Human Rights Commission
Monograph Series No. 1

Human Rights for Australia

A survey of literature and developments, and a select and annotated bibliography of recent literature in Australia and abroad

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Foreword

This is the first volume in the Human Rights Commission's Monograph Series. The Series is designed to include publications under the auspices of the Commission which have the status of a major research project and which, in the view of the Commission, are likely to form a continuing source of reference. It is intended that the Commission Monographs will cover a wide range of topics reflecting the Commission's interests and will contribute to better understanding and acceptance of human rights in Australia.

At present there is no comprehensive survey of human rights literature which has an Australian focus. Nor is there a bibliography, including a graded set of reference items, that provides a satisfactory guide to the literature dealing with human rights of particular concern to the Commission. By *bibliography* is meant here both a comprehensive and annotated listing of works to which reference should be made in the study of human rights and the indexing framework which guides the reader or researcher to relevant material.

This first Monograph is a significant and practical contribution to human rights research. It sets the discussion of human rights in a worldwide and Australian frame and it provides a means of locating relevant publications, particularly of Australian origin. The Commission hopes the Survey and the Bibliography will encourage reading and research, and will be glad to receive comments on either aspect of the Monograph. It intends later to publish revised editions of the Bibliography.

The views that may be expressed or implied in the Monograph Series are not necessarily those of the Human Rights Commission and should not be identified with it or them.

Contents

Preface

The strong commitment of successive Australian Governments to the promotion of human rights, exemplified in a growing body of legislation and in the creation and increased status and activity of the Human Rights Commission, has been accompanied by widespread public, political and academic discussion of the general principles and detailed problems of safeguarding and developing human rights. The discussion of principles and problems has been vigorous and international in scope; so have increasingly urgent demands by individuals and groups for protection of their rights. There is now planning of human rights curricula and the development of a human rights course for schools, a further extension of human rights courses in tertiary institutions and much legislative activity and popular and institutional involvement in the securing of human rights. An Australian Bill of Rights is in preparation. The Human Rights Commission itself is active in an increasing number of areas, conducting hearings and inquiries, receiving and investigating specific complaints, issuing reports tabled in Parliament, occasional papers, discussion papers, leaflets in a multiplicity of languages and a newsletter, and examining existing and proposed enactments.

Knowledge has always been a necessary prerequisite for rational and effective action. The literature on human rights, in Australia and abroad, has grown enormously in recent years. It is both descriptive and evaluative; it summarises the situation (or situations in different countries and regimes); it assesses policies; it discusses very general principles. Increasingly in recent years, critical assessment arises from and remains intimately linked with detailed legislative enactments or proposals. One of the tasks specifically assigned to the Human Rights Commission was that of promoting understanding and acceptance of human rights in Australia and, to this end, of undertaking research and educational programmes. In consequence, in June 1982 the Commission asked me to prepare a select bibliography, with annotations, of recent literature on human rights published in Australia or especially relevant to Australia — for the human rights movement is by its very nature an international concern and part of an international discussion. The Bibliography was to be introduced by a Survey summarising and assessing that literature. The task, both demanding and rewarding, was much too great for one person to do alone. The Commission generously provided assistance, as did the Department of Jurisprudence in the University of Sydney and the History of Ideas Unit in the Australian National University. This made it possible to associate a number of persons in the research for this Bibliography and the Survey that precedes it. Professor Eugene Kamenka of the History of Ideas Unit in the Australian National University has collaborated in this work as a whole; many parts of the Survey draw upon work he and I have done and are doing jointly. Our extended study, *Human Rights and Freedoms in Australia*, which will deal with legal substance rather than literature, and also with the Common Law guarantees not especially examined here, is to be published by Sydney University Press later in 1986. Dr Gabriel Moens and Mr Roger Wilkins, then in the Department of Jurisprudence in the University of Sydney, and Dr Roma Sadurska, who worked in the Department and then in the Unit, compiled extensive draft bibliographies and prepared annotations and critical assessments of specific areas or problems as background material for the writing of the Survey. Mr Andrew Frazer of the History of Ideas Unit helped check a draft of the final manuscript and prepared additional reports on human rights legislation in the States. He was much assisted in the latter task by

access, generously given, to the collection of material of the N.S.W. Anti-Discrimination Board. Mr Adrian Diethelm of the Department of Jurisprudence checked a subsequent draft, making many excellent suggestions for further revision, and prepared a report summarising the most recent work of the Human Rights Commission. Mr David Mason of the same Department checked the draft Bibliography and suggested further items for inclusion, as Mr Frazer had also done. Miss Sheila McGregor surveyed literature and legislative development concerning the rights of the mentally and physically disabled. Mr Mason compiled the Index with the assistance of Mr Diethelm and of a draft prepared by Mrs Elizabeth Short of the History of Ideas Unit. To all of them I am extremely grateful — without their participation and scholarly research this Survey could not have taken account of anything like the range of literature and developments mentioned. The formulations and opinions to be found in the Survey, however, are finally the work of a single hand. For them, I must take sole responsibility — save for the section 'Philosophical bases of human rights', which Professor Kamenka and I wrote jointly after surveying the field for another purpose. Those who assisted in the research and prepared summaries and reports had as many divergent and often sharply conflicting views on matters relating to human rights, on their scope, nature and the desirability of enacting them into legislation, as one finds in the literature. That was entirely appropriate and very helpful. It means that no section of this book is written and presented as any one of my collaborators would have presented it. Some, like Dr Moens and Mr Wilkins, have already made their own contributions to the human rights literature. I hope others who worked with me will do so as well. In every case where I have drawn on material prepared by them, I have indicated that in a footnote.

Professor James Crawford of the University of Adelaide and the Australian Law Reform Commission has read the entire manuscript and made many suggestions for stylistic and substantive improvement; so has Professor Kamenka. My colleagues, Professor D. H. N. Johnson, Challis Professor of International Law in the University of Sydney, and Dr Lyndel Prott, Reader in International Law and Jurisprudence, have been kind enough to read and comment upon the sections dealing with international law and international organisations. They have saved me from a number of errors and infelicities. Dame Roma Mitchell, Mr Peter Bailey, 0.B.E., and Dr Seweryn Ozdowski, all of whom have knowledge and experience in this area, encouraged the project, read the draft manuscript and made valuable suggestions regarding substance and organisation. I owe much to them and to the industry and imagination of Val Mitchell and Elizabeth Van Der Hor, who converted a complex typescript into a visually pleasing book.

Miss Pamela Maning, Mrs Susan Franks and Mrs Carolyn Griffiths of the Department of Jurisprudence, Mrs V. Wetselaar of the History of Ideas Unit, and Miss Deanne Bagnell and Mrs Julie Smith of the General Office of the Faculty of Law prepared this manuscript for publication — a long and exacting task not always made more congenial by the new technology, but greatly appreciated by all who worked on this book.

Much of the literature on human rights today is concerned with the nature and effect of international declarations and covenants, Federal and State legislation, the work of UN organs and regional bodies, and of commissions, boards and tribunals in Australia and elsewhere. Often it presumes knowledge that not every user of this Bibliography will have at his or her fingertips. I have striven in the Survey to indicate the areas and issues discussed in the literature, the lines taken, and the legislative and administrative developments that inspire the discussion or exemplify trends. The Survey is thus a review of literature and developments — for the two go together, each being necessary for a proper understanding of the other. The Survey may be read, therefore, as presenting, *inter alia*, the review of human rights provisions, declarations and legislative

developments since World War II needed to make effective use of the Bibliography.

Sections 1-11 of the Survey deal with those central aspects of human rights in Australia, from discrimination to a Bill of Rights, from women to Aborigines, where the actual details of legislative provisions stand at the centre of the literature and of all discussion. Without a grasp of those details it is hard to understand what the debates are about. Section 12 deals with UN and regional arrangements for the protection of human rights, arrangements often held up in the literature as models to which all parts of the world, including our own, should aspire. These arrangements are having a growing influence on legislation and discussion in many parts of the world. Sections 13-21 review the philosophical consideration, in the literature, of fundamental principles and of difficulties in the formulation or elevation of specific rights. Questions considered range from affirmative action to euthanasia, from freedom of expression to civil disobedience. Here argument rather than legislation stands at the centre of the discussion.

The Bibliography of some 3000 important items covers the same post-war period. It is organised under specific headings, each of which is immediately followed by a list of cross-references and other headings that may be consulted in libraries. The function of the Survey is to draw the reader's attention to the general trend of the literature on human rights, to the problems discussed in it and to the conflict of views that has arisen over some very important questions. References at the beginning of sections of the Survey refer the reader to appropriate sections of the Bibliography.

Literature on human rights since World War II has reflected a number of very general concerns and approaches, each of which has been especially dominant at a particular period, though all have co-existed and continue to co-exist. The first phase, that of the UN Charter and the Universal Declaration of Human Rights, put perhaps the greatest emphasis on the philosophical bases and defence of human rights. It consummated the theoretical shift from a concept of natural rights to one of human rights, grounded in respect for and the dignity of human beings as such and in a theory of what it meant to be human. The second phase, especially evident in the 1960s, saw an upsurge of empirical literature and sociological research designed to draw attention to actual inequalities, injustices and denials of human rights. Such literature focused both on prevalent but previously not much publicised *formal* inequalities and violations of human rights, and also on *substantive* inequalities concealed by formal equality — lack of power and of representation, denial of access to courts and to benefits, continuing inequality of outcomes in spite of proclaimed equality of opportunity. The literature revealed much that had been ignored, concealed or dismissed, though it also aroused a more theoretical discussion about the significance of statistics and of the selection of particular categories and groups, and of particular questions, for the statistical examination. The third phase, a natural result of increasing human rights, anti-discrimination and affirmative action programs and legislation, sees the relevant literature take on a more technical and legal character, having to deal with such established legal problems as ambiguities in the legislation, conflict of protected and recognised interests, conflict of jurisdictions, observance of rules of natural justice etc. The Bibliography presents all these types of work, though the legal phase is one that Australia is only beginning to enter. In the second phase, especially in the sociological and statistical demonstration of substantive inequality, US writing has been dominant, especially in setting the direction and assumptions of research. There have been studies of the position of women in Australia — in education, employment, leisure time, income etc. — and much more extensive studies of Aborigines, and these are continuing. Most of these studies have analysed official statistics: the resources for major independent research projects in Australia have not been great. The reports of the Human Rights Commission, and work by other interested people and groups, are bringing out, in various areas connected with human rights, the extent of perceived discrimination against Aborigines, aliens and migrants, the physically and mentally handicapped,

people in country towns and isolated circumstances. These are mentioned in the Survey and in the Bibliography. A number of women's organisations and the Office of the Status of Women within the Prime Minister's Department have drawn much attention to substantive inequality of women: debate about the role of women in society is certainly not dead, even if formally denying them particular social roles or types of employment is now faced with many legislative barriers. The treatment of prisoners and people in institutions, like many other injustices and brutalities, has been dependent on literally locking such persons away, or not encouraging or sometimes permitting the public to be conscious of what conditions are actually like. In these areas, too, public scrutiny is increasing, though the financial and practical restraints in the way of reform continue to be great. But the fact that these issues have now become public issues is also reflected in the Bibliography.

The legislation establishing the Human Rights Commission specifically directs its attention to the rights enumerated in the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration of the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons, as well as other international instruments relating to human rights and freedoms. Also within the Commission's purview are the Racial Discrimination Act 1975, and through it the International Convention on the Elimination of All Forms of Racial Discrimination, and now the Sex Discrimination Act 1983, and through it the Convention on the Elimination of All Forms of Discrimination against Women. In selecting specific rights for extended bibliographical presentation and discussion in the Survey, my collaborators and I have followed the scope and arrangement of the relevant international documents and not attempted an exhaustive or comprehensive catalogue of rights in a preferred philosophical order. Australian legislation at Commonwealth level, like this Bibliography, is largely tied to those international instruments. A guide to using the Bibliography and an explanation of the way in which headings have been arranged immediately precedes the Bibliography.

Human rights in Australia continue to form part of a strongly developing and rapidly changing social, political and legal scene. Important further extensions of human rights legislation are being mooted or enacted, as this Preface is being written. The Survey and Bibliography endeavour to take into account everything important in the area chosen for review up to 31 December 1983. Some more recent material has been inserted during the checking of later drafts, especially the passage of the Sex Discrimination Bill on International Women's Day, 7 March 1984. I shall be grateful to readers who draw my attention or the attention of the Human Rights Commission to anything significant that has been missed.

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Department of Jurisprudence
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March 1984

Update

Some main human rights events taking place in Australia since the writing for this volume was completed on 31 December 1983 are:

January 1984

Prime Minister Bob Hawke announces that the Federal Government is committed to Public Service employment of Aborigines proportionate to their numbers in the community.

February 1984

N.5 .W. Aboriginal Affairs Minister Frank Walker hands over the first title deeds issued to an Aboriginal group under N.5 .W. land rights legislation to the Yuin people at Wallaga Lake on the South Coast.

March 1984

Commonwealth Sex Discrimination Act, subsequently amended by Statute Law (Miscellaneous Provisions) Act.

April 1984

Queensland Parliament passes 'land rights' legislation: the Community Services (Torres Strait) Act and Community Services (Aborigines) Act. They concern existing reserves; the legislation is condemned by Aboriginal leaders as failing to give real power to Aboriginal people.

High Court Justice Lionel Murphy calls for the States to introduce Bills of Rights.

N. S.W. Attorney-General Paul Landa announces discussions with other States concerning possible uniform State Bills of Rights based on U.S. model.

May 1984

Human Rights Commission Deputy Chairman Peter Bailey calls for an inter-governmental Human Rights Commission for the South Pacific area.

Human Rights Commission commences a review of the Commonwealth Passport Act for conformity with the International Covenant on Civil and Political Rights.

Human Rights Commission opens Brisbane Office.

South Australia granted exemption under Sex Discrimination Act to establish 'women only' job creation schemes.

Victorian Equal Opportunity Act.

Australia elected to three-year term on UN Commission on Human Rights, commencing in 1985.

June 1984

N. S.W. Anti Discrimination (Amendment) Act.

July 1984

First Sex Discrimination Commissioner under Commonwealth Sex Discrimination Act, Ms P. O'Neill, commences appointment.

August 1984

Co-operative arrangements with State anti-discrimination bodies in South Australia and N.S.W. to deal with complaints under Human Rights Commission Act, Racial Discrimination Act and Sex Discrimination Act.

Federal Aboriginal Affairs Minister Clyde Holding affirms support for uniform land rights legislation before the UN Commission on Human Rights Working Group on Indigenous Populations.

Federal Opposition's land rights policy recommends leaving control with State governments.

October 1984

Federal Government weakens proposed national land rights law in response to State government concerns.

Queensland Premier discloses contents of draft Federal Bill of Rights, circulated confidentially for comment.

November 1984

Bill of Rights proposals attacked during election campaign as 'legalising gay marriages' and 'abolishing States' rights'.

High Court in *University of Wollongong v. Metwally* rules as ineffective the Commonwealth's legislative attempt retrospectively to validate the N.S.W. Anti-Discrimination Act provisions which had been struck down in *Viskauskas v. Niland* for inconsistency with the Commonwealth Racial Discrimination Act.

December 1984

Western Australia Equal Opportunity Act.

South Australian Equality Opportunity Act.

Seventeen of the 20 reservations and declarations accompanying Australia's ratification of the International Covenant on Civil and Political Rights removed.

Senator Gareth Evans replaced by Mr Lionel Bowen as Commonwealth Attorney-General following the re-election of Labor to government.

Claims in the media that the Bowen appointment means an end to human rights legislation denied by the Attorney-General.

January 1985

Human Rights Commission report on Queensland Community Services (Aborigines) Act calls for repeal of discriminatory provisions or Federal action to achieve this effect.

February 1985

High Court in *Gerhardy v. Brown* holds South Australia's Pitjantjatjara Land Rights Act not invalid under the Commonwealth Racial Discrimination Act.

March 1985

Human Rights Commission report finds breaches of International Covenant on Civil and Political Rights and I.L.O. conventions, in Queensland Electricity (Continuity of Supply) Act 1985.

April 1985

Federal Government refers to the Senate Standing Committee on Constitutional and Legal Affairs question of 'the desirability, feasibility and possible content of a national Bill of Rights'.

May 1985
Attorney-General Lionel Bowen announces his draft Bill of Rights is to be introduced, although the Senate inquiry has not yet been conducted.
N.S.W. Equal Opportunity Tribunal awards $35 000 damages against employer for sexual harassment of an employee by other employees, under Anti-Discrimination Act.
Victorian Attorney-General James Kennan asks Parliament's Legal and Constitutional Committee to advise on the desirability of a State Bill of Rights.

June 1985
Karen Quinlan dies 10 years after slipping into a coma.

July 1985

Commonwealth Sex Discrimination Commissioner reports 1000 complaints in first year, mostly from 'ordinary working women'.

Calls for employee liability for sexual harassment under N.S.W. Anti-Discrimination Act from the chairmen of N.S.W. Law Reform Commission and the Equal Opportunity Tribunal.

Federal Shadow Attorney-General Neil Brown states the Opposition's intention of abolishing the Human Rights Commission if the Opposition returned to office.
N.S.W. Premier Neville Wran 'reconsidering' power of the Equal Opportunity Tribunal to award damages, following the award of $31 000 for discriminatory forced early retirement.

August 1985

Federal Government announces that privacy legislation is to be introduced.

October 1985

Federal Government announces affirmative action program to be introduced in public employment and for private employers with more than 100 employees.

Australian Bill of Rights Bill introduced into Parliament; similar to earlier drafts but not seeking to bind the States. Human Rights and Equal Opportunity Commission Bill and Human Rights and Equal Opportunity Commission (Transitional Provisions and Consequential Amendments) Bill introduced to reshape Human Rights Commission with added functions and powers.
Title to Ayers Rock handed over to Aboriginal traditional owners.

Human Rights Commission Publications from October 1983

Reports

No.7

Proposal for Amendments to Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation, November 1983.

No. 8
Deportation and the Family: A Report on the Complaints of Mrs M. Roth and Mr C.J Booker, September 1984.
No. 9
Community Services (Aborigines) Act 1984, January 1985.

No. 10
The Human Rights of Australian-born Children: A Report on the Complaint of Mr and Mrs R. C. Au Yeung, January 1985.

No.11
Human Rights of the Terminally III— The Right of Terminally Ill Patients to have Access to Heroin for Painkilling Purposes, March 1985.

No. 12
The Queensland Electricity (Continuity of Supply) Act 1985, March 1985.

No. 13
Human Rights and the Migration Act 1958, May 1985.

No. 14
Queensland Electricity Supply and Related Industrial Legislation, May 1985.

No.15
The Human Rights of Australianborn Children: A Report on the Complaint of Mr and Mrs M. Yilmaz, August 1985.

Occasional papers

No. 5
Aboriginal Reserves By Laws and Human Rights, October 1983.

No. 6
The Teaching of Human Rights.

No. *7*
A badge of exclusion: Epilepsy and Human Rights, 1984.

No. 8
The Right of Peaceful Assembly in the A. C. *T.,* February 1985.

Teaching, Enacting and Sticking Up for Human Rights, March 1985.

No. 10
Legal and Ethical Aspects of the Management of Newborns with Severe Disabilities, August 1985.

Discussion papers

No. 4
Ethical and Legal Issues in Guardianship Options for Intellectually Disadvantaged People, November 1983.
Summary of Proceedings of Consultation with National NonGovernment Organisations, September 1983.

No. 5
Rights of Relinquishing Mothers to Access to information concerning their Adopted children.

No. 6
Guardianship and the Rights of Intellectually Disadvantaged People, November 1984.

Miscellaneous

A Guide to the Commonwealth Sex Discrimination Legislation, March 1984.

9th Annual Lalor Address on Community Relations, June 1984.

Putting the Sex Discrimination Act into practice, 1984.
National Human Rights Organisations in Australia (Non-Government and Government) 1984.

Report on Consultation with Non-Government Organisations, August 1985.

Annual Report 1983-84, August 1985.

10th Annual Lalor Address on Community Relations, September 1985.

PART ONE

SURVEY OF LITERATURE AND DEVELOPMENTS

1

Human rights in the post-war world

See Bibliography —
Human rights — general (p. 131): *International instruments and agencies (p. 134):* United Nations Charter and Universal Declaration of Human Rights (p. 137), United Nations Covenants and Conventions (p. 142); *Philosophy of human rights (p. 167)*

The second half of the twentieth century has seen a remarkable revitalisation and extension of the great seventeenth and eighteenth century doctrine of human rights. Such rights were called natural rights then and were initially set in a religious or natural law context. They produced, for all that, revolutions. Today they are called human rights and are usually derived from the inherent worth, dignity and potentialities of human beings and their essential kinship and responsibility for each other. President F. D. Roosevelt's call to Congress, on 6 January 1941, for it to uphold the Four Freedoms — freedom of speech and expression, freedom of worship, freedom from want and freedom from fear — became part of the allied war aims in World War II and of the conception of a new post-war world. 'Freedom', Roosevelt had said in his notable message to Congress, 'means the supremacy of human rights everywhere'', and a reaffirmation of faith in fundamental human rights forms the Preamble to the Charter of the United Nations (UN) drawn up at the San Francisco Conference of April–June 1945. The UN was to 'facilitate solutions of international, economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms'.

The initial hope that the UN might help to create, or even preside over, a world free of war, persecution and injustice has had some hard knocks. But there can be no doubt that the UN has since 1945 played an enormous role in publicising and promoting a conception of human rights as fundamental to social life and political government and in seeking to have human rights recognised in international convenants and conventions.

The UN's Universal Declaration of Human Rights[2] of 1948 proclaimed a 'common standard of achievement for all peoples and all nations to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms by progressive measures, national and international, to secure their universal and effective recognition and observance'. It provided (Preamble and Articles 1, 2) that all human beings were born free and equal in dignity and rights, that they should act toward one another 'in the spirit of brotherhood' and that they were entitled to the rights and freedoms set forth in the Declaration 'without distinction of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Moreover, no distinction was to be made 'on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs'.

'U.S. Congress House Documents, 77th Congress, Document 1,6 January 1941. Cf. J. G. Starke, 'Human Rights and International Law', in E. Kamenka & A. E-S. Tay (eds), *Human Rights*, Edward Arnold, London and Melbourne, 1978, p. 118.

[2] The text, frequently reprinted, is included in United Nations, *Human Rights: A Compilation of International Instruments of the United Nations*, United Nations, New York, 1973; W. Laqueur & B. Rubin (eds), *The Human Rights Reader*, Temple University Press, Philadelphia, 1979; M. Cranston, *What Are Human Rights?*, Bodley Head, London, 1973; I. Brownlie, *Basic Documents on Human Rights*, Clarendon Press, Oxford, 1981. Most of the standard-setting UN instruments referred to in this Survey are also to be found in the texts listed.

The rights the Declaration enumerated (Articles 3-12) were the right to life, liberty and security of person, the right not to be held in slavery or servitude, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to recognition as a person before the law, the right to equality before the law, the right to effective remedies by competent national tribunals for acts violating fundamental rights granted by the constitution or by law; the right to freedom from arbitrary arrest, detention or exile; the right to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations and of any criminal charge, the right to a presumption of innocence in penal matters until proved guilty in a public trial that has given the accused all the guarantees necessary for the defence; and the right not to be held guilty of a penal offence, or to be penalised more heavily, on the basis of provisions enacted after the commission of the offence.

Articles 13-15 provided for freedom of movement and residence within each state and the right to leave any country, including the person's own, and to return to the latter; the right to seek and enjoy asylum from persecution, save in the case of prosecution for non-political crimes or acts contrary to the purposes and principles of the United Nations; and the right to a nationality, not to be deprived arbitrarily of it and not to be denied the right to change nationality.

Articles 16-20 enumerated the rights of men and women of full age, without limitation due to race, nationality or religion: the right to marry and found a family and to equal rights during marriage and at its dissolution; the right to own property and not to be arbitrarily deprived of it; the right to freedom of thought, conscience and religion, including the right to change religion or belief and to manifest religion or belief in teaching, practice, worship and observance; the right to freedom of opinion and expression, which includes the right to seek, receive and impart information and ideas through any media and regardless of frontiers; the right to freedom of peaceful assembly and association and freedom not to be compelled to belong to an association. Article 16 stated also that the family was the natural and fundamental group unit of society and entitled to protection by society and state.

Articles 21 and 22 proclaimed the right to participate in government of each person's country, directly or through freely chosen representatives; the right to equal access to public service in the country; the fact that the authority of government rests on the will of the people which must be expressed in periodic and genuine elections by universal and equal suffrage through a secret vote or equivalent free voting procedure; the right to social security and, in accordance with the organisation and resources of each state, to the economic, social and cultural rights indispensable for a person's dignity and the free development of his personality.

Articles 23-25 spelled out the rights to work, to free choice of employment, and to just and favourable conditions for work and to protection against unemployment; to equal pay for equal work; to just and favourable remuneration ensuring 'for himself and his family' an existence worthy of human dignity, to form and join trade unions, to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay, and to an adequate standard of living, including food, clothing, housing, medical care, necessary social services and security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond a person's control. All children born in or out of wedlock should enjoy the same social protection, and motherhood and childhood were entitled to special care and assistance.

Articles 26 and 27 provided for rights to education, including free and compulsory education, generally available technical and professional education, and access to higher education on the basis of merit; and the rights to participate in the cultural life of the community, to enjoy the arts, to share in scientific advance and its benefits, and to have protection of moral and material interests resulting from scientific, literary or artistic

production of which a person is the author. Parents had a prior right to choose the kind of education that shall be given to their children.

Articles 29 and 30 provided that 'everyone has duties to the community in which alone the free and full development of his personality is possible', and that the exercise of rights and freedoms should be subject only to such limitations as are determined by law 'for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society' — qualifications that some philosophical and other critics, as we shall see, regard as very broad and open-ended indeed, giving great leeway for weakening or abrogating the rights proclaimed. The Declaration also provided that everyone was entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised, and that nothing in the Declaration should be interpreted 'as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein'.

The Universal Declaration of Human Rights is a statement of principles; whether it is legally binding on governments is still a matter of controversy.[3] It reflects more strongly than subsequent UN documents those Western liberal democratic attitudes and traditions which have been undergoing some modification under the dual pressure of changes in the social climate of the Western world and of demands in the UN by Communist countries and the Third World. The right to property, for example, does not reappear in subsequent UN documents. Nevertheless, the Universal Declaration stated the general principles and set the draft agenda which the UN and member states would follow for the purposes of further extending and strengthening human rights.

In a conscious attempt to work out that program, the UN Commission on Human Rights in 1966 drew up the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the provisions of which are discussed below. Before that there had been such conventions as the Conventions on the Status of Refugees (1951), and on the Political Rights of Women (1952), a Unesco Convention Against Discrimination in Education (1960)[4] and an International Convention on the Elimination of All Forms of Racial Discrimination (1965).[5] The UN Commission on Human Rights in 1967-71 introduced a new procedure for considering petitions or communications alleging violations of fundamental human rights or freedoms together with the replies of the governments concerned. Throughout its history that Commission has been flexible in having recourse to a wide range of expedients, from fact finding, negotiation and conciliation to provision of publicity, dissemination of information, education and the inspiration of national legislation. Both President Carter's proclamation of human rights as a major U.S. foreign policy goal and the Helsinki Accords — undermined as they may have been by subsequent events — would have been impossible without the consistent propaganda for human rights by the

[3] The controversy concerns the status of resolutions of the UN General Assembly generally and also extends, as far as non-members are concerned, to the Charter of the United Nations, though not to covenants, conventions and other instruments signed and ratified by the nation whose duty to observe the provisions is in question. The traditional view was that resolutions and declarations were not binding if not supported by an agreement into which the nation had entered. A growing sentiment among contemporary international lawyers is that such resolutions, when they have the overwhelming support of the member states, including all the major powers, are functidnal equivalents of legislation and may perhaps be treated as a form of 'instantaneous' but binding customary international law: see M. S. McDougal, H. D. Lasswell & L.-c. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity,* Yale University Press, New Haven and London, 1980, pp. 272-7, and the literature there cited (pp. 272-3nn., 359-61).

[4] The texts are reprinted in United Nations, *Human Rights: A Compilation.*

[5] The text is reproduced as Appendix C in A. E-S. Tay et al. (eds), *Teaching Human Rights: An Australian Symposium,* Australian Government Publishing Service, Canberra, 1981, pp. 201-6. Also in United Nations, *Human Rights: A Compilation;* Cranston, op. cit.; Laqueur & Rubin, op. cit.; Brownlie, op. cit.

United Nations and its Human Rights Commission. They had helped to change the language of moral and political protest and justification and had given new hope and new causes to many of the deprived and oppressed.

Apart from the UN role in encouraging governments to legislate for and undertake to protect human rights, Unesco has actively promoted respect for and interest in human rights through educational programs, publications, international seminars and conferences and the proclamation of such projects as International Women's Year and the International Year of Disabled Persons. Such projects have not only directed much attention to the disadvantages from which groups may suffer; they have also resulted, in many countries, in funds being allocated for remedial measures and in legislative steps being taken to protect the rights of groups.

Few of those writing about human rights in recent years have therefore failed to note the considerable and important spread, throughout the world, of an 'ideology' of human rights and of calls or attempts to actualise those ideals. Few also have failed to note that violations of human rights in societies all over the world have grown, in the twentieth century, in scale and horror to heights not envisaged before. A leading Australian judge with a strong and sustained interest in civil liberties and human rights, the Honourable Mr Justice R. M. Hope, has put it thus:

> Nowadays there is much talk, in many places, of human rights. In some places there has been action, and no doubt many optimistic people look forward to a great increase in that action. Undoubtedly some progress has been made during this century. There has been a growth of the recognition of those rights; attempts at a formulation of their content have been accepted internationally; scores of countries have bills of rights provisions with procedures, both international and municipal. For my part, despite this action, despite the concern, the declarations, the covenants, the bills of rights and the legislation about human rights, I fear that the twentieth century will not be looked back upon in history as the century in which mankind turned in its course towards a general acceptance and observation of those rights, at any rate of those which have been described as civil and political rights. I would hazard a pessimistic guess that it will be looked upon as a period when the reverse process gathered momentum. Whatever final judgment will be given in history, the massive inhumanity of man to man, the slaughter, the starvation, the torture, the violence, and the general oppression that has occurred, and is still occurring, in this century will certainly look strange when set beside its professions of humanity. Those professions may indeed be seen as a reaction of a horrified and startled world to the indifferent ravages of the vast historical movements with which, in such a short period of time, it has been enveloped. . .
>
> That wider and to me appalling picture may perhaps emphasise the point I wish to make both universally and in relation to Australia today. . . Human rights stem from the heart of man; if they are to be effectively recognised, it is those hearts that must be won. I am a believer in a bill of rights and in legislative reform. This part of the struggle for their acceptance is important. But it should not divert people into thinking that it is the whole struggle, or that it can produce anything but an aid or sometimes a bulwark in a larger and more intangible struggle. The abuse of power, and the use of force to sustain that abuse, needs no encouragement. The elimination of that abuse and force will require a sustained campaign, the establishment of a tradition of the recognition of human rights, and a much greater concern for human beings than exists today. A prediction was made 2000 years ago that the meek shall inherit the earth. They have not, yet. I fear that it is unlikely that they ever will.
>
> With that gloomy prologue, I will return to the Australia of today. I think there is little doubt that, with some notable exceptions or qualifications, the universally recognised human rights are generally enjoyed in Australia today. There are no significant guarantees; there are no adequate safeguards to ensure that laws infringing those rights will not come into force, or to ensure that violations of those rights will not occur. Discrimination by selective, or selectively aggressive, enforcement of the laws is not uncommon. The earlier gross violation of the human rights of Aborigines is now, so far at any rate as the use of force or violence is concerned, largely of this character. But the widespread gross and continuous violation of human rights

which exists in many parts of the world does not occur here. In the matter of human rights most of us — certainly not all — live in a lucky country.[6]

Any investigation into the history of human rights in Australia since the Second World War will reveal a good deal of sympathy in this country for the development of human rights. Before the War Australia had ratified the 1921 International Convention for the Suppression of the Traffic in Women and Children, the 1926 Slavery Convention, the 1930 Protocols Relating to a Certain Case of Statelessness and to Military Obligations in Certain Cases of Double Nationality, and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age. Then, after the War, Australia participated in the creation of the United Nations and took part in its early activities with distinction. At the 1945 San Francisco conference the Australian delegation, led by Dr H. V. Evatt, then Labor Attorney-General and Minister for External Affairs, was prominent in the drafting of the UN Charter.' Professor K. H. Bailey, of the Australian delegation, took a significant part in drafting the statute of the International Court of Justice.[8] In 1948, Dr Evatt was President of the General Assembly when the Universal Declaration of Human Rights was adopted, and the proposed Convention on Human Rights then being considered by the United Nations was influenced, at least to some extent, by the work done by the Australian delegation, particularly in the field of social and economic rights. This was not a new area of concern for Australia. In the 1930s the distinguished diplomat and former Prime Minister S. M. Bruce had worked to involve the League of Nations in economic and social issues, pressing for example for programs to eliminate malnutrition.[9] In 1949, Australia proposed the inclusion in the Convention of articles dealing with the right to work, to social security, to education and to supervision by the state of wages and working conditions. Eventually, due to the need for a compromise on the inclusion of economic rights in the proposed Convention, Australia supported the concept of two covenants, one to cover civil and political rights and the other to cover economic, social and cultural rights — the concept that was ultimately adopted.

Australia was a party to many conventions adopted by the United Nations. In 1949 Australia ratified the Convention on the Prevention and Punishment of the Crime of Genocide, and in 1954, the Convention relating to the Status of Refugees. Earlier, in 1947, it had ratified the Constitution of the International Refugee Organisation and the revised and amended Conventions for the Suppression of the Traffic in Women and Children and of the Traffic in Women of Full Age. Later, in December 1949, it ratified the newly amended 1904 International Agreement for the Suppression of the White Slave Traffic and the newly amended 1910 International Convention on the same subject. In the remainder of the 1950s, only two such UN conventions relevant to human rights were ratified, a Protocol amending the Slavery Convention of 1926, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. In 1958 the four Geneva Conventions on the Protection of Victims of War were ratified. Thus in the late 1950s, for reasons to be examined below, the pace of ratifications had begun to flag. In the 1960s only the 1957 Convention on the Nationality of Married Women and the 1960 Unesco Convention against Discrimination in Education were ratified by Australia, apart from a 1951 ILO Convention Concerning Wage Fixing Machinery in Agriculture, a 1957 ILO Convention

[6] Hon. Mr Justice R. M. Hope, 'Civil Liberties in Australia: The Case of Peaceful Assemblies' in A. E-S. Tay et al. (eds), *Teaching Human Rights,* op. cit., pp. 33-4. For a more general, recent but already somewhat dated account of Australian attitudes and development see, in the same volume, E. Kamenka & A. E-S. Tay, 'Introduction: Human Rights and the Australian Tradition', pp. 1-16.

[7] K. Tennant, *Evatt: Politics and Justice,* Angus & Robertson, Sydney, 1981, pp. 164-77.

[8] Sir Paul Hasluck, *Diplomatic Witness: Australian Foreign Affairs 1941-1947* , Melbourne University Press, Melbourne, 1980, pp. 192-3.

[9] W. J. Hudson, *Australia and the League of Nations,* Sydney University Press, Sydney, 1980, pp. 169-80.

Concerning the Abolition of Forced Labour and a 1964 ILO Convention Concerning Employment (Policy).

Until the early 1970s there was a widespread belief among established and comparatively affluent Australians that human rights, except in relation to Aborigines, were on the whole adequately protected in Australia itself and that the Common Law and the democratic political system, backed by the Australian Constitution with its federalist structure, were the best guarantees of human rights and political liberty. Geoffrey Sawer, a Labor-leaning academic lawyer then embarking on his career as a distinguished student of the Australian Constitution and the Australian political system, wrote in 1946:

> There is probably no country in the world in which human rights, whether of individuals or groups, are more extensively or better protected than they are in the Commonwealth of Australia. This state of affairs, however, owes more to the inherited tradition of British liberalism, strengthened by Australia's own history and economic circumstances, than to any formal system of constitutional guarantees.[10]

The former Liberal Prime Minister of Australia Sir Robert Menzies said in an address as late as 1974, that 'to live in a Common Law country is, in itself, the very best guarantee of the rights of the individual'." The internationally distinguished Chief Justice of the High Court, Sir Owen Dixon, held the same view[12]; his one-time colleague and prominent Labor Leader, Dr H. V. Evatt, like most Labor thinkers, was more sceptical.

The view that the main guarantor of human rights is and should be parliamentary democracy and the Common Law is no longer so generally accepted in Australia, or among those who write on problems of human rights. Contrary to much popular opinion, and as our Bibliography indicates, able and senior judges in the U.S.A., Canada, the U.K. and Australia have been active and prominent in urging the need for judicial determination, legislative intervention, including Bills of Rights and new procedures to protect human rights in changed circumstances. The discussion of human rights in Australia, and elsewhere in stable and comparatively affluent democracies, takes place in the context of increasing suspicion of bureaucracies and their procedures, and of growing concern for the rights of groups that have been discriminated against in law or in practice or both — women, Aborigines or other indigenous races that have lost control of their habitat, recent migrants and aliens, homosexuals, prisoners, the physically or mentally handicapped or ill. The discussion focuses also on the problems of those who lack the knowledge, education or financial means to avail themselves of traditional legal remedies and whose rights can consequently be trampled upon with comparative impunity by those who have authority, power, wealth or a monopolistic position behind them. In the field of human rights, as in other fields, people increasingly look not just to equality of theoretical opportunity but also to equality of practical outcome. On this basis, there are many who feel that on the standards appropriate to a 'lucky country' like Australia, neither the guarantees for nor the practical implementation of human rights can give cause for complacency or satisfaction.

All Australian Federal Governments, in the past two decades at least, have subscribed to the general aims and ideals of the UN-sponsored campaign for the

10 Geoffrey Sawer, 'Protection of Human Rights in Australia' in *Yearbook on Human Rights for 1946*, United Nations, Lake Success, New York, 1947, p. 31.

Sydney Morning Herald (14 March 1974), 6.

12 'Civil liberties depend with us upon nothing more obligatory than tradition and upon nothing more inflexible than the principles of interpretation and the duty of courts to presume in favour of innocence and against the invasion of personal freedom under colour of authority': Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses*, Law Book Company, Sydney, 1975, p. 153. Sir John Cockburn, at the 1897 Constitutional Convention, and many others there present, rejected a suggested Bill of Rights or an entrenched due process clause for the Federal Constitution on the same grounds, that is that British traditions, parliamentary democracy and the Common Law were the fundamental and sufficiently reliable protection of rights. See J. A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, Melbourne, 1972 p. 321, *passim*.

promotion of human rights. But Labor Governments, both under Mr Whitlam and Mr Hawke, have been more strongly committed to the enactment of a general Bill of Rights to cover all who live in Australia, and to the ratification and enactment into federal municipal law of the provisions of UN covenants and declarations in this area. That has ensured especially lively discussion of these issues in the last twelve years or so, in a context that forces to our attention both the political traditions and realities of Australian government and life and the ever-growing impact of international agreements and their implementation in other countries. The Commonwealth Attorney-General has announced the formation of a task force to draft an Australian Bill of Rights that he intends to put before Parliament shortly. He sees it as establishing guidelines for all relevant legislation and practices in Australia, whether State or Commonwealth. A Sex Discrimination Act, prohibiting such discrimination in work and other areas, awaits proclamation having passed through Parliament, and further amendments to the Racial Discrimination Act have been foreshadowed. Already, during the period of the Whitlam Government, Australia had ratified (with reservations) the International Convention of the Elimination of All Forms of Racial Discrimination, signed in 1966; signed the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both later ratified (the ICCPR with reservations) under the subsequent Fraser Government; and ratified the Convention Relating to the Status of Stateless Persons, the Convention on the Reduction of Statelessness and the Protocol Relating to the Status of Refugees. After the election of the Hawke Government in 1983, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, signed in 1980, was ratified.

In 1982 the High Court of Australia handed down a decision in the *Koowarta* case[13], affirmed in the *Dams* case[14] (both to be discussed below), that the Commonwealth could legislate internally on the basis of its external affairs power in matters otherwise outside its powers under the Constitution, if this was either in discharge of a treaty obligation or otherwise on a 'subject of international concern' (which concern may be evidenced by a conclusion of a treaty). As a result the ratifications of international covenants and conventions listed above, already centrally important to the nature and development of recent human rights legislation in Australia, become even more so. So too, as we shall see, do the principles and procedures of international law and of the UN bodies that prepare, and supervise the workings of, such conventions.

[13] *Koowarta v. Bjelke-Petersen* (1982) 56 *Australian Law Journal Reports* 625; 39 *Australian Law Reports* 417.

[14] *Commonwealth v. Tasmania* (1983) 57 *Australian Law Journal Reports* 450; 46 *Australian Law Reports* 625.

2

Human rights and international law

See Bibliography —
International instruments and agencies (p. 134)

Until the 1950s theoreticians generally agreed that human or 'natural' rights were a species of pre-legal or moral rights as distinct from legal rights. They could not be derived from empirical codes or systems of law, but were proclaimed as deriving from God's plan for nature and the human species, or from nature and history, or from the needs and logical implications of social living, or from the moral consciousness of humankind. They were thus rooted, ultimately, in philosophy, morals or theology, in a specific historical tradition or in a concept of human and social progress, but not in existing legal provisions. Laws in some countries might for one reason or another confer and protect rights that philosophers considered to be human rights. The idea of a human right, however, was prior to and logically independent of specific laws and specific legal systems, just as morality was prior to and logically independent of specific laws, though the latter might incorporate some of its demands. The distinction between laws and duties established by God for all human beings, and those established by God through revelation and thus only for those who had received the Christian message, was important in the Western European history of natural law and natural rights. Today it is of interest as a philosophical issue and not merely an historical one only within the context of religious thought.

