# A RADICAL APPROACH TO THE ELIMINATION OF RACIAL DISCRIMINATION

BY BRIAN KELSEY

Ten years ago, the General Assembly of the United Nations unanimously adopted the International Convention on the Elimination of All Forms of Racial Discrimination.[1] The Convention was a practical expression of the principles of the United Nations Charter[2] and the Universal Declaration of Human Rights[3] and a reflection of the desire of the State parties to the Convention to "implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination."[4]

At the time, the representative of France said that no convention of equal scope or significance had ever been adopted before,[5] and one authoritative commentator has

---

1. Hereafter referred to as "the Convention". The Convention was adopted by the General Assembly on 21 December 1965. The vote in the General Assembly was 106 votes to none, with one abstention, Mexico (General Assembly Resolution 2106A (XX), UN Doc. A/PV. 1406; Mexico later announced an affirmative vote in favour of the Convention (UN Doc. A/PV. 1408). The Convention was opened for signature at New York on 7 March 1966 (not on 21 December 1965, as stated in the preamble to the Racial Discrimination Act 1975 (Aust.). In accordance with Article 19, the Convention entered into force on 4 January 1969, the thirtieth day after the date of the deposit with the Secretary General of the twenty-seventh instrument of ratification or accession. The procedures for entry into force were completed on 13 March 1969, after expiry of the 90-day period referred to in Article 20.1. The Convention will enter into force in Australia on the thirtieth day after deposit of this country's instrument of ratification or accession (Article 19.2). For a detailed history of the Convention, see N. Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination, A Commentary* (1970); for a general introduction to the more important substantive provisions, see Schwelb, "The International Convention on the Elimination of all Forms of Racial Discrimination" (1966) 15 Int. and Comp. L.Q. 996.

2. The clear connection between the protection of human rights and the preservation of peace is recognised in the first paragraph of the preamble to the U.N. Charter, which affirms a determination "[t]o save succeeding generations from the scourge of war" and "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". See also, Arts 55 and 56 of the U.N. Charter. The preamble to the Convention opens with the affirmation that "the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion".

3. The importance to world security of the protection of human rights appears in the first paragraph of the preamble to the Universal Declaration: "recognition of the inherent dignity of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .", (General Assembly Resolution 217A (III), 10 December 1948). The preamble to the Convention recites that "the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin".

4. Preamble to the Convention. The United Nations Declaration on the Elimination of all Forms of Racial Discrimination has been adopted by the General Assembly on 20 November 1963 (General Assembly Resolution 1904 (XVIII)).

5. UN Doc. A/C 3/SR 1345, quoted in Schwelb, note 1 *supra*, 996.

described it as representing "the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races."[6] More soberly, the Convention has been discerned as an element in facilitating a radical reappraisal of some of our more basic cultural postulates, but as making "no attempt to attack discrimination at its roots," that "indeed, the thrust of the entire Convention is towards the symptoms rather than the etiology of racism."[7]

The purpose of this article is to assert the essentially revolutionary nature of the concepts expressed in the Convention and to analyse the implications for Australia of implementation of those concepts. In particular, it will be argued that the radical potential of these concepts remains unrealized and unexpressed, and that the Racial Discrimination Act 1975 (Aust.) passed by Parliament as a measure for speedily eliminating racial discrimination in all its forms and manifestations and for giving effect to the Convention, exhibits no evidence of the required reappraisal of basic postulates, cultural or legal, and in fact makes no *effective* provision for implementation of the Convention in Australia or for satisfaction of the obligations it imposes.

*Obligations under the Convention*

The philosophical underpinning of the substantive aspects of the Convention is expressed in its preamble. Implicit in the preamble is the conviction of the State parties that racial discrimination exists not as an issue to be resolved in isolation but as part of a series of worldwide phenomena of oppression of both international and domestic significance. The basic posulate is the foundation of the Charter of the United Nations on the "principles of the dignity and equality inherent in all human beings." The denial of these principles in all its associated manifestations is condemned:

(a) "Colonialism and all practices of segregation and discrimination associated therewith",
(b) "any doctrine of superiority based on racial differentiation",
(c) "governmental policies based on racial superiority or hatred, such as policies of *apartheid,* segregation or separation", and
(d) "racial discrimination in all its forms and manifestations".

What has been described as "the nexus between human rights and peace"[8] is clearly recognized, for, the preamble reaffirms:

> that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State.

---

6. Schwelb, note 1 *supra*, 1057.
7. Reisman, "Responses to Crimes of Discrimination and Genocide: an Apppraisal of the Convention on the Elimination of Racial Discrimination" (1971) 1 Denver J. of Int. L. and Pol. 29,64.
8. Reisman, *id.*, 39.

The elimination of the tensions created by racial conflict is a necessary precondition of peace and can be achieved only within an international and internal order in which individual and group autonomy are not only recognized but also observed and protected.

> Recent history has emphasized that no nation, no region, no city can flourish, perhaps even survive, unless it fashions an equitable solution to racial conflict and, more generally, to discrimination. Because the technological revolution has shrunk the world, the entire community of man is presented with the same challenge. Discrimination is a matter of international concern; its elimination is intertwined with the prospects of international survival.[9]

The substantive provisions of the Convention are contained in Part I (Articles 1 to 7). Article 1 defines "racial discrimination",[10] and Articles 2 to 7 define clearly the substantive obligations of the signatory states. There are four basic undertakings that may be extracted from these six articles. Firstly, an undertaking to eliminate all racial discrimination by governments and public authorities, and by organizations and individuals within the state;[11] secondly, an obligation to amend domestic laws to eliminate racial discrimination and hatred and to secure equality before the law;[12] thirdly, an obligation to provide effective protection and remedies against acts of racial discrimination;[13] and, finally, the undertaking of programmes of social, cultural and educational development.[14]

A serious and effectual fulfilment of these obligations requires both an intense analysis of the underlying causes of racial discrimination and a willingness to question the basic tenets of the social framework in which it is manifested. It demands also a willingness to develop new legal tools for the resolution of racial conflicts, as existing laws, procedures and institutions are so often the means by which established inequalities and social patterns of discrimination are preserved. Mere tinkering with the obvious and isolated manifestations or prejudice will achieve little. Rather, it may serve only to reinforce existing patterns of discrimination and represent a trivialization of the principles of autonomy, diversity and freedom to which the Convention commits Australia as part of the world community. An analysis of the Convention and the ideals it formulates and of the hesitant steps so far taken in Australia in asserted

---

9. Reisman, *id.*, 63.
10. Art. 1 provides:
1. In this Convention the term "racial discrimination" shall mean any 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 human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Unless otherwise indicated, the words are used in this article with the same meaning. As is argued later (*infra* p.83), the definition is sufficiently broad to include 'racialism', or a practice or policy of discrimination.

11. Arts 2.1(a) and (b); 3; 4(c).
12. Arts 2.1 (c) and (d); 4 (a) and (b); 5.
13. Art. 6.
14. Arts 1.4; 2.1 (e); 2.2; 7.

realization of those ideals will demonstrate the futility, in this context, of adherence to traditional legal thinking and conventional structural solutions.

The first of the stated obligations under the Convention relates to actions of governmental authorities and is contained in Articles 2.1(a)-(b) and 4(c):

> 2.1 States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
>
> (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
>
> . . .
>
> 4. States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

In addition, under Article 3,

> States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

There are two essential aspects to these Articles: an obligation to prohibit discrimination within the instrumentalities of government at all levels, and an undertaking "not to sponsor, defend or support racial discrimination by any persons or organisations". Both aspects have far-reaching implications. For example, constitutional limitations under the Australian federal structure may make it difficult to ensure that all public authorities and public institutions, national and local, comply with the obligations under Article 2 and the similar obligations under Article 4(c). The State of Queensland is a case in point. For the purposes of international law, the States are "territories under Australia's jurisdiction" within the meaning of Article 3, and it has been clearly demonstrated that the Aborigines Act 1971 (Qld) and the Torres Strait Islanders Act 1971 (Qld) contain a series of major and minor violations of the fundamental human rights as formulated in the Universal Declaration of Human

Rights.[15] The "federal clause" doctrine of treaty laws is excluded by Article 2.1(a),[16] with the result that within a federated state the federal government is responsible under international law for violations by the States of the rights guaranteed by the Convention. To the extent therefore that the legislative violations in Queensland of the Universal Declaration are based on "distinction as to race", the Government of Australia may well be responsible in international law and be subject to the remedies provided in later articles of the Convention.[17]

A further issue is raised by the undertaking in Article 2.1(b) "not to sponsor, defend or support racial discrimination by any persons or organizations". This is obviously intended to apply to organizations of a private nature, as government authorities and institutions are already covered in Article 2.1(a). Financial support would appear to come within the prohibition, so that the tax deductions or exemptions hitherto granted to an organization which practised, advocated or even permitted discrimination should cease. A religious or charitable body would be deprived of tax benefits; similarly, donations to these bodies would no longer be tax deductible. Subsidies would be withdrawn from businesses or corporations operating discriminatory employment practices, grants withheld from educational institutions effecting discriminatory admissions policies, and funds for building or land development cut off from construction companies. The potential for the exercise of government sanctions in these terms is considerable, particularly when viewed in the light of the almost unlimited scope of the political, civil, economic, social and cultural rights guaranteed by Article 5.[18]

As compliance with the three remaining substantive obligations under the

---

15. See Nettheim, *Out Lawed: Queesland's Aborigines and Torres Strait Islanders and the Rule of Law* (1973).

16. See Vienna Convention on the Law of Treaties, Art. 17; A/conf. 39/27, 23 May 1969.

17. For the procedural and jurisdictional aspects of securing adherence to the standards imposed by the Convention, see particularly: Art. 11, which enables *any* state party which considers that another state party is not giving effect to the provisions of the Convention to refer the matter to the Committee on the Elimination of Racial Discrimination established under Art. 8; Art. 14, under which a state party may recognize the competence of the Committee to hear petitions from individuals within its jurisdiction who claim to be victims of discrimination; and Art. 22, which provides for disputes between state parties under the Convention which are not settled by negotiation or by the procedures provided for in the Convention, to be referred to the Convention, to be referred to the International Court of Justice for decision. On enforcement of the Convention generally, see Newman, "The New International Tribunal" (1968) 56 Calf. L. Rev. 1559, and Reisman, "The Enforcement of International Judgements" (1969) 63 Am. J. Int. L. 1.

18. The rights enumerated in Art. 5 are based on, but are not identical with those set out in the Universal Declaration. Of particular relevance to the text are those listed in sub-paragraph (e) of Art 5:

(e) Economic, Social and cultural rights, in particular:
  (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
  (ii) The right to form and join trade unions;
  (iii) The right to housing;
  (iv) The right to public health, medical care, social security and social services;
  (v) The right to education and training;
  (vi) The right to equal participation in cultural activities;

Convention is sought to be effected by the Racial Discrimination Act they will be dealt with in that context. Firstly, however, I shall deal with the extent to which the Convention has so far been implemented within Australia.

*Legislation since 1966*

Apart from moves to eliminate the discriminatory aspects of Australian immigration policy[19] and recommendations for the removal of some of the disabilities and disqualifications affecting persons who are not Australian citizens or British subjects,[20] the most significant initiatives since 1966 have been in relation to the advancement of the Aborigines.

At the Commonwealth level, these initiatives have been directed towards increased Federal responsibility.[21] The initiatives have partly been financial, with the provision of annual grants to the States.[22] In other fields, legislation has been passed enabling Federal-State arrangements with respect to Aboriginal affairs, in particular allowing for an interchange of officers between the Australian and State Public Services, and providing a framework within which the Australian Government can assume State responsibilities relating to Aboriginal affairs.[23] On the financial level, the Australian Government has established an Aboriginal Loans Commission with the dual function of enabling Aborigines to engage in business enterprises "that are likely to become, or continue to be, successful", and of making loans for housing and other specified personal purposes.[24] Also, legislation has recently been passed by Parliament[25] for the constitution of an Aboriginal Land Fund Commission which may make grants to an Aboriginal corporation[26] or to an Aboriginal land trust[27] to enable the acquisition of land to be occupied by Aborigines.

---

19. *E.g.*, the extension of the assisted passage scheme to cover non-Europeans and part-Europeans, the adoption of a uniform residence period of 3 years for applicants for Australian citizenship (Australian Citizenship Act 1973 (Aust.), s. 8, the removal of discriminatory entry requirements for citizens or permanent residents of New Zealand other than Europeans or mainland Maoris, and the adoption of a uniform policy towards all foreign students whose expenses have been met privately and who apply for permanent residence after acquiring their qualifications. See Rivett, *Non-White Immigration: A Turning Point?*, Australia's Neighbours (Australian Institute of International Affairs, Sept.-Oct. 1973).

20. See the Interim Report of the Committee on Community Relations to the Immigration Advisory Council (Aug. 1974) 15-22.

21. This has resulted from the enactment of the Constitution Alteration (Aboriginals) Act 1967 (Aust.) which removed the exception of "the Aboriginal race in any State" from the power of the Commonwealth Parliament to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws" (Constitution. s. 51 (xxvi.)).

22. States Grants (Aboriginal Advancement) Acts, No. 155 of 1968; Nos 77 and 78 of 1969; No. 116 of 1970; No. 130 of 1971; No. 99 of 1972; Nos 22 and 168 of 1973; No. 104 to 1974.

23. Aboriginal Affairs (arrangements with the States) Act 1973 (Aust.).

24. Aboriginal Loans Commission Act 1974 (Aust.), which repeals, and replaces in an extended form, the Aboriginal Enterprises (Assistance) Act 1968 (Aust.).

