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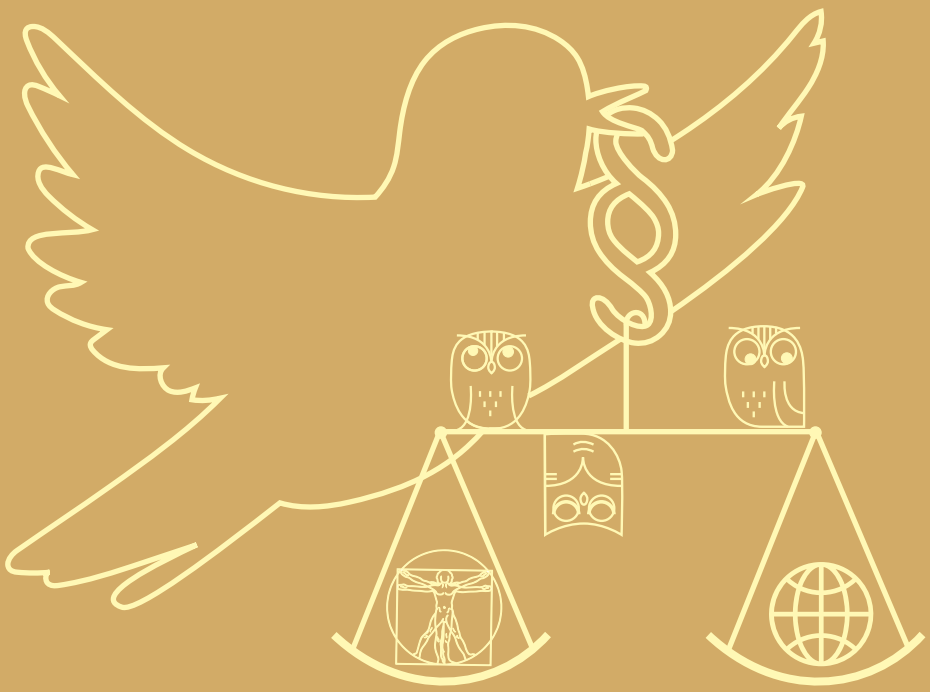
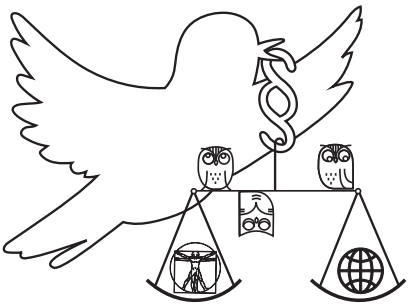


ON EQUALITY & LIBERTY

AND THEIR CONTEMPORARY LEGAL MEANING: FROM SW 61 OF THE LUCERNE IVR WORLD CONGRESS

DOSIJE STUDIO



Jasminka Hasanbegović (ed.)

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ON EQUALITY AND LIBERTY

AND THEIR CONTEMPORARY LEGAL MEANING: FROM SW 61 OF THE LUCERNE IVR WORLD CONGRESS

Belgrade • 2021

CONTENTS

PREFACE

You surely know the difference between sex and gender, but are you familiar with the concepts of gendered legal subject and vulnerable legal subject? Do you know how to find the balance between liberty and equality by means of rule of law at the international level? Based on the assumption that the claim to equality entails more than recognition and respect of other persons, would you know how to articulate social justice, human freedom and the good in a society? Can the right to do moral wrong be justified? Are you familiar with the relationship between the principles of equality, equity and differentiated responsibilities in the specific context of international environmental law? And do you know how equality and liberty may contribute to the theoretical debate on the definition of a secular state? Perhaps you have heard that securing free and equal access to water for individuals is foremost an objective of international water law, but do you know what community of interest is, and how its theoretical framework can contribute to the creation and implementation of rules that can achieve this objective? Do you know what is relational perspective in legal methodology , and what the result of its application can be in a concrete legal case involving child custody? You may not be familiar with the European Court of Human Rights case *Khamtokhu and Aksenchik v. Russia*, but have you heard that the ECtHR has established that there is no consensus in matters of equal treatment of men and women in criminal sentencing in Europe or

its explanation of that judgment? Finally, you've definitely heard of the 2019 petition to stop John Finnis teaching at Oxford University because of his discrimination and phobic views, but are you familiar with academic rules on teaching and their origins, as well as the existing rules of academic writing and the ways in which they organise and limit academic freedom and free speech – which is a requirement in order to assess whether Finnis has overstepped these freedoms, or remained within their limits, while using them in an inappropriate manner? If you responded with "Yes, I know that." to all of these questions, then this is not a book for you. However, if not, perhaps you can find something interesting in the herein offered responses and the arguments backing them.

On July 10, 2019 we gathered in Lucerne, Switzerland, where we spent four hours discussing these and other topics at Special Workshop 61: (Un)Changing Ideas of Equality and Liberty and Their Contemporary Legal Meaning, at the 29th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR). There were sixteen presentations and even more listeners and participants in the discussion, but unfortunately not all sixteen members of our special workshop could contribute to this publication. We discussed our presentations by email well before the Congress and continued discussing them in that manner even more intensively afterwards. The COVID-19 pandemic prevented us from publishing this book earlier.

I would first like to thank all foreign colleagues participants of our joint project: Professor Dr. Gülriz Uygur (Ankara University School of Law), Professor Dr. Isabel Trujillo (University of Palermo), Professor Dr. Konstantinos Papageorgiou (National and Kapodistrian University of Athens Law School), the Associate Professor

Dr. Vassilis Voutsakis (National and Kapodistrian University of Athens Faculty of Law), and the Research Assistant Dr. Nadire Özdemir (Ankara University Faculty of Law). I had not met any of them previously, and it has been a unique privilege, great honour and joy to get acquainted by working on this joint endeavour.

I am equally grateful to my homeland colleagues: Associate Professor Dr. Bojana Čučković, legal Consultant Milica Novaković, Associate Professor Dr. Dr. Marko Božić, and Research Fellow Dr. Mihajlo Vučić, and not only for their remarkable contributions as participants in our workshop and authors of essays in this collection. I owe them a special debt of gratitude also for their selfless assistance in the initial reviewing and editing this volume.

On behalf of all the authors of this volume, I would like to thank Vuk Tošić for his invaluable proofreading work.

Finally, we – as authors – are all deeply honoured to have outstanding pre-publishing reviewers: Professor Emeritus Dr. Dr.h.c. Gerald J. Postema (University of North Carolina), Professor Dr. Mortimer N.S. Sellers (Regents Professor at the University System of Maryland, Director of the Center for International and Comparative Law of the University of Baltimore, and past President of the IVR), and Professor Dr. Marijan L. Pavčnik (University of Ljubljana, Judge of the Slovenian Constitutional Court and Member of the Slovenian Academy of Sciences and Arts). Our local rules state that before being published, a manuscript needs to receive positive assessments from three competent reviewers. We would like to sincerely thank the reviewers for their time and indeed the great honour and privilege of being assessed by them.

Belgrade, 2021 Jasminka Hasanbegović

Gülriz Uygur*

GENDER INEQUALITY AND THE VULNERABLE LEGAL SUBJECT IN THE CONTEXT OF CULTURAL OPPRESSION AND LEGAL CULTURE

This paper is concerned with the philosophical notion of injustice in relation to gender bias in legal matters. The author argues that gender bias is a structural cause of breaches of human rights. The legal theory dealing with this issue is prone to approach the topic in abstract legal terms, without nuance for socio-economic context and power relationships. This, in the words of the author, "gendered legal subject" approach to gender inequalities, easily leads to the same mistake of framing the legal discussion in a patriarchal tone. The author suggests that, instead, the concept of the vulnerable legal subject is the adequate theoretical framework for the discussion of gender inequalities.

Key words: *Gender inequality. – Justice. – Gendered legal subject. – Vulnerable legal subject. – Cultural oppression.*

1. INTRODUCTION

A destructive patriarchal power still exists that is damaging to men and women alike.
(Gilligan and Richards 2009, 1)

Carol Gilligan and David A.J. Richards (2009, 4) say that "patriarchy has remained the strongest force

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in sexual/social relations and that models of equality are actively countered by its ideology and institutions." Similarly, in our age, gender or anti-gender ideologies attempt to be dominant everywhere (for example in Poland, France, the USA, Colombia, Turkey, etc.). The latter, as a reaction against the rights of women and gender minorities, contends that feminist and LGTBIQA+ movements subvert traditional families and social values. This ideology supports the gender inequality that dominates our relationships and institutions. The main question in this article is: How can we imagine a legal subject as free and equal in the context of gender inequality? If that is not possible, then what is the main feature of the said legal subject that is connected to this type of inequality?

To respond to the above questions, the central claim will be grounded in human nature. Drawing on Martha Alison Fineman's vulnerability theory (Fineman 2017, 133–149), it is submitted that to regard inequalities, it is necessary to insist on the vulnerable legal subject. To explain this point, gender inequalities are regarded according to the relationship between the (general) culture and the legal culture. It is intended to show that since both of them underpin gender inequalities, the legal subject should be considered not only associated with the legal inequalities, but also with cultural and other inequalities. In other words, it is necessary to also examine empirically the problem of inequality of the legal subject considering the culture and other issues that cause inequalities.

Concerning the cultural aspect, provisions of certain international agreements are of relevance. First, the Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW) affirms customary practices related to gender inequality:

Article 5

> "States Parties shall take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or stereotyped roles for men and women;"[1]

The CEDAW states three dimensions of the position of women, with the focus on gender inequality. One of them is the impact of cultural factors on gender relations.[2] However, coupled with the provisions of Article 5, Article 3 of CEDAW further obliges signatory states to modify social and cultural factors that affect individuals with the view to eliminate prejudices and biases, and take all appropriate measures against customs that discriminate against women. The CEDAW Committee itself also recognizes cultural factors that confront the struggle against violence against women in the *General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19* (the Recommendation).[3] It stresses the need to change social norms and stereotypes that support violence in the name of culture, tradition or religion, and emphasizes customary laws,

1 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, A/RES/34/180.

2 The others concerned are legal rights and human reproduction. These dimensions are stated in the Introduction of the CEDAW.

3 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No.19, 14 July 2017, CEDAW/C/GC/35.

as well as religious ones, that support and encourage gender-based violence. For example,

> "Discriminatory evidentiary rules and procedures, including procedures allowing for women's deprivation of liberty to protect them from violence, practices focused on 'virginity' and legal defences or mitigating factors based on culture, religion or male privilege, such as the so-called 'defence of honour', traditional apologies, pardons from victims/survivors' families or the subsequent marriage of the victim/survivor of sexual assault to the perpetrator, procedures that result in the harshest penalties, including stoning, lashing and death being often reserved to women, as well as judicial practices that disregard a history of gender-based violence to the detriment of women defendants."[4]

Second, the Council of Europe Convention on Preventing and Combating Violence against Women, and Domestic Violence (the Istanbul Convention)[5] also recognizes the role of culture in the context of gender violence. For example,

> Article 12 – General obligations
>
> "1. Parties shall ensure that culture, custom, religion, tradition or so-called 'honour' shall not be considered as justification for any acts of violence covered by the scope of this Convention.
>
> ...
>
> 5. Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions, and all other

4 *Ibid.*, para. 31.

5 Council of Europe, Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011, CETS 210.

practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men."

Article 42 – Unacceptable justifications for crimes, including crimes committed in the name of so-called "honour"

"1. Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called 'honour' shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour."

These provisions and recommendations indicate that one of the main factors of gender inequality is cultural oppression. According to the Recommendation, it seems necessary to combat cultural narratives that threaten gender equality. Also, the CEDAW and the Istanbul Convention call on the states to take necessary measures to combat these narratives. This point is important also because it shows that the international instruments have recognized the existence of gender inequalities and, in order to fight against them, also propose certain solutions. They reflect women's vulnerability connected to gender inequalities and call for resistance to the cultural narratives.

Yet, although the CEDAW and the Istanbul Convention reflect the vulnerability of women, they do not regard vulnerability as a human condition. In this context, the approach that dominates them understands vulnerability (only) in the context of disadvantaged groups. It also regards the concept of resilience only in

relation to disadvantaged groups. Oppositely, it is submitted that vulnerability should be considered as a human condition.

Additionally, the CEDAW and the Istanbul Convention may also be criticized for the idea that is behind them. Yet, it is important not to understand the subject of the said conventions according to the Western notion, as it is generally imagined in the liberal projection. Here, in contrast, an attempt shall be made to construct the idea based on vulnerability theory.

Nevertheless, the above provisions and recommendations do not make a general claim about the culture. Namely, they do not state that culture yields or supports gender inequality generally. Instead, they mention only a specific kind of culture that nourishes and increases gender inequality. At this point, it is worth recalling Sarat and Thomas (2003, 2) who warn us that "the possession of culture will mark social groups as 'exotic' or that it will become the consolation prize of the marginal and the disadvantaged." However, it may be dangerous to make generalizations about culture because that may render gender inequality difficult to recognize. One of the main reasons for it is that general claims block us from seeing specificities and fail to consider other factors that are related to gender inequality. As Lila Abu Lughod (1991, 150) puts it "there are two reasons for anthropologists to be wary of generalization. The first is that, as a part of a professional discourse of 'objectivity' and expertise, it is inevitably a language of power. On the other hand, it is the language of those who seem to stand apart from and outside of what they are describing."

When it comes to the law, we should also be wary of generalization based on the same reasons as stated above, and here it is submitted that perceiving gender

inequalities is difficult in the context of the law, as well. In fact, the Turkish Constitution also affirms the equality principle, as do many other constitutions, and according to it, the legal subject should be viewed based on the equality principle, because it is defined by the very Constitution in terms of equality of human beings. However, abstract concepts such as equality and free will serve only to hide inequalities and to disconnect the legal subject from their (societal) context of social and economic inequalities. On the other hand, despite the equality principle, there are still gendered legal norms in the world. For example, intentionally or unintentionally, international legal documents still commence with assumptions about the gendered legal subject (Papanicolopulu 2019, 4). Legal culture also does not state the situation of legal subject connected to gender inequalities and the differences between men and women, LGTBIQA+, etc. Evidently, the gendered legal culture disables us from seeing these inequalities. In that regard, it is important to be aware of the gendered legal subject. Many feminists have pointed "to the fact that in early law relating the regulation of marital authority and property the husband's personhood subsumed that of the married woman and drawing attention to the continuing patriarchal assumptions underlying this gendered construction of legal personhood" (Sundari, Gill 2017, 175). Gendered legal practices still dominate legal culture and contribute to maintaining the gendered *status quo* in many countries. For example, Iribarne and Seuffert (2018, 175–201) notice that regulations on two types of female genital surgeries, labeled female genital cutting (FGC) or female genital mutilation and female genital cosmetic surgery in Australia, are involved in the production of a constellation of gendered legal subjects.

Likewise, the construction of the legal subject in legal culture is based on the distinction between men and women. For example, Aultman (2016, 11–34), moving from court decisions, states the epistemological consequences of creating a gendered legal subject in the context of the transgender legal subject. In that sense, the gendered legal subject also excludes transgender and transgender experiences. For this reason, a gendered legal subject that dominates legal culture also hinders the perception of gender inequalities. If we cannot see these inequalities, we can only mention the legal subject as an abstract concept that is far removed from reality. Furthermore, in addition to gender inequalities, there are other social causes of inequality that prevent the legal subjects from being equal. These include poverty, race, ethnicity, etc., and when discussing the equality of legal subjects, they should also be considered, as they intersect with gender inequality.

In the next step, the role of the gendered legal subject, connected to both culture and law, will be explained. In this regard, it is submitted that both culture and law sometimes jointly nourish and produce these inequalities. Consequently, both legal institutions and norms increase the vulnerability of the legal subject.

The legal subject is also a *situated agent*, and to see this point, it is necessary to see how this subject is situated in cultural practices, as well as legal practices. The next question that emerges is how the law and the culture are related in the context of disregarding the vulnerable legal subject. For this, firstly it will be explained why the insistence is on gender inequality, as opposed to that on equality. Secondly, it will be clarified how cultural oppression averts one to see gender inequality. For this, following in the footsteps of Sally Haslanger, the relationship between cultural techne and gender inequality

will be elucidated. And, finally, an explanation will be provided for the relationship between law and culture in the context of gender inequality, as relates to the vulnerable legal subject. In this way, it is possible to understand how the legal subject's agency is connected to influences such as cultural gender roles, and to see this subject as a dependent subject in gendered practices.

2. GENDER INEQUALITY

Following the above lines, it is important to insist on gender inequality since it is difficult to see how it affects the legal subject. For this, the situated agent will be examined in this chapter. And to examine the situated agent in the culture requires moving beyond the equality approach. Concerning this point, it is necessary to operate with the *non*-ideal theory.

The ideal theory generally insists on abstract concepts such as equality, justice, liberty, etc. In this chapter, since cultural oppression will be considered, it is necessary to construct gender in the context of culture. The main question is how it can be done in the context of ideal theory. Regarding this point, Haslanger (2017, 14) wonders: "[B]ut how can ideal theory begin to engage culture and the historically specific social formations that culture makes possible, from the armchair? And how can it avoid normative overreach?" In that context, it is difficult to recognize gender inequalities based on an ideal theory. Therefore, Gilligan and Richards (2009, 4) suggest that to render visible the darkness of patriarchy, we should locate ourselves in it. Namely, we cannot locate ourselves in the darkness from the perspective of ideal theory. To render gender inequality visible, we should enter cultural practices from the perspective of non-ideal theory.

One may claim that it is not possible to insist on inequality without knowing what equality is. This claim may be true, and in this context one may discuss the relationship between ideal theory and non-ideal theory. Without discussing this relationship, it is possible to explain it as a factual matter. Haslanger (2017, 14) assumes that "there is a fact of the matter about what is just and unjust, good, and valuable." In this regard, she moves from some moral truths/facts about what is just and what is unjust, "for example, that slavery and genocide are morally wrong, that rape is morally wrong, that men *and women* have a right to bodily integrity. Moreover, the presupposition that there are *some* moral truths cannot be avoided by those engaged in justified political resistance" (Haslanger 2017, 14). Her idea seems right and the last two moral truths that are stated by her are also related to gender inequality. However, the idea here is that although there are some moral truths, there are difficulties in perceiving them. Haslanger (2017, 15) then says that "[i]t is not necessary to *know what justice is*, or have a complete moral theory, to engage in critique. It may be sufficient to know that this *particular* practice, or structure, is unjust." In other words, to know that a particular situation is unjust suffices. For this, we must, first of all, be able to see injustice, which, as it was said before, is quite difficult and not at all straightforward. Various impediments are not easily made aware of or overcome, such as strong prejudices and biases preventing one from noticing injustice. It is submitted that if we know how we can recognize particularities in a situation or see injustice, we can also know whether that particular situation is unjust. Similarly, it is enough to say that a particular situation is unequal regarding gender. To make this claim, however, one should know how to recognize the particularities of a situation in the context of gender inequality.

Furthermore, to insist on inequality instead of equality does not mean that equality is not important. Formal equality and substantive equality have been important in history to gain equal rights that are affirmed in legal norms. Fineman (2019, 74) says that "[a]n equality model or nondiscrimination mandate certainly remains the appropriate response in many instances: one person, one vote, and equal pay for equal work are areas where equality seems clearly suitable. However, equality is less helpful—and may even be an unjust measure—when applied in situations of inescapable or inevitable inequality where differing levels of authority and power are appropriate, such as in defining the legal relationship between parent and child or employer and employee. Such relationships have historically been relegated to the 'private' sphere of life—whether family or market—away from state regulation." Then, it is possible to say that the equality model does not cover all of the areas of relationships and institutions, especially when individuals are positioned differently in them. Also, this model is not connected enough with the gender problem, which is also a societal problem. According to Fineman (2019, 74), "when explicitly addressed, situations of inevitable inequality are typically handled in law and policy either by imposing a fabricated equivalence between the individuals or by declaring that an equality mandate does not apply because the individuals to be compared are positioned differently." To state positions differently in the context of the situated agent, it is also necessary to insist on inequality.

In that context, the situated agent's position can be explained according to the vulnerable[6] theory. This

6 The term vulnerable or vulnerability is also used for masking the fact that stereotypical gender roles and attitudes and their discriminatory impact women. Here its meaning is completely different from this stereotype. Judith Butler

theory requires moving from inequalities and regarding vulnerability as a human condition. Judith Butler (2014) says that "vulnerability, however, is not a subjective disposition but a relation to a field of objects, forces, and passions that impinge upon or affect us in some way. As a way of being related to what is not me and not fully masterable, vulnerability is a kind of relationship that belongs to that ambiguous region in which receptivity and responsiveness are not clearly separable from each other, and not distinguished as separate moments in a sequence; indeed, where receptivity and responsiveness become the basis for mobilizing vulnerability rather than engaging in its destructive denial." At this point, it is essential to recognize that vulnerability does not mean victimization, which is opposite to the agency and regards it as a situation of defensiveness. Butler (2016, 25–6) says that "vulnerability is neither fully passive nor fully active, but operating in a middle region, a constituent feature of a human animal both affected and acting." In this regard, there is a difference between vulnerability and victimization, and we cannot solely regard vulnerability as a fully passive form. To clearly explain this point, Butler's ideas are followed further.

Butler (2016, 25) says that "the scene of vulnerability is not a subjective feature of the human, nor is

(2014) states this point in the context of the resistance to vulnerability and says that people may claim that "if women or minorities seek to establish themselves as vulnerable, do they unwittingly or wittingly seek to establish a protected status, subject to a paternalistic set of powers that must safeguard the vulnerable—that is, those presumed to be weak and in need of protection? Does the discourse of vulnerability discount the political agency of the subjugated? So, one question that emerges from any such discussion is whether the discourse on vulnerability shores up paternalistic power, relegating the condition of vulnerability to those who suffer discrimination, exploitation, or violence."

it an existential condition. It names a set of relations between sensate beings and the field of objects, organizations, life processes, and institutions that make liveable life possible. These relations invariably involve degrees and modalities of receptivity and responsiveness that, working together, do not precisely form a sequence." Butler (2016, 25) positions "vulnerability" as an existential condition "since we are all subject to accidents, illness, and attacks that can expunge our lives quite quickly, it is also a socially induced condition, which accounts for the disproportionate exposure to suffering, especially among those broadly called the precariat for whom access to shelter, food, and medical care is often quite drastically limited." In that respect, we should not regard vulnerability as a tragic aspect of human beings. Namely, when we regard vulnerability as a human condition, this does not mean regarding humans as victims.

Coming back to gender inequalities, it is difficult to understand vulnerability outside of social and material conditions. This kind of vulnerability is exposed by the dependency of humans and other creatures on infrastructural support. It occurs "when we are unsupported, when those infrastructural conditions characterizing our social, political, and economic lives start to decompose, or when we find ourselves radically unsupported under conditions of precarity or under explicit conditions of threat" (Butler 2016, 19). At that point, the concept of dependency is important for understanding gender and other type of inequalities related to vulnerability.

Fineman (2017) states two forms of dependency: inevitable and derivative dependency. According to her "[i]nevitable dependency described the needs for care associated with certain biological and developmental stages of life. Infants were inevitably dependent, as were

many people as they aged or became ill or disabled." She underlines this kind of dependency as connected to gender roles such as mother and wife. She also theorizes on structural dependency as a derivative dependency: "[D]erivative dependency arises on the part of the person who assumes responsibility for the care of an inevitably dependent person" (Fineman 2005, 184). At this point, she underlines the needs of caretaker persons. According to her, while inevitable dependency is universally experienced, such as in the case of children, derivative dependency is not (for example all the people do not take responsibility as a caretaker) (Fineman 2011, 1–17). At this point, structural dependency is linked to the economic and social conditions.

Fineman (2019, 86) further states that "as vulnerable human beings we are all, and always, dependent upon societal structures and institutions, which provide us with the assets or resources that enable us to survive, and even thrive, within society." Gender inequalities occur when these structures and institutions hide this dependency or make it invisible. Regarding the legal subject, if we isolate agents from these dependencies and regard them free from negative conditions, we increase their invisibility and vulnerability. After that, we can only speak about the equal legal subject as a myth.

Vulnerability theory requires that the state and its policies be based on human vulnerability. For this reason, we need to know what the requirements of human vulnerability are in reality. Fineman (2019, 73) says that "vulnerability theory provides a template with which to refocus critical attention, raising new questions and challenging established assumptions about individual and state responsibility and the role of law, as well as allowing us to address social relationships of inevitable inequality. In this regard, vulnerability theory goes

beyond the normative claim for equality, be it formal or substantive in nature, to suggest that we interrogate what may be just and appropriate mechanisms to structure the terms and practices of inequality." Then, if we focus on the reality of human vulnerability, we should insist on inequality that arises from relationships and institutions. Namely, there is a structural gender inequality connected to the legal institutions. Legal institutions, such as courts, reproduce inequality. In that context, legal institutions cause substantial problems, and to see them is not possible in the logic of equality forms. In other words, as Fineman (2020, 52) puts it, legal culture connected to equality blocks remedying the inequalities. To see this point, the legal culture in the context of cultural techne will be explained since there is a relationship between culture and structure. In this relationship cultural inequalities and structural inequalities that subordinate women to men nourish each other. On the other hand, other structural inequalities also nourish gender inequality, such as poverty, race, religion, refugee matters, etc. (Kuskoff 2020, 227–235). To explain the relationship between the law and the culture, Haslanger's ideas related to cultural techne, as a form of oppression that does not permit to respond properly to situations, are introduced next.

3. CULTURAL TECHNE

There are many forms of oppression that cause inequality, for example gender oppression. As Haslanger (2017, 2) noted, gender oppression "is, at least in many contexts, ideological: men and women, even men and women with deep commitments to justice, hardly notice their participation in practices that sustain male privilege and power and even, sometimes, take them to

be central to their identities." In this context, it is necessary to consider gender oppression as it relates to culture since cultural practices that nourish gender biases push people to enter or maintain gender roles.

The primary objective of this article is to consider the vulnerable legal subject in the context of gender inequality and to argue that efforts to explain this subject must address culture. It is submitted that we should focus not only on the state and its institutions regarding the legal subject (Haslanger 2017, 2). To explain this point, borrowing Haslanger's language, the issue of girls' education in Turkey is taken as an example. Although the Turkish constitution clearly states that girls and boys have equal education rights, there are still problems with it. Furthermore, there are also legal norms that force families to send their children to school at the primary level. The State also approved the CEDAW in 1986. According to the Turkish Constitution, the CEDAW is below the codes. Besides these formal conditions, the state has also organized and supported many campaigns that encourage girls' education. The European Union also supported the State's policies regarding gender education, as did NGOs. However, although these rules and policies *affected* some families' behavior, they have not *changed* families' behavior. There are multiple factors to explain this phenomenon, such as economic, political, legal, cultural, etc. If these rules and policies do not do enough, what can be done?

As stressed at the beginning of the article, this issue is addressed by the legal norms that regulate the role of culture and insist on the necessity to change it. As it was also stated above, the state did many things aimed at changing culture, which has prevented girls' education. For example, in addition to legal norms, since 2006 the state has adopted national programs and

established institutions that aim to prevent and combat violence against women. Unfortunately, these programs and rules have only considered the culture as given data and failed to regard it from an internal perspective. They did not focus on it in a more detailed manner. Rather, they focused either on the state or on individuals. As Haslanger (2017, 4) noted "culture is almost entirely left out of the picture." According to Haslanger (2017, 6), "even if the state were to intervene in an attempt to improve the economic or political position of the subordinated, the interventions would have some social meaning or other that would affect how agents would respond to them and integrate them into current practices (or not)."

Borrowing Haslanger's language, this is clear from the Turkish education experience, which is explained above. Regarding this experience, the next focus is the campaign titled "Hey Girls! Let's Go to School!", which was initiated by UNICEF. The campaign was generally regarded as the best practice of gender equality. It achieved a partnership between public authorities, NGOs and volunteers, and it resulted in an increase in the number of girls accessing schooling. The campaign considered both the economic and the cultural reasons that blocked the education of girls. In this campaign, NGOs and volunteers tried to change cultural techne that did not permit families to send their daughters to school. They went door-to-door, lobbying families to convince them about the value of education. They succeeded only in increasing the number of girls accessing schooling.[7] Unfortunately, despite these achievements, the families' behavior has not changed significantly.

7 *Turkey: 'Hey Girls, Let's Go to School!'*, available at: *http://www.ungei.org/gapproject/turkey_422.html* (last visited 11 June 2020)

"In 2016, 10 percent of young women aged between 15–19 did not complete their eight-year basic education, whereas this ratio was 6 percent for young men" (Batuhan 2014). In other words, these campaigns perhaps resulted in an increase in the number of girls starting their education, but they did not push them to complete it. One of the reasons is that, although they tried to change the gender equality tools of cultural techne, they could not do it effectively. The dominant cultural techne has been blocking it. This point is very clear in the context of gender ideology, which was stated at the beginning. This ideology also affects the state's policies. For example, "in late December 2018, the National Education Minister's statement on a gender-sensitive school action plan—the outcome of the gender equality project—unleashed a wave of conservative backlash initially triggered by radical right media and columnists. Their arguments placed gender equality in a context explicitly narrowed down to combatting the promotion of sexuality and desexualization in Turkish society through education. Accordingly, youth and family were at risk of being deprived of Turkey's traditional and conservative values" (Batuhan 2014). These points reflect cultural techne. To explain it, the meaning of culture needs to be explained first.

There are different meanings of culture. One of them is the traditional definition of culture, which determines it as a product of high culture, treats it as outside of social relations, and as capabilities and habits acquired (Sarat, Kearns 2003, 3). Abu-Lughod (1991, 147) criticizes the traditional understanding of culture: "If 'culture,' shadowed by coherence, timelessness, and discreteness, is the prime anthropological tool for making 'other,' and difference, as feminists and halfies reveal, tends to be a relationship of power, then perhaps

anthropologists should consider strategies for writing against culture." Here culture can be understood as defined by cultural studies. This approach extends the objects of study to include film, advertising, pop art, contemporary music, and other products of the popular culture (Sarat, Kearns 2003, 4). Namely, culture is not limited to classical music, literature, or art, which all together reflect high culture. Also, in this context, one may discuss the relationship between culture and law based on the changes in the law and literature.

On the other hand, cultural studies also claim that the study of culture is linked to power and social conflict. Therefore, the culture against this conflict is analyzed further. In this conflict, other voices resist patriarchal culture. To hear them, one should locate oneself in the culture. In this culture, if one looks at it closely as an actual participant, one can observe one's behavior differently. The narrative of the women who were precluded from going to school and were forced to marry at an earlier age – depicts their struggle. They try to resist, but no one wants to hear their voices. Regarding culture, generalizations also keep their voices from being heard. Abu-Lughod (1991, 157) clearly explains this point by saying that "[g]eneralizations, by producing effects of timelessness and coherence to support the essentialized notion of 'cultures' different from ours and peoples separate from us, make us forget this."

As a result, there is a complex interrelationship between cultural meaning and gender inequality. Culture may be regarded as a consequence and medium of social differences and inequalities, but cultural meaning should not be regarded as a shared meaning. Coombe (2003, 33) clearly explains this point: "An emphasis upon shared meanings evades (and is complicit with) those historical processes through which some meanings

are privileged while others are delegitimated or denied voice-practices in which unity is forged from the difference by the exclusion, marginalization, and silencing of alternative visions and oppositional understandings. Culture must be reconceptualized as an activity of struggle rather than a thing, as conflictual signifying practices rather than integrated systems of meaning." Therefore, we will next explain why we need legal culture as an activity of struggle.

Moving to culture as an activity of struggle follows Haslanger's definition of culture. And according to Haslanger (2017, 7), "culture is a network of social meanings, tools, scripts, schemas, heuristics, principles, and the like, which we draw on in action, and which gives shape to our practices." Haslanger (2017, 7) also defines the concept of cultural techne to emphasize the tool-like and skill-like aspect of culture, and points out its role in the regulation of our interactions in a given domain. In this regard, "a cultural techne is not just a random collection of meanings, but is a frame for socially meaningful action. Cultural techne have a function: they enable us to coordinate by providing the paths and signals that structure our practices. For example, traffic management is not just a matter of passing laws, but finding ways to inculcate public norms, meanings, and skills in drivers" (Haslanger 2017, 7). Haslanger (2017, 8) further determines cultural techne as a mirror of the reality and says that "the loop includes a cultural technē that is public and available to various parties to the coordination; we internalize these tools and engage in the practices that they structure; the practices organize us in relation to resources, that is, they provide schemas for producing, distributing, accessing, and otherwise managing resources (things taken to have (+/-) value); the world then conforms to the technē (more or less)."

For example, resources are distributed to increase gender inequality. Hence, the system itself produces gender injustice. Cultural techne is a component of this system (Haslanger 2017, 8), therefore the cultural techne is a part of the structural injustice.

Haslanger then states the role of the cultural techne with regard to our identities (Haslanger 2017, 8): "A cultural technē not only informs and structures our practices, but also gives rise to different forms of subjectivity and frames our identities." This point is explained in relation to our learning capacity (Haslanger 2017, 9): "Our capacity for meaningful agency is central to who we are. Intentional action draws on conceptual resources for framing what we are doing and why, but not all action can be deliberately considered. Living together requires social fluency, skills for interpretation, interaction, and coordination that we exercise 'unthinkingly.' In a social world structured by practices, performing what the practices require of us is just what we do, it becomes who we are. Some level of responsiveness to others and capacities for interpretation and learning are plausibly innate; but this capacity for learning is oriented towards mastering the local cultural technē." In the above example, although the state pushes families to send their daughters to school and tries to change their behavior, the culture has not responded to it.

In that context, to explain gender inequality requires to understand cultural techne as an ideology. According to Haslanger (2017, 10), ideology "is a cultural technē gone wrong, a cultural technē that organizes us in ways that are unjust, and/or in ways that skew our understanding of what is valuable." In this regard, Haslanger states that ideology causes epistemic problems, as well as political problems. As an epistemic problem, ideology prevents us to know what is unequal. As a

political problem, ideology upbears structural injustice. For this reason, as Haslanger (2017, 10) noticed, we should be aware of ideological oppression in the context of unjust structures and epistemology which are connected. To clarify this issue, it is necessary to now focus on gender ideology.

There are different meanings of gender ideology. In this article, gender ideology refers to "attitudes regarding the appropriate roles, rights, and responsibilities of women and men in society. The concept can reflect these attitudes generally or in a specific domain, such as an economic, familial, legal, political, and/or social domain. Most gender ideology constructs are unidimensional and range from traditional, conservative, or anti-feminist to egalitarian, liberal, or feminist. Traditional gender ideologies emphasize the value of distinctive roles for women and men. According to a traditional gender ideology about the family, for example, men fulfill their family roles through instrumental, breadwinning activities, and women fulfill their roles through nurturant, homemaker, and parenting activities" (Kroska 2007, 165).

For example, if one cannot recognize gender inequality, one may then produce unjust structures that are harmful to some groups. In that context, under the ideological oppression, cultural techne gives rise not to see gender inequality or injustice. However, cultural oppression that is a result of ideology is not the only cause of injustice. There are also other obstacles, such as political, religious, economic, etc.

On the other hand, when cultural techne is considered in this article, this does not encompass all cultures because, as it was underlined in Coombe's view above, there is no shared cultural meaning. Haslanger (2017, 11) also upholds Celiktas' view on this matter. He says

that "cultures are never fully hegemonic, but always, in fact, include oppositional voices whose points of view offer resources for the critical interrogation of dominant practices. The critic's goal should be to open or maintain space for the multiple voices to be heard." For example, in Turkish culture, while some cultural practices prevent girls from going to school, other practices resist this and try to hear their voices. Here the problem lays in dominant practices that block other groups and use oppression. Furthermore, Article 12 of the Istanbul Convention stipulates a general obligation for the signatory states to promote changes in cultural behaviors that are based on the idea of the inferiority of women and stereotyped roles for women and men. According to this provision, the focus should be on cultural practices that are connected to the inferiority of women. This is because, firstly, the Istanbul Convention does not aim to change all cultural practices. Secondly, these practices must cause gender inequality. Additionally, we have other practices that are against the violence against women. The problem here is to change the cultural techne that blocks other voices from being heard, as noted by Haslanger (2017, 12), since culture shapes our beliefs about what is valuable.

At that point, gender inequality is produced by the cultural techne that dominates gender ideology. Consequently, people's beliefs are shaped by it. According to Haslanger (2017, 12), this causes disregard of other considerations and practices. She says that "the police academy trains the officer to ignore (or interpretively skew) certain behaviors, for example, all too often the cries of the Black person or the poor woman in labor. They are not what matters; the local cultural technē produces 'blinders' that filter and shape experience." Similarly, cultural techne produces blinders that prevent seeing others' differences. Then, it is possible to

say that cultural techne as an ideology causes not to see gender inequality and blocks the reconceptualization of culture as an activity of struggle.

4. FROM CULTURAL TECHNE TO LEGAL TECHNE

In the following step, it is submitted that there is a relationship between cultural techne and legal techne with regard to gender inequalities. In that relationship, the law is a powerful force for maintaining hegemonic cultural conceptions. This claim is not new, especially for feminist legal theorists, since they stand on this idea clearly. It is further claimed that it is necessary to examine culture from an insider's perspective in legal theory. Namely, to see gender inequalities requires locating ourselves in the culture. Haslanger (2017, 13) states this point clearly: "If value is not only appreciated through social practices but also created through them, then how can one understand or appreciate the values 'from the outside,' so to speak, that is, without engaging in the practices that they structure? And if one cannot appreciate the values in question, what epistemic standing does one have to critique them, and the practices in which they are embedded?" In that context, it is necessary to insist on the relationship between culture and law.

Cultural studies of law examine the relationship between law and culture. This approach tries to understand the law as an object of the culture: "Cultural Studies of Law move beyond textual analysis by attending to the networks of social practices through which law is constitutive of culture just as culture and cultural analyses shape, resist and interrogate legal regulation, exception and norms" (Davies, Knox 2014, 1). This

approach does not equate law with culture. The distinctive feature of the law is that "its operations, venues and discourses are unique, as is its coercive power" (Davies, Knox 2014, 1). In that relationship, the law has dual capacity, related to the formation of cultural practices and constraining these formations. According to Davies and Knox (2014, 1), the law stands in awkward relation to culture since it "must act to efface both its own rhetoricity and its interestedness in order to function as law." Cultural Studies of Law require that "the symbolic, material, economic, and political practices and power relations ... should be brought to bear upon the assembly of practices, procedures, sites, interactions and agents of law" (Davies, Knox 2014, 2).

Regarding this relationship, it is necessary to state a distinction between the cultural lives of law and the ways law lives in the domains of culture. "From the perspective of law's cultural lives, the law operates largely by influencing modes of thought rather than by determining conduct in any specific case. It enters social practices and is, indeed, 'imbricated' in them, by shaping consciousness, by making law's concepts and commands seem, if not invisible, then perfectly natural and benign. Law is, in this sense, constitutive of culture." (Sarat, Kearns 2003, 7). In that relationship, it is important to see that law is socially constructed, especially cultural contingent regarding interpretations of truth and falsity, and judgments of liability and guilt (Sherwin 2014, 35). Law affects culture especially in the context of rights, as well as is affected by it. For this reason, there is a dynamic and dialectical relationship between them. Regarding the legal techne, the law is not only affected by cultural techne but also a "constitutive of the material forces which guide its own reproduction" (Fineman 2020, 53).

In this instance, it is important to explain the relationship between the legal techne and the cultural techne, according to the networks of cultural practices. As Sarat and Kearns (2003, 10) put it, to explain this relationship "requires us to read and interpret those practices to understand how their form and content are constituted by law and also for what they reveal about the meanings of law itself." At this point, the legal meaning is the key to explaining the relationship between the legal techne and the cultural techne: "Legal meanings are not invented and communicated in a unidirectional process. Because they are produced in concrete and particular social relations, the meaning and the materiality of law are inseparable. Litigants, clients, consumers of culture, and others bring their own understandings to bear; they deploy and use meanings strategically to advance interests and goals. They press their understandings in and on law and, in so doing, invite adaptation and change in the practices of law" (Sarat, Kearns 2003, 8). In that context, it is possible to say that there are different meanings in the legal culture. For this reason, the legal culture must be reconceptualized as an activity of struggle. Like culture, we should not regard it as based on shared meaning. It is necessary to state it regarding different voices and oppositional understandings. However, the legal techne as an ideology prevents its reconceptualizing as an activity of struggle and different voices being heard.

Lastly, legal techne can be considered in the context of cultural techne. Namely, inspired by Haslanger, it can be considered as an ideology. In that context, "historically structured and locally interpreted, law provides means and forums both for legitimating and contesting dominant meanings and the social hierarchies they support. Hegemony is an ongoing articulatory practice that

is performatively enacted in juridical spaces" (Coombe 2003, 35). Nevertheless, this does not mean that there is no distinction between cultural techne and legal techne. At this point, one should be aware that "particular visions of culture are routinely validated in juridical domains while other versions are delegitimated" (Coombe 2003, 63). For example, in Turkey legal techne legitimates some identities and delegitimates others, such as LGTBIQA+. In this context, cultural techne is validated in legal techne. On the other hand, the cultural techne that is against girls' education is delegitimated by the legal techne. Namely, the law determines which vision of cultural techne is regarded or disregarded in the juridical domain.

5. AGAINST THE LEGAL SUBJECT: VULNERABLE LEGAL SUBJECT – GENDER INEQUALITY

Abu-Lughod (1991, 157) says that "[t]he critiques of anthropology that have emerged recently from various quarters have encouraged us to question what we work on, how we write, and for whom we write. I have been arguing that the cultural difference, which has been both the ground and product of anthropological discourse, is a problematic construction and have proposed a number of strategies, most already taken up by others, for 'writing against culture'." Similarly, Coombe (2003, 46) says that "writing against culture has also been the preoccupation of a group of scholars whose work is generally designated as cultural studies." Coombe also suggests writing against the law which is isolated from the culture. Inspired by this, it is suggested here to write against the legal subject who is considered as an autonomous subject and isolated from

culture and other relationships and institutions which cause inequality. In that sense, "against the legal subject" means against the laws which "are drawn with a created legal subject in mind – an imagined ordinary being who is the abstract subject of law" (Fineman 2020, 53).

Fineman (2020, 53) explains further this enlightenment vision of legal subject: "Our contemporary legal subject is posited as an autonomous and independent ... He claims a right to autonomy to govern his own life while at the same time asserting his freedom from responding to the needs of others, who should be equally independent and self-sufficient." According to Fineman (2020, 54), "the liberal legal subject embodies an ideal of abstract equality or fundamental sameness where any differences among men are deemed to be legally or politically insignificant. This liberal legal subject is a fully functioning adult in charge and capable of making choices. Unrestrained by the state, he will be rewarded according to his particular talents and individual efforts. His social relations are defined by concepts, such as consent, and supported by legal doctrines, such as contract and property."

At this point, it is submitted that "writing against legal subject" means to write against the liberal legal subject. One of the reasons is that legal techne does not completely reflect this subject. As stated above, gendered legal subject dominates in the legal techne. This means that writing against the legal subject also means writing against the gendered legal subject. For example, in Turkey, if we consider women's roles, such as motherhood, caring, etc., the legal subject in most court decisions is primarily defined by gender roles, which is contrary to an independent and autonomous legal subject. Secondly, some of the court decisions

reflect the legal subject as an autonomous being. For example, in incest cases, they generally regard the victim as having free will, disregarding dependency. In this case, judges move from the abstract legal subject and cannot see conditions related to gender inequality. This approach carries problems connected to the definition of a human.

