ANTI-DISCRIMINATION LEGISLATION AND PRIVATE RIGHTS

W. A. McKean, B.A., LL.M.(Otago)*

It is commonly said that it is impossible to legislate for racial equality.[1] If what is meant is that peoples' prejudices and beliefs cannot be changed simply by a fiat of the legislature then the proposition is obviously true. But it is often used unjustifiably to support the argument that anti-discriminatory legislation is useless and unnecessary. Laws should certainly not punish people for holding particular beliefs but they can influence external behaviour. Most laws require something contrary to what some people approve or believe in. In democratic societies men are not punished because they may be opposed to taxes, minimum wages, vaccination and so on, but they usually obey the laws which provide for such measures. Whether they do so out of a feeling of obligation to obey the law or because of fear of sanctions is immaterial.

Moreover, the law can have a substantial educative role and influence subjective mental attitudes. As Professor Guest said, the law must give a precise definition of a man's relationship to others in the form of detailed right-duty relationships and it should set goals which the majority of the people have not yet envisaged or which they are unable to obtain without legislative assistance.[2] Law can influence behaviour patterns and is a useful means of fighting prejudice. Two American sociologists, Merton and McIver have categorised four classes of persons; (a) the unprejudiced non-discriminator, (b) the unprejudiced discriminator, (c) the prejudiced non-discriminator, (d) the prejudiced discriminator.[3] In their view, groups (b) and (c) and those who acquire prejudice as they acquire other group values are all clearly susceptible to legal measures discouraging discrimination and incitement to group hatred. American experience has shown that not only can legislation prevent manifestations of anti-social discriminatory acts but can also help to lead public opinion, as the Street Report demonstrates.[4] Anti-discrimination measures came late in the United States because President Eisenhower did not believe the hearts of men could be changed by laws.[5] Another view was held by the late Dr Martin Luther King who said in 1962:

> There are always those who will argue that legislation, court orders and executive decrees from the Federal Government are ineffective because they cannot change the heart. They contend that you cannot legislate morals. But while it may be true that morality cannot be legislated, behaviour can be regulated. The law may not change the heart, but it can restrain the heartless. It will take education and religion to change bad internal attitudes—but legislation and court orders can control their external effects. Federal court decrees have, for example, altered transportation patterns and changed social mores—so that the habits if not the hearts, of people are being altered every day by federal action. And these major social changes have a cumulative force conditioning other segments of life.

* Lecturer in Law, Brasenose College, Oxford.

It is suggested that New Zealand politicians have been too ready to limit the fields of activity in which anti-discrimination legislation can be effective. Many argue that New Zealand has an integrated society, that legislation is unnecessary, that it is better to let sleeping dogs lie and so on. However, some forms of discrimination do exist in New Zealand, and recent American experience is an unhappy warning of what can happen when racial discrimination is left to fester unattended. Mr Robert Gilmore, writing in the Auckland Star[6], has pointed to grave problems caused by racial attitudes in Auckland. Several Members of Parliament, particularly Mr Rata, have drawn attention to instances of discrimination in housing, employment and insurance.[7] Maoris and Islanders of exemplary social habits have been unable to find decent accommodation or work suited to their educational attainments, and have to pay higher premiums for insurance policies. (Statistically, they mave have a slightly lower life expectancy, but so may bachelors or redheads for all one knows and they are not placed in a separate category.)

Several piecemeal attempts have been made to deal with racial discrimination in New Zealand. Section 199 (1) of the Sale of Liquor Act, 1962, forbids hoteliers to refuse admission to licensed premises or service to a person "by reason only of the race, colour, nationality, beliefs or opinions of that person." An amendment to the Property Law Act 1952, passed in 1965, prevents restrictive covenants in the disposition of property. These measures are welcome and go a considerable distance towards dealing with the problem, but do they go far enough? Should New Zealand adopt legislation along the lines of the 1965 United Kingdom Race Relations Act and the 1968 Bill?