International law, at the same time, had uncertain standing as an authoritative systematised branch of law. There were treaties, conventions and agreements to which particular states, sometimes many states, had subscribed and which were therefore binding on them, not by virtue of any 'quasi-legislative' force of international law by itself, but because the states had bound themselves by solemnly entering into the agreement. International law had not, and to a large extent still has not, that power to impose, or at least enforce, binding laws, judgments and sanctions which some theoreticians have taken as constituting the distinction between law and morality. Many lawyers, since Vitoria, Grotius and Pufendorf, had sought theoretically to establish that there were or should be 'natural' laws and 'natural' or human rights observed by all mankind or at least by all 'civilised' nations. They added to the provisions of international treaties and covenants a body of customary international law based on rules and proprieties nations had actually observed in their dealings with each other.

In modern times two doctrines have been seen, at least until the end of World War I, as quite central to international law, though these always had their opponents. The first was the so-called *dualist* theory of international law. In distinguishing sharply between international law and municipal law, it held that only states were capable of being subjects of international law. Individuals might be objects but never subjects of international law, since they had no standing to enforce their rights before or to be heard by an international tribunal. This theory is still argued strongly by representatives of a number of states in the United Nations, especially the Soviet Union, at least in relation to its own citizens. The second was the doctrine that a state had complete sovereignty over its own nationals in its own territory, to the extent that such sovereignty constituted a sphere of *reserved jurisdiction* into which international law might not be permitted to reach. That theory is espoused, at least in practice, by many states now in the UN

(including again the Soviet Union and other Communist states), even where they have become signatories to international covenants that imply or express the opposite.'

The practical realities which these doctrines reflect are not dead. Features typical of international law procedure generally and of the international human rights provisions and procedures detailed above are rooted in the fact that there is no international government that can make and enforce laws for humankind. There is consequently great emphasis on agreement to take part, to accept jurisdiction, to abide by rulings. Similarly there is emphasis on flexibility, which can be achieved by the use of optional clauses enabling states to ratify agreements without subscribing to every part of them; on the exhaustion of all domestic remedies before seeking the aid of international law where citizens are concerned; and on the requirement that conciliation precede any quasi-judicial or judicial stage.

The lack of clear and unconditional sanctioning power has also led to a special reliance on reporting and publishing — making the facts of a violation widely known under the imprimatur of a respected international body — and to a great emphasis on education rather than reliance on coercive intervention. These features of international law have strongly influenced all actors in the field of human rights. Very important human rights organisations of a non-governmental kind, such as the International Commission of Jurists and Amnesty International, have relied above all on reporting and disseminating the facts to the international community. So do many municipal commissions set up to safeguard human rights.

The declarations, covenants and agreements and the decisions of international judicial organs still bear the character of what lawyers call the *lex ferenda* phase of development: determining what the law ought to be, inspiring action and legislation by other authorities, rather than creating or declaring a law which is itself specific enough and binding enough to govern the actual affairs of human beings living in nation states. To achieve that, translation into municipal legislation is still necessary, even if international tribunals can, in certain and usually gross cases, cause redress to occur, hitherto more so among members of the Council of Europe than in other parts of the world. Nevertheless the development of international instruments and procedures in the field of human rights in the last forty years has almost completely undermined, at the theoretical level, the dualist doctrine that only states are subjects of international law and the doctrine that a state's sovereignty with respect to its nationals cannot be attenuated or invaded by international law as such. At the technical level, this is leading to a much more sophisticated treatment of the confused concept of 'subject of international law', which runs together the question of whether individuals can have in principle any rights created by international law *vis-a-vis* their own or other national states and the separate question, following on from this, of whether individuals can appear before and be heard by international tribunals and bodies. A still further question, though not strictly part of international law, is whether individuals can appeal to the requirements of international law in legal proceedings in municipal courts. The answer to all three of these questions is no longer a clear and resounding No, though it is certainly not a clear and resounding Yes. The situation is in flux.

There has been a strong revival, in the literature of international law and of theory of law, of 'natural' law positions robbed of their theological or religious base. These insist that municipal laws can be bad laws, incompatible with human rights or the very concept of the rule of law. At the same time, the growing specificity and institutionalisation of international human rights provisions has made it increasingly possible to see human

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'See, for example, G. Tunkin, *Theory of InternationalLaw,* trans. W. E. Butler, Harvard University Press, Cambridge, Mass., 1974 and the excellent summary of Soviet positions on the international enforcement of human rights in Georg Brunner, 'Recent Developments in the Soviet Concept"of Human Rights' in F. J. M. Feldbrugge & W. B. Simons (eds), *Perspectives on Soviet Law for the 1980s (Law in Eastern Europe No. 24),* Sijthoff & Noordhoff, The Hague, Boston and London, 1982, pp. 37-51, especially pp. 38-40.

rights as more established and practically binding than moral rights. Human rights have become and are continuing to become something more like specific legal rights, grounded not only in philosophy, morality or theology but also in legal and quasi-legal international declarations, covenants, court decisions and procedures.

The philosophical literature on human rights does not show as much awareness of this as it might; the legal literature does. There is, indeed, a growing literature on the translation of international law into domestic law. But even philosophers, in the area of twentieth century human rights, no longer feel comfortable with the sharp opposition many of them used to make between empirically verifiable and testable legal rights and obligations and unverifiable moral rights and obligations. The latter were supposed to be rooted in sentiment or in contentious interpretation of the requirements laid down by God, human nature or practical reason. Now, many theorists see at least some human rights as also rooted in the moral consensus of the international community, expressed in declarations and agreements that are at least quasi-legal. The international development in the human rights field, in short, is a movement that is seeking to convert morality into law and nation states into members of an international community that has a right to query how they treat their own citizens and to prescribe model rules in areas of fundamental and international concern. It cannot force its will upon recalcitrant states (and there are many), but its right to try has become increasingly accepted in all discussions of human rights in recent years.

3

United Nations: Australia's international obligations

See Bibliography —
Human rights — general (p. 131): United Nations Charter and Universal Declaration of Human Rights (p. 137), United Nations Covenants and Conventions (p. 142)

Human rights in Australia, and in many but by no means all other countries, have been or are being increasingly protected by municipal legislation and procedure. But in recent years the overwhelming trend has been for such municipal legislation to follow declarations, covenants and other agreements proclaimed or reached in the UN, its subsidiary organisations or other international associations. Further, many countries — and especially Australia because of the constitutional limitation on federal power to legislate — have used their international obligations under such treaties, documents and declarations as the basis and justification for enacting municipal legislation. Still further, the international community has established procedures by which individual citizens or groups affected may complain of their government's failure to carry out its human rights obligations. An appreciation of the international documents, institutions and procedures that have become central to the discussion of human rights in the twentieth century is therefore vital for anyone using this Bibliography. In this area, the United Nations stands, in a sense, at the head of it all, though the European regional arrangements provide the most developed supra-national legal protection of human rights.

The promotion of respect for human rights is proclaimed in the UN Charter as one of the basic goals of the United Nations. The Preamble of the Charter reads: 'We the People of the United Nations, Determined. . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. . . to promote social progress and better standards of life in larger freedom. . .' Encouraging the respect for human rights 'for all without distinction as to race, sex, language, or religion' is one of the purposes of the United Nations (Article 1(3)). The self-determination of peoples is considered a basis for achieving the other main purpose of this organisation; namely, a development of 'friendly relations among the nations' (Article 1(2)). These principles are reaffirmed in Articles 55 and 56 of the Charter.

Despite the explicit nature of these provisions, the Charter taken by itself does not impose any specific obligations on member states to protect expressly formulated rights. It thus does not create a sufficient normative framework for the protection of human rights. The International Court of Justice did state in its Advisory Opinion on Namibia in 1971 that the practice of apartheid is a violation of the international obligation assumed by South Africa under the Charter, but held that its finding was 'exceptional'. This has led to much scholarly discussion by leading international lawyers on the International Court's power or lack of power to implement the human rights clauses of the Charter. The United Nations, of course, has gone far beyond mere reliance on the Charter.

Its next major human rights instrument was the Universal Declaration of Human Rights adopted without dissent by a General Assembly resolution on 10 December 1948, though there were eight significant abstentions. Although resolutions of the General Assembly do not as such have binding force, the general acceptance of the Declaration (no state has denounced it, even if the international community has not always followed

its provisions) has made it possible to consider it as a part of customary international law, and international lawyers, in their writing, have increasingly done so. Above all, the Declaration has generated other, formally binding instruments.

The Universal Declaration has, indeed, had remarkable influence on national, regional and international legislation. It has been solemnly cited in General Assembly and Security Council resolutions. It has inspired the formulation and the international acceptance of such international conventions as the International Convention of the Elimination of All Forms of Racial Discrimination', the International Covenant on Economic, Social and Cultural Rights[2], and the International Covenant on Civil and Political Rights.[3] These Covenants and Conventions have now all been ratified by Australia, though with significant reservations and declarations in the case of the Covenant on Civil and Political Rights. The implementation of the Covenant on Economic, Social and Cultural Rights is recognised to depend on resources available to the states parties; therefore, in most cases, it can be achieved only progressively. The Convention on the Elimination of All Forms of Racial Discrimination and the Covenant on Civil and Political Rights contain rights seen as legally enforceable that states parties are required to implement.

The International Covenant on Civil and Political Rights was ratified by Australia on 13 August 1980 after extensive consultation with the States, and subject to reservations and declarations which accompanied the instrument of ratification, as permitted by the Covenant.[4] The Covenant follows fairly closely the civil and political rights contained in the Universal Declaration. However, it puts at the head in Article 1 the right of all peoples to self-determination and to dispose of their natural wealth and resources, without prejudice to any obligations arising out of international economic cooperation, based on the principle of mutual benefit and on international law, and the duty of states administering non-self-governing and trust territories to promote self-determination. This has been seen as representing a significant shift from an individualistic to a collectivist approach. Australia, while supporting self-determination as a political principle, opposed its inclusion in a covenant dealing with the rights of individuals and intended to be legally enforceable to some extent.[5] The Covenant makes no reference to the right of property. It strengthens the right to practise and manifest religious belief by demanding from signatories a more specific undertaking to respect the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. It calls, in Article 20, for the prohibition by law of any propaganda for war or 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. It permits restriction of the right of peaceful assembly 'if imposed in conformity with the law and . . . necessary in a democratic society in the interest of national security or public safety, public order *(ordre publique),* the protection of public health or morals or the protection of the rights and freedoms of others' (Article 21). It defines servitude and forced or compulsory labour, which it prohibits, in such a way as to exclude work or service required as a result of the lawful sentence of a court, national military service or, in countries where conscientious objection is recognised, alternative work which is required of the objectors, services exacted in case of emergency or calamity threatening the life or well-being of the community and any work or service which forms part of normal civil

[1] General Assembly Resolution 2106A(XX) of 21 December 1965, entered into force on 4 January 1969.

[2] General Assembly Resolution 2200(XXI) of 16 December 1966, entered into force on 3 January 1976.

[3] General Assembly Resolution 2200A(XXI) of 16 December 1966, entered into force on 23 March 1976.

[4] For the text of these Reservations and Declarations, see A. E -S. Tay et al. (eds), *Teaching Human Rights: An Australian Symposium,* Australian Government Publishing Service, Canberra, 1981, pp. 193-4.

[5] See N. Harper & D. Sissons, *Australia and the United Nations,* Manhattan Publishing, New York, 1959, pp. 262-4.

obligations (Article 8). It makes more detailed provisions for the rights of persons arrested and brought to criminal trial and states that 'it shall not be the general rule that persons awaiting trial shall be detained in custody' (Articles 9 and 14). It provides that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and subject to separate treatment, and that accused juvenile persons shall be separated from adults (Article 10).[6] The right to life, in Article 6, is not extended to prohibition of the death penalty in those countries where it is in force but says that 'sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant or to the Convention on the Prevention and Punishment of the Crime of Genocide'. No death sentence may be imposed on persons below the age of eighteen or on pregnant women. Article 4 permits states, in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, to take measures derogating from their obligations under the Covenant to the extent required by the exigencies of the situation, provided such measures do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin, a derogation from the right to life as defined in the Covenant, subjection to torture, cruel, inhuman or degrading treatment or punishment, slavery or servitude, imprisonment on the ground of inability to fulfil a contractual obligation (generally prohibited by Article 11), retroactive sentencing or punishment, failure to recognise people as persons before the law or abrogation of the right to freedom of thought, conscience and religion. Critics have pointed out that the Covenant does not make the imposition of martial law in Argentina, Chile, Poland or the Philippines clearly contrary to its provisions, though acts committed in all those countries under the authority of martial law may be. At the time that Australia ratified the Covenant, 72 other countries had already ratified, including the U.S.S.R., Poland, Rumania, Bulgaria, Czechoslovakia, Libya, Iran and the German Democratic Republic. Australia, in ratifying subject to reservations and declarations may be said to have shown a degree of honesty not universal among the signatories. As Mr Peter Bailey, (now) Deputy Chairman of the Human Rights Commission, put it soon after the Australian ratification:

> Australia has now accepted an obligation to implement the provisions of the Covenant, subject to the reservations and declarations lodged at ratification. . . There are, of course, a number of reservations and declarations, but many are open-ended or interpretative within acceptable canons and ratification has been accepted by the States.'

The Covenant on Economic, Social and Cultural Rights[8] repeats Article 1 of the Covenant on Civil and Political Rights, relating to the self-determination of peoples, verbatim. It then follows fairly closely the social, economic and cultural rights enumerated in the Universal Declaration, though it adds special protection and paid leave or leave with adequate social security benefits for mothers during a reasonable period before and after child birth; provision for the reduction of the stillbirth rate and of infant mortality (Article 10); the improvement of all aspects of environmental and industrial hygiene and the prevention, treatment and control of epidemic, endemic, occupational and other diseases (Article 12). It also provides for the progressive introduction of free secondary education, including technical and vocational, and retains the provision that higher education should be equally accessible to all on the basis of capacity, while also urging the progressive introduction of free higher education (Article

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[6] The Australian reservation to this Article accepts the principle of segregation of accused adults as an objective to be achieved progressively and the segregation of juveniles only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.

[7] P. H. Bailey, 'Commonwealth Initiatives in the Field of Human Rights' in Tay, *Teaching Human Rights,* P. *21.*

[8] The full text is reprinted in Tay etal., *Teaching Human Rights,* op. cit., pp. 195-9.

13). The same Article makes the states parties 'undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimal educational standards as may be laid down or approved by the state' and provides that no part of the Article should be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, provided they are 'directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms and conform to the minimum educational standards laid down by the state'.

Both Covenants make provision for UN involvement in monitoring and promoting the observance of their conditions by the signatories, in ways detailed below.

The Convention on the Elimination of All Forms of Racial Discrimination condemns all forms of racial discrimination. It requires states parties not to engage in any act or practice of racial discrimination, not to sponsor or defend racial discrimination, to review and where necessary amend, rescind or nullify governmental, national and local policies and laws and regulations which have the effect of creating or perpetuating racial discrimination, to encourage multi-racial organisations and movements and when circumstances so warrant to take '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 to them the full and equal enjoyment of human rights and fundamental freedoms'. But 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 (Article 2). States parties are to make the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, the provision of assistance to racist activities including financing them, and corresponding acts of violence or incitement, offences punishable by law (Article 4), though Australia entered a reservation to this Article. Political and civil rights are to be guaranteed to persons of any race or national and ethnic origin (Article 4). And so is access to any place of service intended for use by the general public (Article 5).

Various United Nations organs have been granted powers to promote the protection of human rights. The General Assembly is called upon to 'initiate studies and to make recommendations' for the purpose of 'promoting international cooperation in the economic, social, cultural, educational and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (Article 13 of the Charter).

Legislating for human rights in Australia: Common Law and constitutional problems

See Bibliography —
Bill of Rights debate — Australia (p. 161); External affairs power (p. 282); *Sex discrimination — women (p. 288)*

Many of the rights and freedoms proclaimed in the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights are based on conceptions of the liberty of the citizen or subject developed over centuries in the Common Law and brought to Australia with it. The presumption of innocence, requirements for a properly conducted fair trial, the notion that officials and official bodies have no legal right or power to exceed the authority given to them, the concepts of equality before the law, of the independence of the judiciary, and of the illegitimacy of any retroactive application of law, were all part of it. They stand at the basis of the legal life and procedure of the Commonwealth of Australia and of all its States and territories. The writ of habeas corpus runs in Australia, preventing (at the level of law) illegal arrest or detention. The prerogative writs of prohibition, certiorari and mandamus provide redress against official actions that are outside the official's power, against official actions the legal propriety of which is suspect enough to require review, and against official failure to act where there is a duty to act. The supplementation of these writs by a statutory system of administrative review and appeal has widened and strengthened the citizen's right to redress in these areas.

Legislation in Australia has generally followed the Common Law principles of defining governmental and official power reasonably strictly and of providing avenues of appeal, in many cases to independent and impartial tribunals. The power of the police, very limited at Common Law, has been steadily extended by legislation, though arrest, bail and search and seizure are strictly controlled by law.

The liberty of the person, freedom of movement and freedom of association, including the right to hold public meetings and processions, are presumed in law and protected by law, unless abrogated or restricted by regulation or lawful administrative power. Such power has often been criticised in Australia[1] and in other Common Law countries, as being directed against unpopular causes under the guise of preventing interference with traffic. The extent to which Common Law, legislation and judicial decisions in Australia protect and do not protect some fundamental rights and freedoms was studied carefully in the two editions of Enid Campbell and Harry Whitmore's *Freedom in Australia*[2], written before the international human rights campaign had had much impact on Australian legislation. Approaching the question more from the standpoint of traditional British civil liberties, the book has been an indispensable guide to those seeking a general account of what traditional civil liberties, Common Law and Australian legislation up to 1973 did and did not protect, and how effectively. It also

[1] See, for example, R. M. Hope, 'Civil Liberties in Australia: The Case of Peaceful Assemblies', in A. E -S. Tay etal. (eds), *Teaching Human Rights: An Australian Symposium,* AGPS, Canberra, 1981, pp. 33-44, where the situation is reviewed, and criticised, State by State.

[2] E. Campbell & H. Whitmore, *Freedom in Australia,* Sydney University Press, Sydney, 1st edn 1966, 2nd edn 1973.

contains a valuable chapter on the constitutional protection of human rights and some discussions of the pros and cons of a federal Bill of Rights.[3]

The general protection of human rights in Australia has not in the past rested on constitutional provisions, neither in the States nor for the Commonwealth. The framers of the federal Constitution consciously and deliberately rejected, in the Constitutional Conventions of the 1890s, the possibility of including a Bill of Rights similar to that which was added to the U.S . Constitution by the important series of Amendments initiated in 1791. As we have seen, they regarded British-style parliamentary democracy and the Common Law as providing sufficient fundamental and reliable protection of rights.

Nevertheless, a small number of provisions in the Australian Constitution does give direct protection to the individual. Section 51(xxxi) requires compensation on 'just terms' for the acquisition of property as a result of the operation of Commonwealth laws. This requirement has been strictly enforced by the courts which interpret the word 'just' in accordance with the principles of a society based on the private ownership of property. Section 80 guarantees trial by jury in the 'trial on indictment' of any offence against Commonwealth law. Most crimes however are governed by State law, and moreover the section only applies where the formal machinery of indictment is employed. Thus trial by jury is not guaranteed even in the most serious cases, since the High Court has not regarded s. 80 as preventing either legislative or administrative directives to prosecutors to use some procedure other than indictment. Section 116 prohibits the Commonwealth from establishing any religion, from imposing any religious observance, from prohibiting the free exercise of any religion and from requiring any religious test as a qualification for any Commonwealth office.[4] The 'free exercise of religion' has been interpreted by the High Court as referring to beliefs and activities which are generally accepted as being religious in character, and the Court has recently held 'scientology' to be a religion in this sense.[5] But the Court has not seen the section as preventing the enforcement of military service on conscientious objectors or the suppression of religious bodies the teachings of which are fundamentally subversive of the existing structure of government or inimical to the defence of the nation.[6]

Three other sections are sometimes considered to embody civil liberties provisions. Sections 99 and 117 prohibit the giving of preferential treatment to any State and the

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[3] Professor Whitmore has now retired and left Australia, and he and Professor Campbell have been unable to prepare a third edition of the volume, which would now require considerable updating and recasting to take account of new human rights development and concerns. Alice Tay and Eugene Kamenka have been commissioned to prepare the successor volume, *Human Rights and Freedoms in Australia.* G. A. Flick's *Civil Liberties in Australia,* Law Book Co., Sydney, 1981, gives a thorough account of the law on traditional civil liberties in Australia and all its States up to 1980, dealing with political powers, demonstrations, contempt and obscenity as well as two more recent concerns — access to government information and sex discrimination. The Institute of Criminology in the University of Sydney Law School has published, over some twenty years, a series of detailed papers (concerned with current and practical issues) on civil liberties, aspects of police powers and the conduct of prisons. The Australian Institute of Criminology in Canberra has also been active in the field, as have other universities and councils of civil liberties in the various Australian States. The journal of the Australian section of the International Commission of Jurists, *justice,* contains much relevant material on all aspects of civil and political rights. A useful reminder of the enormous change in social climate in the last thirty years on questions of obscenity, blasphemy and sedition and censorship generally is given by Peter Coleman's social and historical study of legislation and political action on these matters in Australia, *Obscenity, Blasphemy, Sedition: Censorship in Australia,* Jacaranda Press, Brisbane (undated).

[4] Opponents of Federal Government aid to denominational (non-Government) schools were unsuccessful in pursuing a High Court action under s. 116, claiming that it should be interpreted to prohibit such aid: *Attorney-General for the State of Victoria and Black v. The Commonwealth* (1981) 55 *Australian Law Journal Reports* 155; 33 *Australian Law Reports* 321.

[5] *Church of the New Faith v. Commissioner for Payroll Tax* (1983) 49 *Australian Law Reports* 65; 57 *Australian Law journal Reports* 785.

Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth (1943) 67 *Commonwealth Law Reports* 116.

unequal treatment of residents from another State. Section 92 provides that interstate trade, commerce and intercourse shall be absolutely free. The section has been described as 'a constitutional guarantee of rights, analogous to the guarantee of religious freedom in s. 116'[7], protecting not only the activity of trade in general, but the right of individuals to engage in it.[8] Court interpretations of the section have varied, but the vast and complex body of s. 92 litigation contains many instances of legislation, both State and Commonwealth, being struck down — perhaps most notably the Chifley government's attempt in the 1940s to nationalise Australia's banks.[9] 'Absolute freedom' does not, however, prevent 'regulation' of trade and commerce, since the continued existence of an activity may depend on its regulation: hence, for example, speed limits on interstate roads are permissible. The economic liberty from State interference that s. 92 seeks to guarantee, at least for a particular area, is applauded by some and derided or treated with suspicion by others as a major barrier to nationalisation, centralised economic planning and increasing Commonwealth control [2].

Of the six provisions discussed, three (namely, ss. 51(xxxi), 99 and 116) bind only the Commonwealth, while the remainder (ss. 80, 92 and 117) bind both the Commonwealth and the States. All the provisions, like the rest of the Constitution, can be removed or altered only after a referendum of all Australian voters, in which the proposed change gains the vote of an overall majority of electors, and a majority in at least four of the six States.

For those who see liberty as resting on successful impediments to state action and control, or at least on a system of checks and balances, the most significant feature of the Australian Constitution, however, is the federal system itself. For a Commonwealth enactment to be valid, its provisions must be capable of being linked to one or more heads of federal legislative power enumerated in the Constitution; if it cannot be so anchored, for example because it is too vague and general, then the enactment is unconstitutional because it is beyond the Commonwealth's power.

Many supporters of human rights, however, have felt exactly the opposite. The Constitution, in fragmenting power between the Commonwealth and the States, they say, makes effective human rights legislation in Australia extremely difficult. It prevents the enactment of Australia's international obligations into national law and gives States with a bad human rights record or attitude immunity in their actions. Liberal—National (Country) Party coalition governments, in the past, have believed that the Commonwealth is properly restricted in its internal lawmaking powers to the specific provisions of the Constitution. They have felt that it should not readily seek to extend these powers by claiming that the ratification of foreign treaties gives it power to enact their provisions into municipal law in areas that would otherwise be entirely in the jurisdiction of the States, and that it should, when seeking to implement such treaties, confine itself to traditional areas of Commonwealth control while seeking the voluntary cooperation of the States concerning action in their spheres of jurisdiction. In consequence, human rights legislation brought in under coalition governments has been restricted in scope to matters otherwise within Commonwealth power — that is, to Commonwealth laws, departments and instrumentalities, to those that operate within

[7] Lord Wright, delivering the opinion of the Privy Council *in James v. The Commonwealth* (1936) 55 *Commonwealth Law Reports* 1 at 43, 44.

[8] See, for example, *Bank of New South Wales v. The Commonwealth* (1948) 76 *Commonwealth Law Reports* 1, (the *Banking* case) especially at 283 per Rich and Williams, JJ.

[9] *Banking* case (1948) 76 *Commonwealth Law Reports* 1 (High Court), (1949) 79 *Commonwealth Law Reports* 497 (Privy Council).

[1°] In the *Banking* case the Privy Council left the future possibility of nationalisation open:'. . . in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-state trade thus prohibited and thus monopolised remained absolutely free': 79 *Commonwealth Law Reports* 497 at 641.

Territories administered by the Commonwealth, and to special laws for Aborigines and Torres Strait Islanders which, as such, are within Commonwealth power since the 1967 referendum.

Labor, on the other hand, has taken the view that the Commonwealth not only should have but actually has power to enact into national law binding on all Australians obligations which Australia has accepted by ratifying international treaties. That power, in Labor's view, was implied by s. 51(xxix) of the Constitution. This section gives the Commonwealth power to legislate 'with respect to. . . external affairs'. Labor believed that the mere fact that Australia had entered into an international treaty or covenant on the subject should be enough to stamp that subject matter as an external affair. The precise scope of the power as interpreted by the High Court, however, had been unclear. The Commonwealth's power to legislate on a matter which *from its own nature* is an external affair (e.g., the extradition of criminals) is not a matter of doubt. The doubt arises when the Commonwealth makes laws on a matter that is not by its own nature an external affair (e.g., aerial navigation regulations, discrimination within Australia, or human rights in Australia) and claims power to legislate because it is acting in pursuance of international obligations which Australia has incurred in a way that does come within Commonwealth power (e.g., by signing and ratifying treaties)." In the first *Goya Henry Aviation* case[12], in 1936, a majority of the High Court accepted the Commonwealth power to legislate on the latter basis, but disallowed the Air Navigation Regulations because they departed from the requirements of the 1919 Paris Agreement in which they were supposedly anchored. Subsequently, judicial observations in the High Court raised doubt whether later courts would accept the Commonwealth's power to legislate on the basis of international obligations on matters that were not by their nature external affairs.

The *Koowarta* case in 1982 upholding the validity of the Commonwealth's Racial Discrimination Act 1975[13] and the (Gordon-below-Franklin) *Dams* case in 1983 have probably settled the question in favour of the wider view. In *Koowarta*[14] the High Court, by a majority of four to three, held ss. 9 and 12 of the Racial Discrimination Act (the only sections challenged) a valid exercise of the Commonwealth's power under s. 51(xxix), on the basis of Australia's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, the terms of which were closely

[11] A number of leading constitutional lawyers, as late as the 1970s, flatly denied that the Commonwealth had such power. See e.g., P. H. Lane, *An Introduction to the Australian Constitution,* Law Book Co., 2nd edn, Sydney, 1977, p. 102.

[12] *R. v. Burgess; ex p. Hemy* (1936) 55 *Commonwealth Law Reports,* 608. In *R. v. Poole, ex p. Henry* (No. 2) (1939) 61 *Commonwealth Law Reports* 634, amended regulations were held valid despite some variations in wording between the Agreement and the Regulations.

[13] The Act is discussed below. The case arose out of Mr John Koowarta's complaint to the (Commonwealth) Commissioner for Community Relations in 1976 that the Queensland Minister for Lands had refused to consent to the transfer of a Crown pastoral lease bought by the Aboriginal Land Fund Commission in the expectation that it would be used by Mr Koowarta and other members of the Winychanam Group of Aboriginal people. Mr Koowarta complained that the Minister's ground for refusing, namely that it was his Government's policy to view unfavourably proposals to acquire large areas of traditional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation, was a contravention of ss. 9 and 12 of the (Commonwealth) Racial Discrimination Act. Following the issuance of a certificate by the Commissioner for Community Relations to enable the complainant to go to Court (the Human Rights Commission had not yet been established), Mr Koowarta sued members of the Queensland Government in the Supreme Court of Queensland. The defendants challenged the validity of the Act and the standing of the plaintiff. These matters were then removed into the High Court of Australia and heard in conjunction with an action by the State of Queensland against the Commonwealth, challenging the validity of the Act. It was accepted by both parties that ss. 9 and 12 of that Act were enacted in implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. The Human Rights Commission has since received notice of a similar complaint: see Human Rights Commission, *Annual Report 1982-83,* AGPS, Canberra, 1983, p. 39.

[14] *Koowarta v. Bjelke-Petersen* (1982) 56 *Australian Law journal Reports* 625; 39 *Australian Law Reports* 417.

followed in the legislation. In the *Dams*[15] case, also by a majority of fou ta three, the High Court reached a similar conclusion, on the basis that the Frankli Valley had been declared part of the World Heritage which Australia was internationally pledged to protect, and that the Commonwealth legislation being challenged by Tasmania was designed to avoid a breach of Australia's international obligations in this respect. Parts of the Commonwealth legislation were held invalid by a different majority of four to three (without any underlying reason supported by all members of the majority). This aspect of the case did not go to the issue of the scope of the Commonwealth's external affairs power, which has been clearly determined at the highest judicial level to include the power to translate international obligations into national law. It is, however, reasonably evident that the High Court could still strike down such legislation if it did not follow the terms of the international treaty that legitimates it reasonably closely.[16] In both cases several judges also warned that entry into a treaty merely as a colourable attempt to convert a matter of internal concern into an external affair and thereby attract Commonwealth legislative power would fail in its purpose. The major uncertainty regarding Commonwealth power between 1973 and 1983 is crucial to understanding the development of Commonwealth legislation and other action in this field. In the future, no doubt, new uncertainties will arise. The formulations of the majority in *Koowarta* and the *Dams* cases in discussing the subject matter that may constitute an external affair, make it possible for a future Commonwealth government to seek to persuade the Court that it is not necessary for Australia to enter into an actual international obligation on the subject, but that it may be enough for the subject to be a matter 'of international concern' affecting Australia's relations with other 'international persons' (including, presumably, not only nation states but also other groups and organisations recognised in international law).

[15] *Commonwealth v. Tasmania* (1983) 46 *Australian Law Reports* 625; 57 *Australian Law Journal Reports* 450.

[16] See, for example, 57 *Australian Law ournal Reports* 450 at 489 *per* Mason, J.; Deane, J. at 545; *contra* Murphy, J. at 506.

New Commonwealth initiatives

In 1973, during the Whitlam Government, the Opposition-controlled Senate successfully blocked Attorney-General Senator Lionel Murphy's attempt to enact a Human Rights Bill which would protect, throughout Australia, the rights listed in the International Covenant on Civil and Political Rights either through a Human Rights Commissioner or by permitting legal proceedings. Senator Murphy's Racial Discrimination Bill, also first introduced in 1973, implicitly relied, like the Human Rights Bill, on the Commonwealth's ratification of an international treaty — in this case the International Convention on the Elimination of All Forms of Racial Discrimination — to bring it within Commonwealth powers through the external affairs power. It was finally passed after lengthy debates and some amendments in 1975. Since it was binding on the Australian States it caused some disquiet, especially in Liberal and National Party circles in Queensland and Western Australia. Moreover, one general section, s. 10, was specifically designed to strike down discriminatory State laws, notably those in Queensland concerning Aborigines and Torres Strait Islanders. A number of constitutional lawyers at the time proclaimed the Act to be almost certainly outside the scope of s. 51(xxix): however they were proved wrong, as we have seen, when the High Court in *Koowarta* held that the Act was indeed supported by the external affairs power. In 1975, Parliament also enacted a stronger piece of legislation, the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975, introduced by Senator Murphy after negotiations with the Queensland Government over control of Aboriginal reserves broke down. An attempt in South Australia in 1972 to legislate a Human Rights Bill that involved no federal constitutional question caused much discussion on the pros and cons of Bills of Rights, as did Senator Murphy's Bill, but did not gain the assent of the South Australian legislature. The more recently elected Labor Government in Victoria also proposes to put a Bill of Rights before the State Parliament, and so does the Commonwealth Attorney-General, as we shall see below.

The Law Reform Commission Act 1973, setting up the Australian Law Reform Commission, required it, on reference by the Commonwealth Attorney-General, to review laws with a view to modernisation, elimination of defects, and simplification, and to consider proposals for consolidation, repeal or uniformity. In doing so, the Commission was instructed to ensure that the rights and liberties of citizens are not unduly made dependent on administrative rather than judicial decisions, and that its recommendations as far as possible are consistent with the articles of the International Covenant on Civil and Political Rights.' The Commission, under the chairmanship of the Honourable Mr Justice M. D. Kirby, has indeed been extremely active. Almost all its reports and publications raise and discuss human rights issues directly or indirectly. The most important of those dealing with matters referred to the Commission by the Commonwealth Attorney-General for study and recommendation are the reports on Criminal Investigation (1975), Unfair Publication: Defamation and Privacy (1979), Sentencing of Federal Offenders (1980), Child Welfare (1981) and Privacy (1983). Three inquiries with important human rights implications now in progress are Aboriginal Customary Laws, Sentencing and Contempt. Many earlier reports and other current

[1] Law Reform Commission Act 1973, s. 7. This was the first reference in an Australian statute to that Covenant.

inquiries, from Access to the Courts to Matrimonial Property, from Insolvency to Human Tissue Transplants, from Alcohol, Drugs and Driving to Complaints against Police, also have human rights components.[2]

The Commonwealth Administrative Appeals Tribunal Act 1975 created a tribunal meant, as Mr Peter Bailey has put it, to be 'a guarantor of due process in [administrative] decision-making' under statutory powers.[3] The *Ombudsman Act* 1976 established a Commonwealth Ombudsman with authority to investigate complaints of maladministration by a Commonwealth department or authority. There are now similar Ombudsmen in all the States (some appointed before the Commonwealth legislation), though their specific powers vary. A Commissioner for Community Relations was created under the Commonwealth Racial Discrimination Act 1975 as an agent to promote the purposes of the Act, which makes unlawful (but not a criminal offence) acts of racial discrimination generally, in the provision of access to places and facilities, to goods and services and to land, housing and accommodation, and in relation to employment and advertising. The first Commissioner, Mr Al Grassby, campaigned and pronounced actively on issues of human rights for minorities of all kinds and on racial, religious and ethnic tolerance. He and his successor, Mr Jeremy Long, have received and handled some 5000 complaints, undertaking investigation and conciliation as envisaged in the Act. The Commissioner has power to issue a certificate, when he has failed to produce a settlement, enabling the unsatisfied party to seek from a court an injunction, restraining order or damages, though no case had been taken to court in the first five years of the Act's operation.

There has been in the past decade an increasing body of legislation dealing with and guaranteeing, to some extent, the suppression of racial, ethnic and sexual discrimination in advertisements and commercial and hiring practices, much of it taking its departure from Australia's ratification of the Convention on the Elimination of All Forms of Racial Discrimination, but also incorporating concern with discrimination against women and setting up appropriate bodies at state as well as federal level (Anti-Discrimination Boards and Equal Opportunity Boards or Tribunals) to handle complaints. These laws will be discussed below. There has been legislation at the Commonwealth level to allow citizens (limited) access to government files and documents (the Freedom of Information Act 1982) and improving the avenues of review and appeal with respect to administrative decisions. In modern societies, where an increasing number of people are recipients of various forms of state assistance, much of it discretionary and therefore not directly actionable at law, this is of great importance and it has been almost universally welcomed. The return of the Labor Party to Federal government in March 1983 has led and is likely to lead to further increase in legislation for human rights. Initiatives to date include the passing of the Sex Discrimination Act 1983 and the active promotion in Parliament of an Australian Bill of Rights, as well as administrative measures against discrimination and for affirmative action.

In 1980, in contemplation of Australia's implementation of the United Nations Covenant on Civil and Political Rights, a Human Rights Bureau was set up by administrative directive in the Commonwealth Attorney-General's Department to investigate alleged breaches of human rights referred to it by the Attorney-General, to promote community awareness and discussion, to establish links with non-governmental organisations, to co-operate with appropriate State authorities, to assist the Government in the implementation of its policy on human rights, and in particular to assist in monitoring the observance by the Commonwealth and its authorities of the provisions of

[2] The reports mentioned, other reports and discussion and research papers are available from the Secretary, the Australian Law Reform Commission, Seventh Floor, A.D.C. Building, 99 Elizabeth Street, Sydney, N.S.W. 2000.

[3] P. H. Bailey, 'Commonwealth Initiatives in the Field of Human Rights', in A. E -S. Tay et al. (eds), *Teaching Human Rights: An Australian Symposium*, Australian Government Publishing Service, Canberra, 1981, p. 23.

the International Covenant on Civil and Political Rights. The Bureau was conceived as an interim structure whose role was to prepare for the advent of the Human Rights Commission, which was established in 1981 by the Human Rights Commission Act. Its Charter, compared with the Bureau's, was extended by incorporating as Schedules to the Act the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child (1959), the Declaration on the Rights of Mentally Retarded Persons (1971) and the Declaration on the Rights of Disabled Persons (1975). The Director of the Human Rights Bureau (now Deputy Chairman of the Human Rights Commission), Mr Peter Bailey, said at the time that, although the Declarations do not represent obligations in international law,

> Australia's support for the Declarations indicates a commitment to their objectives. The Commission will accordingly not only monitor observance of the rights and freedoms contained in the International Covenant. . . but will also monitor and report on the way in which Commonwealth departments and agencies, and Commonwealth laws, conform with the Declarations .[4]

Bailey, 'Commonwealth Initiatives', p. 32.

6

Human Rights Commission

The Human Rights Commission is the successor to the two earlier Commonwealth bodies concerned with human rights, the Human Rights Bureau and the Office of the Commissioner for Community Relations. An amendment to the Racial Discrimination Act 1975 transferred the functions of the Commissioner for Community Relations under s. 20 of that Act to the Human Rights Commission, but provided that some of those functions — those of inquiring into alleged infringements of the Racial Discrimination Act and of endeavouring to effect a settlement of complaints under that Act — were to be exercised by the Commissioner on behalf of the Human Rights Commission and under its direction. The Commission was inaugurated on 10 December 1981, Human Rights Day, with speeches in the Senate chamber.' It consists of seven part-time Commissioners, including its Chairman, and one full-time Commissioner, its Deputy Chairman, whose status is similar to that of a departmental permanent head. There have been no changes in the Commission's composition since appointments were made in September 1981. The Commission's Chairman is the Honourable Dame Roma Mitchell, a long-serving judge, and during part of 1983, Acting Chief Justice, of the South Australian Supreme Court, who has recently retired from her judicial office. Mr Peter Bailey, 0.B.E., the Deputy Chairman, was Deputy Secretary to the Department of Prime Minister and Cabinet until 1964, then a member of the Royal Commission on Australian Government Administration and subsequently Special Adviser on Human Rights in the Attorney-General's Department. In 1980, he became head of the Human Rights Bureau.

Other members of the Commission are:

- Professor Manuel Aroney, 0.B.E., Associate Professor of Inorganic Chemistry in the University of Sydney and a member of the Executive of the Ethnic Communities' Council of N.S.W. and of the Australian Institute of Multicultural Affairs;
- Professor Peter Boyce, formerly Head of the Department of Government in the University of Queensland and now Professor of Politics in the University of W.A. and President of the W.A. Branch of the Australian Institute of International Affairs;
- Mrs Norma Ford, a Victorian barrister and solicitor who is now a member of the Advisory Council on Women and of the Equal Opportunity Advisory Council, both of which advise the Victorian Premier;
- Mrs Eva Geia, a member of the National Aboriginal Conference and of the Aboriginal Development Commission and President of the Abis Community Cooperative Society Ltd., an organisation which administers housing, hostel, sporting, welfare and education programmes for the Aboriginal and Torres Strait communities of the Townsville district;
- Dr Christopher Gilbert, a Senior Lecturer in Constitutional and Administrative Law in the University of Queensland, actively involved in human rights issues and the Queensland Committee for the International Year of Disabled Persons;
- Ms Elizabeth Hastings, a Counsellor at La Trobe University, an executive member of the Victorian Committee for the International Year of Disabled Persons, a

[1] See Human Rights Commission, *Annual Report 1981-82, vol. 1,* AGPS, Canberra, 1982, pp. 4-5.

Director of the Paraplegic and Quadraplegic Association of Victoria and a foundation member of Disabled People's International in Australia.

The appointments of Dame Roma Mitchell, Mrs Geia, Dr Gilbert and Ms Hastings expire on 30 November 1984; those of Mr Bailey, Professor Aroney, Professor Boyce and Mrs Ford on 30 November 1986.[2]

The Minister responsible for the Commission is the Attorney-General, who, until 5 March 1983, was Senator the Honourable Peter Durack, Q.C., and since that date is Senator the Honourable Gareth Evans, Q.C. The Commission has three branches — the Legal and Projects Branch, the Inquiry and Conciliation Branch and the Promotion and Information Branch — employing, at the middle of 1983, twenty-five full-time and six part-time officers. The office of the Commissioner for Community Relations, who retains his separate identity as the holder of a statutory office but now acts on behalf of and subject to the directions of the Human Rights Commission, has been reconstructed administratively within the organisational structure of the Commission. The Commissioner's report to Parliament forms part of the Human Rights Commission's Annual Report.

