THE PRINCIPLE OF EQUALITY AS A HEURISTIC DEVICE

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I.

[I am not sure why the organising committee put me on the schedule as the last speaker today, but I am afraid that it is because I am a philosopher and not a lawyer, and lawyers usually suppose that philosophers are able to speak some final words of wisdom. That is a mistake. Philosophers generally try to conceal their ignorance of legal matters by asking questions which have the tendency to obscure rather than to clarify matters. I am no exception to this rule, so I warn you: if you stay listening to me, you might go home in a rather confused state of mind, which can only be avoided by not taking me too seriously.]

In the vast philosophical and legal literature on the principle of equality, two conflicting views recur as to the status of this principle. The first holds the principle of equality to be an empty tautological statement, the second asserts it to be the expression of one of the most fundamental values of democratic society. I think that although both are defensible views, there is no need, indeed no reason, to oppose them to one another and I will finally attempt to bridge the supposed gap by an alternative account of the principle of equality.

But let me first sketch the two conflicting views. According to legal positivists such as Hans Kelsen, the principle that alike cases should be treated alike and unalike cases should be treated unalike, is nothing but an empty formula. Kelsen maintains the view, and it is repeated by many others after him, that the principle merely expresses that if a rule is to be counted as a rule, it should be applied equally to the cases and persons, determined by the legislator to fall within one and the same category. In this view, the principle of equality itself cannot decide which cases should fall within the same categories. The principle is considered to be empty, since it does not give us any criteria in order to decide which cases are alike and which are unalike. The principle of equality, therefore, might be compatible with the grossest injustices and inequalities.

Now we might say that Kelsen is slightly exaggerating here. It may be true that the principle itself does not furnish us with any criteria about what is to be classified as alike or unalike, but the very fact that the principle urges to

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2In Kelsen's words: 'All it means is that the machinery of the law should make no distinctions which are not already made by the law to be applied. If the law grants political rights to men only, not women,(.) then the principle of equality before the law is fully upheld if in concrete cases the judicial authorities decide that a woman (.) has no political rights. The principle has scarcely anything to do with equality any longer. It merely states that the law should be applied as is meant to be applied'. Kelsen, H., 'What is Justice?' in: H. Kelsen, Essays in Legal and Moral Philosophy, ed. Ota Weinberger, Reidel, Dordrecht, 1973 (orig. 1953), pp. 1-26.
apply legal categories in a consistent manner is not without any significance.\(^3\) The principle, even in this formal form, contributes to a degree of certainty and predictability, which is a necessary prerequisite for any social order. Apart from that, the principle of equality, even in this formal form, requires the legislator to adduce at least some justificatory reasons for its classifications and again, this is an advantage compared to arbitrary rule.

But generally speaking, it remains true that although these advantages may have some moral significance, they don't ensure a legal order which is just or which tends to equality. Certainty and predictability may be necessary conditions for social order, they are not sufficient conditions for a good social order. And as for the justificatory reasons which are required, these might not be justifiable at all. In this sense Kelsen is right. The principle itself does not provide criteria as to which classifications are to be counted as just.

In fact, these shortcomings of the principle of equality are presumably also felt by the Dutch legislator who deemed it wise, in 1983, to supplement the principle of equality with a general prohibition of discrimination. After having stated that all should be treated alike in alike cases, the legislator added: "discrimination on the ground of religion, convictions about life, political opinion, race, sex or any other ground, is not allowed". One might question the prudence of inserting a prohibition right at the first amendment of the constitution, but that is not my point here. The interesting thing is, that the legislator himself clearly expresses the need for an additional formula in order to render the article less empty or 'formal', and more 'substantial'. Although we are still left in the dark on the question which criteria for differentiation are relevant or required, we now know which criteria are not allowed.

