

Two concepts of equality before the law

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“those who are in favour of progressive taxation and, at the same time, oppose the ‘Lodo Alfano’ because it is incompatible with the principle of equality before the law, in fact oppose the very idea of “equality before the law” on which progressive taxation, as well as many other discriminatory measures they enthusiastically support (and find “just”), are based.”

On 17th February 2009 Mr. David Mills, a British lawyer, was found guilty of “corruption in judicial acts”. In particular, the tribunal of Milan sentenced that he received 600,000 dollars from Fininvest, the media group belonging to the current Italian prime minister, Mr. Silvio Berlusconi, in order to lie in two trials where the latter was being prosecuted and therefore in order to protect him.

Now, if A is found guilty of having been corrupted by B, normally there are good chances that B could be found guilty of having corrupted A. This, however, did not happen: Mr. Berlusconi could not be prosecuted for the trial had to be stopped. In fact, the parliamentary majority directly controlled by Mr. Berlusconi approved in time the so-called “lodo Alfano”, a “law” according to which the prime minister and the other three top jobs in the Italian state (the president of the republic, the speaker of the senate and the speaker of the house of representatives) are immune against criminal prosecutions. Mr. Napolitano, the president of the Italian republic, countersigned and therefore approved this “law”.

Equality within an arbitrarily chosen category

The electors of the left claim that the “lodo Alfano” constitutes a violation of the constitutional principle of “equality before the law”. What they do not seem to realize is that, whatever the Italian supreme court may say in the future regarding this particular case, this “law” is based on the same idea of “equality before the law” on which most of the measures they more strongly approve of are based, an example of which being progressive taxation, another one being the “extraordinary” additional tax on the “rich” recently proposed by the left.

This idea of “equality before the law” consists in arbitrarily creating a *category* (say, those who earn more than 100,000 euros per year, or those who hold the “four highest jobs” in the state) and in applying a command of the authority uniformly *within it* (Leoni, 1961, p. 68). Keeping in mind the obvious differences in the scale of gravity, we may notice that this concept of “equality before the law” is compatible with some of the most atrocious acts of the twentieth

century: even the nazis, while persecuting the jews, arbitrarily created a category and applied a command uniformly within it.

There is, of course, a different idea of equality before the law with which the “Lodo Alfano”, as well as progressive taxation, for example, are not compatible. This idea of equality before the law is based on an idea of law according to which this is not a command “made” by the authority, but rather a principle *discovered* by it (Hayek, 1982, p. 73). In this sense, equality before the law means equality before an abstract *principle*.

Digression on the concept of principle

A principle is “a standard that is to be observed, *not* because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality” (Dworkin, 1977, p. 22; *italic mine*): therefore (if we accept Hume's idea of justice) because it is the result of a slow, spontaneous process of 'natural selection' of conventions and institutions (such as private property) that contributed to increase the group's chances of survival (see Hume, 2007, pp. 307-322).

Being the result of a spontaneous process of 'natural selection' of conventions, a principle (and therefore what is just) cannot be normally “decided” upon (e.g. by majority vote), it can only be *discovered*, for example by the legislative authority: its formation is beyond anyone's power. From this important conclusion it follows that the law exists *before* legislation, *not* after it.

An example may help to clarify this point: when, in the case *Riggs vs. Palmer* (New York, 1886) the judges of a common-law country had to decide whether to allow the murderer of a relative of his to receive the inheritance that the latter had left him, they admitted that “the statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer” (quoted by Dworkin, 1977, p. 23). However, via intellectual activity in a way similar to that of an archaeologist, they *discovered*

an unwritten, abstract *principle* according to which nobody can benefit from his or her own criminal activity; a principle whose existence they could prove beyond doubt (even in case they had a different opinion) and which prevailed on all rules “made” by authority. The discovery of this principle prevented the murderer from inheriting what his relative had left him.

Even though, on the one hand, authority cannot “make” principles (or laws) but only discover them, on the other hand it has the power to destroy them: this happens via imposition of commands (often wrongly called “laws”) that violate existing principles. In other words, especially in non-common-law countries, legislation tends often to destroy the law, not to “make” it (Leoni, 1961, p. 218). The fact that those who do not have the power to “make” something have the power to destroy it, should not be surprising: it happens for example with forests. In fact, it is not possible to “make” a law more that it is to “make” a tree: the replacement of a forest with trees made of plastic tends to destroy the forest, not to “make” it, and so does the replacement of law intended as principle with arbitrary commands conveniently called “laws”.

