EQUALITY AND INEQUALITY — THE LAW'S AMBIVALENCE

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I

When an idea's time has arrived and institutions or persons stand adamant, then innovations may occur. Thus, for example, England went through its Glorious Revolution in the seventeenth century; the United States and France followed in the eighteenth while Russia had its in the early twentieth; and in the past three decades we have witnessed and are still witnessing a variety of upheavals. Counter-revolutions also occur, as witness those in Russia, in Africa, in South America, and elsewhere, and we must not overlook those ideological-political counter-revolutions *sans* force as occurred, for example, in the United States when its present Constitution was adopted in the eighteenth century. The point is, however, that when the mass of people is convinced, rightly or wrongly, that there is a wave, then governments must ride it or be submerged by it.

So it is with the idea of equality, one of the most pervasive and dominating concepts in this or any earlier century. Perhaps we should speak of the idea of inequality, for there has never been equality on this earth — that is, equality as we ordinarily think of it. For if we mean by equality a kind of equal sharing in everything, but especially in the wealth of our productive processes, then man has never seen this occur. Plato and Aristotle felt that an arithmetical equality might exist in, say, measurements, or numbers, that is, quantitative terms as such, but ordinarily not otherwise.

The Platonic view is that we must usually, if not always, speak of what he termed classificatory equality. What he meant by this was an equality among equals, but since there are many levels or differences among persons then it is really equality within a class, high or low, of which we could speak. In other words, there may be the slave and the freeman, the rich and the poor, the farmer and the mechanic; and even within these classifications there may be sub-classifications, *e.g.*, the rich may be divided into the extremely rich and the middle class, and this latter may further include the upper, middle middle, or lower middle classes. Perhaps

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the logic of Aristotle might here be utilized to speak of the rich and the non-rich, with the non-rich in turn so further subdivided.

Regardless of these details, the idea of equality espoused by Plato (and Aristotle) rejected it as an absolute inter-class, but required it intra-class. Differences (classifications) were to be drawn on a variety of bases, *e.g.*, while men and women were all human beings there did exist physical differences and functions. Because of these latter, Plato found women universally relegated to an inferior status *vis-a-vis* men; he refused to accept this and rebelled. Plato conceded woman's inferiority in strength, but his analogy to the wild dogs indicated that women should ordinarily be treated on a basis of absolute equality save for those instances or situations required by differences in their respective physical or biological needs, for example, face-to-face combat (as then practised). In this Plato was ahead of his time.

As a matter of history, Plato's classificatory equality has been followed by the philosophers, political theorists, economists, sociologists, and later the biologists and other natural scientists, into the present century. For example, Max Weber might disagree with Karl Marx's stress on the economic factor as a (determining) base for social and political inequalities, but, nevertheless, he utilized a similar tripartite formulation for his own forms of inequality, although observing the interconnectedness among them and the way in which people thought of them. As against such acceptance of Plato's approach, here and there a voice arose as in the wilderness, but there was little heed paid. It was God's will, or 'natural', depending on one's approach to life on earth, and the view is decreasingly found even today, *e.g.*, the rulers in the Near East, and the Princes in the Far East, claim a divinity from their respective Prophets (as did earlier Kings) which sets them apart from all men and makes them unique (save when they meet, when their class is then composed of equals). Or in times of war, classificatory equality belonged to him who commanded the strongest forces, for example, the Roman enslavement of their adversaries, William the Conqueror and his aftermath.

One can search throughout the world today for any nation which does not permit, even require, an élite of some sort. Any of the so-called socialist countries may prate equality, but, according to their gospel, this is in the future. Marx, but especially Lenin, wrote of, and the latter practised, the subsequent rule by a determined minority until the bourgeoisie had capitulated in fact as well as in form — subsequent, that is, to the overthrow of the existing government, its replacement during the interregnum by the new, albeit temporary, élite, until ultimately the classless society appeared. Even Sir Thomas More could not fashion a better Utopia than the one fashioned by the 'scientific' socialism of Karl Marx. But it may

also be noted that none of the utopias envisaged by the nineteenth and twentieth century prophets rejected the practice of some sort of classificatory equality although spouting the idea of (absolute) equality philosophically, politically, and otherwise.

The early eighteenth century utopian view of equality did have some effect upon history. Not only did the ordinary person now envisage a future of plenty but, for example, John Stuart Mill was sufficiently influenced to write that while production had to follow natural laws, distribution was controlled by man-made laws. True, but not completely. For distribution, as practiced during the past two hundred years, has followed Adam Smith's admonition against conspiracies when two or more entrepreneurs come together; monopolies through oligopolies have controlled the markets; and conglomerates and multinational corporations are today the economic, if not the political, equal or superior of many nations.