25. Aboriginal Land Fund Act 1974 (Aust.).

26. Defined by s. 3 of the Act as "a body corporate of which all the members for the time being are persons as to whom the Minister is satisfied that they are members of a community of Aboriginals."

27. Defined by s. 3 of the Act as "a body corporate established by a law of Australia or of a State or Territory and having the function of providing Aboriginals with interests in land or assisting Aboriginals to acquire interests in land."

No doubt, these moves are well-intentioned and are an attempt to implement a policy in itself praiseworthy.[28] Underlying them, however, is a belief that discrimination against Aborigines is a "social problem" which can be "solved" by the appropriate forms of bureaucratic management and the provision of the necessary amounts of money. A similar assumption is implicit in general governmental policy towards discrimination, including the Racial Discrimination Act itself. The assumption is ill-founded. Discrimination is not a mere growth upon the body politic which can be neatly removed by skilful legislative surgery. Rather, it is a symptom of an ill that is within that body, a manifestation of a state of ill-health which requires treatment of the whole. What is required is a recognition of the need for wholesale transformations of society itself, flowing from fundamental changes in our conception of the values upon which it rests. Thus, in the particular context of the Aboriginal race, it is crucial to the restoration of Aboriginal pride, dignity and self-reliance that their self-image, self-integrity and independence be elevated.[29] Benevolent paternalism is as destructive of these values as coercive control. The Aborigines still have no control over their future or over the policies that determine that future; their role remains a subordinate one of advising and participating in statutory bodies which themselves are subject ultimately to government direction.

Thus, under the Aboriginal Loans Commission Act 1974 (Aust.) the Aboriginal Enterprises Fund and the Aboriginal Housing and Personal Loans Fund are administered by a Commission of five members consisting of a chairman and four other members, of whom only two are required by statute to be Aborigines. The Commission is obliged to perform its functions in accordance with general directions given by the Minister of a Department which lacks any effective Aboriginal representation.[30]

The same point may be made about State legislation in relation to Aborigines since 1966. In New South Wales, the Aborigines Advisory Council is now composed entirely of Aborigines,[31] but its functions are limited to reporting to the Minister on matters referred to it by him and to advising the Minister on matters relating to Aborigines.[32] Moreover, money in the Aborigines Assistance Fund may be applied to the "benefit" of Aborigines as the Minister perceives it and as he directs.[33] In South Australia,

---

28. A policy formulated by Prime Minister Gorton (and continued by successive Commonwealth Governments): "Our basic aim is to give our *[sic]* aborigines the opportunity to be self-supporting, and to end the mentality of the hand-out. We want them to choose for themselves their own future, and to regain their initiative and independence" (*Kunmanggur*, No. 3 p. 1, Dec. 1969, Office of Aboriginal Affairs, Canberra).

29. See Lippman, *The Aim is Understanding* (1973), and Tatz, "Aborigines : Law and Political Development" in F. S. Stevens (ed.) *Racism, The Australian Experience* (1972) Vol. 2, 97.

30. Aboriginal Loans Commission Act 1974 (Aust.) ss 7 (2), 10, 18 and 23. The Aboriginal Land Fund Act 1974 (Aust.) provides for the Aboriginal Land Fund Commission to be similarly constituted (s. 8). and similar powers of direction are sought to be vested in the Minister s. 5 (2)).

31. Aborigines Act 1969 (N.S.W.), s. 8 (1), as amended by the Aborigines (Amendment) Act 1973, s. 4 (1).

32. *Id.*, s. 9.

33. *Id.*, s. 20 (3).

programmes for the "welfare and development" of Aborigines are under the exclusive control of the Minister for Community welfare.[34]

The most elaborate administrative machinery is that which exists in Western Australia. The Aboriginal Affairs Planning Authority Act 1972 (W.A.) creates both an Aboriginal Advisory Council which consists of persons of Aboriginal descent chosen by and from persons of Aboriginal descent living in Western Australia,[35] and an Aboriginal Lands Trust which is composed of persons of Aboriginal descent appointed by the Governor of the State.[36] Although the Trust has a degree of autonomy,[37] the functions of the Council are, as the name implies, purely advisory.[38] Responsibility for the administration of the Act is vested in the Minister;[39] he is required to have regard to the recommendations of the Advisory Council, the Trust, the Authority and the Aboriginal Affairs Co-ordinating Committee, but is not bound to give effect to any recommendation and may give any of those bodies (after consulting with them) specific or general directions as to the exercise of their functions.[40]

In Victoria in 1967 there was established[41] a Ministry for Aboriginal Affairs and an Aboriginal Affairs Advisory Council. The Council consists of the Director of Aboriginal Affairs and twelve other members: six members are appointed by the Minister and have special knowledge of Aborigines or have experience in other fields of special value to the Council, and six are Aborigines elected in accordance with regulations made under the Act. The functions of the Council are advisory only.[42]

The Queensland legislation of 1971[43] is well-known and has been extensively criticized elsewhere.[44] Suffice it to note here that the Aborigines are limited to an advisory role, through the Aboriginal Advisory Council,[45] and that even this role does not extend to any involvement in the administration of the Aborigines' Welfare Fund, which is established "for the general benefit of Aborigines", yet which is administered and controlled by one man, the Director of Aboriginal and Island Affairs.[46]

---

34. Community Welfare Act 1972 (S.A.), Pt V.
35. S. 18.
36. S. 20.
37. See s. 23.
38. The Council is established "for the purpose of advising the [Aboriginal Affairs Planning Authority, established under s. 8 of the Native Welfare Act 1963 (W.A.)] on matters relating to interests and well-being of persons of Aboriginal descent" (s. 18 (1)).
39. S. 7 (1).
40. S. 7 (1), (2).
41. By the Aboriginal Affairs Act 1967 (Vic.).
42. *Id.*, s. 10.
43. The Aborigines Act 1971 (Qld) and the Torres Strait Islanders Act 1971 (Qld).
44. See particularly Nettheim, note 15 *supra*. Some of the most discriminatory aspects of the Queensland legislation are overriden by the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Aust.).
45. Aborigines Act 1971 (Qld) s. 33. By contrast, the Torres Strait Islanders are granted a certain amount of influence – control even – over their affairs through Island Group Representatives and the Island Advisory Council; see Nettheim. note 15 *supra* 48 *et seq.*
46. For a full description of the administration of the Fund, see Nettheim, note 15 *supra* 58 *et seq.*

The implications of the consequent lack of control evident in all the legislation referred to are not merely financial. From the time that the European set foot on Australian soil, the identity of the Aborigine and the nature of his customs and traditions have been defined for him by his conquerors.[47] Although the nature of that identity and the validity of his culture have been subject to successive redefinitions, the legitimacy thereof is dependent solely upon an institutional and value structure which to him is foreign. His identity remains derivative, imposed upon him by an alien culture of which the legal system is to him the paramount instrument.

The recent legislative changes constitute a re-definition, but they represent only a changed illumination of the white man's experience of Aboriginal identity,[48] manifested in a willingness of the white man to allocate financial resources towards the channelling of Aboriginal energy into forms of enterprise established and sanctioned by the white man. The fact that the Aboriginal state is now perceived by society as one of "intelligent parasitism"[49] rather than of enforced wardship does not alter the fact that Aboriginal identity[50] is defined for him by others and that the expression thereof is financed through instrumentalities in which he merely participates but which he does not control.

If there is a failure in the legislative policies of the States to understand and deal with the root causes of discrimination against Aborigines, even more is there a failure to recognize that a general problem of racial discrimination exists. South Australia alone has made any attempt to deal with the wider issue, having sought to implement the principles of the Convention by enacting the Prohibition of Discrimination Act

---

47. The proposition that the Australian colonies fell into the category of settled or occupied territories, as opposed to ones acquired by conquest of cession is clearly one of law only: *Cooper* v. *Stuart* (1889) 14 App. Cas. 286 (P.C.). In *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 F.L.R. 141 (the *Gove Land Rights* case) Mr Woodward's contention on behalf of the plaintiffs that the Privy Council's conclusion was historically inaccurate, particularly in the light of modern anthropoligical knowledge, was impliedly accepted by Blackburn J.: His Honour, although constrained to regard the authority of *Cooper* v. *Stuart* binding as a matter of law, found the evidence before him to establish Aboriginal rules and customs as "a subtle and elaborate system highly adapted to the country in which the people led their lives, [providing] a stable order of society and ... remarkably free from the vagaries of personal whim or influence", and felt compelled to recognize [that] system revealed by the evidence as a system of law" *id.*, 267-268).

48. It may be that the degree of changed illumination is marginal only, and that the revisions in White conduct are a result of changed views of desirable "treatment" rather than of deeper understanding. For it remains true that "the Aborigines' position in anthropological literature and the world's image generally is that of 'primitive' or 'stone age' man who has been unsuccessful in identifying with modern Western society" (Cawte, "Racial Prejudice and Aboriginal Adjustment: the Social Psychiatric View" in F. S. Stevens (ed.) *Racism, the Australian Experience* (1972) Vol. 2, 45). This image is in turn a mystification of the destruction of Aboriginal identity wrought by White Society; only a 'revolution in perception' (as Marcuse describes it) of the real causes of that destruction will enable both the oppressor and the oppressed to free themselves of the burdens of their past, demystify it, and experience each other on a basis of mutuality (see H. Marcuse, *An Essay on Liberation* (1969), and R. D. Laing, *The Politics of Experience* (1967), ch. 3, "The Mystification of Experience").

49. See A. P. Elkin, *The Australian Aborigines: how to understand them* (4th ed., 1967), *The Australian Aborigines* (1967).

50. As to the role of the law in the 'definition' of a group, see Tatz, note 29 *supra*, 97.

1966-1970 (S.A.).[51] This Act, however, is limited in scope and definition, and is tame and deficient in the remedies it provides. It does not prohibit racial discrimination as such, as its title implies, but makes unlawful certain specific acts; in fact, apart from the title, the word "discrimination" does not appear in the Act at all. Any proceedings under the Act must be taken in courts of criminal jurisdiction, and then only upon the certificate of the Attorney-General. The maximum fine for an offence under the Act is $200. The certificate has been granted on four occasions, and there has been one conviction recorded.[52]

The legislation can at best be described as rudimentary. In its reliance upon criminal sanctions, it ignores the accumulated experience of all the common law jurisdictions that have enacted anti-discrimination legislation. That experience has clearly shown that because of the difficulties inherent in establishing a case beyond a reasonable doubt, few prosecutions are brought, that criminal proceedings are inconsistent with a desire to conciliate and educate, that they are more likely to harden attitudes and exacerbate prejudice, and that they do nothing to correct the harm to the 'victim' or compensate him for the violation of his rights.[53] My criticisms of the Commonwealth Racial Discrimination Act are at once more trenchant and more fundamental, but that Act certainly does not display the lack of sophistication and complete inattention to overseas experience which are evident in the legislation of South Australia.

*Racial Discrimination Act*

The Racial Discrimination Act, as will be seen, adopts a conventional approach to the purported solution of the problems with which it seeks to deal. It first makes unlawful the doing of a number of specific acts by reason of race, colour or national or ethnic origin, and then provides for inquiries into and settlement of alleged infringements, and for civil proceedings in the courts for prescribed remedies in the

---

51. For critical analyses of the legislation, see Ligterwood, "Laws which Prohibit Discrimination" in G. Nettheim (ed.), *Aborigines, Human Rights and the Law* (1974) 23-27, and A. Collett, *The South Australian Prohibition of Discrimination Act*, a paper delivered at a research Seminar on Aborigines and the Law, held at the Centre for Research into Aboriginal Affairs at Monash University, Melbourne on 12-16 July 1974.

52. The four cases are: *Samuels* v. *Baum and Baum*, unrep.; *Fingleton* v. *Miller's Great Northern Hotel Pty Ltd* (1974) 62 S.A. Law Society Judgment Scheme, p. 111; *Fingleton* v. *Max Flannagan Pty Ltd*, 20 December 1973, unrep., and *Samuels* v. *Port Augusta Hotels Pty Ltd* [1971] S.A.S.R. 139, in which a conviction was upheld on appeal.

53. For an elaboration of the arguments against the use of criminal sanctions and of the experience in the United States and Canada, see Jowell, "The Administrative Enforcement of Laws against Discrimination" [1965] Pub. L. 119; Hartley, "Race Relations Law in Ontario" [1970] Pub. L. 20; Tarnopolsky, "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" (1968) 46 Can. B. Rev. 565, 568-9, 585; and Kushnik, "British Anti-Discrimination Legislation" in S. Abbott (ed.), *The Prevention of Racial Discrimination in Britain* (1971). The experience with criminal proceedings in Ontario is of particular significance. Three prosecutions were brought under the Fair Accommodation Practices Act (S. of O., 1954, c. 28), and each failed because the prosecution failed to establish the case beyond reasonable doubt. Criminal sanctions are retained under the Ontario Human Rights Code (S. of O., 1961-62, c. 93) which replaced that Act, but they have not been used for violations of the provisions of the Code since its enactment (see Eberlee and Hill, "The Ontario Human Rights Code" (1964) 15 U. Toronto L.J.

event that a settlement is not reached. The Act adopts a complaint-based procedure: the adjustment and resolution of *individual* cases of alleged racial discrimination.

