Ch 15 | Human Rights

Human Rights: universal freedoms and entitlements which enable dignity, equality, respect, and the ability to make genuine choices about one's own life.
- ↳ classified into different types eg. civil, political, economic, social, cultural.
- ↳ respect for rights is a key feature of liberal democracy and a component of the rule of law.
- ↳ internationally recognised and promoted eg. by the UN, and enshrined in the law of countries

Negative Rights: a right not to be subjected to an action of another group
- Developed during Enlightenment period
  - ↳ during time when people sought justification to limit ultimate power of absolute monarchy in government
  - ↳ eg. French Revolutionaries, American authors of Declaration of Independence → emerged from victory against tyrannical governments.
- Promised individual freedom from govt interference
- Natural rights were those that created a personal sphere where citizens' freedoms would be guaranteed against government and against other people.
- Created 'public sphere' that govt should be active in
  - ↳ should be as small as possible so that private sphere can be maximised → liberalism.
- Oblige a government to refrain from action
- Rights to
  - ↳ life ie. freedom from being killed/injured by govt
  - ↳ liberty ie. freedom from arbitrary deprivation of freedoms
  - ↳ the pursuit of happiness ie freedom from anyone preventing free choice and the pursuit of a livelihood
- The only limit to rights is the point at which one person's enjoyment of their rights infringes on another's
  - ↳ J.S. Mill's 'harm principle': live your life as you please, as long as you do no harm to anyone else
  - ↳ the role of government is only to create laws that prevent people from damaging eachother's rights, and that create an environment for these rights to flourish
  - ↳ ie. small government.
- Centre-right Australian political parties eg. Liberals.

Positive rights: a right to be subjected to an action - permit or oblige action.
- Negative rights seen as insufficient by modern society
- Govt is only institution with power (legally + economically) to prevent discrimination, provide basic living standard.
- Rights to entitlements: oblige govt to take action
- Right to:
  - ↳ education: universal free primary/secondary schooling
  - ↳ health: govt-provided, universal health care
  - ↳ equal treatment: govt must enforce laws against racial, sex, age, disability etc. discrimination
- Bigger govt: must take additional action, provide schools + hospitals, prevent discrimination.
- Centre-left political parties. eg. Labor, Greens.

Generations of Rights
1. First Generation Rights:
   - ↳ Enlightenment period
   - ↳ negative rights: freedom from
2. Second Generation Rights
   - ↳ 20th C, increasing wealth + disparity in West
   - ↳ positive rights
3. Third Generation Rights.
   - ↳ recent
   - ↳ group rights eg. native title, cultural/religious minorities' rights to maintain cultural practices
   - ↳ not distinctly positive/negative
   - ↳ may be controversial, as can conflict with other rights eg. cultural practice of FAM in conflict with first generation rights of women
   - ↳ conflicts in rights must be addressed by multicultural societies eg. Australia

Rights are:
U - Universal: apply to all people regardless of distinction eg race, gender
I - Interdependent: for any right to be enjoyed, all rights must be
I fully enjoyed - to breach one is to diminish all others
I - Indivisible: cannot be partially allowed, or ranked by importance
- Inalienable: cannot separate a person from their rights
  - ↳ except loss of rights by law - eg. murderer has breached right to life, law can restrict their right to liberty/movement to protect community's rights. Rol protects against arbitrary use

Classifications of human rights:

- Civil rights: broad category of rights aimed at protecting people from discrimination and empowering them to live full lives within their communities/societies
  - ↳ eg. freedom of conscience, speech, press, association, religious belief. Right to life, liberty, equality
- Political rights: empower people to participate in the government of their country
  - ↳ right to vote, run for office, assemble, join political associations, eg pressure groups/parties etc.
- Economic rights: entitlements to a minimum standard of living
  - ↳ ensure needs for shelter, freedom from hunger, right to earn a living
  - ↳ eg. right to own property, work, trade, minimum wage
- Social rights: enable a person to live life at their choosing
  - ↳ aimed at personal wellbeing
  - ↳ freedom to marry, have a family, move within and between countries
- Cultural rights: rights which allow people to practice their cultural traditions and to preserve their identities within a wider community
  - ↳ apply to specific ethnic/religious cultural groups
  - ↳ commonly applied to First Peoples in colonial society or to minority groups within a society.
- Legal rights: rights which protect an accused person from severe consequence of being found liable for civil wrongs or guilty of crimes.
  - ↳ apply to those accused of wrongdoing and subject to criminal or civil proceedings.
  - ↳ safeguard those at legal risk of losing their rights
    eg. custodial sentence denies right to movement, liberty, work, participation in govt etc.
  - ↳ eg. right to silence, presumption of innocence.

Ways to Protect Human Rights:

① Superior Law
- Constitutions: superior/fundamental law
  - ↳ mechanisms for alteration → difficult to change
  - ↳ rights are very secure → difficult for legislature/exec to change
  - ↳ usually civil + political rights.
  - ↳ specified or implied rights.
  - ↳ may contain Bill of Rights.
- Constitutional Rights bind all institutions - parliament, government and judiciary
- Advantages:
  - ↳ difficult to change: makes specific rights very safe.
    - govt policy/statute law cannot infringe on rights, as would be unconstitutional
  - ↳ judiciary empowered to interpret constitution - protect rights
    - power to adjudicate if govt policy/statute breaches a constitutional right - can strike down policy/law
    - strong protection - independent judiciary.
  - ↳ judges can discover implied rights.
    - constitutional law can adapt/stay up to date.
    - requires an activist judiciary - often controversial.
    - leads to judicial supremacism - judges exercise most power in determining rights, exec/legis are restrained by constitutions + independence of judiciary.
- Disadvantages:
  - ↳ difficult to change
    - hard to add new rights/remove outdated ones
    - eg. Article 2 USA right to bear arms → controversial, outdated
  - ↳ listing of rights leads to prioritisation of listed rights
    - non-listed rights regarded as less important/unrecognised
  - ↳ judicial supremacism.
    - unconstitutional rights give too much power to unelected judges, who are thus unaccountable
    - judges can strike down unconstitutional laws even if they represent the democratic will of the people and were passed by representative, elected legislatures

