Chevrette-Marx lecture[1]

by the Rt. Hon. Sir Rabinder Singh

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What is a "democratic society"?

Introduction

1. Mesdames et messieurs. Bonsoir et merci beaucoup. C'est un grand plaisir à donner cette conférence en honneur de François Chevrette et Herbert Marx. Ils étaient tous les deux savants distingués. Malheureusement je ne parle pas bien français, et donc je vais donner ma conférence en anglais.

2. Section 1 of the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in "a free and democratic society". The European Convention on Human Rights ("ECHR"), many of whose rights have been given effect in domestic law in the United Kingdom ("UK") by the Human Rights Act 1998 ("HRA"), does not have a similar general limitation provision like section 1 of the Canadian Charter. However, most of the rights set out in the ECHR can in principle be limited. The only one which is truly absolute is the prohibition on torture and inhuman or degrading treatment in Article 3.

3. A good example of a limited right in the ECHR can be seen in Article 10, which guarantees the right to freedom of expression, and provides that limitations can be placed on that right where this is prescribed by law (again echoing – or perhaps anticipating – the language of section 1 of the Charter) and is "necessary in a democratic society" to achieve one or more of the express aims set out in it, for example the protection of the rights of others. Both the Canadian Charter and the ECHR make reference therefore to the concept of "a democratic society". The question which I want to try to address in my lecture is: what is a democratic society for this purpose?

4. There is a textual difference which exists on the face of section 1 of the Canadian Charter (which refers to "*a free* and democratic society") and the ECHR (which refers only to a "democratic society"). I will suggest in this lecture that in fact that textual difference in language between the two documents does not make a material difference. The jurisprudence of the European Court of Human Rights has made it clear that it too envisages a democratic society which is also a free society.

5. In *R v Oakes* [1986] 1 SCR 103, at 138-9, Dickson CJ famously set out the requirements which must be satisfied before a restriction on a fundamental right in the Charter will be regarded as being reasonable and demonstrably justified. First, the objective of the measure must be sufficiently important to

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warrant overriding a constitutionally protected right or freedom. Secondly, the measure must satisfy the test of proportionality, which in turn requires an answer to three questions: (i) there must be a rational connection between the measure and its objective; (ii) the means used should impair the right as little as possible; and (iii) there must be a proportionality between the effects of the measure on the right in question and the objective which has been identified as of sufficient importance.

6. The principle of proportionality is also very familiar to us in Europe as it is at the heart of the jurisprudence of the European Court of Human Rights. The questions set out in *Oakes* are very similar to the ones that courts in the UK have formulated for use under the HRA. Indeed the decision in *Oakes* was very influential in helping us to settle what the relevant questions are for deciding whether a restriction on a fundamental right satisfies the principle of proportionality: see, in particular, the decision of the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167.

7. In *Oakes,* at 136, Dickson CJ also emphasised the importance of that phrase in section 1 of the Charter: "a free and democratic society." He said:

> "The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."

8. Similarly, in its seminal jurisprudence of the 1970s, the European Court of Human Rights made it clear that its vision of a democratic society is not simply one in which the majority will must prevail. Rather it is one which is characterised by "pluralism, tolerance and broad-mindedness". In *Handyside v UK* (1976) 1 EHRR 737, the Court said at para. 49:

> "Freedom of expression constitutes one of the essential foundations of such a society [i.e. a democratic society], one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no 'democratic society'."

9. In 2012, in giving judgment in a freedom of expression case brought by the BBC in the High Court of England and Wales, I suggested that the words "in a democratic society" in the ECHR are not superfluous:

> "… the framers of the Convention, arising as it did out of the ashes of European conflict in the 1930s and 1940s, recognised that not everything

that the state asserts to be necessary will be acceptable in a democratic society."[2]

10. Let me explain what I will endeavour to do in this lecture. I am not a historian, philosopher or political scientist. I am a lawyer by background and now a judge. The concept of a democratic society is one which is no doubt of interest to historians, philosophers and political scientists. But they will have a potentially different understanding depending on their discipline.