As this article is concerned primarily with methods of implementing the obligations imposed by the Convention, the substantive provisions of the Act will be only briefly noted. They are contained in Part II of the Act and follow closely the substantive provisions of the Convention. There are two sections of broad application. The first of these, section 9, makes unlawful any act which involves a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which nullifies or impairs the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. Section 10 is equally broad, and removes from any law of Australia, a State or Territory any provision which purports to deprive persons of a particular race, colour or national or ethnic origin of the enjoyment of a right that is enjoyed by persons of another race, colour, or national or ethnic origin. The following sections, sections 11 to 15, impose specific prohibitions against racial discrimination in the provision of access to or use of public places and vehicles, in the sale or disposition of an estate or interest in land, housing and other accommodation, in the provision of goods or services to the public or any section of the public, in the joining of trade unions, and in employment.

The enforcement provisions are contained in Part III of the Act. In its early drafts, the Racial Discrimination Bill followed very closely the patterns for the enforcement of anti-discrimination legislation established elsewhere, particularly those in Great Britain and New Zealand.[54] As will appear, modifications to the Bill were effected in the Senate.[55] These modifications were accepted by the Government, and the Bill as

54. One of the early drafts for the Bill (the second) was examined extensively by Evans, "New Directions in Australian Race Relations Law" (1974) 48 A.L.J. 479. The second draft of the Bill is that which was introduced in the Senate by the then Attorney-General, Senator Murphy, on 4 April 1974. A further draft was reintroduced in the Senate on 31 October 1974, and then, in substantially the same form, by the new Attorney-General, Mr Enderby, in the House of Representatives, on 13 February 1975. The Bill was debated in the House on 6 March and 15 April 1975, and passed by the House on the latter date. The Bill was then passed by the Senate, but with substantial amendments, on 29 May 1975. These amendments were approved by the House on 3 June 1975. The main differences between the Bill in the form examined by Mr Evans and that as eventually passed by both Houses were: the substitution of the name "Commissioner for Community Relations" for "Australian Race Relations Commissioner" (cl. 19); an expansion of the Commissioner's functions, to include the promotion of the principles of the Act and research and educational programmes (cl. 20); granting to the Commissioner powers to call compulsory conferences of persons affected by a complaint of discrimination (cl. 22) and to apply to the Court for an order for the taking of evidence in a matter under investigation by the Commissioner (cl. 23); a reduction in the range of offences for which criminal procedings may be brought; and a change of name of the Race Relations Council to the Community Relations Council (cl. 31). The amendments to the Bill effected in the Senate are listed in the next footnote.

55. The following are the more important amendments (relevant to the text) effected by the Senate: the removal of the power of the Commissioner to institute civil proceedings arising out of an alleged infringement of the Act (cl. 20 (b)); removal of the Commissioner's power to apply to the Court for an order for the taking of evidence in a matter under investigation by the Commissioner (cl. 23); limiting the right to bring civil proceedings to a person aggrieved by an alleged discriminatory act (s. 25); and deletion of cl. 28 (which sought to prohibit the

enacted varies in some important respects from the original conception. Broadly, the effect of the changes is that although the overall approach to the resolution of the problem of racial discrimination remains unaltered, the enforcement provisions have been so emasculated as to make effective implementation of the obligations under the Convention highly improbable. What remains is the worst of all possible alternatives: an Act conceived in terms of bureaucratic and judicial coercion from which many of the ultimate sanctions and means of coercion have been removed. This article, however, is concerned with the substance of the basic approach of the Act rather than with the dilution in detail which the Senate saw fit to effect, and with that basic approach I am in radical disagreement. Let us firstly examine that approach.

The powers for enforcement of the substantive provisions of Racial Discrimination Act are conferred on the Commissioner for Community Relations[56] and on the courts of the States and the Territories.[57] The Commissioner is to be appointed by the Governor-General,[58] will hold office for such period not exceeding seven years as is specified in the instrument of appointment[59] and may be removed from office by the Governor-General on the ground of misbehaviour or of physical or mental incapacity.[60]

His functions and powers[61] are twofold:

(a) He may enquire into alleged infringements of the substantive provisions of the Act and endeavour to effect a settlement of the matters alleged to constitute those infringements. For the purpose of his inquiries and his endeavours to settle a matter, the Commissioner may direct the complainant, the alleged infringer, or any other person whose presence is likely to be conducive to a settlement, to attend a compulsory conference over which he or a member of his staff will preside.

(b) He shall promote an understanding and acceptance of, and compliance with the Act, and in pursuance of these aims he shall develop, conduct and foster research and educational programs and other programs for the purpose of –
   (i) combating racial discrimination and prejudices that lead to racial discrimination;
   (ii) promoting understanding, tolerance and friendship among racial and ethnic groups; and
   (iii) propagating the purposes and principles of the Convention.

In this respect, the Act follows the bureaucratic pattern already established in other

---

dissemination of ideas based on racial superiority or hatred) and that part of cl. 47, and cl. 48, which conferred jurisdiction in civil proceedings on the Superior Court of Australia; or until creation of that court, on the Australian Industrial Court.

---

56. Racial Discrimination Act, ss 19-23.
57. *Id.*, ss 24, 25 and 44.
58. *Id.*, s. 29 (1).
59. *Id.*, s. 30 (1).
60. *Id.*, s. 34 (1).
61. *Id.*, s. 20.

jurisdictions:[62] an administration agency to serve as both an investigator of complaints and an "independent and impartial conciliator."[63] The question then faced by the draftsman of anti-discrimination legislation is to determine by whom and in what manner contested issues of fact or law are to be decided and remedies applied. As already noted,[64] no-one now seriously argues that courts of criminal jurisdiction can provide the "effective protection and remedies ... against ... racial discrimination" which Article 6 of the Convention requires. The alternatives that have been tried are: determination by the same agency that has responsibility for investigation and settlement of complaints,[65] referral of the matter to an independent board of enquiry,[66] and adjudication by the established courts.[67] The most comprehensive comparative analysis of these alternatives to date is contained in the Street Report.[68] The Report listed the criticisms made of the American method, but accepted in principle "the American lesson that the determination of facts and the prescribing of remedies are best taken away from the ordinary courts."[69] The Report

62. *E.g.*, in Great Britain, the Race Relations Board (Race Relations Act 1968, Part 11), in New Zealand, the Race Relations Conciliator (Race Relations Act 1971 (N.Z.), ss 10-20); in Ontario, the Ontario Human Rights Commission (Ontario Human Rights Code 1961-62 Part II); in New York State, the State Commissioner of Human Rights (N.Y. Executive Law, para. 293); under U.S. Federal law, the Equal Employment Opportunity Commission (Civil Rights Act 1964, Title VII); in the U.S. Model Anti-Discrimination Act adopted by the Commissioners on Uniform State Laws in 1966 (for an annotated copy of which, see (1966-67) 4 Harv. J. Legis. 212), the Commission on Human Rights.

63. See the speech of the then Attorney-General, Senator Murphy, on the second reading of the Racial Discrimination Bill 1974 in the Senate, Sen. Deb., 31 October 1974, 2192-2194. It is not surprising that the bureaucratic model has been so readily adopted in Australia, for as Sol Encel points out (*Equality and Authority, a Study of Class, Status and Power in Australia* (1970) 58-60), the "bureaucratic quality of social and political organisation in Australia colours the whole pattern of social relations ... [the] enormous and pervasive insistence upon authoritative action to deal with economic and social demands is one of the pillars of the bureaucratic ascendancy in Australian life". He instances as "an area where this legal bureaucratic system operates", the industrial arbitration system, "which has grown steadily ... to become the heartland of the Australian system of social values, in which the demands of an egalitarian social philosophy are canalised and enforced by a network of authoritarian, legal-rational controls."

64. See note 53 *supra*.

65. The method used in the United States, both at State and Federal level, and incorporated in the U.S. Model Anti-Discrimination Act.

66. The method adopted in Ontario. See the Ontario Human Rights Code, 1961-62, Part III. Until 1971, the power of a board of enquiry was limited to making a finding as to whether the complaint was supported by the evidence; if it so found, it recommended the course that ought to be taken to the Ontario Human Rights Commission, which then made a recommendation to the Minister of Labour. The ensuing order of the Minister was final, and contravention of an order was made an offence under the Code (*id.*, ss 14 and 15). This procedure was subjected to criticism, somewhat emotively, by Stewart J. in *R* v. *Tarnopolsky, ex parte Bell* (1969) 6 D.L.R. (3d) 576, but with more restraint by the Hon. J. C. McRuer, *Ontario Royal Commission Inquiry into Civil Rights* (1971) Vol. 3, ch. 123. Under the amendments to the Code effected in 1971 (The Civil Rights Statute Law Amendment Act 1971 (S. of O.) c. 50 s. 63) a board of enquiry has jurisdiction to determine all questions of law and fact, to decide whether there has been a contravention of the Code, and to determine the remedy, and either party may appeal to the Supreme Court of Ontario on questions of law or fact or both (Ontario Human Rights Code ss 13 a, b, c, and d).

67. The method adopted in Great Britain and New Zealand; see *infra*, and note 72 and 74.

68. Professor Harry Street, Geoffrey Howe Q.C., and Geoffrey Bindman, *Report on Anti-Discrimination Legislation* (London, Political and Economic Planning, 1967).

69. *Id.*, 112, para. 158.1.

did not, however, accept the American solution, but believed rather "that the Ontario system [had] most relevance at [that] juncture for the United Kingdom."[70] The merits of the Ontario system, "which is working well" were that it had "the advantage of speedy decisions, of preparations for hearing being made within the commission, and yet of maintaining high standards of independent fact-finding."[71]

These recommendations were not accepted by the British Government. The 1968 Act conferred jurisdiction, at the suit of the Race Relations Board, on the courts, specifically on county court judges, assisted by two assessors appointed from "persons appearing to the Lord Chancellor to have special knowledge and experience of problems connected with race and community relations."[72] Appeals from the determinations of the county court may be made on questions of fact and law to the Court of Appeal and (with leave) to the House of Lords.[73] This precedent was followed, with significant modifications, by those responsible for the drafting of the New Zealand Race Relations Act,[74] and, with similar modifications, by the draftsman of the Australian Bill. In the Australian Bill, jurisdiction was sought to be conferred, until establishment of the Superior Court of Australia, on the Australian Industrial Court (but without provision for assessors) in proceedings brought at the instance of the Commissioner or by the person aggrieved by the alleged discriminatory act. The Bill provided that where it was established to its "reasonable satisfaction" that a person had committed an act unlawful under Part II, the Court might grant all or any of the remedies specified: an injunction restraining repetition of the act, or commission of an act of a similar kind; an order directed towards placing the aggrieved person in the position he would have been in had the unlawful act not been committed; an order varying or cancelling a contract, or awarding damages for any loss, loss of dignity, humiliation or injury to feelings; or such other relief as the Court thinks just. These are substantially the same remedies that are contained in the British and New Zealand legislation.[75] They were eventually enacted in section 26 of the Commonwealth Act.

The policy conceived by the draftsman of the Australian Bill is reflected in the Act, but with two modifications. Firstly, the Opposition in the Senate removed all reference to the Australian Industrial Court and the Superior Court of Australia, consequent upon its belief that "offences under Commonwealth law which may take place anywhere throughout the nation ought to be prosecuted ... in the Supreme Courts of the States and Territories".[76] Secondly, the power of the Commissioner to

---

70. *Ibid.*
71. *Ibid.*
72. Race Relations Act 1968, s. 19.
73. Race Relations Act 1968, s. 19 (9): County Courts Act 1959, s. 109 (2); Appellate Jurisdiction Act 1876, s. 3; Administration of Justice (Appeals) Act 1934, s. 1.
74. Race Relations Act 1971, s. 21, which confers jurisdiction on the Supreme Court. There is however, no provision for the appointment of assessors.
75. See Race Relations Act 1968 (U.K.), ss 21, 22 and 23, and the Race Relations Act 1971 (N.Z.) s. 21 (5).
76. Senator Greenwood in the Senate debate in Committee, Sen. Deb., 29 May 1975, 2037.

institute a civil proceeding for any of the remedies contained in section 26 was deleted, so that any proceeding under the Act may be brought only by the person aggrieved by the alleged discriminatory act.

The result of this change is to separate the conciliatory and the litigious aspects of the enforcement procedure. A complainant must first have resort to the Commissioner, who alone has power to investigate the complaint and attempt to effect a settlement. If the Commissioner fails, the complainant may commence proceedings.[77] Before doing so, he must obtain from the Commissioner a certificate that he has held a compulsory conference or that a conference has not been held by reason of the non-attendance of a person directed to attend, and that the matter has not been settled.[78] The Commissioner's involvement in the matter ends upon his furnishing the certificate. The separation of the two aspects of the enforcement procedure is reinforced by section 22(5), which provides that in any civil proceeding, no evidence shall be given or statement made as to anything said or done at a compulsory conference.

These changes are of great significance. The lack of any power to have ultimate resort to the courts will hamper the Commissioner in his attempts to secure settlements, and prevent the development of any consistent policy in the determination of the circumstances in which relief from the courts should be sought. Individual complainants may be subject to pressures to refrain from bringing action, pressures from which the Commissioner would be immune. Further, conferring jurisdiction on the courts of the States and Territories inhibits the development of consistency and expertise in an area in which it is essential that there be sensitivity to the underlying social purpose of the legislation and the subtleties inherent in the manifestations of prejudice.

However, as I have noted, my argument is with the policy itself, rather than with its modifications. That policy, which the Act expresses, reflects the same lack of understanding which is evident in the State and Federal legislation in relation to Aborigines which I have described above.

