'etat. The African Union's aims include bringing about security and peace in Africa and promoting good governance, democratic institutions and human rights. Its decisions are made by the Assembly of the African Union. The African Union includes the African Commission on Human and People's Rights, with responsibility for monitoring and promoting compliance with the African charter of the same name, and the African Court of Justice and Human Rights.

3. Organisation of American States - this includes all the states of North, Central and South America. Two of the organisation's bodies, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, are responsible for overseeing the regional human rights instrument – the American Convention on Human Rights. On 28 August 2019, the Organization of American States passed a resolution condemning the 'systematic violations of human rights in Venezuela including the use of torture, illegal and arbitrary detentions, extrajudicial executions, forced disappearances and the denial of the most basic necessities, especially those related to health, food and education.'
4. ASEAN Intergovernmental Commission on Human Rights
    a. The ASEAN charter contains some provisions on upholding law with respect to human rights and enabling the establishment of a human rights body and unresolved dispute mechanism, and there is a working group for a human rights mechanism, which would create:
        i. a regional declaration of human rights principles
        ii. a regional human rights commission for
        iii. monitoring and recommendation purposes (established in 2009)
        iv. a court that would render binding decisions.

Interpol

- Interpol is the world's largest international police organisation, with 190 member countries and a mission of preventing and fighting crime through enhanced cooperation and innovation on police and security matters.
- It operates to protect human rights by fighting human trafficking and child exploitation.

Courts, tribunals and independent statutory authorities

1. **International Court of Justice (ICJ)**
    - Judicial organ of the UN, established in 1946.
    - Two main roles to hear and judge disputes between states, and issue advisory opinions on matters of international law.
    - Key criticisms of the ICJ
    - Requires the consent of state parties to hear matters, limiting its power/jurisdiction.
    - Unable to hear cases brought by individual people or private organisations, and little power of enforcement, limiting its effectiveness.
    - Has heard very few cases on human rights abuse.
2. **International Criminal Court (ICC) and ad hoc tribunals**
    - Permanent court established in 2002 under the Rome Statute;
    - Previously was a series of ad hoc tribunals established by the UN to deal with specific events involving international crimes (e.g. International Criminal Tribunal on Yugoslavia and International Criminal Tribunal on Rwanda).
    - Not a court for human rights, but prosecutes and hears matters of the most serious international crimes/violations of human rights, including those that fall under international humanitarian law (e.g. genocide, crimes against humanity and war crimes).
    - Has jurisdiction to prosecute individual people rather than states, which potentially makes it a powerful institution.
    - Acts where states are unable or unwilling to resolve serious international crimes but can only be reactive and not proactive (which is arguably the role of the Security Council?)
    - An ICC indictment is only as meaningful as the member state's willingness to enforce it.
    - ICC Snapshot – Current Investigations (Source: Amnesty 2019)
        - 123 countries are party to the Rome Statute
        - 30 Arrest warrants issued by the ICC so far.

- 163 states can exercise universal jurisdiction over one or more crimes under international law

The ICC is an independent judicial body. Although the treaty setting it up was negotiated in the UN, the ICC is NOT one of the official organs of the UN.

Effectiveness of the ICC

Positives	Negatives
• A permanent criminal court • Investigate, charge and prosecute individuals suspected of genocide, crimes against humanity and war crimes – previously only ad hoc tribunals • Reflects changing ethical and moral values • Combats individuals trying to use state sovereignty to shield themselves from consequences of abuses	• Reactive not proactive • Only has jurisdiction if State unable or unwilling to prosecute • A lack of a police force/ability to enforce its decisions (i.e. prosecutor's inability to require states to extradite fugitives). • Relies on compliance from state governments to extradite summonsed individuals

- It prosecutes international crime - prosecutes individual instead of states
- Replaces ad hoc tribunals (ICTY/ICTR)
- Set up by the Rome Statute (1998) - commenced work in 2002
- Deals with
  - Genocide
  - Crimes against Humanity
  - War crimes
  - Crimes of aggression

