

**THE ABORIGINAL WAY FORWARD:  
REVERSE DISCRIMINATION  
OR  
SELF-DETERMINATION?**

by

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This sub-thesis is all my own work  
and all sources have been acknowledged.

..... Pamela Ditton .....

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## CHAPTER I

### INTRODUCTION

This sub-thesis utilises three case studies concerning contemporary Aboriginal<sup>1</sup> issues in Central Australia as vehicles for an examination of whether the existing anti-discrimination regime, both within Australia and internationally, provides adequate and appropriate protection for the Aboriginal groups.<sup>2</sup>

Chapter II looks at each case study separately, and draws out the issues that makes it difficult for each of them, for somewhat different reasons, to find a secure niche within the existing legal regime. The first example concerns Anangu Pitjantjatjara<sup>3</sup> and the Pitjantjatjara Council Incorporated,<sup>4</sup> who have together resolved to implement seemingly draconian measures to solve the alcohol problem. The second example focuses on the Central Australian Aboriginal Congress,<sup>5</sup> which runs the Aboriginal medical service in Alice Springs, and is trying to ensure that Aboriginal women can give birth in a culturally appropriate setting, involving inter alia all staff, including medical, being women. To understand the third example it is necessary to appreciate that community local government has recently been introduced in the Northern Territory. Aboriginal communities are now being encouraged to adopt community

<sup>1</sup> "Aborigine" is used throughout this sub-thesis as meaning "Australian Aborigine".

<sup>2</sup> It is not within the scope of this sub-thesis to assess whether or not the proposals discussed in the case studies are morally desirable, or likely to succeed.

<sup>3</sup> A body corporate, comprising all Pitjantjatjara peoples, created under the Pitjantjatjara Land Rights Act 1981 (SA), hereafter called the "Pitjantjatjara Act".

<sup>4</sup> A body now incorporated under the Associations Incorporation Act 1985 (SA). Its membership embraces certain Aboriginal communities in areas of the Northern Territory, South Australia and West Australia. Hereafter referred to as "Pitjantjatjara Council".

<sup>5</sup> A body incorporated under the Associations and Incorporations Act 1976 (NT). Hereafter referred to as "Congress".

government schemes. The Central Land Council<sup>4</sup> is considering whether such schemes can limit the franchise to Aboriginal residents.

Chapter III commences with an investigation of the associated concepts of "equality before the law" and "the equal protection of the laws". These principles of formal equality, namely that like cases must be treated alike, have been analysed by philosophers and lawyers since the time of Plato<sup>7</sup> and Aristotle<sup>8</sup>. During this century international human rights treaties have required States to proscribe discrimination based on race, gender and other grounds.<sup>9</sup> At the core of all these recent pieces of domestic legislation, which embody what has become known as "the anti-discrimination principle", lies the notion of equality. The chapter then focusses on the meaning of "discrimination" when used as a legal concept.

By the 1960s it was realised that "the anti-discrimination principle" could only go part of the way in guaranteeing equality. Attention shifted, especially in the USA, to whether equality could be promoted by taking measures that cause immediate inequality but lead in the end to the common good.

Chapter IV moves on to one form of reverse discrimination, namely reverse racial discrimination. Although it will be seen in chapter III that reverse discrimination has received substantial support in international law, that recognition has had

<sup>4</sup> A statutory instrumentality established under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) hereafter referred to as "the Land Rights Act (Cth)".

<sup>7</sup> Plato, Georgias 507E-508A (B Jowett trans 1892); Plato, Laws VI 757 (B Jowett trans 1892); Plato Phaedo 74 (B Jowett trans 1892); Plato, The Republic VIII 558 (B Jowett trans 1892).

<sup>8</sup> Aristotle Nicomachean Ethics Book 5 (W Ross trans 1925)

<sup>9</sup> Inter alia the International Convention on the Elimination of All Forms of Racial Discrimination 1969, hereafter referred to as the "Racial Discrimination Convention"; the International Covenant on Civil and Political Rights 1976, hereafter referred to as the "Civil and Political Rights Covenant"; the International Covenant on Economic, Social and Cultural Rights 1976; the Convention on the Elimination of all Forms of Discrimination Against Women 1979.

little influence on a raging debate about the morality, legality and utility of reverse discrimination taking place at the domestic level, particularly in the USA. This chapter opens with a survey of the main arguments for and against reverse discrimination, especially preferential hiring and admissions procedures for disadvantaged minority racial groups such as blacks. The arguments are firmly based in the liberal democratic principle of individualism and the underlying objective is to assimilate these minorities into the wealthier mainstream of society. The chapter concludes with a brief survey of the jurisprudence concerning the application of reverse discrimination to the indigenous people of both the USA and Canada.

In chapter V the focus shifts from the broad theoretical basis for anti-discrimination laws to the specific application of existing Australian law to the three case studies. This requires an examination of the Australian jurisprudence on "special measures" taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups, which are authorised by Article 1(4) and required by Article 2(2) of the Racial Discrimination Convention. Unfortunately the interpretation of both these articles is unclear. Section 8(1) of the Racial Discrimination Act 1975 (Cth)<sup>10</sup> excludes "special measures" from its prohibition of racial discrimination. As section 8(1) "special measures" are defined by direct reference to Article 1(4) they also present problems of interpretation.

These "special measures" were considered by the High Court in Gerhardy v Brown.<sup>11</sup> The issue was whether the permit system established under the Pitjantjatjara Act was inconsistent with the Racial Discrimination Act. Although all seven members of the Court upheld the legislation establishing the permit system, each gave a separate judgement and they left several difficult legal questions to be answered at a later date. It will be argued that "special measures" under the Racial Discrimination Act are best suited to legitimising temporary measures leading to economic

<sup>10</sup> Hereafter referred to as the "Racial Discrimination Act"

<sup>11</sup> Gerhardy v Brown (1985) 159 CLR 70; hereafter referred to as "Gerhardy".

advancement. Although it is possible to argue that the permit system validated in Gerhardy will lead to the advancement of Pitjantjatjara people, it is certainly not self evident. The decision may have reflected the desire of the Court to support an important aspect of the land rights legislation that had been so strenuously fought for by Aborigines.<sup>12</sup> However the Court may feel that in Gerhardy it pushed the concept of "special measures" to the limit. If that is so then a future court might well find that some of the measures discussed in chapter II go beyond that limit.

It is an irony that the much vaunted protections offered by the "anti-discrimination principle" now seem to pose an obstacle for indigenous groups, the members of which are, of course, among the individuals anti-discrimination laws were primarily designed to protect. However the limitations of the "anti-discrimination principle" have been identified in earlier part of this sub-thesis. Thus it is not surprising that in the last decade there have been moves by indigenous minorities worldwide to unite in demanding international recognition of new standards for their protection. They claim that the limited recognition of their particular situation within the present human rights regime is quite inadequate.

One of the major pivots on which indigenous demands hinge is recognition of their right to self-determination. This ill-defined concept is explored in Chapter VI, especially the concept of "progressive self-determination". This latter concept has sometimes, wrongly, been considered synonymous with the current Australian government policy of "self-management". Although self-determination is found to be, putting it at its highest, an emerging right for indigenous populations, it may, in the future, provide the only secure legal basis for measures such as those considered in this sub-thesis.

<sup>12</sup> Aboriginal Land Rights Commission, First Report (July 1973) Parl Pap 138; Second Report (April 1974) Parl Pap No 69 (Woodward Commission Reports); P Toyne & D Vachon, Growing Up the Country: the Pitjantjatjara Struggle for their Land (1984).

## CHAPTER II

### CENTRAL AUSTRALIAN ABORIGINAL INITIATIVES

#### 2.1 A Pitjantjatjara Strategy for Solving the Problems Caused by Alcohol Abuse

##### 2.1.1. Background

A plethora of reports has examined the "Aboriginal alcohol problem" in Central Australia.<sup>1</sup> Most of these reports have been written by non-Aboriginal researchers and government officials. Recently, especially in the Pitjantjatjara area, the alcohol problem is being linked to the petrol sniffing phenomenon which tends to affect the younger members of the communities.<sup>2</sup> The reports are united in seeing it as a tragedy although their analyses both as to the causes and to the solutions differ radically.<sup>3</sup>

There has been an interesting parallel in Canada. Like the Pitjantjatjara, the indigenous peoples in both the U.S.A. and Canada have recognised that excessive drinking is causing serious social difficulties, and have developed similar strategies to alleviate them. One strategy is to champion laws prohibiting

<sup>1</sup> These are a few of the more significant reports "Alcohol Use in the Northern Territory" NT Dept. Health Bulletin (1981) 31; House of Representatives Standing Committee on Aboriginal Affairs, Alcohol Problems of Aboriginals: Final Report Canberra AGPS (1977); M A Brady, A Study of the Impact of Alcohol Use on the Town of Tennant Creek, Northern Territory Darwin, NT Dept of Health (1984); K M Hazlehurst, "Alcohol, Outstations and Autonomy: An Aboriginal Perspective" Canberra, Australian Institute of Criminology (1985).

<sup>2</sup> This is a selection of the more significant studies on this subject, Senate Select Committee on Volatile Substance Fumes, Report on Volatile Substance Abuse in Australia Canberra, AGPS (1985); R D Morice & ors Petrol Sniffing Among Aboriginal Australians A Resource Manual Canberra, Australian Foundation on Alcoholism and Drug Dependence (1981); M A Brady and R Morice, "Defiance or Despair? Petrol-Sniffing in an Aboriginal Community" in J C Reid (ed) Body, Land and Spirit: Health and Healing in Aboriginal Society (1982); J H Downing, "Petrol Sniffing: Treating the Causes not the Symptoms" Aboriginal Health Work (1985) 9.

<sup>3</sup> A useful summary is contained in the detailed Reasons for Decision of Grubb J in the matter of the application by Marla Hotel/Motel & ors for a full publican's licence to be granted under the Licencing Act, 1967-1980 (SA), 23 March 1981.

alcohol on land within the jurisdiction of those peoples.<sup>4</sup> The legal challenges to sections of the Canadian Indian Act designed to deal with the drinking problem may foreshadow difficulties ahead for the Pitjantjatjara strategy that is outlined below.

The Indian Act in Canada made it an offence for "persons" to be intoxicated on a reserve. Although worded to apply to every "person", the Manitoba Court of Appeal found that in practical terms those sections would apply to the predominant group, namely, Indian persons.<sup>5</sup> The Court then struck down the offending section on the ground that under the Canadian Bill of Rights it constituted an inequality before the law based on race.<sup>6</sup> This decision alarmed many bands, particularly those in remote areas. They were very concerned that if the law was not valid they would have no means to control the serious alcohol problems which unfortunately exist on many reserves.<sup>7</sup>

The Indian Act has now been amended<sup>8</sup> to enable band councils, subject to the approval of band electors at a special meeting, to prohibit the sale or possession of intoxicants on reserves and to make it an offence for everyone, whether or not

<sup>4</sup> A D Slater & S L Albrecht, "The Extent and Costs of Excessive Drinking Among the Uintah-Ourah Indians" in H M Bahr & ors (eds) Native Americans Today New York, Harper & Row (1972) 358.

<sup>5</sup> R v Hayden [1983] 6 WWR 655, [1984] 1 CNLR 148.

<sup>6</sup> In reaching this decision the Court relied on R v Drybones (1970) SCR 282. See generally B Morse, M Sherry, W Taggart, for Chiefs of Ontario, Intoxicant By-Laws, The Indian Act and Indian Government (1986 unpublished) 2-3.

<sup>7</sup> Statement made by D Crombie, then Minister for Indian Affairs, 11 June 1984, when introducing amendments into the House of Commons, quoted by B Morse & ors, for Chiefs of Ontario, Intoxicant By-Laws, The Indian Act and Indian Government (1986 unpublished) 4.

<sup>8</sup> Bill C-31, An Act to Amend the Indian Act, came into force in 1986.

band members, to be intoxicated on a reserve.<sup>9</sup> Morse predicts that numerous court battles are likely to be fought before the judiciary clarifies the new law. He believes that the amendments may still violate the equality provisions in both the Bill of Rights and the Canadian Charter of Rights and Freedoms.<sup>10</sup>

The Pitjantjatjara claim that "self-determination requires that the voice of Aboriginal people be listened to and acted upon".<sup>11</sup> They are not the only group to take initiatives designed to curb alcoholism, but it is convenient to focus on the efforts of that group as a case study.<sup>12</sup>

In 1981 the Pitjantjatjara Act granted freehold title of a large portion of land, hereafter referred to as "the lands", in the north-west of South Australia, to Anangu Pitjantjatjaraku, a body corporate comprising all Pitjantjatjara.<sup>13</sup> The Minister can promulgate regulations under that legislation regulating matters such as alcohol. The situation is complicated by the fact that not all Pitjantjatjara communities live on the lands; some have their traditional land in West Australia and others in the Northern Territory. Some of the Northern Territory communities such as the Multitjulu Community at Ayers Rock have gained freehold title to part of their land under the Land Rights Act (Cth) that operates in the Northern Territory; other communities, such as the Imanpa Community who live near Mount Ebenezer

<sup>9</sup> The term "intoxicant" is very wide and, unlike the regulations under the Pitjantjatjara Act discussed below, could extend to petrol used for sniffing.

<sup>10</sup> Morse (1986), op cit n 6, 11-12, 31.

<sup>11</sup> Anangu Pitjantjatjara, Wamaku Tjukurpa: The Grog Story, attached to a Report to the Minister of Aboriginal Affairs on the Annual General Meeting of Anangu Pitjantjatjara, Ayers Rock (12 and 13 Oct 1983 unpublished); hereafter referred to as The Grog Story

<sup>12</sup> See generally J B Hedges, Community Justice Systems and Alcohol Control Report prepared for the Minister with Special Responsibility for Aboriginal Affairs, West Australia (March 1986 unpublished).

<sup>13</sup> "Pitjantjatjara" is used in this sub-thesis as in the Pitjantjatjara Act to include Yungkutatjara and Ngaanatjara.

Roadhouse, still have no secure title. All these communities are members of the Pitjantjatjara Council.<sup>14</sup>

## 2.1.2. Community opinion

During 1982 and 1983 an Anangu Pitjantjatjaraku field officer held many discussions and meetings with both individuals and communities. He found there was an overwhelming desire to ban "grog" from the communities. Statements he recorded form the basis of The Grog Story.

Listen everyone, the men and women are talking so that you will understand about grog. The people at Ernabella are talking about perhaps wanting to ban grog. We are being ruined by that lousy stuff. Listen. Wine is making our kids skinny, as well as mothers and fathers, and killing them. We wish to stay alive. We are banning grog...<sup>15</sup>

Many individuals and communities felt it was acceptable for non-Aboriginal people to drink:

I think that after some heavy work it's all right for white people to drink, it's for them; from the time they were children, they've been drinking, they grow drinking. All the time we're seeing people with wine round here; they don't listen to us and drink it time and time again. We want to retain this strong place and the sacred law that came from it. Strong law came from this place, from this land; from right here, our dreaming law emerged, and spread over the land. And we're most dissatisfied when people bring grog here.<sup>16</sup>

But some Pitjantjatjara opposed anyone having alcohol on the lands, and it was this viewpoint that won out:

Now some of the white people want permits to make it alright for drinking. Aboriginal people will be looking and thinking like this: why is that whiteman able to sit in my country and drink? I am Ngururitja (owner) for this country!<sup>17</sup>

<sup>14</sup> See Ch I, n 4 above.

<sup>15</sup> Ibid

<sup>16</sup> Ibid Kutatju from Kuntajanu (a community on the lands).

<sup>17</sup> Ibid Stanley Kunamara

### 2.1.3. The strategy

In 1983 these discussions culminated in a joint meeting of Anangu Pitjantjatjaraku and Pitjantjatjara Council.<sup>18</sup> That meeting established a policy which is still in place:<sup>19</sup>

1. The Pitjantjatjara freehold lands should be declared a "dry area".
2. Regulations should provide that:
  - (a) Nobody (anangu or piranpa)<sup>20</sup> may bring grog on to the lands or consume grog there...<sup>21</sup>
3. Marla, Kulgera, Victory Downs, Mt. Ebenezer, Curtin Springs and Yulara Tavern/Hotels should not sell grog to anangu for consumption whether on or off the premises...<sup>22</sup>

The first and second sections of the policy have been implemented by Anangu Pitjantjatjaraku persuading the South Australian government to promulgate regulations under the Pitjantjatjara Act,<sup>23</sup> providing that, "no person shall while he is on any part of the lands bring, be in possession of or consume any liquor".<sup>24</sup> These regulations are similar to those that were challenged successfully in Canada. However, as Australia has no

<sup>18</sup> See Ch 1 n 4 & 5.

<sup>19</sup> Personal conversation with M Tehan, solicitor employed by Pitjantjatjara Council in May 1987.

<sup>20</sup> Anangu are Pitjantjatjara people but the term is often used to include all Aborigines. Piranpa are all people who are not Anangu.

<sup>21</sup> The resolution continues to deal with two aspects of the strategy that will not be dealt with in this sub thesis; firstly the particular situation of the miners at Mintabie and the staff at Granite Downs Station, secondly the penalties for breach of the proposed regulations.

<sup>22</sup> Victory Downs ceased trading as licensed premises in 1985.

<sup>23</sup> Regulations under the Pitjantjatjara Land Rights Act (SA) 1981 No 206 of 1984.

<sup>24</sup> Ibid Reg 3(1). This prohibition is subject to some minor exceptions in Reg 4-6. Although Reg 7 establishes a permit system under the absolute control of Anangu Pitjantjatjaraku no permits have been issued to date.

Bill of Rights or Charter of Rights and Freedoms, any legal challenge is likely to be mounted on the basis that the regulations are inconsistent with the Racial Discrimination Act.

The Pitjantjatjara Council has achieved partial success in implementing the third section of the policy, primarily by participating in proceedings under the licensing laws of the Northern Territory and South Australia. In one instance, the Pitjantjatjara community at Imanpa has gone so far as to purchase its local roadhouse partly to control the sale of alcohol to anangu.

#### 2.1.4. Marla Bore Hotel Motel

The Marla Bore Hotel Motel is in South Australia, relatively close to but outside the lands. In 1984 the licensee applied to the South Australian Licensing Court for an extension of its license to allow it to make takeaway sales of liquor (other than fortified wines) to bona fide travellers. The Pitjantjatjara Council lodged an objection to the granting of such a license unless it contained the additional condition that takeaway sales should not be made to travellers to the lands.<sup>25</sup> The matter was settled out of court and the licence was granted with the extra condition:

There shall be no sale or supply of any other liquor for carrying off the licensed premises to any person who is a resident of or travelling to any part of the Pitjantjatjara lands ...

So far there have been no legal challenges to this condition. However, as virtually everyone living on the lands is an Aborigine (except for a few health, education and other support staff) the question that must be asked is whether this condition is inconsistent with the Racial Discrimination Act. The Canadian ruling on the definition of "person" is clearly relevant here.

<sup>25</sup> Joint objection by Pitjantjatjara Council Inc, Yankunytjatjara Council (Aboriginal Corporation) and Iwantja Community Inc. 16 July 1984.

#### 2.1.5. Ernest Giles Tavern, Kulgera Hotel Motel and Curtin Springs Roadhouse

The Ernest Giles Tavern at Yulara, the major tourist resort near Ayers Rock, is close to the Multitjulu Community and not far (using local concepts of distance) from other Pitjantjatjara communities. As a result of objections by the Pitjantjatjara Council to the then Northern Territory Liquor Commission, this tavern's initial licence, granted in 1983, prohibited all takeaway sales. The licensee made a further application to the Commission and in February 1984 he was, despite vigorous objections, granted a full takeaway licence. The Pitjantjatjara Council responded by successfully applying for a writ of certiorari to quash that decision.<sup>26</sup>

Subsequently the Pitjantjatjara Council and the licensee reached agreement on the vexed issue of takeaway sales. The Pitjantjatjara Council agreed not to oppose the grant of a takeaway licence in exchange for a special condition being noted on the licence.<sup>27</sup> Accordingly the Northern Territory Racing, Gaming and Liquor Commission issued a takeaway liquor licence subject to a special condition being noted that an agreement "concerning restrictions on the sale of alcohol for consumption away from the premises" was reached between the parties.<sup>28</sup> The agreed restrictions are that there shall be no takeaway sales of any liquor to persons resident on or travelling to or through not only the lands, but also the Multitjulu living areas, the Imanpa

<sup>26</sup> Certiorari was granted on the ground that there was an error on the face of the record constituted by the Liquor Commission's failure in its Reasons for Decision to take into account the "needs and wishes" of the Aboriginal section of the community, as required by s 32(1)(d) of the Liquor Act (NT). Judgment of Muirhead J in the Supreme Court of the Northern Territory, No 436 of 1984, R v Liquor Commission of the Northern Territory & ors, ex parte Pitjantjatjara Council & anor 8 Nov 1984 (unpublished).

<sup>27</sup> Excluding the sale of fortified wine

<sup>28</sup> Liquor licence No 80303242 for Ernest Giles Tavern, 25 March 1987.

community<sup>29</sup> and certain areas in West Australia, namely the central reserves and the Petermann Aboriginal Lands.<sup>30</sup>

The Curtin Springs Roadhouse has a full takeaway license whereas the Kulgera Hotel Motel's takeaway licence excludes the sale of fortified wines. In both cases the Pitjantjatjara Council and the licensee reached agreement over takeaway sales. As requested, the then Northern Territory Liquor Commission noted an agreement, in the same terms as that in force at the Ernest Giles Tavern, on their respective liquor licences.<sup>31</sup>

#### 2.1.6. Mount Ebenezer Roadside Inn

A particularly interesting situation may be developing at Mt Ebenezer. Earlier this year the liquor licence was transferred to Lisanote Pty Ltd, which is operated by the Imanpa Community.<sup>32</sup> The previous licensee actively discouraged residents of Imanpa Community and other Aborigines from drinking in the bar.<sup>33</sup> Now that Imanpa Community controls the Roadhouse, it is considering not only maintaining the existing upper limit on takeaway sales of six cans of beer per person per day that applies to everyone, but also formalising the previous informal ban on anangu from drinking in the bar.<sup>34</sup> Of all the measures considered in this sub-section this is the most likely to be inconsistent with the Racial Discrimination Act.

