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THE PHILOSOPHICAL CONCEPTS OF EQUALITY

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Pregledni članak

Filozofski koncepti jednakosti

Cilj ovog članka je raščlamba naizgled jasnog i opće prihvaćenog pojma jednakosti pomoću različitih filozofskih i teorijskih postavki. Jednakost u pravnom kontekstu je prvenstveno preskriptivna, ali deskriptivna jednakost predstavlja temelj legitimiziranja grupiranja. Posljedično, materijalna jednakost imanentno ovisi o mjerilima koje određeni pravni poredak primjenjuje prilikom razlikovanja određenih situacija i prilikom odlučivanja o opravdanosti pojedinih grupiranja.

Prvi dio razmatra tri jezična značenja riječi jednakost, dok drugi proučava praktične koncepte koji su se razvili primjenom apstraktnog pojma jednakosti na složenost društvene stvarnosti. Jednako postupanje i nedavno stvoren koncept jednake mogućnosti razmotreni su u trećem dijelu. Isti dio objašnjava temeljne probleme pozitivne diskriminacije. Izuzetno zanimljiv odnos između jednakosti i pravde promišlja se u četvrtom dijelu. Ovdje se izvode i moguća opravdanja pozitivne diskriminacije na temelju pojedinih teorija materijalne pravde. Posljednji dio raspravlja o općoj ulozi jednakosti u pravnom kontekstu. Posebno se ističe tvrdnja da je jednakost u osnovi prazna ideja koja ne sadrži relevantna materijalna mjerila, te se nude protuargumenti takvom stavu.

Ključne riječi: *jednakost, subjekti jednakosti, vrijednost jednakosti, jednako postupanje, jednaka mogućnost, pravda.*

Contents

Introduction

Some of the most significant moral crusades in history have been fought and won in the name of "equality": abolishment of slavery, elimination of feudal privilege, the spread of universal suffrage, the outlawing of racial discrimination, the emancipation of women, etc. It has been argued that the word equality has quite powerful and persuasive rhetorical force not only because of the things it refers to but due to the kind of word it is.[1] It combines two paradoxical features: it appears to be one thing to all people and yet different to different people. Like the word "justice" it has favorable connotations and yet is not itself an evaluative term. It seems to refer to a definite state of affairs, something that is not defined by reference to an ever-changing observer. Still, people have inconsistent concepts of equality, some using it as argument for and some against the same thing e.g. granting maternity leave to (only) women, or the legitimatization of homosexual marriages. Equality is, also, a "virtue word"[2] and arguments in the name of equality put opponents "on the defensive."[3] At the same time, to say that something is equal does not mean that it is right and good. Equality can be condemned without falling into contradiction (e.g. Jews and Roma were treated equally in Hitler's concentration camps but nevertheless notoriously cruel and inhuman).[4]

[1] Westen, Peter: *Speaking of equality*, Princeton, Princeton University Press, 1990, pp. xiii-xxi.

[2] Ibid., p. xvii.

[3] "Like justice, of which all seem to agree it is in some sense a part, no one is against equality." For more details see footnote 192 in Westen, Peter: *The empty idea of equality*, In Harvard Law Review, 1982 (3/95), p. 593.

[4] Loc. cit.

It is one of the great undefined terms underlying much current controversy and antagonism. Its legal relevance has been enormously increasing in recent times, having its contemporary incorporation in equal opportunity law. Programs designed to bring it about by remedying the past direct discrimination (affirmative action programs) invoke a bulk of debates over their desirability and justification. And it is precisely because everyone thinks he knows what equality is, that it appears to be difficult to explain exactly what it is.[5] It should be worth defining.[6]

1. The lexical meaning of equality

"One man is neither equal nor unequal to another man. When I stand in the presence of another man, and I am my own pure self, am I aware of the presence of an equal, or of an inferior, or of a superior? I am not. ... There is me, and there is another being ... There is no comparing or estimating ... Comparison enters only when one of us departs from his own integral being, and enters the material mechanical world. The equality and inequality starts at once." (Lawrence, D.H.: *Democracy*, as quoted in Schaar, John H.: *Equality of Opportunity, and Beyond*, In Equality - selected readings, ed. Pojman and Westmoreland, New York, Oxford University Press, 1997, p. 147.)

According to Webster's dictionary, equality "is a state or instance of being equal".[7] It is commonly perceived to be different from rights and liberties. Rights are diverse, complicated, non-comparative in nature, having their source and their justification in a person's individual well-being; they are individualistic. Equality is, on the other hand, singular, simple, comparative, deriving its source and its limits from the treatment of others; it is social.[8]

There are three separate concepts of equality - descriptive, mathematical, and prescriptive equality.[9] Descriptive equality seems to be simple and self-evident in the area of weights and measures. It has three fundamental features: *plurality* - it involves relationship between two or more things, or persons; *difference* - things or persons are distinguishable in one or more respects; and *comparison* - by comparing the objects one learns something more about them than what one would know by examining them in isolation from one another (e.g. that they are of equal weight). Furthermore, the essential presupposition of comparison is a common standard of

[5] For a more detailed discussion on this point see Menne, Albert: *Identity, Equality, Similarity: A Logico-Philosophical Analysis*, Ratio, vol. 4, no. 1 (June), 1961, pp. 50-61.

[6] "Equality is such an easily understood concept in mathematics that we may not realize it is a bottomless pit of complexities anywhere else." Sowell, Thomas: *We're Not Really Equal*, Newsweek, Sept. 7, 1981, at. 13 as cited by Westen, Peter in *On "confusing ideas": Reply*, In Yale Law Journal, 1982 (91), pp. 1153-1165, on p. 1153.

[7] Equal: (lat.) level, even; 1. of the same quantity, size, number, value,...; 2. having the same rights, privileges, ability, rank; 3. evenly proportioned, balanced; 4. (archaic) fair, just, impartial. Webster's New World College Dictionary, McMillan, 3rd ed., 1996, pp. 458-459.

[8] Westen: *The empty...*, p. 537.

[9] Westen: *Speaking....*, pp. 11-92.

measurement by which subjects of comparison are themselves measurable. In that respect, comparison may be made in terms of "more and less"[10] or in binary standards. Namely, if two persons are of the same height, or if they have the same political power, it is held that they possess the particular trait in the same "degree". But whether they are citizens or not is a question of presence or absence of this characteristic, making them similar or different in "type".[11] The binary standards are particularly important in moral and legal discourse as prescriptive equalities are frequently based on them.

The most important step in establishing descriptive equality is the determination of relevant characteristic that is to be measured. It is quite obvious that there are no two absolutely equal things or persons in the world in all possible respects.[12] The crucial conclusion is, therefore, that the equal objects in one relevant respect can be, and are, unequal in other respects.[13]

The concept of equality is taken for granted in the arithmetics, yet its clarity seems to disappear in normative discourse.[14] It has been shown that this derives from the difference in the subject matter of comparison, i.e. mathematically equal entities are completely identical, whereas descriptively equal entities are not. Numbers do not possess any feature other then their numerical value. As a result of this difference, several so-called "category mistakes" can be made by confusing equality in some respects with the ideal of absolute equality achievable only in high abstraction situations, like mathematics.[15]

Prescriptive equality establishes how certain class of people ought to be treated; prescriptive equals are persons who possess the same description for the purpose of a given rule of conduct, ordinarily called moral or legal rule.[16] Although the major difference between descriptive and prescriptive equality is the nature of the standard of measurement, the standards of comparison that underlie prescriptive equality share significant features of descriptive equality. Namely, it cannot be said that a

[10] Aristotle: *Nicomachean Ethics*, as quoted in ibid., p. 15.

[11] Adler and Hutchins: *The idea of equality*, as quoted in ibid., p. 16. However, this issue may became more complicated if the actual value of a right to vote is taken into consideration. Namely, having or not having this right is measured by binary standard. Every state member of USA elects two representatives for the Senate. Is it then really the right to vote of a citizen of a big state like Texas, equal to the same right of someone from small Rhode Island? More on this see King, Preston: *A Constitution for Europe: A Comparative Study of Federal Constitutions and Plans for the United States of Europe*, London, Lothian Foundation Press, 1991, pp. 94-101.

[12] Although we cannot always perceive the difference by naked eye, but when using more sophisticated methods, the differences grow almost *ad infinitum*.

[13] Westem: *Speaking ...*, pp. 22-41.

[14] Russell, Bertrand: *The Principles of Mathematics*, as explained in ibid., p. 42.