When explaining the amendment which eventually became s.33A of the Property Law Act, the Attorney-General frankly pointed out that the bill did not concern itself with some discrimination which might exist in property matters. It merely forbade a restrictive covenant which prohibited the disposition or subletting of land on account of race and did not purport to prevent a direct refusal to sell a house or a section or to accept a boarder because of his race. In Mr Hanan's view, this sort of thing could not effectively be stopped by legislation. He said, "I believe we have gone as far as we think law can usefully go when we make void any covenant or provision whereby A insists B must discriminate, e.g., when the lessor tells the lessee he may not assign to a Maori."[8]

Such a limited view of the effectiveness of anti-discrimination legislation is not shared by the framers of the 1968 United Kingdom Bill. This would make it unlawful to refuse to sell a house on racial grounds or for neighbours to band together to prevent such a sale. In general it would also be unlawful to discriminate in the letting of flats or rooms, with the exception of those who share their own accommodation with not more than four persons in addition to their own household. These proposals bring into the open a conflict between the rights of persons not to be discriminated against and the private rights of other members of the community. What are the limits within which legislation can be effective without leading the law into disrepute and how far can legislation go without infringing on the rights of individuals to associate with whom they please?

That the Englishman's home is his castle is still a popular belief despite much evidence to the contrary. (For instance, a "Daily Sketch"

inquiry in 1966 revealed that well over ten thousand national or local government officials in the United Kingdom have the right to enter private premises without permission). Great interest has been shown recently in the concept of privacy and much comparative research has been done and many conferences held.[9] It is generally agreed in democratic societies that a man must be able to reserve a part of his life from interference by others. Privacy is an essential guarantee of liberty. Nevertheless, as a social animal, man has a wide range of obligations as a member of a community. Individual freedom and social responsibility are not mutually exclusive concepts, though there is a constant difficulty in reconciling them. Probably the central problem facing modern states is the extent to which the legislature is justified in placing restraints on the pursuit of individual interests where they impinge on the activities of others. Some individuals make extravagant claims to areas of private activities, in the sense of activities which ought to merit immunity from official enforcement provisions.[10] It is often argued for example that alcohol tests for drivers and speed limits on the roads are in some way an attack on "fundamental rights". Fortunately, most people take another view—that driving a dangerous machine is a privilege which should be regulated in the interests of the safety and enjoyment of other road users.

Similarly, it is often claimed that anti-discrimination laws are an unwarranted interference with individual liberty, e.g., "Equality can only be obtained by drastic and continuous curtailments of freedom."[11] Measures against incitement to racial hatred are criticised for limiting freedom of speech.[12] But, of course, freedom of speech is not licence to say whatever one wishes in all circumstances. The freedom of expression recognised in Article 19 of the Universal Declaration of Human Rights or in Article 10 of the European Convention of Human Rights is not absolute. Democratic societies have always considered it necessary to limit this freedom when it results in seditious, defamatory or obscene communications. In *Beauharnais* v. *Illinois*[13] in 1952, the United States Supreme Court ruling that group libel laws were constitutional, said "Free speech is not an absolute right in all circumstances. It must be accommodated to other equally basic needs of society, one of which is society's interest in the avoidance of group hostility and group conflict."[14] An objective assessment of the purposes and effects of incitement to racial, national and religious hatred surely demonstrates that it is no less a menace to democratic society and to public peace and order than is any other abuse of free speech already prohibited by law.

Are there any overriding social interests which should prevent a man from discriminating in the fields of employment or housing? The Street Committee[15], which consisted of lawyers and a Conservative Member of Parliament, recommended that the law should cover privately rented accommodation except where there was a conflict with the "privacy rule". This involved applying a test of "intimate personal proximity", i.e., whether in some circumstances the transaction is so private, so productive of close or intimate personal proximity on the part of different groups of occupants that freedom of choice of the occupant should be unrestricted. Such an exception would cover the case of a widow sharing her own house with a few lodgers[16] to make ends meet. There is clearly a difference between this situation and running a public accommodation business.