Or so it is thought. The question remains whether the addition really renders the principle less empty. Some commentators think it does. They point out that the principle puts some extra constraints on the freedom of legislators. If the legislator differentiates on grounds such as gender, race or religion, it can only do so by adducing very weighty and important reasons. The clause is therefore believed to narrow down the scope of the legislator and to widen the scope of the judiciary, enabling judges to apply a more scrutinious test of the justificatory reasons adduced in favor of differentiations based on these suspect grounds.\(^4\)

Against this point of view it can be argued that the vagueness of the non-discrimination clause, especially the later addition of 'on any other ground' undermines this aim. The non-discrimination clause seems to render all kinds of differentiation suspect, which would turn it into an unworkable, and therefore futile principle. But there is another reason to doubt whether these commentators are right in believing that the clause enables the judiciary to apply stricter tests of justificatory reasons than they would have had without the non-discrimination clause.

The Dutch Act of equal treatment of men and women, for instance,

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clearly diminishes the scope of the non-discrimination clause by pointing out that preferential treatment is allowed 'if it aims at putting women in a privileged position in order to remove or to diminish factual inequalities and if the differentiation is reasonably proportional to its intended aim'. Preferential treatment seems to be a clear case of discrimination on the ground of gender, so one might suppose the judiciary to apply scrutinious tests as to whether the underlying aims are justified, as well as to the question whether the measures are proportional to these intended purposes. In fact, this is not the case: commentators have complained that both the legislature and the judiciary have been remarkably lax, taking underrepresentation of women in certain areas as sufficient reason for preferential treatment, and neglecting to look at the question of proportionality. If the non-discrimination clause calls for greater scrutiny, its call seems to remain unheard in cases of preferential treatment.

The conclusion seems to be justified that Kelsen is right. The principle of equality by itself cannot tell us in what respects we may or may not treat cases alike or unalike. Even if we extend the principle of equality to encompass a general prohibition of discrimination, which declares certain grounds as suspect, it is always possible to find 'higher reasons' or 'more important aims' which justify departures from the non-discrimination clause and which override the formal principle of equality even in its extended form.

II.

Now you may object to all this that in the case of preferential treatment, the higher aim overriding the principle of equality is equality itself. The Act of equal treatment aims at removing or diminishing factual inequalities between men and women. It is therefore in the name of equality and consistent with the principle of equality that the principle of equality and non-discrimination is overridden.

This argument is inspired by the second view of the principle of equality which I discerned at the beginning of my speech. Unlike Kelsen who regards the principle as a purely formal statement, the adherents of this view maintain that the principle of equality expresses one of the most fundamental values of society. The traditional formula that alike cases should be treated alike and unalike cases unalike is taken here as no more than a starting-point. According to this view, the formal principle should be stretched and extended beyond its formal boundaries, ensuring not only legal but also social and economic equality.

It is advocated by several writers, that in order to extend the formal principle of equality, it should be read and interpreted in the light of what is called 'material' or 'substantial' equality; i.e. social and economic equality as opposed to merely legal or political equality. And it is maintained that this can be achieved by making the most of the second part of the traditional formula, which states that unalike cases are to be treated unalike.

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6 See Loenen, T, Verschil in gelijkheid: De conceptualisering van het
It is not immediately clear why this may be a helpful suggestion. The second part of the formula gives us, no more than the first part of the formula, any clue as to how to decide which cases should be counted as unalike. The formality of the principle cannot be avoided by stressing the negative counterpart of the formula.

However, the idea behind this suggestion is that it reverses the burden of proof. In its formal form, the principle of equality presumes equal treatment unless some justificatory reason is given for unequal treatment. It is differential treatment, and not equal treatment, which should be justified. This state of affairs is now reversed. By stressing the importance of the requirement that unalike cases should be treated unalike, the presumption is no longer that unequal treatment should be accounted for, but that equal treatment should be justified by some weighty reasons. We should treat unalike cases unalike, unless weighty justificatory reasons are adduced to do otherwise. In other words: the presumption of equality has turned here into the presumption of difference.

Some advocates of this approach justify this reversal by a critique of the traditional presumption of equality. It would only serve the dominant parties to conceal or to mask the underlying differences of power. Since equality is here taken as sameness and since sameness is identified with conformity to the dominant culture, it is maintained that we should turn the principle of equality into a principle of difference.

