Summary

This study was undertaken to explore the problems surrounding the human rights that are usually regarded as the moral foundation of modern society. The values incorporated in these human rights and the legal problems concerning their validity raise many questions. To achieve an insight into these problems, this study regards human rights as a product of the Western development of the law. The primary concern here is the importance of this development and ways to put it into perspective, not by comparing it with other law cultures, but by exploring the immanent dynamics of the Western development itself. For this purpose, the study primarily regards the Western history (of law) as a history of consciousness. The tertium comparationes for the description of this development is the concept of human individuality. The issue of equality of rights is used as the example that gives this study a concrete focus. The problems surrounding equality of rights may be understood as fundamental to the understanding and functioning of the law and at the same time—because of the existing uncertainty about the meaning of equality as a legal principle—as a starting-point for putting Western legal consciousness into perspective.

The formulation of Article 1 of the Dutch Constitution is a good example of the problems surrounding the principle of equality of rights. This study therefore describes the history of this formulation, from the installation of the Van Schaik Committee in 1956 to the formulation of the current Article 1 in 1983. The conclusion of this research is that the issue of equality of rights appears to be tightly linked to all kinds of other constitutional and technical legal issues. These include the meaning of legal principles in a general sense and the role of the concepts of human individuality and human dignity in the relationship between the individual and society. The study also describes the relationship between equality of rights and issues such as liberty and the non-discrimination principle, and continues with a discussion of the concept of the system of law as such and the importance of legal principles for the development of the law as part of the interplay between legislature, judiciary and public administration. Finally, the study discusses the meaning of fundamental rights, the relationship between classical freedoms and social human rights and the importance of fundamental rights for the system of law as a whole and the related importance of the principle of equality of rights.

On the one hand the history of the formulation of Article 1 of the Dutch Constitution provides an insight into the general problem of equality of rights, on the other hand it also illustrates that issues relating to it could, to a large extent, not be resolved during the preparation of the constitutional amendment and the ultimate formulation of Article 1. The impression is one of great confusion and insecurity about the meaning of equality before the law. The adopted formulation of Article 1 did not resolve these issues in any way, not only because of the existing differences of opinion but most of all through a lack of conceptual clarity.
The study therefore attempts to broaden the scope of the issue by connecting the concept of equality with the concept of liberty and the concept of solidarity or fraternity. To this end an interpretation is given of the Déclaration des droits de l’homme et du citoyen of 1789. This Declaration is seen as the legal form of the revolutionary slogan “liberté, égalité, fraternité”. This exploration of equality in relation to the 1789 Declaration as the document suprême of the French Revolution leads to the following conclusions.

When related to the principle of liberty, equality seems most of all to be the form of the law. In that sense equality formalizes human relationships as an aspect of general liberty. This creates a more complex vision of man, in the sense of what may be distinguished as spatial. This vision of man is dualistic, with freedom of action and freedom of speech on the one hand, and man’s ties to property as a reference to man’s roots in the natural world on the other. This dualism is, to a certain extent, resolved into a polarity by combining the two aspects in the functioning of the principle of equality. In that sense, the two aspects of what it means to be human—which are represented by opinion and property respectively and (implicitly) refer to notions such as the duality of mind and nature—should be distinguished. This complicates the traditional vision of man of seventeenth and eighteenth century natural law.

The scope of this study had then to be broadened again to include an exploration of the development of the concept of equality as a result of a transformation of human consciousness through the initial development of thought by the Greeks and the development of law based on subjective will by the Romans.

The development of thought among the ancient Greeks resulted in a transition from the original homoios equality to the isotes equality that should be understood as structure. The concept of isotes equality is a product of rational thought and—under the influence of the Sophists—accompanied a transition from the original natural philosophy concept of the physis to the distinction between physis and nomos made by Plato and Aristotle. Physis and nomos are rational concepts in which the relationship with pre-conceptual reality has been severed. This led to the concept of geometric equality, in which the original union of the homoios equality was pursued again by means of a reference to the concept of justice, although the meaning of this concept cannot be determined. This development accompanied the disappearance of the original social ferment of the polis, which finally led to Greek particularism and the collapse of ancient Greek civilization.

Among the Romans original formulations of the concept of equality cannot be found; neither do they reflect on this issue. On the contrary, Roman thought emphasizes the test of strength as a natural phenomenon. Only if the result of the efforts made by each Roman requires protection does the law emerge as an instrument to perpetuate the relationships between citizens. Early Roman law does not mention equality. Any equality to be found in the Roman system of law resides in the equal validity of the power of each individual Roman. In the terminology adopted in this study this is referred to as ‘equality of opportunities’. The law only sanctions the mutual validity of the outcome of the power wielded by each Roman. The contradiction introduced in Roman
society by this principle was eventually sublimated in the equal force of the law for all. Ultimately the Roman empire collapsed, partly under the influence of its law system, which prevented internal development and barred mutually beneficial contacts with other cultures.

