DIALECTICS AND EQUALITY: SOME COMMENTS ON "THE IDEA OF EQUALITY" BY GUY HAARSCHER

by

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In the first part of his paper our distinguished guest has elaborated the theme that there is inbuilt oppostiion between the pursuit of truth and values - of the *Agathon* - by the dialectic process of which the Hegelian dialectic is the modern prototype, and the doctrine of human rights. His demonstration is an attractive one, though one wonders whether the dialectic process would be very different in this respect from any relativist criterion proceeding on a wide range of variables, as opposed to an absolute criterion.

Be this as it may, it is important to recognise that this attack on the dialectic is much more dramatic than that made, for example, by Benedetto Croce, on many Hegelian dialecticians as "petulant and comic contemners of history".[1] It is an attack on dialectics as weak, not on abuses of dialectics. The position is nearer that of Carl Friedrich, who charged that the dialectic has been used to bulldoze away the current values rejected by the exponent, so that his own preferred values can be arbitrarily substituted.[2]

For Dr. Haarscher's position seems to attack even the most authentic dialectics of a Plato (or of a Hegel). He sees it as an

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1. B. Croce, *What is Living and What is Dead in the Philosophy of Hegel* (1912), quotation translated from the French version by Burot, at p.121.

2. C.J. Friedrich, "The Power of Negation" in D.C. Travers (ed.) *A Hegel Symposium* (1963) pp.13-35, esp. pp. 33-35.

instrument lending itself to (if not designed for) cunning exploitation by dominant elites of the rest of society, whose claims to justice and equality are thus reduced and relegated to some transient moment in the process of emergence of other values not yet clearly to be seen. On this view, dialectics is a means of assuring continuing frustrations and outrages against what most people feel as ideals of justice and equality.

In a second related aspect, Dr. Haarscher points out that the dialectic process competes with the egalitarian ideal, as a way of legitimating power - equality attracting legitimacy by mass approval, while dialectics attracts legitimacy by its orientation as a process towards the putative ultimate good, *Agathon*.

He thus approaches a theme which goes beyond the mere history of ideas - to what I would prefer to call the sociology (or even the geo-politics) of ideas. Dr. Haarscher points to the ultimate arbitrariness vis-à-vis the community generally of the power implicit in the dialectical functions assumed to themselves by the philosophers, including finally the philosopher-kings. For the philosophers themselves, indeed, the truths they express may (he recognises) be mere normative propositions based on "reason". For the rest of mankind, they are precepts issued by power-wielders - dictators or despots - even if the despots are sincerely misguided idealists rather than mere unscrupulous operators hungry for more power.

Dr. Haarscher sees it as no accident, once these realities are recognised, that Plato had little time for the ideal of political equality. As between the arbitrariness of the demagogues and the demos, on the one hand, and that of the company of philosophers as they unfold dialectical truths on the way to Agathon, Plato's preference was obviously for the arbitrariness of the philosopher.

While the claim of Hegelian philosophers to kingship is not explicit in Hegelian and other modern dialecticians, the cunning of the "unfolding reason" of the Hegelian line of thought shares this classical element, of assertion of uncontrolled authority - that is of legitimated power.

In this light, our thoughtful guest invites attention to a central paradox of Marxism. How was it possible (he asks) in view of the anti-egalitarian thrust of dialectics thus indicated, that Marxism could use it as a way of demonstrating the march - indeed with many exponents the inevitable and irresistible march - of mankind towards equality. It is true that the raising of the "class consciousness" of the masses has been assumed to offer assurances of the ultimate control by the masses of those who exercise power. But Dr. Haarscher properly asks how it can be believed that the masses will be any more capable of controlling outcomes - or even goals - of dialectical operations than the crowd of the non-philosophising demos of Athens was capable of joining the philosophers on the way to Agathon.

In reality, Guy Haarscher thinks, this mainline structured thrust of Marxism may be thought of as an attempt to set a Platonic-dialectical graft onto "an egalitarian ideal". He implies that the outcome is that the graft takes over the whole plant. So that what we have, e.g. in the Soviet Union, is that the "socialist" power is "uncontrollable" and "necessarily generates unlimited inequalities".

