THE IDEA OF EQUALITY

by

Guy Haarscher

Abstraction is necessary to philosophy: philosophers have to analyse notions, to clarify what is ordinarily confused. But abstraction is only one part of the philosophical process: without "synthesis", that is, without placing the "separate" notions in the context which give them meaning, no problem, especially in the social sciences, can be solved.

The idea of equality must be treated in such a way, in order to avoid inextricable difficulties. I shall try to show that no *pure* egalitarianism (or anti-egalitarianism) is possible: whenever a discussion takes place concerning equality, other notions, values and descriptive statements are to be taken into account. In other words, equality itself does not give us the key of what is called the "egalitarian" problematic.

First of all, we have to distinguish between the problem of equality as it arises in the *Rechtsstaat*[1] context, and the same problem in the context of situations which do not belong to the "rule of law"[2] field. This distinction is essential, particularly because some of the greatest philosophers who have taken into account the question of equality have *not* related it to the *Etat de droit*[3] (for instance Plato, Marx, Nietzsche[4]); these conceptions have exerted a strong influence on many western intellectuals, while, on the other hand, equality was analysed and was subject to systematic discussions by lawyers, sociologists and political scientists *in* the realm of the *Rechtsstaat*. No connection was established for a long time between radical anti-egalitarianism (Plato, Nietzsche) or radical egalitarianism (Marxism, anarchism, etc.), and the debate on equality of opportunities, redistribution of wealth, etc.

Why could such a connection not be established? Because, first of all, the egalitarian philosophers considered that these discussions within the context of, say, Western democracies, did not take into account some more fundamental inequalities: it seemed meaningless to discuss the redistribution of rewards, status and powers (see Max Weber[5]) in a state of affairs which appeared globally as a privileged situation, compared to the oppression of those who, as Marcuse said, were condemned to the "great refusal"[6]. On the other hand, the vagueness, the low intellectual level of radical egalitarianism, the totalitarian aspects of the means it used confirmed the lawyers in their position: nothing interesting and progressive could come out of such fanatic delirium.

The danger of such a situation is that it does not allow us to transcend the opposition, that is to be aware of the fact that both positions have very strong points of departure, even if the answers they give to relevant questions are unsatisfactory, perhaps essentially because of this lack of communication. I mean that the radical egalitarians are quite right when they emphasise that the subtleties of discussions concerning equality in the *Rechtsstaat* are a kind of false conflict, a sort of bogus struggle between *privilégiés*; they have no difficulty in showing that the most blatant inequalities often result from the global position of the Third World or people who, living in Western democracies, take no part in the rights and rewards these regimes grant to their populations. They can easily show that many oppressions which leave people in a state in which no fundamental right is secured, are fostered by the indifference or the *Realpolitik* or the economic interests of Western democracies. Consequently, the radical intellectuals despise a kind of *partage du gâteau* which does not take into consideration those who have nothing to partake, because, from a juridical or economical point of view, they are, still today, in a position close to what Marx called the "proletariat" (saying that, for this class, the problem of great values, among them equality, was a kind of unattainable transcendence)[7].

On the other hand, realists have no difficulty in demonstrating that this radical egalitarianism, related to totalitarian ways of thinking, endangers the already fragile Western democracies, and that its results may lead - and actually led, in the so-called "socialist countries" - to still more unbearable inequalities. But the weakness of the adversary is not an argument in itself: a caricature (here often close to the reality of attitudes) often allows us not to take into account the real problems hidden behind the "fanatical" answers. In other words, the contradictions of the radical egalitarian position do not allow us to limit our scope of investigation to the best possible repartition within the (relatively privileged) *Etats de droit*. If we want to challenge the equality problem, we have again to raise the question of the most blatant inequalities, but, in order to avoid totalitarianism (which means, of course, the disappearance of any sort of equality), we have to be infinitely more aware of the fact that, without a minimum rule of law, no equality will take place. I would like, in the following pages, to give some indications about this necessary connection between two problematics which, *prima facie*, are quite foreign to each other.

1. Equality "outside" the *Rechtsstaat*

I began this paper by saying that equality had to be understood in a general context if we wanted to cope with the problems it generates. The "revolutionary" attitude about equality is a good example of such a necessity. Much has been said concerning the totalitarian egalitarianism, that is, egalitarian theories which seem inevitably to lead to monstrous inequalities and oppressions. About Marxism, the relationship between Marx's thoughts and Stalinism or post-Stalinism has been discussed *ad infinitum*, the extreme attitudes being: either Stalinism is in Marx, that is Stalinism is Stalinism because it strictly follows Marx's philosophical "directives"; or Stalinism is "outside" the "original" Marx. Of course, these attitudes are kinds of "ideal types", and, being caricatures, cannot represent the real problematic of Marxism. In particular, they do not take into account the presuppositions of history of

ideas, especially the fact that no philosophical theory is sufficiently autonomous to be considered as the cause of a social phenomenon. Stalinism and post-Stalinism are much more complicated than a result of either application of, or deviation from, a philosophical "system" (provided something like that has ever existed). But one element has to be stressed in the context of our problem: it is the philosophy of power (in modern times: history) which gives the legitimation of attitudes which, although deemed to lead to equality, create and foster extreme inequalities. I think that this kind of paradox can strictly be related to a particular form of legitimation of power: we have first to criticise it in order to understand what, philosophically speaking, this strange "inegalitarian egalitarianism" means. In other words, I think that there is a coherence in the philosophy of history which constitutes the basis of Marxism, and that this coherence elicits a lot of responses, even from people who have not read Marx or apparently reject Marxism.

