GERHARDY v. BROWN v. THE CONCEPT OF DISCRIMINATION: REFLECTIONS ON THE LANDMARK CASE THAT WASN'T

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> [S]ome of the opposition to this title has been based upon its alleged vagueness [and] its failure to define just what is meant by discrimination. . . . I submit that, on either count, the opposition is not well taken. Discrimination in this bill means just what it means anywhere . . . [a]nd, as a practical matter, we all know what constitutes racial discrimination.
> (U.S. Senator Edmund Muskie in the Senate Debate on Title VII, Civil Rights Act of 1964)[1]

I. Introduction

On 28 February 1985 the High Court of Australia handed down a decision the importance of which can be easily over-estimated.[2] This is due to the novelty of the subject-matter which has not been on the agenda of the Court in this country before. For the first time in the judicial history of Australia, its superior court has made a decision concerning the legality of "positive discrimination": the validity of a measure establishing distinctions on racial grounds for the benefit of a group traditionally disadvantaged and suffering the effects of past invidious discrimination.

The decision in *Gerhardy* v. *Brown* is both encouraging and disappointing. It is encouraging because the Court gave its unanimous "go ahead" (though some Justices were less enthusiastic than others) to a measure aimed at the protection and advancement of the most disadvantaged and most unfortunate group in a generally affluent and prosperous society: to Australia's original inhabitants. Although, as one of the Justices admits in his opinion, there is a wide diversity of views "about the identification, extent and resolution of the problems involved in the mitigation of the effects which almost two centuries of alien

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[1] Quoted in *United Steelworkers* v. *Weber*, 443 U.S. 193, 249, n. 27 (1979), henceforth referred to as *Weber*.

[2] *Gerhardy* v. *Brown* (1985) 59 A.L.J.R. 311, henceforth referred to as *Gerhardy*. For a summary of the decision, see J. A. Thomson, "Human Rights Treaties as Legislation: *Gerhardy v. Brown*, Reverse Discrimination and the Constitution", [1985] A.C.L. 36057.

settlement have had on the lives and culture of the Australian Aboriginals",[3] there can be little doubt that the cumulative effects of past institutional discrimination as well as past and present socio-economic deprivation, were disastrous for Aborigines.[4] All the available statistics demonstrate how great a distance separates them from the rest of the community in the fields of education, employment, wealth, political influence, health protection etc.[5] There is, indeed, little need to prove these facts, which seem to be self-evident to most Australians, including the High Court judges. *Gerhardy* v. *Brown* was the first opportunity for the Court to pronounce on the validity of active, positive measures aimed at the protection of Aboriginals, and the Court gave an affirmative answer to the question about the validity of such measures.

But, at the same time, the decision is disappointing because the Court failed to engage in a serious and profound discussion of the meaning, extent and criteria of "discrimination", including illegal racial discrimination, thus wasting an opportunity to turn *Gerhardy* into a major landmark case which could have established standards for future legitimate "positive discrimination", such as the United States Supreme Court's standards of *Bakke*[6] and *Weber.*[7] With all their weaknesses, faults and flaws,[8] these two decisions gave serious answers to problems of the utmost importance in the United States in the 1970's: to what extent race may be taken into account while establishing remedial programs aimed at improving the position of Blacks in the society. No doubt, this is an issue of major importance in Australia as well, and to avoid a general and reasoned answer to this question is to ignore the importance of active and positive measures aimed at the improvement of the situation of

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[3] Deane, J., *id.* at 347.

[4] "Australia's history since the British entry in 1788 to a land peopled by Aborigines has been one of racism and racial discrimination which persists strongly", *Koowarta* v. *Bjelke-Petersen* (1982) 56 A.L.J.R. 625 at 655 *per* Murphy, J.

[5] The most recent statistical report published by the Commonwealth Department of Aboriginal Affairs shows, *inter alia*, that life expectancy of Aborigines is 55 years (as compared to 75 for all Australians), infant mortality: 26.2% (compared to 10%), family income: $6000 a year (compared to $12000), unemployment: 24.6% (compared to 5.9%) etc., see *Sydney Morning Herald*, May 23, 1985, at 1. About the access to political power and participation in political decisions, see P. Hanks, "Aborigines and government: the developing framework" in P. Hanks, B. Keon-Cohen, eds, *Aborigines and the Law* (Sydney: Allen & Unwin, 1984), 19-49. See also C. Tatz, "Aborigines and human rights" in A. E.-S. Tay, ed., *Teaching Human Rights* (Canberra: Australian National Commission for UNESCO, 1981), 149-164; D. Partlett, "Benign Racial Discrimination: Equality and Aborigines", (1979) 10 *Fed. L. Rev.* 238, 254, 266-70.

[6] *Regents of the University of California* v. *Bakke* 438 U.S. 265 (1978), referred to henceforth as *Bakke.* Powell, J. (announcing the judgment of the Court) held the quota for black applicants to the Davis Medical School invalid, but at the same time considered the goal of achieving a diverse student body sufficiently compelling to justify consideration of race in admissions decisions under some circumstances.

[7] *Supra* n. 1. Brennan, J. (delivering the opinion of the Court) held that an affirmative-action plan that reserved for black employees 50% of the openings in a training program was not discriminatory for it was consistent with the purposes of the Civil Rights Act of 1964 (Title VII) prohibiting racial discrimination. The plan did not unnecessarily trammel the interests of white employees, and it was a temporary measure, intended to eliminate a manifest racial imbalance.

[8] Critical legal literature on both these cases is enormous. On *Bakke* see, *inter alia*, "A Symposium: *Regents of the University of California* v. *Bakke*", (1979) 67 *Calif. L. Rev.* 1: J. Dreyfuss, C. Lawrence III, *The Bakke Case: The Politics of Inequality* (New York: Harcourt Brace Jovanovich, 1979); on *Weber*, see *inter alia* A. W. Blumrosen, "Affirmative Action in Employment After *Weber*", *Rutgers L. Rev.* 34 (1981) 1; on both *Bakke* and *Weber* see T. Sowell, " 'Weber' and 'Bakke', and the Presuppositions of 'Affirmative Action' ", (1980) 26 *Wayne L. Rev.* 1309.

Aborigines.[9] The High Court abstained from establishing the criteria of legitimate racial distinctions and satisfied itself with a purely formalistic invocation of the "special measures" proviso of the International Convention on the Elimination of All Forms of Racial Discrimination. Not that there is anything fundamentally wrong with reliance on this article. The point is, rather, that by appealing to the "special measures" clause, the Court held itself relieved from the duty to examine the substantial issues of the limits of legitimate racial distinctions and the indicia of discrimination. By considering the "special measures" clause as an exception to a general prohibition of racial discrimination rather than (as I will argue) a proper inference from the principle of non-discrimination, the Court has assumed that racial distinctions are *per se* discriminatory and invalid, even if they are aimed at the improvement of the situation of traditionally disadvantaged groups, and groups that still suffer the effects of past invidious discrimination.

This, I believe, is a major weakness of *Gerhardy*. It will be the thesis of this Article that the test of "discrimination" must not abstract from the invidiousness of its aims and/or effects, and, hence, that a substantive moral theory of justice is a necessary element of reasoning about discrimination. Consequently, although regulations such as the one challenged in *Gerhardy* are non-discriminatory, this is not by virtue of their consistency with the "special measures" clause (as the Court held) but because they are not aimed at disadvantaging a group which, as in the case of discriminatory measures, is thereby victimized, stigmatized and excluded from the privileges generally available to the rest of the community. It is a substantive moral argument about the justness of a particular measure with respect to a *particular* social group in a *particular* historical context which is decisive for our judgments of discrimination, and not the "special measures" clause. The latter clause might as well have been non-existent at the time, or Australia not have ratified the International Convention on the Elimination of All Forms of Racial Discrimination, and regardless of these circumstances the preferential treatment for Aboriginals (under particular conditions, which the Court *should have* spelled out at such an occasion as this one offered by *Gerhardy*) would still defend itself successfully against the charge of "discrimination".

To put it bluntly, the Court made the right decision for the wrong reasons. But it is not by accident, nor by a mistake, nor by a conceptual error, nor for the lack of intellectual capacity that the Court failed to engage in the only issue which *really* mattered in this case: what are the substantive indicia of discrimination and what are the tests for legitimate, non-discriminatory racial distinctions? The reasons for this monumental failure have to do with the institutional and ideological structure of Anglo-Australian law which is particularly reluctant to spell out any substantive

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[9] To be sure, the issues in *Gerhardy* are not exactly analogical to those raised by *Bakke* and *Weber* for no preferences in a selection or admission process were involved here. However, both the preferences of the type discussed in *Gerhardy* (exclusions of others from the land) and of the type upheld in *Bakke* and *Weber* belong to a broader category of "positive discrimination" in the sense of preferences or benefits granted to the members of the disadvantaged groups; hence comparison with the two American cases is relevant for the purposes of the present argument.

moral judgments of distributive justice. This reluctance is singularly strong in those decisions which have potentially radical consequences in enforcing the values of equality, fairness and distributive justice with respect to a group most victimized by the rest of the community. The Court, which is, after all, a representative and an enforcer of the dominant values of this community, had to make sure that the sweep of its (potentially important) decision would be strictly limited, that the decision would not be read as a threat to the patterns of social privileges and that it would not generate any demands for a broader social reform. To avoid these consequences, the Court has to formulate its decisions in the cases like this one in terms which will make sure that it is not seen to have made any fundamental value judgments but merely to have applied the language of a legal text. The language of value-free, mechanical jurisprudence[10] is a device for avoiding the radical consequences of a potentially radical decision.

But, and it will be the assertion of this paper, such substantive value-judgments are unavoidable when it comes to the analysis of "discrimination". "Discrimination" in itself is constituted by invidiousness and victimization. The Court's failure to admit this, and to draw the consequences of this admission, reflects its unwillingness to engage in a morally serious discussion that potentially could have serious consequences and carry a threat to the stability of dominant community values and dominant patterns of privileges. It will not be my aim here to discuss what are the social and institutional determinants of such a position taken by the Court. I leave it to others to explain *why* these determinants impose such powerful constraints upon the Court. My aim will be merely to show *how* they are reflected in the doctrinal sphere of the Court's decision. I will attempt to make more clear and explicit the claim I have already made, and which could have been taken as a self-evident precept of common sense were it not so spectacularly rejected by the High Court: that any analysis of "discrimination" must appeal to substantive judgments of justice which are irreducible to merely formal criteria such as, for instance, a flat prohibition of racial distinctions. Consequently, the validation of positive measures based on racial distinctions is not an exception to the principle of non-discrimination but necessarily follows from this principle and, hence, *is* non-discriminatory in the first place. This claim, elevated to a more general level of abstraction, amounts to a plea for an explicit system of moral judgments in judicial decisions.

This also helps explain why *Gerhardy* is a disappointment despite the morally plausible result of the decision. The basic contradiction in which the Court is involved: between the intuitive moral decency of this particular decision made on remedial grounds, and the Court's unwillingness to express and endorse the underlying moral reasons for this decision,

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[10] The concept of "mechanical jurisprudence" is borrowed from R. Pound, see "Mechanical Jurisprudence", (1908) 8 *Colum. L. Rev.* 605. Elsewhere, Pound described "mechanical jurisprudence" in a manner particularly fitting to *Gerhardy*: "a condition of juristic thought and judicial action in which deduction from conceptions has produced a cloud of rules that obscures the principles from which they were drawn, in which conceptions are developed logically at the expense of practical results and in which the artificiality characteristic of legal reasoning is exaggerated", "Liberty of Contract", (1909) 18 *Yale L.J.* 454, 457, see also 462-3.

is revealing of the general predicament of the High Court, and of the common law in its attitudes to substantive justice. *Gerhardy* illuminates this contradiction with particular clarity because here the substantive moral standards are involved in the very understanding of the crucial concept of the case: "discrimination". It is not that we *must not* use the concept of discrimination in isolation from the substantive standards of just treatment: we *cannot* do so. The Court's exercise in "mechanical jurisprudence" is particularly out of place here.

The structure of this Article will be as follows. I will begin by summarizing the facts (Section II) and legal issues of *Gerhardy* (III), with the exception of two legal problems which deserve a separate treatment: the status of "special measures" (IV) and, most crucially, the concept of "discrimination" as expressed in *Gerhardy* (V). In conclusion, I will sum up the main reasons for the criticism of the Court's strategy of defence of "positive discrimination" (VI).

II The Facts and the Rules

Robert John Brown, an Aboriginal but not a member of the Pitjantjatjara people, was charged on the complaint of David Alan Gerhardy that he committed an offence under s. 19(1) of the Pitjantjatjara Land Rights Act 1981 (S.A.).[11] The Act provides for a land grant by the Governor of South Australia of an area in the north west of South Australia to the Pitjantjatjara group and several related groups of Aboriginal people who populate the area (s. 15 of the Act): such a grant was issued in 1981. Under the Act, a corporate body was constituted (Anangu Pitjantjatjaraku), consisting of all the Pitjantjatjara people (s. 5 of the Act), with an Executive Board consisting of eleven elected people (s. 9). Section 18 provides that all Pitjantjatjara have unrestricted right of access to the land.

Section 19(1), crucial to the case, makes it an offence for a person (not being a Pitjantjatjara) to enter the land without the permission of Anangu Pitjantjatjaraku.[12] An application for such a permission has to be lodged in writing with the Executive Board (s. 19(3)). Because Brown was present on the lands without having applied for permission, he was charged with committing a breach of s. 19(1). The complaint was heard by a special magistrate who stated a case which raised a number of questions of law for the opinion of the Supreme Court of South Australia. The matter came before Millhouse, J. who concluded that s. 19 was invalid because it was inconsistent with s. 9 of the Racial Discrimination Act 1975 (Commonwealth)[13] which makes it unlawful to make any distinctions on racial grounds with the effect of nullifying the equal enjoyment of human

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[11] To be referred to, subsequently, as the Land Rights Act, or the South Australian Act.

[12] Section 19(1) of the Land Rights Act reads:

"A person (not being a Pitjantjatjara) who enters the lands without the permission of Anangu Pitjantjatjaraku is guilty of an offence and liable to a penalty not exceeding the maximum prescribed by subsection (2)."