<sup>29</sup> Imanpa Community is close to the Mt Ebenezer Roadhouse which, like Erldunda and Curtin Springs Roadhouses, is on the main road between Alice Springs and Ayers Rock.

<sup>30</sup> Letter 20 May 1985 Mildren Silvester & Partners to The Chairman, Northern Territory Liquor Commission.

<sup>31</sup> In addition both the Pitjantjatjara Council and Imanpa Community successfully opposed a takeaway liquor licence being granted to the Erldunda Roadhouse, which is also on the main road between Alice Springs and Ayers Rock, and was built after the resolution was made in 1983.

<sup>32</sup> Imanpa Community is incorporated under the Associations and Corporations Act 1976 (NT).

<sup>33</sup> Personal conversation with C Thornton, Community Adviser, Imanpa Community, May 1987.

<sup>34</sup> Personal conversation with M Tehan, solicitor, Pitjantjatjara Council, 24 May 1987.

## 2.2 A Central Australian Aboriginal Initiative to Establish a Culturally Appropriate Birthing Centre

The Northern Territory has not enacted any anti-discrimination laws, but the Sex Discrimination Act 1984 (Cth) applies to private employers. The legal question posed by the initiative discussed in this section is whether employing all female staff at the Alukura contravenes s 14(1)(b) of that Act: "it is unlawful for an employer to discriminate against a person on the ground of the person's sex ... in determining who should be offered employment".

In 1983 Congress<sup>35</sup> obtained funds from the Commonwealth Department of Health to:

document the beliefs, practices and preferences of the Aboriginal women in Central Australia about what is referred to in Aboriginal English as 'childbirth business' or 'borning'... Borning is primarily 'women's business', and the Aboriginal way is asserted in the single women's camp or the Alukura. Widowed, single and old women camp in the Alukura, and they are the custodians for Aboriginal women's law.<sup>36</sup>

When the Minister for Aboriginal Affairs was presented with the Borning Report he said he was extremely concerned about the maternal and neonatal mortality and morbidity rates among Aboriginal women and children. The Aboriginal Women's Task Force report shows the reason for that concern:

In 1982 the total [infant mortality] rate (which is inflated by the inclusion of deaths among Aboriginal infants) was 10.3 per 1,000 live births as compared with 38.3 for Northern Territory Aboriginal infants.<sup>37</sup>

The Commonwealth Minister for Health responded to The Borning Report by saying that:

<sup>35</sup> See Ch I, n 5 above.

<sup>36</sup> Central Australian Aboriginal Congress, Borning - Ampe Mbwareke Pmere Alaltye: The Congress Alukura By the Grandmother's Law (August 1985 unpublished report) 1; hereafter referred to as the "The Borning Report".

<sup>37</sup> Aboriginal Women's Task Force, Women's Business Report of the Aboriginal Women's Task Force, AGPS (1986) 138.

The importance of culturally specific obstetric practice has, I understand, been well established internationally, as has the need for the creation of a women's space within cultures, including that of white Australia.<sup>38</sup>

The Borning Report emphasises that "birthing is a cultural process, at the heart of a culture, which has far-reaching consequences for the life of a society."<sup>39</sup> It traditionally took place in a women's camp, the Alukura, separated from the main camp by distance and windbreaks. The pregnant woman would be assisted in the birth by special matrilineal kin. No men or children are allowed at the Alukura.<sup>40</sup>

Tribal Aboriginal women's attitude to their experience of giving birth in the Alice Springs Hospital is summarised by the title of chapter III of The Borning Report, "Passive resistance: 'The whitefellah way is shame, proper shame'".<sup>41</sup> They find "being attended by white male doctors, in compromising positions, is a gross cultural shame".<sup>42</sup>

The Borning Report made a series of recommendations, the major one being that the Commonwealth Government should fund a "Congress Alukura" which would be a place in Alice Springs, where Aboriginal women, with their chosen relatives, can have pregnancy care and normal deliveries, in a way consistent with their personal, cultural and social needs.<sup>43</sup> The final object of the Congress Alukura was to reduce the infant and maternal mortality and morbidity rates by methods that were culturally appropriate.<sup>44</sup> As a direct consequence of the cultural importance of

<sup>38</sup> Letter from N Blewett MHR, Minister for Health to J Liddle, Director of Congress, June 1985, quoted in The Borning Report.

<sup>39</sup> Central Australian Aboriginal Congress op cit n 36, 21.

<sup>40</sup> Ibid 24.

<sup>41</sup> Ibid 42.

<sup>42</sup> Ibid

<sup>43</sup> Ibid 95, 80.

<sup>44</sup> Ibid

the Congress Alukura being a women's place, all the staff, including medical practitioners, must be women.<sup>45</sup>

### 2.3. Local Government on Aboriginal Land in the Northern Territory

#### 2.3.1. Recognition of political rights at a local level

This initiative (described in detail in 2.3.2.) involves a suggestion that a racial minority, namely non-Aboriginal residents within certain Northern Territory Community Government Scheme areas, should not have voting and/or membership rights.

It will not be easy to justify this proposal to limit the political rights of non-Aborigines if it is challenged as inconsistent with the Racial Discrimination Act. It has been said that:

to deny a substantial racial minority the right to vote is, whatever the rationalisations offered to support it, a failure to offer even formal, much less substantive, equality.<sup>46</sup>

Political participation plays a key role in sustaining democracies. Aborigines waged a lengthy struggle to gain full rights as Australian citizens, and to gain the right to vote.<sup>47</sup>

<sup>45</sup> Ibid 72.

<sup>46</sup> Ibid 1083. See also D Partlett, "Benign Racial Discrimination: Equality and Aborigines" (1979) 10 F L Rev 238, 253. In the USA the Supreme Court has defined fundamental human rights to include voting, Reynolds v Sims 377 US 533 (1964). See also M F Rice, "The Discriminatory Purpose Standard in Racial Discrimination Litigation from Yick Wo to Arlington Heights" (1984) 10 S U L Rev 241; P Westen, "The Empty Idea of Equality" (1982) 95 Harv L R 537, 563-564.

<sup>47</sup> They were not granted citizenship until the Constitution was amended by a referendum in 1967, s 51(xxvi) Constitution Act. Indigenous minorities in other countries do not have the right to vote: see Report of Committee on the Elimination of Racial Discrimination. This Committee was established under Part II of the Racial Discrimination Convention. Its function is to report annually to the General Assembly of the United Nations on its activities and it may also make suggestions and recommendations based on its examination of reports received from States Parties. Report cited by A D Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of the Supreme Court View" (1978) 62 Minneapolis L Rev 1049, 1082.

The importance of universal suffrage has been recognised in Article 21 of the Universal Declaration of Human Rights 1948:

1 Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives...

2 The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage...

Article 25 of the Civil and Political Rights Covenant makes it abundantly clear that this guarantee of a democratic system extends to the local and regional level:

Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 <sup>[48]</sup> and without unreasonable restrictions:

... (b) To vote and be elected at genuine periodic elections ... guaranteeing the free expression of the will of the electors;...

In short, a denial of the right of non-Aborigines to vote would, if adopted, almost certainly be viewed both by civil libertarians and lawyers as a more serious infringement of these residents' human rights than would be the refusal to allow access of one racial group to the bar of a remote roadhouse, or the refusal by one, small, organisation to employ male medical staff.

### 2.3.2. Aboriginal community government in the Northern Territory

In 1974 the Aboriginal Land Rights Commission reported:

It is important that Aboriginal communities should have as much autonomy as possible in running their own affairs. They should receive, without having to account for them except by way of audit, the necessary funds to cover all administrative and other normal recurrent expenditures...<sup>49</sup> (emphasis added)

<sup>48</sup> Race is one of the distinctions mentioned in Article 2.

<sup>49</sup> Aboriginal Land Rights Commission, First Report (July 1973) Parl Pap 138; Second Report (April 1974) Parl Pap No 69 (Woodward Commission Reports) para 58.

When making that recommendation Woodward J must have had in mind the type of Aboriginal councils then operating in the Northern Territory. Those were largely community councils incorporated under the Associations Incorporation Act 1976 (NT). The membership provisions varied, but it was usual for membership to be limited to Aboriginal adults, sometimes with additional requirements as to residence in a particular area. Mowbray has accused these councils of merely being used by the government "largely as a means of assimilation and social control".<sup>50</sup>

The rhetoric now coming from Northern Territory government ministers certainly indicates a shift in the direction recommended by Woodward J.<sup>51</sup> It is interesting to note that these ministers seem to use the terms "self-determination" and "self-management" interchangeably.<sup>52</sup>

In 1985 the Minister for Community Development, speaking of community government, told the Legislative Assembly that:

We are trying to provide meaningful self-determination for many Aboriginal communities so that they will be responsible for their own budgets and the development of capital works programs within their own areas...<sup>53</sup>

Equally, the Chief Minister, when discussing community government in his 1985 budget speech said "the new administrative arrange-

<sup>50</sup> M Mowbray, "State Control or Self-Regulation?: On the Political Economy of Local Government in Remote Aboriginal Townships" (1986) 2 Australian Aboriginal Studies 31, 32. See generally H Rumley, Aborigines, Local Government and Incorporated Associations in Western Australia, Discussion Paper No 13, Canberra, Human Rights Commission (1986).

<sup>51</sup> This sub-thesis focusses on one aspect of the scheme. The Central and Northern Land Councils in M Mowbray, Report for the Central and Northern Land Councils - Black and White Councils: Aborigines and Local Government in the N.T. (July 1986 unpublished) have found that, generally, the rhetoric is not justified. See also B W Morse, Aboriginal Self-Government in Australia and Canada Kingston, Ontario, Institute of Intergovernmental Relations (1984).

<sup>52</sup> The significance of this distinction is considered in Chapter 6.

<sup>53</sup> Northern Territory Legislative Assembly Debates, 13 Nov 1985.

ments are a significant step forward in the process of self-management [for Aboriginal communities]".<sup>54</sup>

The legislative base for community government is contained in Part VIII of the Local Government Act 1985 (NT).<sup>55</sup> The Northern Territory government is enthusiastically promoting this scheme in Aboriginal communities,<sup>56</sup> including those that hold freehold land under Aboriginal Land Trusts as a result of successful claims made under the Land Rights Act (Cth).<sup>57</sup>

### 2.3.3. Voting and membership provisions

S 239 of the Local Government Act 1985 (NT) provides that a community government scheme may make provision for or in relation to:

(j) the eligibility of persons to be members;

(k) the eligibility of persons to vote at elections;

Ultimately, after the prescribed procedures have been followed, the Minister has the power under s 250 to approve, reject or modify the local government scheme proposed for a particular area. The Minister of the Department of Community Development has described the scheme as providing "meaningful self-determination", but it is not clear how this can be reconciled with the following statement in the leaflet issued by that Department:

<sup>54</sup> Northern Territory Legislative Assembly, 1985, 24-25.

<sup>55</sup> Hereafter referred to as "the Local Government Act".

<sup>56</sup> Mowbray, op cit n 50, 31.

<sup>57</sup> The Land Rights Act (Cth) establishes a detailed scheme of management for land subject to an Aboriginal land trust. There is a real question as to whether this scheme can be reconciled with the Northern Territory community government scheme where it purports to operate within an Aboriginal land trust area. It is arguable that there is actual contrariety between the two schemes of management constituting "direct" inconsistency, and if that is so then the legislation is beyond the power of the Northern Territory legislature and void. However this argument is beyond the scope of this sub-thesis and it will be assumed that the legislation is valid.

when he [the Minister] is satisfied that the people in the area have chosen the best scheme for their community, he will usually give his approval for the community to set up a Community Government Council.

The Minister has accepted a range of Community Government Schemes for areas held by Aboriginal land trusts. In Lajamanu voting is open to anyone over the age of 18, subject to a three month residence period, but council membership is limited to persons over 21 years with a five year residence period.<sup>58</sup> In Angurugu both voting and membership are open to people over 18 years subject to a six month residence period.<sup>59</sup> In Wallace Rock Hole voting is open to residents who are on the electoral roll and non-resident traditional owners of the area, whereas membership is subject to those conditions and a six month residence period.<sup>60</sup> Finally, Yuendumu Community is considering a draft scheme which would allow all residents on the electoral roll to vote, but membership of the council would require an additional two year residence period.<sup>61</sup> An unusual twist is that the composition of the proposed council is to be eight men and eight women, one from each of the eight male and eight female "skin groups". Many non-Aboriginal residents at Yuendumu acquire a "skin group". The draft scheme does not specify whether the members from each skin group must be Aboriginal. The hidden agenda behind a five year residence period may well be to ensure that the largely transient non-Aboriginal population will not be eligible for council membership. Whether the Yuendumu scheme is merely intended as a power sharing arrangement reflecting traditional social arrangements, or whether it is also designed as an ostensibly colour-blind mechanism for excluding non-Aborigines from membership is not clear.

<sup>58</sup> Lajamanu Community Government Scheme, clauses 6 and 11.

<sup>59</sup> Angurugu Community Government Scheme Clauses 6 and 12.

<sup>60</sup> Wallace Rockhole Community Government Scheme clauses 7 and 13.

<sup>61</sup> Draft Yuendumu Community Government Scheme clauses 6, 7 and 14, 16 July 1986.

Leaders of Aboriginal communities who are considering whether to apply for a community government scheme have raised a further possibility with legal officers and a consultant from the Central Land Council: can all non-Aboriginal residents, such as police and teachers, be denied the right to vote or to be members of a community government council?<sup>42</sup>

In 1976 the Commonwealth, using its legislative power under section 51(xxvi) of the Constitution, enacted the Aboriginal Councils and Associations Act 1976 (Cth).<sup>43</sup> Mowbray claims that the Northern Territory scheme under discussion is a less liberal variation of councils under that legislation.<sup>44</sup> It should be noted that under the Commonwealth legislation only Aborigines can vote, or stand for office, in council elections.<sup>45</sup> In fact no councils have been incorporated under the Commonwealth legislation, and it is unlikely that they will be by the Hawke government.<sup>46</sup> Assuming the constitutionality of this legislation, it is paradoxical that the Commonwealth can create a scheme which if established by a State or the Northern Territory, might well be inconsistent with the Racial Discrimination Act.

Ironically, although the then Human Rights Commission described Aborigines in Queensland as having "fewer rights at law than other Queenslanders" and as being "subject to an Orwellian-type scrutiny that the rest of the community would not tol-

<sup>42</sup> Personal conversation with M Mowbray, ex-consultant, Central Land Council, March 1987.

<sup>43</sup> See generally for criticism of that legislation B A Keon-Cohen, "Native Justice in Australia, Canada and the USA: A Comparative Analysis" (1981) 7 Mon U L Rev 250, 283-284; P Hanks, "Aborigines and Government: the Developing Framework" in P Hanks & B Keon-Cohen (eds) Aborigines and the Law (1984) 19, 25-26; Rumley, op cit n 50, 100-105.

<sup>44</sup> Mowbray, "State Control", op cit n 50, 33.

<sup>45</sup> S 21(4) and s 25(3).

<sup>46</sup> See Rumley, op cit n 50, 104-106 for discussion of reasons why no councils have been incorporated and why the government is unlikely to set any up in the future.

erate",<sup>47</sup> one aspect of the Community Services (Aborigines) Act 1984 (Qld) may provide positive discrimination for Aborigines. The then Human Rights Commission found that although all adult residents, whether or not Aborigine, had the franchise, only Aboriginal residents could stand for election.<sup>48</sup> The Commission went on to consider whether this was discrimination under the Racial Discrimination Act and further whether it was saved as a "special measure" under that Act, but failed to reach a conclusion.<sup>49</sup>

This sub-thesis must, when considering the existing and suggested limitations of political participation under various Northern Territory community government schemes, consider the Commission's concerns, taking into account the fact that Gerhardy was decided after the Commission wrote the report.

<sup>47</sup> Miller, The Aspirations of Aborigines Living at Yarrabah in Relation to Local Management and Human Rights Discussion paper No 7, Canberra, Human Rights Commission (1986). See also Nettheim, Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law (1973) and Nettheim, Victims of the Law - Black Queensland Today (1981) Ch 8.

<sup>48</sup> Human Rights Commission, op cit n 67, 9. In May 1987 the draft regulations referred to have not been proclaimed.

<sup>49</sup> Ibid 9-11.

## CHAPTER III

### EQUALITY AND DISCRIMINATION

#### 3.1 Formal Equality and the "Anti-Discrimination Principle"

"Treating everyone equally" is to treat Aborigines fairly by their own standards and according to their priorities.<sup>1</sup>

##### 3.1.1. The link between "equality" and "non-discrimination"

This chapter commences with a summary of the origins of all anti-discrimination laws and concludes with an examination of how the term "discrimination" has been construed in international law. This theoretical discussion of the concepts underlying the present Australian law on reverse racial discrimination assists in understanding the strengths and limitations of that law when applied to the facts of the three case studies described above.

At the opening of the World Conference to Combat Racism and Racial Discrimination in 1978 it was said that:

Of all human rights, the right to equality is one of the most important. It is linked to the concepts of liberty and justice, and is manifested through the observance of two fundamental and complementary principles of international law. The first of these principles, that "all human beings are born free and equal in dignity and rights," appears in the 1948 Universal Declaration of Human Rights; the second, the principle of non-discrimination, has been solemnly reaffirmed in Article 1 of the Charter of the United Nations. It is upon those two principles that all the instruments on human rights adopted since 1945 are based.<sup>2</sup>

The writer accepts the premise put forward in the speech, that "the principle of non-discrimination" is a manifestation of the "right to equality". Partsch sees the "principle of non-discrimination" not as a separate human right but as a "corollary

<sup>1</sup> C Holding, "Directions in Aboriginal Affairs" Address to National Press Club, Canberra (13 September 1985, unpublished).

<sup>2</sup> Address by the head of the Federal Political Department of Switzerland, Report of the World Conference to Combat Racism and Racial Discrimination, UN Doc A/Conf 92/40 Annex IC (1979), see also H Lauterpacht, An International Bill of the Rights of Man (1945) 115.

to the rights of equal protection before the law".<sup>3</sup> Other writers have referred to the "anti-discrimination principle" as modifying or mediating the "right to equality"<sup>4</sup> It is therefore logical to start an examination of the legal concept of "discrimination" with at least a cursory consideration of what is meant by "equality".

### 3.1.2. Equality before the law and equality in the law

Plato and Aristotle were the first to proclaim that likes should be treated alike.<sup>5</sup> This belief has dominated Western thought since the end of the eighteenth century,<sup>6</sup> and has become known as the Diceyan concept of "equality before the law":

Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals.<sup>7</sup>

In the nineteenth century Anatole France graphically expressed the same idea:

The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.<sup>8</sup>

However, as Aristotle recognised, this concept could not

<sup>3</sup> K J Partsch, "Fundamental Principles of Human Rights and Self Determination, Equality and Non Discrimination" in K Vasak (ed) The International Dimensions of Human Rights Vol 1 (1982) Unesco, Connecticut, USA, Greenwood Press 61. Contra P Westen, "The Empty Idea of Equality" (1982) 95 Harv L R 537, 548.

<sup>4</sup> O M Fiss, "Groups and the Equal Protection Clause" in Cohen, Nagel & Scanlon (eds) Equality and Preferential Treatment New Jersey, USA, Princeton University Press (1977) 84, 95; M Rosenfeld, "Affirmative Action, Justice, and Inequalities: A Philosophical & Constitutional Appraisal" (1985) 46 Ohio State L J 845, 875.

<sup>5</sup> See above Ch 1, n 7 & 8.

<sup>6</sup> G Dietze, "Right Rights" (1980) Amer J of Jurisprudence 38, 41.

<sup>7</sup> Dicey, An Introduction to the Study of the law of the Constitution (10th ed 1959) 193.

<sup>8</sup> J Cournos, A Modern Plutarch (1928) 27.

mean that all people must be treated equally.<sup>9</sup> If it had, the law could not grant maternity leave to pregnant women, pensions to the elderly, and special privileges to war veterans. "Equality before the law" has been referred to not so much as a principle of equality but of non-arbitrariness, requiring individuals who are equal according to relevant criteria to be treated equally.<sup>10</sup> It can be reduced to "the principle of legality, of lawfulness, which is immanent in every legal order ... it has nothing to do with justice at all".<sup>11</sup>

In a world where people have different needs, an equal distribution of all social goods would lead to an unequal treatment of people according to their needs.<sup>12</sup> Conversely, if social goods were distributed according to need, they would inevitably be unequally distributed. This means that some criteria must be used to decide which people will be treated equally. To that extent, "equality in the law" has been achieved if a particular legal system chooses relevant criteria to adjudicate on the distribution of social goods.<sup>13</sup> The difficulty, and one that permeates chapter IV of this sub-thesis, is to identify those criteria, or at least determine how they should be

<sup>9</sup> Aristotle was concerned with establishing justitia commutativa and justitia distributiva.

<sup>10</sup> W Sadurski, Giving Desert its Due: Social Justice and Legal Theory Dordrecht, D Reidel (1985) 78. See also for discussion of Aristotle's use of "distributive justice" B Williams, "The Idea of Equality" in P Laslett & W C Runciman (eds) Philosophy, Politics and Society (1962) 110, 120; H Deane, A, "Justice - Compensatory and Distributive" in M Mooney & F Stuber (eds) Small Comforts for Hard Times: Humanists on Public Policy New York, Columbia University Press (1977) 15-16.

<sup>11</sup> H Kelsen, What is Justice? Berkeley, Uni of Cal Press (1971) 15.

<sup>12</sup> J Kaplan, "Equal Justice in an Unequal World: Equality for the Negro - the Problem of Special Treatment" (1966) 61 NW U L Rev 363, 365.