One illustration of this kind of philosophy of history is the Sartre-Camus debate in the fifties[8]. Camus wanted to condemn the Soviet concentration camps in particular, and totalitarianism in general, no matter which ideology is used to cover it. Sartre and Francis Jeanson treated him as a *belle âme*,[9] which means that he was able, in their opinion, to condemn every form of despotism because of his disengagement: Camus, as has been said about Kant, did not soil his hands because he was without arms. On the contrary, Sartre wanted to choose his camp, and even if this implied some very embarrassing silences - as far as an intellectual is concerned - about oppressions "with a human face", he did not want to "*désespérer Billancourt*"[10]. This means that Sartre took, as he said, the point of view of the most disadvantaged; of course, one could - and Aron, Rousset, etc. had - reply that, in his desire to take into account the struggle of the French proletariat, he did not say anything about other oppressions, which were maybe worse. This kind of position seems so silly that one has to go a little farther in order to understand why brilliant intellectuals could have been seduced by such arguments.

I think - and this point is, in my opinion, fundamental for the equality question - that the *dialectical* conception of history gives us the key to such an attitude[11]. Strictly speaking, one can say that dialectics, in the Hegelian sense, is radically opposed to the *human rights* conception, which plays such an important role today (see Amnesty International) in the struggle against blatant inequalities all over the world, sometimes even in the democracies. There is no possible compromise between these two conceptions, because they are absolutely antagonistic, from a philosophical point of view[12]. The first considers every event as dependent for its meaning on the whole of history: this means that one cannot immediately judge a fact which would contradict a universal norm, but must first insert the event in the whole context of world history in order to see whether or not it contributes to the "cunning" progression of reason, that is - in Marx - the radical equality of the society in which the principle of repartition of goods is: "to everybody according to his needs"[13]. So you cannot, strictly speaking, refer to human rights, to a universal principle you would be ready to defend in every circumstance, always and all over the world, because this reference would be subordinated to a primary investigation, that is, the answer to the following question: does this event (even if violent, "deplorable", etc.), serve the hidden purposes of emancipation? If so, you cannot condemn this particular "terror", which is progressive; if, however, you denounce it, you will become a "reactionary", that is, you will hinder the necessary, "cunning", progression of humanity - you will preserve a pure soul (*une belle âme*) for yourself, but you will remain outside the real world, satisfied by your abstract coherence - impotent, "objectively" reactionary.

I do not suggest that such a conception is defended in such a form by the people acting in the political struggles; on the contrary, I am sure that they *cannot* formulate it in this way, because such a formulation would inevitably show the weaknesses of the position.

These weaknesses do not essentially flow from the "scientific" pretensions of the dialectician, who is supposed to know, like God,

the hidden ways of Providence. It is more rigorously related to a problem of legitimization of power, which is not peculiar to the egalitarian theory, but applies to it, as far as it is related to "dialectics" (of course, in the Hegelian sense). I shall try to show that this kind of theory is much more related to an inegalitarian point of view than to an egalitarian one. As a matter of fact, the concept was already elaborated by Plato, who is a typical representative of non-egalitarian thought.

For Plato, dialectics means ascension towards the Good, *to agathon*[14]. As far as *this* kind of progress is concerned, no problem of hierarchy is involved; on the contrary, the idea is that, instead of legitimizing social and moral norms by a resort to tradition, to extant hierarchy, to "mythos", these rules of conduct are now supposed to be justified by a free dialogue; the Good is attained by discussion and common research of the truth, which means that it is a *maieutics*:[15] the norms are not imposed from outside, from a "dogmatic" tradition, but are discovered by the pure exercise of reason. As a consequence, there is a fundamental egalitarian presupposition of such a concept: every *philosopher* is supposed to be able to make the ascent, and, from the "summit", to go down (*dialectique descendante*)[16] to the practical consequences of the universal principle. Of course, a kind of rational hierarchy may be the result of this rational approach, but every philosopher will accept it, since it is strictly implied by pure reason itself. So we have an "intellectual" equality between philosophers, and, as a necessary (or supposedly so) result, the well-known hierarchy of the Platonic ideal state.[17]

The problem arises when we do not consider the relationships *between philosophers* any more, but consider the connections between philosophers and non-philosophers: in this case, the inequality acquires a new meaning, very different from the rationally legitimized hierarchy, because it is a *non-controllable* authority which is at stake. Indeed, if very few people are able to become philosophers, that is, to begin the ascension - to enter the dialectical process - the following question will inevitably arise:

what will be the meaning of the social norms for these non-philosophers? They will not be different from the *diktats* of any tyrant[18]. Why is this so? Because, *for the philosophers*, the norms, the commands, are inferred from the *agathon* (the normative truth); consequently, they will organize society in a way which, for them, is rational; but for the non-philosophers, this kind of organization (and the constraints which it entails) is opaque: that is, they receive orders without being able to control whether they flow from rational truth or from arbitrary, special interests of governments, etc. In other words, they cannot decide whether it is a matter of *rationality*, or a matter of *domination*[19]. We have not, in this context, to suppose that philosophers use rationality as a suitable "façade", which would allow them to make "honourable" oppressive practices; we have just to notice that, from the point of view of the "lower" ones, that is, the perspective of people excluded from the rational ascension, *no criterion is available* to distinguish between the exigencies of philosophy and the arbitrary *diktats* of a despot.

This implies that the problem of Platonism in the traditional sense (is there a moral truth or must we stick to "decisionism", etc.?[20]) is secondary, compared to the question of legitimation: whether or not this philosophical truth is attainable anyway, people not belonging to the philosophical *milieu* will not be able to control it. This kind of truth (existent or non-existent) is a matter of *faith*: we must suppose and hope that above us, in the philosophical realm, the norms which are promulgated result from a fair rational dialogue. But, by definition, we (non-philosophers) cannot know it. So we have to believe or not believe it. The reason why Plato rejected political equality was obvious: it did not entail philosophical competence as far as the aims of the city-state were concerned[21]. But by trying to eliminate this kind of arbitrariness (the norms resulting from the sophistical argumentation in the assemblies) he made possible another kind of arbitrariness: the non-controllable norms of the philosophers.

