

LEGAL STUDIES: *HUMAN RIGHTS*

Human Rights

The Changing understanding of the relationship between state sovereignty and Human Rights	
<p>State sovereignty is simultaneously a threat to human rights and their principal protector.</p>	<p>State capacity, state failure and human rights. Journal of Peace Research 2009</p>
<p>State sovereignty means that HR have to accepted and enforced in each country.</p>	<ul style="list-style-type: none"> • Joint Parliamentary Committee on HR 2012 under the Human Rights (Parliamentary Scrutiny) Act 2011– ensures Australia’s legislation does not contradict HR. • International Criminal Court Act 2002 – to facilitate Australia’s compliance under the Rome Statute. • Charter of Rights is one of the most appropriate ways to enforce HR domestically, however Australia remains the only Western country without one (Human Rights Should Not be Party Political, SMH 2010, UNHRC 2011 Report on Australia said we should have one. World Today Program, ABC Radio National.
<p>If states fail to adequately protect HR, potential abuses may occur.</p>	<ul style="list-style-type: none"> • Toonen V Australia, A v Australia to United National Human Rights Committee • NT Intervention including the suspension of the Anti-Discrimination Act 1975
<p>Since the UDHR was adopted in 1948, there has been an increasing awareness of the need for intervention to protect Human Rights.</p>	<ul style="list-style-type: none"> • International Bill of Human Rights (UDHR, ICCPR, ICESCR has led to the adoption of over 200 treaties, agreements, conventions, constitutions around the world. • Allows an upgrade through the use of optional protocols (Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict 2000) • Responsibility to Protect (R2P)2005, eg. No Fly Zone in Libya

Issues of compliance and Non Compliance in relation to Human Rights

<p>Pressure from the international community in regards to application of customary international law aids in encouraging compliance however Bill of Rights is not binding.</p>	<ul style="list-style-type: none"> • ICCPR and ICESCR are enforceable except that they have “reservation” which are reserved rights that particular countries do not agree to. Eg. Capital punishment. • UNHRCCommittee can hear cases from countries, serves as an international pressure however not necessarily enforceable. Toonen v Australia and A v Australia. • UNHRCouncil – also releases periodic reviews of each member state.
<p>Particular IGOs require compliance to HR for member nations, encouraging compliance however little enforceability.</p>	<ul style="list-style-type: none"> • Council of Europe – European Court of Human Rights which also allows NGOs to bring cases. • European Union – requires compliance, Turkey currently being assessed. • NATO requires compliance • ASEAN – “ASEAN HR Commission stumbles at First Hurdle” SMH, 2010, won’t hear individual cases. • African Union – requires state permission to bring cases to their court of HR, limiting compliance.
<p>The media encourages compliance to human rights by publicising abuses.</p>	<ul style="list-style-type: none"> • Breaking news culture limits reporting to sensationalist cases, often ignoring major abuses. • May act as a deterrent, encouraging compliance due to widespread of social media, Egyptian Uprising.
<p>International bodies which can enforce human rights aid as a deterrence against non-compliance however are ultimately weak in enforcement.</p>	<ul style="list-style-type: none"> • ICJ – can hear cases between nation states but require permission to do so. • ICC – established under the Rome Statute and can hear individual cases.
<p>States do not GIVE HR but they have a responsibility to protect them. Eastern countries often have a lack of political will and resources to adequately protect human rights.</p>	<ul style="list-style-type: none"> • Rights must be balanced with Responsibilities, SMH 2012 • ICESCR and the African Continent 2007 report showed that it was not just money but also political will.

Australia's compliance to HR is overall respectable, however still a complicated system which does not fully protect rights.

- No Charter of Rights despite UNHR Council saying we should have one
- ICC Act 2002 to ratify Rome Statue
- NT Intervention, suspending of the Anti-Discrimination Act 1975.
- Australian Human Rights Commission can examine but not enforce.
- Disability Discrimination Act 1992 – to implement international standards + others.
- Australian Constitution has express rights and implied rights, but not easily accessible.