3. European Court of Human Rights (ECHR)

- Considers cases brought by individuals, as well as organisations and state, against all countries bound by the European Convention on Human Rights (ECHR).
- Has been very successful and its decisions are highly influential.
- Created under the Council of Europe (NOT the UN), and the oldest H.R. court (since 1959)
- Individuals and NGOs are able to bring cases where a member country of the Council of Europe has violated the European Convention on Human Rights
- It's the most successful (in terms of compliance)
- Incorporated into EU treaties - laws of all 27 member states must comply with it's rulings

- Now facing serious problems (new members since the 90s, like Russia and Serbia, which question the authority of the Court to deal with some cases)
- A 70% increase in cases in the last 20 years have led to “fast-track” reforms (changes to finish cases more quickly)

4. **ASEAN -** Association of Southeast Asian Nations
   - It’s charter outlines upholding human rights
   - They have HR treaties and now the HR Commission
   - Relatively new (since 2009)
   - Has to fight against ASEAN’s history of “non-interference” in the ‘internal’ matters of ASEAN members
   - Members of the Commission are appointed by the member states - they end up supporting their own government
   - Decisions are made by consensus (so countries like Myanmar and Vietnam are really able to hold back the Committee)
5. **Human Rights Committee**
   - There are several bodies established under human rights treaties that are linked to the UN. One of the most important of these is the Human Rights Committee.
   - Key roles and impact
     - Assesses member state compliance with the ICCPR and can hear complaints by both states and individual citizens about a member’s performance.
     - Be a quasi-judicial body, where a group of human rights experts will hear a complaint brought against a state and make a ruling.
     - Decisions are not enforceable but are embarrassing for the government of the state accused of the violation.
     - A significant case involving a complaint against human rights in Australia was that of Toonen v Australia.

There has been a lot of celebration about the EXISTENCE of these IGOs, Courts and Authorities. There has not been enough focus on COMPLIANCE and the EFFECTIVENESS

of these organisations as a means of change (in terms of respect for human rights). IGOs and Courts IN GENERAL have been struggling with:

- The massive number of new cases
- The endemic nature of the abuses (a lot of governments are systematically abusing human rights)
- The frequent challenges to their authority

Non-governmental organisations

Key NGOs working for human rights are

- Amnesty International
- Human Rights Watch
- International Committee of the Red Cross

Role of NGOs

- They are organisations created by people that are independent and without representation of any government.
- Their number has increased exponentially over the last century, and many are concerned with monitoring or reporting on human rights abuses.
- Frequently NGOs collaborate in their human rights and humanitarian work.
- NGOs play a key role in 'naming and shaming' human rights violators – this can often be more effective in getting governments to change their behaviour than legal means.

1. **Amnesty International**

Amnesty International was launched worldwide on 28th May 1961 by British lawyer Peter Benenson, bringing in more than 1,000 offers of support for the idea of an international campaign to protect human rights. The organisation focuses on helping and campaigning for prisoners who have been wrongly convicted, ensure fair trial procedures and abolish arbitrary penalties such as the death sentence or torture. On a more general note, it campaigns worldwide for upholding human rights, primarily natural, social, legal and political rights. 'Get Up! Sign Up!' was a significant movement

that sought to pledge 5 million people to the UDHR in 1998, which was further boosted by a concert featuring celebrity guests that brought public awareness to the issue. The report 'Rights for All' also sought to highlight human rights violations in states such as the USA, and persuaded governments to adhere to international human rights standards.

2. **Human Rights Watch**
3. **International Committee of the Red Cross**
4. **Freedom House**
5. **Carter Centre**
6. **Reprieve**

Media

The media plays a crucial role in exposing abuse and 'naming and shaming' human rights violators to help bring about change. Media freedom is severely restricted in many countries, where it can be dangerous for reporters to undertake their work.

