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EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW. By Warwick McKean. Oxford: Clarendon Press. 1983. Pp. 333. \$65.

Equality and Discrimination Under International Law is a history of the development of the twin principles of individual equality and non-discrimination in international law. Warwick McKean¹ convincingly establishes that under international interpretation the concept of equality means a normative, or substantive equality, which includes affirmative action, and does not mean a strictly mathematical, or formal, equality of treatment. McKean also establishes that in international usage the term "discrimination" means an invidious or arbitrary distinction. He shows that according to the international principles of equality and non-discrimination, undertaking special measures to help a certain group reach substantive equality with other groups is not discriminatory, but rather is an essential obligation.

McKean's stated objective is to "discover the extent to which there exist international norms, or standards of international law concerning the equality of individuals" (p. 13). His book is a wide-ranging examination of the international formulations of the equality and non-discrimination principles since the first World War, through which he demonstrates the principles' basic content and their establishment in international law. He offers less adequate evidence for determining whether the principles constitute international legal standards, legal norms, or parts of the *jus cogens* — and thus

1. Warwick McKean is a Fellow of St. John's College Cambridge. He has taught at the Universities of Oxford and Otago, and at the Victoria University of Wellington, New Zealand.

how binding they are on states — but he does suggest convincingly that the principles partake of at least one of the three. The strength of *Equality and Discrimination Under International Law* lies in the insight it gives into the content of the equality and non-discrimination principles, but the book also marks a start toward further examination of the twin principles' legal status as they evolve in international law.

McKean begins his analysis of the equality and non-discrimination principles with the post-World War I treaties that were to guarantee the rights of national minorities and that were signed under the auspices of the League of Nations. Although the treaties were a practical failure and in fact became a focus for irredentist agitation, they were significant because they introduced the notion of special protection into the principle of equality of treatment of minorities. For example, the treaties provided that if minorities are to be equal they must be allowed to choose schools taught in their mother tongue (p. 22).

Since the failure of the League, the United Nations has been the most important forum for the development of the equality and non-discrimination principles. The UN Charter affirmed that individuals should enjoy certain basic rights and that these rights should be secured to all without distinction as to race, sex, language or religion. In addition, Article 13 of the Charter directed the General Assembly to "initiate studies and make recommendations for the purpose of 'assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'" (p. 54).

Within this general mandate to protect human rights, the United Nations, through various organs, has produced many significant documents developing the twin principles. The first important document prepared under UN auspices was the Universal Declaration of Human rights, adopted by the Commission on Human Rights and proclaimed as a UN resolution in 1948. It provided essentially that all people would be entitled to certain fundamental rights without distinction of any kind, and that there would be both equal protection for all under member states' national laws, and freedom from discrimination under those laws. Since its proclamation by the UN General Assembly, the Universal Declaration has been one of the most constantly recited resolutions, referred to and incorporated in numerous UN resolutions and conventions. McKean argues that the principles of equality and non-discrimination contained in the Universal Declaration have through "widespread and constant recognition [been] clothed with the character of customary law" (p. 274). It fell to later UN organs to develop the meaning of the principles con-

tained in the Universal Declaration.²

The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities produced much of the theoretical work behind the Universal Declaration and has since produced several "immensely valuable" studies that have elucidated the "meaning and content of the principles of equality and non-discrimination, and have established several general principles" (p. 94). These studies have defined the concept of equality to include special measures for the disadvantaged, and have described discrimination as an invidious and arbitrary distinction. Further, they have described grounds and considerations for determining what actions are discriminatory.

In McKean's view, the fruition of the Sub-Commission's theoretical work is the UN Convention on the Elimination of All Forms of Racial Discrimination, the "most radical instrument so far adopted" (p. 165) under UN auspices in the field of human rights. The Convention prohibits racial discrimination while carefully distinguishing from the prohibition special measures designed to secure the advancement of under-privileged racial groups.³ In addition, the Convention *requires* state parties to take affirmative action to "ensure the adequate development and protection of certain racial groups or individuals" (p. 158). For McKean, including "the notion of special temporary measures" (p. 159) to aid minorities within the definition of discrimination illustrates how discrimination and minority protection can be "fused into the principle of equality" (p. 159). The affirmative obligations imposed on the state parties to take immediate action to terminate racial discrimination within their jurisdictions and to take special measures "to ensure the 'full and equal' enjoyment of human rights and fundamental freedoms" are seen by McKean to be the most important aspects of the Convention (p. 165).

In addition to UN work on the equality and non-discrimination principles, McKean examines the European Convention on Human Rights and Fundamental Freedoms, which he calls the "most generally effective" procedure for protecting human rights (p. 204), the jurisprudence of the European Human Rights Court, and the juris-

2. Primary authority for development of the principles fell to the Commission on Human Rights, the Commission on the Status of Women, and the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. Pp. 72-87.

