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Chapter I

Introducing a map of (in)equalities

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Equality has been discussed for thousands years in the fields of philosophy and law and most recently in the social sciences and humanities. This discussion has raised most of the philosophical, moral, legal and political questions that are connected with the issues of justice and freedom. However, little discussion has focused on whether citizenship makes people equal or whether those who are equal are recognised as fellow citizens;[1] whether freedom renders all people equal; whether we are equally free to differentiate ourselves from one another. Moreover, the extent to which the principle of equality should include the respect for human diversity still remains an open question.

At least three significant groups of problems determine the way in which equality is questioned and scrutinised: equality of treatment, opportunity and welfare. The equality of individual rights vis-à-vis the law relates to both: the granting of such rights and limiting their application, as well as their deprivation. In order to avoid potential misunderstandings, we must distinguish the following: the individual, who is characterised by his or her existence; the uniqueness that is manifest in the meaning of the individual's name and the ability to use an identity document (i.e., in its descriptive terms); and the prescriptive approach to a person as a personal individuality of 'the highest quality'. Currently, the nature of human rights is determined as inalienable and inviolable, and therefore as constituting a natural attribute of an individual. The two central attributes of the concept of

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[1] Compare Adam Przeworski's *Democracy, equality and redistribution*, in: Richard Bourke, Raymond Geuss (eds.), *Political Judgement. Essays for John Dunn*, Cambridge University Press, Cambridge 2009, p. 288.

human rights are 'being universally valid' and 'being inalienable'. Nevertheless, the difference between the human species — 'being an individual', and human quality — 'being an individuality' should also be considered because it is crucial for understanding the plurality of the social forms of human lives.

In the liberal perspective, individual fundamental rights are exclusively the rights of the individual, that is, his or her individual rights. Their positivist legal expression is in the normative protection of the civil attributes of the individual and his or her unique legal entity. The uniqueness of granting such rights consists in the fact that they are for the benefit of a personalised individual according to the personal meaning of their own names (e.g., age, mental health etc.). Consequently, as 'a personal legal property', every citizen is equally granted the fundamental rights — not as an equal among equals, but as a unique and incomparable person.[2]

As Ronald Dworkin pointed out, "the fundamental human right […] is the right to be treated with a certain *attitude*: an attitude that expresses the understanding that each person is a human being whose dignity matters".[3] Thus, dignity is the quintessence of a human being because it is inextricably linked with every human being irrespective of who he or she is and how and where he or she lives. Thus, for Thomas Cristiano, even "justice is grounded in the dignity of persons".[4] To the extent that the universal and egalitarian concept of dignity assumes that all people deserve to be treated with respect, the concept of dignity has taken the form of the demand to recognise the equal status of all cultures and to eliminate inequalities of gender, origin and race. This concept is based on the fundamental belief that as human beings, we are persons and hence we are all equal, even if we are different in all other respects.[5] Dignity is thus a criterion for establishing whether a given law is fair because fair laws protect dignity, and the violation of such laws is inconsistent with the inherent dignity of all persons. It is therefore accurate to say that no one should be regarded as morally inferior based on physical or racial characteristics that are entirely independent of him or her because "human persons have *equal moral status*".[6]

In addition, it should be kept in mind that living or treating others in ways that are contrary to human rights is afforded neither moral legitimacy nor the right to equal opportunities in life even when they constitute an integral part of a cultural

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[2] Werner Becker, *Über das 'Paradox der Menschenrechte' und wie es sich vermeiden ließe*, in: Eric Hilgendorf (ed.), *Wissensschaft, Religion und Recht. Hans Albert zum 85. Geburtstag*, Logos, Berlin 2006.

[3] Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate*, Princeton University Press, Princeton–Oxford 2006, p. 35.

[4] Thomas Cristiano, *The Constitution of Equality. Democratic Authority and its Limits*, Oxford University Press, Oxford–New York 2008, p. 13.

[5] John Finnis, *The Priority of Persons*, in: Jeremy Horder (ed.), *Oxford Essays in Jurisprudence: Forth Series*, Oxford University Press, Oxford 2001, p. 1.