According to the vulnerability theory, "a legal subject that is primarily defined by vulnerability and need, rather than exclusively by rationality and liberty, more fully reflects the human condition. As such, vulnerability theory has the power to disrupt the logic of personal responsibility and individual liberty built on the liberal stereotype of an independent and autonomous individual" (Fineman 2020, 54). This theory requires that social institutions and relationships respond to human vulnerability and dependency (Fineman 2020, 56). Legal institutions, such as other state institutions, must consider human vulnerability and have the responsibility to meet the needs of the vulnerable legal subject. Namely, "what vulnerability theory offers is a way of thinking about political subjectivity that recognizes and incorporates differences and can attend to situations of inevitable inequality among legal subjects. In this regard, one advantage of vulnerability theory is that it can be applied in situations of inevitable or unresolvable inequality: it does not seek equality, but equity. A vulnerability analysis incorporates a life-course perspective while also reflecting the role of the social institutions and relationships in which our social identities are formed and enforced. It also defines a robust sense of state responsibility for social institutions and relationships" (Fineman 2019, 83).

Related to gender inequality, the vulnerability theory requires recognizing conditions that cause gender

inequality. Similarly, it requires to see and be aware of these conditions. Legal techne, as an ideology, blocks one to see these conditions, although legal techne cannot be allowed to be unaware of these conditions. In this regard, legal techne does not recognize human vulnerability and does not consider the needs of the vulnerable legal subject. Legal techne is one of the conditions that produce gender inequality. The point here is that we need to be aware of this kind of legal techne. To resist and change it is very difficult. It is covered by abstract concepts, such as objectivity, rationality, free will, and autonomy. These are very strong concepts that cannot be denied. It is only submitted that it is not possible to construct these concepts separated from human vulnerability. Legal techne as an ideology also has an oppressive nature. It oppresses some groups and does not recognize them. Different voices are easily ignored, silenced or eliminated. In this manner, the legal techne produces and reproduces structural gender inequality.

Under these conditions, constructing the new legal techne is very difficult, but it is possible. For this one should recognize and be aware of its oppressive nature, and at this point critique is important. Haslanger (2017, 15) says that "we take the paradigm of critique to occur *within* a culture." This idea should be supported, and so one should put oneself in legal culture to take the paradigm of the critique. Haslanger (2017, 17) further claims that "a cultural technē is not a rigid frame, but a set of tools made ready for use in certain ways, and not everyone uses the tools in the same way or finds them fitting for the jobs they need done. So, in cases of ideological oppression, there will be some who are able to gain knowledge of morally relevant facts that are for many inaccessible or unavailable; this is knowledge that the practices are morally problematic. Under good

circumstances (with critical inquiry, support, and so on) they recognize that a different cultural technē will be more just, and, ideally, will be better for all. This gives them reason to resist the practices and demand change." Similarly, since legal techne is not a rigid frame, regarding ideological oppression there are always some judges or lawyers who recognize gender inequality in the context of structural gender inequality. Today, some court decisions show us that it is possible to set up different legal techne. For example, the European Court of Human Rights (the European Court) states that "[v]iolence directed against women because they are women forms an integral part of a gender-biased social structure which leaves its victims in a particularly vulnerable situation. Widespread impunity and inadequate State responses to such violence – often based on patriarchal stereotypes of gender roles – leave many of the female victims of violence unprotected and without recourse to justice."[8] The European Court also emphasizes how these effects of vulnerability could be diminished. Although its decisions do not reflect vulnerability theory, they instruct us how to change legal techne.

6. CONCLUSION

This article focuses on perceiving injustice and it is submitted that to perceive injustice does not appear easy. It is possible to support this claim as related to gender matters since there are gender biases and prejudices that block recognizing injustice. In this context, injustice arises from gender inequalities, which cause

8 European Court of Human Rights, 2015, Research and Library Division, *Articles 2,3, and 14 Equal Access to Justice in the case-law of the European Court of Human Rights on Violence against Women*.

human suffering. It is necessary to talk about gender inequalities and be aware of them in order to see injustice. It is also necessary to see gender inequalities that cause human suffering or harm human capacities since patriarchy still dominates in our world. Gender ideology reflects patriarchy in the 21st century. In the climate of this ideology, it is difficult to see gender inequalities.

In addition, people do not want to see gender inequalities. Gilligan and Richards (2018, 94) ask: "Why is it so difficult to see the pivotal importance of gender?" Similarly, it is possible to ask this question regarding legal theory: Why do none of the theorists discuss legal subject regarding gender inequality? Why can they not see its importance? This situation also reflects that perceiving gender inequalities is very difficult. In this context, writing against the legal subject means writing against the legal theorists who do not realize the importance of gender inequality and discuss it only in the framework of the abstract legal subject, detached from the socioeconomic inequalities and power relationships. Writing against the legal subject also means writing against the subject that is constructed in a gendered way. Cultural and legal techne do not reflect an autonomous legal subject. At this point, one of the problems is to consider the legal subject as having a choice. This concept is not enough to explain the gender inequality with regard to the legal techne, which determines equality or inequality according to the cultural techne. Generally, both of the techne reflect the gendered subject. At this point, the legal subject is considered with regard to the legal techne, but the cultural techne should also be considered. Namely, to engage in legal techne requires engaging in culture, not standing outside of it.

In this way, one can be aware of the gendered legal subject. This awareness is very important to change

legal techne. In our day and age, there are strong movements against gender ideology. These movements strive to make visible gender inequalities in different areas, including the legal area, and provide different alternatives. Gilligan and Richards (2018, 129) claim that "once we can see how a particular framing of manhood and womanhood sanctions or renders invisible the betrayal of love and the silencing of a voice that resists injustice – once we recognize that this is a framing, a way of seeing, a voice or way of speaking rather than the truth or human nature – then we can envision more precisely just what it would take to free democracy from patriarchy." Similarly, once we see that a legal subject is constructed according to gender ideology, then we could strive to construct this subject free from patriarchy.

It is submitted in this article, in line with Fineman, that one should insist on a vulnerable legal subject. In this way, we can perceive gender inequalities of the legal subject and then start trying to change the abstract legal subject. In contrast to the gendered legal subject, the vulnerable legal subject creates the opportunity to change legal techne and explore the strategies by which we can mitigate this vulnerability.

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Isabel Trujillo*

THE LEGAL BALANCE BETWEEN LIBERTY AND EQUALITY

The paper explores the specific legal balance between liberty and equality, distinguishing it from political theories and constitutional settings, where they are often considered in opposition. In order to find the specific legal balance between liberty and equality, and after identifying some of their relevant meanings for the purpose, it becomes necessary to focus on the rule of law, and to examine the relationship between liberty and equality in its different versions. Once the core meaning of the rule of law in terms of liberty and equality is enucleated, it is possible to consider extending it to the international field.

Key words: *Liberty. – Equality. – Rule of law. – Reciprocity. – International rule of law.*

1. INTRODUCTION

Sometimes liberty and equality seem to be mutually exclusive, but this is a controversial opinion within law and politics. The reason for excluding their opposition in this context is the double essence of legal and political institutions, and of their sciences accordingly. As a matter of fact, legal and political institutions

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inevitably deal with the combination of individualities in a social regime. They are social entities and thus they require a mix of individual liberty (or, in the negative, they are characterized as forms of domination) and equality (or, if it is missing, they produce inequality). Liberty and equality are the two sides of the same coin, being the coin of the legal and political domains.

In addition, a specific balance between liberty and equality is a point of no return in the institutional framework of the political and legal Western tradition of democracy and the rule of law, far from extreme forms of liberalism (as libertarianism) – that exalt liberty as the absolute value over any pretended interference in the political context, as well as far from extreme socialist political doctrines – that boost equality over liberty. In very general words, this Western tradition involves a wide development and deep transformation of legal and political institutions in favor of equal freedom and participation. In order to limit the otherwise too wide spectrum of possibilities regarding the balance between liberty and equality, this article will mainly make reference to this modern framework.

The central claim is that it is possible to differentiate a specific *legal* setting of liberty and equality from other (different) *political* models. The former looks at the legal relations, in particular, in its best pattern, the rule of law. The latter covers a wide variety of versions of, on the one hand, constitutional backgrounds and, on another hand, a broad assortment of political theories. Constitutions are generally understood as tangible and given instruments of historical evolution and mediation among pluralistic values in which a specific balance of liberty and equality usually reigns. On the other hand, the more abstract scenario of political theories is where the thesis about the opposition between liberty and equality has prospered. In this latter context, it is

sometimes assumed that liberty and equality are inversely proportional: the more liberty we want, the less equality we can guarantee, and vice versa. This idea is consonant with neo-liberalist ideologies and with their free-markets policies, and it could lead to the impression that the more state intervention we have, the less freedom of exchange we can guarantee, forgetting that in order to have a free market we need at least equal access for all incomers and owners (because all others are denied access to market). In consumerist societies like ours, the only relevant freedom seems to be the access to market. Nevertheless, the challenge here is to identify the *legal* balance between liberty and equality, and this task concerns necessarily the concept of law, which must be distinguished from markets. As an introduction to the topic, it can be noted that even an inverse proportionality is the result of a balance, or a tension. But even a tension shows the link between them.

After presenting a schematic map of the concepts at stake (liberty, equality), in so far as they are relevant for the rule of law as the core of the concept of law, and examining different forms of their relationships, the specificity of the relationship between liberty and equality in the legal context will be established. It will be suggested that a combination of liberty and equality is the very basis of every legal society guided by the rule of law. This circumstance explains the requirements of rule of law and serves to distinguish its more or less suitable version among different possibilities. The suggestion about the legal setting of liberty and equality contrasts with both the idea of an irresoluble opposition between liberty and equality – typical of some political theories – and with the merely formal conceptions of the rule of law. It implies that the rule of law is the core of law and that, consequently, it is possible to design an international

rule of law for the international arena, where liberty and equality take partially different forms.

2. LIBERTY AND/VS. EQUALITY?

2.1. Liberties

Liberty or freedom (here used as synonyms) are not usually considered to be a value or a good in and of itself but rather a general condition, a tool for obtaining some other goods or guaranteeing their pursuit. Those goods are generally associated with human flourishing: wellbeing, self-respect, self-sufficiency or wealth, or whatever other aim human beings decide to pursue in the social context. The point is not that liberty is a necessary mean for obtaining these goals, but rather that all these goals have to be pursued and enjoyed with liberty, since liberty is a human prerogative to be protected in social interaction. The problematic comparison and consequent opposition between the liberty of ancients and that of moderns (Constant 1988, 309) seems to diminish the importance of liberty in the public sphere in modern times, whereas it was clear that the Romans considered *libertas* to be strictly linked to *civitas*. The first point is then that what is at stake in the legal and political context is not a sort of natural liberty, but rather its legal and political implications. In any case, whatever liberty is in the legal and political realm (collective political autonomy for ancients or individual private freedom for moderns, accepting the difference indicated above), its protection is an appropriate treatment for human beings in the context of social interaction.

The instrumental character of liberty does not reduce its importance. On the contrary, it is intrinsically related to its basic meaning: whatever the content of liberty in general is, to protect liberty implies to leave

individuals free to decide and act by themselves. Liberty implies autonomy of judgment and self-determination, features that show the existence of an independent source of action and behavior. In sum, liberty is a crucial characteristic of human agency, to be performed and protected in the social context.

In the modern legal and political framework, freedom is not conceived only as a desirable condition, but it is affirmed as a right, and in particular, as a right to specific claims: freedom of expression, of conscience, and a wide range of rights to choose and to self-determination, which must be specified in consideration of contexts and circumstances. The demand for freedom can be advanced as an abstract claim, but it is concretely assessed in consideration of specific contexts. These rights and many others are considered manifestations of liberty in the framework of interactions because they are necessary for the exercise of liberty. Liberties (in the plural) are then due to individuals. It is not a matter of concession.

As it is well known, within the general background of liberalism, in which liberty is the most relevant if not the only political value, a distinction between negative freedom and positive freedom – also relevant for understanding the rule of law – has prospered (Berlin 1969, 121–122). Negative liberties are generally considered immunities: they seem to require some actors (states, institutions, powers, agents) to restrain from, or to inhibit, interference with free people. Traditionally, negative liberties are believed to be self-executing; such rights seem to exist for the simple fact that it is imperative to protect freedom. On the other hand, positive liberty is the capacity of acting upon one's will without internal constraints. Observed closer – and from the perspective of multiple implications of liberty in the

social context – what really distinguishes negative and positive liberties is the correlative position of others *vis à vis* the free agent. In the first case it is required not to interfere; in the second one – to contribute to the production of conditions for self-mastering. Notoriously, according to Berlin, positive liberty is dangerous because it could justify authoritarianism, or, in other words, interferences and domination. The distinction, however, is graspable only in a liberal context, where an existent general liberal legislation, together with executive and adjudication powers, make the simple idea of a negative liberty possible. In addition, budget and resources are necessary in both cases, because the two forms of liberty require institutions, policies and actions, then they are not distinguished from the point of view of their cost.[1] Both types of liberty are entrenched in relationships. Liberty in a social context depends on others' behaviors and is influenced by them, and this is the case of law.

These interactions/interferences can be considered against liberty only if they are illegitimate, as any interaction is from the point of view of anarchy (Wolff 1970, 18). On the other hand, legal and political contexts must take interactions seriously and think of liberty within the social framework. Liberty in the legal and political context is always a liberty embedded in a network, and in some way conditioned by specific relationships. This aspect seems to weaken liberty because it seems to justify interferences, but at the same time it strengthens it, because freedom becomes a common commitment and not only an individual concern. Pushing this argument further, the promoters of republicanism have noticed that interactions and interferences,

1 It is also difficult to say which one costs more (see Holmes, Sunstein 1999).

even when supported by coercion, can be subjected to our control, and then be in favor of liberty (Pettit 2008, 202–203). In other words, interactions/interferences are not necessarily incompatible with liberty. Interferences are against freedom when they are arbitrary and generate a state of domination. From this point of view, the opposite of liberty is domination, as arbitrary interference, and not equality. And it is worth noting that it is no accident that the avoidance of arbitrary interference or domination has always been the main task of the rule of law. Law then plays an important role in avoiding arbitrary interferences.

2.2. Equalities

Even more than liberty, equality fits well with the plural. Different forms and plural parameters of equality can be found: equivalence – typical of commutative or corrective justice, equality of reciprocity – a more complex system of mutuality in which the correspondence is not univocal,[2] equality in distribution or allocation of resources, rights, chances, opportunities. In addition to the different forms of equality and to the wide range of parameters of equality, there are also different methods for obtaining a possible equality, levelling down or levelling up standards and parameters. All these differences explain the diversity of accounts of equality. What is common to all the versions is the comparative concern: equality is the quality of a comparison between two or more agents in one respect. The comparison should be said to be equal when it shows proportionality or equilibrium among those interested. Nevertheless, in the legal context, equality is

2 The principle of reciprocity has been proposed as a complementary economic logic, different from the equivalence of market logic (Bruni, Zamagni 2007, 159–175).

not a starting point but a final achievement. In other words, equality is a normative principle. To say that human beings are equal means then that they must be treated as equal. When individuals are equal under this or that parameter, a proportionality in their relationship is due, even if, as a matter of fact, human beings are unequal. From this point of view, when Article 1 of the Universal Declaration of Human Rights (1948) says that all human beings are born free and equal in dignity and rights, it means that all human beings must enjoy all those rights connected to their freedom and dignity. The thesis according to which perfectly realized human rights are compatible with inequalities (Moyn 2015, 13) is grounded precisely on the assumption that taking freedom seriously jeopardises equality. But perfectly realized human rights (if there could ever be such a world) would reduce inequalities, as far as equality is served when people's access to desirable conditions of life – like those established in the form of rights in the Universal Declaration of Human Rights – is equal, within reasonable personal differentiations (Cohen 2008, 181). Hence, unreasonable differentiations, or in other words, unjustified and arbitrary discriminations, are the opposite of equality, instead of liberty. Those unreasonable discriminations open the door to domination in so far as they provide a status of oppression.

2.3. Opposition or Complementarity?

The relationship between liberty and equality is intricate, even if the two can hardly be separated. The adoption of this or that concept of freedom and equality complicates their relationships, but some points can be fixed. First, the postulation of their radical opposition is born in the same tradition of liberalism, famously represented by Hayek's doctrine (Hayek 1960,

85), and it is stressed by libertarians – a group of political theorists who emphasize liberty at the cost of intentionally jeopardizing equality. The background of this trend is the anarchical assumption that any interaction is an arbitrary interference and produces a state of domination. But even libertarians – if they are coherent – must support the same liberty for everyone. In their case, they would aim at the highest possible level of freedom for all, or perhaps at the freedoms related to markets, but always claimed for everyone. Otherwise, they would run into the fallacy of restricted universalism (Black 1991, 357).

Second, a balance does not prevent the tension between liberty and equality, and the different opinions about which one must prevail. Notwithstanding his liberalism, Dworkin affirms that liberty will lose out in any conflict with the best conception of the abstract principle of equality, because governments should show the same concern for the lives and liberties of all citizens (Dworkin 2002, 131). This aptly highlights the features of the context in which the balance must be found: a social context of interactions among individuals in which the comparative concern cannot be dismissed.

Finally, while the opposite of liberty is domination and not equality, the opposite of equality is inequality and discrimination, rather than liberty. Liberty without equality is incompatible with an even minimal social order. Equality without liberty is incompatible with a respectful human social order. In so far as unreasonable inequalities and discriminations can produce domination, they are enemy to both freedom and equality.

In general, it can be correctly said that the liberal centrality of the rule of law is linked to its ability to protect liberty (Tamanaha 2004, 1) and to avoid domi-

nation. The question then is how to match liberty and equality within the rule of law. In other words, which is their proper balance in the legal context?

3. LIBERTY, EQUALITY AND THE RULE OF LAW

As it is well known, the rule of law is a contested concept, as is its role in the concept of law (Waldron 2016, §2). In this article, these major questions will be assumed as established. The purpose is, instead, to test the rule of law's relationships with liberty and equality. It will be possible to achieve this goal by examining different readings of the rule of law, in which the relationships involved can be observed according to a vertical and one-way pattern, to a vertical and a bidirectional one, or according to a reciprocity model. These different models rely on different ways of thinking of the rule of law.

From the point of view of liberty, the relationship between the rule of law and human agency, and the rule of law's ability to exclude arbitrary interferences, will be relevant. From the point of view of equality, the correlation between reasonable differentiation and the rule of law, and the opposition between the rule of law and discrimination, are applicable.

3.1. Different Versions of the Rule of Law

Even limiting the focus to its most recent development – and looking at legal institutions and their mechanisms more than at the theories – different readings of rule of law can be sketched. The differences among them depend on which institutions or agents must be disciplined by the rule of law, but also on the way of conceiving the subjects of the rule of law, i.e. those who

are protected by it, and their relationships (Sellers, Tomaszewski 2010, 1).

A first account sees the rule of law as a mechanism for controlling public powers through well-established public norms. It is the tradition of the *Rechtsstaat*, a typically domestic and public account widespread in Continental Europe, and promoted originally by nineteenth century German legal science. According to this view, the rule of law requires the separation of legislature, executive power and judiciary, and the legality principle, in its two variants: preserving rights *through* the law and public powers acting *by* the law. The mechanism serves the protection of individual rights: not only negative liberty rights, but any other rights established through law. Nevertheless, the position of individuals in this historical model is controversial as it was not able to avoid totalitarianism. The reason could have been the predominance of equality before the law over the protection of individual liberty, triggered by an unlimited legislative power. And in fact, its (corrective) evolution has led to constitutional systems that introduce limits on content legislation, as well as mechanisms of judicial review.

This tradition is to some extent different from the one built around the common law system, shaped by a different set of powers and legal constraints, mostly derived by *stare decisis* customary law. It is no accident that this second account pays more attention to the way in which adjudication must be performed according to the rule of law – by public officials subject to the same rules, who apply them impartially, according to the due process of law – and to its role in the system of checks and balances. Obviously, the judiciary is in itself a power and as such it has to be controlled according to the rule of law. However, adjudication is more sensitive

to individual cases, and it compensates the weight of general categories (a claim of equality and liberty, in so far as privileges produce domination) in favor of particular cases (a claim of liberty and sensible equality). The relationships between a general law and an individual case and among different cases are built through a process of reasoning and argumentation in which the argumentative burden is inversely proportional to the weight of the individual case differentiation. In other words, it is the justification of differences to equate the different positions, according to the principle "equals are to be treated equally and unequals unequally".

However, these two traditions of the rule of law focus on public powers and seem to suggest that law is a set of authoritative directives identified by their sources and imposed and applied top-down, following a vertical and one-way pattern. But the rule of law is about guiding people's behavior, and not only about government and public powers, and about the way in which they must apply equality of treatment. The contribution of the contemporary debate in legal philosophy about the rule of law has been illuminating precisely on this point. Law guides people's behaviors (free and rational human agents) through authoritative reason-giving for actions (Raz 1975, 19). It necessarily requires the involvement of freedom. The famous list of rule of law's specific features can be explained precisely in light of facilitating human agency: law must be general, clear, prospective, non-contradictory and practicable, publicly promulgated, relatively stable, applied impartially by officials subordinated to the same rules. All these features exclude domination in so far as they assure that the (inevitable) interference by the government and others does not offend individuals' human agency when it is not arbitrary. The general rules are

aimed at guaranteeing *prima facie* equality of treatment and require human agency in the task of determining appropriate individual behavior. Clarity makes the process of deliberation by the individual possible, while prospectivity assures that the act of compliance or defiance corresponds to free choice, and at the same time represents a limit for the exercise of power, even the legislative. Noncontradictory and practicable rules make obedience possible. Public promulgation in advance assures common knowledge of the law and predictability, promoted also by the stability of rules. The principle according to which rules have to be applied by officials impersonally and with impartiality also ensures equality of treatment in the application phase.

Even if more persuasive, this account of the rule of law and its legal characters still seems to undertake that law is a set of directives targeting individuals that are rational and able to self-determine, though mainly subordinate. The relationship between authorities and dependents is still unidirectional. It is still necessary to distinguish this model from the managerial direction of actions, which famously Fuller opposes to the rule of law (Fuller 1964, 222). In the managerial model, authorities impose standards, rules and goals on those subject to their power, to which they must be considered unconnected. Vertical and one-way accounts of the rule of law are some of the cases of its partial reading. On the one hand, the vertical relationships within the context of the rule of law are not unidirectional, since the rule of law imposes duties on the authorities and establishes criteria for accountability. The vertical dimension in fact is not explained without reciprocity between the government and individuals addressed by the law. In this view, compliance is the result of the government respecting certain mandatory requirements,

according to a vertical but bidirectional pattern. Reciprocity is a form of equality that implies a mutuality of constraints between the ruler and the ruled. In other words, reciprocity entails that authorities and subordinates cooperate in shaping their interactions (Postema 1994, 372). Authorities make general, clear, prospective, non-contradictory, practicable, promulgated and relatively constant rules; those rules apply also to the same authorities, and officials apply those rules with impartiality and consistency, in response to which individuals comply with the rules or, if they defy them, the use of force becomes legitimate.

At the same time, equality in the rule of law is also a quality of a set of horizontal relationships: it is the solidarity perspective of the cooperative enterprise of making the rule of law possible.

Summing up, first, equality is met if people's standing in the network of interactions is equal within the constraint of reasonable categories proposed by a (limited) legislation (Allan 2001, 22). Second, generality introduces the requirement of justification since all forms of discrimination must be adequately justified. Discrimination is tolerable only if it rests upon reasonable differentiation and classification. Third, these classifications must be revised by adjudication, whose role is to apply these categories to individuals. Equality is then assured by equal access to institutions to settle disputes. This is the content of what is called the procedural part of the rule of law (Waldron 2016, §5.2). Authorities, officials and procedures are the guardians of the system of equal interactions, vertical and horizontal. Those subject to the rule of law are all equals, both in relation to authorities (according to reciprocity), and as subordinates (according to generality and equal access to remedies). The need for cooperation in

the enterprise of making possible the rule of law creates solidarity among all participants in the legal project, all called to act according to the law with fair play and exercise the normative power of accountability according to their roles (Postema 2014, 35). In sum, the rule of law is a social order of equal interdependent liberties. This is the reason why the rule of law attracts loyalty, because it is considered not only efficient, but also fair (Postema 1994, 387). It creates links between those who interact in the same contexts, but it requires also some features in those interrelations, in particular, the recognition of the dignity of all partners and, consequently, of their equality.

3.2. Formal vs. Substantive Versions of the Rule of Law?

A classic controversy about the rule of law regards its formal character and its indifference to the content of the law, as well as to liberty and equality (Craig 1997, 468; Raz 1977, 196). There are many versions of this contrast. Sometimes it is indicated as the opposition between rule of law's thick and thin versions, or regarding the link between the rule of law and individual rights (opposing one right concept vs. the no rights thesis: see Fox-Decent 2008, 533 and Dworkin 1985, 12), or it is about the connection between the rule of law and private property.

The aim of the *formalists* in the debate is to distinguish the ideal of the rule of law from other political values, such as human rights, democracy, or some specific accounts of liberty and equality (Raz 2019). However, the very point that should be highlighted is the concept of law. The distinction between form and substance depends generally on the idea of law as a set of norms addressed to individual law subjects in which

it is possible to distinguish form and content. However, when law is defined as a social practice and the rule of law serves to shape the relationships according to liberty and equality as indicated above, the problem of form and substance must be looked at in a different way. In so far as a social practice is a form of coordination of different agents, the rule of law is understood as the appropriate legal form for regulating interactions between free and equal individuals. More than a problem of form and substance, the point concerns the goal of the practice and its appropriate means. As shown above, the rule of law is able to forge both legislative lawmaking systems and common law adjudication legal orderings, and it is also compatible with different sets of rights and even ownership regimes. However, the rule of law is not compatible with every system, if liberty and equality are not protected. It is not about any model of balance between liberty and equality or about just one of them – for instance, the one that necessarily links liberty and private property (Austin 2014, 81) – but it is about liberty and equality in the legal context, i.e. in a practice of interaction among free and equal human agents.

3.3. The Scope of the Rule of Law: Liberty and Equality in the International Scenario

Being compatible with different systems, as well as being a sort of operating scheme, the next question is whether the rule of law can be extended beyond domestic borders. Regarding this point there is a recent and less-settled but nevertheless useful debate about what should be considered the international rule of law. It aims to bring international affairs under the control of the law (Koskenniemi 2011, 37), in the framework of a more ambitious project of fine-tuning the rule of

law to the present-day features of law, such as pluralism (Viola 2007, 109–114). This legal question should be distinguished from the multiple ways in which the theories of justice (that pertain to the political theories built on a possible, in the abstract, dichotomy between liberty and equality) have discussed the possibility of global justice (Brock 2017, §1.2), different from a domestic (or political so far as it refers to specific political communities) scheme of justice.

From the specific legal point of view, the extension of the rule of law beyond frontiers of states and political communities can be fostered in different forms. Firstly, it can regard the inclusion (in the list of the domestic rule of law's requirements) of the demand for the state to comply with its duties in international law, as it should with national law (Bingham 2007, 69). This means that the rule of law implies the recognition of international law as law. Secondly, the extension of the rule of law beyond the domestic domain can be understood in terms of a rule of international law. In this case, the idea is that international law (at least some of its parts) plays a role similar to the domestic rule of law in the domestic domain, as long as it protects human agency against states, thanks to its ability to determine interactions between individuals and their states. The best example is the case of the international law of human rights: they can be protected in regional and international courts (de Londras 2010, 218), in addition to the domestic domain. Thirdly, the international rule of law is the result of adapting the rule of law to the international scenario. In order to achieve this, it is necessary to identify the core and function of the rule of law and to adjust it to the different setting of powers and relationships (Chesterman 2008, 331). Here the controversial point is the convenience of using a sort

of domestic analogy, with the aim of translating the domestic model of the rule of law into the international setting, which is not always a good point due to the risk of distorting the very nature of international law. In any case, the distinction between vertical and horizontal versions of equality can be applied also to the international rule of law. The horizontal notion involves certainly interstate relationships, if we assume that states are the main actors in international law, even if they are not the only ones. International institutions and international organizations, as well as private entities and individual actors, also play a legal role in international law, and could transform that presence into forms of domination. In fact, the international domain is a good context in which it is possible to observe that powers are not only public, but also economic, informational, based on knowledge and expertise. For this reason, the rule of law is necessary also beyond the state in so far as it is able to shape relationships beyond borders. The relationships to be shaped by the international rule of law are different: between states or empowered actors, between empowered agents and those subordinate to them (authoritative relationships), between individuals (free and equals agents). The liberty at stake in the international rule of law is not that of the state but of humans, with the former being relevant only in so far as it is oriented to protect the latter. The requirements of the international rule of law will depend on how we conceive the relationships between human beings in the international field, even when mediated by states and institutions. All this suggests that the international scenario will be a field of expansion of the rule of law as long as it is a context in which it is necessary to regulate those relationships against arbitrariness and discrimination.

4. CONCLUSION

Liberty and equality are undoubtedly relevant values in the legal field, where they are not in opposition. The rule of law – considered as the core meaning of the concept of law – is explained in terms of a specific balance of liberty and equality. The opposite of liberty is domination and arbitrary interference of free and rational agency; the opposite of equality is arbitrary discrimination. Preventing both types of arbitrariness is the job of the rule of law. Understanding this idea allows for the expansion of the model of the rule of law to any other level, including the international field. The protection of liberty is a necessary condition for free and rational agents, and in its absence compliance with the law is not possible. Equality is the manner in which the relationships between those exercising authority and those under the authority of the law (all the components of legal relationships) are characterized from the perspective of the rule of law. From this latter perspective all legal relationships are shaped by reciprocity, which is the very name of equality from the vertical and horizontal perspectives.

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Konstantinos A. Papageorgiou*

THE LIMITS OF MORAL EQUALITY AND WHAT LIES BEYOND

"The deeper purpose of a political society
is to eradicate all causes that make
people hate each other."

Adamantios Korais, *Notes on the Provisional Constitution of Greece* (1823)

Moral personhood is a normative source of moral equality of persons but its importance in justifying a broader (and stricter) conception of equality is exaggerated. Even if strict equality is not what we can be reasonably aiming for, the invocation of moral equality in order to confront serious grievances and social ills does not seem to succeed. If we believe that the claim

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to equality entails more than "recognition respect", social justice must look elsewhere. The paper suggests that the claim to equality beyond basic respect inevitably extends to the common space where persons relate to each other. What is relevant for the articulation of the claim to equality – in addition to recognition respect – is the institutional provision of a polyvalent good that has an enormous structural importance for human freedom. This is a three-pronged good of expressive communication, interaction and participation in life, enhancing networks of prospects and opportunities.

Keywords: *Moral equality. – Social justice. – Luck egalitarianism. – Democratic equality. – Friendship.*

1. MORAL EQUALITY AND ITS DISCONTENTS

Equality is a value inextricably linked to our common political and moral life and it is rightly viewed as a foundational virtue of democratic polities. However, although so fundamental a value, it is not always clear *why* and *how* exactly we have a claim to be treated as equals and *what* this claim implies. Philosophers through the ages have exploited and put this idea to use for many different purposes. Aristotle, for instance, did not base equality on a universal feature of persons in order to ground a respective claim to equal treatment. Equality in his eyes signified a measure of just exchange and correction and in the particular context of distributive justice it meant distribution according to merit or some other principle.[1]

1 Aristotle – in *Nicomachean Ethics* – 1934, V3 1131a10–b24, V4 1131b25–1132b20. For an illuminating discussion see W. von Leyden (1985, 13–4). Referring to Aristotle's discussion of justice and equality in the exchange of goods von Leyden writes: "In Aristotle's example of the relation between a builder and shoemaker, equalisation does not hold between these men as human beings or in their own right (for each may be in many respects sufficiently different from the other to exclude com-

In recent decades many important contributions by liberal egalitarian philosophers built upon and further expanded ideas first articulated by John Rawls (see Arneson 2012, 593–611; Cohen 2010, 181–230).[2] With his *Theory of Justice* Rawls inaugurated a tradition in standard reading, a desideratum of strict equality as emanating from the idea of the person and its equal moral worth. Moral equality of persons may thus be *prima facie* constrained only for the sake of freedom but for no other purpose. As equal moral persons we all have a claim not only to equal liberties and rights but also to equal income and wealth (and the social basis of self-respect), provided the realization of this claim does not turn out to be counterproductive and self-defeating, especially in view of the interests of the least advantaged in society. The difference principle is a reasonable limitation of the scope of the "strictly" egalitarian program, but in principle Rawls' aim was to propose a conception of institutional fairness that could reasonably contain the clout of disparities due to the natural or social lottery. He did not tamper, however, directly with the problem of luck and misfortune because, as Samuel Freeman (2007a, 135) has stressed, he considered this problem to be at most one among many other aspects of a theory of distributive justice. On the one hand, inequalities were justified when beneficial

parison), nor between their contributions to the true interests of society (for each contribution may be assessed by different standards). Instead, what Aristotle proposes is the notion of reciprocation, not in the sense of 'an eye for an eye', as in the context of corrective justice, but in the form of dealings of exchange, as in the context of distributive justice. The reciprocation he has in mind is, (...) in terms of proportion and exact equality, for as he puts it, it is by mutual and proportionate contributions that a social community is held together."

2 The list also includes Thomas Nagel, Ronald Dworkin, Philippe van Parijs, and Gerald Cohen.

for the least advantaged, not when they were a result of individual choice, as luck egalitarians[3] propose. Rawls' parallel attention, on the other hand, was – as it seems – to undermine the moral authority of natural or social endowments, not to equalize them (Scheffler, 2010, 194–5). In this respect the Rawlsian approach remains superior to the roads taken by philosophers who built on his ideas. Nevertheless, most liberal egalitarians followed him in the belief that moral equality entails "strict equality" and thus demands, *prima facie* at least, a "neutralization" of natural and social assets and a reversal of unfair disparities caused by unequal treatment and distribution *due* to these assets. It is not self-evident, however, why exactly moral equality demands this kind of equalization. After a couple of decades and many detailed arguments and exchanges, there still seem to be many unsettled issues, to such an extent that one wonders if we have made any progress at all in solving any of them. Again: why and how are we equal and what does "equality" entail for moral agents and citizens of particular states? What can we expect from others, society and the democratic state, if we are equal?

In this paper, partly inspired by some powerful criticisms of "luck egalitarianism", I will try to propose an approach to the *ideal of equality*, which follows a different route compared to the one usually taken by the tradition inaugurated by John Rawls. I would like to explore how the idea of moral personality triggers and structures our claim to equality. But at the same time, I will try to reveal (and then accommodate) an

3 "Luck egalitarianism" holds roughly that inequalities due to personal choices are morally legitimate whereas those due to not chosen circumstances are illegitimate. For a thorough critical assessment cf. Anderson (1999, 287–337), as well as Scheffler (2010, 175–207, 208–35), and Tan (2012).

interesting difficulty, namely the limited scope of the argument from moral personality. What I will claim is that personhood – despite some notorious problems[4] – is central for grounding moral obligation and a normative source for our sense of moral equality among persons, but its importance in justifying a broader (and

4 The so-called "basis of equality" puzzle is one of those notorious problems. What common faculties do we need to share with others as persons and how can we be equal if we lack them? Jeremy Waldron discusses this problem in his recent book, *One Another's Equals: The Basis of Human Equality* (2017). The problem, initially raised by Bernard Williams, is the following. If whatever makes us eligible as moral equals, say the unknown x, is so disparately distributed in each one of us, then what is the necessary minimum for saying that we are worthy to be treated as equals? If we are *de facto* so different and what renders us equal is present in each one of us in such a diverse way and to such a varying degree, then how can we share the common features that render us capable of equal moral personality (unless we stipulate an ideal notion not founded in experience)? This is not just a theoretical problem; it has an eminently practical side. Important issues of inclusion need to be addressed. For instance, how do we explain the inclusion of beings that fall under the threshold usually invoked in cases of severe mental disability and animals (for some important distinctions see Kamm 2007, 227–36). If, however, we ease the requirements we append to the idea of moral agency and persons, then acquiring the right attitude towards others will no longer require to presuppose a fixed set of enabling features, it will not matter if one is conscious and reflective, whether one is able to conceive and review a life plan chosen, etc. What will matter instead is whether other beings form part of our moral and political universe and our horizon of (emotional and intellectual) interaction and communication. Other beings will be *ends in themselves,* not necessarily due to their self-reflective capacity, but due to the fact that in their variable presence they *manifestly* co-inhabit, communicate and humanly enrich our shared world. They are neither appendices of their "guardians" nor objects of our charitable feelings but independent sources of dignity and claims for moral attention.

stricter) conception of equality is exaggerated. This will lead us to a reconstruction of the ideal to the effect of making it inspiring and effective but also congenial to our moral, social and institutional world. Even for most of us who consider moral equality and individual dignity as sacrosanct and in a sense self-evident, it is far from certain what these two related, but conceptually distinct values entail.[5] If moral equality cannot carry the full weight, then we must downplay our hopes of finding the right fit between our more intuitive claim to equality, society's attitudes towards its members and the state's duty, and we must seek an alternative interpretation and justification for our claim or alternative principles and ideas. My initial intuition is that the moral equality approach lacks an aspect the absence of which presents a difficulty for many egalitarian theories that have a more comprehensive agenda.[6] Nevertheless, moral equality seems to be the only point of entry for an egalitarian argument that has some normative implications. I believe we can avoid this dilemma and in the last sections I will try to propose an alternative.

2. DIGNITY AND RESPECT

Most contemporary egalitarian theories usually start by paying lip service to one or another notion of moral equality but then quickly pass on to other more

5 For a deep and beautifully written philosophical anatomy of the concept see Kateb (2011). For a recent criticism of the notion of "dignity" see Sangiovanni (2017). On dignity as a legal concept see Waldron (2012); Sourlas (2016); and von der Pfordten (2016). For a "deflationary" approach see Peonidis (2020).

6 Elizabeth S. Anderson (1999, 287–337) and Samuel Scheffler (2010, 175–207, 208–35) have identified many of these difficulties and impasses.

urgent domains, such as social, legal, political or economic equality.[7] An idea of "equality of respect", rooted in rational personhood, appears so natural a starting point that we tend to overlook the fact that the demands of equality, extended in particular domains of application, bear only a "family resemblance" to the original. Moral equality functions as a binding agent and a core idea for many different aspects of the egalitarian project and cannot be neglected. But moral equality has a specific meaning and rationale that is usually sufficient for the fundamental, albeit abstract level this core idea seems to address, notably the protection of fundamental values of the person, its dignity, its freedom, its rights. As Dillon nicely (2018) summarizes it:

> "Recognition respect is not something individuals have to earn or might fail to earn, but something they are owed simply because they are rational beings. Finally, because dignity is absolute and incomparable, the worth of all rational beings is equal. (...) What grounds dignity is something that all persons have in common, not something that distinguishes one individual from another. Thus, each person is to be respected as an equal among equals, without

7 Even Dworkin's magisterial effort to develop his *equality of resources* conception (see Dworkin's *Sovereign Virtue* (2000) and *Justice for Hedgehog*s (2013)) seems to be taking the passage from moral equality to political and thence to economic equality for granted. See also Stefan Gosepath (2004, chapters II and V). As Scheffler (2010, 210) points out, "(if) luck egalitarians believe that their position is the best expression of the equal worth of persons, then that claim requires some defense; it cannot simply be assumed". Arneson (2012, 609) concludes his survey essay on Equality with a similar comment: "Without further substantial moral premises this abstract "equality" does not imply egalitarian treatment in any substantive sense. If Dworkin ends up endorsing any conception of equality of life prospects, that posture cannot be supported by interpreting abstract equality". For a very lucid taxonomy and analysis of all relevant meanings and aspects of equality cf. Thomas Scanlon (2018).

> consideration of their individual achievements or failures, social rank, moral merit or demerit, or any feature other than their common rational nature. However, the equality of all rational beings does not entail that each person must be treated the same as every other person, nor does it entail that persons cannot also be differentially evaluated and valued in other ways for their particular qualities, accomplishments, merit, or usefulness."

The importance of moral personality can hardly be exaggerated. What makes us morally equal is not merely the fact that, seen from an objective vantage point, we share potentially similar traits, such as a "rational", self-reflective personality which we value and consider important for our lives as humans. Rather, the traits that render us human *ground* the right of each one of us to *demand* a certain attitude and a certain behavior from others. Our claim to be treated with respect rests on our equal *authority* to hold each other mutually accountable as free and rational persons. There is more than one way to construe this relation. As Darwall puts it (2009, 142):

> "To respect someone as a person is not just to regulate one's conduct by the fact that one is accountable to him, or even just to acknowledge the truth of this fact to him; it is also to make oneself or be accountable to him, and this is impossible outside of a second-personal relation. This, I believe, is what most deeply underlies the sense of 'respect"s root, '*respicĕre*' (to look back). To return someone's address and look back at him is to establish second-personal relationship and acknowledge the other's second-personal authority."

Darwall establishes, in other words, a kind of *relationality of the moral obligation* from the very beginning. We are the sort of beings who anchor claims of moral personality in their capacity to relate "second-personally"

and acknowledge others as responsible beings, worthy to exact respect. Korsgaard (1996, 90–130) takes a somewhat different route. As reflective, practically oriented beings we are rather working up from our own particular "practical identities" towards a broader and deeper normative understanding of our *necessary* moral identity. This development from our practical to our moral identity is, however, not open to contingency. Korsgaard (1996, 143) formulates it very poignantly. If somebody torments you,

> "(y)ou realize that you would not merely dislike it, you would resent it. You would think that the other has a reason to stop, more, that he has an obligation to stop. And that obligation would spring from your own objection to what he does to you. You make yourself an end for others; you make yourself a law to them. But if you are a law to others in so far as you are just human, just *someone*, then the humanity of others is also a law to you. *By making you think these thoughts*, I force you to acknowledge the value of *my* humanity, and I obligate you to act in a way that respects it."

As self-reflective beings, who are capable of realizing what we have in common, we are obliged to defer to other persons' reasons and take them as seriously as we would take our own reasons. Either way, equality or some form thereof, is already inscribed in this potential, and therefore frames the way we address and relate to others[8] and put forward arguments worthy to be

8 We must consider every potential addressee of our thoughts and feelings as our equal, although this as such does not entail that we do treat *de facto* everyone as equal. Racists, slave owners or proponents of a caste system might of course just as well desist from considering other people as proper addressees of their thoughts and feelings. But they cannot address them and deprive them of basic respect. It seems that a principle of equality is ensconced in communication proper.

rationally endorsed.[9] In this sense we are equal (and we are sensitive and alert vis-à-vis this claim) even if what we make out of our lives may in the end differ substantially. The fact that we are indeed beings who can create valuable forms and contents of life simultaneously, in parallel or in common with others, has no further significance other than that. We don't exactly live the same lives and there is nothing *per se* wrong about this fact. Morality, but also the law, reserve pride of place and a special priority for our moral status by protecting rights and liberties closely associated with basic human functions and capabilities that express and enable our agency and moral identity.[10]

There is of course an alternative. One could invoke impartiality as an abstract idea of reason capable to constrain and direct our judgments the way Thomas Nagel seems to be doing (1991, 63–74). I don't think, however, that "impartiality" as such can pull the cart in the direction of more extensive equality, as Nagel seems to believe, because it is simply too blind an idea to conduct this operation. Impartial concern will be manifest only after we agree on the terms, the content and scope of concern owed to anybody. Impartiality as such will not help us further if we fail to clarify the issue of content.

9 Since we all, or nearly all, want to be heard and appreciated by others in what we are saying or trying to articulate or doing or attempting, we not only have a claim to participate on equal terms in the sphere of common reason, but also need to accept that as beings who can judge and act with reason we stand on a par with everybody else. If we want to convince about the truthfulness of our claims and the rightness of our actions, then we have to concede that everybody will have to be able to appreciate the sincerity and truthfulness of our claims and rightness of our actions. There is no "partial truth" in the sense that "x is the case" is true only for some. Truth cannot be relative. Everybody has a stake in the truth and in that sense, we are all equal. Cf. Papageorgiou 2019, 231–259.

10 In Martha Nussbaum's capability theory, the idea of dignity is central for the constitution and interpretation of her list of basic capabilities.