11. For example, the historian may be interested in the difference between a modern representative democracy and direct democracy, such as that in classical Athens in the age of Pericles, with all its limitations, which are well known: the right to participate in the affairs of the *polis* (city-state) was limited to adult male citizens and so it excluded women, slaves and others. It was a very different kind of democracy from what we know of in the modern era because the citizens of Athens all met in the *ekklesia* (assembly) to take the most important decisions facing the state. We have become used to the idea of a representative democracy rather than direct participation in the affairs of the state.[3]

12. The philosopher will be interested in what the underlying justification for a democracy is, for example whether it is based on the principle of the consent of the governed.

13. The political scientist may question whether it is strictly accurate to conceive of a democratic society as including other elements such as liberty and equality. In a very interesting and provocative book published earlier this year, The People vs. Democracy,[4] a scholar at Harvard University (Yascha Mounk) has suggested that we should no longer necessarily speak of a "liberal democratic society" because it is possible for there to be a society which is democratic and yet illiberal. Although he does not approve of the idea, he suggests that it is possible to conceive of a "democracy without rights" (Ch. 1).

14. It may be that the world is now seeing something very different from what it has seen in the past. For example, in the 1920s and 1930s there was a clear and obvious distinction between what were called democracies and what were called dictatorships. Some 20th century dictators came to power in part by using the ballot box but then got rid of the institutions of democracy. Today it is not impossible for a leader to win an election and continue to subject himself to further elections. They do not necessarily want to abolish the basic institutions of democracy in the sense of having elections but they may be hostile to the concept of fundamental human rights, particularly if those rights are conferred on unpopular minorities.

15. The intellectual historian, Professor Sir Larry Siedentop, has suggested in his stimulating book Inventing the Individual: the origins of Western liberalism[5] that the origins of our modern conception of democracy lie in the Christian belief in the "equality of all souls". He suggests that in western philosophy it was not until Christianity came on the scene that it was considered that all

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[2] *R (British Broadcasting Corporation) v Secretary of State for Justice* [2012] EWHC 13 (Admin); [2013] 1 WLR 964, at para. 49 (Singh J, giving the judgment of the Divisional Court, which also included Hooper LJ).

[3] See Paul Cartledge, Democracy: A Life (2016, OUP).

[4] (2018, Harvard University Press).

[5] (2015, Penguin).

human beings were inherently equal. Before that time, and in particular in classical thinking in ancient Greece and Rome, society was founded on the inherent inequality of human beings, based on social status.

16. All of these are valid and interesting viewpoints but the theme of my lecture will be to ask the question what is a democratic society from a legal viewpoint. Both the Canadian Charter and the ECHR are legal instruments. It is therefore appropriate to ask what they mean by a "democratic society" understood as a legal concept.

17. I will start with something which may be regarded as lying close to the heart of a democracy: that is the right to vote. Universal adult suffrage was the result of long and sometimes bitter struggle. In the UK this year we have celebrated the centenary of the extension of the franchise to women although not all women were given the vote until 1928. In Canada I understand that women were able to vote in federal elections from 1918 although they had been able to vote in the province of Manitoba from 1916.

The right to vote

18. The right of every Canadian citizen to vote is now guaranteed by section 3 of the Charter and was described by McLachlin CJ in *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, at 532, para. 1, as a right which "lies at the heart of Canadian democracy."

19. Curiously the ECHR does not contain an express right to vote which is conferred on individuals as such. However, that individual right has been held to be implicit in Article 3 of the First Protocol, which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

20. Because the right to vote lies at the heart of democracy, it might be thought that particularly close scrutiny should be required of any law which denies the right to vote to a certain class of people. In both Canada and the UK there was at one time legislation which denied the right to vote to all serving prisoners. In Canada that was held to be unconstitutional by the Supreme Court in *Sauvé (No 1)* [1993] 2 SCR 438. The legislation was then amended, to disenfranchise only prisoners serving a sentence of two years or longer. The amended legislation, set out in section 51(e) of the Canada Elections Act 1985, as amended, was in turn held to be unconstitutional in *Sauvé (No 2)*.