Subsection 2 prescribes a penalty of $2000 plus $500 for each day during which the convicted person remained on the land (where the offence was committed intentionally) or $200 (in any other case).

[13] Referred to henceforth as the Racial Discrimination Act, or the Commonwealth Act.

rights.[14] Millhouse, J. also found that s. 19 of the Land Rights Act was in conflict with Art. 5(d)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination[15] (set out in the schedule to the Commonwealth Act). Art. 5 imposes upon the States Parties the duty to eliminate racial discrimination, and its subsection (d)(i) specifically mentions the right of freedom of movement as one of the rights the exercise of which should be free of discrimination.[16]

Millhouse, J. did not deal with the other arguments raised on behalf of the defendant, but in so far as they were taken up by the High Court, they will be discussed in the next Sections of this Article. The conclusion of Millhouse, J. was that s. 19 of the Land Rights Act, by reason of its inconsistency with the Commonwealth Act, was invalid. From his decision the complainant appealed to the Full Court of the Supreme Court and the matter was removed into the High Court.

III Minor Legal Issues

The argument of all the Justices of the High Court has basically the same structure: as a starting point, they establish the conflict between the exclusion-from-the-land clause and the prohibition of racial discrimination; subsequently they validate the former as a "special measure" provided for by the Commonwealth Act and the International Convention.

This structure of argument was made explicit, *inter alia*, by Deane, J. who states: "The argument before the Court proceeded on the basis that the first question to be determined was whether, putting to one side provisions of s. 8 relating to "special measures", the provisions of s. 19 of the State Act were prima facie invalid . . . . I propose to approach the matter in that way."[17] Brennan, J. says: "*Assuming for the moment* that the Land Rights Act is not a special measure, it is, in my opinion, clearly discriminatory."[18] The awareness that this "assumption" was wrong affected, however, the internal proportions of the argument: since such a huge weight is attached to the status of s. 19 as a "special measure", no wonder that the analysis of the indicia of "special measures" (and of whether s. 19 fits them properly) occupied most of the attention of the Justices. The extent to which the issue of "special measures" overshadowed

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[14] Section 9 of the Racial Discrimination Act reads:

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

(2) The reference in subsection (1) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention."

[15] Referred to henceforth as the International Convention.

[16] Art. 5(d)(i) of the International Convention provides, *inter alia*, as follows:

"In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and 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 following rights:

. . .

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State."

[17] *Supra* n. 2 at 344.

[18] *Id.* 337, emphasis added.

almost everything else of legal importance in the case is illustrated well by the phrases indicating that, *thanks to the "special measures" issue*, the Justices felt relieved from the duty to examine in depth many other issues which arose. Referring to the question of whether the traditional ownership of land is a characteristic based on race, Wilson, J. says: "No doubt this is a matter upon which minds may differ and *I do not find it necessary to reach a firm conclusion upon it* because of the answer that I give to the question whether the State Act is a 'special measure' ".[19] Similarly, after having concluded that the Land Rights Act is a "special measure", Dawson, J. infers: "That conclusion *renders it unnecessary* for me to consider whether s. 19 of the *Pitjantjatjara Land Rights Act* involves racial discrimination . . .".[20] This indicates the mileage given to the question of "special measures". The question will be, therefore, dealt with separately in the following Section of this Article. Here, I will succinctly mention some of the other legal problems of the case in order to clear the field before discussing the central point.

1. *Is "traditional ownership" a racial criterion?*

One of the arguments of the Solicitor-General for South Australia, appearing for the appellant and for the Attorney-General of South Australia, was that s. 19 of the Land Rights Act did not involve any *racial* discrimination within the meaning of the Racial Discrimination Act.[21] The right to control access to the land and to exclude unauthorized persons is, the argument runs, conferred upon the "traditional owners" and, since "traditional ownership" is not a racial characteristic, the classifying criterion is non-racial.

This inference was rejected by the Court,[22] and properly so. To begin with, the description of the beneficiary group is based explicitly *both* on the criteria of membership in a Pitjantjatjara group (which is a racial, or an ethnic, criterion)[23] and on the criteria of "traditional ownership".[24] At the very least, a necessary (though not a sufficient) criterion of determining the list of beneficiaries of the Act is racial (or ethnic) by its very nature. Second, it seems plainly wrong to suggest that "traditional ownership" in the context of the Land Rights Act may have racially-neutral implications, for this would mean that there can be some "traditional owners" entitled to claiming the rights under s. 18 and s. 19 of the Act (i.e. rights of the presence on the lands to the exclusion of non-traditional-owners) who are non-Pitjantjatjara, or even who are not Aborigines.[25]

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[19] *Id.* 329, emphasis added.

[20] *Id.* 352, emphasis added.

[21] For the summary of the argument, see *id.* at 316 *per* Gibbs, C.J.; 329 *per* Wilson, J.

[22] *Id.* at 316-317 *per Gibbs, C.J.; 324 per* Mason, J.; 332 *per* Brennan, J.; 344 *per* Deane, J.; 349 *per* Dawson, J. Wilson, J. found it unnecessary to reach a conclusion on this issue because of his answer to the "special measure" question, *id.* at 329. Murphy, J. does not take up this issue at all in his opinion.

[23] Distinction between "racial" and "ethnic" criteria is irrelevant since the Commonwealth Act and the International Convention prohibit discrimination based on both these types of criteria alike.

[24] S. 4 of the Land Rights Act provides that "Pitjantjatjara" means:

"a person who is—

(a) a member of the Pitjantjatjara, Yungkutatjara or Ngaanatjara people;

and

(b) a traditional owner of the lands, or a part of them".

[25] "Traditional ownership is itself a criterion based on race. As a matter of fact as well as statutory definition, all traditional owners must be Aborigines", *Gerhardy, supra* n. 2 at 332 *per* Brennan J.

That non-Aborigines, but alleged "traditional owners", may claim any rights under ss. 18 and 19 is explicitly precluded by the Land Rights Act itself in its s. 4. "Traditional owner" is defined there as follows: " 'traditional owner' in relation to the lands means an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them". That no Aboriginal other than a Pitjantjatjara (and related groups, enumerated in the Act) can claim these rights follows from the purpose of the Land Rights Act.[26] This is to preserve the interests, traditions and culture of these particular Aboriginal groups who populate the part of South Australia which is covered by the operation of the Act and of the land grant.

Now it is irrelevant for this argument whether there can be any Pitjantjatjara persons who are not traditional owners and, hence, who might be beyond the reach of the benefits conferred by the South Australian Act.[27] It is a purely abstract speculation: such a case is unlikely to occur, and certainly did not occur in *Gerhardy*. What *is* relevant, however, is the impossibility of the reverse situation, i.e. of non-Pitjantjatjara people claiming the rights under the "traditional ownership" clause. This is excluded both by the explicit language of the Act and by its purpose which is to protect the Pitjantjatjara people, and not any other group. Hence, the "traditional ownership" characteristic is inseparable from racial distinctions.

The invocation of "traditional ownership" as an allegedly race-neutral characteristic in order to defend the Act against the charge of discrimination was therefore misguided and, as will become clear further in this Article, unnecessary. It seems more appropriate (or, at any rate, more honest) to confront the matter of racial distinctions head-on, rather than pretending that they are not racial when they obviously are. An attempt to disguise the Act as non-racial in operation reveals an underlying uneasiness about racial distinctions, even in the remedial context, and even when made in the service of regulations aimed at the legitimate protection of a particular racial group. In a society where the patterns of disadvantages have been determined, *inter alia*, on racial grounds, it is only natural that the remedial and protective measures must be administered along racial lines.

The implicit admission of uneasiness about racial distinctions by the appellant is only too gladly taken up by Gibbs, C.J. who turns it in masterly fashion into the case for an abstract and non-contextual approach to a general prohibition of distinctions on racial lines. After having stated (correctly, for reasons given above) that "the qualification for enjoying the right—traditional ownership—is itself based on racial origin" he paints a hypothetical picture of the evil consequences of racial distinctions which belongs to a classical "parade of horribles" type of argument (the general structure of the argument: take an individual regulation aimed at a concrete, benign purpose; reduce it to an abstract formula disconnected from its original purpose; draw the hypothetical frightening effects of the possible misapplication of this general formula):

[26] "The object of the Act is to give rights to the lands to a group of associated peoples who traditionally own various parts of them.", *id.* at 317 *per* Gibbs, C.J.

[27] See *id.* at 324 *per* Mason, J., 349 *per* Dawson J.

> Recourse to the notion of traditional ownership may readily be had to effect the most obnoxious discrimination. On the one hand, members of a particular race may be confined to one area, not, it may be said, because of their race, but because it is their traditional homeland; on the other hand, the right to own land may be conferred only on members of a favoured race, not, it may be said, because they belong to that race, but because they are the traditional owners. I see no distinction between the effects of ss 18 and 19 of the Act, and that of a law which provides as follows: white men and women who are the traditional owners of land in a particular town have unrestricted rights of access to that town; no-one else may enter it without their permission.[28]

This hypothetical law strikes us, indeed, as a repugnant one, but there is a whole world of difference between the law in this imagined land and the Land Rights Act. The difference hinges upon who are the "members of a favoured race". The analogy between the system in which Aboriginals may exclude strangers from their land, and the system whereby white owners may exclude everyone else from their town, holds only under the condition that race is initially irrelevant in assigning privileges in a society. To equate protection of the race which has been traditionally discriminated against and which is constantly the subject of economic and cultural deprivations related to its contacts with another, more expansive race, and, on the other hand, the right by a dominant race to legally exclude everyone else, is to assume a society where no racial group is more disadvantaged than the other. The error of the analogy drawn in the "parade of horribles" quoted above does *not* consist in exaggerating the dangers stemming from racial distinctions but in actually turning a remedial and protective program against its own purposes. The protection of a racial group which has been the victim of the majority and the legal monopoly of privileges by a racially dominant group are not two analogous cases having a common denominator: they are direct converses. The analogy drawn by Gibbs, C.J. serves to deny concrete demands of a concrete racial group by suggesting that every other racial group would be then justified in making such demands. But surely not every racial group is in the same position with regard to social disadvantages. The denial of this social fact in Gibbs, C.J.'s argument is a part of the strategy of neutralizing the possible radical effects of *Gerhardy* for it reassures the audience of the decision in the safe philosophy of "colour-blindness".[29] Reluctance to endorse wholeheartedly

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[28] *Id.* at 317 *per* Gibbs, C.J.

[29] On "colour-blindness" see A. D. Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine", (1978) 62 *Minn. L. Rev.* 1049, 1065-67; J. S. Wright, "Color-Blind Theories and Color Conscious Remedies", (1980) 47 *U. of Chi. L. Rev.* 213; L. Lustgarten, *Legal Control of Racial Discrimination* (Macmillan: London, 1980) 8. The first explicit statement of the doctrine: *Plessy* v. *Ferguson* 163 U.S. 537, 559 (1986) (Harlan, J., dissenting) was aimed at invalidating racial segregation; more recently it was intended as a device of invalidating affirmative action, see e.g. *DeFunis* v. *Odegaard*, 416 U.S. 312, 331-4 (1974) (Douglas, J., dissenting); *Fullilove* v. *Klutznick* 448 U.S. 448, 523 (1980) (Stewart, J., dissenting). In legal writings, the conception of "colour blindness' provided recently the inspiration for a sharp attack on affirmative action, see R. Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities", (1974) *Sup. Crt Rev.* 1; A. Bickel, *The Morality of Consent* (New Haven: Yale U.P., 1975) 132-3; W. Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution", (1979) 46 *U. Chi. L. Rev.* 775; B. D. Meltzer, "The *Weber* Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment", (1980) 47 *U. Chi. L. Rev.* 423, 424-6. See also *infra* n. 130.

racial distinctions in protective measures reflects the diagnosis of a society where race does not matter—and it is precisely the message Gibbs, C.J. conveys in the passage quoted above.

2. Does the Act exclude "persons of a particular race"?

Section 10(1) of the Commonwealth Act provides that if, by reason of a provision of a law of the Commonwealth or a State, "persons of a particular race, colour or national or ethnic origin" do not enjoy a right enjoyed by persons of another race, then, notwithstanding anything in that law, the first-mentioned persons shall, by force of s. 10, enjoy that right.[30]

On this basis, counsel for the Attorney-General for South Australia submitted an argument that the Land Rights Act, in its s. 19 which excludes non-Pitjantjatjara people from entering upon the land without permission, does not disadvantage "persons of a particular race". Those who are prevented from enjoying the right of unrestricted entry, it was claimed, were *all* persons other than Pitjantjatjara people. Since the class of "all who are not Pitjantjatjara" does not correspond to the notion of "persons of a particular race", s. 10(1) does not apply.

The Court rejected this argument.[31] Although ultimately nothing hinges upon this rejection, because s. 10(1) was held irrelevant in this case due to the "special measures" clause, it is interesting to look at the positions taken by the Court. Gibbs, C.J. said two things. First, "[t]the submission that s. 19 of the Act does not disadvantage or treat unequally 'persons of a particular race', requires a narrow and literal meaning to be given to s. 10(1) of the *Racial Discrimination Act*".[32] This is certainly true, but it hardly sounds a condemnation of the interpretation in the mouth of the Chief Justice. Second, on this construction s. 10(1) would lose "much of its intended efficacy".[33] This may be true but it has little weight unless the purposes of s. 10(1) are clearly elucidated, since "efficacy" is an instrumental notion which must be considered in conjunction with the purposes to be served. Instead, however, Gibbs, C.J. uses his favourite "parade of the horribles" argument coupled with yet another reflection of a "colour-blindness" theory. He says: "On this suggested construction, it would be possible, for example, for the law of a State effectively to provide that only persons of the white races might use certain public facilities, for such a law would disadvantage, not persons of a particular race, but persons of many races".[34] His correct conclusion that "[i]t is absurd to think that this result was intended"[35] comes, therefore, as a

[30] The full text of s. 10(1) of the Racial Discrimination Act reads as follows:
"If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin, shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin".

[31] *Gerhardy, supra* n. 2 at 316 *per* Gibbs, C.J., 324 *per* Mason, J., 334 *per* Brennan, J.

[32] *Id.* at 316.

