Equality: the Neglected Virtue

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Article 1 of the Universal Declaration of Human Rights proudly proclaims that all human beings are born free and equal in dignity and rights. Not only born free, as Rousseau had said in the first sentence of *The Social Contract*, but equal. And not, as the American Declaration of Independence had asserted, only men but all human beings.

It is easy to under-estimate how profound a development this is in human history. The idea that all human beings are equal is a very recent notion. For most of history people have been divided precisely in accordance with notions of inequality. Privilege, not equality, has been the guiding principle. It is often suggested that democracy was born in Athens of the fifth century BC – but political rights were denied to slaves and women and foreigners, "hoi barbaroi" as the Greeks called them, from which we derive the word "barbarians." As the Roman Empire grew from a city-state on the Tiber to a huge empire, more and more people were granted Roman citizenship – but it still meant something to say anywhere in the Empire c*ivis Romanus sum* ("I am a Roman citizen"). Many other societies have been built on rigid social strata – not least the Indian caste system. In more recent times, the European empires which lasted well into the second half of the 20th century could only be justified on the basis of white superiority – to recognise that subjects were equals to their masters would have spelt – as it did in the end – the death of those empires.

In this country the struggle for women's equality was at first the struggle for civil rights in the strict sense, the right to own property, the right to enter into contracts, the right to practise a profession, indeed the right to be recognised as a legal person at all. So deeply embedded was the notion of inequality that, as recently as 1909, the courts could not accept that the gender-neutral word "person" could include women: that was the conclusion reached by the House of Lords in *Nairn v. University of St. Andrews*[2], a case about whether women could vote for the old university seats in Parliament. The Lord Chancellor said this:

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[2] [1909] AC 147 (HL); cf. *Edwards v. Attorney General of Canada* [1930] AC 124 (PC).

"It is incomprehensible to me that any one acquainted with our laws or the methods by which they are ascertained can think, if, indeed, any one does think, there is room for argument on such a point. It is notorious that this right of voting has, in fact, been confined to men."[3]
Lord Robertson added:
"I think that a judgment is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities."[4]

In principle it is possible for a legal system to have a principle of equality at two levels: the constitutional level and the ordinary level. To some extent this corresponds to the distinction between public law and private law but by no means exactly. For example, a public authority may well be subjected to obligations (usually in a statute) to refrain from discrimination in its employment functions. However, that would not be at the constitutional level. There would be no prohibition on discrimination on the legislature itself, or even on the executive when performing core state functions such as immigration control, policing and taxation.

The law of the United States can be taken by way of example. The original Constitution did not include an equality provision even in the Bill of Rights, i.e. the first ten amendments. The famous equal protection clause was included at the end of the Civil War as part of the 14th Amendment. At around the same time Congress enacted a series of statutes, the first Civil Rights Acts, which were designed to confer legal rights on former slaves. They were largely emasculated by the courts and ignored in practice by a society which had legally enforced segregation from about 1890 to the 1960s. Eventually Congress passed the Civil Rights Act 1964, which prohibited discrimination in the provision of employment, housing and other facilities. In the meantime the US Supreme Court had begun in 1954 its long-neglected duty of dismantling state-imposed segregation. In other words discrimination was prohibited in relations between individuals by statute; and prohibited as between the state and the individual by the constitution.

In this country we had no developed principle against discrimination in the common law. In consequence Parliament had to fill the void and did so, at first with weak legislation passed in 1965 and 1968, and eventually with stronger legislation in the form of the Sex Discrimination Act 1975 and the Race Relations Act 1976, which, despite the imperfections which have become clear since then, have stood the test of time remarkably well, surviving the long period of Conservative government from 1979 to 1997, and remain our main equality laws in

[3] At p.160.
[4] At pp.165-6.

those respective fields. Further reform has arrived or is coming soon in the shape of regulations to implement EU directives extending protection against discrimination to cover religion, sexual orientation and age.

What we have not had for so long is a constitutional guarantee of equality. There were hints of it in the common law. Indeed the common law principle can be seen as long ago as *Kruse v. Johnson* in 1898[5], when Lord Russell CJ referred to the possibility that bye-laws might be struck down as being unreasonable if "they were found to be partial and unequal in their operation as between different classes".

In a seminal article in 1994, Professor Jeffrey Jowell put the justification for recognition of a common law/constitutional principle of equality like this:
"Just like free speech it is a principle that derives from democracy itself. Basic to democracy is the requirement that every citizen has an equal vote, and therefore an equal opportunity to influence the composition of the government. The notion of equal worth is thus a fundamental precept of our constitution. It gains its ultimate justification from a notion of the way individuals should be treated in a democracy. It is constitutive of democracy."[6]

Later in the same article Professor Jowell said this:
"Our constitution rests upon an assumption that government should not impose upon any citizen any burden that depends upon an argument that ultimately forces the citizen to relinquish her or his sense of equal worth. This principle is deeply embedded in our law, although it is rarely made explicit."[7]

I agree with much of what Professor Jowell says but note that, whether deliberately or not, he moves between references to "citizens" and references to "individuals".