[15] See ibid., pp. 22-24, and 58 (Plato's view); p. 262 (Aristotle condemning inequality in oligarchies), p. 264 (mistake that equality *never* serves interest of women just because they possess some traits that distinguish them from men).

[16] Ibid., pp. 59-69.

particular group of persons deserves identical treatment unless those who are members of the group are not distinguished from those who are not on the basis of descriptive equality. In addition, people who possess only one of the traits (or sets of traits) in common will be equal in one prescriptive respect and unequal in another, just as it is the case with descriptive equality.[17] However, it cannot be inferred that, because people are equal (descriptively), they ought to be treated equally (prescriptively). Prescriptive equality is impossible without engaging in moral or legal reasoning toward a formulation of a norm. The norm common to all modern states is the axiom: "All persons are equal before the law." The possible prescriptions that arose from it, however, considerably differ.[18] The crucial issue of equality in legal context lies exactly here - what kind of prescriptive equality norms should be adopted.

The lexical meaning of equality remains the same in law and morals as elsewhere: the relationship of identity that obtains among persons or things by virtue of a given standard of measure.[19] The difference between equality in mathematics and equality in morals is the degree to which people agree on the relevant standard of measurement.[20]

2. The translation of equality from a simple abstraction into complex society

"Equality is a single value whose 'ideal limit' is a society in which natural differences will have been ironed out." (Berlin, Isaiah: *Equality*, In: Proceedings of the Aristotelian Society, 56 (1955-56), pp. 301-326, 303.)

"Contemporary political debate recognizes four types of equality: political, legal, social and economic." (Nagel, Thomas: *Mortal Questions*, Cambridge, Cambridge University Press, 1979, p. 106.)

Trying to make laws live up to the doctrine of equality is the point at which single abstract conception of equality becomes several practical notions. These notions of equality differ from one another not merely in historically or empirically supplied particulars, but also in basic structure that is often contradictory. Consequently, the right question to ask when designing laws is not "*Whether* equality?" but "*Which* equality?"[21]

[17] Ibid., pp. 84-85.

[18] For details see ibid., pp. 76-79. E.g. some commentators argue for consistency, as its basic meaning ("the law shall not distinguish among persons except in accordance with legal classification"), whereas other point out rationality ("the law shall not distinguish among people on the basis of arbitrary classifications.").

[19] Westen, Peter: *To lure tarantula from its hole: A response*, In Columbia Law Review, 1983 (83), pp. 1186-1208, 1189.

[20] Westen, Peter: *On "confusing ideas"...*, p. 1165.

[21] Rae, Douglas: *Equalities*, Cambridge, Harvard University Press, 1989, p. 19.

2.1. The subjects of equality

The first question in practice should be "equality for *whom*?" It is commonly thought that this could be answered in three main ways.[22] When a class of individuals is defined, it can be demanded that each of them be equal to the rest. This simple individual-regarding equality is present in the two basic forms, inclusive and exclusive. However, they can be evaluated as such only in comparison to each other. Namely, if it is regulated that the right to vote is granted solely to "white males", it is obvious that only those who qualify for this category have political rights, but all of the white males have the same right. At the same time, the norm stating that "all males", or "all citizens" have this right is inclusive when comparing with the first example; the latter solution including even more subjects than the former one. Conversely, an exclusive norm would confer the right to vote only to "white males over certain age", narrowing the class of subjects.

Secondly, if the boundaries between classes of individuals are drawn within one already existing class, the subjects of equality may be individuals only within one subclass. This segmental individual-regarding equality is reflected e.g. in the existing systems of income taxation, which sort individual taxpayers in different categories according to relevant criterion (gross income, number of dependents, etc.), and provide for equal treatment of those placed in the same subclass. On the other hand, if the subjects of equality are individuals between selected subclasses, the block-regarding equality takes place. A classical example of block-equal subjects is the majority opinion in *Plessy v. Ferguson* where citizens of the USA, after being differentiated on the racial basis, were held to be "separate but equal."[23]

Most probably, the simple individual-regarding equality would be the preferred goal of modern legal systems.[24] However, blocks of individuals, historically discriminated against (non-whites, women, etc.) point out that the consequences of past treatment cannot be erased simply by future equalization of status. This leads to the contemporary problem of "pinwheel effect"[25] - ordering and consolidating the claims of different blocs. The appearance of new candidates for recognition as blocs requiring special treatment, the extent to which any bloc definition captures the subjective identity of an individual and present affirmative action programs are its material reflections.

2.2. The domain of equality

The next problem that arises when translating the ideal of equality into practice is the question of "equal *what*?" - the classes of things that are to be allocated equally.

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[22] Ibid., pp. 20-44.

[23] 163 U.S. 537 (1896).

[24] E.g. in American society there has been a trend toward more inclusive subject classes in response to demands for the rectification of historical inequalities resulting from exclusionary practices. Rae, op. cit., p. 27.

[25] Loc.cit.

Although goods to be allocated vary greatly (in kind, quantity, special reference, etc.), the more important task is to look into the possible ways of allocation rather than to try to define and explain the differences in substance.[26]

The basic terms used to describe class of things that a given agent controls for the purpose of allocation, and the class of things over which a given speaker seeks equality are *domain of allocation* and *domain of account*, respectively.[27] It might seem appealing to state "equal everything in the world for everyone", but due to the scarcity of desired goods (e.g. of education, or free employment possibilities) the two domains are usually not of the equal size, i.e. the domain of allocation is smaller. In the rare cases where the two cover each other and full domain of account is equally covered, the *straightforward* equality comes into play. However, practically the case of *marginal* equality, and strive for *global* equality are much more disputable. Marginal equalization comprises of dividing equally the domain of allocation between subjects, regardless of the previous relation between them. Thus, if the subjects that seek equal allocation already have initial inequalities - e.g. different financial means - described allocation would be facially equal but in fact it would only preserve the preexisting inequalities.[28] Conversely, global equalization would mean unequal division of goods in the name of final equality of results. Obviously, it represents "killing for peace", or "lying in the name of truth" kind of solution.[29] It is also known as compensatory inequality, incorporated in certain versions of affirmative action, school busing, preferential treatment for minorities and women in education and employment. The alternative for reaching global equality is a redistribution of domains.[30] It either enlarges the domain of allocation (by e.g. confiscating the goods through exercise of eminent domain), or diminishes the domain of account, but usually both at the same time.[31]

It has to be said that goods may be distributed unequally in order to preserve inequality, instead of producing equality. The underlying *ratio* is proportionate equality, as similarly stated by Plato and Aristotle.[32] The essential principle of distribution here is "to each according to his merit", which again raises the issue of criterion; namely, who are the equals (subjects of equality). Aristotle gives several characteris-

[26] Rae, op.cit., pp. 45-64. See also, Nagel, Thomas: *Mortal Questions*, Cambridge, Cambridge University Press, 1979, p. 106.

[27] Rae, op.cit., pp. 48-49.

[28] These "residual inequalities" are present in the consequences of long-lasting discrimination against one particular bloc (e.g. African Americans), as contemporary equal distribution cannot erase significantly less favorable starting position in the social structure.

[29] Rae, op.cit., p. 56.

[30] Ibid., p. 57.

[31] For several examples (taxes, school financing) see ibid., p. 169.

[32] "The citizens must be esteemed and given office, so far as possible, on exactly equal terms of 'proportional inequality' so as to avoid ill-feeling... The lower limit of poverty must be the value of the holding..." Plato, *Laws*, Cambridge, Harvard University Press, 1994, V, 740, 744, 745.; "... if persons are not equal their shares will not be equal." Aristotle, *Nicomachean Ethics*, Cambridge, Harvard University Press, 1990, bk. 5, ch. 3, II. 10, 20.

tics, such as noble birth, wealth, excellence as a possible criterion.[33] Furthermore, Plato claimed that there is also "a simple numerical equality, which would hand out the same to everybody, irrespective of differences in personal quality."[34] Clearly, the numerical equality corresponds to previously described marginal equality.

Finally, equality can differ according to the broadness, or narrowness of its domain. Narrow equality, "equal liberty" as opposed to broader equality, "equal life in society", was advanced by John Locke. He claims that "all men are born equal" but this means only equality in "natural freedom". In other respects, people are unequal (age, virtue, merit, excellency, etc.), consequently deserving different treatment.[35] The liberal philosophers, such as Robert Nozick, followed this tradition supporting equal distribution of formal property rights and certain civil and political rights, but opposed the broadening of the domain of equality.[36] Their opponents, leftward ideologists like Marx, argued that narrow equality leaves the weak at the mercy of strong who are given the justification for exploitation.[37]

The broadening of the domain of equality seems to be desirable to create a more equal society. However, whether this is going to be the case in the particular society, as well as the choice of system of allocation, rests on the specific historical, economic, social, and ideological features prevailing in the given country.