Reporters Sans Frontières

As an international NGO, Reporters Sans Frontières releases a World Press Freedom Index. As of 2021, Australia ranks 25 (of 180).

Media reports PROMOTE human rights by making them part of "the news" - this might make us want to change them. Media reports can act as a DETERRENT for governments that might want to deny/abuse people's human rights ("We don't want this ending up on the news…") Media reports also act as a CONSCIENCE TRIGGER for the rest of the world ("we should do something about this") The media is supposed to be independent – journalists should report facts, rather than "take sides" (e.g. if the media is owned by the government, or if we got all our news from human rights NGOs, which may be biased)

Problems

1. Sometimes journalists aren't allowed to report on issues (e.g. North Korea)

2. Sometimes newspapers/TV stations don't want to report on the issues (the Kardashians get more sales/viewers)
3. Sometimes people can't access the news - e.g. restrictions on accessing the internet in China BUT Social media and the internet can help people access the news (assuming you're allowed access by your government)

3. - Incorporation of human rights in domestic law

Human Rights law in Australia

- Monist systems deem treaties enforceable in domestic law as soon as they have been signed. A dualist system does not deem treaties enforceable domestically until and unless they are incorporated into domestic law, usually by passing similar legislation
- There is no one document in Australia where human rights are contained.
- Human rights are derived from different sources, including:
    - international treaties
    - the Constitution of Australia
    - the common law
    - statute law of the Commonwealth, states and territories (predominant source of human rights protection).
    - Other rights are protected by implication, as seen by the High Court – these are referred to as implied rights (e.g. the right to freedom of political communication).
- Under Australian law, simply signing a treaty does not make it enforceable within Australia. The rights and obligations of the treaty will need to be incorporated into Australian law in some way (e.g. legislation via parliament).

High Court

- The High Court has "consistently" ruled that strict separation of the judiciary from the other two 'political' branches is a fundamental principle in the Australian Constitution.

- The independence of the judiciary is an essential mechanism for:
    - upholding the rule of law, ensuring that all people, including the government, are equally subject to the same law.
    - ensuring that rights and liberties are protected from the risk of abuses of power that could come with a politicised judiciary.
    - enables the judiciary to strike down any legislation that it deems incompatible with the rights and limitations provided for in the Constitution.
- Over the last century the High Court has interpreted the Constitution as necessarily holding certain other 'unwritten' rights which must have been intended in order for the Constitution to function effectively – these are known as implied rights.
- Cases
    - *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520): held that the *Constitution* contains an implied right to freedom of political communication, a type of freedom of speech, in order for Australia's political system as established in the *Constitution* to function effectively.
    - *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63: the possibility of a tort for invasion of privacy.
    - A decision on 30 November 2011 in *Australian Crime Commission v Louise Stoddart* [2011] HCA 47: spouses had no right to silence. This overturned a presumption that has existed for hundreds of years and that protected the privacy of communication within a marriage. Some concern was expressed by civil libertarians about the broader consequences of this decision.
    - (*Croome v Tasmania*): Decriminalisation of homosexuality
    - (*Roach v Electoral Commissioner* [2007] HCA 43): constitutional right of all people to vote, including prisoners
    - *Mabo v Queensland* (No 2) (1992) 175 CLR 1: recognition of Australia's indigenous peoples' right to title in their traditional land - 'native title'

- Human rights matters are most important in front of the High Court since it has the power to set precedents that are binding on other courts and to overturn state or Commonwealth legislation where it conflicts with the *Constitution*.
- The High Court's methods of interpretation in cases involving human rights have been particularly influential, and occasionally controversial.
- Combined with the court's power to declare legislation inconsistent or invalid, to uphold the rights provided for in the *Constitution* and to continue to develop the common law, the High Court is arguably the most important protector of human rights in Australia.