What respect of our equal moral status demands is the acknowledgement or recognition of the fact that we all share this nature and the institutional commitment to protect it against encroachment by third parties, including the state itself. In fact, this commitment is a requirement for the democratic legitimacy of the state. No moral life can be imagined without this very basic recognition and respect. No civilized life of humans can be conceived without its institutional protection. On the other hand, we should be careful not to overinterpret the demand of respect of moral persons and see every issue of equality as its direct reflection. Rational individuals and moral persons need of course a lot more to be able to pursue their wellbeing in harmony with others. But not everything they may need can be read as an expression of their moral personality, so it would be misconceived and ineffective to anchor all claims of equality in moral personality. In fact, one could argue that such a strategy could prove to be self-defeating, in a sense undermining the very core idea of equality.

3. EQUALITY AS A CLAIM TO WELLBEING

Some philosophers have attempted to extract something far more substantial than a basic, even if robust, notion of moral equality based on an idea of wellbeing. For Thomas Christiano notably wellbeing is a quality of persons that consists in their active engagement with intrinsic goods. Enjoying the experience of a work of art or acting morally is a case at hand. In his apt formulation "human beings are authorities in the realm of value" and their wellbeing consists in their happy exercise of this authority. But even if we grant this, how does wellbeing relate to justice and equality? Christiano

(2008, 19) hopes to be able to infer a more substantial and extensive principle of equality, stating:

> "To honor the distinctive authority of the person is to ensure that it happily exercises that authority in its life. Ensuring the happy exercise of its distinctive authority is a fitting response to the fact that a person has that distinctive authority. To the extent that wellbeing consists in the happy exercise of the distinctive authority of human beings and each person is due the exercise of that distinctive authority, wellbeing is due each person."

To begin with, this view seems to be burdened with the problems and shortcomings of perfectionism. Even if we have good reasons to admire and propagate human excellence of the sort Christiano recommends, even if we look up to persons capable to fully exercise their distinctive authority of being actively engaged for the good, we may neither expect it from others nor are we held to promote it in others, individually or collectively. I believe this view also faces a further difficulty that may result from an equivocation that is not immediately apparent. Although Christiano's argument operates at a very high level of abstraction, we can still follow him when he extolls the fact that humans are capable of exercising their distinctive authority in actively and happily engaging in some form of intrinsic good. Human individuals have good reasons to seek such forms of active engagement for themselves but we certainly do not have a universal duty to *promote* this distinct capacity vis-à-vis everybody. We have it as parents to children, we have it perhaps as friends to friends but do we also have it as citizens or moral agents? We should certainly grant that a free democratic polity cares about its citizens and cares *equally*. Security, health care, education and culture are special

domains a polity is directly obligated to cultivate and support, making it thus possible for citizens to develop their capacities for active engagement and appreciation of the good. A democracy should care about its citizens' welfare, education and culture, especially for those who are in this respect disadvantaged and have on their own only a limited access to these capabilities.[11] But this is a far cry from claiming that there is a duty of *justice*, something personally owed, which consists in equally ensuring the wellbeing of each person. If persons are authorities in their own distinctive capacity to engage in an intrinsic good of some kind, they are their *own* authorities, which means nobody else can directly ensure their wellbeing to them – unless we understand wellbeing in some derivative sense, such as attaining a pleasurable state or a quantifiable standard of living. Respecting and honoring authority and ensuring and promoting wellbeing seem thus to go in opposite directions.

Christiano seems to believe that if a robust hypothesis of what constitutes wellbeing could be put convincingly forward, then it would be also established that everybody has an equal claim to it. Clearly, if we objectively knew what human happiness consists of, it would be difficult indeed to deny not only that everybody has a legitimate claim to it, but that it is owed to everybody. However, I think that moral personhood cannot reach out that far because agency and responsibility would be thus seriously undermined. You can't have your cake and eat it, too. That is why personhood in a legal, political and moral context is usually handled not as a

11 For an interesting discussion of the "pleasures of a deeper understanding of the world", as one of the values of public reason in Rawl's *Political Liberalism* and its double rationale cf. Freeman (2007b, 390–2).

sufficient requirement of human flourishing, but rather as a quality that enables human individuals to interact peacefully, meaningfully and, most of all, responsibly with each other. Moral equality, whatever its ground, is about basics. Let us now briefly examine an alternative approach that is conscious of this limitation.

4. A LIMITED VIEW OF MORAL EQUALITY

Equality based on a less ambitious and more reserved idea of moral personhood or agency can imply the following. *First*, it supports an understanding of equality that guarantees a certain baseline, such as what being a moral agent is about. People, as moral agents, have most of all a claim to respect and moral inclusion – along the symbolic and real requirements that go with it[12] – but this does not necessarily point towards some further extended understanding of equality. To have a claim to be treated in a certain way, as persons (let us call it the right to be treated by others "with deference and respect"), does not entail that we have a claim to be treated on every occasion exactly as everybody else but rather to be treated according to a recognized standard. This also does not entail a claim to similar entitlements, be it personal or material. *Sufficient* economic resources should be available to the extent that they are necessary for a "life with dignity", but "respect equality" does not put a claim on resources exceeding that level. The fact that I am a moral agent like everybody else therefore does not warrant an expectation to receive the same degree of attention one gives only to compatriots, friends or loved ones, nor the authority, influence or esteem that goes with special social roles and offices, or the

12 Following the Hobbesian-Lockean-Kantian social contract tradition one could add a claim to an institutional guarantee of freedom and rights by the state.

manifestation of excellence in some particular activity. Conversely, such role-dependent differentiations do not influence the basic respect everybody deserves and exacts as a moral person. We all have a stake in being protected by abuse of power or unjustified violence and we all have an equal claim to voice our opinion – either as citizens or simply humans – in matters of common concern, but we do not necessarily share equal power and authority in every respect. The protection is basic and pertains to some requirements emanating from our nature as moral beings. We share an equal standing and everything this equal moral standing entails. But if we are equal in an extended sense then surely it is not due *prima facie* to moral equality. Call this the *negative function of moral equality*.

Secondly, equality of moral persons also expresses itself in our capacity to release the potential for self-transformation. This is, in my opinion, important and it has been developed in a recent monograph by George Sher (2014). Sher reconnects the idea of a moral agency with the notion of "living effectively" which roughly means making the best out of one's own life as it stands. Moral agency lies in our capacity to respond creatively and successfully to life's demands and a worthy life is one that is capable to take up this challenge. According to this model, luck is not interpreted as a paragon of unfair inequality – as luck egalitarians do – but rather as an element that adds to the moral *challenge* that life presents to the agent. Whatever one might say about this approach,[13] what seems interesting for our purposes is that it stems from the idea of moral agency. A modicum of equality thus survives in the thought that

13 Truth be told, Sher's approach seems problematic as a theory of institutional justice, but perhaps attractive as an ethical theory concerning how persons should assess the value of their lives.

we do have a claim to sufficient means enabling us to lead "effective" lives (opportunity and resources, education, reasoning and judgment etc.). But again, the claim from moral agency will not be extensive. As a matter of fact, the argument from moral equality bars an overextended interpretation of the claim. Most importantly, however, it provides a basis that generates a constructive reflection on the meaning of equality. Call this the *positive function of moral equality*.

In other words, while moral persons are by their own nature, as moral agents, entitled to equality of moral deference, it is the very idea of moral personality that provides a foundational feature for egalitarian moral claims, but this feature also sets a limit to the demands of equality. Why? The reason lies, according to Sher, at the very core of human agency and our capacity to be self-conscious, reflective and creative beings capable to reinvent ourselves and steer our lives accordingly. What matters most for us humans therefore is what renders us capable to exert these capacities in a fulfilling way and there we all have an equal claim to be able to acquire these capacities to a sufficient degree. "Equal moral persons is all [that] we all need to be", seems to be the upshot here. What looks important is developing and preserving our agency and here lie the state's distributive obligations. As Sher (2014, 114–5) explains:

> "(T)he state cannot possibly be obligated to bring it about that each citizen *does* live his life effectively. To do this, the state would have to cause each citizen to adopt only those ends, and only those means of achieving his ends, that are in fact supported by the strongest reasons that his situation provides. However, far from living his life effectively, any citizen whose ends and activities were orchestrated in this way would not be living a life of his own at all. If, impossibly, the state could cause each

> citizen to adopt all and only those ends that were supported by the best (or good enough) reasons, and all and only those plans for achieving his ends that were best all things considered, then the ends and activities that its citizens pursued would not reflect their own assessments of their situations. Because a person cannot live his own life without having the leeway to make his own mistakes, it would be self-defeating for the state to try to cause him to live effectively. That is why I have been careful to say that the good with which the state must provide its citizens is only the ability to live their lives effectively."

If we aim beyond, then our potential to be moral agents and lead worthy lives will be stifled in a specific sense, let alone improve on our agency. One of the implicit premises of this argument is that with respect to "living effectively" there is a roof above which no improvement can be achieved, a quasi "marginal utility" effect. As there are limits to the satisfaction that we can draw from devouring bars of chocolate, similarly there are limits in what we can perform in terms of effective agency. If we spend more resources in hopeless endeavors, we will be no more effective, but possibly less. It might be helpful to recall a famous scene from Orson Welles' *Citizen Kane* (Salazar, 2018). Despairing Susan Alexander is forced by her domineering husband to be transformed into an opera singer, something she can never be as she utterly lacks both the voice and the musical talent. Kane is willing to waste a huge amount of time, money and other important human resources, such as the patience of her instructor, in order to make his beautiful wife sing in a new opera house, built especially for her.[14] This is a story of both

14 Of course, for many such cases there is a counter-example. Think of the adventurous, half-mad character Fitzcarraldo (beautifully portrayed by Klaus Kinski) in Werner Herzog's

patriarchal and paternalistic domination (and waste) but it also nicely exemplifies a deep undermining of agency by pointless domination.

Undoubtedly, there are many good reasons to remain skeptical about this narrowing of the claims of agency, as proposed by Sher. One may reasonably disagree with the inegalitarian spirit and the moralizing, perfectionist undertone manifested in the idea that only sincere and engaged lifelong coping with adversity can be equivalent to true agency. What about those who for whatever reason lack the capacity to deal successfully with misfortune?[15] Presumably there is neither halo nor redemption for them. Still, I believe Sher's insight is at least in one sense valuable because it succeeds in extracting from the notion of moral personality an argument for equality in an *affirmative* and not merely negative sense. In principle we do have a claim to whatever is necessary for developing our agency. We *all* have this claim. It is not just about the fulfilment of basic needs, it goes beyond: next to resources and opportunities we also need to rely on education and mental training that can help us cope with adversity as well as we can. It makes us all active responsible agents, judges in our own affairs and choosers, not in an abstract ideal

eponymous film. He tries the humanly impossible and succeeds, even if at a very high cost.

15 Not every kind of adversity should count as a misfortune. It is an adversity if A has a huge talent as a piano player but there is no piano in the vicinity to practice. Similarly, it is an adversity if, one suffers from a debilitating scoliosis and has to wear a body cast. The great pianist Haskil overcame both kinds of adversity. But it is a misfortune if for some reason, as it is losing a hand in the war, one can no longer play the piano and have no other means to live decently and enjoy the life that is left to them. Even if one cannot perform, there are many other ways to relate to music provided they can be helped – and want to be helped – in dealing with the particular misfortune.

situation but in a real-life situation, in a concrete and particular human context. As previously noted, the idea of equality is here interpreted in terms of the *capacity* to respond *effectively* in very diverse situations to the challenge they pose. We should all be given the opportunity and certainly not prevented to unfold our respective capacity to respond. Moral equality in this sense focuses on the *capacity of an adequate response* to the circumstances of one's life, not directly on the improvement of the situation or some other outcome-oriented ideal. We need to be able to develop such a capacity and certainly not obstructed or otherwise undermined in our efforts towards it.

5. EQUALITY BEYOND RESPECT

Can we move any further? I believe we can, but first we need to be aware of the different dimensions and functions of the claim to equality and the intuition behind it. We often associate the intuitive claim to equality with a "redistributive" intention based on a person-centered comparative judgment about how, for example, A fares compared to B, B compared to C, etc. We feel that equality is about levelling x in terms of which A fares better than B or B fares better than C. The equality intuition clearly helps targeting a comparison that sticks out as unfavorable. For instance, children from underprivileged environments, destitute families or racial and other minorities have reduced chances to reach higher education and better remunerated jobs than those from prosperous ones. Similarly, children from underprivileged environments often fall prey to all kinds of biases, marginalization and discriminations that minimize their chances even more. Focusing on these facts with a discerning eye is morally and politically imperative and the comparative approach is

necessary in helping us frame the problem, but it does not *per se* solve the problem. In fact, "comparativism" can be misleading by pointing in the wrong direction.

Let us *first* consider the basic claim to be treated as an equal moral person. If we say A was treated in a demeaning and otherwise dehumanizing way, such as tortured, the problem cannot be primarily described as an equality complaint in the familiar distributive sense, although we can rephrase it in a way that will make it appear as such. The reason why suspects of terrorist acts subjected to water boarding are not treated as equals is because they are completely instrumentalized and dehumanized, not because they are not treated like other normal suspects. A person forced to eat from the floor or leftovers from royal feasts is a person that on a descriptive level is treated differently with respect to every other human being (and such a difference in treatment is often made possible by a more pervasive disparity in social status and economic power). But in such a case it is not the *difference* of treatment as such that is the problem. If on the one hand we, as hosts, serve different quality of food to our guests on two completely different occasions, such as caviar and champagne for the celebration of an important anniversary and simply bean soup, herring and cheap beer at a regular gathering of friends, we do treat the occasions differently but there is no issue about this difference. On the other hand, forcing a human being to eat from the floor carries a symbolic meaning that is ultimately *demeaning because of the bestialization of a human being*. The victim is subjected to a degrading treatment that we usually associate with the treatment of animals. So, if some persons are treated below the threshold of human decency, they are treated in an offensive way and thus also as non-equal in human status.

This aspect of equality that is etched into our common humanity works somehow surreptitiously and there is no extra reason to extoll the difference of treatment in addition to the offense that accrues to inhumane treatment. If we are humans we expect to be treated as such, taking into consideration the overall context of the social significance of human behavior and what it expresses and manifests. Some aspects of what we consider claims of equality are therefore claims of recognition, respect and adequate treatment in areas that cover the core but also extensions of our moral agency. No one should fall below the standard we consider essential to our human nature and respective of our moral status. This basically non-comparative claim covers all our fundamental moral rights and freedoms (e.g. freedom of conscience) that can be seen as stemming from our nature as reflective beings. Even if on the surface it seems perfectly sensible and correct to say that A (especially so if considered as a group) is treated unequally compared to B, in the case where religious group A can freely worship whereas religious group B has to overcome legal and bureaucratic obstacles,[16] religious freedom is a claim that relies on how we are, what we believe, and how we interpret our being, not on how we fare compared to others. In this case the unjustified differential treatment violates basic human rights.

However, not all equality claims are like that. Many intuitions and respective claims classified under the notion of (in)equality cannot be considered as claims based on moral personhood or, at least, not entirely. As stated earlier, the expectation to be treated as a *person demanding respect* provides grounds for a fundamental claim but has a relatively limited, reserved scope. This

16 For such a recently voiced but not entirely convincing complaint see Rosenberg 2020.

also accounts for the fact that the judgement is not comparative; what matters is not the fact that the treatment is differential, but that rights are violated. The object of respect is the person, its features and what one needs in order to be and to remain a person and a self. On the other hand, claims aimed at something beyond *respect of persons* are of a different order and stem from the fact that moral persons do not exist in the abstract but live and become active in socially and politically embedded and institutionally structured environments, obliging them to take responsibility for their relations and their actions. Here is the space where comparisons start becoming relevant for moral persons who, incidentally, are also social and political beings.

Moral personhood is of course an abstraction with a history of its own, also supported by the development of religious ideas, sociopolitical relations, and moral culture. But the claims I am considering are preponderantly claims regarding our life in a world *with* others. I would therefore suggest that at least beyond the radius of respect (associated with our moral personhood, the constitutional protections and material support that goes with it) equality does not exactly imply that we have to be treated according to a universal standard that is peculiar to our nature nor that we have to be treated the same way as everybody else.[17] To that extent

17 In other words, equality, far from demanding a kind of absurd or inconceivable levelling, aims to enable and empower everybody from within his context, situation or identity, to develop and access not just what everybody deserves (this belongs to the person-centered "respect logic", but rather what everybody reasonably wants (= is motivated and capable to attain). "Equal concern" means no equalization other than making it possible for *everyone* to make use of her capacities. For this to happen a social and institutional environment conducive to this effort is therefore essential.

the Dworkinian stock expression concerning a state's duty to accord "equal respect and concern" to its citizens is somehow misleading.

Naturally, all citizens should be treated with equal respect by agents of authority and power, notably the state itself. But there is no ideal measure for *what* allegedly we should all be expecting in terms of real concern from the state and others, or to what degree. The claim to equality *per se* does not settle the issue because beyond moral personality and respect owed to all, the claim is too abstract and unsubstantiated. Again, face the familiar phenomenon of the relevance of difference. What difference should count and why? It would be absurd to include all possible differences. Should we say that disparities due to luck should be corrected? As Scheffler (2010, 201) has rightly pointed out, the luck egalitarian double claim that discrepancies due to luck are unfair, whereas discrepancies due to a choice are fair, is too sweeping a view to be credible. This indicates, I believe, deeper trouble with the claim that our moral equality, our equal moral worth is sufficient grounds for the claims (addressed to others and the state) that are not preponderantly claims of respect. If we believe that all claims of equality emanate from some idea of moral equality of persons, then luck should not really be an issue. Respect is not like merit: it is due to all, whether lucky or unlucky. Even the worse criminal should be treated with respect and imposing the severest punishment does not change anything about it. Luck egalitarians do not aim, of course, at the equalization of respect but rather at the neutralization of the adverse or favorable impact of luck, as the duty of moral equality of persons. But then the need to correct "brute luck" can only be explained by a different intuition, possibly the idea that we all are connected

by bonds of solidarity towards each other. Solidarity, however, is not a notion with a universal scope but rather reserved for a smaller group, such as people fighting for a cause or people united by a common political or other identity. Solidarity with all humans can only be understood in a very minimal, basic sense.

We are certainly entitled to a core and this core of moral worth is important. If we are moral persons and have reason to care about each other's lives, care about other lives as if they were our own, then we cannot condone the attitudes of a slave society, the workings of a caste system or the unbearable partiality of rampant racism and xenophobia in a democratic society. In fact, a democratic polity cannot ignore such phenomena even if they take place in far-off countries. As moral agents we do have reason to respect each other and confront sociopolitical systems, including our own, that are founded on disrespect, inferiorize others and ultimately dominate them. There are undoubtedly further claims from the family of equality claims, beyond those we called the "claims of respect", which we often identify as claims aiming at a correction of deepening social, political and economic inequality, through some restitutive or redistributive scheme. This is one of the most common intuitions in political discourse, past and present. For instance, economic disparities caused by major structural changes in finance and technology in the past decades, combined with substantial loss of income and perspective for large sections of western societies, have brought serious social, cultural and political unrest, criticism and protest. In some cases, the social malaise also supported the rise of all kinds of populism worldwide and has led to a crisis of democracy in many countries. Even if many such complaints are justified, if viewed in the concrete, they do not really succeed as emanations

from an abstract principle of equality. As I have tried to show so far, moral equality of persons is not a principle that could justify strict, broad or inclusive equality, equality in all other respects. Philosophically speaking, the invocation of moral equality in order to confront serious grievances and social ills does not seem to be successful. Justice must look elsewhere. In the remainder I will try to sketch out an alternative approach.

6. A COMMON SPACE AND ITS CLAIMS

I want to suggest that the claim to "equality" beyond *respect to persons* no longer be focused on the domain of the strictly personal but rather that it incorporates the common space where persons *relate* to each other individually or in groups. What is relevant for the articulation of the claim to equality is – in addition to recognition respect – the institutional provision of a polyvalent good that has an enormous structural importance for human freedom. This is the three-pronged good of *expressive communication, interaction and participation* in life-enhancing networks of prospects and opportunities.

Intellectual and emotional communication and exchange is essential for human life. We understand the world, ourselves and others through a constant exchange of information and meanings but also through emotional identification and differentiation. Communication further enables us to form (but also to sever) bonds of allegiance and cooperation, and makes participation and inclusion in a world with others imaginable and possible. In fact, one cannot exist without the other. The literary metaphor of humans growing on their own in an isolated environment with no contact with society reveals the serious consequences of a life

without communication with others and without shared participation in life's challenges. Imagine a child growing up without language, without images and models, condemned to a vegetative state of emotional and intellectual darkness. The *capacity to express oneself and communicate, as well as the opportunity to interact and participate* in networks of knowledge (and feeling) and meaningfully concerted action, is a fundamental aspect of human self-knowledge and ultimately freedom. Nearly nothing has meaning – or rather, everything is pointless – if we cannot all share (and be inspired by) other people's thoughts, ideas and aspirations, if we are excluded from where others walk, (feel) imagine, create, develop, and exchange. There is an obvious reference to democratic politics here: representative democracy must aim to cultivate participatory values as much as possible, citizens must be active if they want to be free and remain undominated. However, this polyvalent good that I am trying to describe is not primarily meant in the political sense (the latter rather flows from it). The dimension of freedom as participation points most of all in the direction of opportunities for individuals to imagine, conceive, rethink and adapt to modes of life congenial to their nature, aspirations, capacities, and context. Following an Aristotelian trail, Brink (2003, 54) puts it thus:

> "Moreover (...) interaction with others contributes to the full realization of my deliberative powers by diversifying my experiences, by providing me with resources for self-criticism as well as self-understanding, by broadening my deliberative menu and improving my deliberations, and by allowing me to engage in more complex and varied activities. Furthermore, the deliberative value of this interaction is enhanced when others have diverse perspectives and talents."

Actually, the goods of communication, interaction and participation are closely related to the fact that human life develops while embedded in a particular context and circumstance. Life is framed. We need opportunities and connectedness in order to transform the circumstances of our life into something creative and meaningful. But the centrality of these goods is also related to another fact that we seldom realize. There is no royal road to what we aspire and what we aspire to is not necessarily something obvious and commonly available. In other words, the opportunity to participate compensates for the lack of obvious availability of the objects of our desires and aspirations, and it works hand in hand with individual commitment and determination. The prospect and necessity of living with others presupposes a framework of availability as a realistic option for any citizen at any stage or moment. Of course, we need to be able to evaluate how a legal, political and social system fares vis-à-vis citizens who come together (and remain together) for the purpose of protecting their standing and who eventually learn to see their individual freedom as inextricably related to a notion of common freedom.

Moral agents can only assert and defend their equal moral standing by becoming active and responsible members of a free society, a fair and democratic constitutional polity.[18] Once seen in relation to their state and their co-citizens, their claim to equality undergoes a

18 In a constitutional democracy active participation of the citizens, or invigilation in Philip Pettit's apt characterization, is a necessary, not a sufficient condition for freedom and the republican tradition, while extolling the value of participation does not exclusively rely on it. Freedom, individual and common, remains an independent value. For a clear demarcation of republicanism from Rousseauian and Arendtian "communitarianism" cf. Pettit 2013, 11–18.

necessary transformation to reflect their need for freedom and protection in the widest sense. The manifold aspects of the extended equality claim are not simply an outgrowth of moral equality – a necessary abstraction to be sure – but rather an expression of enhanced needs for successful communication, interaction and participation in the complex social, economic, political and legal world. The egalitarian intuition caters to the manifold forms of expressive, communicative and participatory freedom for different persons in different situations. Citizens can no more be viewed in the reduced and highly abstracted form of moral persons, even if for many practical purposes we have reason to stick to that usage. Moral personhood is indicative of a paramount necessity. We have to step somewhere when nothing is there to ground our individuality and its value – and above all our capacity to lead a life that is practically coherent. Moral personhood also creates a firewall to protect us against individual and collective instrumentalization, but what it does most of all is direct our attention towards a sense of responsible subjectivity and agency. No moral or social communication, no life for humans as we know it can exist without.

Once, however, the crucial step has been taken, once we see ourselves also as members of a free democratic polity, the quest for equality based on equal moral worth acquires a different momentum. Moral personhood and its claims are no longer to be read as self-propelling ideas. They need to be recast in the context of social, legal, economic and political *relations* and their importance for free and equal citizens. This also alters the role of the state as well as society and social relations in general. The state ceases to signify and operate as a paternal authority addressing its citizens as children who look up to it to receive their fair share of attention and benefits. Such an attitude is not only

normatively unfounded but also recycles corrupting practices of patronage and domination. How can equality be served that way? A radical change of perspective is required. A democratic polity of free equals expresses "recognition respect" for each citizen through its basic social, legal and political institutions and every citizen has the right to demand from state authorities and co-citizens – through appropriate social and legal channels – the equal respect she deserves as a moral person. A democratic polity cultivates and disseminates this basic egalitarian attitude among its members regardless of their social and economic standing, their merit and demerit, their achievements and failures, their gender and race, their endowments and insufficiencies. This is not as obvious or easy as it may seem, especially so for those who hold positions of power. It takes a lot of care and good sense and virtue to exercise power without abusing it. That is why those who hold power must be somehow accountable – not because they hold power but because they may abuse it.[19]

And that is why citizens, regardless of their social or economic standing, must be given normative and institutional tools to be able to resist pressure, direct or indirect, individual or concerted, of those who are in a position of power. One should pay heed to the lessons republican theory and practice have taught us.[20]

To observe an egalitarian ethos in a competitive, differentiated and pluralistic society is difficult but

19 This applies especially insofar as (a) they subject others to their arbitrary wills, and (b) enrich themselves at the expense of others, thereby manifesting their attitude of superiority and exceptionalism. I owe Jerry Postema a special debt of gratitude for pressing me on this. (The very recent disclosure of the Pandora Papers and their secrets further corroborates this ugly truth about abuse of power.)

20 The writings of Philip Pettit are also seminal in this respect.

essential for safeguarding principled unity. Whatever the differences, those we should care about and those we shouldn't, we are in one fundamental sense equal: we deserve respect as moral agents and free citizens. Being treated as equals and receiving the attention we deserve is not only symbolically but also practically significant because it neutralizes factors of adversity in our life plans. Equal treatment blocks discrimination in many important domains such as education, health services, and the job market. Blocking discrimination by preventing unfairness and arbitrariness or eradicating prejudice is one thing, empowering is another. Our intuitions of the importance of egalitarian corrective are rooted to a great extent here. If equality cannot mean strict equality,[21] then what we are seeking is accessibility to opportunities of a kind that will help us achieve effective lives. We may claim that – contrary to longstanding practices of paternalism and patronage – a democratic state of free and equal citizens has an alternative role to play. It acquires the role of a bystander, a guide, an advisor, perhaps even a friend, willing to provide infrastructure, protection and active support for citizens to live effectively. It is from this perspective that crucial aspects of legal, political and social equality have to be interpreted.

21 Strict equality is indefensible not only because it is self-defeating, but also because it cannot be justified by equal moral personhood. In this paper I tried to address the claim to equality. Inequality and the problems it might raise have not been dealt with directly. One might wonder what happens with the remaining inequality after the corrections of legitimate claims to equality. Some harmful side effects, such as excessive and illegitimate influence on democratic procedures, must be corrected institutionally; other negative side effects can be checked by ongoing cultural criticism. Otherwise, I see no issue. Another way of putting it is the following: legitimate inequality provides with resources our efforts for real equality.

7. FRIENDSHIP AS A METAPHOR

Political rhetoric often rehearses a basically empty narrative of "redistribution", supposedly applying an egalitarian idea, such as diverting resources from rich to poor. Resources will definitely need to be dedicated to the improvement of the life prospects of people who are *disadvantaged* in one or more than one dimensions, and this may well be suggested by equality of respect and the fairness we all owe each other in sharing a social world. Basically, it means at this stage "respect of each other" and its concomitant, "equal opportunities", "no discrimination". Nevertheless, our intuitions push further. Their deeper objective is not some kind of direct "redistributive action",[22] but rather the adequate empowerment of those aspiring to engage in creative activities. As human activity is multifaceted and pluralistic and humans differ in capacities and aspiration, the necessary empowerment and support will not be the same and will certainly not be "equal". A human society inspired by democratic freedom will care for institutional arrangements that will focus on equal deference to the needs and aspirations of citizens, enabling rather than blocking their involvement in the social world.[23]

For example, it would make little sense to dismantle excellent and diverse schooling opportunities – even if effectively reserved mainly for privileged kids – because of their unfairness to other kids who are not particularly privileged. This kind of equalization would be

22 There is space for indirect "redistribution" of material and special normative resources when concentration of power needs to be contained lest its excessive growth poses a threat to post-respect equality in state and society. The rationale in these cases is not economic disparity as such, but the effect of excessive power that goes with it.

23 For some inspiring proposals cf. Gardels and Berggruen 2019.

self-defeating. It would be absurd to try to equalize educational opportunities by pulverizing already dedicated resources for purposes of their equal redistribution. It would make more sense to make these opportunities ideally accessible to everybody *capable and willing* – with special attention to children grown up in underprivileged conditions, notably in conditions that undermine the development of their capabilities and block their growth. The availability of excellent and diverse educational opportunities will of course need to be resourced. However, it is not disparity as such but rather the stifling effect of the lack of proper education on individual development and adaptability that points to it. Conversely, economic advantage and opportunities of any kind may be nearly useless for people with serious handicaps.[24] What they would need is respect and a lot of personalized attention and care to make their life as pleasant and beautiful as possible. Resourcing personalized services of care for those in need is imperative, but again this necessity is not supported by an empty idea of equalization. It is triggered by the respect everyone is due and the love and care we owe each other as humans, as citizens, as relatives, as friends.

This last point is important and the case of education is a kind of crucible for what I am trying to say. We assume, in the name of equality, that because we all are equal moral persons, we also stand – all of us – in some kind of ontological parity, like dots at equal

24 For critical discussion of Rawlsian contractualism and the basic goods approach, notably income and wealth, see Nussbaum 2007, 107–140. Martha Nussbaum comments on the constraints of the contractual model that leads to the exclusion of persons with physical and mental disabilities from the original design, due to "normality" and "reciprocity" requirements in the original position, namely, that persons are expected to be "normal and fully cooperating".

distance from a common center. Equality of resources is then expected to help us all cover the supposedly equal distance from the virtual center. This reading is false.[25] We not only have very different talents and vocations, disparate identities, characters, histories and personalities, but we also *inhabit* different real, symbolic, social, political, cultural and psychological spaces, we find ourselves in different time segments and different stages of development with plural perspectives. We cannot change the differences, disparities and contingencies that made us who we are (neither can we change who we are) but we can certainly change – and we ought to change – *the attitudes* that we develop towards ourselves and others and treat each other *as* equal members of a democratic polity. This is not as obvious as it seems, if we mean something deeper than formalities. We can thus learn to deliberate by listening carefully, visualizing and responding to differences – both as individuals and as democratic societies. We may then say that as equal members of a democratic society we are neither inferior nor superior, but different from what we could have achieved in other circumstances and what others

25 This reading is also problematic when applied to issues of global justice. Leaving aside questions of redress for unjust practices of the past, notably colonialist exploitation, and crimes against indigenous populations, equality as a global international concern must be tackled prospectively and locally, not retrospectively and globally. Democratic polities (as privileged entities) are co-responsible for helping create fair global institutions that will allow historically and politically disadvantaged people to access and use effectively international networks of cooperation and development. Citizens address their relevant claims to their own state and not to all humankind. The pure cosmopolitan model is not plausible. However, people who live in economic and political distress may have a claim to protection and inclusion to be addressed as an imperfect duty to the citizens of democratic and prosperous countries.

could have achieved in ours. What "post-respect equality" demands cannot therefore be articulated in the abstract. Rather, individual claims should be able to adapt and become malleable not only according to standard and deeper needs of human beings and citizens, but also with regard to what is reasonably feasible in terms of a particular situation and its prospects. From democratic equality perspective, individual achievements and failures are neither reasons for boastful self-congratulation nor for regrets. The true meaning of "post-respect equality" in a democracy can be no other than enabling equal citizens to successfully express themselves, interact and participate in a meaningful social world. The theory of capabilities can be very useful in this regard – by proposing fundamental requirements for human growth in individualized circumstances.

But is equality really what we are after? It depends. If we mean by equality a broadening of "moral equality", as an abstract and all-encompassing principle – the answer is no. We are after a special kind of moral relation, and the obligations that accrue to it are very similar to what we all experience with friendship. Friendship may serve us here as a useful metaphor and model. In applying friendship as a metaphor for effective "post-respect equality", I do not suggest that equality lies outside of the domain of justice. I only mean to say that the claim to "post-respect equality" is more like the kind of special, embedded, fragmented claim we direct towards friends, relatives and consociates with whom we identify. Its normative source is to be found in practices of mutuality we usually encounter in smaller social units which Postema (2020), drawing on Althusius' notion of "symbiotes", has described and analyzed as "covenant communities". The following characterization is particularly telling:

> "To respond appropriately, each person must be accorded respect, recognition. Recognition must be communicated, given expression in the actions, practices, and arrangements in and through which persons relate to each other. It must publicly structure interactions, such that persons see themselves and others through these modes of communication of recognition. Further, such recognition, like greeting or embracing, cannot without distortion be unilateral. To greet is to *exchange greetings*; to embrace is also to be embraced. A greeting that is not returned misfires; an embrace that is coldly endured is incomplete, deformed. Likewise, interpersonal recognition misfires unless reciprocation is readily available."

A democratic society of free equals should accordingly develop moral, cultural and institutional tools that will allow it to greet without misfiring and embrace without deformation. The idea of equality at this stage is more affirmative and constructive. It is not aimed at radically intervening in life plans and enforcing a supposedly rational pattern and optimal trajectory in the name of an abstract ideal. Post-respect-stage equality makes projections and offers interpretations of ideals of human growth as potentials for institutional corrections and support for real citizens of free democratic societies in their concrete life prospects. Successful reading of existing structures of "covenant equality" and building on them is more than necessary for its prospects.

8. A TRANSFORMATIVE POTENTIAL

If we reflect with hindsight on the model of "effective life" discussed earlier, then what we are aiming at appears as follows. On the one hand, a free and fair polity should never abandon people to struggle with their own life's adversity, even if it comes as a result of

their own mistakes. Its regulatory intention should instead be guided by the prospect of helping them build up their expressive, communicative and participatory potential rather than dictated by a lofty and abstract ideal of strict equalization. If so, the alternative to strict equalization suggests another kind of institutional intervention that is based neither on simple comparative judgments nor on simple ascriptions of responsibility or merits for achievements and failures (or the lack thereof). Adversity is a situation to be reckoned with since it is a permanent feature of life. One cannot do away with it. The attempt of the luck egalitarians to distinguish between brute and option luck, justified and unjustified adversity or privilege, is not the suitable and perhaps even not the right way to tackle the underlying problem. It is a moralistic, over-theorized and bureaucratic approach to dealing with it, to say the least, as Anderson (1999) and Scheffler (2010) have both shown with great clarity. Human beings need moral strength, good judgement as well as resources (basically capabilities and institutional amenities)[26] to confront their life's adversities and, if necessary, they need alternatives (anticipated by public fairness and provided by public efficiency) to avoid these adversities. Removing adversities in life as such is not a token of a higher degree of equality but rather the opposite.[27] If it can be realized

26 Cf. Nussbaum (2007) especially chapters 1 & 2.

27 This is an important and always relevant observation made by Harry Frankfurt (1987, 21–43). Frankfurt's "sufficientarianism" is convincing as a powerful criticism of the pointlessness of (resource) egalitarianism. It confronts, however, difficulties in fixing *and* justifying the level of sufficiency. It is not easy to say when and why "we should be content with what we have" and from which viewpoint we evaluate one's condition. People and cultures differ immensely in their self-appraisals. The doctrine of aiming at sufficiency and no more may be a wise piece of personal advice, but how can

at all, it will happen as an artificial, external, momentary (and intrusive) intervention with no lasting effect. A moralistic language of winners and losers, or even of victims and culprits, is not helpful in the context of a free, egalitarian democracy. Actually, it is an unfair and stigmatizing language. What is an expression of a fair society, however, is to activate and upkeep options and reasonable prospects within everybody's reach, such that everyone in the society can build their life upon. In a sense, it is like having a friend. Human beings, moral agents, citizens need environments to learn, enjoy, thrive and work together in a democratic society. Every human being growing up in different and disparate environments must be given the opportunity to succeed by learning to cope with their own self and their own human environment or, alternatively, by transforming their own environment and, if necessary, by replacing their environment altogether. A fair democratic society should be in a position to make these transformations possible. The idea of friendship conveys the deep human need for genuine and mutually engrossing interaction with one's double(s), suitably adjusted to fulfil deeper desires and aspirations. The quest for equality in

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we tell whether state x is "enough" for person A? For some relevant remarks, see more recent work of Frankfurt 2015, where he says rightly: "Being satisfied with how things are is clearly an excellent reason for having no great interest in changing them. A person who is satisfied with his life as it is can hardly be criticized, accordingly, on the grounds that he has no good reason for declining to make it better" (2015, 57). Frankfurt seems to be following Voltaire's quip "more is the enemy of good." This may be correct, but how can we say "this is enough" to people who think they have a rightful claim to more? After all, no one will be criticized for failing to claim more. This does not entail that the claim is groundless. I think the only way to say "this is enough" is either by advising as a friend or alternatively, and more drastically, by establishing that no such *legitimate* claim exists.

a free and fair democratic polity has a lot to learn from the idea of friendship. The quote I used as a motto stems from Adamantios Korais, the great Greek polymath who lived during and after the French Revolution in Paris. Korais endorses a supreme regulative principle for political society – not less contested nowadays than in his time – which can only be implemented if we understand more about the importance of friendship in human life.

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MORALISM AND THE RIGHT TO DO WRONG

The main question addressed by the paper is whether the right to do moral wrong can be justified. One popular answer appeals to the notion of personal autonomy. This answer is not satisfactory because it does not examine the value of personal autonomy. Furthermore, it ignores the intrinsic relation between this right and personal autonomy. The shortcomings of the argument for personal autonomy bring us to the notion of moral autonomy. According to Kant, even the evilest wrongdoer, by the sole fact of being duty-bound to obey the moral law, leads a dialogue with her moral conscience. In order to be able to do so, she has a claim against any other agent not to obstruct this personal process. Herein lies the function of the right to do wrong: it protects the agent from moralistic interventions and contributes to the constitution of her moral personality; moreover, it is a prerequisite of the agent's fundamental rights.

Keywords: *Personal autonomy. – Moral autonomy. – Rights. – Moralism. – Right to do wrong.*

1. THE PROBLEM

1.1. Two Questions: Meaning and Value of the Right to Do Wrong

At the early 1980s, Jeremy Waldron published an article titled 'A Right to Do Wrong' (Waldron, 1993). This article gave rise to intense discussions among

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political philosophers and legal scholars. At first, the discussion surrounding it focused on the meaning of the alleged right to do wrong (is it possible, from a moral point of view, to be allowed to do something morally wrong?), and later on – on its justification (can such a right be morally justified?).

The discussion on the first issue seems to have lost its verve: today almost everyone acknowledges that it makes sense to say that the right of an agent to do wrong consists, above all, of her claim against other agents not to hinder her from committing morally blameworthy acts – and not of her liberty to commit such acts. Hence the indignation of a utilitarian like James Goodwin appears rather misplaced: since it is widely accepted, after Hohfeld, that rights might be claims or powers and not necessarily liberties or immunities (and *vice versa*); an agent might have a claim against another agent, stopping the interference of the latter in her sphere of action when she does something morally blameworthy, i.e. definitively and categorically morally unacceptable. Hence, the discussion surrounding the meaning of the right to do wrong is constricted to secondary, although still important, questions such as whether even serious moral wrongs might be committed in the name of such a right, or whether such a right refers to the exercise, or the very validity of a claim (Herstein 2012, 347).

On the other hand, the question that still raises vehement discussions is the one referring to the justification of the right to do wrong. The latter issue is still controversial for several reasons, among which perhaps (or so I will argue) the most important is that it touches upon deep metaethical, political and legal questions.

1.2. Metaethical Implications

Let me shed more light on this matter. From the beginning, Waldron placed the right to do wrong in a

wider metaethical frame. The deeper issue that is addressed through the right to do wrong, he claimed, is the question of whether rights can make sense against the background of cognitivist theories of morality, in other words, theories that recognize the possibility of rational examination of our acts (Waldron 1983, 325; cf. Galston 1983, 320). I would like to make a further step in the same direction, albeit a more decisive one: the discussion surrounding the right to do wrong has even wider implications, which touch on the core of political philosophy.

The gist of my argument is that the right to do wrong contributes to the delimitation of the domain of morality in the broad sense, i.e. the domain of good or evil, right or wrong, etc. And, furthermore, this function is of tantamount importance, especially for political theorists and lawyers, to the extent that morality, according to influential parts of contemporary philosophy, is intrinsically connected to law. In other words, many who believe that the validity of law presupposes the moral value of its content, i.e. the opponents of legal positivism, at the same time consider that law is somehow separated from morality in the broad sense. In that respect, they oppose, for instance, the notion of the right to the notion of good or, in the same vein, morality narrowly conceived (related to right or wrong) to ethics (related to good or evil).

To add to that, I will argue that a further mechanism of delimitation of the domain of morality is the right to do wrong. The value of the right to do wrong consists in the safeguard of the space within which an agent can do even morally wrongful acts. The right to do wrong fulfils the function to demarcate morality from moralism. In the name of such a right, the agent can perform acts that violate the requirements of morality in the narrow sense – although, according to the

latter, she is not allowed to do so. For example, let us assume, for the sake of the argument, that it is right not to lie to others or, in other words, morality narrowly conceived imposes upon us the duty not to lie; I will try to demonstrate that in a number of cases it is, nonetheless, the right not to be obstructed when lying. The reason is that by virtue of the right to do wrong, the agent can lead a discussion with her own moral conscience without the interference of other agents.

I said at the beginning that I am going to restrict myself to the moral right to do moral wrong.[1] Some examples: A out of boredom tells lies to B. C does not help D, a friend of hers who is in need, although she can afford this help. E flaunts her wealth in front of F, a helpless beggar. G makes impolite and indiscrete remarks about her friend H, in front of other people.[2]

In light of those preliminary remarks, I am going to examine two separate issues. The first is whether and how the right to do wrong may be justified: after exposing the rather familiar personal autonomy argument (2.), I will appeal to the more solid principle of moral autonomy (3.). Then I will present some thoughts on the implications of the validity of the right to do wrong on morality, as well as on law (4.).

1 Hence, I am not going to examine other forms of the right to do wrong, such as the moral right to do legal wrong, the legal right to do moral wrong, or the legal right to do legal wrong (Herstein 2014, 22).

2 All those examples comprise the relation of an agent, the wrongdoer, to another person, her victim. In what follows, however, we will focus on another relation – the relation of a third party to the agent – and leave the victim aside. Although I believe that the right to do wrong maintains its value even in the face of the victim of the wrong act (the wrongdoer has a claim against the victim of her act not to judge her in a disrespectful way), I concede that the relation between the wrongdoer and her victim requires further examination.