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*

case of *non sequitur* for reasons having to do with the general inappropriateness of the colour-blindness assumption.[36]

More convincing reasons for the rejection of the argument about the irrelevance of s. 10(1) of the Commonwealth Act to s. 19 of the Land Rights Act are given by Brennan, J. He proposes to adopt a meaning of the word "particular" with respect to "the distributive operation of s. 10" to the effect that "each racial group (persons of a particular race) should enjoy the rights enjoyed by the advantaged racial group (persons of another race)".[37] As a consequence of this interpretation, "[i]f the persons suffering a comparative disadvantage are of different races, s. 10 operates so that every disadvantaged racial group enjoys the same right to the same extent as it is enjoyed by the advantaged racial group".[38] Now this sounds like a reasonable interpretation: the only problem is that it operates with the concept of "disadvantage" relative to the rights and benefits conferred by a particular provision under scrutiny. A group "disadvantaged" by a particular law (e.g. all non-Pitjantjatjara who are excluded from unrestricted entry) may be, overall, better-off than a group "advantaged" by this particular law which may be, in turn, socially disadvantaged.[39] But this has to do with the overall philosophy of the Court (best exemplified in *Gerhardy* by Brennan, J. himself) that the analysis of "discrimination" has to ignore the social realities of the disadvantages of groups who are the beneficiaries of remedial programs (unless the provisions about "special measures" apply, in which case "discrimination" can be, exceptionally, tolerated). This is a broader issue, which will be taken in the further Sections of the Article: as far as the literal analysis of the concept of "persons of a particular race" is concerned, Brennan, J.'s contention that the concept may include persons of many races, other than one indicated in a benefit-conferring provision, seems to pass the test of common sense.

Perhaps the opinion of Mason, J. is the most interesting in this regard. Of all the Justices tackling this particular matter, he admits most openly that "[t]here is the problem of giving effect to the word 'particular' when the effect of the exclusion is that all persons other than the persons of a specified race enjoy the relevant right".[40] Although he believes that such an exclusion is "no doubt" inconsistent with the International Convention, he at least admits that "it is not evident" that it falls within the operation of s. 10(1) of the Commonwealth Act.[41] He admits that literal interpretation does not help us much: although there is a presumption that "words in the singular include the plural" (so that "particular" may apply to members of more than one race), it is uncertain whether it allows us to "embrace the exclusion of all persons other than the persons of a specified race or races".[42] The clue comes in this sentence: "The draftsman of the subsection [s. 10(1) of the Commonwealth Act] seems to have had his focus on discrimination against a particular

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[36] See *infra*, text accompanying n. 130-152.
[37] *Gerhardy, supra* n. 2 at 334.
[38] *Ibid.*
[39] Brennan, J. admits it indirectly by using the notion of a "comparative disadvantage", *ibid.*
[40] *Id.* at 324.
[41] *Ibid.*
[42] *Ibid.*, interrogation mark omitted.

race—the obvious case—rather than on discrimination in favour of a particular race."[43]

This is one of the rare moments in *Gerhardy* where the very *possibility* of a qualitative difference between "discrimination against" and "discrimination in favour" is openly acknowledged. Now one possible conclusion stemming from this distinction would be to say that s. 10(1) is concerned only with the prohibition of invidious discrimination, and that it does not embrace these regulations which confer compensatory benefits upon the members of one class, thereby depriving all the other racial categories of the same benefits. Mason, J. draws the opposite conclusion. In this, he is guided by two types of considerations. He suggests, first, that in the case of apparent uncertainty about s. 10(1) "it may be legitimate to look beyond the narrow focus of the draftsman [of the Commonwealth Act] to the broader sweep of the Convention which the statute is designed to implement". As we have already seen, for him the Convention "no doubt" prohibits exclusions such as the one in question. Secondly, he settles for a somewhat tautological assertion that "all persons who are not members of the Pitjantjatjara peoples are necessarily members of the class of non-Pitjantjatjaras". True, though hardly illuminating. And it still begs the question whether they indeed, as Mason, J. claims, "answer the statutory description" of s. 10(1): to say that all non-members of the race X (however small the class might be) are *eo ipso* the members of "a particular race", namely race of non-X, stretches the notion of "a particular race" a bit too far.[44] For instance, even if we agree (and it is hard not to) that all those who are not members of the class of Tamils are necessarily members of the class of non-Tamils, does it make any sense to claim that they are the members of such "a particular race"? Be that as it may, Mason, J.'s opinion at least has the merit of pointing our attention to the uncertainties of this interpretation, and to the problems arising out of "discrimination in favour of a particular race". We will see later, how important these problems are indeed.

3. *Is it unlawful for a State to enact a discriminatory law?*

Section 9(1) makes it unlawful for a person to do any act of racial discrimination of the kind described in the section.[45] The question arose whether the enactment of a discriminatory State law (or more particularly, of section 19(1) of the Land Rights Act, *providing it is discriminatory*) is made unlawful by s. 9(1). Besides the very enactment by South Australia of s. 19(1), two other candidates for an unlawful action in the sense of s. 9(1) were considered: issuing a land grant under s. 15 of the South Australian Act, and prosecuting the defendant for an offence against s. 19(1).[46]

As is clear, the validity of these two latter actions (in terms of their consistency with s. 9(1) hinges upon whether the making of a dis-

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[43] *Ibid.*

[44] Note also that in his tautology Mason, J. uses the neutral concept of "a class", which may apply to any social category distinguished by any criteria whatsoever, while s. 10(1) is more specifically concerned about "a particular race" which is a really existing social group.

[45] See *supra* n. 14.

[46] *Gerhardy, supra* n. 2 at 315-6 *per* Gibbs, C.J.

criminatory law is prohibited by s. 9(1). As to this last question, the Court gave a negative answer.[47] This was stated most emphatically by Brennan, J. who said that "[i]t is . . . outside the powers of the Commonwealth Parliament to prohibit the Parliament of a State from exercising that Parliament's power to enact laws, whether discriminatory or not, with respect to a topic within its competence".[48] Ironically then, the power of the State to enact protective measures for Aborigines has been defended, in this case, on the basis of its power to discriminate (including power to discriminate invidiously, as long as it is "with respect to a topic within its competence"). The State Act was held to be invulnerable to the prohibition of discriminatory acts (in the sense given to them by s. 9(1) of the Racial Discrimination Act) because, due to the states' rights theory, the State was declared free to discriminate! This, of course, does not undermine the operation of s. 109 of the Constitution as a result of which a State law will be invalid by reason of its inconsistency with a Commonwealth law. In other words: Brennan, J. distinguishes between the legality of the enactment of a State law (which is beyond the operation of Commonwealth law, including s. 9(1) of the Racial Discrimination Act) and the validity of a State law inconsistent with the Commonwealth law. This is emphatically stated in this phrase: "Section 9 of the *Racial Discrimination Act* cannot be construed as purporting to prohibit the enactment of discriminatory laws by the Parliament of a State, although the validity of discriminatory State laws if enacted is another question".[49]

This may well be a correct constitutional theory and yet one may ask what difference precisely does it make? After all, what *does* matter is whether s. 19(1) of the State Act which excludes strangers from the Pitjantjatjara land, is discriminatory and *hence* invalid by reason of its inconsistency with the Commonwealth Act, including s. 9. If it is so, it seems redundant to add that the enactment of the Act was legal in the first place: the discriminatory Act has to be invalidated. If it is not discriminatory, the question of legality of the enactment of law does not arise at all. The information that the enactment was legal in the first place does not add anything new to what we already know, i.e. that the law is invalid if inconsistent with the Commonwealth law. Brennan, J.'s contrast between the legality of an enactment and the validity of a law seems therefore to be a distinction without a difference.

Additional light on this matter is thrown by Mason, J. He suggests that s. 9 of the Commonwealth Act can operate as a source of invalidity of State laws in two hypothetical cases: first, when a State law is a law dealing with racial discrimination, while the Commonwealth law is intended to be a complete statement of the law;[50] second, when a State law makes lawful the doing of an act which s. 9 forbids.[51] Mason, J. claims that neither of these situations arise here. First, the South Australian Act (including its s. 19) is not "a law dealing with racial

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[47] *Id.* at 315-6 *per* Gibbs, C.J., 321 *per* Mason, J., 333 *per* Brennan, J. The other Justices did not comment upon this particular issue.

[48] *Id.* at 333.

[49] *Id.* at 333.

[50] See *Viskauskas* v. *Niland* (1983) 57 A.L.J.R. 414.

[51] *Gerhardy, supra* n. 2 at 320.

discrimination".[52] This, again, is literally true, but rather formalistic, for it presumes that there is a significant distinction between "a law *dealing with* racial discrimination" and "a law containing racial discrimination". There may be very discriminatory and invidious laws which, strictly speaking, do not "deal with" racial discrimination, but which are discriminatory in their purposes and effects. Where the line is to be drawn between laws "dealing with discrimination" and discriminatory laws is not at all clear. It is even more puzzling why should it matter at all. Second, Mason, J. holds that the Land Rights Act does not "make lawful the doing of an act proscribed by s. 9".[53] But this statement may come only as a *conclusion* of the substantive analysis of the discriminatory or non-discriminatory character of exclusion provided for by s. 19. If we hypothesize for a moment that s. 19 is racially discriminatory (and Mason, J. comes to this conclusion—implicitly—further on when he states that the only rescue to s. 19 comes from the "special measures" clause)[54] then what s. 19 does is precisely to "make lawful the doing of an act proscribed by s. 9(1)", that is to say, an act of racial discrimination.[55] We see here, again, the impact of the Court's self-imposed constraint of not examining the substantive merits of the exclusion in question as a prerequisite of the discussion of "discrimination". Mason, J.'s case is strongest when he argues about the irrelevance of s. 9 to the enactment of s. 19 on the basis of purely formal, textual interpretation. As he notes, "s. 10 of the Commonwealth Act, by making specific provisions in the case of State laws which discriminate in the manner already described, makes it clear that s. 9 is not intended to apply to such a situation".[56] Indeed, s. 10[57] seems to make s. 9 otiose with respect to State acts (for it assumes the prior existence of the discriminatory Act, and hence that it had not been invalidated by s. 9).

The textual argument (from the operation of s. 10 of the Commonwealth Act) about non-application of s. 9 to s. 19 of the South Australian Act is formulated also (in very much the same way as in Mason, J.'s opinion) by Gibbs, C.J.[58] He also asserts the constitutional doctrine that the Commonwealth Parliament cannot "make it unlawful for a State Parliament to pass a law of a particular kind"[59] (*implicite*: to pass a discriminatory law). In an implicit form, the Chief Justice states what Brennan J. made explicit: South Australia's competence to pass protective racial legislation is defended on the basis of the State's competence to pass a discriminatory law. This is even more clear when Gibbs, C.J. explains

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[52] *Id.* at 321.

[53] *Id.* at 321.

[54] *Id.* at 326: "The fact that the lands constitute one-tenth approximately of the area of the State of South Australia, suggests that the vesting of title to the lands and the restrictions on access imposed by s. 19 on non-Pitjantjatjaras amounted to an impairment of their freedom of movement. However, in my opinion the State Act should be regarded as amounting to a special measure within the meaning of Art. 1(4) of the Convention, as provided by s. 8(1) of the Commonwealth Act."

[55] See in particular *id.* at 345 *per* Deane, J.

[56] *Id.* at 321.

[57] See *supra* n. 30.

[58] *Gerhardy, supra* n. 2 at 315.

[59] *Id.* at 315. Such an act, he says, "would be not only surprising, but of very doubtful constitutional validity". Brennan, J. is less equivocal: "If s. 9 were construed as encompassing a prohibition directed to State Parliaments to refrain from enacting discriminatory legislation with respect to matters that are within the legislative competence of the States, s. 9 would itself be invalid", *id.* at 333.

why s. 9 does not affect the Governor's act of issuing a land grant under the Land Rights Act. He begins with a general principle:

> If a statute which confers a power does not leave it open to the person exercising the power to discriminate in doing so, the exercise of the power is not rendered unlawful by s. 9(1) [of the Commonwealth Act]. Under s. 15(1) of the [Land Rights] Act, the Governor had no power to discriminate between persons or groups or classes of persons in the exercise of his power. . . . He could make the grant to Anangu Pitjantjatjaraku but to no one else.[60]

In other words, if a statute does not leave any discretion as to the question of *who* is to be a beneficiary of the action by an executive branch (though it leaves a competence not to confer the benefit at all, as Gibbs C.J. explicitly states),[61] then no action by the executive in application of the statute can be discriminatory in the sense of s. 9! This is a controversial statement, to say the least. After all, everything depends on whether the statute is discriminatory or not: an act in the application of a discriminatory statute will be discriminatory as long as the statutory provisions are correctly applied, irrespective of whether the action is an exercise of discretion or not (Gibbs, C.J. does not make it clear why he believes that only discretionary actions may be deemed discriminatory—a statement if not puzzling, at least not self-evident). To say that the Governor's grant "did not involve a distinction, preference, exclusion or restriction of any kind"[62] seems counter-intuitive: the Governor's grant clearly does include "exclusion" of non-Pitjantjatjaras and "restriction" on entry. Whether the Governor's grant is discriminatory, depends on fairness of this exclusion and restriction, especially so since it was in his power to "refrain from issuing the land grant".[63] But such a conclusion would conflict with the colour-blindness philosophy which refuses to enquire into the substantive merits of a particular distinction. Not surprisingly, the above mentioned phrases are a prelude to yet another excursion by Gibbs, C.J. into the world of colour blindness:

> The case is comparable to that in which special legislation empowers the Governor to vest a particular piece of land in, say, an agricultural company or a mining company all the members of which are white, or in an ecclesiastical corporation all the members of which are of the same ethnic origin. No discrimination is involved in the act of the Governor in exercising his power in such a case.[64]

By now, I hope it is clear what is the general message conveyed by these three instances of Gibbs, C.J.'s play with the interchangeability of black and white colours. In the first two cases,[65] he rejected two particular interpretations of the benefits for the Blacks by showing how obnoxious would be the acceptance of similar benefits for the Whites. Here, he accepts an interpretation of the defence of a protective measure

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[60] *Id.* at 316.