My general thesis is that the method of enforcement described is completely inadequate to the task it seeks to perform and to the effective implementation of the obligations under the Convention. It represents an attempt to mould old institutions to new problems. It is doomed to failure for the same reasons that the bureaucratic attempts to accommodate Aboriginal aspirations are doomed. It reflects a basic misunderstanding of the nature of the problem, a problem that is incapable of solution within the traditional forms of the existing power structure. *It is in fact precisely because the solution is sought within that structure and particularly within its formal administrative and judicial constructs that it will not be found.* For the existing power system and the economic and social infrastructure which underlies it *are* the problem.

---

77. S. 24 (1).
78. S. 24 (3).

The elimination of discrimination will be accomplished only by the elimination of the inequalities inherent in a society in which "minority groups" are excluded from the process of decision-making. Yet the institutions to which recourse is had to eliminate discrimination are the very institutions which help maintain and perpetuate the society of unequals.

The validity of these assertions may be demonstrated in part by an analysis of the true nature of the problems with which the Convention ventures to deal, and in part by a consideration of the degree of success so far achieved by the conventional instruments used to combat discrimination. I take Great Britain as an example. The circumstances there which have given rise to a situation of discrimination provide the closest analogy to those existing in Australia, and the method of combating discrimination has provided the model on which the Australian Act is based. The relative failure of the attempts in Britain to combat discrimination by conventional means is seen at both the administrative and judicial levels. I shall consider these separately.

*Administrative machinery*

The British legislation of 1965 and 1968 was based on two misconceptions. In introducing the 1965 Race Relations Bill during the second reading debate, Sir Frank Soskice said that the Bill was

> concerned with public order. Overt acts of discrimination in public places, intensely wounding to the feelings of those against whom these acts are practised, perhaps in the presence of many onlookers, breed the ill will which, as the accumulative result of several such actions over a period, may disturb the peace.[79]

To regard legislation concerned with racial harmony and equality as directed primarily at the maintenance of public order misconceives both the issue and the remedy. The classic method of maintaining "public order" is the criminal law, and the Bill in fact provided a system of criminal penalties for the enforcement of its substantive provisions. This proposal provoked such a barrage of criticism based on experience in the United States that the Government was compelled to withdraw the proposal and substitute a process of conciliation.[80] This was an improvement. Unfortunately, conciliation was seen as an end in itself, rather than a means to an end – almost, indeed, as an alternative to sanctions of any kind.[81] The result was a statute conceived in terms of "offences" and "penalties" from which the sanctions were virtually removed.

The substantive and procedural provisions of the Act of 1965 were contained in three sections. Under section 1, discrimination on the grounds of colour, race, or

---

79. H.C. Deb. 3 May 1965, Vol. 71 (5th series), cols 926 *et seq.*

80. For accounts of the events leading up to the passing of the 1965 Act, see Lester and Bindman, *Race and Law* (1972), ch. 3 and Kushnik, note 53 *supra,* 233.

81. Kushnick, note 53 *supra*, 257. The objective of any enforcement machinery is 'compliance', conciliation should be a means towards that end.

ethnic or national origins in places of public resort was prohibited. The Race Relations Board was constituted by section 2, with the function of securing compliance with the provisions of section 1 and the resolution of difficulties arising therefrom, and with the duty to set up local conciliation committees. The local committees were to receive complaints, make necessary inquiries and use their best endeavours to effect a settlement. Section 3 provided for the bringing of proceedings in the county courts by the Attorney-General for the enforcement of section 1. The sole remedy provided for was an injunction to restrain the commission of acts contrary to section 1, where the defendant had engaged in a course of discriminatory conduct. The Board was obliged to refer unsettled cases to the Attorney-General and had no power itself to take any proceedings. Nor was it given any powers to aid it in its investigatory and conciliatory work, or any right to investigate a matter where no complaint had been made.

Given, however, the concept of essentially administrative enforcement of anti-discrimination legislation by a process of conciliation, a commissioner must have far-reaching and effective means of coercion at his disposal, the threat of the use of which, it is argued, leads to settlement.[82] It is not conciliation in the traditional sense of negotiation and reconciliation of opposing interests, but the advancement of one particular interest.[83] These misconceptions of the conciliation process had not been dispelled by 1968, with the result that the Act of that year which substantially replaced the 1965 Act, failed to confer what the Race Relations Board itself conceives to be essential powers.[84] The Board has continued to campaign for increased powers, without success.[85]

Those who now, like the Board, advocate increased powers to make the conciliation procedure effective face a dilemma. The measures they advocate are unacceptable not only to those sceptical of the value of any anti-discrimination legislation but also to those who support it but are unwilling to concede wide powers (pejoratively

---

82. Kushnick (note 53 *supra*, 265) warns against weak enforcement agencies with minimalist views of their role, and quotes the words of an American practitioner: "A position of neutral umpire-like disinterest by a commission has been demonstrated as only slightly more effective than no commission at all. A Commission must make itself felt". *Cf.* Senator Murphy's eulogy for an "independent and impartial conciliator" (*supra*, note 63).

83. B. A. Hepple suggests in a "Note on the Race Relations Act 1968 (U.K.)" (1969)32 M.L.R. 181, 186, that "persuasion" might have been a more accurate expression than "conciliation" in this context.

84. See the Reports of the Race Relations Board (London, H.M.S.O.) for 1971-72, paras 72-85; and 1973, paras 55-68.

85. However, following the introduction by Lord Brockway last year of a private member's Bill designed to increase the Board's powers, assurances were given by Lord Harris, Minister of State for the Home Office, that the Government would introduce legislation for that purpose. These assurances were repeated by the Prime Minister and the Home Secretary after the decision of the House of Lords in *Dockers' Labour Club and Institute Ltd* v. *Race Relations Board* [1974] 3 All E.R. 592 (discussed *infra* p. 77). See *Race Relations*, No. 18, Summer 1974; No. 21, Winter 1974-1975. The Government's proposals are now contained in the White Paper released in September 1975 (see *note* 92, *infra*).

described as "draconian") to an administrative agency.[86] At the same time, there is a growing acknowledgement of the ineffectiveness of a complaint-based procedure to achieve the purposes of the legislation at all. The experience of the Race Relations Board is that most individual victims of specific acts of discrimination are comparative newcomers, often with language difficulties, or that even when well-established in the community, they are reluctant to complain, fearing the humiliation and uncertainty that may arise and are reluctant in any event to encounter the forces of authority which to them appear hostile and alien. Also, the process of individual discrimination may be so subtle that the "victim" may be unaware of the fact of discrimination, and even when aware may just stay away from those places and situations where humiliation has occurred. The reaction reinforces the isolation of minority groups and leads to a dulling of their consciousness that discrimination exists.[87]

This outcome is also a result of the second misconception upon which the British legislation was founded. Responsibility for introduction of the 1968 Bill into the House of Commons rested upon Mr Callaghan. He said at the time:

> The race problem is as much a question of education as of legislation. I think the law can give comfort and protection to a lot of people who do not wish to discriminate but who might otherwise be forced by the intolerant opinions of their neighbours to discriminate. Any legislation introduced, I think, will have less emphasis on the enforcement side than on the declaratory nature of the Act itself, which must show where we stand as a nation on this issue of principle.[88]

From being, according to Sir Frank Soskice, concerned with "public order", the issue of racial discrimination had now, at the other end of the spectrum, become one of principle to be solved by declaration and education. The statute that emerged reflected an uneasy compromise of the two extremes. The scope of discriminatory acts was extended to cover, subject to specific expections, the provision of goods or services to the public or a section of the public, employment, trade unions and employers' organizations, housing accommodation and business and other premises, and advertisements.[89] The Act reconstituted the Board with an increased membership, conferred investigatory and conciliatory functions on the Board as well as on the conciliation committees, and gave the Board power to investigate acts of

---

86. In the second reading debate on the Racial Discrimination Bill, in the House of Representatives, Mr Killen, although expressing the Opposition's unequivocal opposition to racial discrimination described the Bill as "proposing ... that the transgressions with respect to racial discrimination should be solved by erecting an apparatus ... more suited for a totalitarian country" and as "desparately unsuited for a nation such as Australia". He moved that the Bill be substantially amended on the ground that it, *inter alia*, "denied the operation of the rule of law by the conferring of 'star chamber' functions and powers upon administrative officials" (H. R. Deb., 6 March 1975, 1222, 1224). Similar criticisms were expressed by Opposition members in the Senate debate in Committee in support of a successful motion for the deletion of cl. 23 which would have enabled a judge of the Australian Industrial Court to take evidence and order the production of documents relevant to an investigation by the Commissioner.

87. See Reports of the Race Relations Board for 1971-72, paras 74 and 75, and for 1973, paras 57 and 58.

88. The *Sunday Times*, 28 January 1968.

89. Race Relations Act 1968 (U.K.), ss 2-11.

discrimination in the absence of a formal complaint.[90] More importantly, it was given the sole power to commence legal proceedings, and the remedies were expanded to include relief by way of damages, declaration and revision of discriminatory contracts.[91] However, the Board was given no powers to aid in its investigations and endeavours to conciliate, a reflection no doubt of the desire to place "less emphasis on the enforcement side" of the Act. The educational side of the Act is manifested in the creation in Part III of the Act of the Community Relations Commission with the prime duty to encourage harmonious community relations.

However, neither education nor coercion has been successful in accomplishing the intentions of the 1968 Act. Although some of the more obvious symptoms of discrimination have disappeared in Britain, there is no evidence of substantial changes either in attitude or in the structure of society of which acts of discrimination are merely the overt symbol.[92] In 1970 the Board indicated,[93] rather wistfully, that when the legislation was enacted, many considered that an Act declaratory of a code of conduct combined with enforcement provisions would be sufficient to ensure its purpose. This expectation, it says, no longer adequately meets the problem.

In a recent report,[94] the Board notes the lack of confidence of minority groups in the effectiveness of the 1968 Act and their reluctance to work for the equal opportunity that the Act purports to assure:

> One element in this is their belief that the Act itself provides little of value to them in the way of redress for their grievances or the possibility of bringing about change, and in certain circumstances to seek redress may expose them to victimisation against which the existing Act provides no protection. Another

90. *Id.*, ss 14, 15 and 17.

91. *Id.*, ss 21-23.

92. In its most recent report the research organization, Political and Economic Planning, describes and documents "massive and widespread discrimination" in the areas of employment offers and housing which it investigated (see *The Extent of Racial Discrimination* (1974)). The Report confirms the Race Relations Board's "own analysis of the lack of progress . . . Towards full equality of opportunity" (Report of the Race Relations Board for 1973, para. 56). P.E.P.'s conclusions are further supported by the findings contained in the Reports of the House of Commons Select Committee on Race Relations and Immigration ("Racial Discrimination in Employment", and "The Organization of Race Relations Administration", H.M.S.O., 1975), and by the Report of the Race Relations Board for 1974 (published in July 1975). There is, however, disagreement in Britain as to the remedies for the situation. The Select Committee considers that persuasion, education and voluntary action are preferable to a coercive policy in the furtherance of good race relations. The Board's own experience leads it to differ from that conclusion and to assert that "without [an improved law], we seriously doubt if the additional resources, which the Select Committee recommends, could make any worthwhile contribution to progress" (Report for 1974, para. 83). The Board welcomes the Government White Paper, "Equality for Women" (1974) which states that the ultimate aim of the Government is to "harmonise the powers and procedures for dealing with sex and race discrimination", and proposes the establishment of an Equal Opportunities Commission with wide powers of investigation. It is understood that the recent Government White Paper on Race Relations released in September 1975 proposes far-reaching changes in the Race Relations Act, including the conferring of additional powers on the proposed Commission in the area of race relations. This latter White Paper was not available at the time of going to press.

93. Report of the Race Relations Board for 1969-70.

94. Report of the Race Relations Board for 1973 (published in June 1974).

> element is disillusionment resulting from exaggerated expectations of the Act. In both cases the Board tends to be blamed as well as the Act for the perceived inadequacy of what can be achieved. In so far as they are firmly and widely held, these views place a significant constraint on our ability to carry out our role.[95]

"Exaggerated expectations" which are doomed to disappointment are, it is suggested, the inevitable outcome of the belief that high-sounding declarations of principle will contribute to the solution of a problem, even when administrative machinery exists for the implementation of those principles. Too often, legislation is accepted as a substitute for a solution, or induces a belief that a solution has been found and that no further action is necessary.

The Board's view of the extent of disillusionment among minority groups is confirmed by the most recent surveys of opinion among the leaders of the groups in Britain most directly affected by discrimination. The main criticisms among those leaders are of two kinds: firstly, legislation, although desirable as a framework of legitimacy for the development of harmony among groups, is merely one means among many and not an end in itself, and furthermore the particular legislation has been largely ineffective; secondly, and more importantly, legislation administered without the direct participation of those affected is useless, if not detrimental to the course of integration.

The conclusions of those who interviewed West Indian immigrant leaders are sufficient in themselves to cast doubt on the type of legislative remedies tried in Britain and now proposed in Australia:

> The interviews with the West Indian immigrant leaders leave no doubt about their conviction that the racial situation in Britain is rapidly deteriorating as much in degree and kind as in the expression of racial prejudice. Equally clear is their impression that legislative measures have been quite inadequate for dealing with racial discrimination and for reducing the socio-economic disadvantages of the coloured minorities in Britain. With Government suspect, law and justice uncertain, the police persecutory, and white society becoming overtly and uncompromisingly prejudiced, the leaders see themselves as having to rely almost exclusively on self-help in the ever-widening racial rift. Their forecast is grim.[96]

The "uncertain justice" referred to is in part a reflection on the approach taken by the courts to the Race Relations Act, and in particular by the House of Lords, an approach which, it is submitted, indicates the futility of including the courts in any process of harmonizing race relations. An examination of the English court decisions demonstrates shortcomings in both judicial philosophy and technique which confirm the futility of attempting to incorporate the courts, State or Federal, into the resolution of racial issues in Australia.