2. FROM PERSONAL TO MORAL AUTONOMY

2.1. The Argument from Personal Autonomy

Many people believe that the right to do wrong mainly protects personal autonomy (Herstein 2012, 349; Waldron 1993, 80). The argument about personal autonomy might be reconstructed as follows. First, personal autonomy is valuable: any agent needs a space within which she can take decisions by herself concerning her acts (microscopic level), and, at the same time, she can fix her personal goals and create bonds with other agents of her choice, thereby constituting her own life (macroscopic level);[3] in other words, a space where her personal reasons and commitments (be it subjective, inter-subjective or communal) count and prevail over heteronomous considerations. Second, personal autonomy fulfils a distinctive moral function: given that among the alternatives the agent has at her disposal in the space of her autonomy, some are morally important, the agent has, by means of those latter alternatives, the chance to do morally sound acts and hence to constitute a self that is more experienced and capable of avoiding morally defective acts. Without such a space the agent would lack quantitatively sufficient options (even though it might be true that too many alternatives might disorientate the agent, it is also true that only a few alternatives do not give her an authentic possibility of choice); moreover, the agent would be devoid of qualitatively crucial options (without the existence of important options, the possibility to choose would have no meaning). And, inversely, such a space is crucial for the dialogue the agent leads with her own self. Third, the right to do wrong is morally valuable: it

3 This is the point the perfectionists would oppose (cf. Jorgensen-Bolinger, 2017; George 1993, 122).

contributes in a decisive way to the constitution as well as the protection of the vital space of autonomy. This right gives the agent, on the one hand, the ability to test a wide range of alternative solutions, including morally problematic ones; moreover, it allows her to learn from her mistakes and to avoid repeating them in the future.[4]

Herein lies the core of the personal autonomy argument: the constitution of the personal and moral self by the agent herself is the ultimate foundation of the right to do wrong. If the agent has the possibility to choose between morally sound and morally deficient options, she might become fully aware of the moral flaws of the latter. And by means of the experience thus accumulated, the capacity to avoid morally deficient alternatives becomes gradually part of her moral baggage.

2.2. Questioning the Personal Autonomy Argument

Before moving on, however, we need to take into consideration that the value of the right to do wrong seems to be confirmed by recent educational and psychological research. By being exposed to trial and error, a child can corroborate her cognitive, sentimental and behavioural aptitudes and form habits that, in the long run, permit her to build her proper self, including her moral self.[5] To that extent, the correlation between the right to do wrong and personal autonomy seems to reflect our considered conceptions.

However, despite its appeal, this justification of the right to do wrong has some noteworthy deficiencies.

4 Ori Herstein (2012, 351) correctly holds that the right to do wrong is not founded upon the value of personal integrity.

5 I think this is the path followed by Françoise Dolto, among others.

First, the moral quality of personal autonomy is rather weak. It is true that any conception of good and right has its own moral merits. On the other hand, it is difficult to accept that the beliefs of, say, an egoist (*pace* Ayn Rand) or the beliefs of a sadist (*pace* Sade or perhaps Deleuze's Sade) are moral and *a fortiori* sound. In other words, such an extremely weak conception of morality, which abstracts from any content, is not satisfactory.

Moreover, it undermines the moral importance of the right to do wrong. If an agent's act is not wrong according to her own subjective conception of right and wrong, the right to do wrong is deprived of part of its importance. If, on the one hand, an agent lies although she does not consider lying as morally erroneous and, furthermore, morality is merely subjective, this agent does not do anything wrong: she does not violate her subjective morality. If, on the other hand, an agent lies although she considers lying as morally erroneous and, moreover, morality is merely subjective, she does something subjectively but not objectively wrong: she does violate her subjective morality but she still does not go against the requirements of objective morality because such morality does not exist; this agent simply does something wrong in light of her moral convictions – but not in light of morality *simpliciter* unless if we consider that coherence or integrity are objective moral values. Hence, we have good reasons to consider that the right to do wrong is interesting only if we accept that the moral convictions of the self are objectively sound; or, in other words, that morality is not defined by any agent in a subjective way (as moral subjectivists claim) nor by her historic community or by her existential commitments (as moral relativists consider), neither does it lie outside of the scope of reason (as moral scepticists believe). In sum, the agent's morality is not

satisfactorily captured by the many variants of moral irrationalism. The right to do wrong presupposes a more robust morality or, even better, an objective morality.

Second, the relation of the right to do wrong and the constitution of the personal self, albeit a probable one, is empirical and thus, from a philosophical point of view, rather weak. An agent who takes advantage of the possibilities open to her by her right to do wrong might not be able to build her character. Or, even worse, those possibilities might block her imagination or neutralize her sense of initiative. In other words, the right to do wrong is neither a sufficient nor a necessary prerequisite of the constitution of her proper self.

Third, the value of the right to do wrong seems to be merely instrumental. The right to do wrong is presented as a means the agent has in order to attain an aim, the aim of personal (and moral) autonomy. Even if we assume that personal autonomy has objective value, the right to do wrong thus conceived does not comprise an element that exceeds the 'means-aim' scheme. However, personal autonomy is not merely presupposed as an aim to be attained by the right to do wrong: it is not an entity that exists in an ideal realm; it is rather constituted as such by the right to do wrong. The right to do wrong, in turn, is not a simple device the agent has at her disposal; it is rather an expression of personal autonomy. In other words, the right to do wrong is not externally related to personal autonomy; being a form of personal autonomy, it is intrinsically connected to it.

2.3. The Path to Moral Autonomy

To summarize, we have established, firstly, that the value of personal autonomy is not fundamental and that, furthermore, the right to do wrong makes sense against the background of objective morality, secondly,

that the right to do wrong is not a necessary prerequisite for the constitution of the personal self and, thirdly, that the right to do wrong is intrinsically connected to personal (and moral) autonomy. If our reservations against personal autonomy argument are correct, we face a new task: we either have to abandon the quest for a moral justification of the right to do wrong, or to accommodate the right to do wrong within the framework of moral autonomy.

The first horn of the dilemma, although tempting, has its own problems. It does not fit with our intuition that the right to do wrong has certain merits. It is not only the aforementioned educational or psychological function of wrongdoing that pleads for such a right – the credentials of personal autonomy also cannot be ignored, at least in our socio-political era. In other words, the moral importance of this vital space of autonomy, although not established yet, should not be *eo ipso* rejected. Despite the difficulties encountered by moral irrationalism, the value of the agent's personal commitments and reasons, and the importance of the dialogue the agent leads with her own self are issues that have to be taken seriously.

Hence, despite the failure of the personal autonomy argument, the other horn of the dilemma looks more promising: the relation between the right to do wrong and moral autonomy is worth exploring. And this path leads us to subtle and difficult questions: what does the relation of the agent to her own self consist of? What is this inner self? Which part of the agent is subject to the examination of her inner self?

But before touching upon those questions, we have to deal with another complication, which has remained previously unnoticed, but now surfaces. The perspective that seems open, goes against the moral

value of criticism, be it positive (in the form of praise) or negative (in the form of blame) – at least *prima facie*. However, it looks hardly possible, for instance, to deny the value of moral blame. Moral blame is not only a constitutive part of one of the most important rights – freedom of expression – moreover, it fulfils a direct moral function (Scanlon 2008, 122 ff.). This function is positive insofar as it touches upon every pole of the complex relationship which appears when an agent does something wrong that affects another agent: it gives the wrongdoer the chance to reflect upon her act and not repeat it; the person who blames is given a chance to finesse her judgment; it permits the victim of the wrong act to stand up and claim her rights, etc. On the other hand, this might be one side of the coin: we all acknowledge situations where moral blame leads to ostracism and exclusion or escalates into rigidity and arrogance. Thus, we might ask whether, despite its positive implications, moral blame has its own moral limits.

3. FROM MORAL AUTONOMY BACK TO PERSONAL AUTONOMY

3.1. Why Kant?

It is my contention that we can make a fresh start if we take a closer look at the writings of Immanuel Kant, and more specifically at *The Metaphysics of Morals*. One can almost hear the counter-arguments: may Kant, the philosopher of moral law and categorical imperatives, protect the relation of the moral conscience to the empirical self in the kingdom of the practical reason? Does the rigidity of the Kantian moral system allow for taking into account the importance of personal reasons and commitments? I do not intend to address

these counter-arguments directly (although I do not find them convincing). My approach is far more modest; in any case, even for tactical reasons, I think, it is worth carefully reading *The Metaphysics of Morals*. Let us see why. Let us, for the sake of the argument, consider that Kant is reluctant *vis-à-vis* the moral relevance of our personal reasons and commitments. Once we have managed to detect in the thought of a thinker – who allegedly mistrusts personal autonomy – the moral arguments that speak in favour of personal autonomy, we will have made significant steps in the direction of the justification of the right to do wrong.[6]

I shall not appeal to Kant's insistence on the importance of the crucial – at least for law – independence of each person *vis-à-vis* other persons (Ripstein 2009, 30), or to the uniqueness of each person's wellbeing or to the contribution of reason to personal wellbeing (Waldron 2009, 311); or to the difference between the duties one has *vis-à-vis* herself, the duties to strive for her personal perfection, and the duty one has *vis-à-vis* other persons, the duty to assure their wellbeing (Taylor 2005, 611).

3.2. The Moral Conscience of the Agent

Instead, I will try to establish a direct argument that Kant articulates in favour of the need to protect personal autonomy. In that respect, I find particularly illuminating some passages from *The Metaphysics of Morals*, which provide, or so I will argue, an articulated

6 I do not argue that Kant mentions the right to do wrong, although he explicitly refers, for instance, to the power the agent has to 'resist with right as a violation of the respect due' against the 'mania for spying on the morals of others' (Kant 1996, 582). In that respect, I think that Kant gives us the conceptual means that might help justify such a right.

and coherent argument that comprises four distinct moments. Let us follow Kant:

a) The first moment of his argument goes like that:

> 'It is, therefore, a duty of virtue not to take malicious pleasure in exposing the faults of others so that one will be thought as good as, or at least not worse than, others, but rather to throw the veil of philanthropy over their faults, not merely by softening our judgments but also by keeping our judgments to ourselves (...) – For this reason, a mania for spying on the morals of others (*allotri-episkopia*) is by itself already an offensive inquisitiveness on the part of anthropology, which everyone can resist with right as a violation of the respect due him.' (Kant 1996, 582).

I have to acknowledge that Kant seems to limit himself on the vices of defamation and backbiting, two well-defined and not very common acts. However, I think it is not the act of defamation as such but some of its important manifestations – the exposition of the faults of others and the mania for spying on the morals of others – that capture his attention. The distinctive characteristic of the latter acts is their intensity rather than their continuity and duration. A third party is not allowed to expose, for example, the moral error of E, the rich person who ostentatiously exhibits her wealth in front of a helpless beggar. She is not allowed to focus on it and castigate it persistently even if she does so only once.

b) Nevertheless, I am ready to concede that Kant's remark in the previous passage has a very precise aim and that the third party's duty against the wrongdoer has rather marginal importance. However, the focal point of Kant's approach becomes, I think, clearer in another passage:

> '[The censure of vice] must never break out into complete contempt and denial of any moral worth to a vicious human being.' (Kant 1996, 580).

This passage seems *prima facie* also irrelevant to our discussion: Kant seems to focus on the moral errors of the 'vicious' individual, hence on its character, whereas our discussion refers to deficiencies of particular acts, as opposed to characters. However, I do not think that this impression is founded. Kant is referring to 'errors', in other words, to aspects of morally relevant acts; it is acts and not characters that are attracting his attention. It is not the moral character in its totality that is not allowed, according to Kant, to be under the intensive and austere examination of a third party, it is rather the agent's self – to the extent that she performs actions that are contrary to the imperatives of reason. Thus, even deeper, it is her acts as such that are in the centre of Kant's remarks. In other words, Kant is interested in an agent's actions insofar as they lead to the blame, because of their wrongness, or, especially, to the disapproval of a third party. And he goes on by insisting that this disapproval should obey certain rules: it is not allowed to reach 'complete contempt and denial of any moral worth' of the vicious agent (Kant 1996, 580). But why? And what does 'moral worth' of even the vicious agent consist of?

c) Kant's answer to those questions does not lead him to underline the value of the experience accumulated nor the importance of the experimentation for the self; it leads him, as we all know, to the duty of respect every human being by virtue of their humanity. Even the vicious agent should, albeit being subject to disapproval, be recognized as a moral person. The reason lies in Kant's well-known rejection of dogmatism: the refusal of such recognition would imply that the vicious

agent is by nature vicious and hence, having a fixed nature, is not capable of 'being improved'. This cannot be accepted by Kant. Moreover, for Kant, a fervent supporter of rationalism, there is but one single way to assure the 'improvement' of a human being, even the most vicious one: by '*bring[ing] him* to *understand* that he has erred' (emphasis added).

Let us concentrate on the latter point. The case we are envisaging is not the case of the ignorant wrongdoer who does not know that her action is wrong; it is the case of the wrongdoer who is aware of the wrongness of her action but still proceeds with it. Given this, when is it not even possible to 'bring [the agent] to understand' that she has erred? When does such a condition occur? Some examples spring to mind: when, for instance, the third party hastens to evaluate the act of the vicious agent or evaluates her in such a strict or severe manner that the agent loses her confidence in her very ability to act. In such cases, the third party demeans the vicious agent.

This is why the restrictions of the disapproval of the moral wrong are justified: the duty to respect the wrongdoer comprises, according to a third passage of *The Metaphysics of Morals*, the logical use of her reason:

> '[One has a] duty not to censure [the agent's] errors by calling them absurdities, poor judgment, and so forth, but rather to suppose that his judgment must yet contain some truth and to seek this out, uncovering, at the same time, the deceptive illusion (...) and so, by explaining to him the possibility of his having erred, to preserve his respect for his own understanding' (Kant 1996, 580).

Kant seems to argue as follows: if an agent performs wrong actions, the third party is not allowed to disapprove of her *qua* moral person; the third party

should try instead to persuade the agent to do the right thing – since the latter knows that she has done something wrong. This is the point where the value of moral blame appears clearly: its function is to persuade the vicious wrongdoer to do the right thing. But why should the agent be persuaded, as opposed to coerced or brain-washed? Why shouldn't her acts be evaluated severely or in a demeaning way – since she has done something morally wrong? In other words, what ought the third party see in the wrongdoer that imposes on her the duty not to disapprove of her as a moral person, but, on the contrary, to try to persuade her to do the right thing?

d) Kant's answer is clear and is based upon the concept of moral conscience; let us follow him in a fourth passage of *The Metaphysics of Morals*: 'Every human being has a conscience and finds himself observed, threatened, and, in general, kept in awe (respect coupled with fear) by an internal judge; and this authority watching over the law in him is not something that he himself (voluntarily) *makes*, but something incorporated in his being. (...) [T]his original intellectual and (...) moral predisposition called *conscience* is peculiar in that, although its business is a business of a human being with himself, one constrained by his reason sees himself constrained to carry it on as at bidding *of another person*' (Kant 1996, 560).

Moral conscience is the representation the agent has in regard to her duties (which stem from the moral law) and as such, *ex ante*, addresses injunctions to the agent and, *ex post*, evaluates whether her acts abide by those injunctions. It can easily be noted that the agent appears twice in this relation: as the one who gives, as well as the one who receives the injunctions. We have to be careful at this point: the being who gives the

injunctions is not identical to the being who receives them. The first is the incarnation of the representation of the law, the second is the empirical self. This is why, according to Kant, we face a bilateral relation, a relation that is not formed by 'one and the same person'. The conscience is 'a merely ideal person that reason creates for itself', whereas the object of examination is the agent who acts *hic et nunc*.

I think that for Kant this relation – an authentic moral relation – has no room for the third person. The reason is not that the agent herself might have more accurate knowledge of the imperatives of the moral law. Rather than the moral conscience, it is the empirical self that is at the centre of the discussion. The empirical self is prone to persuasion. It is this capacity of her that is denied by the third party who violates her right to do wrong. Instead of trying to persuade the agent through rational arguments, the third party treats her as unpersuadable. To contest the validity of the right to do wrong is to deny this very feature. The third party might take two morally problematic actions: when she hastens to judge the agent's acts, she might not take into consideration her rhythms and particularities; when she judges the agent very strictly and definitively, she does not try to persuade her.

4. THE FUNCTIONS OF THE RIGHT TO DO WRONG

4.1. Kant and Moralism

Let us for a moment leave the right to do wrong aside and turn our attention to morality. A commonplace among sociologists and public intellectuals is that in these last decades morality has become part of the central stage of our social and public life in Western

democracies. Many examples justify this diagnosis: political correctness, the prohibition of 'blasphemous' works of art, the moral stigmatization of numerous protagonists of political life, or the humiliation of many people on social networks. In all these cases, negative judgments are enunciated in the name of morality. It seems that, despite the diagnosis of Lipovetsky (1992, 133) or Baudrillard (1983, 261), our societies fall back to the certainty of traditional values and look for the security of conventional morality.

However, the rehabilitation of morality is not unanimously welcomed. Many are rather critical *vis-à-vis* this trend, which they qualify as moralistic. But what exactly is moralism? Moralism can be defined in a variety of ways: some consider that the distinctive treat of moralism is its all-inclusiveness (morality encompasses almost every manifestation of our personal, social and political life, which, in its turn, should be reduced to morality), while others hold that moralism is defined by its rigidity and intransigence (cf. Fullwinder 2005, 106). I will not go into further detail concerning these approaches and will simply assume that the most persuasive one is the definition that combines all those elements: according to this approach, the moralist believes that morality has a very extended domain so that almost every aspect of our personal, social or political life can be reduced to it and, based on that belief, she is inclined to formulate her moral judgments regarding such aspects with intransigence and rigidity.[7]

7 Moralism is often associated with paternalism. However, these two attitudes can be clearly distinguished. The most important difference between them is that moralism is concerned with an act that the agent herself considers as contrary to a conception of the right, whereas the paternalist intervenes in the name of her own conception of good, even if it differs from the agent's conception of good.

This definition has the joint advantages of broadness and elasticity: it is broad insofar as it comprises every form of morality – be it utilitarian, deontological, or (even) aretaic; it is elastic to the extent it is based upon the validity of morality as such – not of a precise form of morality.

However, the elasticity of moralism thus defined is, at the same time, the source of problems. Moralism appears as formalistic and, to that extent, void of particular content. In other words, a particular form of moralism – at least, in principle, there are utilitarian, deontological, or (even) aretaic moralists – corresponds to any particular form of morality that is adopted. For instance, if we accept that, according to Kantian morality, the reasons for a morally sound act[8] must be generalizable, the moralist, according to the same Kantian morality, shall consider that the reasons for any act, in order to be considered as morally sound, must be generalizable and that, furthermore, she shall evaluate the reasons for this act with intransigence and rigidity. The moralist is inclined to examine all aspects of an agent's acts and life and, in the event that the agent violates the imperatives of morality, stigmatize her as an immoral person.

Kant distances himself from moralism.[9] All the passages presented above can be read as containing moral arguments against moralism. They are arguments against moralism insofar as Kant stresses the importance of the dialogue between the agent's moral conscience *and the agent as an empirical being*. At the same time,

8 'Maxims' according to Kant's terminology.

9 Cf. Papageorgiou (1991), who considers Kantian duties against oneself as implications of the agent's freedom, and Höffe (2007, 37 ff.), who qualifies moralism as 'a not defensible normativism'. I do not elaborate on the relation of those approaches to the one adopted in the text.

they are moral insofar as he stresses the importance of the dialogue between the agent's *moral conscience* and the agent as an empirical being. So when Kant warns us as third parties to 'keep our judgments to ourselves', when he insists that we should avoid feeling 'complete contempt' for a vicious human being or avoid 'denying any moral worth to such a human being', when he urges that we have a duty not to censure this human being's errors by calling them 'absurdities, poor judgment, and so forth', he underlines the moral importance of this two-sided inner mental process, which is the 'business of a human being with herself' while, at the same time, it presents itself as 'the bidding of another person'.[10]

It is clear then that, according to Kant, the moral reproach of an agent by another agent, although useful, should not go so far as to stigmatize her in her quality as a moral person. Those engaging in moral criticism should recognize the agent's capacity to act, to be subject to the judgment of her own conscience, to accept the verdict of this very conscience, and to accept the responsibility of her actions. In sum, they have a series of duties to the agent criticized. These duties are not imperfect: at the same time, the agent in her quality as a moral person has the moral claim not to be morally stigmatized. In other words, the claims of the agent and the duties of those engaging in moral reproach are two sides of the same coin.

A last remark: according to many commentators, Kant demarcates clearly the domain of ethics (which he associates with the notions of good and evil) from the domain of morality (which he associates with the

10 Dean (2012) holds that arrogance is the source of Kant's opposition to moralism. My point is that Kant goes even deeper and considers arrogance to be morally deficient because of the importance of the agent's moral conscience.

notions of right and wrong). I do not want to examine the pertinence of this analysis of the Kantian thought. The point I want to stress is that, if we adopt it, we can note that within the domain of morality the ultimate judge of an agent's act is her own moral conscience. In other words, Kant accords a very substantial function to the dialogue the agent leads with her own moral conscience even when questions of right and wrong are at stake.

4.2. From Moral Claims to Legal Rights: Some Preliminary Remarks

What are the implications of the right to do wrong on us – on our social and public life? I think that herein lies the essence of the argument in favour of the right to do wrong, and the perspicacity of Waldron's approach is brought to light.

Our last remark concerning the anti-moralistic gist of the Kantian argument for moral autonomy might shed light on these questions. It suffices to recall that the distinction between morality, as articulated around the notion of right, and ethics, as articulated around the notion of good, paves the path for the distinction between the public sphere, where law and the state might intervene, and the private sphere, where individuals might act and interact, at least in principle, as they consider good for them. Needless to say, this dichotomy has many grey zones and, moreover, sometimes it oversimplifies much more complicated situations and processes; however, the public sphere–private sphere dichotomy is valuable in regard to the competence of law and the state – at least a state that is based on legal principles.

Since the right to do wrong pertains to questions of morality, its function becomes clear. In the field of law, it is widely believed that, contrary to positivism, fundamental (or constitutional) rights are founded on moral

principles and that it is in regard to these principles that the violations of the aforementioned rights should be considered. In other words, anti-positivists believe that legal rights presuppose moral rights. The issue of the exact relationship between moral and legal rights can be left aside for the moment. In any case, if such a relationship is a necessary condition for the validity of legal rights, the preceding analysis of the moral right to do moral wrong sheds new light on the matter.

Since an agent has a moral right to do moral wrong, the state cannot substitute her in the relationship between her and her moral conscience by using violence, by treating her as a means, by intervening in her inner self, or by stigmatizing her as an immoral person, even when she commits morally deficient acts. Such substitution is not allowed in the domain of morality. Moreover, since morality and law are parts of a *continuum*, such a substitution is also not allowed in the sphere of law. Thus, it is part of the content of an agent's freedom of conscience to be able to form insulting thoughts about others; it is part of the content of an agent's right to privacy to be able to proceed with activities that hinder her moral development, at her leisure; it is part of the content of an agent's right to property to be able to spend her money to attain insignificant or even immoral aims. All those morally deficient acts are possible because the agent has the moral right to do moral wrong. Moreover, all those acts are legally tolerated. The state, on the other hand, is under the duty to respect the agent's right to proceed with those acts. The reason for the state's duty is the same: the agent's moral right to do moral wrong.

Since we are talking about constitutional rights, this cannot be the end of the story. If the state violates the agent's freedoms of conscience, privacy or property,

the agent has a solid claim against the state: solid because this claim stems from morality – not just from positive law. This is a claim whose source is morality – a morality that is distinct from and strongly opposed to moralism.

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FROM EQUALITY TOWARDS EQUITY AND DIFFERENTIATED RESPONSIBILITIES: A CONTEMPORARY INTERNATIONAL ENVIRONMENTAL LAW PERSPECTIVE

The paper analyzes the relationship between the principles of equality, equity and differentiated responsibilities in the specific context of international environmental law. By tracing these three principles throughout the texts of relevant international environmental instruments and agreements, the author provides for distinction between various levels of differentiation through which equity is achieved. It is argued that, due to the novel solutions contained in the Paris Climate Agreement, a change has occurred in contemporary international environmental law regarding the relationship between the principles of equality, equity and differentiated responsibilities. Instead of fostering equality through equity and differentiated responsibilities, these changes have widened the gap between these principles. Differentiation has slowly detached from both equality and equity and has started to fulfill objectives other than fairness, such as achieving wider participation, effectiveness and better implementation of multilateral environmental agreements.

Keywords: *Equality. – Equity. – Principle of common but differentiated responsibilities. – Environment. – Climate change.*

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1. INTRODUCTION

Equality, equity and differential treatment are present through various emanations in general international law.[1] However, their evolution appears to be rather authentic and the use of equity instead of equality is frequent in international environmental law (IEL). Such specificities of IEL may be explained, on the one hand, by the very characteristics of global environmental problems, which cannot be resolved without the participation of the entire international community, or at least its dominant part. On the other hand, it must be acknowledged

1 For example, the composition of the United Nations (UN) Security Council reflects the inequalities between UN Member States. Inequalities seem also to be reflected in the voting systems of a number of international organizations where a state's number of votes depends on its financial contributions or other criteria. In contrast to such examples, where differentiation was not established in order to foster substantive equality, general international law is also familiar with situations in which differential treatment actually seeks to achieve equality. Thus international maritime law provides for a number of solutions that differentiate between countries with the aim of eliminating differences between them to the highest degree possible. It should, however, be noted that inequalities between states are not necessarily unjust. Aristotle provides classical distinctions between the terms equality, justice and equity. In his words, "if the persons are not equal, they will not receive equal shares," whereas although "justice in distribution must be in accordance with some kind of merit, (...) not everyone means the same by merit" (Aristotle 2004, 86). In regard to equity and its relation to justice, Aristotle considers them to be one and the same. However, while both are good, in Aristotle's opinion "what is equitable is superior" (Aristotle 2004, 100). The problem, though, appears with what should be considered as legally just. Since "all law is universal, and there are some things about which one cannot speak correctly in universal terms" it may become "necessary to make universal statements but not possible to do so correctly." In such cases, "the law takes account of what happens more often, though it is not unaware that it can be in error" (Aristotle 2004, 100).

that not all states contributed to environmental degradation equally and that they differ significantly with regard to their individual capacities to address environmental problems since they represent costly undertakings.

The subject matter of the analysis will be the relationship between the principles of equality, equity and differentiated responsibilities in the specific context of international environmental law. By tracing these three principles throughout the texts of relevant international environmental instruments and agreements, a number of issues will be analyzed. The first part of the paper considers the evolution of the relationship between the principles of equality, equity and differentiated responsibilities, both in the context of IEL and public international law in general. Secondly, the paper will provide an in-depth analysis of these principles and the manner in which they are implemented in a number of international environmental agreements. The third part of the paper focuses on the innovations introduced in the latest international environmental treaty – the Paris Agreement on Climate Change. Finally, an assessment of the possible repercussions of such novel solutions on the relationship between the principles of equality, equity and differentiated responsibilities will be the subject of analysis in the last part of the paper.

2. EQUALITY, EQUITY AND COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN EARLY IEL INSTRUMENTS: THE STOCKHOLM AND RIO DECLARATIONS REVISITED

There appears to be a reverse evolution in the relationship between equality and equity in IEL as compared to general international law. In international law, the principle of sovereign equality came to life quite late

and was born out of obvious inequalities that existed between states, in an attempt to disguise substantive inequalities by proclaiming formal equality.[2] Oppositely, in IEL the principle of equality represented a starting point which, in a world of still present disparities, was transformed into the principle of equity and "common but differentiated responsibilities" (CBDR).

These three principles can be traced in the texts of relevant international environmental instruments that paved the way for current international environmental agreements. In contrast to Principle 24 of the 1972 Stockholm Declaration on the human environment, which proclaimed that international matters concerning the protection and improvement of the environment should be handled "by all countries, big and small, on an equal footing," with no mention of equity

2 Voigt, Ferreira (2016, 286) offer a definition of the principle of sovereign equality of states that is in line with the prevailing position that equality equals to a "guarantee that all states have equal rights and obligations." As noted by Lavanya Rajamani (2006, 2), differentiated duties may therefore be perceived as a derogation of the principle of sovereign equality. However, it should not be disregarded that the free will of states to enter into differing commitments actually represents a valid link between sovereign equality of states and their unequal rights and duties. States are the ones who decide whether they will express their consent to be bound by treaties providing for differentiated obligations. It therefore appears that formal equality between states fosters their substantive equality through means of formal inequalities (unequal rights and duties) based on substantive inequalities. Such an understanding of the principle of sovereign equality is close to Hans Kelsen's (1944, 209) thesis that, in international law, "equality does not mean equality of duties and rights, but rather equality of capacity for duties and rights," which basically means that equality should be understood in a way that "under the same conditions States have the same duties and the same rights."

or differentiated responsibilities,[3] the 1992 Rio Declaration on environment and development did not refer to the principle of equality but instead relied largely on equity.[4] It stated that the special situation and needs of developing countries should be given priority, particularly the least developed and those most environmentally vulnerable, and provided the first and most famous recognition of the principle of common but differentiated responsibilities, by stipulating that not all states contributed to the present environmental degradation in the same manner and that, therefore, not all States should have the same commitments both to the environment and to each other.[5] A definition of equity is offered by Voigt (2014, 51), who refers to it as "the quality of being impartial, fair, and just." In the area of international environmental law, this comes down to taking account of "states' different 'circumstances', whether these relate to the stage of development, economic means, risk (exposure and vulnerability), (...) financial and technological capacity, etc." In regard to the CBDR principle, it is regularly understood as a manifestation of equity in IEL (Cullet 1999a, 169).

This shift from Stockholm equality towards Rio equity and differentiation may be explained by the

3 UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994.

4 In contrast to the CBDR principle, which is defined in Principle 7 of the Rio Declaration, IEL does not provide a definition of equity, neither in general nor in regard to the international climate change regime. United Nations Conference on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26 (vol. I).

5 Principles 3, 6 and 7 of the 1992 Rio Declaration on Environment and Development. For a detailed doctrinal analysis of the CBDR principle in international law, *see* Stone (2004, 276–301).

specific relationships between a number of factors, as well as their varying significance for different categories of international actors. As remarked by Beyerlin (2006, 262), many Third World countries opposed the approach adopted at the Stockholm Conference for two main reasons. Firstly, they perceived environmental degradation predominantly as a result of the industrialization process in developed countries and, secondly, pollution was not among their priorities. Equal obligations therefore needed to be replaced by differentiated obligations, in order not only to achieve the practical aim of getting underdeveloped and developing countries to make environmental commitments, but also to acknowledge the current realities since in the post-Stockholm period the economic and social concerns of developing countries far exceeded the environmental concerns of developed ones. The shift from equality towards equity and differentiation therefore represented a reflection of both necessity and fairness within the international community at the time, the latter however prevailing over the former.

3. MODES OF INTEGRATING THE PRINCIPLES OF EQUITY AND COMMON BUT DIFFERENTIATED RESPONSIBILITIES INTO THE PROVISIONS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS: COMMON AIM – DIFFERENT MEANS AND BASIS

The next issue to be analyzed concerns the modes of integrating the Rio principles of equity and differentiated responsibilities into specific international environmental agreements, with special focus on the international climate change regime, protection of the ozone layer and atmosphere, biological diversity and

desertification. Although the relevant provisions of the respective conventions all reportedly aim to achieve equity of the contracting parties, the differentiation through which equity is to be achieved is compound and can be identified at various levels. Such diversification regarding the means of integrating the two Rio principles into specific agreements may be explained by the specificities of the particular environmental problem, the level of disparities between states as regards their capacities to address it, as well as the intended objectives. On the other hand, these considerations dictated the very form and content of the treaty provisions that contain the differentiated commitments. The analysis will, for the moment, exclude the 2015 Paris Agreement, and will focus on a number of international environmental treaties that preceded it. The reason for using such an approach lies in the fact that the youngest member of the environmental treaties' family introduces significant innovations that deserve a separate, more detailed and focused analysis. Such an analysis would further enable relevant comparisons to be made, as well as conclusions to be reached regarding the very topic of this paper, i.e. the relationship between the principles of equality, equity and differentiated responsibilities.

3.1. Differentiation at the Level of Primary Treaty Rules vs. Differentiation at the Level of Treaty Implementation

Firstly, there appears to be differentiation at the level of primary treaty norms and differentiation at the level of their implementation. Both levels of differentiation appear to be twofold.

The most common manifestation of differentiation at the level of primary treaty rules can be described

as "loose" since it makes contracting parties' commitments conditional upon their "particular circumstances," in so far as it is "appropriate" or "as far as possible."[6] Its second variation is less frequent in IEL and includes stipulating entirely different commitments from one contracting party to another. An example of such "strict" mode of differentiation is the establishment of greenhouse gas emission (GHG) reduction targets by the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) only for the group of developed contracting parties stated in Annex I,[7] or differentiation of commitments provided in Article 4 of the UNFCCC.[8]

6 Article 6 of the Convention on Biological Diversity stipulates that general measures for conservation and sustainable use of biological diversity will be performed "in accordance with particular conditions and capabilities of a contracting party. The same level of differentiation is achieved by using other formulations, such as "as far as possible and as appropriate" (Art. 7 CBD). Convention on Biological Diversity, 5 June 1992, United Nations Treaty Series, Vol. 1760, 79. A similar pattern is used in Art. 5 of the UN Convention to Combat Desertification which contains the formulation "in accordance with their circumstances and capabilities." The United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 17 June 1994, United Nations Treaty Series, Vol.1954, 3.

7 Art. 10 of the Kyoto Protocol defines the commitments that are to be fulfilled by all parties, Art. 2, 3, 4, 5, 6, 7 and 8 define the commitments of the Annex I parties, whereas Art. 11 stipulates additional commitments for the Annex II group of parties. Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, 10 December 1997.

8 Paragraph 1 of Art. 4 provides commitments of all parties, paragraph 2 lists commitments for developed country parties and other parties included in Annex I, whereas paragraphs 3, 4 and 5 of the same Article stipulate the commitments of

Differentiation at the level of implementation of treaty norms is first and best perceived through the Montreal Protocol on Substances that Deplete the Ozone Layer, which provides for reciprocal commitments of all parties at the level of primary treaty norms, but with longer implementation periods for developing countries for which compliance with this treaty is more difficult.[9] However, another, more frequently used variation of this mode of differentiation, exists through the so-called implementation aid. Since many parties to environmental agreements do not possess the required financial and technical capacities to implement the commitments stipulated in the given treaty, their implementation is made conditional upon the aid which is to be provided either by those contracting parties

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the developed parties included in Annex II. UN General Assembly, United Nations Framework Convention on Climate Change: Resolution adopted by the General Assembly, 20 January 1994, A/RES/48/189, United Nations Treaty Series, Vol. 1771, 107.

9 The initial text of the Montreal Protocol on Substances that Deplete the Ozone Layer stipulated in Art. 5 that any party that is a developing country and whose annual calculated level of consumption of the controlled substances is less than 0.3 kilograms per capita, on the date of the entry into force of the Protocol for it, or any time thereafter within ten years of the date of entry into force of the Protocol, would be entitled to delay its compliance with the control measures by ten years. Subsequent amendments followed a similar pattern, although by specifying precise timetable for Art. 5 countries to implement the obligations of phasing-out hydrochlorofluorocarbons and phasing-down hydrofluorocarbons. The Montreal Protocol on Substances that Deplete the Ozone Layer, 16. September 1987, United Nations Treaty Series, Vol. 1522, 3. For more details on the amendments, see the official Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer (United Nations Environment Programme 2018, 19–23).

that possess such capacities or by an international fund established for that purpose.[10]

Significant differences exist between these options from the perspective of their effectiveness. Differentiation at the level of implementation, at least its first option, has not only proven to be the most successful,[11] but it also has had positive reverse impact on primary norms, by providing them with additional strength (*see* Voigt 2014, 56–58). Judging by the experience of the Kyoto Protocol, the second variation of substantive differentiation failed to live up to expectations, whereas the first one is usually considered as additional maneuvering space for contracting parties not to fulfill their commitments, and thus represents the further weakening of already weak international environmental commitments.[12]

3.2. Equity Through Collective and Individual Differentiation

Secondly, *ratione personae*, differentiation can encompass a group of states or can be established between countries on an individual basis, independently of the common characteristics that they share with other countries. Both approaches have certain advantages

10 Art. 10 of the Montreal Protocol on Substances that Deplete the Ozone Layer, Art. 20 of the Convention on Biological Diversity, Art. 13 of the Stockholm Convention on Persistent Organic Pollutants. Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, United Nations Treaty Series, Vol. 2256, 119.

11 Namely, according to the United Nations Environment Programme (2019), compared to 1990 levels, the global phasing-out of substances that deplete the ozone layer has reached 98%, whereas ozone depletion would have increased ten times by 2050 compared to current levels had it not been for this international treaty.

12 For additional argumentation see Handl (1990, 9).

and disadvantages. Collective differentiation enhances negotiating capacities and the general position not only of the group as a whole, but also of each individual member of the group. However, such an approach, as noted by Cullet (1999b, 552), tends to be "reductionist", since it fails to take into account the immense disparities and inequalities between countries that are considered to belong to a particular group. In other words, the classification of countries as developed, developing or least developed, cannot adequately reflect the characteristics and specificities of each particular country: not all developed countries are equally developed, and the circumstances of all developing countries are not the same.[13] Individual differentiation may thus be perceived as a sounder solution since it is based on the individual circumstances of each country and its own capability to contribute to resolving a particular environmental problem. However, in an international community consisted of nearly 200 states, such an approach is problematic both at the level of the creation and at the level of implementation of international norms.[14] Namely, normative frameworks are not able to reflect these specificities by defining them or at least by offering

13 Voigt (2014, 52) argues in favor of individual differentiation due to another aspect of this problem. The author stresses that it is impossible for particular groups of states to be precisely identified in the sense that "the antagonistic dividing line between developed and developing countries is not only becoming increasingly blurred, but in effect an obstacle to meaningful mitigation action".

14 Cullet (1999b, 552), in contrast, uses the number of states in the international community as an argument in favor of the individual differentiation approach. The author believes that "the relatively manageable number of states in the international community" enables taking into account "the situation of each and every state to determine their actual capacity to respond to a given problem."

firm criteria for properly determining them.[15] Instead, they mostly opt for rather loose formulations that simply make implementation of particular duties conditional on the national circumstances and capabilities of the contracting parties, whatever that may mean, thus practically equating individual differentiation with the first option of substantive differentiation, as explained in the previous section.[16]

3.3. Equity: Single Aim – Different Basis?

Thirdly, regarding the very basis for differentiation, differentiated responsibilities of contracting parties may be considered to be based on the principle of common but differentiated responsibilities, whereas others can hardly be linked to this principle. Namely, in its initial meaning, the CBDR principle took into account the varying historical contributions to environmental degradation of the so-called developed and developing countries and observed differentiated treaty obligations as a means of corrective justice. In addition to the climate change regime,[17] differentiation is explicitly based on the CBDR principle in the 2001 Stockholm Convention on Persistent Organic Pollutants[18] and the

15 In addition to the Kyoto Protocol which provided a list of developed countries in one of its annexes, the Montreal Protocol on Substances that Deplete the Ozone Layer may also serve as an exception in this regard. It offers clear numerical criteria for determining which countries qualify as Article 5 countries, i.e. developing country deserving special treatment. Such a method of classifying countries as developing countries may be perceived, among other things, as having contributed to the success achieved by this international environmental instrument.

16 *See* examples contained in footnote 6.

17 Art. 3 and 4 of the United Nations Convention on Climate Change, Art. 10 of the Kyoto Protocol to UNFCCC.

18 *See* the Preamble to the Stockholm Convention on Persistent Organic Pollutants.

2013 Minamata Convention on Mercury.[19] Other international environmental treaties that provide for differentiated commitments of contracting parties do not offer any explicit basis for differentiation, with differentiation implicitly stemming from the characteristics of the particular situation, needs and capabilities of the contracting parties.[20] Since the CBDR principle can be understood as just one among many emanations of equity, does this mean that equity represents a basis for differentiation in all international environmental treaties that do not rely on CBDR?

There appears to be a significant disparity that arises from this distinction regarding the basis for differentiation. Differentiation based on the CBDR principle seems to be in pursuit of corrective justice, fairness and fairly achieved outcomes. In contrast, differentiation based on other reasons may have other ultimate aims, such as effectiveness and better treaty implementation, either exclusively or in combination with fairness. Thus, it has not only become obvious that substantive equality would never be reached in IEL – not even through equity and differentiation – but it has also become questionable whether differentiation always tends to reach equity and fairness. This question

19 Minamata Convention on Mercury, 6 November 2013, UNEP(DTIE)/Hg/ INC.5/7.

20 According to the analysis provided in Pauw *et al.* (2014, 31–32), the CBDR principle can be identified as a basis for differentiation even in the multilateral environmental treaties that do not mention it explicitly, such as the Convention on Biological Diversity. However, the arguments supporting this claim do not seem convincing enough. On the other hand, the absence of a link to the CBDR principle in certain environmental treaties may be explained by the temporal argument since their adoption preceded the introduction of the principle in the Rio Declaration. The Montreal Protocol on Substances that Deplete the Ozone Layer may serve as an example in this regard.

gains even more importance in the context of the 2015 Paris Agreement on Climate Change.

4. DIFFERENTIATION IN THE PARIS AGREEMENT ON CLIMATE CHANGE: ABOLISHMENT OF THE CBDR OR ITS NOVEL ELEMENT?

Following previous considerations, the next matter to be questioned relates to changes to the the CBDR principle that were introduced by the 2015 Paris Agreement on climate change. The replacement of strictly determined quantified GHG emission reduction targets with the so-called "nationally determined contributions" (NDCs) represents a major novelty. Namely, instead of defining emission reduction targets in the text of the agreement and exclusively for the group of developed parties, the Paris Agreement opts for a solution where all contracting parties have quantified emission targets, but these targets are to be determined on their own.[21] Although there is still differentiation between developed and developing parties in certain provisions of the Agreement,[22] this seems to have been abandoned in the case of emission reduction targets, as the central and most significant treaty commitment. Instead, a specific kind of individual differentiation takes precedence over the previously-used collective differentiation.

21 Art. 3 and 4 of the Paris Agreement on Climate Change. Paris Agreement on Climate Change, 12 December 2015, C.N.63. 2016.TREATIES-XXVII.7. d.

22 Art. 9 appears to be most indicative in this regard. However, differentiation between categories of countries is also present in other articles. For example, Art. 3 recognizes the need to support developing countries in implementing treaty provisions, Art. 4 allows developing parties longer GHG peaking, etc.

It, nevertheless, differs from ordinary individual differentiation in that it is determined by the contracting parties themselves, in line with their own interests and assessment of national capabilities.[23]

Even though some authors claim that differentiation through taking account of particular national conditions and capabilities of a contracting party may be considered as a novel element of the CBDR principle,[24] such a solution may also be understood as an abolishment of the CBDR principle with regard to differentiation at the level of central primary treaty norms, with its implicit subsistence with regard to less important provisions of the treaty[25] and at the level of implementation aid.[26] If differential treatment is perceived as a means

23 Cullet (2016, 317) qualifies this sort of individual differentiation as self-differentiation.

24 Beyerlin (2006, 279) proposed a revised scheme of commitments that would entail a sliding scale of reduction obligations, allowing for a more flexible differentiation between the parties, according to their share of greenhouse gas emissions at the present, or which are expected to have in the near future. Although the author reads the CBDR principle as encompassing such an option, in our opinion it would actually represent either its complete abolishment or significant modification, which would need to be recognized through a newly-adopted formulation, contained in a future international environmental instrument.

25 Art. 7, paragraph 3 stipulates that "the adaptation efforts of developing country Parties shall be recognized, in accordance with the modalities to be adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement at its first session."

26 Art. 13, paragraph 2 states that "the transparency framework shall provide flexibility in the implementation of the provisions of this Article to those developing country Parties that need it in the light of their capacities", whereas paragraph 3 provides the same for the group of the least developed countries and small island developing states.

to achieve equity and equality, this departure from the CBDR may be understood as a necessity brought about by the fact that circumstances have changed and that greater significance should be attached to current environmental and economic factors than to historical reasons. Are we witnessing the emergence of a new principle of different national circumstances (DNC) which will serve as the basis for differentiated responsibilities and achieving equity in IEL? Is this principle nothing more than an evolving version of the CBDR principle, or is differentiation in IEL actually based on the combination of the two (CBDR-DNC)?

