



JUGGLING COMPETING NEEDS IN THE JUSTICE SYSTEM: A RULE OF LAW AND HUMAN RIGHTS PERSPECTIVE

*Justine Hanks
Education Manager
The Rule of Law Education
Centre*



THE RULE OF LAW

All people should be ruled by just laws
subject to the following principles:



The rule of law must be supported by informed and active citizens

01. THE RULE OF LAW AND HUMAN RIGHTS

You can't have one without the other

02. ACCUSED/ OFFENDERS

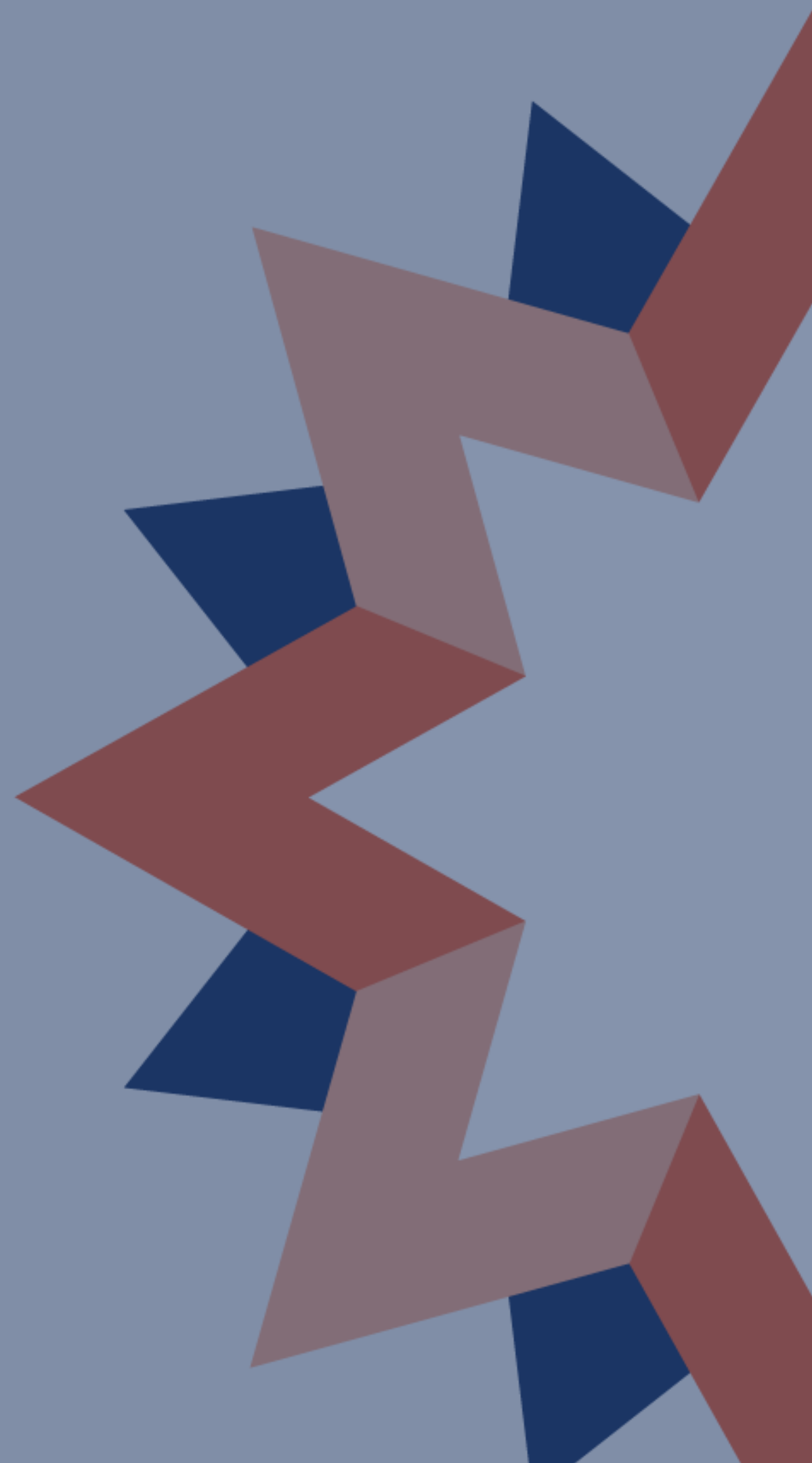
Case studies

03. COMPLAINANTS/ VICTIMS

Case Studies

04. SOCIETY/ COMMUNITY

Case Studies



“Whereas **it is essential**, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, **that human rights should be protected by the rule of law...**”

Universal Declaration of Human Rights:
Preamble

Universal Human Rights codes are a regulatory framework for states that provide common standards of achievement for their peoples

These are standards by which all nations can be measured and critiqued for their responsiveness to the common principles regardless of political system (and whether they have agreed to them or not)