<sup>13</sup> See generally M Rosenfeld, op cit n 4, 845; B Williams, "The Idea of Equality" in P Laslett & W C Runciman (eds) Philosophy, Politics and Society (1962) 110, 120-121; G Evans, "Benign Discrimination and the Right to Equality" (1974) 6 F L Rev 26, 51-53.

identified. In this respect it has been argued that there are no objective and non-controversial standards of relevance.<sup>14</sup>

An illustration in point was given in a speech by the then Minister for Aboriginal Affairs in which he referred to a poll showing that most Australians considered that "everyone should be equally treated" and that special government programmes for Aborigines gave them something to which they were not entitled.<sup>15</sup> He pointed out that when:

people say "treat everyone equally" - they mean "treat everyone according to white, European standards". Well, Aborigines don't see that as equal treatment.<sup>16</sup>

Both Evans and Partlett have considered the theoretical problems involved in reconciling claims to preferential treatment by Aborigines with the concept of equality.<sup>17</sup> Evans's article was written prior to the passage of the Racial Discrimination Act, whereas Partlett's article takes the Racial Discrimination Act into account, but is pre-Gerhardy. Both use as a starting point the criterion of relevance.<sup>18</sup> This sub-thesis takes a similar approach to a similar topic, and the writer acknowledges the assistance she has derived from both articles.

The type of programmes considered by Evans and Partlett involved massive financial aid to Aborigines, such as free legal services, special health services, housing grants and sub-

<sup>14</sup> Sadurski (1985) op cit n 10,91; G Marshall, "Notes on the Rule of Equal Law" in Pennock & Chapman (eds) Equality, Nomos IX New York, Atherton Press (1967) 267-269. Cf W McKean, Equality and Discrimination under International Law Oxford, Clarendon Press (1983) 267. P Westen, op cit n 3, 537 goes further and argues that the principle of equality is so empty of content that it should be abandoned.

<sup>15</sup> Holding, op cit n 1, 2.

<sup>16</sup> Ibid 6.

<sup>17</sup> Evans, op cit n 13, 26; D Partlett, "Benign Racial Discrimination: Equality and Aborigines" (1979) 10 F L Rev 238.

<sup>18</sup> Evans, ibid, 38; Partlett, ibid, 247.

sidies.<sup>19</sup> Evans reached the conclusion after considering the jurisprudence from the United States and Canada that, on balance, Australia should support such programmes.<sup>20</sup> Partlett went further, and found them "an indispensable requirement for the promotion of equality for Aborigines".<sup>21</sup>

This sub-thesis has consciously chosen to examine aspects of three specific programmes, each quite different from the Evans-Partlett economic aid type programmes. The Congress Alukura intends to employ an all-women staff regardless of how the project is funded. Equally, government financial support is not an issue in the proposals to limit non-Aboriginal residents' political rights in community government schemes on Aboriginal land, and to restrict Pitjantjatjara people's access to alcohol. Again, the main question is: what are the criteria the Australian legal system utilises when judging these initiatives? Theorists like Rawls also try to answer the next question, which lawyers find unanswerable: do these criteria accord "equality in law"?

### 3.1.3. Equality for individuals and groups?

According to classical liberalism, political rights have less intrinsic importance than individual freedoms. This postulate was accepted by the acclaimed liberal theorist Rawls, in his influential work, A Theory of Justice,<sup>22</sup> in which he constructed the latest in a series of social contract theories.<sup>23</sup>

<sup>19</sup> Although Evans includes "conferring of title to traditional land" in his list he concentrates on programmes requiring economic aid, ibid 27.

<sup>20</sup> Evans, ibid 241.

<sup>21</sup> Partlett, op cit n 17, 286.

<sup>22</sup> J Rawls, A Theory of Justice Oxford, Clarendon Press (1972).

<sup>23</sup> Many publications examine this work, see generally W Runciman, Relative Deprivation and Social Justice (1966) 265-266; G Hughes, "Reparations for Blacks?" (1968) 43 New York U L Rev 1063, 1066-1069; R A Nisbett, "The Costs of Equality" in M Mooney & F Stuber (eds) Small Comforts for Hard Times: Humanists on Public Policy New York, Columbia University Press (1977); Partlett, op cit n 17, 238; W Sadurski "Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case That (continued...)

His criteria of relevance are based on a fundamental notion of justice as fairness to individuals:

Social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular the least advantaged members of society.<sup>24</sup>

Rawls sees the human race as being divided into societies, and lends unswerving support to the democratic system. This leads him to oppose any form of elite or minority rule:

No special weight is or should be given to ... the votes of those who let it be known that their being in the minority will cause them great displeasure.<sup>25</sup>

Unfortunately his social contract theory does not mention the existence of sub-groups within societies, whether racial, linguistic, national or religious; he only recognises individuals and societies. "Societies" are assumed to be sovereign states. Van Dyke attacks Rawls's theory, and contends that, "to be satisfactory a theory of justice must concern itself with groups as well as with individuals."<sup>26</sup>

Rawls has recently elaborated his theory of "justice as fairness" to take into account pluralism as a permanent feature of the public culture of modern democracies.<sup>27</sup> He assumes that within societies, opposing religious, philosophical and moral doctrines will involve "conflicting and indeed incommensurable comprehensive conceptions of the meaning, value and purpose of

<sup>23</sup> (...continued)

Wasn't" Vol 11 Syd L R (March 1986) 5. A H Goldman, Justice and Reverse Discrimination Princeton, New Jersey, Princeton University Press (1979).

<sup>24</sup> Ibid 14-15.

<sup>25</sup> Ibid 361.

<sup>26</sup> V Van Dyke, "Justice as Fairness: For Groups?" (1975) 69 American Political Science Review 607. See also J Sigler, Minority Rights: A Comparative Analysis London, Greenwood Press (1983) 184-186.

<sup>27</sup> J Rawls, "The Idea of an Overlapping Consensus" (1987) Vol 7 No 1 Oxford Journal of Legal Studies 1, 4.

human life..."<sup>28</sup> His purpose is to examine how such societies can achieve stability and social unity by the public recognition of a reasonable political conception of justice.<sup>29</sup> His solution is an "overlapping consensus", by which he means more than a mere modus vivendi, which may lack stability. An "overlapping consensus" has three aspects: the object of the consensus is a moral conception of political justice; the object is confirmed on moral grounds; and, those who reach consensus agree that they will not withdraw their support if their view of society eventually predominates.<sup>30</sup>

Rawls works on certain assumptions to found his belief that this "overlapping consensus" can be reached within the framework of a post-industrial liberal democratic society. One of these assumptions is that the various elements of his plural society not only share, but also have benefited by three centuries experience of democratic thought and developing constitutional practice, and have "some allegiance to democratic ideals and values as realized in existing political institutions".<sup>31</sup> The ethnocentrism of that assumption is immediately apparent when juxtaposed with the situation of Aborigines. He concedes that certain "truths" "concern things so important that differences about them have to be fought over, even should this mean civil war".<sup>32</sup> As Aborigines have not been moulded by these same shared experiences that are assumed as the norm above, it is likely that the gulf between their core "truths" and those of the rest of the society are too wide for them to be able to compromise sufficiently to reach an "overlapping consensus".

If one were to use Rawls's framework, the endeavour in this sub-thesis to discover whether the initiatives in the three case studies can withstand an attack based on existing Australian law

<sup>28</sup> Ibid 9.

<sup>29</sup> Ibid 2.

<sup>30</sup> Ibid 11.

<sup>31</sup> Ibid 2.

<sup>32</sup> Ibid 13.

would be viewed as an attempt to see whether the conditions exist that make it likely an "overlapping consensus" would be reached in Australia. If it could not, then, realistically, as less than two per cent of a democratic society, Aborigines have the option either of admitting defeat (a possibility not canvassed by Rawls) or waging "civil war".

One form of "civil war" that is being explored by Aborigines is their move into the international arena to press, inter alia, for self-determination. For the last decade they have been part of a worldwide movement of indigenous peoples and their supporters whose objective is to evolve international norms which will form the basis of a Declaration on Indigenous Rights.<sup>33</sup> Since 1982 the Working Group on Indigenous Populations has provided the movement with an internationally recognised forum

<sup>33</sup> See generally for discussion of the progress of this movement: H Hannum, "The Thirty-Third Session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities" (1981) 75 AJIL 172; Robin Wright (ed), Native Peoples In Struggle: Cases from the Fourth Russell Tribunal Erin Publications, USA (1982); J Hantke, "The 1982 Session of the UN Sub Commission on Prevention of Discrimination and Protection of Minorities" (1983) 77 AJIL 651; R L Barsh, "Aboriginal Rights, Human Rights, and International Law" (1984) 2 Australian Aboriginal Studies 2; R T Coulter, The Evolution of International Human Rights Standards: Implications for Indigenous Populations of the Americas Indian Law Resource Centre, Washington DC (11 June 1984, unpublished); L Garber & Ors, "The 1984 UN Sub Commission on Prevention of Discrimination and Protection of Minorities" (1985) 79 AJIL 168; Aboriginal Law Research Unit, "UN Action on Aboriginal Rights" 15 Aboriginal Law Bulletin (August 1985) 1; Aboriginal Law Research Unit, Briefing Paper, UNESCO-International Protector 17 Aboriginal Law Bulletin (December 1985); E Lucas, "Towards an International Declaration on Land Rights" 14 Aboriginal Law Bulletin (June 1985) 10; A Field, "Indigenous Peoples Network" 18 Aboriginal Law Bulletin (February 1986) 4; T Simpson, "On the Track to Geneva" 19 Aboriginal Law Bulletin (April 1986) 8; R L Barsh, "Indigenous Peoples: An Emerging Object of International Law" (1986) AJIL 369; T Simpson, "Geneva, September '86" (1987) 24 Aboriginal Law Bulletin 7.

for its demanding task.<sup>34</sup> The official report of the 1985 meeting of the Working Group notes that:

[a] number of indigenous observers, referring to recent developments and efforts by certain Governments to identify indigenous populations with minorities underlined that such a concept denied to them, inter alia, the right to self-determination.<sup>35</sup>

To return to Van Dyke's attack on Rawls, he was concerned with the fateful consequences for certain groups of a theory which, when he wrote his article, failed to take into account their demands for "justice [comprising legal status and rights] for themselves as collective entities".<sup>36</sup> These demands, which primarily concern the status of groups, have not been resolved by Rawls "overlapping consensus" theory, and the demands still bear examination. Van Dyke then proceeds to cite various examples of group recognition, such as seats in the New Zealand legislature being reserved for Maoris, and the Supreme Court in the United States accepting the stance of the Old Order of Amish in Wisconsin, who refused to send their children to school beyond eighth grade. The United States Supreme Court held:

Compulsory school attendance to the age of sixteen for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today;...<sup>37</sup>

<sup>34</sup> The Working Group on Indigenous Populations was proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981, endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982 and authorised by the Economic and Social Council in its resolution of 1982/34 of 7 May 1982.

<sup>35</sup> E/CN.4/Sub.2/1985/22 page 12 para 52. See also First and Second World Conferences to Combat Racism and Racial Discrimination, A/Conf.119/26; D Sanders, "the Re-Emergence of Indigenous Questions in International Law" (1983) Toronto, Canadian Human Rights Yearbook 3, 5. See also Barsh (1986) op cit n 33, 376, L B Sohn, "The Rights of Minorities" in L Henkin (ed) The International Bill of Rights: The Covenant on Civil and Political Rights (1981) 270, 281.

<sup>36</sup> Rawls (1987) op cit n 27, 13

<sup>37</sup> Wisconsin v Yoder 406 US 218 (1971).

Another example (not relied on by Van Dyke) is given in a dissenting judgment in the United States Supreme Court by Brennan J:

I agree that, in providing a special benefit for a needy segment of society long the victim of purposeful discrimination and neglect, the statute [providing a classification favourable to women] serves the compelling state interest of achieving equality for such groups.<sup>38</sup>

Van Dyke is overstating the case when he generalises from his list of examples to the statement that "groups in fact have status and rights at an intermediate level between the individual and the state"<sup>39</sup> Recognition of groups as having a legal status is still the exception; the norm was stated by Vierdag in the conclusion to his careful examination of discrimination in international law: "the international endeavours to protect human rights are aimed at the attainment of justice in the relations between the individual and the community."<sup>40</sup>

Van Dyke was only concerned that a theory of justice should concern itself with those groups that are:

distinguished by relatively fixed qualities such as race and language or by a set of fundamental beliefs and attitudes of comprehensive importance such as religion or nationalism.<sup>41</sup>

It is reasonably easy to envisage as "Van Dyke groups" those Aborigines coming under the Anangu Pitjantjatjaraku or Pitjantjatjara Council umbrella,<sup>42</sup> or those recognised as traditional owners under the Pitjantjatjara Act.<sup>43</sup> They may also be

<sup>38</sup> Kahn v Shevin (1974) 416 US 351, 358-359.

<sup>39</sup> Van Dyke, op cit n 26, 614.

<sup>40</sup> E W Vierdag, The Concept of Discrimination in International Law The Hague, Martinus Nijhoff (1973) 166.

<sup>41</sup> Van Dyke, op cit n 26, 607.

<sup>42</sup> See Chapter I n 4 & 6.

<sup>43</sup> See Chapter II, 2.3.

"self-determination units", although that is far from settled.<sup>44</sup> The Congress Alukura<sup>45</sup> is intended to serve the needs of Aboriginal women from all the different Central Australian language groups.<sup>46</sup> Despite the fact that the women who will use the Congress Alukura do not share a common language, and may not share a common race,<sup>47</sup> it is a Van Dyke-type group as the women share a set of beliefs of fundamental importance to them.

In Gerhardy,<sup>48</sup> the Australian High Court has allowed a reverse discrimination measure that favoured an Aboriginal group, although it meant overriding certain human rights of individual members of the group.<sup>49</sup> So there is now at least one Australian precedent for groups rights taking priority over individual rights, but it is premature to say that the law on the issue is well settled in Australia. The High Court may treat different criteria as relevant if, for example, it considered the case study concerning voting. In that case no individual Aboriginal is favoured, it is the Aboriginal group that is claiming differential treatment of a political nature. This reverse discrimination in favour of the group will clearly result in one of the fundamental rights of persons of another race, who are not members of the group, being curtailed - namely the right to vote.<sup>50</sup>

<sup>44</sup> See Chapter VI.

<sup>45</sup> See Chapter II 2.2.

<sup>46</sup> The Central Australian Aboriginal Congress works with "Aranda, Warlpiri, Loritja, Pitjantjatjara, Warumungu and Anmatjirra" women, Borning - Ampe Mbwareke Pmere Alaltje: The Congress Alukura By the Grandmother's Law (August 1985 unpublished report), 15.

<sup>47</sup> There is a vast literature written by social scientists, anthropologists, biologists, social scientists and lawyers concerning the problem of defining "race". See generally K J Partsch, op cit n 3, 76-77.

<sup>48</sup> This case is considered in detail in Ch 5.

<sup>49</sup> Gerhardy op cit ch 1 n 11, 117 (Brennan J)

<sup>50</sup> This argument applies to a lesser extent to the other two initiatives.

#### 3.1.4. The "anti-discrimination principle"

In the International Court of Justice Tanaka J gave what has become a famous dissenting opinion.<sup>51</sup> He described what is variously known as "the anti-discrimination principle" and "the norm of non-discrimination", as "the reverse side of the notion of equality before the law".<sup>52</sup> The principle aims to establish concrete criteria for deciding which factors are relevant in arriving at equality.<sup>53</sup> Using minorities treaties as an example, Tanaka J explained that the principle guaranteed members of the minority group protection for their religious and educational practices. Both international law, and many national legal systems including Australia, now proscribe many forms of discrimination.<sup>54</sup>

In the 1890's the United States Supreme Court, not bothering to disguise its notion of black inferiority, approved of the practice of racial segregation, basing the decision on the "separate but equal" view of legal equality.<sup>55</sup> That decision was impliedly overruled in 1956 by a unanimous Supreme Court in Brown v Board of Education,<sup>56</sup> a case that has become a landmark in the development of anti-discrimination law. The Court adopted a colour-blind approach and held that separate educational facilities were inherently unequal, and therefore unconstitutional under the equal protection clause of the Fourteenth Amendment.

The simplistic popular view equating a colour-blind society

<sup>51</sup> South West Africa cases, ICJ Rep (1962) 318 (1st phase) and ICJ Rep (1966) 4 (2nd phase).

<sup>52</sup> Ibid

<sup>53</sup> See generally Rosenfeld, op cit n 4, 875-879.

<sup>54</sup> Partsch, op cit n 3, 68-70. See generally W McKean, op cit n 14, 264-284.

<sup>55</sup> Plessy v Ferguson (1893) 163 US 537.

<sup>56</sup> (1954) US 483.

with equality<sup>57</sup> has been rejected at the international level by Tanaka J:

The principle of equality does not mean absolute equality, but recognises relative equality, namely different treatment proportionate to concrete individual circumstances. Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice, as in the treatment of minorities, ... In these cases the differentiation is aimed at the protection of those concerned, and is not detrimental and therefore not against their will.<sup>58</sup>

It is, as McIntyre J found in Canada, easier to recognise the problem than to find an acceptable basis on which to make the differentiation:

It is incontestable that Parliament has the power to legislate in such a way as to affect one group or class in society as distinct from another without any necessary offence to [the principle of equality before the law in] the Canadian Bill of Rights. The problem arises however when we attempt to determine an acceptable basis for the definition of the special class, and the nature of the special legislation involved.<sup>59</sup>

<sup>57</sup> Holding, op cit n 1, 8. Whether complete colour-blindness is desirable is a subject of academic debate. Among those arguing against proposition are Evans, op cit n 13, 33; Partlett, op cit n 17, 240; A D Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of the Supreme Court View" (1978) 62 Minneapolis L Rev 1049, 1103; Fiss, op cit n 4, 106-107, Jencks, "Discrimination and Thomas Sowell" (3 March 1983) 30 n 3 New York Review of Books 93. Among those arguing for the proposition are Vierdag, op cit n 40, 134-136; J W Nickel, "Discrimination and Morally Relevant Characteristics" 32 Analysis (1972) 113; cf Kaplan, op cit n 12, 363-365; M D Bayles, "Reparations to Wronged Groups" 33 Analysis 182 (1973).

<sup>58</sup> South West Africa, op cit n 51, 313.

<sup>59</sup> Mackay v R (1980) 114 DLR (3d) 422-423.

### 3.1.5. The relationship between "equality" and "self-determination"

Both principles are based in the ideology of the French Revolution:

[w]hen the concepts of human dignity, of the sovereignty of the people, and of the active role of the citizen in the political process were developed in opposition to the doctrines of the omnipotent State, of the sovereignty of princes and of the passive role of the obedient subject.<sup>40</sup>

This common background is reflected in the purposes of the United Nations Charter to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".<sup>41</sup>

The relationship between these principles has never been entirely clear. Despite the right to self-determination now being guaranteed in the Civil and Political Rights Covenant and the International Covenant on Economic, Social, and Cultural Rights 1966 no procedure has been established for its realisation, and its content is still controversial. By contrast the principle of equality before the law is generally accepted as one of the most important human rights, with the principle of non-discrimination determining its field of application. It is possible nevertheless to identify the main difference between the principles: the protection of human rights is assigned to individuals, whereas only groups can collectively make use of the possibilities offered by the principle of self-determination.

Partsch is virtually alone in considering how "self-determination" meshes with "equality before the law".<sup>42</sup> He suggests, more in the manner of a discussion starter than a

<sup>40</sup> Partsch, op cit n 3, 67.

<sup>41</sup> Article 1(2) of the Charter of the United Nations 1945.

<sup>42</sup> See Ch IV below

conclusion, that "respect for one is a pre-requisite for respect for the other".<sup>43</sup>

### 3.2. Discrimination as a Legal Concept

#### 3.2.1. The standard meaning of "discrimination"

The Oxford English Dictionary meaning of the verb "to discriminate" is "to make or constitute a difference in or between; to distinguish, differentiate". Used in that sense discrimination does not have a pejorative connotation; that usage is indicated by the phrase "discriminate against". However the Webster's New World Dictionary definition of the term "discrimination" simpliciter claims it can be used in three ways laudatory, neutral and adverse:

1. The act of discriminating, or distinguishing differences;
2. The ability to make or perceive distinctions; perception, discernment;
3. A showing of partiality or prejudice in treatment; specific action or policies directed against the welfare of minority groups.<sup>44</sup> (emphasis added)

Lawyers, like the writers of dictionaries, disagree as to whether "discrimination" means any "distinction" or "differentiation" whatsoever, or whether it has come to be used in the restricted adverse sense of unfair, improper, unjustifiable or arbitrary distinction.<sup>45</sup>

#### 3.2.2. "Discrimination" in international law

While preparing the Customary Law Report the Australian Law Reform Commission undertook a general survey of the available jurisprudence.<sup>46</sup> It concluded that a general definition of "discrimination" has emerged in international law which:

<sup>43</sup> Partsch, op cit n 3, 68.

<sup>44</sup> See generally W D Tarnopolsky, Discrimination and the law in Canada Toronto, Canada, Richard de Boo Ltd (1982) 85-86; B Gross, Discrimination in Reverse: Is Turnabout Fair Play? New York, New York University Press (1978) 6-17.

<sup>45</sup> McKean (1983) op cit n 14, 9.