[6] Thomas Cristiano, *op. cit.*, p. 17.

practice or an element of the religious belief system with which people identify. The principle of neutrality is a manifestation of the egalitarianism of human rights, and the latter, in turn, entitles everyone equally to live in a democratic community governed by democratic rules. Because neutrality has an ethical dimension, it does not allow for the attitude of indifference vis-à-vis the cultural forms that violate human rights.[7] In other words, the idea that tolerance (i.e., the neutrality principle) results from human rights is integral with respecting the rights of others. Accordingly, it is not a question of any tolerance but of tolerance that is directly related to the rights and freedoms vested in others.

The human rights speech is paramount because it has a real influence on the daily life and treatment of many people all over the world. Nevertheless, recently, the focal issue concerns the daily functioning of political and public institutions that exercise, apply and obey laws, including human rights. Political and public institutions are supposed to create possibilities whereby diverse persons and/or groups are able to make use of their rights and influence the system of decision-making for the sake of combating inequalities and discriminatory practices. Therefore, Christiano argued that "public equality, or the idea that the institutions of society must be structured so that all can see that they are being treated as equals, is the core principle of social justice".[8] In formulating the principle of public equality, he refers to the concept of interests of all members of the society as well as to the concept of common good understood as well-being. Thus, for Christiano, a basic principle of justice is that "a just society advances the interests of all persons in it and it advances the interests of persons equally",[9] and therefore the well-being, not the simple aggregation of interests, is of huge importance. For Christiano, the political right to participate in institutions with the goal of changing the world in order to advance the equal interests of persons stems from the principle of distributive justice. In other words, through the principle of public equality, Christiano attempts to include the concept of well-being in the issue of distributive justice.

Because equality, not freedom, is the guiding principle of human rights, human freedom cannot be defined in isolation from the principle of equality. The right of freedom can thus be adequately determined only such that it prescribes obedience only to rules that could be established in concert with all others. In analysing this issue from the perspective of semantics, it cannot be explained without reference to the legislative power equally enjoyed by all. The basic premises of human rights are therefore inherently connected to the right to live

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[7] Wolfgang Kersting, *Recht, Gerechtigkeit und demokratische Tugend. Abhandlungen zur praktischen Philosophie der Gegenwart*, Suhrkamp Verlag, Frankfurt am Main 1997, p. 463.

[8] Thomas Cristiano, *op. cit.*, p. 2.

[9] *Ibidem*, p. 12.

in the state under the rule of law as well as the right to a democratic system of power.[10]

However, discussions about the concept of distributive justice have largely contributed to the development of the concept of the equality of opportunity. Lesley A. Jacobs argues the following:

> The traditional view of equality of opportunity is *one*-dimensional. This view focuses on procedural fairness. In the 1960s, a number of influential liberal political philosophers — most notably, John Rawls and Brian Barry — introduced a two-dimensional view of equality of opportunity. This *two*-dimensional view stressed not only procedural fairness but also background fairness. It constitutes a major advance over the one-dimensional view because it is sensitive to the extent to which the distribution of opportunities is partly a function of background socio-economic differences between individuals.[11]

The discussion launched in the nineteen sixties about the equality of opportunity was heated, and it divided academics into adherents and opponents of distributive justice as a principle of a well-ordered society. For example, Gerald Allan Cohen formulated a detailed objection to, as he termed it, the Rawls/Berry[12] argument on equal opportunity, based on the entailed acceptance of certain inequalities, such as the reinforced inequality of talent, in which "the talented should end up with more, since […] the circumstance of their greater talent justifies no distributive effect".[13] In addition, the labour burden and inequalities of people's

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[10] Robert Alexy, *Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat*, in: Stefan Gosepath, Georg Lohmann (Hg.), *Philosophie der Menschenrechte*, Suhrkamp Verlag, Frankfurt am Main 1998, p. 254 ff.; Klaus Günther, *Liberale und diskurstheortische Deutungen der Menschenrechte*, in: Winfried Brugger, Ulfrid Neumann, Stephan Kirste (Hg.), *Rechtsphilosophie im 21. Jahrhundert*, Suhrkamp Verlag, Frankfurt am Main 2008, p. 338–359.

[11] Lesley A. Jacobs, *Pursuing Equal Opportunities. The Theory and Practice of Egalitarian Justice*, Cambridge University Press, Cambridge 2004, p. 15.