Right

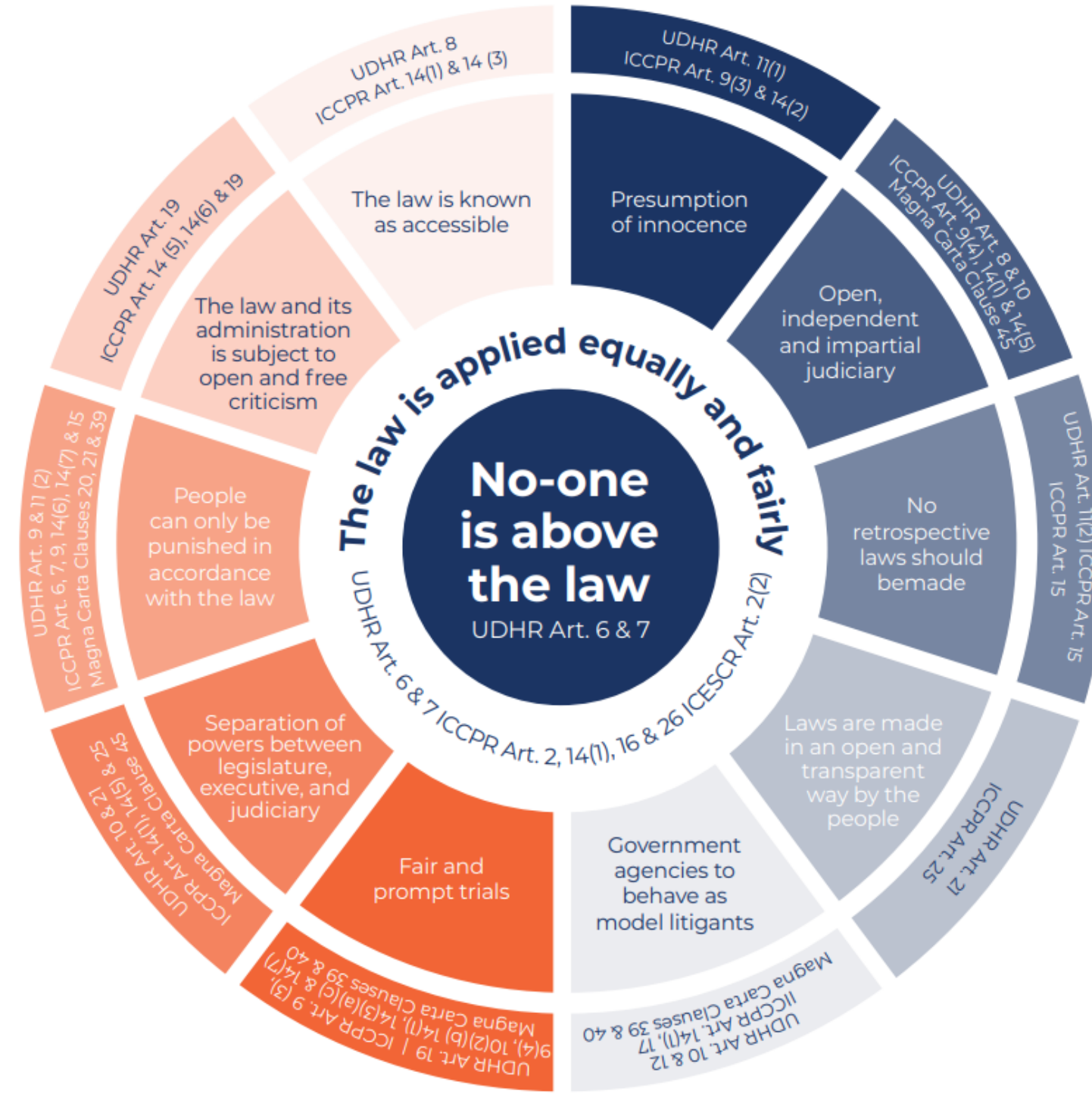
or

FREEDOM?



Human Rights are protected by The Rule of Law

The Magna Carta was the basis for contemporary human rights and established the Rule of Law. The Rule of Law principles provide the foundations for the protection and enforcement of human rights, and in turn, the principles are protected with human rights by International documents, such as the UDHR, the ICCPR and the ICESCR.



Human rights and the Rule of Law are protected and supported by the participation of informed and active citizens