Similarly, in a lecture given in Australia in April 2003 entitled "Human Rights and Minorities" Lord Woolf, the Lord Chief Justice, said this:
"Just as it is the essence of democracy that every individual has an equal right to vote, so each individual has the right to expect that a democratically elected government will regard it as its responsibility to protect each of its citizen's human rights. Human rights come with true democracy whether the government wants them or not."

[5] [1898] 2 QB 91, at p.99.
[6] J. Jowell, 'Equality as a Constitutional Principle' (1994) 7 CLP 1, at p.7.
[7] *Ibid.*, p.18.

One of the major problems that our legal system has to grapple with is how to deal with discrimination against non-citizens. They may well not have the vote; they may not even have any lawful entitlement to be here. But the premise of human rights is that fundamental rights flow from our common humanity, not from legal concepts such as nationality. This is how the point was put in *Andrews,* an early and important case on section 15 of the Canadian Charter of Fundamental Rights and Freedoms, by Justice McIntyre in the Supreme Court of Canada:

"It is clear that the purpose of section 15 is to insure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration."[8]

Nor is this some strange foreign notion which has only recently arrived in this country. As the Court of Appeal noted in *Abbasi*, the principle which protects personal liberty at common law is one "which applies to every person, British citizen or not, who finds himself within the jurisdiction of the court"[9], quoting Lord Scarman's famous speech in *Khawaja* that: "He who is subject to English law is entitled to its protection"[10].

This is a problem to which I will return later in this talk.

The authority which is often cited these days for the proposition that there is a common law principle of equality is the decision of the Privy Council in *Matadeen v. Pointu* in which Lord Hoffmann said this:

"Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational ...

But [Lord Hoffmann continued] the very banality of the principle must suggest a doubt as to whether merely to state it can provide an answer to the kind of problem which arises in this case. Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And,

[8] *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143, at p.171. Justice McIntyre wrote the judgment for the majority of the Court.
[9] *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 [2003] UKHRR 76, at para. 60 (Lord Phillips of Worth Matravers MR, giving the judgment of the Court).
[10] *Khawaja v. Secretary of State for the Home Department* [1984] AC 74, at p.111.

perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? … The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle - that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied."[11]

It is open to argument whether judicial review cases in which the principle of equality has been successful are "frequent" but nevertheless it has long been established that some considerations are simply irrelevant to a decision and therefore should not be taken into account, for example the colour of a person's hair in the famous example about a teacher given *obiter* in *Short v. Poole Corporation*[12]. But what is less well-known is that, on the facts of that case, the Court of Appeal held that it was lawful for a local education authority to dismiss a teacher on the ground that she was a married woman. It is worth reading the decision letter in that case:

"Town Clerk's Office, Poole, 19th May, 1924. Dear Sir, Married Women Teachers. The Education Committee have had under consideration the desirability of continuing the employment, in the public elementary schools in the Borough, of married women teachers, and they have decided that, so far as the Council schools are concerned, the engagement of all such teachers will be terminated unless in any particular case some sufficient reason exists for the engagement being continued … The Committee were led to this decision for the following reasons: (1.) They consider the duty of the married woman is primarily to look after her domestic concerns and they regard it as impossible for her to do so and to effectively and satisfactorily act as a teacher at the same time; (2.) That it is unfair to the large number of young unmarried teachers who are at present seeking situations that the positions should be occupied by married women, who presumably have husbands capable of maintaining them."

Even today, the problem with the common law principle of equality is that it really does nothing to move forward the debate from traditional grounds of administrative law, e.g. that irrelevant considerations should not be taken into account and that a decision should not be

[11] [1999] AC 98, at p.109. See also *R (Gurung) v. Ministry of Defence* [2002] EWHC 2463 Admin (27 November 2002, McCombe J), in which discrimination on racial grounds was held to be irrational.
[12] [1926] KB 66, at p.91 (Warrington LJ).

irrational in the sense that no reasonable body could have reached it. It is rarely the case that a public body will do that, although last year the Ministry of Defence was held to have done so in *Gurung*, in which discrimination was held to have been on purely racial grounds and therefore irrational.