② Statute law
- Statute laws made in parliament.
  ↳ parliamentarianism: the preference for a sovereign, democratic parliament to be a guarantor of rights.
  ↳ laws guaranteeing rights are designed to be dialogical: create dialogue btw parliament + courts.
    - designed not to permit judicial supremacism.
  ↳ may include political/civil/social/economic/cultural/legal rights
  ↳ 'statutory bill of rights': made up of statutes that focus on rights exclusively.
  ↳ bind governments and courts - not parliaments, as no parliament is bound by its predecessors.
  ↳ statutes must conform to constitutional law
- Advantages.
  ↳ made by sovereign parliament which represents the will of the people - legitimate
    - parliament can amend/make new laws - rights can adapt to modern values, more responsive
    - add, remove, or change rights - by an elected, accountable parliament.
  ↳ powerful form of law: applies to govt + courts, applies universally within a jurisdiction.
  ↳ allows for balancing of parliamentarianism and judicial supremacism.
    - Act may give judges power to strike down other Acts (judicial supremacism)
    - Act may limit judges' power in striking down or adjudicating the constitutionality of other Acts (parliamentarianism)
- Disadvantages.
  ↳ less well protected.
    - can be changed, watered down or removed by parliament, esp. where exec dominates parliament.
    - ultimate authority is parliament (or executive eg. in QLD is unicameral parliament) - can make/amend/repeal rights Acts, restrict judicial review of them.
  ↳ listing rights may diminish other non-listed rights.
  ↳ judicial control over rights still exists - judges can interpret/strike down unconstitutional Acts.

③ Common law

- Common law - judge-made law
  - ↳ made in courts via doctrine of precedent.
  - ↳ inferior to statute, can be overridden by statute law
  - ↳ based on tradition + authority not democracy.
  - ↳ most are legal rights. eg. right to silence, presumption of innocence.
  - ↳ binds lower courts in the same hierarchy. Doesn't bind parliaments. Parliament can override common law or judicial interpretation of statutes. Doesn't bind govt unless govt is a party to the case.
- Advantages
  - ↳ flexible
    - evolve case to case
    - can be overridden by parliament.
  - ↳ legal rights are embedded into common law
    - history of developing legal rights as protection against absolute rulers of history means common law is predisposed to protect legal rights, and relies on legal rights to function. eg creates and relies on right to remain silent: to prevent extraction of false confessions under torture/threats, and to ensure truthfulness of trial.
- Disadvantages
  - ↳ vulnerable to parliamentary/executive interference
    - eg. exec-dominated parliaments prone to giving in to populist pressure for particular policies. Following crises eg. terror attacks - parliament vulnerable to community's demands for retribution, to be 'tough on crime' - Australia's recent anti-terror laws saw parliament override common law right to silence, presumption of innocence.
    - has led to parliamentary protection of common law rights eg. legal professional privilege: protects right of client to discuss matters with their lawyer and the lawyer not to be forced to reveal them in parliament. Protected by Evidence Acts of each state.

④ International law
- International law: law made between nations or by international organisations.
  ↳ can influence domestic law but only if the nation's government and parliament agrees to adopt it.
- Advantages
  ↳ allows adoption of internationally-recognised rights
  ↳ allows nations to promote rights internationally by participating in the drafting of laws.
  ↳ nations can raise their human rights record by adopting international human rights
- Disadvantages
  ↳ is unenforceable in any jurisdiction - only moral force until adopted and ratified by a nation.
    · ratification: the process of codifying international law principles into domestic law.

United Nations.
- World's largest + most influential international organisation.
- General Assembly: a representative body in which each nation has an equal voice + vote regardless of population. All member nations have a seat
- Security Council
  ↳ 15 nations → 5 permanent, 10 rotating 2yr basis.
  ↳ permanent members (US, UK, Russia, China, France) possess veto power.
    · Russia + China have problematic HR records.
  ↳ can authorise UN to take action (inc. military) to prevent HR abuses and end conflicts.
- UN Human Rights Council (UNHRC)
  ↳ 47 member nations
  ↳ forum for promoting human rights.
- Office of the High Commissioner for Human Rights (OHCHR)
  ↳ chief UN agency for promotion of human rights.
  ↳ appoints Special Rapporteurs / Expert Investigators / Working Groups to travel to places where HR abuses are occurring to investigate them. Allows UN to bring attention and pressure on nations abusing HR
- UN High Commissioner for Refugees.
  ↳ one of many other bodies that investigate HR status of particular groups eg. refugees.
- UN can investigate, but can't intervene in the sovereign affairs of a nation, cannot enforce international laws - only moral force

International Courts
- International Court of Justice
  - ↳ settles disputes between nations
  - ↳ one of six main UN bodies
  - ↳ not often involved in HR disputes
- International Criminal Court.
  - ↳ established by Rome Statute - international agreement.
  - ↳ greater focus on human rights
  - ↳ prosecutions of human rights abuses, war crimes, crimes against humanity, genocide etc

International Law → process.

1. Agreements negotiated between UN member states
   - ↳ eg. Universal Declaration on Human Rights (1948)
2. Nations' executive arms sign agreements
   - ↳ usually represented by Foreign Minister
   - ↳ agreements are international law, but are not yet domestic law until they are ratified.
   - ↳ eg. Australia has signed the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD)
3. Ratification
   - ↳ rights contained in international law are codified into statutes of the signatory nation
   - ↳ statutes drafted and passed through normal legislative process of the parliament.
   - ↳ s51(xxix) of Australian Constitution enables Cwth parliament to make laws on international agreements
   - ↳ once this occurs, the law is enforceable by the executive, usually by agencies
   - ↳ eg. Australia ratified the CERD with the Racial Discrimination Act 1975.
4. Administration and enforcement.
   - ↳ parliament can establish executive agencies to administer the law and protect rights enshrined in it.
   - ↳ eg. Australian Human Rights Commission
   - ↳ eg. Race Discrimination Commissioner - 2016, Tim Soutphommasane.

Federalism and International Agreements
- Cwth parliament ratifies international law
- if agreement covers a residual power, external affairs power s51(xxix) can be used to expand Cwth powers, changing the federal balance eg. Tasmanian Dams 1983
- eg. Koowarta 1982
  - ↳ Cwth had ratified CERD in RDA 1975
  - ↳ QLD govt prevented John Koowarta from purchasing a lease on land because he was Aboriginal
  - ↳ contravened RDA - enacted via external affairs pwr s51xxix to give effect to CERD agreement.
  - ↳ as a result, QLD lost land management power to Cwth external affairs power.