I do not enter into the details of this interpretation, as to which there may obviously be many disagreements. But I would add, in support of its broad tendency, that it is entirely consistent with the lapse of a full century of Marxist whistling in the dark about "the fading away" of State and law. The praises of "radical equality" (as of "the fading away" of State and law) continue to ring out, while at the same time there is constant postponement, on a succession of more or less plausible pretexts, of the time for the arrival of the true portents. I discussed this aspect many years ago (1960) in *Social Dimensions of Law and Justice*, where I wrote in Chapter 10 of the prophecy of the disappearance of the State and law. I there discussed the succession of manoeuvres whereby the obvious failure of the prophecy is constantly beclouded either by the naming of new portents, or the redefinition of the meanings of "law" and "State". (Ch. 10, pp. 490-515).

In the latter part of our lecturer's paper, he has asked us to recognise four versions or references or meanings of equality within the context of *Rechtsstaat* or "Rule of Law" theorising.

(a) Legal Equality under a Uniform Rule (*Formal Justice* à la Perelman) means subjection to the same rule of law of all those to whom it is, by its terms, addressed. I would like to recall here my point many years ago that this meaning of equality is not in any special sense a legal or even jurisprudential or ethical one. It is rather an exemplification of the axiomatic truth of logic that all members of a class fall within that class.

(b) Political Equality. No doubt, in the context of theorising about the sociology of justice (which seems here to be one of Guy Haarscher's main concerns) uniform rules of access to public offices and franchises can usefully by distinguished from other cases of legal equality under a uniform rule. In terms of the outcomes of the operation of law, however, political equality has similar attributes to legal equality under a uniform rule. That is (as I will later stress) that this kind of equality gives, in itself, no assurance that the actual positions of the beneficiaries of the rule will be any closer to equalling the positions of others in the relevant respect after the application of the so-called equal rule, than they were before.

This truth about absence of any increase of equality (or reduction of inequality) after application of the rule is what Guy Haarscher seems to have in mind when he says that political equality is "inefficient if not completed by social rights".

(c) "Equality of Opportunities" Insofar as equality of opportunities is hampered by historically set disadvantages of sections of a society, enhancement of equality will require the operation of laws which are not uniformly applicable to all, but rather apply discriminatingly so as to reduce disadvantages. To this extent I would want to move "equality of opportunities" into the lecturer's fourth class, which he calls "equality of results",

but which I have preferred to speak of as "residual (or resultant) greater equality produced by deliberately discriminatory rules of law".

Insofar as there are no such historically set disadvantages of sections of the community, then "equality of opportunities" is probably again a species of "formal equality" which gives no assurance whatsoever as to how factually equal to each other the shares of people will end up. This is subject to the nagging question increasingly stirred by the developing techniques of genetic engineering. Should the notion of historical disadvantages be extended to include genetic as well as environmental endowment. If it were so extended then as a practical matter (since the total elimination of differences in genetic endowments is barely conceivable) the whole area of equality of opportunities would become only a sub-area of "equality of results".

(d) Equality of Results. I have no divergence from this fourth categorisation of equality by Guy Haarscher. But I have already added two riders. One is that a primary significance of laws designed to produce equality of results is that practically always such laws have to be deliberately discriminatory, that is, they *must not* apply equally to members of the community. A second is that, precisely for this reason, rules conforming to this goal of achieving equality of results, almost always violate equality in the first sense, above, of the uniform application of the same rule. Failure to recognise this contradiction between two main versions of equality, and the use of the same symbol for each contradictory limb, are the source of endless and growing confusions in discussions of "benign" or "reverse" discrimination within the context of the equal protection clause of the American Constitution.

I would rather hope that Dr. Haarscher can make rather clearer than he has, that when he speaks of "human rights" (and opposes human rights thinking to dialectical thinking), he is not identifying human rights with the general symbol of "equality". For it is rather essential for him to specify that demands for

"human rights" are demands in terms of one specific reference of that symbol - namely, that of greater resultant equality produced if necessary by the imposition of discriminating laws.

The "human rights" demand in this sense is some part of the wider demand for justice. And what people are entitled to in justice escapes control by the equality notion in at least two respects.