The weakness of irrationality as a ground for protecting people against discrimination can be demonstrated by the well-known litigation concerning the blanket ban on homosexuals in the armed forces. That was an application for judicial review brought before the Human Rights Act was enacted. In the domestic legal system, both the Divisional Court and the Court of Appeal felt unable to grant the application[13]. There was evidence before the courts that the view of senior members of the armed forces was that the ban was needed for reasons of military effectiveness. Even though the courts recognised the human rights background they felt unable to hold that the ban was irrational and so the applicants had to follow the well-trodden path to Strasbourg. There they were successful. The European Court of Human Rights held that not only had there been a violation of Article 8 (the right to respect for private life) because the ban was excessive and disproportionate, but also that there had been a violation of the right to an effective remedy in Article 13, because the standard of review applied by the domestic courts was too low to give the protection to Convention rights which is required. Although the Court did not find a violation of Article 14, the non-discrimination provision in the Convention, this was only because it did not need to address it in the light of its other findings[14]. It is clear that otherwise the Court would have found a breach of Article 14 because there was clearly discrimination which the Court did not think was objectively justified and proportionate. If there was any single case which demonstrated the need for the Human Rights Act it was that one.

I therefore turn to the Human Rights Act and the European Convention on Human Rights to which it gives effect in domestic law. This does operate at the constitutional level. As Lord Steyn and others have observed, it is a constitutional statute, not an ordinary one, not least because it provides for judicial review of Acts of Parliament albeit it does not permit the courts to strike them down but only to issue a declaration of incompatibility.

In many ways the most important word in the European Convention on Human Rights is “everyone”. Most of the substantive articles of the Convention begin with the word “everyone”. The real challenge is to take that word seriously and accept that it means what it says. Many of the articles of the Convention are inherently based on the idea of human

[13] *R v. Ministry of Defence, ex p. Smith* [1996] QB 517.
[14] *Smith and Grady v. United Kingdom* (2000) 29 EHRR 493, paras. 115-6.

equality: that each one of us is entitled to express a view however much others may disagree with it; to have a religious belief of our choice or to have none; to organise our private life as we see fit. This reflects a concept of human happiness in which it is not for the state to impose a particular view or belief or lifestyle on any person. In that sense, one can say that the Convention treats us all equally, without descending into the bankruptcy of moral relativism. The Convention is not saying that every view is as good as any other; merely that the state should treat us as mature human beings who can work out the answers for ourselves without imposing a view from on high. And, of course, there is Article 14, which guarantees equality in the enjoyment of other Convention rights.

I have already mentioned the equal protection clause in the 14th Amendment to the US Constitution and I would like to express my debt to a highly instructive article on that clause published by Tussman and tenBroek in the California Law Review as long ago as 1949[15]. Although written before the classic jurisprudence of the US Supreme Court on the equal protection clause emerged from 1954 onwards, when *Brown v. Board of Education*[16] was decided, this seminal article deserves careful consideration by those who are interested in developing a constitutional law of equality in this country. It is impossible to do justice to the article here but I will seek to summarise its main points:

(1) The equal protection of the laws requires more than merely the equal application of the laws. This is because otherwise the content of the law itself may be unequal. A discriminatory law may be applied equally to all who fall within its scope. So, early on in the history of the 14th Amendment, Justice Matthews said in 1886 that: "The equal protection of the laws is a pledge of the protection of equal laws."[17]

(2) All legislation necessarily places persons into classes and therefore classification by itself cannot be a sound basis for regarding the legislation as unequal. As the Constitutional Court of South Africa put it in relation to the equality guarantee in the Interim Constitution: "in order to govern a modern country efficiently and to harmonise the interests of all of its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. … In regard to [such] mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental

[15] J Tussman and J tenBroek, 'The Equal Protection of the Laws' (1949) 37 Calif LR 341.
[16] (1954) 347 US 483.
[17] *Yick Wo v. Hopkins* (1886) 118 US 356, at p.369.

purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state."[18] Accordingly, as in American law, the courts will give considerable deference to the other parts of the state when they seek to regulate economic matters and will be reluctant to infer that a line which has been drawn between two classes of persons has been drawn in the wrong place.

(3) However, some classifications are so invidious that they are "suspect" and so will be subjected to strict scrutiny, requiring much more than mere rationality. Indeed, in practice, it may be impossible to justify certain kinds of discrimination, such as discrimination on the ground of colour. The test which has subsequently been developed in US constitutional law is that the law must be narrowly tailored to meet a compelling state interest.

(4) In principle there are five different possible relationships between the scope of the mischief aimed at by legislation, its purpose, and the scope of the class actually caught by it.

(a) The first is where there is a perfect fit between the purpose to be achieved and the means used to achieve it: this is the ideal to be sought but may be very difficult to achieve in practice.

(b) The second is where there is no fit at all: this kind of measure could be said to lack even a rational connection between the aim sought to be achieved and the means used.

(c) The third type is where the law hits more than the class aimed at. For example, if the aim of the law is to prevent acts of disloyalty by US citizens, but all citizens of Japanese ancestry are detained, the law is overbroad, or over-inclusive[19]: this is known as the doctrine of overbreadth and we would recognise it as a classic example of a law which is disproportionate because it goes further than is necessary to achieve its aim.