Regardless, man has never practised distributive equality in this economic sense although endorsing a minimum standard of living in principle — and even this minimum has varied throughout the globe, has seldom if ever been met, and is still an utopian goal, expressed by Marx as from each according to his ability, to each according to his needs. Logically, however, even this goal carries within itself a confession of difference, distinction, and delusion; or, simply put, of classificatory equality. What is also found in practice, as well as in logic, is not only a world in which social and class inequality has always existed, but one in which economic inequality has never been reduced, and governmental efforts therefore have not only been frustrated but have even been ineffective to prevent a widening of the gap.[1]

II

Without otherwise going into the details of its course through history, the idea of (absolute) equality has never been found in human affairs although many, like Babeuf, gave their lives to its dream. Even the seventeenth century Levellers fought a losing struggle against the entrenched ideas and practices of their forebears. Whether or not civilization — at least Western civilization — is not conducive to the effectuation of the idea is an open question. It may be ventured that in the aboriginal cultures of which we know there was (and is) more of equality present in its many facets than in the more advanced cultures of our own civilization. For example, Greece, Rome, and all the roots of democracy were watered by slavery, inequality, and class distinctions. The cultures of the tribes-turned-

[1] For example, the 1968-69 distribution of earned income in Australia to males is disclosed as having the bottom 20 per cent receive only 5 per cent of the total gross income, while the top 1 per cent received nearly 8 per cent.

nations disclose Europe (and England) becoming a hotbed of inequality erupting with revolutions in each century, and continually spouting equality while always practising inequality, even during the revolutions.

Capitalism, which may or may not be a term of meaning, has conduced, it is said, to more misery than any other political-economic system. Perhaps — but it cannot be denied that inherent in the structure of capitalism is a form of equality, that is the equality of the foot-race become rat-race. It is inconceivable that a theoretically 'pure [perfect] competition' system will ever be or become equal. In theory all start equal, but then changes occur. In a footrace there is a common mark from which all start; when the gun sounds then the race is to the swiftest. Or, put differently, in fields other than the physical, the race is to the cleverest, to him with merit, to her with talent, and so forth. In education, for example, we dote on merit; a university run on a purely pass-fail basis would be unthinkable. So we have honours programmes, achievement awards, *etc.*, perhaps to equalize (compensate for?) those in the non-educational areas.

Nevertheless, life goes on with its differences, its classifications, and its inequalities. Every girl, or fellow for that matter, wants to be at least the 'look-equal' of every other girl, but she knows that whatever the stand is to which she aspires she must overcome her own differences. So, too, with station, work, achievement, and whatever else goes into the good life. All seek inequalities *vis-a-vis* all others. Which does not make them different from others, individualists, or successful. Entrepreneurs are seeking for inequalities, with themselves as top dogs; employers and employees seek the same whether in confrontation with each other or at the expense of others (in or out of their ranks), for example, organized labor's higher wages due to their collective economic strength in comparison with the unorganized labourers; lawyers, under an adversary system and mentality, seek for procedural (and substantive) advantages, with the condoned creation of bias (in judge or jury or both) their goal; and governments do not look unkindly at political parties, each of which assumes control when some form or degree of difference (inequality) becomes sufficiently major to convince the electorate.

Even with respect to the electorate there is an elaborate mechanism and ritual which mouths equality but practises inequality. Perhaps an excellent example is found in the United States. There the Supreme Court of the United States recently insisted upon a one-man-one-vote principle under the Equal Protection Clause of the United States Constitution, but permitted the states to retain the age of twenty-one as that of voting majority. Why? Is it for a legislature to determine that eighteen is not the constitutional equal of twenty-one for purposes of voting? Or is this a built-in difference which is 'natural' and therefore makes for inequality when the 18-year old is not permitted to vote? Why did it thereafter take another

High Court decision plus a constitutional amendment to enable 18-year olds to vote in all elections? The 18-year old has always been a 'man', equal to the 21-year old, for purposes of, say war; so, too, he can marry, work, *etc.*, although in many communities in the United States he cannot drink, enter into contracts, or otherwise be treated in all respects as an adult. And even Australian politics is not exempt from these platitudes. For example, in opposing the Electoral Redistribution Bill in the Legislative Council the Opposition Leader argued that it made a vote in the city worth only seven-tenths of a country vote, and concluded: 'Unless the report of the commissioners is rejected, the concept of political equality will once again escape us in Victoria'.[2]

III

This idea of classificatory equality, which to Plato was a Form-Idea and therefore independent of man is thus seen as primarily a man-determined one, although rationalized arguments can be advanced on both sides. For example, one suggestion is that man's nature is such that he cannot accept the homogeneity of equality, that as each man is unique there is inherent in him a spark of difference, and that his individual strivings necessarily tend toward inequality, *i.e.*, classificatory equality. Thus, it is concluded, since man so acts and determines, it is he who makes or alters this type of equality.[3] *Au contraire,* responds the critic, whatever this nature or inherent force is which conditions or impels man, it must be something not a necessary part of him, for it is universal, found in all times and all men, and is therefore akin to, not identical with, a Platonic Form.

Regardless of these strictures, the idea and practice of classificatory equality has been institutionalized in many ways, for example, economically, politically, sociologically, theologically, and legally, to mention but these. It is this last with which I now deal. But we must first understand the meaning of 'equality' somewhat before proceeding further. For example, the terms we use today as terms of opprobrium or praise, in the past have been used in an opposite sense or, in the future may change completely, *e.g.*, liberalism, democracy, conservatism, family (a good illustration in changing meanings in today's cultures). Plato thought of equality in terms of an absolute when he spoke of the arithmetical equality in measurements, but he was unwilling to have such an absolute equality then move over into human areas. He justified this by referring to all other areas of life, for example, animals, and felt that equality in the absolute sense, even though, perhaps, not in the complete degree as with

[2] *The Age,* May 1, 1975, page 13, col. 6.
[3] See, *e.g.*, V. Packard, The Status Seekers (New York: 1959), *passim.*

measurements, could exist only as between equals (or was required or justified only as between equals).

