

HARKNSS@100 PRESENTATION

The Impact of the International Human Rights Law on Domestic Human Rights. The Case of Australia

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INTRODUCTION

Welcome, Harkness Fellows!

My best congratulations to the Harkness Foundation on 100 years of work to improve our world.

Today, I will say a few words about how International Human Rights Law shapes global and domestic narratives and enhances human rights observance worldwide.

I will focus my address on the experience of Australia, although I was born in Poland, where my initial work to advance human rights took place. Between 1973 and 1975, I lived in West Germany as a refugee.

In 1975, I migrated to Australia, where I became involved in the human rights movement almost immediately.

I first assisted Australians in supporting the Solidarity movement in Poland, then worked on refugees' and migrants' rights and multiculturalism in Australia. Finally reached the positions of Australia's Human Rights Commissioner and Disability Discrimination Commissioner.

My Harkness Fellowship, between 1984 and 86, has charged my battery for many years to come. I worked at Harvard and Georgetown Universities, as well as the University of California, Berkeley, focusing on international refugee protection and maintaining social cohesion in diverse societies.

INTERNATIONAL HUMAN RIGHTS

International human rights are a relatively new concept. They emerged post-WW2 when the nations realised that human rights require international protection. The examples of nazi-Germany, Imperial Japan and the Soviet Union have shown that the protection of human rights cannot be entrusted to individual states.

On 10 December 1948, the UN adopted the Universal Declaration of Human Rights. It was a visionary document, a triumph of hope and optimism. All 193 UN Member States have signed it. Article 1 proclaims that "*All human beings*

are born free and equal in dignity and rights". This is a fantastic summary of what Harkness Fellows are about.

Over the past 77 years, some 70 human rights conventions, treaties and declarations have been adopted by the UN and other international bodies. They created a body of international human rights law for nations to follow.

The law dealt with:

- civil and political rights
- genocide
- economic, social and cultural rights, and
- rights of particular groups such as women, children, indigenous people, people with disabilities, refugees and LGBTIQ people.

The international human rights law has a significant influence on domestic legal systems worldwide. In fact, all 193 UN member states have ratified at least one of the core human rights treaties. Countries such as Iran, North Korea, Russia, Saudi Arabia and Zimbabwe ratified most of the core United Nations human rights treaties, including Afghanistan and Saudi Arabia ratifying *the Convention on the Elimination of All Forms of Discrimination Against Women*.

My key point here is that the international human rights law can, in some circumstances, influence the domestic legal system. But ratification of the UN human rights treaties does not automatically translate into an improved human rights situation domestically. Domestic observance depends heavily on the local political system, the existence of a robust civil society and on citizens' awareness and ability to demand their rights.

DOMESTIC HUMAN RIGHTS

Let's now focus on Australia. The Bill of Rights was not incorporated into Australia's Constitution of 1901. In fact, Australia is the only Western democracy without a national Bill of Rights.

But historically speaking, Australia was indeed a world pioneer in inventing the secret ballot in the 1850s, in legislating women's rights to vote in 1901, and establishing economic rights.

Australia has ratified all major conventions, and the treaties concerning the rights of particular groups have been incorporated into Australian domestic law.

For instance, many of the provisions contained in the *Convention on the Rights of People with Disabilities* are mirrored in Australian law through the *Disability Discrimination Act 1992 (Cth)*. Similarly, provisions of the *International Convention on the Elimination of All Forms of Racial*

Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women were incorporated into the domestic law.

Unfortunately, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child were only incorporated as an appendix to *the Australian Human Rights Commission Act 1986*. This means their impact on Australian domestic legal system is minimal.

WORKING AS AUSTRALIAN HUMAN RIGHTS COMMISSIONER

I held the position of Australian Human Rights Commissioner for 5 years (2000-05). One of my responsibilities was to conduct public inquiries into systemic human rights violations.

The human rights breaches of asylum seekers arriving by boat were the key issue of concern when I was appointed in 2000. The detention was mandatory, with no time limit, for all boat arrivals.

There was a report from the previous Commissioner documenting in detail the breaches of the International Covenant on Civil and Political Rights (ICCPR) by the Australian immigration laws. Although the report was tabled in Parliament, the government did not amend the mandatory detention laws.

After some consideration, I decided to focus on children in immigration detention and use the Convention on the Rights of the Child. When I announced the Inquiry in late November 2001, there were over 700 children, mostly Afghan, Iraqi and Iranian, in immigration detention centres. By December 2003, the average length of detention was one year, eight months and 11 days.

There were three key reasons for my decision to focus on children rather than to concentrate again on adult asylum seekers.

First, children had a different status in public opinion. They were not associated with the Islamic religion or culture of their parents but were perceived as blameless victims of unnecessarily harsh government detention policies.

Second, I decided to use the *Convention on the Rights of the Child*, not the ICCPR, because its provisions are particular about children's rights. For example, Article 37(b) stated that “*detention should be a measure of last resort and for the shortest appropriate period of time*”. The Convention also mandated that children have access to proper education and health services, be protected from all forms of physical and mental violence, and be able to practice their culture, language and religion.

Third, I also understood that the government would not implement any of my recommendations unless I won a public opinion battle with it. In 2001, about 65 per cent of Australians supported the government's mandatory detention policy.

Therefore, I decided to conduct my Inquiry in the open.

I invited public submissions, subpoenaed a significant number of documents from the Department of Immigration and called their senior officials to give evidence in public, visited, often drawing significant media interest, all the immigration detention centres, and conducted public hearings – all to educate the public about the fate of children in long-term detention. I took time to conduct the inquiry.

As a result, public opinion shifted dramatically. In 2004, well over 65 per cent of Australians were opposed to the mandatory detention of children.

In April 2004, I presented my Report to the Parliament. It concluded that *“Australian immigration detention laws/.../ are fundamentally inconsistent with the Convention on the Rights of the Child”* and recommended immediate release of children with their parents.

Following the tabling of my report, within a month, the government released all children with their families from mandatory detention. The government understood that there were clear electoral consequences of such a shift in public opinion.

To conclude, my story is just one of many examples of how international human rights law, along with associated diplomacy, education and community willpower, shapes global and domestic narratives and improves human rights observance worldwide.