(d) However, there is a fourth type of law, which is less familiar to us. This is where the law hits some of its target but not all of it. At first sight this seems not to raise any problem about proportionality at all. It does not go further than is necessary. But it penalises some people and leaves others alone. From an equal treatment perspective, this should raise alarm bells: how have the two pools of people been defined? Why is the state not

[18] *Prinsloo v. Van Der Linde* (1997) 3 SA 1012, paras. 24-25 (Ackermann, O'Regan and Sachs JJ).
[19] This provided the background to *Korematsu v. United States* (1944) 323 US 214. The challenge in fact failed in the US Supreme Court. See further Lord Bingham, 'Personal Freedom and the Dilemma of Democracies' (2003) 52 ICLQ 841, at pp.856-8.

prepared to go as far as its stated purpose would dictate it should go? Are there objective and compelling reasons or is it that some are more popular than others? In the example I gave earlier, the law did not extend to US citizens of German or Italian origin: yet they too could have been said to have a potential conflict of loyalty in the Second World War. It was only citizens of Japanese origin who were detained without trial.

(e) The final type of law is one which appears to be at first sight a contradiction in terms but is in fact fairly common. It is the law which is both over-inclusive and under-inclusive. The example from the Second World War again illustrates this type: the law was both overbroad because it treated the loyal and the disloyal person of Japanese ancestry in the same way; and it was under-inclusive because it did not apply to others who might have been disloyal as well.

Where a law uses a suspect classification the courts should be astute to see that there is as tight a fit as possible between the scope of the legislation and the scope of the professed purpose. Otherwise there is a danger that, however much it acts in good faith and even if discrimination is subconscious, the state will sacrifice an unpopular minority for the perceived good of the majority.

The discipline of equality analysis is important for two main reasons. First, it provides a rigorous analytical framework for what might otherwise be perceived to be simply political decisions not suitable for judicial interference. As so often in the law, getting the right answer is difficult but it helps to ask the right questions. Secondly, the discipline of equality is consistent with the democratic structure of our society. It gives the courts a useful role in protecting fundamental rights without encroaching on the purely political function which is the province of the government and of Parliament. This is because, when the court finds that a decision or even a piece of legislation violates the right to equal treatment it does not prescribe the only response available to the state. What the other branches of the state may then do is respond by levelling down or levelling up. But the “political price” for levelling down has to be paid. This is morally right as well because it means that, in difficult areas such as the allocation of resources, the state is entitled to a wide latitude of judgment on the underlying question but when it comes to the discriminatory allocation of benefits or burdens, there is no reason why the state should be given much, if any, deference. Indeed it is in this perpetual struggle between minorities and the majority that the court should play the most vigilant role. It should always be vigorous in acting as the guardian of minority rights. This is because the majority can usually be expected to use their superior political power through the ballot box to achieve the outcomes which they perceive to be in their interests. If the

majority abuse their power (even unwittingly) and impose burdens on the minority which are not necessary and objectively justified, the democratic system suffers a systemic failure. It is in danger of eating itself up. What the courts can and should do is stand up for the enduring values of our society, which include the principle of equality. As Lord Steyn said in his lecture on 2 October 2003 in memory of Chief Justice Dickson in Canada:
"A core characteristic of a constitutional democracy is the protection it offers to the rights of individuals against the majority view as reflected by an elected government. In our new constitutional order Parliament itself has placed this duty on the courts. It permits judicial review of Acts of Parliament. … The courts may not abdicate their responsibilities by developing self-denying constitutional limitations on their powers."

Against that background I would like to turn to the decision of the Court of Appeal in *A v. Secretary of State for the Home Department*[20]*,* which concerned detention without trial of suspected international terrorists. The Court had to consider the legality of the UK's derogation from Article 5 of the ECHR under Article 15, which permits derogation in time of war or other public emergency threatening the life of the nation. In relation to the discrimination part of the challenge, Lord Woolf CJ started off well by referring to an important American case from 1949:

"The vice involved in discrimination was well identified by Jackson J of the United States Supreme Court in 1949:
'equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.' *Railway Express Agency Inc v New York* (1949) 336 US 106, 112-113."

However, when he came to analyse the discrimination part of the argument in the case of *A* itself, Lord Woolf held that Special Immigration Appeals Commission had erred in concluding that there was discrimination as between British citizens, who cannot be detained on the

[20] [2002] EWCA Civ 1502 [2003] 2 WLR 564, at para. 7.

certificate of the Secretary of State, and foreign nationals, who can be under the conditions laid down in section 23 of the Anti-terrorism, Crime and Security Act 2001.