The answer is – none of the above. The Paris Agreement abolished the CBDR principle, while at the same time it reintroduced the well-known, but previously slightly differently formulated, principle of different national circumstances. Namely, the preamble of the Paris Agreement reiterate the equity and CBDR principles, however with an addition – "in the light of different national circumstances."[27] Such a formulation indeed represents another important novelty in the future climate change regime since it was not contained in any of its previous reiterations. However, certain provisions that contain differentiated commitments mention CBDR-DNC,[28] while others rely

27 The Preamble to the Paris Agreement states that contracting parties shall pursue the objectives of the UNFCCC and that they are "being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

28 Article 4, paragraph 3 states that "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective

exclusively on equity,[29] and some invoke only "different national circumstances".[30]

Maljean-Dubois (2016, 154–155) believes that the new formula increases "the range of factors that may serve as a basis for determining differentiation" and perceives it as opening the door for an "evolutionary interpretation" of the CBDR. However, the manner in which the new CBDR-DNC principle is used in the specific provisions of the Paris Agreement proves that it has little or no connection to its UNFCCC and Kyoto Protocol predecessors.[31] Firstly, not only has its essence and substance vanished, since it is used in provisions that do not differentiate between the countries on the basis of their contribution to environmental degradation, it focuses on successive, i.e. future contributions and long term GHG development strategies, not on historic ones. Secondly, by requiring that successive contributions follow the principle of progression, meaning that each successive GHG emission reduction target needs to be higher than the previous one, the Paris Agreement has definitely departed from the CBDR principle. By opting for the principle of progression as regards nationally determined contributions, the Paris Agreement takes the assumptions that the national circumstances will certainly improve, thus resulting in the country's advanced capacities to handle the

capabilities, in the light of different national circumstances." In a similar manner, Art. 4, paragraph 19 stipulates a duty to formulate and communicate long-term low greenhouse gas emission development strategies, by taking into account common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

29 *See* Art. 4.1. and Art. 14 of the Paris Agreement.

30 Art. 4.4, Art. 13.1 and Art. 15.2. of the Paris Agreement.

31 Rajamani (2016, 509) takes the same position, although using different arguments.

climate change issue, and that its emission of GHG will surely decrease. But what if this is not the case? Would it be fair to require more ambitious NDCs from those contracting parties that have limited national capacities and are not large GHG emitters, while at the same time leaving it entirely at the discretion of the greatest emitters, with favorable national circumstances, to decide to which extent their targets will increase successively? Such a solution basically consists of abandoning the CBDR principle in its original sense. Thirdly, the original CBDR principle entailed certain formal criteria derived from the wording of Principle 7 of the Rio Declaration.[32] The absence of any formal criteria by which nationally-defined contributions could be determined, may serve as another indication that the Paris Agreement actually departs from the CBDR.[33] In line with these arguments it can be concluded that although formally still present, though in combination with the DNC part, the CBDR principle has actually been withdrawn from the climate regime, whereas its place has

32 As noted by Honkonen (2009, 258–259), this does not mean that the content of the CBDR principle is definitely determined and deprived of any controversies. Even other, less disputed IEL principles, such as the principle of environmental impact assessment and the precautionary principle, are not characterized by firm and precise content. Such a claim should be understood in the sense that certain formal elements of the CBDR principle could be derived from its initial definition contained in the Rio Declaration, whereas the Paris Agreement obviously does not follow these criteria, at the same time, by failing to provide new ones. An in-depth discussion on the elements of the CBDR principle and its content is offered by Rajamani, (2006, 130–138 and 152).

33 In addition to criticizing the absence of formal criteria, according to which contributions would be based on the CBDR principle, Vanderheiden's (2015, 43) analysis offers insightful direction on the application of the CBDR principle in relation to the financial aspect of the climate change phenomenon.

been taken over by the principles of equity and different national circumstances. The DNC principle, however, should not be considered as something completely new in the climate regime and in IEL in general. It has served as a basis for differentiation for quite some time, although through different formulations, and it is the equivalent of what was considered the "loose" variation of differentiation at the level of primary treaty norms, as explained in part 3.1 of this paper.

The Paris Agreement has demonstrated another departure from its predecessors and other environmental treaties: it does not opt for specific type of differentiation; it encompasses them all. As explained above, it provides for both individual, or self-differentiation, and collective differentiation. It not only stipulates differentiation at the level of primary treaty commitments, it also uses differentiation with regard to their implementation. Finally, it formally links differentiation to the CBDR principle, although it substantially uses equity and the principle of different national circumstances as its basis.

5. THE PARIS CLIMATE AGREEMENT: ANY CONSEQUENCES REGARDING THE RELATIONSHIP BETWEEN EQUALITY, EQUITY AND DIFFERENTIATED RESPONSIBILITIES IN CONTEMPORARY IEL?

Due to the novel solutions contained in the Paris Agreement, a change has occurred in contemporary IEL regarding the relationship between the principles of equality, equity and differentiated responsibilities. Namely, differentiation based on different national circumstances may only be understood as the direct application of the principle of equity and cannot be considered to emanate from the principle of common but

differentiated responsibilities. This is clear from the very wording of the Paris Agreement which stipulates certain treaty commitments by explicitly referring only to the principle of equity, whereas in regard to other obligations it simultaneously refers to the principles of equity and common but differentiated responsibilities. It seems that, although still formally present, the principle of common but differentiated responsibilities represents neither the exclusive nor the most important means for achieving equity and that the principle of respective national capabilities has taken precedence. By opting for such a basis for differentiation, the international climate change regime has taken a step back and abandoned the "advanced" or "progressive" level of differential treatment, as provided by the Kyoto Protocol. The differentiation present in the future climate change regime has thus combined modes of differentiation used in other environmental agreements. "Strict" differentiation is replaced by "loose" differentiation; differentiation encompassing groups of states is substituted by self-determined individual differentiation, whereas instead of being based on the CBDR principle, differentiation is now mainly based on national circumstances and capabilities of each individual contracting party.

As an aim for achieving equity and confronting the fact of inequality with the fiction of equality, changes that have occurred in IEL, related to differential treatment and differentiated responsibilities, have inevitably influenced respective changes in the principles of equity and equality. Equity and equality have become "loose", determined on an individual basis and depending on national circumstances and the capabilities of the parties to a particular environmental agreement. This will undoubtedly result in further weakening of the already weak environmental commitments, whereas the equity

principle will be perceived as a tool in the hands of the developed instead of the developing countries. Namely, if in 1992 CBDR appeared as a necessary compromise to attract environmentally unaware developing countries which, at the time, had other priorities, during the second decade of the 21st century it is necessary to make compromises with developed and certain developing countries, in order to plead for their participation in international environmental agreements, with underdeveloped and developing countries becoming aware that they have been impacted the most by climate change and other environmental consequences, *inter alia* due to their high vulnerability and low resilience capacities. Therefore, instead of fostering equality through equity and differentiated responsibilities, these changes have further deepened the inequalities between the members of the international community. Differentiation is no longer a means for achieving equity between developed and developing in a world of substantive inequality; rather it became a constituent element of an insufficiently defined new concept of equity which is to be achieved through equally undefined and vague differentiation based on individual capabilities of each member of the international community. In other words, the interpretation and application of the principles of equity and differentiation has always been and will always be dependent upon the interests of the developed states. If back in the 1990s these states had an interest to offer strict and collective differential treatment based on the clear lines of the CBDR principle, in 2010s the interests of developed states have obviously undergone a significant change, which has resulted in loose and individual differentiation based on an undefined principle of equity. Although at some point during the evolution of IEL, differentiation, as an emanation of equity, had

the potential of being perceived as a tool for fostering substantive equality, it has recently become obvious that differential treatment does not pursue equality any longer and that it has departed from it. Differentiation has, also, slowly detached from equity and started to fulfill objectives other than fairness, such as effectiveness of international environmental treaties. It now predominantly serves the purely rational and practical purposes of attracting as many contracting parties to a particular environmental agreement as possible and better implementing those agreements once they enter into force.[34]

6. CONCLUSION

The reasons for introducing differentiation into international environmental law were initially distinct from the reasons for differentiation in other areas of international law. This distinction is mainly due to the principle of common but differentiated responsibilities, which has significantly influenced the understanding of the equity principle, although it has generally been considered to be just one of its potential manifestations. Namely, the CBDR principle contains a significant, though quite specific understanding of fairness,

34 Under these circumstances, in which participation and effectiveness definitely take precedence over fairness in multilateral environmental agreements, the presence and subsistence of fairness as the key quality of the principle of equity is, in our opinion, best explained by Voigt, Ferreira (2016, 288). The authors rightly note that "while effectiveness depends on participation, participation in turn depends on states' own perception of fairness and equity with regard to other states' contributions towards addressing the problem". Put differently, the state's willingness to make environmental commitments will, among other factors, depend on its own perception of the given treaty's fairness. A similar line of reasoning is offered by Ringius, Torvanger and Underdal (2002, 1).

which, at the time of the Rio Declaration, prevailed over other more pragmatic factors. By abandoning the CBDR principle, the application of equity in IEL risks losing this specificity and becoming closer and more similar to the practical purposes that differentiation has in other areas of international law.[35]

By abandoning the CBDR principle, as well as by introducing multiple and flexible forms of differentiation, the Paris Agreement has significantly disturbed the relationship between equality, equity and differentiated responsibilities in contemporary IEL. Initially, in the community consisting of unequal states, IEL started to evolve based on formal equality. which was soon substituted by equity and CBDR, so as to eventually achieve substantive equality. Unfortunately, reality took a different turn. IEL indeed started its development by establishing formal equality in the Stockholm Declaration; equality was indeed transformed into the principles of equity and CBDR in the Rio Declaration and some of the successive multilateral environmental agreements, but substantive equality has never been achieved. Instead, with the abolishment of the CBDR principle in the new climate change regime, IEL risks, though only formally, being reduced to equity through differentiation, although it in fact provides for differentiation detached from equity. Differentiation that does not aim to achieve fairness cannot be viewed as based on equity. Therefore, instead of establishing "equitable differentiation", as an evolving principle of international law for the protection of the environment,[36] it seems

35 Additionally, Caney (2005, 748) remarked that the influence of the global distribution of environmental burdens and benefits risks being lost as well, which also lay in the basis of differentiation at the time when this approach was first introduced in IEL.

36 According to Shelton (2010, 125), however, the equitable differentiation approach does not rely exclusively on morality and the notion of justice; it also includes other, more prac-

that IEL is closer to what may be described as a principle of pragmatic differentiation.

Instead of being at the forefront of IEL in terms of equitable outcomes of differentiation, the international climate regime has taken a step backward. By opting for the DNC principle, it has reintroduced loose, individual differentiation based on vague and undefined criteria.[37] Although it should be acknowledged that such a solution represented the only acceptable compromise between negotiating parties at the Paris conference, adopted mainly in order to ensure wide participation, it remains to be seen whether the solution will live up to the other fairness-free aim for differentiation – assuring better implementation of the treaty. Indeed, strict and collective differentiation, applied in the Kyoto Protocol to UNFCC, failed to achieve successful results. Nevertheless, other, more successful forms of differentiation could have influenced the architecture of the future climate treaty. An attempt could have been made to achieve both equitable and pragmatic differentiation by adapting successful solutions from other multilateral environmental agreements to the specificities of the climate change regime, such as individual differentiation at the level of implementation of the treaty, based on objective and clear numerical criteria.

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tical aims such as fostering "more effective action on issues of common concern". Therefore, in this perspective equitable differentiation is equitable and based on the sense of fairness, but at the same time it is able to achieve additional pragmatic aims. Here lies the most important distinction as regards our qualification of "pragmatic differentiation", which basically either excludes the element of fairness or leaves it to a minor, negligible extent.

37 For opposing views that praise the potentials of the new climate regime and its solutions *see* Voigt, Ferreira (2016, 301–302); Voigt, (2014, 54); Rajamani (2016, 494); Maljean-Dubois (2016, 159).

In order to protect the environment, IEL needs successful international treaties. Successfully implemented multilateral treaties that do not pursue equity and fairness are therefore worth more than fair agreements that gain insufficient acceptance and prove unsuccessful. For the sake of present and future generations, all the species and the planet itself, let us hope that the drafters of the Paris Agreement sacrificed equity for the success of the climate regime.

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Marko Božić*

EQUAL LIBERTY TEST: A PROLEGOMENON FOR AN AXIOLOGICAL DEFINITION OF A SECULAR STATE

The paper examines the way equality and liberty may contribute to the theoretical debate on the definition of a secular state. Its starting point is the idea that a modern state, with its liberal and democratic legitimacy, should guarantee religious liberty in an equal manner to everyone. However, most modern states either provide legal measures to restrain religious liberty as such, or do not treat all their citizens equally, but deliberately make some of them more equal than others. Therefore, a simple definition of a secular state, closely connected to the values of liberty and equality, is only an ideal and does not correspond to any empirical phenomenon. As such, it cannot offer the basis for a scientific theory, but it may be scientifically useful as a heuristic tool, and instrumental in evaluating different governmental practices and legislative policies.

Key words: *Secularism. – Liberalism. – Democracy. – Equality. – Liberty.*

1. INTRODUCTION

It is widely believed that secularism is one of the standard values of liberal-democratic constitutionalism. But, what does secularism actually mean? At the constitutional level, all European countries are secular,

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meaning that the state is officially religiously neutral. However, in reality legal frameworks stemming from these constitutional premises differ from state to state. They range from the laical approach, where religion belongs strictly and exclusively to the private sphere, as in the French political system, the so-called state churches, common for the Scandinavian and Greek political model, to advanced clericalization, typical for the Eastern-European transitional democracies. Hence, the question arises as to what kind of secular politics the modern democratic state is allowed to carry out, and consequently that of equality and liberty, as fundamental values affecting these dilemmas once they are interpolated into the constitutional discourse on secularism.

The following lines examine the way that equality and liberty may contribute to the theoretical debate on the definition of a secular state. Their starting point is that a simple definition of a secular state closely connected with the values of liberty and equality and understood as state non-interference policy, is only an ideal and does not correspond to any empirical phenomenon. As such, this definition cannot offer the basis for a scientific theory, but it may be scientifically useful as a heuristic tool and instrumental in evaluating different governmental practices and legislative policies.

2. SECULAR STATE – A CONCEPTUAL PROBLEM

In 2013, the Slovakian Government decided to celebrate the 1150th anniversary of the arrival of Christianity on Slovakian soil. The Slovakian National Bank took part in this event by minting a special commemorative euro coin featuring Byzantine monks Saint Cyril and Saint Methodius, with halos and crosses on their chests.

However, the European Commission (EC) found the design of the coins unacceptable since the EU diversity rules forbid any signs of inclination toward a single faith, whatever that faith may be, and as a consequence ordered the Slovakian Government to redesign the commemorative coins by removing the haloes and crosses (Higgins 2013).[1]

Yet, what makes this decision of the EC particularly controversial, providing an excellent topic for scholarly debate, is the absence of an actual and sound legal basis for it. Namely, even though it is widely believed that the European Union (EU) is a secular political entity (and that, therefore, this controversial decision was not unexpected), a closer look at the EU constitutional framework – a long series of founding treaties, from the treaties of Maastricht, Amsterdam and Nice, to the Treaty of Lisbon – indicates that there is no clear definition of what the EU secularism actually means, nor an intra-EU consensus on the exact meaning of the said "secularism" either. As it will be shown later, these documents practically do not pronounce on the issue of secularism at all, while, at the national constitutional level, all EU Member States are defined as secular.[2]

1 At the state level, however, some interesting charges in regard to the controversial issue of the Slovakian commemorative coins came from France (as a laical state with the most rigid separation) and Greece (where the Church and the State are closely intertwined). The French Government objected to the Christian symbols appearing on the Slovak coins because they would also appear as legal tender in France, while Greece protested because it considered the Greek-born monks Cyril and Methodius part of its own cultural heritage.

2 As indicated in the Introduction, there are various models and degrees of such separation: from the French laical model, with the religious belonging strictly and exclusively to the private sphere of life, to the so-called state-church model common in the Scandinavian and Greek political traditions, and the

While the above, surely, is not an exclusively EU issue, it confirms one of the underlying dilemmas of every theory of secularism: if there is a consensus that a secular state must be religiously neutral or, more precisely, that it must implement separation between private belief and public policy, it is also true that there are as many models of separation as there are states.

3. EQUAL LIBERTY – AN AXIOLOGICAL SOLUTION?

In order to find a plausible answer to abovementioned questions, i.e. to determine not only what the common denominator of EU secularisms may be, but also to define the place and role of secularism in a modern liberal democracy in general, one should take into account equality and liberty as fundamental values of liberal and democratic constitutionalism.

The starting point of secular logic is the idea of a liberal state understood as the guardian of human rights and liberties. One of the liberties that the liberal state is supposed to protect and promote is religious liberty, defined, *inter alia*, as the free manifestation of individual or collective beliefs through teaching, practice, worship, and observance. As such, religious liberty is closely linked to freedom of thought and consciousness, being (also) the very origin thereof. However, if the purpose of a liberal state is to guarantee religious

post-communist countries and transitional democracies that have experienced an overwhelming wave of new clericalization. Additionally, each of these models claims that it practices some kind of separation of church and state. There are several collections of papers that provide thorough comparative studies on distinctive European experiences in this field. See e.g. Champion 1993; Bauberot 1994; Robbers 1996; Haguenau-Moizard 2000; Giard 2002; Bauberot 2006.

liberty, the aim of a democratic state should be to ensure equal protection of this liberty to all its citizens without discrimination, i.e. regardless of their beliefs and religious choices. Therefore, it would be relatively easy to conclude that a modern state with liberal and democratic legitimacy should guarantee religious liberty and should do it in an equal way. In other words, the basic definition of the secular state is twofold: to be secular, a state must protect religious liberty, and it has to do this in an equal manner.

Nevertheless, this equal liberty model, as simple as it is, can be easily challenged by political reality: despite the fact that every modern liberal democracy, *per definitionem*, recognizes and protects religious liberty, it rarely does so without controversy. Most modern states, in practice, either adopt legal measures to restrain religious liberty, or they do not treat all their citizens equally regardless of their confessional identity, by deliberately making some of them "more equal" *vis-à-vis* others.

Furthermore, there are liberal democracies that have adopted a form of a so-called system of recognition, meaning that the state does not provide all religious organizations with the same legal status (set of legislative privileges, obligations, rights, and restrictions). In these systems there are usually one or more privileged churches that enjoy special legal treatment concerning state financial benefits – such as tax exemptions or direct subsidies – that other religious organizations cannot count on. The reasons for such special treatment are different, but they predominantly stem from the presupposed social importance or historical role of the privileged religious denominations.[3]

3 For example, Article 10 of Serbia's 2006 Law on Churches and Religious Communities (Zakon o crkvama i verskim zajed-

Also, there are states that purport to have a secular character, or even consider themselves champions of

nicama, *Official Gazette of the Republic of Serbia*, No. 36/06), introduced the categories of "traditional church" and "traditional religious community", as religious organizations with historical continuity, with many administrative and financial benefits. Besides the Serbian Orthodox Church, this status is also given to the Roman Catholic Church, the Islamic and the Jewish communities and the three Protestant denominations with the greatest congregations. Additionally, Article 11 of the Law recognizes the exceptional historical, statehood and civilizational role of the Serbian Orthodox Church in the formation, preservation and development of the Serbian national identity. This legal differentiation legalized some previous discriminatory governmental measures (e.g. the 2001 Uredba o organizovanju i ostvarivanju verske nastave i nastave alternativnog predmeta u osnovnoj i srednjoj školi [Governmental Regulation on Religious Instruction], *Official Gazette of the Republic of Serbia* No. 46/2001, which recognized the right to organization and implementation of religion classes in public schools only to these seven traditional churches and religious communities) and justified all further discriminatory legal solutions, as was the case with Article 55 of the Serbian Value Added Tax Law (Zakon o porezu na dodatu vrednost, *Official Gazette of the Republic of Serbia n° 84/2004, 84/2004, 86/2004 – correction, 61/2005, 61/2007, 93/2012, 108/2013, 6/2014 – harmonized dinar amounts, 68/2014 – other law, 142/2014, 5/2015 – harmonized dinar amounts, 83/2015, 5/2016 – harmonized dinar amounts, 108/2016, 7/2017 – harmonized dinar amounts 113/2017, 13/2018 – harmonized dinar amounts 30/2018, 4/2019 – harmonized dinar amounts, 72/2019 and 8/2020 – harmonized dinar amounts*) providing exemption from the VAT tax only to the traditional churches and religious communities. As such, the Serbian legal system discerns four types of religious communities with a distinctive legal status, i.e. a set of rights and benefits. Firstly, it makes a basic distinction between the recognized and non-recognized religious communities. Then, it classifies the recognized communities into two groups: the traditional and non-traditional. Finally, it recognizes the specific role of the Serbian Orthodox Church in order to justify its privileged political and social status in contemporary Serbian society.

secularism, even though in reality they have imposed numerous legal restrictions on religious liberty, understood as a free public manifestation of religious feelings and beliefs. Those are political cultures with political evolution marked by a previous severe conflict between religious and political authorities, with one dominant church continuously and persistently contesting the results of political modernization, and in which the state has traditionally had a hostile attitude toward religion as such. In those countries, such as France or Turkey, religion is strictly restricted to the private sphere of life and banned from the public space.[4]

Going back to the equal legality test, for example, it can be claimed that a secular state should be completely free to forbid school teachers, to use religious symbols at work, in order to protect schoolchildren from religious proselytism sponsored by the state – personified by school teachers as civil servants. However, at the same time, in some states such as France and Turkey the legal ban on the Islamic headscarf (and other religious symbols, such as the Christian cross or the Jewish kippah) applies not only to school teachers, but also to schoolchildren, who are then obviously limited in their constitutional right to free manifestation of their beliefs, on the pretext that religiously motivated practice could harm the religiously neutral character of the state and the school as a public service.[5]

4 For the French case, see Lalouette 2002; Ormieres 2002; Durand-Pringborne 2004; Bauberot, Wieviorka 2005; Haarscher 2005, and for the Turkish case see Akgonul 2008; or Anciaux 2003.

5 There are several French critical analyses of these legal politics that inspired our reflections (e.g. Robert, Duffar 1999; Robert 2004; Airiau 2005; and especially Bauberot 2006), as well as a series of American authors that contributed to the debate on the 2006 French legal ban of the Islamic headscarf (e.g. Lay-

This example is illustrative, but also indicative of the simple strategy that a liberal democratic state should adopt in order to ensure the secular character of its public policy: the principle of non-interference in religious matters. By adopting a public policy based on non-interference, a state would easily satisfy both requirements of the previously proposed equal liberty test. A liberal state would satisfy the first requirement by restricting or forbidding only those individual or collective manifestations of faith that are obviously harmful to other citizens or the public order. These acts should be treated as criminal not because of their religious nature (as is the case in the aforementioned French and Turkish legislation and which should be irrelevant as such), but simply because of their harmful social consequences. As for the second requirement, a strategy of non-interference would relieve a democratic state of endless political debates on how exactly the political authorities should settle the unequal legal treatment of unequal religious denominations (unequal by, for example, the size of the congregations or historical importance). In other words, such an approach would avoid the labyrinth of commutative justice.

4. EUROPEAN REALITY – AN EMPIRICAL CHALLENGE

Unfortunately for the philosophy of secularism and the definition proposed above, the policy of non-interference is rarely an option in modern liberal democracies. Contemporary experience best indicates how far from reality this axiological approach, based on a simple equal liberty test, actually is.

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cock 2005; Eisgruber 2005; Conkle 2005; Gedick 2005; Zoller 2005; Custos 2006; McGoldrick 2006).

As mentioned previously, even though it is widely believed that the European Union is a secular political entity, the EU constitutional framework – consisting of a long series of the EU founding treaties – does not precisely state what such EU secularism actually entails. For example, unlike the Treaty of Maastricht, the Treaty of Lisbon provides certain general remarks in the Preamble and in Article 17 of its Title II. The Preamble to the Treaty of Lisbon recognizes "drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."[6] The fact that the Treaty of Lisbon finds its inspiration in religious inheritance is only a type of recognition of the European spiritual heritage, and declared in a quite neutral way. At the same time, in order to protect EU diversity, the Preamble of this Treaty avoids mentioning any specific religion, especially Christianity, albeit it is still the predominant religion in the majority of European Union member states.

On the other hand, Article 17 of the Treaty states that the "Union shall maintain an open, transparent and regular dialogue with these churches and religious organizations" about important social issues, whereas the same article also stipulates that the "Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States." The aim of this provision, which had already been included in the Treaty of Amsterdam,[7]

6 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union are available at *https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206655%202008%20INIT* (last visited 18 July 2021).

7 Specifically, Declaration 11 included in the Treaty of Amsterdam. Official version is available at *https://europa.eu/*

is not protection of religion, but the division of power between the European Union and its member states. This practically means that the state–church relationship is the residuary competence of the member states and that the European Union is not empowered to act in this matter. Hence, when it comes to choosing partners for the open dialogue with churches and religious organizations, the EC recognizes only those churches and religious organizations that the member states had previously decided to recognize as such.[8]

Thus, it is necessary to approach the explication of the role and place of religion in the European Union legal order in a different way. A solution might be to consider the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention or ECHR) and the jurisprudence of the European Court of Human Rights (the European Court or the ECtHR). Yet, right at the beginning, this approach is disputable for two reasons. The first is formal in nature and quite banal: the European Convention is not a formally binding document for institutions and bodies of the European Union because neither the European Union nor the European Communities are among the contracting parties. Hence, citizens of European Union member states have no possibility for bringing an application before the ECtHR regarding presumably illegal actions by the EU's executive bodies pertaining to religious liberties.

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european-union/sites/europaeu/files/docs/body/treaty_of_amsterdam_en.pdf (last visited 18 July 2021).

8 The European Political Strategy Centre (EPSC, formerly Bureau of European Policy Advisors – BEPA) is a body that conducts this dialogue through regular meetings with different representatives of major religious organizations. It reports directly to the President of the Commission.

However, there are at least two arguments why the European Convention actually might be considered a part of the EU legal order and, as such, relevant for this survey on EU secularism. One is the fact that all EU member states are bound by it, and another is that the Court of Justice of the European Union in Luxembourg considers the Convention a source of unwritten principles of fundamental rights within the Union.[9]

The second contention is substantive in nature. The ECHR does not specify the most appropriate state–church relationship model. In Article 9, which defines religious liberty as an individual right and establishes the state obligation to protect it, the Convention says nothing about how this protection should be organized on the state level nor does it impose any sort of compulsory secularism. The ECtHR has not used its case law to define any model of church and state relationship or secularism. Its focus is on the rights of private individuals and not the broader aspects of law and religion. Actually, the ECtHR's reasoning has been pretty much in line with the logic of the Treaty of Lisbon, and the European Court has tried not to prejudice the status under the national legislation on churches and religious communities. The European Court holds that the State's attitude toward religion is primarily a political issue and it is the result, to a large extent, of the historical tradition and the social circumstances of each country. "Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the

9 See Opinion 2/94 on Accession by the Community to the ECHR (1996) ECR I-1759. Official version is available at *https://www.cvce.eu/content/publication/2001/8/22/db253212–9e45–4545–8179-f6d51dd059c0/publishable_en.pdf* (last visited 18 July 2021).

role of the national decision-making body must be given special importance."[10]

However, the ECtHR case law does provide a set of protection standards that every European state is supposed to observe. In that way, indirectly or implicitly, Article 9 of the Convention, and the ECtHR case law, has already influenced arrangements between the governments and religious denominations in the European Union member states.

Namely, there are two compelling judgments that illustrate the importance of the ECtHR case law in this matter. The first is the 1993 judgment in the case of *Kokkinakis v. Greece*,[11] in which the Greek official prohibition of religious proselytism was considered a violation of Article 9 on religious freedom. It is important to note that the Court held that the so-called state–church system in Greece is compatible with the European Convention on Human Rights or, in other words, that the state did not have to collaborate with all religious groups on an equal basis. However, should the state choose to collaborate in a special way with only one church, as the Greek state had decided, this special collaboration may not, as a side effect, cause unjustified harm to the rights and freedoms that other religious groups and individuals enjoy. In other words, the fact that the state is allowed to privilege certain religious

10 *Leyla Şahin v. Turkey*, App. 44774/98 (ECtHR, 10 November 2005).

11 *Kokkinakis v. Greece*, App. 14307/88 (ECtHR, 25 May 1993). As a Jehova's Witnesses, Mr. Minos Kokinakis and his wife were invited into the home of Mrs. Kyriakaki, in Sitia, and engaged in a discussion with her. Mrs Kyriakaki's husband, who was the cantor at a local Orthodox church, reported the applicant, Mr. Kokkinakis, to the police and Mr. Kokkinakis was convicted for proselytism, under the Greek criminal law.

communities, does not mean that it can deprive others of their fundamental rights.[12]

The second example is the judgment in the case of *Rommelfanger v. Germany*.[13] This is an even more interesting case since it confirmed not only the legality of a controversial German law, but of European Union Council Directive 2000/78/EC, which provided an important exception to the non-discriminatory principle in an attempt to, ironically, establish a general framework for equal treatment in employment policy. Article 4 of this Directive established the employer's right to demand the loyalty of the employees regarding the respect of "ethos" – religion and moral views of the organization they work for. This practically means that churches and religious organizations, once they act as employers (especially those running hospitals, schools or welfare institutions), are free to take into account the religion or beliefs of candidates when making recruitment decisions, and that they can request current employees to act in good faith and loyally to the organization's ethos.

As these two landmark cases demonstrate, the European Court has given the states a large margin of

12 Similar to this is the judgment in *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, in which the Strasbourg Court confirmed that the state cannot compel citizens to believe nor restrain their belief in any given way. More precisely, the state is forbidden to organize its educational system in such a way so as to impose on pupils certain religious or moral views contrary to the religious or moral views of their parents. *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Apps 5095/71; 5920/72; 5926/72 (ECtHR, 7 December 1976).

13 *Rommelfanger v. Germany*, App. 12242/86 (ECtHR, 9 June 1989). Dr. Rommelfanger, an employee of a Catholic hospital in Germany, publicly criticized the Catholic Church conservative standpoint on abortion and was dismissed by his employer, which both the German Constitutional Court and the ECtHR declared lawful.

discretion when they rely on "public policy" concerning religious liberty and the legal framework of the state–church relationship. In general, the European Court emphasizes a strong principle of equal liberty, but it leaves it to the states to decide on how this equality will be understood and implemented by them.

5. CONCLUSION

The absence of a clear legal definition of EU secularism, but first and foremost the controversial ECtHR's case law, can easily explain why, back in 2013, the Slovak National Bank decided to pursue its initial idea and rejected the proposal to mint coins without religious symbols in honor of the two Christian saints. The European Commission went along with this, and the commemorate coins were minted with halos and crosses only a few months later than originally planned (Higgins 2013).

This was a result of the fluid meaning and flexible interpretation of the EU secularism, which is no more than an illustration of a global phenomenon. The definition of a secular state – closely linked to the values of liberty and equality – is only an ideal and does not correspond to any empirical phenomenon. There is no such state that can duly and completely pass the equal liberty test. Instead of a simple strategy that might easily ensure the secular character of its public policy (the principle of non-interference in religious matters), most contemporary states either provide legal measures to restrain religious liberty, or they do not treat all their citizens equally, but deliberately make some of them more equal than others. On the contrary, with a non-interference based public policy, a state could easily satisfy both of these requirements. A liberal state may satisfy the

first requirement and duly protect religious liberty by forbidding only those individual or collective manifestations of faith that are obviously harmful to other citizens or the public order. These acts should be treated as criminal not because of their religious motivation, but because of their harmful social consequences. Secondly, a strategy of non-interference would relieve the democratic state of endless political debate on how exactly political authorities should settle unequal legal treatment of unequal religious denominations. In reality, this logic is rarely a guideline for governmental strategies.

However, even though the proposed axiological definition of a secular state is deprived of an empirical foundation, and, as such, certainly cannot represent a scientific theory, it is still scientifically useful. The liberty and equality test might serve as an excellent heuristic tool, which can help in evaluation of different governmental practices in a world of extremely different politics and legislations, wherein due respect of religious liberty – equal for everyone – is still more of an ideal than a reality.

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ACCESS TO WATER IN THE CONTEXT OF THE INTERNATIONAL WATERCOURSE: A THEORY OF THE COMMUNITY OF INTEREST

Securing free and equal access to water for individuals is foremost an objective of international water law. This paper analyses the community of interest theoretical framework for the creation and implementation of rules that can achieve this objective. This theory is in line with the natural unity of the watercourse that traverses political borders between states. However, legal doctrine is not unanimous concerning its practical value, state practices largely evade it, and case law only provides declarative support without indicating precise contents of community rights and obligations. It seems that practical application of the community of interest theory is only possible through meticulous and systematic application of positive legal rules based on limited territorial sovereignty theory, in the spirit of joint management and use of common water resources.

Key words: *Community of interest. – Access to water. – International watercourses. – Shared water resources.*

1. INTRODUCTION

Access to water is a vital human need. The United Nations Convention on the Law of the Non-naviga-

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tional Uses of International Watercourses (UN Watercourses Convention) was the first water-related international agreement introducing the term "vital human needs" which has been defined as "sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation".[1] Thus, it seems reasonable to assume that what is intended by using the term "vital human needs" is to give special attention only to the most essential needs in order to prevent death from dehydration or starvation (International Law Commission (ILC), 1994, para. 4, McCaffrey and Rosenstock 1996). In international law, a soft norm of the right to water is currently under formation,[2] based on the much wider approach to vital human needs that can be found in the 2002 General Comment on the Right to Water, related to the 1966 UN International Covenant on Economic, Social and Cultural Rights, which uses the term "personal and domestic uses", comprising drinking water, personal sanitation, washing of clothes, food preparations, and personal and household hygiene.[3] Following the recognition by the General Comment, on 28 July

1 Article 10.1.1, Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly Resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).

2 Under the term soft norm, a large corpus of legal rules in international environmental but also other fields of public international law can be described. Those are norms that can influence the conduct of addressees due to its normative value but are lacking liability and enforcement mechanisms to secure compliance (Dunoff, Ratner, Wippman 2015). The term itself might be misleading (Blutman 2010) but has been consistently used for a long time.

3 UN Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water, International

2010, the United Nations General Assembly recognized the human right to water and sanitation in Resolution 64/292.[4] It acknowledged that clean drinking water and sanitation are essential for the full enjoyment of life and all human rights. World Health Assembly Resolution 64/24, of May 2011,[5] and Human Rights Council Resolution 18/1,[6] also recognize the right to water and call upon the water and sanitation sector to progressively achieve the full realization of the right to safe drinking water and sanitation for all. The human right to safe drinking water and sanitation continues to be affirmed by the UN Human Rights Council and continues to be observed, particularly by the Special Rapporteurs on the right to safe drinking water and sanitation. The World Bank report on the human right to water extends its normative content beyond the provision of water for drinking purposes to water for environmental hygiene and health generally, as well as for growing food (Salman, McInerney-Lankford 2004).

Regardless of the differences in the definition of this term, there is no doubt that sufficient water to sustain human life, including both drinking water and water required for the production of food, in order to prevent starvation, is a *conditio sine qua non* of human life. Thus, if we are speaking of water as a human right, it cannot be denied that every person, without discrim-

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Covenant on Economic, Social and Cultural Rights (29th Session, 26 Nov 2002) UN Doc E/C 12/2002/11.

4 UN General Assembly Resolution 64/292 "The human right to water and sanitation", adopted 28 July 2010 (A/64/L.63/Rev.1 and Add.1).

5 World Health Assembly Resolution 64/24 "Drinking-Water, Sanitation and Health", adopted 24 May 2011 (A64/24).

6 Human Rights Council Resolution 18/1 "The human right to safe drinking water and sanitation", adopted 28 September 2011 (A/HRC/18/L.1).

ination, should enjoy the freedom of access to adequate quantity and quality of water. At the same time, every person should have, as much as possible, the equality of access to adequate quantity and quality of water.

Is there a sufficient material basis in our world to make this right viable? There is no doubt that enough freshwater in the world exists to meet the present and future free and equal access of the world's population to it (Gleick, 1993, 3–4). These adequate quantities, however, are poorly distributed. In some regions of the world severe drought leads to desertification, while in others heavy floods cause massive pollution of freshwater resources. Global climate patterns provide ample access to water in some regions only during winter seasons, while causing deficit during summer. Climate change leads to unpredictable precipitation patterns in other regions which causes unexpected multi-seasonal droughts. Thus, water allocation to secure free and equal access of individuals to it must take into account all these factual inequalities of access and natural obstacles to the freedom of water use.

Thus, the activity of securing a free and equal access for individuals to freshwater is necessarily conditioned by some idea of redistribution of this natural resource. Such a redistribution process inevitably brings into play the competing priorities of different uses and users. To complicate this equation further, since most water resources traverse political boundaries, these competing priorities often become regional conflicts between riparian states. Therefore, the redistribution rules must become international in nature. This is why international water law plays a crucial role in securing equality and freedom of access to water for all human beings.

However, for international law to be efficient in the quest for securing free and equal access to freshwater

resources, its rules that relate to water allocation and use must be informed by a theoretical framework that recognizes this freedom and equality of the interests of individuals. States that have sovereignty over natural resources based on their territory represent the interests of their citizens' needs for water, but from this the conclusion does not automatically follow that international rules for allocation and use of water resources, which are established by states, will faithfully defend these interests. On the contrary, selfish state interests and half-baked compromises between competing interests can exclude completely, or just partially satisfy the interests of the people on the other side of state border.

The ideal understanding of the international regulation of freshwater would be that, since all human beings need water for their subsistence, it can be said that all freshwater should be shared by the community of human beings. Therefore, water should be treated as the common property of mankind. This is, however, not the case in contemporary international relations. The legal status of freshwater resources in international law is a status of so-called common-pool resources, which are partially excludable and rival. (Ostrom, 2015, 30–33). This means that only the riparian states enjoy access to them for purposes other than navigation and that their benefits are therefore partly excludable. In contrast to open-access commons, such as high seas fisheries and the electromagnetic spectrum, non-riparians have no access to water resources and cannot benefit from them directly (Benvenisti, 1996, 393). The benefits from the use of water resources are an object of rivalry between riparians, since any unit of water diverted or polluted by one of them reduces the quantity and quality available to others. This manner of use of common-pool resources leads to the well-known "tragedy

of the commons" syndrome, in which each of the users receives direct benefits from its one-sided use of common resources, while costs of the act are borne by all users (Hardin, 1968, 1243), which creates woeful inequalities and restricts freedom of use.

Instead of the "common property of mankind" concept, for water to be accessible to everyone freely and equally it is enough to create a theoretical framework that would take different interests for its use as an integral whole. In other words, instead of trying to balance competing interests, it is preferable to establish joint mechanisms of water use that would eliminate the obstacle of state sovereignty, which defends particular interests. International water law legal doctrine has identified four principal theories of water allocation. These theories are more or less supported by state practices. These are: a) absolute territorial sovereignty, b) absolute territorial integrity, c) limited territorial sovereignty, and d) community of interest theory. Of these four theories, the first two can be described as slightly outdated, rarely used in practice, and completely lacking support in contemporary legal doctrine. First one retains for one riparian state the exclusive right of usage (see more in McCaffrey, 1996), while the other excludes all possible uses that would interfere with the natural flow of a watercourse, which virtually renders the water resources useless (Rahaman, 2009). Theory of limited territorial sovereignty is based on the assertion that every state is free to use shared watercourses flowing on its territory as long as such utilisation does not prejudice the rights and interests of the co-riparians. It forms the basis of customary international water law. However, key positive legal rules that have been designed in the framework of this theory, equitable and reasonable utilization, no-harm rule and

procedural principle of cooperation, do not eliminate the possibility of legal outcomes in individual cases of water allocation that would disable free and equal access to water.

Free and equal access to water can be optimally secured if water is regarded as an indivisible resource, over which all the users of a particular watercourse share a right of use. This does not mean that every person in the world will be given an equal share in water and that freedom of use can be guaranteed everywhere in the same manner. This means only that water in an international watercourse will be used in the interests of a community that depends on that particular watercourse for its water needs. Thus, the guarantee of a free and equal access is a particular and not a global guarantee, in line with the nature of international water law, which is globally only regulated by framework agreements (the UN Watercourses Convention is the best example of this), but the legally binding rules, which actually provide for access to water resources, are contained in particular watercourse or regional treaties. Therefore, inequalities between different regions in terms of water abundance cannot be erased by any legal theory, since they exist no matter the wishes of legal academics and practitioners. However, what can be secured is the management of water resources that uses these resources in the common interest of users of a particular watercourse.

This paper explores the fourth principal theory of water allocation, the community of interest theory, since it is the author's opinion that this theory is the most suitable framework for creation and implementation of rules on water use that satisfy requirements of freedom and equality of access for human beings to water resources on a particular watercourse. This theory is

based on the idea that riparian states share a common interest in using the international watercourse. Whereas the doctrine of limited territorial sovereignty merely connotes unilateral restraint, the concept of a community of interests evokes shared governance, joint action across an entire unified system (McCaffrey, 2010). At face value, it seems logical that only joint and integral management of the whole watercourse system can ensure optimal use of water and respect of freedom and equality of access to water for all watercourse users. However, as it will be shown, the theory of the community of interest has not exerted a substantial influence on positive international law, and state practices that are inspired by it are sparse (part I). On the other hand, writings of scholars that support the author's theoretical approach are abundant, but the majority are those classical authors who were inspired by natural rights theory and modern environmentalist theory, which means that doctrinal consensus about the practical value of this theory is far from being achieved (part II). Finally, the jurisprudence of international courts and tribunals – generally a thin corpus of law in this field – has some ground-breaking judgments in favour of this theory to show, however their influence on actual state practices must not be overvalued (part III). It seems then that the only way to implement community of interest theory in positive legal rules is not to transform them completely, but to try to infuse existing norms with its essential meaning in the process of implementation, which is possible since legal norms of general nature in this field are worded in a manner that leaves room for creative interpretation (part IV). At the end of the article the conclusion based on all previous arguments is given.

2. COMMUNITY OF INTEREST IN STATE PRACTICE

Although the topic of this article is about non-navigational use of international watercourses, we will start the analysis with some examples of state practice that relate to navigation on international rivers, since they were historically the first to cause disputes among states over access to water. The first traces of state practices inspired by the community of interest theory in literature are usually connected with U.S. Secretary of State Thomas Jefferson, who wrote a letter to the U.S. President George Washington expressing his legal advice on the matter of the freedom of navigation in the Lower Mississippi River, at the time under sovereignty of the Kingdom of Spain (Vitányi, 1979, 30). Jefferson states in his letter that the ocean is free for all the people and rivers for their inhabitants (*ibid*., 31). Jefferson argues in line with the generally accepted position of international legal doctrine at the time, which was founded on the theory of natural rights. That same year French Government adopted a decree upon the opening for navigation of the river Scheldt in which it is stated that watercourses are a common and unalienable property of all the regions through which they flow (Le Fur, Chklaver, 1934, 67). All these natural legal ideas stem from the natural phenomenon of the physical unity of the watercourse. There are also other examples of this idea that international rivers are common to all riparians: Treaty of Teschen, signed between Austria and German electoral state of Palatinate of 1779, which states that certain rivers will be common to these two countries if they are situated on their borders (Berber, 1955, 23), and the so-called Imperial Recess of 1803 (*Reichsdeputationschauptschluss*) which regulates the

status of Rhine from the borders of the Bavarian state to the Swiss border, calling it a common watercourse between the French Republic and the German Empire (*ibid*.). The Treaty of 14 May 1811, concerning the border demarcation between Prussia and Westphalia, was also concluded. It proposes that "although the thalweg of the Elbe is a border between two sovereigns", between themselves, "the river would always be considered common for both kingdoms for purposes of commerce and navigation" (Vitányi, 1979, 37). All examples so far were related to contiguous watercourses, while one example of community of interest approach related to a successive watercourse can be found in the Treaty on Peace and Friendship between France and Batavian Republic of 1795, which was inspired obviously by a French governmental decree on the river Scheldt (*ibid.*, 34). The definition of common watercourses was some 100 years later broadened to include contiguous lakes as well, since in the Treaty of Karlstad from 26 October 1905, signed between Sweden and Norway, Article 4 states that lakes and watercourses that form a border between two countries, or are situated on the territory of both, or flow into named lakes and watercourses, would be considered as common (Berber, 1955, 24).