The Human Rights Commission Act, as we have seen, schedules the International Covenant on Civil and Political Rights and the Declarations of the Rights of the Child, on the Rights of Mentally Retarded Persons and on the Rights of Disabled Persons. The Preamble of the Act states that it is 'desirable that laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions' of those four instruments and of 'other international instruments relating to human rights and fundamental freedoms'. The Racial Discrimination Act schedules the International Convention on the Elimination of All Forms of Racial Discrimination, though that Act sets out detailed provisions which apply of their own force without reference to the scheduled Convention. By force of the amendment to that Act noted above, the Human Rights Commission now has responsibility for those rights as well. The Minister, under the Human Rights Commission Act s. 31, has power to declare, after consultation with the States and the Northern Territory, an international instrument to be a 'relevant international instrument' relating to human rights and freedoms for the purposes of the Act, thus bringing it within the purview of the Commission. An instrument may be declared such if it is an instrument ratified or acceded to by Australia or a declaration that has been adopted by Australia. The Minister thus has power to enlarge the functions of the Commission by administrative act, but under s. 31(3) of the Act, his declaration must be tabled in Parliament and may be disallowed by either House.

For the Commission, then, as its first Annual Report put it, 'human rights are relatively well-defined. They are the rights and freedoms described in the four international human rights instruments annexed as scheduled to the Human Rights Commission Act 1981. They cover also the rights enshrined in Part II of the Racial Discrimination Act 1975'.[3] The Commission has summarised these rights thus:

- *The rights of all people* to privacy; marriage and family; their own language, culture and religion; participation in public affairs; freedom of expression, movement, association and assembly; protection of their inherent right to life; liberty and security of person; freedom from degrading treatment or punishment; and equal treatment with others under the law.
- *The rights of children* to a name and nationality; to opportunities to develop fully in conditions of freedom and dignity; to adequate care, affection and security, including pre-natal and post-natal care; to education; to special treatment and care of handicapped; and to protection against cruelty and neglect.

[2] Human Rights Commission, *Annual Report 1982-83,* AGPS, Canberra, 1983, pp. 2-3.

[3] Human Rights Commission, *Annual Report 1981-82, vol. 1,* p. 1.

- *The rights of mentally retarded (or intellectually disadvantaged) persons* to proper medical care and therapy; to economic security; to education, training and work and trade union membership; to a qualified guardian and to a review of procedures which may deny them these rights.
- *The rights of disabled persons* to respect; to family and social life; to economic security; to protection from discriminatory treatment.

The Racial Discrimination Act makes it unlawful to discriminate on grounds of race, colour, descent, and national or ethnic origin in doing any act which involves such discrimination; refusing access to places and facilities; transaction in land or providing accommodation; refusing to provide goods and services; restricting entry to trade unions; employing or dismissing a person; public advertisement and inciting the doing of any unlawful act.

The functions of the Commission, set out in s. 9 of the Act, include the monitoring and reviewing function of examining enactments of the Commonwealth or under Commonwealth laws, or of any Territory other than the Northern Territory, to see if they are inconsistent with or contrary to any human rights; to do the same for acts done or practices engaged in by or on behalf of the Commonwealth or an authority of the Commonwealth, or done or engaged in within a Territory other than the Northern Territory; and to examine proposed enactments for the same purpose if requested by the Minister. The Commission on its own initiative or when requested by the Minister may report to the Minister as to the laws that should be made by the Parliament or actions that should be taken by the Commonwealth on matters relating to human rights. When requested by the Minister, the Commission is to report to the Minister as to the action, if any, that in the opinion of the Commission needs to be taken by Australia in order to comply with the provisions of any of the scheduled instruments or of any 'relevant international instrument' as defined (those in respect of which a Ministerial declaration under s. 31 is in force). It may also examine relevant international instruments to see whether they are inconsistent with the Covenant, the Declarations or other relevant international instruments and report to the Minister. It may further perform any functions conferred on the Commission by any other enactment, or by arrangement between the Attorney-General and a Minister of a State or the Northern Territory for the performance on a joint basis of functions relating to the promotion of the observance of human rights in that State or Territory.

Apart from its monitoring and reviewing functions, the Commission is 'to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories' and to 'undertake research and educational programmes, and other programmes, on behalf of the Commonwealth for the purpose of promoting human rights and to coordinate such programmes undertaken by any other person or authorities on behalf of the Commonwealth' (ss. 9(1)(f) and (g)). The Commission in performing its functions may work with and consult appropriate non-governmental organisations (s. 9(3)). It may 'make an examination or hold an inquiry in such manner as it thinks fit, and in informing itself in the course of such examination or inquiry, [it] is not bound by the rules of evidence' (s. 12).

The Commission thus undertakes legislative reviews, receives complaints, conducts or authorises persons to conduct inquiries, consults with other human rights bodies, makes itself available for cooperative arrangements with the States and the Northern Territory, undertakes research and promotes information and education. Complaints to the Commission are broadly confined to the federal sphere, but the Racial Discrimination Act, High Court decisions and proposed Commonwealth legislation (in particular, the Sex Discrimination Bill) have extended or are extending that sphere significantly, making it possible for the Commission to examine and receive complaints concerning State legislation in particular areas with a view to determining its consistency with overriding Commonwealth human rights provisions or international instruments.

Between 1 July 1982 and 30 June 1983, the Commission received 512 complaints under the Racial Discrimination Act and its team of three conciliators had so heavy a workload that it had to confine its operations to northern Victoria, northern New South Wales, southeastern Queensland and some northern areas of Queensland, being unable to undertake systematic work in Western Australia or the Northern Territory. In the same period, the Commission received 142 complaints under the Human Rights Commission Act. Complaints concerned a wide variety of matters including the deportation of long-time permanent residents of Australia convicted of crimes who had served their sentences; rights of mentally handicapped persons to equality of opportunity in the use of government and community services; rights of prisoners; rights of residents of institutions for the physically disabled or mentally handicapped; rights to privacy; rights of a child to know her or his natural mother; rights to equal treatment and equal protection under the law regardless of homosexual status; right to immigrate to Australia despite physical disability; rights of children to participate in custody decisions of the Family Court; rights of public servants and some other employees to their good reputation in promotions and appeals processes.[4]

The Commission has submitted to the Minister and published reports on its reviews of or inquiry into the Citizenship Act 1948, the proposed A.C.T. Mental Health Ordinance 1981, Testamentary Guardianship in the Australian Capital Territory (where the existing law made any female parent, and a male parent of an ex-nuptial child, unable to appoint a testamentary guardian for his or her child), the deportation of convicted aliens and immigrants, the Crimes Act 1914 and other crimes legislation of the Commonwealth, and the observance of human rights at Villawood Immigration Detention Centre.[5] The Commission also examined at the request of the A.C.T. Right to Life Association the law relating to child destruction in the A.C.T.: the submission here was that as the law of the A.C.T. now stands the child has no legal protection while in the process of birth — that is, at a stage when its destruction would not amount to a 'miscarriage' — and that this was inconsistent with Article 6 of the International Covenant on Civil and Political Rights proclaiming the right to life; the Commission responded that Article 6 does not appear to provide any 'absolute' right to life before birth, and found provisionally that no change to A.C.T. law was required.[6]

The Commission has launched a major inquiry into freedom of expression, receiving fifty-two submissions in response to advertisements. It decided to focus initially on four aspects: parts of s. 116 of the Broadcasting and Television Act 1982 dealing with the prohibition on dramatising current political matter and the right of freedom of expression of candidates for parliamentary elections; controls on peaceful assemblies in Commonwealth places; freedom of expression and the right of people with disabilities; freedom of expression and racist propaganda. The Commission is also reviewing by-laws applying in Aboriginal reserves in Australia. It has published occasional papers on Incitement to Racial Hatred, Freedom of Expression and Racist Propaganda and a

[4] Human Rights Commission, *Annual Report 1982-83,* pp. 7-9,31.

[5] Human Rights Commission: *The Australian Citizenship Act 1948* Report No. 1, Canberra, 1982; *Propsed A .C.T T. Mental Health Ordinance 1981,* Report No. 2, AGPS, Canberra, 1982; *Testamentary Guardianship in the Australian Capital Territory,* Report No. 3, AGPS, Canberra, 1983; *Human Rights and the Deportation of Convicted Aliens and Immigrants,* Report No. 4, AGPS, Canberra, 1983; *Reviews of Crimes Act 1914 and Other Crimes Legislation of the Commonwealth,* Report No. 5, AGPS, Canberra, 1983; *The Observance of Humcn Rights at the Villawood Immigration Detention Centre,* Report No. 6, AGPS, Canberra, 1983.

[6] Human Rights Commission, *Annual Report 1981-82, vol. 1,* pp. 27-29.

compendium of Human Rights Courses in Australian Tertiary Institutions. It has devised a course entitled *Teaching Human Rights: Activities for Schools* being tested in selected schools in New South Wales, Victoria and the Australian Capital Territory; disseminated a pamphlet concerning the Commission and its functions in fourteen languages, and special purpose booklets such as *Human Rights — A Handbook* (an illustrated handbook for children) and a newsletter *Human Rights* appearing four to six times a year. The Commission has published discussion papers on Corporal Punishment in Schools, on Payment of Award Wages on Aboriginal Reserves, and on a Proposed Amendment to the Racial Discrimination Act Concerning Racial Defamation.[8]

The Human Rights Commission is also consulting with the States and the Northern Territory to achieve an integrated regime for promoting human rights at both State and federal levels. It is pursuing the creating of joint offices with each State and Territory to handle complaints and to share research, education and promotion. Agreement has been reached by the Commonwealth and Victoria for cooperative working arrangements between the Human Rights Commission and the Victorian Commissioner for Equal Opportunity. The reports of the Commission emphasise the desirability of creating single points of access for the public wishing to complain or to learn about human rights, rather than fragmenting the work through a host of organisations with overlapping responsibilities and duplicated resources.[9] To whatever extent that hope is realised, it is clear that reports and publications by the Human Rights Commission will become an ever more significant part of the human rights literature in Australia, that its activities will increase in scope and that Commonwealth initiatives, under the present Government, will produce further transformations in Australian law concerning human rights. In these areas literature discussing the position in Australia dates quickly, though in the meantime a large body of practical experience and empirical information is being built up.

The Commission itself expects the years ahead to see further rapid development of its activities. The function of actively promoting equality between the sexes is to be vested in the Commission by statute and the Commission will be given a power of determination and not only of examining, reporting and conciliating. The proposed national Bill of Rights, according to the Attorney-General, envisages a significant role for the Commission in its implementation. He has also indicated that he intends to review the Human Rights Commission Act to ensure that the Commission's constitution and powers are appropriate to the new tasks being assigned to it.[10] The Australian Law Reform Commission's Report on Privacy, before Parliament at the time of writing, proposes the creation of a Privacy Commissioner to work within the Human Rights Commission.

Complaints alleging infringements of the Racial Discrimination Act prohibition on racial discrimination are inquired into by the Commissioner for Community Relations, who is required by the Act to try to effect a settlement of such matters on behalf of the Human Rights Commission, making use of Commission staff. In the year to 13 June 1983, the Commissioner received 512 complaints of which 403 were resolved by the end

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[7] Human Rights Commission: *Incitement to Racial Hatred: Issues and Analysis,* Occasional Paper No. 1, AGPS, Canberra, 1982; *Incitement to Racial Hatred: The International Experience* (prepared by Dr Ralph Pettman), Occasional Paper No. 2, AGPS, Canberra, 1982; *Words that Wound: Proceedings of the Conference on Freedom of Expression and Racist Propaganda* (held in Melbourne, November 1982 under Commission auspices), Occasional Paper No. 3, AGPS, Canberra, 1983; *Compendium of Human Rights Courses in Australian Tertian: Institutions* (prepared by Professor Alex Castles & Leonie Farrell), Occasional Paper No. 4, AGPS, Canberra, 1983. All are available from Mail Order Sales, Australian Government Publishing Service, G.P.O. Box 84, Canberra, A.C.T. 2601, Australia.

[8] Obtainable from the Human Rights Commission, G.P.O. Box 629, Canberra City, A.C.T. 2601, Australia.

[9] Human Rights Commission, *Annual Report 1982-83,* pp. 10-11. [1°]

ibid., p.45.

of the year. His report comments that discrimination is still commonplace and widespread but that the number of complaints actually made is also a reflection of the extent of knowledge of the legislation and of the remedies available. Complaints related to discrimination against Aboriginal Australians form the largest single group, amounting to about one-third of all complaints received and to a much larger proportion of those complaints which actually related to unlawful acts of discrimination.'[11]

The Sex Discrimination Bill 1983, which had passed through both Houses of Parliament on 7 March 1984 and at the time of writing was awaiting Royal assent, provides in cl. 48 that the Human Rights Commission shall inquire into alleged infringements of the prohibitions against discrimination on grounds of sex, marital status or pregnancy, and against sexual harassment, in the areas enumerated in Part II of the Act. It gives the Commission the additional function of inquiring into and making determinations on matters referred to it by the Minister or by the Sex Discrimination Commissioner established to inquire on behalf of the Commission into the infringements mentioned. The Commissioner is subject to the direction of the Commission in performing a function on behalf of the Commission, but it may not give him or her a direction in relation to a particular matter or a direction inconsistent with the objects of the Act. The substantive provisions of the new Act are discussed in section 8 below, but the Act is also important for extending considerably, in this new area of its activities, the powers of the Commission. The Commission has power to hold inquiries in private where it is appropriate to do so and to prohibit the publication of evidence (cll. 66 and 67), and to receive representative complaints made on behalf of persons other than the complainant (cll. 70-72). It is not bound by the rules of evidence and is directed to conduct inquiries with as little formality and technicality as the Act and proper consideration of the matter permit (cl. *77).* It may summons persons to give evidence and produce documents and may take evidence on oath (cl. 75). It is given power in cl. 81 to make determinations after holding an inquiry, declaring that a person complained of has engaged in conduct rendered unlawful by the Act and should not repeat it, that he should redress any loss or damage suffered by the complainant or employ or re-employ or promote the complainant, that he should pay to the complainant damages by way of compensation, or should vary the terms of a contract or agreement to provide redress of loss or damage. Such determinations by the Commission are said not to be binding or conclusive between the parties, but under cl. 82 the Commission or complainant may institute proceedings in the Federal Court for an order to enforce such a determination and the Federal Court may make such orders, including a declaration of right, as it thinks fit. Thus the Court may give effect to a determination of the Commission. Further, the Commission may recommend to the Attorney-General that assistance be given to complainants or respondents where the complaint has been dismissed in respect of expenses incurred by the person in connection with the Commission inquiry. Application may also be made to the Attorney-General for legal or financial assistance in respect of court proceedings to enforce a determination of the Commission.

This rapid growth in the activities and powers of the Commission is greatly welcomed by many and opposed, at least in some respects, by others — both trends being reflected in parliamentary debates, newspaper columns, recent journal articles and letters to the editor in the leading Australian dailies.[12] If and when determinations of the Human Rights Commission become matters before the Court, specific legal problems and resultant legal discussion will certainly develop — as they have over aspects of State anti-discrimination provisions.

[11] ibid., pp. 31-9.

[12] See, for instance, J. L. C. Chipman & H. J. McCloskey, 'The Open Society: Its New Insidious Enemies, the New Moral Guardians and the New Republic', and J. Kleinig, 'Keeping an Open Mind on the Open Society: A Response to Chipman & McCloskey', in (1983) 28 *Bulletin of the Australian Society of Legal Philosophy,* 3-43.

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A Bill of Rights?

See Bibliography — Bill of Rights debate (p. 160)

An Australian Bill of Rights based on the International Covenant of Civil and Political Rights was a Labor election commitment during the campaign of February-March 1983. In October 1983, Cabinet approved the planned presentation of such a Bill to Parliament to be allowed to lie on the table for a period to permit discussions with the States and for community comment. The Attorney-General, in an unpublished paper presented to the Twenty-second Legal Convention in Brisbane on 7 July 1983', said the Bill would require observance of the rights to freedom of expression, conscience, religion, assembly and privacy, as well as rights relating to the criminal process. It would not be 'entrenched' but would be a normal Act of Parliament alterable by a simple majority in the two Houses. The Bill if passed, the Attorney-General says, could not be relied upon directly to found legal action for injunctions, damages or variations of contract; instead it would give courts guidance in the interpretation of existing laws and would allow them to modify prior or later-enacted legislation, or any Common Law rules, to the extent of any inconsistency with the Bill. Complaints about breaches of rights would be able to be investigated by a strengthened Human Rights Commission (the Human Rights Commission Act was also to be amended), and the Bill would provide for limited judicial enforcement. In his speech and Press Release, however, Senator Evans indicated that there may be something to be said after experience has accumulated in the interpretation of the Bill of Rights for going further, to enable the Bill to be used as a sword and not merely as a shield, and with a view to it ultimately becoming part of the Australian Constitution.

Since Canada adopted a Bill of Rights in 1960 similar in its approach to the one outlined by Senator Evans, there has been active discussion in the British Commonwealth, and especially among its lawyers, of the advantages and disadvantages of enacting a Bill of Rights in a democratic, Common Law country. Over one hundred of the world's Constitutions do contain Bills of Rights, though many of those Constitutions make no adequate provisions for citizens to seek legal enforcement of those rights. This is despite the fact that the tendency of Constitutions in recent times has been to make rights more specific. An even greater proportion of the countries with Bills of Rights has at best an unsavoury reputation in the matter of actually respecting those rights. Paradoxically, the most lively critical discussion about the desirability of a Bill of Rights, and its possible disadvantages, has taken place in countries where most human rights are respected, in practice and in law, to a much more significant extent — for example, in Canada, the United Kingdom, New Zealand and Australia — but perhaps this fact is not so surprising.

The case for a Bill of Rights has been put in much the same way in all the latter countries. Some prominent members of the judiciary including the Chief Justice of Canada, the Honourable Mr Justice Bora Laskin, and a past Chairman of the U.K. Law Commission, Sir Leslie Scarman (now in the House of Lords), have been strongly in favour, as are a number of Australian judges both State and Federal. Proponents of a Bill

'Summarised in a Press Release by the Attorney-General, no. 86 of 1983, 7 July 1983.

of Rights argue that it is necessary, especially in the current international climate, to make a public and visible symbolic commitment to the human rights campaign, and to recognise that a Bill of Rights will have an important effect on the moral climate of a community, on citizens, and police and government servants, on barristers and solicitors and judges themselves. They argue further that the Common Law does not protect the traditional civil liberties as effectively or pervasively as is often thought. On the contrary, it is often powerless in the absence of legislation or before specific legislative provision for administrative discretion. In recent times, the ever-increasing flow of legislation and of administrative regulation has made the protection of such rights even more hazardous and uncertain. In areas such as privacy, where the need for protection of such rights has been made even more urgent by technological advance and urbanisation, the Common Law offers little protection and most of it indirect. Senator Evans has complained that the right to vote is not constitutionally guaranteed in Australia, that freedom of expression and assembly are residual concepts in our system, that minorities are mistreated, that conventions are subject to being overruled and that freedoms are too much restricted.[2] Senator Lionel Murphy, as he then was, argued that the Australian people are 'entitled' to a Bill of Rights 'because too often in the past our courts and our parliaments have let us down . . . between the two of them a series of grave injustices have been perpetrated, mainly on those groups in the community who lack the power or the popularity to answer back'.[3] Both Mr Justice Gordon Samuels and Mr Justice R. M. Hope have supported, in principle, the enactment of an Australian Bill of Rights.[4] The chief promoter of the 1960 Canadian Bill of Rights, J. G. Diefenbaker, told the Canadian House of Commons in 1947 that the great traditional rights were mere pious ejaculations unless the individual had the right to assert them in the courts of law.[5]

In Australia, attention has been drawn to the *Darcy Dugan* case[6] in which the High Court held that a person convicted of a capital offence lost his civil rights to approach the courts and could not sue for libel; to the *McInnes* case[7] in which the same court held that a prisoner defending a serious charge (rape) and abandoned by his barrister when legal aid was refused, was not entitled to legal representation as a right; and to the refusal of Common Law courts to recognise or develop a Common Law right of privacy in the absence of legislation.[8] Much weight is placed by proponents of a Bill of Rights on the effect that the U.S. Bill of Rights, as an entrenched part of the Constitution, has had on the decisions of the courts in the United States and on the Federal Government's power to intervene in abuses at State level. They stressed the international example set by the UN and, especially, by the European Court of Human Rights, which has exposed and rejected the United Kingdom Government's failure to respect, in certain cases, human rights set out in the European Convention and not protected, in such instances, by Common Law or U.K. statute law. Many of those supporting a national Bill of Rights in

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[2] Gareth Evans, 'An Australian Bill of Rights', in (1973) 45 *Australian Quarterly,* 11-12,22 & 33; John McMillan, Gareth Evans & Haddon Storey, *Australia's Constitution: Time for Change?,* Allen & Unwin, Sydney, 1983, pp. 231-2.

[3] *Sydney Morning Herald* (22 March 1974), 6.

[4] Mr Justice G. Samuels, 'A Bill of Rights for Australia?' (1979) 51 *Australian Quarterly,* 91-7; Mr Justice R. M. Hope, 'Civil Liberties in Australia: the case of peaceful assemblies', in Tay et al. (eds), *Teaching Human Rights: An Australian Symposium,* AGPS, Canberra, 1981, pp. 33-6.

[5] (1947) 86 *House of Commons Debates 3188,* cited in W. G. How, 'The Case for a Canadian Bill of Rights', (1948) 26 *Canadian Bar Review* 759 at p. 759.

[6] *Dugan v. Mirror Newspapers Ltd* [1976] *1 New South Wales Law Reports* 403 (Yeldham, J., at first instance); (1979) 53 *Australian Law Journal Reports* 166; (1979) 142 *Commonwealth Law Reports* 583 (in the High Court).

[7] *R. v. McInnes* (1980) 54 *Australian Law Journal Reports* 122.

[8] *Victoria Park Racing v. Taylor* (1937) 59 *Commonwealth Law Reports* 479. The three cases mentioned were cited in Gareth Evans, Tenth Annual John Curtin Memorial Lecture: The Politics of Justice, Australian National University, 1980, p. 32. cf. John McMillan, Gareth Evans & Haddon Storey, *Australia's Constitution,* p. 324.

Australia have been specifically concerned to prevent what they see as bac-kwater' States or State governments from denying human rights to protesters, Aborigines or other minorities not popular in that State and therefore not defended by local voting majorities.[9]

Many of those supporting a national Bill of Rights would have preferred to see it attached to the Australian Constitution, perhaps as part of a more wide-ranging review of the Constitution altogether.[°] It is generally accepted, however, that the history of referenda on proposed constitutional amendments, and the stances of non-Labor parties and State governments, make the amendment of the Constitution to incorporate a Bill of Rights a practical impossibility in the immediate future. Concrete proposals to enact a Bill of Rights, therefore, have presented such a Bill as an ordinary legislative Act, relying for its validity principally on the external affairs power and tying its provisions, therefore, to international instruments which Australia has ratified.

Opposition to a national Bill of Rights and also to State Bills of Rights where these have been mooted, has rested principally on the belief that such instruments would extend not the rights of the citizens but the discretion of judges." They would give the courts an increasingly politicised role and thus undermine the traditional 'legalistic' stance of the law and the courts, supposed to guarantee certainty and impartiality. There was further suspicion of a national Bill of Rights as an attempt to extend Commonwealth power at the expense of the States, and some unease at the notion that lists of human rights should be spelt out for Australians by international organisations, many of whose members had a record of hypocrisy, deceit and shameless selectivity in these matters. Doubts have also been expressed about the possibility of getting widespread agreement on what rights should be protected and how, about the extent to which such legislation should intrude into all aspects of social life and, if not, how exceptions and exemptions should be worded. At the concrete technical level, the discussion of these issues in Australia — for and against — has so far been surprisingly insipid and has commanded little public attention; it is on such issues as the right to life, racial and sex discrimination, and centralism versus State rights that newspaper and popular discussion has focussed. Philosophers, as we shall see, have argued strongly that there is nothing traditional, natural or generally 'human', or even coherent, about the lists of rights that make up Bills of Rights; they tend to represent sectional (though urgently felt) contemporary demands; and they are often in conflict with each other or with other 'rights', so that in the end the genuine observance of one group of rights entails that only lip-service can be paid to a conflicting group.

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[9]In an Address to the Queensland Institute of International Affairs on 23 November 1983, Mr Peter Bailey called on the State Government to begin implementing anti-discrimination legislation, pointing out that more than half the complaints of discrimination against Aborgines came from Queensland and Western Australia and that nineteen out of twenty-one compulsory conferences called by the Human Rights Commission to resolve complaints of discrimination had occurred in Queensland. He also announced the Commission's plan to establish a Brisbane office. He foresaw a 'new phase' beginning in the human rights field in which there would be much closer integration of Commonwealth and State mechanisms. He did not, however, himself make any reference to a Bill of Rights.

'[9]A Bill without constitutional status could be overriden or altered by an ordinary statute. For some, this would render the exercise useless, the entire point of a Bill of Rights being to put fundamental rights beyond interference by day to day political majorities. Others argue that an unentrenched Bill is sufficient, since Parliament is thereby required to deliberately and explicitly decide to override rights; or even that an unentrenched Bill is preferable, since it can more easily be amended, should this prove desirable, than a Bill embodied in the Constitution. Ease of amendment is particularly favoured by those who distrust, or are at least uncertain of, the interpretation of a Bill of Rights by the Australian judiciary — though it has often been insisted that as many of the rights under discussion derive from the Common law, their interpretation and application are familiar to the courts.

"For example, Sir Garfield Barwick in an address on 'The High Court and the Proposed Amendments to the Judiciary Act, 1903', extracts from which appeared in (1976) 50 *Australian Law Journal,* 433, and Peter Brett, 'Reflections on the Canadian Bill of Rights', (1969) *7 Alberta Law Review* 294.

8

Racial and sex discrimination laws[1]

See Bibliography —
Racial discrimination (Aborigines, indigenous peoples and minorities) (p. 269), Sex discrimination — women (p. 288): Employment (p. 294), Social services (p. 297)

An Australian Bill of Rights covering human rights generally, or at least those listed in the International Covenant on Civil and Political Rights, has had to wait for a Labor victory and/or the resolution of the question of the scope of the Commonwealth's external affairs power. Legislation against racial discrimination, perhaps because the issues were more clear-cut, initially went ahead more strongly, at both State and Federal levels. More recently, legislation against sex discrimination has done the same.

The first anti-discrimination legislation in Australia was South Australia's Prohibition of Discrimination Act 1966 (amended in 1970 and 1975). It was designed to prohibit racial discrimination in the provision of services in hotels, accommodation, employment, etc., by making it a criminal offence, punishable by fine, to refuse entry to any licensed premises, place of entertainment, shop or public place, to refuse to supply food, drink or accommodation, to refuse to let dwellings, to dismiss employees or to restrict land or housing sales to a person, 'by reason only of that person's race or country of origin, or the colour of his skin' (s. 5). During its operation from December 1966 to 1976, only four cases were brought under the Act, all of them involving the refusal of hotel service to Aborigines. Only one was successful. Critics of the Act, or rather of this way of approaching the problem of discrimination, see its failure to have real impact on the life of Aborigines as a result of its being addressed to individual (and overt) acts of racism, which it renders criminal, and not to the problems of surreptitious, institutionalised discrimination and the socially inferior position of Aborigines.[2]

The 1966 Act was replaced in 1976 by the Racial Discrimination Act which attempted to meet some of the problems encountered in proving racial discrimination to the standards of proof demanded by criminal law. It made it an offence for a person to discriminate against another on the ground of race in the offer or description of employment (except in private households or where the employer employed no more than three persons), the provision of goods or services, access to public places (defined to include hotels, shops or places in which public entertainment is held), or in offers of, applications for, and the terms of, accommodation. 'Race' is defined to include nationality, country of origin, colour of skin or ancestry of a person or that of any person with whom they reside or associate. The test for discrimination on the ground of race under s. 5 is whether a person treats another 'less favourably than in identical or similar circumstances he treats or would treat a person of another race' either on the ground of race or 'on the ground of an actual or imputed characteristic appertaining or attributed to that person', as a result of his or her race. It is unlawful discrimination on the ground of race whether the decision to discriminate is 'motivated or influenced to a significant extent' by the race itself, or by the actual or imputed racial characteristic of the person

[1] I have been helped in writing this section by a survey and critical assessment of State laws prepared by Andrew Frazer and a further report by Adrian Diethelm.

[2] See D. Prideaux, 'The South Australian Prohibition of Discrimination Act and Racism', (1975) 10 *Australian Journal of Social Issues,* 315.

discriminated against. By s. 11, the Court, once satisfied beyond reasonable doubt that the defendant discriminated against another person, need only find to a civil standard of proof (a balance of probabilities) that the discrimination was on the ground of the race of the person discriminated against in order to deem an offence proved. Proceedings under the 1976 Act, which are disposed of summarily, may only be commenced with the authority of the South Australian Attorney-General. Neither the repealed 1966 Act nor the 1976 Act (still in force) contained any provisions for conciliation. Both relied instead on criminal prosecutions in the ordinary courts.

In the Commonwealth sphere, a Racial Discrimination Bill was mooted in the first months of the Whitlam Labor Government, and such a Bill was introduced into the Senate by the then Attorney-General, Senator Lionel Murphy, on 21 November 1973, at the same time as he presented the Human Rights Bill. It was based on, and was expressed as giving effect to, the UN Convention on the Elimination of All Forms of Racial Discrimination, and it purported to rely on the Commonwealth's powers with respect to external affairs, the people of any race for whom it is deemed necessary to make special laws, and immigration. Both Bills were subjected to substantial amendments in the Senate, and the Human Rights Bill eventually lapsed in 1975. The Labor Government decided to proceed with the Racial Discrimination Bill, and it was introduced for the fourth time (this time in the House of Representatives) by the then Attorney-General, Mr Kep Enderby, in February 1975. The Bill was again substantially amended, but passed both houses on 3 June 1975. Sections 1, 2 and 7 (concerning the Governor-General's power to appoint the Commissioner for Community Relations and the Minister's power to appoint members of the Community Relations Council, as well as the legislature's approval to ratify the UN Convention) came into operation on the receipt of the Royal Assent on 11 June, 1975; the remainder was proclaimed to commence on 31 October 1975. The Commonwealth Act was closely modelled on the New Zealand Race Relations Act 1971 and the U.K. Race Relations Act 1968. It differs from the South Australian Acts already discussed (and from successive U.K. statutes on the subject) in that it contains a general prohibition which indirectly refers to public international law. Section 9(1) states 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 or cultural or any other field of public life.

The terms used in this sub-section are not defined, but the reference to a human right or fundamental freedom in the specified fields is expressed to include the kind of right referred to in Article 4 of the UN Convention (s. 9(2)). The Convention is included as a Schedule to the Act (by s. 3(1)). Commenting on this general clause of the then Bill, Gareth Evans (now Attorney-General) wrote in 1974 that 'the clause is so widely drawn that it is difficult to foresee how it will be applied in practice, for example, in regard to claims that there have been discriminatory patterns of arrest, conviction and sentencing by state police and magistrates' courts'.[3] Another general section (s. 10), was designed to nullify State laws, by force of s. 109 of the Constitution (inconsistency of Commonwealth and State laws) notably Queensland's Aboriginal and Torres Strait Islanders Acts. Subsequently, after negotiations with the Queensland State Government over control of Aboriginal reserves had broken down, Senator Murphy, as we have seen, introduced a stronger, and more specific piece of legislation — the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill 1974, which became Act No. 75 of 1975. The second version of the Racial Discrimination Bill had expanded the ambit of the 1973 Bill to include discrimination against persons on the ground that they were

[3] Gareth Evans, 'New Directions in Australian Race Relations Law', (1974) 48 *Australian Law Journal*, 483.

migrants. This provision was deleted from the Bill on its reintroduction after the dissolution of Parliament for the 1974 elections.

The Commonwealth Act also contains, in Part II (Prohibition of Racial Discrimination), sections making unlawful discrimination in respect of access to or use of any place or vehicle (s. 11); the disposition, acquisition, occupation or termination of an interest or estate in land, or residential or business accommodation (s. 12); the provision or terms of supply of goods or services (s. 13); the offer of terms of, or dismissal from, employment (s. 15); and membership of a trade union (s. 14(2)); the last-mentioned provision inserted on the initiative of the Liberal Opposition. Any provision or rule of a trade union which prevents or hinders a person from joining it by reason of race, etc., is invalid (s. 14(1)). Advertising that indicates or could reasonably be understood as indicating an intention to do any of the above unlawful acts, is unlawful (s. 16). Finally, incitement to, assistance in, or promotion of any of these unlawful acts is also unlawful (s. 17). None of these unlawful acts constitutes a criminal offence (s. 26). The original Bill contained a series of offences, triable summarily and punishable by fines of up to $1000 or imprisonment for up to six months. These included activities inciting racial hatred; disseminating ideas based on racial superiority or hatred; committing acts of violence on persons of different race, colour or ethnic origin; and inciting acts of racial discrimination. These offences were deleted on the third introduction of the Bill in 1974 and, as Senator Murphy said at the time, the Bill was 'amended to emphasise reliance on civil, rather than criminal, law to combat racial discrimination. The range of offences in the Bill has accordingly been reduced and is mainly concerned with meeting the specific requirements imposed by Article 4 of the Convention'.[4]

The Commonwealth Racial Discrimination Act followed the example of the U.K. legislation in relying to a large degree on conciliation and attempts to settle complaints. Originally, these functions were exercised by the Commissioner for Community Relations and by Conciliation Committees established under the original Act (Act No. 52 of 1975, s. 23(1)). The Act also made provision for a Community Relations Council whose functions were to advise the Attorney-General or the Commissioner on matters referred to it relating to observance and implementation, education, promotion and research, publications, promotion of understanding, and other matters related to the Convention (s. 28). That Council was never established.

The difficulty of proving discriminatory intent, and the standard to be applied, have been thorny questions seen by some radical critics as going to the heart of the operation and effectiveness of anti-discrimination legislation. In the original Racial Discrimination Bill, the problem of proving discrimination was to be lessened by stating that a discriminatory reason did not have to be the dominant reason for the refusal of services, etc. — a requirement implied in the South Australian Prohibition of Discrimination Act 1966. The Bill was amended by the Opposition in the Senate, and the Act as it now stands requires that a discriminatory act, to be unlawful, must be done for reasons which are dominantly reasons of the race, colour or ethnic origin of a person (s. 18). The Sex Discrimination Bill 1983 does not require the unlawful discriminatory intent to be the dominant or substantial reason — only a reason (s. 8).

By 1983, three States had introduced anti-discrimination legislation. South Australia, besides the Racial Discrimination Act already discussed, enacted the Sex Discrimination Act 1975 in response to International Women's Year. Assented to on 4 December 1975 (but not coming into force until 12 August the following year), it operates largely outside the criminal jurisdiction and relies on administrative action for conciliation of complaints. This objective is reflected in the long title, where the Act is described as being 'to render unlawful certain kinds of discrimination on the grounds of sex and

[4]Senate, *Debates* (1974), vol. S. 62, 2193.

marital status; to provide effective remedies against such discrimination and promote equality of opportunity between men and women generally; and to deal with other related matters'. This statute closely follows the U.K. Sex Discrimination Act 1975 and was enacted less than a month after it; the South Australian Act therefore imports much of the then current British attitude in dealing with discrimination, including the belief that the criminal law is a blunt tool for instituting social reform.

The South Australian Sex Discrimination Act established a Commissioner for Equal Opportunity and a three-member Sex Discrimination Board, the chairman of which must be a lawyer. The Board acts as a quasi-judicial body, being able to determine questions of evidence, and to issue summonses, both to produce documents and to attend and answer questions. It is required to act 'according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms' and is not bound by the rules of evidence in informing itself. Persons appearing before the Board are assured of the normal rights of natural justice.

The criteria of discrimination under the Act (s. 16) are similar to the provisions in the U.K. Race Relations and Sex Discrimination Acts. Thus a person discriminates against another on the ground of sex or marital status if (1) 'he treats him less favourably than in identical or similar circumstances he treats or would treat a person of the opposite sex or of a different marital status'; (2) 'he discriminates against him on the basis of a characteristic that appertains generally to persons of that other person's sex or marital status, or a presumed characteristic that is generally imputed to persons of that sex or marital status'; or (3) he discriminates against him by reason that he does not or cannot comply with a requirement whose nature is 'such that a substantially higher proportion of persons of a sex or marital status other than that of the person discriminated against' does or can comply with it, and the requirement is not reasonable in the circumstances of the case. The Act further makes it unlawful to commit an act of victimisation, which is done if a person discriminates against another for bringing proceedings, giving evidence or doing anything that is reasonably asserting his or her rights under the Act (ss. 17, 30). Discrimination *per se* is not unlawful — nor is an unlawful act an offence (except in the case of causing to be advertised an intention to do an act which is unlawful under the Act — s. 45). Instead, several areas of activity are isolated: employment (including partnerships, membership of trade unions, professional or trade organisations, qualifying bodies and employment agencies), education (including applications, admissions, access to benefits and subjection to detriments), provision and terms of supply of goods and services (including accommodation) — in each of which areas particular activities are made unlawful. A complainant must not only prove that unlawful discrimination has taken place; he or she must also show that it occurred in an area covered by the Act. These requirements are complicated by the numerous exceptions either enumerated in the Act (for example, terms of an insurance policy or superannuation scheme, practices of religious bodies; note, however, that the Act binds the Crown), or else granted by the Board (for no more than three years) in relation to a particular person or activity, or class thereof, or in circumstances of a specified nature.

The Board, acting on its own initiative or after receiving a complaint, may hold an inquiry for which an investigation may be undertaken by the Commissioner or some other person and, on satisfying itself that a person has contravened a provision of the Act, may make a non-discrimination order requiring the discriminator to refrain from contravening the Act, or to perform specified acts, in order to eliminate future or to remedy past contraventions (s. 38). The Commissioner is given a preliminary, conciliatory role; but on receiving a complaint and having unsuccessfully made all reasonable attempts to resolve the matter informally by conciliation, he must refer the complaint to the Board for quasi-judicial determination. The Board must proceed to hear and determine all complaints referred to it or lodged with its Registrar. Thus there are directly available to the complainant both informal and formal resolution mechanisms.

In addition to making redress orders, the Board may order damages by way of compensation for loss or damage suffered by the complainant. It may order the respondent to refrain from discrimination or victimisation of the complainant or to act to redress loss or damage caused by the unlawful discrimination. This latter order, considering the penalties which may be imposed for non-compliance with it, is virtually a form of injunctive relief.

An appeal lies as of right from a decision of the Board to either the Full Court of the S. A. Supreme Court (in the case of education, or the provision of goods and services) or to the Full Court of the S.A. Industrial Court (in relation to any other area). This division of appellate work reflects the primary target of the legislation, namely discrimination in employment and infringements of equal rights to work.

While the bodies set up under this Sex Discrimination Act are both administrative and quasi-judicial in nature, there is a strict delineation of functions. Legal guarantees of due process and appeal are rigorously upheld. The Board has power to institute affirmative action programmes, as well as providing relief in individual cases. Affirmative action may take the form of a demand by the Board that a scheme be introduced in an area concerning which a complaint has been received, or by exempting an organisation from the requirements of the Act. The legal problems encountered, for example in the United States with the *Bakke* case[5], do not seem to be troublesome (perhaps because there is no Bill of Rights yet), though the moral questions remain and continue to evoke disagreement.

New South Wales and Victoria passed anti-discrimination legislation in 1977. The N.S.W. Anti-Discrimination Act 1977 is considered by many the 'most advanced' of such statutes in Australia.' It has been revised in operation and expanded in scope by amendment. Its long title reflects the intent of the Wran Government to pursue social reform through legislation by describing it as 'an Act to render unlawful racial, sex and other types of discrimination in certain circumstances and to promote equality of opportunity between all persons'. It follows the South Australian Sex Discrimination Act in its drafting and in the machinery set up for the implementation of its objectives, though it shows the effects of studying U.S., U.K. and Commonwealth legislation. Both Acts provide a form of 'representative action' or `joinder'; but whilst the S.A. Act (s. 38(4)) allows a single inquiry to be held in relation to discriminatory actions of the same character by two or more persons, the N.5 .W. Act (s. 88(1)) enables a representative complaint on behalf of the complainant and others.

The original Bill presented to the New South Wales Legislative Assembly in 1976 contained specific provisions to cover areas of activity in which it would be unlawful to discriminate on the ground of race, sex or marital status. A major innovation was to be in the proposed capacity of the Anti-Discrimination Board to make regulations covering discrimination on the ground of age, religious or political conviction, physical handicap or condition or mental disability, and homosexuality. Supporters saw the inclusion of these grounds as making it 'one of the most far-reaching pieces of anti-discrimination legislation in the world' .[7] But because of the controversy surrounding some of the proposed areas for action, especially homosexuality and the enforcement of sexual equality, the Bill was amended by the Opposition in the Legislative Council. The six grounds referred to were removed from the Board's regulatory ambit and downgraded to being areas for research. That action has gradually been reversed by amendment, so that now the Act covers discrimination on the grounds of race, sex, marital status, physical impairment (introduced by Act. No. 15 of 1981), intellectual impairment and

[5] *Regents of the University of California v. Bakke,* 438 *United States Reports* 265 (1978).

[6] See, for a helpful guide to the various statutes up to 1978, designed to help possible victims, C. Ronalds, *Anti-Discrimination Legislation in Australia: a Guide,* Butterworths, Sydney, 1979.

[7] C. Ronalds, op. cit., p. 5.

homosexuality (both brought in with the major revision by Act No. 142 of 1982). The N.S.W. Act does not contain specific provisions on sexual harassment. In a widely publicised complaint of sexual harassment heard by the N.S.W. Equal Opportunity Tribunal, *O'Callaghan v. Loder,* however, the judicial member of the Tribunal, Judge Jane Matthews, ruled as a matter of law that sexual harassment fell within the discrimination in employment provisions of the Anti-Discrimination Act.[8]

The original Act covered discrimination on the ground of race in work (including job applicants and employees, commission agents, contract workers, membership of trade unions, qualifying bodies, and services of employment agencies), education, access to public places and vehicles, the provision of goods and services, and accommodation. An exception is provided by s. 17 which, importing a U.K. provision (known as a 'Chinese waiters' section), relates to genuine occupational qualifications in the artistic, food and drink, and welfare industries. Another exception is in the selection for the eligibility to compete in sports and games (s. 22). This was designed to maintain the nationality, birthplace or residence qualifications for some ethnic sports clubs, State competitions and the Olympic Games. Section 21 contains an exemption which allows positive discriminatory practices and reads:

> Nothing in this part applies to or in respect of anything done in affording persons of a particular race access to facilities or services to meet the special needs of persons of that race in relation to their education, training or welfare, or any ancillary benefits.