Plato opposed the *vrai* (truth) and *vraisemblable* (appearances) but his theory does not allow people to distinguish between the

pretence and the truth. This is a fundamental flaw in his theory, which does not mean, of course, that the kind of democracy (political equality) he criticised was acceptable. But again, the weakness of a position is not a reason for accepting the blemishes of the opposed camp. There is, in Plato, a kind of political equality between philosophers: all of them participate in the rational dialogue which is supposed to lead to the political norms of the ideal state. There is no civil equality, because Plato is in favour of a kind of hierarchical division of labour. But principally, there is no possibility of controlling the supposed philosophical authority: consequently, the inequality between the representatives of authority and other people can increase without any philosophical limitation. I do not mean that this limitation is a simple problem: I am only trying to say that it is a fundamental philosophical problem and that the solution of it cannot be found in Plato. I also want to emphasise that this kind of inequality is the most basic one: because, if you cannot control the authority, the rational politicians will be allowed to promote any norm which they will dress in the rational "coat".

This flaw in Plato's theory is not simply a matter of history. On the contrary, it can be found again in modern philosophy, and especially in Hegel. The "cunning of reason" is exactly the same conception as Plato's non-controllable authority theory:[22] the dialectics is, this time, historical; it means, as I have stressed before, that history follows a rational course, even if people, the rights of whom are endangered by such a "progression", do not understand it immediately. If they do not do so, it is because they have no access to the totality of history, in other words to the Hegelian "Good". But the philosophers know the *Wissenschaft* of being and history. So, if we "moralise" and stick to our abstract human rights principles (these principles which are the basis of equal treatment of people in such fundamental matters as life or human dignity), it is because we do not know the "winding" rationality of history.

What is extremely strange and significant is that Marx could assume the Platonic-Hegelian arguments *in a radical egalitarian context*. He also could say that the movement of history was necessary; he also could speak of a very vague "dictatorship of the proletariat", but condemn people quite violently for not being in the sense of history:[23] all this is well-known. But the paradox is blatant: what can assure me that the dictatorship of cunning history will lead to radical equality, instead of being used as a potent weapon of ideological power? Nothing, except the fundamental laws of historical materialism, which no intellectual has been able to prove, for the reason that they are not falsifiable.[24] And, as the proletariat is, of course, in a situation which does not allow it to have access to the subtleties of the theory of history, class-consciousness has to be introduced from outside in order to avoid "trade-unionism", that is, false consciousness (we could have replaced trade-unionism by human rights or moralizing, or even common sense). I do not mean that Lenin (and Kautsky before him) had not seen a real problem: how can the proletariat know what is in its own interest if it is "alienated"? Plato said: how can people democratically decide in political matters, since they are manipulated by the sophists and the demogogues? But the Marxist-Leninist answer is no more sound than the Platonic one.

Everybody knows that in *this* sense, the theory has become reality, and that the "socialist" power is uncontrollable. Let us now come back to the Sartre-Camus symptom. Undoubtedly, Sartre believed in a kind of historical rationality, which explains (but not justifies) how he was *at the same time* capable of taking the point of view of the most disadvantaged *and* of coming back from the Soviet Union, accepting as valid what the authorities had let him see: that is, of course, nothing relevant to free enquiry.[26] The very broad Marxist context of main-current intellectual disputation in the twentieth century is, in its philosophy of history, closely connected with the Platonic mode of legitimation of authority: that is, an uncontrollable hierarchy - which necessarily generates unlimited inequalities - for the sake of (here the difference to the *Republic* is obvious) radical equality.

Thus I think that, if we want to raise the problem of equality in revolutionary ideology, the main question does not consist of asking whether or not the second phase of the Gotha Programme is strictly egalitarian: we have, before that, to analyse the philosophical presuppositions of the *way* which is supposed to lead to such an end. If we do that - as I tried to schematize it - we may consider that "Marxism" is, by the cunning of the history of ideas, a Platonic graft on an egalitarian ideal.

This egalitarianism implies that good questions can be asked: as I said in the beginning of my paper, the point of view of the "proletariat" (whatever form it may take) has a heuristical, a critical function; it helps to be aware of the fact that misery, oppression, exploitation - the deprivation of any rights - are still the fate of a lot of people, related in one way or another to the functioning of western *Rechtsstaate*. But we can also easily understand that the "Hegelian" answer to such a question - and the attitudes it implies - is also connected with a lot of inequalities (the word is a euphemism in this case) *which it helps to hide, or,* which means the same thing, *to legitimize*.

Let us now consider the other aspect of our question.

2. Equality within the *Rechtsstaat*

In 1945, Chaim Perelman defined philosophy as "the systematic analysis of confused notions".[27] In 1967, the *Centre de Philosophie du Droit* of Brussels University decided to organise a series of seminars dedicated to the study of Equality. This notion soon appeared as a particularly good example of a "confused idea", and the seven volumes published in the collection are as such sufficient evidence of the difficulty of defining univocally practical notions.