3. United Nations practice . . . endorses the view that the equality principle permits and sometimes requires differences of treatment so long as four conditions are satisfied: (1) The differential treatment must consist of protective measures designed to promote the welfare of a particular indigenous group; (2) It must be wanted by such groups; (3) It must be based on the needs of a particular group and not its race or colour classification; (4) It must not be continued for longer than is strictly necessary. Should any of these conditions not be satisfied then the differential treatment will be invidious and therefore discriminatory.

prudence of the United States and Indian Supreme Courts. He generally approves of the European Court's interpretation of the equality and non-discrimination principles but criticizes the European Convention for not providing a general guarantee of equality before the law (found to be too vague for many member states), and for providing instead for protection only against the infringement of those rights specifically set out in the Convention. He notes that the European Court also interprets "discrimination" to mean invidious and arbitrary distinction, and "equality" to be used in its normative rather than its mathematical sense (pp. 204-227). He criticizes the United States Supreme Court's equal protection clause interpretation, which has tied affirmative action to compensation for past wrongs and has failed to permit special measures based solely on an obligation to achieve present substantive equality and justice. He also criticizes the concept of "reverse discrimination" as a confusion of terminology. He argues that if the Supreme Court would follow the international principle of normative rather than formal equality, and the international definition of discrimination, it would encounter no difficulties in upholding special measures for disadvantaged groups under the fourteenth amendment.⁴

After tracing the development of the equality and non-discrimination principles, McKean turns his attention to their legal status in international law. McKean offers three ways of viewing the principles: as legal standards, as norms, or as parts of the *jus cogens*. A legal standard is a "category of indeterminate reference" (p. 265), such as reasonableness, that provides guidance in situations in which a precise legal rule gives no definitive answer. Such standards have their roots in the "mores of the day" (p. 265). McKean argues, based on the *South West Africa* cases,⁵ that the U.N. equality and non-discrimination principles are evidence of legal standards to which all member states should be held.

The *South West Africa* cases, brought by two African countries before the International Court of Justice,⁶ presented the question of whether the policy of apartheid violates an international human

4. The Fourteenth Amendment must be read both to further general equality regardless of race and to permit affirmative action for certain groups regardless of individual disadvantage so long as the group remains disadvantaged. To describe affirmative action as discrimination and therefore contrary to the principle of equality enshrined in the Fourteenth Amendment is to confuse terminology. . . . If a 'discrimination *per se*,' i.e. distinction, is reasonable and designed to further real and genuine (normative) equality then it is valid.
P. 245.

5. See [1971] I.C.J. 16; [1966] I.C.J. 6; [1962] I.C.J. 319 (preliminary objections); [1950] I.C.J. 148.

6. The plaintiffs asked the Court to determine if South Africa was still bound by its Mandate from the League of Nations and whether it had breached its obligations if the Mandate was still in force. The cases were dismissed for lack of standing, but the judges discussed many of the issues raised in the complaints in the majority and minority opinions.

rights norm, or whether an international human rights standard exists by which South Africa's Mandate to administer the territory of South West Africa must be interpreted. Both the minority and majority judges agreed that the Mandate must be interpreted with respect to international standards, and that the consensus of the world community (as has been expressed in various United Nations forums) must be examined in order to discover the substance of the standard. McKean argues that, in a similar fashion, equality and non-discrimination standards developed in UN resolutions, declarations and conventions should also be used to interpret the UN Charter itself, and thereby bind all member states (pp. 269-70). How much force the standards may have, however, turns on whether they are "authoritative" or merely "guide[s] to interpretation" (p. 270). McKean cannot say for certain which of these the equality and non-discrimination principles are. He does, however, argue that although the Universal Declaration is probably not an authoritative interpretation of the Charter, and therefore not binding, it, along with the other UN pronouncements on equality and non-discrimination, must at least be given substantial weight as a guide to Charter interpretation.

A second possible status of the twin principles is that they are legal norms. Judge Jessup, in the majority opinion to the *South West Africa* cases, rejected this status on the ground that international bodies are not legislative in character and cannot create law by resolution. McKean asserts however, that even if the UN cannot create new rules of law, UN practice may be strong evidence of customary law. As noted earlier, McKean argues at several points that considerable authority supports the notion that the Universal Declaration of Human Rights and the principles of equality and non-discrimination they contain are now customary international law.

McKean also takes up the possibility that the principles of equality and non-discrimination are part of the *jus cogens*, a group of select rules of law that have become so fundamental that they cannot be abridged by individual states without seriously affecting the "very essence" of the legal system (pp. 277-78). It is generally agreed that the principle of *jus cogens* in international law covers genocide and slavery, and Judge Tanaka in the minority opinion to the *South West Africa* cases asserted that if *jus cogens* exists at all then "surely the law concerning the protection of human rights may be considered to belong to [it]" (p. 281). McKean agrees. He argues that genocide and slavery are merely extreme examples of violations of the basic principles of equality and non-discrimination, and that in view of the nature of the latter as "fundamental constituents of the international law of human rights, [they] are part of the *jus cogens*" (p. 283).

McKean's arguments for the precise status of the twin principles

of equality and non-discrimination are less convincing than those for the existence and content of the principles. In fact, they draw most of their strength from the weight of the book's thorough study of the establishment of principles in international law. *Equality and Discrimination Under International Law* is essentially a history, and as such the concluding chapter on legal status is limited by the lack of material clearly supporting one possible status over another. McKean is able to convincingly establish the existence of principles of equality and discrimination and to elucidate their content, but he is only able to propose tentative answers to the question of the principles' force as law.