[61] "[The Governor] could issue or refrain from issuing the land grant . . . but he had no discretion to decide who should be the grantee", *id.* at 316.

[62] *Id.* at 316.

[63] *Ibid.*

[64] *Id.* at 316.

[65] See *supra*, text accompanying n. 28 and 34.

for the Blacks (by showing that it is not vulnerable to attack by s. 9) but it comes in a package with the defence of a hypothetical similar provision for the Whites. In first two examples, excluding non-Pitjantjatjara persons from the Pitjantjatjara land is for him *prima facie* wrong because excluding Blacks from the "white only" town would be also wrong; in the third example, issuing a land grant for Blacks is deemed non-discriminatory but then issuing a land grant to the company consisting of Whites only would be also non-discriminatory. The world in which colours are so easily interchangeable is a world where colours do not matter in the first place.[66] The general message of this alleged "white/black" equivalence is clear: it is that there is no substantive difference (from the point of view of the validity of the statute, anyway) between benefits for a disadvantaged racial group and benefits for the dominant race. Gibbs, C.J. implies repeatedly that discrimination in favour of a particular race and discrimination against that racial group must either stand or fall together. This is what "colour blindness" is all about:[67] although we will discuss it separately,[68] it is important to see now how the ground is prepared for it in the discussion of the minor legal issues of *Gerhardy*. The general function of these passages is to smuggle in the idea of colour-blindness in the context of the discussion of minor legal issues, so that this idea can be assumed as something self-evident in the discussion of the central issue: the meaning of "discrimination". The more particular impact of the above-quoted passage for this specific issue which we have been discussing in this Section is to reinforce the sad irony which we have already noticed with reference to Brennan, J.'s opinion: that the price to be paid for the defence of a protection afforded to Aboriginals by s. 19 (as being beyond the ambit of s. 9) is the commitment to a defence of a hypothetical invidious, discriminatory measure such as the one described in Gibbs, C.J.'s story about "an agricultural company . . . all the members of which are white". In other words: protection for Aboriginals is supported by an argument for discrimination against non-whites.

IV "Special Measures"

The interpretation of "special measures" clauses is the pillar of *Gerhardy*. Remove this pillar, and the whole construction will collapse. For *all* the Justices, the resort to "special measures" clauses constitutes the sole defence of s. 19 of the Land Rights Act.[69] Were it not for "special measures", the exclusion of non-Pitjantjatjara people would be invalidated as discriminatory. Murphy, J. says that the Racial Discrimination Act would render "s. 19 of the State act ineffective unless it can be justified as a special measure within s. 8(1) of the *Racial Discrimination Act*".[70] Brennan, J. asserts: "If the Land Rights Act is not a special measure, s. 19 of that Act is inconsistent with s. 10 of the *Racial*

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[66] "The only way that discriminations by whites against blacks can become ethically equivalent to discriminations by blacks against whites is to presuppose that there is no actual problem of racial discrimination", Freeman *supra* n. 29 at 1073.

[67] See R. Dworkin, *Taking Rights Seriously* (Duckworth: London, 1978) 229.

[68] See *infra*, text accompanying footnotes 130-152.

[69] *Id.* at 318-9 *per* Gibbs, C.J.; 326-7 *per* Mason, J.; 327 *per* Murphy, J.; 329-30 *per* Wilson, J.; 339-44 *per* Brennan, J.; 345-9 *per* Deane, J.; 351-2 *per* Dawson, J.

[70] *Id.* at 327.

Discrimination Act".[71] Deane, J. confirms: "[U]nless they qualify as 'special measures', the provisions of s. 19 of the State Act are invalid . . .".[72] These phrases express the *communis opinio* of the Court. They also indicate how important it is, first, to examine the meaning of "special measures" clauses, and, second, to ascertain the role they play in the structure of *Gerhardy*. To the first task, this Section of the Article will be devoted. As to the second task, the role of the "special measures" argument can be appreciated only in the context of its effect upon the analysis of "discrimination". This will be taken up in the next Section.

By s. 8(1) of the Racial Discrimination Act, Part II of the Act (in which, *inter alia*, ss. 9 and 10 occur) does not apply to special measures to which Art. 1(4) of the International Convention applies.[73] Article 1(4) of the Convention provides that special measures taken for the sole purpose of securing adequate advancement of certain racial groups requiring protection necessary to ensure them equal enjoyment of human rights shall not be deemed racial discrimination, provided that such measures do not lead to the maintenance of separate rights and that they shall not be continued after their objectives have been achieved.[74] The concept of "special measures" is repeated, in a different context and a slightly different formulation, in Art. 2(2) of the Convention which specifies the obligations of the States Parties to undertake "special and concrete measures" to ensure the goals stated in Art. 1(4).[75] It is not, however, a concept without its problems, and three of them are of special relevance to the Land Rights Act.

1. *The effect of the "non-separate-rights proviso"*

A closer reading of both Art. 1(4) and 2(2) of the Convention indicates immediately the first difficulty with the interpretation of "special measures". One of the differences in the wording of the two Articles consists in the way two provisos are related to each other: (1) the proviso of non-maintenance of separate rights for different racial groups, and (2) the proviso of non-continuation of special measures after their objectives have been achieved (for the sake of clarity, we will call them here,

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[71] *Id.* at 334-5.

[72] *Id.* at 345.

[73] S. 8(1) of the Racial Discrimination Act reads:

"This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relations to which sub-section 10(1) applies by virtue of subsection 10(3)."

The reference to s. 10(3) is immaterial for our discussion.

[74] The full text of Art. 1(4) of the International Convention:

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

[75] Art. 2(2) of the International Convention reads:

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

respectively, "a non-separate-rights proviso" and "a non-permanent-continuation proviso"). Art. 1(4) ends: " . . . provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." But art. 2(2) ends: "These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." The difference consists, obviously, in the type of conceptual link between two provisos. While Art. 1(4) suggests that they constitute two independent conditions, each of which has to be satisfied in order to validate "special measures", Art. 2(2) introduces a temporal sequence within which the non-permanent-continuation proviso must be satisfied first, while the non-separate rights proviso becomes operational after the hypothesis described in the non-permanent-continuation proviso has been materialized, i.e. after the objectives for which special measures have been taken have been achieved.

Clearly, Art. 2(2) establishes a more liberal regime for "special measures", while Art. 1(4) imposes much more rigorous conditions (indeed, so rigorous, that—as will be argued later[76]—one may wonder whether any "special measures" can pass the test of Art. 1(4) at all). The Justices in *Gerhardy* have adhered to a liberal interpretation suggested by Art. 2(2)—with one, rather insignificant, exception. An exception is contained in the opinion of Dawson, J. who seems to be unaware of the difference between Art. 1(4) and 2(2) and, speaking about "the limitations which are imposed by par. 4 of Art. 1 and par. 2 of Art. 2 upon the special measures" he says:

> They [i.e. the limitations] require either the prediction of the consequences of the special measures in order to determine whether they will lead to the maintenance of separate rights for different racial groups *or* will be continued after the objectives for which they have been taken have been achieved, or, alternatively, they require the termination of the special measures or some provision to be made for their termination in those circumstances.[77]

We see that Dawson, J. endorses (seemingly without realizing it) the interpretation suggested by Art. 1(4) but not by Art. 2(2). Otherwise, the first "prediction" would be correctly formulated in his sentence as "whether they will lead to the maintenance of separate rights for different racial groups *after* the objectives have been achieved". However, this exception to the general interpretation adopted in *Gerhardy* is rather insignificant for two reasons. First, Dawson, J. suggests that the limitations imposed by Art. 1(4) and 2(2) are relevant in the context of the International Convention but not as a means of marking out the scope of Part II of the Racial Discrimination Act.[78] Controversial though it is, this assertion undermines the rigor of the two provisos with regard to the scrutiny of the Land Rights Act *qua* a special measure. Secondly, in a different

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[76] See *infra* text accompanying notes 83-84.
[77] *Gerhardy, supra* n. 2, at 351, emphasis added.
[78] *Id.* at 351-2.
[79] *Id.* at 349.

context, Dawson, J. states that "the existence of par. 4 of Art. 1 was predicated upon, and drafted after, par. 2 of Art. 2"[79] thus recognizing implicitly the prevailing force of Art. 2(2).

The other judges in *Gerhardy* who acknowledge the difference between Art. 1(4) and 2(2) endorse a liberal interpretation (without using the word), allowing "special measures" to establish separate rights in the period before the objectives of special measures have been achieved.[80] I believe that this is, on balance, a correct interpretation, though not a self-evident one. The only possible argument against this interpretation that I can think of (*not* made in the course of *Gerhardy*) is that, if the authors of the Racial Discrimination Act wanted to endorse this interpretation, this could easily have been done by making a reference in s. 8(1) of the Act to Art. 2(2) of the Convention, which expresses a liberal test, rather than to Art. 1(4) which expresses a much more strict test of validity for "special measures". Now, although the purposes of Art. 1 and Art. 2 of the Convention are not exactly the same (Art. 1 defines racial discrimination, Art. 2 describes the duties of States Parties), nevertheless from the point of view of the operation of s. 8(1) of the Commonwealth Act this difference is irrelevant. The purpose of s. 8(1) is to suspend the operation of Part II of the Act (in the context of our discussion—mainly of ss. 9 and 10) to "special measures". This end could well be served by a direct reference in s. 8(1) to Art. 2(2) of the Convention or, at the very least, to Art. 1(4) and 2(2) alike. The legislator has chosen, however, to mention only Art. 1(4) which makes a liberal interpretation somewhat suspect.

But there are important arguments against the interpretation that Art. 1(4) should prevail over 2(2), and that the strict test should be adopted. Three such arguments can possibly be made, in ascending order of importance. First, the textual interpretation suggests to me that Art. 2(2) is a *lex specialis* in comparison with Art. 1(4). While Art. 1 defines discrimination, Art. 2 refers to the duties which are imposed by the Convention on States Parties. In the case of a possible divergence between the two Articles, the principle that provisions of general application give way to specific provisions should apply here.[81] Second, as the history of the discussion in the U.N. Commission on Human Rights shows, the draft paragraph of Art. 2 dealing with "special measures" was adopted before the analogous draft paragraph of Art. 1. Actually, the discussion of the "special measures" clause in Art. 1 was postponed until a decision was taken on Art. 2(2).[82] This suggests that for those drafting the

[80] Gibbs, C.J. epitomizes this interpretation by saying that "[t]he proviso as a whole appears to be designed to prevent such special rights as are granted from being indefinitely maintained or continued after the special measures have achieved their objective", *id.* at 319. See also *id.* at 326 *per* Mason, J.; 330 *per* Wilson, J.; 342 *per* Brennan, J.; 348 *per* Deane, J. Murphy J. did not consider this issue at all.

[81] "As a matter of general construction, where there is repungancy (sic) between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions", *Refrigerated Express Lines (A/Asia) Pty Ltd* v. *Australian Meat and Livestock Corp.* (1980) 29 A.L.R. 333 at 347 *per* Deane, J. See also *Perpetual Executors and Trustees Assoc. of Australia Ltd* v. *FCT* (1948) 777 C.L.R. 1 at 29; *Pretty* v. *Solly* (1859) 26 Beav 606 at 610; D. C. Pearce, *Statutory Interpretation in Australia* (Sydney: Butterworths, 1981; Second Edition), pp. 46-47 on the principle "*generalia specialibus non derogant*".

[82] N. Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* (Sijthoff: Alphen aan den Rijn, 1980) 27. This fact is also stated by Dawson, J. in *Gerhardy supra* n. 2 at 349 (who, however, does not refer to the same source as cited in this note).

Convention, Art. 2(2) was of prevailing importance as far as "special measures" are concerned, and that Art. 1(4) was predicated upon it. Thirdly, and most importantly, the literal interpretation of Art. 1(4), as contrasted with 2(2), would undermine the very purpose of "special measures". If the non-separate-rights proviso were to operate at the same time as the non-permanent-continuation proviso, then one wonders what special measures would be permissible at all? Special measures taken, as Art. 1(4) has it, "for the sole purpose of securing adequate advancement of certain racial or ethnic groups", cannot but establish separate rights for the members of these groups and for all the others. We are told by an authoritative historian of the U.N. Convention that "[i]n the debate on the paragraph on special measures . . . some representatives [to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, to the Commission on Human Rights, and to the Third Committee of the General Assembly] mentioned their concern that it could be used as a weapon by governments anxious to perpetuate the privileges of certain racial groups, as in the case of *apartheid*".[83] This may well explain the surprising strictness of the provisos in Art. 1(4) which, taken literally, make it impossible to establish any system of separate rights at all. But, if the *raison d'être* of the links between both provisos in Art. 1(4) was such as described in the last quotation, then we need not worry about it with respect to protective measures for disadvantaged racial groups, where "perpetuation of the privileges" or an apartheid-like system are hardly likely to occur.

Be that as it may, "special measures" would be incapable of being validated with the observance of both provisos at the same time. That such an effect could be envisaged, is contradicted both by elementary common-sense (why allow "special measures" in the first place if the test effectively makes them impossible?) and by the analysis of the purpose of the "special measures" clauses of the Convention. They come as a result of the conclusion that formal equality before the law may be insufficient to secure to certain racial groups "equal enjoyment or exercise of human rights and fundamental freedoms". Without this reflection, "special measures" clauses would be redundant since the prohibition of racial discrimination would be sufficiently covered by Articles 1(1) and 2(1) of the Convention. This purposive interpretation is endorsed in *Gerhardy* by Brennan, J. who says that if both provisos were to operate in the same time, "[t]he Convention would entrench inequalities in fact by precluding any legislative distinction based on race. Clearly this is not the object of the Convention".[84]

2. *"The air of temporariness" and "the air of permanence"*

Even if we successfully solve the problem of the relation between the two provisos, it does not fully dispel the suspicion that there is a contradiction between "the air of temporariness" of the "special measures"

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[83] Lerner, *supra* n. 82 at 33. See also T. Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *Amer. J. Inter. L.* 283, 284: "The Convention drew its primary impetus from the desire of the United Nations to put an immediate end to discrimination against blacks and other nonwhite persons".