This approach may have some practical advantages. It can be argued, for instance, that preferential treatment is, strictly speaking, not preferential treatment at all, but simply a correct application of the formal principle that unalike cases should be treated unalike. But the theoretical price of these advantages is, I think, rather high. If one consistently reads the principle of equality as a principle of difference, we may arrive at a more substantial form of equality, but sacrifice the advantages of the formal principle of equality.

One of the main functions of the principle in its classical form is, as far as I can see, that it guides the search for analogy. In order to solve new cases, one looks for similarities with older and better-known cases. Can electricity be regarded a good? Can email be compared to ordinary mail? Can software be classified as intellectual property? In order to solve new cases, the law is always looking back. Underlying the principle of equality in its classical form is the need to make law consistent with its past. In order to do so, not differences but similarities are important. The proposal to turn the principle of equality into a principle of difference obviously fails to meet these requirements. The search for inequalities rather than equalities cannot possibly bring us any further to the ideals of order, regularity and certainty.

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One might object to all this that this is a price we should be willing to pay in order to further social and economic equality. But I doubt whether such a substantial form of equality can be achieved in this way. For even if we accept the principle of difference as a worthy successor of the principle of equality, we still seem to be haunted by the problem that we have no criteria to decide which cases should be classified as alike or unalike.

Those who advocate differential rather than equal treatment seem to resolve that question by suggesting that empirical research should supply an answer: factual inequalities should be taken into account in order to classify cases as unalike. It is said that if the result of equal treatment amounts to factual inequalities, the cases were apparently not alike but unalike: in that case, differential treatment is called for. Here again, the classical principle is extended by changing the formula itself. Alike and unalike cases are not taken to be categories defined by the legislator but as empirical statements about social and economic inequalities. If women are underrepresented at senior university jobs, they should be treated as ‘unalike’ to men.

I don’t think that this is a promising strategy. The first rather obvious difficulty is how we should understand the term ‘factual inequalities’. In order to assess what should be counted as factual equalities or inequalities, one needs to adopt a perspective. From one perspective there may exist inequalities which disappear when viewed from another perspective. Secondly, there has to be consensus about which factual inequalities are taken to be relevant. Should, for instance, the shorter life expectancy of men be considered an empirical fact to be taken into account in assessing factual inequalities, leading to a proposal to an early retirement scheme for men? In short: empirical research can only be conducted on the basis of theoretical and normative suppositions. The debate concerning these theoretical and normative assumptions is hidden from our view if we ask legislators and judges to accept blindly a set of empirical data as the basis for a more substantial principle of equality.

But this proposal to ground legal classifications on factual inequalities not only leads to unwarranted scientific positivism; it also seems to achieve the opposite from what was intended. It threatens to turn the principle of equality not into a more substantial but into an even emptier principle. This can be seen by returning once again to the search for analogy which is conducted on the basis of the principle of equality. If lawyers decide to classify electricity as a good or software as intellectual property, it is not just because lawyers are a conservative lot, who try to avoid the chaos of a new world by squeezing it into old categories. The search for analogy is at the same time a search for justificatory reasons. The principle of equality not merely asks the legislator to define whether a certain case is similar to another, but also asks for reasons which justify these legal classifications. The question whether these modern and fast rollerskates are to be classified as vehicles is, taken in itself, quite irrelevant. It is only when rollerskaters threaten to bump against innocent

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11. This point is raised by Minow, M., Making all the difference: Inclusion, exclusion and American law, Ithaca, London, 1990.
pedestrians in the park, that people start pondering about the possibility to classify them as vehicles, in order to prohibit them in areas such as parks. It is no good then to examine the factual similarities (that they have wheels) or differences (that rollerskates are not self-propelled). What is interesting here are the reasons one might adduce for classifying them in the same category, such as public safety.

The same applies to persons. Just as it is irrelevant to draw a list of similarities and differences between software and books, it is irrelevant to mention all the attributes different groups of persons may have in common or not. If the principle of equality would only require us to draw up such lists, it would be reduced to an absurdity. One of the useful functions of the principle of equality is, as far as I can see, that it forces us to reflect about the reasons why in a particular case items or persons can be classified as alike or unalike.