Probably the most controversial recommendation of the Report to be included in the 1968 Bill was that legislation should extend to the sale of dwellings by owner-occupiers, and this was the only point on which the Street Committee was not unanimous. One argument is that the home is so fundamental an aspect of the citizen's financial and domestic arrangements that it should not be the subject of legal regulation. It is difficult, however, to see how much interference would offend the privacy rule—no one is being forced to live or associate with persons whom he has not chosen. A sale of a house is a contract like any other and there are many restrictions in the law on the types of contract which may be entered into. All the legislation does is to provide that when a man offers a house for sale, he cannot refuse a buyer on the ground only of race. The only way in which the interests of neighbours could be affected would be if their own house values were reduced, but if discriminatory selling is totally prohibited particular houses would be less affected and the law correspondingly more effective.

Another argument against anti-discrimination legislation is that it creates privileges for those sections of the community it attempts to protect and thereby discriminates against the rest of the population.[17] One wonders how a person who otherwise is forced to take a menial job and inferior housing is made a privileged person by this legislation, but in any case this objection reveals a failure to appreciate the legal meaning of "discrimination". International conventions based on work done in the United Nations Subcommission on the Prevention of Discrimination and the Protection of Minorities have not defined "discrimination" merely to mean "distinction". For instance, Article 1 of the 1965 Convention on the Elimination of all Forms of Racial Discrimination defines the terms as:

> . . . any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

This is further qualified by Article 4 which provides that special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring special protection in order to ensure them equality shall not be deemed to constitute racial discrimination so long as they do not lead to separate rights and are not maintained longer than necessary.

In the *Minority Schools in Albania Case*[18] the Permanent Court pointed out that legal equality did not necessarily mean equality in fact, and Judge Tanaka in the *South West Africa Case*[19] said that non-discrimination did not mean non-distinction but the absence of irrelevant or unreasonable distinctions having regard to all the circumstances.[20] He rejected an attempted *reductio ad absurdum* by counsel for South Africa which sought to show that a norm of non-discrimination would forbid special protection for minorities or even separate toilet facilities for men and women. On this basis certain special rights given to "non-dominant members of the community"[21] do not necessarily offend the non-discrimination principle, because they are designed to achieve *de facto* equality with the rest of the community.

In his Bill introduced in the House of Representatives in 1965, Mr N. V. Douglas, Member of Parliament for Auckland Central, sought to include a provision to render void any trust *inter vivos* or testamentary

disposition which was discriminatory on grounds of race. A principal objection to this clause was that it would render void any provision by will for the education of Maori children, but it is submitted that if discrimination is defined as above this result does not necessarily follow. However, it would probably be preferable to exempt from the operation of such a clause all gifts made to charities registerable under the Charitable Trusts Act 1957 since these must be for the public benefit.

But the main purpose of this clause was to prevent anyone placing a restriction on a member of his family by providing that a beneficiary would be disinherited if he or she married into a particular race or ethnic group.[22] Such provisions are often void for uncertainty as in *Armitage* v. *Armitage*[23] where a testator attempted to disinherit his son if he married a Maori woman. It was held by Wood V.C. that the children of a marriage between the testator's son and a woman concerning whom there was not enough evidence before the court to show whether she was an Englishwoman or not, were entitled to the property under gift in default of appointment. Had it been clear, however, that Hannah Tuhituki was a "New Zealand native" the plaintiffs would probably not have recovered. It is surely not beyond the bounds of ingenuity to forbid this sort of discriminatory provision without also making void gifts to charities such as the Maori Education Foundation.

It is sometimes claimed that some sort of sacred right exists for a man to dispose of his possessions after his death in any way he thinks fit. Such a view has already suffered a serious loss of esteem since the Family Protection Acts. Is the "freedom" of a man to dispose of his economic resources after his death more desirable than the freedom of his children to marry whom they choose, whatever their race (or religion for that matter)?