On the broad canvas of history one may discern the schism here created between such unequals, regardless of what the inequality is concerned with. Some have termed these differences 'classes', others have spoken of 'factions',[4] and still others of the 'haves' and the 'have-nots' (in today's international terminology). In the economic, political, and sociological areas these bifurcations have created dissension, opposition, and revolution; in the sphere of the family, where inequality has always been the rule, still, and for the foreseeable future will necessarily remain so, it is impossible for the infant or child to be an equal, but as our society and our culture have advanced into the modern approach, children tend more and more to demand equality in the determination of their own futures, that is, a kind of co-determination (as in Germany's labour relations as well as in England, Australia, and elsewhere). But throughout the centuries the ebb and flow of this overall separatedness has, politically and economically, been reflected in the law. Reflected, but also reflecting, that is, the law does enter into the affairs of man in many aspects and does influence and even somewhat determine conduct, legislation, and the course of government. This interrelationship is found in all nations, in some degree, and sometimes it is exalted into a theoretical and even constitutional equality, but in practice may wind up with a judicial superiority (inequality), as in the United States.

Legal equality in the absolute sense is thus necessarily a chimera, nay, a false premise and promise. The law speaks of equality when it is inequality which it supports and which exists, *e.g.*, the contract relationship, even today, where there is an ordinary interplay of forces. It is only recently that exceptions to this general rule have been judicially formulated, for example, the 'unconscionable contract', or the 'inequality of bargaining power'.[5] So, too, has the consumer become the darling of not only the

[4] James Madison, a signer of the Constitution and later a President of the United States, urged the people of New York State to ratify the document in a series of newspaper essays which, with those of Alexander Hamilton and John Jay, were collected into a volume called 'The Federalist'. Number 10, by Madison, alludes to 'factions' amongst the people, and it was, said Madison, one goal of the new government to control these classes and factional struggles, a goal which should endear the Constitution to the people.

[5] This may be illustrated by three recent cases decided by the House of Lords, *A Schroeder Music Publishing Co. Ltd. v. Macaulay* [1974] 3 All E.R. 616, and the Court of Appeal, Civil Division *Lloyds Bank Ltd. v. Bundy* [1974] 3 All E.R. 757 and *Clifford Davis Management Ltd. v. W.E.A. Records Ltd.* [1975] 1 All E.R. 237 all in 1974.
In the *Lloyds Bank* case Lord Denning MR, first referred to the general rule for 'the vast majority of cases', *i.e.*, that 'No bargain will be upset which is the result of the ordinary interplay of forces', and then gave illustrations and discussions of five exceptions, winding up with the general principle running through them all, namely, "They rest on 'inequality of bargaining power'." [1974] 3 All E.R. 757, 765. A little more than three months later Lord Denning sat in the *Clifford Davis* case

politician but of the judges, even though one may detect a glimmer of counter-concern emerging. And, although not to conclude, every cigarette advertisement or television commercial must include an ominous warning, also found on the packages. Why is this last required? Is it because the individual purchaser has such an inequality of research ability, of knowledge, and the wherewithal to do anything about it, that the government, because its concern is allegedly for the health and welfare of its citizens, must step in to equalize the contract of purchase? Why must a police power be necessary to provide a legal justification for overcoming such an inequality? I suggest that where absolute equality is the goal of society then no justification is required; it is only where classificatory equality is the accepted and institutionalized norm that then inequalities are likewise so accepted and institutionalized, so that any removal requires not only a reason but also a legal justification.

To illustrate this need for a justification of some kind, the impotence of the federal government in Australia to enact legislation against racial discrimination under its police or other powers is highlighted by its need to proceed under a treaty. The analogy is found in the federal ability to enforce legislation and regulations in the field of aviation because of a treaty entered into under S. 51(29) of the Constitution, *i.e.*, giving it jurisdiction over external affairs. The High Court apparently upheld such a power[6] which, in practical effect, indicates a possible method to effectuate the international convention to eliminate racial discrimination.[7]

and rendered the main opinion in which he referred to the earlier case as well as to Schroeder, and now felt that the latter's speeches 'afford support for the principles we endeavoured to state at the end of last term about inequality of bargaining power'. [1975] 1 All E.R. 237, 240.
That *Schroeder* case involved a contract for exclusive services for five years by a young and unknown song-writer with a music publishing company, a standard form being used by the company being signed under which it was held 'bound to do . . . nothing'. At [1974] 3 All E.R. 616, 621 (per Lord Reid). According to Lord Reid a distinction existed generally between contracts 'made freely by parties bargaining on equal terms' or 'moulded under the pressures of negotiation, competition and public opinion' and those which, as here, resulted in 'a one-sided agreement'. Whereas the former type is ordinarily upheld, despite the restrictions upon livelihood it contains, the latter requires good justification, here absent. Lord Diplock referred to the course which the concepts of unconscionable bargains had taken, economically and legally (p.623 per Lord Diplock), also distinguished between the old standard forms of contract and the new, and felt that the latter's 'Take it or leave it' attitude called 'for vigilance on the part of the court to see that' the stronger party did not use its power 'to drive an unconscionable bargain with' the other (p.624 per Lord Diplock).

[6] See *R. v. Burgess, ex parte Henry,* (1936) 55 C.L.R. 608, and *Airlines of New South Wales Pty. Ltd. v. New South Wales* (No. 2), (1965) 113 C.L.R. 54, with several opinions and views canvassed on the particular source of power to uphold the federal legislation, See, for one analysis of the cases, Howard, *Australian Federal Constitutional Law* (2nd ed., 1972), pp.446-60.