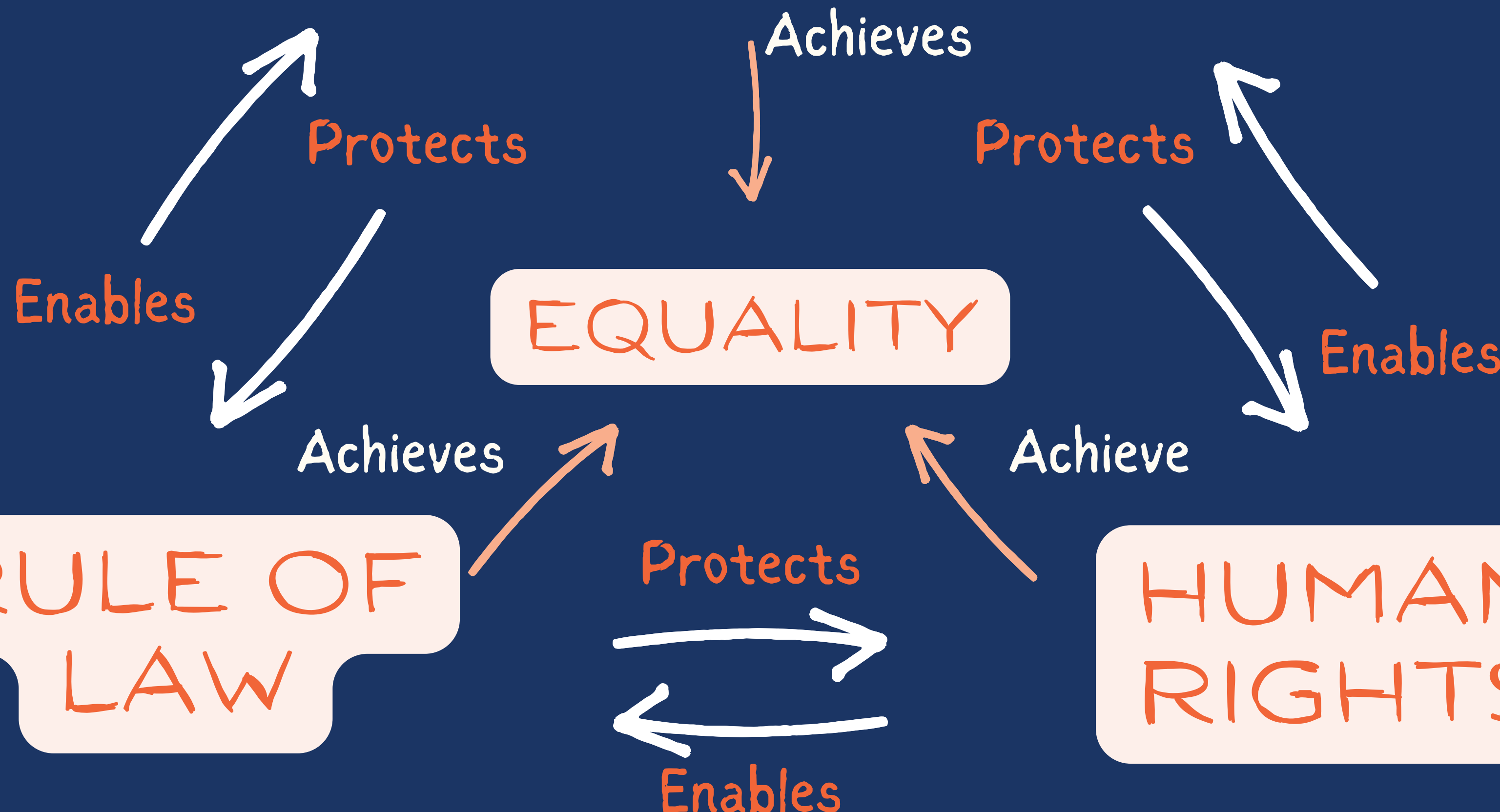


DEMOCRACY

EQUALITY

RULE OF LAW

HUMAN RIGHTS



HOW ARE HUMAN RIGHTS PROTECTED AND ENFORCED IN AUSTRALIA? POSITIVE LAW

Presumption of Innocence

Procedural fairness

Common Law

The Constitution

Statute Law

Explicit recognitions

Vote

Trial by Jury (C/W matters)

Freedom of religion

Acquisition of property on just terms

Discrimination on basis of state of residency

Implied recognitions

Freedom of political communication

Only courts can impose criminal sanctions

The Principle of Legality

'Somerset's Case' 1772 (UK)

Established fundamental rights on individual's status as a political subject

Teoh's Case [1995] HCA 20

Individuals entitled to fundamental rights where Aus is a signatory

Toonen v Australia [UNHRC]

Right to a private life

Australian Human Rights Commission Act 1986 (Cwlth)

Equal Opportunity Act 1977 (Vic)

Human Rights Acts (ACT, Qld, Vic)

Commonwealth Discrimination Acts - age, gender, race, disability

Family Law Act 1975 (Cwlth)

WHAT ARE THE OBSTACLES FOR HUMAN RIGHTS PROTECTION IN AUSTRALIA?

Political willingness for compliance and accountability (e.g. CPCAT, youth prisons and UNi Torture prevention body)

Party and political instability and smaller majorities makes law making and law reform challenging

Balancing competing needs in a multicultural,

Inadequate legislative protections

socio-economically diverse society with a complicated social history

Reduced participation in democratic processes

Government overreach restricting pursuit of remedies

No singular framework to provide consistency across the geographical jurisdiction eg QLD, ACT and Vic HR's Acts

What we often end up with in domestic policy terms is a form of Pareto optimality - efficient resource allocation, but we can't make someone better off without making someone worse off

Pareto Optimality

Domestic Law




International Law

NASH

EQUILIBRIUM

When we consider International Law, we often see a Nash Equilibrium with the legal norms established in ID's as the focus, where states choose to compliance if others do too.

WHOSE NEEDS ARE THE ARMS OF THE SEPARATION OF POWERS JUGGLING WITH RESPECT TO JUSTICE?



Accused persons/ offenders, victims/ complainants – how will upholding these rights impact on the other party? Will those decisions have implications on future parties?

