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22 September 1994

Jeffrey Jowell QC
Faculty of Laws
University of College
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Fax No: 0944-71-380 7734

Dear Jeffrey

I was very happy to receive your lecture on equality. I found it most interesting. How you people have to struggle to find a principle of equality! With one mighty leap we have it in our new constitution. I am sure however that we will be arguing about its various meaning until kingdom come, if it comes!

I suppose you know that the process of selecting judges for our Constitutional Court is proving to be long drawn out. Over a hundred names were initially proposed to the Judicial Services Commission. The Commission reduced this number to 25. I am on what I call the long short list. In the first week of October we go to Johannesburg for an hour long interview each. It will be held in public with the press present but there will be no TV or radio recording or photographs. There are 25 extremely tense people in South Africa at the moment!

The Commission will choose 10 names who will be referred to the President. The President acting in conjunction with the Cabinet will finally choose 6 and so by the end of October we should have our first Constitutional Court.

The whole process should be one in which all South Africans take pride. I personally feel it is being handled in a serious and dignified way. I understand that the Commission has hired researchers to read everything that each of the 25 candidates has written. The interviews will certainly be interesting. The Judicial Services Commission contains a mix of mainstream legal professionals and persons from many other walks of life.

Unfortunately, a lot of the press reporting has been sour to say the least. I think there are some people who feel that this area is their preserve and if the process and the person selected don't correspond exactly to what they had in mind then they get rather angry.

In any event, let us hope that the arrival of the Court is greeted with the same warmth and sense of overdue historic evolution that accompanied the birth of the new Parliament.

Please keep in touch. Whatever its composition I am sure we will have an excellent Court and I have no doubt that you will be able to enrich its functioning with your ideas and observations.

With best wishes.

Albie Sachs

11.

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From: Jeffrey Jowell QC
Professor of Public Law and Vice Provost

15th June 1994

Professor Albie Sachs
P.O. Box 3684
Cape Town 80000
South Africa

Dear Albie,

I am sorry I missed you yesterday. There was so much I wanted to ask you about, although Francie has reported a great deal. Great news about Arthur heading the Constitutional Court. It would be wonderful if you were there too but I understand the problems.

I enclose my piece on Equality. It is just a sketch. I am preparing a book on constitutional principles which will flesh out much of it. But I do think that it is worth emphasising that the rule of law is not the only constitutional principle we have — and that it is rather thin on equality.

Warmest wishes.

Yours,

Jeffrey

Jeffrey Jowell*

IS EQUALITY A CONSTITUTIONAL PRINCIPLE?
(Dennis Lloyd Memorial Lecture)

To be published in 1994 Current Legal Problems

English public law has displayed a remarkable vigour over the past 25 years. Whatever the state of our other public institutions, or other parts of our law, our courts have, over this period, addressed the most intractable problem of our unwritten constitution and come up with a definitive answer. That problem is the extent to which the exercise of governmental power is constrained by legal principle. The answer, which the courts have firmly asserted, is that it is so constrained, and that individuals have the right, in their dealings with the state, to be treated legally, fairly, and, if not reasonably, then at least not unreasonably.

Last year saw a further decisive step in this direction. A unanimous House of Lords held that a local authority, the Derbyshire County Council, was not entitled to bring a libel action against Times Newspapers. The reason given was that "it is of the highest public importance that a democratically elected body should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on free speech".[1]

The House of Lords did not reach this conclusion by resting it upon our obligations in international law. Freedom of speech has thus been judicially recognised as a right implied in our domestic common law. As was made clear, it is a right that is derived from the principle that, in a democracy, necessary criticism of government should not be unjustifiably restrained.

* Q.C., Professor of Public Law and Vice Provost, University College London. The author would like to thank Stephen Guest, Bob Hepple, Martin Loughlin, Anthony Lester, Sandford Levinson, Jeffrey Barnes and Daniel Jowell for their helpful assistance with the preparation of the lecture.

In other recent cases, other rights, such as the right to life,[2] and the right of unimpeded access to courts[3] have been mentioned as meriting especially "anxious" judicial scrutiny when threatened.

If these rights exist, what others? And, the question I shall now address, what of equality? Is equality a constitutional principle?

It might seem self evident that equality is a fundamental principle in a democracy, as I believe it to be, but the evidence from the literature on that point is sparse. Working through the index of all the leading English works on constitutional and administrative law published over the past 10 years there is barely a mention of equality.[4] Most have no reference to it at all. Books on Civil Liberty do deal with our law outlawing certain forms of race and sex discrimination, but rarely with other forms of discrimination.[5] Contrast the books on the public law of most other countries, where equality takes up at least as many inches in their indexes as are allotted in ours to Professor Albert Venn Dicey and his book <u>The Law of the Constitution</u>, which was published 109 years ago.[6]

Dicey's formidable Victorian figure still looms over the law of the British constitution. It brings to mind the image of the Albert Memorial as it exists today, encased in scaffolding and wrapped in protective sheeting. The powers that be cannot decide whether to restore it to its former glory or to acknowledge that its fabric, ravaged by twentieth century elements not foreseen at the time of its Victorian construction, is frankly beyond repair.