The difference between Domestic and International Rights

- As a member of the UN, Australia has adopted the HR in the UDHR (1948).
- State sovereignty means HR are not enforced by the UN. Countries cannot be forced to comply with UN conventions.
- To be enforceable, HR must be incorporated into domestic law. Australia has a dualist system. This means domestic legislation is needed for international treaties to have the force of law in Australia.
- Australia is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)1969, as a result the Racial Discrimination Act 1975 (CWTH) was enacted. This is an example of Australia enforcing international law.

Legal Mechanisms

- Enforcement of international law is 'patchy'. The UN International Court of Justice (ICJ) is severely restricted because:
    - it only hears cases involving countries
    - a country's attendance is voluntary
    - the decision of the court can be ignored by the nation state

Australia and Timor-Leste 2018

- Australia has been in dispute with our northern neighbour over the Greater Sunrise Oil and Gas Field worth about AU$40 billion located in waters between the 2 countries.
- The agreement was organised by the UNCC (United Nations Compensation Commission) using the 1982 UN Convention on the Law of the Sea (UNCLOS).
- Snapshot
    - The 2018 Timor Sea Treaty concluded in New York on 6 March following conciliation brought by Timor-Leste under the 1982 UN Convention on the Law of the Sea.
    - The Treaty delimits for the first time a permanent maritime boundary in the Timor Sea, replacing previous joint petroleum development arrangements.
    - Timor-Leste gains 100 per cent revenue from much of the previously disputed area with the Greater Sunrise oil and gas field subject to a 'special regime' under which Timor gains at least 70 percent of upstream revenue.
    - The Treaty has rightly been praised as a significant breakthrough for both Australia and Timor-Leste that has the potential to repair a damaged bilateral relationship and provide legal certainty for the Timor Sea, however some uncertainties remain.

Enforcing HR: Individuals

- The Human Rights Committee ordered Australia to repeal the law inconsistent with Article 17 of the ICCPR (the right to privacy)
- Federal legislation was enacted: Human Rights (Sexual Conduct) Act 1994
- Tasmania still did not act to decriminalise homosexuality. In Croome v. Tasmania 1997 the High Court of Australia ruled in favour of Croome and the law changed in Tasmania.

HRC - a legal mechanism

- The Australian Human Rights Commission (known as AHRC), established by the Human Rights Commission Act 1986 (Cth) investigates HR abuses in Australia
- They have a complaints unit to discrimination complaints to resolve matters under Federal law e.g. the Racial Discrimination Act 1975
- They write reports that lead to change (Same Sex: Same Entitlements 2008 is an example)

A Current Issue: Detention Centres

The Border Force Act 2015 (Cwth) will make it a criminal offence punishable by a prison term of up to two years for anyone involved in immigration or border protection to reveal to anyone other than the Immigration Department anything that happens in offshore detention on Manus Island or Nauru.

It is possible that the legislation will prevent professionals from reporting any physical or mental harm. The act criminalises whistleblowers and stops professions bound by an ethical duty to report harm. In Australia doctors and teachers are mandated to report child abuse and neglect. In offshore detention centres it is a criminal offence to report suspected abuse.

HRC Australia released this damning report (National Inquiry into Children in Immigration Detention) into children in detention. They found high rates of mental illness and that detention of children is a violation of children's rights. The coalition government questioned the impartiality of the report. They point to the fact that many of these practices were during the previous Labor government.

Human Rights Implications

- for free speech of individuals and organisations e.g. Amnesty International
- meeting international obligations to asylum seekers
- Does Australia need a Charter of Rights?

Australia's Indigenous HR record

- The HRC report Little Children are Sacred (2007) put the spotlight on the sexual abuse of indigenous children in the Northern Territory.
- This led to the Northern Territory Intervention of the same year.
- Some of the measures employed breached the Racial Discrimination Act (1975)

International Law applied in Australian Courts

- Dietrich v R (1992)- the right to Legal Aid supports the right to a fair trial in the ICCPR
- Mabo v Queensland (1992) was influenced by international law because there was a "gap" in domestic law.
- Polyukhovich v Commonwealth (1991) = a war crimes case
- There was legislative change to the Commonwealth Crimes Act 2005 which brings us into line with international law on trafficking. Wei Tang case (2009) enforced HR.