Race is defined to include colour, nationality and ethnic or national origin (interpretation section, s. 4).

Similar provisions apply with respect to sex and marital status (defined to include the condition of being single, married, separated, divorced, widowed or in a de facto relationship). The N.S.W. Anti-Discrimination Act has an additional section (s. 32) covering discrimination on the ground of sex in access to places where liquor is sold. This provision does not exist in the field of racial discrimination, possibly because it was felt the Commonwealth Racial Discrimination Act was sufficiently strong in this area. Exceptions in the sex discrimination field concern special rights and privileges in connection with pregnancy and childbirth, conditions of superannuation funds, terms of insurance policies, and sporting activities. In the marital status field, there is an exemption for conditions of superannuation funds, criticised by many.

The Anti-Discrimination Act operates similarly in the rest of its provisions regarding discrimination on the grounds of physical or intellectual impairment, or homosexuality, listing unlawful activities in employment and other areas. An important amendment was the extension of the Act to cover registered clubs in 1981. Firms of more than six partners were also brought within the scope of the Act. General exceptions to the Act (Part VI) are acts done in compliance with any other Act or court order, charities, religious bodies, voluntary bodies, and establishments providing housing accommodation for aged persons.

In 1981 the Anti-Discrimination Act was amended to introduce affirmative action in public employment, adding a new Part IXA. Section 122C states that 'the objects of this Part are (a) to eliminate and ensure the absence of discrimination in employment on the grounds of race, sex and marital status; and (b) to promote equal employment opportunity for women and members of racial minorities, in the authorities to which this Part applies'. The aim was both to redress past discrimination and to prevent future discriminatory practices. A Director of Equal Opportunity in Public Employment was created to oversee the devising and implementation of Equal Employment Opportunity Management Plans to be carried out in each public authority according to specific timetables. These plans are to prevail over other provisions of the Act.

[8]Matter no. 3 of 1983, interim decision of 21 June 1983 (copies available in N.S.W. Anti-Discrimination Board library, C.A.G.A. Building, Bent Street, Sydney).

Another affirmative action provision gives the Governor power to make regulations exempting any person or class of persons, any activity or class of activity, or any other matter or circumstance from specified parts of the Act (s. 127(4)(e)).

Sympathetic writers have seen the 1981 and 1982 amendments as successfully extending the Act to cover indirect discrimination in fields of race, sex, marital status, physical impairment, intellectual impairment and homosexuality.

As originally devised, the machinery of the Act was similar to the Commonwealth Racial Discrimination Act with a Counsellor for Equal Opportunity whose role was conciliatory, and the Anti-Discrimination Board which had a quasi-judicial function as well as providing research, educational and advisory facilities through its staff. In 1981, however, in response to doubts about the advisability of the Board having mixed functions, a separate Equal Opportunity Tribunal was created. In 1982 the functions of the Counsellor were merged with those of the President of the Board. (Victoria has passed the Equal Opportunity Act 1977 which covers discrimination on the grounds of sex and marital status. It is similar to the N.S.W. Anti-Discrimination Act, but has more limited scope).

In 1978 the Labor Government in Tasmania introduced an Anti-Discrimination Bill into the Tasmanian Lower House. It was not debated at that session, and on the accession of the Liberal Party to power in that State the Bill was dropped, on the ground that it was unnecessary.

In response to the International Year of Disabled Persons in 1981, all States having anti-discrimination legislation passed amendments to include discrimination on the ground of physical impairment in their schemes: South Australia by the Handicapped Persons Equal Opportunity Act 1981, Victoria by the Equal Opportunity (Discrimination against Disabled Persons) Act 1982 and New South Wales by the Anti-Discrimination (Amendment) Act 1981. The South Australian legislation gave additional functions to the Commissioner for Equal Opportunity created under the Sex Discrimination Act and created a Handicapped Persons Discrimination Tribunal. In both Victoria and New South Wales, the changes were incorporated into the body of the general Acts. (For a more detailed account of the position of mentally retarded and physically disabled persons, see section 10 below).

In Victoria, a new Equal Opportunity Bill was introduced into Parliament in 1983. It is designed to replace the various grounds of discrimination with the widely defined ground of discrimination on the ground of status (meaning sex, marital status and impairment), though retaining the enumerated areas of unlawful discrimination. It also has special clauses (Part III, Division 2) dealing with both overt and covert sexual harassment, a question in which both discussion and determinations in cases are beginning to build up in Australia.

In late 1981, Senator Susan Ryan introduced into the Senate a Sex Discrimination Bill as a private member's bill. It was only read a first time at that stage, but in accordance with its platform, the Labor Government introduced a revised version, read for the first time on 2 June 1983. By October, it was announced that some fifty-three amendments had been agreed to by the Government. As a result a new version of the Bill was drawn up and with very few further amendments (by the Senate) went through all stages in March 1984.

The Bill is modelled on the New South Wales Anti-Discrimination Act and incorporated several developments in legislation on the area. It makes it unlawful to discriminate against another person on the ground of sex, marital status or pregnancy in the areas of employment, education, the provision of goods, facilities and services, accommodation, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programmes. The Bill covers sexual harassment of employees, fellow employees, job applicants, commission agents and contract workers (cl. 28) and a student or prospective student (cl. 29). Sexual harassment is here taken to be unwelcome

sexual advances, unwelcome requests for sexual favours or other unwelcome conduct of a sexual nature, provided the recipient has reasonable grounds for believing that rejection, refusal or objection will disadvantage him or her in connection with his or her employment or education or that such disadvantage actually occurs. The objects of the Bill (cl. 3) are described as 'to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women'; to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy in the areas listed above as covered by the Act; 'to eliminate, so far as is possible, discrimination including sexual harassment in the work-place and in educational institutions and . . . to promote recognition and acceptance within the community of the principle of equality of men and women'.

The Bill passed through the House of Representatives by eighty-six votes to twenty-six, on a free vote in which slightly more than half the Opposition voted against the Bill. The Opposition spokesman on Women's Affairs supported the Bill but unsucessfully proposed a series of amendments seeking to remove the Bill from the ambit of the Government's external affairs power by saying that Australia's signing of the UN Convention on the Elimination of All Forms of Discrimination Against Women should not be used to extend the powers of the Commonwealth. A program of affirmative action legislation was dropped from the Bill and the Minister Assisting the Prime Minister on the Status of Women, Senator Susan Ryan, has said that the Government was unlikely to introduce that program for at least two years. Though there was also some opposition to the Bill equating de facto relationship with marriage, much of the debate concerned the exemptions provided for in the Bill and the scope they should take. The expanded list of exemptions in the Bill includes an exemption for the positions in relation to which it is a genuine occupational qualification to be a person of the opposite sex of the person alleged to be discriminating. It also covers situations where the position can be performed only by a person having particular physical attributes, other than strength or stamina, not possessed by persons of the opposite sex, dramatic roles in which authenticity, aesthetics or tradition requires a particular sex, and situations where decency or privacy require such a limitation (the particular cases being spelt out in the Bill in connection with fitting of clothing, clothing or body searches, duties in lavatories, living on premises without separate sleeping accommodation or entering premises ordinarily used by people in a state of undress). Further exemptions apply to residential care of children, the conferring of charitable benefits, religious bodies, educational institutions established for religious purposes, the admission of or provision of facilities or services to members of voluntary bodies, superannuation or insurance where no limited exemption is to apply not later than two years after the commencement of the Act, sporting activity by persons over the age of twelve where strength, stamina or physique is relevant, combat duties and acts done under statutory authority except in relation to specified Commonwealth Acts such as the Social Security Act 1947, the Compensation (Commonwealth Government Employees) Act 1971, the Repatriation Act 1920 and others. The exemption in respect of anything done by a person in direct compliance with a Commonwealth Act, any State Act or any law of a Territory in force at the commencement of the Sex Discrimination Act should cease to be in force at the expiration of two years after the commencement of the Sex Discrimination Act.

The Bill also provides that nothing in the Act shall render unlawful actions designed to promote equal opportunity for persons of a particular sex or marital status or persons who are pregnant (cl. 33). Clubs are specifically debarred from using sex, marital status or pregnancy as a criterion for membership, from imposing special terms or conditions of membership, denying access to any benefits etc. (cl. 25).

The Sex Discrimination Bill is designed to complement the Commonwealth's Racial Discrimination Act. Like it, it is to be administered by the Human Rights Commission,

although a special Sex Discrimination Commissioner is to be appointed to act as first channel of complaint and as conciliator. The Commission is to act as a quasi-judicial tribunal. It may determine that particular matters shall be dealt with as representative complaints if it is satisfied on a number of criteria, which are designed to ensure that the complainant is a typical representative of the class he or she claims to represent (cl. 70).[9] However, the Commission's determination is not enforceable. If it is not observed, the Federal Court may be asked by the Commission or the complainant to make a suitable order.

All this legislation against discrimination based on sex, marital status and pregnancy, reflects the growing strength of women's movements and of `women's issues' in Australia and other countries in recent years. The movements have been concerned to bring out the social prejudices or male hostility that women face in certain occupations, the difficulties created for them by pregnancy and the need for child care, the existence of positive formal barriers and inequalities, legal and administrative provisions and business practices, as well as the existence of more general or diffuse informal barriers. An earlier concern with formal and informal direct discrimination has been followed up by great attention to substantive inequality and to the discouraging effect of 'sexist' language. Statistical studies have shown that the average female wage is 67 per cent of the average male wage, that women are clustered in more lowly paid and less prestigious occupations, that their chances of promotion are smaller and that the proportion of women decreases as positions become more senior. Similar trends can be seen in educational institutions and in comparisions between undergraduate and postgraduate student numbers.[10]

Anti-discrimination legislation has now been in existence in Australia for eight years. Much of the literature associated with it, first on Aborigines and then on women, has been concerned to bring out the extent of existing inequality, both formal and substantive or 'systemic', that is, inequality that results from wider social circumstances, practices and attitudes and not from direct, deliberate and immediate acts. Activist groups have played an important role in collecting and disseminating such literature and have on the whole supported programs of affirmative action designed to overcome or correct substantive, systemic and not formal discrimination which can be abolished by law. There is no significant literature supporting formal discrimination though there are social groups who believe that discrimination is not the only factor leading to inequality of outcome and, in the case of women, social groups that believe that men and women should not play indistinguishable social roles. Most of the theoretical and philosophical discussion concerning discrimination, however, has focussed on the concept of systemic discrimination and the relationship between non-discrimination and 'affirmative action' — temporary discrimination meant to achieve the equality of a disadvantaged group. Both UN documents in this area and such Acts as the Sex Discrimination Act contain provisions to ensure that discrimination by way of affirmative action should not be regarded as a violation of the anti-discrimination provisions of the document or Act. The literature on this question and the philosophical issues involved are discussed in sections 18 and 19 of this Survey, below.

Meanwhile, with the growth of legislation, some specifically legal problems have begun to emerge. One recurring problem is the question of conflicting State and Commonwealth laws. In a number of cases[11], it has been held that State Acts were not inconsistent with Federal awards made under the Conciliation and Arbitration Act and therefore not invalid under s. 109 of the Constitution. Recently, in a joint decision, the

[9] See section 6 of this Survey.

[10] For the substantial literature in this area, see Bibliography,

[11] *Ansett Transport Industries (Operations) Pty Ltd v. Wardlg* (1980) 54 *Australian Law Journal Reports* 210 (Full High Court); *R. v. Sex Discrimination Board; ex p. Cope* (1980) 26 *South Australia State Reports 197 (Full Ct S.A. Sup. Ct).*

Full High Court held, however, that the Commonwealth Racial Discrimination Act 'covered the field' and therefore invalidated s. 19 of the New South Wales Anti-Discrimination Act.[12] Almost immediately the Federal Parliament passed the Racial Discrimination Amendment Act 1982 which purports to obviate the problem by stating that 'This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the [UN] Convention [on the Elimination of All Forms of Racial Discrimination] and is capable of operating concurrently with this Act'.[13] Similar saving provisions are included in the Commonwealth Sex Discrimination Act (cll. 10,11).

[12] *Viskauskas v. Niland* (1983) 47 *Australian Law Reports* 32; (1983) 57 *Australian Law Journal Reports* 414.

[13] Nevertheless, the University of Wollongong has raised the constitutional issues as one of 38 grounds in its appeal to the Court of Appeal of the N. S.W. Supreme Court against an award of $46,500 made by the N.S.W. Equal Opportunity Tribunal, which had found that the University had racially discriminated against an Egyptian Ph.D. student, Mr Mohamed Naguib Metwally, whose Ph.D. candidature and scholarship had been terminated by the University. The University's submission is that the amendment of the Racial Discrimination Act is invalid in so far as it purports to be retrospective and that the Tribunal had no jurisdiction in the case because the cause of action pre-dated the amendment. [The submission was upheld in November 1984.]

9

Aborigines: land rights and customary law

See Bibliography—
Racial discrimination (Aborigines, indigenous peoples and minorities) (p. 269)

The Commonwealth Department of Aboriginal Affairs has estimated that there are approximately 167 000 Aborigines in Australia today, which represents 1.1 per cent of the total population, but this estimate has been disputed as being too low. The Department's figures are projections for 1983 from the 1981 National Population and Housing Census.

The Aboriginal people have occupied this land for at least forty thousand years. In 1788 there were perhaps five hundred tribes and as many distinct dialects or languages. The Aboriginal population at that time was probably around 300 000, though estimates are fraught with guesswork. Within the next hundred years whole tribes had been decimated by conflict with white settlers, their traditional way of life, except in a few instances, was destroyed or suppressed, and the population reduced to some 60 000. Today Aborigines have the highest growth rate, the highest death rate, the worst health and housing conditions, and the lowest educational, occupational, economic, social and legal status of any identifiable section of the Australian population — facts brought out by the first report of Professor W. D. Borrie's National Population Inquiry, *Population and Australia: A Demographic Analysis.* Professor James Crawford, the Australian Law Reform Commissioner in charge of the Aboriginal Customary Law Reference, has summarised some horrifying statistical facts in his paper, 'The Australian Law Reform Commission's Reference on the Recognition of Aboriginal Customary Law', presented to the XI International Congress on Anthropological and Ethnological Sciences (Commission on Folk Law and Legal Pluralism) in Vancouver, British Columbia, in August 1983:

- 1981 census figures show that approximately 11 per cent of all Aborigines of 15 years and over have never attended school. This compares with 1 per cent for the non-Aboriginal population.
- Aboriginal unemployment is running at almost three times the rate of unemployment for non-Aborigines.
- The average life expectancy for Aborigines living in country areas in New South Wales in 1981 was approximately 49 years for males (some 23 years less than for non-Aborigines) and 56 years for females (some 16 years less than for non-Aborigines).

a Prevalence of trachoma is 15 times greater for Aborigines than for non-Aborigines. In some areas of the Northern Territory and Western Australia, up to 77 per cent of Aborigines have been affected.

- In New South Wales, as at 30 June 1981, 15 per cent of children in substitute care (excluding adoption) were Aborigines, although Aborigines make up less than 1 per cent of the total population of New South Wales. This represents 5 per cent of all Aboriginal children in substitute care compared with 0.5 per cent of all non-Aboriginal children. In Western Australia, over 54 per cent of the children in foster care placements are classified as Aboriginal or Torres Strait Islander, and over 5 per cent of the children in residential child care establishments are similarly classified.

- Aborigines are grossly over-represented in Australian criminal statistics, both in terms of conviction rate and the rate of imprisonment.

In recent years, judicial notice has been taken of these facts. In the High Court of Australia, in the *Dams* case Murphy, J. said:

> The history of the Aboriginal people of Australia since European settlement is that they have been the subject of unprovoked aggression, conquest, pillage, rape, brutalisation, attempted genocide and systematic and unsystematic destruction of their culture.'

In the same case Brennan, J. stated that the 1967 amendment to the Constitution, giving the Commonwealth special power to legislate for Aboriginal people,

> - . . was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficia1.[2]

Outside judicial circles, too, there is widespread acceptance in Australia, by the major political parties at Federal level and Labor parties at all levels, and in the literature on problems of Aborigines, that gross injustice has been done to them in the past, that injustice is still often done in the present, and that resolute affirmative action is needed. Aboriginal voices and representatives are being heard and provided for in legislation and government action on matters concerning Aborigines for the first time. The literature dealing with Aboriginal traditions, customs and problems, grows rapidly. Important contributions have been made to it through the series edited by Professor Charles Rowley for the Academy of Social Sciences in Australia, the work and publications of the Institute of Aboriginal Studies, and by many individuals and centres in universities throughout Australia. The Australian Law Reform Commission is examining the extent to which Aboriginal customary law should form part of the legal provisions for Aboriginal communities that follow it and it has consulted widely with traditional and outlying Aboriginal communities. Public awareness is higher than it has ever been, encouraged by films, the growth of Aboriginal studies in schools, media interest and widespread political and policy discussion. So is Aboriginal awareness, especially at the grassroots level. The Aboriginal Legal Service, the National Aboriginal Conference and a multitude of State and local Aboriginal organisations and councils protect and further the claims of Aborigines; they have ready access to government and ministries of Aboriginal affairs, although the extent to which their demands are met and to which Aborigines are employed at the level of governmental decision-making is still the subject of much criticism. So are the attitudes of governments in Queensland and the Northern Territory and the attitudes of many non-Aborigines in Australian country towns that have significant black populations. There have been nasty incidents of violence against Aborigines, and Aboriginal confidence in the police is not great. The Commissioner for Community Relations in 1981-2 reported discrimination against Aborigines in every State and Territory, having had many complaints, especially in regard to non-service in hotels, but also on matters ranging from discrimination in schools to council vetoing of property purchases and community projects. The Human Rights Commission has also been conducting a study of access to human rights in country towns.

Legislative attempts to promote the rights of Aborigines, among others, by outlawing discriminatory practices have been dealt with above, in the wider context of Australian legislation for human rights, affirmative action and racial and sex discrimination. Aborigines still have much basis for complaint in terms of equality of outcomes — complaints that are principally aimed at strengthening affirmative action programmes, promoting opportunities for self-management, and increasing financial support. Periodically there is interest in, or threat of, taking Aboriginal complaints to

[1](1983)46 *Australian Law Reports* 625, at 737; (1983) 57 *Australian Law Journal Reports* 450, at 510.

[2](1983) 46 *Australian Law Reports* 625, at 791; (1983) 57 *Australian Law Journal Reports* 450, at 537.

international fora. These are general issues for human rights, forms of discrimination. Two issues specifically tied to the problems and needs of Aborigines are land rights and the recognition of Aboriginal customary law, neither of which can be dealt with as simply belonging in the field of combating discrimination. They are justified and supported rather by reference to the guarantees of the rights of peoples in Article 1 of the International Covenant on Civil and Political Rights and the guarantees of 'culture' and 'religion' in Article 27. The latter Article protects individual rights of members of minorities rather than conferring rights on minority groups as such. All Australian endeavour towards creating special rights or arrangements for Aborigines has been predicated on the right of individual Aborigines to choose whether they wish to be part of an Aboriginal community or not, thotigh in parts of Australia that freedom of choice is not always as respected, in practice, as it should be.

In the 1970s, there were repeated calls in the Commonwealth Parliament to acquire land for Aborigines.[3] The claim to land rights was advanced in terms of Common Law doctrine in the *Gove Land Rights* case.[4] It failed, and this brought out the need for legislation if Aboriginal claims were to be recognised. Land rights for Aborigines became part of the then Liberal Government's policy. The Aboriginal Land Rights (Northern Territory) Act 1976 was the first recognition in Australia of the traditional ownership of land by Aborigines. This Act gave Aboriginal communities freehold title to Aboriginal reserve land and established a Land Rights Commission with which Aboriginal communities could lodge claims for the protection of sacred or significant sites. Land rights activists support their claims with a reference to Article 18 of the International Covenant on Civil and Political Rights, according to which 'everyone shall have the right to freedom of. . . religion', and Article 27 guaranteeing the right of ethnic minorities to enjoy their own culture and to practise and profess their own religion. The Whitlam Labor Government's Aboriginal Land Fund Act 1974 had earlier established a fund to be used to purchase land anywhere in Australia for Aboriginal groups. Queensland, as we have seen, has refused on some occasions to permit the transfer of land to Aboriginal groups.

A wider issue than land rights has been raised in the demands for an Aboriginal treaty, the Makarrata. Such a treaty would recognise that the European colonisation of Australia was not the peaceful settlement of a continent that contained no other nation, but that there was armed resistance by an Aboriginal people with a complex social, cultural and legal system who did not and still do not accept white intrusion as 'legitimate'. The treaty to be negotiated with the Aboriginal people would recognise their rights, protect their identity, languages, law and culture, compensate them for the loss of traditional lands and for damage to those lands and to their traditional way of life and recognise the right of Aboriginal Australians to land and to control of their own affairs. As Professor Henry Reynolds has put it:

> In Aboriginal eyes the whites were invaders who came preaching the virtues of private property; people who talked much of British justice while unleashing a reign of terror and behaving like an ill-disciplined army of occupation once the invasion was effected, fornicators who pursued black women in every fringe camp on the continent but in daylight disavowed both lovers and resulting offspring.[5]

Demands for the signing of such a treaty, the relevant literature indicates, are meant to shock non-Aboriginal Australians out of the 'complacent' view that they bear no historical guilt and that the settlement of Australia and its prosperity were simply based on peaceful enterprise and hard work, harming no one. But they also have an important legal significance. International and constitutional law have a concept of *terra nullius*,

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[3] In the discussion of land rights, I have drawn on a report prepared by Dr Gabriel Moens.
[4] *114ilirrpum v. Nabalco Pty Ltd and Commonwealth* (1971) 17 *Federal Law Reports* 141.
[5] H. Reynolds, *The Other Side of the Frontier,* James Cook University, Townsville, 1982, p. 199.

land belonging to no one to which sovereignty may be claimed and in which existing populations have no right to recognition of their laws, customs and rights. Britain's original claim to sovereignty over Australia has been upheld at law and Aboriginal claims to prior and conflicting sovereignty have been consistently denied by the courts. Those advocating the Makarrata seek a formal admission that the treatment of Australia as *terra nullius* was historically incorrect. Aboriginal groups have made and are currently making approaches to international fora and tribunals to seek a declaration in their favour. (For an account of the procedures and provisions for such appeals to the UN and international bodies and tribunals see section 12 below.)

The Aboriginal Treaty Committee formed in 1979, under the chairmanship of Dr H. C. Coombs, with the aim of influencing and mobilising non-Aboriginal opinion in favour of a treaty and of granting land rights and compensation engaged in much publicity .[6] It was disbanded in 1983. The Committee's newspaper *Aboriginal Treaty News* (no. 8, March-June 1983) stated that the Committee was disbanding because its work in influencing non-Aboriginal attitudes had been significant, political parties now gave greater weight to Aboriginal issues and the Committee had mobilised greater support for independent Aboriginal initiatives.

The Executive of the National Aboriginal Conference which had adopted the Treaty proposals as a request to the Australian Government in April 1979 formed a sub-committee to consult Aboriginal people and organisations in November 1979. The same meeting adopted the term Makarrata in place of the term Treaty of Commitment used earlier. Among several meanings it gave to the term Makarrata, it used the translation 'A coming together after a struggle'. Both the then Minister of Aboriginal Affairs, Senator Fred Chaney, and the then Prime Minister, Mr Malcolm Fraser, welcomed the National Aboriginal Conference's initiative. By 1981 Government responses had been formulated, which included preparedness to acknowledge prior Aboriginal occupation of Australia but insisted that any agreement 'must reflect the special place of Aboriginal and Torres Strait Island People within Australian Society as part of one Australian nation'. The Government therefore could not legitimately negotiate anything that might be regarded as a treaty, implying an internationally recognised agreement between two nations. Nor was the Commonwealth Government, the Minister said, prepared to act unilaterally in areas where the States have an interest. The Government of the time regarded the return of tribal lands including sacred sites in freehold title as a matter to be taken up with the States separately; it rejected the notion of a fixed percentage of the Gross National Product or any fixed financial commitment into the future as compensation in cash. It also rejected and doubted the merit of a National Aboriginal Conference proposal for reserved seats for Aboriginal people in the Commonwealth Parliament or of compulsory employment of a fixed proportion of Aboriginal people in government bodies, though it would continue to promote existing schemes to stimulate employment and promotion opportunities for Aboriginal people in the Commonwealth sphere.

The National Aboriginal Conference continued in 1981 and 1982 to pursue Makarrata proposals and to itemise specific demands. The Australian Labor Party in its policy statement before the 1983 election supported continued investigation of the concept of a Treaty of Commitment between Aboriginal and non-Aboriginal Australians and indicated that members of both groups had supported the concept for some years.

Earlier, on 24 September 1981, the Senate referred to its Standing Committee on Constitutional and Legal Affairs 'an examination of the feasibility, whether by way of Constitutional amendment or other legal means, of securing a compact or "Makarrata"

'See B. Keon-Cohen, 'The Makarrata, A Treaty within Australia between Australians', *Current Affairs Bulletin,* Sydney, 1981 (February) and S. Harris, *It's Coming Yet. . . An Aboriginal Treaty Within Australia Between Australians,* Aboriginal Treaty Committee, Canberra, 1980.

between the Commonwealth Government and Aboriginal Australians'. The Report published in 1983,[7] after the Labor Party had come into power, surveyed the development of the idea of a treaty of commitment and the legal issues involved in alternative forms of agreement: an international treaty, an agreement with constitutional backing, an agreement with legislative backing under s. 51(xxvi), the races power, or s. 51(xxix), the external affairs power, or s. 51(xxxvii), reference of powers by States, as well as a compact in the form of a simple agreement or contract, and further issues involved in any implementation decision. It recommended that the Government 'should in consultation with the Aboriginal people give consideration, as the preferred method of legal implementation of a compact, to the insertion within the Constitution of a provision . . . which would confer a broad power on the Commonwealth to enter into a compact with representatives of the Aboriginal people'. [8] It further recommended that the National Aboriginal Conference seek re-establishment on an independent basis with an increase in membership, that the increased funding given to the Conference for 1983-4 be maintained and that, if the compact proposal is pursued, the National Aboriginal Conference should be considered the most suitable organisation to co-ordinate Aboriginal opinions during negotiation and to conclude the compact on behalf of the Aboriginal people.

State parliaments have given some recognition to Aboriginal claims for land rights. In South Australia, the Pitjantjatjara Land Rights Act was proclaimed in 1981; in New South Wales, land rights legislation has recently been passed, though criticised by many Aboriginal groups. On 22 December 1982, the Government of New South Wales released a Green Paper on Aboriginal Land Rights and invited the public to comment upon the proposed land rights legislation. After describing the unequivocal support for the introduction of land rights by the churches, the trade union movement and the business community, the paper listed the benefits which that State would reap from land rights for Aborigines. In particular, it mentions studies which have demonstrated a close link 'between Land Rights and significant improvements in welfare, health and housing, and a downturn in alcoholism'. The paper also highlighted the historical importance of land for Aborigines as recognised by leading anthropologists. The New South Wales Government has allocated about $13 million per year to buy land for Aborigines, an amount equal to 7.5 per cent of the Government's land tax revenue. These monies will be set aside each year for fifteen years to provide a fund to enable Aboriginal communities to acquire and develop land. There is no right for Aborigines to claim private lands. Aboriginal Land Councils, which are to have title to the land now held by the New South Wales Aboriginal Lands Trust, will have the right to purchase private lands on the open market, using funds provided by the Act. These Councils will also receive freehold title to all lands transferred to them. Some Aboriginal leaders were sufficiently bitter about limitations embodied in the legislation to demand Federal intervention. The Commonwealth Government in November 1983 transferred two major areas of Crown Land (National Parks) in the Northern Territory to Aboriginal ownership with provisions for joint control in respect of tourist development. The Chief Minister of the Northern Territory has protested over lack of consultation with his government and opposed the transfer.

The only international convention pertaining directly to land rights is the International Labour Organisation's 1957 Convention No. 107, Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, which has not been ratified by Australia. Article 11 states that `[t]lhe right of ownership, collective or individual, of the members of the populations

[7] *Two Hundred Years Later . . . Report by the Senate Standing Committee on Constitutional and Legal Affairs on the feasibiliv of a compact or `Makarrata' between the Commonwealth and Aboriginal people,* AGPS, Canberra, 1983.
[8] ibid., p.

concerned over the lands which these populations traditionally occupy shall be recognised'. But concern with Aborigines, their land rights and their personal rights has in any case not been primarily inspired (though it may have been strengthened) by Australia's international obligations. The referendum that granted the Commonwealth power to legislate for Aborigines throughout Australia has made appeal to the external affairs power unnecessary. Aboriginal activists, however, have at various times appealed to international fora and organisations in furtherance of their claims and have recently been in Geneva. Under the UN provisions they have some basis for doing so, although not for securing directives binding on the Australian Government unless Australia consents to have the matter heard and determined internationally.

On 9 February 1977, the then Attorney-General of the Commonwealth referred to the Australian Law Reform Commission the question of recognition of Aboriginal customary law. In the Reference the Attorney-General set out a number of relevant matters, including:

- the special interest of the Commonwealth in the welfare of the Aboriginal people in Australia;
- the need to ensure that every Aboriginal enjoys basic human rights;
- the right of Aborigines to retain their racial identity and traditional lifestyle or, where they so desire, to adopt partially or wholly a European lifestyle;
- the difficulties that have at times emerged in the application of the existing criminal justice system to members of the Aboriginal race; and
- the need to ensure equitable, humane and fair treatment under the criminal justice system to all members of the Australian community.

In the light of this (formidable, and potentially contradictory) list of principles the Attorney-General asked the Commission

> *to inquire and report upon* whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only and, in particular
>
> (a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines.
>
> (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
>
> (c) any other related matter.

Professor Crawford, in the paper already cited and on which I draw heavily in the remainder of this section, reminds us of incidents and factors that may have led to this reference:

- requests from, in particular, the people of Yirrkala to be allowed to set up a form of local justice mechanism in their community, applying at least to minor law and order matters;
- the controversy aroused by the decision of Wells, J. in the South Australian Supreme Court in the case of *R. v. Sydney Williams*[9] in which the Judge placed the defendant, convicted of the manslaughter of an Aboriginal woman, on a two-year good behaviour bond on condition that he returned to the Yalata community and obeyed the lawful orders of his tribal elders. The decision, which was construed (or rather misconstrued) as a form of licensing of traditional punishment (i.e. spearing in the thigh), aroused considerable controversy;
- the widespread perception amongst informed Australians of the failure of the general legal system to come to terms with Aboriginal ways of belief and action, and the appalling statistics relating to Aboriginal incarceration which were seen as a symptom of that failure;

[9](1976) 14 *South Australian State Reports 1*.

• perceptions, in certain quarters at least, of a resurgence in traditionality, associated with or accompanied by the conferral of land rights in the Northern Territory, and the movement away from larger settlements to smaller 'outstations'.

The report of the Australian Law Reform Commission on the Aboriginal Customary Law Reference, based on widespread consultation, is now being written. There is a movement away, especially at Federal level but to some extent also at State and Territory level, from policies of 'assimilation' and 'integration' towards policies based on self-management. There is recognition, legislative, judicial, scholarly and popular, of the importance and complexity of Aboriginal traditions and rules of behaviour, and the fact that they constitute a body of customary law, even if that customary law has been liable to change in the past and is perhaps even more liable to change now. There has been growing realisation that many Aborigines, and not only those living in fully traditional communities, are influenced by at least some aspects of customary law, of the Aboriginal heritage and its obligations. Australian legislatures have conferred land rights in some areas on the basis of traditional Aboriginal affiliation with the land not previously recognised as enjoyment or possession of land in Common Law. They have accorded a degree of protection to Aboriginal sacred sites and other aspects of the Aboriginal heritage; recognised traditional Aboriginal marriage for some (limited) purposes; and made some provisions for traditional distribution of property on death. Courts have exercised sentencing discretion to take Aboriginal customary law into account, and have also taken it into account in considering such established Common Law defences as provocation, duress and claim of right. All this may be seen as a movement towards recognising the Aboriginal right to their own culture and way of life, enjoined — for all people — in Article 1 of the International Covenant on Civil and Political Rights.

Up to now much of the legislation and judicial decision has been particular rather than general in relation to customary law. Aboriginal life-styles and opinions vary; so does the strength of customary law in the sentiments and habits of particular communities. The old-fashioned distinction between Aborigines who live a traditional way of life, those who used to be described as 'detribalised' or 'fringe-dwelling', and those who are urbanised, has been seen to be a simplified and vulgarised version of the complexity of Aboriginal life and an underestimation of the many common, social and legal difficulties faced by Aborigines regardless of their life-style or where they live. But the distinction does remind us of the need for care and flexibility in assessing the varying legal needs and demands of Aborigines in remoter areas when compared with those in urban or semi-urban areas. That is one factor that has led to proper caution in making general provisions for Aborigines and the recognition of customary law. Another is the question whether there can be an incipient conflict between aspects of customary law as an expression of one's right to one's own culture, and other human rights proclaimed for *all* people.

That fundamental conflict is inherent in the International Covenant on Civil and Political Rights in so far as it is left unclear whether the guarantees of practices essential to the preservation of a particular culture and religion do or do not override the guarantees of rights ascribed either to human beings as such or (in other conventions) to groups such as women. Some of the general human rights, for example the right not to be subjected to cruel and degrading punishment, may themselves be subject to cultural interpretation. Others are not, and do stand in conflict with many traditional and religious practices throughout the world — practices that those following them regard as essential to their distinctive way of life.

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Mentally retarded and physically disabled persons[1]

See Bibliography —
Disabled persons' rights (p. 329), Mentally retarded persons' rights (p. 332)

Throughout history, as much of the recent literature on this question emphasises, disabled and mentally retarded people have been regarded as social outcasts or abnormal. The laws of Sparta and Ancient Rome, for instance, had provisions for extermination of the severely handicapped in infancy. In biblical times, the segregation of lepers was justified on the ground that their disease was contagious. In the first half of the twentieth century, segregation of the physically disabled and mentally retarded was advocated and practised on the ground that specialised education, accommodation and employment would benefit them. Segregation, as one writer has put it[2], appeased the conscience of able bodied and 'normal' people who believed that society was looking after the physical disabled and mentally retarded. It also catered to society's aversion to 'socially negative qualities' such as illness and ugliness. Over the past ten to fifteen years, a change in attitude brought about by increased awareness of the problems of the disabled has resulted in an about-face in policy and moves towards 'normalisation' and 'integration'.

'Normalisation' is a word used in much of the recent literature on the disabled.[3] The term is a new expression for an attitude that has been developing for some time. In 1886, Dr S. G. Howe issued a warning against the possible damage caused by segregation[4]; in 1977, Dr J. Vanier, the founder of the *L'Arche* movement, criticised the lack of faith in the abilities of the handicapped.[5]

The principle of 'normalisation' encourages the disabled to lead a life as normal as possible in an environment simulating normal conditions as closely as possible.[6] The underlying philosophy is that the mentally retarded and physically disabled should not be segregated but should be compensated by specialist services according to individual need. The term does not imply that with training every disabled person will become normal' or that every disabled person will 'live out' in the community.[8]

The modern literature emphasises that legal rights for the disabled must go far beyond those rights accruing to other able bodied/normal people if normalisation is to be

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[1] In this section I have condensed but followed closely the organisation, content and references of a report prepared by Miss Sheila McGregor.

[2] S. Tolliday, *Physical Handicaps and Employment Discrimination,* Research Paper No. 4, Kensington Industrial Relations Research Centre, University of New South Wales, 1982, p. 12.

[3] See for example R. Hayes & S. Hayes, *Mental Retardation: Law Policy and Administration,* Law Book Company, Sydney, 1982, pp. 5-6; New South Wales Anti-Discrimination Board, *Discrimination and Intellectual Handicap,* N.S.W. Anti-Discrimination Board, Sydney, 1981, pp. 16-19; Victoria Committee on Mental Retardation, *Report of the Victorian Committee on Mental Retardation,* Victorian Government Printer, Melbourne, August 1977, pp. 3-6.

[4] 1n *Ceremonies on laying the Cornerstone of the New York State Institute for the Blind, at Batavia, Genesse Co., New York,* pp. 37-43, cited in *Report of the Victorian Committee on Mental Retardation,* p. 3.

[5] In a recent public address in Melbourne, cited in *Report of the Victorian Committee on Mental Retardation,* p. 3.

[6] A. 0. Jennings, 'Overcoming Adverse Attitudes to the Handicapped', (1969) 3 *Mental Health in Australia,* 137.

[7] *Report of the Victorian Committee on Mental Retardation,* p. 51.

[8] R. Hayes & S. Hayes, *Mental Retardation,* op. cit., p. 56.

achieved.[9] The New South Wales Anti-Discrimination Board has pointed out that 'normalisation' is not itself sufficient and may be harmful if it is used to deny the individual's needs for 'services not "normally" provided'.[10] Thus the Board recognises that segregation on a short-term basis may be the best way to provide a particular service, for example, special schooling.

According to United Nations estimates, at least one person out of ten of the population of any country is afflicted by some kind of disablement." The most prevalent forms are physical impairment, chronic illness, mental retardation, and sensory disabilities. The Australian Bureau of Statistics estimates that 1 942 000 or 13.2 per cent of Australians are disabled.[12] The precise figure of those physically disabled as opposed to mentally retarded is not known: the New South Wales Anti-Discrimination Board views the lack of this statistic 'as itself a sign of discrimination'.[13] The U.S. Department of Health, Education and Welfare estimated in 1974 that by the year 2000, 50 per cent of the world's population will be disabled[14] as a result of people living longer with improved social conditions and medical care, of rapid increase in urbanisation and industrialisation and of greater use of motor vehicles. The estimate is a projection of current trends and makes the hitherto counterfactual assumption that no new, unexpected, factors will intervene.

The drafting of exact and uniform definitions of the imprecise and shifting concepts of retardation and handicap in legislation providing services and benefits to the mentally retarded and disabled, has proceeded haphazardly with a resulting lack of any commonly agreed terminology.[15] This is commented on in two of the three State government reports on discrimination and in much of the literature.' Mr Justice C. H. Bright, Chairman of the South Australian Committee on the Rights of Persons with Handicaps, found a lack of unformity in South Australian legislation: in one Act, twenty-four phrases were used to describe physical handicaps and more were used for mental handicap. Mr. Justice Bright observed that the terminology perpetuates negative attitudes, that it is unfocused, that there is no recognised code of definitions, and that some references are positively discriminatory.[17]

More recently, international bodies have begun to formulate definitions and where necessary classify different categories of mentally retarded and disabled persons. In the UN Declaration on the Rights of Mentally Retarded Persons 1971, the UN adopted the phrase 'mentally retarded' as opposed to 'intellectually impaired' or 'developmentally delayed' to describe those people who suffer an impairment in their mental ability. The term is regarded as the most precise (meaning literally a slowing down of an individual's mental processes) and as paralleling the concept of physical retardation. The term handicap, apart from being too broad, is avoided because it includes the personal and

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13. N. Schoenfeld, 'Human Rights for the Mentally Retarded: Their Recognition by the Providers of Services', (1975) 4 *Human Rights,* 49.

[17]N.S.W. Anti-Discrimination Board, *Discrimination and Intellectual Handicap,* p. 17.

[11]*World Programme of Action Concerning Disabled Persons,* United Nations, New York, 1983, p. 1.

[12]Australian Bureau of Statistics, Catalogue 4343.0, *Handicapped Persons Australia,* AGPS, Canberra, 1981, p. 1.

[13]N.S.W. Anti-Discrimination Board, *Discrimination and Physical Handicap,* N.S.W. Anti-Discrimination Board, Sydney, 1979, vol. 1, p. 6.

'ibid.

[15]ibid.

'ibid., pp. 2-5; Committee on the Rights of Persons with Handicaps, South Australia, *The Law and Persons with Handicaps* (hereinafter referred to as *The Bright Report),* S.A. Government Printer, Adelaide, 1978, vol. I, pp. 7-17; R. Hayes & S. Hayes, *Mental Retardation,* op. cit., pp. 4-5; S. Rees & A. Emerson, 'How Doctors Decide', (1983) 8 *Legal Service Bulletin,* 71-5; F. J. Weintrub & R. Abeson, 'Appropriate Education for All Handicapped Children: A Growing Issue', (1972) 23 *Syracuse Law Review,* 1036; J. Webster, 'Incapacity for Work: Rights and Wrongs', (1983) 6 *University of New South Wales Law Journal,* 31.

'The Bright Report, p. 9.

social consequences of a disability and the emotional adjustment problems which follow.[18]

A further distinction not always made by legislators and authors is that between the mentally ill and the mentally retarded. Those who by reason of mental illness, such as schizophrenia, paranoia or depression, exhibit pathologically different ways of behaving and coping, are suffering from a mental condition very different from that of a mentally retarded person. Furthermore, mental illness usually affects adults and rarely occurs before adolescence. Mental retardation, on the other hand, is usually diagnosed during childhood, and is often of a congenital nature.[19] The confusion of the two groups is seen as a disadvantage both for the mentally retarded and for the mentally

Associated with the newer use of the term 'mentally retarded' has been the use of a system of classification of mental conditions. The traditional classification used such terms as idiot, imbecile and moron, which are or have become pejorative. In 1954 the World Health Organization proposed the terms 'mild', 'moderate' and 'severe' sub-normality. Further changes were suggested in 1973 by the American Association on Mental Deficiency, namely, 'mild', 'moderate', 'severe' and 'profound' based on a standard score attained by the individual on an intelligence quotient test.[21] Although different degrees of mental retardation are generally recognised, there are often doubts about how a particular individual should be classified and over the value, if any, of classification. According to the report of the [U.S.] President's Committee on Mental Retardation;

> Classification usually provides little or no information of value in developing programs for the individual; that requires factual information about the person's strengths and specific weaknesses and the kinds of support that are most beneficial to the person. Unfortunately, classification systems are used widely and in many instances are written into law or regulations governing programs and services. Thus it is important to re-emphasize that the dividing lines between the various groupings and between the retarded and nonretarded populations are inexact. [22]

An explanatory framework of terms relating to disabled people was formulated by the World Health Organization for the International Year of Disabled Persons.[23] Its definitions of disability, impairment and handicap can be summarised as follows: a *disability* is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being. An *impairment* is any loss or abnormality of psychological, physiological or anatomical structure or function. A *handicap* is the consequence of environmental and social conditions which prevent a person with a disability from realising his maximum potentia1.[24] The effect of a disability can vary widely for different people, for example, a professional runner who becomes a paraplegic will be severely handicapped in relation to his occupation, whereas a paraplegic radio personality may not be. Impairment is a medical condition, disability is the functional consequence and handicap is the social consequence.