[84] *Gerhardy, supra* n. 2 at 342.

clauses and "the air of permanence" of the Land Rights Act. This contradiction is related, more particularly, to the fact that nothing suggests that the Land Rights Act is a temporary measure while Articles 1(4) and 2(2) create the impression of devices applying to transitory, episodic situations.

Now both limbs of this assertion (i.e. about the "air of permanence" of the Land Rights Act, and the "air of temporariness" of the "special measures" clauses) can be attacked with the purported effect of undermining the contradiction. Indeed, both were the subject of challenges by the Justices in *Gerhardy*. As to the "air of permanence" of the South Australian Act, three Justices expressed the view that if the exclusion from the land is maintained indefinitely, this may pose a problem at some time in the future.[85] Surprisingly perhaps, Murphy, J. came closest to the prediction that in the future the validity of s. 19 may become problematic: "The provisos are so couched that questions of continuing validity of the challenged provisions may arise if the special measures are continued indefinitely".[86] But this is the strongest expression of unhappiness with the "air of permanence" of the Land Rights Act in *Gerhardy*—and arguably it is still very feeble. The other Justices made it clear that there will be no doubts about the consistency of s. 19 with the "special measures" clauses as long as the objectives for which they were taken have not been achieved, and it can be a very long, indeed an indefinite, process. Mason, J. says that the legislative regime of the Land Rights Act "may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples".[87] Accordingly, the other Justices rejected the contention that the "temporariness" of special measures calls for a "sunset clause" in the Act, i.e. a clause which would automatically deprive the Act of operative force after the objectives have been achieved.[88]

Strictly speaking, this interpretation is quite correct: to say that the special measures must be discontinued after the objectives have been achieved does not imply that they are short-term measures: the objectives may be incapable of being achieved in the near future, or they may be never attainable at all, thus justifying the indefinite validity of "special measures". And yet, it seems that this conclusion stretches the concept of "special measures" a bit too far: as they are worded, they generate an immediate suggestion that they are transitory means to an end which is, as it were, on the horizon. Even writers sympathetic to the idea of legal preferences for disadvantaged groups emphasize this episodic and limited nature of "special measures": they describe such measures, for instance, as "crash programmes which allow special privileges or 'preferences' to underdeveloped groups".[89] An idea of intervention aimed at solving of the particular issue, rather than of an ongoing pattern of preferences, seems to be built into the concept of "special measures". The Land Rights Act, though literally consistent with it, does not fit very nicely the category of "special measures".

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[85] *Id.* at 319 *per* Gibbs, C.J.; 327 *per* Murphy, J.; 330 *per* Wilson, J.

[86] *Id.* at 327.

[87] *Id.* at 326-7.

[88] *Id.* at 342 *per* Brennan, J.; 348-9 *per* Deane, J.

[89] W. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983) 159. He also refers to the measures provided for by Art. 1(4) and 2(2) as "special temporary measures", *id.*

3. *The aims of the Act: "restoration" or "advancement"?*

This impression can only be strengthened by reflection on the aims of Land Rights Act, as compared with the aims of "special measures" in the International Convention. Gibbs, C.J. describes the aims of the Act as "to enable the Pitjantjatjaras to live on the land in accordance with their traditions and customs and to maintain their relationship to the land" and he adds that "the provisions of s. 19 of the Act were intended to be a protective measure, enacted in the interests of racial or ethnic groups thought to require that protection".[90] He also mentions, in a different context, that "the true purpose of the Act" is "to restore the lands to their traditional Aboriginal owners".[91] Mason, J. defines the object of the Act as "to restore to an Aboriginal people the lands which they occupied traditionally" and also "to provide that people with the means to protect and preserve their culture".[92] Wilson, J. repeats this formula: "The emphasis upon traditional ownership and the functions of Anangu Pitjantjatjaraku set out in s. 6(1) are plainly directed to enabling the Pitjantjatjaras to protect and preserve their culture . . .".[93] Note the words most frequently used to describe the aims of the Land Rights Act: "to restore", "to protect", "to preserve". The language of the "special measures" clauses is distinctly different: the sole purpose of "special measures" must be to "secur[e] adequate advancement of certain racial or ethnic groups . . . requiring such protection as may be necessary to ensure to such groups equal enjoyment . . . of human rights and fundamental freedoms".[94]

There is a difference between the activist, dynamic ring of the language of Art. 1(4) and 2(2) of the Convention, and the passive, restorative connotations of the Land Rights Act. The basic claim of the Pitjantjatjara people, as recognized in the Act, is to be left alone. To be sure, this requires a positive action by the State, but it is an action of "restoration" of traditional ownership and creation of conditions in which the traditional relationship of Pitjantjatjaras with land may be again maintained. It is the aim of bringing back the situation disturbed by white settlers; of recreating—within limits—the conditions of the *status quo ante.* There is a contrast between the language of these claims, and the language of "advancement" which suggests upgrading the situation of a disadvantaged group, bringing it up to a norm enjoyed already by the rest of society. This contrast is perhaps best displayed by the opinion of Gibbs, C.J. who, within the space of two pages defines, first, "the true purpose of the Act" as "to restore the lands to their traditional Aboriginal owners",[95] and, second, says that the Act "has the sole purpose of securing the advancement of the ethnic groups in question".[96] The reason for this difference in vocabulary is that in the second case (but not in the first one) Gibbs, C.J. attempts to demonstrate the conformity of the Land

[90] *Gerhardy, supra* n. 2 at 318.
[91] *Id.* at 317.
[92] *Id.* at 326.
[93] *Id.* at 330. S. 6(1) of the Land Rights Act mentioned by Wilson, J. enumerates the functions of Anangu Pitjantjatjaraku, basically with respect to the management, use and control of the lands.
[94] Art. 4(1) of the International Convention.
[95] *Gerhardy, supra* n. 2 at 317.
[96] *Id.* at 318.

Rights Act with the "special measures" clauses: that is why he is adopting the language of "advancement" rather than "restoration" or "preservation". In the Chief Justice's judgment, "the true purpose" seems to be different from "the sole purpose", depending on the aims of the argument.

Now, again, this is not to say that to describe the restorative measures as a means of "advancement" is literally wrong. Brennan, J. devotes much effort in what are perhaps the most impressive passages of *Gerhardy* to warn against the paternalistic approach to "advancement" and to demonstrate that the ultimate standard of "advancement" must be rooted in the wishes of the beneficiaries of the proposed measures.[97] But this is not the most natural connotation that "advancement" has. In the context of the situation of the Aborigines, "advancement" is most immediately related to the provision of the means which improve their standing in the community with respect to material well-being, health protection, political influence, education etc. In these areas, "advancement" is indeed needed, understood as a progression on a unitary scale of values which applies to the community as a whole. But clearly the Land Rights Act is not concerned with an advancement in this sense, and the validity of *par excellence* restorative and protective measures, such as land rights, does not depend on them being and continuing to be an effective means of "advancement" in the literal sense of the word. To present restorative and protective measures as a way of "advancement" is, hence, not literally incorrect, but requires stretching the concept beyond its natural and immediate meaning.

We see now that with respect to the three issues related to "special measures" that have been discussed so far: the combined impact of two provisos on the validity of the Land Rights Act, the issue of "temporariness" of special measures, and the issue of "advancement" as the sole legitimate purpose, there are some problems with recognizing s. 19 of the Land Rights Act as a case of "special measures" in the meaning given to the concept by the International Convention. None of these problems is absolute, and not all are equally damaging (in particular, the first issue is the least problematic). Hence, it cannot be said that the label of "special measures" does not fit s. 19 of the Land Rights Act at all. But it is not as obvious as *Gerhardy* seems to suggest. Why did the Court, usually so preoccupied with literal and textual analysis, take this apparent inadequacy of the "special measures" analysis so lightly?

The answer is this: because it offered the only way of saving the essentially decent and morally proper Act without, at the same time, undermining the colour-blindness philosophy of the Court and without entering into the analysis of "discrimination" in terms of benign v. invidious racial distinctions. "Special measures" clauses offered an easy escape from such analysis: a shortcut solution for reaching a morally plausible end-result. The Court could afford to declare s. 19 as *prima facie* invalid (thus assuming that any racial distinction is discriminatory) because it knew in advance that the "special measures" argument would ultimately rescue the challenged provision. As *a* strategy of defending the Land Rights Act, the "special measures" strategy must be applauded. As an excuse for avoiding an analysis of "discrimination" with a possibly significant impact

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[97] *Id.* at 340.

on the future of the anti-discrimination law in Australia, the choice of this strategy by the Court is regrettable. The reasons for this judgment will be stated in the next Section of the Article.

V. "Gerhardy" and the Concept of Discrimination

In the passage quoted at the beginning of this Article, Senator Muskie says that "as a practical matter, we all know what constitutes racial discrimination".[98] Well, we don't, and even if we think we do, some other people may disagree. The simplest description of "racial discrimination" would be one identifying it with any "racial distinction", or, in other words, a distinction along racial lines. And yet we know that just as not any distinction along sexual lines amounts to "sex discrimination" (how about maternity leave?), and just as not any distinction between soldiers and civilians amounts to discrimination against either of these groups, and just as not any distinction based on age amounts to discrimination against those under, or above, the age indicated in a regulation, so equally not any classification based on racial criteria amounts to racial discrimination. Discrimination is more than merely a distinction, or classification: it carries with it some amount of disregard for the legitimate interests of a group discriminated against, it is to some extent invidious, or victimizing, or stigmatizing, it denies the group discriminated against something that other groups do enjoy.[99] All this is rather obvious. Or is it?

In *Gerhardy* only two Justices entered into a discussion of what "discrimination" really means: Brennan, J.[100] and Wilson, J.[101] One other Justice (Murphy, J.) merely asserted, without any arguments whatsoever, that discrimination "in favour" is equally prohibited by Racial Discrimination Act as discrimination "against", and hence that the Land Rights Act is discriminatory. These two assertions, of absolutely crucial and fundamental importance for the case, and perhaps for the future of the anti-discrimination law in Australia, are contained in a paragraph which is short enough so that it can be quoted in full:

> The challenged part of the State act discriminates on racial grounds by providing for exclusion from the land on a racial basis. A discrimination on racial grounds in favour of a racial group against the rest of the community is within the intendment of the *Racial Discrimination Act*, which should not be read pedantically.[102]

An overall picture of "discrimination" in *Gerhardy* is therefore this: one Justice opted out from the discussion of "discrimination" altogether,[103] six Justices held that the Land Rights Act (in its s. 19) was discriminatory. Out of these six Justices, two came to this conclusion on

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[98] See n. 1, *supra*.

[99] See e.g. E. W. Vierdag, "Non-Discrimination and Justice", (1971) 57 *Archiv für Rechts- und Sozialphilosophie* 187; T. Sandalow, "Racial Preferences in Higher Education: Political Responsibility and the Judicial Role", (1975) 42 *U. Chi. L. Rev.* 653, 654-663.

[100] *Id.* at 335-8.

[101] *Id.* at 330.

[102] *Id.* at 327 *per* Murphy, J.

[103] Dawson, J., on the basis that the Land Rights Act is a "special measure", hence it is not necessary to consider whether it involves racial discrimination, *id.* at 352.

the basis of the discussion of the concept of "discrimination" (Brennan, J. and Wilson, J.), one simply asserted it (Murphy, J.), three others inferred it from the negative effects the exclusion from the lands has for non-Pitjantjatjaras. Gibbs, C.J., in his favourite "black/white interchangeability" style, by now well familiar to the reader, held that if the exclusion from certain lands of persons on the grounds of race was held non-discriminatory, then "it would be easy indeed to introduce a system of apartheid without contravening the Convention or the *Racial Discrimination Act*".[104] Mason, J. stated that, the "special measures" clause absent, s. 19 would constitute racial discrimination because it would "constitute an interference with freedom of movement".[105] Similarly, Deane, J. held that the exclusion of entry by non-Pitjantjatjara persons constitutes a distinction based on race with the effect of impairing the recognition, enjoyment or exercise, on an equal footing, of the right to freedom of movement.[106] None of the three last mentioned Justices found it relevant to consider the effects s. 19 has on Pitjantjatjara people as *a possible* argument against holding the Land Rights Act prima facie discriminatory, or prima facie invalid. The only rescue came from the "special measures" provisions, but as far as the discriminatory nature of the Act is concerned, this was evident to all the Justices with the exception of Dawson, J. (because of his declared *désinteressement* in the matter) and Brennan, J. and Wilson, J. who at least admitted the matter deserved some consideration. To their opinions we will, therefore, turn now.

1. *Are "benign racial classifications" discriminatory per se?*

Wilson, J.'s opinion is interesting in this context because he tries to explain why a benign discrimination is prohibited by the Racial Discrimination Act equally with an invidious one. His is a purely formal argument and it may be useful to consider it briefly before we go on to discuss the substantive issue.[107] The argument Wilson, J. gives for including benign discrimination in the ambit of prohibited discrimination is from the explicit provision in the Art. 1(4) of the International Convention for "special measures" as not embraced by the general prohibition of discrimination in Art. 1(1). Had the draftsman intended to prohibit only "invidious" discrimination, the argument runs, he wouldn't have to permit explicitly "special measures" for such measures would be beyond the reach of the prohibition of discrimination anyway. Art. 1(4) describes, therefore, exceptions to a general prohibition in Art. 1(1): they are invulnerable to the charge of discrimination not by virtue of their benign character but by virtue of being an explicit exception to a general rule. Hence (the argument concludes), the general prohibition of discrimination must apply to all racial distinctions, invidious and benign alike.