I readily avow that empirical data concerning the results of equal or unequal treatment should form a part of that justification. In this limited sense, empirical research always does form a part of legal argument. If a prohibition of prostitution amounts to a higher rate of rape, this might well be a reason to reconsider the prohibition. But that does not imply that legal definitions of alike and unalike should be entirely based on factual equalities and inequalities. This proposal is in fact an attempt to define away the complex and interesting issues that may arise and to abandon the search for justificatory reasons. This attempt to render the principle of equality less formal and more substantial risks, therefore, to achieve the opposite of what is intended: the substantial issues are redefined in formal categories which conceal the underlying dilemmas.

III.

I said that it is one of the most important functions of the principle of equality that it urges us to look for justificatory reasons. Now you may object that this may be true for rollerskates and vehicles but not for men and women or blacks and whites or, for that matter, protestants and catholics. It may be maintained that there is only one justificatory reason here that really counts, and that is the ultimate aim of equality: Equality with a capital E, which should be distinguished from the kind of equality with a small e which pertains to rollerskates and vehicles. In the latter case, the kind of equality which is established is completely dependent upon the higher aim which is served by such equality: rollerskates do not have an inner dignity which resists itself against being classified as vehicles (althoug rollerskaters might object being treated as cardrivers). Or to put it in other words: the counterargument might run that whereas the equality between rollerskates and vehicles is constituted by various justificatory reasons (such as public safety), the equality of men and women qua persons is morally prior to other justificatory considerations and should always override these other considerations. One might argue that there is no need to conduct a debate on the choice between various justificatory aims; since only one such aim, material or substantial equality, can serve as a valid justification for the classification of persons.

I think this view is problematic. The first problem is that the argument rests upon metaphysical or religious suppositions which are not widely shared. It may well be that we are all equal in the eye of God, who endowed us equally with an immortal soul, but that can hardly be a reason for secularized societies to elevate Equality above all other goals and values.
The second problem is that even if we accept some metaphysical foundations for equality, that does not mean that there aren't many considerations which can be regarded as equally or even more important than Equality, even if spelled with a capital E. In order to see that, it may be worthwhile to remind you that many rights cannot be converted or translated in terms of equality. It is true that one says that every person has an equal right to free speech, or to work, but one may wonder whether the term 'equal' here has any special significance. Is there any difference between the statement 'all persons have an equal right to free speech' and the statement 'all persons have a right to free speech'? All that the insertion 'equal' amounts to here, is that it asserts the right to free speech to be a universal right. But that notion is already included in the term 'all persons'. I shall not trouble you with the complexity of the philosophical debate concerning the relationship between rights and equality, but merely assert here that one of its main problems is the apparent impossibility to translate rights into terms of equality.

In fact, one can even assert that talking in terms of equality falsely suggests a symmetry which is not there. A good example in point is the example I just mentioned, the forms of preferential treatment which are allowed by the Dutch Act of equal treatment. I said that both the legislator and judges have been remarkably lax in examining the grounds for preferential treatment, although it conflicts with the constitutional prohibition of discrimination. In fact, this behaviour is only remarkable if you adopt a strictly egalitarian view. The reason why judges are less scrutinious in their examination of this kind of discrimination, as opposed to other forms of discrimination, is that other values play an important role, such as women's rights, or integration of women in the labour-market.

That means that in order to assess relevant aspects of equality one should always refer to rights people have. We want to be equal in the enjoyment of goods, nobody wants to be equal in suffering ills. Therefore, an assessment of what is to count as 'goods' or 'ills' necessarily precedes an analysis of equality. So the claim that equality with the small e with respect to persons should exclusively orient itself on Equality with a capital E, disregarding any other justificatory aim, is at least inconsistent.

IV.