<sup>46</sup> Australian Law Reform Commission, Report No.31: The Recognition of Aboriginal Customary Laws AGPS (1986) para 147-148.

involves discovering a distinction based on a prohibited ground which has an invidious or arbitrary effect in preferring or excluding particular classes of persons.<sup>67</sup>

McKean, Sadurski and Vierdag, have also examined the question carefully, and each reaches a conclusion compatible with that expressed by the Australian Law Reform Commission.<sup>68</sup> The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities has adopted the interpretation that "discrimination" means "invidious discrimination".<sup>69</sup>

In 1935 the Permanent Court of International Justice, whose role was to consider the effectiveness of the minorities treaties and declarations, gave an Advisory Opinion on the interpretation of the Albanian Declaration concerning the treatment of its Greek minority.<sup>70</sup> Albania argued that its decision to close all private schools, which included those that taught the Greek minority in Greek, was in conformity with the Declaration. The Court disagreed. It believed that one aspect of these treaties and declarations was to enable minorities to preserve the characteristics that distinguished them from the majority and to meet their special needs. To achieve this minorities needed, firstly, to be placed in a position of perfect equality with other nationals, and, secondly, for an assurance that they have suitable means for preserving their racial peculiarities, traditions, and national characteristics. This "may involve the

<sup>67</sup> Ibid para 147.

<sup>68</sup> McKean (1983) op cit n 14, 286-287; Sadurski (1986) op cit n 23, 7; Vierdag, op cit n 40, 286-287. See also Nettheim & Rees, "Discrimination and Land Rights" (1983) 9 Aboriginal Law Bulletin 2

<sup>69</sup> Study of Discrimination in the Matter of Political Rights UN Doc E/CN4/Sub 2/213 (9 Nov 1961), and the Study of Discrimination Against Persons Born Out of Wedlock UN Doc E/CN 4/Sub 2/265, 25. See also General Assembly Resolution 644 (VII) adopted on 10 Dec 1952, United Nations Yearbook 1952, UN, New York, (1953) 575-576.

<sup>70</sup> Advisory opinion on Minority Schools in Albania PCIJ (1935) Ser A/B No 64.

necessity of different treatment in order to attain a result which establishes an equilibrium between different situations".<sup>71</sup>

A more recent case is a decision of the European Court of Human Rights, concerning Article 14 of the European Convention of Human Rights, which guarantees non-discrimination and equality before the law.<sup>72</sup> In the Belgium Linguistics case the Court distinguished carefully between discrimination consisting of an inequality of treatment of an arbitrary nature, and discrimination based on legitimate distinctions, or designed to re-establish rather than destroy equality.<sup>73</sup> The European Commission on Human Rights went further in the same case and spelt out its view that it is not discrimination where a State, subject to certain limits designed to protect others from becoming victims of undue preference, confers an "advantage", "privilege" or "favour" rather than imposing a "hardship", "inequality" or "disadvantage".<sup>74</sup>

The logical corollary of the European Commission on Human Rights view is that it is not necessarily discrimination to provide special measures to assist certain groups. This is the conclusion reached by McKean, and the writer considers that on the available evidence it is correct:

It is now generally accepted that [in certain circumstances] the provision of special measures of protection for socially, economically, or culturally deprived groups is not discrimination ...<sup>75</sup>

The next two chapters of this sub-thesis focus on "reverse racial discrimination", and will consider the circumstances in which "special measures" are permissible.

<sup>71</sup> Ibid 19. Cf Settlers of German Origin in Territory Ceded By Germany to Poland PCIJ Ser B, No 6 (1923) 24.

<sup>72</sup> Belgian Linguistics Case ECHR Ser A No 6 (1968).

<sup>73</sup> Ibid 34.

<sup>74</sup> Report of the Commission, paras 400-405, 425. See also Applications 104/55, 167/56, 261/57; Yearbook I, 228, 235, 255.

<sup>75</sup> McKean, op cit n 3, 288.

## CHAPTER IV

### THE REVERSE RACIAL DISCRIMINATION CONTROVERSY

In order to get beyond racism, we must first take account of race ... and in order to treat some persons equally, we must treat them differently.<sup>1</sup>

#### 4.1. "Reverse racial discrimination" - a confusion of terms

Gross distinguishes between what he calls "positive discrimination programmes" and those he calls "reverse discrimination programmes".<sup>2</sup> Examples of the former are the type of programmes focussed on by Evans\Partlett, which commonly involve direct cash payments, such as Aboriginal study grants and free legal and medical services for Aborigines.<sup>3</sup> However Evans\Partlett use a different terminology and refer to them as "benign discrimination programmes". In contrast, Gross calls "reverse discrimination programmes" those where "favorable treatment is replaced by a kind of favoritism"<sup>4</sup> which is much more directly felt by certain individuals than the unequal distribution of government spending.

Sadurski, like Gross, distinguishes between these two types of programmes, but the terminology is different. He uses the term "preferential treatment programmes" to include those described above as "reverse", "benign", "compensatory" or "positive" discrimination, these all, according to him, a sub-species of a generic notion of affirmative action. He includes in this category programmes:

where the processes involving selection, admission or distribution of important opportunities, preference should be given to persons singled out on the basis of those

<sup>1</sup> Blackmun J, Regents of the University of California v Bakke (1978) 438 US 265, 338, hereafter referred to as "Bakke".

<sup>2</sup> B Gross, Discrimination in Reverse: Is Turnabout Fair Play? New York, New York University Press (1978) 17-18.

<sup>3</sup> Chapter 3, p 31 - 32.

<sup>4</sup> Ibid

very characteristics which have been used in the past to deny them equal treatment.<sup>5</sup>

An important feature of Sadurski's terminology is that a programme may involve generic affirmative action, but not "preferential treatment". An example is the Australian government giving special health grants designed to alleviate the depressed conditions of Aborigines.<sup>6</sup> Note, these are the very programmes Evans/Partlett designate as "benign discrimination".

Fullinwider, in his book The Reverse Discrimination Controversy, dismisses the term "benign discrimination" as confusing because the old discrimination was also benign - for whites. He contends that the term "reverse discrimination" recognises that "if one person is discriminated 'for' somebody else must be discriminated 'against'".<sup>7</sup> That is certainly the case if only non-Aboriginal residents are denied the right to vote, an employer refuses to employ any male medical staff, or an Anangu drinker is refused a beer in a bar where others are being served. The writer accepts the strength of this argument and also uses the term "reverse discrimination", but as comprising both Gross's "positive" and "reverse" discrimination programmes,

<sup>5</sup> W Sadurski, "The Morality of Preferential Treatment (The Competing Jurisprudential and Moral Arguments)" (1984) 14 Melb U L Rev 572, 574.

<sup>6</sup> Ibid. Polyviou also notes the lack of uniform terminology. He does not see the need to distinguish between the many expressions in use, namely "benign discrimination", "reverse discrimination", "preferential treatment", "affirmative action" and "benign classifications" The Equal Protection of the Law London, Duckworth (1980) 348-351. See also Krygier who distinguishes between "weak" and "strong" forms of "preferential treatment". The former occurs when preference is given to one candidate who is as qualified as other candidates, the latter is where preference is given to a candidate regardless of whether the applicant is as qualified as the other candidates, "Discrimination and Anti-Discrimination Law. Affirmative Action and Human Rights" (1980) Quadrant 4, 6.

<sup>7</sup> R K Fullinwider, The Reverse Discrimination Controversy: A Moral and Legal Analysis New Jersey, Rowman & Littlefield (1980) 2-3; Polyviou, op cit n 6, 350.

and Sadurski's "preferential treatment" and "affirmative action" programmes.<sup>6</sup>

The term "reverse discrimination" also applies to similar programmes designed to assist women, or other sections of the community such as the disabled, but this sub-thesis is limited to an examination of "reverse racial discrimination".

## 5.2. Policy arguments for and against

Legal and policy arguments for and against reverse discrimination are topics of intense public debate and massive academic output, so it will be possible only to skim the surface.<sup>7</sup> Much of the it has take place in the United States

<sup>6</sup> It does not include affirmative action programmes of the type Sadurski describes as "facilitatory measures" e.g. advertising vacancies in ethnic-language newspapers, Sadurski (1984), op cit n 5, 575.

<sup>7</sup> These are a selection from among the many books and articles, listed in chronological order: S M Huang-Thio, "Constitutional Discrimination under the Malaysian Constitution" 6 Malaya L Rev (1964) 1; G Hughes, "Reparations for Blacks?" (1968) 43 New York U L Rev; B I Bittker, The Case for Black Reparations New York, Random House (1973); R Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities" (1974) Sup Ct Rev 1; K L Karst & H W Horowitz, "Affirmative Action and Equal Protection" (1974) 60 Virginia L Rev 955; O M Fiss, "The Fate of An Idea Whose Time Has Come: Anti-Discrimination Law in the Second Decade after Brown v Board of Education (1974) 41 U Chi L Rev 742; J W Nickel, "Preferential Policies in Hiring and Admission: A Jurisprudential Approach" DeFunis Symposium, 75 Colum L Rev (1975) 534; P Brest, "The Supreme Court, 1975 Term-Foreward: In Defense of the AntiDiscrimination Principle" (1976) 90 Harvard L Rev 1; R A Sedler, "Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California" (1977) 17 Santa Clara L Rev 329; Cohen, Nagel & Scanlon (eds) Equality and Preferential Treatment New Jersey, USA, Princeton University Press (1977) 63; H A Deane, "Justice - Compensatory and Distributive" in M Mooney & F Stuber (eds) Small Comforts for Hard Times: Humanists on Public Policy New York, Columbia University Press (1977); R A Rossum, Reverse Discrimination: The Constitutional Debate Political Science Vol 19 New York, Marcel Dekker Inc (1980); Fullinwider, op cit n 7; Krygier, op cit n 6; I Thalberg, "Themes in the Reverse Discrimination Debate" (1980) 919 Ethics 138; Gross, op cit n 2; K Greenawalt, "The Unresolved Problems of Reverse Discrimination" (1979) 67 Calif L Rev 87; Partlett, op cit ch 3 n 17; R G Dixon Jr, "Bakke: A Constitutional Analysis" (1979) 67 Calif L Rev 69; A H Goldman, Justice and Reverse Discrimination Princeton, New Jersey, Princeton University Press (continued...)

since the cases of DeFunis v Odegaard<sup>10</sup> and Regents of the University of California v Bakke.<sup>11</sup> The DeFunis case involved the Washington Law School's admission procedures, and the Bakke case those of the Davis Medical School, both of which set different and less onerous admission standards for minority group applicants than for non-minority group applicants.<sup>12</sup> DeFunis and Bakke, who were not members of the designated minority groups, challenged the constitutionality of the procedures which had denied them admission to Washington Law School and Davis Medical School respectively. Despite the enormous literature generated by these cases they are both, from a legal viewpoint, disappointing. DeFunis did not resolve anything as the court was moot.

<sup>9</sup> (...continued)

(1979); L Lustgarten, Legal Control of Racial Discrimination London, McMillan (1980); W Sadurski, "Equality, Law and Non-Discrimination" (1981) 21 Bulletin of the Australian Society of Legal Philosophy 113; T Franck, Chapter X "The Right to Equal Protection" in Human Rights in Third World Perspective Vol III New York USA, Oceana Publications Inc (1982); M L Duncan, "The Future of Affirmative Action: A Jurisprudential/Legal Critique" (1982) 17 Harvard Civil Rights - Civil Liberties L Rev 503; W E Block & M A Walker, (eds) "Discrimination, Affirmative Action & Equal Opportunity: An Economic & Social Perspective" Canada, Fraser Institute (1982); M Rice, "The Discriminatory Purpose Standard in Racial Discrimination Litigation from Yick Wo to Arlington Heights" (1984) 10 S U L Rev 241; Sadurski (1984) op cit n 5; W Sadurski, Giving Desert its Due: Social Justice and Legal Theory Dordrecht, D Reidel (1985); G Moens, Affirmative Action: The New Discrimination Centre for Independent Studies, Sydney (1985); L D Weeden, "Race-Conscious Affirmative Action v Color-Blind Policies and the Implications of Stotts" (1985) 11 Southern U L Rev 1; M Rosenfeld, "Affirmative Action, Justice, and Inequalities: A Philosophical & Constitutional Appraisal" (1985) 46 Ohio State L J 845; Hsieh An-Ping, "An Examination of Equal Protection Analysis in Construction Set-aside Programs" (1986) 6 Boston College Third World L J 57.

<sup>10</sup> DeFunis v Odegaard 163 US 312 (1974). Hereafter referred to as "DeFunis". See also Sweatt v Painter 339 US 629 (1950).

<sup>11</sup> Bakke op cit n 1. The debate is bound to be rekindled by the recent decision of the United States Supreme Court in Johnson v Transportation Agency upholding, for the first time, the constitutionality of an employers affirmative action plan for minorities and women which took into account a woman's sex as a factor in determining that she should be promoted.

<sup>12</sup> Blacks were included in the favoured group in both cases.

Bakke did little to resolve the controversy as the nine justices each wrote separate opinions. Burger CJ, Stevens, Stewart and Rehnquist JJ concluded that the Davis Medical School admission programme violated Title VI of the 1964 Civil Rights Act, 42 USC (1976 and 1979 Supp). They, with Powell J, ordered Bakke's admission to medical school; however they did not agree on a rationale for the decision.

Although Australia has a different constitutional framework, the United States experience, as well as that of other countries such as Canada, India, New Zealand and Fiji, is valuable when considering the application of the broadly worded provisions of the Racial Discrimination Act to reverse discrimination cases.<sup>13</sup> The experience of those countries has identified major themes in the arguments, that are currently labelled as "compensatory justice", "distributive justice" and "social utility". The following discussion will identify those broad themes, and the extent to which they apply to the three case studies.

#### 4.2.1. Compensatory justice

Compensatory justice is concerned with providing compensation for unfair burdens borne in the past.<sup>14</sup> Some proponents also see it as a way of bringing about a more just society in the future.<sup>15</sup> Demands for black reparations in the United States as a way of redressing injuries caused by a system of legally imposed segregation is in this tradition.<sup>16</sup> These demands are not based

<sup>13</sup> In Gerhardy Brennan J made extensive reference to this body of comparative jurisprudence, 128-135. This sub-thesis, for reasons of length, has concentrated on jurisprudence from the USA. However the writer believes that the jurisprudence from the other countries amplifies rather than alters the themes identified by analysis of material from the USA.

<sup>14</sup> Nickel, op cit n 9, 537-539.

<sup>15</sup> R M Dworkin, Taking Rights Seriously London, Duckworth (3rd ed 1981) 232-239.

<sup>16</sup> See the Black Manifesto 1969 which is reprinted in Appendix A, Bittker, op cit n 9, 161.

on any constitutional right, but instead rely on the exercise of legislative discretion.<sup>17</sup>

It is usually conceded that a basic pre-condition for compensation is that the past and present injury are inseparable.<sup>18</sup> In the United States Supreme Court Marshall J had no hesitation in finding the link in the case of Negroes:

[t]he relationship between [unemployment and poverty statistics] and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.<sup>19</sup>

That Aborigines have suffered injustices in the past<sup>20</sup> has been accepted by Murphy J in the High Court:

[t]he aborigines did not give up their lands peacefully; they were killed or removed forcibly from their lands by United Kingdom forces or removed from the lands in what amounted to attempted (and in Tasmania almost complete) genocide.<sup>21</sup>

Present injury can also be established:

[Aborigines} probably have the ... highest death rate, the worst health and housing and the lowest educational, occupational, economic, social and legal status of any identifiable section of the Australian population.<sup>22</sup>

Partlett, after surveying the evidence, found that for Aborigines there was the necessary link between the past and the

<sup>17</sup> Bittker, op cit n 9, 19-21; Sedler, op cit n 9, 354-358.

<sup>18</sup> Duncan, op cit n 9, 511.

<sup>19</sup> Bakke 396. Cf Sadurski (1985) op cit n 9, 207.

<sup>20</sup> That statement is not intended to exclude the possibility that injustice continues today.

<sup>21</sup> Coe v Commonwealth (1979) 24 ALR 118, 138. See also House of Commons, Select Committee on Aborigines (British Settlements) Report, Parl Paper, No 425 (1837) 5-6.

<sup>22</sup> National Population Inquiry, Population and Australia. A Demographic Analysis and Projection AGPS, Canberra, (1975) Vol 2, 455. See also Australian Law Reform Commission, op cit ch 3 n 66, [31].

present to support his "benign discrimination" programmes.<sup>23</sup> These programmes, like black reparation programmes in the United States, are primarily designed to improve the economic circumstances of the group by assisting individual members of the group.

A common argument against compensatory justice, and one espoused by Goldman, is that it is over-inclusive. Not all individual members of the disadvantaged group are victims of discrimination.<sup>24</sup> Sowell expresses a similar view which can be summarised as "pull yourself up by your bootstraps". He is completely against any "reverse discrimination" for blacks. He contends that racial and ethnic discrimination has been common throughout American history, and the ex-victims, including blacks, are now often wealthier than their former oppressors. He claims that the government sponsored compensation programmes do the "beneficiaries" more harm than good.<sup>25</sup>

There is also a possibility, according to Iyer J of the Supreme Court of India, that the benefits of preferential promotions:

[a]re snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake.<sup>26</sup>

Partlett smartly dismisses these arguments as applying to

<sup>23</sup> Partlett, op cit ch 3 n 17, 254.

<sup>24</sup> Goldman (1979), op cit n 9, 7.

<sup>25</sup> Sowell claimed the figures usually quoted to prove that blacks were disadvantaged were unreliable as they had not taken into account the fact that blacks now have a higher birth rate in the USA than most other sections of the community. T Sowell, Markets & Minorities International Center for Economic Policy Studies, Oxford, Basic Books (1981); T Sowell, Ethnic America New York, Basic Books (1983). For criticism of Sowell's views see Jencks, "Discrimination and Thomas Sowell" (3 March 1983) 30 n 3 New York Review of Books 93 and "Special Treatment for Blacks?" (17 March 1983) 30 n 4 New York Review of Books. See also G Dietze, "Right Rights" (1980) Amer J of Jurisprudence 38, 72.

<sup>26</sup> Kerala v Thomas (1976) AIR (SC) 490, 531.

Aborigines: "there are few middle class Aborigines and this avoids immediately over-inclusion as a major problem".<sup>27</sup>

Marshall J has done the same for American blacks:

[i]t is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact...<sup>28</sup>

The other facet of the "inclusiveness" argument, is that programmes of compensatory justice using race as the classification for eligibility are under-inclusive. There are poor whites as well as poor blacks. Thus the appropriate classification on which to found compensation is "poverty" not "race".<sup>29</sup> This argument would be worth pursuing if the sub-thesis was considering free legal services that serve the Aboriginal community exclusively.<sup>30</sup> However, in none of the three case studies could poverty be substituted for race as the determining factor. "Alcoholism" could possibly be substituted for Anangu as the criteria requiring the licensee at Imanpa Roadhouse to refuse bar service to certain individuals, but that avoids the central issue which is: does the Australian law accept the strategies determined (or in this example under consideration) by Aboriginal group(s).

A somewhat different debate took place in successive issues of Analysis. The basic premise was that if blackness is a morally irrelevant characteristic,<sup>31</sup> then it must also constitute

<sup>27</sup> Partlett, op cit ch 3 n 17, 250.

<sup>28</sup> Bakke 400; Rosenfeld, op cit n 9, 911.

<sup>29</sup> Goldman, op cit n 9, 6-7; Lustgarten, op cit n 9, 22-23; Katz, "Benign Preferences: An Indian Decision and the Bakke Case" (1977) 25 Amer J Comp L 611, 620; D A J Richards, The Moral Criticism of the Law Encino, USA, Dickenson (1977) 167-172; Krygier, op cit n 6, 7; Polyviou, op cit n 6, 314; Posner, op cit n 9, 32.

<sup>30</sup> An example is the Central Australian Aboriginal Legal Aid Service Inc.

<sup>31</sup> See discussion re a colour-blind society above ch 4 p 57.

wrongful discrimination to use it as a basis for providing reparations. Nickel asserted that blackness is only a morally irrelevant characteristic for discriminating against a black.<sup>32</sup> It is a relevant characteristic when used to justify reparations to an individual who has been subject to unfair treatment because s/he was black.<sup>33</sup> Cowen disagreed with Nickel, and pointed out that a member of one discriminated against group (a black) could end up being favoured over a member of another (a Jew), who may also have suffered the effects of group discrimination.<sup>34</sup>

#### 4.2.2. Group rights v individual rights

The "compensatory justice" debate assumes that compensation is financial or in the form of an advantage that leads to economic advancement for individual members of a discriminated group, such as preferential admission or hiring schemes. Only in the most indirect way can any of the chosen case studies be fitted into that pattern.<sup>35</sup>

The Australian Law Reform Commission, whose brief was limited to the recognition of customary law, has also considered the argument that special measures should be taken to compensate Aborigines for past wrongs. It was reluctant to accept that compensation, in the form of recognition of customary law, is an appropriate way of compensating for past injustices.<sup>36</sup> The primarily "non-economic" type of scheme considered in chapter II do not fit comfortably within the parameters of individually

<sup>32</sup> The argument in Analysis is not between philosophers. It is interesting to note that they, independently, reach the same conclusion as the international law, see above p 53.

<sup>33</sup> J W Nickel, "Discrimination and Morally Relevant Characteristics" 32 Analysis (1972) 113, 114.

<sup>34</sup> J L Cowan, "Inverse Discrimination" 33 Analysis 10 (1973) 10-12. N.B. This actually happened in Bakke.

<sup>35</sup> e.g. It can be argued that restricting Anangu access to alcohol will lead to less trauma in their communities, which in turn will result in better health, which will enable the children to concentrate at school and gain the skills that will assist them to compete economically as adults. Cf R Folds, Whitefella School (1987).