On balance I would vote to restore Dicey's monument, not to demolish it. Not in order to elevate his work to the order of unimpeachable doctrine, nor to provide our scholars with a perpetually revolving grindstone on which to sharpen their critical faculties, but to have the opportunity from time to time

to salute some (although by no means all) of his insights into the British constitution, and his method of determining its elusive patterns and practices.

Although many of Dicey's dogmas delayed the development in this country of a coherent public law, his abiding insight was that our constitution, albeit unwritten, is guided by principles. Some of these principles, together with what he called Conventions, enable power to be exercised by government, and specify the manner of its exercise. Dicey also however identified the fact that principles also disable government from abusing its power. The essential disabling principle is the Rule of Law, which acts as a practical constraint on the way power is exercised. The content of The Rule of Law is broad: it requires laws as enacted by Parliament to be faithfully executed by officials; individuals wishing to enforce the law should have access to courts; no person should be condemned unheard; power should not be arbitrarily exercised. Perhaps above all, and in order to achieve the aims just mentioned, the Rule of Law requires law to be certain, that is, predictable and not retrospective in its application. These constraints inherent in the Rule of Law have provided the background justification for much of our developing rules of public law.

The practical effect of a disabling constitutional principle, like the Rule of Law, is seen when an alleged breach of the principle is challenged in the courts. The courts make the assumption that individuals have a right to be treated in accordance with the principle. In interpreting the scope of a statutory power, the implication is made that Parliament intended the law to conform to the principle. If the scope of the power is ambiguous, the principle applies. It is only excluded where clearly stated to the contrary. That of course means that a principle like the Rule of Law can be expressly overridden by Parliament - in our system the prior principle of the Sovereignty of Parliament has up to now prevailed, as Dicey required. But the absence of judicial review of primary legislation is by no

means fatal to the principle. It will still always provides the basis for evaluation of all governmental action.

It serves as a critical focus not only for judicial review, but also for public debate. The government may succeed in enacting a law providing for detention without trial, or may enact retroactive legislation, but strong justification is needed for such laws to withstand the Rule of Law's moral strictures. It is this conception of a constitutional principle that I seek for equality.

Now it may be that we do not need a separate and distinct constitutional principle of equality, because it is already contained within the Rule of Law. In elaborating the Rule of Law Dicey said that "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen."[7] Dicey is here espousing a concept of what has been called formal equality, by which he meant that no person is exempt from the enforcement of the law. Rich and poor, revenue official and individual taxpayer are all within the equal reach of the arm of the law.

This kind of equality has been derided[8] but it is important. It is inherent in the very notion of law, and in the integrity of law's application, that like cases be treated alike over time.[9] Its reach however is limited because its primary concern is not with the content of the law but with its <u>enforcement</u> and <u>application</u> alone. The Rule of Law is satisfied as long as laws are applied or enforced equally, that is, evenhandedly, free of bias and without irrational distinction. The Rule of Law requires formal equality which prohibits laws from being enforced unequally, but it does not require substantive equality. It does therefore not prohibit unequal laws. It constrains, say, racially-biased enforcement of laws, but does not inhibit apartheid-style laws from being enacted.[10] Dicey's supporters such as Maitland and, later, Hayek freely admitted that certain

law is much more important than "bad" or "unjust" laws.[11] The role of equality in the Rule of Law is merely instrumental. It is espoused not as a virtue for its own sake. Its place is to buttress the Rule of Law's supreme quality; that of legal certainty.

A very different conception of equality was advanced by Dicey's critics in the 1930s. Professors Ivor Jennings and Harold Laski unleashed attacks on the Rule of Law which were almost fatal. They accused Dicey's thin concept of formal equality, together with his concern not to permit wide discretionary powers, as devices to perpetuate inequalities in society and to inhibit the redistribution of wealth.[12] Jennings and others were interested therefore in unshackling our officials from the constraints of this kind of Rule of Law so as to give them a freer hand to promote social and economic equality.

But can a <u>constitution</u> foster social and economic equality? Some modern constitutions do contain a catalogue of what are called "second generation" rights, such as the right to shelter, health, and so on. India, Brazil and Namibia have included such benefits under a list of "directives of state policy," which are not directly enforceable rights but more in the nature of aims of equality they preferred. There are some very serious contenders these days, putting forward theories much more appealing than those that crudely suggest the equal distribution of wealth between citizens.