21. In the meantime, in some of the first cases that were brought under the Human Rights Act in 2000, the English courts had held, in a group of cases which included *Hirst*, that the UK legislation, contained in section 3 of the Representation of the People Act 1983, was compatible with the rights in the HRA. In part this was because the English courts followed what at that time was the decision of the Federal Court of Appeal in *Sauvé (No 2)*,[6] which was later reversed by a narrow majority of 5 to 4 in the Supreme Court of Canada.

22. The case of *Hirst v UK* then proceeded to the European Court of Human Rights in Strasbourg. In *Hirst (No 2)* (2006) 42 EHRR 41 the European

[6] [2000] 2 FC 117.

Court held (by a majority of 12 to 5, the minority including the then President of the Court, Judge Wildhaber) that UK legislation was incompatible with Article 3 of the First Protocol. This was essentially because the legislation contained a complete ban which applied to all serving prisoners irrespective of the length of sentence or any other characteristic of the individual prisoner. This was therefore held to be disproportionate. At para. 80 of its judgment, the Court noted that the decision in *Sauvé (No 2)* of the Federal Court of Appeal had later been overturned by the Canadian Supreme Court. At para. 82, the Court stated that, although the margin of appreciation afforded to Contracting States in this field is wide, it is not all-embracing:

> "Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be …"

23. The decision in *Hirst* has proved extremely controversial, particularly in British society and in Parliament. Uniquely in my experience (and I should say that I acted as counsel for the Government of the UK in *Hirst*), the judgment of the Court was not implemented quickly. In fact it has taken over a decade for the practice in the UK to be amended. A number of later court cases have been brought both in the domestic courts of the UK and in Strasbourg.

24. Finally, in December 2017, the UK Government published proposals which the Council of Europe has said that, if implemented, would be sufficient to signify compliance with the judgment in *Hirst* in 2005. Even now, the proposed changes are administrative only and not legislative. They were announced by the Secretary of State for Justice to the House of Commons on 2 November 2017 (HC Debates, Vol 630, Column 1007). He said that, first, the Government would work with the judiciary to make it clear to criminals when they are sentenced that while they are in prison they will lose the right to vote. That directly addresses a specific concern of the judgment in *Hirst* that there was not sufficient clarity in confirming to offenders that they could not vote whilst in prison. Secondly, the Government would amend guidance to address an anomaly, where offenders who are released back in the community on licence using an electronic tag under the Home Detention Curfew Scheme can vote but those in the community on temporary licence cannot vote. Release on temporary licence would not be granted in order to enable a prisoner to vote.

25. In its meeting of 5-7 December 2017 the Committee of Ministers of the Council of Europe, which is the body charged with the function of supervising the compliance by Contracting States with judgments of the European Court of Human Rights, concluded that, overall, these measures "are an effective package to ensure compliance with the *Hirst* group of judgments". The Government of the UK intend to implement the proposed changes by the end of 2018 and have agreed to report back to the Committee of Ministers this month, September 2018.

<u>The right to freedom of expression</u>

26. My next suggestion will be that, apart from the right to vote, there are other rights which are essential to the healthy functioning of a democratic society. The most important of these is the right to freedom of expression. As Lord

Steyn put it in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 125:

> "In a democracy it is the primary right: without it an effective rule of law is not possible."

27. He went on, at 126, to describe freedom of speech as:

> "the lifeblood of democracy. The free flow of information and ideas informs political debate. … It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country …"

28. However, as Lord Steyn went on to say in *Simms* itself, at 127:

> "Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech."

29. *Simms* was decided just before the HRA came into force in the UK. Now the right to freedom of expression is guaranteed by Article 10 of the ECHR through the HRA.

30. In Canada the right to freedom of expression is guaranteed by section 2(b) of the Charter. However, it is also to be noted that there is an equality provision in section 15(1) of the Charter, which provides that:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national and ethnic origin, colour, religion, sex, age or mental or physical disability."