2.3. The value of equality

The very difficult problem for egalitarianism is the essential difference in people's needs, tastes, capacities, life histories. In other words, how can people be made equal when they are so different? The "equal" treatment of persons can thus become "unequal", and conversely, "unequal" treatment change into "equal" resulting from different values that people attribute to certain goods.[38] As a consequence, equality is further divided in *lot-regarding*, and *person-regarding* equality. The right to vote, equality before the laws, or right to property (NOT to equal property!) are examples of former. Lot-regarding equality is characterized by distribution of lots that are of the same value, in the sense that one would neither gain, nor lose by switching one's lot with another. "Equal lots imply nothing about equal well-being."[39] It is the person-regarding equality that establishes equal value of allotted shares comparing their

[33] Aristotle, ibid., I.25. The relevance of several features is discussed in the chapter ***3.2. Equal opportunity***.

[34] Aristotle agreed: "Equality is of two kinds - numerical and proportional to desert." *The Politics*, Grinnell, Iowa, Peripatetic Press, 1986, bk. 3, ch. 9, 12, 13, pp. 84-95. For the reasons, impacts, and consequences of these two equalities see also Brown, Henry Phelps: *Egalitarianism and the generation of inequality*, Oxford, Clarendon Press, 1991, pp. 16-22.

[35] Locke, John: *The Second Treatise of Government*, In Two Treatises of Government, Cambridge, Cambridge University Press, 1991, ch. 6, sect. 54., p. 304.

[36] Nozick, Robert: *Anarchy, State and Utopia*, New York, Basic Book, 1974, as presented by Rea, op.cit., pp. 47-48.

[37] Loc.cit.

[38] Rae, op.cit., pp. 82-103.

[39] Ibid., p. 91.

significance to persons in question. Of course, the result depends on the basis for comparison. If it is utility-based comparison, the problem of establishing subjective satisfaction in individual mind is introduced. In addition, intentional lies and misunderstanding in communication have to be taken into account. Ends-based person-regarding equality is concerned with "giving equal status to socially verifiable different ends."[40] Here the conflict arises when two or more ends are intolerant among themselves, or when due to the shortage of resources they cannot be simultaneously pursued (e.g. competing budget distribution claims). Finally, needs-based person-regarding equality takes account of relative needs that are open to public perception.[41] This kind of equality is extremely relevant in meeting special needs of certain blocs, e.g. disabled. It gives positive answer to the question whether a mentally retarded person should be provided with schooling equally suited to his needs regardless of increasing costs of education.

Again, different paths lead to different practical reflections of equality. There cannot be a simple and unilateral solution suitable for every field of application. Nevertheless, keeping in mind the relative pro's and con's is necessary to create adequate legal rules.

2.4. Absolute v. relative equality

It was Plato who first denied the existence of absolute equality among tangible things in relation to descriptive equality.[42] Nevertheless, it is not meaningless to talk about absolute equality in respect to the prescriptions. As a consequence of the diverse concepts of equality, the absolute equality is hardly attainable. The notion "absolute" itself is limited only to extent and degree, not implying anything about material substance of prescriptive equality.[43] All other equalities are relative in a sense that they are more or less close to absolute one, being either more extensive, or more intensive. Thus, the system that disenfranchises only minors and aliens is more egalitarian than the one that excludes African American in addition (extent). However, the content of intensity of equality is much more controversial. As a result of different approaches four possible solutions have been developed.[44]

The *maximin criterion* (maximizing the minimum) advocates for the improvement of the position of less advantaged subjects by increasing their entitlement. Conversely, the *minimax criterion* (minimizing the maximum) favors diminishing of entitlements of more advantaged subjects. The *ratio criterion* argues for the decrease

[40] Ibid., p. 97.

[41] As the famous Marx's slogan states: "From each according to his ability, to each according to his needs." ibid., p. 99.

[42] Plato: *Euthyphro; Apology; Phaedo; Phaedrus*, Cambridge, Harvard University Press, 1995. Namely, the level of sophistication of our measurement is the only deceiving factor that might induce us to believe in absolute equality.

[43] Thus, it can be absolute lot-regarding, or person-regarding equality; individual or bloc equality, etc. See more in Rea, op.cit., pp. 104-106.

[44] Ibid., pp. 110-128.

of relative difference between less and more entitled, regardless of the absolute values in question. Finally, the *least difference criterion* promotes decrease of absolute difference between greater and lesser entitlement.

This brief overview of abstract criteria for allocation of goods discloses significant differences that multiply the actual difference in result when applied to concrete cases. In any event, it seems that pursuance of equality by any of these criteria has the only limit, which does not depend on particularities of given society, in the point after which it starts to hurt those who should help, i.e. those who are least advantaged by existing inequalities.[45]

3. The meaning of "being equal"

"As a statement of fact, it just is not true that 'all men are born equal'. We may continue to use this hallowed phrase to express the ideal that legally and morally all men ought to be treated alike. But if we want to understand what this ideal of equality can or should mean, the first requirement is that we free ourselves from the belief in factual equality." (Hayek, Fridrich A.: *The Constitution of Liberty*, Chicago, University of Chicago Press, 1960, p. 155.)

The notion of equal treatment does not appear to be particularly interesting, its meaning is usually thought to be sufficiently clear. Nevertheless it is worth looking closely in its consequences, as well as clarifying the concept of equal opportunity that supplies the former with additional features. The considerable variety of affirmative action programs is the contemporary answer to the problems of equality in the legal world.

3.1. Equal treatment

"Treatment" signifies behavior that a person manifests toward himself of toward another person or thing.[46] In this context, the term "equal" can be used descriptively (referring to actual course of treatment), or prescriptively (referring to treatment that people ought to be given). Although "equal treatment" seems to be always a laudatory term, in descriptive sense it can denote both just and unjust treatment. Namely, a treatment is always equal if it manifests the same behavior toward a certain class of people, regardless of its relation to moral or legal rule. People are treated descriptively equally when they have been given the treatment prescribed by the rule, but also when they have been equally denied such a treatment. Therefore, only equal treatment in prescriptive sense (in accordance with the rule) is producing the just effect. However, people can be treated descriptively unequally and this might still thought to be just.[47]

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[45] Rawls, John: *A theory of justice*, Oxford University Press, Oxford, 1992, p. 83. Thus allowing certain inequalities of income, if these offer incentives for work, or capital accumulation that would promote the welfare of society's least advantaged members, would be acceptable and just.

[46] Westen: *Speaking...*, pp. 94, 100-107.

[47] Further elaboration on this point see infra, ***4.3. The proper relationship between equality and justice***.

Some authors distinguish between "equal treatment" and "treatment as an equal."[48] The difference is explained through a simple example of two sick children, one of which would die without the drug and the other would be merely uncomfortable for the lack of it. It is argued that "equal treatment" would require equal shares of remaining drug for both of them, while "treatment as equals" or "treatment with the same respect and concern" would result in giving the drug to the child who needs it most.[49] Ultimately, this difference derives from the diverse rules governing prescriptive equal treatment, which have different concepts of equality as their foundation. Recalling Plato's and Aristotle's concepts of numerical and proportional equality, the "equal treatment" corresponds to the former, while the "treatment as equals" to the latter, where the need is used as the measure of proportionality.[50]

Another argument that labels some forms of "equal" treatment as practically "unequal" is the condemnation of facially neutral legal rules that have disparate adverse effect on a specific bloc (group, class) of people.[51] It is exactly because those rules do not appreciate the relevant specifics of bloc at issue, and treat them equally compared to the other addressees of the norm, that by virtue of factual differences among the blocs the same rules affect them differently. This could be the consequence of predominantly uniform lot-regarding equality conferred in the fields of public education, conflicting with personal-regarding equality based on the choice of different ends.[52] This argument is often raised by socially disadvantaged groups who assert that they have been indirectly discriminated by the preservation of existing unjust inequalities. However, some authors claim that the controversy over "disparate impact" is in fact dispute between two different notions of equality - equal treatment and equality of opportunity.[53]

3.2. Equal opportunity

The equality of results may at the first glance seem to be the perfect criterion for the distribution of any goods in society. However, this statement implies at least two fundamental problems: the definition of "equal result", and the possible scarcity of desired goods. The conflict between lot-regarding and personal-regarding equality is just one pair of many confronting claims that understand the equality of result in completely different ways. Moreover, the goods are usually not infinitely divisible (if divisible at all), which allows only binary distribution, not equal result. The concept of equality of opportunity is said to have been developed as a possible solution.[54]

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[48] Dworkin, Ronald: *Taking Rights Seriously*, Cambridge, Harvard University Press, 1978, p. 226-229.