From this further conclusion it follows that the law intended as an abstract principle to be discovered is a guarantee against tyranny, while “made” law can be a powerful instrument of that tyranny: as Hayek says, “ (In modern times) law, which in the earlier sense of *nomos* was meant to be a barrier to all power, becomes instead an instrument for the use of power” (Hayek, 1982, Vol. 1, p. 92). In other words, only where rules are the result of arbitrary power can tyranny exist. Of course, whether it is the tyranny of a minority or that of a majority, or whether it is a tyranny based on tanks or one based on TV, is irrelevant.

Equality before the law intended as an abstract principle

If law is intended as an abstract principle to be discovered and not as a command to be imposed, equality before the law means therefore equality before a principle; more precisely, it means equality before a principle in its *abstract* form, that is a principle *which is not arbitrarily limited or discretionally applied* by the authority. Once it is discovered that a principle exists, equality before the law means that *that principle* should be *integrally* and *uniformly* applied to everyone, in every case where it is relevant, independently of any

arbitrarily chosen category or any other arbitrary decision or limitation imposed by authority. This does not mean, of course, that the application of that principle should be unlimited, but only that, in case, it should be limited exclusively by other *principles*, *not* by the arbitrary decision of an authority.

(From now on, unless explicitly stated otherwise, by “equality before the law” I will intend equality before the law intended as an abstract principle).

Progressive taxation

It should be intuitive (though, surprisingly, for many who would still oppose someone else's attempt to steal their trousers on the street, it isn't when they are discussing about other people's property) that something like “private property is inviolable” is a principle. It should also be fairly intuitive that, in normal circumstances, redistributive measures discriminating against the better off (say, progressive taxation) violate this principle. If, for example, authority transfers resources from A to B because the latter has less resources at his disposal than the former (or, which is the same, if it takes more resources from A than from B for the provision of a service from which A and B benefit equally, say national defense, or the administration of justice), unless there are other explicitly stated, stronger *principles* (*not* arbitrarily “made” rules -or tradition of “made” rules-, nor arbitrarily designed “principles”, such as, for instance, Rawls' *difference “principle”* - see Rawls, 1973) which demonstrably more than off-balance that of the inviolability of private property, the authority is in fact certainly and arbitrarily violating the latter.

This violation does not happen in the form of a straightforward negation of that principle (which would obviously make the social system unstable, and therefore would back-fire against the authority itself), but rather in the form of arbitrary, fine-tuned limitation if it by authority. More precisely, the latter arbitrarily divides the population into categories according to the chosen criteria and, via commands, it *imposes different degrees of limitation of the principle of inviolability of private property within each category*. Therefore, progressive taxation, as well as any other measure arbitrarily and selectively discriminating against any

category of individuals or minority, violates the principle of equality before the law and therefore is incompatible with the rule of law: “Only if one understands by law not the general rules of just conduct only but any command issued by authority (or any authorization of such commands by a legislature), can the measures aimed at redistributive justice be represented as compatible with the rule of law. But this concept is thereby made to mean mere legality and ceases to offer the protection of individual freedom which it was initially intended to serve” (Hayek, 1982, Vol. 2, p. 87).

In the same way in which it can be argued that progressive taxation violates the principle of equality before the law, so it can be shown that the “Lodo Alfano” also does it. In fact, it is intuitive that it violates the principle according to which it is unjust that some (e.g. the strong ones) are not bound by the principles that bind all others (e.g. the weak ones); in addition, it is also evident that it does so only in some cases and not in others. Therefore, the “Lodo Alfano” is also not compatible with the principle of equality before the law.

Conclusion

In conclusion, those who are in favour of progressive taxation and, at the same time, oppose the ‘Lodo Alfano’ because it is incompatible with the principle of equality before the law, in fact oppose the very idea of “equality before the law” on which progressive taxation, as well as many other discriminatory measures they enthusiastically support (and find “just”), are based. Such idea of equality before the law is not that which prescribes to apply the same principle equally to everyone, but that which prescribes to apply the same arbitrary command (or, which is the same, to arbitrarily limit a principle) uniformly within each of the categories formed by the authority.

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