A great deal of attention has been focused upon John Rawls' "Difference Principle",[13] under which social and economic inequalities are permitted only to the extent that they are to the greatest benefit of the least advantaged members of society. By contrast, writers of a more libertarian point of view, such as Robert Nozick[14] and Peter Bauer[15], tend to support economic equality in the sense of the equal right freely to enter into contracts or the equal opportunity to enjoy one's property or the fruits of one's labour.

Should any of these conceptions of equality qualify as the constitutional principle of equality that we are seeking? Professor John Ely gave one answer to this question when he responded to a plea by Ronald Dworkin to employ the writings of Rawls as a way towards fusing constitutional law and moral theory. He replied as follows: "Rawls's book is fine. But how are judges to react to Dworkin's invitation when almost all the commentators on Rawls's work have expressed reservations about his conclusions? The Constitution may follow the flag, but is it really supposed to keep up with the New York Review of Books?"[16]

Ely's jibe too lightly dismisses the riches for law in work like Rawls, but there is a related point which is valid; that a constitution ought not to be in itself an instrument of policy. It provides the framework for the implementation of policies by an elected government. It is not the function of a constitution to predetermine the allocation of resources or the distribution or redistribution of wealth, or the proper place of the market. A government duly elected by the people should be free to pursue Rawls' or Nozick's vision of equality, and the constitution should ensure its freedom to do so.

[As an aside, it is interesting to note that in the recent debate about the South African Constitution the African National Congress initially proposed that certain social and economic rights (such as the right to a health service and guaranteed shelter) be contained in the constitutional text. In the end these were not included, although the right to "freely engage in economic activity"[17] is balanced by the right to form and join trade unions, and the right to strike.[18]]

If formal equality is too thin a concept to deal with substantive inequality, and if broad theories of social equality disqualify themselves as constitutional principles (however attractive we may find them as social policies), is there any other notion of equality which might limit government's power to treat people

unequally in a substantive sense?

Put in this negative way, seeking a principle to limit governmental power, rather than seeking a policy to promote a particular conception of the social good, a positive answer is suggested by a conception of equality that requires government not to treat people unequally without justification. In other words, government should not discriminate. Such a principle does not require or predetermine any particular social and economic programme Yet it is directed not only at the way law is applied but also at the content of the laws themselves. It forbids not only the unequal application of equal laws, but also forbids unequal laws. Just like free speech, it is a principle that derives from the nature of 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.[19] It gains its ultimate justification from a notion of the way individuals should be treated in a democracy. It is constitutive of democracy.

This conception of equality of course allows differential treatment (between adults and children, the elderly and the young, aliens and citizens) but it prevents distinctions that are not properly justified. Distinctions between individuals or groups must be reasonably related to government's legitimate purposes. Under our system, equality may be expressly violated if Parliament clearly so requires. Like the Rule of Law however, its apparent violation will provoke strong questioning and require rational justification. We see this debate today on the question of different ages of consent for homosexuals or on the question of the possible withdrawal of some forms of hospital treatment from habitual smokers or from the elderly.

Now where do we find this conception of equality in our law? How do we test whether it is a constitutional principle?

We could start with that growing element of our law which involves the application of "directly effective" European Community law. Certain provisions of the European Community Treaty provide for the principle of equal treatment with regard to specific matters. Discrimination is prohibited on the ground of nationality,[20] in pay on the grounds of sex[21] (though not race) and between consumers and producers in the application of the Common Agricultural Policy.[22] The European Court has however ruled that each of these prohibitions on discrimination is "merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law."[23] The principle of equality in Community law requires that similar situations shall not be treated differently, and that different situations not be treated equally, unless the distinction or lack of distinction is "objectively justified" - a concept of equality which is compatible with that which I have just outlined.

Many of the cases in which the equality principle is applied under Community law may not exactly be rivetting to civil libertarians. One important case, for example, dealt with unjustified discrimination in subsidising two kinds of maize, quellmehl and gritz, while continuing to pay the refunds on the maize used to make starch. The producers of the two former products successfully argued that the distinction between their products and starch could not be objectively justified.[24] Important of course if you happen to produce quellmehl, starch or grits, but the some principle has been enunciated in cases involving equal pay between men and women[25], or the discrimination against Mrs. Johnston by the Royal Ulster Constabulary (although the latter case was decided on other grounds.[26])

It should be added that, although the Treaty of Rome does not provide for a catalogue of fundamental human rights, the Court of Justice has held in the case of Nold[27] that it cannot uphold measures which are incompatible with fundamental rights , and

subsequent cases have accepted that the European Convention on Human Rights has a special significance in this respect. Article 14 of the Convention outlaws discrimination on a number of grounds namely, sex, race, colour, language, religion, political opinion, national or social origins, association with a national minority, property, birth or "other status." The case law of the European Commission and Court of Human Rights has included under "other status" a variety of grounds, including marital status, and the distinction between "foster" and "natural" children, and illegitimates.[28]

In cases in which Community law is directly effective in the United Kingdom, equality of this kind - preventing discrimination without "objective justification" - is one of the principles which our courts must apply as governing not only our administrative action, but also our primary legislation.