[49] Loc.cit.

[50] See supra, f. 33. In addition, Dworkin holds that the right to treatment as an equal is more fundamental then the right to equal treatment, concluding that the former is always just, while the latter might or might not be just in every case.

[51] Westen: *Speaking* ..., pp. 108-113.

[52] See Rae, op. cit., pp. 97-98.

[53] See Belton and Fiss as quoted in Westen: *Speaking* ..., pp. 109-110.

[54] Rosenfeld, Michael: *Affirmative action and Justice: a philosophical and constitutional inquiry*, New Haven, Yale University Press, 1991, pp. 23-24.

The equality of opportunity requires that each member of the subject bloc has the same or equal opportunity (formal procedural right) to obtain the scarce good. It falls somewhere between a guarantee and a possibility, being less than the former but more than the latter.[55]

There are two analytically distinct types of equality of opportunity: prospect-regarding and means-regarding.[56] Prospect-regarding equality of opportunity enables its agents to have the same probability of attaining their goal, in the sense that individual characteristics do not affect the result. It has the randomizing effect and its best example is the lottery. The fortunate winner gets the good in question. In some circumstances, when an identical distribution of goods is desirable, but unattainable because of the indivisibility of the good itself, the lottery should give to everyone the equal chance to unequal outcome.[57] Nevertheless, it is almost a matter of common sense to conclude that this meaning of equality cannot be accepted in the great majority of social distribution, as it would not provide for a just solution.

In practice, the means-regarding equality, giving the equal tools to achieve the same goal, is much more important and complex. Of course, people differ from each other in natural endowments such as physical built, talents, interest, and all of these influence the prospect of attaining the goal, even when other means (access to education, or to employment) are more or less equalized. Therefore, it has been argued that means-regarding equality of opportunity legitimizes unequal prospect of success, distinguishing acceptable from non-acceptable factors influencing the final result.[58] Basically, it created a meritocratic system that appears to be more egalitarian, and at present nondiscrimination, defined as impersonal competition, plays a main role in bloc-regarding doctrines of equality for minorities, women, etc. even though it fosters inequality between gifted and ungifted, strong and weak.[59] On the other hand, critics of means-regarding equal opportunity point out the negative effect it has on "losers", those less talented whose self-respect decreases proportionally to the unjustified increase of self-esteem of the "winners".[60] In addition, it is blamed to be conservative in a sense that reproduces and praises always the same values, accepted and incorporated in particular society.[61]

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[55] Westen: *Speaking...*, p. 167.

[56] Johnson, Alex M., Jr.: *Bid Whist, Tonk, and U.S. v. Fordice: Why Integrationism Fails African-Americans Again*, In California Law Review, 1993 (81/6), pp. 1401-1447, 1464.

[57] Rae, op.cit., pp. 65-67, 172-173. The rare case in which prospect-regarding equality of opportunity is applicable is e.g. rescue operations when is impossible to save all of the victims, but just randomly chosen. Also in Netherlands the selection of students for medical school is administered through lottery if the demand exceeds the university's capacity.

[58] See e.g. Rae, op.cit., pp. 66-74; or Rosenfeld, Michael: *Substantial equality and equal opportunity: A jurisprudential appraisal*, In California Law Review, 1986 (74), pp. 1687-1712, 1698-1700.

[59] Rae, op.cit., p. 68.

[60] See Sennett and Cobb as quoted in ibid., pp. 75-76.

[61] Schaar, John H.: *Equality of Opportunity, and Beyond*, In Equality - selected readings, ed. Pojman and Westmoreland, New York, Oxford University Press, 1997., p. 138. For the elaborated defense of equal opportunity doctrine see Galston, William: *A Liberal Defense of Equality of Opportunity*, In Equality - selected readings, ed. Pojman and Westmoreland, New York, Oxford University Press, 1997., pp. 170-179.

Another way of defining equal opportunity concept shows the difference between formal (procedural) and substantive (fair) equality of opportunity. According to its formal version, equality of opportunity is the absence of specified obstacles in an agent's way toward attaining desired goal.[62] This concept corresponds to the notion of negative freedom that requests noninterference.[63] However, the great initial inequalities such as natural talents, motivation, social class, cultural values, and the nature and quality of education greatly hinder the prospects of success of an individual, reducing opportunity to the mere theoretical possibility. It is argued that the "real" equality of opportunity requires, apart from the removal of obstacles, a positive state action, such as distribution of particular goods, or granting of certain rights.[64] The fair equality of opportunity should neutralize discrepancies in social, economic, and educational advantages and thus eliminate unjustified differences in, at least, status and birth that unduly influence people's chances to attain their goals. Finally, the substantive equality of opportunity is pronounced to be "useful and flexible tool for promotion of equality" which "may require unequal treatment as a prerequisite to the global equalization of the means-regarding opportunities" making "differences in prospects among competitors an exclusive function of differences in natural abilities and skills."[65] Consequently, it provides a justification for temporary imposition of affirmative action plans based on preferential treatment, as well as the quota representation.

3.3. Affirmative action

Affirmative action refers to attempts to bring members of underrepresented groups, usually groups that have suffered discrimination, to higher degree of participation in some beneficial program.[66] When discussing discrimination, it has to be explained that there are different types of discrimination. Direct (or first-order) discrimination is different and unfavorable treatment of certain bloc of people based on race, gender, or any other unjustified ground. It is the most overt kind of discrimination, but its elimination is relatively easy, by applying so called "color-blind" rules that are the same for all, regardless of these sort of differences among them. On the other hand, indirect discrimination signifies the still present effects of decades of blatant discrimination toward minorities; discrimination that has been public, societal and institutionalized. Moreover, it is manifested in the exclusionary effects of past discrimination, including the discriminatory effect of testing procedures, subjective selection standards, race or sex role stereotypes, or seniority rules. This relates even

[62] See Westen: *Speaking...*, pp. 166-171.

[63] For the explanation of difference between negative and positive freedom see Berlin, Isaiah: *Four Essays of Liberty*, Oxford, Oxford University Press, 1992., pp. 118-173.

[64] Rosenfeld: *Substantial...*, pp. 1687-1695.

[65] Ibid., pp. 1708 and 1711, and Rosenfeld: *Affirmative...*, p. 29. For the similar conclusion see Rawls, op. cit., p. 73. ("... those with similar abilities and skill should have the same life chance...").

[66] Rosenfeld: *Affirmative ...*, p. 42.

to situations in which apparently neutral regulations or practices result in inequalities with respect to certain persons with certain characteristics.[67]

Finally, the term reverse (or benign) discrimination is used to describe discrimination in favor of those who have been targets of direct discrimination, providing a remedy for indirect discrimination. This wording itself is quite disputable, as "discrimination" usually has negative implications. Other terms, like preferential treatment, affirmative or positive action can be used more or less as synonyms, although the last two are more inclusive, consisting of programs that are not necessarily unfavorable to the "majority" group.[68] Nevertheless, the oxymoron in phrase "benign discrimination" precisely reflects its core problem, meaning its justification and balancing between the opposite, often contradicting values/interests of the compared groups.

Generally, affirmative action seeks to eliminate indirect discrimination and produce fair means-regarding equality of opportunity e.g. in education and employment through different programs designed and administered on the level of the educational or employment institution itself.

Its two most frequent forms are *preferential treatment* and *quotas*. The former consists of giving a preference to one of the competing candidates on the grounds that he is a member of an underrepresented group, or group that has been discriminated against in the past.[69] Of course, preferential treatment (as well as the discrimination to be remedied) does not occur if "membership" in one of these groups presents a job-related qualification (also known as bona fide occupational qualification).[70]

Quotas relate to particular allocation of goods requiring that a set number, or proportion of this good be distributed to members of an underrepresented group.[71] Thus, e.g. a public employer can reserve certain number or percentage of working places for the employment of women. These numbers are established by comparing the percentage in which a given group participates in the relevant community with the proportion in which it participates in a given company. Due to the fairly obvious problems quotas can invoke if applied rigidly, several additional requirements are usually set in order to support their application. Namely, quotas should be flexible, allowing decrease of established number, or percentage in accordance with possible

[67] Ben-Israel, Ruth: *Equality and Prohibition of Discrimination in Employment*, In Comparative Labour Law and Industrial Relations in Market Economies, Deventer, Kluewer, 1990, Chapter 5, pp. 90-92.