However, these early historical examples of the acceptance of community of interest theory disappear completely from state practice around the turn of the 20th century, and only at the end of this century of creation of positive general international water rules can we find new examples. McCaffrey opines that this is a consequence of natural law theories being suppressed by legal positivism (2010, 152). However, with a change of historical context caused by a development of the law of environmental protection and global move for sustainable development in international relations, many

international treaties concluded at the end of the century opted for the same approach.

For example, the idea that international watercourses are common goods is strongly expressed in the Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region (1995).[7] This agreement uses the term "shared watercourse system" which is defined in Article 1 as "a watercourse system passing through or forming the border between two or more basin states". The term "shared watercourse" is very similar to the term community of interests on the watercourse of the riparian states. Article 2 confirms this similarity when it says that members of the development community "undertake to respect and apply the existing rules of general or customary international law relating to the utilisation and management of the resources of shared watercourse systems and, in particular, to respect and abide by the principles of community of interests in the equitable utilisation of those systems and related resources".

Similar provisions are found in the Agreement between Namibia and South Africa on the Establishment of a Permanent Water Commission (1992). Article 1 of the Agreement states that the objective of the Commission is to "act as technical adviser to the Parties on matters relating to the development and utilisation of

7 Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) region signed at Johannesburg, 28 August 1995, http://www.fao.org/docrep/w7414b/w7414b0n.htm, last visited 20 July 2019. The agreement was prepared and adopted by eleven African countries of this region, including Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Eswatini (formerly Swaziland), Zambia, Zimbabwe and Southern Africa. In the meantime a new revised protocol was adopted but still has to be brought into force.

water resources of common interest to the Parties". The idea of common interest in the issues regulated by the Agreement is essentially the same as the idea of the community of interest in international watercourse. Obviously, some linguistic differences between common interest, community of interest, common rivers or lakes do not change the essence of the idea – that all riparian states must treat the freshwater resources of the international watercourse as a common good. Every treaty, regional or bilateral, that regulates watercourses in the framework of the theory of the community of interest contains at least some of the options. The Agreement between the Federal Republic of Nigeria and the Republic of Niger concerning the equitable sharing in the development, conservation and use of their common water resources even interchangeably uses the terms shared river basins and common water resources.[8] The International Law Commission also uses in its Draft Articles for the UN Watercourses Convention the expression "use of waters that represent a common natural good" (ILC, 1994). To summarise, differences are non-existent, these are all different expressions for one concept, one idea, the idea of the community of interest of watercourse states in the use of its water resources. These water resources are shared, but not physically divided, since that would be impossible due to the nature of water as a physical substance. Shared water resources implies that they are common, and that the whole watercourse is common. Even though the formal legal logic cannot institute a common ownership over them, there exists a community of interest for their use.

8 Agreement between the Federal Republic of Nigeria and the Republic of Niger concerning the equitable sharing in the development, conservation and use of their common water resources, done at Maiduguri, 18 July 1990, http://www.fao.org/docrep/w7414b/w7414b10.htm, last visited 20 February 2014.

So far we have concentrated on the African continent in presenting state practices, however instances of the community of interest approach are visible in Latin America as well. The Agreement between Bolivia and Peru concerning joint utilization of the waters of Lake Titicaca (1957) states in Article 1 that the "two countries have joint, indivisible and exclusive ownership over the waters of Lake Titicaca".[9] This is an upgrade of the previous examples since here it is expressly mentioned that the riparians institute joint ownership, although it is not clear from the Agreement whether any specific institute of shared property in the legal sense is created besides the management policy which recognizes a community of interest. However, in the exchange of letters during 1992 and 1993 two states agreed to establish a binational authority to implement a binational master plan for the lake (McCaffrey, 2010, 154). This authority is still not operational.

Actually, the only example of a living and functioning joint ownership organization for the management of the international watercourse globally is the Senegal River Basin Development Organization (Organisation pour la Mise en Valeur du fleuve Senegal – OMVS), a regional cooperative management body for the Senegal River which currently includes Guinea, Mali, Mauritania, and Senegal. Created in 1972, following several years of severe drought, the OMVS's common facilities on the Senegal River are operated under a joint, indivisible ownership regime among the riparian states.[10]

9 Agreement between Bolivia and Peru concerning a preliminary economic study of the joint utilization of the waters of lake Titicaca, signed at La Paz, on 19 February 1957, http://www.colsan.edu.mx/ investigacion/aguaysociedad/proyectofrontera/1957.pdf, last visited 20 April 2014.

10 Convention portant création de l'OMVS, 11 March 1972, Nouakchott.

The riparians share joint responsibility for the management and operation of the two existing dams. This framework has particularly strong implications for financing arrangements.[11] The OMVS Member States jointly guarantee the repayment of principal and interest on any loans made to the organisation for the construction and operation of the common facilities. This "communitisation of interests" within the framework of the OMVS allows water infrastructure to be anchored in one State's territory without hindering other Member States from exercising their rights (Gander, 2014). In this sense, the status of the Diama and Manantali, the two dam installations on the watercourse, represents a perfect example of water use cooperation on an international watercourse in order to produce energy, provide drinking water, and allow irrigation and navigation (Schemeier, 2012; Kauffman, 2015).

Instead of creating joint ownership organization, states have so far concentrated on establishing joint programs for the development of international watercourse systems, without paying attention to political borders. Some of the examples that more prominently accentuate community of interest are the Agreement for the utilization of the Nile waters between former U.A.R. (Egypt as successor) and Sudan.[12] However, other Nile River riparians[13] consider these agreements anachronistic holdovers from the colonial era and want

11 See Convention relative aux modalités de financement des ouvrages communs, 12 March1982, Bamako.

12 United Arab Republic and Sudan Agreement For The Full Utilization of the Nile Waters, 8 November 1959, Cairo, http://internationalwaterlaw.org/documents/regionaldocs/uar_sudan.html, last visited 20 July 2019.

13 The Nile River is the longest river in the world covering nearly 7,000 kilometers. It traverses eleven countries in Africa: Burundi, the Democratic Republic of Congo (DRC), Egypt,

them abrogated and replaced by a new international watercourse legal regime that enhances equity in the allocation of the Nile River's waters. Egypt and Sudan, however, insist that the existing Nile Waters Agreements be maintained or that, in the event a new legal regime is established, Egypt's historical rights – those granted by the original agreements – should be honoured (Adar, Check, 2011). Another is the Columbia river treaty between the United States and Canada,[14] which is concentrated on cooperation in the common interest in developing water resources of Columbia for hydropower generation and control of floods, but is rather outdated in view of the development of international environmental considerations from the days when it was concluded (1961) (Firuz, 2012, 173).

An interesting legal arrangement that recognizes a common interest in sharing joint water resources is the Yarmouk river agreement between Jordan and Syria,[15] which created a sort of a barter agreement whereupon Syria restricted its right to use the water above the dam in exchange for 75% of the energy generated by a water-powered plant, whereas Jordan obtained greater water rights in exchange for electricity. However, due to Israel's protests and political instability in Syria, the agreement was never fully implemented (Szwedo, 2018, 158–159). Similar electricity-for-water arrangements

Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, Uganda and South Sudan.

14 Treaty relating to cooperative development of the water resources of the Columbia River Basin, 17 January 1961, http://www.internationalwaterlaw.org/documents/regionaldocs/columbia_river1961.html, last visited 20 July 2019.

15 Agreement concerning the utilization of the Yarmouk waters, 3 September 1987, Amman, http://www.internationalwaterlaw.org/documents/regionaldocs/Jordan-Syria-1987.pdf, last visited 20 July 2019.

were successfully implemented in the case of the treaty between Switzerland and France on the development of hydropower potential of the river Rhône (Verzijl, 1970, 290) or the treaty between the USA and Canada relating to the uses of the waters of the Niagara River.[16]

Finally, a most developed aspect of the implementation of the community of interest theory in international water law are the joint institutional mechanisms for management of shared water resources. More than a hundred international river commissions have been established so far, geographically spread all over the globe, and they all share the purpose of managing day-to-day non-navigational uses of international watercourses (Vučić, 2018, 25, fn. 23; Dombrowsky, 2007). Their great number and the fact that they were founded by states that intensively use their water resources implies that institutional cooperation is a natural consequence of a great interdependence of riparian states. Numerous and important functions are relegated to these authorities, in some cases they can adopt and even implement plans for the development, use and protection of international watercourses. Although, this is still far from joint ownership, we can agree with Lipper that these international commissions are the best indicator of factual recognition of the community of interest in the state practice (1967, 39).

To conclude this section, although various international agreements recognize the existence of the common interest, or community of interest in the access to water contained in international watercourse, they do not automatically create legal institutes that would

16 Treaty between the United States of America and Canada relating to the uses of the waters of the Niagara River, signed at Washington, 27 February 1950, http://www.internationalwaterlaw.org/documents/regionaldocs/niagra1950.html, last visited 24 July 2019.

transfer this notion to the concept of joint ownership over these resources (with the exception of the case of the OMVS). Rather, they create joint institutional bodies for management of watercourses or joint plans and programs for their development. However, these institutions, in order to effectively realize the community of interest in practice, would have to encompass all the riparians of the particular watercourse, to establish solidarity mechanisms in times of water crisis, and to ensure that their management is safe from the influence of regional hegemons that may subvert their institutional capacity for their own interest and not the communal, therefore preventing the realization of free and equal access to water of all the citizens that depend on the particular watercourse for the satisfaction of their vital human needs.

3. APPROACH OF THE LEGAL DOCTRINE

One must start with Grotius when one wants to discuss international law and community of interest. In his famous work, he argued for the establishment of joint ownership of the watercourse by the riparians (Grotius, 2001, 29). Grotius found roots of the community-of-interests doctrine in Roman law, which treated water resources as *res publicae jure gentium*, not subject to private appropriation or free disposition. Building this notion into natural law, Grotius and other authors reaffirmed the conceptualisation of rivers as "common property", arising from the physical unity of a river system, seen as a public good in which everyone shares an interest.

Speaking about the opening of the Scheldt to international navigation, Schlettwein states that the river is a God-given joint property of all riparians. None of them has the right to keep for itself exclusively the right

of use of such a river, and none can take this right from the others. Even if one is forced by the other to cease the navigation, this would not be legally binding, since it was always unjust to take from someone the right to use an object that was meant by the Creator to be common property (1785, 11–12). Both authors are influenced by the natural law doctrine which does not discriminate between navigational and non-navigational uses when it comes to community of interests on the watercourse.

In the 19th century, Carathéodory, as another follower of the same school of thought, writes that a nation did not create the river and therefore cannot have exclusive right to use it. In his words, it would be the greatest injustice to purport a theory of usage that would strip other countries of their natural rights to use the river without causing any damage to other riparians' interests whatsoever (2010, 32). However, Carathéodory limits the community of interests to naturally made watercourses, which logically excludes man-made canals. Another weak point of his theory for the purposes of the community of interest is that he actually adopts a limited sovereignty approach, since he expands on the notion of damage and its prevention, as the limits to the otherwise sovereign unilateral use of the river by an individual riparian.

At the beginning of 20th century, Farnham also follows the same stream of thought, stating that the river that flows through the territory of several states forms their common property. It is his opinion that, as a gift of nature to the humanity, a river must not be appropriated by any particular group of people that would unilaterally impose their rights of use on others (1904, 29). Continuing on his work, Lederle, expressly supports the idea of common ownership of international

watercourses, but with a slight reserve. He is concerned about the real possibility of implementation of this idea to the hard fact of territorial sovereignty. Therefore, he splits the idea of the community of interest into two legal principles: the principle of joint ownership of flowing water, and the principle of territorial sovereignty over a watercourse. His joint ownership over water resources resembles a vital human needs approach of the UN Watercourses Convention, since he proposes that this regime would regulate the use of water for personal needs (drinking, washing, food preparation), while for other purposes (hydropower production, irrigation, grazing), unilateral use is allowed insofar as it does not cause damage to other riparians (here Lederle stands on the position of limited sovereignty theory) (see more in Lederle, 1927, 700).

Huber is of the opinion that analogies with municipal legal institutes, such as Roman property law, are ill-conceived for the conditions of international relations, due to territorial sovereignty obstacle. Therefore, Huber argues not for common ownership over a part of territory-watercourse, but on the equal right of use (1907, 161–162). Of course, we can agree with Huber that analogies are never successful when legal transplantations pass between completely different social realms, but the idea of joint ownership is in essence the idea of joint right of use and enjoyment of fruits of usage, whereas the third aspect of ownership – disposal – is unimaginable with the ownership of a watercourse itself. However, the disposal of water resources, for example as a measure of redistribution of water resources from water-rich regions to water–scarce regions, should be encouraged if it is done in the common interest of all riparians.

In the second half of the 20th century, specifically in 1985, with the rise of legal positivism in doctrinal

thought, Godana was able to argue that the idea of the community of interest was inadequate to be a legal principle of international law that governs watercourses, since its implementation would require a much more developed state of international infrastructure (1985, 49). Just four years after, Caflisch is already more optimistic, arguing about the idea in naissance that common natural resources that lie outside of national jurisdictions should be regarded as a common heritage of mankind, including there already internationalized goods such as the high seas, Moon and other celestial bodies, geostationary orbits and transmission frequencies. Caflisch states that these goods are or should be regulated by international institutions of universal character, in the interests of all the states in the international community. Therefore he implies that the same analogy can be made in relation to international watercourses. Obviously, he continues, riparian states form a certain community that ignores state borders, and a simple division of waters, however equitable, would not guarantee an optimal method of development for the watercourse system. From this flows the idea of "denationalization" of international watercourses and the transfer of authority to manage and use them from the state level to an international organization formed to regulate this management and use. Caflisch opines that treaty regimes that create international river commissions lack the integrative effect to transform international watercourses into a common property of riparian states, and asks whether the joint authority to use the water goods can also be observed as the emanation of the community of interests in practice. He concludes that condominium over a watercourse is inappropriate for another reason. In the case of condominium, every riparian state could veto new uses of a watercourse, which would in effect lead to the theory of absolute integrity's deadlock

(Caflisch, 1989, 59–61). Therefore, he opts for a community of interest approach, which creates common right of use without instituting common ownership.

The community of interest approach in the legal doctrine is sometimes downplayed as something not truly revolutionary in comparison with existing factual and legal state of affairs. It is said that this theory simply recognizes the situation that exists on the watercourse, that all riparian states have an interest in using it, but does not create in itself any legal obligation to use it in the interests of free and equal access to water for everyone. Unless there is a treaty established between the riparian parties, which explicitly obligates them to secure free and equal access, it is not at all certain that the simple sense of community between them will lead to optimal solutions of water distribution (see Fitzmaurice, Elias, 2004, 14). Therefore these authors tend to tread a backdoor path to get to the more or less same result. They turn to international environmental influence on water regimes and there find the emanations of the community of interests.

Thus, the so-called ecosystem approach to water management focuses on the whole ecosystem of which a watercourse is just a part. Besides water, the equation also includes the living species and their physical environment connected to water. Therefore, limits on state sovereignty come not from the community of interests in water use but rather from the more general need to protect and conserve the ecosystem itself (see Teclaff, 1991, 355–370; Brunée, Toope, 1994, 72; McIntyre, 2004, 1–14; Tza, 2004, 40–46).

There is no doubt that the ecosystem approach to water management creates the need for communal practices, since it further ties the interests of various actors, not just states themselves, but also environmental

NGOs, business sector, local communities – basically all societal groups. This modern strand of legal doctrine observes private actors, such as business entities, as actors of equal importance to states in the communal management of water resources and even tries to read this into the provisions of UN Watercourses Convention. They especially accentuate following provisions of the Convention that represent the community of interest among private industrial and commercial sectors from riparian states that use common water resources: (1) prevention, control and reduction of transboundary impact by taking such measures as the application of best available technologies (Article 3.1); (2) consideration of existing lists of industrial sectors or industries and of such hazardous substances in international conventions or regulations, which are applicable in the area covered by the Convention (Article 3.2); (3) protection of information related to industrial and commercial secrecy (Article 8); and (4) exchange of best available technology, particularly through the promotion of the commercial exchange of available technology and of direct industrial contacts and cooperation, including joint ventures (Article 13.4) (Samvel, 2018, 6).

4. COMMUNITY OF INTERESTS IN INTERNATIONAL JURISPRUDENCE

Two key decisions of international adjudicatory bodies are especially important for the analysis of the community of interest theory. First is the decision of the Permanent Court of International Justice in the *River Oder case*.[17] The background of the case is as

17 Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Series A.-No 23, Judgment of 10 September 1929.

follows: the Treaty of Versailles established an international commission to rework international regulations pertaining to the Oder River and its tributaries. Poland disagreed with the commission's assertion of jurisdiction over two tributaries within Polish territory, because the tributaries were found to be "navigable" and to "naturally provide more than one state with access to the sea". However, the Court held that jurisdiction extended to navigable tributaries within Polish territory. The Court did not rely on the treaty establishing the international commission in its judgment, since it found that textual analysis of the relevant provisions cannot give the requested answer. Instead it cited principles that regulate international water law in general. Therefore, it reasoned that when one particular watercourse traverses the territory of more than one state, the requisites of justice and necessity require that a simple right of passage through a river, as a limit to territorial sovereignty of the state upon whose territory the passage is requested, is not enough. The optimal solution for free and equal access to the waters of the Oder for all riparian states was in the fact of their community of interests. This community of interests forms a basis for a shared right of access, which excludes any privileges and creates perfect equality.

Although the issue in this case was navigation, it can be interpreted that the Court, in citing general principles of international water law assumed that they would be valid for non-navigational uses of waters as well. The Court regarded community of interest as a fact, which is a consequence of the physical unity of the watercourse, as a natural system that traverses political borders and therefore unites territories of various states in one community, dependent on it for its vital needs. The Court also pointed out that community of interest

is a requirement not only of the necessity of factual interdependence, but of justice, which relates to our notion that community of interest is the best option for securing free and equal access to water.

The second case is the decision of the International Court of Justice (ICJ) in the *Danube Dam* case.[18] In 1977 Hungary and Czechoslovakia signed a treaty obligating the states to cooperate in the construction of a system of dams and locks along a section of the Danube River that formed the border between the two countries. Construction commenced in 1978 but progressed slowly due to political and economic transformations in both states. In 1989, Hungary abandoned the project, justifying its decision with claims of changed circumstances and impossibility. In 1993, Czechoslovakia peacefully separated into two nations: the Czech Republic and Slovakia. Slovakia assumed its predecessor's responsibilities under the treaty because the planned hydraulic system fell within its territory along the Danube River. After continued negotiations failed, Slovakia devised "Variant C", an alternative plan to complete the project. Under Variant C, Slovakia dammed the Danube and appropriated between 80% and 90% of the river water. The dispute came before the International Court of Justice in 1994 and was decided in 1997. The Court rejected Hungary's claims of changed circumstances and impossibility but also concluded that Slovakia, by putting Variant C into operation and unilaterally taking control of a shared resource, had violated international law and the 1977 Treaty. Ultimately, the Court ordered the parties to "re-establish cooperative administration of what remains of the Project".

The ICJ cited its predecessor in *River Oder* in regard to the community of interest concept, adding that

18 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997, p. 7.

modern development of international law has confirmed this principle for non-navigational uses of international watercourses. The ICJ found proof for this statement in the adoption of the UN Watercourses Convention. Following the same line of reasoning, the ICJ labelled Slovakia's breach of Hungarian right to equitable and reasonable utilization of common water resources a consequence of its disregard for proportionality. Finally, the remedy ordered by the ICJ was to continue with cooperation, as this is only inevitable since the two countries are in the community of interest, and only joint management can lead to legality of the use of common resource, regardless of their unilateral wishes. Therefore, the ICJ concretised the theory of the community of interest into a practical guide for fulfilling of positive legal obligations, which were conceived as limits to territorial sovereignty in the first place – equitable and reasonable utilization and procedural principle of cooperation.

The ICJ continued to confirm the community of interest doctrine in its decisions in *Gulf of Fonseca*,[19] and *Pulp Mills*.[20] However, its arguments fell short of detailing concrete legal rights and obligations. In *Gulf of Fonseca* the ICJ Chamber concluded that the existence of a community of interest among Honduras, El Salvador, and Nicaragua was "not open to doubt" with regard to sovereignty over the waters of the Gulf of Fonseca. The Chamber deemed a condominium or shared sovereignty arrangement involving Fonseca's waters "almost an ideal juridical embodiment of the community of interest's requirement of perfect equality of user". In

19 Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), Judgment, 1992 I.C.J. 351, 407 (Sept. 11).

20 Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep. 14., 281 (Apr. 20).

Pulp Mills, the Court held a treaty-based commission "established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment". The limited application of the community of interest standard nevertheless mandated that the commission "devise the necessary means to promote the equitable utilization of the river" (see more in Vučić, 2017).

5. CONCLUSIONS

The theory of the community of interest is one of the four principal theories for water allocation in the international context. Among those four theories, we argued that the theory of the community of interest is the optimal theoretical framework for the creation and implementation of rules for water allocation that ensure free and equal water access for riparian-states and individuals that depend on the particular watercourse for satisfaction of their vital human need for water.

However, the analysis has shown that the status of this theory in positive international law is subordinate to the dominant position of the theory of limited sovereignty. With the exception of the case of the Senegal River basin and its legal regime, which implements fully community of interest by instituting joint ownership and management over the organization for the use of waters of Senegal, all other treaty regimes are based on limited territorial sovereignty, implementing in their legal regimes cooperation (in the form of joint intergovernmental commissions and programs of management that serve as forums for coordination of competing interests of usage), restraint (rules on prevention of significant transboundary harm from unilateral use), and unilateral utilization (supposed to be equitable and reasonable).

Even though the early doctrinal approach gave primacy to community of interest theory, since it was in accord with natural law concept, legal positivists, always on the alert when state sovereignty is perceived as threatened, discarded this theory as unrealistic since it does not respect the sovereign control of the state over natural resources situated in its territory. Modern theoretical approaches that included environmental considerations in the water allocation procedures, again started promoting community of interest theory, now under the pretext of the ecosystem approach. It remains to be seen how climate change, pollution and population growth, as factors that further endanger freedom and equality of access to water, will influence legal thought. At the moment it can be said that it is a tie between limited sovereignty and community of interest theories.

Jurisprudence for its part strongly encouraged community of interest idea as a fact, which must be taken into account when implementing legal rules for use of international watercourses. However, it found community of interest already identifiable in general principles of international water law and especially procedural principle of cooperation, without further specifying its contents.

Clearly, the main flaw of the community of interest theory is its vagueness. It is easy to say that the unity of the international watercourse creates a community of interest of the entities dependent on its use for satisfying their vital human needs. The difficult part is to ascertain which precise legal rights and obligations flow from this fact. Free and equal access to water can be cited as one, but what does it entail? A human right to water, basin-specific, enforceable in front of international bodies tasked with management of the international watercourse? This type of right is non-existent

in positive international law. Optimal utilization of common water resources, which will enable free and equal access due to all the interests of use being taken as a whole? This is more alike a procedural guarantee of freedom and equality of access, and it can be argued that community of interest theory is exactly that –a joint management system for the purpose of using available resources to maximize satisfaction of the individual needs of water users. It is argued, in this context, that "countries may develop a river basin more efficiently and equitably, if the focus is less on the gallons used by each country and more on the potential or real economic benefits that can be derived from joint management", (Hunter *et al.*, 2002, 808). In other words, "if compared to interstate cooperation founded on limited territorial sovereignty, a community of states would be better suited for promoting equitable and reasonable use; the fair sharing of benefits and costs directly or indirectly associated with cooperation; and the effective protection of aquatic and related ecosystems and the services they provide for human development and a healthy environment", (Rocha Loures, 2016, 224–225).

Community of interest is not a condominium, but rather a sort of large neighbourhood (Rodgers, 1991, 163). These neighbours should not be only limited in their activities concerning common spaces, as the theory of limited sovereignty suggests, but encouraged to work jointly on every aspect of use of common spaces. Additionally, to ensure sustainable use of their common space and free and equal access of every member of their community to it, they must not only strive to maximize the benefits of use for present members of the community, but also take care of the protection and preservation of the common space for the generations to come. This arduous task is only possible in careful and meticulous

everyday management and long-term developmental planning in unison among the riparian states.

The theory of the community interest would play the role of theoretical framework for this management and planning, and further inform the application of general legal principles such as equitable and reasonable utilization, no significant harm, co-operational rules (notification, prior consultations, information exchange, negotiations), protection of the environment. This is the only role community of interest theory can play in the present state of international water law, due to sovereign restrictions, lest other countries take the example of the Senegal River riparians and start instituting real communities for management and planning. Perhaps the lack of water resources due to pollution and draught will eventually lead to this scenario.

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RELATIONAL LEGAL PRACTICE: A CASE STUDY ON AUTONOMY

This paper examines a legal case involving child custody by using the relational perspective. The relational perspective structures how autonomy is perceived and used in jurisprudence. This understanding also affects the lawyering practice and it shapes the decision-making by clarifying the legal reasoning. This paper will briefly explain all these approaches and use their insight for evaluating a legal case. In this regard, this study presents an application of an abstract theory to a concrete case.

Key words: *Relational autonomy. – Consent. – Adoption. – Child custody. – Relational lawyering.*

1. INTRODUCTION

The issue of consent has long been discussed in jurisprudence and occasionally it has been a matter of public debate, which is also the case in Turkey. Sometimes the debate was related to a rape case,[1] sometimes

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1 In Turkey, for example, the case known as N.Ç. has occupied the public for a long time and has pushed many to consider the concept of consent (Court of Cassation of Turkey, No. 2011/1056). For news about it see: Armutçu 2003; for a similar news in English see Schleifer 2011. 28 different men raped N.Ç., when she was 13 years old. It was alleged that she actually had consented to all of these sexual relations. The perception that "if there is no coercion or force then there is the consent"

it was over reproductive rights,[2] but frequently in cases involving women.

From a legal philosophy perspective, the problem of consent is related to the concept of personal autonomy. Feminists have contributed to this discussion with their reinterpretation of the meaning of autonomy, which they call *relational autonomy*. This article will shortly summarize this approach and highlight the significance of the relational perspective in jurisprudence by using a court case from Turkey.

2. DEFINING AUTONOMY FROM A RELATIONAL PERSPECTIVE: COUNTER ARGUMENTS TO LIBERAL ACCOUNTS[3]

Liberalism accepts autonomy as one of the most crucial values for a satisfying life and also as a core element of political power (Friedman 2003, 75).[4] Liberal conception pictured humans as atomistic, self-sufficient, self-made and rational all the time with their choices. Christman uses the term "hyper-individualism" in order to define this traditional approach (Christman 2004, 144). However, feminists have criticized this traditional understanding of autonomy, which is based on the liberal concept of individual (Nedelsky 1989, 7–8). Their critics shaped their own version of the term.

(Sancar 2013, 201, translated by author) has been revived during the discussions about this prominent case. Feminist voices have cried out against this understanding, claiming that a 13-year-old girl could not have consented to being sold for sex.

2 Mostly on abortion rights. See for example Alphan 2016.

3 For further information about relational autonomy, see: Nadire Özdemir (2020).

4 Jonathan Herring uses Raz's and Reece's arguments in order to show how liberal understanding of autonomy takes the individualistic atomistic beings as a ground. (Herring 2014, 1).

Feminists claim that the traditional understanding of autonomy was based on the liberal values such as independence, rationalism, self-sufficiency or atomistic individualism, and these values, they claim, do actually not reflect many women's reality. In reality, women's (and actually all humans') situational and relational conditions played a role in their identity and their autonomy.[5] Liberalism, however, failed to see this relational dimension.[6]

Jennifer Nedelsky, one of the opponents of relational autonomy concept, stated that liberalism does not recognize "the inherently social nature of human beings" since it accepts atomistic individualism as the ground unit of political and legal theory (Nedelsky 1989, 8). Mackenzie and Stoljar also pointed out that the traditional meaning of autonomy is characteristically masculinist and that there is a need for a new understanding of autonomy that would focus interest on the social and relational dimension of identity (Mackenzie, Stoljar 2000, 4). These and other feminist authors opposed the traditional view by highlighting the significance of relations and social conditions that were playing a role on one's autonomy (Nedelsky 1989, 12; Friedman 2003, 16, 7; Oshana 2006, 49). They used the term "relational autonomy" in order to challenge the

5 This approach has a similar theoretical background to the ethics of care. Carol Gilligan, known as one of the founders of this ethical approach, claimed that women define their identity in the context of their relationships and responsibilities to others (Gilligan 2003, 17, 160). In her later works, she also stated that she did not mean to make a generalization on either sex, but just wanted to point out the distinction of two different ways of thinking: ethics of justice and ethics of care (Gilligan 1993, 208–209).

6 However, Nussbaum defends a form of liberalism that she believes replies to the feminists' critics (See for more explanations: Nussbaum 1999, 9–10, 55–80).

liberal atomistic or individualistic accounts. However, Mackenzie and Stoljar have pointed out that there is no unified conception of relational autonomy, but instead the term is like a hypernym that refers to many related perspectives (Mackenzie, Stoljar 2000, 4). These related perspectives share the similar grounds about moral, political and legal agency, emphasizing its complex and intersecting nature, shaped by social determinants (Mackenzie, Stoljar 2000, 4).

What is "relational" in these accounts of autonomy? Firstly, it is human connectedness to other individuals, their impact on one's identity and choices. Humans are not atomistic beings, but relational and interdependent beings. As Foster and Herring emphasize, human nature is "relational, vulnerable and interconnected" (Foster, Herring 2017, 35–38). As interdependent beings, humans need relationships in order to "flourish" (Herring 2018, 54). In this sense, individuals shape their identity and autonomy through their relationships instead of being apart from each other.

On the other hand, relationships do not only promote autonomy, they may also harm it (Braudo-Bahat 2017, 131). Nedelsky has stressed the importance of relations that weaken or strengthen autonomy and suggested the distinction between supportive and damaging relationships (Nedelsky 2011, 119–123). In this regard, the interaction between relationships and autonomy is reciprocal: the former helps to develop the latter while the latter contributes to the establishment of the former (Braudo-Bahat 2017, 133). The constructive relationships, Braudo-Bahat explains, are those that enable a person's critical and creative competences and feeds one's self-value (Braudo-Bahat 2017, 132). Contrarywise, the destructive relationships limit one's options, diminish her self-confidence and shadows her

self-value (Braudo-Bahat 2017, 133). Thus, interpersonal relations shape one's personal autonomy or even have a role in its realization (Friedman 2003, 84; Nedelsky 1989, 12). Accordingly, some feminists used the term "becoming autonomous" in order to point out to the capacity that can be developed through social forms and relations (Nedelsky 1989, 10). For Marilyn Friedman likewise, autonomy has been "a matter of degree" (Friedman 2003, 7).

Secondly, relational autonomy accounts have opposed the rational-emotional dilemma, as well as the assumption that only the former can lead to valuable choices. They claimed that emotions too can and do influence one's choices (Friedman 2003, 9–10). Autonomy is shaped by how an individual interacts with other people (Oshana 2006, 52), and autonomous choices can be those made on emotional grounds since emotions are also one of the core elements of the "multidimensional self" (Braudo-Bahat 2017, 138). This multidimensional-self approach shows us that humans are not rational all the time nor that they always act upon their intelligence. Instead, feelings can also influence one's choices. It is actually difficult to distinguish between these two dimensions. Hence, the multidimensional self, with its reason and emotion, influences one's thoughts and acts.

Another thing that is also relational is the socialization process that forms the conditions. Relational accounts take into consideration socialization and its significances in one's life (Braudo-Bahat 2017, 139). In this regard, the social or relational conditions can determine one's acts. In the liberal accounts of autonomy the individual is usually accepted as "the author of her own life" (Braudo-Bahat 2017, 115). She can lead her life however she wants and her choices are of her free will all the time. However, relational accounts make it

clear that we all are somehow connected to each other in the same story, with those we are in relation with, and our narrative is only understandable by knowing about others' stories. This interconnectedness makes us see the "big framework" where our picture is a small but an equally meaningful one along with the others'.

John Christman's words summarize the points reflected above. "It is certainly true that any plausible philosophical or political theory must take into account the various ways in which humans are socially embedded, intimately related to other people, groups, institutions, and histories, that they experience themselves and their values as part of ongoing narratives and long traditions, and that they are motivated by interests and reasons that can only be fully defined with reference to other people and things" (Christman 2004, 144).

Relational autonomy does contribute to this understanding, which is crucial in the legal context. I will use a court case to concretize the explanations I have given and show how relational perspective can clarify the legal reasoning and affect decision making.

3. THE CASE

A few years ago, I came across an interesting case at one of the family courts in Ankara.[7] Even though the case could simply be solved using existing legal rules, it nevertheless carried a significant puzzle with it, since there was no "best" solution for the legal dispute. I not-

7 The case is from Ankara 10th Family Court, Application No: 2012/1364 Decision No: 2013/933, Decision date: 4 July 2013. For my PhD, I conducted fieldwork at the family courts, where I observed many cases. Although I was not specifically working on child law or custody, I came across this interesting case, for which I had attended the hearings and studied the entire file.

ed this case because it perfectly shows how relational perspective can change the legal interpretation and the subsequent decision.

One of the parties of the case was a girl named Ayşe.[8] She was born and raised in a conservative family where her father did not let her go to public school. Therefore, she attended an "open high school", which is based on distance education. When she was 14 years old, while shopping at a market, she met Ahmet (15 years older than her) and fell in love. They started to see each other secretly, as Ayşe's family would not let her have an extramarital relationship. Shortly thereafter they wanted to get married, however, Ayşe's father opposed this. In response, Ayşe and Ahmet made "a plan": if they had sexual intercourse then the father would be obliged to accept their relationship, they thought. They secretly had sex for 8–10 times. But the plan did not go as well as they expected it would. In meanwhile, the father banned Ayşe from seeing Ahmet, Ahmet moved to another city, and consequently they lost contact.

When Ayşe learnt that she was 4 months pregnant, she got scared and worried. She tried to end that pregnancy every way possible: she used pills, she threw herself from a ladder, and she stabbed herself in the belly several times. But this did not work. She spent the pregnancy months quite traumatic and in isolation. Her mother would only find out about her pregnancy when she was 8 months along. The mother said: "She was not eating bread and she was wearing large clothes, which is why I could not determine that she had a pregnant body." They were afraid of the father, who got angry when he found out what had happened. Ayşe, in a state of fear, told her father that she got pregnant as a result

8 The author changed the names of the parties for confidentiality reasons.

of rape. The father lost his temper, slapped her on the face, he tried to get her an abortion, but the doctors said that was not an option at that moment.

Upon this, the father made "a plan": he took Ayşe to another house, which was far from where they lived, and she gave birth in secret, where she took care of the baby for a week with the help of her mother and her aunt. The father asked doctors whether they could "repair" her hymen, but the doctors said that was not possible right after the birth; they should wait a while. When the baby was one week old, they gave him to a child protection institute where a young couple looking to adopt saw the baby for the first time.

The young couple had longed for a child for many years and decided to adopt one when they found out that they were not able to have one naturally. The baby was 10 days old when they first met him. They took care of him and considered him their biological son from the first day. Expert reports state that their parenting was impeccable and that the baby accepted them as his parents. However, when they decided to adopt him officially,[9] the biological parents came froward, now as a married couple, asking for their son back.

The baby was almost two years old at the time of the proceedings, and he knew the adoptive parents as his "mama" and "papa", and the biological parents were completely unknown to him. One expert report confirmed that the adoptive couple was taking care of him impeccably and that the two-year-old baby would have psychological problems if he were to be taken from his parents (the adoptive couple). However, there was also

9 According to the Turkish Civil Code article 305, adoption of a minor depends on the condition that the adopter has cared and raised the minor for a year. For the full text of the Code see: Turkish Civil Code.

a legal fault in the case: when the baby was given to the child protection institute, the institute had forgotten to take the consent of the biological parents. On paper, Ayşe's father was seen as the father of the baby and he signed the papers with Ayşe, while the biological father was absent.

The judge, having the two couples as parties, had to decide to give the baby to one party, and she knew it was not easy. The adoptive party said they took care of the baby when the biological parents did not want him. They claimed that the biological parents were not capable of taking care of a baby, just like they had not been capable of doing it two years earlier, when they abandoned him. But the biological mother said that it was not her "real" choice to leave her baby – social pressure forced her to make that choice. There were two expert reports, similar in context but different in conclusion. One stated that the baby should be with the adoptive parents because they had raised him for two years and it was in his best interest to stay with them. The other report stated that the baby should be given to biological parents, since it was in the child's best interest to know and to be with his biological parents.

The case could be solved using the abstract legal principle of the best interest of the child[10] as follows: the judge could give the baby to the biological parents, as there was no legal consent by Ahmet on file and it was the baby's best interest to be raised by his biological parents. Or, she could leave the baby with the adoptive parents, who raised him for two years and with whom the baby had a parental bond, and in accordance with the expert report that stated that it was in the best

10 According to Turkish legal rules, the best interest of the child principle should be considered in line with the Convention on the Rights of the Child.

interest of the child. Legal rules paved the way for both solutions and it was up to the judge to decide.

4. RELATIONAL PERSPECTIVE IN LEGAL PRACTICE

Abstract legal rules can provide a solution to a legal dispute, however, there might still be no "winner" in the case because of the relational aspects involved. In this sense, the example above not only presents an example of how the relational perspective allows for the understanding of the real position of the parties, but also how it can affect the lawyering practice, which influences the final decision. In this regard, relational feminism and its reflections illuminate the way for legal actors to see what is limited by a liberal understanding (West 2019, 71), and helps to find a better solution for all parties. I will now use this relational perspective for the evaluation of the given case.

First of all, there is no way to fully comprehend the "consent" of the biological mother without a relational autonomy perspective. At first glance, we can say that the biological mother left the baby with her consent, because of her earlier attempt to "get rid of" her pregnancy. However, when we take into consideration her relational and social conditions, we can question her consensual but unwanted pregnancy in the first place. As West highlights, women consent to sex for many social, cultural or emotional reasons, such as "out of duty", or "because of pressure" or especially if "they are teenage," etc. (West 2019, 68–69). Ayşe had "consensual" sex with Ahmet, because she thought that only then would her father let her marry him, since in her culture marriage was the only tool to legitimatize their relationship, and perhaps because she was only a

teenage girl who had limited information about sexuality and its consequences. In this sense we can say that her cultural code and her existing relationships shaped her adopted "autonomous" choice.

When we look at her relationships (which played a role in her choices) we can also say that they were not constructive, but mostly destructive. As explained in the theoretical section, destructive relationships are those that limit one's choices and diminish her self-esteem. Ayşe did not attend school, she was raised under a patriarchal and hegemonic parenthood, where her father was the one who made decisions for her (and actually for every member of the family's) life. In this regard she was not the real "author" of her own story, contrary to liberal assumptions. Relational perspective enables us to evaluate her consent to give up her baby and want him back after she got married to Ahmet, when the marriage legitimized their relationship and the baby, within the culture that they belong to.

When we look at the baby's life, in addition to his relationship with the biological parents, there is already a healthy, constructive relationship (we learn from the expert report) with his adoptive parents, which would be harmed if he is given to his biological parents. The law once established this relationship through adoption rules and now it has its consequences on both the lives of the baby and the couple. Ending that relationship via legal decision would affect the baby and the adoptive couple in a negative way. Thus, the decision should consider both of these existing relationships and find a way to conserve them. Since relational perspective does not see the custody dispute as a battle and ultimately assigns the legal parent (who had the custody right) as the winner, it requires "quality of the parental bond" (Zafran 2010,

200), and it is irrelevant whether this parental bond is already established, biologically or legally.

Secondly, relational perspective can also shape the lawyering practice. Brooks and Madden ask whether there is a way to make the legal processes "less adversarial, more humanistic, more responsive, or even transformative (...) for the participants" (Brooks, Madden 2009, 24). They find the answer in what they call as *relationship-centred lawyering*, which is a focus on understanding the parties in the context and interaction with the others (Brooks, Madden 2009, 26). Also known as *relational lawyering*, this practice advocates the protecting of relationships and avoiding harm, which they focus on more than on abstract legal rights. The institutional roles of lawyers and the others are derivative on relationships (Parker, Evans 2007, 23). This approach has a holistic perspective that combines the moral, emotional and relational dimensions of a legal problem (Parker, Evans 2007, 32). Such lawyering would provide a more collaborative and peaceful environment and refuse to see the legal system as a "battlefield" (Menkel-Meadow 2013, 54–55).

This lawyering also assumes its theoretical background from ethics of care, like relational autonomy did (Gilligan 2003, 17, 160). As ethics of care focuses on the relationships between people instead of abstract rights and duties, this lawyering practice also tries to understand the concerns of all those affected by the given situation, and tries to take necessary legal precautions in order to minimize harm (Ellmann 1993, 2665). As an example, the lawyers in the given case could seek a common ground for keeping the constructive relationships in the case, for example the relationship between the adoptive parents and the child. This is required not only by the best interest of child principle but also by the relational aspect.

Thirdly, the relational perspective and lawyering would influence the judge's decision, which is a reflection of the position of the State. Braudo-Bahat conceptualizes personal autonomy as a right and explains which duties the State has in the exercising of this right (Braudo-Bahat 2017, 111–154). How the judge should decide is related to what position the State has taken on personal autonomy, differing in liberal or relational perspectives. In addition to its lacking image of personhood and autonomy, the liberal account of autonomy fails to actively promote personal autonomy as this active role bears the risk of undermining the liberal value of the State not interfering (Braudo-Bahat 2017, 122). However, from a relational perspective, the State should prevent harming relationships and promote constructive relationships within private and public sphere (Braudo-Bahat 2017, 140). In this sense, the relational account asks legal actors not only to scrutinize the given consent of the parties, but also assigns the duty for judges to establish or protect constructive relationships and prevent the destructive ones. In this regard, "while the liberal approach mostly focuses on the borders between individuals, the relational one focuses on the constructiveness of the relationships between them." (Braudo-Bahat 2017, 151). Accordingly, the judge in the given case could have taken an active role. For instance, she could have made sure that the destructive relationship between Ayşe and her father did not continue. Although this was not ensured (as Ahmet started to work in her father's office and thus became dependent upon him economically) the judge warned him orally during the hearing not to interfere with the couple's life or pressure them.

Relational perspective also requires that the judge interpret the best interest of the child principle in light of constructive relationships. Upon giving her final decision, the judge highlighted that the baby had four different

parents (two adoptive and two biological) and all of the parents had the right to have a relationship with him. Although she gave the baby to his biological parents, she established a personal relationship with the adoptive parents so that the baby's existing parental bond would continue to be protected by the law. Actually, the solution the judge found was an extraordinary one: since custody disputes are done within the rights discourse, the relationship of one party is usually broken up in favour of the other. However, the judge in this case decided that the child's best interest was to conserve the already existing relations and protect them by law.

5. CONCLUSION

Relational autonomy is a useful tool for legal disputes, especially where the consent of a disadvantaged person is in question. It influences the interpretation of certain abstract legal rules and principles by providing a multidimensional perspective on consent, particularly in cases involving women and children. Relational perspective enforces rights without overshadowing the care and responsibility values (Zafran 2010, 194), which are the result of human interdependence. In this regard, the relational perspective requires a contextual examination of the conditions of the case and the attributes of the parties (Zafran 2010, 197). Such legal reasoning undoubtedly requires a different way of lawyering and judging.