[7] The International Convention On the Elimination of All Forms of Racial Discrimination (United Nations), effective January 2, 1969, and referring in its preamble to the Conventions concerning Discrimination in respect of Employment and

Assuming such judicial support, therefore, the federal Racial Discrimination Bill 1974 seeks to prohibit discrimination based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'.[8] However, the Convention and the Bill do not cover all sources of discrimination, and do not attempt to provide equality in all areas, but the judiciary may also enter the arena, *e.g.*, the economic area[9] especially where sex is the basis for unequal treatment.[10]

IV

If, therefore, in place of the absolute equality which the law does not require we utilize classificatory equality as the jumping-off point, then we are confronted by the question, how does the law enter to support this Platonic view? The answer is manifold. We must, however, not overlook the fact that Plato's theoretical *Republic* envisaged a tripartite classification of people, and that (educational) merit determined who was to be a

Occupation adopted by the International Labour Organisation in 1958 and to that against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organisation in 1960, the present Convention being appended in a Schedule to the Racial Discrimination Bill 1974, with Sec. 3(1) of said Bill defining 'Convention' in the proposed Act as meaning that Inernational Convention, and Sec. 7 giving approval to the ratification by Australia of that Convention.
The Racial Discrimination Bill 1974 is being opposed by several of the states on various grounds, including the constitutional inability of the federal government so to proceed despite the Convention (on which see, *e.g.*, note 6, *supra*).

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[8] Racial Discrimination Bill 1974, Sec. 9(1). Subsection (2) incorporates in the terms used in subsection (1)'s reference to 'human right', *etc.*, Art. 5 of the International Convention, that Article listing six divisions setting forth 'the following rights' to which everyone is to be entitled, including 'equality before the law', and those six subdivisions refer to 'equal treatment' in justice, security, political rights, civil rights (giving nine further subdivisions), economic, social and cultural rights (six further subdivisions), and the right of access where the general public uses facilities.

[9] See text and note 5, *supra*.

[10] For example, *Nagle v. Feilden, et al*, [1966] 2 Q.B. 633, involved the denial of licence to a female trainer by the Jockey Club, solely because of her sex, and the court unanimously voted to uphold her appeal against the dismissal of her claim so as to permit her to prove her allegations of discrimination in, and arbitrary and unreasonable consideration of, her application. *Inter alia* the Sex Disqualification (Removal) Act, 1919, was referred to as indicative of the public policy, but was not made the basis for the decision. That basis was that where a monopoly existed (here in granting or refusing a licence) involving one's right to work and earn a livelihood then such arbitrary and capricious refusal to issue a licence solely because of sex constituted an affront to public policy. The case is a limited version, therefore, of a broader right here discussed. See also text and notes 30 ff., *infra*.
On the English Race Relations Act 1968 see, *e.g.*, *Dockers' Labour Club & Institute Ltd. v. Race Relations Board*, [1974] 3 All E.R. 592, unanimously upholding the right of a private workingman's club to exclude blacks and all others, the ground being that the club did not come within 'a section of the public' under Sec. 2(1) of the Act.

philosopher-king; also, that without an acceptance of slavery his beloved city could not exist. In his *Laws* Plato may have accepted the actuality, but in his *Republic* he dreamt the possibility. Finding this aspect of Plato in any nation's laws today is not difficult. I suggest, as earlier indicated, that all nations follow Plato and this is as true of Australia as it is of the United States.

For example, two recent administrative determinations in Australia disclose the ambivalence of the law's application, and the whimsical treatment of sex. In the first situation a 26-year old woman had gone to work while her 29-year old husband stayed home to look after their young son, do the housework and cooking, and also work on their home; her application for unemployment benefits was eventually granted, but only for $31.00 plus $5.50 for the child, whereas if her husband had been the one to receive benefits the total would have come to $56.50. The second situation found the Victorian Minister for Education ordering the Teachers' Tribunal to revise a decision limiting paid maternity and paternity leave to married teachers so as to grant it to all, married or single.[11]

The United States may be used as a good illustration of how nations continue to follow the Platonic view and approach. Insofar as legislation, to be differentiated from judicial (common law) decisions, discloses not only inequalities but also an effort to create equalities, then a few references may be of aid. One of the greatest equalizers of all times is education, and the early compulsory education, and free public education laws in the states disclose this concern; whether or not the desire was equality or the rat-race concept (*i.e.*, starting all off equally and then letting the best rat win) is immaterial, for one of the greatest levellers of all time has been the printing press and the public school.[12] But equality is also found for employees, employers, and those not within the production-distribution circle, for example, throughout Title 29 of the United States Code (dealing with labour laws) one can find examples of laws having to do with wages, hours, conditions of employment, child labour, woman labour, and numerous other state-aid or grants legislation. Separately, laws such as the Sherman Antitrust Act of 1890 and its numerous

[11] See, respectively, *The Melbourne Herald*, May 9, 1975, page 15, col. 1, and *The Age*, May 10, 1975, page 2, col. 3. See also the statement by the Minister for Labor & Immigration concerning a white woman, prevented from marrying a black man because of South Africa's Immorality Act, but who had nevertheless lived with him and had borne his child, both thereafter being convicted of 'unlawful carnal intercourse' under that Act; the couple now desired to immigrate to Australia and the Minister was quoted that the woman appeared to have the qualifications in demand here, and that 'Under the guidelines against discrimination on grounds of sex that I have established we now treat both male and female breadwinners equally'. *The Age*, June 3, 1975, page 10, col. 4.