Bill of Rights: constitutional or statutory.
- constitutional → judicial supremacism eg. US Bill of Rights.
  - ↳ constitutional Bill of Rights: empowers the federal judiciary to strike down incompatible laws.
    - all laws are subject to fundamental/superior law
    - judgements by constitutional courts are final.
- Statutory → parliamentarianism
  - ↳ mostly adopted by countries with strong tradition of responsible parliamentary government
    - see that parliament is sovereign and democratic, should not be subject to the will of judges.
    - assume that the parliament is the best protector of people's rights, as people wouldn't allow the parliament to abuse them.
    - ie. parliamentary sovereignty.
  - ↳ modern times: has been compromised by executive dominance of parliament → led to proposals of 'constrained parliamentarianism' to check executive
    - 'declaratory Bill of Rights': allows judges to highlight and declare statutes in violation of HR - dialogical nature constrains the parliament, as applies public pressure to amend law or justify its violation of HR. eg. Victorian, ACT, NZ, British statutory Bills of Rights - no judicial power to invalidate, only highlight incompatible laws. - Parliament retains ultimate power.
  - ↳ statutory Bill of Rights may empower judiciary to strike down laws eg. Canadian Charter of Rights and Freedoms 1982 - enacted by Canadian parliament, then British parliament in Canada Act 1982 - effectively constitutional, but created by statute

somewhat judicial supremacism

Ch16

Rights Protection in Australia.

Constitutional Express Rights

*Few: Australia doesn't have a rights-based constitution.

- s41: ability to vote at federal elections if at the time of federation, person had the right to vote in state elections.
  - ↳ transitional, spent clause
- s51(xxxi): right to just compensation for the compulsory acquisition of property by the Cwth.
- s80: right to trial by jury for federal indictable offences.
- s116: right to freedom of religion (Cwth may not impose any religion)
- s117: freedom from discrimination based on state of residence.
- s92: free trade between and within states

Constitutional Implied Rights

- Discovered by HC Constitutional interpretation
- eg. Roach v electoral commissioner (2007) - right to vote
- eg. Theophanous v Herald & Weekly Times Ltd (1994): right to political free speech.

Commonwealth Statute Law: Parliamentarianism

- Parliament is an active body in protecting rights.
- Most Cwth Acts originate from international law.
  - eg. Racial Discrimination Act 1975
    Sex Discrimination Act 1983.
    Crimes (Torture) Act 1988.
    Disability Discrimination Act 1983.
- Australian Human Rights Commission Act 1986
  - ↳ formerly known as Human Rights and Equal Opportunity Act 1986: created the Human Rights and Equal Opportunity Commission (HREOC).
  - ↳ HREOC intended to be a dispute resolution body to make legally binding resolutions on human rights violations - exercise judicial power
  - ↳ struck down by Brandy's Case: Brandy v HREOC (1995)
    - Mr Brandy had order made against him by HREOC which registered decisions with Federal Court to make them legally enforceable.
    - Struck down - HREOC not Ch3 court, no judicial power
    - diminished HREOC's power to protect human rights.
    - must use courts to redress violations - costly, formal - barrier.

International Law Rights.

- International law has been implemented as statutory law within Australia
  - eg. Convention on the Elimination of All Forms of Racial Discrimination → Racial Discrimination Act 1975
  - eg Convention on the Rights of Persons with Disabilities → Disability Discrimination Act 1992
- Further implemented/administered by Australian Human Rights Commission and anti-discrimination commissioners.
  - eg. Race Discrimination Commissioner
  - eg. Age and Disability Discrimination Commissioner.
    - ↳ people who allege HR violations can make acomplaint to the commissioner
    - ↳ usually use conciliation to resolve complaints
      - less formal, less costly, shorter.
      - no contractural/legally binding agreement
      - more accessible and easy - resolve HR abuses
    - ↳ existence of commissioners - raise awareness of HR to prevent abuses.
- Parliamentary Joint Committee on Human Rights
  - ↳ Established by Human Rights (Parliamentary Scrutiny) Act 2011
  - ↳ joint standing committee
  - ↳ scrutinises all legislation for HR compliance with 7 international treaties signed by Australia
  - ↳ publishes scrutiny report to parliament each week of sitting - alerts parliament to potential HR violations in scrutinised Acts and regulations.
  - ↳ does not scrutinise for compliance with Convention Relating to the Status of Refugees. Means that Migration Act 1958 (enables detention on Nauru and Manus) not subject to scrutiny against the Refugee Convention - reduces status of the Refugee Convention as international law in Australia.
  - ↳ Refugee Council of Australia (pressure group) wrote letter of submission to Senate Standing Committee on Legal and Constitutional Affairs to argue that Refugee convention should be included (among others) on list of international conventions considered by the PJCHR.

-Optional Protocols.
↳optional protocols: optional additional treaties which are related to or clarify an original international HR convention or treaty
- possesses the same legal status as a treaty once signed, ratified and adopted by a nation.
↳eg. Australia signed Second Optional Protocol to the International Covenant on Civil and Political Rights. - Aiming at the Abolition of the Death Penalty

Vulnerability of Statutory Rights: CASE STUDY - Northern Territory National Emergency Response/NT Intervention
- Little Children Are Sacred Report by the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse → highlighted serious issue of sexual assault, domestic violence and child abuse in remote indigenous communities in the NT.
- Howard Govt (2007) ordered Army into NT communities to intervene - included forced medical checks on Aboriginal children
- To legalise the Intervention, Howard govt was forced to amend Racial Discrimination Act 1975, which ratified CERD. Otherwise, direct intervention in indigenous communities would be deemed racist and thus unlawful.
↳Howard amended RDA with friendly Senate.
- If freedom from racial discrimination had been a constitutional right → Intervention would have been deemed illegal, Parliament could not have amended the right.

State Laws: states enact their own statutory Bill of Rights.
- Victorian Charter of Human Rights and Responsibilities Act 2006.
↳protects 20 basic human rights: derived from ICCPR.
↳requires all executive agencies in Victoria to take these rights into consideration when developing laws/policy
↳laws passed by Vic Parliament are checked against Act and a Statement of Compatability is issued.
↳parliament can override the Charter with good reason - retains sovereignty, is accountable to but not bound by the charter.
↳A 'declaration of inconsistent interpretation' by Vic Supreme Court requires a Minister to reconsider a decision - cannot strike down law.

Strengths of the Charter	Weaknesses of the Charter.
-Improved govt service delivery -Setting of disputes with Charter as guideline. -Awareness of human rights -Govt agencies include human rights training -Audits by the Victorian Equal Opportunity and Human Rights Commission (which administers the Charter) have led to improvements eg. better treatment of female prisoners in Victorian jails.	-Gives too much power to judges, unelected + unaccountable -Courts cannot strike down the law, only force Ministers to explain their decisions - original law stands. Limits power of judiciary to protect rights and remedy violations. -focussed on prevention, not remedies, limited use for seeking redress against a violation -Plaintiffs can only raise the Charter in court when bringing forward another action ie. piggybacking

CASE STUDY: Castles v Secretary to the Department of Justice (2010)
- Kimberly Castles serving jail time for social security fraud. Had already been receiving IVF treatment to become pregnant.
- Requested to continue treatment while in prison
  - ↳ due to age, would be ineligible for treatment after release
  - ↳ Dept of Justice refused - prisoners no entitlement to IVF treatment
- Castles began court action under s47(1)(f) of Victorian Corrections Act 1986: prisoners have a right to "have access to reasonable medical care and treatment necessary for the preservation of health"
  - ↳ enabled her to bring forward the Charter of Human Rights and Responsibilities Act's s13 privacy and family right, right to equality (s8) and humane treatment in detention (s22)
- Court ordered Dept to review decision in relation to rights.