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Milica Novaković*

MEN IN THE AGE OF (FORMAL) EQUALITY: THE CURIOUS CASE OF *KHAMTOKHU AND AKSENCHIK* – REVISITED

Equality before the criminal law and protection of persons with restricted personal liberty in the European states diverge. The European Court of Human Rights has been engaged in establishing and protecting standards and principles for fair preconviction proceedings. However, when it comes to sentencing, sex and gender equality, and non-discrimination in sentencing, the Court faces serious challenges. It has established that there is no consensus in matters of (un)equal treatment of men and women in criminal sentencing in Europe, but was deeply troubled in addressing a more significant issue – is exemption of an entire sex from one type of criminal sentence justifiable and reasonable, even in the absence of the afore consensus at the European level? The case analyzed in this contribution shows that such exemption may be permitted (or is even desired to be permitted) and is justifiable and reasonable, due to various social particularities that may affect sex and gender equality.

Key words: *Discrimination. – Formal and substantive equality. – Life imprisonment. – Margin of appreciation. – Sex and gender.*

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1. INTRODUCTION

In March 2012 the Grand Chamber of the European Court of Human Rights (the European Court or the Court) rendered a judgment in the case of *Konstantin Markin v. Russia*.[1] The case dealt with the unequal treatment of male and female personnel in the Russian Army in regards to the right to a three-year parental leave, which was permitted only to women, while men were entitled only to three months' leave and under very specific conditions. Even though some facts of the case in relation to the applicant's private life status were quite controversial,[2] the Court eventually established that the afore discrepancy in treatment amounted to sex-based discrimination. Namely, contrary to the Russian Constitutional Court, which defended the public interest, national defense, importance of military service for the protection of the fatherland, and voluntary nature of the military service contracts, all being compatible with the Russian Constitution,[3] the European

1 *Konstantin Markin v. Russia,* App. 30078/06 (ECtHR, Grand Chamber, 12 March 2012).

2 *Ibid*. Facts of the case indicate that even though the applicant formally got divorced from his wife after the birth of their third child, and that she left him and their children for a job in St. Petersburg soon after (that being the formal reason for his leave request), they actually maintained their informal relationship and raised their children together, in her parents' apartment. Moreover, despite the afore and contrary to domestic military rules, sometime after the birth of the third child, the applicant *was* granted a parental leave until his son's third birthday together with pertaining compensation (see paras. 9–32, 93–94 of the judgment). Also, he remarried his former wife, and they had a fourth child thereafter. This was all established by the military prosecutor upon request of the Russian representative before the European Court (paras. 35–41).

3 *Konstantin Markin v. Russia* (fn.1), paras. 33–34.

Court noted "the rigidity of the Russian legal provisions on parental leave in the army,"[4] and, regardless of the "special armed forces context" in the case,[5] established that the adopted policy on parental leave, which depended exclusively on the sex of the military personnel, was discriminatory.[6] Despite divergence, the judgment was welcomed as "a positive example of a fruitful judicial conversation" between the European Court and the Russian Constitutional Court (Bowring 2018, 27) and was expected to bring some progressive changes in the Russian understanding of equality of the sexes.

However, five years later, when another discrimination-related case against Russia appeared before the European Court, the anticipated outcome was completely different. In the case of two Russian citizens, who, after having been sentenced to life imprisonment (which cannot be imposed on women), alleged discriminatory sentencing policy adopted in Russia on a basis of gender and age,[7] the European Court found no discrimination and upheld the Russian legislation.

Given the relevance of the problem that appeared in the latter case of two Russian male convicts and its outcome, particularly in a time of an open struggle to equalize men and women, we will dedicate this contribution to the analysis of this case. It is our intention to answer the following questions: Does formal equality eliminate discrimination? When should formal equality give

4 *Ibid.*, para. 145.

5 *Ibid.*, para. 134.

6 *Ibid.*, paras. 148–152.

7 *Khamtokhu and Aksenchik v. Russia* App. Nos. 60367/08 and 961/11 (ECtHR 24 January 2017). The applicants in this case challenged equality on the basis of both gender and age, but the subject of this analysis will be only the alleged discrimination on a basis of gender.

precedence to substantive equality? Is gender equality attainable and how do we regulate it? Therefore, in the first part of the analysis we will present the main facts of this curious case and the reasoning of the European Court thereof. In the second part we will go through the notions and meaning of equality, discrimination and the approach adopted by the European Court in relation to these topics, so as to revisit the Court's case analysis in the third part. The last part of the analysis contains concluding remarks and answers sought.

2. FACTS OF THE CURIOUS CASE

2.1. Introductory Remarks

Pursuant to Article 57 of the Russian Criminal Code, life imprisonment may be imposed for particularly serious offences against life and public safety. However, it may not be imposed on women, persons who were under 18 years of age at the time they committed the offence or men who were 65 or older at the time of sentencing. The offender sentenced to life imprisonment may be pronounced eligible for early release after serving 25 years, provided he has fully abided by the prison regulations throughout the last three years.[8] The Constitutional Court of Russia had consist-

8 *Khamtokhu and Aksenchik* (fn.7), paras. 15–16. The Relevant Domestic Law section of the judgment provided an explanation of the applicable legislation in criminal matters in Russia. Pursuant to the 1960 Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) capital punishment could not be imposed on anyone below the age of 18 or on a woman who was pregnant either at the time of the offence or at the time of judgment, and that the alternative to the death sentence was 15 years imprisonment. Subsequently, in April 1993 the Code was updated and the exemption from capital punishment was extended to all women, to young offenders

ently rejected as inadmissible complaints regarding the alleged incompatibility of the foregoing legislation with the constitutional protection against discrimination.[9]

In 2008 and 2010 the Russian courts found two men guilty of committing certain crimes and sentenced them to life imprisonment: Aslan Khamtokhu (1970-), who was found guilty for multiple offences, including escape from prison, attempted murder of police officers and state officials, and illegal possession of firearms, was sentenced to life imprisonment in June 2008, and Artyom Aksenchik (1985-), who was found guilty on three counts of murder, was sentenced to life imprisonment in April 2010 (the applicants). They are both Russian citizens, and are serving their life sentences in the Yamalo-Nenets Region. Also, they both unsuccessfully filed complaints about the discriminatory sentencing regime with the domestic courts.

2.2. Parties' Submissions

In October 2008 and February 2011, respectively, these two men lodged their applications against Russia before the European Court. Their claim was that the different and less favorable treatment, under the applicable criminal legislation, of the group they belonged to, as opposed to those exempted from life imprisonment,

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and offenders aged 65 and over. Thereafter the 1997 Criminal Code of Russia provided for up to 20 years imprisonment, life imprisonment and capital punishment, but women, young offenders below the age of 18 and offenders aged 65 and over were exempted from both life imprisonment and capital punishment. By way of a pardon, capital punishment could be commuted to life imprisonment, i.e. to 25 years imprisonment. Eventually, in 2009 the Constitutional Court of Russia imposed an indefinite moratorium on capital punishment.

9 *Ibid.*, para. 18.

constituted unjustified discriminatory treatment based on gender and age, in breach of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention or the Convention), taken together with Article 5 of the European Convention. They pointed out, however, that "they were not seeking universal application of life sentences to all offenders, including women, and men aged under 18 or over 65. Rather, they claimed that, having decided that imprisonment for life was unjust and inhuman with respect to those groups, the Russian authorities should likewise refrain from subjecting men aged 18 to 65 to life imprisonment."[10]

The applicants further elaborated their complaint:[11] for them, undisputedly, the imprisonment was an ordeal, but it was an ordeal for both men and women, which both included individuals of varying degrees of vulnerability, and therefore, the difference in sentencing of male and female perpetrators had no objective or reasonable justification. For the applicants, motherhood and fatherhood played equally important roles in child care and upbringing, and not even national laws made any difference in that regard. In their view, the Government's assertion that women were more psychologically vulnerable than men and were affected to a greater degree by the hardships of detention was also unfounded. While they did not contest "the physiological characteristics of certain categories of women" and at specific times (during pregnancy, breastfeeding and childrearing), for the applicants this did not constitute reasonable and objective justification for the approach accepted in Article 57 of the Criminal Code. The

10 *Khamtokhu and Aksenchik* (fn. 7), para 33.

11 *Ibid.*; for detailed argumentation by the applicants see paras. 34–41.

applicants believed that exclusion of all female offenders, but only on the basis of their alleged special role played in society in regard to their reproductive function and childrearing, even when and where all other circumstances were identical with that of males, did not pursue any legitimate aim: it should be a judge who should take into account gender-based distinctions in exercising sentencing discretion, otherwise the proportionality between the means employed and intended aim would be lacking. Additionally, there was an emerging international trend towards abolition of life imprisonment and there were 25 countries worldwide that did not have recourse to life imprisonment in their legislation. Nevertheless, even assuming that a life sentence could remain the appropriate form of punishment in certain circumstances, a "high degree of individualization of punishment should be part of contemporary sentencing policy and that individualization should be used as a general principle instead of institutionalized gender– and age-related discrimination."[12]

The Government[13] did not consider the applicants victims of any violation of the European Convention, since their convictions had been "lawful" within the meaning of Article 5 thereof. What the applicants in fact sought was a change in the domestic criminal law that would allow others, including women, to be given harsher sentences, while their personal situation would not change. In the Government's view, finding a violation of Article 14 of the European Convention would not constitute grounds for reviewing individual sentences or for completely abolishing life imprisonment in Russia. Russian legislation had established, by way of a general rule,

12 *Ibid.,* para. 41.

13 *Ibid*.; for more detailed argumentation of the Russian Government see paras. 42–48.

that life imprisonment could be imposed for particularly serious crimes against life and public safety, whereas exclusion of the three categories – on a basis of sex and age – was an exception to the said rule, and did not infringe upon the rights of the majority of convicted prisoners.[14] In the Government's opinion, discrimination could only be invoked in cases of unjustified restrictions, and it reminded that the Member States of the Council of Europe (CoE) should be allowed a margin of appreciation in deciding of the appropriate length of prison sentences for particular crimes. Additionally, the Government relied on the Constitutional Court's consistent case law in regard to Article 57 of the Criminal Code, which affirmed that different treatment in sentencing, based on sex and age, was based on the principles of justice and humanity, taking into account the "physiological characteristics of various categories of offenders."[15] Overall, the Government believed that, given the biological, psychological, sociological and other specific features of female offenders, "sentencing them to life imprisonment and their incarceration in harsh conditions would undermine the penological objective of their rehabilitation."[16] In reality, in Russia the exception concerned only a small number

14 *Khamtokhu and Aksenchik* (fn. 7), 43–46; The Government added that only six Council of Europe Member States had abolished life imprisonment, whereas in Russia life imprisonment was the penalty for the most serious crimes, always accompanied by alternative penalties and never applied automatically.

15 *Ibid.*, para. 44. The Government also added that the Russian Constitutional Court had previously established that a different retirement age for men and women was justified not only by physiological differences between the sexes, but also by the special role of motherhood in the society, which did not amount to discrimination, but rather served to reinforce effective, rather than formal, equality. (para. 47).

16 *Ibid.*, para. 48.

of convicted persons, and as of 1 November 2011 only 1,802 offenders had been sentenced to life imprisonment, while of the total number of 533,024 prisoners (only) 42,511 were female.[17]

The Equal Rights Trust intervened as the third party. It submitted that, with the exception of provisions relating to juvenile offenders, blanket rules that exempted particular groups from life imprisonment could not be justified under Article 14 of the European Convention. It believed that a blanket exemption of all women from certain sentences was not temporary and did not pursue any objective related to the equality of opportunity or treatment. It proposed that in order to comply with Article 14 of the European Convention, Russia should adopt an individualized approach to sentencing.[18]

2.3. The European Court's Assessment and Judgment

The Court[19] first established that the issue before it fell within the ambit of Articles 5 and 14 of the European Convention. It repeated its position that life

17 *Ibid.*, para. 45. The Russian authorities also relied on international instruments that called for special care of pregnant offenders, and scientific studies that showed that very often women were the principal caregivers of children before their incarceration and that up to 90% of those women had a history of domestic abuse that contributed to their criminal conduct and to their vulnerability. The Government added that in addition to Russia, Albania, Armenia, Azerbaijan, Belarus and Uzbekistan also did not sentence women to life imprisonment, while, at the time, the Ukrainian Parliament had adopted, at first reading, a draft law exempting women from life sentences.

18 *Khamtokhu and Aksenchik* (fn. 7). For more detailed argumentation of the third party see paras. 49–52.

19 *Ibid.* For more details of the Court's reasoning and cited jurisprudence see paras. 53–88.

imprisonment, as a type of sentence, is lawful and at the discretion of the state, and then cited its settled case-law and adopted standards in discrimination cases,[20] which, thereafter, it applied to the present case.

Firstly, the Court concluded that the applicants were in an analogous situation to all other offenders who had been convicted of the same or comparable offences, but that exemption of female offenders amounted to a difference in treatment on the basis of sex. Secondly, it accepted the Government's position that "the difference of treatment was intended to promote the principles of justice and humanity which required that the sentencing policy take into account the age and 'physiological characteristics' of various categories of offenders" and, as such, pursued a legitimate aim in the context of sentencing policy.[21] Thirdly, in regard to proportionality, the Court noted that life imprisonment in Russia was not mandatory or automatic for any offence, but reserved for only a few particularly serious offences, could be pronounced only after very careful scrutiny of the case by the domestic courts and the

20 *Ibid.*, For the Court "in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favorably than another, even though the more favorable treatment is not called for by the Convention." (para. 64).

21 *Ibid.*, para. 70.

conclusion that it is the only punishment that "befits" the crime.[22] Additionally, the offenders, including the applicants, were entitled to early release after serving 25 years. In conclusion, overall this does not render imposition of life imprisonment an excessive measure.

Thereafter, operating within the lines of the doctrine of margin of appreciation, and searching for the existence or non-existence of an European consensus, the Court invoked the International Covenant on Civil and Political Rights (Article 6(5)), United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; Article 4), UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Preamble, rules 5, 10, 31, 48), Committee of Ministers of the CoE Recommendation Rec(2006)2 on the European Prison Rules (recommendations 13, 34.3), and the European Parliament's Resolution of 13 March 2008 (recommendation 14), which are all instruments that call on individual states to provide special measures for gender-specific healthcare for all female prisoners, protection of female prisoners from gender-based violence, and protection of pregnant, breastfeeding and menstruating women and mothers with young children in prisons. The Court concluded that on the basis of the particular circumstances of the case, available data and international instruments, "there exists a public interest underlying the exemption of female offenders from life imprisonment by way of a general rule" in Russia.[23]

The Court added that, in addition to Russia, there were some other states that exempted women from the imposition of life imprisonment by way of a general rule (Albania, Azerbaijan, and Moldova), some

22 *Ibid.*, paras. 71–72.

23 *Khamtokhu and Aksenchik* (fn. 7) para. 82.

states that exempted only pregnant women (Armenia and Ukraine), and some states in which life imprisonment was limited because of the requirement of reducibility of a sentence, and that, in the absence of common ground, this area should still be regarded as one of evolving rights, with no established consensus, in which states must enjoy a wide margin of appreciation. Russia, in light of all the circumstances, did not overstep its margin of appreciation and its legislation is not in contradiction to the international instruments in this sphere, nor to the legislation of other states. Moreover, exemption of certain groups of offenders represents "social progress in penological matters."[24] While it would clearly be possible for Russia to exempt all categories of offenders from life imprisonment, in pursuit of its aim of promoting the principles of justice and humanity, it is not required to do so under the European Convention as currently interpreted by the Court. The Court was satisfied that there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued, and concluded that the impugned exemptions do not constitute a prohibited difference in treatment for the purposes of Article 14, taken in conjunction with Article 5. In reaching this conclusion, the Court took "full account of the need to interpret the Convention in a harmonious manner and in conformity with its general spirit."[25]

In the light of the above considerations, on 24 January 2017 the Grand Chamber of the Court found, by ten votes to seven, that there had been no violation of Article 14 of the European Convention, taken in conjunction with Article 5, in respect of the difference in treatment on the basis of sex. The judgment also con-

24 *Ibid.*, para. 86.

25 *Ibid.*, para. 87.

tained concurring opinions of four judges, the joint partly dissenting opinion of five judges, and a dissenting opinion of one judge.

3. EQUALITY AND DISCRIMINATION AS SEEN IN DOCTRINE AND BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

3.1. Equality

The principle of equality is best expressed through the principle of non-discrimination (see Dimitrijević *et al*. 2006, 111), even though differentiation based on personal characteristics, innate or acquired, should not be regarded as discrimination (Dimitrijević *et al*. 2006, 115).[26] However, in a time when the search for equality between men and women is the main driving force of some of the major social and legislative changes, personal characteristics, particularly those related to sex and gender, play the role of key determinants.

Furthermore, the right to equality is a "central commitment in human rights law" (Nikolaidis 2015, 34; Fredman 2016, 712). Here we differentiate between formal equality, which requires that all people be treated identically in all circumstances (not an ideal concept, nor without any traps, according to MacKinnon 2016, 742), and substantive equality, which also aims at equality, but recognizes that in fact all people are not equal (Davis 2009, 12) and is more sensitive to the disadvantaged (see Fredman 2016; 2016a). The latter concept is more sophisticated, multidimensional and evaluative, but also much contested by scholars (see multidimensional approach as argued by Fredman

26 Translated by the author.

2016, opposed by MacKinnon 2016, and then, again, defended by Fredman 2016a).

International law permits states to treat unequally those who are unequal, usually groups with particular status – women, persons with disabilities, ethnic minorities, etc. (Fredman 2016, 713), and to adopt policies that are discriminatory on their face, mostly because of the recognized particularities of their histories, politics or economies, for which they may need to pursue regimes of "unequal" treatment for unequal matters (Davis 2009, 12). Yet, for both McKean (1982, 23) and Davis (2009, 12), in the case of choice of a different treatment, such treatment must be proportional to the specific individual circumstances. In order to be legitimate, it must also be reasonable and not arbitrary;[27] then the onus of showing that those particular distinctions are justifiable is on those who make them, i.e. on the states.

Comparative studies in the domain of criminal law and sentencing show that the European law, in general, "demands that all citizens face an equal threat of investigation and prosecution," as it perceives the pre-conviction phase as the greatest threat to equality before the criminal law, unlike its cousin from the other side of the Atlantic, which "generally demands that all citizens face an equal threat of punishment" (Whitman 2009, 119–36). But, as Whitman (2009, 140–1) also observes,

27 Similarly, Fredman (2016, 713) argues that "the right to equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded, or ignored," and that the substantive equality, with the approach for which she agitates, "illuminate better the multi-faceted nature of inequality" and assists "in determining whether actions, practices or institutions impede or further the right to equality." Yet, MacKinnon (2016, 740–2) opposes Fredman's multidimensional approach and fears of Fredman's "accommodation of difference" becoming an excuse for actual unequal (or special) treatment.

this does not mean that Europe completely succeeds in achieving pre-conviction equality in procedure, nor that equal punishment is of secondary importance. On the contrary, it is noted that the European approach is such that continental courts in fact make careful, systematic and comprehensive efforts to consider the personality of the perpetrator throughout the criminal justice system and individualization in punishment is accepted (Whitman 2009, 146, 153). Still, Whitman underlines that for the sociologists of criminal law "there will always be some lurking threat to equal treatment" in the criminal proceedings when there is demand for individualization, and that this is unavoidable (Whitman 2009, 121–2).

3.2. The European Convention and the Court – Limits, Tests and Challenges in Pursuit of Equality

The European Convention regulates the prohibition of discrimination in two articles: one that protects freedom from discrimination, regarding rights protected by the European Convention itself (Article 14), and the other that is distinctly wider in its scope, calling for non-discrimination regarding "any rights set forth by law" and introduces a general prohibition of discrimination (Article 1 of Protocol No. 12).[28] In practical application of non-discrimination standards, under both Article 14 and Article 1 of Protocol No. 12, the European Court has dealt with various cases involving discrimination. When it comes to (in)equality problems related to sex and gender, the judgments in which the

28 See *Sejdić and Finci v. Bosnia and Herzegovina* App. Nos. 27996/06 and 34836/06(ECtHR 22 December 2009) para. 53. Yet, for the Court the meaning of the term "discrimination" is the same in both these provisions. (see para. 55 of the judgment).

Court found a violation of the aforementioned provisions were limited in number earlier, mainly due to the Court's "formalistic interpretation of equality", sometimes even in a manner that undermined rather than enhanced gender equality (as noted more than decade ago by Radačić 2008, 842). However, certain changes have also occurred in jurisprudence, which are reflective of developments attuned to the social progress that has been made throughout Europe in the past decade (see Haris *et al.* 2014, 800; also *Konstantin Markin* (fn. 1) para. 140). Additionally, changes in the approach are also due to the "appreciation of several different dimensions of inequality" by the Court itself (Fredman 2016a, 749–50).

In any case, regardless of dynamics of the change, the European Court has developed and has been applying a standard test for sex-based discrimination claims (see Čahojová, Bitterová 2018, 27–8). The Court first examines whether the case at hand falls within the scope of substantive rights, guaranteed by the Convention, and whether persons in a comparable situation are treated similarly or differently, based on prohibited grounds. This also requires a comparator against which the applicants are discriminated. Then the Court shifts assessment to the possible justification for different treatment. For the state that wishes to successfully justify of its own action, this means that it must prove that the different treatment pursued a legitimate aim and that there was a proportionality between the measure(s) undertaken and the legitimate aim pursued. If the state fails to fulfil these requirements, the Court usually finds a violation. In cases in which discrimination is alleged based on sex, the Court is required to perform a higher degree of scrutiny of the circumstances, subject-matter, background and a consensus

(Radačić 2008, 843–4; Čahojová, Bitterová 2018, 29) since "the advancement of the equality of the sexes is...a major goal in the member States of the Council of Europe and very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention,"[29] while "references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex."[30] However, even in this regard the Court takes a note of the underlying public interest, and leaves the states a certain margin of appreciation, although it never fails to determine whether the exemption is justifiable and reasonable if there is a European consensus on the issue in question.[31]

The margin of appreciation doctrine implies that states are allowed a certain measure of discretion, subject to European supervision, when they take legislative, administrative and judicial actions in the area of Convention rights (Harris *et al.* 2014, 14; Zysset 2017, 139–54). This concept provides the states with certain discretion in "determining the reasonableness of interference with the Convention rights" so that the Court can relatively easily accept reasons and arguments submitted by the governments, unless they are "clearly unconvincing or disclose arbitrary decision-making" (Gerards 2018, 498–9). According to Gerards (2018, 499–500), this doctrine is, thus, flexible, but applies only to the review of the reasonableness, and should therefore be applied with great care.

29 *Petrovic v. Austria*, App. 20458/92, (ECtHR 27 March 1998) para. 37; *Konstantin Markin* (fn. 1) para. 127.

30 *Konstantin Markin* (fn. 1), para. 127.

31 *Petrovic* (fn. 29), para. 38.

Also, the margin of appreciation doctrine is to be applied consistently, with acceptable deference to the national authorities (Gerards 2018, 501), as it depends on the existence of a consensus or common ground of the CoE Member States on the approach to the matter in question (Wildhaber *et al*. 2013, 248). When there is no European consensus, the Court will have a wider margin of appreciation (and often a violation will not be found), but where the Court affirms existence of the European consensus, the margin of appreciation will be narrow, and the Court will find a violation thereof, by applying evolutive interpretation of the Convention (Wildhaber *et al*. 2013, 248; Candia 2017, 600). Even though widely accepted, Wildhaber *et al.* (2013, 256) argues that there is no indication that consensus is binding, while Gerrards (2018, 506–15) adds that in practice this doctrine actually does not demonstrate the objectives it should theoretically, and that the Court is moving to use other instruments to give the shape of its subsidiary role and effective protection (case-based review and incrementalism) as judicial strategies in dealing with diverging standards and the creation of general principles.[32]

In equal treatment cases the European Court operates in a complex context (Gerards 2017, 1) as it is asked to deliver binding judgments from the position of a judicial authority that should respect national sovereignty and national values, having to balance the need for uniform and effective rights protection, with respect for diversity (Gerards 2018, 495) and the objective to provide consistent protection of individual fundamental

32 For example, see the Court's considerations concerning the evolution of the right to parental leave in the CoE Member States since the *Petrovic* case, in *Konstantin Markin* (fn. 7), paras. 98–99.

rights (Gerards 2017, 2). The European Court has already dealt with different and changing sentencing regimes among CoE Member States, with cases covering the difference in treatment of child offenders on account of their age differences, and consequent ineligibility for remission,[33] the difference in juvenile sentencing on a basis of sex,[34] and the difference in early release prospects of life prisoners and others when life imprisonment is the mandatory penalty for certain offences.[35] In the case of *Khamtokhu and Aksenchik*, however, the

33 *Nelson v. the United Kingdom* App. 11077/84 (Commission, decision 13 October 1986). In this case the applicant (aged 15 at the time of commencement of a nine-year prison sentence for attempted murder) complained that due to his age at the time of arrest and trial, and the location thereof, he had been denied the possibility of remission, even though he was entitled to parole. He also complained of difference in sentences in England and Wales, which were more lenient and where children were entitled to remission for the same offences, unlike in Scotland, where he had been tried and sentenced.

34 *A. P. v. the United Kingdom* App. 15397/89 (Commission, decision, 8 January 1992 (striking-out)). In this case the applicant (boy, aged 14) complained of different sentencing of male and female juveniles. The applicant and respondent state concluded a friendly settlement, but from the facts of the case we learn that during a certain period of time only boys aged 14 and older could be sentenced to imprisonment, while girls of the same age were exempt from such punishment. In the meantime, the UK amended the law and abolished the critical punishment in regard to 14-year-old boys.

35 *Kafkaris v. Cyprus* App. 21906/04 (ECtHR, Grand Chamber, 12 February 2008). In this case the applicant (sentenced to life imprisonment for premeditated murder) complained of his discriminatory treatment vis-à-vis other life prisoners released by the discretionary decision of the President of the Republic, applied on a case-to-case basis, as well as him and other convicts who were not serving life sentence. The Court established no discriminatory treatment in either of the applicant's complaints.

Court had to reconcile sex, gender, age, public interest, lack of European consensus, constitutional guarantees, and societal values adopted in Russia.

4. REVISITING THE CURIOUS CASE

Throughout most of the history of the European Court its jurisprudence on equality was based on a formal conception of equality, and only recently has the Court begun to "give equality more substantive content" (see Radačić 2008, 842; O'Connell 2009, 129; Fredman 2016a, 749–50). Whether the second approach brought more of the desired equality into practice, particularly in domains that do not concern private life or family matters, is difficult to determine.

The case of *Khamtokhu and Aksenchik* came before the European Court after it had confirmed its position that equality of sexes is one of the major goals to be achieved and preserved in the Council of Europe, and had invited for the stereotypical and traditional views to be abandoned (above in fn. 2: *Konstantin Markin v. Russia*). Indeed, the Court found a violation of Article 14 in conjunction with Article 8 of the European Convention in the *Konstantin Markin* case, and recognized that the mother and the father play equal roles in the early stages of a child's life, i.e. that motherhood should no longer be given priority over fatherhood.[36] Hence, even though

36 *Konstantin Markin* (fn. 1), paras. 132–133, 151. "... the Court concludes that, as far as the role of taking care of the child during the period corresponding to parental leave is concerned, men and women are 'similarly placed'... It follows from the above that for the purposes of parental leave the applicant, a serviceman, was in an analogous situation to servicewomen. It remains to be ascertained whether the difference in treatment between servicemen and servicewomen was objectively and reasonably justified under Article 14... In

positions of Markin, Khamtokhu, and Aksenchik were not comparable, given the contexts from which alleged inequalities arose, it was reasonable to expect that the Court's reasoning in the *Konstantin Markin* case would also be of certain importance and value for *Khamtokhu and Aksenchik*. However, the reasoning of the Court and the outcome in the case were opposite, and the question arose whether the Court was right.

There are two possible ways to respond to the above dilemma. One is that, in principle, the Court took the right approach in the case of *Khamtokhu and Aksenchik*, in line with their complaints and the established body of its case law, but that the outcome largely owes to the applicants' mistake in submitting one request. Namely, unlike in the case of *Konstantin Markin*, where the applicant had (successfully) claimed that "the refusal to grant him parental leave amounted to discrimination on grounds of sex"[37] without further requests, Khamtokhu and Aksenchik carried on with the request to the Russian authorities to abolish life imprisonment in respect to men aged 18 to 65. Indeed, no one can guarantee that the Court would have taken a different direction had the applicants left out the second part of their request. However, the second part of their claim could be a strategic mistake in arguing the case: by leaving only the first, substantively tenable and defensible submission, the applicants would have been more successful.[38] In this way the latter

view of the foregoing, the Court considers that the exclusion of servicemen from the entitlement to parental leave, while servicewomen are entitled to such leave, cannot be said to be reasonably or objectively justified. The Court concludes that this difference in treatment, of which the applicant was a victim, amounted to discrimination on grounds of sex."

37 *Ibid.*, para. 76.

38 According to the information from the Department for the Execution of Judgments of the European Court of Human

request prevailed, and the Court was clear regarding the direction in which it was going already at the outset of the case deliberation, and that its subsidiary role and restricted powers in regard to domestic legislation were about to "save" it from delving into this socially and legally complicated issue. Ordering Russian authorities to abolish life imprisonment completely (leveling up) or to extend it to women (leveling down) was not within the Court's power, but the sole recognition that the adopted approach to sentencing was discriminatory had more prospects of success (compare with *Konstantin Markin*).[39]

Another response to the above dilemma is that the Court took the right approach in the case of

Rights, in addition to being acknowledged that he was discriminated against by the Court judgment, we read that in execution of the individual measure Konstantin Markin was paid (on time) non-pecuniary damages and legal costs and expenses, awarded by the Court. Moreover, in June 2014 the Russian Government submitted a draft law providing for parental leave and child allowance to be granted upon request to single male serviceman for consideration by the State Duma. Even though there were no further developments reported to and by the Execution Department, according to numerous media reports this draft law was welcomed as a step further in respect of establishing equality between men and women in Russia. The status of execution available at *https://hudoc.exec.coe.int/eng#{%22fulltext%22:[%2230078/06%22],%22EXECIdentifier%22:[%22004–13956%22]}* (last visited 19 July 2021).

39 Lessons from this case, and how it was argued, could be a good and useful example for proponents of the so-called "public interest litigation" (a synonym for human rights litigation, strategic litigation, test case litigation, impact litigation, social action litigation, and social change litigation) in Central and Eastern Europe, seeking structural and social changes through the courts and judicial practice (see Goldston 2006, 496–7, particularly the section concerning lack of legal remedies for some problems in domestic legal orders, 499–500).

Khamtokhu and Aksenchik, and that they had no prospects of success at all. The content and strategy of their complaint only paved the way for the Court to analyze the case from a more substantive perspective, and weigh better all arguments and facts. Where there are strong arguments in favor of national or public interest, as it was in this case, they often override individual rights or sectional interests, and even some exceptions (McHarg 1999, 671–5). Also, when there is no common ground among European states as to the submitted claim(s) – life sentence and its prescription depending on the sex and gender of offender in this case – the Court will most likely reply negatively to the applicants' complaint(s) in such cases (see the part concerning margin of appreciation in the second section of this contribution).

In the application of the discrimination test in this case, the Court established that the exemption of female offenders amounted to a difference in treatment on the grounds of sex. In justifying this treatment, however, the Court completely upheld the Government's position that the difference in treatment was intended to promote the principles of justice and humanity (which require that the sentencing policy take into account the physiological characteristics of women, in addition to age) and therefore pursued a legitimate aim in the context of sentencing policy. While one may argue that such a policy is clearly contrary the imperatives of formal equality (sought in this case), here the Court, unlike in the *Konstantin Markin* case, actually weighed in on the societal and legislative context, and the value choice made on part of Russia (compare to McHarg 1999, 677) to determine what concretely "principles of justice and humanity" entailed in this case.

Firstly, regardless of the fact that the international instruments enumerated in the judgment[40] contain regulations and recommendations to the states with regard to their obligations to provide special measures for gender-specific healthcare to some female prisoners,[41] taking into consideration their individual circumstances and vulnerability while serving their sentences, the Court noted that Russian (complete exemption) policy in fact goes beyond these standards by encompassing all women, which could be considered a sign of a "social progress in penological matters."[42]

Secondly, the Court also took into consideration the practice of the Constitutional Court of Russia, which had continuously rejected constitutional appeals questioning the adopted (discriminatory) sentencing policy,[43] and stood firm on protection of certain constitutional guarantees. Namely, Article 7 (2) of the Russian Constitution guarantees state support to the family, maternity, paternity and childhood, while in Article 38 (1) particularly guarantees that "[m]aternity, childhood and the family shall be protected

40 *Khamtokhu and Aksenchik* (fn. 7), see the list under Relevant International Instruments section, paras. 27–31.

41 *Ibid*. Namely, the measures of protection of female prisoners from gender-based violence, and the protection of pregnant, breastfeeding, or menstruating women and mothers with young children in prisons, and no instrument prohibits life imprisonment as such and no instrument calls for exempting women from life imprisonment, or from any type of prison sentence.

42 *Khamtokhu and Aksenchik* (fn.7) para. 86. Clearly, here the Court talks about the progress in the protection of women, even though one may ask if there is any reasonable ground to claim "progress" when male offenders still remain exposed to possibility of being sentenced to life in prison and possibly exposed to some lower prison standards.

43 *Ibid.*,para. 18.

by the State."[44] Evidently, the European Court could hardly ignore the legitimate purpose that the adopted sentencing policy had in the respondent State.[45] As the Court concluded, each state is in the best position to know which sentencing policy befits its societal needs best.[46]

Finally, as for the quest for a European consensus on the underlying issue in this case, the Court established that, regardless of various different approaches adopted throughout Europe, in fact all former Soviet states exempt women from life imprisonment. More specifically, through the example of Russia, the Court noted that female offenders have been better protected than male offenders by legislation therein for much longer: by the 1960 Criminal Code of the RSFSR capital punishment could not be imposed on pregnant women, in 1993 exemption from capital punishment was extended to all women, and, finally, since 1997 all women have been exempt from both life imprisonment and capital punishment.[47]

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44 Конституция Российской Федерации [Constitution of the Russian Federation, adopted by Referendum on 12 December 1993, amended by the Laws of the Russian Federation on amendments to the Constitution of the Russian Federation on 30 December 2008 N 6-FKZ, 30 December 30, 2008 N 7-FKZ, 5 February 2014 N 2-FKZ, 21 July 2014 N 11-FKZ], Article 7 (2) and 38 (1) available at: http://constitution.kremlin.ru/ (last visited on 28 February 2020).

45 Compare here also with *Konstantin Markin* (fn.1), paras. 34, 43.

46 *Khamtokhu and Aksenchik* (fn. 7), para. 71.

47 *Ibid.* See also fn. 8. Moreover, studies on female sentencing show that even where there are no explicit provisions in domestic legislation that provide for special treatment of women, they still receive more lenient sentences, in and outside Europe. For example, see and compare the studies on divergence in male and female sentencing, and lack of objectivity and neutrality in United States of America (Doerner, Demuth 2012; Goulette *et al.* 2015), United Kingdom (Hopkins *et al.*

Although it may be argued that the applicants negatively contributed to the Court's approach to their problem, and that the Respondent state received overly deferential treatment by the Court (Čahojová, Bitterová 2018, 30), it undertook a comprehensive analysis in this very challenging case, by examining all the elements that its test requires: subject matter (sentencing policy), circumstances (offenders' sex and life imprisonment), background (respondent state's legislation history, constitutional guarantees), and consensus (particularities of the region). And, it should not be overly criticized in regard to its conclusion. Namely, "[e]quality becomes an 'empty idea' when it is all formal and no context or content," says MacKinnon (2016, 744), and the above case of two male offenders and the Court's judgment thereof is in fact very good confirmation of this hypothesis. With this case the Court affirmed that, indeed, the valid judgments on public interest and equality require examination of various dimensions of the categories being compared and whose equalization is intended.[48] Also, it reasonably held that the social context and background matter, particularly in the case of the state which is socially, politically, ethnically, religiously and culturally largely different than the majority of other states it is

2015), France (Philippe 2017), and Sweden (Svensson, 2018). Also, see and compare with the comprehensive study on arrest and sentencing of male and female offenders in prostitution (Pfeffer *et al.* 2017), which showed that women are disproportionately more often arrested for prostitution than men, and more likely to receive jail sentences than men, for example.

48 See proposed models on reconciling rights and the public interest in McHarg (1999, 678–683), as well as the need for accommodation of differences and their synchronization in order to reach structural change, in Fredman 2016a.

compared to.[49] And, particularly, in the above case the Court[50] implied that human rights issues require nuanced and careful judgment in international adjudication, and that a uniform approach to equality issues, within different value systems, is not an adequate solution.[51] Hence, the equality problem can be evaluated only when all the aforementioned conditions are met. When all the dimensions of the equality problem are properly considered, equality can be achieved; or, if it is not possible to achieve, then this impossibility will be properly and reasonably justified.

49 In this case, the necessary context was provided by Russia. However, it should be noted that, as literature indicates, the social position of the Russian (and later Soviet) women varied from the second half of the 19th century. Efforts to overcome the conservative and paternalistic treatment they had been exposed to, even during some periods of the 20th century, actually lasted a very long time, even though e.g. the female "intelligentsia" played an important role in the Bolshevik movement; women gained the right to vote in 1917 – much earlier than many other women in Europe, and highly educated women constituted a significant part of society in Russia/Soviet Union in the 20th century. In spite of all this, in reality, women were always split between the freedom they formally enjoyed and some traditional perspectives of the role of womanhood in society, and therefore bore a "double burden" (see Engel 1987). Therefore, legislation that excludes women from harsh punishment, such as life-sentence, might have had origins in disparate history of the position of Russian (and Soviet) women, and to a certain extent intended to exclude already disadvantaged women from prison hardships. Hence, it might take a long time to make some reasonable changes to the sentencing regime, so as not to forcefully distort existing system, to the detriment of neither male nor female offenders.

50 See almost 50-pages-long discussion of the members of the Grand Chamber following the judgment.

51 See an excellent exchange of arguments on threats of imposing a universal value system in human rights, instead of upholding the broader idea of an international rule of law between Paulus and Regan (2010).

5. CONCLUDING REMARKS

In conclusion, if we look back at the questions posed at the very beginning of this case analysis – namely (i) does formal equality eliminate discrimination, (ii) when should formal equality give precedence to achieve substantive equality, and (iii) is gender equality attainable and how do we regulate it – we may say that, in principle, and as an ideal, formal equality eliminates discrimination. However, the analyzed case shows that sometimes (forced) formal equality can be damaging because there are some inequalities that can be permitted, or whose permission is even desirable. Also, societies are fragile when confronted with changes and reforms, and it takes time, careful examination of all circumstances, and lengthy processes to achieve the outlined goal. We see this in formal equality, which *per se* is absolutely not a bad goal, but evidently hides traps and pitfalls, especially in cases that involve issues of sex and gender. Therefore, it may be said that sex and gender equality is attainable, but only with careful regard for the context, (natural) differences, and nuances between comparable groups and categories.

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ACADEMIC FREEDOMS AND DIGNITY: THE CURIOUS CASE OF JOHN FINNIS' PHOBISM

This paper focuses – through the lens of the Finnis case – on the search for answers to the questions: Where do the boundaries of academic freedom and free speech lie? Did Finnis overstep them with his "extremely discriminatory views against many groups of disadvantaged people" presented in his papers between 1992 and 2011, as it is said in the Petition to stop John Finnis teaching at Oxford University because of his discrimination? Are Finnis' views phobic? The main theses presented in the paper are: The boundaries of academic freedom and freedom of speech have not been overstepped, but these freedoms were abused. Some of Finnis' views, as abstractly expressed opinions, are undoubtedly phobic, but there is no tangible proof of any discriminatory or phobic behaviour by Finnis in relation to anybody.

Key words: *Academic freedoms of speech. – Human dignity. – Case of John Finnis in Oxford academic community. – Abuse of right. – Sphere unregulated by law.*

1. INTRODUCTION – THE JOHN FINNIS CASE IN A NUTSHELL

This paper focuses – through the lens of the Finnis case – on the search for answers to the questions:

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Where do the boundaries of academic freedom and free speech lie? From the aspect of methodology, this is a case study – the said case presenting a legal and moral (i.e. ethical) issue.

Hence, we shall first briefly recapitulate the Finnis case. Then we shall proceed to analyse whether Finnis has overstepped the boundaries of academic freedom and free speech with his "extremely discriminatory views against many groups of disadvantaged people." He presented these views in his papers published between 1992 and 2011, and they were the cause for a Petition to stop John Finnis teaching at Oxford University because of his discrimination (Petition 2019).

On 2 January 2019 a petition to the University of Oxford was launched on Oxford's Remote Desktop Protocol, demanding two things: (1) that John Finnis stop teaching at the University of Oxford because of his discrimination, and (2) that the University of Oxford clarify its policy on discriminatory professors (Petition 2019). In a short period of time the Petition was signed by several hundred members of the Oxford community, both professors and students (Smith 2019).

What is exactly held against John Finnis (1940–), a renowned professor emeritus at Oxford's Faculty of Law? The first section of the Petition states that he "has a long record of extremely discriminatory views against many groups of disadvantaged people. He is known for being particularly homophobic and transphobic. He has even advised US state government not to provide legal protection for LGBTQ+ people who suffer discrimination" (Petition 2019). It also says that "his hateful statements include: gay sex is similar to bestiality—having sex with animals (1992; 1994; 2011); being gay is 'evil' and 'destructive of human character' (1994; 2011); approving of gay sex is like approving of killing innocent

people in a terrorist massacre (2011); governments and societies should 'discourage' being gay, and they should encourage anti-gay educational programmes (1994; 2011); being gay should count 'at least as a negative factor, if not a disqualification', in allowing adoption of children (2011); there may be a relationship between being gay and abusing children (2011)" (Petition 2019). It also mentions his record "of other forms of discrimination, namely racism and xenophobia. For example when he has stated that cultural diversity [in Europe and Britain] will lead to 'miseries of hatred, bloodshed and political paralysis', comparing this to the Bosnian genocide in former Yugoslavia (2009)"; as well as when saying that "modern immigration is a kind of 'reverse colonization' (2009)" (Petition 2019). Finally, the Petition also indicates that "Finnis teaches seminars on the BCL [Bachelor of Civil Law] and MJur [Master of Jurisprudence], the main Law graduate courses. This is unacceptable. It puts a hugely prejudiced man in a position of [academic] responsibility and authority. It makes people who are affected by his discrimination question whether they should attend these seminars, which are supposed to be the main source of teaching on the BCL and MJur. University is a place to focus on education, not to be forced to campaign against or to be taught by professors who have promoted hatred towards students that they teach." (Petition 2019)

The second section of the Petition asks the University of Oxford to clarify its position on the professors who have demonstrated discriminatory views and behaviour by determining how much the *real* state of affairs corresponds with the existing ethical and legal acts that actively encourage "inclusive culture which promotes equality" and "values diversity", as well as "a positive environment" of fairness and respect, "free

from harassment" (Oxford University 2013; Oxford University 2017). This is because, at the moment, students and staff have to wait for an instance of harassment or victimisation of a *specific* person by a specific person before they can complain about a professor. The aforementioned ethical and legal acts seem not to suffice in case of professors attacking people in disadvantaged position in a more general manner, so if a policy on that issue already exists it needs to be made publicly available and easily accessible to students and staff (Petition 2019).

At its end, the Petition cites *excerpts* from Finnis' public statements and published work *mentioned* in the first section, with detailed references to relevant sections of Finnis' works. We shall elaborate on this later in the paper.

Until now the University of Oxford has failed to provide any official opinion or decision on this petition. This certainly does not preclude us from taking a position on the Finnis case in this paper. And, as the rules of methodology proscribe, this position initially takes the form of a hypothesis, i.e. thesis that then should be argued, proven and explained in order for it to be reasonably adopted and defended, which is to say accepted as correct on the basis of well-founded arguments.