The World Health Organization's [WHO] definition of 'disability' has been adopted by a number of Australian States and Territories; it is used in the A.C.T. Mental Health Ordinance 1981. In his report, Mr Justice Bright accepted the WHO definitions and

[18] R. Hayes & Hayes, *Mental Retardation,* op. cit., p. 4.
[19] C. G. Judge, *Retarded Australians,* Melbourne, 1975, p. 1.
[m] *The Bright Report,* p. 6; R. Hayes & S. Hayes, *Mental Retardation,* op. cit., p. 6.
[21] E. M. Bates & P. R. Wilson (eds), *Mental Disorder or Madness? Alternative Theories,* St. Lucia, 1979, p. 13.
[22] M. Kindred, J. Cohen, D. Penrod & T. Shaffer (eds), *The Mentally Retarded Citizen and the law,* The Free Press, New York, 1976, pp. xxyi-xxviii; cf. R. Hayes & S. Hayes, *Mental Retardation,* op. cit., p. 3.
[23] International Year of Disabled Persons is discussed further below.
[24] *World Programme of Action Concerning Disabled Persons,* United Nations, New York, 1981, p. 3.

recommendations[25]; and the N.S.W. Anti-Discrimination Board adopted the definition of 'physical handicap' from the Bright Committee's report.[26] The Australian Bureau of Statistics also adopted the WHO definition in its statistical survey *Handicapped Persons Australia.*[27]

The problems disabled people face are receiving growing recognition at international and national levels. Public awareness is also high. The UN, in a little over a decade, has adopted and proclaimed the two Declarations concerned with rights of disabled and mentally retarded persons and proclaimed the International Year of Disabled Persons. In Australia, the past ten years have seen the establishment of the Human Rights Commission (discussed above), the setting up of a number of State Anti-Discrimination Boards or Equal Opportunity Tribunals administering anti-discrimination legislation; amendments to legislation which grants benefits and provides services to the disabled; changes in policy of government departments concerned with education, and social services; and a certain attempt to remove or avoid architectural and transport barriers.

The United Nations General Assembly, in a resolution passed in December 1971, adopted the Declaration on the Rights of Mentally Retarded Persons. Its seven principles reflect the UN's recognition of the need to assist mentally retarded persons in their integration in normal life and in the development of their abilities in various activities. The Declaration follows closely the Declaration of General and Special Rights of the Mentally Retarded enunciated by the International League of Societies for the Mentally Handicapped in 1968; in several instances the phraseology is identical.[28] The Declaration of the Rights of Disabled Persons was proclaimed four years later in 1975. Both Declarations as we have seen (section 6 above) are scheduled in the Human Rights Commission Act, giving them limited domestic legal force, for the legislation contains no sanctions and is confined to Commonwealth responsibilities. Their force has lain in the Commission's function of reviewing existing and proposed legislation from a human rights perspective, including the rights of the disabled, of conducting education, research, hearings and inquiries.

In the Declaration on the Rights of Mentally Retarded Persons (the 1971 Declaration) Article 1 states that the mentally retarded person has the same rights as other human beings. Article 2 accords to the mentally retarded person the right to proper medical care, physical therapy and to such education and rehabilitation as will enable him or her to develop his or her ability. Article 3 states the right to economic security, to a decent standard of living and to perform productive work. Article 4 contains a recommendation that the mentally retarded person should, if possible, live with his or her family or foster parents and that his or her family should receive assistance. If institutional care is needed it should be as close as possible to normal life. Article 6 casts an onus on governments to protect the mentally retarded person from exploitation, abuse and degrading treatment and on law officers to give full recognition to his or her degree of mental responsibility. Article 7 states that if the mentally retarded person is unable to exercise his or her rights due to the severity of his handicap, any procedure used to restrict those rights must contain proper legal safeguards.

Four articles in the International Covenant on Civil and Political Rights are particularly relevant to retarded citizens: no-one shall be subject to torture or to scientific experiments without consent (Article *7);* anyone in detention is entitled to take court proceedings to determine the lawfulness of the detention (Article 9(4)); the right to liberty of movement and freedom of residence (Article 12); and the right to recognition as a person before the law.

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[25] *The Bright Report,* p. 11.

[26] N.S.W. Anti-Discrimination Board, *Discrimination and Physical Handicap,* 1979, vol. 1, p. 5.

[27] Australian Bureau of Statistics, op. cit. p. 173.

[28] B. N. Schoenfeld, 'Human Rights for the Mentally Retarded: Their Recognition by the Providers of Services', (1975) 4 *Human Rights,* 47.

The Declaration on the Rights of Disabled Persons (the 1975 Declaration) contains a definition of 'disabled': 'any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency either congenital or not in his or her physical or mental capabilities' (Article 1). The definition thus covers the mentally retarded. The 1975 Declaration differs from the 1971 Declaration in that it spells out specific rights for the disabled, whereas Article 1 of the 1971 Declaration sets out a very fundamental right, the right to have 'the same rights as other human beings'. Articles 2 and 3 of the 1975 Declaration go into some detail as to what it is to have the same rights as other human beings. Article 3 states that having the same rights as 'fellow citizens' implies 'first and foremost the right to enjoy a decent life as normal and as full as possible'. Article 2 provides that the disabled person shall 'enjoy all rights set forth in this Declaration . . . without any exception whatsoever and without distinction or discrimination'. Article 10 does not lay down a right but addresses itself to the society's law-makers and states that 'disabled persons shall be protected against all exploitation, all regulations, and all treatment of a discriminatory, or abusive or degrading nature'.

Both Declarations accord to the disabled person the right to medical treatment (Article 2, 1971 Declaration; Article 6, 1975 Declaration). The history of the medical treatment and management of the disabled, especially of the mentally retarded, has been the subject of much criticism in the literature[29]; the question of consent has aroused major controversy.[30] A second major problem is the denial of medical treatment. The disabled are often denied routine preventative medical care, for example dental treatment, because the professionals do not consider it 'worthwhile'.[31] The disabled person's right to refuse treatment raises problems, and is not mentioned in either Declaration (under most Mental Health Acts, or their equivalents, throughout Australia, involuntary patients have no right to refuse treatment). The 1975 Declaration contains three additional articles: Article 8 states that the disabled have the right to have special needs taken into account in economic and social planning; Article 13 gives them a right to be informed of the rights contained in the Declaration; and Article 12 says that 'organizations of disabled persons may be usefully consulted in all matters regarding the rights of disabled persons'.

The literature on discrimination against the disabled has concentrated on employment, and to a lesser extent education.[32] It has stressed that many disabled people feel a sense of uselessness and failure due to inability to get a job[33], and that lack of regular employment leads to social isolation. Disabled people are often segregated in other areas of life as well, for example accommodation and education. Some attention is given in the literature to the effect technology is having on jobs for the disabled. Technology benefits them by making possible simple and cheap adaptions to jobs and the physical environment, for example a no-hands phone cradle or office modifications for wheelchair use.[34] On the other hand it may be detrimental with the increased number of unskilled jobs being done by machines. The literature stresses that appropriate

[29] N.S.W. Anti-Discrimination Report, *Discrimination and Intellectual Handicap,* op. cit., pp. 64-8.
[30] R. Hayes & S. Hayes, *Mental Retardation,* op. cit. pp. 64-8.

[32] 5. Tolliday, *Physical Handicaps and Employment Discrimination;* N.S.W. Anti-Discrimination Board, *Discrimination and Physical Handicap; Disabled Persons at Work,* Occupational Safety and Health, Working Environment Series 19, Canberra, 1981; M. Stanton (ed.), *Employment of Disabled People,* Canberra College of Advanced Education, Canberra, 1981.
[33] T. J. Leonard, 'The Retarded in Society: A Brief Conceptional and Philosophic Overview', (1976) 4 *Australian Journal of Mental Retardation,* 36.
[34] M. Dohrmann, 'Adaptation of Jobs for Disabled People', in M. Stanton (ed.), *Employment of Disabled People,* op. cit., p. 172.

education of persons with handicaps, whether mental or physical, is fundamental to guaranteeing them equal opportunity to join the community.[35]

The UN Declarations have had considerable impact. The 1975 Declaration was used by the Bright Committee to measure the inadequacy of existing South Australian and Commonwealth legislation, in so far as it affected disabled people. The 1971 Declaration provided guidelines for the N.S.W. Anti-Discrimination Board in its 1981 report and for the Victorian Committee in its Report.

The UN General Assembly, in 1976, proclaimed 1981 the International Year of the Disabled Persons. The purpose of the year was not to solve the difficult and complex disability problems that are long-term in nature, but to inform the public, member states, nongovernmental organisations and the international community of the rights of disabled persons. Over 142 National Committees were established during 1981, and most of the countries involved in that International Year undertook practical measures to secure permanent organisational structures and to help the disabled.

In Australia, the Minister for Social Security was given the responsibility for the Commonwealth's observance of the Year and for the implementation of the twin UN themes of 'full participation and equality'. The Minister chaired the Council of Commonwealth and State ministers whose task was to co-ordinate Australia's response to the year. Each State and Territory established its own Committee with its own secretariat. At a national level a committee within the Department of Social Security and a National Committee of Non Governmental organisations were established.

At the request of the then Minister of Employment and Youth Affairs, the Department of Employment and Youth Affairs (as it was then called) mounted a national open employment strategy for the disabled to coincide with the International Year. $300 000 was allocated to advertising the capacity of disabled persons to perform work in the private sector.[36] One of the aims of this 'Open Employment Strategy' was to highlight the existence of the employer-based training schemes of the Department, such as the National Employment Training Scheme[37] and the National Handicapped Youth Programme, under which full wage subsidy is given to employers for the first six weeks of employment. The strategy has been criticised for failing to consider adequately the problems disabled persons face at the end of the training period.

The Australian Association for the Mentally Retarded has been formed as a voluntary organisation whose prime focus was the implementation of the 1971 Declaration.[38] Its main activity is the promotion of welfare and normalisation of life-style of mentally handicapped persons.

There is a body of Australian legislation that provides services and benefits to the disabled. The Commonwealth *Social Security Act* 1947 provides, in Part VIB, a 'Handicapped Children's Allowance' which the Director-General may grant to a person in charge of a handicapped child where certain requirements are satisfied. Two categories of handicapped child are set out in s. 105H of the Act: the 'severely handcapped child' who needs 'care and attention' permanently or for an extended period; and the 'substantially handicapped child', who needs 'marginally less care and attention than he would need if he were a severely handicapped child'. If a child is classified 'severely handicapped' the parent automatically receives the Allowance at a non-means-tested rate of $85 per month in addition to family allowance (s. 105L(a)). If the child is classified 'substantially handicapped' the entitlement to the allowance

[35] *The Bright Report,* p. 65.

[36] 1. Viner, 'Employment Trends in the 1980's', in M. Stanton (ed.), *Employment of Disabled People,* op. cit., p. 7; R. Galbally, 'Government Policy and Disability: Myths and Ntereotypes', in M. Stanton (ed.), op. cit., p. 19.

[37] R. Galbally, ibid., pp. 15-16.

[38] *National Human Rights Organisations in Australia,* AGPS, Canberra, 1981, p. 15.

depends on a means test which includes an assessment of the family's-income and a calculation of the extra costs incurred in caring for the child. Only a small proportion (estimated at 20 per cent) of families with a handicapped child receive any allowance. In their discussion of the legislation, Stuart Rees and A. Emerson argue that the distinction between the two classes should be abolished.[39] The definitions are inadequate from the parents' point of view, they say, since it is not immediately apparent to the parents that a child diagnosed as severely handicapped necessarily requires more care and attention than the substantially handicapped child. The 1982-83 Annual Report of the Australian Council for Rehabilitation of the Disabled says that the differentiation between 'severely' and 'substantially' handicapped is proving impossible to administer.[49] Hayes and Hayes are also critical of the legislation.

Part VITA of the same Act establishes a 'Sheltered Employment Allowance' payable to a person over the age of sixteen years who is provided with sheltered employment by an approved organisation and who has already qualified for an invalid pension or is likely to become eligible for the pension if he is not provided with sheltered employment. The allowance is not payable where the person is in receipt of certain allowances, for example, service pensions or a tuberculosis allowance. The allowance is paid on the same terms and conditions as the invalid pension and is governed by the same income test.

Part VIII of the Act permits the Director General to pay an allowance to 'persons who are suffering from a physical or mental disability' who undertake vocational training as part of a rehabilitation programme provided by the Commonwealth Rehabilitation Service. The rate payable is based on the average male weekly wage, and is paid in lieu of wages when the person is in full-time training. It is not means-tested. Part III, 'Invalid Pensions', provides for an invalid pension for any person over the age of sixteen who resides in Australia and who is permanently incapacitated for work (s. 23). The degree of incapacity must be not less than 85% and is dependent on medical assessment (s. 27(1)). The pension is subject to an income test, the pension being reduced by 50 cents in the dollar for all additional income over $20 a week. A supplementary allowance of $5 per week is made for pensioners with very limited means residing in rented accommodation.

The Commonwealth Handicapped Persons Assistance Act 1974, like the Sheltered Employment (Assistance) Act 1967 which it replaced, assists in the establishment and equipment of sheltered workshops, which are now administered under the 1974 Act by eligible organisations — religious, charitable or non profit. The workshops produce goods for sale to the public, but also provide counselling, vocational rehabilitation and education in basic skills.[4'] As an incentive to sheltered workshop employers, a $500 fee is paid to the sheltered workshops for every employee who graduates to open employment.

In its 1981 report, the N.S.W. Anti-Discrimination Board says the workshops have not been very successful because of inadequate subsidisation, exploitation by private industry and the employee's possible loss of invalid benefits due to the money earned in the workshops.[42] The Bright Committee has suggested that the $500 payment to workshops is an incentive to employers and not to employees and that the money should be used to benefit either the individual or the workshop and the individual equally. The Victorian Report gives a more positive appraisal of the Act.[43]

Activity Therapy Centres were established under the same Act. They are non-profit centres which provide social and vocational training, therapeutic services and useful occupation for severely handicapped adolescents. The 1981 report suggested that the Activity Therapy Centres have not been successful in their stated aims but have become

[39]S. Rees & A. Emerson, 'How Doctors Decide', op. cit., pp. 71-5.

[49]Australian Council for Rehabilitation of the Disabled, *Annual Report 1982/83,* Canberra, 1983, p. 16. [4']N. S.W. Anti-Discrimination Board, *Discrimination and Intellectual Handicap,* p. 229.

[42]ibid, p. 230.

[43]*Report of the Victorian Committee on Mental Retardation,* p. 139.

little more than child minding facilities." Others do not agree with this assessment. Newsome considers that because the centres are free of the pressures of productivity, they are 'much more than an adult minding centre'.[45] Because the centres are non-productive workshops they are more in need of government subsidy than the productive workshops, but receive a similar subsidy to that of the sheltered workshops.

Mr Justice Bright is critical of the Act, which he sees as standing 'most formidably in the way of a move towards funding that encourages normalisation'.[46] But Hayes and Hayes point out that Part VIII encourages employers to place trainees in open employment.[47]

In the Commonwealth Income Tax Assessment Act 1936, s. 23AD exempts the following payments from income tax: payments under the Repatriation Act 1920; certain payments under the Social Security Act (s. 23AD(3)(d)(i)); allowances under the Tuberculosis Act 1948 (s. 23AD(3)(ii)); and domiciliary nursing care benefit under Div. 5B of Pt V of the National Health Act 1953 (s. 23(3)(d)(iii)). Section 159J provides for concessional rebates for dependants, including inter alia 'invalid relatives'; s. 159P provides for rebates on certain medical expenses.

The Commonwealth Repatriation Act 1920 grants pensions to incapacitated service personnel. The Bright Committee observed that persons with disabilities caused by war service are better off than their civilian counterparts.[48] The Tuberculosis Act 1948 provides for medical services in respect of tuberculosis.

Throughout most of the States and Territories, the approach to the provision of services and facilities for the mentally retarded is to categorise them into two broad classes of mildly retarded, and therefore *educable,* and moderately and severely retarded and therefore *trainable.* Generally speaking the mildly retarded live at home and are the responsibility of the Education Departments in each State. Most State Education Acts provide for the establishment of special schools for the mildly mentally retarded, and specify the ages between which education is compulsory.

Mental Health Legislation in most States applies both to the 'mentally ill' and the 'mentally retarded'. The literature is critical of the fact that in most of the States and Territories, the mentally retarded are treated as if they were mentally ill and fall under the provisions of the respective State legislation." The definition of a mentally ill person usually suggests that the person, due to mental illness, is incapable of managing his affairs and requires care and control. This is not the case with a large number of mentally retarded people, who may be in control of and capable of managing their affairs.

The Governments of South Australia, Victoria and New South Wales have devoted considerable attention to the problems and rights of disabled people. In N. S.W. and Victoria it is now unlawful to discriminate against a person on the ground of physical or mental impairment. In all three States reports have been prepared on Discrimination and Physical and/or Mental Disability. The South Australian reports led to a number of changes: for example the passing of the Handicapped Persons Equal Opportunity Act 1981 (S. A.); a parking permit scheme allowing disabled drivers and their passengers to remain longer on limited time zones; the introduction of a Handicapped Persons Training Scheme; and a review of State government owned and tenanted buildings to see whether they provided reasonable access. After consideration of the 1979 report of the

[44]N. S.W. Anti-Discrimination Board, *Discrimination and Intellectual Handicap,* pp. 226-7.
[45]R. Newsome, 'The Role of the Activity Therapy Centre in Facilitating Employment', in M. Stanton (ed.), *Employment of Disabled People,* op. cit., p. 52.
'The Bright Report, p.258.
[47]R. Hayes & S. Hayes, *Mental Retardation,* op. cit., p. 197.
"The Bright Report, p. 254.
[49]R. Hayes & S. Hayes, *Mental Retardation,* op. cit., p. 153; *Report of the Victorian Committee on Mental Retardation,* p. 11.

Anti-Discrimination Board, the New South Wales Government implemented a number of the Board's recommendations. In 1979 the Premier announced the establishment of a coordinating unit for handicapped persons and the Anti-Discrimination Act 1977 was amended to include 'physical impairment' as a ground of discrimination. After completion of the 1981 report, 'intellectual impairment' was introduced as a further ground under the Act.

11

Rights of the child

See Bibliography —
Children's rights (p. 310)

The UN Declaration of the Rights of the Child, proclaimed on 20 November 1959 by Resolution of the General Assembly, is a declaration of ten principles, none of which goes beyond what is generally preached and practised in Australia, save in earlier years in respect of Aboriginal children. Very few of the principles are specifically formulated as rights, and none of them envisages the child itself exercising these 'rights'. Philosophers indeed have treated the Declaration as a statement of our duties toward children. These are: to give them special protection, and opportunities and facilities to enable them to develop physically, mentally, morally, spiritually and socially (Principle 2); to give them a name and nationality from birth (Principle 3); to provide adequate prenatal and postnatal care, nutrition, housing, recreation and medical services (Principle 4); to provide an atmosphere of affection and of moral and material security, with love and understanding, and where possible development under the care and responsibility of the parents (Principle 6); to provide education that will promote a child's general culture, develop its abilities, its individual judgment and its sense of moral and social responsibility, and enable the child to become a useful member of society, such education to be based on the guiding principle of the child's best interest (Principle 7). Principles 8, 9 and 10 require that the child in all circumstances be among the first to receive protection and relief; that it be protected against all forms of neglect, cruelty and exploitation and against being the subject of traffic in any form; and that it be protected from practices which may further racial, religious and any other form of discrimination. The child shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that its energy and talents should be devoted to the service of its fellow men (Principle 10). It shall not be admitted to employment before an appropriate minimum age or to such employment as would prejudice its health or education or interfere with its physical, mental or moral development (Principle 9). Physically, mentally or socially handicapped children shall be given the special treatment, education and care required by their particular condition (Principle 5). Only in exceptional instances shall a child of tender years be separated from its mother. Society and public authorities have the duty to extend particular help to children without a family or without adequate means of support (Principle 6).

The Declaration, as it stands, has not aroused controversy or even discussion in Western writings, especially in Australia, though the incompatibility between some of its demands on the character of education and the freedom of expression necessary, according to many, to produce both moral and intellectual judgment in the child is often stressed. So is the vagueness of the rights or rather duties, since performance is greatly dependent on means and resources available. It is widely recognised that any enactment of the terms of the Declaration into law would almost certainly produce a conflict between rights, e.g. with religious freedom and the right of parents to choose their

child's education. There would also be questions of interpretation if_the Declaration in Principle 2 were included, namely that

> . . . the child shall enjoy all the rights set forth in this Declaration . . . without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

In the philosophical controversy between those who believe that children have rights, and those who believe that we have duties towards children but that it is inappropriate to speak of children as having rights, the Declaration — despite its title — gives more comfort to the latter.' It speaks of protection, duties and entitlements and uses the term 'right' to establish a specific claim only once (in respect of nutrition, housing, etc.), though Principle 1 speaks of 'the rights set forth in this Declaration'. For those who do speak of children's rights, the Declaration lends support to the view that such rights cannot be based on will but must be based on the protection of interests.

In recent years there have been groups in Australia and elsewhere which speak of children's rights in the sense linked with will theories, and which suppose that children have a sufficiently developed will to provide a foundation for rights.[2] They elevate, as a matter of principle and not just of educational practice, the child's 'right' to a say in the form and content of the education it receives, its right to growing independence from its parents before maturity and to avenues of appeal and redress against decisions of the parents that it disagrees with. There are those who proclaim that children should have the right to make their own decision about contraceptives or participation in sexual activities from the age of 10 onward. The Declaration eschews such problems; its language gives comfort to those who believe that the ultimate decision about the best interests of the child is not a matter for the child itself. While so far this is also the position in Australian law, legal provisions and practice in Australia recognise the possibility of problems in this respect in a way that the Declaration does not, and Australia has some procedures for dealing with them. Aspects of the question are under review in various connections — the right of privacy, doctors' obligations to patients who are minors, provision for children to be represented by their own counsel in family cases, revisions of children's court procedures, etc. In these matters, too, a study of the history of the literature suggests a tendency to vacillate between two poles. The informality and special procedures of children's courts were greatly welcomed when they were set up, as helping to protect the child, to resolve conflict rather than sharpen it, and to allow commonsense to take the place of abstract concentration on legal rights and duties. Now there is a tendency to emphasise the opposite view — the child's 'right' to proper, abstract and formal, legal procedures that treat it as equal to adults and not 'paternalistically'. Commonwealth legislation in the area of children's rights could strengthen this trend.

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[1] For a brief statement of the philosophical relationships between rights and duties, see below pp. 81-7.

[2] On the difference between theories which found rights on the concept of will, and those which see rights as a matter of interests, see below, pp. 86 and 103.

12

International procedures for the protection of human rights'

UN procedures

See Bibliography—
United Nations Charter and Universal Declaration of Human Rights (p. 137), United Nations Commission on Human Rights (p. 141), United Nations Covenants and Conventions (p. 142)

The United Nations' role in formulating and promoting international declarations, covenants and conventions that have influenced Australian law or become part of it has been discussed above (section 2). But the United Nations also plays a more direct role in seeking to implement human rights provisions, investigating and reporting on human rights problems and, in certain circumstances, considering complaints and imposing sanctions .[2]

Various UN organs have been granted powers to promote the protection of human rights. Under Article 13 of the Charter of the United Nations, the General Assembly is called upon to 'initiate studies and to make recommendations' for the purpose of 'promoting international cooperation in the economic, social, cultural, educational and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.

Most human rights items on the agenda of the General Assembly originate in sections of the report of the Economic and Social Council which relate to human rights, or in decisions taken by the General Assembly at earlier sessions to consider particular matters. Items relating to human rights have also been proposed for inclusion in the Assembly's agenda by other principal organs of the United Nations, by member states, and by the Secretary-General.

Most items relating to human rights are referred by the General Assembly to its Third Committee, which deals with social, humanitarian and cultural matters. Some, however, are considered by the Assembly without reference to a Main Committee. Items of an essentially political character are normally referred to the First Committee or to the Special Political Committee. Those of an essentially economic or financial character are referred to the Second Committee, those relating to decolonization to the Fourth Committee, and those of a legal nature to the Sixth Committee. The Fifth Committee deals with administrative and budgetary questions, including those arising from the consideration of human rights items.

A number of permanent, temporary and *ad hoc* subsidiary organs has been established by the General Assembly to assist it in its task of protecting human rights, for example, the Special Committee Against Apartheid and the Special Committee with

'In writing this section I have been much helped by a survey prepared by Dr Roma Sadurska and by further suggestions from Mr Adrian Diethelm.

[2]For an account in the area of civil and political rights, see J. Carey, *UN Protection of Civil and Political Rights,* Syracuse University Pres, Syracuse, New York, 1970; and for UN action generally, see United Nations, *United Nations Action in the Field of Human Rights,* UN Documents ST/HR/2/Rev.1, 1980. M. S. McDougal, H. D. Lasswell & L. C. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Digniv* Yale University Press, New Haven and London, 1980, discusses in detail 'the basic policies of an international law of human dignity', setting international provisions, procedures and trends into their social and philosophical context and discussing the future of human rights in public and civic order.

Regard to the Implementation of the Declaration on the Granting of Independence to ColonialCountries and People (the Special Committee on Decolonization).

The General Assembly established in 1951 the *Office of the United Nations High Commissioner for Refugees.* This body provides international protection to refugees who fall within the scope of its statute. The High Commissioner acts under policy directives given him by the General Assembly and the Economic and Social Council, and supplies an annual report to the Assembly through the Council.

The General Assembly 'shares' its functions in the field of human rights with the *Economic and Social Council* (ECOSOC) which, under Article 62 of the Charter, may 'make recommendations for the purpose of promoting respect for, and observance of, human rights'. It may also prepare draft conventions, call international conferences and establish commissions for the protection of human rights.

ECOSOC is entitled to make arrangements with members of the United Nations and with its specialised agencies to obtain from them reports on steps taken to give effect to recommendations of the Assembly and its own recommendations; it may communicate its observations on these reports to the Assembly (Article 64). Human rights issues are usually first considered by the Council's Social Committee which prepares reports, including draft resolutions, that are then submitted to the ECOSOC for consideration.

Under Article 68 of the Charter the ECOSOC created the *Commission on Human Rights* at its first session on February 16, 1946. Its tasks consist of submitting proposals, recommendations and reports to the ECOSOC concerning 'an international bill of rights, international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters, the protection of minorities, the prevention of discrimination on grounds of sex, language, or religion'.[3] The Commission consists of thirty-two members elected by the Council on the basis of an equitable geographical distribution. Eight members are from African states, six from Asian states, six from Latin American states, eight from Western European and other states, four from Eastern European states.

The Commission (like other functional commissions of the ECOSOC) may establish permanent or *ad hoc* subsidiary bodies to examine certain questions falling within its own competence. It set up in 1947 two permanent sub-commissions: the Sub-Commission on Freedom of Information and of the Press (which was discontinued in 1952) and the *Sub-Commission on the Prevention of Discrimination and Protection of Minorities.* The second is composed of 26 members selected by the Commission on Human Rights to serve in their personal capacities.

Despite the fact that each year thousands of individual petitions have been addressed to the Commission, for several years there was no satisfactory procedure for handling them, because the Commission at its first session had decided that it had no power to take any action in regard to any complaints concerning human rights. In the late 1960s that attitude changed. ECOSOC Resolution No. 1503 of 27 May 1970 authorised the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to appoint a working group to hold an annual 'private meeting' to consider all communications, including the replies of governments thereto, in order to present to the Sub-Commission those communications which appear to reveal 'a consistent pattern of gross and reliably attested violations of human rights'. The working group does not handle complaints about individual cases unless they fit into such a consistent pattern. Communications concerning individual cases should be directed to the Human Rights Committee established under the International Covenant on Civil and Political Rights.[4]

The Sub-Commission considers at private meetings the communications brought before it by the working group and decides whether to refer particular cases to the

[3] ECOSOC Res. 5 of 16 February 1946 as amended by ECOSOC Res. 9 of 21 June 1946.

[4] The Human Rights Committee is discussed below.

Commission on Human Rights. The Commission in its turn, after having examined situations referred to it by the Sub-Commission, may undertake a thorough study and reports its results and recommendations thereon to the ECOSOC. The other possibility is that the Commission will appoint an *ad hoc* committee to investigate the case if the state concerned has expressed its consent, if all local remedies were exhausted and if the case is not pending before another international jurisdiction. The third possibility is that the Commission does not take any action.

All procedures under Resolution 1503 are confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council. There are no effective sanctions to enforce any recommendations made by the Commission on Human Rights to the defaulting states.

A very important part of the Commission's activity consists in preparation of international instruments in the field of human rights. At its second session in 1947 the Commission decided to undertake drafting of an 'International Bill of Human Rights' embracing a general declaration, covenants including more specific rights, and measures of implementation. The first two stages of this program were accomplished under the form of the Universal Declaration and two covenants; the third is not yet completed.

The Commission has also drafted other important documents and international instruments, some of which have been mentioned above: Declaration of the Rights of the Child (adopted by the General Assembly 1959); Declaration on the Granting of Independence to Colonial Countries (adopted 1960); Declaration on the Elimination of All Forms of Racial Discrimination (adopted 1963); Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 1965, entered into force 1969); Declaration on Territorial Asylum (adopted 1967); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968, entered into force 1970); Convention on the Suppression and Punishment of the Crime of Apartheid (1973, entered into force 1976).

ECOSOC created in 1946 another of its functional commissions, the *Commission on the Status of Women.* Its functions include the preparation of recommendations and reports to ECOSOC on promoting women's rights in political, economic, civil, social and educational fields. The Commission also drafts proposals for international instruments concerned with women's rights. It is composed of 32 members representing, like the Commission on Human Rights, states of various geographical regions; it meets in session every second year.

The Commission on the Status of Women has drafted, or closely collaborated in the preparation of, several important international instruments: Convention on the Political Rights of Women (1952, entered into force 1954); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962, entered into force 1964); Declaration on the Elimination of Discrimination Against Women (1967); Convention on the Elimination of All Forms of Discrimination Against Women (1979). The last named convention provided for the creation of the *Committee on the Elimination of Discrimination Against Women.* The Committee consists of 23 members serving in their personal capacity, whose task is to implement a four-year cycle of reporting.

Special institutions and mechanisms have been provided for the implementation of provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (which was the first UN human rights instrument to include procedures, for implementation) and of the International Covenants on Human Rights. Under the Convention on the Elimination of All Forms of Racial Discrimination, as we have seen, the states parties are obliged to take steps to eliminate racial discrimination and to guarantee civil rights. To apply this provision, the *Committee on the Elimination of Racial Discrimination* was established. It is composed of 18 persons selected for their 'high moral standing and acknowledged impartiality', who serve in their personal capacity (Article 8).

States parties submit to the Committee reports 'on the legislative, judicial, administrative or other measures' which they adopted pursuant to their obligations under the Convention (Article 9(1)). These reports are not made public. If reports submitted to the Committee do not satisfy it, it informs confidentially the reporting state's representative that this state is in default under the Convention. The Committee in its turn prepares an annual report and recommendations to the General Assembly. Its reports are published. The Commitee is also competent to receive from any state party a complaint that another state party 'is not giving effect to the provisions of the Convention'.

Another procedure of implementation included in the Convention on the Elimination of All Forms of Racial Discrimination provides for individual petitions. The preliminary and *sine qua non* conditions of the admissibility of petitions are typical of international instruments. There must be a declaration by the state party concerned that it recognises the competence of the Committee to receive communications from individuals 'within its jurisdiction, claiming to be victims of a violation by that state of any of the rights set forth in this Convention'. The second condition is the exhaustion of local remedies (Article 14(1, 2)). The petitioner should refer the matter to the Committee within six months from the time he or she failed 'to obtain satisfaction' from the domestic organs competent in such a case. The Committee communicates confidentially petitions to the state party concerned (without revealing the identity of the petitioner). The state party concerned is obliged to submit a written explanation of the matter. Then the Committee supplies both parties concerned with its own recommendations. A summary of its suggestions and, where appropriate, a summary of petitions and states' explanations are included in the annual report of the Committee.

The effectiveness of these procedures, which are based on the regional European Convention for the Protection of Human Rights, has evoked criticism in the literature of human rights, as giving offending states too much power to stonewall. A similar mechanism of implementation, however, is provided for in the International Covenant on Civil and Political Rights. The *Human Rights Committee,* composed of 18 members elected by the states parties to the Covenant on the ground of their 'high moral character and recognised competence in the field of human rights' and serving in their personal capacity, plays a key role in the three procedures that exist under the Covenant and its Optional Protocol.

Article 40 of the Covenant says that states parties undertake to submit to the Secretary-General 'reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights'. The Secretary-General transmits the reports to the Human Rights Committee for consideration and to the specialised agencies those parts which may fall within their field of competence. The Committee studies the reports and then transmits its own report and general comments to states parties. It may also supply ECOSOC with these observations and copies of the reports it has received. The states parties may submit to the Committee observations on comments made by the Committee.

There are also two optional procedures, one provided for in Articles 41 and 42 of the Covenant and the second in the Optional Protocol. Under the first procedure, a state party may declare that 'it recognises the competence of the Committee to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the present Covenant'. If such an accusation is brought before the Committee, a procedure of dispute settlement between states starts. It consists basically of the Committee's mediation and good offices offered to both states parties concerned. If an amicable solution is reached, the Committee prepares a short statement of facts. If there is no agreement, the Committee draws up a brief report including written and oral submissions of states concerned.

If the matter referred to the Committee is not solved to the satisfaction of both states parties the Committee may, with the prior consent of the states parties concerned, appoint an *ad hoc* Conciliation Commission which offers its good offices to both states 'with a view to an amicable solution of the matter'. After full consideration of the problem, the Commission submits to the Human Rights Committee its report for communication to the states parties concerned.

Under the Optional Protocol to the Covenant on Civil and Political Rights a state which is a party to the protocol recognises the competence of the Human Rights Committee to receive and examine communications from individuals subject to its jurisdiction, who claim to be victims of a violation by the state of human rights protected by the Covenant on Civil and Political Rights (Article 1).[5] Before this procedure starts, domestic remedies must be exhausted. The Committee may not consider any anonymous communications, any communications which it considers to be an abuse of the right of petition or any communication being investigated under another international procedure.

The Committee presents the communication to the state accused which undertakes to provide the Committee with a written explanation of the subject and remedies that it has taken. After the consideration of all information supplied by the petitioner and the state concerned, the Committee presents to them its opinion. An annual report on its activities to the General Assembly gives the Committee a possibility to publicise the results of its investigations.

Only 25 states have ratified the Optional Protocol — Australia, like Britain, the United States and New Zealand, is not among them. Canada, Denmark, Italy, the Netherlands, Sweden, Uruguay and Venezuela are.

Part IV of the International Covenant on Economic, Social and Cultural Rights regulates its implementation. The procedure is based on a reporting system. The states parties submit to the Secretary-General 'reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognised herein' (Article 16). In 1976 ECOSOC established a program under which the states parties furnish reports in biennial stages.[6] Reports are considered by ECOSOC, by specialised agencies in so far as parts of these reports relate to the matters which fall within the competence of these agencies, and under Article 19, by the Commission on Human Rights, if ECOSOC decides to transmit a copy to it. The Commission may present its own recommendations, which in their turn may be subject to comments supplied by the states parties and the specialised agencies to ECOSOC.

Article 21 authorises ECOSOC to submit to the General Assembly reports containing recommendations and a summary of the information received from the states parties and specialised agencies.

Other UN organs

See Bibliography — International Labour Organization (ILO) and other specialised organisations (p. 145)

There are other bodies within the United Nations which are in varying degrees concerned with the protection of human rights. Three of them are main organs which only from time to time may deal with problems involving human rights. The *Security*

[5] For a clear handbook setting out how to lodge complaints on human rights to the UN Commission on Human Rights, as well as to the European Commission, the Inter-American Commission and ILO, see G. da Fonseca, *How to File Complaints of Human Rights Violations, A Practical Guide to Inter-Governmental Procedure*, World Council of Churches, Geneva, 1975.

[6] Resolution 1988 of 11 May 1976.

Council is empowered to take appropriate measures with a view to the peaceful settlement of disputes and preventive and enforcement action. Violations of human rights have been on its agenda, and the Security Council has voted resolutions condemning the policy of apartheid and the denial of human rights in Southern Rhodesia and in the territories under Portuguese administration.

The *Trusteeship Council's* task is to assist the General Assembly in carrying out its functions concerning the International Trusteeship System. Under Article 76 of the Charter, one of the basic objectives of that system is 'to encourage respect for human rights and for fundamental freedoms of all without distinction as to race, sex, language, or religion'. The Trusteeship Council, acting under the authority of the General Assembly, may consider annual reports submitted by the Administering Authorities to the General Assembly, accepts and examines individual petitions and may periodically visit the Trust Territories. It may perform its functions of supervision only in consultation with the respective Administering Authorities.

The *International Court of justice* is competent in 'all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in the treaties and conventions in force' (Article 36(1) of the Court's Statute). The Statute of the Court is an integral part of the UN Charter, which provides that all members of the United Nations are parties to the Statute (Article 93 of the Charter). States parties may at any time declare that they recognise the jurisdiction of the Court as *ipso facto* compulsory, without any special agreement, in relation to any other state accepting the same obligation (Article 36 of the Statute). The International Court of Justice has no jurisdiction over individuals: it may not consider directly individual petitions nor judge persons who are alleged to have committed crimes against international law. Most conventions concerning human rights contain a clause under which any dispute between the parties arising under the convention can be referred to the International Court of Justice at the request of any of the parties to the dispute: e.g. Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (Article IX); Convention Relating to the Status of Refugees, 1951 (Article 38); Convention on the Political Rights of Women, 1952 (Article IX); Convention Relating to the Status of Stateless Persons, 1954 (Article 34); International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (Article 22).

The *International Law Commission,* composed of twenty-five persons of recognised competence in international law elected by the General Assembly for five-year terms from lists of candidates nominated by member states, was established by a statute adopted by the General Assembly in 1947. The primary functions of the Commission are the progressive development of international law, meaning essentially the preparation of draft conventions on subjects not previously regulated by international law or in regard to which the law has not been sufficiently developed in the practice of states; and the codification of international law, meaning the more precise formulation and systematisation of rules of international law in fields where there already has been extensive state practice, precedent and doctrine.

In the field of human rights, the International Law Commission has been most active in the preparation of several international conventions relating to the problems of nationality and statelessness, including the Convention on the Nationality of Married Women, the Convention Relating to the Status of Stateless Persons, and the Convention on the Reduction of Statelessness. In addition, it has, at the request of the General Assembly, formulated the principles of international law recognised in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, and has examined the question of the establishment of an international criminal jurisdiction.

Some of the organisations belonging to the United Nations system are particularly concerned with human rights problems. They are the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization, the

World Health Organization and the Food and Agriculture Organisation. Among them the *International Labour Organization* (ILO) with over 140 member states is most involved in the protection of civil and political rights.

The constitution of the ILO, which forms Part XIII of the Treaty of Versailles, includes in its preamble the formulation of some substantial human rights, in particular workers' rights and protection of children, youth, women, aged and handicapped persons. It proclaims also the principle of equal remuneration for men and women and the right to organise. Many writers have seen the ILO as a conspicuously successful international body and ascribe this success to its less exclusively political role and to its tripartite composition of representatives of governments, unions and employers.

In May 1944 the Conference in Philadelphia adopted a Declaration concerning the goals of the ILO, which was incorporated into the ILO Constitution in 1946. Among the basic principles of the organisation are freedom of expression and association and the equality of human beings regardless of their race, religion or sex. The ILO constitutional principles have been developed in some 150 conventions and more than 150 recommendations. Some eleven of the conventions are regarded by the ILO central office as containing human rights clauses.

From the point of view of civil and political rights the most important are Convention No. 29 Concerning Forced Labour (1930, entered into force 1932); Convention No. 98 Concerning the Application of the Principles of the Right to Organize and Bargain Collectively (1949, entered into force 1959); Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize (1948, entered into force 1950); Convention No. 100 Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951, entered into force 1953); Convention No. 105 Concerning the Abolition of Forced Labour (1957, entered into force 1959); Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation (1958, entered into force 1960). A number of conventions protect also rights of women, children, migrant workers and indigenous and tribal populations.

Like all other treaties, ILO conventions become legally binding only after their ratification by member states. According to Article 19 of the ILO Constitution, member states have an obligation to submit a convention to the competent national authorities for ratification within one year, or in some cases within 18 months, after the adoption of the Convention. The rate of ratifications is relatively high. There are nearly 4500 instruments of ratification deposited with the Director-General of the ILO. A ratification stipulates, apart from the obligations defined in the Convention itself, a general obligation for the state to 'take such action as may be necessary to make effective the provisions of such Convention'. Australia by 1980 had ratified 41 ILO conventions, leaving some 95 still open for ratification by her. This was a high rate of ratification for our part of the world, including the Far East, but has been criticised by Mr Whitlam who in 1981 regarded Australia's performance and that of our region as bad.'