Development of Human Rights as a reflection of changing values and ethical standard

<p>National security issues as a result of the “War on Terror” has led to legislation which infringes on HR.</p>	<ul style="list-style-type: none"> • Anti-Terrorism Act 2005 which allows for preventative detention. • Haneef Case
<p>The development of HR has been disproportionate around the world, with difference values and standards in different countries.</p>	<ul style="list-style-type: none"> • ICCPR and ICESCR are divorced allowing countries to ratify one and not the other. Evident by eastern countries favouring economic over social and political and vice versa for Western.
<p>Overall, acknowledgement, promotion and protection of HR is becoming more widespread.</p>	<ul style="list-style-type: none"> • International Bill of Rights has led to over 200 treaties, declarations, agreements, and conventions. • Environmental rights are now becoming more widely accepted and acted on, Kyoto Protocol although Copenhagen 2009 failed to reach a resolution.
<p>Slavery was the basis for a number of societies for thousands of years but changing values have led to its eradication.</p>	<ul style="list-style-type: none"> • Transatlantic Slave Trade transported millions of Africans to America over 400 years. • 13th Amendment to the US Constitution abolished the slave trade. • R v Wei Tang 2008 was the first successful slavery prosecution in Australia. • UN Chronicle estimates there are still 27 million slaves worldwide.
<p>Universal suffrage is now acknowledged as a fundamental political right.</p>	<ul style="list-style-type: none"> • In 1900 it was only NZ that allowed women to vote, otherwise it was men, and even then, usually wealthy and racially discriminatory. • 1965 allowed ATSI people to vote in Australia. • Roach v Electoral Commission (2007) outlined the right for those in prison to vote.

<p>Trade Unionism and Labour Rights have come a long way as a reflection of changing values.</p>	<ul style="list-style-type: none"> • Trade Unionism is defined by BOS as – “an organisation of employees whose main activity is to negotiate wages/conditions.” • Ordinance of Labourers banned trade unions in the 1300s. • International Labour Organisation (ILO) as part of the league of nations and later the UN outlined rights of work. • UDHR and ICCPR protect this right • In Australia, Work Choices was replaced with the Fair Work Act 2009 after rallying by the Australian Council of Trade Unions
<p>Universal education is a fundamental HR, now extremely well protected, however developing countries struggle to implement.</p>	<ul style="list-style-type: none"> • UDHR and ICESCR both protect the right to education, “compulsory, free and free from discrimination”. • Domestic Responses include raising the school leaving age to 17 in 2010. • Millennium Development Goals
<p>Self-determination is a HR still widely debated and applies to both internal and external political independence.</p>	<ul style="list-style-type: none"> • Australia gained its self-determination through the Statute of Westminster 1931 • External examples: Palestine (Israel) and Taiwan (China), Kosovo (Serbia) • Internal examples: ATSI people, not necessarily self-governance, but maintain their own culture and communities. • ATSI Commission 1990 was established to make governing decision, abolished in 2004, only self-administration without power. • Abuses: NT Intervention, suspension of the Anti-Discrimination Act 1975. • National Congress of Australia’s First Peoples Ltd 2010, independent, Checks to Avoid ATSI Scandals” SMH 2010.

<p>Environmental rights are collective rights and are becoming more widely recognised as an international issue as they transcend state borders.</p>	<ul style="list-style-type: none"> • Not specifically recognised in the International Bill of Rights other than the right to “hygiene” in the ICESCR. • Rio Declaration 1992, Kyoto Protocol 1997 • 2005, 60% of the World Constitutions had environmental protection clauses. • UNHRCouncil adopted resolution to link climate change to other HR, as a result it has now been recognised in over 350 multilateral treaties on environmental rights. • Copenhagen 2009 Conference failed to reach a global agreement.
<p>There is no legally recognised HR to peace, only programs to facilitate alternatives arrangements to war.</p>	<ul style="list-style-type: none"> • Declaration on the Rights of Peoples to Peace, 1984 non-binding. • UN Charter 1945, article 1 are the purpose of the UN which is peace. • ICC seeks to enforce illegality of crimes against humanity (eg. Genocide).