2. BASIC (HYPO)THESES ON THE FINNIS CASE

The fundamental issues reviewed in this article can be summarized by the following questions: (1) has Finnis overstepped the limits of academic freedom of speech, and (2) are Finnis' views discriminatory and phobic or not. The basic theses on these issues proposed in this paper are as follows: Finnis did not overstep the limits of the academic freedom and freedom

of speech, but did abuse these freedoms. Some of his views, as abstractly expressed opinions, are phobic, but there is no proof of Finnis' specific discriminatory or phobic behaviour towards anyone.

2.1. Thesis on the Abuse of Academic Freedom of Speech

The thesis on the abuse of the academic freedom of speech will be elaborated in three steps. The first one will identify the notion of the abuse of rights (or freedom, or right to freedom) and distinguish between the phenomena (and notions, respectively) of abuse of rights, on one side, and the overstepping or the breaching of rights, on the other. The second one will examine what is and what is not good (if not the best) academic practice in Finnis' use of the aforementioned freedoms, which shall be done (a) by indicating the rules of academic teaching (some of which were established at modern age universities and some much earlier, existing almost as long as the institution of university), more precisely by indicating the obligation of reviewing different and especially opposing views (opposing one's own) on a certain issue in the framework of the academic teaching process; (b) by examining a potential professionally acceptable explanation for Finnis' views on bestiality etc.; and (c) by clarifying the main academic rule (or obligation) for the professors to limit themselves to their subject, or discipline and content thereof, and, accordingly, methods appropriate for such subject/discipline/content, having in mind that Finnis is a Professor of Law and Legal Philosophy at the Oxford University Faculty of Law, and not a professor of Catholic dogmatics on human sexual behaviour at a Catholic theological faculty. And, finally, in the third step, directly founded on the second one, the thesis on

Finnis' abuse of academic freedom of speech will be elaborated through the discussion on the sphere unregulated by law (Ger. *rechtsfreier Raum*) in order to determine and explain where in legal theory and practice we should place the phenomena that Finnis discusses and on which he takes views deemed as unacceptable in the Oxford academic community by the signatories of the Petition. Let us start from the beginning.

2.1.1. Step One: What is Abuse of Rights

In order for behaviour to be identified as an abuse of academic freedom of speech, we first need to identify the notion of rights abuse, and the abuse in law or a legal order, respectively. A right is an exceptionally purposeful phenomenon, a phenomenon with a *telos*, an objective. Hence, the right, i.e. existence thereof, is not a purpose in itself, although as a means to an end it does possess value in itself and by itself. The instrumental character of a right as a means for achieving a specific objective/objectives indicates, however, that a right as a means can always be used for one purpose or abused for another, regardless of whether such (ab)uses are discussed within a legal order or in the framework of a specific legal theory.

In continental legal theory – which in this case can also be applied to the *common law* system (in which the doctrine of rights abuse is not encountered) as it can be applied to any other legal system due to the aforementioned purposefulness and instrumentality of rights – we can differentiate between the abuse of law and abuse of right in the eyes of law as a legal order. The abuse of law is the abuse of legal regulations, legal regulating, which arises when legal norms regulate something that should not be regulated by them, for example, how acquaintances should greet or address each other today. We are

not momentarily discussing this type of abuse, although it will come up in the later sections of this paper. At the moment we are discussing the abuse of rights.

What is abuse of rights? In order to avoid extensive, for this purpose unnecessary theoretical discussion, it seems best to refer to the most common definitions of these terms, which are, also, the least contested (Lukić 1975, 273–276; Vodinelić 1997; Vodinelić 2014, 305–318).

The *main* (or *general*) characteristics of any abuse are, primarily, that the subject of a right (or freedom, or right to freedom, or the competent authority) seems to *act within the limits* of their right (or freedom, or right to freedom, or their competence) and doesn't, hence, *overstep* their given right or competence, meaning that their actions – *stricto sensu*, in the strict sense, and viewed *abstractly – do not represent a breach* of that right (or freedom, or right to freedom, or competence). However, even when acting (abstractly viewed) within the limits of their rights, an individual – and here we come to the second element of the notion of abuse – can harm others with their actions, thus preventing those others from fully or partially enjoying their respective right (or exercising their juridical competence) (Lukić 1975, *loc. cit.*). Additionally, in order for a specific action to be labelled as abuse of a right it must exhibit one of the following specific (or special) characteristics (in addition to the two aforementioned main/general ones): that specific action must be either harassment (this being the only form of abuse with the intent to harm), or useless, or disproportionate, or counter to the purpose, or inappropriate, or immoral, or contradictory (in the remaining seven specific types of abuse there is no obligatory intent to harm) (Vodinelić *loc. cit.*).

It should be added that we consider that there is essentially no legal difference between rights, freedoms

and rights to freedom, that these are simply differences in terminology in line with different traditions, and that they refer to the same legal phenomenon, a right, when discussing a freedom such as academic freedom, or freedom of speech, and right to academic freedom, or right to freedom of speech, respectively. Hence, there are no essential differences between the abuses of these phenomena.

It should also be added – although it is of no importance for this discussion – that we consider there is no crucial difference between the abuse of a right and the abuse of a juridical competence since both are cases of abuse of two types of juridical powers (Lukić 1975, 270–276).

Consequently, in order to prove the thesis on Finnis' abuse of academic freedom of speech, it is first necessary to demonstrate why some of his specific actions are *the use of that freedom only in appearance*, as well as whether these actions have *prevented others from enjoying their rights*, specifically, their right to human dignity and the right to obtaining appropriate knowledge in law and philosophy of law especially. These issues will be reviewed in the second step.

In order to make that second step in the right direction, we should keep in mind that freedom of speech and academic freedom of speech are not identical: *speakers' corner* (in Hyde Park or anywhere else) and a lecturer's post (at Oxford, or somewhere else) do not imply same freedom or same limitations (i.e. obligations) for the speaker. The academic freedom of lecturers has always had typical legal and ethical limitations (i.e. the obligations of a lecturer – university professor, and legal or philosophical writer, i.e. author, respectively), which are in a sense wider and in a different sense stricter, but certainly different than the former freedom

(Roberts 2000). In this sense, as a reminder, one should mention *exempli gratia*, first, the 1940 AAUP Statement of Government of Colleges and Universities, which states that the faculty member, as a citizen, has the right to speak or write free from institutional censorship or discipline, though attention is called to the professor's special obligation to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that he is not an institutional spokesman (AAUP 1940). Further, the 1967 Joint Statement on Rights and Freedoms of Students, which points out that freedom to teach and freedom to learn are inseparable facets of academic freedom, since free inquiry and free expression are indispensable to the attainment of the goals of academic institutions, which are the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society so that students should be encouraged to developed the capacity for critical judgment and to engage in a sustained and independent search for truth (AAUP 1967; see also Fellman 1968, 15 and 11).

2.1.2. Step Two: What Is Good (if Not Best) Academic Practice

The *idea* of good or best possible practice (*praxis*, *bios praktikos*, *vita activa*, *res humanae*) is a very old philosophical idea, but as a generally developed best practice *doctrine*, which could be applied in *different* public spheres, it emerged at the beginning of this millennium (Bardach 2000). However, we are not discussing the general best practice doctrine, but only the specific university/academic practice. Universities established some of the rules of good (if not best) university/academic practice quite early on in their history, as medieval institutions in Europe from the 11th to the 15th

century (the University of Oxford being one of the oldest among them) and later, also as modern universities (where legal teaching was an integral part of these institutions from the beginning), and the relevance of that practice remains unchallenged (Hasanbegović 2000, 476–489).

2.1.2. (A) of Step Two: On the Rules of Teaching at Medieval and Modern Universities

The formula and form of lectures were not established precisely at the very conception of universities and the Bologna legal reform (i.e. by the glossators), but rather with the postglossators or commentators or conciliators, as they are also known, i.e. from the late 13th through the 14th and 15th centuries and later. This did not include only in the postglossator centre in Orleans in France but also in other places, such as Italy.

Without going into details, we should explain that the school formula represents a scheme of problem review and resolution, i.e. *questio*. This is a procedure that we encounter in its classical form in the works of Thomas Aquinas (1225–1274), as well as in those of Bartolus de Saxoferrato (1313–1357), perhaps the most prominent postglossator. Bartolus applied the classic school formula in his *consilia* (advices) and *commentaria* (comments). This procedure consists firstly of identification, establishment of the issue, then the presentation and review of similar, easily understandable views on it, followed by the presentation and review of contradictory, opposing opinions, and finally the presentation of a solution, after which it is potentially possible to reject the objections that are or could be issued against such a solution. Hence, presentation and review of opposing views during the process of taking a position on a legal issue/problem is a norm dating from

the postglossators school (Pringsheim 1921, 273–283; Viehweg 1974, 70–72; Hasanbegović 2000, 487).

Quite similar to the school formula is the presentation scheme used in lectures (*lectiones*, *lecturae*). The lecture form entailed: opening remarks (with explanation of terms, etc.); detailed explanation of the elements of the interpreted text followed by their summary; providing concrete cases and examples; reading (quoting, referencing) and interpretation of sources; explanation of the decision, i.e. solution; other remarks including the setting of (new, general) rules; and ultimately, the review of opposing answers and existing controversies, which demanded substantial knowledge and dialectic skill. It should be especially noted that the entire matter was reviewed in even more detail at joint weekly debates than during basic, regular lectures (Viehweg 1974, 73–76; Hasanbegović 2000, 488).

In the case of modern universities, already before Kant (1724–1804) a rule had been established that a professor should not present their own views or interpretation of a subject at lectures. This was left for one's own original works, which were not a part of the teaching materials. Instead, a pre-existing textbook was used for the basis of the lectures. Maybe the most prominent such example are Kant's logic lectures that spanned several decades (1755/56–1798) and his teaching manual *Logics* (1800) based on Meier (Georg Friedrich Meier, 1718–1777, *Auszugaus der Vernunftlehre*, 1752) even though Kant personally had already penned criticism and comments on Meier's opinions, and Kant's fundamental views on logic, belonging to the period of critical thinking, were already expressed in *The Critique of Pure Reason,* and were quite opposite to Meier's (Damnjanović 1976, 7–14). Hence, university lectures and manuals can present certain disciplines

without reviewing contested issues on which different, even opposing views exist – depending on the required academic level of the textbook, i.e. teaching material. In such cases the professor *does not* present their own views and arguments, unless they belong to the universally accepted or predominant views on the issues and problems related to the content of a given academic discipline.

Finnis failed to adhere to these fundamental aforementioned academic rules (as well as some other important ones), which we shall endeavour to demonstrate in the continuation of this paper, thus forming the basis for our view on the faultiness of his academic (lecturing and writing) practice.

Finnis' academic papers containing the disputed views cited in the Petition do not present or review also relevant opposing opinions, and we can especially note the absence of academically, epistemologically and methodologically based review of the said disputed views. For example, if we look at his opinion that someone's homosexuality should be considered if not disqualifying, then at least less acceptable condition in case of applying for adoption, as well as his opinion that there could be a link between gayness and child abuse (Finnis 2011b1, 38, 42; 2011b2, 21, 23–24), or his view that homosexuality is evil, wrong and bad not only for the society and the state but also for anyone unfortunate enough to have innate or quasi innate homosexual inclinations, so the state and the society, hence, should discourage gayness and promote anti-gay educational programmes (Finnis1994a, 17, 14; 1995; 1997a; 2011a21, 334–336, 351). We can see that Finnis develops all these and similar views on the basis of his own general and legal philosophy, which, as we well know, he has been basing for decades on the arguments

of the most prominent legal authors in his view, primarily Thomas Aquinas and Aristotle (Finnis 1994a; 1995; 1997a; 2011a21; 1997b; 2011a22; 2008; 2011a20; 2011b1, 20, fn 61–62; 2011b2, fn 61–62). This is clearly evident from the *name index* of Finnis' collection of essays *Human Rights and Common Good*, where only certain names include also a real, more or less comprehensive topics' registry, and where the most comprehensive and longest entry is the one referring to Aquinas (Finnis 2011a, 411–429, especially 411–412), followed by the one referring to Aristotle (*idem*, especially 412–413). Finnis, for example, does not base his aforementioned views, or the majority of his other opinions, on contemporary scientific research of human (homo)sexuality and the scientific views founded on it, so in that sense (as well) many of his lectures represent an abuse of the freedom of academic speech. The university professor's desk is not a bishop's pulpit, nor is it a place for uncritical preaching of one's own general and legal philosophy, and it is completely irrelevant on which exact non-legal dogmatics those are based (in Finnis case the Roman Catholic one). A good example, contrary to Finnis', can be found in papers of Serbian sociologist Slobodan Antonić (1959–), whose certain views on homosexuality are similar to Finnis', but he bases those views discussing critically methodological or scientific approaches, elaborations, as well as scientific insights (opposite or different to his own), which were gained during the study of these issues (Antonić 2014, especially 97–139, i.e. Chapter III "Istopolne porodice": Ideja i osporavanje ["Same sex families": Idea and contestation]; then 141–173, i.e. Ch. IV Deca u "istopolnim porodicama": Pregled debate [Children in "same sex families": Debate overview]; and 175–218, i.e. Ch. V Školska "kvir inkluzija": težnje i otpori ["Queer inclusion" in schools: Efforts and resistance]).

Here we should emphasize that when we say that Finnis' academic legal philosophy papers in which he deliberates on homosexuality lack relevant presentation and review of different and opposing opinions, especially the scientifically, methodologically and epistemologically based relevant different and opposing opinions, we are primarily referring to different *approaches* to homosexuality and different views on its *causes* and *nature* from those of the (so-called) new natural law theories, adhering to the official Roman Catholic doctrine to which Finnis himself belongs. So, we are not referring only, and not even primarily, to so-called queer theory and its characteristic view of homosexuality as a social construct (some basic criticism of this we can see in Pickett 2018). We are referring to scientific theories on individual sexual orientation being the result of complex interlinked influences: genetic (but not by a specific gene, rather at the chromosome level), hormonal and the influences of the environment; on it not being a matter of choice, something that can be willingly changed – hence it is biologically and not psychologically or socially founded; on it not being unnatural, neither by itself nor for itself a source of negative psychological consequences, nor a negative psychological consequence in itself; on how it cannot be changed through psychological influence. These are, hence, some elementary and important views of different and opposing approaches to homosexuality (for example, LeVay 2011; Balthazart 2012; Bailey *et al.* 2016), which were completely disregarded by Finnis. We shall discuss this as well as other academically unacceptable omissions later in this paper.

We cannot say much about Finnis' lectures,[1] apart from the fact that on the basis of the Petition and the

1 We would like to express special gratitude to Prof. Marija Karanikić Mirić, who, as a postgraduate student at Oxford,

number of its signatories we can assume that those lectures have more or less the same content as Finnis' papers. In that sense the content of those lectures could be subject to same remarks as those presented here in regard to Finnis' papers.

2.1.2. (B) of Step Two: Finnis' Views on Bestiality

The main definition of the word *bestiality* in the English language – both general and legal – is *sexual intercourse between a person and an animal*. Finnis uses the word *bestiality* in this exact meaning. However, his understanding of bestiality as a phenomenon which he generally or specifically equates with some other phenomena, primarily homosexuality, especially when considering the reasons for such equating, results and must result in at least some professional dilemmas, quandaries, non-acceptance and resistance at the beginning of the 21st century. Let us take a closer look.

Finnis states that "copulation of humans with animals is repudiated because it treats human sexual activity and satisfaction as something appropriately sought in a manner that, like the coupling of animals, is divorced from the expressing of an intelligible common good – and so treats human bodily life, in one of its most intense activities, as merely animal. The deliberate genital coupling of persons of the same sex is repudiated for a very similar reason" (Finnis 1992). In such and similar equating of bestiality and homosexuality, Finnis, as usually,

has attended a course on philosophy of law with Prof. Finnis during her research fellowship at Trinity College in the school year 2006/7, and who not only communicated her impressions and experiences from those lectures, but also considerably assisted and facilitated the collecting of certain parts of missing primary references.

refers to prominent philosophers. Thus, discussing Kant's notion of unnatural crimes, named thusly for being acts against humanity, he cites rape, pederasty and bestiality as belonging to such crimes (Finnis 1987, 433–456; 2011a 2, 47–71, especially 61–71). Later he will again state and reaffirm that the post-Christian moral philosophy of Immanuel Kant has identified the wrongness/sinfulness of masturbation and homosexual (and bestial) conduct as consisting in the instrumentalization of one's body, and thus ("since a person is an absolute unity") the wrong/sinful to humanity in our own person (Finnis 1994b; 1996; 2011a5, especially 104, fn 80; and identically in 1994a; 1995; 1997a; 2011a21, especially 342, fn 17). Discussing these phenomena from the viewpoint of Thomas Aquinas, and wondering which among these acts is the worst, Finnis emphasizes that Andrew Koppelman (1957–) exaggerates when he says that for Aquinas homosexual acts are uniquely monstrous, bestiality is a worse type of surrender to unreasonable, disintegrated desire for pleasure, and that rape and adultery are characteristically much worse in terms of injustice (Finnis 1994a; 1995; 1997a; 2011a21, especially 347, fn 27). Finnis then also concludes in his own wording that such sexual acts that same-sex partners engage in (intended to culminate in orgasmic satisfaction by finger in vagina, penis in mouth, etc.) remain non-marital, and so unreasonable and wrong/sinful, even when performed in like manner by a married couple (Finnis 1994a; 1995; 1997a; 2011a21, especially 347–348). Finally, when reviewing homosexuality, bestiality and other phenomena considered similar by those prominent philosophers, and criticising John Boswell (1947–1994) for deliberate misrepresentation and misinterpretation of Aquinas, Finnis highlights

that Aquinas owes linking cannibalism, bestiality, coprophagia and homosexual acts (and placing them in the same group of unnatural pleasures) to Aristotle (384–322) since Aquinas adopted that view from *Nicomachean Ethics* (7.5) (Finnis 1997b; 2011a22, especially 370–372).

This short overview of Finnis' definition of bestiality and his analysis of it as a human sexuality phenomenon, similar or identical to homosexuality, aims to demonstrate, on one hand, the scope of Finnis' dealing with this topic, and on the other, the equally important question of the methodology he used in that endeavour. We consider these issues relevant for both theses related to the Finnis case that are being presented in this paper. From the standpoint of the hypothesis on the abuse of academic freedom of speech, Finnis' discussion on bestiality is important for both the main (or general) characteristics of any abuse: creating an illusion that a behaviour (specifically, his discussion on bestiality) remains within the boundaries of academic freedom of speech without overstepping them, ergo, without breaching the legal, professional and ethical rules, as well as harming others with such behaviour (specifically, by speaking about bestiality in this manner) by preventing them from enjoying any of their protected legal goods (specifically, their human dignity), or their rights (specifically, the right to obtain relevant academic knowledge in the fields of law and legal philosophy). Nonetheless, considering the hypothesis on the discriminatory and phobic nature of Finnis' views, we believe that his deliberations on bestiality contain significant arguments in favour of the conclusion on his phobism, so we shall hence return to them. However, first, we should conclude the discussion on good academic practice.

2.1.2. (C) of Step Two: Academic Rule or Obligation to Limit Ourselves to Our Subject or Discipline and Methods Appropriate to Them

The academic obligation to limit oneself to one's discipline, its content and method in lectures, research and professional papers, certainly does not mean that nowadays we should not seek a correct balance between high and deep but narrow professional and specialized knowledge on one side, and interdisciplinary insights of a wide and distant horizon on the other. Definitely not. In this sense we should keep in mind, as it has been mentioned, that Finnis is Professor of Law and Legal Philosophy at the University of Oxford Faculty of Law. However, precisely taking all that into consideration, Finnis could be criticised for excessively analysing other similar or dissimilar fields of study without providing any content-related, epistemological or methodological basis for such an analysis, as well as for completely disregarding and insufficiently analysing certain issues in his own field, or not analysing them in a methodologically desirable and necessary manner. This, on one hand, created the illusion that his analysis was actually the analysis of his own subject, an analysis based on methods appropriate for the given subject and discipline, and on the other hand, it failed to provide academically required critical insights into the fields of law and philosophy of law, as well as relevant non-legal fields such as biology, psychology, anthropology, sociology, etc. Allow us to provide specific examples for this assertion.

For contemporary understanding of the phenomenon of homosexuality and adopting a proper moral, political and legal view of this phenomenon in the fields of constitutional law and family, marital, criminal and other legislation, it is beneficial to shed some

light on the opinions on that phenomenon of great historical minds, as well as our contemporaries. This is why Finnis' references to Socrates, Plato, Xenophon, Aristotle, Plutarch, Gaius Musonius Rufus, Augustine, Thomas Aquinas, Kant and others are illuminating (Finnis 1994b; 1996; 2011a5; 2008; 2011a20; 1994a; 1995; 1997a; 2011a21), but these historical views are irrelevant, let alone decisive for the current understanding of homosexuality and our moral and legal notions on it. This is simply because, for example, we definitely find the view of one of these greatest minds – Aristotle's view on *slavery* – completely unacceptable in our world today. We must be aware that a similar conclusion could be drawn in the case of homosexuality.

Even though history is the teacher of life, in order to understand homosexuality and adopt a proper ethical and legal opinion on it, hence, it is not enough to simply be familiar with the history of the idea, without also knowing the moral and legal history of legislation and jurisprudence related to homosexuality in different eras and different communities.[2] It is necessary to keep in mind the new scientific studies and insights – biological, psychological, anthropological and sociological, first and foremost (in addition to the previously mentioned authors: LeVay 2011 and Balthazart 2012; and for the sake of examples we should also mention Frankowski 2004; Lamanna 2012; Stuart 2014; Baily 2016). And this is precisely what Finnis is lacking, even though the results of contemporary scientific research are taken into critical consideration by others, such as Antonić (Antonić 2014, especially 261–308; and it should be mentioned again that these results are primarily written in English). That is why we consider that

2 Such a brief yet comprehensive historical approach is provided by Pickett (2009).

the omission and ignoring of relevant insights from other disciplines necessary for a contemporary understanding of homosexuality and its legal regulating is also academically inappropriate, being an expression of academically unacceptable selectivity in relation to views and arguments, thus a form of abuse of academic freedom of speech.

When we object to Finnis' disregard of new scientific (biological, psychological, anthropological, sociological, etc.) results in the study of homosexuality, at least at the level of their simple presentation, regardless of later adoption of either a positive or a negative critical view on that research and its results, we are primarily referring to Finnis' epistemological and methodological approach. Namely, we believe that the contemporary approaches to and views on homosexuality should not be based solely on the set of arguments made by prominent historical authors starting with, for example, Socrates (or even the Old Testament), continuing through Plato, Aristotle, Plutarch, Augustine, Aquinas (and others), and ending with Kant, as the supreme post-Christian (i.e. modern) moral and philosophical authority. Academic freedom of speech implies not only the obligation to adhere to one's discipline and its content, as well as relevant insights from other disciplines, but also to adhere to methods appropriate to one's discipline, including argumentation methods. And in that sense the aforementioned arguments by the authors to which Finnis refers cannot be considered as academically sufficient in this day and age. This objection to Finnis' epistemological and methodological approach is additionally emphasized by the fact that he (as we have previously demonstrated) has *published and republished his papers*. And every new publishing, namely, represents not only an opportunity, but also scientific and

academic obligation to complement one's previously published papers with new relevant insights on the topic or with remarks on the criticisms of the said paper, if these have appeared.[3]

Truth be told, it should be said that Finnis does refer to contemporary views as well as those opposing his, but primarily by commenting on opposing opinions on and interpretations of Plato, Aquinas or Kant and others, hence, the history of ideas on homosexuality. We should use this opportunity to state that we agree with Finnis' critical opposition to Martha Nussbaum (1947–), Koppelman and Boswell, as well as certain other authors (Finnis 1994b; 1996; 2011a5; 2008; 2011a20; 1994a; 1995; 1997a; 2011a21). But, at the same time, as important as this is for the history of ideas and their correct reception, it is equally irrelevant to our contemporary view on homosexuality. This is due to the fact that in this day and age the views of (prominent historical) authority figures, as it was stated, cannot be decisive and *eo ipso* assist the formation of our valid opinion on homosexuality in different communities (marital, familial, neighbourhood, school, business, church, confessional, and many other smaller or larger ethnical, linguistic, national and even legal and international communities) to which we all belong, including a specific professional one – the community of writers, professors and students of philosophy of law.

3 For examples of both comprehensive and thematically focused criticism of Finnis' approach and argument, see Perry 1995; Strasser 1998; Dmitrenko 2001, especially 16–55; Ball 2002; Pickett 2004; Carpenter 2005; Feldblum 2005; Coleman 2006; Eskridge, Spedale 2006; Ball 2007; probably the most comprehensive is Bamforth, Richards 2007; Allen 2009; but Finnis never comments on them: see in Finnis 2011a. Not even after the publication of his *Collected Essays* does Finnis comment on these or later criticisms: for example, Dale 2013; Denaro 2014; Davis 2015; Murphy 2016; Lago 2018.

Finally, in the case of Finnis' extensive and detailed excursions into the history of human sexuality ethics, in which he, referring to phenomena supposedly similar to homosexuality, discusses bestiality, pederasty, cannibalism, coprophagia, rape, masturbation, the morally wrong sexual practices of married couples, etc., there is no doubt that, by doing that, he is leaving the domain of philosophy of law (similar Zdravković 2008, 111–112, 118–124). On the other hand, it seems that such and so extensive referring to these phenomena as similar to homosexuality must engender (not only in homosexuals) the feeling of hurt dignity of homosexual persons, even though that was probably not Finnis' intention. But, for the existence of the abuse of academic freedom of speech, as we have seen, the existence of such *intent* is completely irrelevant, i.e. unnecessary.

If we try to explain Finnis' excursions into the fields outside the domain of philosophy of law, and especially the reason for their nature and extensiveness, we acknowledge that we must limit ourselves to the level of impressions. Finnis does not want to express his views on homosexuality *expresis verbis*, but wants to present them not only clearly but – in his opinion – also convincingly explained. These views are a reflexion of his deeply rooted beliefs. His worldview, his general, moral and legal philosophy are very tightly and inextricably connected. This is sometimes damaging for the philosophy of law, because it must pay its (dogmatic) dues to the (firmness of belief in) specific moral principles (in this case Roman Catholic worldview and ethics).[4] Finnis has a negative moral (and legal, respectively) view of

4 We can find examples that this exact worldview and religion do not preclude having a completely different (to Finnis') view of homosexuality in Perry 1995, and Lago 2018, and for a similar worldview and totally different view on homosexuality, see Pickett 2004.

homosexuality, but since the positive law view of homosexuality is no longer negative, he is required to tolerate that phenomenon in practice. Finnis has a strong negative attitude towards the marital community of two same-sex partners, even though it is protected by law in certain legal orders. This community, in his opinion, can be legally defined as a marriage, but can never have the essential characteristics of a marriage. Also, we gain the impression that even though Finnis doesn't explicitly state it, he is against legal recognition, registration and protection of life partnerships between two same-sex partners, even if such a partnership is not legally termed a marriage. Moreover, even though he is not against the decriminalisation of homosexual relationships, one could gain the impression that he does not believe that public demonstration of homosexual affection is exclusively a matter of taste but that in his eyes (because of the impact it has on upbringing and formation of society's moral views) it seems to be (at least a minor) breach of morality. Finally, Finnis is against the legal possibility of same-sex spouses adopting children, particularly whenever heterosexual couples aspire to the same, but he fails to explain his views, especially since he disregards contemporary studies and insights (unlike, Antonić 2014, as mentioned previously).

In order to finalize our discussion on whether Finnis has or has not abused academic freedom of speech, we should proceed to step three.

2.1.3. Step Three: What Is a Sphere Unregulated by Law

From the aspect of whether they are or are not regulated by (positive) law, we can divide all social relations (the entire social sphere) into the sphere of legal relations (the legal sphere in the wider sense) and the sphere of remaining social relations (those unregulated

by legal norms), i.e. the legally unregulated sphere in the wider sense. However, all social relations can be divided according to a different criterion (also law-related) into those social relations that *should be* regulated by law (e.g. property, and especially land property) and those that *should not be regulated* by legal norms (e.g. the manner in which people address one another).

Once we cross-reference these two criteria, i.e. apply them simultaneously, we can differentiate between four types of (dis)connections between social relations and legal regulations: (1) social relations that *are and should* be legally regulated (valid/positive law), (2) those that *are not and should be* legally regulated (legal lacunae, i.e. legal gaps), (3) those that *are not and should not be* legally regulated (legally free, i.e. unregulated sphere in the stricter sense), and (4) those social relations that *are but should not be* legally regulated (abuse of legal form, i.e. abuse of objective/positive law) (Lukić 1975, 254–258).

Without engaging, on this occasion, in a comprehensive theoretical debate on this topic, which could address the following legal issues, for example: whether or not there may be positive law gaps in a specific legal system, whether legal systems are open or closed, what is the difference between a legal gap, legal void and legal "hole", etc., we should provide for a short terminological remark. In German the legally unregulated sphere (in both the stricter and the wider sense of the term) is called *rechtsfreier Raum*, while in English the most frequent term is an unsuccessful metaphor – *legal vacuum*, or even worse – *legal lacuna*, but we consider the non-metaphorical expression *sphere unregulated by law* to be the best.

These two (positive law) criteria could be complemented by a third (natural law) one, so the question could be raised whether a well determined positive law

is simultaneously (from the aspect of its content or legal techniques) a good one. For example, are all types of property in a specific legal system justly regulated by its positive law; should the prohibition of discrimination on the basis of sexual *orientation* be stipulated by a constitutional provision, or does a statutory provision suffice? Even though such an analysis of Finnis' views would be quite interesting, it would definitely fall outside the scope of this topic, so we shall limit ourselves to the first two criteria: legal (non-)regulation of certain social relations, and social (non)necessity/need of such legal regulation.

In our day and age the law usually does not regulate sexual relations between mature adults if they enter those relations willingly. Adultery and prostitution remain potential exemptions in some contemporary legal systems, as separate legal institutes of marital, business and criminal law. Hence, consensual sexual intercourse between mature adults today generally falls within the sphere unregulated by law (in the stricter sense of the term), i.e. the sphere of interpersonal relationships that are not and should not be regulated by (positive) law.

In the very rich legal history of sexual regulations in England (and the entire UK) the aforementioned attitude was first adopted in 1957 in the Wolfenden Report ("It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour."), and a decade later the recommendations from that report resulted in the adoption of the Sexual Offences Act (1967) and the decriminalisation of consensual sexual relations between mature couples in private spaces, regardless of their gender (Lewis 2016, 275).[5]

5 For the legal opinion from the viewpoint of USA, see Koppelman 2002; SCUS (The Supreme Court of the US) 02–102 2003.

It should be pointed out that unlike some states and their positive laws, many churches have regulated this issue in their proper norms, as well as every mature individual has their own moral opinions (i.e. norms) on the issue. Why does that matter?

It matters because we consider it an abuse of academic freedom of speech in the field of philosophy of law when someone analyses issues pertaining to spheres unregulated by law (and value judgments on sexual acts and techniques of consenting adults in private space definitely belong to such a sphere), as well as when someone discusses in detail allegedly similar or quite distant issues from the history of an idea – in this case, the idea of homosexuality – but refrains from discussing important non-legal issues such as contemporary sociological, psychological, biological and other results of studies on homosexuality, without which it is impossible to take a valid moral, political and legal stance on this phenomenon. We believe that due to the following reasons:

> Firstly, deliberating issues that fall with the sphere unregulated by law, as well as allegedly similar but actually quite remote issues from the history of an idea, creates the *illusion* that one is staying within the boundaries of academic freedom of speech – even though such speech is completely irrelevant to the matter in hand or bears very little relevance to it.
>
> Secondly, by writing on such issues the author (possibly inadvertently and unconsciously) creates another illusion, namely that their view of the world and phenomena in it (including homosexuality) is the only correct one, because they refer to supreme authority figures in this field, while refraining from any review of contemporary results

of different relevant scientific disciplines. Such an *uncritical* epistemological and methodological approach is foreign to any philosophy, including the philosophy of law.

Thirdly, such analysis of the aforementioned issues (i.e. issues falling within the sphere unregulated by the law, as well as issues allegedly similar to homosexuality but actually considerably removed from it and belonging to the history of ideas) is an attack on the human dignity of homosexual persons, even though the said analysis was probably not undertaken with that intent.

In summary, when taking into consideration all of the aforementioned, it can be concluded that the manner in which Finnis discusses homosexuality and similar phenomena, i.e. his academic speech on this and some other interconnected (in his view) topics, possesses all the elements of abuse of academic freedom of speech in a considerable number of his papers. Or, if we refrain from referring to continental legal categories of abuse of right (or freedom), we can conclude that many elements and aspects of Finnis' deliberations on this topic exhibit the characteristics of poor academic, and especially poor philosophical and scientific practice.

Now we shall turn to the other main thesis discussed herein, which relates to potential discriminatory and phobic nature of Finnis' views.

2.2. Thesis on (Non-)Discriminatory and (Non-)Phobic Nature of Finnis' Views

We will first address the issue of *discrimination*. Again, without engaging in theoretical discussion on definition of discrimination, we shall review only the three most basic manners in which discrimination

manifests itself in law, as an unlawful differentiation. This are: (A) in legal practice/life: illegally different treatment as one's behaviour in legal order; (B) in political activism: (il)legitimate and (il)legal political advocacy of elimination or establishment of certain preferences or disadvantages in a legal system; and (C) in philosophy of law and legal sciences: presentation of similarities and differences of certain phenomena that grounds and justifies unlawful discriminatory value judgements, regardless of whether it has an impact on the first two manners in which discrimination manifests itself.

Hence, in this case, the relevant discrimination in law based on (homo)sexual orientation can refer to: (A) legally banned different treatment of homosexuals, i.e. discrimination of homosexuals; (B) (il)legitimate and (il) legal political advocating of legal discrimination based on (homo)sexual orientation, i.e. the advocating of specific constitutional/statutory provisions (for example, (un) lawfulness of homosexual marriage, or merely registered homosexual partnership that is not called marriage, or homosexual (in)capacity for adoption of children or that capacity only in the absence of heterosexual candidates, etc.); or (C) just the expressing of one's own legal philosophy or scientific views on homosexuality and similar or allegedly similar phenomena.

(A) In Finnis' case there are no accusations of a specific discriminatory behaviour towards anyone, nor is there any indirect knowledge, statements or evidence of that. Since this was the only relevant form of discrimination in the existing practice of the Oxford academic community (University of Oxford 2013; 2017; Petition 2019), we can conclude that there was no discrimination in this sense in Finnis' case. But the Petition was also initiated in order for this academic community to

start taking into consideration and forming a response to other (referred under (B) and (C) herein) forms of discrimination (Petition 2019).

(B) As far as Finnis' political advocating legal exclusion or distinction based on specific sexual orientation, through certain constitutional and legal decisions, is concerned, we should distinguish between two things: first, Finnis' political agitating for specific discriminatory constitutional and legal decisions, and second, his advocating and promoting of such discriminatory normative decisions either *de lege lata* or *de lege ferenda* in his philosophical/theoretical/scientific papers.

(B-1) Firstly, to our knowledge, the only known case of Finnis' political and expert activity in this sense is his 1992 deposition before the Colorado Supreme Court in favour of Amendment 2 to the Colorado Constitution, prohibiting any positive anti-discriminatory legal protection for lesbians, bisexuals and gays. This amendment was successfully contested before the Colorado Constitutional Court and it also reached the US Supreme Court.[6] When testifying in favour of Amendment 2 before the Colorado Constitutional Court in 1993 Finnis stated that "A political community which judges that the stability and protective and educative generosity of family life are of fundamental importance to the whole community's present and future can rightly judge that it has compelling reasons for judging that homosexual conduct – a 'gay lifestyle' – is never a valid, humanly acceptable choice and form of life, [...] and doing whatever it *properly* can [...] to discourage such conduct" (cited from Bamforth 1997, 14). It seems to us that this is an undoubtedly discriminatory (Barnett *et al*. 2003), but also an undoubtedly legitimate and legal

6 The Supreme Court of the US *Romer v. Evans* 517 US 620 (1996).

opinion. Why? Because its content might be discriminatory but the issue was legal and legitimate because it was expressed in the circumstances of a legal, i.e. court debate on its constitutionality, initiated by Amendment 2 to the Colorado Constitution, and at that moment it was still pending – *open* as a positive law issue. We consider that even after the final ruling on this case, Finnis' or anyone else's *similar* political action for changing the constitution or statutes could *under certain circumstances* remain legitimate and legal. However, the aforesaid behaviour towards lesbians, bisexuals and gays since then definitely represents a breach of law, i.e. unlawful discrimination.

(B-2) Secondly, apart from the Colorado case, Finnis does not discuss nor advocate specific constitutional or legislative solutions and regulations in his papers. It is striking that he does not review different possible constitutional and statutory options, nor appropriate arguments in favour and against them. This is not good either for philosophy, as *vita contemplativa*, nor for law as praxis, since it distances the philosophy of law – especially philosophies of constitutional, family, marital and other branches of law – from real life, *vita activa*, by seeking arguments in favour of specific legal provisions exclusively in the works of prominent authors from the distant past. Even the case of the Colorado constitutional Amendment 2, which Finnis cites in several places in his papers (Finnis 2011a, 16, 99, 111, 345, 352, 372, 378, 385, 387), is mentioned only in passing, most often in footnotes, and he refers to the discussion on the history of ideas that he conducted on this occasion with Martha Nussbaum (Nussbaum 1994) and others more often than to the very constitutional and legal issue that was being contested. Even in the rare instances when he does engage in a more detailed

legal analysis of this issue, he mostly limits it to the adoption rights of homosexuals without even quoting or paraphrasing the contested amendment, let alone discussing it in detail and explaining his contestable arguments in favour of such an amendment. Overall, Finnis' papers also do not contain the second manifestation of unlawful discriminatory views in any of their two variants.

(C) Finalizing the analysis of the (non)existence of discrimination *in Finnis' work*, it remains to be seen whether his papers contain unlawful discriminatory attitudes barring the ones already reviewed under B. The answer to this question is negative as well, because legal discrimination and value-based disqualification *do not* overlap. Although Finnis holds some criteria for distinguishing and separating, as well as equating and grouping that are today unacceptable to some persons, and even occasionally legally unacceptable in some legal orders, still these could not be defined as legal discrimination in *stricto sensu*. On the other hand, it is completely normal and natural for some members of Finnis' audiences and readers to assume that he has expressed his philosophical or theoretical attitudes and views as correct and truthful in order for them to be embodied in the societal practice, thus they see them as legally discriminatory. Allow us to recall these previously mentioned views: deliberate genital coupling of persons of the same sex is repudiated for a very similar reason as copulation of humans with animals; there could be a link between gayness and child abuse; homosexual conduct is evil, wrong and bad not only for the society and the state but also for anyone unfortunate enough to have innate or quasi innate homosexual inclinations; the view on the equal wrongness/sinfulness of masturbation, homosexuality and bestiality; the

sex acts that same-sex partners engaged in, intending to culminate in orgasmic satisfaction by finger in vagina, penis in mouth, etc., remain non-marital [sex acts], and consequently unreasonable and wrong, even when performed in a like manner by married couples; cannibalism, bestiality, coprophagia and homosexual acts fall in the *same* group of unnatural pleasures; homosexual conduct – "gay lifestyle" – is never a valid, humanly acceptable choice and form of life so the political community should do anything appropriate to discourage such behaviour.

Allow us to recall that the second section of the Petition demands that the University of Oxford clarify its policy on discriminatory professors, inter alia, because the *real state* of affairs *does not* correspond to the objectives of "inclusive culture which promotes equality and values diversity", as well as "a positive environment of fairness and respect, free from harassment" (University of Oxford 2013; 2017) promoted in these documents (Petition 2019). The Petition notes that in the current practice, students and staff have to wait for a *person-to-person* instance of harassment, intimidation or victimisation before they make a complaint, while there is no response to professors targeting disadvantaged groups in a more general manner, such as in their published papers (Petition 2019).

One can gain the impression that the authors of the Petition were aware that the existing regulations at the University of Oxford would allow for the accusation of discrimination and harassment (or harassing discrimination) against Finnis to be rejected as unfounded precisely for the aforementioned reasons (i.e. because it is not a case of harassment, victimisation or intimidation of a *specific person or persons* by a specific person, but instead a case of a professor targeting disadvantaged

people in a more general manner, through his papers), which is precisely why they defined such general (or to be more precise specific group-related) targeted harassing discrimination of disadvantaged groups as *hateful statements*, i.e. *phobic* – that is to say, *homophobic* or *transphobic* – views (Petition 2019).

This is why we should now finally turn to *hate speech* and *phobic* statements. Hate speech has been a crime in England, Wales and Scotland since 1986, but it began to relate to hate speech towards persons of a specific sexual orientation in England and Wales only after the 2008 Addendum (Vanderbeck, Johnson 2011). We should note that hate speech can be expressed through various means (words, behaviour, written material, recordings, or programme) but it must be threatening and not only insulting or defamatory. According to this definition, Finnis' speech cannot be classified as hate speech, so this is probably why the authors of Petition mention Finnis' *hateful statements* and *phobic, i.e. homophobic and transphobic* views. If we take another look at Finnis' views cited herein (see under C above), it seems that it could be said that even if they are not hateful, i.e. not the expression (or conscious consequence) of hate, nor hate-inducing in relation to persons they discuss, they still undoubtedly express and induce *constant, continuous, strong and even extreme aversion, dislike, revulsion* in relation to the people whose conduct they describe. That is why we consider that such Finnis' views are undoubtedly phobic.

3. CONCLUSION AND LESSONS LEARNED

In our opinion, Finnis did not overstep the boundaries of the academic freedom of speech, especially not with hate speech in the legal sense of that term, but he did abuse that freedom.

His exercise of academic freedom of speech does not, in our view, constitute good academic practice for the following reasons:

First, because he presents his general and legal philosophy as well as his religious beliefs as the only correct views;

Second, because he fails to take into consideration different, critical and opposing opinions (not even those expressed by other Roman Catholic authors);

Third, because he deals with the issues belonging to the sphere unregulated by law (such as sexual practice of consenting adults) in a manner that expresses and invites strong aversion towards homosexuals;

Fourth, because in doing so he uses arguments presented by prominent historical authors (such as Aristotle, Aquinas, Kant, etc.) in an uncritical manner, inappropriate for contemporary philosophy of law;

Fifth, because he refrains from reviewing scientific findings relevant for contemporary legal and political – primarily constitutional and legislative – decisions, etc.

Some of Finnis' views, as abstractly expressed opinions, are – without a doubt – phobic, but there is no evidence of his specific discriminatory behaviour towards anyone.

So, in our view, Finnis could be held accountable only in terms of professional ethics, but not in the legal sense.

The question whether Finnis' phobic views and breach of the aforementioned rules of professional ethics are a sufficient reason to consider the demand in

the Petition (for him to stop teaching at the University of Oxford) as morally correct, just and fair, is a decision that can be made only by the University of Oxford community. Only then could outsiders evaluate that decision and particularly its rationale.

However, ultimately, we must wonder why for more than twenty five years (which from a historical point of view is a period during which a new generation matures, i.e. the period of generational shift) there were *almost* no reactions to Finnis' now contested views, so frequently repeated (in his papers and probably in lectures as well).

We say *almost* because, apart from some honourable exemptions (meaning the authors mentioned herein as well as some others, who all – we believe – were not sufficiently supported by other members of our profession), Finnis' approach to methodological ways of inquiry, dealing with and views on human homosexuality received almost no criticism. This especially applies to the most prominent authors in the field of the *legal philosophy*, who were first-called by professional duty, precisely because Finnis came from their ranks. Their and others' predominant reaction was silence until the Oxford academic community tolled a very loud bell in early 2019. We shall see whether it will also take an official stance.

The voices from the geographically wider and professionally narrower cosmopolitan community of legal philosophers were muted and not great in number. We, the members of that community, have kept quiet because it is better for one's career although worse for our profession. So, Finnis is not the only one who should be held accountable for such an abuse of academic freedom of speech, and the academic practice of repetition and republishing of his phobic views, respectively. All

of us from the legal philosophers' community who remained silent are also responsible. The bell tolls for us as well.

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