Turning now to English common law, we find some ancient duties placed upon the likes of inn-keepers, common carriers and some monopoly enterprises such as ports and harbours, to accept all travellers and others who are "in a reasonably fit condition to be received"[29]. The reach of these laws was not sufficient to prevent racial discrimination in other public places and therefore, in the 1960's, legislation outlawing discrimination first on racial grounds, and later on grounds of sex, was introduced[30]. These laws cover discrimination in employment, education, the provision of goods and services, and some other areas in relation to racial discrimination[31].

Does this specific enunciation of forbidden discrimination imply that other forms of discrimination are permissible? To answer this question we have to turn to our administrative law. Here we find first that the courts imply that decisions of public officials should not be taken in "bad faith". Decisions should not therefore be infected with motives such as malice, fraud, dishonesty or personal animosity. Such motives are impermissible because they bias or distort the decision-maker's approach to the

applicant[32]. The applicant is therefore in a sense subject to unfair discrimination, in breach of the principle of formal equality.

In other cases the courts have invoked the notion of " public policy" to strike down discriminatory provisions. In Nagle v. Fielden[33] a decision of the Jockey club to refuse a woman a horse trainer's licence was held to be against public policy and in Edwards v Sogat[34], a case involving the withdrawal of trade union rights, Lord Denning said: "The courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules or in the enforcement of them" (thereby addressing himself both to substantive and formal equality).

Most decisions invoking substantive inequality have been struck down under the ground of judicial review known as "unreasonableness". In cases of this kind, wide discretionary power has normally been conferred on the decision-maker, and the courts - through judicial review - must be careful to allow the decision-maker a sufficiently wide margin of discretion. Courts therefore intervene under the formula set out by Lord Greene in the 1947 case of Wednesbury only when the decision is "so unreasonable that no reasonable decision-maker would so act"[35]. Incidentally, the example of a clearly unreasonable decision provided in the Wednesbury case was that of a teacher dismissed from her post on the ground of her red hair alone.
Unease with the tautologous Wednesbury formulation of unreasonableness has recently resulted in some attempts at redefinition. The term "irrationality" is currently in vogue - it was suggested by Lord Diplock - in the GCHQ case in 1984[36]. His extended definition of irrationality incorporates situations defying "accepted moral standards"[37]. Other definitions employ terms such as "absurdity" and "perversity" so as to prevent the courts interfering with a decision unless the official has "taken leave of his senses"[38]. Lord Donaldson recently rejected all the above definitions, preferring that of an unreasonable

decision as one that elicits the exclamation: "My goodness, that is certainly wrong!"[39].

The courts tend to avoid defining criteria of unreasonableness more specific than any of those above. There are advantages to vagueness and judges may be concerned to disguise the fact that judicial review allows the courts to strike not only at procedural defects and cases of illegality, but also at defects in the substance of the decision itself. Underneath the Wednesbury camouflage, however, a principle of equality can be discerned.

A century ago the notion of unreasonableness was less obscure. In 1898 in the case of Kruse v Johnson Lord Russel of Killowen was asked to invalidate a by-law for unreasonableness. "Unreasonable in what sense?" he asked, and then proceeded to provide some relatively specific examples including the following: The by-laws would be unreasonable, he said "if, for instance, they were found to be partial and unequal in their operation as between different classes"[40].

In 1925 in the famous case of Roberts v Hopwood[41] the House of Lords confirmed the view of the district auditor that the attempt of Poplar Borough Council to raise the level of the wages of both their men and women employees to an equal level was unlawful. Lord Atkinson fulminated against the council for allowing themselves to be guided by "eccentric principles of socialistic philanthropy, or by feminist ambition to secure the equality of sexes". This case is often produced as an exhibit of a typically blatant judicial opposition towards social equality. No doubt Lord Atkinson was not one of its more ardent supporters, but the ratio of the case was based upon a more sober consideration of the lack of "rational proportion" between the rates paid to the women and the going market rate (a ground of review which has a more modern ring)[42].

In 1955 in Prescott v Birmingham Corporation[43] the local

authority, which had power to "charge such fares as they may think fit" on their public transport services introduced a scheme for free bus travel for the elderly. The decision was declared to be unlawful because it conferred out of rates" a special benefit on some particular class of inhabitants . . . at the expense of the general body of ratepayers"[44]. The reasoning in Prescott might have benefited from attention to a more sophisticated conception of equality, but its approach was followed in other cases involving differential transport fares schemes, each of which grapples with some notion of equality. In the GLC Fares Fair case,[45] for example, justification was required for the differential costs and benefits of the transport fare cut to the inhabitants of Bromley, other ratepayers in London, and travellers from outside London using London's public transport.