"47 … the position here is that the Secretary of State has come to the conclusion that he can achieve what is necessary by either detaining or deporting only the terrorists who are aliens. If the Secretary of State has come to that conclusion, then the critical question is: are there objective, justifiable and relevant grounds for selecting only the alien terrorists, or is the discrimination on the grounds of nationality? As to this critical question, I have come to the conclusion that there are objectively justifiable and relevant grounds which do not involve impermissible discrimination. The grounds are the fact that the aliens who cannot be deported have, unlike nationals, no right to remain, only a right not to be removed, which means legally that they come into a different class from those who have a right of abode."

This reasoning is remarkable. It amounts to saying that foreigners can not only be regulated in the context of immigration control but also outside that context because they have no right to be here in the first place. But Article 5 provides that "everyone" has the right to liberty. If that had not been so, there would have been no need for the derogation anyway. Suppose Parliament enacted a law which abrogated the right to a fair trial for offences generally (including murder or theft) but did so only in relation to foreign nationals. Lord Woolf's reasoning appears to suggest that that would be permissible because a foreign national has no right to be here, so while they are here, they cannot complain that their Convention rights are being interfered with in a discriminatory way.

Brooke LJ set out an extensive discussion about international law and the detention of foreign nationals, concluding that both customary international law and multilateral treaties had recognised that states are entitled to detain foreign nationals without trial in times of war or other emergencies even if they do not detain their own citizens. This argument again misses the point and proves too much. The question is not what international law generally permits but whether the criteria for a lawful derogation under Article 15 of the ECHR are met. Those criteria include the important requirement that the measures taken should be "strictly required" to meet the needs of an emergency. It is difficult to see how a discriminatory measure can be regarded as strictly required. Moreover, the argument simply fails to address the point that what needs to be justified is not just the underlying measure but the discrimination. The point can be tested in this way. Suppose the Government had expressly derogated from Article 14 of the ECHR and not only from Article 5. It would then have had to show that the discrimination involved in its measures was strictly required. That would have been an uphill struggle to say the least. But the implication of the Court of Appeal's

judgments is that the Government has somehow improved its legal position by not derogating from Article 14 and so it does not need to justify the discrimination inherent in its measures. It is interesting to note that at first instance the Government argued that it had impliedly derogated from Article 14 and from Article 26 of the International Covenant on Civil and Political Rights. That argument, which was a bold one, was rejected by SIAC and not revived in the Court of Appeal. But the Court of Appeal seems to have concluded that it did not matter. The result of cases in such a fundamental area should not depend on procedural or tactical points.

Chadwick LJ agreed with the other members of the Court and added:
"153 … The decision to confine the measures to be taken to the detention of those who are subject to deportation, but who cannot (for the time being) be removed, is not a decision to discriminate against that class on the grounds of nationality. It is a decision that it is only persons who fall within that class who need to be detained in order to meet the emergency. **What would be discriminatory would be to decide that all suspected international terrorists needed to be detained in order to meet the emergency; but to confine the power to detain to those who, because they were foreign nationals, were subject to immigration control.** If that were what the Secretary of State had done, then it would be right to quash the Derogation Order."

But, on an objective scrutiny, that is precisely what Parliament has done. The professed purpose of the derogation is to deal with international terrorism as a direct result of September 11. But the means chosen to achieve that aim are under-inclusive and discriminate on the ground of citizenship.

In the *A* case the Secretary of State was represented by Lord Goldsmith, the Attorney General. The Attorney General recently gave an interesting lecture to the International Bar Association in San Francisco on 18 September 2003. There is much with which I am sure many here would agree. He said, for example, this in relation to balancing security and fundamental rights:

"I do not believe that this can be a simple utilitarian calculation of balancing the right to security of the many against the legal rights of the few. That would be to ignore the values on which our democratic society is built. For in the war on terrorism we are fighting for more than the safety of our citizens … We are fighting for the preservation of our democratic way of life,

our right to freedom of thought and expression and our commitment to the rule of law … These are the very liberties and values which the terrorists seek to destroy …"[21]

The Attorney General referred in passing to the decision in *A*. He mentioned that the Government had lost on one point in SIAC but that the Court of Appeal had reversed SIAC. He said that the ground could be described as follows: "that the powers were not wide enough." I have to say that I fundamentally disagree with the Attorney General on this point. The difficulty with that approach is that it could be used to undermine any equality argument. Whenever a person argues that a measure is discriminatory the state could always caricature the argument as an argument that the state has not gone far enough.