As a point of departure, I shall briefly propose a kind of rough classification of the meanings of equality which are relevant for the analysis elaborated by the Centre. This typology is not supposed to be original, but only consists of a "heuristical" means

of raising the main problems: I am aware of the fact that other distinctions would also be relevant, but as far as my aim is concerned, this classification looks the most suitable one. I propose four different meanings of equality in the field of *Rechtsstaat* theory

(i) Equality before the law: I consider this first kind of equality as purely formal, referring to the Perelmanian "*règle de justice*".[28] It is well-known that this principle does not commit us to any *substantive* conception of equality: maybe the Kelsenian distinction between "equality before the law" and "equality within the law" is the clearest one to clarify the notion:[29] "equality *before* the law" only means that we have to treat similar cases in a similar way.[30] The simple fact that this attitude can be related to the Aristotelian conception of justice - which of course is not, in a strict sense, egalitarian[31] - indicates that no egalitarian ideal is implied by it. Of course, the main problem will be: *what* characteristics must be considered as similar, and which similarities are we to take into account? In the answer to this two-sided question, we cannot avoid the resort to ethical choices and conceptions, and on this point I refer to Professor Stone's discussion of the Perelmanian "reasonableness".[32] So, "equality before the law" is a very thin principle, which nevertheless has to remain formal in order to avoid confusions and difficulties. In the history of law, the overlapping of the two domains (formal and substantive) has been constant,[33] and this is quite normal, if we take into account some elementary notions of the history of ideas and ideologies: equality before the law immediately suggested that the distinctions and classifications were to be justified, and so the two domains would inevitably overlap. But this is an element of ideological struggle, and not of rational analysis: the equality before the law does not say anything about substantive differentiations, except that *if* a differentiation exists (is recognised by the law), it must be applied to every situation which corresponds, objectively, to such a discrimination (in the logical sense of the term). If it is not,

we are in a situation of *arbitrariness*. This may seem to be very little, but arbitrariness is still the condition under which a majority of people in the world live (such a point is related to my first context). To this formal equality, philosophers of law have related different notions, which are necessary to enforce it. Among them: the *non-retroactivité de la loi pénale* (or *fiscale*, etc.), the adage "*nemo censetur ignorare legem*", the completeness and consistency of the body of laws, also the univocal definition of terms, the "due process of law", the "equal protection of the laws", etc.[34]

I shall briefly refer to the French situation, in order to show how fragile this minimal, formal equality may be. In the continental juridical system, equality before the law was, during the revolutionary period, connected with a strong limitation of the powers of the judge:[35] we have only to remember what, for instance, Montesquieu,[36] before the Revolution, and Le Chapelier[37] or Robespierre,[38] after it, said about jurisprudence, "*la plus détestable de toutes les institutions*",[39] which has to be "*effacée de notre langue*".[40] Regardless of the Orwellian connotations of this last phrase, we can consider how rational it was for a conception which implied that law is "*l'oeuvre de la raison*" (Portalis),[41] to try to avoid the interference of judges' interpretation. The procedure of the "*référé législatif*", very soon abandoned, was significant of this way of thinking[42]. It was replaced, as soon as its impracticability had become obvious, by the obligation, for the judge, to take a decision even if the texts of the law were obscure, had deficiencies or antinomies - that is, if the law was neither univocally defined, nor complete nor consistent.[43] But at the same time, the judge could not "*agir par voie de réglementation générale*",[44] that is, take the place of the legislator. This may appear a little derogatory to the judge, and too favourable to the "rational" legislator. But I do not think that this last presupposition is relevant in the particular context of formal juridical equality: the point is that the law (whatever it is) must be predictable (*sécurité juridique*), and that, in order to avoid

arbitrariness, people have to know, at the very moment they are acting, what is permitted and what is not (*nul n'est censé ignorer la loi*); they have to be sure that an independent judge will enforce the law if they have done what is allowed by it, and that this judge will not substitute *his* rule for the legal one; this does not imply that the judge is supposed to be less "wise or "honest" than the legislator (even if the French revolutionaries, as far as they were influenced by Rousseau's "*volonté générale*",[45] often meant so), but that his decision must be *predictable* (this is the basis of the non-retroactivity principle). Of course, the same result could be (and has been) obtained by other means in another context, for instance in the Common Law,[46] but the system was quite rational, I repeat, as far as only formal equality was concerned, and not a supposed "divine" rationality of the "general will" (as different from the "*volonté de tous*").[47]

If the judge has to interpret the law, how can we be sure that he will not endanger the predictability of the rule? I only want to refer here to the evolution of French (and, to a certain point, German) legal reasoning: the conception of the revolutionary period was strictly related to the notion of the "*syllogisme judiciaire*".[48] If the judge has to interpret the law, two general concepts can be taken into account: first, the *juristische Dogmatik*, which allows the judge to interpret, but in a "descriptive" way ("modernising" the language of the legislator, but without introducing his own value "preferences" in the case);[49] secondly, the Perelmanian *rhetoric*, which of course does not go to the "judiciary existentialism", tries to preserve the primacy of the legislator, but allows the judge to interpret the law by taking into account evaluations.[50] I just wanted to mention this evolution to show that, of course, juridical reality is complex, fluid and unpredictable like social evolution, but that a fluid law, a "*flexible droit*",[51] may endanger the formal equality, provided we do not take into consideration the whole context of continental law: it is always dangerous to eliminate one piece of a "system", while not seeing that it is related to other elements, and that, if a conception of the "free" (*freirecht*) juridical decision may make the law more fluid,

it may also endanger the *Rechtsstaat* in one of its main bases: the equality before the law. The recent "case Croissant",[52] which was famous, is a good example of this situation. I refer for all these problems to Perelman's *Logique juridique*.