First, insofar as we cannot interpret the notion of equality to mean exclusively that a uniform rule on all matters must be applied to all persons regardless of relevant similarities or differences in their circumstances, we are compelled, as soon as we try to use it, to resort to some value other than inequality before we can come to judgment. We always have to ask whether there are similarities and differences between this case and the cases to which the uniform rule applies, which afford a sufficiently relevant reason for treating this case the same or treating it differently. This judgment of relevance can in turn only be made by reference to some goal or policy or value (other than equality) which "justifies" applying a different rule in this case. The heart of the judgment of justice is the relevance of the factual differences among justice-claimants to goals other than equality, also approved by law. Second, as seen a moment ago, equality may mean not only uniformity of rule, but, *inter alia*, equality of factual outcome after applying *discriminating* rules. And nothing in the notion of equality itself tells us when each of these rather contradictory meanings is the appropriate one for doing justice in the given case.

Let me now illustrate the point I have just made by reminding you that it has not been possible to apply even the equal protection of the laws clause of the American Constitution merely in terms of the ideal of equality until a choice has been made between the rather contradictory versions of the meaning of equality just mentioned. As Ronald Dworkin has well observed, that clause makes the concept of equality a test of State action, but *it does not stipulate any particular conception of that concept.* In this light it ceases to be surprising that Dworkin's own valiant effort to explain how De Funis's or Bakke's exclusion in favour of a less

intellectually qualified black ended in the conclusion that unequal treatment will be justified as long as the victim still is "treated as an equal". He is concerned here to assert (on grounds far from self-evident) a distinction between "treatment as an equal" and "equal treatment", and that the "right to treatment as an equal" is fundamental, and "the right to equal treatment" merely "derivative" from it.

This distinction begs the question which of the possible references of "equal" protection examined above is the predominant one, though (as just seen) Dworkin himself recognises the choice to be open under the equal protection clause. Moreover, the very right to "equal treatment" which he is at pains to derive from his Kant-like axiom about "treatment as an equal", has itself at least two potentially conflicting meanings. The meaning Dworkin assumes is that "equal treatment" means equal distribution under a uniform rule. But "equal treatment" can also mean, as just seen, treatment by a differentiating rule which results in a greater residual equality between the persons concerned. And resort to this latter meaning would succour the minority claims in *De Funis* and *Bakke* situations, without even any need to resort to Dworkin's vague notion of "treatment as an equal", here in question. In the Welfare State, this second kind of residual greater equality produced by deliberately discriminatory rules is an everyday phenomenon. But, of course, for Dworkin to have relied on *this* meaning of "equal treatment" (rather than on the overriding primacy of "treatment as an equal") would still require him to give good reasons for choosing it. And those reasons could *not* be in *terms of equality*. They would have to involve *other* justice-related values.

This intellectual impasse in the outcomes of equality as a criterion of justice has climaxed for the moment in the confrontation of whites and blacks in *Regents of the University of California v. Bakke*. No doubt the impasse may seem to have been avoided in the

past by a presumption, analogous to that mentioned in Section III above, that equality prevails until this presumption is rebutted, with the implicit addendum that "equality" means equality *by virtue of general application of a uniform rule*. The courts have a better basis for this presumption, namely, the equal protection constitutional precept, than do the philosophers; but their preference of the uniform rule version of equality rather than other versions available, is no less question-begging.

Amid the doubts and controversies surrounding the Supreme Court's decision, its outcome rings clear in support of the present position. Even when the Court is applying the constitutional precept of the equal protection clause, still, at the critical watersheds of judgment, it is not equality but some wider notion such as "justice", or "policy" or the removal of "oppression", or "arbitrariness" or "invidiousness" which is decisive. The five judges who constitute the majority which held that the Supreme Court of California erred in prohibiting the University from establishing race-conscious programs in the future, consisted of Justice Powell (who announced the judgment of the Court), and Justices Brennan, White, Marshall and Blackmun who concurred on this issue in a single joint opinion ("the Brennan Four"). Justice Powell and the Brennan Four, all proceeded on the basis that the prohibition of section 601 of the Civil Rights Act of 1964 was coterminous as to race discrimination with the equal protection clause.