<sup>36</sup> Except possibly in the context of traditional land rights, Australian Law Reform Commission, op cit ch 3 n 66, [09].

orientated "compensatory justice". These schemes require instead a move away from the individually orientated common law approach<sup>37</sup> to a group rights strategy. As Kelsey advocated:

There has to be a move towards a recognition of group rights. Since aborigines, migrants and other minority groups have needs and aspirations which are peculiar to them as a group, the law must both recognise the need and encourage the aspiration.<sup>38</sup>

The usual argument against compensating groups is that groups cannot be said reasonably to have "merits" or "needs".<sup>39</sup> Goldman impliedly supports that position by setting up such an onerous set of conditions that a group would have to satisfy before being eligible for compensation that it would be virtually impossible to qualify.<sup>40</sup> Interestingly, he finds there is one group in the United States that meets all his conditions: "Indian tribes whose treaties were violated by the federal government":

Here we have collectives characterised by group practice or purpose and interaction of members, specific damages that cannot be assigned differentially within the group, and official bodies to receive compensation owed on behalf of all members, that is, tribal organisations recognised by members as responsible for internal disbursement of amounts received.<sup>41</sup>

The Aboriginal groups discussed in chapter II meet all Goldman's criteria except one: no treaties have been broken. In Australia, where no treaties were entered into with the indigenous

<sup>37</sup> Rowley, A Matter of Justice (1978) 22-48.

<sup>38</sup> Kelsey, "The Role of Law in Achieving Racial Equality" (1976) Vol 1 No 4 UNSW Quarterly 3, 4.

<sup>39</sup> S Sher, "Groups and Justice" (1977) 87 Ethics 182-185; Glazer, "Individual Rights Against Group Rights" in Kamenka and Tay (eds) Ideas and Ideologies, Human Rights London, Edward Arnold (1978). 102.

<sup>40</sup> Goldman defines a group as requiring "actual interaction between members, each of whom occupies a certain role in the group reciprocal to the other roles, roles being reciprocal when their performances are mutually dependent" A Goldman, "Limits to the Justification of Reverse Discrimination" 3 Soc Theory & Prac (1975) 289, 292-293.

<sup>41</sup> Goldman, op cit n 40, 85.

population, but the injury caused by the colonisers is well established,<sup>42</sup> the case for reparations to Aboriginal groups is at least as strong as that for American Indian tribes.

Some writers, such as Bayles, take a compromise position and believe that ideally the group not the individual should be compensated, but point out that this would not be feasible:

[since] the group is not an organized one like a state, church, or corporation, the only way to provide reparations to the group is to provide them to members of the group.<sup>43</sup>

All the case studies in chapter II involve incorporated groups. This may go somewhat towards meeting the difficulty adverted to by Bayles. Nevertheless Rosenfeld considers that the reality is that the nature of the existing groups make them unsuitable to receive compensation:

While there are organizations that purport to represent the interests of blacks or of women, none of these are sufficiently representative of all women or all blacks so that reparations to the organisation would be deemed reasonably to constitute compensation to women or blacks as a group.<sup>44</sup>

Bittker, an early advocate of black reparations, considers the individual versus group dilemma. He, like Goldman, accepts that American Indians should receive group compensation.<sup>45</sup> He points to the precedent in the Indian Claims Commission having jurisdiction to hear and determine claims presented "on behalf of any Indian tribe, band, or other identifiable group of American Indians."<sup>46</sup> However, for the reasons given by Rosenfeld, he

<sup>42</sup> See above n 21.

<sup>43</sup> M D Bayles, "Reparations to Wronged Groups" 33 Analysis 182 (1973) 182, 183.

<sup>44</sup> Rosenfeld, op cit n 9, 910.

<sup>45</sup> Bittker, op cit n 9, 73.

<sup>46</sup> Ibid 73.

doubts that there is sufficient internal coherence among blacks for group reparations to be a viable option.<sup>47</sup>

Fortunately neither coalition or labor governments in Australia have waited for the theorists to reach a decision. Since the mid 1970's both have supported reverse discrimination programmes for Aborigines, both as individuals (for example Aboriginal secondary school study grants) and to groups (for example, Aboriginal Legal Services).<sup>48</sup> The usual requirement is that the groups are incorporated and Aboriginal controlled. A government unwilling to accede to the pressure on it to support group-based programmes could have taken, what the writer believes would have been a retrograde step, of accepting the justice of providing compensation for past wrongs without individual Aborigines needing to prove that they have been victims of discrimination, but then channeling the compensation solely through individuals. For example, rather than funding Aboriginal controlled legal services the government could have paid the legal costs incurred by all Aborigines appearing before the courts, regardless of individual wealth.

#### 4.2.3. Distributive justice

Distributive justice; like compensatory justice, is concerned with an individuals entitlements. It requires that:

Benefits and burdens be distributed in accordance with relevant considerations such as the rights, deserts, contributions and needs of the recipients.<sup>49</sup>

Aborigines in Australia and blacks in the USA are grossly under represented in the top schools or well paid jobs.<sup>50</sup> If this state of affairs is caused not by a relevant consideration, but by an irrelevant consideration such as racism, then the argument is that those disadvantaged individuals require a greater share

<sup>47</sup> Ibid 74-76. N.B. Bittker is considering reparations in the form of money, ibid 83.

<sup>48</sup> See also Deane, op cit n 9, 14.

<sup>49</sup> Nickel (1975), op cit n 33, 539. See also Sadurski (1985) op cit n 9, 275.

<sup>50</sup> Ibid 540; Duncan op cit n 933; Australian Law Reform Commission, Customary Law Report op cit ch 3 n 66, Vol 1, 25.

of the communities resources to redress the balance. Inevitably in this contentious field the theory has its opponents. Greenawalt points out that statistics do not themselves establish distributive injustice - for example careers are, to some extent, a matter of individual choice.<sup>51</sup>

#### 4.2.4. Social utility

Pure social utilitarian arguments are not concerned with the past, nor with individual entitlements. Their concern is with whether reverse discrimination should be used as a means of bringing about social goals, such as reducing poverty and inequality and creating a more harmonious society.<sup>52</sup> Its rationale for reverse discrimination is that it is the only way to "interrupt the cycle of disadvantage for disadvantaged groups",<sup>53</sup> or, as expressed by Matthew J in the Indian Supreme Court:

[t]he ultimate reason for the demand of equality for the members of backward classes is a moral perspective which affirms the intrinsic value of all human beings and calls for a society which provides those conditions of life which men need for development of their varying capacities.<sup>54</sup>

The dissenting judges main criticism of Matthew J's use of a social utility argument, to hold that a state sponsored reverse discrimination employment does not violate the constitutional guarantee of equality of opportunity in state employment, is that it would result in the erosion of the right of equality.<sup>55</sup> These

<sup>51</sup> Greenawalt, op cit n 9, 65-67; Gross (1978), op cit n 2, 381.

<sup>52</sup> Sadurski (1985), op cit n 9, 189-190; Duncan, op cit n 9, 524; Fullinwider, op cit n 7, 18; Nickel, op cit n 33, 541.

<sup>53</sup> Sadurski (1985), op cit n 9, 190.

<sup>54</sup> State of Kerala v Thomas (1976) All India Rptr S Ct 490, 521.

<sup>55</sup> Ibid 509 (Khanna J), 522-523 (Beg J), 543 (Gupta J). See also Katz, op cit n 29, 634-635.

judges are merely repeating the now discredited colour-blind doctrine discussed in chapter III.<sup>54</sup>

Some writers claim that preferential admissions procedures, such as those litigated in DeFunis and Bakke, can be justified on social utility grounds as they will result in the provision of much needed legal and medical services to the black community.<sup>57</sup> On the other hand, it can be argued that social utility will be reduced if allowing less qualified persons into medical or law schools results in a lowering of services, as society functions best when it entrusts tasks to the most competent individuals.<sup>58</sup> But do the highest admission scores lead to the most proficient lawyers and ones able to deal effectively with the problems of underprivileged clients? Likewise some argue that the promotion of positive minority role models, such as law and medical students, will encourage other group members to attain their full potential.<sup>59</sup> Again there are contrary views. Some say that it will lead to a white backlash against the black community.<sup>60</sup> This has already happened in Australia; the Australian Mining Industry Council has attacked land rights legislation as:

[p]ositively discriminating against the existing rights of others ... It does not take cognizance of the fact that Australia is now one nation with one community of people whether they be of Aboriginal, Asian, European or any other descent.<sup>61</sup>

It is said the black students will be stigmatised as incapable of

<sup>54</sup> See above p 57.

<sup>57</sup> Bakke 307; T Nagel, "Equal Treatment and Compensatory Discrimination" (1973) 2 Philosophy and Public Affairs 348, 361; Sedler, op cit n 9, 355.

<sup>58</sup> Duncan, op cit n 9, 525-526.

<sup>59</sup> Ibid.

<sup>60</sup> Bakke, (1976) 18 Cal. 3d 34, 62-63;

<sup>61</sup> Australian Mining Industry Council, Comments on Aboriginal Land Rights Legislation (March 1979 10. See also Partlett, op cit ch 3 n 17, 258-261.

"advancing"<sup>42</sup> without special help, thus reinforcing racial stereotypes of black inferiority.<sup>43</sup> A riposte to that last proposition comes from Nickel who argued that in 1975 in the United States, black organisations and leaders advocated and supported, rather than denounced, such potentially stigmatising programmes.<sup>44</sup>

These factors must all be weighed to see if the social cost of the programme is greater, on balance, than the benefits gained. Only then can it be determined if it raises the aggregate well-being of the community. This weighing and balancing will always be fraught with difficulty.

Partlett finds social utility arguments persuasive as a justification for his "benign discrimination programmes".<sup>45</sup> In 1979 he balanced the factors and wrote that:

[an Aboriginal] minority, however small, which is permanently disaffected must be bought at the cost of optimum social cohesion. Perhaps more important in the short term, from the "real-politic" perspective, rests the international position of Australia.<sup>46</sup>

Partlett was, however, largely considering very general government sponsored benign discrimination programmes. By way of contrast this sub-thesis examines three very particularised programmes. It is suggested that it is much easier for supporters of such particularised programmes to point to concrete benefits and for detractors to identify the specific social cost. For that reason, it is quite predictable that the balancing will be yet more controversial.

<sup>42</sup> For a discussion of the difficulties posed by the term "advancement" see below, p70.

<sup>43</sup> Goldman (1979), op cit n 9, 143; R A Posner, The Economics of Justice Cambridge, Mass., Harvard University Press (1981) 368-369. See also Sadurski (1985) op cit n 9, 191-195.

<sup>44</sup> Nickel, op cit n 9, 554-555.

<sup>45</sup> Partlett, op cit ch 3 n 17, 259.

<sup>46</sup> Ibid 259. See also T Tatz, Race Politics in Australia (1979) 103.

#### 4.3 The Indigenous Experience of Reverse Discrimination in North America

The case studies in Chapter II all involve Aboriginal groups. Therefore it is worth considering whether indigenous groups in North America have been treated differently from other discriminated against minority groups when they have sought recognition for reverse discrimination measures.

In Morton v Mancari<sup>47</sup> the United States Supreme Court considered a reverse discrimination measure on the face of it analogous to the one it later considered in Bakke, however the rationale for its decision was quite different. The case concerned a challenge by non-Native American workers for the Bureau of Indian Affairs to the federal legislative provision giving a preference in promotion to their Native American colleagues. The Court was unanimous in finding that this employment preference did not violate the non-Native American worker's right to due process under the Fifth Amendment:<sup>48</sup> "Indeed, it is not even a 'racial' preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government... The preference as applied, is granted to Indians not as a discrete racial group, but, as members of quasi-sovereign entities whose lives and activities are governed by the BIA in a unique fashion."<sup>49</sup>

Clearly it will be futile for Aborigines to cite this decision unless and until they establish a similar special constitutional position.

<sup>47</sup> 417 US 535 (1974)

<sup>48</sup> See Australian Law Reform Commission, op cit ch 3 n 66, 96-101 for brief history of the special position of Native Americans in the United States of America as it relates to the question of reverse discrimination.

<sup>49</sup> Ibid 554. The Supreme Court has maintained that the classification is political rather than racial in subsequent cases, Fisher v Rosebud District Court 424 US 382, 390-1 (1976), and even in the situation where such a classification is to the disadvantage of an individual Native American United States v Antelope 430 US 641 (1977).

In Canada three leading cases<sup>70</sup> all hinge on the impact of the "equality before the law provisions" contained in the Canadian Bill of Rights 1960,<sup>71</sup> where the Federal Government had exercised its constitutional right to legislate "for Indians and lands reserved for Indians" by means of the Indian Act. At first the case of R v Drybones<sup>72</sup> seems pertinent to the issues raised by the measure proposed by the Pitjantjatjara Council to limit residents of their member communities access to alcohol. The Canadian Supreme Court had to consider whether a section of the Indian Act, which made it an offence for an Indian to be intoxicated off a reserve, was inoperative by virtue of the guarantee of equality under the law. The majority decision was that the section in question was inoperative, but the reasoning in both the majority and minority decisions has been criticised, and the case does not establish any principles which could assist the Australian High Court as to when it is legitimate to discriminate.<sup>73</sup> Attorney General of Canada v Lavell,<sup>74</sup> like the Congress Alukura project, involved the seemingly conflicting demands of freedom from discrimination based on the grounds of sex and pro-indigenous reverse discrimination measures. However, despite the matter becoming a cause celebre, no clear ratio decidendi emerged.<sup>75</sup> Later the same year the Canadian Supreme

<sup>70</sup> R v Drybones [1970] SCR 82; Attorney General of Canada v Lavell (1973) 38 DLR (3d) 481; Attorney General v Canard (1975) 52 DLR (3d) 548.

<sup>71</sup> s 1(b). N.B. This legislation has been superceded by the Charter of Rights and Freedoms contained in the 1982 Constitution.

<sup>72</sup> [1970] SCR 82.

<sup>73</sup> Australian Law Reform Commission, op cit ch 3 n 66, 101-102; G Evans, "Benign Discrimination and the Right to Equality" (1974) 6 F L Rev 26, 68-74; cf W D Tarnopolsky, Discrimination and the law in Canada Toronto, Canada, Richard de Boo Ltd (1982) 135-143.

<sup>74</sup> (1973) 38 DLR (3d) 481.

<sup>75</sup> D Sanders, "Indigenous Rights, Peoples Rights, Group Rights" University of British Columbia (23 June 1986 unpublished (continued...))

Court decided Attorney General v Canard,<sup>76</sup> the third major case involving a challenge to parts of the Indian Act, this time the section conferring on the Minister of Indian Affairs the testamentary jurisdiction in respect of Indians resident on reserves. Unfortunately this decision is also difficult to follow, but the majority found that the power to legislate for Indians was not necessarily discriminatory.

This saga supports the Evans opinion, writing before the Canard decision, that the approach of the Canadian courts to the equality provisions of the Canadian Bill of Rights was "cautious, fumbling and for the most part intellectually sterile".<sup>77</sup> It is unlikely that Evans would see any reason to modify his view now.

In conclusion, because of the particular constitutional status of Native Americans in the United States of America and Indians in Canada, the major cases dealing with reverse discrimination in their favour offer very little assistance to the Australian High Court if it was asked to consider the issues raised in any of the three case studies. However there have been cases in North America, such as Lau v Nichols,<sup>78</sup> which support reverse discrimination measures in areas like bilingual education, that the High Court may find persuasive if it had to decide a similar case, whether brought by Aborigines or members of other linguistic minority groups. The ratio in Lau is, like that in Bakke, not limited to, or indeed even directly concerning, indigenous people. The decision is of interest to Aborigines as it shows that the United States Supreme Court has

<sup>75</sup> (...continued)

paper) 17; Australian Law Reform Commission, op cit ch 3 n 66, 102-103.

<sup>76</sup> (1975) 52 DLR (3d) 548

<sup>77</sup> Evans, op cit n 73, 68.

<sup>78</sup> 414 US 563 (1974); see also Calswell v Stuart (1984) 2 SCR (4th) 603; Reference re the Education Act 10 DLR 491 (Ontario Court of Appeal).

not always restricted its support for reverse discrimination to cases where there is a clear link between the measure and economic "advancement".<sup>79</sup>

<sup>79</sup> See Ch 5.2.2.

## CHAPTER V

### "SPECIAL MEASURES"

#### 5.1. "Special Measures" Under the International Convention on the Elimination of All Forms of Racial Discrimination

This chapter is particularly concerned with how "special measures" in the Racial Discrimination Convention<sup>1</sup> have been implemented in Australia by the Racial Discrimination Act, and the High Court's interpretation of such "special measures" in the leading case, namely Gerhardy. The purpose of this examination is to consider whether the current Australian law on "special measures" is able to accommodate the examples in the three case studies.

The Racial Discrimination Convention was adopted unanimously by the General Assembly of the United Nations in December 1965<sup>2</sup> following international condemnation of escalating anti-Semitic incidents.<sup>3</sup> Unfortunately, possibly because of the speed with which it was prepared, the "robustness of the political forces" at the time and even a "certain impatience with the niceties of legal drafting", several crucial provisions (including those considered in this chapter) suffer from inadequate drafting.<sup>4</sup> What Meron says of Article 2(2) could equally well be said of Article 1(4):

If Article 2(2) had been more carefully worded, it might still not have ensured the equalization of rights among ethnic groups without loss of cultural identity, but the present text exacerbates the difficulties through its lack of precision and standards.<sup>5</sup>

<sup>1</sup> Articles 1(4) and 2(2)

<sup>2</sup> It entered into force on 4 January 1969.

<sup>3</sup> Schwelb Egon, "The International Convention on the Elimination of All Forms of Racial Discrimination" (1966) 15 Int & Comp LQ 996, 997.

<sup>4</sup> Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" (1985) 79 Amer J International Law 283, 316.

<sup>5</sup> Ibid 311.

Indigenous peoples had no hand in shaping the Racial Discrimination Convention, as at that time they had no real voice in the United Nations. Thus it is not surprising that the Convention includes concepts and interests that are in some ways foreign to them, and can even be adverse to their thinking and interests.<sup>4</sup>

Article 1(4) of the Racial Discrimination Convention excludes "special measures" from the prohibition on racial discrimination in Article 1(1). Specifically Article 1(4) provides that "special measures" taken:

for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2(2) places an obligation on States Parties to take "special measures":

when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

## 5.2 Gerhardy and "Special Measures"

The Racial Discrimination Act is the Australian way of implementing the Racial Discrimination Convention. Section 9(1)

<sup>4</sup> R T Coulter, The Evolution of International Human Rights Standards: Implications for Indigenous Populations of the Americas Indian Law Resource Centre, Washington DC (11 June 1984, unpublished), 63.

of the Racial Discrimination Act is the operative section, making racial discrimination unlawful and it provides that:

it is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Section 8(1) allows "special measures" as an exception to the prohibition of racial discrimination contained in Section 9(1), as long as the "special measure" is of a type sanctioned by Article 1(4) of the Racial Discrimination Convention.<sup>7</sup>

The leading (and so far only) Australian High Court case to consider section 8(1) "special measures" is Gerhardy.<sup>8</sup> In that case the defendant, a non-Pitjantjatjara person, was prosecuted under section 19 of the Pitjantjatjara Land Rights Act 1981 (SA) for entering on the Pitjantjatjara lands without formal permission. This is an offence for all persons<sup>9</sup> who are not "traditional owners"<sup>10</sup> of the "Pitjantjatjara lands".<sup>11</sup> Thus, when the matter finally reached the High Court,<sup>12</sup> and it had to

<sup>7</sup> S 8(1) This Part [which includes inter alia s 9 and s 10] does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies ...

<sup>8</sup> Gerhardy v Brown (1985) 159 CLR 70. It is beyond the scope of this sub-thesis to consider many of the important issues raised in Gerhardy.

<sup>9</sup> There are some exceptions that are irrelevant to the argument in this sub-thesis.

<sup>10</sup> The question of whether the "traditional owners" are a racial group within the meaning of the Racial Discrimination Act is not pursued in this sub-thesis.

<sup>11</sup> The legislation designates certain land as the "Pitjantjatjara lands".

<sup>12</sup> The magistrate stated a case raising several points of law for the South Australian Supreme Court. Millhouse J in the  
(continued...)

consider, inter alia, the meaning of "racial discrimination" under section 9(1)<sup>13</sup> and the applicability of section 10 to the facts of the case.<sup>14</sup> Despite the varying constructions placed on section 9(1) and section 10 by different members of the Court, they each found it necessary to move to construe section 8(1) for the first time. The facts of the case before the Court were not in the relatively safe Evans/Partlett mould - rather the fate of the entire Aboriginal land rights movement was in its hands. The Aboriginal land rights movement must have been extremely relieved when the Full Bench was unanimous in deciding that there was no conflict between section 19 of the Pitjantjatjara Land Rights Act and the Racial Discrimination Act, as the permit system was a "special measure" within the meaning of section 8(1).<sup>15</sup> Despite the indubitable popularity of this decision within the Aboriginal community, the following sub-sections, which focus on certain aspects of the decision, show its limitations when applied to the situations described in the three case studies.

#### 5.2.1. Gerhardy - "human rights and fundamental freedoms"

The bizarre truth is that the more narrowly "human rights and fundamental freedoms", as defined in section 9 of the Racial Discrimination Act, are construed, the less likely any of these Aboriginal sponsored initiatives are to be prima facie racially discriminatory under Section 9(1). This incongruous situation bears out Nettheim and Rees's allegation that:

<sup>12</sup> (...continued)

Supreme Court held that section 19 was invalid because it was inconsistent with the Racial Discrimination Act (1983) 49 ALR 169 (Millhouse J). An appeal was lodged and part of the action was removed to the High Court under s 40 Judiciary Act 1903 (Cth).

<sup>13</sup> See sub-section 5.3 below.

<sup>14</sup> Section 10 provides that if, under a Commonwealth, State or Territory law, persons of a particular race do not enjoy a right enjoyed by persons of another race, then the race that was omitted shall enjoy the right to the same extent as the other race. The constitutionality of s 10 was left open in Gerhardy. All discussion of s 10 is omitted as it is not central to the subject under consideration in this sub-thesis.

<sup>15</sup> Gerhardy op cit n 8, pp 87-89 (Gibbs CJ), 106 (Mason J), 107-108 (Murphy J), 113 (Wilson J), 143 (Brennan J), 153 (Deane J), 162 (Dawson J).