ACT Human Rights Act 2004

- Details:
  - ↳ statutory Bill of Rights for ACT citizens
  - ↳ parliamentarianism
  - ↳ 'dialogical' between parliament + courts
  - ↳ complainants do not have to 'piggyback' HR action on another case - can bring straight to courts.
  - ↳ mostly civil + political rights → 20 rights.
  - ↳ unicameral ACT legislative Assembly must review all legislation for HR compatibility.
  - ↳ standing committee investigates laws.
  - ↳ ACT Attorney General issues 'compatibility statement' for each new law passed - must justify if a law does not meet HR compliance
  - ↳ courts must interpret statutes with HR in ming
  - ↳ Supreme Court ACT can issue 'statement of incompatibility' for inconsistent laws
  - ↳ establishes ACT Human Rights commissioner

Strengths	Weaknesses
- made ACT parliament/ govt more rights-aware	- Gives too much power to unelected, unaccountable judges
- requires both executive, legislative + judicial arms to consider rights in laws/policy/decisions	- too weak: can only 'declare' laws incompatible with HR
- fostered human rights culture	- focusses on prevention: few opportunities for redress.
- hold govt to account	

* Decisions in state/territory courts and parliaments can be overturned by their federal counterparts ie. are weakened

CASE STUDY: Nona v R (2012)

- Nona charged with 4 offences, warrant issued 1998 but never carried out.
- Summoned for trial 2009, case commenced 2012
- Applied for + rejected for 'stay of proceedings' (permanent suspension of case) → sought leave to appeal this rejection
- Human Rights Act 2004 → right to be trialled without 'unreasonable delay' (14 yrs for Nona)
- Judgement found Nona had right to appeal, but did not provide permanent stay of proceedings as remedy - still trialled
- Demonstrates contribution of ACTHRA 2004 to common law rights.

Queensland Human Rights Act 2019

- palaszczuc Government in QLD relied on confidence of Independent member Peter Willington for government- Willington requested parliamentary inquiry into HR act.
- Reasons for QLD to have a HR Act.
  - ↳ unicameral parliament - fewer checks on govt. HR violations. No upper house = more exec dominance, less scrutiny, fewer minorities represented
  - ↳ eg. indigenous mistreatment - Kooweerta, Mabo
  - ↳ eg. Bjelke - Petersen (1968-87) turning a blind eye to the brutal crushing of protests by police, outlawing protests and street marches, gerrymandering.

CASE STUDY: biased jury

Joh Bjelke-Petersen faced trial for giving false evidence to Royal commission into Human Rights, Fitzgerald Inquiry. Revealed that jury foreman was member of Young Nationals, and supporter of 'Friends of Joh' movement.

- 2018 Human Rights Act introduced to QLD Parliament
- 2019, " " " passed
  - ↳ protects 23 rights including: recognition and equality before the law, freedom of thought, conscience, religion and belief, freedom of association and peaceful assembly.

Other Common Law Rights:
- Access to courts (Plaintiff s157)
- Freedom of speech
- Right to equality of religion
- Freedom of association

Common Law Rights Protection

- Right to a fair trial
  - ↳ Dietrich v The Queen 1992 (HCA)
    - 1986, Dietrich arrested for smuggling heroin from Thailand
    - Tried in County Court of Victoria 1988 → had no legal representation, had applied for legal aid, but would only be granted if he pleaded guilty.
    - appeal refused by Victorian Supreme Court
    - appealed to High Court on grounds that his trial had been miscarriage of justice as he had no representation based on common law tradition of a fair trial
    - proposed that ICCPR was relevant - had not been implemented in statute, but Dietrich argued that Australia's common law tradition should reflect its obligations under international law
    - established publically - provided legal counsel as part of fair trial.

- Right to presumption of innocence: presumed innocent until proven guilty beyond reasonable doubt
  - ↳ Article 14 of ICCPR
  - ↳ s13.1 of Criminal Code Act 1995: prosecution bears the burden of proving every element of an offence beyond reasonable doubt.
- Right to silence: right not to be made to testify against oneself. Statute may require that a person answers questions, but does not extend to the provision of incriminating answers
  - ↳ Sorby v Commonwealth protects privilege against self-incrimination
- Impact of Terrorism Laws on Common Law rights.
  - ↳ parliamentary sovereignty = executive-dominated parliament 'may respond heavily to public pressure to be tough on crime'
  - ↳ since 2001, terrorism laws
    - infringed on right to a fair trial by disallowing terror suspects from knowing their charges
    - undermined presumption of innocence: terror suspects can be kept detained in secret without charge for seven days.
    - infringed on right to silence: terror suspects can be charged for not answering questions, or if they are believed to be in possession of evidence
    - infringe on presumption of innocence by allowing control orders and preventative detention orders, which enable the imposition of sanctions upon 'suspected', but not proven, terrorists.
  - ↳ demonstrates ease with which government can override common law rights.

Refugee + Asylum seeker Treatment
- Australia is signatory to UN Convention Relating to the Status of Refugees 1951 → ratified in Migration Act 1958
- Australian recent and current refugee policy.
  - ↳ offshore detention on PNG for boat arrivals → threatens freedom from arbitrary indefinite detention
  - ↳ offshore resettlement → no refugee arriving by boat will ever be allowed to settle in Australia. 2016, USA agreed to receive genuine refugees → Turnbull govt was seeking to pass a lifetime ban on these refugees ever entering Aus.