To take an extreme example which one hopes would never happen in this country: suppose the state announces that there is an economic crisis and that it is necessary in the public interest that property should be seized without compensation. It seeks to derogate from Article 1 of the First Protocol. But then suppose that the state announces that the only property which is to be seized is that belonging to Jewish people. Immediately the question of discrimination arises. In one sense it could be said that the state has acted more proportionately by drafting its measure in a narrow way rather than by hitting everyone in society. But no one could seriously suggest that such a measure was compatible with human rights principles, because it would constitute the most offensive kind of discrimination. In the context of the case of *A*, there is nothing surprising about a civil liberties organisation like Liberty arguing both that the power to detain without trial is unnecessary in general and that it is discriminatory in particular. Of course Liberty and many others would prefer to see there being no power to detain without trial at all. But if there is to be such a power it should include everyone equally. By imposing the discipline of equality on the state, the law would compel the state to face up to the full gravity of what it is doing. It would truly have to be a national emergency to justify such legislation. It is also consistent with democratic principle, because the court's decision that there has been a breach of the principle of equality forces the issue back to the democratic arena.

The fact that the Government is reluctant to ask Parliament to pass wider legislation suggests that in fact it is not "strictly required" to meet the exigencies of the situation. In any event, one has to be careful to appreciate what has to be justified as being objectively necessary. It is not just the underlying measure – that would be true in any event because of the requirements of Article 15. What has to be justified is the *discrimination.* In *Gaygusuz v.*

[21] In similar vein, Lord Woolf CJ put it pithily in his lecture (above): "In defending democracy, we must not forget the need to observe the values which make democracy worth defending."

Austria[22] the Court of Human Rights said that "very weighty reasons would have to be put forward before the Court could regard a difference based exclusively on the ground of nationality as compatible with the Convention."

And the test under Article 15 is even harder to satisfy than the normal test of proportionality. The measure used has to be strictly necessary to meet the exigencies of the emergency. Far from being strictly necessary, discrimination means that the measure is less effective. How can it be necessary to discriminate when it would assist the fight against terrorism if there were no discrimination? And if the state is not prepared to go that far, it should not pick on a small unpopular minority.

I would like to turn next to the *European Roma Rights* case[23]. This was a claim for judicial review brought by an NGO based in Budapest devoted to the protection of the rights of Roma people in Europe and by individuals who were refused leave to enter the UK by immigration officers at Prague Airport. For present purposes the only relevant ground of challenge was based on section 19B of the Race Relations Act 1976, as inserted by the Race Relations (Amendment) Act 2000. As is well-known the 2000 Act was passed to implement many of the recommendations made by the Stephen Lawrence Inquiry Report. It is designed to extend to various public functions the duty not to discriminate on racial grounds which had previously only applied to a limited range of functions, such as employment, housing, education and goods and services. Services in this context had been interpreted in the past to exclude statutory functions such as immigration functions because they were not analogous to what a private person can do in the provision of services[24]. That restriction has now been swept away by the 2000 Act. Accordingly, it could be said that the 2000 Act is part of the constitutionalisation of discrimination law, just as the Human Rights Act is.

Section 19B makes it unlawful for a public authority in carrying out any functions of the authority to do an act which constitutes discrimination under section 1. Section 19D provides an exception in certain circumstances, including where there has been a ministerial authorisation in the fields of immigration and nationality. On 23 April 2001 a ministerial authorisation had been made which, under the heading 'Examination of passengers', permitted an immigration officer, by reason of a person's ethnic or national origin, to subject

[22] (1996) 23 EHRR 364, at para. 42.
[23] *R (European Roma Rights Centre) v. Immigration Officer, Prague Airport* [2003] EWCA Civ 666 [2003] 4 All ER 247.
[24] *In re Amin* [1983] AC 818.

that person to a more rigorous examination than other persons in the same circumstances. In a schedule, this authorisation was made applicable to Roma people. However, the evidence filed on behalf of the Secretary of State was that the authorisation had not in fact been relied on to discriminate against Roma applicants at Prague airport. The argument was rather that the actions of immigration officers had complied with the 1976 Act in full and there had been no discrimination. The appellants alleged that there had been direct discrimination in that, for example, there was longer and more intrusive questioning of Roma than non-Roma; the treatment of them with greater suspicion; and a requirement of a higher standard of proof before leave to enter the UK would be granted. They placed what Simon Brown LJ called "striking figures" before the Court of Appeal. These showed that, in a three month period in early 2002, of 6, 170 passengers recorded as Czech nationals but not Roma, only 14 were refused (that was 0.2%); whereas, of 78 applicants who were apparently Roma, 68 were refused (that was 87%).