Summary

1. Human Rights in Australia is not perfect. Our record on Indigenous People, same sex couples and refugees are examples of how domestic law is sometimes in conflict with our international law commitments.
2. Legislation, case law and international mechanisms (the ICC and ICJ) all have a part to play.
3. We don't always comply with our international law obligations: ATSI people and asylum seekers are examples.

4. - The roles of:

The Constitution: division and separation of powers

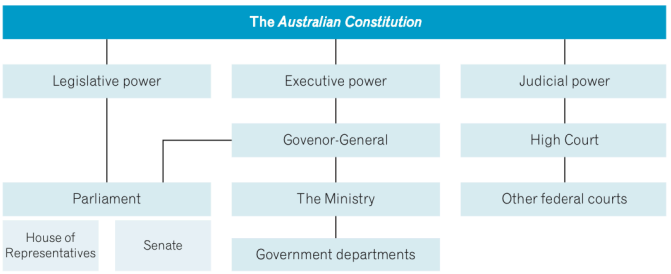


Figure 8.9 Under the *Australian Constitution*, judicial power is strictly separated from political power.

As a Westminster system of responsible government, Australia has no strict separation between the legislature and executive – the Constitution provides for ministers to sit in parliament and to be part of the executive, which can make delegated legislation.

The separation of the judiciary is a fundamental principle of the Australian Constitution, upholding the rule of law, ensuring that all people including the government are equally subject to the same law. It also helps ensure that rights and liberties are protected from the risk of abuses of power that could come with a politicised judiciary.

1. Most specific areas that the Commonwealth can make laws on are listed under section 51 of the Constitution – these areas are known as Commonwealth heads of power and include, for example, currency (s 51(xii)), marriage (s 51(xxi)) and copyright and patents (s 51(xviii)).
2. Powers that are not listed in the Constitution are residual powers – they are the powers the states can use. States can decide to refer such powers to the Commonwealth, as they did, for example, with air navigation and terrorism.
3. Express rights are included (written) in a document.
4. Implied rights may be implied through the text, structure or purpose of a document.

In a nutshell

The Constitution lays down the system of government in Australia. It specifies a division of power between the Federal and State governments. This means the Commonwealth can make laws regarding some matters and the states can make laws regarding others.

An example of this is the Commonwealth's right to make laws regarding marriage and divorce. The separation of power between the different sections of government – ie the executive, judiciary and parliament. The purpose of this is to prevent an abuse of power by any one section.

The Constitution is a source of 7 specific express human rights:

1. S 116 : Freedom of religion
2. S 41: Right to vote in Federal elections
3. S 80: Right to trial by jury for Federal indictable offences
4. S 51(xxxi) The right to just terms (compensation) when property is compulsorily acquired (The movie the Castle is based on this idea- the Kerrigans are being made to sell their home to the airport- but their lawyer successfully argues that there can never be fair compensation for a home and so the forced sale is stopped).
5. s92 The right to free trade between states (this is more a state right than a human right- but it can be considered a human right).
6. s75(v) right to court review of government decisions
7. S 117 right to no discrimination based on your state

In addition, the Constitution has been held to contain the following implied human rights:

- Implied right to freedom of political communication (Lange v Australian Broadcasting Corporation (1997) 189 CLR 520) This is based on the right to free trade between states. An implied right to freedom of movement is also based on this section).
- Implied right to vote (Roach v Electoral Commissioner (2007)) based on sections 7 and 24 of the Constitution which require representatives to be "directly chosen by the people"

Statute law

Some of the most important pieces of human rights legislation in recent times are:

1. Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth).
2. Age Discrimination Act 2004 (Cth)
3. Disability Discrimination Act 1992 (Cth)
4. Racial Discrimination Act 1975 (Cth)
5. Anti-Discrimination Act 1977 (NSW)
6. Sex Discrimination Act 1984 (Cth)
7. Australian Human Rights Commission Act 1986 (Cth)

In recent years, the Commonwealth, states and territories have enacted a large body of statute law to protect human rights in Australia. Statutes are a powerful tool in protecting human rights and can be wide-reaching. But like common law, they can be removed by a later Act of Parliament.