*The Courts*

To date, four cases under the Act have traversed their way through the appellate processes for ultimate determination by the House of Lords.

---

95. *Id.*, para. 58.

96. Manderson-Jones and Kamath. "Minority Group Leaders" in S. Abbott (ed.), *The Prevention of Racial Discrimination in Britain* (1971) 216.

In *London Borough of Ealing* v. *Race Relations Board,*[97] their Lordships, having held that they had jurisdiction to grant declaratory relief based on the 1968 Act at the suit of a party other than the Board, then held (by a majority of four to one) that the Council was entitled to discriminate against an applicant for council housing on the ground of his "nationality", as the Act prohibited only discrimination on the ground of "national origin". The result was that the applicant, "a Polish national of excellent antecedents and character", was not entitled to be placed on the Council's waiting list for accommodation, as such entitlement was declared by the Council to be dependent upon being a British subject. This decision is certainly supportable on the basis of a strict and literal reading of the statute, unaided by any consideration of the effect of the decision on those of foreign "national origin" who had not chosen to become naturalized British subjects. The fact that discrimination against applicants on the ground of their national origin might indirectly be effected by their exclusion on other yet related grounds – that is, present nationality – was ignored by the majority of the House of Lords. Only Lord Kilbrandon, in his dissent, was prepared to advance beyond a dry literalism towards a decision "more consistent with reality".

The next case, *Charter and others* v. *Race Relations Board,*[98] concerned an application by a Mr Amerjit Singh Shah for admission to the East Ham South Conservative Club which was refused. The refusal raised two issues: whether the substantive provisions of the Act applied to an application for membership to be considered under the Club Rules by the Committee of the Club, and (ii), the issue whether a refusal by the Committee, on the ground of colour, race or ethnic or national origins, to elect to membership an applicant eligible under the Rules would be unlawful by virtue of section 2(1) of the Act.[99] By a majority of four to one, the House of Lords reversed a unanimous decision of the Court of Appeal, and held that as the word "public" was used to contrast to "private", section 2 (1) did not apply to situations of a purely private character, and a club, being essentially a private association of individuals, fell outside the scope of section 2(1), provided that the club's rules concerning the election of members made provision for a genuine process of selection and those rules were in practice complied with. In such a situation the club, in providing facilities or services to members, was not providing them to a "section of the public" within section 2(1), and it could not be inferred from the admitted facts that there was no genuine selection of members of the East Ham South Conservative Club. Accordingly the facts did not disclose a situation in which section 2(1) applied, and a refusal by the club to elect a person to membership on the ground of colour was not unlawful.

The decisions in the other two cases also involved the courts in interpreting the words "section of the public". In *Applin* v. *Race Relations Board*[1] (the only case of

97. [1971] 1 Q.B. 309; [1972] A.C. 342 (H.L.).
98. [1972] 1 Q.B. 545 (C.A.); [1973] A.C. 868 (H.L.).
99. S. 2 (1) makes unlawful, discrimination by "any person concerned with the provision to the public or *section of the public* . . . for any goods, facilities or services . . . " (emphasis added).
1. [1973] Q.B. 815 (C.A.); [1974] 2 W.L.R. 541, (H.L.).

the four in which the Board was successful), their Lordships, affirming the decision of the Court of Appeal by a four-to-one majority, held that a married couple who were registered with local authorities as foster parents and took into their home four or five foster children at a time, were concerned with the provision of "facilities or services" to those children for whom the local authority acted and who are a "section of the public" within the meaning of section 2(1) of the Act. Refusal by them to accept coloured children would have constituted discrimination within section 2. Accordingly, by bringing pressure on the couple to take white children only the appellant, Applin, had incited them (unsuccessfully but) unlawfully, contrary to section 12 of the Act.

The decision in *Charter* was applied in the most recent case to come before the Lords, *Dockers' Labour Club and Institute Ltd* v. *Race Relations Board.*[2] In that case, a working men's club, one of 4000 similar clubs in the country, excluded from its premises on the ground of colour a Mr Sherrington who, along with about one million others, held associate membership in the club by virtue of membership in another of the 4000 clubs included in the club network. Their Lordships held, again reversing the Court of Appeal, that those who were allowed into the dockers' club, whether as members, guests or associates of the union, were not admitted in their roles as members of the public but by reason of their having been chosen, because of their character as private individuals, by the club or by others whose judgment the club was prepared to trust. The dockers' club did not move from the private into the public sphere in offering admission to associates of the union and the attendance of associates did not in any way alter the private character of the club. The members, guests and associates who attended the club were not a "section of the public" within section 2(1) of the 1968 Act. It followed that the dockers' club, in providing facilities and services to members, guests and associates, was not concerned with the provision of facilities and services to "a section of the public" and therefore, in discriminating against Mr Sherrington, was not guilty of unlawful discrimination under section 2(1) of the 1968 Act.

It should be noted that nowhere in the 1968 Act is any distinction made between public and private clubs. In fact, the Act makes no reference to clubs at all. Section 2(1) prohibits discrimination in the provision of goods, facilities and services to "the public or a section of the public" and section 2(1) lists examples of the facilities and services intended to be covered. These include "facilities for entertainment, recreation or refreshment". The assumption that the words in section 2 are intended to create the dichotomy between "private" and "public" clubs which their Lordships establish flows from preconceptions for which there is no warrant in the legislation itself. These preconceptions as to the limited scope of the Act led to the construction of "section of the public" as words of limitation upon that scope and a consequent expansion of the so-called domestic area, where a colour bar may operate, to cover a network of clubs whose membership includes some four or five per cent of the adult population of the country.

2. [1974] 2 W.L.R. 166, (C.A.): [1974] 3 W.L.R. 533, (H.L.).

The absurdity of the "genuine selection" test is further illustrated by a comparison of the club cases with the decision in *Applin*. In that case, the married couple who were registered with local authorities as suitable foster parents took into their home four or five children at a time. They did not pick and choose among the children they elected to take, but took them on the basis of need alone. The fact that they did not, in the words of the club cases, "operate a genuine selection process", enabled the House of Lords to define the foster children as "a section of the public" and hence prevent the household from being characterized as one of a purely private character. The result in the case is unexceptionable, but the reasoning used to support it leads to a situation in which a private household can be held to be public, yet a network of clubs with a million members is regarded as private. More importantly, it allows the exercise of one form of discrimination to provide a legitimate basis for the exercise of discrimination on grounds expressly outlawed. A "genuine selection process" presupposes an exercise of discretion by club officials on the basis either of criteria outlined in the club's constitution or of the personal dispositions of those officials. Whatever criteria are used, a form of discrimination operates. It thus becomes open to any club to remove itself from the operation of the Race Relations Act by introducing other forms of discrimination, "selection", which then entitle it to add discrimination on the ground of race as a criterion for admission. The courts' decisions then become dependent, not upon an analysis of the extent to which the community has an interest in a particular social relationship and the harm that might ensue from allowing existing patterns to continue, but upon decisions made by those persons whose very conduct is in issue. It is difficult to escape the conclusion that their Lordships' reasoning is dictated by a desire to perpetuate the exclusiveness of the existing preserves of the privileged and to forestall community intervention into those areas in which private interests exercise the most effective and most discriminatory forms of social and economic manipulation.

I would go further. In my view, the sequence of cases I have described constitutes a train of disaster for the cause of race and community relations in Great Britain, and illustrates the incapacity of the judiciary to deal with the issues raised by legislative implementation of principles of human rights so long as it adheres to its traditional methods of problem-solving.[3] My criticisms are three-fold: firstly, the failure of conventional judicial techniques as an aid to the resolution of race conflict; secondly, and related, the clear misconceptions which the decisive majority of the judges had of the role and purpose of such legislation; and thirdly, the disillusionment and consequent

3. J. K. Bentil in his excellent analysis of these cases, written prior to the decision of the House of Lords in *Dockers' Labour Club*, expresses his criticisms in more restrained terms: "surely the judges who come to interpret and apply the provisions of [the] legislation have to face up to the principle that racial discrimination in all its manifestations, even in its most subtle forms, should be outlawed. On the assumption that this principle is conceded, should not the spirit rather than the ambiguous letter of the present law relating to race relations be given effect to by the courts? ... It could hardly be doubted that the decisions of the House of Lords in the *London Borough of Ealing* and the *Charter* cases, may have undermined the efforts of the Race Relations Board in discharging its functions under the 1968 Act." ("Interpreting the Race Relations Act" [1973] Pub. L. 157, 173, 177.).

exacerbation of inter-group hostility that is the inevitable outcome of decisions reached in this traditional way.

The inadequacy of existing techniques was recognized by two members of the House of Lords, Lord Simon and Lord Kilbrandon. The dissatisfaction was expressed in terms of the restrictions placed upon the courts by the accepted methods of statutory construction, but the expressions of dissatisfaction have wider implications. In *Ealing,* Lord Kilbrandon recognized the importance of the 1968 Act as one "designed to remedy social grievances by assuring large groups of citizens of the protection of the law," but lamented that the fact that "one should be left groping for, or even speculating about, the meaning of a key phrase" in such legislation was "an unhappy feature of our present rules for the interpretation of statutes."[4] The "mischief rule" of construction was an inadequate and "unsatisfactorily subjective test, since each judge must depend on his own notion of the mischief, derived from his own private interpretation of the social and political scene, whether recent or remote."[5] The sources of knowledge which might make an interpretation less remote were denied to those charged with the duty of saying what the Act meant. The arguments based on the wording in the Act were, he thought, "finely balanced" and in the result, and in a dissenting judgment, he accepted the Board's argument, as leading to "a result less capricious and more consistent with reality than that proposed by the council."[6]

Similar reservations were expressed by Lord Simon in the *Ealing, Charter* and *Dockers' Labour Club* cases. He indicated a number of possible remedies for the shortcomings of the judicial approach: an explanatory memorandum accompanying a complicated measure,[7] an examination of Parliamentary proceedings or other preparatory material,[8] or recourse to Parliamentary debates to ascertain the general objective, perhaps even to see whether any understanding was expressed during those debates as to the meaning of statutory language in situations not expressly covered.[9] One way of avoiding forensic misinterpretation that should receive consideration, he thought, was that:

> Where the promoter of a Bill, or a Minister supporting it, is asked whether the statute has a specified operation in particular circumstances, and expresses an opinion, it might well be made a constitutional convention that such a contingency should ordinarily be the subject-matter of specific statutory enactment – unless, indeed, it were too obvious to need expression.[10]

Lord Kilbrandon agreed with these observations on statutory construction:

> We have here an especially unfortunate example. This recent Act has during a period of less than three years, been on four occasions before your Lordships'

4. [1972] A.C. 342, 357.
5. [1972] A.C. 342, 368.
6. [1972] A.C. 342, 369.
7. [1972] A.C. 342, 361.
8. [1973] A.C. 868, 900.
9. [1974] 3 W. L. R. 533, 543.
10. *Ibid.*

> House in order that the scope for its provisions may be defined and its meaning investigated. The present is the first of those occasions on which your Lordships have been able to interpret with one voice the questioned provision. It is not necessary to emphasise the need for some authoritative examination of possible remedies for this constitutional infirmity.[11]

The "constitutional infirmity" is more fundamental than His Lordship imagines. It extends beyond mere technique to the whole approach of the judicial mind and the value system is seeks to preserve. Let us take the *Charter* and *Dockers' Labour Club* cases, involving as they do similar issues, as illustrative of the point that the controversy is one of political philosophy rather than of technique.

There are two significantly different philosophical approaches towards the advancement of human rights:

> The conservative view is that Parliament should intervene as little as possible in matters about which people differ in large numbers . . . This view begins with the private rights of the individual, including the right to discriminate on the ground of the colour of a man's skin. In interpreting an Act of Parliament, it assumes that those rights are to be diminished to the extent necessary to make sense of the legislation and no further. Therefore within the spectrum of happenings which range from the way a family makes provision for its friends within the home to the conduct of an open market the definition of 'a section of the public' must be restricted as tightly as possible.
>
> The [opposing] view does not found itself on this individualist position, does not think primarily of private rights. It makes other assumptions. It seeks to interpret the Race Relations Act in a way which will extend its operation and not restrict it, while recognising that the Act clearly means to avoid intervention in the domestic sphere and in other private gatherings (certainly including some clubs). It regards racial discrimination not as an individual right but as a social wrong.[12]

The initial position taken on the principles upon which the legislation was founded determines the result. Thus, Lord Diplock, one of the "conservative" majority, argued that the Act of 1968 was

> a statute which, however admirable its motives, restricts the liberty which the citizen has previously enjoyed at common law to differentiate between one person and another in entering or declining to enter into transactions with them. It falls to be construed within the framework of the general law relating to transactions between private citizens.
>
> The arrival in this country within recent years of many immigrants from disparate and distant lands has brought a new dimension to the problem of the legal right to discriminate against the stranger. If everyone were rational and humane – or, for that matter, Christian – no legal sanction would be needed to prevent one man being treated by his fellow men less favourably than another simply on the ground of his colour, race or ethnic or national origins. But in the field of domestic or social intercourse differentiation in treatment of individuals

---

11. *Id.*, 544.