Furthermore, section 27 of the Charter provides that it:

> "… shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

31. In the UK we do not have any statutory provision like Article 27 of the Charter. We do have an equality provision, in Article 14 of the ECHR. Although Article 14 is not a freestanding provision, like section 15 of the Canadian Charter, it does guarantee equal treatment in the enjoyment of other Convention rights. The Twelfth Protocol to the ECHR does contain a freestanding right to equal treatment but it has not been ratified by the UK.

32. In both Canada and the UK there are criminal laws prohibiting the propagation of hate speech, particularly speech which is directed at certain groups in society defined by reference to race or religion. In the UK at least, such laws had their origins in concern about public disorder, for example the Public Order Act 1936, enacted at a time when the British Union of Fascists was active; that Act later being amended to include incitement to racial hatred by the Race Relations Act 1976. More recently, in 2006, Parliament has prohibited speech which is likely to incite religious hatred.

33. In Canada the compatibility of legislation prohibiting hate speech (section 319 of the Criminal Code) was considered by the Supreme Court in *R v Keegstra* [1990] 3 SCR 697. The law was upheld by a majority of 4 to 3. The majority judgment was given by Dickson CJ. The Supreme Court considered that in principle section 319(2) of the Canadian Criminal Code did constitute an infringement of the Charter guarantee of freedom of expression. Accordingly the crucial question was whether that infringement could be justified under section 1 of the Charter as a reasonable limit in a free and democratic society. At 736, Dickson CJ said:

> "… A practical application of section 1 requires more than an incantation of the words 'free and democratic society'. These words require some definition, an elucidation as to the values that they invoke. To a large extent, a free and democratic society embraces the very values and principles which Canadians have sought to protect and further by entrenching specific rights and freedoms in the Constitution, although the balancing exercise in section 1 is not restricted to values expressly set out in the Charter …"

34. Dickson CJ identified two sorts of injury which are caused by hate propaganda. This went beyond mere offensiveness. As I have mentioned, the European Court of Human Rights has frequently said that the right to freedom of expression includes the right not only to express ideas which are found to be acceptable by others in society but also to say things which may cause offence. However, as Dickson CJ said in *Keegstra*, hate propaganda goes beyond mere giving of offence and causes real harm. First, there is harm done to members of the target group:

> "It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. In the context of sexual harassment … this Court has found that words can in themselves constitute harassment … In a similar manner, words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group, and in this regard the Cohen Committee noted that these persons are humiliated and degraded … In my opinion, a response of humiliation and degradation from an individual targeted by hate propaganda is to be expected. A person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs … The division, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. … Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society."

35. Dickson CJ said that a second harmful effect of hate propaganda is its influence upon society at large. After referring to the experience of the 20th century, which had shaken faith in earlier Enlightenment views about the rationality of humankind, he said:

> "It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the

> process create serious discord between various cultural groups in society."

He went on to say, at 748:

> "The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society."

36. Dickson CJ also noted that international human rights instruments support Canadian (and I would suggest British) policy in this context. Article 4 of the UN Convention on the Elimination of all forms of Racial Discrimination of 1966 (CERD) is of special interest, providing that:

> "States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, …
>
> (a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin …"

37. Dickson CJ also noted that the 1966 International Covenant on Civil and Political Rights, which guarantees the right to freedom of expression in Article 19, goes on, in Article 20(2), to state that:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

38. At 763-5 Dickson CJ turned to the heart of the dispute in *Keegstra* itself. He noted the particular link with the "political" rationale for protection of freedom of expression in a democracy. He said:

> "Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity."

39. Dickson CJ recognised that suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process but he considered the degree of that limitation "not substantial." He went on to say that hate propaganda can work to undermine our commitment to democracy when employed to propagate ideas "anathemic" to democratic values:

> "Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee."

40. In a very important passage, in my view, Dickson CJ went on to state:

> "I am very reluctant to attach anything but the highest importance to expression relevant to political matters. But given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need to be treated with equal respect and dignity so as to make participation in the political process meaningful, I am unable to see the protection of such expression as integral to the democratic ideal so central to the section 2(b) rationale."