[68] Ibid., p. 114.

[69] Fullinwider, Robert: *The Reverse Discrimination Controversy: A Moral and Legal Analysis*, Totowa, N.J., Rowan and Allanheld, 1980., p. 17. "A black/woman is preferentially hired/admitted over a white/man when the black/woman is chosen over at least one better qualified white/man, where being black/woman is not a job related qualification/does not affect the educational abilities of a candidate for admission."

[70] E.g. possessing certain physical capabilities for the proper and safe performance of a certain task.

[71] Rosenfeld: *Affirmative* ..., op. cit., pp. 45-46.

lower proportion of minority applicants. Furthermore, minority members have to meet at least some minimum standards, if not even be similarly competent for the job. In certain instances individual characteristics of other candidates must be taken into consideration being, in exceptional cases, able to overrule the application of quota system.[72] And finally, whatever kind of remedial program is chosen, it has to be introduced only temporarily, until a clearly set goal will have been achieved. This is crucial in order to prevent a new discrimination, now in the opposite direction.

Arguments in favor of affirmative action emphasize its benefits: development of desirable role models and destruction of negative stereotypes, achievement of diversity among the student body at institutions of higher education, promotion of better services for minority communities, etc. At the same time, criticism is related to negative consequences of preferential treatment like reduction of efficiency associated with awarding jobs to less competent candidates, perpetuation of distinction based on negative stereotypes, devaluation of achievements of beneficiaries, damaging of the self-esteem of beneficiaries (by conveying to them the message that they cannot get things by themselves but only if it is given to them), increase in racial tensions, etc.[73]

It follows that the affirmative action deals with bloc- (group-) regarding equality, raising the issue of group compensation and group liability. However, these are not valid justifications for affirmative action programs, as it has been rightly emphasized that neither all members of discriminated group have been discriminated against, nor have all members of historically favored group been favored.[74] Moreover, the e.g. preferential treatment, although based on belonging to a certain group, provides compensation only to particular individual, not to the whole class. Clearly, the problem of theoretical justification of affirmative action is complex and there are several different approaches deriving from the respective theories of justice an author is willing to accept.

4. Equality v. justice

"Justice is equality; and so it is, but not for all persons, only for those that are equal. Inequality also is thought to be just; and so it is, but not for all, only for the unequal." (Aristotle: *The Politics*, bk. 3, ch. 9, p. 84.)

Justice alone presents an enormously broad issue that requests for immense and autonomous study, far beyond the scope of this paper. However, basic questions

[72] Thus, if a man is unemployed and woman only changes her job, or if the man is moderately disabled, the individual conditions of this particular man would require giving him preference over the hiring of a woman. For other details about legally binding quotas in North Rhine-Westphalia, Germany see Shaw, Josephine: *Positive Action for Women in Germany: The Use of Legally Binding Quota Systems*, In Equality - selected readings, ed. Pojman and Westmoreland, New York, Oxford University Press, 1997, pp. 386-411.

[73] Fullinwider, op. cit., pp. 17-18, 70, 248-250.

[74] For detailed analyses of the problematic relationship between the individual and the group see, Rosenfeld: *Affirmative* ..., pp. 81-90.

related to justice have to be briefly examined in order to understand its interrelation with equality.

First, justice has certain similarities with equality in fundamental characteristics, i.e. it is a desirable state for everybody, or at least arguments are always given in its name, never against it. Moreover, a number of different concepts and criteria for establishing what justice really means have been developed throughout history of social, political and legal thought. Justice is a concept that ought to be confined to the deliberate treatment of men by other men in the aspects that are subject to their intentional control. "Justice means giving every person his due."[75] It deals with the distribution of benefits and burdens, and in particular the distribution of scarce resources. Thus, injustice may be regarded as a feature of situations in which one person or group of persons wrongly receives less or more than other persons or groups.[76] It is here where the equality and justice encounter each other.

4.1. Distributive, compensatory and procedural justice

Again, the proper starting point are the Plato's and Aristotle's views on justice. While dealing with the appropriate form of distribution (of goods, positions, powers, etc.) in the society, they emphasized that the differences between people are so fundamental and so inherent as almost to divide mankind into sub-species. Therefore, justice consists of satisfying those claims that are proportionate to the merit (desert) of the claimants.[77] Aristotle differentiates between absolute and particular justice, the latter divided between distributive and corrective (compensatory) justice. Distributive relates to the distribution of public goods by political authorities based on proportional equality, whereas the latter applies to private transactions based on numerical equality.[78] Today, the terms distributive and corrective justice are understood in a broader sense. Namely, distributive justice consists in allocating goods according to previously established standards, while corrective justice remedies unjust departures from the prevailing distribution of goods.[79] Hiring the best qualified person would be an example of distributive justice, while preferential treatment of a member of disadvantaged group, or quota system would represent corrective justice. Obviously, those definitions of justice cannot by themselves point toward the desirable material criteria that are to be followed when deciding what is just. But before looking into those, it has to be made clear that the achievement of justice also depends on just procedures.

Pure procedural justice would validate any result provided that it was a product of properly followed fair procedure. According to this, even the lottery that does not take into account qualifications, or any other relevant criteria, organized to choose

[75] Westen: *The empty...*, p. 556.

[76] Campbell, Tom: *Justice*, London, MacMillan, 1990, p.12.

[77] Plato, *Laws*, VI, 757; Aristotle, *The Politics*, bk. 3, ch. 9, p. 84.

[78] Aristotle: *Nicomachean ...* , bk. 5, ch. 3, II. 10, 20. See also supra, ***2.2. The domain of equality***.

[79] Campbell, op.cit., pp.17-18.

between applicants for a vacant employment place would be just. The narrower form of procedural justice requires both an independent criterion of justice to determine what would be just distribution of compensation, and an independent criterion to determine the procedure that would lead to the desired outcome.[80]

4.2. The concepts of material justice

The postulate of equality, as the substantive requirement of justice, first emerged as a moral weapon against the privileges of status and birth characteristic of the feudal order, condemning the use of those differences as the basis for treating persons unequally.[81] Christianity, which has declared that all men are equal in the sight of God, acknowledged that all citizens are equal in the eyes of the law. Among numerous different views on justice, the four liberal concepts of it (libertarian, contractarian, utilitarian, and egalitarian)[82] are the most relevant ones for the scope of this paper.

4.2.1. Libertarian justice

The libertarians (Nozick, Locke) are in fact agitators of minimal state. The principal purpose of society is the protection of individual property rights, while the state should protect life and liberty of its members, and provide for the enforcement of contracts. The postulate of equality is for them embodied in equality of free association and equality to acquire and transfer property freely.[83] It reflects the formal opportunity of equality approach. The freedom of choice takes precedence over welfare considerations, and the limits to someone's activities can be imposed only with someone's consent. Therefore, every company has the absolute right to hire whom it pleases, and can refuse to hire a member of minority group, as well as to provide for a preferential treatment.[84] Locke adds that the government should operate on the principle of majority rule, and the allocation of public positions should be determined by the will of majority, making the acceptance of affirmative action programs (designed to advance the interest of minorities in a broad sense of the word) improbable in the public sector, too.[85]

It seems that the attainment of equality in both private and public sector is left to the mercy of those who run them. However, Nozick maintains that reallocation would be necessary in view of rectification of past injustices caused by the state. Namely, if a person has acquired something that he should not have e.g. due to past discrimination, the state should provide for compensation in order to put the affected

[80] Rawls, op.cit., pp. 83-90. Furthermore, Rawls distinguishes between perfect and imperfect procedural justice, depending on whether the procedure really assures the desired outcome or not.

[81] Rosenfeld, Michael: *Affirmative* ... , p. 21.

[82] Ibid., p. 6.

[83] Ibid., pp. 52-53, 58. A person's property rights can be overridden for purposes of promoting fundamental welfare needs only in order to avoid a "catastrophe".

[84] In that sense Nozick, op. cit., p. 95.