After the Greek and Roman cultures had thus faded away, the third phase of Ancient development emerged: Antique Christianity. As far as equality is concerned, this development led to a complete reversal of concepts. The thought-related structure of the Greek *isotes* equality became incorporated into the dynamics of a ‘futurized’ equality ‘in Christ’ of which history is the process, without this equality achieving concrete social validity. The equality of opportunities associated with the will, however, became superseded by the demand for a structuring of the will ruled by the commandment of charity. Instead of being a socially effective principle, under early Christianity equality became a moral imperative aimed at the subjective disposition of each individual, separate from concrete social or political events.

Thus, equality, which the Ancient Greeks and Romans regarded as a primary experience of mutual comparability, was converted into an issue of history and morality, the concretization of the concept of justice as experienced by human consciousness. This made history and morality both subject and content of the concept of equality. An analysis of the relationship between equality and associated aspects of early Christianity may lead to an understanding of this transition as a shift from (cosmic) universality to (human) singularity.

This concludes the first part of the study. The second part consists of a search for a new element that may be used in conjunction with the results of the first part to achieve a better understanding of the concept of equality of rights.

To this end, the study explicitly links the above-mentioned singularity with the development of human self-consciousness and concludes that this singularity exists as the substance of the human ‘self’ that has become relevant in politics and legal systems since the Middle Ages. An analysis of the dualistic structure of this substance—the result of developments in Antiquity—leads to the conclusion that it is impossible to base the development of the law in the form of human rights on the validity of each individual as ‘self’. Because of its internal structure, the ‘self’ is only motivated by self-preservation and thus asocial in its relation to society and anti-social in its relation to politics. The general nature of the human ‘self’ can therefore not attain any political and legal validity and is only experienced as a mystic ideal without practical relevance. This phenomenon is regarded as a moral issue.

The study then states that the preliminary culmination of this development is formed by the issue of morality as complete arbitrariness and negative liberty. This means that in an ethical sense it is impossible to attribute other qualities to the will than the ability to make choices, which (initially) precludes any perspective on a reality of the will more inclusive than the individual, since the whole of reality can only be understood as
(completely) encapsulated within the human self. Within each individual as ‘self’ there can only exist complete arbitrariness expressed as absolute abstract liberty. At this point the classical ontological concept of individuality as the essential element of the ‘self’ of each individual has come to an end; *individuum est ineffabile*.

This brings us to the question of human individuality as ‘I’, which again points to the importance of the Middle Ages. One can only become aware of this importance if the Middle Ages are regarded as a true midpoint, i.e. a turning point between Antiquity and New Era.

In pre-medieval development time transforms from an element of the cosmic order via the humanization of history through myth to individual history through the development of (rational) thought. This turns history into the realm of free action by the human personality, but it also creates the tragedy that man is no longer embedded within a context that provides reasonable purpose within history conceived as a general order of events. Although this creates the freedom to act as one pleases, it also isolates the will completely without the content of the will as such entering consciousness.

The study then presents a preliminary concept of human individuality in which each human being is conscious of his or her uniqueness and also feels connected with the whole of reality that presents itself to him or her. As far as equality of rights is concerned, this means that human individuality can only be characterized in conjunction with the development of the law. To understand the law (and equality of rights under the law) and human individuality one concept does not function as a given for the other; instead, the meaning of both concepts should be determined in conjunction. This can only be achieved if both are understood as developments. The beginning of this development is situated in this study within the appearance of human individuality as ‘self’ with respect to morality.

Further development of this individuality is only possible and imaginable if the concept of human individuality is understood as a *praxis*, as a moral category that exists in open relationships with others. This *praxis* is concerned with the transformation of the substance of the ‘self’. This means that the issue of morality itself is none other than an understanding of the initial human individuality as self, and may therefore be characterized as an issue of choice. Simultaneously, the *praxis* or the development of human individuality does not allow this issue to reside in a preference for either a universal intellectualism or a contingent voluntarism. In both cases the development would necessarily lead to a denial of human individuality. This means that a third element should be introduced into the equation.

The possibility of a third element presupposes an a posteriori postulated end of the development of human individuality as ‘I’ as the union of mankind, of which the actuality somehow already forms the principle, so that the substance of the (initial) human individuality of ‘self’ regarded as a dualism of universality (thought) and contingency (will) may be understood as a union in which both elements are equal. This leads to an explicit formulation of the epistemological problem of the ‘I’ as absolute
equality, in which the ‘I’ is regarded as a practical concept. The ‘I’ is understood as the (ultimate) equality of knowledge and action, i.e. as the union of the two. This union can therefore initially only exist as a supposition, a conjecture of consciousness. In the reality of this conjecture of consciousness lies the understanding of human dignity.