The argument is not convincing. For one thing, the "special measures" provision may equally well constitute "a confirmation of", as

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[104] *Id.* at 318.
[105] *Id.* at 326.
[106] *Id.* at 344-5.
[107] We will discuss this issue *infra*, see text accompanying notes 117-164.

an "exception to", the general prohibition of discrimination.[108] There is nothing inconsistent in suggesting that the draftsman of the Convention wanted to prohibit, in Art. 1(1), all *invidious* discrimination, and in Art. 1(4) to further dispel any possible doubts about whether "special measures" constitute invidious discrimination. Art. 1(4) does not add, therefore, anything new to the contents of the prohibition in Art. 1(1) but confirms emphatically what we already know: that "special measures" are not discriminatory. This does not mean that all other *distinctions* are necessarily discriminatory. This conclusion is supported by the plain language of the Convention, by its purpose, and by the doctrine of international law. First, the plain language of the definition of "discrimination" in Art. 1(1) of the Convention confirms that not "any distinction . . . based on race" is discriminatory, but only such a distinction based on race which "has the purpose or effect of nullifying or impairing . . . the recognition, on an equal footing, of human rights . . .". A racial distinction is therefore outside the ambit of the "discrimination" (in the meaning of Art. 1(1) if this effect or purpose is lacking: the Convention does not prohibit racial distinction *per se.*[109] Wilson, J. says:

> To paraphrase Art. 1(1), the paragraph defines racial discrimination to mean 'any distinction, exclusion, restriction or preference' based on race which has the effect of impairing the enjoyment on an equal footing of a human right in a field of public life. That definition is not confined to distinctions which are arbitrary, invidious or unjustified. It refers to *any* distinction, etc.[110]

The most important word in the last sentence is: "etc.". "Et cetera" stands for the effects of the distinction which make it discriminatory: the effects of impairing the enjoyment on an equal footing of a human right. Without establishing these effects (or purposes), the analysis of "discrimination" is simply incomplete. So, while it is true that Art. 1(1) says what Wilson, J. says that it says, it does not support the conclusion that all racial distinctions are *per se* discriminatory. Secondly, the analysis of the purposes of Art. 1(4) suggests that those who drafted the Convention were equally concerned about creating a legal ground for protective measures, as (in the two provisos attached to the "special measures" clauses) about distancing themselves from the apartheid-type systems.[111] They were not aiming at restricting the scope of benign, protective measures. To interpret the Convention in this way is therefore to construe it contrary to the intention of its drafters. It would be indeed ironic if the same Articles that were motivated by moral horror related to apartheid and other forms of racial discrimination were utilized in order to prohibit protective or compensatory measures for the victims of such past discrimination. Thirdly, the Convention should be read in the general context of the

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[108] I owe this observation to discussion with Mr David Mason. See also, similarly, McKean, *supra* n. 89 who says (at 159) that "[a] definition of discrimination" in the International Convention "incorporates the notion of special temporary measures, not as an exception to the principle but as a necessary corollary to it . . .".

[109] "When distinctions are made on the explicit basis of race, a violation of the Convention can *often* be established without great difficulty, since the discriminatory purpose may be apparent on the face of the instrument, policy or program in question", Meron, *supra* n. 83, emphasis added.

[110] *Id.* at 330, italics in the text.

[111] See *supra* n. 83.

meaning of "discrimination" in international law of which it constitutes a prominent part. As has been clearly demonstrated,[112] and as Wilson, J. himself acknowledges by quoting the main exponent of this view,[113] the notion of "discrimination" as identical with invidious (or arbitrary, or unjust) distinctions only, and not with *any* distinction, has gained common currency in international law. It is not clear why the interpretation of the International Convention should be an exception to this general interpretative custom. The problem, therefore, begins precisely in the point where Wilson, J.'s opinion ends: is the distinction in question discriminatory by virtue of the impairment of human rights? This is a substantive issue to which we will turn now: without tackling it, the discriminatory nature of a distinction cannot be established. Wilson, J. does not provide any answer to this substantive question: his interpretation of the Convention merely helps formulate the question.

The only detailed analysis of the concept of discrimination and "equality before the law" is contained in the opinion of Brennan, J. He begins with a statement which is hardly controversial: "Racial equality is the opposite of racial discrimination, and full racial equality would be achieved by the elimination of all forms of racial discrimination."[114] Indeed, but what *is* racial discrimination? On the pages which follow the last-quoted statement, Brennan, J. makes a *tour d'horizon* of the concepts of legal equality (and, by contradistinction, discrimination) in international law (in particular, in the jurisprudence of the Permanent Court of International Justice and the International Court of Justice), in the decisions of the Supreme Court of India and of the United States, in legal literature both overseas and in Australia only to conclude that an act "which involves a distinction based on race that denies formal equality" is discriminatory unless it falls into the category of "special measures".[115] The mountain has brought forth a mouse. Brennan, J. states also that "[w]hatever may be the connotation of the term 'discrimination' in international law generally, in the context of the Convention Art. 1(4) expresses an exception to what otherwise falls within Art. 1(1) . . . . Section 9(1) [of the Racial Discrimination Act] relates to *all formal discrimination including benign discrimination* unless the benign discrimination is effected by a special measure which s. 8(1) takes out of the ambit of s. 9(1)."[116] But then, if the Racial Discrimination Act is held to proscribe all distinctions along racial lines ("all formal discrimination") irrespective of their purposes, unless they are protected by "special measures" clauses, what is the use of citing the views, in international law and in the doctrine of anti-discrimination law, which save benign racial classifications from the charge of a discriminatory character? What is the point of citing these views, if one decides that, "[w]hatever may be the connotation of the term 'discrimination' in international law generally", the Racial Discrimination

[112] McKean, *supra* n. 89 *passim*, especially at 139-140, 147-8, 221-3, 286-8. For example, commenting upon the preparation of the Covenant on Economic, Social and Cultural Rights, McKean says (at 147): " 'Discrimination' had come to mean 'unfair distinction' both in legal terminology and in everyday speech; arbitrary actions were precluded but legitimate distinctions allowed."

[113] W. McKean quoted in *Gerhardy, supra* n. 2 at 330.

[114] *Id.* at 335.

[115] *Id.* at 338.

[116] *Id.* at 338, emphasis added.

Act is indifferent as to the distinction between invidious and benign "discrimination"? By discounting these "connotations" as inapplicable to this case, Brennan, J. undermines the relevance of his own discussion of these conceptions and returns to the safe world of "special measures".

One cannot help thinking that the invocation of the idea of "benign discrimination as falling outside the conception of discrimination in international law"[117] plays merely a decorative role in Brennan, J.'s argument. It is, however, an instructive decorum because it contains the elements of the conclusion contrary to the one reached by Brennan, J. (and all the other Justices as well, for that matter). For one thing, he quotes some very convincing arguments which demonstrate (what seems obvious, anyway) that discrimination is not identical with a differential treatment. He quotes, for example, a well-known decision of the Permanent Court of International Justice as proclaiming that "[i]t is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality . . .".[118] He also quotes the famous dissent by Judge Tanaka, in the *South West Africa Cases* before the International Court of Justice, who says: "To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists."[119] And he also quotes Blackmun, J. in *Bakke* with his famous dictum: "In order to get beyond racism, we must first take account of race. . . . And in order to treat some persons equally, we must treat them differently."[120] The common tenet of these judgments is that not any difference of treatment (including difference of treatment based on race) is discriminatory: what matters is whether the differential treatment is related to relevant differences between the groups in question. This, of course, calls for the analysis of these actual differences and the evaluation of the goal to be served by the differential treatment. The upshot is that, as a widely accepted doctrine in international law[121] (including regional systems of human-rights protection)[122] and in other municipal legal systems,[123] establishing what is discriminatory depends on the goals

[117] *Id.* at 338.

[118] *Advisory opinion on Minority Schools in Albania* (1935) Ser. A/B No. 64, quoted *id.* at 337.

[119] Quoted *id.* at 337.

[120] Quoted *id.* at 338.

[121] See, in particular, McKean, *supra* n. 89 who concludes his book (at 288): " 'Discrimination' is defined under international law to mean only unreasonable, arbitrary, or invidious distinctions, and does not include special measures of protection . . . . Putting it positively, the equality principle forbids discriminatory distinctions but permits and sometimes requires the provision of affirmative action" (footnote omitted). See also, with reference to Millhouse, J.'s decision in *Gerhardy*, J. Crawford, "The Australian Law Reform Commission's Reference on the Recognition of Aboriginal Customary Law", (1984) 17 *Verfassung und Recht in Übersee* 133, 154-156 and I. Brownlie, "The Rights of Peoples in Modern International Law", (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 104, 111-12.

[122] P. Sieghart, summarizing a decision of the European Commission of Human Rights in *De Geillustreerde Pers N. V.* v. *Netherlands* of 1971, concludes that discrimination contrary to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is established where the following elements are found:

> "(1) The facts found disclose a differential treatment; and
>
> (2) The distinction does not have a legitimate aim—that is, it has no objective and reasonable justification, having regard to the aim and effects of the measure under consideration; and
>
> (3) There is no reasonable proportionality between the means employed and the aim sought to be realized."
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> P. Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 78, footnote omitted.

[123] For the American and Indian decisions, see *infra*, n. 153, 154, 158, 159, 165. In Canada, see *The Athabasca Tribal Council* v. *Amoco Canada Petroleum Co.* [1981] 1 S.C.R. 699, 711 (*per* Ritchie, J.).

of the treatment and the relevance of the means adopted to attain these goals.

Interestingly enough, not only the opinions quoted by Brennan, J. (which he ultimately disqualifies as irrelevant to the Racial Discrimination Act's concept of "discrimination") but also his own reasoning contains the bases for such a conclusion, rather than for the conclusion which he explicitly endorses. Consider this passage:

> The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society. If it appears that a racially classified group or one of its members is unable to live in the same dignity as other people who are not members of the group, or to engage in a public activity as freely as others engage in such an activity in similar circumstances, or to enjoy the public benefits of that society to the same extent as others may do, and that the disability exists because of the racial classification, there is a prima facie nullification or impairment of human rights and fundamental freedoms.[124]

This is an important, and very powerful, statement of the circumstances in which discrimination occurs. It relates discrimination directly to the effect of impairment of human dignity, and more particularly, to the disabilities in the enjoyment of public benefits because of a racial classification. The question, as it stands, is whether the exclusion from the lands constitutes such an impairment of the dignity of the non-Pitjantjatjaras. As for the Pitjantjatjaras themselves, the measure is certainly designed in order to protect their dignity, inseparable from their exercise of the traditional relationship with the land. But it still may be questioned whether such an effect is likely to occur, and also whether the same result could be achieved with the employment of means less burdensome to non-Pitjantjatjaras. In sum, it appears therefore that the test of the "discriminatory" nature of the regulation in question is a function of the analysis of two types of factors: firstly—the impact of the regulation upon the dignity, self-respect and "enjoyment of public benefits" by those who are non-beneficiaries of a proposed benign classification (here: non-Pitjantjatjaras); secondly—the nature of the relation between the means employed and the legitimate ends to be attained regarding the beneficiaries. These two types of problems constitute the fundamental agenda of the discussion about the "discriminatory" character of benign racial distinctions. Taken together, they constitute the test of legitimate racial distinction. We will discuss now these two ingredients of the test.

2. *The test for discrimination: the first limb*

Clearly the Land Rights Act imposes certain burdens on non-Pitjantjatjaras or, more precisely, it denies them certain benefits available

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[124] *Gerhardy, supra* n. 2 at 336.

to the Pitjantjatjaras. But then any classification of citizens denies to some the benefits available to others. The specific benefits for war veterans are denied to non-veterans. Housing commission facilities for people under a certain income are not available to anyone else. This is obvious, and in itself it does not constitute discrimination. A measure will be discriminatory, however, if it will unfairly deprive some people of the benefits which they deserve. In order to establish this, one has to inquire into the relationship between the classification and its aim. This is precisely what Brennan, J. (and the other Justices of the High Court) refuses to do within the concept of discrimination. Such a denial of benefits may be also discriminatory if, irrespective of the relationship between the aim and the goal, it affects the dignity of the non-beneficiaries of a given classification.

S. 19 denies non-Pitjantjatjaras certain benefits: they are not allowed to enter the Pitjantjatjara land. But then we are not allowed to enter restricted military zones either. Nor are we entitled to enter the premises of some buildings without permission. Neither have we unrestricted entry to certain national parks or reservations. The test for the legitimacy of these restrictions and exclusions lies not in how large is the area of restricted entry, nor in how important it is for us to enter there. For a Sydneysider, the restrictions upon entry to the military zone in the Watsons Bay area may be more annoying than the restrictions upon the entry to the Pitjantjatjara land in the north-west of South Australia which, as one of the Justices describes nicely, are "of greater comparative importance to the cartographer than to the economist".[125] The importance and the degree of restrictiveness of particular exclusions depend, to a large degree, upon the individual hierarchies of preferences of particular people, and these can hardly be grasped in legislation. What matters then is, again, whether the restriction affects the dignity of those who are excluded and whether it is relevant to an acceptable aim.

Measuring the dignity infringed by the restriction is a tall order. It may well happen that some non-Pitjantjatjaras feel offended by exclusion from the Pitjantjatjara land. If it is likely to occur on a broad scale, if wide segments of the community will feel victimized, offended, stigmatized as "inferior", branded as second-class citizens etc. — then the Land Rights Act indeed smacks of discrimination. But this needs demonstration. And, we might also add, it sounds hardly probable to happen. It is not good enough to show that some people feel wronged: the sense of injustice must have a legitimate status on the basis of a sound moral theory.[126] Otherwise, any benefits to any social group are likely to be defeated by the test of disapproval by those who do not profit from them. In any event, this is not the case of the Land Rights Act. But this shows that the analysis of discrimination calls for the assessment of how invidious the classification is in its purposes and/or effects. And yet, the lack of such an assessment is, in *Gerhardy*, elevated to the status of a general principle.[127]

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[125] *Id.* at 344 *per* Deane, J.

[126] In a similar context, Dworkin says: "Everything depends upon whether the feeling of insult is produced by some more objective feature that would disqualify the policy even if the insult were not felt", *supra* n. 67 at 231. See also V. Blasi, "*Bakke* as Precedent: Does Mr. Justice Powell Have a Theory?", (1979) 67 *Calif. L. Rev.* 21, 51-58.

[127] See also Brownlie, *supra* n. 121.

Linking discrimination with the impairment of dignity may sound at first blush as making it dependent upon a hopelessly and inevitably subjective standard. After all, what is offensive to one person may be perfectly acceptable to another. But one must not exaggerate: law operates with the use of typical standards, applicable to typical situations. The test of the discriminatoriness of a regulation must, therefore, involve a question of whether typically it is likely to impair the dignity and self-respect of the non-beneficiaries of a proposed (or challenged) provision. One can at least try to sketch a list of circumstances which preclude or minimize the risk of such damage to self-respect of non-beneficiaries. Indeed, anti-discrimination law (notably in the United States) and the literature of anti-discrimination is in constant search of the acceptable criteria of benign, or non-discriminatory, classifications. This is not to say that these criteria are easy to find, or that the ones which have been proposed are non-controversial. But one cannot even begin considering them if one believes that any racial distinction is *per se* discriminatory. What is wrong with *Gerhardy* is not that the Court has identified improperly the criteria of discrimination but that it has not even set about the task of searching for them.