↳interception of boats at sea
↳tow-backs of boats to country of origin if safe.
↳at-sea processing to return unsuccessful claims to countries of departure. (right to seek asylum)
↳Temporary Protection Visas → temporary settlement for refugees in Australia
↳Malaysian Solution: failed attempt to swap 800 asylum seekers in Australia for 4000 confirmed refugees from Malaysia.
↳Medevac: attempt to enable transfer of medically at risk asylum seekers to Australia for treatment (right to medical care, health)
- Criticised by UN and other nations.
- Poor conditions for asylum seekers
↳reports of rape and abuse
↳mental health concerns
↳genuine refugees not allowed resettlement
↳those returned to countries face harsh treatment eg. Vietnamese and Sri Lankan asylum seekers interrogated by own governments, Afghan refugee tortured by Taliban.
- Protected information by government.
↳journalists not permitted to travel to camps
↳employed personnel can face charges if they speak out against them.
↳doctors protested by refusing to release refugee children from Australian hospitals, saying professional oath disallowed them from sending patients back to where they could be harmed
- Justification of harsh policies
↳deter people from attempting dangerous journey, preventing deaths at sea (preserve right to life)
↳dichotomy → receive refugees, risk deaths at sea OR reject refugees, prevent deaths at sea.
- New policies being investigated by Parliamentary Joint Committee on Human Rights
↳possibility of negotiating transit path through SE Asia for refugees to reach Australia

Parliamentarianism in Australian Human Rights Protection
- Limited constitutional express/implied rights which empower the judiciary → more parliamentarianism where parliament remains supreme in dialogue w/ courts
- s51(xxix) external affairs power allows parliament to enact treaties + covenants into law (statute) → human rights remain at will of the Parliament.
∴ parliament supreme over international law
- Parliament supreme over common law
  ↳ override them eg. anti-terrorism laws.
  ↳ flexibility + vulnerability of rights under parliamentarianism
- Vic, ACT, QLD HR statutes
  ↳ require parliament to issue statements of compatibility for each law, and respond to judicial declarations of incompatibility
  ↳ criticised as weak:
    - preventative, not remedial
    - don't maintain proper accountability, don't give judges real power to check HR compliance or strike down laws.
  ↳ have led to improved outcomes in Vic, ACT, QLD.
  ↳ still constrains parliament to be answerable to courts investigation → constrained parliamentarianism
- Judicial supremacism only exists for express and implied constitutional rights → few.

* robust liberal democracy with strong rights culture

* creates litigious culture

* empowers judiciary: independent, defend against government

Rights Protection in the USA
- Influences on the US constitution
  ↳ desire for freedom from tyranny: freedom from British colonial rule 4 July 1776 - civil war.
  ↳ French Revolution: idea of liberty, freedom, natural rights
  ↳ Enlightenment ideas
    - Montesquieu → separation of powers
    - John Locke → liberalism
  ↳ Federalism
- In addition to functions of a constitution, the American Constitution also has a constitutional Bill of Rights.
  ↳ 10 amendments
  eg. 1st amend: Freedom of religion/speech/press/assembly
  eg. 3rd amend: Freedom from quartering of soldiers in private homes
  eg. 5th amend: right to silence of an accused person
  eg. 6th amend: legal rights: free + fast public trial, impartial jury, right to know charges against you, rules of evidence.

CASE STUDY: Second Amendment: right to keep and bear arms for a 'well-regulated militia'

- Recent events have brought into debate the right:
  - ↳ 2012 Sandy Hook Elementary School Shooting
  - ↳ 2016 Orlando Nightclub shooting
- District of Columbia v Heller 2008
  - ↳ 5:4 Supreme Court upheld right to own guns for personal self-defence → expanded 2nd amendment
  - ↳ demonstrates powerful activist impact of judicial supremacism in constitutional rights
  - ↳ means unelected, politicised, activist judges can impose own views and 'policy' on rights.
- Argument that 2nd Amendment no longer has any relevance → civil war v modern America.
  - ↳ no threat of tyrannical government now
  - ↳ US is a powerful superpower, spends more on military than next 15 most powerful countries combined - no need for a 'well-regulated militia'
  - ↳ 18th C weapons were single-shot, limited + cumbersome. Today, anyone can access assault rifles designed to kill large numbers of people.
- Awareness of Constitutional Bill of Rights.
  - ↳ people more aware of their rights, media coverage of rights issues → keeps govt more accountable to upholding rights.
  - ↳ has effect of making Americans more litigious - more likely to turn to litigation in courts to resolve disputes - higher costs.
    - 'zero-sum' nature of court means win/loss dichotomy - always one losing party, may lead to further litigation through appeals.
    - ADR / rights commissioners used less, but are less expensive, can lead to mutually beneficial outcomes - 'positive-sum'.
- Influence of Pressure Groups - National Rifle Association
  - ↳ uses 2nd Amendment to block most laws restricting gun ownership by challenging laws in Supreme Court eg. D.C. v Heller, 2008.
  - ↳ therefore, NRA blocks will of people as represented through Congress - financial resources
  - ↳ court can only judge on law, not merits - means sensible gun restrictions have been blocked.

* inflexible - can't adopt gun laws. eg. Australia after 1996 Port Arthur Massacre, gun amnesty resulted in no more mass shootings since laws adopted, but USA has had more than 80 mass shootings.

* empowers small minorities and groups eg. NRA

problem of judicial supremacism

Statutes protecting human rights in the USA
- Civil Rights Act 1964.
- American Civil War (1861-1865)
  - ↳ fought btw pro-slavery South and anti-slavery North → North won, slavery abolished
  - ↳ African Americans discriminated against, from segregation to extrajudicial killings etc.
  - ↳ Civil Rights Movement 1960s eg. Rosa Parks, Martin Luther King Jr
- Encouraged Congress to take action
  - ↳ passed Civil Rights Act 1964
  - ↳ granted equal rights to all American citizens of race → helped African and Indian Americans
- Also → Americans with Disabilities Act 1990

Common Law Rights in the USA
- USA inherited common law tradition from British.
- means that common law predisposed to protecting rights, against a historically powerful monarchy
- contains most English common law rights
- Some have been elevated to constitutional status
  - ↳ eg. 5th Amendment: right to silence
  - ↳ eg. 6th Amendment: right to impartial adjudicators and certain rules of evidence.