[12] In the United States the 'public school' is one which is open to all, free, and compulsory to the age of 14 (or more depending on the State). The English or Victorian 'public school' would be termed a 'private school' in the United States.

progeny, seek a degree of entrepreneurial equality, and the banking fraternity is not far behind. The Constitution, via its amendments, also seeks to produce equality, for example, in the political sphere the Fifteenth Amendment prevents race, colour, or previous condition of servitude from inhibiting one's right to vote, and the Nineteenth Amendment adds one word, 'sex', to this. The proposed Equal Rights Amendment is an effort to put women on a plane of (absolute) equality with men in all lines of endeavour, not only the economic, albeit in athletics, for example, this cannot be or become. And while much more could be written on legislation, sufficient has been disclosed to make the point, namely, that Plato's classificatory equality as so conceived is the rule and exceptions are sought to be legislated (albeit these exceptions are seldom, if ever, absolutes, or result in an absolute).

What of judicial opinions and decisions? How do they support and yet seek to overcome this classificatory equality which is and breeds inequality? Two illustrations may aid, one a straightforward common law decision which also finds legislation, a century later, reinforcing it, and the other involving judicial interpretation of a constitutional provision. The former deals with the status of labour first under the common law, when the doctrine of criminal conspiracy was used to prevent employees from organizing to demand higher wages, and brings in later efforts at equality; the latter deals with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The English common law condemned associations of labourers where a goal was higher wages,[13] and this view was initially taken over by the American colonists. Even after independence and the formation of a new government this approach continued, and it was not until 1842 that Chief Justice Shaw, of the Massachusetts Supreme Court, rejected the doctrine and upheld the legal and lawful right of workingmen to combine for this and other ends. In that case seven unionists were indicted for criminal conspiracy and Shaw dismissed the indictment, upheld the right of the defendants to combine (unionize), and made all their actions permissible where their ends were not condemned and their means were also lawful or justifiable.[14] In effect this decision and its aftermath equalized the ability of employees to deal with employers and employer organizations, both economically and politically, although today there is criticism to the effect that the balance has swung overly-much in favour of labour, *i.e.*, there is

[13] See, on the English statutory and judicial background, M. Forkosch, *A Treatise on Labour Law* Chaps. IX and X Indianapolis, Ind.: Bobbs-Merrill Co. (2nd ed., 1965), and also Forkosch, The Doctrine of Criminal Conspiracy and Its Modern Application to Labor, (1962) *40 Texas L. Rev.* 303, 473.

[14] *Commonwealth v. Hunt,* 4 Met. 111 (1842), on which see also Forkosch, Doctrine, *supra* note 13, p.320f., and also Nelles, The First American Labor Case, (1931) *41 Yale L. J.* 165.

unequal power being exercised when labour so confronts capital.

This contention of current inequality may also be somewhat traced in legislation. For example, the Norris-LaGuardia Anti-Injunction Act of 1932[15] states, in its policy S. 2, that 'Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labour . . . it is necessary that he have full freedom of association', *etc.;* the Wagner Labour Relations Act of 1935, as amended by the Taft-Hartley (1947) and Landrum-Griffin (1959) Acts,[16] later found the initial federal effort to achieve equality in bargaining power allegedly over-balanced in favour of labour, so that it then compensated for this by including union unfair labour practices in the listing of prohibited acts by the parties (the employers unfair labour practices were enumerated in 1935 without any by labour being included); and, while later seeking further so to balance the law, separately and additionally sought to aid union members *vis-a-vis* their own unions by also giving them a 'bill of rights' so as to enable them to attain an equality within their own organizations.[17]

Regardless of such common law decisions and the later statutes and legislation, two things may be noted. First, all these decisions and laws deal with segments of employers and employees, *i.e.,* those of the former subject to the federal commerce power, and those of the latter who have unionized or at least organized within their employers' scope, so that, first, only a fraction, albeit large, of the employees is covered and is advantaged by the laws, and second, only those employees with power (*e.g.,* unionized) may obtain advantages not available to the others — which discloses classificatory equality in operation. And, second, that although such court decisions and legislative enactments seem thus to disclose that classificatory equality is not a static or institutionalized set of relationships where a dynamic society is found, and that the idea of equality is still a viable concept, nevertheless, in practice, the disparities amongst the labour-capital, organized labour-nonorganized labour, workingmen-workingwomen, and other relationships has not only continued but deepened and become intensified — and Australia may be cited as another such illustration.

[15] 47 Stat. (1936), 29 U.S.C. ss 101-115.

[16] 49 Stat. 449 (1935), as amended by the Taft-Hartley Act of 1947, Pub.L. No. 101, 80th Cong., 1st Sess. (1947), and further amended by the Landrum-Griffin Act of 1959, Pub.L No. 257, 80th Cong., 1st Sess. (1959), all found in 29 U.S.C. ss 141-169. Other and later amendments are here not of moment.