[a]t a time when Aborigines are starting to make some headway in the battle against 200 years of dispossession of their lands, it is the ultimate irony that an Act [Racial Discrimination Act], designed to provide remedies for the victims of racial discrimination, establishes another legal hurdle to jump.<sup>16</sup>

The only racially discriminatory acts proscribed under section 9(1) of the Racial Discrimination Act, which section 9(2) expands to include the entire catalogue of rights listed in Article 5 of the Racial Discrimination Convention, are those involving "any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life".

In Gerhardy the Court had to consider, having determined that the Pitjantjatjara lands were privately owned, whether "freedom of movement", which is catalogued as a "human right and fundamental freedom" by Article 5(d)(i), extended to this private property. Mason J found that there is no universal agreement as to the content of this right to "freedom of movement".<sup>17</sup>

In the course of discussing the problem raised by "freedom of movement" Brennan J noted the novel problems of statutory interpretation caused by the introduction into a Commonwealth statute of the "rubbery and elusive language" of the Racial Discrimination Convention.<sup>18</sup> In addition five of the judges referred to the difficulty they found in defining "human rights and fundamental freedoms".<sup>19</sup> Although Brennan J pointed out that

<sup>16</sup> Nettheim & Rees, "Discrimination and Land Rights" (1983) 9 Aboriginal Law Bulletin 2. See also D Barwick "Equity For Aborigines? The Framlingham Case" in P N Troy (ed), A Just Society. Essays on Equity in Australia (1981) 212, where she asserts that the Racial Discrimination Act seems to rest on notions of Aboriginal need rather than a recognition of Aboriginal entitlement to a special status as prior occupants of this continent.

<sup>17</sup> Gerhardy op cit n 8, 102 (Mason J).

<sup>18</sup> Gerhardy op cit n 8, 123 (Brennan J) citing Ealing v Race Relations Board [1972] AC 342, 362.

<sup>19</sup> Gerhardy op cit n 8, 86 (Gibbs CJ); 125-126 (Brennan J); 97, 101-105, (Mason J); 113 (Wilson J); 157 (Dawson J).

such human rights are not unqualified,<sup>20</sup> the Court in Gerhardy failed to establish any general principles.

The difficulty posed by the term "human rights and fundamental freedoms" can be demonstrated by examination of the Chapter II scenarios. Although the proposed restrictions on the community government scheme are clearly caught by Article 5(c), the right to vote and stand for election, the other instances pose more difficulty. The Alukura project arguably involves the right to freedom of religion under Article 5(d)(vii) in that the practice of excluding men from births is an Aboriginal cultural practice which is part of their religion.<sup>21</sup> The proposal to limit the sale of alcohol in certain roadhouses to members of one racial group<sup>22</sup> may be contrary to the right of access to a place of service intended for use by the public under Article 5(f), or of the right to equal participation in cultural activities (assuming that drinking in a roadhouse is a cultural activity) in Article 5(e)(vi). It is also arguable that if a particular

<sup>20</sup> Gerhardy op cit n 8, 134 (Brennan J).

<sup>21</sup> This sub-thesis is based on the assumption that the Alukura's refusal to employ male workers contravenes the Sex Discrimination Act 1985 (Cth). If this policy qualifies as a "special measure" under s 8(1) then the issue arises, but is not pursued, as to whether "special measures" under the Racial Discrimination Act or the prohibition of discrimination under the aforesaid Sex Discrimination Act has precedence. See generally Meron, "On a Hierarchy of International Human Rights" (1986) 80 AJIL 1.

<sup>22</sup> In Gerhardy five judges rejected the attempt to bring the legislation in question outside the provisions of the Racial Discrimination Act by claiming the classification "traditional owner" was race-neutral. Gerhardy, op cit n 8, 85 (Gibbs CJ), 100 (Mason J), 144-145 (Deane J), 116-117 (Brennan J), 154-155 (Dawson J). Therefore, the use of length of residence in the community government case study, or place of residence in the restrictions on alcohol case study, when in both cases virtually only persons of a "particular race" fall within the categories, will not remove the measures from the purview of the Racial Discrimination Act. See generally W Sadurski, "Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case That Wasn't" Vol 11 Syd L R (March 1986) 5, 11-14; L Lustgarten, Legal Control of Racial Discrimination London, McMillan (1980); M F Rice, "The Discriminatory Purpose Standard in Racial Discrimination Litigation from Yick Wo to Arlington Heights" (1984) 10 S U L Rev 219, 236 and Chapter II ss 2.1.6.

racial group is disrupted by alcoholism or traumatised by high infant mortality rates the members of the group will be unable to avail themselves of their rights to work, education and housing also contained within Article 5(e).<sup>23</sup>

It is suggested that the underlying purpose of all three Chapter II measures is, either directly or indirectly, to enable the "group" to live in accordance with its own customary law. The right of groups to preserve their culture is not specifically mentioned in the catalogue of civil rights under Article 5(d), although it must be conceded that the list is not closed, and there is another international treaty that addresses the issue of preservation of culture.<sup>24</sup> Mason J considered that the concept of human rights was not limited to individuals but extended to the "rights of peoples and the protection and preservation of their cultures".<sup>25</sup> Hence it is uncertain if a future Court would hold that all the measures in the three case studies fit within the expanded definition of "human rights and fundamental freedoms".

#### 5.2.2. Gerhardy - "adequate advancement"

Article 1(4) of the Racial Discrimination Convention requires that the sole purpose of a special measure must be to secure adequate advancement of the particular racial group. It

<sup>23</sup> See also Gerhardy op cit n 8, 136 (Brennan J) "In Australia, the phenomenon of landless, rootless Aboriginal peoples is sadly familiar. Many of them are incapable of enjoying and exercising 'on an equal footing' the human rights and fundamental freedoms that are the birthright of all Australian citizens".

<sup>24</sup> This sub-thesis does not consider ILO Convention No 107, which is at present the only, but much criticised, multilateral treaty to deal specifically with the position of indigenous peoples, as it has not been ratified by Australia. See generally Australian Law Reform Commission, op cit ch 3 n 66, 128-132 and G Bennett, Aboriginal Rights in International Law London, Royal Anthropological Institute (1978) 16-18.

<sup>25</sup> Gerhardy op cit n 8, 104 (Mason J). See generally L V Prott, "Cultural Rights as People's Rights in International Law" (1986) 10 Bulletin of the Australian Society of Legal Philosophy 4, 5-6 and L B Sohn & T Buergenthal, International Protection of Human Rights Indianapolis, Bobbs-Merrill Co Ltd (1973) 329-333 on the difficulties presented by the word "culture".

is important to consider how that term was construed in Gerhardy, as it has implications for the three case studies.

Mason J describes the aims of the land rights legislation as "to restore to an Aboriginal people the lands which they occupied traditionally" and also "to provide that people with the means to protect and preserve their culture".<sup>24</sup> Sadurski, quite correctly, points out that it is difficult to reconcile legislation whose aim is "to restore", "to protect" and "to preserve" with the "activist, dynamic ring of the language" of the term "adequate advancement" as used in Article 1(4) of the Racial Discrimination Convention.<sup>27</sup> "Adequate advancement" suggests upgrading the situation of a disadvantaged group, bringing it up to a norm enjoyed already by the rest of society.<sup>28</sup>

The Committee on the Elimination of Racial Discrimination<sup>29</sup> has been concerned to see that "special measures" aimed at securing norms of social and economic equality do not destroy the integrity of discrete cultures.<sup>30</sup> In its reports it has on occasion expressed concern:

lest the concept of "integration" be carried too far; it was observed that total integration of an ethnic group into the mainstream of society, with consequent

<sup>24</sup> Gerhardy op cit n 8, 103 (Mason J); for analogous statements see also Gerhardy op cit n 8, 87 (Gibbs CJ), 136-137 (Brennan J), 113 (Wilson J).

<sup>27</sup> Sadurski (1986) op cit n 22, 26.

<sup>28</sup> Ibid. It is well established that according to the norms of the dominant society Aborigines need advancement in most areas affecting material well-being, such as health, education, employment and political influence, Australian Law Reform Commission, op cit ch 3 n 66, 24-26.

<sup>29</sup> Established by Art 8(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>30</sup> Meron, op cit n 4, 309. See also Gerhardy op cit n 8, 136 (Brennan J), and 105 (Mason J).

abandonment of traditions and customs, could be a form of racial discrimination.<sup>31</sup>

This concern would be apposite if this sub-thesis was focussing on government sponsored reverse discrimination programmes for Aborigines because they are, as Barwick claimed "essentially assimilationist in aim and are modelled on the remedies offered to Black Americans, who seek economic parity within the existing political and economic system."<sup>32</sup> Whereas she argued that what "the domestic nations of North America, Australia and New Zealand ... want [is quite different, they seek] greater political and economic autonomy, ... recognition of their special status and settlement of their land claims".<sup>33</sup> The various special measures discussed in Chapter II are all moves originated by Aboriginal groups, whose thrust is essentially "anti-integrationist" and "anti-assimilationist". As such the question is, do they comply with all the requirement of section 8(1) that they should be directed to securing "adequate advancement"?

Sadurski said, speaking of the land rights legislation in Gerhardy, "to present restorative and protective measures as a way of "advancement" is, ... not literally incorrect, but requires stretching the concept beyond its natural and immediate limit".<sup>34</sup> It would require the concept to be stretched still further to find that the sole purpose of limiting the right of non-Aborigines to vote or stand for election in certain community government elections is to secure "adequate advancement" for members of the numerically dominant racial group. Similarly the

<sup>31</sup> UN GOAR 29 Supp No 187 para 121 UN Doc A/0618 (1974). See also Statement of the Four Directions Council to the Working Group on Indigenous Populations, UN Doc E/CN 4/Sub2/ AC4/1983/CRP3; D H Mackeekin, "Red, White and Gray: Equal Protection and the American Indian" in H M Bahr & ors (eds) Native Americans Today New York, Harper & Row (1972) 116.

<sup>32</sup> D Barwick, "Equity For Aborigines? The Framlingham Case" in P N Troy (ed), A Just Society. Essays on Equity in Australia (1981) 211-212.

<sup>33</sup> Ibid

<sup>34</sup> Sadurski (1986) op cit n 22, 27. See also G Bennett, Aboriginal Rights in International Law London, Royal Anthropological Institute (1978) 55-56.

champions of the Alukura project can try to persuade the Court that their anti-integration measures are not stretching the concept of "adequate advancement" a bit too far. They can argue that improved health statistics should result from following culturally specific obstetric practices.<sup>35</sup>

Brennan J, who is the only judge to consider the concept of "advancement", has condemned paternalistic special measures.<sup>36</sup> He recognises that "a racial minority which wishes to preserve its own identity may need particular supports to preserve that identity if its members are not to be disadvantaged in the society of which it is a part".<sup>37</sup> However he sees the purpose of such supports as limited to enabling the members of the group "to adopt the standards and customs of the majority or to cope with the pressures which assimilation with the majority entails".<sup>38</sup> This is a far cry from the recognition of cultural rights per se.

#### 5.2.3. Gerhardy - jurisdiction and judicial method

In Gerhardy it was the South Australian state government that made the political assessment that "advancement of a racial group is needed to ensure that the group attains effective, genuine equality and that the measure is likely to secure the advancement needed".<sup>39</sup> Brennan J conceded that this was the proper function of the political branch, the role of the Court was limited to "determining whether the political branch acted

<sup>35</sup> See Chapter II p 19.

<sup>36</sup> Gerhardy op cit n 22, 135 (Brennan J) "What the person who takes the measure regards as a benefit for the beneficiaries" is not necessarily "advancement", "the wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement".

<sup>37</sup> Gerhardy op cit n 8, 136 (Brennan J). See also Gerhardy op cit n 8, 105 (Mason J).

<sup>38</sup> Ibid . See also Gerhardy op cit n 8, 105 (Mason J).

<sup>39</sup> Gerhardy op cit n 8, 138 (Brennan J).

reasonably in making its assessment".<sup>40</sup> Of course, in doing so it must not act capriciously, but follow well established legal principles for conducting a judicial review. The Court may, as Brennan J, has indicated, place great weight on the wishes of the recipients of the "special measures", but ultimately the Court cannot abdicate its responsibilities.<sup>41</sup>

In conducting a judicial review the Court must determine certain facts and in doing so it is not limited to evidence tendered by the parties.<sup>42</sup> In Gerhardy, Deane J expressed most vehemently the concern of several judges: that the Court had not been provided with sufficient evidence that such a stringent permit system was necessary to achieve the kind of purpose referred to in Article 1(4):

[t]he evidence before the Court neither explains the need for those rigid formalities and criminal sanctions nor ... If the matter were solely for my decision, I would incline to the view that the case should be remitted to the learned special magistrate to allow the factual material to be supplemented.<sup>43</sup>

The Court gave a clear warning that in the future it will expect more evidence on which to base its determination. Consequently the personal views of the judges on such subjective concepts as "adequate advancement" is likely to become increasingly important. Deane J has acknowledged that:

[diverse views] have been expressed about the identification, extent and resolution of the problems involved in the mitigation of the effects which almost two centuries of alien settlement have had on the lives and culture of the Australian Aboriginal.<sup>44</sup>

<sup>40</sup> Ibid. See also Gerhardy, op cit n 8, 149 (Mason J). Cf G Triggs, "The Rights of 'People's' and Individual Rights: Conflict or Harmony?" preliminary version, distributed by Australian National Commission for UNESCO (1986) 27-28.

<sup>41</sup> Gerhardy op cit n 8, 142 (Brennan J).

<sup>42</sup> Gerhardy op cit n 8, 142 (Brennan J). Cf 108 (Murphy J).

<sup>43</sup> Gerhardy op cit n 8, 152 (Deane J). See also 87-88 (Gibbs CJ), 105-106 (Mason J), 142 (Brennan J).

<sup>44</sup> Gerhardy op cit n 8, 151 (Deane J).

This trend, leading to a more thorough judicial analysis of future "special measures", bearing in mind the reluctance with which some judges reached their decision in Gerhardy,<sup>45</sup> does not bode well for the fate of future "special measures".

#### 5.2.4. Gerhardy - the provisos to "special measures"

Both Article 1(4) and 2(2) are subject to two provisos: firstly, a "special measure" must not maintain separate rights for different racial groups, and secondly, a "special measure" must not continue after its objectives have been achieved. The two provisos to the articles are slightly differently worded.<sup>46</sup> A strict interpretation of Article 1(4) treats the two provisos as independent conditions, both of which must be satisfied if a "special measure" is to be valid. Article 2(2) can readily be given a more liberal interpretation. It can be construed as meaning that separate rights for certain racial groups are proscribed only after the measures are no longer required because their objective has been achieved.<sup>47</sup> If the strict interpretation is correct it is difficult to envisage any "special measures" being allowable, as they all require some form of separate rights for different racial groups until their objectives have been achieved. Five of the judges in Gerhardy adopted the liberal interpretation suggested in Article 2(2). As Gibbs CJ held:

[i]t is obvious enough that measures within the introductory words of Art. 1(4) may involve some special rights for the protected group... In my opinion, the words of both limbs of the proviso, should be read together. The proviso as a whole appears to be designed to prevent such special rights as are granted from being indefinitely

<sup>45</sup> Gerhardy op cit n 8, 152-153 (Deane J), 105 (Mason J), 84-85 (Gibbs CJ).

<sup>46</sup> Lerner saw these as inessential, N Lerner, The U.N. Convention on the Elimination of All Forms of Racial Discrimination Alphen aan den Rijn, Netherlands, Sitjhoff & Noordhoff (1980) 33; whereas Sadurski considered them in detail and reached the conclusion that the Court in Gerhardy had adopted the better interpretation, Sadurski (1986) op cit n 22, 22-24.

<sup>47</sup> Sadurski (1986) op cit n 22, 32.

maintained or continued after the special measures have achieved their objective.<sup>48</sup>

If the "special measure" under scrutiny is, for example, to make it easier for Aboriginal applicants than any others to gain admission to a particular university where they are currently grossly under-represented, it is reasonably straightforward to gauge when the measure has achieved its objective. On the contrary, as Mason J pointed out:

there is some difficulty in fitting the legislative regime of the type in question [land rights] within the framework of the proviso. It is looking primarily to measures of a temporary character ... [whereas this regime] may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples.<sup>49</sup>

Mason J and the other members of the Court, albeit reluctantly, all rejected the argument that the "special measures" in question fell outside section 8(1) because the legislation did not contain a sunset clause.<sup>50</sup> This means that the Chapter II proposals will, at least initially, comply with the provisos to Article 1(4), which is essential if they are to qualify as "special measures" under section 8(1). However three judges mentioned the possibility that, as Gibbs CJ put it, "protection may degenerate into discrimination".<sup>51</sup> Thus, if at some time in the future, any of these matters came before the Court again, this proviso might be applied.

<sup>48</sup> Gerhardy op cit n 8, 88 (Gibbs CJ). See also 96 (Mason J), 113 (Wilson J), 133 (Brennan J), 148 (Deane J). Contra 160-161 (Dawson J). Murphy J not deciding. Cf G Triggs, op cit n 40, 16.

<sup>49</sup> Gerhardy op cit n 8, 106 107 (Mason J). See also M Annis, "Indian Education: Bilingual Education - A Legal Right for American Indians" (1982) 10 Am Indian L Rev 333, 348-353; Sadurski (1986) op cit n 22, 184; P C Scarman, "Minority Rights in a Plural Society" in B Whitaker (ed), Minorities: A Question of Human Rights? Oxford, Pergamon Press (1984) 63, 68.

<sup>50</sup> Gerhardy op cit n 8, 106 (Mason J), 88-89 (Gibbs CJ), 140 (Brennan J), 108 (Murphy J), 113 (Wilson J), 154 (Deane J), 161 (Dawson J).

<sup>51</sup> Gerhardy op cit n 8, 88-89 (Gibbs CJ), 108 (Murphy J), 113 (Wilson J).

### 5.3. The meaning of "discrimination" under the Racial Discrimination Act

Six of the seven members of the Full Court in Gerhardy found that the permit system under section 19 was discriminatory within the terms of the Racial Discrimination Act.<sup>52</sup> Only Brennan J and Wilson J found it necessary to consider the meaning of discrimination under the Racial Discrimination Act before reaching that decision. Chapter III sub-section 3.2.2. summarised a substantial body of jurisprudence which all pointed to the concept of discrimination in international law as incorporating a test of "reasonable classifications", resulting in reverse discrimination, in certain circumstances, not being treated as discriminatory. Unfortunately there is no jurisprudence yet dealing specifically with the Racial Discrimination Convention which could have assisted the judges in Gerhardy. Wilson J was aware of this international law meaning of "discrimination" but considered that:

whether or not it is desirable to adopt such an understanding of the concept of racial discrimination, in my opinion it is not possible to construe the Convention to give effect to it.... That definition [Article 1(1)] is not confined to distinctions which are arbitrary, invidious or unjustified. It refers to any distinction, etc. It was therefore necessary for the article to go on to deal with special measures... If the Convention did not intend "racial discrimination" to bear an inclusive meaning, there would be no need to make any provision for special measures.<sup>53</sup>

Brennan J delves into this issue far more deeply and makes, what Sadurski fairly describes as, "a tour d'horizon of the concepts

<sup>52</sup> Pp 87 (Gibbs CJ), 103 (Mason J), 107 (Murphy J), 113-113 (Wilson J) 146-147 Brennan J). Dawson J did not find it necessary to decide the issue, see 162.

<sup>53</sup> Gerhardy, op cit n 8, p 114 (Wilson J).

of legal equality (and, by contradistinction, discrimination in international law)",<sup>54</sup> but Brennan J also concludes:

whatever may be the connotation of the term "discrimination" in international law generally, in the context of the Convention Art. 1(4) expresses an exception to what otherwise falls within Art. 1(1). Section 9(1) relates to all formal discrimination including benign discrimination unless the benign discrimination is effected by a special measure which s 8(1) takes out of the ambit of s. 9(1). Section 8(1) would have no operation if the exception was already provided for by s. 9(1). (emphasis added)<sup>55</sup>

Regrettably, the drafting history of the Convention does not provide an unequivocal answer as to whether "special measures" were envisaged as an exception to the prohibition on discrimination, or a cautious corollary to it.<sup>56</sup> During the debate in the United Nations Economic and Social Council over Article 2(2)<sup>57</sup> of the United Nations Declaration on the Elimination of all Forms of Racial Discrimination 1963<sup>58</sup> (on which the Racial Discrimination Convention was based) the Canadian Co-Sponsor claimed "special measures" were to provide "temporary compensatory inequalities" in order to achieve true equality for racial groups in inferior positions.<sup>59</sup>

However Sadurski takes the opposite position. He suggests that there is nothing inconsistent in the drafters of the

<sup>54</sup> Sadurski (1986) op cit n 22, 31. The tour Sadurski refers to can be located in Gerhardy op cit n 8, pp 123 - 131 (Brennan J).

<sup>55</sup> Ibid 131.

<sup>56</sup> N Lerner, The U.N. Convention on the Elimination of All Forms of Racial Discrimination Alphen aan den Rijn, Netherlands, Sitjhoff & Noordhoff (1980).

<sup>57</sup> Article 2(2) of the Declaration was the precursor to Articles 1(4) and 2(2) in the Racial Discrimination Convention.

<sup>58</sup> 13th sess (1961) UN doc E/CN 4/815.

<sup>59</sup> UN docs E/CN4/L 655 and corr 1-2; E/CN 4/L 658; E/CN 4/SR 759-760 (1964).