The development scheme mentioned may be formulated by means of the epistemology of Nicholas of Cusa (1401-1462), which interprets the acquisition of knowledge as a process in which four steps may be distinguished: perception, representation, knowing/not-knowing, and insight. These four elements satisfy the demand made on thought by the legal system, namely that reality should play a role in thought even before it has become conceptualized. This demand is satisfied by giving perception its own position separate from thought within the knowledge process.

The actuality of the union of thought and will that initially exists only as a conjecture for the thinking consciousness can be experienced as the sense of justice. Since the pre-conscious initial union no longer possesses an ethical value within the development of human individuality as ‘I’ and therefore cannot play a role either within an objective evaluation of the course of this development, this sense of justice also forms the most objective confirmation of the truth of this development. Because of this sense of justice the pretence of the objectivity of thought and will within the course of this development is exposed as an illusion.

The second part of the study concludes with an exploration of the concrete development of the praxis of the initial human individuality by investigating the social and political function of equality in the Renaissance. It appears that in the late Middle Ages and the Renaissance equality was discovered as a basic experience within the concrete interaction between individuals. However, the practical realization of equality within the historical development appears to have been problematic and ultimately led to royal absolutism and the notion of the raison d’État in which the union of thought and will is realized in the abstract. Individual political equality as the individual right to political action is ultimately confronted with the use of power and the concept of royal or state sovereignty.

This ends the second part of the study. The last part is concerned with an attempt to formulate a concept of equality appropriate to the constitutional state. The third part therefore opens with a discussion of theories of equality formulated by Enlightenment, Rationalist and Idealist thinkers in conjunction with their practical application in law and politics. The study explores the way in which these theories attempt to determine the rational meaning of equality.

In the Enlightenment the experience of the preceding centuries is expressed in an (always subjective) representation in conjunction with pre-medieval paradigms concerning the determination of their meaning. With respect to equality in a general sense this also means that Enlightenment theories only formulate a subjective or impure concept of equality, in which the reality of the will cannot play a meaningful role
because of the impossibility of making a distinction between perception and representation. The result is a unilateral linking of equality and liberty. The ideal of equality becomes the force of equality.

The next step is an investigation of attempts made to apply notions of reasonable equality to the national constitutional state through the principle of the rule of law. It appears that in practice this mainly results in greater socio-economic inequality. The subsequent attempt to develop the concept for a rational control of the socio-economic relations in combination with a scientific consciousness shaped by rationalism leads to a 'collapse of consciousness', which turns the natural world into matter so that it comes to be experienced as controllability on the basis of the laws attributed to it. This precludes any opportunity for the development of solidarity or fraternity as a principle of law. Representational thought is thus not only both the origin and a typical attribute of the constitutional state, it also threatens to destroy the constitutional state.

This brings us to the fundamentals that follow from the principle of the rule of law within the development of the constitutional state: democracy and human rights. The question here is whether democratic procedures and the validity of human rights can overcome the deficiency created by the unimpaired application of the principle of formal equality under the law in the constitutional state.

The instruments for democratic decision-making created during this development appear as yet insufficient to counterbalance this deficiency within the twentieth-century constitutional state. Again the cause for this inability seems to be representational thought, which prevents the creation of a link between freedom and solidarity and isolates individuals within their personal role as citizen. After the world wars, then, the focus is on attempts to transform the fundamental rights of the constitutional state into human rights, which may turn equality into a concrete legal praxis within the encounter of individuals. These attempts appear to be in the initial stages and have so far hardly led to a revaluation of the by now classical concept of the constitutional state.

The imperative of formal equality seems to exist primarily within the formality of state interventions in the area of the traditional freedoms, consisting of the state’s ‘care’ for the availability and accessibility not only of education and culture but of all matters that in the eyes of the state are elements of the freedoms associated with thought, without any interference with their contents. To achieve this insight, the unquestioningly accepted but inadequate idea that the traditional freedoms require state abstinence and basic social rights require state interference should be abandoned.

As far as the development of the law as human law is concerned, material equality seems to consist primarily of a re-attachment of each individual with the (all) products of his or her labour and secondly with the equality of the bargaining positions taken by consumers and producers in the negotiations concerning economic production. Material equality refers to an equality that is determined by the distinction resulting from the *suum* of each human being, as expressed by his or her desires and labour. Material equality points to the congruence between this distinction and the bargaining positions
of producers and consumers and has nothing to do with equality of material rights.

In the light of the above, geometric equality as the ‘separation of Zeus’ may once again come into force in the democratic constitutional state as the geometry of concrete arbitration. For the sake of the constitutional concept of democracy as a guarantee for the geometry of equality, an important conclusion with respect to the issue of equality seems to be the necessity for the government to withdraw to the area of its legitimate authority when it comes to the equality of legal positions. This also sums up the conjectural nature of equality as a human right and at the same time puts the importance of the Western development of the legal consciousness into perspective. An advancement of equality of rights therefore not only requires less state intervention but also the unimpaired access of ‘all’ to all law cultures.