(ii) Political equality: This is already a *substantive* notion of equality: we have to be very cautious, on this point, to avoid the confusion of different meanings of the adjective "formal" Political equality has often been considered as formal because people said that the principle "one man, one vote" did not mean anything concrete about the real control of political authority; it was formal in a second sense, closely connected to the first one: the "*éligibilité*" and the "*égale accessibilité aux emplois publics*"[53] were "formally" granted to every citizen (if we do not distinguish between "passive" and "active" citizens),[54] but, related to the social stratification,[55] had not any practical correspondent. This is "formal" in a quite definite sense: it means, as has been often emphasised, that these principles cannot be enforced without taking into account material (social, economic and cultural) inequalities in the exercise of political rights. But even if we stick to these minimal rights the principle will remain *substantive* compared with the equality *before* the law: it is actually a characterisation which concerns the "content" of activity and is *not* logically entailed by the abstract "rule of law" in the sense of Dicey's conception.[56] So the statement is substantive, but surely inefficient if not completed by social rights. *Inefficiency* is not "formality" in the strict sense of the "*règle de justice*". Such a distinction may be important if we consider that Marxism has criticised both equality *before* the law and equality *in the "creation" of* law (political equality) as "formal".[57] This kind of confusion may be very dangerous for equality itself.

The "concretisation" of political equality is directly related to the socio-cultural rights, and that is the reason why I must go further in the exposition of the typology before discussing the

problems connected with this kind of principle.

(iii) Equality of opportunities: This kind of equality is "substantive", because it implies a kind of evaluative preconception, that is a categorisation (whereas the formal equality *stricto sensu* applies to *any* classification, only requiring that arbitrariness disappears in the "use" of the logical classes)[58]. This categorisation is "universal" or, in other words, grants everybody the opportunity of competing for jobs and rewards (or status and power in the sense of Weber)[53]. The equality concerns the point of departure, and not the *results*, which depend on the merits, the performances, the efforts or the talents.[60] If we suppose (but of course it is purely hypothetical) that a *fair* (see Rawls)[61] equality of opportunities can exist in the society, in other words that the inequalities related to the social stratification do not irremediably bias the "game" or the competition - even in this ideal situation, the inequalities of results will be legitimized. I would rather say that they would be so only in *that* case, as far as contemporary, post-revolutionary evaluations are concerned: if one can show or demonstrate that the inequalities of rewards depend more on the social *milieu* than on differences of performances in fair starting conditions, these inequalities will not be *legitimable*, because their cause, their origin will reside in the contingency of birth and not in the choices, efforts, etc., of the rational individual.[62]

Of course, this is largely hypothetical because all the serious studies concerning social stratification and mobility *in* the *Rechtsstaate* show that the impact of the inequalities of conditions is blatant.[63] Therefore, the accent has been put on the *equalisation of social and cultural departure situations*. Everybody knows how many confused conflicts arise from this question: it is of no use to speak of them again here. What I would like to say, very generally, is that this kind of extremely important problem cannot be solved by such abstract confrontations between "equality" and "liberty". Indeed, the very meaning of this opposition depends on the *definition* you give both concepts: for instance, if you mean by equality of

opportunities the right for everybody to dispose of the fruits of his own efforts, you will not be entitled to criticise inheritance, private medical care, and even simple taxation.[64] Whereas, if you define equality as an equality of rewards, every liberal (and not necessarily a "conservative" one) will tell you that this kind of egalitarianism not only destroys the very condition of equality of opportunities, but also endangers freedom in whatever sense, or simply democracy (which is obvious). So we can always find definitions of equality and freedom which would make them either compatible or antagonistic: but in all cases, the result will depend *on other factors*, other than "pure" liberty or equality.

Of course, a fair equality of points of departure is far from being realised in western societies; but the question is: how can governments or intellectuals propose a more egalitarian situation (that is, a "functional" - in the sense of Parsons[65] - legitimation of inequality of rewards) without threatening other values, also essential for humanity? Does one not see that such a question can only be answered by recourse to the "eternal" problems of philosophy, and by an extremely rigorous analysis of contemporary societies, dangers of bureaucratisation,[66] role of the new technologies and the new international division of labour (see the idea of "dual society")?[67] This study also depends on more ethical evaluations, that is, at which point are we ready to accept the moral implications of competition, of division of labour, of naive faith in the capacity of technology, or, on the contrary, of naive belief in the harmony of pre-industrial, ecological, romantic societies?[68] All these questions, which of course are not exhaustive, show that the old debate between liberty and equality depends on exterior parameters, and that, as I said in the beginning, equality is not, as it were, the key of equality. Philosophical analysis, even if extremely positive (especially seen through the continental metaphysical mists), has its limits: at one moment, the idea of equality must be "synthetically" related to our context, our questions, our other values and "preferences", and to the prospects of a western society in crisis. And of course, it has to be separated

from the kind of illimitable inequalities which flow from Platonic-Hegelian flaws in the theory of legitimisation of power.

(iv) Equality of "results": The equality of opportunities does not guarantee an equality of results; on the contrary, it helps to justify "functional" inequalities, or, which means the same, to criticise class and caste inequalities (as opposed to social mobility). The so-called "human rights" are basically related to the equality of results, that is, to prerogatives which are secured to every human being as a human being, and not dependent upon such-and-such a performance. Of course, within this category, we have to make a further distinction: between what I. Berlin has called "negative freedom" and "positive freedom".[69] The classical human rights were "negative", that is, they consisted of prerogatives *against* the state, they secured, for the individual or for groups (associations, etc.), a kind of "privacy" which was supposed to be out of reach of the political authority. The socio-economic human rights are "positive": in other words, they consist of a demand addressed to the State, requiring that some basic material conditions be secured (*equally* secured) to every individual as such. But nevertheless, human rights - whether positive or negative - have to be distinguished from the rights secured by the activity related to the field of equality of opportunities: of course, they will be differently realised in relationship to what the individual will do with them, but basically they are of another nature.

Again, there were numerous debates about the meaning of the relationships between human rights and competitive equality:[70] were the former ones supposed to secure the fair conditions of the latter? Or were they contradictory with equality of opportunities? Again, equality is not the key of the debate: it depends on the scope of human rights, on the meaning of competition, on other emergencies, etc. It is obvious that the "idea of equality" does not allow us to solve this secular problem. Only a "metaphysics" of society and of ethical requirements can do that.