Convention wanting:

to prohibit in Art. 1(1), all invidious discrimination, and in Art. 1(4) to further dispel any possible doubts about whether "special measures" constitute invidious discrimination.<sup>40</sup>

In a swingeing attack on the Court, contained in a scrupulously reasoned article,<sup>41</sup> Sadurski accuses the High Court of making the "right decision for the wrong reasons":<sup>42</sup>

having decided to "play it safe" [by relying on section 8(1)], the Court has abdicated its role as the institution which should elucidate, interpret and clarify moral values inherent in open-ended legal concepts, such as the concept of "discrimination".<sup>43</sup>

As far as he is concerned the Court failed to engage in the only issue that really mattered "what are the tests for legitimate, substantive indicia of discrimination and what are the tests for legitimate, non-discriminatory racial distinctions?".<sup>44</sup> He maintains that discrimination under Article 1(1) should be interpreted as allowing benign protective measures. The drafters did, in his view, intend Articles 1(4) and 2(2) to restrict the scope of the measures already allowable under Article 1(1):

it would be indeed ironic if the same Articles that were motivated by moral horror related to apartheid and other forms of racial discrimination were utilised in order to prohibit protective or compensatory measures for the victims of such past discrimination.<sup>45</sup>

Brownlie has also attacked the High Court's reasoning. He says it was based on a "faulty premise", namely the need to look to "special measures" if the legislation in question was to be saved. The Court should have commenced by considering whether

<sup>40</sup> Sadurski (1986) op cit n 22, 30.

<sup>41</sup> Sadurski (1986) op cit n 22, 29-33.

<sup>42</sup> Ibid 7.

<sup>43</sup> Sadurski (1986) op cit n 22, 43. See also Ibid 8.

<sup>44</sup> Ibid.

<sup>45</sup> Sadurski (1986) op cit n 22, 30.

the "protection of traditional land rights is discriminatory in the first place".<sup>44</sup> Unlike Sadurski he does not develop this argument in detail, he merely rests his case on "the international experience" indicating "certain points of general technique". He contends that the protection of traditional land rights in Gerhardy is not discriminatory under Article 1(1), which has been implemented by sections 9 and 10 of the Racial Discrimination Act, as:

the legal recognition has an objective basis; it is not arbitrary and is discriminatory only in the sense that a reasonable and legitimate policy coincides with racial origin, in the same way as pregnancy coincides with womanhood.<sup>47</sup>

The authoritative Customary Law Report, recognised that these two views could be taken of the Racial Discrimination Convention. It cautiously supports the conclusion expounded above by Sadurski and Brownlie as the better interpretation "given the drafting history of the Convention, the pre-existing and widely accepted meaning of discrimination in international law, and the apparent consensus of writers".<sup>48</sup>

Despite these influential views against the Court's interpretation of discrimination in Gerhardy, in the absence of any articulation of this rationale in the Travaux Préparatoire, and in the light of statements such as that of the Canadian Co-Sponsor, the writer finds the reasoning of Wilson and Brennan JJ persuasive. It is suggested that the Court was correct in reaching its decision on the basis that these "special measures" were intended as a carefully circumscribed exception to a regime of formal equality.

If the Court had adopted the "reasonable classifications" view of discrimination it might have overcome some of the difficulties the judges found in fitting the lands rights

<sup>44</sup> I Brownlie, "The Rights of Peoples in Modern International Law" 1985) 9 Bulletin of the Australian Society of Legal Philosophy 104, 112-113.

<sup>47</sup> Ibid 112.

<sup>48</sup> Australian Law Reform Commission (1986) op cit ch 3 n 66, 111-112.

legislation in Gerhardy into the complex requirements of section 8(1) "special measures". One major benefit would be that the measures would not need to masquerade as temporary.<sup>69</sup> However this legal test would not be the complete panacea for those searching for protection under the existing Australian legal system for Chapter II type measures. The measure could only last as long as it is strictly needed.<sup>70</sup> There would continue to be a need for a "reasonable relationship of proportionality between the means employed and the aim sought to be realised."<sup>71</sup> Is the decision to impose partial prohibition on all individual members of a racial group - albeit at the group's own request - and ride roughshod over the rights of a member of the group wishing to drink in the roadhouse, a reasonably proportionate means of achieving a more harmonious community, which would then enable the community to lead a better life? If this question came before the Court it would need to review whether the decision-makers, in this example the Northern Territory Racing, Gaming and Liquor Commission, could reasonably have reached that decision.<sup>72</sup> In doing so the Belgium Linguistics Case takes an unashamedly ethnocentric viewpoint and suggests that regard must be had "to the principles which normally prevail in democratic societies".<sup>73</sup> Keon-Cohen has noted that a similarly ethnocentric view prevails in Australia. Western legal concepts, especially notions of human rights, have been and are still applied to minority indigenous populations. Nowadays a plural society is encouraged within one political entity, but only on terms acceptable to the

<sup>69</sup> See generally Lau v Nichols 414 US 563 (1974) where special measures for bilingual education were envisaged as lasting as long as the linguistic group survived; also Australian Law Reform Commission op cit ch 3 n 66, 112.

<sup>70</sup> W McKean, Equality and Discrimination under International Law Oxford, Clarendon Press (1983) 91.

<sup>71</sup> Belgian Linguistics Case, European Court of Human Rights Ser A No 6 (1968) 34.

<sup>72</sup> See discussion on role of Court p 73 above.

<sup>73</sup> Ibid

majority culture.<sup>74</sup> However, at least at the international level, a different idea is now on the agenda, maintaining that:

[i]n the present circumstances, peoples rights may be asserted to enjoy in some circumstances, a higher claim than individual rights, resulting in overriding individual human rights.<sup>75</sup>

<sup>74</sup> B A Keon-Cohen, "Native Justice in Australia, Canada and the USA: A Comparative Analysis" (1981) 7 Mon U L Rev 250, 252.

<sup>75</sup> Draft uncirculated note containing the views of Counsellors on the UNESCO Major Programme XXIII, January 1985, cited by G Triggs, "The Rights of 'People's' and Individual Rights: Conflict or Harmony?" preliminary version, distributed by Australian National Commission for UNESCO (1986) 7.

## CHAPTER VI

### "SELF-DETERMINATION" OR "SELF-MANAGEMENT"?

Freedom of the individual was a snare and a delusion as long as the nation of which he was a part was not free.<sup>1</sup>

#### 6.1. "Self-Determination" - Its Importance to Australia

The right to "self-determination" is subject to a vigorous debate, largely taking place at the macro level, which should be of vital concern at the domestic level. This chapter will show how the debate has been shaped by international power politics in its continuing search for answers to the many questions concerning who has a right to "self-determination", what does it involve, and how is it implemented.<sup>2</sup>

The debate is relevant to Australia in a number of respects. The Aboriginal groups involved in the three initiatives under consideration are not alone in acting (or planning to act) in ways that go beyond programmes of "self-management", and consequently may be contrary to the Racial Discrimination Act. The survival of these initiatives may depend on Australia accepting, and then implementing, a form of "self-determination" that does not necessarily lead to secession.<sup>3</sup> Is Australia acting contrary to international human rights law if it fails to do so? This question is of more than academic importance to Australia, a country which believes it sets, and wishes to

<sup>1</sup> An opinion expressed by the representative of China; UN Doc E/CN 4/SR 255 at 6 (1952).

<sup>2</sup> J Clinebell & J Thomson, "Sovereignty and Self-Determination: The Rights of Native Americans Under International Law" (1979) 27 Buffalo L Rev 669, 670; R T Coulter, The Evolution of International Human Rights Standards: Implications for Indigenous Populations of the Americas Indian Law Resource Centre, Washington DC (11 June 1984, unpublished), 46; R L Barsh, "Aboriginal Rights, Human Rights, and International Law" (1984) 2 Australian Aboriginal Studies 2, 3; M K Nawaz "The Meaning and Range of the Principle of Self-Determination" (1965) Duke L J 82, 83; R Emerson, "Self-Determination" (1971) 65 AJIL 459.

<sup>3</sup> Some Australian citizens from the Torres Straits go further and do wish to secede and form a separate nation. Canberra Times p 7 (12 June 1987).

continue to set an example to the world in the human rights area.<sup>4</sup>

## 6.2. Australian Government Policy

In 1983 the then Australian Minister for Aboriginal Affairs made a policy speech stating:

This Government ... looks to achieve further progress for the Aboriginal and Torres Strait Islander people through the two principles of consultation and self-determination, that is, with the involvement of the Aboriginal people in the whole process.<sup>5</sup>

Recently instead of using the term "self-determination" he has pledged his Government's support for Aboriginal "self-management" but added the rider "we will have nothing to do with ideas of sovereignty or separate development".<sup>6</sup> In 1983 his Department put out background notes on Aboriginal "self-management":

[I]n advancing the concept of self-management the Government has sought to open the way to Aborigines, as individuals or in cooperation with others and in some cases with government support, to make choices as to their lifestyle, to have a say in their community affairs, to provide services for themselves, to conduct businesses, and, within the law, to make their own decisions.<sup>7</sup> (emphasis added)

In its impressive Report on the Recognition of Aboriginal Customary Laws<sup>8</sup> the Australian Law Reform Commission also noted that the policy of the present Commonwealth Government has been variously described as "self-determination" or "self-management",

<sup>4</sup> Senator G Evans, "Australia's Approach to Human Rights" (1985) 56 AFAR 82, 85.

<sup>5</sup> Hon C Holding MHR, Commonwealth of Australia 134 Parl Debs (H of R) (8 Dec 1983) 3487.

<sup>6</sup> C Holding, "Directions in Aboriginal Affairs" Address to National Press Club, Canberra, Department of Aboriginal Affairs (13 September 1985) 11.

<sup>7</sup> Department of Aboriginal Affairs, Background notes: Aboriginal self-management (1983).

<sup>8</sup> Australian Law Reform Commission, Report No.31: The Recognition of Aboriginal Customary Laws AGPS (1986), hereafter referred to as "The Customary Law Report".

and added that "full self-determination in a particular field implies more than either management by or consultation with the 'self' involved."<sup>9</sup>

### 6.3. The Changing Content of the Right to "Self-Determination"

#### 6.3.1. The League of Nations era

The difficulty in giving content to this concept has even led to a suggestion that "self-determination" does not belong in the province of law at all:

This principle is not, properly speaking, a rule of international law...it is a principle of justice and of liberty... To concede to minorities, either of language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life.<sup>10</sup>

This view has been firmly repudiated and international law now recognises the principle of self-determination.<sup>11</sup>

Towards the end of the First World War, largely as a result of the work of President Wilson from the USA, the principle moved from a loose formulation espoused by philosophers and politicians to a legal principle of world-wide importance. The distinguished legal scholar Partsch maintains that between the Two World Wars "self-determination" was understood as a political principle which applied to all kinds of "peoples" without distinction.<sup>12</sup>

<sup>9</sup> Ibid Vol 1, 23; see also Pat O'Shane who made a similar observation about the last Commonwealth Government's policy, "Comment" in G Nettheim (ed) Human Rights for Aboriginal People in the 80s (1983) 51.

<sup>10</sup> Report of the Committee of Rapporteurs (Beyens, Calonder, Elkens), LN Council Doc B7/21/68/106 [VII] 27-28 (1919).

<sup>11</sup> M K Nawaz, "The Meaning and Range of the Principle of Self-Determination" (1965) Duke L J 82; J Crawford, Creation of States in International Law Oxford, Clarendon Press (1979) 101; I Brownlie, Principles of International Law Oxford, Clarendon Press (3rd ed 1979) 595.

<sup>12</sup> K J Partsch, "Self Determination, Equality and Non Discrimination" in K Vasak (ed) The International Dimensions of (continued...)

He gives, as an example of "peoples", those living entirely as minority groups inside a state ruled by another "people". That description fits the way many Aborigines now describe their own situation.<sup>13</sup>

In that era national independence was not seen as the only form of implementation of the principle; regional autonomy, internal protection of minorities and statehood within a federal state were other possibilities.<sup>14</sup> A number of minorities treaties were made which, though couched in universal terms, would not have come into existence were it not for the plight of various European ethnic groups who became minorities in the territorial rearrangements that ended the First World War.<sup>15</sup>

#### 6.3.2. The post World War Two era

After the Second World War the issue was revived with a different theme: international attention turned to the need for an international order to ensure "self-determination for peoples living under foreign rule".<sup>16</sup>

In 1949 the USSR proposed that a provision should be inserted in the Civil and Political Rights Covenant that would require only colonial powers to grant self-determination.<sup>17</sup> The main colonial powers, United Kingdom, France and Belgium, were among those who bitterly opposed this idea. Their argument was based in part on Article 1(2) of the Charter of the United Nations, which states that one of its purposes is:

<sup>12</sup> (...continued)

Human Rights Vol 1 (1982) Unesco, Connecticut, USA, Greenwood Press 61, 63; Nawaz op cit n 2, 83-84; Emerson op cit n 2, 463.

<sup>13</sup> See also R L Barsh, "Indigenous North America and Contemporary International Law" (1982) 62 Ore L Rev 73, 76-78.

<sup>14</sup> Ibid 64.

<sup>15</sup> Emerson op cit n 2, 463.

<sup>16</sup> A Cassese, "The Self-Determination of Peoples" in Louis Henkin (ed) The International Bill of Rights: The Covenant on Civil and Political Rights New York, Columbia University Press (1981) 92, 93.

<sup>17</sup> Ibid 92.

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate means to strengthen universal peace.<sup>18</sup>

It was argued that as Article 1(2) of the United Nations Charter already recognised the right of self-determination, it was unnecessary to reaffirm it in further international human rights treaties.<sup>19</sup> Unfortunately the sponsoring powers left no definitive record as to what they meant by "self-determination". The United Nations Committee which discussed the concept said, rather unhelpfully:

Concerning the principle of self-determination, it was strongly emphasised on the one side that this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Charter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession.<sup>20</sup>

There was an inconclusive discussion about a compromise position, put forward by Western states and most of the developing states who were then members of the United Nations, namely that the right to self-determination should extend to the peoples of any state who were oppressed by their own or a foreign government. This debate was predicated on the term "self-determination" giving the right to full autonomy<sup>21</sup>.

The wording finally adopted in Article 1(1) of the Civil and Political Rights Covenant is quite blunt:

<sup>18</sup> The Charter of the United Nations came into force in 1945. The same phrase "respect for the principle of equal rights and self-determination of peoples" also occurs in Art 55. "Self-determination" as used in the Charter or any other treaty has not yet been interpreted or applied by any of the competent independent international institutions.

<sup>19</sup> Brazil, UN Doc A/C 3/SR 309 para 59 (1950).

<sup>20</sup> UN Doc 343 I/1/16, 6 UN Conf International Ord Docs 296 (1945).

<sup>21</sup> New Zealand, UN Doc A/C 3/SR 649 para 9 (1955); also Partsch op cit n 12, 66.

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>22</sup>

The few states who opposed this article did so because they feared that the article would confer rights of secession on their minorities, despite the by then prevailing legal view that it did not confer any such right.<sup>23</sup>

The Civil and Political Rights Covenant does not give any guidance as to the interpretation of "peoples".<sup>24</sup> Sohn, the well known legal commentator in this field, believes that the problems of interpretation have been compounded by using the expression "peoples", rather than "nations" as in earlier drafts.<sup>25</sup> He does not reach a conclusion as to whether "minorities" (the definition of "minorities" is another vexed question)<sup>26</sup> are "peoples" in this context, but certainly indicates it is far more arguable than if the term "nation" had been used. Another respected scholar, Cassese, considers the same issue and comes to a firm conclusion that "peoples" "is not limited to peoples of dependent territories but also [refers] to the peoples of sovereign states".<sup>27</sup> Coulter concedes that the question of what are "peoples" has not been settled but tends to support Cassese; he

<sup>22</sup> The same wording was adopted in the International Covenant on Economic, Social and Cultural Rights 1976.

<sup>23</sup> L B Sohn, "The Rights of Minorities" in L Henkin (ed) The International Bill of Rights: The Covenant on Civil and Political Rights (1981) 270, 276.

<sup>24</sup> Bennett states that an examination of the travaux preparatoires does not clarify the matter, G Bennett, Aboriginal Rights in International Law London, Royal Anthropological Institute (1978) 50.

<sup>25</sup> Sohn op cit n 23, 276.

<sup>26</sup> F Caporti, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities UN Doc E/CN.4/Sub.2/384/Rev.1 (1979) 11-12, 95-96, hereafter referred to as the Caporti Report.

<sup>27</sup> Cassese op cit n 16, 96.

considers it reasonably clear that Article 1(1) is not limited to "peoples" who are part of colonial empires.<sup>28</sup>

Even if "minorities" are "peoples" in this context a further question arises: are minority autochthonous groups to be considered "peoples"? It has been argued that "minorities" only includes alien groups settled in a territory, thus excluding groups such as Aborigines.<sup>29</sup> McKean, in his important book Equality and Discrimination under International Law,<sup>30</sup> which was cited by Brennan J in Gerhardy, rejects this argument and suggests that the real reason underlying it is a fear of secessionist tendencies.<sup>31</sup>

### 6.3.3. The "salt-water doctrine"

As a response to the numerical power of the newly independent nations, whose concerns are addressed below, a narrow view of "self-determination" has developed. It is known as the "salt-water doctrine". It defines as "colonies" only those non-self-governing territories separated geographically from the administering state, as by an ocean. Once the "colony" has gained independent statehood the right of self-determination has been fully exercised; there is no notion of a continuing right to self-determination for internal minorities.<sup>32</sup>

The central feature then of the "salt-water doctrine" is, as Gross puts it, that it abandons the concept that "peoples" formed "on the basis of political consciousness, but living under foreign rule, are entitled to self-determination":<sup>33</sup> Gross also suggests a motivation for the doctrine:

<sup>28</sup> Coulter, op cit n 2, 46.

<sup>29</sup> UN Doc A/C3/SR 1103.

<sup>30</sup> W McKean, Equality and Discrimination under International Law Oxford, Clarendon Press (1983).

<sup>31</sup> Ibid 143.

<sup>32</sup> P Thornberry, "Minority Rights, Human Rights and International Law" (1980) 3 Ethnic and Racial Studies 248, 259; Emerson op cit n 2, 464.

<sup>33</sup> Gross, "The United Nations, Self-Determination and The Namibia Opinions" (1973) 82 Yale LJ 533, 65. See also Barsh (1982) op cit n 13, 81.

[o]nce formed, however, the state exists in dialectic opposition to further group formation, governing elites jealously preserving their existence against the formation of groups which do not find the state supportive of their needs.<sup>34</sup>

That analysis can be applied to the numerous African States which have become members of the United Nations in the decolonisation following the adoption in 1960 of the Declaration of the Granting of Independence to Colonial Countries and Peoples.<sup>35</sup> Many of their boundaries are artificial, a legacy of the colonial era. They have good cause to fear fragmentation if their stability is threatened by the classifying of "minorities", whether or not autochthonous, as "peoples" able to seek any form of self-determination.

#### 6.4. "Self-Determination" for Indigenous Populations

The "salt-water doctrine" of self-determination is still the dominant view among international lawyers,<sup>36</sup> but it is increasingly coming under attack by minorities and indigenous populations.<sup>37</sup> At the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention in 1986 the representatives of indigenous and tribal organisations present stated that "the only concept which would respond to their needs was that of self-determination".<sup>38</sup>

<sup>34</sup> Gross, op cit n 33. See also J W Nickel, "Cultural Diversity and Human Rights" in J L Nelson & V M Green (eds) International Human Rights: Contemporary Issues, New York, Earl M Coleman Enterprises (1980) 45.

<sup>35</sup> General Assembly Resolution 1514(XV).

<sup>36</sup> Australian Law Reform Commission op cit n 8, 128; V Van Dyke, "The Cultural Rights of Peoples" in Universal Human Rights Stanfordville, NY, Vol 2 No 2 (1980) 1, 4; K M'Baye, "Human Rights in Africa" in K Vasak and P Alston (eds) The International Dimensions of Human Rights 583; Gross, op cit n 33, 533.

<sup>37</sup> Bennett op cit n 24, 50; General Assembly Resolution 1514 (XV), (14 Dec 1960); A Field, "Indigenous Peoples Network" 18 Aboriginal Law Bulletin (February 1986) 4, 5.

<sup>38</sup> Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107), Geneva 1-10 Sept 1986, Appl/MER/107/1986/D.7 para 50.

In 1981 the International NGO Conference on Indigenous Peoples and Land included in its Final Declaration a request that the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities should appoint a Special Rapporteur to "further study the right to self-determination, focusing in particular on this right as it refers to indigenous nations and peoples".<sup>39</sup> This was done, and Cobo has now completed a detailed report.<sup>40</sup> In it he has noted the constant reference by indigenous communities and organisations to "self-determination", "which they consider the only form [of political arrangement] that would enable them to determine for themselves the future course of their existence".<sup>41</sup> He quotes with approval a summary of the discussion at a United Nations seminar held in 1981:

Self-determination in its many forms was the basic pre-condition to the possibility for indigenous populations to enjoy their fundamental rights and to determine their future and preserve, develop and transmit to future generations their ethnic specificity.<sup>42</sup>

After reviewing all the evidence he was persuaded that "self-determination" was the basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights.<sup>43</sup>

As long ago as 1973 Gross saw not only claims for secession, but also demands "not for independence but for some greater role

<sup>39</sup> E/CN 4/Sub 2/1983/21/Add 6 Para 152.

<sup>40</sup> J R M Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities Study of the Problem of Discrimination Against Indigenous Populations Revised version E/CN 4/Sub 2/1986/7 Add 1-3 (1983-1985); hereafter referred to as "The Cobo Report".

<sup>41</sup> Ibid E/CN 4 Sub 1/1983/21/Add 6 para 148.

<sup>42</sup> Ibid E/CB 4/Sub 2/1986/21/Add 6 para 6 quoting from the Report of the United Nations Seminar held in Managua, Nicaragua in connection with the Decade for Action to Combat Racism and Racial Discrimination ST/HR/SER A/11 para 58(m).