How did the five latter judges draw from the equal protection clause their view that the use of race as a criterion is not prohibited in "benign" discrimination remedying disadvantages of members of a group resulting from past unlawful discrimination?

For Justice Powell the decisive point was that the benign discriminatory provision must be shown to be necessary for protecting a substantial and constitutionally permissible purpose or interest of the state. Since what was to be justified in the *Bakke* case was the *departure* from equality involved in benign discrimination, his justifying "purpose" or "interest" could not be the attainment

of equality in that same sense. At nearest, it might be the approximation to that condition - *i.e.*, in this case, to a percentage of minority entrants proportionate to that of the minority in the general population. But this was precisely the purpose which Powell denied ever to be permissible. There were other purposes than percentage representation offered by the University of California in *Bakke* which Justice Powell *did* regard as permissible. These were (1) to ameliorate "the disabling effects of identified discrimination"; (2) to improve delivery of minority health services; and (3) to diversify the student body so as to produce a robust exchange of ideas, speculation, experiment and creativity. Since the values which these represent cannot be contained within a mere norm of equality, some value other than equality was finally decisive for this judge.

The same may be said of the assertion by the Brennan Four that "our cases have always implied that an 'overriding statutory purpose' could be found that would justify racial classification". Unless this "overriding purpose" refers to values other than equality, why should it be said to be "overriding"? And their more favourable attitude towards "affirmative action" clearly indicates that at least the same "important political objectives" which would satisfy Justice Powell would also satisfy them.

Can it be said to rebut this that the Brennan Four (disagreeing in this respect with Justice Powell) held that even the fixing of numerical quotas proportionate to population was a permissible remedial measure against effects of past discrimination? Could it be said that in approving quotas the "overriding purpose" was still the achievement of "equality", albeit in a sense of "equality" different from that in title of which Bakke claimed, or which Justice Blackmun called "idealistic equality". Even this in-some-sense of quality-seeking purpose cannot, however, rehabilitate equality as the *decisive* value in play. For, by hypothesis, race-conscious criteria in remedial discriminatory preferences impair the equality of the nonpreferred. So that the confrontation is

between two vindications of "equality". Equality, being on both sides of the argument, cannot decide it as long as its meaning does not shift - as indeed it here does - from equality in the sense of application of a uniform rule, to equality in the sense of application of discriminating rules which (precisely by their discrimination) increase the resultant factual equality. Even if the only critical point is whether one meaning of equality still overrides the other, careful analysis must conclude that this point inself cannot be decided without reference to a value other than equality.

Justice Blackmun's sensitively eloquent separate opinion indeed almost expresses the present thesis. He pointed out that "governmental preference has not been a stranger to our legal life", instancing veterans, handicapped persons, and Indians, quite apart from the constitutionally protected progressive income tax. Further, "in order to treat some persons equally, we have to treat them unequally. We cannot - we dare not - let the equal protection clause perpetrate racial supremacy". The inference seems clear that he was conscious that the equality notion is no more decisive for legitimating preference for victims of the effects of past racial discrimination, than it is for legitimating preference for veterans or handicapped persons or Indians.

Let me add a few words about the theme in Guy Haarscher's peroration, that the problematics of "equality" is unlikely to be solved by some dreamed-of adjustments between certain refined modalities of "equality" and of "liberty" respectively.

Even while Professor Haarscher was writing this, the ink had hardly dried on a most earnest study on *Liberal Equality* (1980), by the able American scholar, Amy Gutmann. The purpose of that book was precisely to show in what senses of the notions of "liberty" and "equality", and in what arenas of social life, these two notions could operate together, so as to realise "equality" in "the liberal state".

Certainly, this is the most impressive recent attempt to make sense of the notions of "equality" and "liberty" taken together. It may indeed be the most impressive attempt ever made, even though, as Gutmann's footnotes and bibliography show, the relevant works on this "single" problem include more than 500 books and major articles. This spate of discussions is not really surprising, in view of the range of versions of each notion and of the fact that *their* mutual contrasts, conflicts and complementations bear deeply on almost every aspect of individual, social, economic and political life.