There are two main types of procedures for implementation of the ILO conventions. The first is based on the regular examination of governments' annual reports. Under Article 22 of the ILO Constitution, member states have an obligation to present annual reports on the measures taken to give effect to the ratified conventions. Copies of these reports must be supplied to the representative national organisations of employers and workers. If these organisations make observations on the application of the ILO conventions, the state should provide information on any such observations and their own comments. The member states may also be requested by the Governing Body of the ILO to provide reports on their law and practice in relation to the matters dealt with in conventions which they did not ratify, or in recommendations. In the case of conven dons

[7]E. G. Whitlam, 'Human Rights and the Western Pacific' in A. E -S. Tay et al, *Teaching Human Rights:* An *Australian Symposium,* AGPS, Canberra, 1981, p. 64.

these reports should include an explanation concerning the reasons for failure to ratify. Copies of these reports should also be communicated to national organisations of employers and workers. The summary of reports is submitted by the Director-General of the ILO to the annual session of the Organization (Article 23). Reports are also subject to examination by the *Committee of Experts on the Application of the Conventions and Recommendations.* The Committee is composed of independent persons who are eminent specialists appointed by the Governing Body. The task of the Committee is to examine reports, official journals, legislation and any available information and data. The Committee prepares a report drawing the attention of governments and the International Labour Conference to a divergence existing between the national legislation and practice and the ILO provisions. Observations made by the Committee of Experts serve as a basis for further examination carried out by the *Committee on the Application of Conventions and Recommendations* which is appointed annually by the International Labour Conference. The Committee on Application is composed of the representatives of governments, employers and workers. Conclusions of the discussion of this Committee are submitted to the International Labour Conference in the form of a report. The effectiveness of this procedure, as compared with other international organisations, is regarded in the literature as relatively high: 80 to 90 per cent of governments fulfil their reporting obligations.

The second type of procedure for implementation of the ILO conventions involves the examination of complaints or representations (Articles 24-34 of the ILO Constitution). Complaints may be filed by a member state or by the Governing Body against another member state party to a Convention on the ground of non-compliance with the Convention. The Governing Body appoints a Commission of Inquiry composed of three independent members. Member states are bound to make available to the Commission all relevant information. After consideration of the matter the Commission prepares a report including its recommendations. States parties should, within three months, notify whether they accept the recommendations and, if not, whether they want to bring the case before the International Court of Justice. If a member state does not undertake action in compliance with the recommendations of the Commission or the International Court of Justice, the Governing Body may recommend to the International Labour Conference any appropriate measure to secure the execution of these recommendations. This procedure has been applied a few times since 1961 when the first complaint was brought (Ghana against Portugal for the violation of Convention No. 105 on the Abolition of Forced Labour).

Another quasi-judicial procedure consists in the making of 'representations' by national organisations of workers or employers. These are made in a case when a member state has not effectively applied a ratified convention. The Governing Body appoints a committee composed of three independent members to investigate the case. The representation procedure has been used several times, but not as frequently as one might expect.

Apart from the above ways of protecting human rights within the ILO, there are also special procedures relating to freedom of association for trade union purposes. These were established in 1951 by the ILO in agreement with ECOSOC. The admissibility of complaints of alleged infringements of trade union rights of freedom of association is not dependent on the ratification by a state of the ILO Freedom of Association Convention; the Constitution of the ILO and the principle of freedom of association included in it are considered a sufficient legal basis. There are two organs in charge of these procedures: the *Committee on Freedom of Association* established by the Governing Body and composed of nine members representing governments, workers and employers, and the *Fact-Finding and Conciliation Commission on Freedom of Association* composed of independent members. Both organs use a quasi-judicial procedure but depend on diplomatic consultations as well, because collaboration and, in the case of the

Fact-Finding and Conciliation Commission, the consent of the stateconcerned to investigation are essential for the procedure to result in effective action. Over the years more than 900 complaints have been brought before the Committee but only a few were investigated by the Commission.

The purpose of the *United Nations Educational, Scientific and Cultural Organization* (Unesco) is, as laid down in its Constitution, `to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the people of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations'.

Unesco has prepared several conventions and recommendations relating to human rights, including the Convention and the Recommendation Against Discrimination in Education, the Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between states parties to the Convention Against Discrimination in Education, and the Declaration of the Principles of International Cultural Co-operation.

Unlike the International Labour Organization, Unesco has no constitutional or statutory arrangement for reviewing allegations concerning the implementation of its recommendations and conventions. However, in the case of the Convention Against Discrimination in Education, the Unesco General Conference in 1962 adopted a Protocol establishing a *Conciliation and Good Offices Commission* to assist states parties to the Convention to reach an amicable settlement of any disputes which may arise.

Communications concerning human rights received by Unesco and within the competence of that Organization are considered, after having been communicated to the Government concerned for observations, by a Committee established by Unesco's Executive Board. The Committee submits its reports and recommendations to the Board. The handling of cases and questions concerning the exercise of human rights in matters falling within Unesco's competence is being studied with a view to improving the effectiveness of the Organization's action in this field.

A basic purpose of the *Food and Agriculture Organization of the United Nations* (FAO) is . . contributing towards an expanding world economy and ensuring humanity's freedom from hunger'.

FAO is mainly concerned with raising levels of nutrition and standards of living, securing improvements in the efficiency of the production and distribution of food and agricultural products, bettering the condition of rural populations, and thus contributing towards an expanding world economy. Its activities are designed to help solve one of the fundamental problems of mankind: the maintenance of the balance between the world's food supply and its population. The Freedom from Hunger Campaign, launched by the FAO in 1960, spread public knowledge of development problems in FAO's fields of concern and mobilised public opinion for increased development effort. The World Food Programme, established in 1963, distributes food supplies as backing for programs of economic and social development and to meet emergency relief situations. Both are aimed at the achievement by all mankind of a fundamental human right — the right to freedom from hunger.

The preamble to the Constitution of the *World Health Organization* (WHO) declares that the enjoyment of the highest attainable standard of health is a fundamental right of every human being and that governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures. WHO serves as the co-ordinating authority on international health work. It maintains certain necessary international health services, promotes and conducts research in the field of health, and works to improve standards of teaching in the health, medical and related professions.

The Council of Europe and the European communities

See Bibliography —
European Convention on Human Rights (p. 147), European Court of Human Rights (p. 150),
European Commission on Human Rights (p. 152), Committee of Ministers of the Council of Europe (p. 153),
European Community law (p. 154)

United Nations and regional human rights activities have grown simultaneously and influenced each other. The latter, in Europe especially, have also led to changes in municipal law and are frequently cited as possible future models for the Pacific region.

The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) was the first treaty adopted by the Council of Europe — an organisation composed of twenty Western European states, formed in 1949. It was signed on 4 November 1950 and came into force on 3 September 1953. Now twenty-one member states of the Council of Europe are parties to this Convention. The European Convention is accompanied by five Protocols. The First' and Fourth[9] add substantive human rights to the Convention's catalogue; the Secone concerns the limited competence of the European Court of Human Rights to issue advisory opinions; the Fifth" amends the procedure of the election of members of the Commission and of the Court. Not all of these Protocols have been ratified by all states parties to the Convention.

States parties have a legal obligation to secure for everyone within their jurisdiction the rights and freedoms guaranteed in the Convention. This means that not only nationals of the countries which ratified the Convention but all other persons within the territory of these states are protected under the Convention (Articles 1, 14). Similar provisions are included in the International Covenant on Civil and Political Rights, in the American Convention on Human Rights and in the Convention on the Elimination of All Forms of Racial Discrimination.

Rights and freedoms guaranteed by the Convention and Protocols are defined in a detailed and precise way. Some restrictions on these freedoms are formulated in Articles 15-17.

Three distinct organs are in charge of the implementation of the Convention and Protocols: a Commission, a Court and a Committee of Ministers.

The *European Commission on Human Rights*, composed of members serving in their personal capacities, may receive two types of communications about violations of human rights. Any state party may refer to it 'any alleged breach of the provisions of the Convention' by any other state party. An individual, a non-governmental organisation, or a group of persons claiming to be a victim of infringement of human rights by a state party may also address a petition to the Commission. It may do so only provided that the state concerned recognises the Commission's competence to receive such petitions (thirteen states parties have recognised that competence). A state party which has accepted the competence of the Commission under this optional clause is bound 'not to hinder in any way the effective exercise of this right'.

Further specific conditions of admissibility of a petition are typical for international judicial procedure generally: all domestic remedies must have been exhausted, the petition must be submitted within six months from the date on which the final decision was taken by local authorities, the petition cannot be subject to any other international jurisdiction, etc. The petition must not be incompatible with the provisions of the Convention and should not be manifestly ill-founded. If the petition has been accepted,

[a]Entered into force 18 May 1954.
'Entered into force 21 September 1970.
'Entered into force 2 May 1968.
"Entered into force 20 December 1971.

the Commission should undertake, together with the representatives of states parties, an examination of the petition and, if appropriate, an investigation, 'for the effective conduct of which the states concerned shall furnish all necessary facilities'. The aim of this procedure is a conciliation. If amicable settlement has been reached, the Commission draws up a report which is sent to states parties to the dispute, to the *Committee of Ministers* and to the Secretary-General of the Council of Europe for publication. If agreement is not reached, the Commission draws up a report and 'states its opinion as to whether the facts found disclose a breach by the state concerned of its obligations under the Convention' (Article 3(1)). This report is transmitted to the states concerned and to the Committee of Ministers. The Commission may supplement its report to the Committee with appropriate recommendations. At this stage the report is confidential.

If neither the Commission nor the state party refers the case to the Court within three months from the date of the transmission of the report to the Committee of Ministers, the latter decides whether there has been a violation of the Convention. If it decides there has been, the Committee prescribes a period within which the state concerned must undertake measures specified by the Committee. The decisions of the Committee of Ministers are binding on the states parties to the Convention, but the only sanction the Committee has against a state which has not taken satisfactory measures within the prescribed period is a publication of the report.

If the conciliatory procedure of the Commission is unsuccessful, the Commission or states parties concerned may bring the case to the European Court of Human Rights within three months from the date of the transmission of the report to the Committee of Ministers. Individuals do not have a right to bring a case before the Court, or even to appear in person in the Court. The petitioner's point of view may be presented by the Commission or by counsel for the petitioner as part of the Commission's team.

The *European Court of Human Rights* consists of a number of judges equal to the number of member states of the Council of Europe. A judge need not be a national of a member state, but no more than one judge may be a national of any particular state. They are elected by the Consultative Assembly of the Council. The jurisdiction of the Court extends to all cases concerning the interpretation and implementation of the Convention and Protocols. The Court constitutes a Chamber of seven judges to consider each case, unless there is an important question of interpretation, which should be considered in plenary session. The judge who is a national of the state concerned is *ex officio* a member of the Chamber.

The condition *sine qua non* for starting the procedure is the acceptance by the state party concerned of the jurisdiction of the Court (fourteen countries have accepted the compulsory jurisdiction of the Court). If the Court finds that the state party has breached the provisions of the Convention or Protocols, and if the internal law of the country 'allows only partial reparation to be made for the consequences' of that unlawful act, 'the decision of the Court shall, if necessary, afford just satisfaction to the injured party' (Article 50). The judgment is final, but requests for its interpretation may be made. The decision is published in the Registry of the Court and transmitted to the Committee of Ministers which is in charge of the supervision of its execution. The states parties 'undertake to abide by the decision of the Court' (Article 51).

The ever-growing literature on and reports of the activity of the organs of the European Convention show that only a small percentage of all complaints are declared admissible by the Commission. By 1 April 1978, 179 communications had been accepted by the Commission, eleven of them state-to-state complaints. The Committee of Ministers dealt with 71 cases (nine were state v. state) and 37 cases were brought before the Court (one of them was a state v. state case). By June 1983 the Court had given 63 decisions. Besides this judicial procedure there is also a reporting system which may be

used to supervise the application of the Convention, though here it plays a subsidiary role.

States parties to the Convention have an obligation to furnish on request from the Secretary-General of the Council of Europe a report on the effective implementation of the provisions of the Convention within their national laws. The reporting system has been used only a few times. In 1964, the states parties responded to a request for explanations of how the rights guaranteed in the Convention and First Protocol were being implemented. In 1972 the inquiry concerned the way in which internal laws comply with the requirements of Article 5(4) of the Convention (right to compensation for everyone arrested in contravention of the provisions of the Article). In 1975 the request concerned the application of Article 8 (right to privacy), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association). The replies were published.

The European Convention is generally considered by authors cited in the Bibliography as the most sophisticated of all international instruments protecting human rights. It has inspired some other conventions and bilateral acts, in particular the American Convention on Human Rights. The jurisprudence of the Commission and the Court has had significant domestic effects, both legislative and administrative, in the states parties. There has been a vigorous debate, or rather a number of vigorous debates, in the United Kingdom between those who want to see the European Convention and European Communities law increasingly modify and override the Common Law and United Kingdom statutes in cases of conflict, and on the other hand those who prefer Common Law standards and national autonomy in these matters. In fact, the provisions of the European Communities treaties do override the Common Law and U.K. statute law by force of the (U. K.) European Communities Act 1972. In dealing with U.K. statutes subsequent to the Act, there has been a strong rule of interpretation that the two are to be interpreted consistently [12], this aspect of the debate has been won by the internationalists, unless Britain were to withdraw from the EEC altogether. On the other hand, the debate over the European Convention of Human Rights and its relation to Common Law and statutes is still being fought. A general U.K. Bill of Rights based on the European Convention has had support but seems unlikely to eventuate in the near future. The courts are interpreting British statutes, and to some extent the Common Law, by reference to European Convention standards in some cases, though so far mildly rather than radically. The *Court of justice of the European Communities*, however, has interpreted the EEC treaties as implying the standards of the European Convention of Human Rights with respect to matters that those treaties cover. To this extent, the European Court of Justice, by a form of interpretation unknown to the Common Law, holds that the European Convention is directly applicable with respect to EEC law, which itself applies in the U.K. by virtue of the European Communities Act.

The European Economic Community Treaty contains no catalogue of political and civil rights. Discrimination on ground of nationality between EEC member nations is prohibited under Article 7 except in specific circumstances. The principle of equal remuneration for men and women for work of equal value is guaranteed by Article 119. EEC law protects also the freedom of movement of persons within the Community (Articles 48-58), and provides that the EEC Commission has to promote close cooperation among member states in the social field, including freedom of association for trade union purposes. Under the EEC Treaty individuals may appeal directly to the European Court of Justice. A few major cases involving human rights issues have been decided by the Court.

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[12] See the recent case, *Garland v. British Rail Engineering Ltd* [1982] *2 Weekly Law Reports* 918, reviewed by James Crawford in (1982) 53 *British Yearbook of International Law*, 289-91.

Though the European Convention influenced the authors of the American Convention on Human Rights, the American system of protection of human rights is in fact older than the Convention.

Organization of American States (OAS)

See Bibliography —
American Convention on Human Rights (p. 146)

The International Conference of American States held in Bogota in 1948 adopted documents which laid down the basic principles of the inter-American system of human rights. The Charter of the Organization of American States established the constituent organs of the OAS; the American Declaration of the Rights and Duties of Man proclaimed a number of civil and political rights; and the Inter-American Charter of Social Guarantees formulated social and labour rights. However there was no organ in charge of implementation of human rights until 1959, when the Meeting of Consultation of Ministers of Foreign Affairs decided to establish the *Inter-American Commission on Human Rights.* Its Statute was approved by the OAS Council in June 1960.

Originally the Commission had no jurisdiction in individual cases, but by interpreting its powers broadly, it investigated individual complaints and made recommendations to governments. Eventually this practice was sanctioned when the Commission's Statute was revised in 1965 to confirm its power to deal with petitions and to make recommendations. Then in 1970 the Commission became, under the Revised Charter of OAS, one of the principal organs of the Organization.

On 22 November 1969 twelve American states signed the American Convention on Human Rights which entered into force on 18 July 1978. In comparison with the Universal Declaration it contains more elaborate and specific political and civil rights. As in the European Convention and the Covenant on Civil and Political Rights, the states parties undertake to guarantee and respect human rights of all persons within their jurisdiction regardless of nationality of the individual.

The protection of rights provided for in the American Convention is entrusted to two main organs: the Commission and the Court. The Inter-American Commission on Human Rights is composed of seven members elected in their personal capacities by the General Assembly of the OAS. Under Article 41 of the Convention, the mandate of the Commission is 'to promote respect for the defence of human rights'. To exercise this function the Commission has the following powers: it may make recommendations to the governments for the adoption of progressive measures in favour of human rights in their domestic legal organs, prepare reports which it considers advisable in the performance of its duties, and urge the governments to supply it with information on measures adopted by them in the field of human rights. On their side the states parties have the legal obligation to provide the Commission with such information (Article 43). The Commisison submits an annual report to the General Assembly of the OAS.

The Convention clearly permits individual right of petition (Article 44). Individual complaints or communications by non-governmental organisations which denounce violations of the Convention by a state party may be lodged with the Commission. The admissibility of the petition does not depend on a special recognition by the state party which allegedly violated the Convention of the Commission's competence to receive such complaints: the ratification of the Convention is sufficient. This is probably the most significant difference between the American Convention on one side and the European Convention and the United Nations instruments on the other. Communications may also be made by a state party which alleges that another state party has violated human rights set forth in the Convention, provided that both states (accusing and accused) have

recognised the competence of the Commission to receive such complaint (Article 45(1, 2).

Other conditions of admissibility are similar to those adopted generally in international law: local remedies must be exhausted, the petition or communication must be lodged within the period of six months from the date on which the party was notified of the final decision of the national authorities, the subject of the complaint must not be pending before another international jurisdiction, etc.

If the complaint has been considered admissible, the Commission transmits the 'pertinent parts' of the communication to the government concerned and requests from it information about the alleged violation (Article 48(1a)). The fact-finding stage of the procedure is conducted in cooperation with the states parties concerned which are bound to 'furnish . . . all necessary facilities' (Article 48(1)). The Commission also lends its good offices to the parties in order to achieve a friendly settlement of the dispute.

If amicable agreement has been reached, the Commission draws up a report containing a brief statement of the facts and the solution reached, which is published by the Secretary-General of the OAS. If settlement has not been reached, the Commission draws up a report, including its conclusions, and transmits it to the states concerned. If after three months from the transmission of the report the matter has been neither settled nor submitted to the Court, the Commission sets forth its opinion and conclusions concerning the case. It may also make recommendations and prescribe a period within which the state must undertake measures necessary to remedy the situation. After the prescribed period expires, the Commission decides 'whether the state has taken adequate measures and whether to publish its report' (Article 51).

If the procedure before the Commission has not led to the settlement of the matter, the case may be brought before the *Inter-American Court of Human Rights.* It consists of seven judges elected by absolute majority of the states parties to the Convention. Judges are elected in their personal capacities on grounds of their 'highest moral authority and of recognised competence in the field of human rights' as well as legal qualifications (Articles 52, 53). There must be always among the judges called upon to hear the case one who is a national of the state party to the case. If necessary a judge *ad hoc* may be appointed to serve on the court in that particular case.

Only states parties and the Commission have the right to submit disputes to the Court. The jurisdiction of the Court embraces 'all cases concerning the interpretation and application of the provisions of this Convention. . . provided that the states parties to the case recognise. . . such jurisdiction' (Article 62(3)). The Commission is required to appear before the Court in all instances.

If the Court finds that protected rights were infringed, it decides that 'the injured party be ensured the enjoyment of his rights' and that 'the consequences of the measure or the situation that constituted the breach of such right . . . be remedied and that fair compensation be paid to the injured party' (Article 63(1)). The judgment is final and not subject to appeal. States parties must comply with it.

Writers have found it too early to formulate any opinion about the application of the American Convention. They see it as an ambitious act aimed at the very difficult task of protecting human rights in a region of the world notorious for their violation. In the past the 'old' Commission had succeeded in reporting on violations of human rights in some Latin American States — Brazil, Cuba, Bolivia and Chile — but on the whole its activity was not particularly effective. It was widely believed that the American states and the OAS as such had no genuine interest in the promotion of human rights. Many governments refused to cooperate with the Commission. When the report on Chile was published, member states took no action against that country but, on the contrary, permitted Chile to organise the June 1976 meeting of the OAS in Santiago.

Under the new Convention writers see some hope for an enhanced protection of human rights. The Commission has greater investigative powers, and states are obliged

to provide it with all required information and facilities to allow on-site inquiry. How far legal and moral considerations determine any situation in many parts of Central and South America is another question on which most writers are not hopeful.

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The philosophical_bases of human rights'

See Bibliography —
Philosophy of human rights (p. 167), Philosophy of equality (p. 173)

Philosophers have long had an interest in the nature and theory of human rights. Stoics and medieval Christian philosophers tackled the topic, as did the classics of Hinduism, the Talmud and the great Islamic philosophers of the Middle Ages. Nevertheless, it is widely (but not universally) held that social thought outside Europe, and social and legal thought within Europe until the seventeenth century, emphasised on the one hand *privileges* and *duties* rather than general 'human rights', and on the other, rights and obligations flowing from status, law or relations between people rather than *abstract* rights of individuals that logically precede law or society.[2] Then, with Grotius, Hobbes, Locke and Pufendorf the theory of rights took on a 'new look', corresponding to the shift of attention from the social to the individual, to the individual's fears, powers, needs and rights as fundamental to society. It was for the fullest possible satisfaction of such individual needs and the rights corresponding to them, it came to be suggested, that society was instituted. The American Declaration of Independence of 4 July 1776, with its elevation of 'certain unalienable Rights' with which all men have been endowed by their Creator, including life, liberty and the pursuit of happiness, echoed the philosophy of John Locke. So did the 'Declaration of Rights' promulgated by the people of Virginia on 12 June 1776. The French Declarations of the Rights of Man and the Citizen, formulated and promulgated in successive versions between the years 1789 and 1795, reflected both the philosophy of John Locke and that of Jean-Jacques Rousseau and the eighteenth-century French Encyclopaedists. Philosophers, such as Jacques Maritain, were active in the discussions and formulations of human rights that preceded, accompanied and followed the United Nations' Universal Declaration of Human Rights in 1948. Moreover, since Grotius, Pufendorf, Hobbes, Locke and Rousseau and, at a more popular level, Tom Paine, put the question of natural or human rights on the moral and political agenda of the late seventeenth and the eighteenth and nineteenth centuries, philosophical debate on the foundation and nature of such rights has never ceased. The literature is enormous and generally of high quality, even if it does not by any means result in the formulation of a general consensus.[3] Nor do philosophers now find the arguments put forward by Hobbes, Locke or Hume, Bentham or John Stuart Mill, of merely historical interest — problems raised by these thinkers and the solutions they proffered still dominate much of the discussion, though fewer philosophers now see persons as abstract and self-contained individuals.

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[1] This section was written jointly by Eugene Kamenka and A. E-S. Tay.

[2] This is not true to the same extent of moral pleas and exhortations. In all countries and at all times, they have been concerned with protecting individuals against injustice for instance, but they have not developed a general theory of abstract human rights until stimulated to do so by Protestantism and the social contract theory of society with their elevation of the self-contained abstract individual.

[3] For a general introduction to and survey of the historical development and contemporary discussion, see F. E. Dowrick (ed.), *Human Rights: Problems, Perspectives and Texts,* Saxon House, Farnborough, 1979; E. Kamenka & A. E -S. Tay (eds), *Human Rights,* Edward Arnold, London and Melbourne, 1978; W. Laqueur & B. Rubin (eds), *The Human Rights Reader,* New American Library, New York, 1979; A. I. Melden (ed.), *Human Rights,* Wadsworth, Belmont, California, 1970.

Until recently, and to a large extent even today, the 'Western world's' perception of political theory and philosophy has been Eurocentric. The United States (like Australia for that matter) is an historical, political and cultural continuation or offshoot of Western European traditions in this respect and so is Latin America. The Communist countries absorb and incorporate European intellectual history through Marx to a greater extent than is often recognised. Even those contemporary writers in these countries who believe that human rights have been basically sought by everyone at all times see the recognition and discussion of these rights as having emerged most clearly in the history of Europe and as first linked with a characteristically modern European elevation of the individual in society. The current international campaign for such rights, especially for civil and political rights, is seen by many as a spread to the world at large of European and American attitudes in these matters, embodied in and promoted by the industrial and scientific revolutions and the European Enlightenment. The United Nations, in seeking to make human rights matters of international agreement and concern, is unquestionably giving them a new and independent force at the theoretical level and allowing their content to reflect additional, less individualistic concerns. Some Unesco and Third World effort, too, is going into the attempt to show that human rights have been cherished, if not always observed or elevated into a fundamental principle of government, in all parts of the world and at all times.[4]

Most moral philosophers, though not all social philosophers, go along with that. There is greater reservation among many western writers, however, about Third World and Marxist socialist interest in elevating rights that do not fit so well with classical Western liberal individualism — the right to solidarity, for instance, or the right to freedom of peoples, which they welcome as rights against people outside the relevant group, but which they fear may be used as means of oppression within the group. There is some tension in the current literature on human rights between, on the one hand, those who see the theory of human rights as an historical product linked with the development in Europe of both political democracy and social and political individualism (and therefore as not easily exportable to societies that accept neither), and, on the other hand, those who seek to promote a theory of and respect for human rights as a universal phenomenon and who therefore wish to deny any necessary link with social and political traditions that are not universal. Such theorists often put greater stress on economic, social and cultural rights than on civil and political rights.

Within the Third World, on the other hand, there have been voices denying that either individualism or the conception of abstract individual rights are well suited to Third World traditions and contemporary realities. In the world more generally, and especially in developed nations, there has also been a growing tension between the liberal-individualist historical foundations of the theory of human rights and the belief, held by many, that contemporary emphasis should be on wider social interests, on social consequences and social groups. Many writers argue that the contemporary elevation of human rights often puts side by side 'rights' stemming from very different traditions and perceptions of society and therefore standing in conflict with each other.[5] Much of the literature, for instance, emphasises that civil and political rights are directed primarily against the state, meant to give the individual an area of freedom and inviolability, 'room

[4]See for instance Jeanne Hersch (ed.), *Birthright of Man*, Unesco, Paris, 1969, which brings together quotations from antiquity to the early twentieth century and from numerous cultures. Another Unesco volume, edited by Professor R. Klibansky and now in the press, presents accounts of the philosophical foundations of human rights as seen by various countries and cultures. (The Australian contribution, by the authors of this section, emphasises the Common Law matrix of Australian conceptions and their involvement with Australian egalitarianism and the elevation of parliamentary democracy, but also brings out the class colouration of conflict of attitudes in Australia's past and present, and the dramatic changes that have become evident in recent years, largely as a result of international trends and wider social changes.)

[5]See for example, M. Cranston, *What are Human Rights?*, Bodley Head, London, 1973.

to play the game of life'.[6] Economic, social and cultural rights, on the other hand, are demands that the state do or provide something; instead of keeping the state out or limiting its power, they invite the state to intervene, to make itself responsible for fundamental aspects of important areas of social life.

Theoretical writers in the area of human rights have found it easier to give such rights an historical foundation than a philosophical one — though many try to do the latter. It is generally agreed that human rights belong to the species 'moral rights'. That species has to be distinguished from the class of positive or empirical rights which people have — in particular places or particular times — through the operation of positive existing traditions, customs, laws or agreements. Positive rights are empirically verifiable, derived from an existing social arrangement. In principle, we can look them up or confirm their existence in other ways. Moral rights, if they exist, do not exist in the same way. Statements about moral rights do not belong to the class of 'is statements', but to the class of 'ought statements'. The relationship between 'is' and 'ought' and the question whether morals can be given any objective foundation are questions on which philosophers have disagreed for centuries and continue to disagree.[7]

Philosophers know well that presenting 'objective' and convincing arguments for any particular morality (even for morality as such) and justifying the existence and binding nature of human rights are major problems on which they cannot agree no matter how much most of them support treating people as though such rights existed. Some, indeed, see such moral rights as necessary and morally worthwhile fictions. It is not true that every human being accepts the existence of human rights and behaves accordingly. The radical utilitarian philosopher and legal reformer, Jeremy Bentham, promoter of human happiness and enemy of all moral 'intuitions', thought that moral rights were nonsense and 'natural, imprescriptable rights double nonsense, nonsense on stilts'.[8] Even philosophers who do accept the existence of human rights do not agree on what they are or from what they derive their authority. Philosophers in the English-speaking tradition tend to the view that moral propositions, claims that people ought to behave in certain ways or be accorded certain rights, cannot be deduced simply and directly from descriptive propositions about the nature of the world or the nature of man. The dominant view is that propositions concerning human or moral rights are not descriptive, stating a fact, but `ascriptive', conferring such right as a social or subjective act. On the other hand, there are those who believe that human rights can be deduced from facts in complex ways, which variously take into account God's plan and design as evident in nature and human beings, or human striving and potentialities, or the existence of society, of a specific moral language or of moral sentiments and convictions.[9]

The discussion of human rights at a philosophical level therefore presupposes and incorporates discussion between the major contending schools in moral philosophy generally. These include ethical objectivists or intuitionists, who believe that moral propositions can be known as true or false; and ethical relativists or subjectivists, who

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[6] K. R. Minogue, 'Natural rights, ideology and the game of life', in Kamenka & Tay (eds), *Human Rights*, pp. 13-35.

[7] For a general introduction to this crucial and fundamental problem see R. M. Hare, *The Language of Morals*, Oxford University Press, Oxford, 1952; J. L. Mackie, *Ethics: Inventing Right and Wrong*, Penguin, Harmondsworth, 1977; P.H. Nowell-Smith, *Ethics*, Penguin, London, 1954; and C. L. Stevenson, *Ethics and Language*, Yale University Press, New Haven, 1944. For a defence of the objectivity of moral propositions and natural rights, see J. Finnis, *Natural Law and Natural Right*, Clarendon Press, Oxford, 1980.

[8] J. Bentham, 'Anarchical Fallacies' (1824), reproduced in numerous editions and books, including A. I. Melden, *Human Rights*.

[9] For a guide and select bibliography to these discussions on the concept, nature and foundation of rights, see two articles by R. Martin & J. W. Nickel, 'Recent Work on the Concept of Rights', (1980) 17 *American Philosophical Quarterly*, 165-80 and 'A Bibliography on the Nature and Foundation of Rights 1947-1977', (1978) 6 *Political Them*, 395-413, as well as J. W. Nickel, 'Bibliographical Update/The Nature and Foundations of Rights', (1982) *Criminal justice Ethics*, 64-9.

believe that they cannot be so known but rather reflect different social and historical, or even personal, attitudes and traditions. There are various 'sophisticated' positions in-between. There are conflicts between those who value rights in themselves and those who see them as means to other more fundamental ethical ends. There are those who believe that all ethics is social and conventional, but that it is based on an attempt to get a systematic and coherent view of human beings and their relation to society which will allow for the fullest possible development of human capacities and potentialities, or of social virtues, or of harmony and peace. There are those who believe that morality is based on and concerned with the attempt to maximise pleasure or to avoid pain and suffering. Such utilitarians normally reject 'rights-talk' or treat it as short-hand for more complex moral claims. There are others who think morality is based on a program for human self-realisation; others yet who think that respect for persons is one of the irreducible elements in all worthwhile morality and the basis of human rights. For some, human rights are fundamental and irreducible moral goods; for others, they are deductions from or implications of more basic ethical concerns, such as respect for persons or opposition to suffering.[10] Quite a few thinkers have felt that care *(for* and *in* dealing with others), 'sympathy' (in the Humean sense of recognising all human beings as 'ourselves once more'), compassion, tolerance, capacity for self-criticism and the intellectual virtues often summarised as rationality, which involve recognising complexity and the demands of others, are more basic to morals and satisfactory social life than a doctrine of abstract human rights.' Some see morality, human rights and freedom as better furthered by economic enterprise and well-being, by culture, institutions and traditions, by vigorous social, political and literary discussion, by trade union organisation and activity, professional bodies and specific interest groups, by political and social pluralism, than by governments or legislation.[12] Others, including many of those who do not like a black and white approach to the proclamation of human rights, have been conscious of the extent to which social groups and individuals of various kinds need state and legislative protection, of the extent to which government and legislation can influence and change human attitudes, and of the extent to which the international human rights campaign can alleviate or undercut tyranny in some countries.

The traditional doctrine of natural rights was linked with the social contract theory of society according to which individuals were logically, and for some also historically, prior to society. It therefore sought to present natural rights as prior to and independent of social arrangements and society altogether. Natural rights were rights not conferred by society, but maintainable against it. The transition to a concept of human rights has robbed such rights, for many of their exponents, of any pre-social or supra-social authority. They have become, simply, moral claims or entitlements that individuals have as human beings. The literature, indeed, increasingly sees such claims and entitlements as social, not pre-social. Some philosophers, however, express concern at the extent to which the term 'rights' generally and the term 'human rights' in particular are being stretched to cover any urgently felt moral claim whether universal, or universalisable, or

[10]The summary of trends and bibliographies incorporated in the articles by Martin and Nickel cited above will guide the reader to representatives of each of these views. Thus, J. Feinberg and S. I. Benn emphasise respect for persons; H. J.McCloskey is an ethical intuitionist; and M. Cranston and E. Kamenka do not believe that the existence of moral rights can be established by appeal to some authority. See also the debate between S. I. Benn, J. Kleinig and C. Wellman in Kamenka Sz Tay (eds), *Human Rights*, pp. 36-73, and C. Arnold's utilitarian reduction of (legal) rights to duties in the same volume, pp. 74-86.

[11]See, for example, J. A. Passmore, 'Civil justice and its rivals', in E. Kamenka & A. E-S. Tay (eds), *justwe*, London, 1979, pp. 25-49, esp. at p. 47; and Passmore's Boyer Lectures for the A.B.C., *The Limits of Government*, Australian Broadcasting Commission, Sydney, 1981.

[12]See, for example, J. Anderson, *Studies in Empirical Philosophy*, Sydney, 1962 and A. J. Baker, *Anderson's Social Philosophy*, Angus & Robertson, Sydney, 1979, especially at pp. 1-76.

not, whether unconditional or not [13] Others try to show that particular claims made by particular groups are justified because their achievement of 'full humanity' is dependent on the satisfaction of such claims.[14]

Philosophers have discussed the bases on which one would justify claims that there are human rights or that any particular claim is a human right, though until very recently they have not displayed great interest in the UN lists of human rights as having any theoretical basis or significance. They have also considered the place of the theory of human rights and the vigorous assertion of them in moral conduct and moral life, not always with unconditional approval. But if philosophers have not been unanimous in advocating total commitment to the promulgation and dissemination of lists of human rights, they have been virtually unanimous in their commitment to the causes and interests which these lists of rights are meant to protect. There is no significant philosophical trend in contemporary English-language writing that believes in or advocates the inequality of persons, of the sexes, of nations or particular religious persuasions. There is no belief in or advocacy of cruelty as good for society, for the soul or the upbringing of children. There is widespread outrage at the brutality meted out to defenceless or allegedly 'inferior' peoples in the recent past and at the assumption of white superiority over other races and the inhabitants of colonised countries. There is much but by no means universal belief in the need for social justice, for seeing economic and social conditions as part of a general concern for the welfare of human beings, a strong belief in the right of people to participate, and a strong sense that philosophy and morality rest on a principle of human universality, on the recognition that human beings are members of one moral and logical class, entitled to equal respect and consideration. This has not prevented philosophers from insisting on conceptual precision. They have been interested in the analysis of rights, showing that they are not all of the same logical type, distinguishing rights as the *liberty* to do something, right as a *claim* to have someone else do something, and right as an *immunity* that prevents others from doing something that affects you.[15] The bearing of these three elements on the theory of human rights is direct and important: it enables philosophers to ask exactly what is entailed in proclaiming something to be a human right and to show that the entailments are different for different *kinds* of rights. Philosophers have been interested in the question under what conditions may a given right be absolute or conditional, and the extent to which it is defeasible. There has been much argument whether rights are reducible to duties and vice-versa. H. J. McCloskey, for instance, asserts that a moral right is more than a normative claim on people. A right for him is an entitlement rather than a claim or

[13] M. Cranston insists that human rights must be rights of all people against all people in all situations and must be possessed by them simply as people and not as occupants of some station or role. Thus he argues that life, liberty and a fair trial are paradigms of human rights, but that the right to paid holidays is not a human right at all, because it derives from a particular situation and applies only to people in a certain role, that of an employee: M. Cranston, *What are Human Rights?*, pp. 6-7, 21, 65-9. C. Wellman defines a human right 'as an ethical right of the individual as human being vis-a-vis the state' and excludes ethical rights one has as a human being against other individuals or against organisations other than the state: C. Wellman, 'A New Conception of Human Rights' in Kamenka & Tay (eds), *Human Rights*, pp. 48-58 at pp. 55-6.

[14] See, for example, J. Feinberg, 'Duties, rights and claims', (1966) 3 *American Philosophical Quarterly*, 137-44 and D. Lyons, 'Human rights and the general welfare', (1977) *Philosophy and Public Affairs*, 113-29.

[15] The *locus classicus* for this discussion is the important work by W. N. Hohfeld, *Fundamental Legal Conceptions*, New Haven, 1919 (reprinted 1964), based on articles that appeared in the *Yale Law Journal* in 1913 and 1917. Hohfeld distinguishes between,legal liberties (being legally free to do something), legal claims (when the party claimed against has a legal duty to do what is claimed), legal powers (having legal authority to bring about some legal consequence for another person) and a legal immunity (when another party has no power to bring about a specific legal consequence for me). The corresponding legal disadvantages in Hohfeld are legal no-claim, legal duty, legal liability and legal disability. Hohfeld's logical distinctions have been widely discussed and criticised in some respects, but distinctions like those he makes have become fundamental for philosphers asking exactly what is involved in proclaiming something to be a right. Particularly important is the question whether my right involves anybody else's duty and, if so, whose.

duty.[16] Philosophers have further asked whether every right that a person has can be translated into a duty that others have toward that person — a duty not to interfere or a duty to provide. Some philosophers think all rights are translatable into duties, some do not; some think that even if rights are logically translatable into duties, the proclamation of a right sets a different moral tone. Philosophers also distinguish 'perfect duties', that give someone a correlative right against us, from 'imperfect duties' which are not individuated and therefore give no particular person a determinate right against us (for example the duty to be charitable, which does not nominate a particular person or charity). A similarly important distinction, emphasised by Feinberg and Cranston, among others, is the distinction between claims to something and claims against someone. The former may not directly imply the latter. Most philosophers agree that the failure to emphasise that most rights involve duties by others is politically conditioned, a means of propaganda. Some philosophers, for example the legal philosopher Ronald Dworkin, have seen the distinctive character of rights as lying in the fact that they give the right-holder an especially strong justification for acting in a certain way or demanding a certain benefit. This justification is independent of, and is meant to triumph in competition with, collective goals such as welfare, prosperity or security. Rights therefore function as trumps over collective goals and worthwhile demands that may come in conflict with them. But how could one human right function as a trump over other human rights that may conflict with it, in particular situations and perhaps even in theory? Some philosophers are very interested in that problem.[17]

The United Nations and its human rights documents, while commanding much support from democratic governments, political leaders and movements representing the deprived and oppressed, or those who feel themselves to be so, have been dealt with rather critically in the philosophical literature. The substitution of the term 'human rights' for 'natural rights', as an attempt to divorce the belief in fundamental inalienable rights from the notion of a creator and a law of nature, has had widespread approval even among those who believe in God. There are Christian and non-Christian churches and fundamentalist sects who reject the notion of human rights as abstracted or abstractable from God's plan for the universe or, among the more extreme, from God's demands on man as evinced in his revelations. Except for the natural law tradition, which is varied, subtle and not itself based on revelation or the need for all human beings to believe in God, these fundamentalist and other religiously-based views have not entered the mainstream of English-language philosophical debate; though they do find some reflection in political life, especially on such emotive questions as euthanasia and abortion, the rights of the child, the right to life for criminals, etc. Issues of the status of the right to property, and its ramifications and limits, have had widespread discussion among both social and legal philosophers. Few now see it as a basic human right or as an unlimited right, but many stress its social importance, while others attack it as involving unjustified social power. Still others attempt to extend the concept of property to cover benefits and remuneration, to create a concept of 'property' rights to welfare and other

[16] J. McCloskey, 'Rights — Some Conceptual Issues', (1976) 54 *Australasian Journal of Philosophy*, 99-115.
[17] R. Dworkin, *Taking Rights Seriously*, Duckworth, London, 1981, (rev. edn with Appendix).

benefits. Charles Reich and C. B. Macpherson have been very interested in that.[18]

There is less widespread approval, among philosophers, of the consistency and coherence of the lists of human rights and special rights promulgated by the United Nations, and of the use of 'escape clauses' that allow governments to define where and when rights can be suspended or held inapplicable. Some of the alleged conflicts and inconsistencies are attributed to consensus-seeking in the United Nations, with its mix of very disparate practical and theoretical attitudes to human rights, some to simple lack of philosophical or other care, and some to the fact that rights inescapably live at each other's expense, that no right or moral claim can be pushed to its limits without injuring other moral claims or virtues. There is widespread recognition of the fact that natural or human rights in the eighteenth or nineteenth century were seen as needing protection, basically, against the state, while in the twentieth century other dangers to human rights in some societies have become more apparent. The state, as the literature reveals, is now more regularly invoked to promote and protect as well as respect human rights. Philosophers, however, note that civil and political liberties are still largely rights that require the state to abstain from doing something, while the economic and social rights proclaimed by the United Nations require or presuppose positive state intervention in the lives of individuals and non-governmental bodies. The relationship between civil and political rights on the one hand and economic and social rights on the other is the subject of vigorous debate, in which the possibility of inherent conflict between rights has become especially evident. There is also criticism of rights that are vague because they leave unclear *who* has the duty of actualising them. To philosophers these points are even more fundamental than doubts they often express about a certain politically-conditioned selectivity in the attention which the United Nations devotes to particular human rights or particular violations of them; or doubts about the attempt to gloss over quite fundamental differences in attitudes to rights between politically democratic and politically non-democratic states; or doubts about the attempt to curtail such rights as freedom of the press, or of 'opting out', in the name of such alleged rights as the right to solidarity or the right to a 'balanced' flow of information.