<sup>43</sup> Ibid E/CN4/Sub 2/1983/21/Add 8 para 580.

in the body politic".<sup>44</sup> He refused to accept that the General Assembly's pronouncements were applicable only to the colonial phenomenon. His argument was that if the United Nations is to retain its authority its principles must be embedded in the expectations of the effective participants in the world community; and these may change.<sup>45</sup>

#### 6.5 Internal "Self-Determination"

There are conflicting views among international lawyers as to the content to be given to the concept of "self-determination" contained in international human rights instruments. The dominant view has been discussed above. A view that is gaining ground is that "internal self-determination", namely "self-determination" operating within the boundary of an existing state, is an aspect of "self-determination". In 1978 UNESCO recognised and adopted the concept in its statement on Race and Racial Prejudice.<sup>46</sup>

Cassese has no doubt that a proper interpretation of Article 1 of the Civil and Political Rights Covenant requires the peoples of sovereign states to have "internal self-determination", but he gives a limited content to the right. He believes that these peoples have enjoyed "internal self-determination" when they have been accorded their other rights under the Covenant, such as freedom of expression and opinion (Article 19), and the right to vote (Article 25(b)).<sup>47</sup>

Brownlie and the other writers cited below are less certain that there is a right to "internal self-determination", but this may be because they are seeing it as having a far greater content. Brownlie stresses that there are various forms of self-determination, some involving statehood, others "self-government"

<sup>44</sup> Gross, op cit n 33, 555.

<sup>45</sup> Ibid

<sup>46</sup> Cobo, op cit n 40, Revised Version E/CN 4/Sub 2/1983/21/Add 8. Cf Meeting of Experts, op cit n 38, paras 51-60.

<sup>47</sup> Cassese, op cit n 16, 97.

or "autonomy", neither of which he sees as terms of art.<sup>48</sup> Partsch, when considering whether such right exists, hypothesised that if it did it could take the form of an ethnic group gaining a certain autonomy, whether as a State in a Federation or even as a self-administered unity in a decentralised unitarian State.<sup>49</sup>

Although Brownlie argues forcefully that Aboriginal populations should, inter alia, be entitled to "self-determination" he cautiously falls short of saying that international law presently recognizes the right.<sup>50</sup> Coulter is braver: he claims a "qualified doctrine of self-determination appears to be emerging [it would be more accurate to say re-emerging], in which territorial enclave populations have a right to internal autonomy within the structure of the State".<sup>51</sup> If he is correct, much of the credit must go to indigenous peoples who have become "effective participants in the world community".<sup>52</sup> Nettheim, a veteran champion of Aboriginal rights, is less optimistic than Coulter. He also sees this trend, and recognises its importance, but he believes that for "international political reasons" it is unlikely to succeed in the near future.<sup>53</sup>

In 1971 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Cobo as a special rapporteur to conduct a thorough investigation of discrimination against indigenous populations. His report unequivocally supports indigenous peoples right to internal self

<sup>48</sup> Brownlie, op cit n 10, 108.

<sup>49</sup> Partsch, op cit n 11, 67.

<sup>50</sup> Ibid

<sup>51</sup> Coulter op cit n 2, 27.

<sup>52</sup> See Ch 3 n 33.

<sup>53</sup> G Nettheim, "The Relevance of International Law" in P Hanks & B Keon-Cohen Aborigines & the Law (1984) 50, 7; T Simpson "Geneva, September '86" (1987) 24 Aboriginal Law Bulletin 7, 9; See also M D Kirby "Introduction" (1985) 9 Bulletin of the Australian Society of Legal Philosophy 101, 102.

-determination, which he concludes constitutes:

the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State.<sup>54</sup>

It would assist those asserting that indigenous populations are "peoples" at least entitled "internal self-determination" if they could rely on legal as well as political arguments. Crawford suggests an argument that is likely to appeal to Aboriginal activists, although he describes it as acutely controversial.<sup>55</sup> The right to "self-determination" could apply to:

entities part of a metropolitan State but which have been governed in such a way as to make them in effect non-self-governing territories, or in other terms, territories subject to carence de souverainete [deficiency in sovereignty]... [The mismanagement] must therefore be substantially in that ... area of misgovernment and denial of fundamental human rights.

Using this rationale, Aborigines could readily claim that they are entitled to self-determination. Those working in the international arena have frequently pointed to evidence of genocidal practices by the Australian Government,<sup>56</sup> such as statistics showing they have the highest imprisonment rate in the world,<sup>57</sup> and to last century's destruction of Aboriginal society in Tasmania. Genocide was condemned by the United Nations in the Convention on the Prevention and Punishment of the Crime of

<sup>54</sup> UN Doc E/CN 4/Sub 2 / 1983 / 21 Add 8 para 581.

<sup>55</sup> Crawford, op cit n 11, 100.

<sup>56</sup> Simpson, op cit n 53, 8.

<sup>57</sup> M Mansell, "Can White Law Accommodate Black Demands?" (1986) 23 Aboriginal Law Bulletin 10.

Genocide 1948.<sup>50</sup> What should be included in a list of "fundamental human rights" is another grey area, but freedom from genocide is included in even the shortest lists.<sup>51</sup>

The concept and content of "internal self-determination" is in its infancy, and exactly who are the "Aboriginal People/s" entitled to assert this right is obscure.<sup>60</sup> Are all Aborigines<sup>61</sup> one "people" or are they many "peoples"? If they are many "peoples", it is easier to envisage Aborigines who have established their traditional attachment to land through a stringent land claim process, as in the community government example, being a "people", than Aboriginal women from all over Central Australia who wish to use the Alukura. It is beyond the scope of this sub-thesis either to pursue this question further, or the question that logically follows; how is the right to be asserted at a domestic level?

#### 6.6. The Flaw In "Self-Management"

The point was made at the beginning of this chapter that the Australian Government, while it vehemently denies all Aboriginal claims to sovereignty, recognises and claims to encourage "self-management". Is "self-management" different from "internal self-determination"? The former Human Rights Commission got to the nub of the matter when considering submissions that the Community

<sup>50</sup> See generally A Field, "Indigenous Peoples Network" 18 Aboriginal Law Bulletin (February 1986) 4; Aboriginal Law Research Unit, Briefing Paper, UNESCO - International Protector 17 Aboriginal Law Bulletin (December 1985).

<sup>51</sup> M Meron, "On a Hierarchy of International Human Rights" (1986) 80 AJIL 1, 14-16. McKean argues that genocide is generally accepted as being contrary to the jus cogens, Equality and Discrimination under International Law Oxford, Clarendon Press (1983) 281.

<sup>60</sup> The right to "internal self-determination" is not dependent on whether Aborigines are able to establish that they are a sovereign people. The Aboriginal claim to sovereignty has been rejected politically, see n 3 above, and in the Federal Court Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141. The question of sovereignty may finally be determined by the High Court in Mabo & Ors v The State of Queensland and the Commonwealth of Australia (1986) 64 ALR 1.

<sup>61</sup> See generally Australian Law Reform Commission, op cit n 8, [88] - [95] for a discussion of who is an "Aborigine".

Services (Aborigines) Act 1984 (Qld) does not give self-management to Aboriginal communities. It saw that:

There is, however a dilemma in providing for self-management. It is that if the wishes of Aboriginal communities are fully met, then they may well have arrangements for self-management which differ from those for the community generally.

The disbanding of the National Aboriginal Conference illustrates the point made by the Human Rights Commission. In 1983 the Conference was cited by the Department of Aboriginal Affairs as the showpiece of Aboriginal self-management,<sup>42</sup> but the following year it was disbanded by the government. On the assumption that it met the wishes of the Aboriginal communities, but that its performance did not satisfy the Government, then it shows that self-management consists merely of those powers that the government decides to devolve to Aborigines. Self-management can crumble any time that it proves inconvenient to the State. Put another way, the Government will only allow self-management within the framework of Australian law.<sup>43</sup>

Since the term "self-determination" is used in international human rights instruments; a body of jurisprudence is developing as to its meaning. "Self-management", by contrast, is merely a political term used within Australia, without a precise, internationally accepted meaning. Therefore, if it wishes, a government could use "self-management" as a smoke-screen to "sell" programmes to Aboriginal communities that they would otherwise find unacceptable.

In terms of the content of any right, it is a matter of conjecture what differences exist between "internal self-determination" and "self-management".<sup>44</sup> To Cassese "internal self-determination" under the Civil and Political Rights Covenant

<sup>42</sup> Department of Aboriginal Affairs, op cit n 7.

<sup>43</sup> Morse B W, Aboriginal Self-Government in Australia and Canada Kingston, Ontario, Institute of Intergovernmental Relations (1984) 79.

<sup>44</sup> See generally Task Force to Review Comprehensive Claims Policy, Treaties: Lasting Agreements Ottawa, Department of Indian Affairs and Northern Development (1985) 22-23 35-41.

means nothing more than implementing the other rights enshrined in the Covenant. This writer considers that if "internal self-determination" is to have any value it must mean more than that. It should mean, and this view is consonant with those of several writers cited above, that the State, through its legislative, executive or judicial branches, cannot exercise control over a measure taken by a "self-determination unit" as part of a progressive right of "internal self-determination". Clearly then, if a community government scheme operating in an Aboriginal area, such as that discussed in the Northern Territory government, can be controlled ultimately by the government, then it is not a measure of "internal self-determination". At best, it is a measure of "self-management".

Another interesting example that may highlight the difference between the terms is the new Canadian arrangement for by-laws for Canadian Indian reserves controlling the use of alcohol.<sup>45</sup> This has been hailed as "a small, yet important advance in Indian self-determination".<sup>46</sup> The scheme enables each Band Council to settle the content of its by-laws without ministerial interference.<sup>47</sup> Morse and his co-authors assert that Canadian Indians have an inherent "aboriginal right of self-government" which they use consistently with the way the term "internal self-determination" has been used above.<sup>48</sup> They suggest that if the validity of any particular set of by-laws is challenged in court as contrary to section 15 of the Charter of Rights and Freedoms (guarantee of equal protection without discrimination on the ground of race), then the by-law might be saved under section 25 of the same Charter which exempts "aboriginal, treaty or other rights or freedoms" from being

<sup>45</sup> See Ch 2 p 12.

<sup>46</sup> B Morse, M Sherry, W Taggart, for Chiefs of Ontario, Intoxicant By-Laws, The Indian Act and Indian Government (1986 unpublished) 31.

<sup>47</sup> Ibid 29. The by-laws must be consistent with the Indian Act which confers the power to enact them ibid 29.

<sup>48</sup> Ibid 21, 24.

harmd by other clauses of the Charter.<sup>47</sup> The success of this argument depends on accepting that "internal self-government" is an "aboriginal right" under the Charter. If such an argument was accepted by the courts then this scheme comes closer to a measure of "internal self-determination" than any arrangements currently in force in Australia, as the content of the by-laws would be beyond scrutiny by the executive arm of the state. However, the scheme is still not beyond the reach of the legislative arm of the State, which could repeal or amend the Indian Act that gives the power to pass by-laws as subordinate legislation. For that reason this writer would still define this scheme as one of "self-management" not "self-determination" as claimed by Morse and his co-authors. Even so, viewed as a scheme of "self-management", it clearly goes much further than any of the Australian schemes discussed in chapter II.

Notwithstanding all the problems, the concept of progressive "internal self-determination" may, eventually, provide a more secure theoretical legal basis for Aboriginal initiatives than the slippery concept of "self-management". At present, in Australia, "self-management" can only operate within the restrictive parameters of "special measures" under the Racial Discrimination Act which were discussed in the previous chapter.

<sup>47</sup> Ibid 21.

## CHAPTER VII

### CONCLUSION

Professor Kunz's droll musings are as true today as they were in 1954, when he pondered whether there might be:

fashions in international law just as there are in neckties. [At the end of the first World War] international protection of minorities was the great fashion: treaties in abundance, conferences, League of Nations activities, and enormous literature. Recently this fashion has become almost obsolete. Today the well-dressed international lawyer wears human rights. [Their wardrobe now includes] special measures of protection [as well].<sup>1</sup>

Lawyers representing minority groups who go shopping for outfits to include in their wardrobe still find that their choice is limited to "human rights", although this encompasses a wide variety of models. Sales assistants are keen to sell their most popular line, "protection against unfavourable discriminatory treatment", but a cursory examination shows that although this is desirable stock, another outfit is vital if they are to be equipped to assist those of their clients who wish for a measure of differential treatment in order to preserve the basic characteristics which they possess, and which distinguish them from the majority of the population.<sup>2</sup> Then, while browsing in a boutique,

<sup>1</sup> Kunz (1954) 48 AJIL 282. This obsolescence can, broadly speaking, be attributed both to the States concern that the League's regime posed a threat to their internal autonomy and the minorities objection that their "rights" under the treaties fell short of entitling them to claim self-determination, W McKean, Equality and Discrimination under International Law Oxford, Clarendon Press (1983) 52; P Thornberry, "Minority Rights, Human Rights and International Law" (1980) 3 Ethnic and Racial Studies 248, 252-253; J Sigler, Minority Rights: A Comparative Analysis London, Greenwood Press (1983) 190; R T Coulter, The Evolution of International Human Rights Standards: Implications for Indigenous Populations of the Americas Indian Law Resource Centre, Washington DC (11 June 1984, unpublished) 37; L B Sohn, "The Rights of Minorities" in L Henkin (ed) The International Bill of Rights: The Covenant on Civil and Political Rights 270 (1981) 276.

<sup>2</sup> UN Docs E/CN4 /Sub 2/36 and E/CN4 /Sub2 /SR 14-15. See also ECOSOC OR 6th sess, supp no 11, UN doc E/CN4/52 10-11; P De Azcarte and Y Florez, League of Nations and National Minorities: An Experiment trans E O Brooke, Washington DC, Carnegie Endowment (continued...)

they notice that it is selling "special measures of protection". At first they walked past, as the advertising was mainly directed to lawyers acting for individual clients rather than minority groups. Eventually a few adventurous lawyers bought these somewhat trendy outfits and tried to alter them sufficiently to meet their clients' needs. Although still considered avant garde, "special measures of protection" are more than a mere fashion accessory. Individually orientated measures, such as in Bakke,<sup>3</sup> have played an important role in assisting members of the disadvantaged black minority in the United States of America to move beyond the limited notion of equality under the law, although fears have been expressed that such measures are based on assimilative assumptions. In Australia the recent case of Gerhardy<sup>4</sup> has shown that, the more common, individually orientated, model of reverse discrimination, can be remodelled to benefit a minority group per se. In that case the South Australian land rights legislation, that is so vital to all Aboriginal people, survived a legal challenge in the High Court. The race-conscious permit system established by that legislation was, albeit reluctantly on the part of several judges, held to be a "special measure" under section 8(1) of the Racial Discrimination Act.

In Australia the legislation concerning the criteria for race-conscious "special measures" incorporates the international treaty on the subject, namely the Racial Discrimination Convention. However several legal writers have attacked the Australian interpretation of the "special measures" section of the Racial Discrimination Act in Gerhardy as being contrary to the construction of that term in international law. This writer rejects that criticism. The Racial Discrimination Act has been

<sup>2</sup> (...continued)

(1945) 24; G Kaechenbeeck, The International Experiment of Upper Silesia London, Oxford Uni Press (1942) 249. Contra E W Vierdag, The Concept of Discrimination in International Law The Hague, Martinus Nijhoff (1973) 159.

<sup>3</sup> Bakke op cit Ch 4 n 1.

<sup>4</sup> Gerhardy op cit ch 5 n 8

interpreted by the High Court as proscribing all forms of discrimination, save for "special measures" under section 8(1), which are exempted from the regime of formal equality. It is well established under international law that the anti-discrimination principle only applies to invidious discrimination, and leaves the way open for distinctions based on valid grounds, or designed to re-establish rather than destroy equality. Nevertheless, from the point of view of the Aboriginal proponents of the three measures highlighted in Chapter II, this divergence from the international law understanding of the meaning of discrimination is insignificant. Both routes to the sanctioning of reverse discrimination measures are equally onerous and stringent.

Traditionally, minority rights are only accorded to those minorities which owe undivided allegiance to the government of the state in which they live, and consequently are subject to its laws.<sup>5</sup> Gerhardy can certainly be cited as an important Australian precedent for reverse discrimination that benefits "traditional" minority groups, whose aims go no further than achieving genuine equality within a plural society. Undoubtedly Gerhardy will prove to be of some assistance to future Aboriginal groups, as it supports the more conventional forms of reverse discrimination which were discussed by both Evans<sup>6</sup> and Partlett.<sup>7</sup>

However a careful analysis of Gerhardy's impact on the three "special measures" highlighted in Chapter II shows that it does not create a precedent that is likely to open the floodgates to all Aboriginal sponsored "special measures". Firstly several judges conceded that they had considerable difficulty in interpreting the "rubbery and elusive language" of the Racial Discrimination Convention, which has been adopted by the Racial Discrimination Act. Unfortunately, because of the diversity in their reasoning, the seven separate judgments failed to establish

<sup>5</sup> McKean, op cit n 1, 82. See also 1982 submission by the Mikmaq Nation to the Commission on Human Rights, UN Doc E/CN 4/ Sub 2/404.

<sup>6</sup> Evans, op cit ch 3 n 13.

<sup>7</sup> Partlett, op cit ch 3 n 17.

principles that assist in determining whether these three further measures are authentic section 8(1) type "special measures". Secondly, it is noteworthy that, although the Court accepted that the land rights legislation was "for the sole purpose of securing adequate advancement" of the Pitjantjatjara people, only one judge attempted an analysis of the term "adequate advancement". The composition of the High Court has changed since Gerhardy was decided. If any of the judges were unsympathetic to these Chapter II-type "special measures", it would be easy for them to conclude that it was not their "sole purpose" to bring the group up to the norm enjoyed already by the rest of society, which is the usual meaning given to the notion of "adequate advancement". Thirdly although Gerhardy established that it was not essential for "special measures" to contain a sunset clause, the proviso to section 8(1) does require that "special measures" shall not continue after their objectives have been achieved. Some judges gave a clear warning that the court could, if invited, periodically review whether the land rights legislation continued to comply with the proviso. This warning is a reminder to the proponents of all these "special measures" that ultimately it is the court, not themselves, that will determine whether there were reasonable grounds on which to base the decision to take the measure in the first place, and if so how long the measure can remain in force. Thus, Gerhardy can only be regarded as a manifestation of traditional minority rights, not a licence for some form of autonomy beyond the authority of the state.<sup>24</sup>

Thus "special measures", which are constrained by the traditional limitations on minority rights, have been unable to

<sup>24</sup> See Partlett, op cit ch 3 n 17, 286 where he argues that courts are the appropriate institution in our society to determine the parameters of these rights; cf D Barwick, "Equity For Aborigines? The Framlingham Case" in P N Troy (ed), A Just Society. Essays on Equity in Australia (1981) 173, 212. Contra R L Barsh, "Aboriginal Rights, Human Rights, and International Law" (1984) 2 Australian Aboriginal Studies 2, 8 where he contends that "[t]here is little point in recognising collective land rights if Aboriginal groups will lack authority to govern themselves and maintain, if they choose, culturally distinct communities. None of the existing or proposed [land rights] legislation immunises Aboriginal lands from the operation of State laws, rendering self-determination largely illusory".

provide Aborigines with a secure legal foundation for programmes that are so important to them. So it is not surprising that Aborigines have an international movement working towards the establishment of a Declaration on Indigenous Rights.<sup>9</sup>

The credibility of this movement has been greatly aided by the Cobo Report on "discrimination against indigenous populations".<sup>10</sup> If one were to express the Cobo Report in the style of Professor Kunz's metaphor one would say that it concluded that the existing models of human rights are "not wholly adequate" to the task, and that fashion designers should develop a new line. Initially this should consist of a declaration to be released on a trial basis, which could, when market reaction had been tested, be re-released in the form of a convention.<sup>11</sup> The special rapporteur advised the fashion designers to ensure that the new line incorporated "self-determination" as this is the "basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future"<sup>12</sup> He considered that, to a large extent, indigenous peoples must create the specific content of the principle, and that it may be expressed in various forms of autonomy within the state.<sup>13</sup>

If the members of the Working Group on Indigenous Populations can be viewed as the fashion designers, then, they have heeded Cobo's advice to the extent of placing "consideration of

<sup>9</sup> See ch 3 n 33

<sup>10</sup> See Ch 6 n 40. The final part of the Report and its recommendations are contained in UN Doc E/CN 4/Sub 2/1983/21/Add 8, hereafter referred to as the "Cobo Report". This Report has already been accepted as authoritative by the Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1984/35A, 4th preambular para (Aug 30).

<sup>11</sup> UN Doc E/CN 4/Sub 2/1983/21/Add 8 paras 624-625, 628.

<sup>12</sup> Ibid para 581 also Ch 6 n 42. See also J Clinebell & J Thomson, "Sovereignty and Self-Determination: The Rights of Native Americans Under International Law" (1979) 27 Buffalo L Rev 669.

<sup>13</sup> Ibid. Contra the then Australian Minister for Aboriginal Affairs during the 1984 session of the Working Group on Indigenous Populations cited by T Simpson, "On the Track to Geneva" 19 Aboriginal Law Bulletin (April 1986) 8, 9.

the right to autonomy, self-government and self-determination, including political representation and institutions" at the top of the agenda for their next session.<sup>14</sup> The indigenous fashion designers have already decided that "all indigenous peoples have the right of self-determination", and are bound to cite the Cobo Report in support of "self-determination" becoming an integral part of any declaration on indigenous rights.<sup>15</sup>

The time may be coming when the well-dressed human rights lawyer's wardrobe includes not only the existing "special measures of protection", but also an outfit specifically tailored for the particular needs of indigenous peoples. This new outfit is required because, for them to achieve justice, "more radical solutions are required than the mere sensitizing of the majority justice system".<sup>16</sup>

<sup>14</sup> E/CN 4/Sub 2/1985/22 Annex I para 3.

<sup>15</sup> See Principle I, Declaration of principles adopted at the Fourth General Assembly of the World Council of Indigenous Peoples in Panama, September 1984, Ibid Annex III page 1; Draft declaration of principles proposed by the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference, and the International Indian Treaty Council, Ibid Annex IV page I; in a 1982 submission to the Commission on Human Rights, the Mikmaq Nation explained why they, unlike minorities, had the right to self-determination, UN Doc E/CN 4/ Sub 2/404.

<sup>16</sup> Keon-Cohen, op cit ch 5 n 74, 251.

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