[85] Locke, op.cit., ch. 8, sec. 95-96, pp. 330-331.

persons in the position they would have been if the injustice had not occurred.[86] This may amount to the substantive means-regarding equality, or at least to elimination and compensation for facially neutral rules that in practice had adverse effects on certain groups.

4.2.2. Contractarian justice

The ground stone of contractarian concept of justice is the consent of those who are to be bound by the particular rule. The classical contractarian theory has its roots in works of Hobbes, Locke and Rousseau, the latter being heavily biased toward egalitarianism.[87] The modern contractarian ideology, according to Rawls, is lifted "on a higher level of abstraction", which rests on the premise of the "veil of ignorance". Namely, the consenting parties are conceptualized as being in "original position, not knowing their place in society, their class position or social status, ... nor do they know their fortune in the distribution of natural assets and abilities, intelligence,...". Therefore, they could reach a hypothetical agreement on a particular concept of justice, on something that would be fair regardless of parties positions in the social structure. Justice is reflected in two principles: firstly, "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." And secondly, "social and economic inequalities are to be arranged so that they are both to the greatest benefit of the least advantaged,... and attached to offices and positions open to all under conditions of fair equality of opportunity."[88] In other words, in a society in which no members have advantage due to their social position, the allocation of scarce goods (e.g. employment) should be made exclusively through an open competition under conditions of fair equality of opportunity. But, when the direct discrimination operating in the past produced considerable differences in the starting positions, compensation for this past injustice should take place.

However, critics[89] emphasize that according to contractarian justice it is not clear whether the affirmative action (or any other form of compensation) could be justified for those members of disadvantaged group who have not themselves experienced direct discrimination. The same is questionable in relation to the members of privileged group who are not themselves wrongdoers. On the other hand, "the innocent white male"[90] enjoys undeserved greater prospect of success in that

[86] For more details on "principle of rectification" see Nozick, op.cit., pp. 150-153.

[87] See Hobbes, Thomas: *Leviathan*, London, Penguin Books, 1985., ch. 14., pp. 91-100; Locke, op.cit., ch. 8, sec. 95-96, pp. 300-1; Rousseau, Jean - Jeacques, *On the social contract*, Indianapolis, Hackett, 1988. The alienation of rights is made without reservation, people united in social contract forming a body politic give themselves entirely. Since they do it all the condition is equal for all, and they are entitled to equal protection of law. General will cannot impose heavier burdens on some, or grant privileges to other.

[88] Rawls, op.cit., 60-75.

[89] See Goldman as quoted in Rosenfeld: *Affirmative* ... , pp. 75-90.

[90] This is a paradigmatic notion for a member of privileged group that did not himself engage in direct discrimination. It derives from the historical dominance of white race and male population, based on discriminatory treatment of "others".

competition and on this basis he can be held subject to compensatory liability. Of course, not all white males will in reality be reversely discriminated by introduced preferential treatment, just as not all of the disadvantaged members in society will benefit from it.[91]

4.2.3. Utilitarian justice

Whenever utilitarianism is invoked, one cannot but remember the notorious Bentham's phrase: "the greatest happiness for the greatest number." Keeping in mind that for utilitarian philosophy the greatest concern is the social utility, it is obvious that almost all the previously given arguments for and against the affirmative action can be said to lean on utility reasons. It is believed that by producing a substantive equality of opportunity and remedying the past discrimination, a more just society can be created.[92] At the same time, the biggest problem of utilitarianism is that it allows the sacrifice of an individual's interests to the collective good. Provided that collective welfare is increased, it does not matter to the utilitarian how it is distributed, and the unhappy state of and individual or members of a permanent minority may be ignored.[93] Furthermore, the preferential treatment, while creating better society and more satisfaction for oppressed members, brings a less qualified person to a particular position. The overall efficiency of work will decrease which in turn cannot be deemed to present a greater utility in society.

These opposite tendencies resulted in a reshaped utilitarian approach - limited, as opposed to pure utilitarianism - that legitimizes only those actions that beside creating social utility pay due care to the individual rights. Namely, maximization of utility should not violate any rights, and if it does, the harm has to be outweighed by great benefit. As an example, Thomson points out that affirmative action could maximize utilities without violating any rights of "innocent white males" when the preference is given to an equally qualified member of disadvantaged group. Although in this situation both candidates would have the right to equal prospects of success (lottery), deciding in this way would be more just. In addition, she claims that the community owes a compensation for the wrongs done in the past.[94]

Finally, there is a modified utilitarian argument presented by Dworkin who relies on his differentiation between the "right to equal treatment" and "the right to be treated as equal".[95] Namely, in certain cases the fundamental right to be treated as equal requires unequal treatment. It supports the adoption of affirmative action programs "if it seems reasonable to expect that the overall gain to the community

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[91] This would represent an example of Rawls' imperfect procedural justice, as the outcome is not the same for all. See also Rosenfeld: *Affirmative* ..., pp. 87-88.

[92] Pitt, Gwyneth: *Can reverse Discrimination Be Justified?*, In Equality - selected readings, ed. Pojman and Westmoreland, New York, Oxford University Press, 1997, pp. 88-89.

[93] See Mill, John Stuart: *On Liberty*, London, Penguin Books, 1985.

[94] Thomson, Judit Jarvis: *Preferential hiring* as summarized in Rosenfeld, *Affirmative* ..., pp. 100-101.

[95] See supra, ***3.1. Equal treatment.***

exceeds the overall loss" and there is no other policy that would produce roughly the same benefits but with less loss.[96]

4.2.4. Egalitarian justice

Egalitarian justice presumes that every individual has an equal right to develop his talents. It is relying on person-regarding equality, usually establishing order of priority among people's needs according to their urgency. However, according to Nagel "different natural abilities are not the characteristics that determine whether people *deserve* economic and social benefits".[97] This argument emphasizes that natural abilities are not deserved, therefore they cannot make the difference between otherwise "morally equal" people. In other words, egalitarianists condemn meritocracy as unjust system. For them the ideal is equality of results, rather that equality of opportunity, and if equality of opportunity than certainly prospect-regarding rather than means-regarding equality of opportunity. This does not mean that direct discrimination is held to be just, quite the opposite. In egalitarian view "equality is in itself a good and producing it may be worth a certain amount of inefficiency and loss of liberty."[98]

It is held by the commentators[99] that egalitarian justice would probably include certain values of the utilitarianism, and therefore would accept validity of affirmative action in order to remedy past discrimination. However, the most probable justification would go in the direction of special training and rehabilitation programs designed to develop the capacities of the members of disadvantaged groups. The final goal would be to raise their capacities on the level they would most likely achieve if it was not for the direct discrimination.

4.3. The proper relation between equality and justice

As has already been shown, Aristotle thought that "giving every person his due" (justice) and "treating like persons alike" (equality) is equivalent. This view is adopted by some scholars,[100] while the others[101] claim that it is important to understand that justice and equality cannot be equated. Namely, equality is concerned with placing people in the same situation after all relevant has been taken into account, while justice is concerned with distinguishing between individuals, or groups, and justifying their differential treatment.[102]

Some kind of compromise between the two is held to be found in the meaning of justice in the formal sense, which states that "in the distribution of benefits and

[96] Dworkin, op.cit., p. 227.
[97] Nagel, op.cit., p. 97.
[98] Ibid., p. 108-112.
[99] Rosenfeld: *Affirmative* ... , pp. 129-132.
[100] Westen: *The empty* ..., pp. 556-558. See infra, ***5.4. The "emptiness" of the idea of equality?***.
[101] See Campbell, op. cit., pp. 31-35.
[102] Ibid., p. 32.

burdens it should be assumed that all are to be treated equally until it is demonstrated that they differ in some relevant respect".[103] Moreover, this principle may extend to prescription that all persons should be given equal consideration, in the sense that everyone's pleasure is of the same moral significance. This "equal worth" principle, however, is not applicable unless certain guidelines are set about the sort of factors that ought to be considered as being of equal worth. Merit or desert are the usual ones. It has been argued that this meritorian view of justice still leaves a lot of unsolved problems, e.g. what is to count as merit; what implications individual differences have with respect to treatment of people; and, finally, whether so construed justice has always the major role in determining what is morally right.[104]

As it is shown in the next chapter, the idea of equality has produced similar dilemmas. Along the lines of the difference between formal and substantive principle of equality, the presumption of equality has emerged, as well as the somewhat radical view that equality is essentially an empty idea.