[12] Brian Barry reinforces (or intends to reinforce) the Rawlsian argument formulated and discussed as the difference principle by the recourse to the Pareto argument. Compare John Rawls, *A Theory of Justice. Revised Edition*, Oxford University Press Oxford–New York; Brian Barry, *Theories of Justice. A Treatise on Social Justice, Volume I*, University of California Press, Berkeley–Los Angeles 1989.

[13] G.A. Cohen, *Rescuing Justice and Equality*, Harvard University Press, Cambridge, MA–London 2008, p. 98. Richard J. Arneson formulates Cohen's objection very succinctly: "Cohen argues that Rawls produces an intuitive argument for the difference principle that illicitly moves from (a) premises that appeal to the value of equality to (b) a conclusion that affirms the difference principle as the core principle of distributive justice. […] In other words, the difference principle instruct us to arrange the basic social structure so as to make the worst of as well of as possible, and to let equality chips fall where they may. Cohen protests that there is an incoherence in this argument. From premises afforming the intrinsic moral value of equality, how can you validly reason to a conclusion that says inter alia that equality is not intrinsically morally valuable at all?". Richard J. Arneson, *Justice is not Equality*, in: Brian Feltham (ed.), *Justice, Equality and*

conditions generated by the economic market shaped the research interests of Cohen.[14] In general, Cohen is convinced that fair institutions, which are designed to meet the requirements of justice and equality of opportunity, do not suffice to make a society a fair one; also needed is the attachment of all members of a society to the principles that constitute a part of the motivational structure that is characteristic to them, such as an ethos. Thus, Cohen is interested not only in formal inequalities but also in substantive, genuine inequalities to which the equality of opportunity seems blind.

Social awareness has been influenced by the numerous emancipation movements that originated in Western countries and directed against authorities and/or social inequalities. Examples are the abolitionist movements of the late eighteenth and early nineteenth centuries, modern feminist movements, and contemporary movements that fight for the rights of indigenous peoples. The fact that the recognition of human rights had to be struggled for is indeed a common element in all cultures, particularly in Western, Islamic, Asian and African ones. They are not the primordial element of any particular cultural or religious tradition, but they arise in the course of public political debate.[15] The same applies to the principle of equality: the more that a society changes, the more that the principle of equality, that is, its merits, shall be put into question.

In the context of the discussion about the equality of opportunity and the diversity and plurality of contemporary (changing) societies, Jacobs proposes a shift from the concept of equal opportunity as a guiding standard to the concept of equal opportuni*ties* as meeting the demand to be an ideal that is "sensitive to this pluralism and diversity of opportunities".[16] Although competitive opportunities and non-competitive opportunities should be allocated through distinct and appropriate processes,[17] it is important, as Jacobs rightly argues in *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice*, to understand that all forms of inequalities should be understood as social ones. Moreover, the law should be comprehended based on the post-positivist paradigm, which serves as the best tool because of its transformative power to redesign the social structure of inequalities. This issue was also raised by Adam Przeworski, who stated, "even if all human beings are born only as such, society generates differences among them. Indeed, if their parents are unequal, they become unequal at the moment they are born. To make them equal, recourse to law is necessary".[18] Hence, in

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Constructivism. Essays on G. A. Cohen's Rescuing Justice and Equality, Wiley-Blackwell, Malden, MA–Oxford 2009, p. 16.

[14] G.A. Cohen, *op. cit.*, especially Part I.

[15] Heiner Bielefeldt, *Menschenrechte in der Einwanderungsgesellschaft. Plädoyer für einen aufgeklärten Multikulturalismus*, transcript Verlag, Bielefeld 2007, p. 28 ff.

[16] Lesley A. Jacobs, *op. cit.*, p. 23.

[17] *Ibidem*, p. 24.

[18] Adam Przeworski, *op. cit.*, p. 287.

general, unjust inequalities are those that matter *in* and *for* society because they deprive persons from their inalienable dignity or prevent them from the pursuit of one's life with dignity. It follows that employing the law matters if and only if we have achieved some philosophical, moral and political understanding of what equality means and the ways in which inequalities strike and infringe human dignity. However, this understanding, at least in the realm of practical philosophy, is not achieved for nothing but for the sake of changing the world and making it a better place to live for each person. For that very reason, the law is needed as a medium of communication in reaching agreements that are subsequently applied to transform social, economic and political structures.