Looking under recent applications of Wednesbury unreasonableness we do see stark examples of the application of the principle of equality. In 1988 a councillor in Port Talbot was allowed to jump the housing queue in order to put her in a better position to fight the local election from her own constituency[46]. The decision was held unlawful because unfair to others on the housing waiting list, adversely discriminated against. The principle of equality was not mentioned, but surely applied.
It has recently been held that schools may not discriminate in the allocation of school places against children living outside the school's catchment area. In R. v Hertfordshire County Council ex parte Cheung[47] the Master of the Rolls Lord Donaldson held that the Home Secretary, in considering the remission of a prisoner's sentence, must have regard to the length of time served by the applicant's co-defendants. He said that: "It is a cardinal principle of good public adminstration that all persons in a similar position should be treated similarly".

Some of these cases provide examples of formal equality, but there are many other cases where, whether explicitly mentioned or not, substantive equality was the standard by which

administrative decisions have been tested. Planning conditions that insist that local businesses only have access to new office premises have been upheld on the ground that their primary intent was to fuel the local economy - a legitimate planning consideration. On the other hand, conditions attached to planning permissions requiring local people only to occupy new or converted housing in the area (and thus discriminating against second home owners, or indeed anyone from outside the area) are of more doubtful validity[48]. In Great Portland Estates v. Westminster Council[49] the council's local district plan was challenged on the ground that it favoured the retention in the area of certain small industries only. The plan was upheld but the apparent discrimination had indeed to be carefully justified[50].

The clearest recent articulation of equality as a substantive standard was applied by Mr Justice Simon Brown in the case of R v Immigration Appeal Tribunal, ex p. Manshoora Begum[51], when he struck down part of immigration regulations promulgated by the Home Secretary. The regulation made provision for a dependent parent to be admitted to the United Kingdom in exceptional and compassionate circumstances, but required as one such circumstance that the parent should have a standard of living "substantially below that of his or her own country". Citing Lord Russell's formulation of unreasonableness as, inter alia, involving "partial and unequal" treatment, it was held that these regulations would benefit immigrants from affluent countries and discriminate against those from those from poor countries. The particular provision was however struck down on the explicit ground that it was "manifestly unjust and unreasonable".

Sometimes, in our administrative law, we see the principle of legal certainty, of formal equality, the Rule of Law value, in conflict with the principle of substantive equality I have outlined, involving treatment as equals. The doctrine of the fettering of discretion is a case in point[52]. Public officials are permitted to make rules that make it easier for them to

exercise their discretion and which have the benefit of making their policy clear to the public. For example, local authorities devise a points system for the allocation of council housing. But the decision-maker must always be prepared to listen to someone with something new to say. Discretion may not be fettered. The decision-maker must be willing to depart from a rule aimed at all equally (that is, seeking formal equality), by allowing the applicant to show that difference in treatment is justified in the particular case (that is, in order to achieve substantive equality).

There is no doubt that equality is used as a test of official action in our law. But is it wise for it to be explicitly articulated and declared - to be elevated to the status of lion under the throne, and not just a well-disguised rabbit to be hauled occasionally out of the Wednesbury hat? The jurisprudence of equality in international law, in European Community law, and in places with equal protection of the law enshrined in their constitutions - like the USA and Canada - give us fair warning of the kinds of problems with which our courts may have to grapple:

The first is the question of direct and indirect discrimination.Our anti-discrimination law is familiar with the concepts of direct and indirect discrimination (known in America as "disparate treatment" discrimination): Direct discrimination involves the less favourable treatment of the complainant than someone else on prohibited grounds and in comparable circumstances. "Indirect" discrimination arises when a seemingly neutral provision has a disproportionate impact on a particular group without any objective justification. For example, a height requirement, or requirement to work full time, may disproportionately disadvantage women. European Community law outlaws indirect discrimination[53], but in the USA the situation is patchy. In the area of racial discrimination in employment, indirect or disparate impact discrimination was outlawed by the US Supreme Court in Griggs v Duke Power Co[54]. Subsequent case

law reversed the Griggs position[55], which legislation then clearly endorsed[56]. Disparate impact discrimination is not however covered under the Equal Protection Clause (The 14th Amendment to the Constitution) - even in respect of racial discrimination.[57]

The second question concerns the scope of affirmative action. Under European Community law, affirmative action - positive discrimination for the special protection of socially, economically or culturally deprived groups - is regarded as a derogation from the fundamental right to equal treatment. As such it is strictly construed, in accordance with the principle of proportionality, and must therefore be within the limits of what is appropriate to achieve the aim in view[58]. International human rights law goes further and even requires affirmative action in order to diminish conditions which help to perpetuate prohibited discrimination[59].