The proper relation between justice and equality still remains somehow vague. Arguments that support their identity seem to be very persuasive. On the other hand, when Lord Halifax dismissed from duty everyone in the typing pool during the Second World War - because there was a leak from it, but the exact source could not have been traced - he treated all the persons equally, yet unjustly.[105] It is obvious that this result, which directly contradicts Aristotelian postulate ("equal is always just" and vice versa), derives from the evaluation of equality from descriptive standpoint, while justice was taken in material sense consisting of implied moral standards. Employees would not have been treated equally if one applied Westen's definition of prescriptive equality. Usually, legal rules allow the removal from office only for a certain reasons, and only one of the persons in this example had the reason to be removed, i.e. only the responsible individual has been treated as he ought to be treated, namely as a prescriptive equal. Therefore, it can be concluded that the relation between justice and equality depends on the definition of which one employs while making the comparison.

5. The role of equality in legal context

"Legal professionals (professors, lawyers) should constantly engage in debate with political experts (sociologists, historians, and philosophers) to find in the evolution of social thought the aspirations or claims that deserve recognition as rights. They must also, by fitting these claims into a legal framework, facilitate the adjustment of these rights to the jurisprudential charter of freedoms." (Rousseau, Dominique, *The Constitutional Judge: Master or Slave of the Constitution?*, In Rosenfeld, Michael ed.: *Constitutionalism, identity, difference, and legitimacy: theoretical perspective*, Durham, Duke University Press, 1994, p. 272.)

[103] Ibid., p. 33.

[104] Ibid., p. 35.

[105] Greenawalt, Kent: *How Empty is the Idea of Equality?*, In Columbia Law Review, 1983 (83), pp. 1167-1208, 1174.

While evaluating the implementation and operation of the idea of equality in the contemporary legal orders, legal scholars pointed out several other important issues that deserve to be tackled in this paper. The most interesting idea appears to be Westen's conclusion that the concept of equality is basically empty in itself and confusing as used in legal discourse. Before the assessment of this theory, some other basic notions have to be explained.

5.1. The formal principle of equality

The formal principle of equality is embodied in the following form "likes should be treated alike", or "equals should be treated equally".[106] This axiom is thought to provide for an additional moral reason for complying with an established standard of how people are to be treated.[107] At the same time, its corollary ("unequals should be treated unequally") does not deny that unequals can empirically be treated equally, depending on the way the concept of unequals is construed. This would be possible when the knowledge on relevant characteristics of those who are to be assessed in terms of equality is insufficient (like in the case of Lord Halifax's choice of equal treatment for unequals). Also, every classification of those who are equal for the purpose of certain rule creates a group of necessarily unequal persons in some other respects that are thought to be irrelevant. At the same time, the degree of the possession of desired characteristic varies among those who are made "equal". Both of these in practice means that unequals are treated equally. It has been argued that breaking the formal principle of equality, i.e. treating equals unequally creates more resentment in popular view, that treating unequals equally.[108]

The validity of the formal principle of equality is ever since Aristotle's times perceived to be self-evident[109] leading to another interesting notion - the presumption of equality.

5.2. The presumption of equality

The proposition that everyone should be treated alike unless there is a good reason for treating them differently is widely known as the presumption of equality. Aristotle was the first to imply that social inequalities, not equalities, are in need of some justification, and that inequalities for which no adequate reason can be given are unjustified.[110] In its strong form presumption of equality postulates that equal treatment is always preferable to unequal treatment, and, thus, whenever the reasons

[106] See e.g. Westen, *The Empty ...*; *On Confusing ...*; *To Lure ...*; Greenawalt, *How Empty...*; Burton, Steven: *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, In Yale Law Journal, 1982 (91), pp. 1136-1152.

[107] "It exercises directive influence over social choices and gives ethical reasons for consistent compliance with standards that have been set." Greenawalt, op. cit., p. 1178.

[108] Ibid., p. 1175.

[109] "What is unjust is unequal, what is just is equal; as it is universally accepted even without the support of argument." Aristotle: *Nichomachean ...*, as quoted in Westen: *To Lure ...*, p. 1190.

[110] As quoted in Westen: *The Empty ...* , p. 570.

for equal treatment and unequal treatment are otherwise evenly balanced it favors equal treatment. The weaker form states that while equal treatment may not be preferable to unequal treatment when good reasons favor both respective treatments, equal treatment is preferable to unequal treatment when no reasons favor either treatment.[111]

This presumption is incorporated in legislative and administrative rules, meaning that the state must have a legitimate reason for drawing the lines among groups, and furthermore, that it must present an acceptable reason why some of these groups should be treated differently (i.e. worse). As it was already emphasized in the chapter about justice, substantive judgments have to be made about the relevant characteristics in order to decide who is equal and who is not.

5.3. The substantive principle of equality

Substantive norms of equality are said to be of "various sorts" having "a highly complex relationships with other norms and values."[112] Of course, many of them being general norms do not indicate precisely which persons are to be treated equally. Rather, it is the satisfaction of certain criteria that leads to equal treatment. For example, designation of different categories of taxpayers does not apply on some particular X and Y, but on everyone who meets the conditions described in this norm.

At the same time, most of the norms against discrimination are given in the what could be called "negative form", in the sense that they require "exclusion of factors from consideration ... (those) that are to be regarded as irrelevant."[113] Some of those considerations may be forbidden as not bearing required relation with the kind of decision that is made. Others are thought to be on a higher level; they are deemed to be "likely to fortify irrational prejudices" and thus unacceptable regardless of the subject-matter in question.

In sum, substantive norms of equality can preclude certain forms of classification, limit the factors to be taken into consideration, and affect the gradation of reason for justifiable classification. They impose significant constraints upon the substantive choices of political majority and their representatives.

5.4. The "emptiness" of the idea of equality?

Equality was condemned over the past two decades for being an empty idea. Essentially, it is claimed to be prescriptively empty because to say that "those who are equal should be treated equally" is in fact to say "those who should be treated equally according to the norm, should be treated equally".[114] Equality is said to be wholly a normative concept that lacks a "reality referent", that "equality does not by

[111] Westen, Peter: *To lure tarantula* ... , p. 1206.

[112] Greenawalt, op. cit., p. 1178.

[113] Ibid., p. 1179. This is also the case with the equality provision in the constitutions of Croatia, article 14 and 17(2).

[114] Westen: *The Empty* ..., p. 547.

itself say what 'ought to be' without an external normative standard".[115] Thus, the concept of equality is not only unnecessary, but also confusing because people believe that equality does imply certain substantive rights, or that the propriety of treating persons as equal for one purpose suggests the propriety of treating them as equal more generally.[116] The same is attributed to descriptive equality, i.e. that it contains variable terms that must be filled in. Namely, being identical in relevant respects requests first a reference to some external descriptive standard.[117]

As to the formal principle of equality, Westen claims it only tells us we should do what we have already decided we should do.[118] Similarly, the presumption of equality rests only on an anterior prescriptive standard for distinguishing between just and unjust classifications. The popular resentment when treating equals unequally does not by itself show anything about the "ought to be" substance of the rule.[119] Even the substantial principle of equality, as presented before, is in fact formal for Westen, as "its main constituent terms are variables that remain to be further specified."[120] Namely, saying that "rights under the law shall not be denied on account of sex" is enough by itself, while saying that "men and women are equal" is confusing and requires further clarifications.

These seemingly persuasive arguments may be effectively rebutted. The most important criticism is directed to the fact that legal rules are not given but chosen. Equality can be a very useful concept while deciding about the appropriateness of particular rules, as well as in deciding under which rule to place a certain set of facts. "The judgment of importance in applying a rule, like the judgment of similarity in using an analogy, depends on unspecified values outside the rule itself. ... Equality is needed as a higher standard."[121]

In addition, it can be argued that by labeling equality with the notion of "emptiness" "one proves too much." Using the logical positivism method of analysis it is possible to render virtually all proposition of law and moral meaningless.[122] Equality is, of course, empirically unverifiable (it can not be touched or tasted), but is pragmatically extremely valuable instrument of thought and argument. At least, there is no viable alternative in legal discourse.[123]

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[115] Westen: *On Confusing* ..., p. 1156.

[116] Westen: *The Empty* ..., pp. 579-584.

[117] Westen: *On Confusing* ..., p. 1158.

[118] "Formal equality can do nothing but await the selection of the rule - and then spell out what the rule has already determined the proper treatment to be." Westen: *To Lure* ..., p. 1196.

[119] Ibid., pp. 1207-8.