Simon Brown LJ, who gave the main judgment for the majority, said that:
"The question is this: what is the position in law if, as seems to the court wholly inevitable, immigration officers, aware of the fact that the overwhelming majority of those seeking asylum from the Czech Republic are Roma (it may be doubted, indeed, whether any such are non-Roma), bring a greater degree of scepticism to bear on a Roma's application for leave to enter for some permitted purpose than upon an apparently comparable application by a Czech non-Roma?"[25]

In answering that question, Simon Brown LJ said:

"because of the greater degree of scepticism with which Roma applicants will inevitably be treated, they are more likely to be refused leave to enter than non-Roma applicants. But this is because they are less well placed to persuade the immigration officer that they are not lying in order to seek asylum. That is not to say, however, that they are being stereotyped. Rather it is to acknowledge the undoubtedly disadvantaged position of many Roma in the Czech Republic. Of course it would be wrong in any individual case to assume that the Roma applicant is lying, but I decline to hold that the immigration officer cannot properly be warier of that possibility in a Roma's case than in the case of a non-Roma applicant. **If a terrorist outrage were committed on our streets today, would the police not be entitled to**

[25] At para. 66.

question more suspiciously those in the vicinity appearing to come from an Islamic background?"[26]

Laws LJ dissented:

"when a Roma and non-Roma both present themselves at the desk at Prague airport and state they wish to visit London for the weekend, the immigration officer at that stage knows nothing of their personal circumstances. He has not seen what evidence they have to support their applications for leave to enter as visitors. All he knows, from their appearance, is that one is Roma and the other is not. He treats the Roma less favourably, by subjecting him or her to a more intrusive enquiry with a lesser prospect of leave to enter being granted. One asks … why did he treat the Roma less favourably? It may be said there are two possible answers: (1) because he is Roma: (2) because he is more likely to be advancing a false application for leave to enter as a visitor. But it seems to me inescapable that the reality is that the officer treated the Roma less favourably *because* Roma are (for very well understood reasons) more likely to wish to seek asylum and thus more likely to put forward a false claim to enter as a visitor. The officer has applied a stereotype; though one which may very likely be true. That is not permissible. More pointedly, he has an entirely proper reason (or motive) for treating the Roma less favourably on racial grounds: his duty to refuse those without a claim under the Rules, manifestly including covert asylum-seekers, and his knowledge that the Roma is more likely to be a covert asylum-seeker. But that is irrelevant …"[27]

It seems to me that Laws LJ must be right. It is clear that there was less favourable treatment. It is also clear that it was on racial grounds. As all the judges acknowledged, the reason for the discrimination is immaterial: in particular, the absence of a hostile intent or the presence of a benign motive is immaterial. What the majority view amounts to is, on analysis, an attempt to introduce into the law of direct discrimination the possibility of justification. But Parliament could have provided for that possibility – as it has done in the context of allegations of indirect discrimination – and has chosen not to do so. In so far as the fields of immigration and nationality may be thought to require special treatment, permitting discrimination on certain grounds (ethnic or national origins) but not others (such as colour), again Parliament has catered for that possibility in enabling a minister to give an authorisation. The Government did not want to rely on the authorisation in the *Roma* case: that was a matter for its tactical choice but the courts should not bend over backwards to save the executive from what may have been its own folly. Their duty, as Laws LJ said, is to

[26] At para. 86.
[27] At para. 109.

apply the will of Parliament as enacted in its laws. Moreover, the danger in the majority's reasoning is that it is capable of application outside the limited areas with which the Court was concerned. For example, it could be applied in the context of police stop and search powers. Simon Brown LJ expressly gives an example from just that context. This is potentially very damaging to race relations law going beyond what may have been perceived to be the problem in the *Roma* case itself.

In case it be thought that I am unduly gloomy, there is one beacon of hope in the early case law on Article 14 and it is the *Ghaidan* case[28]. At first sight that case might not appear to be a constitutional case at all. It was a landlord and tenant dispute between two individuals, about whether the defendant could succeed to a statutory tenancy under the Rent Act 1977. But, because the case turned on the meaning of an Act of Parliament, it was a constitutional law case. The question arose whether Parliament had discriminated in a way which was incompatible with Article 14 of the ECHR. The Rent Act had been amended in 1988 to give the right of succession to a statutory tenancy to the surviving partner in an unmarried relationship as well as to the surviving partner in a married one. The question was whether the right was available in a same-sex relationship or whether it was confined to a heterosexual one. The Court of Appeal held unanimously that it was available to same-sex partners as well. In a text-book example of the generous and progressive spirit with which the Human Rights Act should work, the Court took the following innovative steps:

1. It was prepared to depart from a decision of the House of Lords, in *Fitzpatrick v. Sterling Housing Association*[29], decided in 1999, just a year before the Human Rights Act came into full force.

2. It was prepared to depart from earlier case law of the European Commission of Human Rights which was directly in point on the ground that the court's task is to interpret the ECHR as a "living instrument" and it is required by section 2 of the HRA only to take such case law into account and is not bound by it.