A third question is about the intensity of review - or the margin of discretion or appreciation allowed to the decision-maker. The approach of the United States Supreme Court is instructive on this point: The Fourteenth Amendment to the United States Constitution guarantees that "[n]o State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws". While it had initially been argued that the Equal Protection Clause was intended only to require equal enforcement of the laws (that is, Diceyan formal equality), it is accepted now that the Clause is a guarantee of "equal laws", that is, State legislation may be challenged as violating equal protection. A legal classification will however survive a challenge if it is "reasonable in relation to the objectives of the law"[60].

In developing the conception of reasonableness the Supreme Court has employed a threefold standard of review. In matters involving social and economic policy, or where the matter is not easily "justiciable" because a question of opinion or taste, the

threshold of discretion is high and the courts will tend to defer to the administrative agency. Differentiation will in this kind of case survive challenge if it is "rationally related to furthering a legitimate government objective"[61]. In such cases therefore the law is accorded a strong presumption of validity and a classification must be upheld if there is "any reasonably conceivable state of affairs that could provide a rational basis" for the classification. For example a "grandfather clause", exempting two vendors from a ban on pushcart dealers in the French Quarter of New Orleans was sustained because the City could rationally conclude that the exempted vendors had become part of the "discrete charm" of the area[62].

When, however, the law employs what the Supreme Court has called a "suspect classification", such as race or "immutable traits or stereotypes", or when the classification burdens "fundamental rights", strict scrutiny is applied. "Suspect classifications" include those which "imply inferiority in civil society" and include race or national origin. Judicial deference here is not appropriate. In Palmore v Sidoti[63] the Supreme Court overturned a state rule allowing child custody to be refused to a white mother cohabiting with a black male.

In between these two extremes there is a third category, that of a "quasi-suspect classification." Sex discrimination - against men or women, comes under this head at present. In California, where a man challenged the rape legislation, which he said was discriminatory because aimed at men and not women, Justice Rehnquist has said that the courts will uphold gender classification which "realistically reflects the fact that the sexes are not similarly situated in certain circumstances". "Men as a class" the Court has held, "are not in need of the special solicitude of the courts"[64].

Do we really want our already overloaded courts to grapple with these kinds of problems? They are by no means foreign to our system. Our courts are already familiar with many of these

questions through the interpretation of our laws against race and sex discrimination. What is particularly striking is the extent to which the approach of the House of Lords, in recent cases about substantive review, is so similar to that of the US Supreme Court on the subject of equal protection. In cases involving allegations of unreasonableness the House of Lords have made the distinction between two types of decision. First are decisions which involve social or economic policy-making, and decisions involving the allocation of resources. In this type of decision, for example by a minister to penalise local authorities for "excessive expenditure"[65] the courts will only intervene if the decision-maker has acted "perversely", to the extent of his having "taken leave of his senses". Like U.S.-style rationality review, this test permits a very wide margin of discretion to the decision-maker.

In a second type of case the margin of discretion is less and the courts are less deferential towards the administration. These are decisions concerning fundamental human rights. In the case of Brind,[66] involving the challenge to the Home Secretary's ban on broadcasting the direct words of members of certain terrorist organisations, the majority of the House of Lords was prepared to impose "more anxious scrutiny" upon a provision interfering with a fundamental human right, and required evidence that the infringement is justified by a competing public interest (such as the need to prevent terrorism). This test is very similar to U.S.-style "strict scrutiny".

Fears that equality as an articulated principle will undermine our conventions of judicial review are therefore highly exaggerated. In respect of directly effective European law - covering virtually all economic activity, equality is a concept which our courts will have to treat expressly and which our textbooks on "English" administrative law will no longer be able to ignore. In respect of other law, equality is there to be found.[67]

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.

The scope of equality is too great to be contained within the intertices of the Rule of Law. Its aims are too important to be obscured under vague definitions of irrationality. These aims summon far more than nebulous conceptions of reasonableness; they are integral to our democratic system.

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ENDNOTES FOR "IS EQUALITY A CONSTITUTIONAL PRINCIPLE?"

1. Derbyshire County Council v Times Newspapers Ltd [1993] AC 534 H.L.

2. R v Secretary of State for the Home Department ex parte Khawaja [1984] AC 74; Bugdacay v Secretary of State for the Home Department [1987] AC 514.

3. Raymond v Honey [1983] AC 1. And see the recent case of R v Secretary of State for the Home Department, ex p. Leech (No.2) [1993] 3 WLR 1125 (C.A.).

4. A singular exception is the recent book by T.R.S.Allen, Law, Liberty and Justice (1993).

5. But see the excellent chapter on equality in the context of decisions about sentencing in A. Ashworth, Sentencing and Criminal Justice (1992), ch.7.

6. In 1885; referred to here in its 10th edn. (1959), edited by E.C.S. Wade (reprinted 1960).

7. Ibid. p.193

8. See e.g. Morton Horwitz' review of E.P. Thompsons's Whigs and Hunters: The Origin of the Black Act (1975). Although Horwitz agrees that the Rule of Law (claimed by Thompson to be an "unqualified human good") creates formal equality which Horwitz regards as a "a not inconsiderable virtue", he claims that "it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes.". (1977) 86 Yale LJ 561.