12. Professor John Griffith, "Judges, Race and the Law" *New Statesman*, 22 November 1974, 734, 735.

> is unavoidable. No one has room to invite everyone to dinner. The law cannot dictate one's choice of friends. The legal process is not adequate to analyse the multifarious and inscrutable reasons why a Dr Fell remains unloved.
>
> Thus, in discouraging the intrusion of coercion by legal process in the fields of domestic or social intercourse, the principle of effectiveness joins force with the broader principle of freedom to order one's private life as one chooses.[13]

Lord Morris, on the other hand, made no assumption that there had previously existed "a legal right to discriminate against the stranger" or that the Act constituted "the intrusion of coercion by legal process", rather that

> by enacting the Race Relations Acts 1965 and 1968 Parliament introduced into the law of England a new guiding principle of fundamental and far-reaching importance. It is one that affects and must influence actions and behaviour in this country within a wide-ranging sweep of human activities and personal relationships. In the terms decreed by Parliament, but subject to the exceptions permitted by Parliament, discrimination against a person on the ground of colour, race or ethnic or national origins has become unlawful by the law of England. . . . it seems to me that the whole policy of the Acts gives guidance as to the meaning of the phrase 'the public or a section of the public' . . . What Parliament has as a matter of policy provided is that, subject to certain defined exceptions, that type of discrimination which is made unlawful is just as unlawful where groups of the public are concerned as it is where members of the public at large are concerned.[14]

If Lord Morris' approach were to prevail in the courts, one might accept with cautious equanimity the involvement of the judiciary in the protection of human rights and, more importantly, in the processes which are necessary to secure serious implementation of the terms of the Convention. The traditions of the courts, in Australia and elsewhere, give no cause for confidence that this will occur, and so long as the conservative individualistic philosophy is so strong in the courts, there is no possibility of effecting the sweeping changes in society which the Convention will demand.

As an indication of the extent of disillusionment and hostility which the approach of Lord Diplock generates, one has only to examine the reaction of the decision in the *Dockers' Labour Club* case.

The Race Relations Board itself described the decision as "deplorable" and its chairman, Sir Geoffrey Wilson, said that the Law Lords had created "a very large area where integration cannot take place. I think it's the greatest blow at the whole aim of public policy". The press, in a rare display of virtual unanimity, condemned the decision. Michael Zander said in *The Guardian:*

> In many ways it [the decision] shows the English judiciary at its worst – narrow in its approach, legalistic, seemingly unconcerned with social realities and the intention of Parliament.

---

13. [1974] 3 W.L.R. 533, 540.
14. *Charter* v. *Race Relations Board* [1973] A.C. 868, 895, 889.

> It is already being said that the Law Lords reached their view reluctantly because they had no choice. Yet the House of Lords was overruling a trial judge and three Court of Appeal judges, all of whom had decided that racial discrimination was unlawful.

On behalf of immigrants, it was said that the decision

> confirms some of the worst fears that we, the coloured people, feel about our future here . . . How can it ever be imagined, that in the face of such an inhuman practice these coloured people who have made England their home, and who are sincerely keen and anxious to play their part, however small, in making Britain truly great, will give their trust and loyalty to this country? Isn't the way being paved for the creation of a legally sanctioned class of second-class citizens?
>
> The decision that this country faces is perfectly simple. Is England to remain a civilised, mature and compassionate society, anxious to maintain her glorious traditions of tolerance and fair play, or will it be allowed to degenerate into a frightened little island, unsure and unwilling to face the challenges of the contemporary world?[15]

As has been pointed out, "it is the few odd cases which come before the superior courts which would seem to catch the public's imagination and interest", and of the greatest significance is "the psychological impact that the adverse decisions of [the courts] in proceedings [under the Act] may have not only on the Race Relations Board, but also on those liberals who have been seeking . . . to ensure better race relations".[16] These factors and the consequent disillusionment among minority groups make it imperative that implementation of the principles and policy of the Convention be not dependent upon hopes of a "liberal" approach from the bench which, it is submitted, are unlikely to be fulfilled.

In fact, all hopes for the liberalization of relations between groups in any society will remain unfulfilled so long as legislation is enacted which merely tinkers with some of the more overt but superficial aspects of a problem which is part of the existing fabric of society. Paternalistic legislation based upon the assumption that racial (or any other) conflict within society is a "problem" to be solved without disturbance of the basic patterns of economic social and political relations within that society is an illusion. Legislation which is aimed merely at the realization of physical freedom but which ignores the psychological servitude which results from patterned discrimination is ineffective.

The implications of this statement provide a key to moves towards possible resolutions of the issue. It requires an understanding of what the issue is.

*The issue*

Firstly, let me summarize what I have so far sought to establish.

It is clear, I think, that the methods for enforcing the substantive provisions of the Racial Discrimination Act (conciliation by a Commissioner for Community Relations

15. The statements in this paragraph are quoted in *Race Relations* No. 21, Winter 1974-5.
16. Bentil, note 3 *supra*, 177.

and civil proceedings in the courts) are inadequate to the task the Act seeks to perform. The approach manifests the same fundamental errors apparent in recent Commonwealth and State legislation in relation to Aborigines. The elimination of discrimination will be accomplished only by the elimination of the inequalities inherent in a society in which 'minority groups' are excluded from the processes of decision making. Yet the institutions to which recourse is had in the Act to combat discrimination are the very institutions which help maintain and perpetuate inequalities within society. The validity of these assertions is demonstrated in part by a consideration of the degree of success achieved by the conventional instruments used to combat discrimination in other countries, of which Great Britain is a particularly relevant example. The relative failure of the British legislation, which is recognized by the Race Relations Board itself, is due to two factors. Firstly, the legislation is founded upon a complaint-based procedure, which by definition treats only symptoms, not causes. Secondly, the courts have demonstrated their incapacity to resolve the issues raised by legislative implementation of the social policy of the protection of human rights so long as they adhere to the traditional methods of problem-solving and to principles of statutory construction which ignore the broad social purpose to which human rights legislation is committed.

It now becomes necessary to establish the root causes of the failure described, and for that purpose to identify the true nature of the issue with which the Convention is concerned.

All legislative efforts to date have been directed towards racial discrimination in its narrowest sense, that is, towards specific outward and visible manifestations of the basic phenomena, racism and racialism.[17] It is submitted that it is the failure to recognize that the Convention attacks racialism, not merely acts of racial discrimination, that explains the increasingly apparent futility of the legislative experiments hitherto attempted. It is ironic that the only countries which have built conceptions of race into all the structural components of their culture have been Nazi Germany and South Africa. It does not seem to have occurred to other countries that

17. Definitions of "racism", "racialism" and "racial discrimination" vary, and the terms are often used interchangeably. In this article, "racism" and "racialism" are used as defined by M. Banton in *Race Relations* (1967) 7-10: the former to indicate the *ideology* of racial superiority, the latter to denote the *practice* of discrimination and repression against particular groups. The term "racial discrimination" may sometimes refer to a particular act "involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin", as in s. 9 (1) of the Racial Discrimination Act 1975 (Aust.) or more broadly it may denote a practice or policy of discrimination by certain groups against other groups, which is more appropriately defined as racialism. Thus, the definition of "discrimination" given by A. H. Richmond in Mitchell (ed.), *A Dictionary of Sociology* (1968) 58 ("the use, by a superordinate group, of its superior power to impose customary or legal restrictions and deprivations upon a subordinate group in order to maintain a situation of privilege and inequality") closer approximates "racialism". The definition of "racial discrimination" in Art. 1 of the Convention (*supra* p. 58) is, it is submitted, sufficiently broad to encompass "racial discrimination" in its narrow sense and in the broader sense of "racialism". The argument that follows is based on the proposition that almost all legislative efforts failed to realize this and have been mistakenly directed at specific acts of discrimination, towards racial discrimination in its narrower sense rather than at racialism and its progenitor, racism.

if a state can be organized on a theory of race which expresses inequality and a pathological ethnocentrism that leads to a theoretical and actual segregation, it might be equally possible to structure a system founded on concepts of race which express a true cultural pluralism and equality leading to a theoretical and actual conviviality.

A serious objection to existing anti-discrimination legislation is that in confining itself to regulating isolated physical acts it serves to perpetuate a situation of psychological slavery to a system founded upon a racialist premise. The legislation itself treats individuals coming within the defined groups as objects in need of special care and protection, which in itself tends to perpetuate the feeling of benevolent superiority on the part of the dominant group and a corresponding feeling of inferiority in the minority groups, with both feelings continuing so long as the legislation exists. If this hypothesis be correct, the "strengthening" of legislation merely serves to strengthen the sense of inferiority and to foster the very conditions which produce it.

Acts of individual race discrimination are only a reflection of institutional racialism,[18] which is not a series of acts, rather a total act of one group vis-a-vis another. A recent study[19] ascribes to institutional racism a high concentration in such factors as inequality of power, segregation, racial heterogeneity, social pathology in one group, endogamy, and institutional separation. Among those countries ranking low on a list of the converse of these variables (defined collectively as pluralism), the writer lists Australia;[20] racist patterns are clearly evident. It is difficult to envisage the Racial Discrimination Act making any significant contribution to the elimination of any of the factors of institutionalized racial attitudes. Entrenched patterns of discrimination based on the factors described will remain untouched.

It seems that there are two aspects to the problem: established, institutionalized patterns of discrimination resulting from an entrenched racialist pathology; a resulting exclusion of minority groups from the mainstream of society which paternalistic efforts are more likely to perpetuate than remove. There are signs of a recognition of both aspects, less so of the remedies necessary to deal with them.[21]

The authors of the Street Report referred, rather delicately, to what they described as "situations [in the United States] where as a result of past discrimination against

---

18. "Racism takes two, closely related forms: individual whites acting against individual blacks, and acts by the total white community against the black community. We call these individual racism and institutional racism. The first consists of overt acts by individuals, which cause death, injury or the violent destruction of property. The second type is less overt, far more subtle, less indentifiable in terms of specific individuals committing the acts. But it is no less destructive of human life. The second type originates in the operation of essential and respected forces in the society, and thus receives far less public condemnation than the first type". (S. Carmichael and C.V. Hamilton, *Black Power* (1967) 4).

19. Bagley, "Racialism and Pluralism: a dimensional analysis of forty-eight countries" *Race*, Vol XIII, No. 3, 1972, p. 347.

20. *Id.*, 350-351.

21. In his Report for the year ended 31 March 1973, the then New Zealand Race Relations Conciliator, Sir Guy Powles, said that "the general attitude of waiting until discrimination occurs and then punishing it does not go far enough in developing a good multi-racial community in New

Negroes and other minority groups over many generations, those groups are unequally represented".[22] Under the U.S. Model Anti-Discrimination Act,[23] the Commission on Human Rights is given power to sanction programmes designed to eliminate social imbalance, even where such measures may involve positive discrimination in favour of the minority groups. The Report noted that commissions in many of the States had affirmative powers. They were empowered to conduct surveys into areas of possible discrimination and to conduct investigations into patterns of discrimination in employment. The authors envisaged that similar functions would be conferred on the Race Relations Board.[24] In fact, they were not. Nor have such powers been conferred on the Ontario Human Rights Commission, the New Zealand Race Relations Commissioner or the Australian Commissioner for Community Relations.

There are a number of reasons. The breaking up of existing, established patterns of discrimination must involve discrimination in favour of a presently disadvantaged group, and as has been pointed out,[25] "positive discrimination", although not a new device of social policy is apparently a new concept. As D. G. T. Williams has indicated "It does not lend itself easily to legal discussion for lawyers have played little or no part in its function."[26]

Because, apparently, of the difficulties of adapting existing legal process to the implementation and control of positive discrimination, he finds it "a depressing thought that the legal issues raised by positive discrimination are likely to grow in importance."[27] Certainly it is not a concept with which lawyers have hitherto been familiar, for it goes beyond the traditional function of law of prohibiting specific acts or imposing specific duties.

Positive discrimination presupposes that there already exists an unacceptable degree of discrimination or inequality between particular areas, bodies, groups or persons. It presupposes also that the appropriate remedy is not simply that of forbidding discrimination or of providing ostensibly equal treatment. It amounts to an acceptance of the fact that the victims of discrimination or inequality are entitled to preferential and unequal treatment as the only effective means of redressing the balance. Its

---

Zealand. It savours too much of the ambulance at the bottom of the cliff rather than the fence at the top." The only remedy he could suggest was that "the main thing is to play a positive role", and he referred with approval to Part III of the U.K. Act which sets up a Community Relations Commission "to encourage the establishment of harmonious community relations." The recent reports of the Race Relations Board in the U.K. make similar statements on the need for a more positive role in the achievement of equal opportunity; by way of remedy, the Board can suggest only "more of the same" (see note 84 *supra*).

---

22. Street Report, note 68 *supra*, 23-24.
23. Note 62 *supra.*
24. Street Report, note 68 *supra* 94.
25. By D. G. T. Williams, "Legal Aspects of Positive Discrimination" (1968) 2 *Social and Economic Administration* 242.
26. *Ibid.*
27. *Id.*, 249.

ultimate justification is to be sought in the pursuit of equality and equal opportunity.[28]

Inasmuch as the Convention specifically requires acts and programmes of positive discrimination, it is difficult to see how the Australian Government can now avoid facing the problems inherent in it.