3. It was prepared to use section 3 of the HRA to give the Rent Act a meaning which was not its ordinary meaning, as the House of Lords had held in *Fitzpatrick*, but a meaning which was "possible". As Buxton LJ put it[30]:

[28] *Ghaidan v. Godin-Mendoza* [2002] EWCA Civ 1533 [2003] 2 WLR 478
[29] [2001] 1 AC 27
[30] At para. 35.

"Th[e duty in section 3 of the HRA] can be properly discharged by reading the words "as his or her wife or husband" to mean "as *if they were* his or her wife or husband".

... It is quite true … that the words "husband" and "wife" are in their natural meaning gender-specific. They are also, however, in their natural meaning limited to persons who are party to a lawful marriage. … And, Parliament having swallowed the camel of including unmarried partners within the protection given to married couples, it is not for this court to strain at the gnat of including such partners who are of the same sex as each other."

4. Perhaps most importantly, when it came to assessing whether there was an objective and reasonable justification for the discrimination between heterosexual couples and same-sex couples, the Court was not prepared to give much deference to Parliament. As Buxton LJ said:

"The general organisation of housing policy, and in particular of public housing … clearly involves complex questions of social or economic policy that the courts should only enter with trepidation. But I have no hesitation in saying that issues of discrimination, which it is conceded we are concerned with in this case, do have high constitutional importance, and are issues that the courts should not shrink from. In such cases deference has only a minor role to play.

20 … once it is accepted that we are not simply bound by whatever Parliament has decided … then we need to see whether the steps taken in implementation of the supposed policy are, not merely reasonable and proportionate, but also logically explicable as forwarding that policy. If it is accepted for the moment that Parliament seeks by the Schedule to promote the interests of landlords, flexibility in the housing market and the protection of the family, how is any of that significantly forwarded by depriving the survivors of same-sex partnerships of statutory but not of assured tenancies? Since this part of the argument rested simply on assertion, no actual facts or evidence were available to assist us; so the court has to fall back on common sense."

Keene LJ added:

"43 As for proportionality, one accepts that in a number of areas of social and economic policy-making the courts should grant a generous degree of deference to Parliament when it comes to striking the balance between the individual and the community. But this depends

crucially on the context. The issue here is one of discrimination between two groups on the basis of their sexual orientation, rather than one of housing policy.

44 Where discrimination against a minority is concerned, amounting on the face of it to a breach of article 14 rights, the courts are entitled to require to be satisfied that a proper and rational justification for the difference in treatment has been made out. It is, as Buxton LJ has emphasised, a matter involving rights of high constitutional importance where the courts are equipped to arrive at a judgment. It is indeed a classic role of the courts to be concerned with the protection of such minority rights."

Although it is difficult to speculate, it may be that the reasons which explain why the courts were prepared to be so much more intrusive in *Ghaidan* than in *A* or in the *Roma* case are not so much legal as subconscious:

(1) There seems to remain the residual but instinctive feeling that equality is about equality as between citizens. Foreign nationals are not regarded as analogous because foreigners are "different."

(2) The contexts of the first two cases are politically more controversial (terrorism and asylum), where the courts would be taking on the Government directly and doing so in areas where the Government may well have many people, perhaps the majority of people in society, on its side. But, of course, one should recall that, when an equality argument is made, the court does not have to enter the merits of national security or asylum policy; rather it is concerned with whether there is an objective and pressing justification for the discrimination involved.

(3) In contrast, in the *Ghaidan* case, the parties were private litigants, and the Government was not represented even as an intervenor. Furthermore, the Court may well have felt, from its own reading of the social and political context, that the tide of opinion is moving in favour of equalisation of rights in the field of sexual orientation, for example, the Government is proposing to introduce civil partnerships for same-sex couples.

Whatever the reasons, it seems to me that equality has been for too long a neglected virtue in our constitutional law. But it could not be more important as a symbol of the kind of society we are. As Lord Woolf put it eloquently in his recent lecture in Australia:

"The real test of the [Human Rights Act] arises when individuals or minorities attract the antagonism of the majority of the public. When the tabloids are in full cry. Then, the courts must, without regard to their own interests, make the difficult decisions that ensure that those under attack have the benefit of the rule of law. At the heart of the HRA is the need to respect the dignity of every individual by ensuring that he or she is not subject to discrimination."

These are important statements of the right approach but the time has come to turn the rhetoric into reality. The tabloids are indeed in "full cry" on the issues of asylum-seekers and terrorist suspects. It is important to recall that, when Lord Scarman used his Hamlyn Lectures nearly 30 years ago to advocate incorporation of the ECHR, one of the main reasons he gave was that it is when fear stalks the land that unpopular minorities most need protection. And if one thing is certain after September 11, it is that people are more afraid of terrorist attack. It is precisely in that climate of opinion that the courts have to step in and protect not only minorities but the enduring values of our society.