41. In the context of the ECHR it is worth noting that Article 17 of the Convention itself contains a provision designed to prevent abuse of the rights set out in it:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

42. The position in both Canada and the UK can be contrasted with the starkly different approach which has been taken by the Supreme Court of the United States, for example in *RAV v City of St. Paul, Minnesota* 505 US 377 (1992). This is no doubt because of the very strict nature of the First Amendment guarantee of free speech in the US.

43. I would suggest, as Dickson CJ did in *Keegstra*, that the underlying value which is protected by laws against hate speech is the right to equality. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 (often known in the UK as the "Belmarsh case"), at para. 46, Lord Bingham quoted Professor (later Sir) Hersch Lauterpacht, An International Bill of the Rights of Man (1945), at p.115:

> "The claim to equality before the law is in a substantial sense the most fundamental of the rights of man."

Lord Bingham then went on to observe that, in the Privy Council, in *Matadeen v Pointu* [1999] 1 AC 98, at 109, Lord Hoffmann had said, with reference to the principle of equality:

> "... Such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution."

44. In *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, at para. 132, Baroness Hale said:

> "Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each

> individual has equal value. … it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not."

45. In that important passage I would suggest lies the key to an understanding of the legal concept of a democratic society. The reason why we value democracy is precisely because it is founded on the inherent equality of every participant in it. This is why everyone in a democracy has the right to vote but no one has more than one vote. That was not always the case in the UK. At one time, until as recently as the end of the Second World War, people who were graduates of one of the so-called ancient universities could vote more than once, both in the constituency where they lived and secondly for a Member of Parliament who represented their former university. In theory at least it is not impossible to conceive of a society in which people might be given more votes depending on their wealth or social status. It might be said that someone who pays more in taxation should have more votes than a person who pays little into state's coffers. Such ideas seem fanciful and indeed wrong to us now. This is because, I would suggest, at its root democracy is properly considered to be a system in which everyone counts but no one counts more than anyone else. This is the fundamental idea of equality.

46. When therefore one member of society abuses their right to freedom of expression to deny the right of another member of society to participate on an equal basis in a democracy, as in the case of hate speech, this could be regarded as striking at the very heart of what a democracy is.

<u>The rights of minorities – and the rights of a minority within a minority</u>

47. In the Belmarsh case, at para. 237, Baroness Hale (who is now the President of the Supreme Court of the UK) quoted Thomas Jefferson in his inaugural address on becoming President of the United States in 1801:

> "Though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable … The minority possess their equal rights, which equal law must protect, and to violate would be oppression."

She added, in her own words:

> "Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities."

48. In the last year I have sat in two cases as a judge in which this issue of the protection of the rights of minorities has arisen in a stark way. The first case was in the Divisional Court, which is part of the High Court of England and Wales, in which I sat with Whipple J: *R (Adath Yisroel Burial Society) v HM Coroner for Inner North London* [2018] EWHC 969 (Admin). That case concerned a policy which was adopted by a coroner not to take into account the religious views (for example of Jewish or Muslim people) that their cases should be dealt with urgently because they felt there was a need to bury a loved one quickly and, if possible, on the day of death. The policy was described as a "cab rank" principle, in other words that every case would be dealt with in the order in which it was notified to the coroner's office. We held

that the policy was unlawful on a number of grounds, including a breach of the right to freedom of religion in Article 9 of the ECHR and the right to equal treatment in Article 14. That did not mean that members of a religious minority such as Jewish or Muslim people always had to be given priority, because there may be other legitimate demands on a coroner's time and resources; but it did mean that there could not be a policy that their needs would never be taken into account. The principle of proportionality had to be complied with.

49. At para. 115 we quoted Lord Steyn from a paper he gave in 2001:

> "It is a fundamental tenet of democracy that both law and Government accord every individual equal concern and respect for their welfare and dignity."

50. That phrase, "equal concern and respect" echoes the central thesis in the writings of the late Professor Ronald Dworkin.

51. In our judgment we added that:

> "The kind of society which is envisaged by the Convention and the HRA is one which is based on respect for everyone's fundamental rights, on an equal basis. … It regards democracy as being a community of equals."