[17] See, *e.g.,* the Labor-Management Reporting and Disclosure Act of 1959, Pub.L. 86-257 (1959), 73 Stat. 519 *et seq.,* 29 U.S.C. Sec. 401 *et seq.,* the Bill of Rights being Sec. 41 *et seq.*

V

The judicial interpretation of the constitutional provision concerning equal protection has been somewhat anticipated in the outline of labour legislation just mentioned, but now there is found a co-operative judicial-legislative-constitutional amalgam likewise utilizing and supporting classificatory equality. Under Article VI of the United States Constitution that document, and laws and treaties made under it, are the 'supreme Law of the Land'. In the Fourteenth Amendment, S. 1, sentence 2, there is found an Equal Protection Clause (also a Due Process one [as well as in the Fifth Amendment] and a Privileges and Immunities Clause). This Equal Protection Clause inhibits the states only, and as there is no like Clause impinging on the federal government another source had to be found. That source is illustrated by the 1954 language of Chief Justice Warren, that 'it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government' (to reject a colour classification as the famous Desegregation Case had just done with respect to the states)[18] and so he now used a process of judicial interpretation and incorporation to give the Fifth Amendment's Due Process Clause a substantive meaning of classificatory equality.[19]

Equal protection has meaning only when interpreted and applied. Back in 1943 Justice Frankfurter remarked that 'The right to legislate implies the right to classify',[20] and in 1884 Justice Field felt that it was 'From the very necessities of society, [that] legislation of a special character . . . must often be had . . .'[21] Classification, it has been written, results in differences in rights and duties; 'this inequality . . . is of no significance upon the question of constitutionality. Indeed the very idea of classification is that of inequality . . .'[22] Classification therefore, is the jugular vein of equal protection, for unless judicially upheld the entire legislative-judicial structure of inequality falls. For classification and absolute equality are antithetical, as the former's use connotes inequality whereas the latter's use denotes the contrary. And yet, while permitting and even condoning many classifications, the Supreme Court has abjured certain types because

[18] *Bolling v. Sharpe,* (1954) 347 U.S. 497, 500, decided simultaneously with *Brown v. Board of Education,* (1954) 347 U.S. 483, the *Bolling* opinion so stating.

[19] *Ibid.,* the *Bolling* case. The reason for mentioning the Due Process Clause of the Fifth Amendment is that that Amendment is a limitation on the Federal Government, whereas the Clauses in the Fourteenth are limitations on the States, and that now the Chief Justice used the Fifth's Due Process Clause to hold as he did, *i.e.,* that the equal protection concepts (Fourteenth) were also binding on the Federal Government (via the Fifth's Due Process Clause). See also, for other and analogous reasoning in earlier (colour) cases, M. Forkosch, *Constitutional Law* (New York: Foundation Press, 2nd ed. 1969), with Sec. 441 and others referring to prior decisions in educational areas.

[20] Concurring in *Martin v. City of Struthers,* (1943) 319 U.S. 141, 1954.

[21] *Barbier v. Connally,* (1884) 113 U.S. 27, on which see, for a recent necessity, the *Bolling* quotation and reference in note 19, *supra.*

[22] *Atchison, Topeka & Santa Fe Ry. Co. v. Mathews,* (1899) 174 U.S. 96, 106.

of a judicial abhorrence, expressed sometimes in stilted legalese. All this may be illustrated by a few cases.

The original use of classifications, before an Equal Protection Clause and concept was ratified in 1868 (the Fourteenth Amendment), was for economic reasons primarily, if not solely. Slavery and other inequalities were accepted in the period to the Civil War, and even that great conflagration did not wipe out the colour line. Even into the twentieth century the Clause was seldom referred to. When, in 1896, the first great attack on segregation (classification) came before the Supreme Court that body, with one dissent, upheld use of colour for this purpose; and thereafter, for almost sixty years, this was the law.[23] During all these decades it was concepts of substantive due process which were primarily used by the judiciary to denounce legislation, with equal protection a bad second.[24] Thus Chief Justice Stone, in 1942, could concur, but reject the *ratio decidendi* of the majority, because 'I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process'.[25]

Regardless, colour had not been looked upon favourably into 1954, even though permitted to sustain legislation. For example, in 1886, ten years before colour was upheld as a classification, the Supreme Court had denounced a situation where Chinese laundrymen had been discriminated against; but a careful reading of the opinion discloses that it was not the classification which was rejected (colour was not itself mentioned) but the application of the statute which now, for practical purposes, embraced almost only the Chinese.[26] Similarly, while sex at first had not been sufficient to sustain classifications, although in exceptional situations it was upheld,[27] by 1937 it was recognized as a sufficient base for unequal treatment, *i.e.*, with respect to men.[28] Numerous and varied other classifications were used, of course, for many other reasons and purposes, all of which need not be discussed. Suffice it to say that in Australia, New Zealand, India

[23] *Plessy v. Ferguson,* (1896) 163 U.S. 537, and see also note 26, *infra. Plessy* created the famous 'separate-but-equal' concept, *i.e.*, colour could be used to separate so long as the physical facilities were equal, which was denounced in 1954, on which see note 18, *supra.*

[24] See, *e.g.*, Forkosch, *Constitutional Law, supra* note 19, Sec. 454 *et seq.* for cases and illustrations.

[25] *Skinner v. Oklahoma,* (1942) 316 U.S. 535, 544, with a concurrence therein by Justice Jackson.

[26] *Yick Wo v. Hopkins,* (1886) 118 U.S. 356, 373.