Common law

Some examples of fundamental rights protected by the common law are the presumption of innocence and the burden of proof, and the right to a fair trial. However, rights in the common law are not absolute and can be removed by legislation (e.g. the NSW Right to Silence amendments). The common law cannot be relied upon to develop new rights, as judgments can only define those rights on an ad hoc, case-by-case basis.

Mabo case High Court Mabo case established native title, overturning the belief of 'terra nullius'.

Courts and tribunals

All courts and tribunals in Australia, such as the Australian Human Rights Commission and High Court, have a role to play in both protecting and enforcing, as well as, interpreting and developing human rights laws.

1. Australian Human Rights Commission
    - An independent national body established to deal Australia's human rights legislation.
    - Can receive and investigate complaints into discrimination and breaches of human rights.
    - Promotes public awareness of human rights.
    - Conducts public inquiries into human rights issues and issue recommendations.
    - Advises parliament and governments on development of laws, policies and programs consistent with human rights
2. High Court
    - Matters involving human rights can appear before any state or federal court or tribunal.
    - However, the High Court has the power to:
        - set binding precedents
        - overturn legislation incompatible with the Australian Constitution (e.g. ACT Same Sex Marriage Act).

Non-governmental organisations

As with international NGOs, Australian NGOs can play an important role in protecting individual's rights, shaping public and political opinion, and exposing violations of human rights. Their work involves making submissions to parliamentary inquiries and law reform bodies. Important NGOs working for human rights in Australia include Civil Liberties Australia or the Law Council of Australia.

1. **NSW Council for Civil Liberties**
2. **Australian Council of Social Services**
3. **Civil Liberties Australia**
4. **Asylum Seeker Resource Centre**

Media

The media plays an indispensable role in 'naming and shaming' human rights violators and can have a significant influence on public opinion and government action. Australia is ranked as one of the top countries in the world for media freedom, and reporters, particularly the ABC and SBS play a critical role in reporting on both Australian and international human rights issues.

Charter of Rights

Many nations around the world have opted to protect their citizen's rights through adoption of a central bill or charter of human rights.

- In Australia, Victoria and the ACT have adopted state-based charters of rights, but the Commonwealth does not have one.
- Although an Australian Government 2010 inquiry into whether Australia should adopt such a charter found overwhelming support for a charter, the government rejected the recommendation.

Arguments for a Charter	**Arguments against**
Community support	Australia already has sound human rights protection
Remedying shortcomings in existing laws- eg if we had a Charter with a requirement of equality before the law, we would probably not have had the same sex marriage debate	A Charter of rights would give judges more power to make more common law based on their interpretation of those rights. The effect would be to undermine the sovereignty of the parliament.
Reflecting basic Australian values	A Charter would not provide better protection than existing laws- because ultimately it is only another law- not equal in stature to the Constitution.
Protecting the marginalised	It could lead to excessive, costly litigation.
Ensure consistency of laws (all rights found in one place rather than in many different laws)	It could create unnecessary legalism and 'red tape', domestic processes/institutions are more effective

Supporting a culture of regard for human rights	
Improving Australia's international status	
Bringing Australia into line with other democracies (eg the USA)	
Improving the accountability of government	

As the primary law of Australia, the Constitution is very effective in protecting the human rights it clearly protects, However, its weakness is in the limited number of human rights that are protected compared to the 33 rights listed in the UDHR. It is on this basis that arguments are made for the creation of a Charter of Rights in Australia. A Charter of rights would be a statute that would clearly state the human rights that would be protected in Australia. This means that it would not have the same power as the Constitution, but would be equal in power to the other federal Human Rights Acts.