PART ONE

II. EQUALITY AND INEQUALITY

1. Introduction

"Discrimination" has a "treatment" element and an "equality" (or "inequality") element. We shall first deal with the equality element; the "treatment" element will be discussed in the next Chapter.

The conceptual relationships between "discrimination" on the one hand and "equality" and "inequality" on the other hand are so close, that an inquiry into the former necessarily entails consideration of the latter. And consideration of the equality principle immediately leads to the perennial problem of justice, because "equality" plays a dominant role in the thinking on justice. We can state what justice is in terms of equality by saying – as has been said so many times before – that justice requires equal treatment of equals. This is the classic formula in its most simple form, from which it follows, as a second part, that justice likewise requires unequal treatment of unequals. This addition implies the notion of proportionality, which underlies the principle of suum cuique tribuere. The formulations may differ one from another, but basically they all amount to something like: "Equal treatment of equals and unequal treatment of unequals in proportion to the inequality." It can safely be asserted that no theory of justice of a principally different nature has ever been able to detract from its influence permanently or to a considerable extent. This is not only true in what

1 That is: "formal" justice, as contrasted with the broader notion of "material" justice, which does not only refer to the mode of distribution of burdens or favours, but rather also to the character of the "just act" as such. "Material" justice thus relates for example to the "just king" who e.g. will punish the guilty and release the innocent. In the following we rely to some extent on our note "Non-Discrimination and Justice" in Archiv für Rechts- und Sozialphilosophie, Vol. LVII (1971), p. 187 ff.

2 In our opinion it cannot be regarded as compliance with a rule that stipulates equal treatment of equals when equal treatment is granted to unequals, no more than when equals are granted unequal treatment.
could be called the "Western" (European) ideology; it needs hardly be argued that in societies with an ideology based on a Marxist social philosophy "equality" has an even more crucial function. And the ideal of justice as the equality of all human beings has no less appeal in what is sometimes referred to as the "third world." It is quite remarkable that the idea of equality as an important element, or even as the essential element of justice, could not only remain unchanged and nearly unchallenged for more than twenty centuries, but that it seems even more influential now than it ever was.

To explain the remarkable general and widespread acceptance of this idea we must emphasize the both ambiguous and formal nature of the formula.

By insisting upon the ambiguity of the formula we want to stress the fact that the requirement of equal treatment is always supplemented by that of unequal treatment if the unequalness of the case is recognized. This dual character of equality is already explicit in its Aristotelian fashion. A learned student of Aristotle's concept of justice expressed this duality in a clear and pregnant way:

"Das, warum es letzten Endes geht ist die Unterscheidung einer Gleichheit in Ansehung oder ohne Ansehung der Person, also symbolisch gesprochen einer iustitia ohne oder mit der Binde vor den Augen. Und das ist der Grund, weshalb sich die Gleichheit aufspaltet, und zwar in einfache Gleichheit — ισοτέτα — und verhältnismässige Gleichheit — διαλογικά —; Gleichheit bedeutet einmal: jedem das Gleiche, einmal: jedem das Seine." 6

We use the word "formal" here in order to indicate that obviously equality in itself cannot determine the nature of the treatment in question. It seems to us that it is precisely because of this dual character and formality that the principle of equality is still alive, and that it was able to survive twenty centuries of political philosophy.


4 Compare for example the recent "Lusaka Manifesto", proclaimed at the Fifth Summit Conference of East and Central African States, held in Lusaka, Zambia, in April 1969, in the second paragraph of which it is said that "by this Manifesto we wish to make clear, beyond all shadow of doubt, our acceptance of the belief that all men are equal, and have equal rights to human dignity and respect, regardless of colour, race, religion of sex." Text in *Objective: Justice*, Vol. I, no. 1 (U.N. Office of Public Information, New York 1969, p. 20 ff.).

5 See the *Nicomachean Ethics*, Book Five, Ch. 2–8.