9. See R Dworkin, Law's Empire (1990). Compare J Raz, The Morality of Freedom (1986), ch.9. For a clear account of the debate about equality's role in relation to justice and judicial reasoning see S Guest, Ronald Dworkin (1992), chs.9&10.

10. Compare T.R.S.Allen, supra, note 4, who claims that both formal and substantive equality are inherent in the Rule of Law. For an extended discussion of different concepts of equality see P.G.Polyviou, The Equal Protection of the Laws (1980), ch.1. See also Bernard Williams, "The Idea of Equality", in Lazlett and Runciman eds. Philosophy, Politics and Society, (1962) p.125.

11. Maitland wrote that "Known general laws, however bad, interfere less with freedom than decisions based on no previously known rule" Collected Papers, vol.i [1911], p.81. Maitland equated arbitrary power with power that is

"uncertain" or "incalculable". Ibid., p.80. Hayek wrote that "it does not matter whether we all drive on the left or on the right-hand side of the road so long as we all do the same. The important thing is that the rule enables us to predict other people's behaviour correctly, an this requires that it should apply in all cases - even if in a particular instance we feel it to be unjust" F.Hayek, The Road to Serfdom (1943), p. 60.

12. See Sir W.Ivor Jennings, The Law and the Constitution (1933). William Robson's celebrated criticism of Dicey in 1928 did not take issue with the Rule of Law as such. However, Robson listed a number of "judicial virtues", among which are the need for consistency, for certainty and for equality. W.A.Robson, Justice and Administrative Law (1928), ch.5.

13. J. Rawls, Political Liberalism (1993), p.6. In other words, if the least advantaged members of society can be made better off in absolute terms only by the existence of greater relative inequality between themselves and the more advantaged members of society then this form of inequality is permissible. Rawls' view concentrates on equality of "primary goods". By contrast, other theories of economic equality focus on equality of "welfare" or equality of "capabilities". Under these theories for example a disabled person is entitled to more resources in order to conpensate for his disablity. See e.g. Amartya Sen, Inequality Reexamined (1992), who defines equality as the equal "freedom to achieve" or "capability to function".

14. R.Nozick, Anarchy, State and Utopia (1974)

15. P. Bauer, Equality, The Third World and Economic Delusion (1981).

16. John Hart Ely, Democracy and Distrust (1980), p.58. There has been an extensive debate in the USA in the context of the equal protection clause as to whether or not equality in itself is an "empty idea". The proposal was mooted in P. Westen, "The Empty Idea of Equality", 95 Harv.L.Rev (1982). For some of the replies see Greenawalt, 83 Coum.L.Rev. 1167 (1983); Chemensky, 81 Mich L.Rev. 600 (1983); D'Amato, 81 Mich.L.Rev.600 (1983).

17. Constitution of the Republic of South Africa 1994, Chapter 3, Article 26.

18. Id. Article 27. The South African Constitution also has a general "equality clause" which also permits affirmative action. Id. Article 8. Some constitutions e.g. India, Brazil, Namibia, do contain social and economic rights, but these are expressed as "directive principles of state policy" and expressly excluded from judicial enforcement. See e.g. The Constitution of India, Part IV.

19. See Ronald Dworkin, "Equality, Democracy and the Constitution", (1990) Alberta L. Rev.324.

20. Article 7

21. Article 119

22. Article 40(3)

23. Joined Cases 103, 145/77 Royal Scholten-honig v IBAP [1978] ECR 2037 at 2072. See also Joined Cases 117/76 and 16/77 Ruckdeschel [1977] ECR 1753.

24. Ruckdeschel, supra, at 1769.

25. E.G. Case 1/72 Frilli v belgium [1972] ECR 457.

26. Johnston v Chief Constable of the RUC, Case 222/84 [1986] ECR 1651; [1986] 3 CMLR 240. See generally, D. Whyatt and A.Dashwood European Community Law, (1993) p. 95-98.

27. Nold v Commission Case 4/73 [1974] ECR 491 at 507. Now see Article F(2) of the Treaty on European Union 1993 (the Maastricht Treaty): "The Union shall respect fundamental rights, as guaranteed by the European Convention . . . as general principles of Commuity law". However, this provision is not justiciable by the European Court. See Article L of the Treaty on European Union. And see S.Weatherill and P.Beaumont E C Law p.220 -23.

28. Danning v The Netherlands (Communication no. 196/1984); and Sprenger v the Netherlands (Communication no.395/1990).

29. Rothfield v N.B.Railway, 1920 S.C. 805; Pidgeon v Legge (1857) 21 J.P. 743. The services of some utilities are also required to be offered without discrimination. See e.g. South of Scotland Electricity Board v British Oxygen Ltd [1959] 1 WLR 587 (H.L).