[27] *E.g., Muller v. Oregon,* (1908) 208 U.S. 412, 422-423, the Court accepting the views of later Justice Brandeis on woman's required special treatment because of her biological function as a mother. When a legislative 'solicitude' was found not present by a minority, they dissented, as in *Goesaert v. Cleary,* (1948) 335 U.S. 464, 468.

[28] *West Coast Hotel Co. v. Parrish,* (1937) 300 U.S. 379, which now reversed earlier cases preventing State minimum wage laws for women.

and elsewhere, just as in the United States, the multiplicity of classifications is limited only by man's ingenuity. Classifications, however, are not static, are subject to judicial whim (at least in the United States), and may also be subject to different judicial approaches.

To illustrate this last aspect is not difficult. Into the recent decade or two the Supreme Court has ordinarily utilized a standard of reasonableness to determine whether or not to uphold a classification, *i.e.*, 'the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible'; or, put differently, the Equal Protection Clause 'avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary'.[29] This approach is still in use and has not been discarded. However, a different view is now taken when race, colour, nationality and, perhaps, sex, come into the picture. These were used, in the past, to classify and treat differently (unequally); today the judicial view is that these are invidious, and therefore 'suspect', classifications and that, in place of the burden of proof being on the one who attacks a classification, with the presumption being that the statute is constitutional, now the reverse is to be used, namely, that the state has the burden of showing that there is a valid and necessitous reason to support these particular classifications. In other words, the burden of proof has shifted to the one supporting these suspect classifications, and, in addition, the burden is a heavy one.

The heaviness of that burden is disclosed if we add the word 'inherently' to the judicial terminology. Whenever, for example, race, colour, or nationality is disclosed as the basis for a classification, then it is *per se*, inherently suspect; the person attacking the classification has little, if anything, to do; his burden appears to be solely that of disclosing the suspect basis. In this situation it is the state which then assumes the heavy burden of defending the classification and, in the ordinary situation, it cannot do this successfully, even when invoking its police power. Some commentators and lower courts have viewed this overall approach as automatically and completely condemning classifications based, say, on colour, but this is not so. Colour is invidious as a classification, suspect, inherently suspect, condemned, and only under a fact situation which, practically, is difficult to envisage, could it be upheld; but the Supreme Court has not, as yet, said that these classifications can never be sustained. Practically, however, they are non-sustainable.

Sex was placed in this category (second paragraph above) with 'perhaps'

[29] Respectively, Justice Brandeis, dissenting in *Quaker City Cab Co. v. Pennsylvania*, (1928) 277 U.S. 389, 406, and *Lindsley v. Natural Carbonic Gas Co.*, (1911) 220 U.S. 61, 78-9. Other details of the standard are not discussed, *e.g.*, purposes and permissibleness, constitutional limitations, police power. See, on this, Forkosch, *Constitutional Law*, *supra* note 19, Ss. 444-46.

as a qualifying term. The reason is that the Supreme Court has not yet, by a majority vote, agreed to group sex with colour, race, and nationality as such an inherently suspect class. There are numerous federal and state laws which utilize sex as a classification for purposes of granting benefits, preventing discrimination, and otherwise having women treated differently, but while upholding all such legislation the Court has refused to place this term in the constitutionally preferred-treatment (classification?) group. Congress has not been so queasy, and it may be that within the next year or two the judiciary may decide otherwise, especially in view of the status of the proposed Equal Rights Amendment to the Constitution; all this is, however, speculation.

As of today the attitude of the Court has been to look carefully at classifications involving, stemming from, or based upon sex, and subjecting them to intensive consideration but refusing to make them inherently suspect. This is disclosed in the *Frontiero* case, where a married woman, in the air force as a lieutenant, objected to statutes which granted a serviceman the right to claim his wife as a dependant regardless of whether she was in fact dependent upon him for any part of her support; she, however, could not claim her husband as a dependant unless in fact he was so dependent upon her for over one-half of his support. The question, said Justice Brennan for himself and three other Justices, 'is whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of' equal protection concepts.[30] The Justice so held, and he was joined in the holding by all of the other Justices except one, who dissented (Justice Rehnquist), but this does not tell the whole story. Justice Brennan's conclusion concerning sex was that 'classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny . . .' [31] Justice Stewart, however, felt that 'the statutes before us work an invidious discrimination in violation of the Constitution',[32] *i.e.*, he refused to put sex into the inherently suspect class, while Justice Powell (joined by Chief Justice Burger and Justice Blackmun) refused to 'join the opinion' of Justice Brennan insofar as the above quoted language was concerned.[33] In other words, only four Justices support sex as inherently suspect, four reject it as such, and the ninth uses 'invidious discrimination' to denounce it as so used and applied.

[30] *Frontiero v. Richardson,* (1973) 411 U.S. 677, 93 S.Ct. 1764, 1766. The language was, 'in violation of the Due Process Clause of the Fifth Amendment', but see notes 18 and 19, *supra,* on this.

[31] *Ibid.,* at 1771.

[32] *Ibid.,* at 1772-73.

[33] *Ibid.,* at 1773. The individual states may, for their own constitutional provisions, place sex in an inherently suspect classification, *e.g., Sail'er Inn, Inc. v. Kirby,* (1971) 5 Cal. 3d 1, 485 P.2d 529, *Hanson v. Hutt,* (1973) 83 Wash. 2d 195, 517 P.2d 599.