International Human Rights Law in the USA.
- USA has always been ambivalent to international law, have not ratified any agreements on human rights since 2002.
  - ↳ USA and Somalia only countries not to have ratified Convention on the Rights of the Child.
  - ↳ USA one of seven not to ratify Convention on the Elimination of all Forms of Discrimination Against Women
    - others eg Iran, Sudan, Somalia → are dictatorships
- Demonstrates that USA feels entitlement to a special position as a global superpower - 'manifest destiny'
  - ↳ resisted entering legal arrangements for fear that enemies may use them against the US.
    eg. disallows American soldiers from appearing in ICC on war crime charges, for fear that enemies may use the process to prevent US from carrying out its foreign policy

USA War on Terror

- Since 2001, USA conducted military and police operations designed to eliminate terrorist groups eg. Al-Qaeda
- Guantanamo Bay, Cuba
  - ↳ prison for captured terrorists at military base.
  - ↳ established by George W Bush → outside of American jurisdiction; prisoners could not access the judicial system.
  - ↳ classified detainees as 'enemy combatants' to avoid Geneva Convention protections on 'prisoners of war' treatment conditions.
  - ↳ 2008 Boumediene et al v. Bush, Supreme Court ruled that detainees in Guantanamo Bay were entitled to the protection of US Constitution and jurisdiction, to challenge the lawfulness of their detention ie habeas corpus.
- Waterboarding
  - ↳ form of torture whereby prisoner is shackled to a board, water poured on a cloth draped over the nose and mouth - psychological sensation of drowning used to gain info and plans of terrorist groups
  - ↳ US government called it an 'enhanced interrogation technique', to avoid being accused of torture - applied a narrow definition of torture under law
  - ↳ waterboarding banned by Bush admin in 2008
- Extraordinary Rendition
  - ↳ process of transferring terrorism suspects ('abducted foreign citizens') to countries with less rigorous HR protections than the US.
  - 54 known countries to which US transfers suspects
  - ↳ suspects are handed to authorities of that country, who deal with them in accordance with the country's own laws and standards - may include torture.
  - ↳ violation of international law, crime against humanity - Poland condemned for participating by European Court of Human Rights.
  - ↳ President Obama signed executive order banning transfer of subjects to countries known to practice torture - didn't fully ban ex. rendition

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Political Representation:
↳direct democracy eg. Athens
↳representative democracy: citizens elect others to represent their views and interests in govt on their behalf.
·Delegate/trustee/partisan/mirror representation

Australia's strengths:
- PM (executive) not directly elected: less representative
- Secret ballot
- Compulsory voting
↳firm will of the majority for maj. political representation
↳prevents well-organised minorities from achieving political-over representation
- Australian Electoral Compromise:
↳preferential (HoR)
·strong majority, may have winners' bonus, majority representation
·single member electorates: each citizen represented by one member
·strong link btw reps and constituents
·stable govt
·one vote, one value
·weaknesses: minorities + minor parties are underrepresented
↳proportional (Senate)
·accurately transfers votes into seats
·minorities are better represented
·hung Senate for accountability
·weaknesses: too much power to minorities, weak links to constituents, malapportionment
↳achieves balance btw stability and accountability.

USA's strengths:
- President (executive) directly elected: represents people's views
- FPTP: clear representation of views: for Congress + president
- House of Representatives: First Past the Post, single member electorates.
↳strong link btw reps and constituents - accountability
↳representation of majority
- Senate: FPTP, multi-member
↳stable
↳strong link reps/constituents
↳representation of majority
↳no gerrymandering.
- Short electoral cycles: frequent expression of vote ensures that incumbents represent the views of the pop"
- Fixed terms: executive can't manipulate election times.

Australia's strengths cont'd.
- Capable of reform to increase political representation
  eg. SA 2nd to let women vote, 2016 electoral reforms improve representation
- Independent AEC: statutory body
  ↳ administers Cwth Electoral Act 1918
  ↳ protect against electoral fraud
  ↳ minimises malapportionment: mandates electorates have within 10% of average #pop^n (EXCEPT Tasmania → 5 in HoR)
- Proportional Senate combines opinions of minorities + majorities to hold govt to acct: some concerned at 'veto' power of Senate → accountability, but can override majority
- powerful bipartisanship: a strong Senate counters the executive-dominated House
  eg. Malcolm Turnbull DD election for hope of 'easier' Senate after electoral reforms: Senate more hostile.

Australia's weaknesses
- Preferential system conceals diversity of votes: decline of 1st pref major party from >90% to 77% in 2016.
- Suggested reforms eg. NZ Mixed Member Proportional to represent more minor parties.
- Voter disengagement + mistrust of politicians increasing.
  eg. 2016, <50% 18yos enrolled
  eg. high rates of postal/pre-votes, not fully informed
- s7 produces malapportionment
- Poor mirror representation
- Political donations influential

USA's Weaknesses
- FPTP reduces minority rep^n
  ↳ some local govts eg. city govt of Cambridge, Massachusetts has proportional representation; mostly rejected by court challenges by major parties
- Few electoral reforms → most notable was 17th Amendment in 1913: change from Senators appointed by states to elected by people - limits change
- Gerrymandering: manipulation of HoR boundaries by State legislatures who have a stake in the electoral outcome.
  ↳ can benefit the incumbent by changing electoral boundaries to concentrate opposition votes in fewer seats. May allow a minority to win a majority of seats.
- Decentralisation: lack of central national electoral standards: all administered under differing state laws
- Major parties use power to exclude other parties.
- Electoral/political donations
  ↳ Citizens' United v Federal Electoral Commission 2010 abolished limits on political donations under First Amendment (freedom of speech)
  eg. NRA: $30 m donations, in return for limiting gun regulation laws
  eg. conservative billionaire Koch brothers donated nearly $900 m to presidential/congressional candidates
  ↳ lack of transparency: reuse questions of 'buying' political influence for rich groups
  ↳ Super PACs (Political Action Committees) take donations, support candidates' campaigns

Popular Participation: process of making citizens' voices, opinions and perspectives present in public policy processes so that citizens can participate in their own government
↳through: elections, political parties, pressure groups.

AUSTRALIA's STRENGTHS

Electoral participation
- Compulsory voting
  ↳wide participation
- Constitutional implied right to freedom of political speech
- Wide franchise ensured by Commonwealth Electoral Act 1918
- Independent AEC
- Uniform voting laws across all states.
- Public funding of political parties' campaigns
  ↳for parties who receive over 4% of the 1st pref. vote, $2.62 per 1st pref vote
  ↳reduces reliance on donations from influential groups/ppl with vested interests or demands
  ↳$62.7 mill paid to political parties by the AEC 2016

Political Parties
- Have extensive membership outside of parliament
  ↳allows members to take part in policy development
  ↳some parties allow members to choose candidates for electorate eg. Celia Hammond, Curtin 2019
- Broad range of political views
  ↳diversity of representation reflects high levels of participation

Pressure Groups: pluralism.
- Wide range of pressure groups
- Sectional groups eg. Minerals Council of Australia-more success
- Smaller cause groups also success eg. Machali Conservation Group 2015
- 2008: Lobbyist Register + Code of Conduct.

USA's STRENGTHS

Electoral Participation
- Strong rights awareness
- Voter turnout relatively high for voluntary system.