30. See generally, A.Lester and G.Bindman, Race and the Law (1972); The governing statutes are now the Race Relations Act 1976 and the Sex Discrimination Act 1975. See also the Equal Pay Act, 1970.

31. Membership of associations and the exercise by local authorities of their planning functions.

32. de Smith, Judicial Review of Administrative Action (1979), p. 335

33. [1966] 2 Q.B. 633.

34. [1971] Ch.354

35. Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation [1948] 1 KB 223.

36. Council of civil service unions v Minister for the Civil Service [1985] AC 374.

37. Irrationality was defined by Lord Diplock, supra, as applying to "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

38. See Pulhofer v Hillingdon L.B.C.[1986] AC 484, 518; R v Secretary of State for the Environment ex.p.Notts C.C. [1986] AC 240,247-48.

39. Piggott Brothers and Co. Ltd. v Jackson, Times L.R. May 20 1991. See also May L.J. in Neale v Hereford and Worcester C.C. [1986] 1 C.R. 471,483.

40. [1889] 2 QB 291

41. [1925] AC 578

42. As pointed out by Ormrod L.J. in Pickwell v Camden L.B.C. [1993] QB 962 at 999-1000.

43. [1955] Ch. 210.

44. Per Jenkins L.J. at 235-36.

45. Bromley L.B.C. v G.L.C. [1983] 1 AC 768. In Board of Education v Rice [1911] AC 179, oft cited in connection with natural justice, the decision of the Board was quashed by the House of Lords on the ground that the Board had failed properly to determine whether teachers in church schools should be paid the same rate as teachers in the authority's own schools.

46. R v Port Talbot B.C.ex parte Jones [1988] 2 All ER 207.

47. The Times, 4 April 1986

48. See generally Malcom Grant Urban Planning Law (19820 p.349-51. See also Alnatt v Kingston on Thames B.C. [1991] JPL 744. Discrimination in the allocation of school places to children living outside a school's catchment area has been held to be unlawful. See R v Greenwich L.B.C. ex p. Governors of the John Ball Primary School [1989] 88 LGR 589; R v Devon County Council ex p. G. [1988] 3 WLR 49.

49. [1985] AC 661.

50. By showing the linkages between those industries and other economic activities. There is some doubt as to whether provisions in structure plans requiring preference to the Welsh language can be reqarded as material planning considerations. See Huw Thomas, Planning 22 October 1993 p.20.

51. [1986] Imm. AR 385.

52. See generally D.J.Galligan Discretionary Powers (1986).

53. For example, Article 119 of the EEC Treaty and the Equal Pay and Equal Treatment Directives. See e.g. Bilka v Weber von Harz [1986] ECR 1607; Commission v Belgium [1991] ECR 1-2205.

54. 401 U.S. 424 (1971).

55. Wards Cove Packing Co. v Antonio 490 U.S. 642.

56. Title VII, Civil Rights Act 1991.

57. See e.g. Washington v Davis 426 U.S. 229 (1976).

58. Such as measures for the special protection of women, in pregnancy and childbirth. See e.g. Minstere Public v A. Stoeckel, Case 345/89 (25 July 1991) - (equal Treatment Directive obliges Member States not to prohibit night work from being done by women).

59. See generally, McKean, Equality and Discrimination under International Law (1983); Brownlie, Principles of Public International Law, (1990), p. 598-601. See the Human Rights Committee's General Comment on "Non-Discrimination", No.18, UN doc HRI/GEN/1, 4 September, 1992, which requires specific action by states to correct conditions which prevent or impair a certain part of the population from their enjoyment of human rights. See also General Comment no.4 and Stalla Costa v Uruguay Communication no 198/1985, paragraph 10.

60. See Tussman and Ten Broek, "The Equal Protection of the Laws", 37 Calif. L.Rev. 341 (1944).

61. Massachusetts Board of Retirement v Murgia (1976) 427 U.S.307, 96 S.Ct. 2562.

62. City of New Orleans v Dukes 427 U.S.297,96 S. Ct.2513. (cf. Great Portland Estates note 49, supra).

63. 466 U.S. 429,104, S.Ct.1879.

64. Michal M. v Superior court of Sonoma County, 450 U.S. 464,101 S.Ct.1200.

65. R v Secretary of State for the Environment ex p. Hammersmith and Fulham L.B.C. [1991] 1 AC 521.

66. R v Secretary of State for the Home Department ex p. Brind [1991] 1 AC 696.

67. A striking exaple of judicial attention to equality was provided in the recent Australian case of Leeth v

Commonwealth 107 ALR 672. A challenge was made in that case to legislation which had the effect of creating different periods of non-parole detention for sentences for the same offence in different States and Territories. Although the Australian Constitution does not possess an express equal protection clause, Deane, Toohey, Gaudron and (perhaps) Brennan JJ. all acknowledged the force of equality as a common law doctrine or concept.