So we have two conflicting views on the principle of equality. The first, formal view, sees it as an empty shell which can be filled up with any substance whatsoever, depending on the aims and goals of the legislator. The second sees it as a precursor of Equality with a capital E, or 'equality proper' as it has been named, as a not yet perfected form of the ideal of substantial equality to

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13 Although it might be possible to go the other way round and to translate equality in terms of rights. See Westen, op.cit. and Raz, op.cit.

14 See Westen, op.cit.

strive after. I think that both interpretations are misleading, because both try to squeeze the principle in a means-ends relationship which distorts rather than clarifies the nature of the principle of equality. The first formal view sees the principle as a value-neutral instrument for implementing any goal or policy legislators decide upon. The second approach regards the principle not as a means, but as the expression of an aim, as an 'end-in-itself', to use Kantian terminology.

That the principle can hardly be seen as an instrument is easy to see if we think of the goals that are traditionally said to be served by the principle of equality: certainty and predictability. Can we really say that the principle of equality is a 'means' to achieve the aim of certainty? No, we cannot. The principle is not a means to that goal, but it is a form of predictability and certainty. And the same applies to other legal principles. The principle of nemo tenetur does not serve as a means to ensure the rights of the defendant; it is in itself the lively embodiment of these rights. Neither predictability nor defendants' rights can be isolated as ideals or goals which stand apart from these legal principles.

But in the formal view of the principle of equality, the principle is not only thought to be instrumental for internal goals such as certainty, it is also regarded as a means in order to implement external goals or policies the legislator comes up with, including downright racist policies. I doubt whether this is the case. Already Radbruch noted that Nazi legislation violated the principle of equality by making a difference between murdering Jews and murdering Nazi-officials. But since World War II the development of the principle of equality is such that today it is even less possible to regard it as a value-neutral instrument. I noted already that appeals on the principle of equality force us to consider and reconsider the various justificatory reasons for classifying cases as alike or unalike. This constant search for justificatory reasons and the ensuing debate on which reasons should count as good reasons, contribute to an ever refining network of distinctions. Distinctions in kinds of classifications, in kinds of discrimination, and also in the degree of scrutiny required in order to evaluate existing classifications, such as the 'rational basis test', the 'strict scrutiny test' and all the intermediate forms that have been developed over the years. This development drastically limits the possibilities of using the principle as a value-free instrument for any policy whatsoever.

The fact that we cannot regard the principle of equality as an instrument does not, however, suggest that we should start from the opposite end and to regard it as the expression of a goal or as an end-in-itself. As I noted earlier, the proposal to read the principle of equality as a principle urging us to remove factual socio-economic inequalities actually proclaims the ideal of equality proper as the aim which should override all other justificatory aims. It thereby blocks a discussion concerning these other justificatory aims as well as to how equality proper relates to these other aims. An apriori definition of what should count as the substance of the principle effectively undermines the potential of the principle to launch and to develop discussions about what this substance should consist in. Just as it would be absurd to proclaim beforehand that public safety should be the only justificatory reason for the classification of things, it is absurd to proclaim socio-economic equality as the only justificatory reason for the classification of persons. It is one such reason, and an important one, but I think it should weighed against other important values and ideals. For the same
reason as the principle of equality cannot be seen as a value-free instrument, we should refrain from attributing prematurely only one fixed goal as the 'proper' subject of the principle.

Rather than regarding the principle of equality as either means or end, I would therefore propose to regard the principle as a heuristic device. It is a way to find arguments, a vantage-point (topos), from which the various conflicting justifications can be assessed. The principle is not an empty shell, because it generates reasons and arguments that could not have been found without the principle. Neither is the principle an expression of just one overriding aim, but a way to develop and to assess various and conflicting aims. The development of the principle of equality over the years has shown that the principle has acquired a dynamism of its own. It is not only a means to solve problems, but generates new problems as well. Or it generates answers to problems which did not exist in the first place. The principle of equality not only meets old needs, but creates new possibilities as well\(^\text{16}\). It is therefore dangerous to fix one or a set of definite goals. Such a strategy would narrow down this wide array of new possibilities and would turn the principle into the empty shell it never was.