It is suggested that consideration should be given to the desirability of a comprehensive non-discrimination Act for New Zealand. The assertion that New Zealand has no race problem ignores the facts, and with an increasing number of Pacific Islanders, and students and tourists of other races coming to this country, it may be aggravated. Legislation now may help to avert the situation in which the United States and the United Kingdom currently find themselves. Preventive medicine is commonplace so why not preventive law? The 1968 United Kingdom Bill based to large extent on United States and Canadian practice as set out in the Street Report wisely prefers conciliation procedures and civil remedies to criminal sanctions. A conciliation tribunal could be established with power to subpoena witnesses and make interim orders. The Magistrates' Court could be empowered to award damages and order discriminators to desist under penalty of imprisonment for contempt. Such a bill would be a dramatic affirmation of New Zealand's good faith in voting for the Convention on the Elimination of All Forms of Racial Discrimination.

It would enlarge and not reduce individual freedom. It would not illegitimately extend the freedom of members of other races at the expense of the white man's but would attack the white man's illegitimate extension of his freedom at the expense of other people. It would not remove anyone's freedom to employ whom he wishes or to sell his house to whom he will. It would merely provide that in the exclusion of any applicant, colour alone should not be the decisive criterion.[25]

Of course, these arguments do not apply only to racial discrimination. Perhaps an omnibus bill could be prepared to deal with discrimination

on other grounds also, such as religion and sex. A convention on the former is currently being prepared in the United Nations and several conventions on the rights of women already exist or are in preparation. It is to the shame of this country that New Zealand and Australia were the only two countries not to vote for the 1958 International Labour Organisation Employment and Occupation Convention primarily because of questions relating to sex discrimination.[26] It is high time that this indefensible state of affairs was remedied.

1 340, *New Zealand Parliamentary Debates,* 2219, 2223, and 343 *ibid,* 1535.
2 Freedom and Status, *supra* p. 275.
3 See Council of Europe publication, "Measures to be taken against Incitement to Racial, National and Religious Hatred". Strasbourg, 1966.
4 The Street Report on Anti-Discrimination Legislation published by Political and Economic Planning, London 1967.
5 As he often told his Press Conferences. See Anthony Lewis, "The Times", 22 April 1968 p. 11.
6 "Auckland Star", 16 June 1965.
7 See 342, *New Zealand Parliamentary Debates,* 698.
8 343, *New Zealand Parliamentary Debates,* 1535 (and Mr Riddiford M.P. at p. 1540).
9 Nordic Conference of Jurists on Privacy 1966, Oxford Conference 1967. See e.g. "Privacy under Attack". N.C.C.L., 1968.
10 See G. Marshall, "Notes on the Rule of Equal Law". "Nomos", Volume IX, p. 272.
11 A. Lejeune "Daily Telegraph Magazine" (U.K.) 5 January 1968.
12 See examples in the publication mentioned in Note 3 *supra,* pp. 11, 19.
13 343 U.S. 250 (1952).
14 See publication mentioned in Note 3, p.11 (Ivor Richards M.P.).
15 Note 4 *supra* (at p. 83).
16 The Street Report recommended a maximum of five but the 1968 bill imposes a maximum of four.
17 Such an argument has been put forward by Mr Heath, Leader of the British Opposition.
18 P.C.I.J. Ser. A/B, No. 64.
19 I.C.J. Reports 1966, p.301-310.
20 See also G. Marshall, op. cit.
21 The United Nations Subcommission description of a minority.
22 343, *New Zealand Parliamentary Debates,* 1535.
23 (1868) 16 W.R. 643.
24 See notes 4, 5 and 6 *supra.*
25 See leader to "The Sunday Times" (U.K.) 14 October 1967.
26 See C. W. Jenks, *Human Rights and International Labour Standards,* (1960), 81.