To begin with, one must reject the assumption that each classification on racial lines is necessarily discriminatory, for discrimination is a function of victimization, and victimization depends upon the relative positions of racial groups who are advantaged and those who are disadvantaged by a given racial distinction. The view that any classification based on race is inherently wrong, and a corresponding directive that law must use only race-neutral classifications (which we have been referring to as "colour blindness theory"), underlies *Gerhardy*'s conclusion that the Land Rights Act is prima facie discriminatory. This view is mainly represented in Gibbs, C.J.'s arguments quoted above as to the black/white equivalence;[128] it is also expressly endorsed by Brennan, J.: "The differential treatment of Pitjantjatjaras and non-Pitjantjatjaras achieves no legitimate object except to confer a privilege on Pitjantjatjaras. . . . A distinction etc. based on race that is required by law nullifies the enjoyment of the human right to equality before the law."[129] To identify "equality before the law" with the absence of *any* distinctions based on race (as Brennan, J. does in this last quoted phrase) is the crux of the colour-blindness theory (which has been, incidentally, rejected in the law of the country where the very notion of "colour blindness" was coined).[130] It suggests that race as a criterion of classification is discriminatory *per se*, irrespective of the aims it serves and the relationship between the classification and the aims.

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[128] See *supra* n. 28, 34, 64.

[129] *Gerhardy, supra* n. 2 at 337 *per* Brennan, J.

[130] Actually, the "colour blindness" theory has never become the law in the United States. The Supreme Court has explicitly upheld the use of racial classifications on a number of occasions, see e.g. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971); *Wright* v. *Council of Emporia*, 407 U.S. 451 (1972); *McDaniel* v. *Barresi* 402 U.S. 39 (1971); *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Franks* v. *Bowman Constr. Co.*, 424 U.S. 747 (1976); *United Jewish Organizations* v. *Carey*, 403 U.S. 144 (1977); *Bakke, supra* n. 6; *Weber, supra* n. 1; *Fullilove* v. *Klutznick, supra* n. 29 ("we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion", at 482, Burger C.J., joined by White and Powell, JJ., delivering the opinion of the Court). See also Wright, *supra* n. 29 at 220-1, J. C. Smith, Jr., "Review: Affirmative Action", (1984) 27 *Howard L.J.* 495, 518-9.

I have argued elsewhere against the theory that some criteria of classification are discriminatory *per se*[131] and here I should be forgiven for not saying much more. One can, essentially, think of two reasons why "race" might be thought to be discriminatory *per se*, in contradistinction to the other criteria the discriminatory nature of which is displayed only in the context of the aims of classifications. First, it is argued that traditionally classifications based on race served usually as a method of imposing and perpetrating invidious, racist discrimination.[132] This objection does not apply here for the object of the Land Rights Act is to protect a traditionally victimized racial group. It would be ironic to defeat this protective regulation on the basis of the argument deriving from the history of invidious racial discrimination,[133] and it would be perverse if the evils visited upon Aborigines in the past lent moral force to the claims of non-Aborigines to prevent even a partial redress for those evils. At best, this argument may serve as a warning that we should apply special caution when resorting to racial classifications. Second, it has been argued that race is an immutable characteristic and hence laws based on such a criterion create a caste system and confine people to status-groups which they cannot escape.[134] But then gender is immutable too, and so is (within limits) intelligence or physical strength. And yet we do not object to maternity leave (based on gender criteria) or intelligence tests for entry to the universities or professions, or physical tests for the applicants for jobs in the police. Neither the "traditional invidiousness" argument, nor the "immutability" argument, carries sufficient weight to defeat protective measures based on racial criteria.

The upshot of the argument against "colour blindness" is that the discriminatory nature of the classification cannot be assessed with regard to the classifying factor *per se*, but only in the context of the aims to be attained. A classification which favours a traditionally disadvantaged group is less likely to have a discriminatory effect upon the rest of the community than a classification imposing additional burdens upon a group which is already in a disadvantaged situation. This assumes that an analysis of "discrimination" applies to a real society, with its actual patterns of divisions, stratification and disadvantages, rather than to an ideal world of the judicial phantasy of "colour-blindness" in which the colours are interchangeable in our maxims about discrimination. By suggesting that any classification based on race is wrong, the philosophy of colour blindness presupposes that belonging to a particular racial group is of no relevance whatsoever to the pattern of disadvantages in a society. Classification in favour of blacks can be deemed equivalent to classification

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[131] W. Sadurski, "Equality, Law and Non-Discrimination" (1981) 21 *Bulletin of the Australian Society of Legal Philosophy* 113. See also *id., Giving Desert Its Due: Social Justice and Legal Theory* (Dordrecht: D. Reidel, 1985), at 85-93.

[132] See *Fullilove* v. *Klutznick, supra* n. 29 at 535 n. 5 (Stevens, J., dissenting); *Bakke, supra* n. 6 at 303 (Powell, J.); Bickel, *supra* n. 29 at 132-33; J. Harvie Wilkinson III, *From Brown to Bakke* (Oxford U.P. 1979), 291-192.

[133] See, similarly, P. Green, *The Pursuit of Inequality* (Martin Robertson: Oxford, 1981), 180-1; R. Lempert, "The Force of Irony: On the Morality of Affirmative Action and *United Steelworkers* v. *Weber*", (1984) 95 *Ethics* 86.

[134] *Fullilove* v. *Klutznick, supra* n. 29 at 526 (Stewart, J., dissenting); *Weber, supra* n. 1, at 228-9, n. 10 (Rehnquist, J., dissenting). See also M. H. Redish, "Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments", (1974) 22 *UCLA L. Rev.* 343, 365-366.

against blacks if "being black" in the first place is an indifferent matter.[135] This is an escape into a myth-world. In an actual world, the fact that a group suffering the burdens of a classification is generally well-off and has not been a victim of traditional discrimination is one of the factors which justifies a presumption that the classification is not discriminatory. The validity of this presumption may be defended on three main grounds.

First, it is a plausible judgment that, historically, invidious discrimination has been usually a product of the ignorance or resentment of the politically powerful group against those unrepresented (or inadequately represented) in the political and legislative process. Hence, the burdens imposed by a majority (in a democratic system), or by a political elite, upon a minority or upon an unrepresented group, raise immediate suspicion. But this suspicion is not warranted when a legislator grants benefits to the group which is beyond, or at the margin of, the political process, while the burdens of the new regulation are to be borne by the majority whom the legislator represents. As Judge J. Skelly Wright says: "when a decisionmaker chooses to disadvantage members *of his own* racial or ethnic group, it may hardly be supposed that he is acting out of prejudice, ignorance, or hostility. . . . When the majority group acts to disadvantage itself for the benefit of the minority, there should be a strong presumption of legality."[136] And earlier, John Hart Ely (in the article which has become a *locus classicus* of this doctrine) stated: "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking."[137] The Land Rights Act is clearly a regulation of this sort. We have no reason to believe that the white majority in South Australia seeks to unfairly disadvantage itself, that it exhibits racial prejudice to itself, that it willingly and somewhat masochistically impairs its own self-respect.[138] As an additional argument one might say that, even if some residual feelings of this sort may occur, the awareness that the regulation comes as a decision made by a majority in a democratic process, rather than imposed from above or from outside, may have a powerful soothing impact upon the sentiment of disadvantage by those whites who happen to disagree with this particular measure. When a representative government is coercing people to do what they otherwise would wish not to do (or prevents them from doing what they would like

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[135] See Freeman, *supra* n. 29, 1073. See also R. A. Wasserstrom, "Racism and Sexism" in *Philosophy and Social Issues* (University of Notre Dame Press, 1980) 14-6; P. Taylor, "Reverse Discrimination and Compensatory Justice", (1973) 33 *Analysis* 177, 179; M. L. Duncan, "The Future of Affirmative Action: A Jurisprudential/Legal Critique", (1982) 17 *Harv. Civil Rights—Civil Liberties L. Rev.* 503, 514-518.

[136] Wright, *supra* n. 29 at 234-5, footnotes omitted. See also Partlett, *supra* n. 5 at 285.

[137] J. H. Ely, "The Constitutionality of Reverse Racial Discrimination", (1974) 41 *U. Chi. L. Rev.* 723, 735; for the opposite view see R. G. Dixon, Jr., "*Bakke*: A Constitutional Analysis", (1979) 67 *Calif. L. Rev.* 69, 80-86.

[138] There may be two counter-arguments made, first, that "the majority" is not monolithic but is in fact composed of a number of minorities (see Partlett, *supra* n. 5 at 285) and, secondly, that the legislator is not representative of the majority. As to the first point, all depends on whether there is a clear social distinction between the minority-beneficiary of the regulation and the groups constituting a "majority" (though composed of various minorities) on the other hand. As to the second point, the force of the argument depends on how democratic the legislative process is. None of these points seem to challenge the relevance of the proposed test to the South Australian Act.

to do), the very knowledge that the government is acting with people's consent and that they are ultimately responsible for its action, makes the coercion more easily tolerable and less painful. This is a psychological fact which is one of the traditional arguments for majority rule and for the duty to obey the law in a democratic system.[139] The weight of this argument depends, obviously, on how representative the government is, and in particular how well represented is the group which is affected by a regulation in question.

The second ground for the contention about the non-discriminatory nature of benign classifications is that in the case of benefits conferred upon the traditionally and notoriously disadvantaged groups there is no effect of perpetrating, strengthening or freezing of the existing pattern of disadvantages. One of the features of discriminatory regulations has usually been that they add insult to injury, that is to say, they petrify the existing structure of social burdens and disadvantages.[140] But the provisions of the Land Rights Act which impose entry restrictions upon non-Pitjantjatjaras surely are not vulnerable to this charge. That is why it does matter, in our analysis of a particular classification, what is the history of discrimination in a given situation which is under review.[141] In the American equal-protection doctrine this test has been reflected in the concept of "discrete and insular minorities":[142] if the group that bears the burden of a regulation in question cannot be so characterized, there is only a little fear that the burden will contribute to the existing disadvantages. Just to the contrary, such a group seems to answer the description in *Rodriguez*: "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process".[143] John Rawls suggests (not in the context of a theory of discrimination, but of discussion of the duty to comply with an unjust law) that "in the long-run the burden of injustice should be more or less evenly distributed over different groups in society".[144] We may conclude from this that in the cases where the burden of a particular regulation falls unevenly on different groups,

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[139] See e.g. J. P. Plamenatz, *Consent, Freedom and Political Obligation* (Oxford U.P., 1968) 148.

[140] F. Michelman suggests that one of the characteristics of an "invidious" discrimination is "a high degree of adaptation to uses which are oppressive in the sense of *systematic* and unfair devaluation, through majority rule, of the claims of certain persons to nondiscriminatory sharing in the benefits and burdens of social existence", in "The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment", (1969) 83 *Harv. L. Rev.* 7, 20, emphasis added.

[141] Note that this argument does not use the concept of compensation for the past discrimination but only constitutes a test of how victimized is currently the group which bears the burden of a regulation in question. See also Partlett, *supra* n. 5, 254-6.

[142] See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938): "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry". The concept of "discrete and insular minorities" has been recently invoked with the aim of applying an intermediate, rather than the strict, judicial scrutiny of a benign racial classification, see *Bakke, supra* n. 6 at 361-2 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part). But it should be noted that it is not a unanimously accepted doctrine, see *ibid.* at 290 (Powell, J., delivering the judgment of the Court). And see a recent important criticism: B. A. Ackerman, "Beyond *Carolene Products*", (1985) 98 *Harv. L. Rev.* 713.

[143] *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973).

[144] J. Rawls, *A Theory of Justice* (Oxford: Clarendon Press 1972), 355. See also, similarly, *Fullilove* v. *Klutznick, supra* n. 29 at 485 (Burger, C.J., joined by White and Powell, JJ., delivering the opinion of the Court).

burdens borne by a group which is generally well-off and traditionally dominant do not raise equal moral problems as the burdens suffered by the groups traditionally and permanently disadvantaged.[145]

The third reason has to do with the stigmatizing effect of the discrimination. One of the most powerful effects of discrimination is that it not only imposes disadvantages upon the "discrete and insular minority", but also it fosters a sense of inferiority of the group vis-a-vis the rest of the community.[146] Stigmatizing may (and usually does) work in both ways: affecting the sense of inferiority on the part of the victims and confirming the contempt towards the victims by the perpetrators. Discrimination is, after all, the end result of the process whereby external differences (in race, class, religion) are transformed into differences of value, or worthiness, of particular groups. Perhaps the most invidious effect of discrimination is that it reflects and strengthens the stereotypes and prejudices against a group as a whole: that it is a legal weapon in the service of an irrational hatred. As the social scientist who gave the most illuminating account of the "stigma" phenomenon put it:

> By definition . . . we believe the person with a stigma is not quite human. On this assumption we exercise varieties of discrimination, through which we effectively, if often unthinkingly, reduce his life chances. We construct a stigma theory, an ideology to explain his inferiority and account for the danger he represents, sometimes rationalizing an animosity based on other differences, such as those of social class.[147]

Clearly this stigmatizing effect is one of the major objects of attack by anti-discrimination law.[148] Interestingly, the landmark decision in the United States, *Brown* v. *Board of Education*, invalidated school segregation on the ground that it "generates a feeling of inferiority as to [blacks'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone".[149] The International Convention which, ironically, served the High Court as a basis for declaring the Land Rights Act prima facie discriminatory, links in its Preamble racial discrimination with "doctrine[s] of superiority based on racial differentiation" which are described as "scientifically false, morally condemnable, socially unjust and dangerous". Again, the question arises whether the exclusion of non-Pitjantjatjaras from the lands expresses "racial superiority" of Pitjantjatjara people, whether it "generates a feeling of inferiority" on the

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[145] See further W. Sadurski, "The Morality of Preferential Treatment (The Competing Jurisprudential and Moral Arguments)", (1984) 14 *Melb. U. L. Rev.* 572, 596-7; R. A. Wasserstrom, "Preferential Treatment", in *Philosophy and Social Issues, supra* n. 135 at 64.