The preceding analysis permits a tripartite classification of classifications to be suggested: the historic, usual and orthodox approach is to examine a classification for reasonableness and arbitrariness, and to denounce it when it does not meet such a standard; at the other end there is the narrow band of inherently suspect classifications, just discussed; and in between the orthodox and the inherently suspect may be placed those which are 'invidious', *i.e.*, the orthodox approach is softened for the attacker but not removed completely, and into this category we may place, for example, sex (also First Amendment rights such as free press, religion, and free speech).

VI

The idea of equality, I have commented initially, might well be said to really be the idea of inequality with equality an exceptional situation. So the concept of equal protection is really the concept of equal discrimination, *i.e.*, a valid classification permits a whole group (class) to be treated differently (discriminated against). The Platonic view of equality as a numerical one in the absolute sense, and in all others ordinarily a classificatory one, is seemingly correct.

This correctness can be seen not only locally or nationally but also internationally. We tend to think and speak of the have and have-not nations, of the third world, of the emerging countries, and so on. The recent Commonwealth Conference in Jamaica has disclosed inequalities within this type of world-wide conglomeration, but so is it with regional ones as in Latin America. The Commonwealth economic experts are to meet in an effort to narrow the gap between the rich and the poor nations, and one wonders how the standards of richness or poorness are to be determined.

There are today only two true superpowers, if measurement is tied in with guns, planes, production, and manpower, and the rest of the world arranges itself hierarchically on the basis of, perhaps, its possession of the atomic bomb, natural resources, and otherwise. If we examine the two superpowers on the basis of military, cultural, financial, and economic might and influence, then to the extent that the United States has exported its movies and television, its money and its multinational corporations and finances, then to that extent is America the only influential superpower in the Western world, if not the entire world. Internationally, regionally, nationally, and locally, we thus tend to classify and compare, and always it is on a basis of equal or not equal.

Similarly law, in its various forms, whether legislative, judicial, or administrative, is also impossible to discuss or apply without classifications and unequal applications. Whether or not all this means that an élite we shall always have with us is irrelevant; the question is whether absolute

equality is ever attainable in any field in any nation in any large degree, even though we may concede that within a class sufficiently small there may be such. Unless we are mistaken the answer must be no; of importance to us, as lawyers, is the fact that the law recognizes this situation and conclusion and even supports both.

This does not mean that we must 'do something' about this. Even if absolute equality were obtainable, the next question would be whether it could ever be sustainable for long. For example, to what extent and degree property has entered into and 'made' law what it is has been a subject considered by many philosophers and political scientists; but it seems to be logical that where any major premise permits private property then inequalities must result, whether because man himself is inherently different and therefore incapable of being absolutely equal *en masse,* or whether because property enables accumulations — the result is the same. And what is true for property is likewise true for the uniqueness of man and the resulting éliteness upon which Plato built, *i.e.,* there will always be differences among men, with some ascending and others descending, while the mass remain in the centre (the middle class).

Insofar as this middle class is concerned the question also becomes one of classificatory or absolute equality — can the latter ever be attained for this mass? Again the answer seems to be no, for again the same objections might be made as were made for the totality of mankind, and with the same result. But this does not mean that man accepts passively what the gods have decreed, as in the ancient Greek tragedies.

Two current examples, stemming from the indexation decision of the Full Bench of the Arbitration Commission may be given. The Minister for Labour (Mr. Cameron) commented that the Government 'was completely opposed to total indexation', and the reasons why included his view that 'each adjustment will put the [high-income] "haves" further and further ahead of the [low-income] "have-nots".' And Mr. Bill Richardson, Secretary of the Australian Council of Salaried and Professional Associations felt that 'The conditions allow for increased profits and deny workers the objective of continuing the redistribution of the wealth of the country in their favour'.[34] However, if the Association seeks to better its members

[34] Both reported in *The Melbourne Age,* respectively on May 1 and 7, 1975, page 12, col. 8 and page 5, col. 2, the Full Bench having also included a scheme for quarterly cost-of-living adjustments. The illustrations of the spreads disclosed a recipient of $100 weekly now receiving $103.60, whereas $400 was increased to $414.40.

If a personal note may be permitted, the tax structure in the United States (as indeed throughout the world) is riddled with inequities, loopholes, subsidies ('tax expenditures'), and countless other inequalities. Regardless of the efforts currently being made in the Congress to devise an equitable and fair system, it is not incorrect to view the scene as another Sisyphean failure. Almost two hundred forty-five years ago Sir Robert Walpole, speaking on the Salt Duties in 1732, declaimed that 'that tax which is the most equal and the most general, is the most just, and the least burthensome . . .'

only, then it deepens the existing inequalities among workers generally; if it seeks to better all workers, unionized or not, the consequences allegedly may imperil the economic, or capitalistic, system under which we live; and if, nevertheless, such an equality is attained, then co-determination, or participation, or socialization is feared by some to result.

All of which in effect means that as a practical matter it is only in the dregs of humanity that there can be found the absoluteness of equality, but an equality which is not desired. Or absolute equality may be found in the conditions of a war-torn situation, or a holocaust or pestilence, or some other temporary aberration which distorts the normal, peace-time posture envisaged above. And, while this may be a pessimistic view of humanity and the law, does history offer aught to replace it? Can the law do aught but accept it? And, finally, is it the law's 'business' to change it? The answer to these questions is deserving of analysis, debate, and a consideration of values and functions to be thought through in another context.