Political Parties
- Primaries + caucuses
  ↳allows citizens to join a party, campaign for a presidential candidate, vote on a candidate
  ↳allows contest of ideas - debate
  ↳enables party members, rather than bosses, to choose candidates
  ↳bosses can influence outcome eg. having super-delegates at party conventions to vote
  ↳eg. Donald Trump: grassroots democracy (people's candidate), party didn't approve of him.
  2016, 28.5% of voters participated in primary elections.
  ↳typically more Democrats than Republicans participate in primaries.

Pressure Groups
- High levels of pressure group participation → representation of wide range of views in pressure group influence
- Robust inter-group debate
- Enables participation ie. influence strengthened by judicial supremacism.
  ↳well-resourced pressure groups can challenge in Supreme Court for interpretation of rights.
  eg. Citizens United v Federal Electoral Commission 2010

AUSTRALIA'S WEAKNESSES:

Electoral Participation

- Declining registration of young voters and ↑ pre-poll/postal votes = voter disengagement + prejudice
  - ↳ solutions: social media campaigns for youth, cross-checking voters, automatic enrolment updates
- Need for lower thresholds on political donations - ↑ transparency
  - ↳ law changed 2005: >$10,000 needed to be declared, indexed for rise each yr: $13,200 in 2017. Had previously been $1500.

Political Parties

- Declining membership
  - ↳ no party >50,000 members, compared to highs of 200,000 for Liberal Party in the past. Members are mostly older
- Parties dominated by career politicians: seek personal benefit to the exclusion of ordinary members
- Could be remedied by increasing member participation in party activities eg. leader selection.
- Fragmentation of electorate (more not voting for major parties) means diversity of opinion not fully represented accurately
- Few party members participate in pre-selection - party/PM/Premier may choose own preferred candidate, less participatory

Pressure Groups:

- Corporatism
  - ↳ several large + powerful pressure groups eg. Minerals Council of Aus, Clubs Australia
  - ↳ distort popular participation.
- Influence limited by 2008 Lobbyists Code of Conduct and Register.

USA'S WEAKNESS

Electoral Participation

- Voluntary voting
  - ↳ poor turnout:
    - 75-85% 19th C (expansion of franchise) → very high
    - 55% 2016 election: lowest in 20 years
- Voting discrimination
  - ↳ minorities disenfranchised
  - ↳ registration disadvantages African Americans and low-education voters eg. North Carolina + Texas required provision of predominantly White-held forms of ID eg. military ID, US passports, weapon ID, but not mainly minority-held forms of ID eg. student ID, public assistance ID
  - ↳ fewer minorities vote at elections eg. 2018 midterm elections: 54.5% of whites, 40.4% Hispanics, 51.4% Blacks
  - ↳ illegal immigrants who live/work/pay tax in America - no voting right
- Partisan/Executive-led electoral system: decentralisation, gerrymandering, partisanship.
  - ↳ Federal Electoral Commission: election financing. Undermined by Citizens United v FEC 2010.
- Lack of public funding = rely on donors
- Electoral college 'winner takes all' distorts results eg. Clinton more votes than Trump 2016 - but places like Florida: large pop^n, swing btw parties
- Voting machines: 2000 election, voting machines failed in Florida. Election very close in votes: Florida crucial to outcome. Democrats challenged result Supreme Court: gave presidency to George Bush (Republican).

USA Weaknesses cont.d:

Political Parties:

- First Past The Post
  - ↳ creates duopoly of power (Dem/Rep) to exclusion of minor parties + independents
- Political spectrum skewed to right
  - ↳ Democrats centrist/centre-right, Republicans right, support deregulation + smaller govt.
  - ↳ eg. neither party delivered strong welfare similar to Medicare → Obamacare very basic version; not supported by Republicans.
  - ↳ means little representation for the political left: choice + freedom limited
  - ↳ rise of Bernie Sanders (forced Clinton to move policies to the left) indicates greater push for representation of social democrat/socialist voters.
  - ↳ wide intra-party ideological range eg. Northern Republicans and Southern Democrats very similar. Benefit → easy to find 'ideological home' in a party

Pressure Groups

- Strong Corporatism for sectional pressure groups
- Citizens United Case allowed pressure groups' money to make large impact on lawmakers
- Short 2yr terms HoR = heavy reliance on pressure group support for electoral success - more vulnerable
- eg. NRA: protects 2nd Amendment right to bear arms.
- eg. Farm lobby: secured govt subsidies for corn:
  - ↳ eg. Ethanol Mandate: force corn-based ethanol to be added to petrol - creates an inferior product to pure petrol, but increases market for corn-based alcohol.
- Senate: 2/state.
  - ↳ rural states smaller → malapportionment. Means over-representation of rural populations
  - ↳ skews power in favour of farm lobby.
- Judicial supremacism over rights allows powerful, resource-rich pressure groups to achieve binding rulings in Supreme Court, influencing lawmaking. eg Citizens United

Rule of Law:
↳constitutional limits to power eg. SoP
↳laws universally + equally applied, inc. to lawmakers
↳govt. acts in accordance with law
↳laws coherent, known, capable of being obeyed, don't target any particular individual or group.
↳legal rights respected eg. presumption of innocence
↳laws not retrospective
↳independent judiciary
↳free + fair trials

AUSTRALIA STRENGTHS:
- Written + conventional limits to power
- Separation of powers
  ↳exec + legis merged
- Independent judiciary
- Checks on exec power: Senate, parliamentary committees, AAT, AG...
- Representative legislature makes laws using transparent + established legislative processes
- Free, fair + transparent trials.
- Legal rights in common law
- Strong judicial review of exec + legis: eg. Williams I and II (constitutional) and Malaysian Solution (statute law).

USA STRENGTHS:
- Robust SoP: total seperation of exec + legis.
- overarching Constitution protected by powerful court.
- No exec dominance of legis
- Strong checks on all arms of govt eg. veto powers of Congress + president
- Strong rights culture: stronger protections of rights, stronger accountability checks
- Litigious culture = people prepared to take court action - limit govt powers
- Article 1, s9, cl3 Const: no 'ex post facto' law

AUSTRALIA WEAKNESSES:
- Refugee policy
  ↳ignored international law
  ↳secrecy of offshore issues = reduced transperency of Migration Act 1958.
- Retrospective law
  ↳were found to be constitutional in R v Kidman 1915
  ↳breach RoL: laws must be known and predictable.
  ↳resisted by courts eg. DPP v Keating (2013), High Court upheld presumption against respectivity

USA WEAKNESSES
- War on Terror
  ↳eg. avoid protections of POWs by calling terrorists 'enemy combatants'
  ↳detaining terrorists outside USA: avoid US jurisdiction.
  ↳Supreme Court checks on power: extended jurisdiction to Guantanamo Bay.
- Extraordinary Rendition, extra-judicial killings of terrorist suspects by drone strike, in territory of non-combatant countries.