52. In our judgment we observed that it would be a mistake to think that having a "cab rank" policy will always lead to everyone being treated equally. At para. 111, we said:

> "… What on its face looks like a general policy which applies to everyone equally may in fact have an unequal impact on a minority. In other words, to treat everyone in the same way is not necessarily to treat them equally. Uniformity is not the same thing as equality."

53. The second case that I would like to mention in this context is *In re A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)* [2017] EWCA Civ 2164; [2018] 4 WLR 60, which was decided by the Court of Appeal of England and Wales last December. I was a member of the Court, which included Arden LJ and was presided over by Sir James Munby, the then President of the Family Division, who gave the judgment of the Court. That case concerned the right of a male to female transgender person to have direct contact with her children in circumstances when the family's community (which was an ultra-Orthodox Jewish community) said that it would ostracise the entire family if there was such contact. Such ostracism would have had a detrimental effect on the welfare of the children. But the consequence of the alternative course of action was that the children would no longer have direct contact with their natural father. We allowed the appeal and remitted the case to the High Court for further consideration to be given to whether it was possible to promote contact, judging the children's welfare by the contemporary standards of society.

54. At para. 60, the Court said:

> "… the function of the judge in a case like this is to act as the 'judicial reasonable parent,' judging the child's welfare by the standards of reasonable men and women today … having regard to the ever changing nature of our world including … *changes in social attitudes*, and always

> remembering that the reasonable man or woman is receptive to change, broad-minded, tolerant, easy-going and slow to condemn. … We live in a democratic society subject to the rule of law. We live in a society whose law requires people to be treated equally and where their human rights are respected. We live in a plural society, in which the family takes many forms, some of which would have been thought inconceivable well within living memory." (Italics in original)

55. We were acutely conscious that the case concerned not only the rights of the children or the rights of a transgender person but also the rights of a religious minority to live their lives in accordance with their sincerely held beliefs. However, at para. 95, we recalled that it is well-established on authority "that discrimination which is motivated by a religious belief (however sincerely held and even if the discrimination is mandated by that religious belief) does not make discrimination under the Equality Act [2010] lawful."

56. Both of the recent cases I have mentioned raise in an acute way sensitive issues about the balance which needs to be struck in a democratic society between the rights of individuals and minority groups on the one hand and the rights of the majority on the other. There may indeed also be a tension between the rights of an individual *within* a religious minority group, such as a transgender person, and the rights of others in that group. The courts in both Canada and the UK have no choice but to grapple with such sensitive issues when they are brought before them by litigants.

57. This leads me on to my final point, the relationship between the elected institutions in a democracy and the courts. This was addressed by Lord Bingham in the *Belmarsh* case, at para. 42, as follows:

> "… I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true … that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. … The [HRA] gives the courts a very specific, wholly democratic, mandate."

<u>Conclusion</u>

58. By way of conclusion let me try to draw together the threads of my theme in this lecture.

59. I would suggest that the sort of democratic society which is envisaged by a human rights charter is not one which can be based simply on the notion of majority rule but rather is one which is based on the three fundamentals of liberty, equality and fraternity, the last of those perhaps now better expressed as community. We no longer conceive of fundamental rights as belonging to atomised individuals living in a state of nature. Rather they exist within the framework of an organised community. Indeed they often depend on the

community for their protection and full enjoyment. This is one reason why there can be limitations placed on a fundamental right, provided the limitation is objectively justified and satisfies the principle of proportionality.

60. But I would suggest that a democratic society is a community of equals. The concept of democracy itself is founded on the basic value of human equality.

61. Finally, a democratic society is one in which there are independent courts entrusted with the task of the protection of fundamental rights, including the rights of individuals and minority groups even if they are unpopular with the majority. In the words of the oath of office which every judge in England and Wales has to take, the courts will protect those rights "without fear or favour, affection or ill-will."

62. What all of this indicates is that a democratic society is not only one in which the people elect their government. It is also a community in which everyone enjoys fundamental human rights on an equal basis and in which those rights are enforceable in independent courts.