I would like to relate the two contexts of reflection, as a conclusion. I am aware of the fact that I have been much more categorical concerning revolutionary egalitarianism than about equality in the *Rechtsstaat*. Of course, the crisis of revolutionary thought makes us the "prey" of reformism. But here again, the history of ideology may be confusing: reformism suggests certain historical features of social-democracy, that is, bureaucracy, inefficiency, etc. Reformism may be another thing: it may relate to the fact that no other basis of equality is provided than the *Etat de droit*; but it must also imply, in my opinion, a perpetual vigilance about the dangers of such a statement: pessimism, pragmatism, short-sighted positivism. The temptation is indeed great to indulge in such a "*moindre mal*" attitude: confronted by the fanaticism of Khomeinism or by the "god that failed" in the "real socialism" countries, western social immobility and stratification appear as a "paradise" of equality. This is because, as I have tried to show, inequality is primarily a question of legitimation and control of power: if this is not limited by means of law, culture, existence of a middle-class, etc., it will permit worse inequalities between the dominant and the dominated. The rest, the arbitrariness and the disappearance of the rule of law, corruption and *Nomenklatura*, will easily follow, spontaneously.

On the other hand, western intellectuals cannot limit the scope of their investigation to "their" world, with its - relatively - benign inequalities (as far as they are not "functionally" justified). Other inequalities (discriminations, oppressions) are to be taken into account with the same radicality which was shown during the revolutionary "period". But, without the too simple recourse to history and the perception of "the Rose on the Cross of the Present",[71] the philosophical task is actually immense.

FOOTNOTES

1. Cf. G. Del Vecchio, *Justice*, Edinburgh, University Press, 1952, pp. 134-135, for the history of the term; cf. also a good analysis in R. Marcic, *Geschichte der Rechtsphilosophie*, Freiburg, Rombach, 1971, in particular pp. 100 sq.; I use the term in the most general sense ("The State whose activities are bound by law,... as a defence against...executive despotism", Del Vecchio, *op. cit.*, p. 135), and not as it is utilised in a particular debate presupposing the general idea of supremacy of the law (cf. for the analysis of the ideological meaning given to the word by Hayek: J. Stone, *Human Law and Human Justice*, Sydney, Maitland, 1965, p.100). The term is of course widely used in German philosophy of law: cf. G. Leibholz, *Gleichheit vor dem Gesetz*, München, C.H. Beck, 1959, pp.218sq.

2. Cf., on the general meaning of Dicey's "rule of law", J. Stone, *Social Dimensions of Law and Justice*, Sydney, Maitland, 1966, pp. 619-621.

3. For the use of the term in France, cf. G. Burdeau, *Les libertés publiques*, Paris, L.G.D.J., 1961, p.30, and *Droit constitutionnel et institutions politiques*, Paris, L.G.D.J., 1976 (2nd ed.), pp.35sq.

4. I shall analyse *infra* Plato's and Marx's positions. The case of Nietzsche is clear: he rejected the "nihilism" of the modern idea of law as a victory of the "reactive" forces. (Cf. G. Deleuze, *Nietzsche et la philosophie*, Paris, P.U.F., 1961, *passim*.)

5. For this conception of Weber, cf. J. Matras, *Social Inequality, Stratification and Mobility*, London, Prentice-Hall, 1975, pp. 67-69; cf. also R. Aron, *Main Currents in Sociological Thought*, Harmondsworth, Penguin 1970, pp. 185sq.

6. Cf. H. Marcuse, *One-Dimensional Man*, Boston, Beacon Press, 1971, Conclusion.

7. For the use and abuse of the term "proletariat" by intellectuals, and generally for the present problematic, cf. E. Wiehn, *Intellektuelle in Politik und Gesellschaft*, Stuttgart, F. Enke, 1971, *passim;* P. Buckman, *The Limits of Protest*, London, Gollancz, 1970, pp. 159sq. and 217sq.; P.K. Raina, *Die Krise der Intellektuellen*, Freiburg, Walter, 1968, *passim*, and in particular the chapter "21 Oktober 1966: Kolakowski spricht" (pp. 67-72).

8. Cf., on this point, the recent - and excellent - book by C. and J. Broyelle, *Le bonheur des pierres*, Paris, Grasset, 1982, *passim*. This work is very significant of the Camus-revival in France, and more generally of a major shift in the French *intelligentsia*.

9. Cf. Hegel, *Phenomenology of Spirit*, Oxford, Clarendon Press, 1977, pp. 383sq.

10. Cf. C. and J. Broyelle, *op. cit.*, and J.P. Sartre, *Nekrassov*, Paris, Gallimard, 1956; cf. also C.A. Micaud, *Communism and the French Left*, New York, Praeger, 1963, 62-65 and 157-158.

11. Cf. G. Haarscher, *L'ontologie de Marx*, Bruxelles, Editions de l'U.L.B., *passim;* E. Kamenka, *The Ethical Foundations of Marxism*, London, Routledge and Kegan, 1972 (2nd ed.), pp. 51sq.; L. Kolakowski, *Main Currents of Marxism*, Oxford, Clarendon Press, 1978, Vol.I, *passim;* I have emphasised the meaning of modern dialectics in "Prolégomènes a une lecture spéculative de la *Phénoménologie de l'esprit*", *Revue internationale de philosophie*, 1982, no. 139-140, pp. 69-94.