The role of law reform in protecting Human Rights

<p>There are many areas of Australian law which require law reform to adequately protect human rights.</p>	<ul style="list-style-type: none"> • Incorporation of a Charter of Rights as suggested by the UNHRCouncil in their period report on Australian in 2011. • LEPR was amended following amendments to federal terrorism laws allowing for preventative detention and control orders which infringe on HR.
<p>Contemporary law reform can be triggered by events, particular cases, investigations by Law reform Commissions, Human Rights watchdogs or pressure from media/NGOS/international courts.</p>	<ul style="list-style-type: none"> • UN 1948 was established as a result of WWI, UDHR 1948 was created was established as a response. • ICESCR and ICCPR were still reforms which made UDHR binding due to pressure from countries. • Mabo v Queensland (No 2) (1992) was a common law decision which resulted in the Native Title Act 1993 outlining ATSI peoples' rights to their land.
<p>The historical development of human rights has included substantial law reform in order to protect these emerging rights.</p>	<ul style="list-style-type: none"> • Slavery: Slavery Abolition Act 1833, 13th Amendment to the US Constitution, R v Wei Tang (2008) • Universal Suffrage: NZ was the first to allow women, ATSI peoples gained the right to vote in 1965. Roach v Electoral Commission (2007) established right for prisoners to vote. • Trade unionism and labour rights: Ordinance of Labourers prevented trade unions until the 1800s. International Labor Organisation as part of the UN allowed for recognition of workers' rights. Work Choices was greatly refuted by Australian Council of Trade Unions (ACTU), replaced with Fair Work Act 2009. • Education: UDHR and ICESCR protect right to compulsory, free and non - discriminatory education. CROC outlines further rights, Education for All Pledge by UNESCO, Australian government raising leaving age to 17 to reflect importance.

	<ul style="list-style-type: none"> • Self Determination: Internal: ATSI Commission established for self - administration, abolished in 2004 and replaced with National Congress of Australia's First Peoples Ltd 2010 as it was independent, less prone to corruption, 'Checks to avoid ATSIC Scandals" SMH 2012. External: Taiwan, Kosovo, Palestine, all want self-governance. ICJ Advisory Opinion found Kosovo had not broken any laws in voting for independence. • Environmental: Kyoto Protocol 1997, Copenhagen 2009 Conference on Climate Change, 2005 saw 60% of Constitutions with environmental protection clauses.
<p>Australia has reformed many of its laws to implement international treaties on human rights however all of these HR are only partially incorporated.</p>	<ul style="list-style-type: none"> • Anti-Discrimination Act 1975 • Disability Discrimination Act 1992, • Human Rights (Parliamentary Scrutiny) Act 2011 which formed the Joint Parliamentary Committee on Human Rights to produce a statement of compatibility. • Most HR are protected by a lack of laws AGAINST them, i.e. Freedom of movement.

The effectiveness of legal and non-legal measures in protecting Human Rights

<p>International Bill of Rights and ways of enforcement.</p>	<ul style="list-style-type: none"> • UDHR is non-binding, ICCPR and ICESCR can have “reservations” in which countries can reserve particular rights. Effective in creating international pressure and have led to over 200 different treaties, conventions. Ineffective in lack of enforcement. • Ad Hoc Tribunals such as the International Criminal Tribunal Rwanda (ICTR) have been effective in limited cases, however not resource effective as they must be established and then later abolished. • ICC, most powerful organ for international enforceability, however 10 billion spent in ten years for only one conviction (Thomas Lubanga 2012) limited by signatories (US does not accept its jurisdiction). May still act as a deterrent. • ICJ – can offer opinions, not binding, can only hear cases between states and only with permission. Effective as a deterrent due to internal pressure but largely ineffective at enforcing HR.
<p>International Measures</p>	<ul style="list-style-type: none"> • UN: severely limited by state sovereignty, problem of veto power in the security council limits applications, record of failure in acting in situations (Eg. Yemen). Lack of enforceability. Effective in promoting respect for HR, 2011 action Libya No Fly Zone, resource efficient in allowing NGOs observer status, uniting to protect HR. R2P but lack of action. • IGOs: Create HR Instruments which can then create further courts, tribunals, independent statutory authorities. NATO, European Union require HR to be upheld as a membership requirement, act to enforce compliance. European Court on HR has been effective in allowing cases from NGOs. ASEAN “ASEAN HR Commission Fails at First Hurdle” 2010 – won’t hear individual cases, very little enforceability, state sovereignty is an issue and huge number of cases.