The Government may be reluctant to do so, as the implications of, for example, Article 5 of the Convention are revolutionary. Under that Article, Australia undertakes to "guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of" the political, civil, economic, social and cultural rights enumerated at length in the Article. If this obligation is taken seriously, it means, for example, the positive elimination of all obstacles to the equal securing of an education and the free choice of employment. For the concept of equality of opportunity implicit in this Article

> requires not merely that there should be no exclusion from access [to goods] on grounds other than those which are appropriate or rational for the good in question, but that the grounds considered appropriate for the good should themselves be such that people from all sections of society have an equal chance of satisfying them.[29]

This is not achieved by a proclamation of equal opportunity, nor by the mere removal of specific or isolated barriers based upon race. Where lack of education and economic opportunity have been the result of past entrenched patterns of deprivation based upon race, the elimination of the race factor will leave untouched the paucity of educational and economic resources needed if those affected are to participate on equal terms with the dominant groups. There is then a "necessary pressure to equal up the conditions"[30] so that members of the racial minority groups may progress towards a degree of genuine equality in the enjoyment of the rights set out in Article 5 of the Convention.

The Australian Act leaves all these matters untouched. The rearrangements that would be required to the patterns of Australian society are perhaps too far-reaching, too radical, for the Government to contemplate.[31]

---

28. Certainly, as Gareth Evans writes, "there is no reason for supposing that benign discrimination is somehow incompatible with the concept of equality" ("Discrimination and the Right to Eqaulity" (1974) 6 F.L. Rev. 26, 79).

29. B. Williams, "The Idea of Equality" in P. Laslett and W. G. Runciman (eds), *Philosophy, Politics and Society* (1962) 125-6.

30. *Id.*, 127.

31. The furthest point to which official thinking has yet advanced is exemplified by the Second Progress Report from the Senate Standing Committee on Social Environment, The Environmental Conditions of Aborigines and Torres Strait Islanders and the Preservation of their Sacred Sites (1974). Although emphasizing the need for "meaningful advancement", "equal opportunity", "leadership and self-determination" and "tolerance towards Aboriginal development", the authors of the Report fail to recommend any innovative moves in the practical implementation of these principles. They speak of "effective machinery for consultation" and of the need for "legitimate [*sic*] spokesmen" who can "speak for [Aborigines] with their support and confidence in the processes of consultation and negotiation, and their representations must be received respectfully [*sic*] by public and private authorities", (pp. 27-29). The Report reflects both in its tone and its recommendations the very paternalism it purports to abjure.

A similar reluctance to grapple with fundamentals is evident in relation to the second aspect of the problem under discussion: the exclusion of minority groups from the decision-making process. Solutions which exclude the subject of the "problem" are no solutions. At best they still leave untouched the psychological and social sense of deprivation and perpetuate subordination to the system built upon the very assumptions and practices which must be destroyed. Participation within the law-making process and in its administration is essential if the political system is to survive. As one West Indian leader in Britain put it:

> To recognize the legal system one must play an active part in framing it. If one goes into history and examines what happened post-emancipation [of slaves], one will find that the slaves were not freed at all. In fact, slavery was perfected, and though the slaves were physically free in the sense that their chains had been removed, they remained in mental slavery perfected by a bunch of economists. As the system stands now it is impossible to construct any successful way of getting to change the legal system – proof is the Race Relations Bill and 'Asian legislation'.[32]

The same views have been expressed by Aboriginal leaders in Australia. Thus, Charles Perkins:

> In the present context of Aboriginal affairs in Australia today, it must be Aboriginals who decide, right or wrong, what should happen in Aboriginal affairs, and this definition is a fundamental platform on Aboriginal affairs.[33]

And by those concerned on behalf of Aborigines: Professor Wootten:

> I think one of the conclusions I have come to, from my limited experience in dealing with movements relating to Aboriginal affairs and attempts to achieve things in relation to Aboriginal advancement, is that nothing succeeds in any meaningful way unless you do have real Aboriginal involvement, you do have something being done or some movement which is felt by some significant number of Aboriginals to be theirs, to be something that they want, to be something that they can identify with, and not just something that is handed down or provided from outside.[34]

Integration or assimilation are not the answer. Eliminating specific manifestations of oppression, and granting permission to minority groups to enter the established society on its terms, do nothing to break what has been termed the psychological yoke, the system of proctorship and guardianship,[35] imposed by white society on the Aborigine. Deprived groups seek participation in a society on their own terms, and only such entry will satisfy the revolutionary aspirations expressed in the Convention.

There are a number of steps which are a pre-condition for the realization of real equality.

Firstly, a recognition by a minority group of its uniqueness and a positive internal

---

32. Quoted by Manderson-Jones and Kamath, note 96 *supra*, 207.
33. In Nettheim (ed.), *Aborigines, Human Rights and the Law* (1974) 9.
34. Now Mr Justic Wootten, in Nettheim, *id.*, 59.
35. See Tatz, "Aborigines: The Struggle for Law" in Nettheim, *id.*, 174.

affirmation of its own worth; secondly, a development of cohesion on its part, and awareness of its economic and political potential; and thirdly, a quest for recognition of its legitimacy, an actual recognition by all groups within society of the essential equality of all human experience and the provision of, as Reisman puts it, opportunities for all "to clarify, value and appreciate, without apology, the uniqueness of their own cultural experience":

> A human rights system able to create and sustain such individuals must be one which, through its noncoercive structures, promises and effectively secures the conditions of unimpeded self-realization in every institutional process. Human rights, then, must be understood in terms of full participation in the shaping and sharing of power, wealth, enlightenment, skill, well-being, affection, respect and rectitude.[36]

This is essentially a liberation of the mind, a revolution in consciousness, an auto-emancipation, leading to autonomy, a degree of control over the direction of life. For inferiority and the discrimination that results are essentially the result of the deprivation of mind. The kind of deprivation which Eldridge Cleaver eloquently describes in *Soul on Ice:*

> Those who have been assigned the Brute Power Function we shall call the Supermasculine Menials. They are alienated from their minds. For them the mind counts only insofar as it enables them to receive, understand, and carry out the will of the Omnipotent Administrators.
>
> The chip on the Supermasculine Menial's shoulder is the fact that he has been robbed of his mind. In an uncannily effective manner, the society in which he lives has assumed in its very structure that he, minus a mind, is the embodiment of Brute Power. The bias and reflex of the society are against the cultivation or even the functioning of his mind, and it is borne in upon him from all sides that the society is actually deaf, dumb, and blind to his mind . . . His thoughts count for nothing. He doesn't run, regulate, control or administer anything. Indeed, he is himself regulated, manipulated, and controlled by the Omnipotent Administrators. . .[37]

The Supermasculine Menials, those whom Marcuse[38] describes as the substratum of outsiders and outcasts, the exploited and persecuted of other races and other colours, the unemployed and the unemployable, exist outside the democratic process. They are administered by a nominally democratic process, but of which they are not part, and their opposition to it is potentially revolutionary, even though they may not at present be conscious of it. It is the aim of the Convention to diffuse this revolutionary situation. Can this be achieved by the law?

*Role of Law*

The traditional arguments for and against the use of conventional legal prohibitions and procedures as a tool for reducing the more overt aspects of racial conflict have

36. Reisman, "Responses to Crimes of Discrimination and Genocide: an Appraisal of the Convention on the Elimination of Racial Discrimination" (1971) 1 Denver J. Int. L. and Pol. 29, 53, 54.

37. *Soul on Ice.* (1969).

38. In *One Dimensional Man* (1964; Abacus ed., 1972) 199.

been extensively canvassed elsewhere[39] and it is unnecessary to repeat them here. Few now seriously support the adage expressed by President Eisenhower that "you [cannot] change the hearts of men with laws", and experience has shown that even those most outspoken in their initial opposition to anti-discrimination legislation have come to accept its effectiveness in hastening the process of eliminating at least some of the more obvious symptoms of prejudice.[40]

However, the arguments have more recently acquired added dimensions. Among some of the most ardent supporters of existing legislative tools for combating discrimination, there are many who are realizing that the legal structure is capable only of redressing individual grievances, that it leaves untouched the economic social and political environment with its built-in, structured, sanctioned inequality, its established patterns of discrimination, and its exclusion from positions of power of the victims of discrimination. The potentialities for social conflict remain. The supporters of the conventional means of solution have little to offer outside the existing legal methods of redress other than "deliberate programmes of voluntary action carried out by government, industry and voluntary bodies".[41] Such proposals are but a tame response to the real problem, but so long as solutions are confined to the conventional and traditional, it is difficult to envisage what other response there can be. An acceptance of the legal structure in its present form can only lead further along the blind alley in which even the most perceptive and well-intentioned proponents of anti-discrimination measures inevitably find themselves. At this point the traditional debate becomes irrelevant.

Resolving problems of the role of the law now depends upon an initial refusal to accept the legitimacy or validity of the use to which existing legal procedures are put. The debate is then between those who advocate a 'recovery' of these procedures and their conversion into a means of reconciliation, and those who maintain the irrelevance of those procedures ('recovered' or not) in casting off the ethic of domination and repression which discrimination manifests.

On both sides of this argument there is agreement on one fundamental – that existing laws and procedures are the means by which established inequalities are preserved and the power of the dominant groups is expanded. Those who argue for the 'recovery' of the juridical system in establishing the autonomy of all individuals and groups in society maintain however that that system is in essence neutral and that a clear distinction must be maintained between the substance of the law and the formal structure through which its ideology is enforced. Thus, Ivan Illich envisages the use of

---

39. See, *e.g.*, Lester and Bindman, *Race and Law* (1972), ch. 2; Jowell, "The Administrative Enforcement of Laws against Discrimination" [1965] Pub. L. 119, 168 *et seq.*, Bentil, "Interpreting the Race Relations Act" [1973] Pub. L. 157, 157-160; McKean, "Anti-Discrimination Legislation and Private Rights" (1968) 1 Otago L. Rev. 308.

40. In his examination of the forces opposing anti-discrimination legislation in the United States, Lockard ("The Politics of Anti-Discrimination Legislation" (1965-6) 3 Harv. J. Legis. 3) refers to the "changes of heart [evident] as experience with laws diminishes the timidity about social innovation".

41, Lester and Bindman, note 39 *supra*, 59.

the existing juristic structure by interests wholly opposed to the interests which at present control it and whose needs it serves.

> Law is more effective than centralized planning in bringing and keeping people under the rule of machines. Yet the current misuse of the juristic structure is not a valid argument against its use for precisely the opposite purpose, though it suggests caution against overly optimistic hopes for such an inverted use.
>
> Most of the present laws and present legislators, most of the present courts and their decisions, most of the claimants and their demands are deeply corrupted by an overarching industrial consensus . . . But this entrenched consensus does not invalidate my thesis that any revolution which neglects the use of formal legal and political procedures will fail. Only an active majority in which all individuals and groups insist for their own reasons on their own rights, and whose members share the same convivial procedure, can recover the rights of men . . .[42]

Admittedly, those who now operate the law as a social tool are deeply infected with the myths and ideology of a society that sanctions in practice the exclusion of whole groups from the corridors of power, and certainly the law necessarily embodies the values of those who serve the groups who inhabit those corridors, whether they be legislator, judge or administrator. However, according to Illich, this does not exclude the desirability of preserving the virtues of the common law – its inherent continuity and its adversary nature – as continuing means of on the one hand adjusting conflict in the interests of liberation rather than oppression, or on the other, of ensuring effective opposition to hostile and discriminatory interests.[43]

The opposing argument is put by Charles Reich.[44] The law is supposed to be a codification of those lasting human values which a people agree on. In fact, the law is "an inhuman medium", ostensibly rational, in fact irrational, utilized by the Corporate State in every facet of its activity as a means of management and control, and, ultimately, domination. Lawful procedures cannot succeed against the Corporate State, for there can be and is no rule of law in an administered state. The ideal of the rule of law can be realized only in a state which imposes limits upon bureaucratic power and permits diversity to exist, and the solution is not to be found in a proliferation of precisely-drawn laws which enable the individual to know exactly what is prohibited and what is permitted. For the greater the number of the laws, the greater the degree of official discretion as to which law to enforce, and hence the more lawless the bureaucracy may become.

Reich does not reject law entirely. He challenges the validity of institutionalism and the existing legal system and the belief that the solutions to the problems posed by the Corporate State can be sought in structural or institutional change. But this is because that system is based on the assumption that "man is a wolf to man" and that "only the law makes us free". The new community he envisages will rest upon basic laws, but a community of laws reflecting values that are shared and universally respected, not

---

42. In *Tools for Conviviality* (1973) 98.
43. *Id.*, 97.
44. In *The Greening of America* (1970) 102-109, 250-254.

laws designed to coerce and suppress. Coercion and suppression will disappear not through the enactment of more substantive laws nor in the reformation of procedure. The solution resides in the quest for knowledge of where power resides, power not in the political sense, but "the power of new values and the new way of life", a product of a revolution by consciousness, not of the manipulation of procedures or the proliferation of laws.

On initial reflection, these views appear irreconcilable; the one advocating the recovery of existing procedures, the other content only with those forms that emerge from and reflect a change in consciousness and a revolution in values. It may be, however, that they merely represent different stages in an evolutionary process in which they are both participating. There is much in common between Illich's concept of "conviviality"[45] and Reich's formulation of "Consciousness III"[46] between Illich's perception of "the evolution of a life style and a political system which give priority to . . . personal energy under personal control" and Reich's conviction that the liberation upon which Consciousness III is founded is that which emerges when "the individual is free to build his own philosophy and values, his own life-style, and his own culture from a new beginning". The difference is that Illich stresses evolution, Reich revolution in thought. Illich then accepts existing institutions as a vehicle for change. Reich does not. But Illich does not reject, rather embraces new legal forms as a vehicle for institutional change.