12. Cf. G. Haarscher, *Egalité et Politique*, Bruxelles, Travaux du Centre de Philosophie du Droit, 1982, pp.3-42.

13. K. Marx, *Randglossen zum Programm der deutschen Arbeiterpartei, Marx-Engels Werke*, Dietz, Berlin, 1957, vol.19, p. 21. For the analysis of this statement, cf. S. Avineri, *The Social and Political Thought of Karl Marx*, Cambridge University Press, 1968. Cf. also *L'ontologie de Marx, op.cit.*, pp. 251sq.

14. Cf. Plato, *Republic*, 533c-535a; L. Robin, *Greek Thought and the Origins of Scientific Spirit*, New York, Russel and Russell, 1967 (first published: 1928), pp. 183sq.; P.-M. Schuhl, *L'oeuvre de Platon*, Paris, Hachette, 1961 (3rd ed.), pp. 90sq.

15. Cf. Plato, *Theaitetos*, 150bc.

16. Cf. Plato, *Republic*, 510b sq., 533c sq.

17. E. Barker, *The Political Thought of Plato and Aristotle*, New York, Dover publications, 1959, pp. 81sq. and *passim*.

18. Cf. for instance E. Barker *op. cit.*, pp. 161sq. ("Plato and the Tyranny of Reason"); K. Popper, *The Open Society and its Enemies*, London, Routledge and Kegan, 4th ed., 1962, vol. 1, *passim*.

19. This opposition between rationality (functionality) and domination will reappear in the second part of this paper.

The most interesting debate in that context is the discussion Parsons-Dahrendorf, cf. J. Matras, *op. cit.*, pp. 69-75.

20. Cf. K. Popper, *op. cit.*

21. Cf. P.-M. Schuhl, *op. cit.*, p. 108 and 113; E. Barker, *op. cit.*, pp. 183sq.

22. Cf. my paper "Prolégomènes....", *op. cit.*, *passim.*

23. Cf. *L'ontologie de Marx*, *op. cit.*, *passim.*

24. Cf. K. Popper, *op. cit.*, vol. II, pp. 222 and 263.

25. Cf. L. Kolakowski, *op. cit.*, vol. II, pp. 381sq. and 487sq.

26. Cf. C. and J. Broyelle, *op. cit.*, pp. 220sq.

27. Cf. C. Perelman, *De la justice*, Bruxelles, 1945, Introduction.

28. Cf. C. Perelman, *op. cit.*

29. H. Kelsen, "Justice et droit naturel", in *Le droit naturel*, *Annales de Philosophie Politique*, III, P.U.F., 1959.

30. C. Perelman, *op. cit.*,

31. Cf. E. Barker, *The Politics of Aristotle*, Oxford, Clarendon Press, 1946, p. 151; Aristotle, *Nichomachean Ethics*, 1131a sq.

32. J. Stone, *Human Law and Human Justice*, *op. cit.*, pp. 326-330.

33. Cf., for two examples of such overlapping: Th. Chome, "Le principe d'égalité en droit de la République Fédérale allemande", in *L'Egalité* I, Travaux du Centre de Philosophie du Droit de l'Université de Bruxelles, Bruylant, 1971, pp. 36sq.; J.A. Sigler, *American Rights Policies*, Dorsey Press, Homewood (Illinois), 1975, pp. 25sq. (The Fourteenth Amendment to the American Constitution, on the "Equal Protection of the Laws").

34. Cf., on these points, F. Ost and J. Lenoble, *Droit, mythe et raison*, Bruxelles, Facultés Universitaires Saint-Louis, 1981, pp. 17sq.

35. *Ibid.*, pp. 28sq.

36. "Plus le gouvernement approche de la république, plus la manière de juger devient fixe...Dans le gouvernement républicain, il est de la nature de la constitution que les juges suivent la lettre de la loi. Il n'y a point de citoyens contre qui on puisse interpréter une loi, quand il s'agit de ses biens, de son honneur ou de sa vie...le juge prononce la peine que la loi inflige pour ce fait; et, pour cela, il ne lui faut que des yeux...Si les tribunaux ne doivent pas être fixes, les jugements doivent l'être à un tel point qu'ils ne soient jamais qu'un texte précis de la loi. S'ils étaient une opinion particulière du juge, on vivrait dans une société sans savoir précisément les engagements que l'on y contracte..." (Montesquieu, *Esprit des lois*, liv. VI, chapter III p. 73 et liv. XI, chapter VI, p.144) (ed. Garnier); (cf. Ost-Lenoble, *op. cit.*, p. 31).

37. *Archives parlementaires*, 1re série, t.XX, p.517 (*ibid.*, p.32)

38. *Archives parlementaires*, 1re série, t.XX, p.516 (*ibid.*, p.32)

39. *Ibidem.*

40. *Ibidem.*

41. Portalis, Discours préliminaire au Code Civil; cf. M. Sevin, *Etude sur les origines révolutionnaires des Codes Napoleon*, new edit., Paris, 1879, p.102 (*ibid.*, p.30)

42. The purpose of the "*référé législatif*" was to leave every interpretation of the law to the legislator. In case of obscurities, antinomies, etc., the judge had to "refer" the litigious point to the legislator, who would give the "*interprétation par voie d'autorité*". For the history of this institution, see Ost-Lenoble, *op. cit.*, pp. 37sq. and 92; cf. also C. Perelman, *Logique juridique*, Paris, Dalloz, 1976, Introduction.

43. For the problem of the "*antinomies*" and the "*lacunes*" in the law, cf. *Les antinomies en droit*, ed. C. Perelman, Bruxelles, Travaux du Centre National de Recherches de Logique, Bruylant, 1965, *passim* and *Le problème des lacunes en droit*, Bruxelles, Travaux du Centre National de Recherches de Logique, Bruxelles, Bruylant, 1968. Cf. also C. Perelman, *Logique juridique, op.cit., passim.*

44. *Code Napoléon*, art. 4.