	<ul style="list-style-type: none"> • NGOs: No enforceability, only promotion. Independent bodies, provide information and data or grass roots support, Amnesty International, (direct action very effective, focus on larger countries while smaller get less attention) International Association of the Red Cross, Human Rights Watch. • Media: No enforceability, pure promotion, however vocalises worst cases of abuse to stimulate reform, social outrage. Egypt Uprising, made HR abuses widely known.
<p>Australian Measures</p>	<ul style="list-style-type: none"> • Constitution: Carries express rights, eg Right to Trial by Jury under section 80 and implied rights such as those found in the Lange v Australian Broadcasting Incorporation. Limited remedies available, many are not aware, wasn't created to protect HR, can't be taken away without referendum. Division of powers: Allows the federal government exclusive power to oversee external affairs (Sign international treaties such as UDHR ICCPR ICESCR CROC) however can result in contradictory laws, "States could legalise same-sex marriage, SMH 2010" Separation of Powers: Specifies separation of legislature, judiciary, and executive. Executive and legislature are in together other than Gov Gen who can still refuse to give Royal Assent to Bills which breach HR. High court can only interpret when a case is presented. • Statute Law: Majority are federal government implementing parts of international treaties, Anti-Discrimination Act 1975 to implement the Convention on the Elimination of all forms of Racial Discrimination. Disability Discrimination Act 1992 to implement ICCPR, ICESCR, UDHR. Also establishes organisations, eg. AHRC. Human Rights Act 2004 (ACT) – state statute to protect HR. Effective in ease of incorporation, able to pass specific laws. Ineffective in lack of accessibility and high complexity, can be suspended NT Intervention, Racial Discrimination Act 1975, potential inconsistencies between state and federal.

	<ul style="list-style-type: none"> • Common Law: Ineffective in that it's an incremental process bound by precedent and limited by statute. Effective in that it could lead to law reform and able to be interpreted leads to implied rights. World Youth Day Act 2006, Federal Court held that parliament did not move to take away freedom of speech. • Courts and Tribunals: NSW Anti-Discrimination Board and Australian Human Rights Commission. Inquire, monitor, promote but can't enforce. HR Commission cannot investigate state cases, and is limited by the Australian Human Rights Commission Act which outlines that it cannot investigate ICESCR. Ombudsman – strong investigative powers but limited in enforceability. • NGOs: No enforceability, promotion only, Amnesty International Australia, Women's Electoral Lobby, mostly focus on particular rights, Australia's NGO Commission join together to make submissions. • Media: Promotion, ownership is concentrated, breaking news culture.
<p>Charter Of Rights</p>	<p>FOR:</p> <ul style="list-style-type: none"> • National HR Consultation in 2008 found overwhelming support for a Charter of Rights. • Failure of existing laws to protect rights (Toonan v Australia, Haneef Case). • Number of issues highlighted in UNHRCouncil Report 2011 including asylum seekers, ATSI peoples, treatment of disabled, mentally ill, elderly, would improve international reputation. • Would provide models for states. • Can be repealed/amended/added to ensure it remains up to date with protection. • Would push government to make better laws and decisions (Eg. Avoid NT Intervention)

	<p>AGAINST:</p> <ul style="list-style-type: none"> • Existing HR protection is adequate (Eg. Haneef case was solved and compensated) • Won't necessarily ensure better protection, eg. Zimbabwe has one. • Potential to clog up the system with a large number of cases • Rights are "limited" to the list in the statute. • Judges would have more power, be required to make policy decisions, <i>Mabo v Queensland (No 2)</i> 1992.
Contemporary Issue	<ul style="list-style-type: none"> • ICC, Thomas Lubanga 2012 conviction, 10 billion in 10 years. • CROC and OPAC –but limited enforceability as they are optional. • Australian Defence Force Ombudsman Report 2005 –suggested age of enlistment should be raised to 18. Ignored. • KONY 2012 Campaign by Invisible Children (promotion only, little to aid in legal goal of bringing perpetrators to justice). • Coalition to stop the use of Child Soldiers (effective on a grass roots level, disarming, demobilising and reintegrating)