Philosophers, in treating human rights as a species of moral rights, distinguish them from positive rights, conferred by law. Some philosophers, but not a large proportion, do ground moral imperatives and moral requirements in what they believe to be a common moral sentiment. Much of the UN activity in regard to human rights has grounded itself in and striven to promote such common moral sentiments, expressed by way of international declarations, covenants and agreements. Students of international

[18] C. Reich, 'The New Property', (1964) *73 Yale Law journal,* 733, and C. B. Macpherson, 'Capitalism and the Changing Concept of Property' in E. Kamenka & R. S. Neale (eds), *Feudalism, Capitalism and Beyond,* Australian National University Press, Canherra, 1975 and Edward Arnold, London 1976, pp. 104-24. More recently, philosophers have become interested in welfare rights as a special sub-class of rights and in the way in which they can be related to human rights. Welfare rights have been seen as a claim on the efforts of others, but also as 'option rights' which may be claimed on appropriate occasions or waived. Some argue that they are properly rights only if the claim being made is practicable; there can be no right to that which cannot be done. The right to be saved from starvation and the right to employment have been seen by some writers as primary human rights. Others have grounded welfare benefits upon a fundamental human right to wellbeing or upon the right to life: see, for example, H. Bedau, 'The Right to Life', (1968) 52 *The Monist,* 550-72; M. Cranston, 'Human Rights, Real and Supposed' in D. D.-- Raphael (ed.), *Political Theory and the Rights of Man,* Macmillan, Bloomington and London 1967, pp. 43-53; A. Gewirth, 'The Basis and Concept of Human Rights', in J. R. Pennock and J. W. Chapman (eds), *Human Rights,* (Nomos XXIII), New York and London, pp. 119-47; M. P. Golding, 'Towards a Theory of Human Rights', (1968) 52 *The Monist,* 521-49; H. J. McCloskey, 'Rights', (1965) 15 *Philosophical Quarterly,* 15-27; H. Shue, *Basic Rights,* Princeton University Press, Princeton, N. J., 1980; J. B. Sterba, 'The Welfare Rights of Distant Peoples and Future Generations: Moral Side-Constraints on Social Policy', (1981) 7 *Social Theory and Practice,* 99-119; G. Vlastos, 'Justice and Equality', in R. B. Brandt (ed.), *Social justice,* Englewood Cliffs, N. J., 1962, pp. 31-72; D. Watson, 'Welfare Rights and Human Rights', *(1977)Journal of Social Policy,* 31-46, and C. Wellman, *Welfare Rights,* Rowman *8z* Littlefield, Totowa, N. J., 1982.

law see these as becoming part of a positive system of international law and human rights, in their UN formulation, as becoming something more than moral rights, as contributing to the development of a positive system of international laws and obligations, as part of the law of the world-wide human community.

Marxism, both as a philosophical position and as a political movement, is not as monolithic as it long was. Traditional Marxists, and the Soviet bloc, treat the concept of human rights as historical and the rights themselves as conditional. They are dependent on the individual's performance of his or her social duties, and on their not being used to harm the cause or development of socialism. The full flowering of the human personality in a social context, and not the elevation of abstract or individual rights, is seen as the ultimate goal and basic moral criterion of Marxist socialism.[19] Both Marxists and socialists have often been in the forefront of struggles for particular rights claimed as human rights in the heat of battle, but they have generally insisted on seeing claims for rights in a wider social context, on asking who is claiming them and for what purpose. In recent years, among socialists generally and among Marxists of the Euro-communist and analogous persuasions in particular, the view has grown that there is a role for traditional political democracy after the socialisation of the means of production, distribution and exchange, that the formal aspects of 'bourgeois' democracy should survive into socialism, and that this should include a concept of human rights, covering both civil liberties and social and economic rights.

Both philosophers and political theorists have become conscious in recent years of a point long canvassed by Marxists, namely a distinction between formal and substantive approaches to rights. This is not so much a distinction between civil and political rights on the one hand, and social, economic and cultural rights on the other as a different way of approaching both. Even in the area of civil and political liberties, this newer approach leads to new results.[2°] Eighteenth and nineteenth-century liberals, after Locke to J. S. Mill and beyond, embraced the view that to define a right is to define an area where a person can do what he or she likes, where others are obliged not to interefere. How does one define such an area? Mill attempted to define it in terms of the 'harm principle', the idea that I can do what I like as long as I do not harm other people. Take the example of freedom of assembly. Assemblies were rendered unlawful, in accordance with J. S. Mill's principle, where they were likely to cause breaches of the peace, disorder, irrespective of what their content was.

We are now beginning to see this formal approach give way to a more substantive one. The development of the offence of 'incitement to racial hatred' is an instance. It is the substance or content of what is said, what the assembly is *about,* that makes it illegal in some countries at least. There are specific varieties of 'harm' that have come to be recognised more and more in the literature at the expense of the older rights and liberties. These harms are preeminently varieties of discrimination — against women, racial minorities, the aged, the handicapped. Mill's notion of harm has always been problematic and has somewhat fewer defenders now than earlier. What 'harm' was to be taken to include was a problem. The modern debate between H. L. A. Hart and the then Mr Justice Devlin illustrates what was at stake.[2I] While Hart contended that 'harm' should be restrictively interpreted to mean harm to those interests that individuals

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'See A. E-S. Tay 'Marxism, Socialism and Human Rights' in Kamenka & Tay (eds), *Human Rights,* pp. 104-112; E. Kamenka & A. E-S. Tay, 'Human Rights in the Soviet Union', (1980) 19 *World Review* (Brisbane), 47-60; and G. Brunner, 'Recent Developments in the Soviet Concept of Human Rights' in F. J. M. Feldbrugge &*W W.* B. Simons, Sijthoff & Noordhoff, *Perspectives on Soviet Law for the 1980s,* The Hague, 1982, pp. 37-51.

[20]We follow here and in the next two paragraphs portion of a draft on particular philosophical issues in Ihe theory of rights prepared by Roger Wilkins.

[21]See H. L. A. Hart, *Law, Liberty and Morality,* Oxford University Press, London, 1963, and Sir Patrick Devlin, *The Enforcement of Morals,* Oxford University Press, London, 1965.

reasonably took themselves to have Devlin suggested that it made sense to talk about doing harm in some larger sense, that of destroying the *mores* and values that hold society together. Both political and moral-religious conservatives typically argue, along lines anticipated by Burke, that one can 'harm the community as a whole', its sense of values and structure, without harming identifiable individuals. This expanded conception of harm has also been taken up by Marxists and the radical left, and by many previously oppressed groups. For them, the dissemination of racist or sexist views or of information that gives comfort to those views is to be seen as harming a group of persons as a whole, and the moral climate of the community, even if it does no specific identifiable harm to a specific person. The tendency in deciding what is harm is increasingly to use substantive criteria rather than formal ones, to deny that what is sauce for the goose is sauce for the gander, not to oppose censorship or indoctrination as such but to oppose it when it serves some values or ends and to support it when it serves other values or ends, especially if they can be called 'human'. Recent literature reflects this.

We have noted the contrast between rights that amount to claims to have things done for oneself or to be given things, and rights that amount to claims *not* to have things done to oneself, to be free from various types of interference. The contrast is between 'positive' rights and 'negative' rights, sometimes but not at all accurately seen as a contrast between substantive and formal rights. Maurice Cranston[22] argues that 'negative' rights have the feature of imposing a specific obligation on identifiable individuals, for example if I have the right to walk down the street, then every person has the obligation not to interfere with my doing so. Such a right is amenable to legal protection, for the law can provide disincentives for people doing things to me. Negative rights are the classical liberal rights or *civil liberties* which are 'formal' in the sense that they mark out an area of freedom into which others are not permitted to intrude — freedom of movement, of thought and conscience, of speech, of assembly. The new positive rights are 'substantive' at least in the sense that they mostly require someone to do something for me: to give me food, employment, education, etc. Formal and substantive distinctions often appear as a distinction between positive and negative rights. Some generally more conservative thinkers see important antipathies between positive and negative rights. Positive rights are things like rights to education, a decent standard of living, etc. The pursuit of these 'rights', they fear, can be used as an excuse for abrogating the negative rights, the classical freedoms. They suspect sinister motives on the part of those countries, socialist and Third World, who were advocates of the Covenant on Economic, Social and Cultural Rights in the United Nations. Cranston suggests that many of the rights contained in that Covenant are not rights in any intelligible sense; they are more rhetoric. They do not impose any specific obligation on anyone. Even if they are thought of as imposing obligations on governments, some governments simply could not comply with many of these welfare rights. Kenneth Minogue, an expatriate Australian teaching in London, takes up a similar stance and writes:

> Human rights of this kind require much more positive action on the part of whoever is charged with the running of society. The natural rights to life, liberty, and property require little more of government and other citizens than forbearance, but the right to be provided with an actual job requires that governments shall manage the economy, and it may also require that governments shall manage the lives of their citizens in very considerable detail. To have the right to be provided with an actual job is in some ways a great practical advance upon the old natural right to work, but it has an obverse side. It is the right — which may also become a duty — to do a socially necessary job. But such a job may not at all be the kind of job the bearer

[22]Maurice Cranston, Chapter VIII, 'Economic and Social Rights' in his *What are Human Rights?*, pp. 65-71.

of the right had in mind. The evolution of the idea of rights to a point where they may become oppressive duties is a fascinating object lesson on the relation between rhetoric and reality.[23]

Socialists and 'progressives', against this, stress that the formal civil and political liberties presuppose that people will have the means, the knowledge and the leisure to exercise them and that all this is to a large measure dependent on substantive claims to the material conditions and benefits conferred by guaranteed work, education and cultural enrichment. And many others think that proclaiming a 'right' to work, to receive welfare payments, to have an education etc., can have important social effects by creating presumptions in favour of action and access, even if the right does not place a clear duty on any particular person or institution to make the exercise of the right possible.

The shift from formal to substantive considerations in the theory of rights, and from 'negative' to 'positive' rights, has had some important effects on the theory of rights and on the way in which rights are presented and viewed in the literature. Classical theories of rights tended to connect them with a person's will, with the right to choose, and therefore distinguished sharply between full moral agents — formed, adult persons — who had rights and those who were not fully moral agents — children or the mentally ill — toward whom we had duties of care and of acting in their best interests, but who could not be said to have rights. Some contemporary philosophers still take this view. But another view of rights sees them as linked with protecting the basic needs, or interests, or the well-being, of the person to whom rights are attributed.[24] This view, which is becoming predominant — just as interest theories had earlier largely replaced will theories in the general theory of law — sees no difficulty in speaking of the rights of children, or of the mentally ill, or even of animals, since they all have interests. It is more plausible, in all these latter cases, to think of rights as forms of protection and not as rights to exercise one's judgment, to be free from interference.

The shift from formal to more substantive conceptions of rights, however, tends to make the formulation of such rights in practice less universal and more conditional. As the number of persons needing or demanding special protection becomes evident, the list of rights, as in the United Nations covenants and conventions, becomes more and more mixed. Some seem to be rights that attach to all persons simply because they are persons; others result from singling out special groups as requiring special or at least specifically emphasised protection. A general theory of human rights gives way to some extent to, or is at least obscured by, a strident battle for attention, for a degree of privileged status. The theory of rights becomes merged with a certain conception of justice, of 'substantive' concrete social justice and equality rather than formal justice and equality. The debates surrounding these developments transcend the philosophy of rights and become debates about justice-and-equality — a veritable growth industry in contemporary legal and political philosophy to which this Bibliography can only refer briefly.

At a less philosophical level, the growth of the substantive approach to rights has resulted in greater attention being paid not merely to formal rights and opportunities but to how people in particular groups actually live, what rights they actually enjoy and what rights in practice, even if not in formal arrangements, are denied to them. Some of that material is presented in the modern mode in statistical terms, but there is also much that is detailed and descriptive, a presentation of case histories or a description of general social conditions. Much of it has by now become an essential part of the discussion of human rights in a concrete social and not only in a formal legal context. It is largely on

[23] 'The History of the Idea of Human Rights' in Walter Laqueur & Barry Rubin (eds), *The Human Rights Reader*, New American Library, New York, 1979, pp. 14-15.

[24] See, for example, D. N. MacCormick, 'Children's Rights: A Test Case for Theories of Rights', (1976) 62 *Archiv fiir Rechts- und Sozialphilosophie*, 305-17.

the increased appreciation of these substantive social differentiations, and of the increasing power and impersonality of governmental and bureaucratic structures, that the demand for human rights legislation in countries like Australia is based. The attitudes and interests expressed here are understandably different from the muted but powerfully felt and traditionally expressed demands for human rights in countries where the freedom of expression, the freedom of movement, the freedom of assembly and the right to a fair trial are suppressed in the name of socio-economic development and of social as opposed to individual justice.

14

Education or indoctrination?

A large part of the UN and Unesco campaign for human rights, and of particular governments' actions in response to this campaign and the covenants associated with it, has been devoted to promotion of 'education in human rights' or the 'teaching of human rights'. There have been demands for agreements on the outlawing of incitement to racial violence or war, the promotion of peace studies, the need for preaching the equality of peoples. Both governments and activist human rights groups have shown a large measure of support for these actions and the attitudes to the use of schools and tertiary institutions implied in them. In Australia and elsewhere, there has been a considerable body of educationalists and teachers who contrast their 'social' or `reconstructionise attitudes to education as a means of building a new and better society with traditional 'humanist' or 'liberal individualist' values that they see as standing in the way of such reconstruction.

The literature on human rights reveals tension and outright conflict between those who see human rights as the ultimate expression of humanist values and respect for individuals and for their freedom to live full and rewarding lives, to know and to learn, and those who see human rights as only a means to or an ingredient of a wider conception of social justice and community development. There is also tension between those who think that goals — promoting tolerance, peace, goodwill and respect for persons — justify methods that are not good in themselves (censorship of school texts, extended limitations on freedom of speech and expression, suppression of 'unpleasant' facts, in a word, indoctrination), and those who believe that such procedures are themselves a violation of human rights, of the right to know and of the right to learn, since learning cannot consist of learning only that which is correct — a view that undermines all foundations for independent critical judgment.' These are the extremes: a conciliatory view is that teaching about human rights should, in the manner appropriate at each level, emphasise the degree of moral consensus on these questions and draw attention to the nature and consequence of violations of human rights and the offensiveness, possibly to some members of the class, of notions of degrees of human worth, while always leaving the class free to explore difficulties and conflicts in the doctrine and consider whether there is any truth in opposing views.

Similar tensions arise in the area of legal protection of human rights, especially in the areas of discrimination. Human rights activists press not only for 'affirmative action' (discussed below), a program which deliberately sets aside, for a period and 'in a good cause', the normal anti-discrimination provisions to make it possible to discriminate in favour of specified groups: they have also pressed, or many of them have done so, for relaxation in standards of proof and other aspects of 'due process' to make it easier to suppress or punish discrimination, and this has aroused opposition from those who believe that due process is also one of the human rights that must be protected.

'See E. Kamenka, 'Thinking and Teaching about Human Rights', H. J. McCloskey, 'What Ought to be Taught about Human Rights?' and P. Singer, 'Teaching About Human Rights', all in Tay et al. (eds), *Teaching Human Rights: An Australian Symposium,* AGPS, Canberra, 1981, pp. 77-98 and note that all three authors avoid the phrase 'teaching human rights'. See also, on the broader issue of moral indoctrination and 'guardianship' — pro and con — J. L. C. Chipman & H. J. McCloskey, 'The Open Society: Its New, Insidious Enemies, the New Moral Guardians and the New Republic', (1983) 28 *Bulletin of the Australian Society of Legal Philosophy* 3-33 and the rejoinder by J. Kleinig, 'Keeping an Open Mind on the Open Society: A Response to Chipman and McCloskey', in the same issue, 34-43.

15

Principle of equality and equal treatment

See Bibliography—
Philosophy of equality (p. 173), Affirmative action (p. 299)

The philosophy of equality, and the conflicting political demands that have sprung from it, also revolve around the distinction between the formal and the substantive. It is widely recognised that equality of opportunity does not necessarily lead to equality of outcome. Equality before the law, coupled with wider social inequalities, may lead to unequal success rates in using the law. It may positively favour those with knowledge, money or power, those 'at home' in the law or with the law. Much empirical work in the sociology of law, in the sociology of education and of other human rights, has been concerned with this. It has become common, especially among reforming activists, to brand inequality of outcomes as a form of 'discrimination' demanding positive remedial measures, reverse discrimination or, in the preferred term, 'affirmative action'.

The philosophy of equality is one of the more ideological or proclamatory branches of social and moral philosophy; it is not easy to see what would constitute a decisive philosophical argument enabling one to choose between equality of opportunity and equality of outcome. The distinction is often related, in the literature, to the distinction between formal justice and 'real' or social justice; but the problem is the same. Those who advocate substantive equality and substantive justice can point without difficulty to the limited, 'abstract', non-pervasive equality achieved by formal justice and equality.[1] Their opponents see concrete, pervasive justice and equality as an unrealisable and utopian ideal, the pursuit of which does not implement but actually destroys the manageable and intellectually concrete ideal of formal justice and equality. The pursuit of social justice, of equal outcome, can and does demand the actual rejection of formal justice, of equality before the law and equality of opportunity. It first rejects these in so-called deserving cases, but the latter can and do become wider and wider in scope and implication. The pursuit also implies a degree of social management — and a consequent split betwen the managers and the managed — which many see as necessarily destructive of the civil liberties and political rights associated with democracies. They see it as destructive of social pluralism and of the independence of institutions, and as inimical to the pursuit of excellence, or even of quality, in any field of social endeavour. In practice, more rational discussion of the problem comes down to recognising two conflicting approaches and ideals here, each of which, if pursued to the total exclusion of the other, leads to dreadful injustice and inequality.

The issue has been confused rather than clarified by the current political vogue for finding evidence of discrimination not in the intentions or actions of parties who discriminate but through statistical evidence regarding the success rates of large groups. Such statistical evidence reflects many factors other than conscious or even unconscious discrimination by decision-makers. The point has been approached by many writers in the field by distinguishing discrimination in the traditional sense from what is now often called 'systemic' discrimination, or opposing direct discrimination to indirect discrimination. Proponents of affirmative action argue that a seemingly neutral rule or

[1]For the relationship between justice and equality and the presentation and discussion of competing views of justice, see E. Kamenka & A. E-S. Tay *(eds)justice*, London, 1979, *passim* and the reading there suggested (at p. 172).

practice, which embodies no deliberate discrimination against persons or groups, may in fact tend to 'disadvantage' a particular group. It thus creates indirect discrimination. For example, if it is known that a society has separate schools for girls and that such schools do not teach science or mathematics to an advanced level, then making advanced science or mathematics a necessary qualification for public service jobs, or entry into universities, or for some other 'benefit', is *in fact* to discriminate against women. Statistical evidence of the number of women in jobs of a certain kind will tend to reveal such indirect discrimination. It will reveal even more conclusively the 'systemic discrimination' which allegedly occurs when a whole complex of seemingly neutral rules or practices combine to produce 'discriminatory', i.e. disproportionate, results.

Writers who make strong use of the concept of systemic discrimination, for reasons of moral and political persuasiveness, often do treat the statistical outcome as evidence for individual discriminatory attitudes, even if they be unconscious. In practice, however, the term 'systemic discrimination' or its equivalent has been extended more and more to cover the situation where a social or natural situation leads to inequality and steps are not taken to correct such social or natural bias. Thus it is 'discrimination' to fail to make 'proper allowance' in promotion for the fact that women suffer from more interference than men in their pursuit of a profession — through childbirth, greater home duties, etc.[2] For those who hold that morality is concerned with human motives and intentions, this shift from discrimination as a conscious attitude and policy to discrimination as an objective feature of situations or outcome of rules that are neutral in intention is a worrying extension of moral praise and blame. On the other hand, there are many who feel no temptation to restrict the operation of morals in this way. Writers do note, however, that the concept of systemic discrimination does not sheet home the blame to any particular individual (though often groups, such as men or the 'white races', are blamed). The New South Wales Anti-Discrimination Act of 1977, like many such Acts throughout the world, is careful to proclaim the practice or advocacy of discrimination as unlawful, but not as a criminal offence. It thus helps to promote a social climate in which the distinction between discrimination proper and systemic discrimination does not need to be sharply made, since the criminal law conception of *mens rea* — guilty mind or intention — does not apply.

Part of the argument between those who emphasise equality of opportunity and those who judge by equality of outcome, rests on the question of the relevance or moral admissibility of particular criteria for selecting candidates or apportioning benefits. This is the same problem as the problem that arises in treating like cases alike, namely the problem of deciding what is a significant or relevant difference and what is not. The traditional concept of equality of opportunity, linked with the notion of a career open to talents, objects to discrimination on any ground not relevant to ability to perform the task or to benefit from the opportunity given. Such questions as race, religion, ethnic origin, sex, are rightly considered to be patently irrelevant in most cases — though difficult borderline cases, such as workmates' unreasonable hostility to women, could arise. Such difficulties have helped to encourage the view that in certain cases rules should be used to change discriminatory attitudes rather than to help entrench them by remaining neutral. But this is a far cry from setting aside altogether consideration of merit, capacity to do or to benefit, and rights and claims of individuals to equal treatment in relation to other individuals, in favour of a concept of equality for group outcomes. The latter implies that (discriminatory) practices based on this concept should replace practices based on consideration of a given individual's merit and capacities. The

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[2] See R. Wilkins, 'Women: Concepts of Sexual Discrimination', in Tay etal. (eds), *Teaching Human Rights: An Australian Symposium,* AGPS, Canberra, 1981, pp. 165-71 and the examples there cited, esp. S. Encel, N. MacKenzie & M. Tebbutt, *Women and Society: An Australian Study,* Cheshire, Melbourne, 1974, N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy,* Basic Books, New York, 1976 and C. Ronalds, *Anti-Discrimination Legislation in Australia,* Butterworths, Sydney, 1979.

actual practice of 'affirmative action' has varied from merely *encouraging* employers and institutions to attract applicants from 'underrepresented' groups to *requiring* such employers and institutions to meet target quotas that ignore the question of merit or capacity in the actual applications. The United Nations' covenants and conventions, however, in promoting 'affirmative action', recognise the conflict between such action and the individual human rights proclaimed in the Charter, covenants and conventions. They require that such affirmative action be conceived as a temporary measure entered into solely for the purpose of promoting and protecting the equality and other human rights of members of groups which were previously discriminated against. The Commonwealth Act establishing the Human Rights Commission in 1981 states that the Commission shall not 'regard an enactment or proposed enactment as being inconsistent with or contrary to any human right . . . by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons'. Other Australian anti-discrimination legislation contains similar provisions. Not only philosophers, but the major political parties of most democratic countries and the populations of most of those countries, united as they may be in believing in human rights, are deeply divided about the moral and legal propriety of discarding the concept of deliberate racial, ethnic or sex discrimination as intolerable and, instead, extending the concept of affirmative action over a wide range of social activities to protect large and reasonably secure sections of the population. This, they say, can be done only at the expense of the social ideal of individual equality of rights and of individual equality before the law. It sets up a most dangerous instance of the very discrimination we are pledged to overcome. The literature, at both serious and popular levels, displays strong feelings and extended arguments on both sides.

16

Affirmative action[1]

See Bibliography — *Philosophy of equality (p. 173); Racial discrimination:* Employment (p. 286), Education (p. 286), *Sex discrimination — women:* Employment (p. 294), *Affirmative action (p. 299); Disabled persons' rights (p. 329), Mentally retarded persons' rights (p. 332)*

Some of the liveliest debate in the area of discrimination concerns the use of 'reverse discrimination', now more commonly called 'hard' affirmative action' (that is, discrimination involving recruitment or selection on the basis of group characteristics), to overcome past and 'systemic' discrimination in respect of certain, 'protected' groups. Many studies, the argument in favour of affirmative action ran, had shown that practices that are fair in form can still be discriminatory in operation. This will not be overcome by 'soft' affirmative action, by 'discrimination' which does not involve recruitment or selection on the basis of group characteristics. Such discriminatory results could keep on perpetuating themselves from one generation to another. To break this cycle and to make impossible unconscious, hidden and devious as well as 'systemic' discrimination, it might be necessary, for a period, to adopt practices in relation to those who have been badly discriminated against in the past that now discriminate in their favour. Such practices might be discriminatory in form but they would be fair in content or, rather, in results.

Much that is now called 'affirmative action' is not directly discriminatory in the sense of requiring in practice the passing over of the more qualified or the otherwise more deserving on the grounds that they do not belong to the relevant 'protected' group that was formerly discriminated against. Legal interpretation of the U.S. Civil Rights Act 1964, which deals with discrimination in employment, held that Act to proscribe 'not only overt discrimination but also practices that are fair in form but discriminatory in operation' and to provide that if an 'employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited'.[2] Thus, discrimination is held to occur where jobs are not advertised in areas which might yield suitable candidates or where candidates likely to be put off by past discrimination are not specifically encouraged to apply. Affirmative action plans to overcome this may therefore include measures for improved recruiting, new training programs, revisions in the criteria for hiring and promotion. More traditionally, assignment of seats for elderly or handicapped persons on public transport, ramps for the disabled in wheel chairs, remedial teaching classes, specially equipped toilets and public housing programs, are all forms of affirmative action. Virtually all authors see such acts as constituting no more than customary and proper responses to well established situations, commonplace and readily accepted. Such programmes are described in the literature as 'soft' programs. There is no significant dispute over them. Some authors argue that affirmative action

[1] In preparing this section I have been helped by a survey prepared by Dr Gabriel Moens and by reading his paper 'Understanding Affirmative Action: The Search for an Ideal of Equality', presented to the National Conference and Workshop on the Teaching of Human Rights, Adelaide, 25-7 August 1983, convened under the auspices of the Australian National Commission for Unesco and the Human Rights Commission.

[2] *Griggs v. Duke Power Company,* 101 *United States Reports* 424 (1971). Although all U.S. cases in this area, like the U.S. programs, are tied to the specific provisions of the U.S. Constitution and U.S. Acts, the language used in them has entered theoretical discussion and administrative practice in the English-speaking world, especially Canada and Australia, through the overwhelming influence of American developments and literature.

programs go too far, however, if they result in the displacement or rejection of those who, under traditional criteria of excellence, would have been appointed to a job or selected for tertiary study. For example, preferential admission programs to educational institutions have been seen as examples of affirmative programs which go too far because they involve selection simply on the basis of one's race and set aside the criteria genuinely relevant to the capacity to benefit educationally. Such programs are characterised in the literature as 'strong' or 'hard' affirmative action programs. Sometimes they involve the practice of giving minority members a percentage advantage within the scale of admission requirements; sometimes they provide for the reservation of a certain number of places in professional schools for members of a specific racial group. 'Strong' or 'hard' affirmative action programs have been developed mainly in the field of employment, and they aim at the improvement of the economic and social conditions of designated minorities. (They are also concerned in many countries to protect majorities — for example, formal discrimination in favour of Malays in Malaysia, of indigenous Fijians in Fiji, etc.)

The development of similar affirmative action programs in some U.S. educational institutions led to the two earlier classic affirmative action cases *DeFunis v. Odegaard*[3] and *Regents of the University of California v. Bakke.*[4] Both cases were initially brought by persons who were not members of the particular minority being protected under institutional affirmative action programs. They had been passed over in selection as students granted entry into law school in the one case and medical faculty in the other in favour of formally less qualified blacks or other preferred minorities. The decisions in the cases were subtle and complex and the Justices were divided. The majority in *Bakke* rejected the view that 'race-conscious' programs as such were prohibited by the anti-discrimination legislation in force as part of the U.S. Civil Rights Act 1964.They could be justified in special circumstances. As one of the Justices in the *Bakke* appeal put it[5], such programs could be instituted if they were necessary for protecting a substantial and constitutionally permissible purpose or interest of the state, such as the promotion of equality, to ameliorate 'the disabling effects of identified discrimination' or to promote proper aims of the institution itself— the creation of a diversified student body which would produce a robust exchange of ideas or to improve the delivery of medical services to minority communities, where persons belonging to that minority were more effective. In that case, race would be taken as an individual rather than a group characteristic justifying the selection or recruitment of the minority person. The literature resulting from these cases and from the development of 'hard' affirmative action programs is enormous. The fundamental issue in moral theoretical terms is the alleged conflict, in 'hard' affirmative action programs, between equality of opportunity for individuals and equality of outcome for groups, though proponents of such programs often argue that their aim is to create 'real' equality of opportunity. Critics have not only opposed allowing equality of outcome for groups to become an overriding criterion, but have

[3] *DeFunis v. Odegaard,* 416 *United States Reports* 314 (1974).
[4] *Regents of the University of California v. Bakke,* 438 *United States Reports* 265 (1978) affirming in part *Bakke v. United States,* 553 *Pacific Reporter,* Second Series 1152 (1977). For a later, significant case concerned with employment discrimination, see *United Steelworkers of America v. Weber,* 47 *United States Law Week* 4851 (1979) (voluntary affirmative program initiated by employers).
[5] Mr Justice Powell, in 46 *United States Law Week* 4896ff., especially 4906-8.

argued that the selection and definition of groups for protection is inevitably arbitrary and unfair, neglecting some groups for others.[6]

The discussion continues and opinions remain sharply divided. Nevertheless, there is no doubt that affirmative action programs in America and now in Australia have become widespread. They enjoy legislative and administrative authority in those countries, and anti-discrimination legislation, like the UN Covenants on the subject, more and more specifically exempts affirmative action programs meant as temporary measures for overcoming past discrimination. Most affirmative action programs are mixtures of 'soft' and 'strong' affirmative action. The language is often designed to present them as seeking equality of opportunity rather than equality of outcomes. Increasingly, it is also designed to avoid any suggestion of formal and direct discrimination in favour of individuals by setting mandatory quotas rather than desired targets. Quotas suggest that the less qualified, if belonging to a protected group, must be appointed if the quota would not otherwise be met; targets do not formally require such decisions, though critics claim that they encourage them.

The U.S. Civil Service Commission has listed nine points as desirable elements of affirmative action programs[7], which are described as 'results-oriented' and as producing 'equal employment opportunity'. The points are:

- Adequate and competent staff and dollar resources throughout the organisation to assure administration and implementation of a results-oriented program of equal employment opportunity which is involved in every aspect of personal management policy and practice;
- Recruitment activities designed to reach and attract job candidates from all segments of the population. Where appropriate, these activities are tailored to improve their effectiveness among members of specific groups;
- Full identification and utilization of the present skills of employees on the rolls, facilitating movement through job restructuring techniques, establishment of trainee positions, and assuring that qualifications or requirements are realistic in terms of the job to be done;
- Opportunities for employees to enhance their skills, perform at their highest potential, and to advance in accordance with their abilities and the availability of opportunities. These efforts include programs of career counselling and planning, training and education, job analysis and re-design, and elimination of any barriers to upward mobility.
- Encouragement of Equality of Employment Opportunity (EEO) programs, understanding and support by supervisors and managers through practical training and advice, effective use of incentive systems, and evaluating supervisory and managerial performance in the EEO area;

[6]For a sample of serious writing of a more general theoretical character, ranging from the sharply critical to the highly supportive, see W. E. Block & M. A. Walker (eds), *Dscrimination, Affirmative Action and Equal Opportunity,* The Fraser Institute, Vancouver, 1982; T. Eastland & W. Bennett, *Counting by Race: Equality from the Founding Fathers to Bakke and Weber,* Basic Books, New York, 1979; F. E. Farmer, *Affirmative Action 1981: Debate, Litigate, Legislate, Eliminate?* Washington, D.C., 1981; R. Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis,* Rowman & Littlefield, Totowa, 1980: N. Glazer, *Affirmative Discrimination: Ethic Inequality and Public Policy,* Basic Books, New York, 1976; A. H. Goldman, *Justice and Reverse Discrimination,* Princeton University Press, Princeton, N.J., 1979; B. Gross, *Discrimination in Reverse: Is Turnabout Fair Play?* New York University Press, New York, 1978; F. Hall & M. Albrecht, *The Management of Affirmative Action Programmes,* Goodyear, San Monica, 1979; J. C. Livingston, *Fair Game? Inequality and Affirmative Action, W.* H. Freeman, San Francisco, 1979; R. M. O'Neil, *Discriminating Against Discrimination: Preferential Admission and the DeFunis Case,* Indiana University Press, Bloomington, 1975; J. A. Passmore, 'Civil justice and its rivals', in E. Kamenka & A. E.-S. Tay (eds), *justice,* Edward Arnold, London, 1979; J. Stone, 'Justice in the Slough of Equality', (1978) 29 *Hastings Law Journal,* 995-1024 and 'Justice not Equality' in Kamenka & Tay (eds), *Justice,* pp. 97-115; R. Dworkin, 'Reverse Discrimination' in R. Dworkin, *Taking Rights Seriously,* Duckworth, London, 1977, pp. 221-239 and 'Why Bakke has no Case', *New York Review of Books,* 10 November 1977 and J. R. Lucas, 'Against Equality', (1965) XL *Philosophy,* 296-397. The issues discussed in connection with affirmative discrimination have become central issues in the contemporary discussion of the argument over the concept of justice and its relation to equality.

'U.S. Civil Service Commission, Office of Federal Equal Employment Opportunity, *Guidelines for the Development of Agency Equal Employment Opportunity Plans,* 1977.

- Managerial support for and participation in community efforts to improve conditions such as housing, transportation and education which affect employment;
- Systematic evaluation of EEO program progress, identification of problem areas and assessment of the effectiveness of program activities;
- Systems providing for the informal resolution of EEO-related employment problems wherever possible and for prompt, fair and impartial consideration of formal complaints of discrimination in any aspect of employment; and
- Special programs to provide employment and training opportunities for the economically and educationally disadvantaged.

A number of State governments and now the Commonwealth Government in respect of the Commonwealth Public Service, Commonwealth instrumentalities and educational institutions have also developed affirmative action programs. The following principles have been elaborated in connection with the New South Wales Government program[8]:

- Equality of employment opportunity is a matter of basic social justice.
- There are two kinds of discrimination, namely direct and indirect; both of these must be addressed if equal employment opportunity is to be achieved.
- Past discrimination and its enduring legacy require redress in the form of (a) positive and active steps to eradicate discrimination, and (b) remedial programs for members of groups who have suffered discrimination.
- Improvements in equality of employment opportunity should be visible both in the outcome of selection and promotion procedures and in the redistribution of minority groups and women in personnel statistics.
- Affirmative action programs should have specific goals and, where possible, numerical qualitative targets together with a timetable for their achievement. Programs should be evaluated in terms of their redistributive effects and their success in regard to the nominated targets. This does not constitute proportionate hiring or quotas.

The N.5 .W. guidelines, like the U.S. Civil Service ones, speak of equal employment opportunity. The Australian document encourages the use of special programs; it also mentions that affirmative action should be seen to be working, and it states that affirmative action should have specific goals. The American document also mentions these ideals, but goes further to enunciate in detail the areas for action, for example, managerial support, special programs, staff and dollar resources, and recruitment.

In the United States, all employers who have contracts or sub-contracts of $50 000 or more with the Federal Government and employ 50 or more people must have a written affirmative action program. Those with contracts totalling $10 000 in a 12-months period are also bound to accept programs, and contracts exceeding $25 000 require an affirmative action program for handicapped persons. Without an acceptable affirmative action program, the employer runs the risk of being disqualified from receiving a contract, or of having receipt delayed or the contract cancelled. The American Equal Employment Opportunity Commission has recently broadened the concept of affirmative action to require specific goals or plans which broaden the opportunities of the groups which have been discriminated against. During the middle seventies, concepts of goal and quota were both used to test the success of affirmative action programs. As the program evolved, the Office of Federal Contract Compliance Programs required contractors to undertake an evaluation of their patterns of employment of minorities and women in all job categories. Then the employer was required to identify obstacles to the full utilisation of minorities and women that might account for their under-representation in particular categories, and to develop an affirmative action program to overcome the obstacles. The Commission on Civil Rights has been sensitive, however, to one important aspect of results orientation, namely, whether affirmative action should involve goals (targets) or quotas. It stated the difference thus:

[8]Review of N. SW. Government Administration, *Affirmative Action Handbook,N N.* S.W. Government Printer, Sydney, 1980.

> (U)nder a quota system a fixed number or percentage of minorities or females is in upon the employer, who has an absolute obligation to meet that fixed number. No excuses are accepted, nor can failure to meet the quota be justified. Goals and timetables, by contrast, are result-oriented procedures by which the employer's good-faith determines goals and a time schedule for correcting minority under-utilization, and then makes every good-faith effort to achieve the self-imposed goals.[9]

After making specific findings of discrimination, courts have sometimes found that fixed goals and remedies are the only solution. Typically, a court may require that a specified percentage of all new employees be members of a particular group until such time as the desired goal of minority participation is reached. For example, in *Carter v. Gallagher*[10], it was found that the Minneapolis Fire Department had engaged in discrimination against minorities, and an order was made that the department hire one minority person for every two who qualified until there were at least twenty minority workers on the staff. And in *Rios v. Enterprise Association Steamfitters loc. 638 of UA,* the Court said:

> But where the imbalance is directly caused by past discriminatory practices it is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher. . . The effects of such past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this should be illusory and inadequate as a remedy. Affirmative action is essential . . . to place eligible minority members in the position which the minority would have enjoyed if it had not been the victim of discrimination. [11]

The N.S.W. Government *Affirmative Action Handbook* outlines various types of discrimination, defines affirmative action, outlines programs for implementation in a very general sense and provides educational information on reducing discriminatory actions. It is based on the belief that a system which requires complaints by individuals is insufficient and can only help those who are well-informed or self-motivated. Departments and authorities of the N.S.W. Public Service are required, in accordance with the State Anti-Discrimination Act 1977 to develop equal employment opportunity management plans. A feature of the management plan, it is said by critics, is the setting of goals *and* targets, even though this is not emphasised in the *Affirmative Action Handbook.* The Handbook attempts to distinguish clearly between targets and quotas:

> Targets are the prime motivators and guides to the success of an affirmative action plan. They are not mandatory quotas. In equal employment opportunity programs, quotas imply proportional hiring, i.e. bypassing remedial programs and hiring employees without regard to merit, in order to meet numerical requirements. Targets, on the other hand, express the expectation that desired numerical outcomes will be achieved by means of positive remedial programs . . . The people responsible for setting and achieving targets should always distinguish clearly between targets and quotas, and ensure that targets are not treated as quotas. The difference between targets and quotas should be clearly explained at all EEO awareness and other training sessions.[12]

It also says:

> Implementation of the program should be subject to regular statistical evaluation, and objectives and strategies should be revised as necessary. In the end, the success or failure of affirmative action depends on statistical results. An affirmative action plan is successful only if it results in a more equitable distribution of women and migrants in personnel statistics.

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[9]United States Commission on Civil Rights, *Statement on Affirmative Action for Equal Employment Opportunities,* Washington, Clearinghouse Publication no. 41, 1973, p. 20.

[10]452 *Federal Reporter,* second series, 315 (1971).

[11]501 *Federal Reporter,* second series, 622 (1974).

[12]Review of N.S.W. Government Administration, op. cit., p. 25.

Statistical profiles and summaries of estimated versus actual performance should be updated at least annually.[13]

Affirmative action programs are not at present mandatory in private businesses. The National Labour Consultative Council, established by Commonwealth Act of Parliament in 1977, recently issued a booklet, *Equal Employment Opportunities for Women",* which encourages employers and trade unions to be responsible for and committed to the implementation of an Equal Employment Opportunity Program for Women.

Controversy in philosophical and political literature is only over 'hard' affirmative action, and both American and Australian provisions display some sensitivity to making programs appear 'too hard'. Their supporters seek to show that targets are not the same as quotas, that relevant criteria for employment are not being simply set aside, that discrimination is on the side of those who oppose these programs; or that capacity to work or learn can only be acquired 'on the job'. The voluminous literature surrounding the *Bakke* case discusses, often subtly and carefully, the extent to which education and other social goods, such as training medical doctors, can legitimately take into account broader social desiderata than the individual's ability to cope with the education or training provided. There is no doubt, however, that a strong national and international trend in favour of affirmative action has been growing in recent years, producing and encouraged by UN support for affirmative discrimination and increasingly widespread legislation in Common Law democratic countries, providing for both soft and hard affirmative action. The trend, as we have seen, has produced a large body of literature on the problem and that displays as much criticism of, as support for, 'hard' affirmative action.

[13]ibid., p. 63.

"National Labour Consultative Council, *Equal Employment Opportunities for Women,* AGPS, Canberra, 1980.

17

Right to life'

See Bibliography —
Right to life (p. 182)

If there is any value that has generally been seen as 'universal', it is the value of life itself. It is hallowed in ancient codes of law, religions, and ethics, and is respected, or at least regulated, in very nearly all social systems. Plato used the human interest in life as a premise in his celebrated *excursus* into political and social justice in *The Republic* (although he was far from recognising a right to life and advocated euthanasia of the unfit). At least since Thomas Hobbes, the minimal rationale for the existence of any society has been taken to be that it preserves and protects the lives of its members. In more recent political theory, Professor H. L. A. Hart argues, in *The Concept of Law*[2] , that the value of life must be recognised by any legal system, that it constitutes the most fundamental of the congeries of values that make up Hart's 'minimum content of natural law'

Alongside this tradition of thought, there is another, ostensibly opposed, line of argument. Is life valuable *per se?* Or is life valuable only in so far as it is a vehicle for valuable pursuits, activities and experiences? In the philosophy of Greece and Rome, though not exclusively there, there were more important values than life itself: honour, for example, or the well-being of the city or the community. The idea that there are more important things than life, that there are values for which life must be sacrificed, can also be found in Judaic and Christian thought and in much socialist, nationalist and revolutionary thought.