45. The "*volonté générale*" "*ne peut errer*" (cannot be wrong) (J.-J. Rousseau, *Du Contrat Social, Oeuvres Complètes*, tome III, Paris, Gallimard, Bibliothèque de la Pléiade, 1964, pp. 371sq. "*La volonté générale (est) postulée comme Dieu lui-même*", writes Camus, and he also quotes Brissot saying that "*Le monument le plus ferme de notre révolution est la philosophie*", A. Camus, *L'homme revolté*, Paris, Gallimard, 1953, pp 144 and 147)

46. I want to stress that the position of the judge (his possibilities of intervention, evaluative interpretation, etc.) cannot - this is a good example of what I suggested in the very beginning of my paper - be considered abstractly, but only in the context of the *primat de la loi* in continental law. Others' presuppositions will of course imply other problems and difficulties. The position of the judge has no meaning *in se*, but only in relationship to some aims. For instance here the preservation of the predictability of the law and the *sécurité juridique*. In another context, these requirements could be obtained by other means.

47. J.-J. Rousseau, *op. cit.*, p.371. This is another example of the contextual meaning of problems: we can consider the problem of *sécurité juridique* without taking into account the rationality of the legislator, at least in the strict sense of the revolutionary conception ("strong" rationalism). The question is here: once a law has been passed, and therefore is supposed not to be ignored, how to ensure its predictability if problems of interpretation arise. In other terms, the judge's evaluations are not *per se* predictable: whence the problem.

48. Cf., on this point, C. Perelman, *Logique juridique, op. cit., passim*, and Ost-Lenoble, *op. cit.*, p.32. For Garat L'Aine, Beccaria has for the first time introduced this conception of the judge's activity (cf. also Montesquieu, *supra*, n.36).

49. The problem is quite complex in the evolution of French philosophy of juridical reasoning (see the evolution from the "*école de l'exégèse*" through the "scientific school" (Geny, etc.) to the rhetoric point of view in C. Perelman, *Logique juridique, op. cit., passim.*). I only want here to stress a general difficulty by emphasising the two extremes of the conception of interpretation, as represented (among a lot of other examples) by Montesquieu and the rhetorical point of view. I have developed this point in my paper: "La crise du légalisme et ses conséquences éthiques", Mexico, *World Congress of the I.V.R.*, 1980.

50. C. Perelman, *ibidem.*

51. G. Carbonnier, *Flexible Droit*, Paris, L.G.D.J., 1973.

52. Croissant was the advocate of the *Rote Armee Fraktion* in Germany in the seventies. He was accused of collaborating with the terrorist movement and flew to France. He was extradited to Germany due to pressure from the French government on the judiciary. The motivations of the decision were quite complex and did not preserve the *sécurité juridique* linked to the French "*droit d'asile*". This does not imply in my opinion any positive assessment of Croissant's conception. Croissant is a dogmatic stalinist in the purest sense of the term.

53. *Déclaration française des droits de l'homme et du citoyen*, 1789 (*Préambule* of the Constitution of 1791), art. 6. For a commentary of these "*droits politiques du citoyen*", cf. G. Burdeau, *Libertés publiques*, *op.cit.*, *passim*, and *Droit constitutionnel et institutions politiques*, *op.cit.*, pp.287sq.; cf., for a philosophical analysis of the Human Rights Declarations, E. Kamenka, "The Anatomy of an Idea", in *Human Rights*, ed. E. Kamenka and A. Tay, Edward Arnold, 1978, pp.1-12. I agree with Kamenka's conception of the contextual definition of human rights and his critique of the natural law philosophical reference (*ibid.*, pp. 10-12).

54. Cf. G. Burdeau, *Droit constitutionnel et institutions politiques*, *op.cit.*, p. 291.

55. Cf. J. Matras, *op.cit.*, *passim*, and C. Owen, *Social Stratification*, London, Routledge and Kegan, 1968, *passim*.

56. Cf. J. Stone's analysis of this point, *supra*, n.32.

57. For the marxian conception of law, cf. E. Kamenka and A.E.-S. Tay, "Socialism, Anarchism and the Law", in *Law and Society*, ed. Kamenka, Tay and R. Brown, London, Edward Arnold, 1978, pp.48-80. Their general conception of the *Gesellschaft* would have to be taken into consideration here, such as it appears in their different publications.

58. Cf. M. Vanquickenborne, "La structure de la notion d'égalité en droit", in *L'Egalité I*, *op.cit.*, pp. 176-195.

59. Cf. *supra*, n.5.

60. On the problems related to these expressions which are not at all synonymous and embody potential conflicts, see: *Equality and Social Policy*, ed. W. Feinberg, University of Illinios Press, 1978, pp.15sq.

61. J. Rawls, *A Theory of Justice*, Harvard University Press, 1971, pp.83sq.

62. Cf. J. Matras, *op.cit.*, *passim*.

63. *Ibidem*.

64. Cf., for a conservative-liberal position in the sense of Hayek or Nozick: K. Joseph, *Equality*, London, Murray, 1979.

65. J. Matras, *op.cit.*, pp.69sq.

66. Cf. *Bureaucracy*, ed. E. Kamenka and M. Krygier, London, Edward Arnold, 1979.

67. Cf. A. Gorz, *Adieux au prolétariat*, Paris, Flammarion, 1980.

68. Cf. the positions of Marx, Rousseau, Marcuse, Illich, etc.

69. I. Berlin, *Two Concepts of Liberty*, Oxford, Clarendon Press, 1958.

70. Cf. *Equality and Social Policy, op.cit., passim.*

71. "*Die Vernunft als die Rose im Kreuze der Gegenwart zu erkennen*" (Hegel, *Grundlinien der Philosophie des Rechts*, Berlin, 1821, *Vorwort.*).