[120] Ibid., p. 1187.

[121] "Professor Westen errs in stating that the conclusions are the 'logical consequences' of the rule... logically deduced from a 'given'." Burton, op. cit., pp. 1141-1145.

[122] "The workaday vocabulary of the lawyer is full of normative or normatively ambiguous concepts: proximate cause, duty, malice, promise, substantial performance, title, material issue of fact, reasonableness, good faith." Ibid., p. 1148. For more details on logical positivism, Cartesian certitude and modern philosophy see Quine, Glymour, Kuhn, Rorty, Wittgenstein as quoted in ibid., pp. 1147-1150.

[123] Ibid., p. 1152.

Regardless of someone's personal preference for one of the approaches to the idea of equality, the legal world presents undeniable evidence of the role equality has played in the development of modern normative systems. Its importance can be traced and assessed on several different levels, from the constitutional provisions, or even general principles of law, through regular laws and statutes, to the affirmative action programs on the lowest level of institutional application.

Conclusion

"Equality will never in itself alone give us a perfect civilization. But, with such inequality, as ours, a perfect civilization is impossible." (Arnold, Matthew, essay on "Equality" (1878) in Arnold, Matthew: *Prose and Poetry*, ed. A. L. Bouton, New York, Scribner's, 1927, p. 362.)

Although a very commonly used word whose meaning is thought to be completely clear, under its surface equality possesses an enormous number of different faces. Moreover, many of them are not even coherent but mutually antagonistic even contradictory. This is especially true when one tries to apply abstract notion of equality to the practical world. Sometimes it can be counterposed to other values in the society, like efficiency, freedom, justice, or rights. Several disagreements among philosophers and theorists are rooted in the fundamental misunderstanding of the concept of equality they are talking about. As pointed out, descriptive and prescriptive concepts of equality, as well as the fact that equality in one respect does not mean equality in all respects, can create if not kept in mind a considerable confusion.

Equality in itself is not a guardian of human prosperity, being as well served by total poverty as by universal wealth. The combined development of social consciousness and progress of legal orders filtered this vague notion; as Dworkin has insightfully put it, being "treated as an equal" should prevail over formal "equal treatment for all". The latter developed logically and chronologically before the former with the zenith of liberal ideology.

The ground stone of democratic society is the requirement that those conditions of people's lives that are determined by government be provided equally for all. Facially neutral laws presented a great improvement, but very soon showed that this was only the first step. They were the expression of individual-regarding approach to equality. Indirect discrimination has an ugly face not always easily discoverable. Utilitarian and egalitarian philosophy pointed in the right direction; equality of opportunity appeared to be a better concept. However, blocs of people have inherently unequal starting position due to immutable personal traits. Some of these may constitute a *bona fidae* occupational requirement, others may have been the source of traditional prejudicial stereotyping. Thus, certain positive actions - in some cases they even amount to the reverse discrimination - were designed to bring about the fair, meaningful equality of opportunity. At the same time, the domain of equality was broadened. Instead of having only the "negative" expression (in the best tradition of liberal philosophy), the substantial value of equality for the particular person became increasingly important. Thus, the achievement of lot-regarding equality remained the leading concept in certain areas (e.g. right to vote for all), while in others person-regarding equality took precedence (e.g. special schooling for disabled).

Equality is without exception used as a moral argument that imposes itself as an essentially positive concept. It bears several other similarities with justice, but their spheres do not overlap completely. In spite of virtually universal acceptance of its desirability, equality is still fought for. This is the obvious consequence of different concepts people have in mind when striving for equality. At the same time, the radical egalitarianism is not even acceptable as it would mean total equalization of conditions. The equality as argued for in this paper aims at exactly the opposite, i.e. appraisal, acceptance and dignified treatment of different people.

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Summary

THE PHILOSOPHICAL CONCEPTS OF EQUALITY

The aim of this paper is to deconstruct apparently clear and widely accepted notion of equality along different philosophical and theoretical lines. Equality in legal context is primarily a prescriptive one, although descriptive equality forms the basis for legitimate classifications. Consequently, the substantial equality immanently depends on the criteria the specific legal order chooses to apply when establishing what makes certain situations different, and which of the classifications should be considered justified.

The first chapter deals with the three different lexical meanings equality has, while the second examines practical concepts which arose when applying this abstract notion to the social complexities. Equal treatment and recently developed concepts of equal opportunity are examined in the third chapter. The same chapter explains general problems of affirmative action. The very intriguing relationship between equality and justice is closely looked into in the fourth chapter. It also shows some of the possible justifications of affirmative action dependent on the standard of justice one applies. Finally, the fifth chapter discusses the overall role of equality in

legal discourse. Special emphasis has been placed on the claims that equality is basically an empty idea which lacks relevant material standard of measurement, and several counterarguments have been offered.

Key words: *equality, subjects of equality, value of equality, equal treatment, equal opportunity, justice.*

Zusammenfassung

PHILOSOPHISCHE KONZEPTE DER GLEICHHEIT

Ziel dieser Arbeit ist die Analyse des anscheinend klaren und allgemein akzeptierten begriffs Gleichheit mit Hilfe unterschiedlicher philosophischer und theoretischer Konzepte. Gleichheit ist im juristischen Kontekst vor allem preskreptiv, doch die deskreptive Gleichheit bildet die Grundlage für die Legimisierung von Gruppierungen. Folglich hängt die materielle Gleichheit imanent von den Maßstäben ab, die ein bestimmtes Rechtssystem bei der Unterscheidung verschiedener bestimmter Situationen anwendet und bei der Entscheidung über die Berechtigung einzelner Gruppierungen.

Im ersten Teil werden drei sprachliche Bedeutungen des Wortes Gleichheit betrachtet, während im zweiten praktische Konzepte untersucht werden, die sich bei der Anwendung des abstrakten Begriffs Gleichheit auf die komplexe gesellschaftliche Realität entwickelt haben. Gleiche Behandlung und das unlängst geschaffenen Konzept der gleichen Möglichkeiten werden im dritten Teil betrachtet. Dort werden ebenfalls Grundprobleme der positiven Diskriminierung dargelegt. Über die interessante Beziehung zwischen Gleichheit und Gerechtigkeit wird im vierten Teil reflektiert. Hier werden auch mögliche Entschuldigungen für eine positive Diskriminierung auf Grund einzelner Theorien der materiellen Gerechtigkeit vorgestellt. Im letzten Teil wird über die Gleichheit auf Grund einer leeren Idee diskutiert, die keine relevanten materiellen Maßstäbe enthält und es werden Gegenargumente dazu angeboten.

Schlüsselwörter: *Gleichheit, Subjekte der Gleichheit, Wert der Gleichheit, gleiche Behandlung, gleiche Möglichkeit, Gerechtigkeit.*

Sommario

IL CONCETTO FILOSOFICO DI EGUAGLIANZA

Lo scopo del presente saggio è di decostruire l'apparentemente chiara e comunemente accettata nozione di eguaglianza lungo differenti linee filosofiche e teoretiche. Eguaglianza nel contesto giuridico è primariamente una nozione prescrittiva, nonostante l'eguaglianza descrittiva formi il fondamento per legittime classificazioni. Conseguentemente l'eguaglianza sostanziale dipende immanentemente dai criteri

che lo specifico ordinamento giuridico sceglie di applicare quando stabilisce cosa renda determinate situazioni differenti e quale classificazione debba considerarsi giustificata.

Il primo capitolo tratta dei tre differenti significati lessicali dell'eguaglianza, mentre il secondo esamina i concetti pratici maturati nell'applicare tale nozione astratta alle complessità sociali. L'eguale trattamento e il concetto recentemente sviluppatosi di eguale opportunità sono esaminati nel terzo capitolo. Lo stesso capitolo illustra i problemi generali della discriminazione positiva. La relazione molto stimolante tra eguaglianza e giustizia è indagata da vicino nel quarto capitolo. Questo espone anche alcune delle possibili giustificazioni della discriminazione positiva dipendenti dallo standard di giustizia applicato. Infine il quinto capitolo discute complessivamente il ruolo dell'eguaglianza nel discorso giuridico. Speciale enfasi è messa sulle affermazioni che l'eguaglianza è fondamentalmente un'idea vuota che difetta di rilevanti standard di misurazione concreta, e sono avanzati numerosi controargomenti.

Parole chiave: *eguaglianza, contenuti dell' eguaglianza, valore dell' eguaglianza, eguale trattamento, eguale opportunità, giustizia.*