Differing social groups (gender, race, age, culture, income level), current and future community members – when we cater to one group, are/ how are other groups impacted? Negatively or positively? The needs of groups are prioritised based on social conventions and political interests of the time

Community – local, domestic, global – what scale impact will a decision have? Dependent on the decision maker

EQUALITY BEFORE THE LAW ASSISTS IN MEETING HUMAN RIGHTS OBLIGATIONS

People can only be punished in accordance with the law
UDHR Art 11

Historical Child Sexual Offences
Lam v R [2024] NSWCCA 6

CDO's and ESO's

ESO's
R v Benbrika
Attorney General of the Commonwealth of Australia v Ghazzawy (Final) [2024] NSWSC 208

Presumption of Innocence
Bail

CDO's
R v Butterfield

Bugmy Directions
Bugmy v the Queen (2013) 249 CLR 571 [2013] HCA 37

Consent Laws

Unintended effect of shifting the the burden of proof?

Presumption of innocence

Issues of compliance - the law is known and accessible

Judicial discretion

No sentencing alternatives. Standard NPP of 7 years (effectively a mandatory sentence)

No Body No Parole
R v Dawson [2022] NSWSC 1632

Article 15 ICCPR

No retrospective laws should be made

Prosecution of sexual assault matters with contrary evidence
R v DS [2022] NSWDC 441
R v Martinez [2023] NSWDC 552

Judicial advocacy in costs decisions met by complaints by ODPP to JCA

Consideration of disadvantage and significance of culture - lessened moral culpability

Costs awarded in both cases

Vulnerable persons - LEPRA, questioning, evidence
R v Blake [2021] NSWDC 536

Fairness, the law is known and accessible

Accused/ Offenders

Complainants/ Victims

Fairness, Equality for victims of 'uncommon' crime

Historical Sexual Offences
Lam v R [2024] NSWCCA 6

Victim's rights
Society's rights

Just outcomes for victims

Responsiveness of the law to issues presenting a lengthy time after the fact

Justice - opportunities for appeals, reviews and remedy

ICAC and Government Overreach
Kazal v Australia [2023] UNHRC

Individual rights v society's rights

Fair and prompt trial

Right to privacy, family, home, unlawful attacks on honour and reputation

UDHR Art. 8
ICCPR Art. 2 (3)(a)(b)(c)
ICCPR Art 17

AI Use in the justice system - USA
Facial recognition for apprehension - Robert Williams
Judgements for minor matters and judicial time saving
Use of by AI lawyers - Mata v Avianca 2023
AI legal representation

Article 17 ICCPR

Right to privacy and rights to security of the person

Fair and prompt trial

Right to privacy, family, home, unlawful attacks on honour and reputation

Will the rights of the individual be represented by a non-discretionary system?

Resource efficiency

Right to privacy and rights to security of the person and bodily integrity

Consent Laws

Articles 9 & 17 ICCPR
Article 12 ICESCR

Right to enjoyment of highest attainable standard of physical and mental health

Society/ Community

Equality before the law
ICESCR Article 7(d)

Improved fairness and
equality

The Closing Loopholes Bills

e.g *Fair Work Amendment
(Right to Disconnect) Bill
2023 (Cwlth)*

Following lead
of France and
Italy (2017)

Promotion and
enforcement

Issues of compliance and non-compliance in Human Rights

Effectiveness of legal
measures in protecting
human rights

The role of law reform in protecting Human Rights

In conflict with
*Charter of Human
Rights and
Responsibilities Act
2006 (Vic) s12*

Covid-19 legislation

e.g Victoria

Where is the line
between protections and
freedoms? Who decides
and how?

Intergenerational
equity and promotion
and protection of
socioeconomic rights
needed to support RoL
principles

Effectiveness of
International
response?

Environment and Culture

*Billy and Ors v Australia
[2023] UNHRC*

UDHR Article 8

Right to
privacy, family
and the home

Present and
future rights

Conflicting types of
individual rights and
collective rights

Get in touch...

w: www.ruleoflaw.org.au

e: justine@ruleoflaw.org.au

education@ruleoflaw.org.au