- Other laws still violate RoL
  - ↳ Mandatory sentencing WA/NT reduces judicial discretion, targets minorities, may not be proportional punishment
  - ↳ anti-bikie laws QLD: infringe upon freedom of an organisation or group within the law
  - ↳ Bail laws NSW: reverse onus of proof by requiring that a person prove they should not be held in reprimand - no presumption of innocence
  - ↳ (With anti-terror laws may undermine onus of proof, right to silence, presumption of innocence
- Parliamentarianism means executive government is powerful (as they dominate parliament) in determining human rights
  - ↳ eg refugee policy → may pass draconian laws without effective checks/balances from parliament
  - ↳ bipartisan support means effectively no checks on laws
- No commission against corruption
  - ↳ eg. 2016 ALP accused Liberals of funnelling public funds for its MPs' electoral offices through parliamentary business which then donated $ to Liberal Party
  - ↳ investigated by AFP, but demonstrates need for C.A.C

- PATRIOT Act passed after 9/11
  - ↳ authorises executive agencies to investigate people accused/suspected of terrorism. Includes gag orders to prevent accused from knowing charges against them, or informing anyone else. Cannot have access to judicial review under one of these NSLs (National Security Letters). Authorities don't need reasonable suspicion ('probable cause') to issue a NSL
  - ↳ enables interception of communications without warrant, and delayed notification of search warrants
  - ↳ denies presumption of innocence, right to know own charges, access to judiciary, all reducing checks on arbitrary use of power.

Judicial Independence: separation of the judiciary from the executive and legislature, making it free from govt interference or intimidation - feature of RoL
↳essential for effective judicial review - accountability. Can declare a law ultra vires, or a policy unlawful.

AUSTRALIA STRENGTHS:
- Constitution protects independence
↳s71: vests judicial power in HCA + other courts created
↳s72: protects judges from arbitrary removal unless proven misconduct a incapacity. Prevents reductions of a judge's pay. Exec appoints and parliament dismisses.
- Judicial independence enhanced in Brandy's Case and Boilermakers Case
↳clarified that only Ch3 courts can exercise judicial power to make binding decisions.
- High Court able to restrict the power of the Cwth: binding for all institutions
↳eg. Williams, Malaysian Sol'n (re Plaintill M70/2011), which was common law, forced govt to make new solution.
↳: exec policy + legislative statutes can be held to account through robust judicial review.

USA STRENGTHS.
- US judiciary could be seen as more powerful - specific constitution creates greater judicial supremacism, rather than parliamentarianism
- Constitution protects independence:
↳Article 3 s1: vests judicial power in Supreme Court and other courts created by parliament
↳A3: judges may hold office "during good behaviour"
↳A2 s2: President shall, with advice + consent of Senate, appoint Supreme Court judges
↳A1/A2: allow judges to be impeached if not of good behaviour
- 2 arms of govt (President + Congress) appoint judges.
- Judicial Supremacism
↳creates an assertive Supreme Court eg extending jurisdiction to Guantanamo Bay
↳emboldened + protective of rights-based constitution.

AUSTRALIA WEAKNESSES
- Executive Dominance of parliaments.
  ↳ led to passage of tough-on-crime laws and anti-terror laws which infringe on rights/independent judiciary
  ↳ justified through sunset clauses which force a parliament to reevaluate the law upon expiry.
- Mandatory sentencing impacts judicial discretion and independence
- Proposal to introduce Cwth Statutory Charter of Rights
  ↳ would allow judiciary to defend more rights/freedoms
  ↳ would increase dialogue btw courts + parliament, create improved legislation without compromising judicial independence or parliamentary sovereignty.

USA WEAKNESSES.
- Election of judges (in 7 states)
  ↳ judges should derive authority from common law practices, maxims, traditions, not from democratic mandate
  ↳ forces judges to appeal to populist tactics
  ↳ politicises judiciary, reducing public confidence
  ↳ encourages bias by making judiciary political, can open up to pressure grup influence
  ↳ eg. Illinois requires judges to be elected for initial term
  ↳ eg. Texas, Alabama require judges to be elected for subsequent terms
  ↳ these states rank high on executions/death penalty counts, as judges need to be seen as "tough on crime"
    - eg. Texas: 2nd
    - eg. Alabama: 6th

Natural Justice:
- ↳ Impartiality of judges: nemo iudex in causa sua
- ↳ Fair hearing: audi alteram partem
- ↳ Hearings based on evidence
- ↳ Open and transparent process

- Ensured in Aus and USA through adversarial trial
  - ↳ Passive, impartial judges who ensure fair trial, decide on facts of case, apply statute + common law
  - ↳ Neutral juries: weigh up evidence
  - ↳ Active parties to present their own cases: question witnesses, test + introduce evidence
  - ↳ Strict rules of evidence eg. hearsay, opinion, hearsay.
  - ↳ Open courts: viewing galleries, media reports.
- Supplement trial processes with ADR: negotiation, mediation, conciliation, arbitration
  - ↳ Australia: ADR

AUSTRALIA STRENGTHS
- Dispute resolution processes, both court and ADR, are strong + accessible.
- Protections on procedures and traditions of adversarial trial are embedded in law
  - ↳ eg. Evidence Act 1995: legislates rules of evidence
  - ↳ Australian Human Rights Commission Act 1986: requires HRC to use conciliation
  - ↳ Family Law Act 1975: forces parents disputing custody to use ADR before court trial
- s80 Constitution: right to trial by jury for federal indictable offences.
- Dietrich 1992: right to legal representation - led to creation of legal aid in criminal cases, if no representation, proceedings must be stayed until obtained

USA STRENGTHS
- Similar to Australia - both systems inherited from Britain
- Litigious culture: use of courts to resolve disputes
- Legal aid: Legal Services Corporation → assists people of low socio-economic status to access courts.
- Rules Enabling Act 1934 enables Supreme court to determine the processes + procedures of trial, rules of evidence
- ADR Act 1998: measures to reduce cost + backlog, and increase accessibility of ADR

AUSTRALIA WEAKNESSES
- Expense of adversarial trial
  ↳ barrier to access
- Time consuming trials: backlog
- Disproportionate amount of Indigenous people
  ↳ rate of incarceration led to Royal Commission
  ↳ discriminatory factors eg. mandatory sentencing

USA WEAKNESSES.
- Over-reliance on litigation
  ↳ court action is a threat: costly to defend, can lead to financial ruin, always one loser in a case
- High income and wealth inequality means people increasingly unable to use courts to obtain justice
- Legal aid services eg. Legal Services Corporation: underfunded