Of course, the fact that resort to these symbols of "equality" and "liberty" has become - especially since the slogans of the French and American and Soviet revolutions - an habitual way of talking about individual, social, economic or political problems, does not prove that it is the best way - or even a very good way - of talking about them. Nor does it even prove that it is an adequate way of talking about them.

It does establish that legal, social and political theorists, as also philosophers, as well as politicians, many jurisprudents, and perhaps even many ordinary people, like to discuss their problems in these terms. But, of course, the reason for this liking may have no functional relation whatsoever to the contribution of discussion in these terms to the solution of their problems.

Most discussants are probably of course hoping for such a contribution. But as to some of them, even this cannot be taken for granted. All of these discussants indeed (perhaps with the exception of those I have called ordinary people) may often have a vested interest (of which they may or may not be conscious) in *not* solving any problems, and certainly in *not* solving *all* the problems.

How, for example, would later philosophers maintain their audiences and readers - or for that matter their means of livelihood - if the problems which engage them from generation to generation were ever fully clarified? And this question has its rhetorical point also for legal philosophers or jurisprudents, as for social

and political philosophers.

All this is by way of introduction to Gutmann's *Liberal Equality*, not by way of derogatory dismissal.

For what she is proposing (pp. 1-18) is that we sufficiently clarify what we mean respectively by "equality" and "liberty" to enable us to explore and test and delimit the inadequacies of each of these as a criterion of justice for the good society we seek to create. An incidental goal is to consider, at the point when these two criteria give conflicting indications, which criterion is to be preferred, and to what extent, over what area of human life. (She does herself less than justice - at the outset - by exposing her personal conviction that - "the liberal theory has a greater egalitarian potential than has generally been recognised...and that that potential is compatible with the desire to safeguard and expand individual liberty".)

The question-begging by this hypothesis becomes, nevertheless, alarming in the light of Gutmann's immediate specification of the "equality" notion (in relation to "social justice"), as having two uses. The first (in her view) describes people as equal entities - "equality assumptions". (Clarity would advise us here to speak rather of "badges of equal entitlement"). The second use of the notion which Gutmann specifies is to justify a more "equal distribution of goods, etc.", and she proceeds (as if it is all self-explanatory) to describe this use as "egalitarian". She presumably means by this that this use of "equal" recommends a more equal distribution than is actually found, of whatever is being distributed

But all this ignores the critical ambivalences of the equality notion which Guy Haarscher has already discussed, namely, between (1) equal entitlement under a uniform rule (sometimes called abstract equality), and (2) greater resullant equality after the operation of a discriminating rule on the prior conditions of relative inequality (or disadvantage), sometimes called "concrete" or "real" equality. It is true that we should attempt, as Gutmann does, to find some

meanings of equality and liberty which will allow these criteria to stand together. Yet to ignore the self-contradictory references within the equality notion itself as she at this and other points appears to, is to invite insoluble confusions on the main issues she is attempting to approach. And the difficulties are compounded by her apparent belief that "egalitarianism" is in some way a *substitute* for the judgment of justice. Had she achieved a thoroughgoing recognition of the final dependence of equality criteria on other justice criteria, rather than vice versa, she might have written a very different book.

Amy Gutmann admits that "the descriptive definitions (of egalitarianism) leave unspecified the criteria of distribution" (p. 2). She specifies "material goods", "treatment", "satisfactions", "participatory opportunities" as if these represent a range of criteria, though it is strange to think of these as "criteria" (as distinct from kinds of benefits or advantages in the distribution of which equality is to be sought). But she proceeds immediately to hint at the more important truth that it is not equality as such, but rather "appropriate or relevant criteria" (or, in our term, the "badges of entitlement" of these distributees) which designates whether equality or inequality (and what degree of inequality) is to apply among them. At moments, indeed, she even seems to acknowledge outright that she is hoping to reply to questions of justice by replacing justice with some precisely defined modality of "egalitarianism". What else can she mean by saying: "Our use of the terms 'egalitarian' and 'just' will therefore overlap; because we shall consider egalitarian only those principles which would create a more equal distribution of goods based upon appropriate (or relevant) critera" (p. 2)? I leave all this to your pondering!