Indeed, the issue of equality, particularly the principle of equality, has been a matter of profound academic debate. This issue has also been the subject of legal scrutiny and appropriate decision-making to introduce legal recommendations that are expected to transform social, economic and political structures. For example, in London on 3–5 April 2008, the Equal Rights Trust organised the conference, Principles on Equality and the Development of Legal Standards on Equality, which concluded with the Declaration of Principles on Equality.[19] The Declaration consists of six parts: *Equality*, *Non-Discrimination*, *Scope and Right-Holders*, *Obligations*, *Enforcement* and *Prohibitions*. It includes twenty-seven articles that address the majority of the issues discussed in this chapter. The Declaration recognises the right to equality of all human beings and the right to be equal in their dignity (Art. 1; Art. 9 on a right-holder restates the claim). It emphasises that similarly situated people should be treated equally but differently situated people should be treated differently "according to their different circumstances" (Art. 2) and their capabilities to participate in shaping and changing the world. Therefore, unjust inequalities, that is, socially significant inequalities that result in the discrimination against certain persons and/or groups "must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms" (Art. 5). The duty-bearers are most of all states, however, the other actors also should respect those rights (Art. 10). These issues have been elaborated and justified in this chapter.

It is extremely important to highlight that the Declaration of Principles on Equality was endorsed by the Standing Committee of the Parliamentary Assembly of the Council of Europe, which on 25 November 2011 in Edinburgh adopted the "Resolution and a Recommendation on 'The Declaration of Principles on Equality'" (Resolution 1844 (2011)),[20] "reiterat[ing] the crucial importance

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[19] Text of the Declaration of Principles on Equality is available at: http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf (access: 22-04-2016).

[20] Text of the *Resolution and a Recommendation on 'The Declaration of Principles on Equality'* is available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=18046&lang=en (access: 22-04-2016).

of the principles of equality and non-discrimination, as an essential part of the international protection of human rights, already enshrined in the 1948 Universal Declaration of Human Rights and the 1968 International Covenant on Civil and Political Rights" (Art. 1). Because the referred document has the status of recommendation, the Parliamentary Assembly of the Council of Europe would be able to call on its member states to adopt the Declaration and then elaborate, adopt and/or develop appropriate and effective equality policies and legislation as well as anti-discrimination measures (Art 9 & 10).

It must be noted, however, that adopting and/or developing effective policies and legislation to a certain system of law and appropriate institutional settings is always a challenging endeavour that is demanding both theoretically and practically. Therefore, on 28–29 September 2014, the Centre for the Theory and Philosophy of Human Rights (CENHER), at the University of Lodz, Faculty of Law and Administration, held an international conference dedicated to the issues concerning the principle of equality. This volume consists of selected papers that were presented and discussed at this conference.

The authors of the papers collected in this volume consider what contemporary democratic societies should be guided by to prevent dominant groups from violating the principle of equality. It may seem trivial to assert that in the twenty-first century, in every society there are various forms of social life. Nevertheless, this pluralism plays an important role in shaping the democratically legitimised law and in the democratic functioning of various public and political institutions. Thus, the principle of equality is of particular importance in assuring these various forms.

The volume consists of three parts. In Part I, *The Idea of Equality under Scrutiny*, three chapters analyse the content of equality from a legal perspective, focussing respectively on the historical transformation of its meaning and its contemporary significance for the law (Jasminka Hasanbegović); its contribution to the constitutional debates (Jerzy Zajadło); and its relationship to freedom as a core legal value (Tomasz Bekrycht). Part II, *Concepts of Equality in Question*, focuses on issues of equality raised in the well-known theories of John Rawls (Anna Kalisz), Paul Ricoeur (Marcin Pieniążek) and Hans Kelsen (Monika Zalewska). The theoretical essays in Part I and Part II are complemented in Part III, *Respecting the Principle of Equality — Case Studies*, by discussions about practical problems in implementing and ensuring equality. These problems consist of the legal regulation of culturalism (Ivan Padjen), judicial impartiality and independence (Artur Murdecki), copyright in the EU (Anna-Maria Andersen), Polish legal culture (Paweł Skuczyński), and the barriers faced by women who participate in the political sphere (Małgorzata Niewiadomska-Cudak).

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