There is a philosophical tradition, most clearly exemplified by Epicurus and later by Lucretius, in which life *in itself* has no value. If it has value, that value is purely instrumental. This Epicurean tradition has not fallen into desuetude; on the contrary, with the rise of modern utilitarian philosophies, its contemporary prominence is assured. For the utilitarian the only thing that has intrinsic value is want-satisfaction, the fulfilment of desires, so that a life which is devoid of 'utility', which is completely miserable and empty of satisfaction, has no value. In his recent book *Causing Death and Saving Lives*, Jonathan Glover argues that the principle of sanctity of life needs at least to be tempered by the principle of the quality of life. He emphasises that what we need to be interested in is not life *per se* but the *quality* of life. If we accept this line of thought, then problematic choices to do with 'the right to life', such as euthanasia, abortion, capital punishment, the allocation of scarce medical resources, need to be reformulated. We do not ask, 'Does this foetus have the right to live?'; rather we ask, 'What quality of life is this foetus likely to have?'[3]

Article 6 of the International Covenant on Civil and Political Rights sets out the right to life, but answers none of the critical issues raised by the literature. It says that every human being has the inherent right to life. 'Inherent' suggests that this right is somehow different from other rights enumerated in the Covenant. Yoram Dinstein, in his analysis of the articles dealing with the right to life[4], holds that the term may attest to the primacy

'This section and those on abortion and euthanasia are based on reports prepared by Roger Wilkins and in parts some summaries of the literature follow them quite closely. David Mason provided additional material on abortion.

[2]H. L. A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1961, p. 190.

'Jonathan Glover, *Causing Death and Saving Lives*, Penguin, Harmondsworth, 1977, p. 127.

of the right and emphasises that it is derived from the very fact of a human being's existence. Dinstein also suggests that the framers of the Covenant may have felt that the human right to life is entrenched in customary international law and that Article 6 is merely declaratory in nature and does not create new international law.

Article 6 says that no one is to be 'arbitrarily deprived' of his life. Dinstein points out that deprivation of life here means homicide; capital punishment is not excluded, and the right to life, in effect, is the right to be safeguarded against (arbitrary) killing. Homicide may be carried out through a variety of means, including starving someone, exposing a person to extreme temperatures or contamination with disease. But the mere toleration of malnutrition by a state will not be regarded as a violation of human right to life, whereas purposeful denial of access to food, for example to a prisoner, is a different matter. Failure to reduce infant mortality is not within Article 6, while practising or tolerating infanticide would violate the Article. But there are those who are not much impressed by the difference between doing and tolerating and the distinction between acting and failing to act can be fine.

The cardinal question is when a deprivation of life may be labelled as arbitrary. What the term 'arbitrary' means is not clear. It occurs again in the Covenant at Article 9, in connection with the arbitrary arrest and imprisonment of individuals. In his article, 'The Word "Arbitrary" as used in the Universal Declaration of Human Rights: "Illegal" or "Unjust"?', Hassan argues that if the word is to do any work at all, it cannot be taken to mean 'illegal'.[5] The actions of the Nazis were not 'arbitrary' in this sense. It must be taken to mean 'unjust', as importing some sort of 'minimum international standard' of treatment. What this might imply is a well-known and unsolved problem. The classical Kantian suggestion is that the law must be 'general' and not aimed at specific individuals. But that condition is easily met by the most iniquitous laws. One suggestion — by Roger Wilkins, in an unpublished survey — is that the standard for non-arbitrariness should be taken to include the elements of due process set out in Articles 14 and 15.

Much of the literature on euthanasia emphasises the impact of modern medical technology on problems of life and death. Apologists for some restricted form of euthanasia often rely on the distinction between tolerating and doing, between negative and positive acts. If I kill someone by giving him an overdose, that is murder; if I stand back and allow someone to die, that is not murder. This distinction makes more sense where there is not very much I could do to stop someone dying. But once we have opportunities and technologies that will prevent death, the distinction becomes more problematic. Guido Calabresi, in his book *Tragic Choices*[6], considers a variety of cases where scarce resources have to be allocated, one being scarce medical resources. If the government decides to spend money on education rather than hospitals, has not the government effectively 'killed' some people?

Some writers want to distinguish between incurably ill patients and dying patients. If a patient is dying, then his dying should not be prolonged and should be made as painless as possible. The distinction makes sense so long as we do not have the means of extending a life. But we now do. The position stated by Pope Pius XII in 1957 makes a distinction between 'extraordinary' and 'ordinary' treatment and says there is no obligation to keep people alive by the use of 'extraordinary' treatment. The enormous advances of medical technology can, however, quickly change what was considered 'extraordinary' into the 'ordinary'.

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[4]Yoram Dinstein, 'The Right to Life, Physical Integrity and Liberty' in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981,114-37.

[5]Parvez Hassan, 'The Word "Arbitrary" as used in the Universal Declaration of Human Rights: "Illegal" or "Unjust"?', (1969) 10 *Harvard International Law Journal*, 225-62.

[6]Guido Calabresi and Philip Bobbitt, *Tragic Choices*, Norton, New York, 1978.

18
Abortion

See Bibliography — Abortion (p. 184)

Abortion has been, and continues to be, in many societies, including Australia, an emotionally-charged issue on which the major political parties regularly permit a 'conscience' vote to their parliamentarians. Religiously-based arguments, including a conception of the sanctity of all human life, have played a much larger role in the abortion debate than in most discussions of rights. A 'right to life' amendment that would have recognised the right of the foetus to be left alive was a crucial factor in the Whitlam Labor Government's failure to put through Parliament Senator Murphy's Bill of Rights. Attempts to rally widespread public support against abortion are now generally presented as part of the right to life, proclaimed as a human right by the United Nations. Much of the theoretical discussion, as will be noted below, has therefore concerned the criteria of being human and a question when or whether a foetus should be counted as human.

Not all the participants in the debate, however, are prepared to see the problem of abortion as lying solely, or even at all, within the ambit of the right to life. In recent times, many have seen it as raising issues of freedom of choice for women, of the right of privacy, of religious freedom and of freedom of conscience. Probably the most celebrated case on the issue in recent years has been the U.S. Supreme Court decision in *Roe v. Wade.*[1] In that case, the court struck down as unconstitutional a Texas law prohibiting abortion except for the purpose of saving the mother's life. The decision held that the law violated a woman's free choice, an aspect of the right of privacy which the court had already found to be guaranteed by the Fourteenth Amendment to the U.S. Constitution. The court explicitly dismissed the argument that the foetus is a person. It did acknowledge the existence of 'potential human life' and the interest of the state in protecting it. The court held that the rights of the woman are different during each trimester of pregnancy. During the first three months, the decision to abort rests solely with the woman and her doctor. During the second the state can regulate abortion procedure to protect the mother's life, but not prohibit it. During the final three months of pregnancy, when the foetus is 'viable', the state can regulate abortion or even prohibit those abortions not necessary for the protection of the mother's life or health.

In other non-Catholic Western countries, there has been a similar shift toward the liberalising of anti-abortion legislation which in many cases dates from the nineteenth century. In the U.K., in *R. v. Bourne*[2], Macnaghten, J. directed the jury in the following terms, reading an exception into s.58 of the Offences Against the Person Act (1861):

> It is not contended that these words mean merely for the purpose of saving the mother from instant death . . . The law does not require the doctor to wait until the unfortunate woman is in peril of immediate death. In such a case, he is not only entitled, but it is his duty to perform the operation with a view to saving her life . . . I think that those words ought to be construed in a reasonable sense, and, if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will

[1] *Roe v. Wade,* 410 *United States Reports* 113 (1973).
[2] *R. v. Bourne* [1939] 1 *King's Bench* 687.

be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman.

In 1967, the U.K. Parliament passed an Abortion Act. Section 1(1) reads as follows:

(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith —

(a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The South Australian provisions more or less replicate the U.K. Act. In New South Wales and Victoria, the situation is governed by a decision, or rather a direction, by Menhennitt J. in the 1969 case of *R. v. Davidson:*

> To establish that the use of an instrument with intent to procure a miscarriage was unlawful, the Crown must establish either (a) that the accused did not honestly believe on reasonable grounds that the act done by him was necessary to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail; or (b) that the accused did not honestly believe on reasonable grounds that the act done by him was in the circumstances proportionate to the need to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail.[3]

Thus, abortion is lawful if the doctor believes, on reasonable grounds, that it is necessary, and proportionate to the danger to the woman. 'Reasonable grounds' has been held to encompass 'any economic, social or medical ground or reason'.[4] Even this wide definition, however, would not render lawful an abortion simply on the basis that the woman did not want a child. Australian law does not concede a general 'right to abortion' in the terms of *Roe v. Wade.*

In *The Law and Politics of Abortion*[5] , a series of essays by American scholars, various post-Roe v. *Wade* developments are considered. Some of the problems thrown up there are echoed in the U.K's *Lane Committee Report*[6] and in subsequent discussion in the U.K.

In *Planned Parenthood of Central Missouri v. Danforth*[7] the U.S. Supreme Court held that a statute requiring the husband's consent for abortion infringed the wife's right to have an abortion. The 1967 U.K. Act does not require the husband's consent; nor does English Common Law[8], so a husband cannot prevent an abortion otherwise lawful under the Act. In a recent Queensland case, it was held that a prospective father had no legal right which would give him standing to sue to prevent even an allegedly illegal abortion.[9] Moreover, when the man secured the intervention of the Attorney-General for Queensland, who undoubtedly had standing to sue, an injunction was nonetheless

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[3] *R. v. Davidson* [1969] *Victorian Reports* 667, at 672.

[4] R. v. *Wald* (1971) 3 *New South Wales District Court Reports* 25, at 29 *per* Levine, Chairman of Quarter Sessions. The Court also emphasised, in the same place, that the Crown bears the onus of proving unlawfulness.

[5] Carl Schneider & Mavis Vinovskis (eds), *The Law and Politics of Abortion,* Lexington Books, Lexington, Massachusetts, 1980.

[6] Committee on the Working of the Abortion Act, *Report,* Cmnd. 5579, London 1974. See also the House of Commons Select Committee on Abortion, *Report,* Parliamentary Papers 573-I of 1975-76 (report), 573-11 (minutes of evidence).

[7] *Planned Parenthood of Central Missouri v. Danforth,* 428 *United States Reports 52 (1975).*

[8] *Paton v. British Pregnancy Advisory Service Trustees and Anor.* [1979] 1 *Queen's Bench* 276.

[9] K. v. *T.* [1983] 1 *Queensland Reports* 396, *per* G. N. Williams, J.

refused. The court would not restrain by injunction an abortion which had not been proved to be illegal and could not be so proved except by criminal prosecution:

> There are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims. Those limits would be overstepped if an injunction were to be granted in the present case.'

In *Doe v. Bellin Memorial Hospital"* and in *Taylor v. St. Vincent's Hospital*[12] *U.S.* courts dealt with the problem of refusal of hospitals to perform abortions. In the first case, a mandatory injunction requiring the hospital to perform the abortion was refused. In the second, an injunciton was granted, but the case provoked the passing of legislation preventing courts from forcing private hospitals to undertake abortions or sterilisations. In *Doe v. Hale Hospital*[13], it was held that a municipal hospital in receipt of public funds could not refuse to perform abortions when facilities were available.

The best known attempt to limit the impact of such decisions administratively is the 'Hyde Amendment' to the U.S. budget. In 1976, the following clause was passed with the 1977 budget:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

In *Harris v. McGrae*[m] the Supreme Court upheld the Amendment by five to four. Stewart, J., for the majority, said that there was no constitutional entitlement to the financial resources required for a woman to avail herself of the full range of choices protected by the Constitution. Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls into the latter category. Brennan, J., in a dissenting judgment, pointed out that the amendment effectively deprived poor women of their right, and that this is the group that most needs an effective right of abortion.

Another difficult area which has attracted some attention in New South Wales is the problem of a minor who is pregnant, and the legitimacy of intervention by parents or the State in such a case. In the U.S. it has been held that a law requiring a minor to obtain parental consent for abortion would be unconstitutional.[15] The actual statute being considered was not invalid, since it allowed the minor, in the event of a parental veto, to apply to the courts for consent.

In a recent N.5 .W. case, the Minister responsible had refused consent for an abortion for a fifteen-year-old state ward. His refusal was overridden by the court on the basis that, while the Minister had the power of a guardian to give or refuse consent, the courts have inherent power to authorise medical treatment of infants, where satisfied

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[m] *Attorney-General for the State of Queensland (ex rel. Kerr) and Anor. v. T.* (1983) 57 *Australian Law Journal Reports* 285, at 286, *per* Gibbs CJ (High Court), refusing leave to appeal from the decision of the Full Court of the Supreme Court of Queensland, [1983] 1 *Queensland Reports* 404.

[12] *Doe v. Bellin Memorial Hospital,* 479 *Federal Reports,* second series, 756 (1973).

[13] *Taylor v. St. Vincents Hospital,* Civil No. 1090 (D.C. Montana, 1972).

[13] *Doe v. Hale Hospital,* 369 *Federal Supplement* 970 (1974).

[m] *Harris v. McCrae,* 448 *United States Reports* 917 (1980).

[15] *Bellotti v. Baird,* 448 *United States Reports* 662 (1979).

that this is necessary in the interests of their welfare.[16] It appears that this power would also allow the courts to override a refusal of consent by a parent.[17]

It has been argued that the modern tendency is to expand the autonomous rights of children, increasingly leaving minors free to make their own decisions.[18] Indeed, the Commonwealth Attorney-General has foreshadowed legislation to protect the 'right of the child' in this situation. It should be noted, however, that the Common Law leaves the final decision on whether a minor may have an abortion not with the minor but with the courts, acting in a quasi-parental manner.

The crucial issue in the abortion debate and the issue of central relevance for the right to life is whether or not the foetus is a human being. If it is, then it has the right to life set out in the International Covenant of Civil and Political Rights; if it is not, then it has no such right. It is clear that the foetus is alive as from conception. The development of the foetus then takes place along a continuum. There have been various attempts to make out some critical point at which one can say that the foetus is now a person. Roman Catholics, many other Christians and strict followers of traditional Judaism and Islam believe that the foetus becomes a person at the moment of conception, when it acquires a soul. The Common Law as enunciated by the great seventeenth-century Chief Justice Coke treated it as a person from the moment of quickening. More recent judicial decision, such as *Roe v. Wade,* has used the test of independent viability, normally set at around six months after conception. Others argue that a foetus is not a person until the moment of birth. For the Perth philosopher Professor Michael Tooley, 'an organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity'.[19] (This is also relevant to the rights of the 'human vegetable'.) Others say that humanity is an achievement, not an endowment, and can be attained only in society, not in the womb. Their positions link rights with the capacity to have a will. Their opponents, when using philosophical rather than religious arguments, claim that the foetus has enough human characteristics to have interests and therefore a right to live or, more pragmatically, that there is no sharp break between a foetus and a human being and that killing one will weaken respect for life in the other. They also stress that the UN Declaraion of the Rights of the Child speaks of its rights (to care, etc.) before and after birth.

The liberalisation of abortion law has taken it into the area of moral decision for medical personnel. There is then the difficult problem of reconciling the woman's right to have an abortion with medical staff's freedom of religion and conscience. So, for example, we find a 'conscience clause' inserted in the Abortion Act 1967 (U.K.), and in South Australia's Criminal Law Consolidation Act 1935, allowing hospitals, medical practitioners and medical staff who conscientiously object to abortion not to participate. This exemption, as with the U.K. legislation, is normally not absolute. In cases where the abortion 'is necessary to save the life or to prevent grave permanent injury to the

v. Minister for Youth and Community Services, [1982] 1 *New South Wales Law Reports* 311, *per* Helsham C. J. in Equity.

"This is, of course, a power not restricted to wards nor arising because of wardship. It is a power of the Sovereign to protect persons who from their legal disability stand in need of protection. It is a power exercisable at large': ibid., 323, *per* Helsham C. J. in equity; see also *Johnson* v. *Director General of Social Welfare (Victoria)* (1976) 135 *Commonwealth Law Reports* 92 at 99 *per* Murphy, J.: 'The courts have traditionally exercised the power (as parens patriae, parental power, protective power or jurisdiction, or quasi-parental power) to protect children. This power is exercisable over the person who is the guardian and has the right to custody (whether at common law or by statute) whether it is one or both parents, or a testamentary or other guardian.'

'See, for example, E. Veitch & R. R. S. Tracey, 'Abortion in the Common Law World', (1974) 22 *American Journal of Comparative Law,* 652-96.

[19]M. Tooley, 'Abortion and Infanticide', (1973) 2 *Philosophy and Public Affairs,* 44.

physical or mental health of a pregnant woman', the practitioner's conscience must give way.

Roman Catholic theologians, who hold abortion as such to be prohibited by divine law, have elaborated a doctrine of 'double effect' which, when applied to abortion, permits measures to save the mother's life that will result in the death of the foetus, provided the death of the foetus is not the intended effect. The classic modern formulation of this principle is presented in J. P. Gury's widely-used and often revised manual, *Compendium theologiae moralis:* it is licit to posit a cause 'which is either good or indifferent from which there follows a twofold effect, one good, the other evil, if a proportionately grave reason is present, and if the end of the agent is honorable — that is if he does not intend the evil effect'.[2°] The doctrine makes an important distinction between ends that are intended, and in that sense desired, and ends that are foreseen as possible or even inevitable results of the action but that are not themselves intended or desired, that do not constitute the basis for doing the action. The action, then, is morally acceptable in Catholic theology if four requirements are met: 1. the agent's end must be a morally acceptable end; 2. the action or cause intended to produce it must be morally good or at least morally neutral; 3. the intended good effect must be immediate; 4. there must be a grave reason for undertaking the action and in assessing the gravity of the reason, the seriousness of the foreseen but unintended bad effect must be taken into account. The doctrine of double effect stretches far back in scholastic philosophy and is found in Aquinas. It does not make it morally right to do intentionally an act which is intrinsically bad even if good consequences will ensue.

Two legislative ways of dealing with the problem of conscience are often criticised by proponents of easier access to abortion, as Veitch and Tracey note.[2i] Allowing total exemption from performing or participating in abortions on conscientious grounds may result in the impossibility of obtaining abortions in certain parts of the country. Remaining silent in the issue of conscience in the relevant legislation, but imposing no obligation whatever on doctors or hospitals to perform abortions may have the same effect.

From the women's rights side, the U.S. philosopher Judith Jarvis Thomson has argued that, in cases where the mother's life is in danger, she has the right to defend herself. This right of self-defence, she urges, is legitimate even where the party against whom you are defending yourself (the foetus) is innocent. Thomson also argues that the mother 'owns' the body that shelters the foetus. On this, she could ground a claim to have the foetus aborted. Her critics, such as Mary Anne Warren[22] have replied that mere ownership does not give one the right to kill innocent people one finds on one's property: 'It is equally unclear that I have any moral right to expel an innocent person from my property when I know that doing so will result in his death.' In fact, at Common Law there is no 'ownership' of a human body nor any unfettered right to deal with or assign rights over one's living body as one wishes.

Another critic, Jonathan Glover, points out that women's rights arguments only support a *right not to have to cony and give birth to a child.*[23] The mother may have the right to have the child removed, but not a right to have it killed. Medical technology is almost at the stage where it may be able to satisfy the right to have the foetus removed without causing its death. That, of course, will raise new and far-reaching problems.

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[2]1. P. Gury, S.J. (revised by A. Ballerini, S.J.), *Compendium theologiae moralis,* 2nd edn (Rome and Turin 1869) p. 7, as trans. by I. M. Boyle, Jr, in his 'Toward Understanding the Principle of Double Effect', (1980) 90 *Ethics* 527 at 528.

[21]E. Veitch & R. R. S. Tracey, 'Abortion in the Common Law World', (1974) *American Journal of Comparative Law,* 652-69.

[22]Mary Anne Warren, 'Do Potential People Have Moral Rights?' (1977) 7 *Canadian Journal of Philosophy,* 275-89.

[23]J. Glover, *Causing Death and Saving Lives,* Penguin, Harmondsworth, 1977, p. 135.

There is also, as we have seen, intersection between the problem of the rights of children and the issues of abortion and euthanasia, which some see as important. They argue that the 1959 UN Declaration on the Rights of the Child treats the 'child' as including the foetus. The foetus, therefore, has rights. The Declaration says in its preamble: 'the child, by reason of his physical and mental immaturity, needs safeguards and care, including appropriate legal protection, before as well as after birth'. The Declaration then proceeds to enunciate a set of ten principles dealing with the rights of the child, which include:

- The child shall in all circumstances be among the first to receive protection and relief. (Principle 8).
- The child shall be protected against all forms of neglect, cruelty and exploitation. (Principle 9)
- The child shall be entitled to grow and develop in health; to this end, special care and protection shall be provided to him and to his mother, including *adequate prenatal and postnatal care.* (Principle 4)

The law of property had for centuries accepted the idea of foetal rights. A child *en ventre sa mere* can enjoy rights of inheritance from the moment of conception but not vesting in it until the child's live birth. But as Veitch and Tracey point out:

> The greatest steps have been in the law of tort where, since the acceptance of the argument in 1946 that mother and child are not one person, a majority of the U.S. jurisdictions, along with Canada, Australia, South Africa and the United Kingdom permit recovery for damage suffered by the unborn while in utero. Remedies are available where the child is born alive but dies soon afterwards, and some seventeen of the American States recognize an action by the parents of a child fatally injured in the mother's womb. And lastly some courts have held that there is no theoretical objection to an action by an injured child against his parents where their wrongful act has caused his injury. The right of the child is not only to life but to a reasonable life free from the harmful consequences of the irresponsible acts of his parents or others.[24]

Some judges have thought that a right of action for injuries such as stillbirth extended to the *parents* implies a legal personality in the unborn child. Others think it is the harm suffered by the parents which is being looked at. However, in almost every jurisdiction in which the action of a child has been accepted, there has been the demand that the child be born alive.

[24] Veitch & Tracey, 'Abortion in the Common Law World', p. 693.

19

Euthanasia

See Bibliography —
Euthanasia (p. 188), Definition of death (p. 191)

With the decline in many countries, including Australia, in the force of religious sanctions against suicide, there has been growing support for voluntary euthanasia, for a 'right to die' when life is no longer worth living to complement a right to life. The moral and legal problem becomes patently a general social problem, and not just an individual one, because those seeking death may be dependent, especially if they become totally incapacitated, on having others terminate life for them: the latter are not legally protected by the victim's desire to die. Moreover special legal and moral problems arise when death can be brought about by failure to maintain life, by switching off a life-support system, for example. There is a growing literature on this question. It is also true to say that there is considerable divergence here between the law in theory, which sees mercy killing as murder if intended to kill, and the law in action which has allowed medical doctors considerable scope to exercise judgment on when to stop preserving life.

Another problem is that of 'substituted judgment' — where the intended victim is incapable of forming or expressing a rational judgment but is presumed by those concerned with his welfare to be in a state where he finds or would find, if he could, life no longer worth living. There is much sympathy in recent years, even in the courts, for relatives who seek to 'ease the burden' of prolonging life for those so mentally or physically incapacitated that it can hardly be a pleasure to them. But critics have warned that the doctrine of substituted judgment may cloak, or involve self-deception about, the motives behind the relatives' or authorities' decision. Really, we are killing off someone who is an emotional and financial burden. We would prefer to spend money and attention on someone whose 'quality of life' and of enjoyment is higher. Some of the change in attitudes on this question, critics have suggested, mirrors a wider downgrading of the value of each individual and a contrary elevation of social considerations and social costs.

Often difficult cases in this area involve the problem whether someone is 'really dead', since a person can suffer destruction of the brain, and yet have the remainder of his body continue to function with support-machinery. On the traditional view of death — that is, the irreversible cessation of vital bodily functions, for example the action of the heart — such a person is alive. To switch off the support system is to kill. In these circumstances the temptation is to argue that when the brain is dead the person is dead, and that killing therefore does not take place. Medical science, indeed, has now revealed clearly that 'death' can and does take place in stages, and transplant techniques have made it especially important to remove organs before all vital functions have ceased.

The Deputy Chairman of the N.5 .W. Law Reform Commission, Russell Scott, has traced the development of the definition of death from the 1950s in his *The Body as Property.'* In 1957, Pope Pius XII stated an open Catholic position on the definition of death: what was to count as death was a matter for medicine and not for the Church. The law on death at this stage was vague and undefined. In 1972, in the *Richmond Brain* case[2] a Virginia jury accepted the concept of brain death. It found for doctors who had

[1] R. Scott, *The Body as Property,* Allen Lane, London, 1981.

[2] *Tucker's Administrator v. Lower* (Law & Equity Court, Richmond, Virginia) cited in ibid., pp. 151-2.

been sued for wrongful death in removing the functioning heart from a brain-dead patient for transplantation. A similar case in California in 1974 led to the California legislature giving recognition to brain death in September 1974.

In the U.K., a series of cases (from 1963) have left the definition of death as somewhat uncertain, though implicitly the law now recognises brain death as decisive. These cases have very similar fact situations: *X* is assaulted by Y and suffers brain death. Y is charged with murder and raises as a defence that he did not cause X's death, but that the doctor who turned off the support mechanisms (respirator, for example) did. In rejecting these defences, the courts have given some credence to the contention that English law recognises the crucial significance of brain death.

In Europe, brain death has been recognised as definitive. In 1978, the Council of Europe put in its model rule on transplantation: 'Death having occurred a removal may be effected even if the function of some organ other than the brain may be artificially preserved.'

The U.S. Uniform Brain Death Act 1978 says: 'For legal and medical purposes, an individual with irreversible cessation of all functioning of the brain, including the brain stem, is dead.' The Australian Law Reform Commission, in its report on transplants (1976-1977), framed a model law that recognised the concept of brain death. South Australia's Death (Definition) Act 1983 defines death as occurring when there is (a) an irreversible cessation of all function of the brain of the person; or (b) irreversible cessation of circulation of blood in the body of the person.

Criticism of the concept of brain death in the literature focuses on its tendency to elevate quality of life considerations to the neglect of sanctity of life considerations. Can one really use a condition of life criterion for purposes of defining death, Leonard Weber has asked, and still insist that every life is of equal value regardless of the condition? Does not one statement cancel out the other in the actual ethical climate in which today's debate is taking place?

The editor of *California Medicine* has openly embraced these implications. In 'A New Ethic for Medicine and Society', he wrote:

> The traditional Western ethic has always placed great emphasis on the intrinsic worth and equal value of every human life regardless of its stage or condition . . . This traditional ethic is still clearly dominant, but there is much to suggest that *it is being eroded* at its core and may eventually be abandoned . . . there is a *quite new emphasis* on something which is beginning to be called the quality of life . . . It will become *necessary and acceptable* to place relative rather than absolute values on such things as human lives, the use of scarce resources and the various elements which are to make up the quality of life or of living which is to be sought . . .[3]

The new definition of death is an element in this development. The new definition effectively settles the problem of euthanasia for the comatose patient who is 'brain dead'. Such a patient is dead, support systems may be removed, and that is an end of the matter. But the definition does not settle the issue for other comatose patients, whose brains still function to some extent.

In the case *In re Quinlan*[4] the New Jersey Supreme Court had to consider the situation where there was a comatose patient (Karen Quinlan) incapable of making a decision for herself, and whose prospects of coming out of the coma were virtually nil. The court had to decide firstly whether this patient had a 'right to die', or at least a right to relinquish what was considered to be life-supporting treatment. And then, who was to exercise this right for her since she could not do so herself? On the first question, there is no explicit mention of a right to die in any major rights documents, including the Bill of Rights in the U.S. Constitution. The court found what amounted to a 'right to die' in the right of *privacy*, guaranteed by the Fourteenth Amendment. Hughes, CJ drew a parallel

[3] Editorial, *California Medicine*, September 1970, 67-8, italics supplied.
[4] (1976) 70 *New Jersey Reporter* 10; 355 *Atlantic Reporter, second series*, 647.

with *Roe v. Wade: '* . . . presumably this right [of privacy] is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions'. And on the second question, her guardian had a right to act on Quinlan's behalf to make this decision; if the guardian were not granted such a right, Karen Quinlan's right would be effectively destroyed. The court decision resulted in the life-support system being switched off, but Karen failed to die.

Similar cases are becoming common and the trend in court decisions, especially in the U.S., is to show sympathy for requests to terminate a 'minimal' life. Critics, however, have stressed that the doctrine of substituted judgment has gone a long way toward obliterating the distinction between voluntary and involuntary euthanasia. It has weakened the legal protection of life. It makes it possible, with court approval, to withdraw life support systems from a demented person needing kidney dialysis and from an elderly person with severe mental retardation who has leukemia. It could easily be extended to babies with Downs' syndrome accompanied by other life-threatening physical problems, or to a *spina bifida* baby born into desperate social conditions. The U.S. courts, so far, have insisted that the judgment whether life is worth living, where the sufferer is incompetent, must not be made on the general standard of the reasonable man, but by putting oneself in the specific place of the sufferer. Critics see this safeguard as nowhere near strong enough.

The area is one in which discussion is likely to grow and in which legislation will be needed. In European Civil Law, or in many national variants of it, there is recognition of a lesser form of culpable homicide, homicide upon request. In Roman, Canon and Common Law, the consent or request of the victim is irrelevant to the charge of homicide in its various forms. There are those supporters of 'situational ethics', who believe with Joseph Fletcher[5] that general principles, including the erection of rights, are not the best way to approach the complex factors and features of moral situations, especially such situations as raise the question of terminating a person's life. The rigidity implied in the rights approach is seen as especially unsuitable to such problems as euthanasia and abortion, where the special features of each case can be of vital importance. A legalistic or rights-based approach, such critics argue, can lead doctors or relatives to act with vigour, haste and even moralistic self-righteousness as a way of remaining outside the situation, of not sharing the patient's terrors, fears and uncertainty.

The general conclusion in the literature is that the law is inadequate, but there is no agreement over what is needed to solve the problem. As far as voluntary euthanasia is concerned, California in 1977 introduced the Natural Death Act. Other states have since followed this lead. That Act allows a person to sign a direction that would be effective to prevent the use of life-sustaining procedures in the event that he or she is dying. A. B. Downing has proposed a bill extending the right to ask for death more widely.[6] Downing's proposal includes 'serious physical illness or impairment reasonably thought in my case to be incurable and expected to cause me severe distress or render me incapable of rational existence'. Australia and the U.K. have not, so far, shown signs of formally legalising euthanasia. Any such attempt would raise further questions about the effectiveness and defeasibility of the proclaimed right to life.

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[5] See, for example, B. Barb & J. Fletcher, 'The Right to Die', (1968) *Atlantic*, 59-64.

[6] A. B. Downing, *Euthanasia and the Right to Death*, Peter Owen, London, 1969, Appendix.

20

Freedom of expression

See Bibliography
Privacy (p. 205), Freedom of expression (p. 221), Freedom of information (p. 237); Incitement to racial hatred and prejudice (p. 284)

Article 19 of the International Covenant on Civil and Political Rights provides:

1. [Guarantee of freedom of opinion]
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order *(ordre publique),* or of public health or morals.

This guarantee of the freedom of expression seems to be more hedged about with qualifications than the current position in Australia and U.K. Common Law, let alone in the U.S., where the constitutional guarantee, as interpreted by the courts, is much stronger and more fully developed. The Covenant has been signed by nations notorious for the ubiquitous censorship of all opinions not approved by their governments and ruling parties. Nevertheless, the literature suggests that the qualified nature of the Covenant provisions reflects a growing trend, all over the world, *away from* the classical liberal elevation of freedom of expression for the individual. That freedom was based on the belief that readers and hearers (especially readers) are predominately mature adults capable of forming their own conclusions and of resisting, or seeing through, the blandishments of the liar and the demagogue. The family was taken to control the exposure of the immature. Social sentiment, reflected in and encouraged by many of the formulations in the UN declarations and covenants, now looks more and more to the state to protect the threatened and to use education and the media to inculcate social responsibility, good habits and the appropriate moral outlook.

The demand for social control has been strengthened by various factors. There is the fact that the electronic media have not only rendered print far less significant but act more directly and often with subliminal persuasiveness, allowing little time for reflection, analysis or critical detachment. The ownership and control of media have tended, in Australia, the U.S. and the U.K., to become increasingly concentrated in a few hands, while social sentiment and the increasing education, articulateness and cultural variety of the general public have led to increasing demands for public access and public participation. The result has been summed up by Anthony Smith:

> We are gradually evolving in the late twentieth century an altered view of the place of communication and of cultural activity in general within society. Whereas traditionally these were seen as a congeries of essentially private acts, over which governmental processes were to have no authority, we are coming to realize that the whole panoply of communication media are inexorably public institutions dependent upon decisions taken by or on behalf of society as a whole.'

'Anthony Smith, *The Politics of Information: Problems of Policy in Modern Media,* Macmillan, London, 1978, p. xii.

This is reflected in the Unescn concern in recent years, with a 'balanced' flow of information throughout the world. The Sydney political scientist, Professor Henry Mayer, in his studies of the Press in Australia, and in an address to the Academy of Social Sciences in Australia[2], has argued that the role of quality newspapers will steadily decline and that the very nature of the more sensational 'popular' newspapers will make demands for freedom of the press on the traditional grounds of contribution to the development of knowledge, informed opinion and capacity for moral judgment less and less plausible. Public pressure on all the media that amounts to censorship or at the least to an invitation to self-censorship is seen by almost all writers as growing in leaps and bounds. Race Relations and Anti-Discrimination Acts invite examination of the content of expression on the media to see whether it is racist, discriminatory, sexist or in other ways out of step with proclaimed social norms and goals. A widespread belief that the media, and the word itself, represent above all social power leads to demands that the media and expression in the media be controlled or at least supervised. The belief that television influences children especially, in a way that the printed word does not, strengthens the demand for control to protect the population. So for instance does the belief that public health is a concern of overriding importance.

These new tends are recognised by writers to stand in some tension with and to complicate the traditional elevation of free speech and opinion. In Western democracies such as Australia, the traditional incursions by the state throughout the censorship of indecent or obscene matter, through censorship on the ground of national security, through censorship on the ground that words may lead to a disturbance of the peace, or that they may amount to contempt of court or parliament, still attract attention. But so does concern over alleged 'bias' in the media, over-emphasis on horror, crime and violence, or the alleged serving of commercial interest at the expense of public and social goals and welfare.

Jerome Barron, in his *Public Rights and the Private Press,* contrasts England and in the U.S. in these terms:

> the English experience shows a concern for the individual in conflicts between the individual and the press to which both American law and press are increasingly insensitive. On the other hand, the English experience shows a preference for government in conflicts between the media and government which is often inimical to freedom of expression.[3]

More generally, in England, freedom of expression and information is seen as enabling the individual to pursue his rights against the administration. In the U.S., it is more often seen as a way of bringing out into the open the discussion of national policies and group interests. Australia is moving, in many respects, from an English to an American attitude in these matters, though the courts move more slowly in this respect than politicians, media personalities and law reformers.

These trends apart, freedom of expression in Australia is still governed by legislation and judicial decisions that are best understood in the context of Common Law principles and traditions. Neither the legislation nor the decisions so far, outside the area of discrimination, racism, sexism, etc., show the influence of the UN Covenant, which is indeed much looser than our own provisions. The same may be said of the question of religious belief, worship, observance, practice and teaching, protected under Article 18(1) of the International Covenant on Civil and Political Rights. Important changes in the legal position on all these questions are both necessary and inevitable, but they are coming through locally devised legislation and particularly through the discussions and recommendations of law reformers. Heightened interest in scrutinising governmental secrecy and national security powers, in curbing (or defying) the very wide powers of courts and parliament to define and punish contempt, in regulating ownership

[2] Henry Mayer, *Dilemmas in Mass Media Policies,* Academy of Social Sciences in Australia, Canberra, 1979.
[3] Jerome A. Barron, *Public Rights and the Private Press,* Toronto, 1981, p. 190.

of the media and the 'moral' effect they have on their audience or readers, and in protecting individuals against invasion of privacy — all tend towards legislative intervention on these matters. Such discussions undoubtedly bear on the future state of freedom of expression, communication and information in this country. So do growing legislative provisions and political demands for the suppression of statements inciting to racial hatred, sexual 'chauvinism' or war.

21

Civil disobedience

See Bibliography —

Freedom of assembly (p. 217), Freedom of expression (p. 221), Civil disobedience and symbolic speech (p. 258)

In recent times, with the growth of 'activist' protest and the emphasis on visual expression necessary for television coverage, action, including civil disobedience, has become more central than speech or writing to most civil libertarian causes. The International Covenant on Civil and Political Rights does not mention the concept of 'civil disobedience'. It has been argued that at least some acts of 'civil disobedience' are protected by the guarantee of freedom of thought, conscience, religion and expression. Acts of 'civil disobedience', indeed, have been proclaimed to constitute 'symbolic speech'. It has also been argued that exercise of the rights to freedom of expression, thought, conscience and religion implies the 'right' of a person to breach any law which is incompatible with these rights. If this is so, it will be necessary practically and theoretically to distinguish between 'protected' and 'unprotected' acts of disobedience. The literature, and those who commit acts of civil disobedience themselves, normally lay great stress on the public and open nature of the breach, its aim of bringing about social and legal change, and the willingness of the offender to bring punishment upon himself or herself in order to have a wrong righted.

The U.S. civil rights movement of the 1960s and the Australian and American protests over involvement in the Vietnam war inspired a voluminous literature on the concept of and the possible justifications for acts of civil disobedience. Whilst most writers emphasise the need for clarifying the concept of civil disobedience, their writings on the subject have not resulted in a generally agreed definition! Indeed, despite its popular use, many definitions of the term 'civil disobedience' are contradictory and mutually exclusive. Nevertheless, it is possible to establish minimal requirements without which an act could hardly qualify as civil disobedience. Civil disobedience must involve a deliberate violation of a valid law and the violation must be based on the belief that that law is incompatible with 'higher' principles, for example, moral or religious dictates, or political or social ideas. The borderline case is where people defy a law that affects them directly and materially, treating themselves as a case of a wider social injustice.

Take the first requirement that civil disobedience involves deliberate violation of valid law. A law against which there is civil disobedience may in fact, on judicial examination, often resulting from the disobedience, prove to be invalid — unconstitutional, for example — and be struck down. The violator's reasons for civil disobedience may coincide with, or rest upon, the grounds for holding the law invalid. They may not. The legal position, however, is that a law is presumed valid until it is held invalid. Segregation in the U.S. has been held unconstitutional and the civil rights leaders who defied laws imposing segregation have been, in a sense, legally and not only morally vindicated. They were properly convicted of breaches at the time, and their sentences were equally properly quashed when the law was struck down. At the time that they defied these laws, they were committing an offence and engaging in civil disobedience.

'The differing views of three academic writers, Carl Cohen, Harrop A. Freeman and Ernest van den Haag, writing in the middle 60s, can be found in 'Civil Disobedience and the Law', (1966) 21 *Rutgers Law Review 1.*

The requirement that the act of civil disobedience be done for 'higher', that is, non-self-interested reasons, raises obvious problems of fact and definition. Self-interest and the proclamation of principle can coincide and often do. There are no judicial determinations on this thorny problem since the law does not recognise, for the purpose of definition of offences, a special class of offences committed as civil disobedience.

The question whether acts of civil disobedience should always be non-violent in character is debated heatedly in the relevant literature. Most writers agree that civil disobedience should be non-violent, but it has been argued that there are instances of social injustice that can only be remedied through violent protest. Nor is the insistence of protesters that they are 'passive' resisters and the police violent aggressors always convincing — though most civil disobedience puts great stress on non-violence.

Writers make a distinction between direct and indirect forms of disobedience. 'Direct disobedience' involves breach of the same law which is deemed to be incompatible with 'higher' principles. Indirect disobedience involves the violation of a (valid) law which is not related to the object of protest. This latter form, 'making oneself a nuisance' to draw attention to a cause, has become increasingly common in the 'sit-in', the picket, etc. Dealing with it, without appearing 'repressive', has been one of the factors that has led to increased reliance on discussion and mediation, rather than the exercise of legally justified power.

Is civil disobedience, then, protected by the guarantee of the right to freedom of thought, conscience and religion? Many scholars argue that this guarantee protects beliefs but not necessarily actions, since actions can harm the rights of others or social and public welfare. On this view, beliefs are accorded absolute protection, whereas actions may be subject to regulation. That is why protesters are anxious to present their actions as *symbolic* speech. Some actions have been considered by the U.S. Supreme Court as constituting such symbolic speech. For example, wearing in breach of an established school policy black armbands to protest against American involvement in the Vietnam war was held to be protected by the guarantee of free speech. But the breach here was of a school policy, not of a law. Courts might well find, however, that laws prohibiting at least some actions or forms of 'symbolic' speech are invalid, or that legal restraints on the holding of meetings or processions are too wide to be reasonable exercises in safeguarding a recognised interest — for example, quiet enjoyment, unimpeded flow of traffic, etc. — and therefore offend against a constitutional or legislative guarantee of freedom of speech or expression. There has been a long list of cases, many initiated by the American Civil Liberties Union, on such questions in America based on the First Amendment. The courts in America and the U.K. have rejected what has been called the 'heckler's veto' — the attempt to secure a ban of a meeting or procession as likely to cause a breach of the peace by claiming that you will be so outraged by it as to resort to violence.

The current trend in most democratic countries is to deal with civil disobedience where possible without physical and legal restraint. Ready recourse to disobedience has become a feature of our times and has been taken over by disaffected groups expressing their hostility or frustration *vis-à-vis* law-enforcing bodies in general. Here again the trend is toward discussion, mediation, 'defusing' the issue rather than ready invoking of the law.

Critics of civil disobedience and of these trends emphasise that civil disobedience is resorted to because the group does not believe it can carry a majority in society with it. They argue that it and the television medium have helped to destroy the role of argument in social conflict, to elevate sincerity and strength of feeling in place of rationality and making out a case. Supporters believe that civil disobedience is made necessary by the

requirement that the act of civil disobedience be done for 'higher', that is, non-self-interested reasons, raises obvious problems of fact and definition. Self-interest and the proclamation of principle can coincide and often do. There are no judicial determinations on this thorny problem since the law does not recognise, for the purpose of definition of offences, a special class of offences committed as civil disobedience.

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