It would seem, however, that the use of conventional legal procedures to effect change of a fundamental nature presupposes either that those procedures are ideologically neutral or at least that they are capable of adaptation to an infusion of values radically different from those which they have hitherto expressed. But forms of organization rest upon a perception of society and of the relationships within it. The content and the form are inseparable. Thus, medieval forms of absolute government reflected assumptions of moral certainty and religious orthodoxy which were inconsistent with the impetus towards individualistic self-expression sought by Renaissance and Reformation man. The result was an institutional revolution, a development of parliamentary institutions, and judicial systems for the settlement of disputes, which were congruent with the perceptions and aspirations of a self-confident and aggressive *bourgeoisie.* Later, as concepts of social justice were developed to counter the more obvious excesses of economic individualism, and scientific rationalism replaced romantic idealism as the dominant ethic of Western society, new tools were conceived to administer interests of a corporate rather than an

45. Illich chooses this term to mean "autonomous and creative intercourse among persons, and the intercourse of persons with their environment; and this in contrast with the conditioned response of persons to the demands made upon them by others, and by a man-made environment. I consider conviviality to be individual freedom realized in personal interdependence and, as such, an intrinsic ethical value." (note 42 *supra,* 11).

46. As defined by Reich, "the foundation of Consciousness III is liberation. It comes into being the moment the individual frees himself from automatic acceptance of the imperatives of society and the false consciousness which society imposes . . . the meaning of liberation is that the individual is free to build his own philosophy and values, his own life-style, and his own culture from a new beginning". (note 44 *supra,* 190).

individual nature. Political power has moved from the legislature and judiciary to the executive, to the institutional managers, whether they be cabinet ministers, senior public servants , executive assistants or members of the administrative tribunals which determine the allocation of society's resources.

The resultant bureaucracy is not the ideologically neutral instrument it purports to be. Its characteristics reflect the scientific and rationalist spirit in which it was conceived. Just as scientific rationalism exalts precision, predictability, continuity in the pursuit of control over man's environment, so the bureaucracy manifests order, certainty, adherence to rule and legality, formalism and impersonality in the "efficient" management of both man and his environment. It is, according to Max Weber, a system which eliminates "from official business, love, hatred, and all purely personal, irrational, and emotional elements which escape calculations".[47]

It is clear, however, that bureaucratic values are the very antithesis of the ideals expressed in the Convention. The brotherhood of man, founded upon love and concern for humanity in all its infinite expressions, will not be achieved through instruments in which status, formalized authority and administration by fixed rules are pre-eminent. Nor will true equality be achieved by management, either of man or his physical resources. The evolution of freedom demands tools of liberation, not restriction; the impetus towards conviviality requires procedures of participation, not domination. In the particular context of racial emancipation, this means an institutional revolution which will match the ideological revolution. The legal forms required are radically different from those which have been used to date.

*New Legal Tools*

It has been seen that a coercive administrative machinery and the existing court structure have been a failure in achieving any significant breaking-up of institutionalized patterns of discrimination. What approach is likely to succeed?

Let us return to the proposition that the issue is not racial discrimination, but racism, not the symptoms, but the distorted perceptions that create social norms and patterns which sanction and perpetuate the existence of in-groups and out-groups. At the heart of racism are three beliefs:

(a) that one's own culture is superior to others;
(b) that perceived physical or cultural differences between groups are evidence of group inferiority; and
(c) that these two factors provide a legitimate basis for discriminatory treatment of those groups or, more importantly, a rationalization for their dispossession, deprivation, subjugation or oppression.

In order to visualize a truly non-racist society it is necessary to invert these beliefs. We then arrive at the following:

(a) one's own culture is equal to and co-ordinate with every other;

47. Max Weber, "Bureaucracy" in Hans Gerth and C. Wright Mills, *From Max Weber* (1946) 216.

(b) physical and cultural differences are evidence of the diversity and richness of the human condition, so that other cultures provide the opportunity for exploration of those facets of human experience in which one's own culture is deficient; and

(c) these two factors provide a legitimate basis for a society in which no group is "treated" by another but accepted as a participant in a common endeavour towards the full enjoyment and experience of their common humanity.

This inversion of the racist idea has vast implications for our perception of humanity as a whole, for our view of a world order and, in context, for our understanding of the legal tools which will not only reflect but also make tangible aspirations towards new forms of society. First, it is clear that a system for protecting human rights must be aimed not at specific acts but must extend to every value process with which man is involved. For the elimination of group conflict requires "a totally integrated personality capable of resolving personal and inter-personal conflicts without the easy recourse to rage and violence."[48]

Second, there must be changes which ensure the existence or survival of only those institutions which have rejected the claim to curtail or negate any person's or group's right to the creative expression of his or its uniqueness. Third, coercion as a tool of the legal system must be replaced by co-operation; law as a negative restriction must be replaced by law as a positive encouragement:

> The principal source of injustice in our epoch is political approval for the existence of tools that by their very nature restrict to a very few the liberty to use them in an autonomous way. The pompous rituals by which each man is given a vote to choose between factions only cover up the fact that the imperialism of industrial tools is both arbitrary and growing . . .
>
> I believe that society must be reconstructed to enlarge the contribution of autonomous individuals and primary groups to the total effectiveness of a new system of production designed to satisfy the human needs which it also determines.[49]

Practically, what does this mean, right now, in the implementation of the Convention? The criteria which the requisite legal tools must satisfy are clear. They must both legitimate and include the out-groups and they must be reflected in the legal system in its substantive, procedural and institutional aspects. The changes must be reflected both in the nature of the institutions and in the identity of the people running those institutions.

First, as to legitimization and inclusion. I take as a specific instance the Aborigines because their suffering at the hands of the legal system is the most apparent. The first step is a recognition of the right of Aborigines to self-determination. The second is the concrete realization of that right to self-determination. These are the most important and the most difficult moves demanded of white society, as they require the relinquishment of white power over the Aborigines. Actions by white society

48. Reisman, note 36 *supra*, 53.

49. Ivan Illich, note 42 *supra*, 43, 10.

thereafter will be those necessary to accommodate the aspirations of the Aborigines themselves as reflected in the decisions they make. This is not to minimize the magnitude of those accommodations, but merely to emphasize their responsive character. The legitimation of the process of self-determination demands that the decisions made by the Aborigines be given legal recognition. The relinquishment of white power over the Aborigine would be reflected in a transfer of legal sovereignty, and the reconciliation of possible (and probable) conflicts of sovereignty would have to be effected by negotiation or ultimately by a body in which each affected interest was equally represented.

The nature of the institutional change necessary to reflect and protect this process of redefinition and legitimization can be appreciated by inverting the structural solutions which have hitherto been attempted and found wanting. The solution proposed by the Racial Discrimination Act and by the recent legislation applying to Aborigines exhibits well-defined characteristics. It is bureaucratic, legalistic, administered, paternalistic, complaint-based and adversary, operated and controlled by bureaucrats and lawyers, professionals who by their training are least-fitted to express the flexibility required for the resolution of conflicts essentially of a social, economic, psychological and cultural nature. It is an attempt to compress into a rigid, semantic formalism a process of liberation which by definition demands the very opposite, an expansive, creative informality. The law has an indispensable part to play in this impetus to liberation, but law as a permissive agent ensuring the legitimation of this impetus, not as a coercive instrument confining it within the life-destroying formulae of strict legalisms. It must express the exact reverse of what is proposed by the Act; it must be non-bureaucratic, equitable, democratic, participatory, consensual, open to the widest range of influences, of which the traditional-legal is only one among many.

This will not be an easy process. The administered state seems well-entrenched, and to date Australian society has not demonstrated notable resilience in reconciling its demands for equality with an apparent need for authority.[50] There are, however, some precedents which express in a tentative way the values here expressed.

The place where the conflict of values of white and Aborigine is most apparent, the real forum of discontent, is the court. As has been pointed out,[51] the prospect of the Aborigine securing overall justice with any degree of consistency in the existing juridical structure is remote. It is to him an alien instrument enforcing alien values. This instrument must become convivial *to him,* it must reflect and express his values. Moves in this direction have been made in Papua New Guinea, where the Government has established customary courts at the village level which are composed of customary elders. According to one commentator, this practice

50. According to Sol Encel, "the price of institutionalised equality [has been] institutionalised authority . . . The ambiguity of Australian attitudes towards authority, and bureaucratic authority in particular, is itself a reflection of the paradox that the quest for equality has been satisfied to such a large extent by the establishment of bureaucratic institutions" (*Equality and Authority, A Study of Class, Status and Power in Australia* (1970) 79).

51. Elizabeth M. Eggleston, "Aborigines and the Administration of Criminal Law" in F. S. Stevens (ed.), *Racism, the Australian Experience* (1972) Vol. 2, 88.

> is recognising a situation which in fact has existed for a long time in various parts of New Guinea. For instance, the Tolais in the Gazelle Peninsula have always operated a dispute settlement mechanism. They have been doing so for the last year or so quite openly in Rabaul and mediating in disputes between themselves and other New Guinean people, between themselves and Chinese, *and occasionally between themselves and white men.* The fact that the law in Papua New Guinea is coming to recognise that this sort of dispute settlement mechanism comes from the people themselves, and is accepted by them, is a step forward.[52]

A similar experiment of particular relevance to Australia is that provided by the New Zealand Maori Welfare Act 1962, which establishes elected Maori Committees,[53] the functions of which include the imposition of modest penalties for certain offences.[54] An accused may elect to be tried before an ordinary court under the Summary Proceedings Act 1957 or by a Maori Committee. A Maori Committee may adopt such form of procedure as it thinks fit, but before imposing a penalty must give the accused a reasonable opportunity of being heard in his own defence.[55] The system is based upon traditional Maori methods of settling disputes in the open and before the community, and reflects a desire to reconcile the "offender" to the community rather than to isolate him and cast him out. It has been described as "a grand example of convivial law – of a parajudicial system which offers sensitivity and refinement."[56]

The New Zealand Act is of particular significance because it represents an abandonment of attempts to fit all cultural groups within a system that is the reflection and artifact of one particular, dominant group. It is instead built on the foundations of the traditions of the group it seeks to serve. It also raises the exhilirating possibility of an escape from the mystifications of a structure run by specialists and professionals.

There is another type of "convivial" tool which is beginning to receive recognition – the legal incorporation of Aboriginal communities. This is an idea which has already received some legislative recognition in New Zealand.[57] It reinforces Aboriginal unity, but more importantly, it enables a group to develop its own methods of decision-making and implementation and to assert its own ethic with a confidence derived from autonomy. It encourages and enables the same impetus towards

---

52. Goldring, in Nettheim (ed.), note 33 *supra*, 150 (emphasis added).

53. Every Maori over the age of twenty-one is entitled to vote at elections for members of the Maori Committee for the area in which he ordinarily resides: Maori Welfare Act 1962, s. 19(3).

54. The offences are riotous behaviour, drunkeness, disorderly behaviour at Maori gatherings and incapacity to drive a motor vehicle: Maori Welfare Act 1962 (N.Z.) s. 36.

55. *Ibid.*

56. Tatz, in Nettheim (ed.), note 33 *supra*, 187. A similar system was in operation in Western Australia between 1936 and 1954. Under the Aborigines Act Amendment Act 1936 (W.A.) s. 31, the Governor had power to establish a "court of native affairs" in any district for the trial of any offence committed by a native against a native. The Court was constituted by a special magistrate and the Commissioner, and the Court was obliged if practicable to call to its assistance a headman of the Tribe to which the accused belonged, and might, in considering any charge, take into account in mitigation of punishment any tribal custom as the reason for the commission of the offence.

57. In the Maori Associations established by the Maori Welfare Act 1962 (N.Z.) ss 21-23, 37-41.

responsible community development that is evident in the proposals for so-called marginal estate legislation which, with the removal of its "welfare" overtones, might be moulded into an acceptable experiment in the kind of independent structure envisaged. Under this type of legislation a particular district or community could be declared a marginal estate if it failed to satisfy certain economic criteria or demonstrate social viability. Money, advice and expertise would be made available to the community, with a minimum degree of external control, but with a maximum encouragement to the inhabitants to plan and utilize the new resources to their own benefit. Community and individual enterprise would be developed on a co-operative basis which would result in an increased self-regard and self-respect and a disappearance of the debilitating dependence which results from most governmental-controlled welfare programmes.[58]

These kinds of experiment should encourage those seeking change and an effective, imaginative implementation of the precepts of the Convention to direct their efforts away from reform of existing procedures towards a consideration of radical alternatives. Their efforts should include, on the one hand the evolution of mechanisms allowing participation by the non-professional and real involvement in and responsibility for the making of decisions by those whose lives are affected; on the other hand, the development of methods of resolution other than the adversary system. Mediation, conciliation, arbitration, consensus would produce decisions which more accurately reflected societal aspirations. The adversary system reflects an ethic of right and wrong, of winners and losers, which is inconsistent with the concept of the legitimacy of individual and group experience outlined. Institutions capable of accommodating the full breadth of differing value systems are necessary for the realization of the common endeavour.

The hesitant moves towards recognition of Aboriginal identity and the bureaucracy of coercion to which resort is had under the Racial Discrimination Act are clearly incapable of this task. The Act is a trivialization of the fundamental principles to which the Convention commits the world community, and of the measures it obliges that community to implement. The ideals of the future cannot be realized through the tired institutions of yesteryear. Rather, the legal tools must themselves be created by the ideals of autonomy, diversity and freedom of which the Convention is a concrete expression.

58. For an outline of the principles upon which marginal estate legislation should be based, see Cawte, "Racial Prejudice and Aboriginal Adjustment: The Social Psychiatric View" in F. S. Stevens (ed.), *Racism: The Australian Experience* (1972) Vol. 2, 59-61.