[146] "The distinction between discrimination against blacks and discrimination against whites is that the former is part of a system that stigmatizes the group and treats its members as inferiors, and the latter is not", J. A. Baer, *Equality Under the Constitution* (Cornell U.P.: Ithaca, 1983), 139. See also *Bakke supra* n. 6 at 357-8 (Brennan, White, Blackmun, Marshall, JJ., concurring in part and dissenting in part); *Fullilove* v. *Klutznick supra* n. 29 at 519 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring).

[147] E. Goffman, *Stigma* (Penguin: Harmondsworth, 1968), p. 15, footnote omitted. To be sure, Goffman develops his account around stigmas related to physical disabilities, but it applies well to racial, religious and other stigmas as well.

[148] See Note, "Developments in the Law. Equal Protection", (1969) 82 *Harv. L. Rev.* 1065, 1127.

[149] 347 U.S. 483, 494 (1954). See also *Bakke, supra* n. 6 at 401: "The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by law." (Marshall, J.).

part of non-Pitjantjatjaras, whether it represents those excluded as less worthy, less human, generally inferior? The answer seems to be, emphatically, negative. Whatever burdens they bear as a result of exclusion from the land, they do not carry the burden of stigma, inferiority, hatred and contempt. The charge of stigmatizing the "victims" of a given regulation does not apply to protective regulations such as the Land Rights Act.[150]

These three reasons explain why there is no legal or moral equivalence of "discrimination against" blacks and "discrimination in favour" of blacks. These three reasons indicate why it is not true that benign and invidious racial classifications must either fall or stand together: what is wrong about racial discrimination is not that it is racial but that it is discriminatory. If, to be more specific, the wrongness of discrimination lies essentially in victimization of a group by a politically powerful segment of the community, in sanctioning the pattern of disadvantages and in stigmatizing the group as inferior, then racial distinctions which favour a traditionally disadvantaged racial group and those distinctions that put a burden on them are not equivalent in a society where racial identity is still relevant to the pattern of disadvantages. Indeed, such distinctions are not "discriminatory" in a sense of "discrimination" that implies consigning the non-beneficiaries of a given rule to the status of an inferior race.[151] In such a society, "[e]qual justice does not mean that what is good for the goose is good for the gander".[152] Who is the goose and who is the gander, is a matter to be decided empirically with reference to the particular society in question, not in abstract terms.

3. *The test for discrimination: second limb*

The second part of the test of the non-discriminatory character of classification concerns the relation between the classification itself (which is seen as a means to an end) and the legitimate end to be attained. The idea here is that not every classification which is *somehow* related to the purported end must be validated but that there must be a reasonable proportion between the aim and the means employed.[153] This part of the test calls for the evaluation of the purpose of the regulation and an assessment whether the regulation is reasonably designed to achieve this purpose.

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[150] But there is a popular argument that "positive discrimination" measures stigmatize their beneficiaries as inferior in the eyes of a general public and endanger their own self-respect (see e.g. A. Goldman, *Justice and Reverse Discrimination* (Princeton U.P., 1979) 144; L. A. Graglia, "Special Admissions of the 'Culturally Deprived' to Law School", (1970) 119 *U. Penn. L. Rev.* 351, 356-7). I have argued elsewhere against this notion: see Sadurski, *supra* n. 145 at 576-9. At any rate, this argument applies much less to the protective measures such as Land Rights Act than to preferences in competitive selection. And it would be ironic indeed for non-Pitjantjatjaras to gain the right of entry to Pitjantjatjara land by purporting to defend the interests of uncomplaining Pitjantjatjaras.

[151] In a decision back in 1880, the U.S. Supreme Court explained the meaning of the 14th Amendment (equal protection clause) as containing "exemption from legal discriminations, implying inferiority in civil society, lessening security of [Blacks'] enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race", *Strauder* v. *West Virginia*, 100 U.S. 303, 307-8 (1880).

[152] J. S. Wright, "Judicial Review and the Equal Protection Clause", (1980) 15 *Harv. Civil Rights—Civil Liberties Law Rev.* 1, 17-18. Further, he adds: "it is *not* embarassing, or unjudicial, to notice whose ox is gored when assessing legislation or other official action under the equal protection clause" (at 23).

[153] See the standards of reasonable classification employed by the Supreme Court of India in *Pandurangarau* v. *Andhra Pradesh Public Service Commission*, (1963) A.I.R. (S.C.) 268, 271. See also G. Marshall, *Constitutional Theory* (Oxford U.P., 1971) 143-5; Vierdag, *supra* n. 99 at 197.

With respect to this test, there has been an important body of decisions and legal writings in the United States concerning the appropriate level of "scrutiny" to be applied to race-conscious legislation (from the point of view of its conformity with the equal-protection clause). The doctrine, as it has developed recently, is that racial classification is "suspect" and is legitimate only if shown to be necessary to accomplish a "compelling" or an "overriding" state interest.[154] This suggests that "strict scrutiny" of such classifications entails: (a) a requirement that the challenged classification be strictly relevant to the purpose, and that it be the least restrictive alternative available for the pursuit of that purpose (a "necessity" requirement); and (b) a requirement that the purpose claimed by the state to justify the use of this classification be "compelling" or "overriding", and not just any legitimate state purpose (a "compellingness" requirement). Obviously, the likelihood of invalidation of the "suspect classification" is high when this "strict scrutiny test" is applied.[155] Hence, both some of the judges of the U.S. Supreme Court[156] and legal writers[157] have argued that when a racial classification is established for ostensibly benign reasons, a less strict scrutiny should be employed. Such an "intermediate" level of scrutiny requires that a classification "must serve important governmental objectives and must be substantially related to the achievements of those objectives".[158] This is a more relaxed test than the "strict scrutiny", yet it represents a higher level of review than in ordinary economic and social classification, when the courts ask only whether the classification is "rationally related" to a legitimate state purpose.[159] The application of this intermediary test is defended on the basis that, while racial classifications should be looked at very carefully, "to treat efforts to remedy

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[154] See *inter alia McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954); *Bakke, supra* n. 6 at 287-91, *Fullilove* v. *Klutznick, supra* n. 29 at 508 (Powell, J., concurring). Race is not the only suspect basis of classification in the United States; alienage and national origin would be suspect (see, respectively, *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971) and *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)), and under certain interpretations, sex (*Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971)) though the Supreme Court has adopted an intermediary standard for classifications based on sex, see *infra*, n. 158, see also *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); Baer, *supra* n. 146 at 121-6. The Supreme Court has expanded the "compelling interest" test to apply also to classifications that impair fundamental rights, such as rights to privacy and to travel, see respectively *Roe* v. *Wade*, 410 U.S. 113 (1973); *Schapiro* v. *Thompson*, 394 U.S. 618 (1969). See, further, Note *supra* n. 148 at 1087-1120.

[155] That is why this test was once described as " 'strict' in theory and fatal in fact", G. Gunther, "The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", (1972) 86 *Harv. L. R.* 1, 8.

[156] See *Bakke, supra* n. 6 at 356-62 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part); *Fullilove* v. *Klutznick, supra* n. 29 at 520-1 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring).

[157] See, *inter alia*, K. Greenawalt, *Discrimination and Reverse Discrimination* (New York: Alfred A. Knopf, 1983), p. 78; Wright *supra* n. 29 at 240-2; Note, "Developments in the Law", *supra* n. 148 at 1116. For an opposite view, see T. Kaplan, "Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment", (1966) 61 *Northwestern Univ. L. Rev.* 363, 375-8; R. M. O'Neill, "*Bakke* in Balance: Some Preliminary Thoughts", (1979) 67 *Calif. L. Rev.* 143, 145-7.

[158] The formula is from *Craig* v. *Boren*, 429 U.S. 190 (1976) and applies to gender classification but a similar formula has been postulated with regard to race classification see *supra* n. 156, see also R. K. Greenawalt, "The Unresolved Problems of Reverse Discrimination", (1979) 67 *Calif. L. Rev.* 87, 106-108.

[159] See *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979); J. Tussman, J. tenBroek, "The Equal Protection of the Laws", (1949) 37 *Calif. L. Rev.* 241, 346; Gunther, *supra* n. 155 at 19-21; P. Westen, "The Empty Idea of Equality", *Harv. L. R.* 95 (1982) 537, 569-77.

past injustice with the same disfavor as we treat invidious discrimination itself would be . . . improper."[160]

The analysis of the appropriate level of scrutiny of racial classifications points our attention to the key issues related to discrimination: how adequate is the regulation to attain the aims, how important the aims are, whether those same aims can be achieved in a less burdensome or a race-neutral way, whether the classification is over- or under-inclusive etc. Together with the first part of the test (victimization and stigmatization of non-beneficiaries), these questions determine the agenda of a rational discussion about discrimination. But the High Court in *Gerhardy* failed to even begin this debate (let alone to determine the guidelines for the future of anti-discrimination law in Australia) because colour-blindness theory (and the associated view that any racial distinction is discriminatory) precludes analysis of the proper standard of review of classification.

To illustrate this paralyzing effect of colour-blindness of the Court upon the discussion of discrimination one may remark that some of the Justices expressed their uneasiness about the burdensome nature of the Land Rights Act's requirements for entry upon the lands, and yet they refused to draw any conclusions from it because they lacked the conceptual apparatus for dealing with the issue of proportionality between the means and the ends of the regulation. In particular Deane, J. expressed his doubts as to whether "the rigid formality of s. 19 of the State Act is necessary to achieve a purpose of the kind referred to in Art. 1(4) of the Convention",[161] but he concluded that "the provisions of s. 19 of the State Act should be accepted as constituting part of the 'special measures' of the kind referred to in Art. 1(4) of the Convention . . .".[162] Indeed, the concept of special measures does not lend itself well to the discussion of the standard of appropriateness of the means employed to achieve the aims. Having decided that the measures "were enacted in good faith for the same purpose as that which characterises the central provisions of the State Act"[163] or that the political assessment "could . . . reasonably be made" that "the measure is likely to secure the advancement [of a racial group] needed",[164] the Court had little choice but to endorse the regulation without any more detailed discussion of its appropriateness.

VI Conclusion

By now, it should be clear why it is regrettable that the Court in *Gerhardy* has opted for the strategy of reliance upon the "special measures" provisions. But perhaps one can still question this conclusion, say that it is merely hair-splitting and maintain that, through "special-measures" analysis, the Court achieved the same end as one postulated here with the help of the analysis of "discrimination"?

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[160] Wright, *supra* n. 29 at 241.

[161] *Gerhardy, supra* n. 2 at 348; see also *id.* at 341 *per* Brennan, J.

[162] *Id.* at 348.

[163] *Ibid., per* Deane, J.

[164] *Id.* at 342, 341 *per* Brennan, J.

[165] In the United States: e.g. *Morton* v. *Mancari*, 417 U.S. 535 (1974); *Oburn* v. *Sharp*, 521 F. 2d 142 (3rd Cir. 1975); *EEOC* v. *AT&T*, 556 F. 2d 167 (3rd Cir. 1977); *Morrow* v. *Dillard*, 580 F. 2d 1284 (5th Cir. 1978); *Weber, supra* n. 1; *Fullilove* v. *Klutznick, supra* n. 29; see also n. 130 *supra*. In India: e.g. *Balaji* v. *Mysore* (1963) A.I.R. (S.C.) 649; *Kerala* v. *Thomas* (1976) A.I.R. (S.C.) 490.

From the point of view of this particular Act under challenge, the end-result of the Court's strategy and of the alternative strategy postulated here is indeed the same. But from the point of view of shaping the future of the anti-discrimination law in Australia, the difference is very significant. Let us sum up the main deficiencies of the "special-measures" analysis employed by the Court, as opposed to the alternative analysis of the discriminatory nature of the distinction in question.

First, it implies the colour-blindness philosophy which as we have suggested above, is wrong. It has neither a proper basis in morality (for it wrongly equates invidious racial discrimination with racial distinctions aimed at protective, benign goals) nor in international law (where the doctrine has developed identifying illegal discrimination with invidious discrimination only). It also stands in stark contrast to the municipal legal systems with a developed body of equal protection decisions (such as the United States or India) where a line is drawn between invidious and benign racial discrimination and where the courts repeatedly have sustained benign racial classifications without resort to "special measures" but on the basis of the review of the "discriminatory" nature of classification.[165] By suggesting that racially based protective measures and invidious racial classification are discriminatory alike and therefore must either stand or fall together, the Court refuses to include the analysis of purposes into the discussion of "discrimination".

Second, it represents the racially based protective measures as an exception to a general rule prohibiting all racial distinctions, rather than an expression of an important and plausible principle in its own right. This suggests that such measures constitute deviations from a norm and require special justification. By relegating such measures to the status of exceptions, rather than admitting that they express an important duty of the community towards its disadvantaged minority (a duty which is, indeed, an extension of the anti-discrimination policy), the Court commits an error of moral judgment. By suggesting that race-conscious distinctions are prima facie wrong, the Court assumes erroneously that the wrongness of discrimination lies not in its invidious purposes or/and effects but in the very use of race as a classifying criterion.

Third, the Act under review poorly fits the description of special measures in the International Convention: the Act has an "air of permanence" while the Convention stresses "temporariness" of the measures; the purpose of the Act is to preserve and maintain the traditional status of the group while the aim of the measures under the Convention is "advancement" of a group.

Fourth, the analysis in terms of special measures does not lend itself well to the discussion of the proper level of the relevance of the classification to the purposes. It avoids scrutiny of the appropriateness of the distinction to the legitimate end, and of the degree of victimization and stigmatization of non-beneficiaries of the Act: two basic parts of a developed test of discrimination. By embarking upon this safe, special-measures device, the Court has failed to lay judicial foundations for such a test. Having decided to "play it safe", the Court has abdicated its role as the institution which should elucidate, interpret and clarify moral values inherent in open-ended legal concepts such as the concept of "discrimination".