

Chapter II

(In)equality of human beings: eternal — premodern, modern and postmodern — or outdated legal idea?

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This paper focuses on the idea of legal equality, but first and foremost on the idea of legal equality of human beings. The idea of equality lies at the core of the idea of justice, more precisely it lies at the core of every idea, conception or notion, let alone theory of justice.¹ Namely, justice demands that equals are treated equally, and unequals unequally. This is why justice is more than equality. Equality demands that equals should be treated equally, and justice not only explicitly demands that the unequals are treated unequally, but also inherently requires two other things: on one hand, the differentiation between essential and non-essential (in)equalities, and on the other hand proportionality, proportional action, proportion in treating essential (in)equalities. Hence, equality by itself can be absolute, while equality as a core part of the notion of justice must be also relative, precisely due to being subject to comparison and grading.² Although it may sound paradoxically, it is here, in this very fact of being subject to comparison and grading, that smaller and greater inequalities, as well as smaller and greater *equalities* stem from! And, although the phrase ‘smaller and greater equalities’ might sound Orwellian, ironic, or even totalitarian — as you like — it still doesn’t

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¹ Allow me just to remind you of the span of theories of justice between Aristotle, *Nicomachean Ethics*, book V; and Chaim Perelman, *De la justice*, ULB, Bruxelles 1945 (later appearing in *Justice et raison*, Editions de l’ULB, Bruxelles 1963, as well as *Cinque leçons sur la justice*, in: *Droit, morale, philosophie*, LGDJ, Paris 1968); or John Rawls, *Justice as Fairness*, articles written from 1957 (“*Journal of Philosophy*” 1957, October 24, 54(22), p. 653–662) to the end of his lifetime (2002), and two books *A Theory of Justice*, Belknap Press of Harvard University Press, Cambridge, MA 1971 (rev. ed. 1999) and *Justice as Fairness: A Restatement*, Belknap Press, Cambridge, MA 2001.

² Cf. Aristotle, *Topics* or *Topika* or *Topica*, Books II and III; topoi of comparison belong to topoi of accident.

always have to be so when it is stated that “all animals are equal, but some animals are more equal than the others”,³ as we are going to see.

When we add *fairness* (I prefer this colloquial word to the legal term of Latin origin: *equity*, stemming from ἐπιείκεια in Ancient Greek), which has been determined since Aristotle as something surpassing justice, namely as justice (i.e. justness) of a specific case, hence (in)equality caused by specific circumstances,⁴ then it is clearer that not only equality, but also justice (i.e. justness) can be compared and graded, and, moreover, it enables us to notice the dialectics in the relationship between equality and justice, the dialectics of their universal (or general) and specific (or individual) features, where inequality caused by specific circumstances can lead to something which is better and greater than justice, namely fairness. Such a complex connection between equality and justice results in the fact that, accordingly, on the universal, general level one can say very little about equality and justice, hence raising the question whether two Peters — Westen and Unger — were right when talking about the empty idea of equality,⁵ and empty ideas in general, in the context of criticism of the analytic philosophy.⁶

³ George Orwell, *Animal farm*, 1946/2004. AAARGH Internet Edition, p. 57.

⁴ Aristotle, *Nicomachean Ethics*, transl. by W.D. Ross, bk. V, ch. X, §2, §6, §8, 1137b, p. 138–139:

“The same thing, then, is just and equitable, and while both are good the equitable is superior. [...] And this is the nature of the equitable, a correction of law where it is defective owing to its universality”. And in the same chapter *in fine*: “It is plain, then, what the equitable is, and that it is just and is better than one kind of justice”. The same Aristotle’s thought, if we use word *fairness* instead of *equitable*, then reads: “The same thing, then, is just and fair, and while both are good the fairness is superior. [...] And this is the nature of the fair, a correction of law where it is defective owing to its universality”. And *in fine*: “It is plain, then, what the fair is, and that it is just and is better than one kind of justice”.

⁵ Disagreements with Peter Westen occurred even before his lecture held at his University’s conference on February 6, 1980, and subsequently published as *The Empty Idea of Equality*, “Harvard Law Review” 1982, 3(95), p. 537–596. Westen soon replied to criticism in *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, “Michigan Law Review” 1983, 81, p. 604–663; followed by *The Concept of Equal Opportunity*, “Ethics” 1985, 95, p. 837–850; and finally in the book *Speaking of Equality: An Analysis of the Rhetorical Force of ‘Equality’ in Moral and Legal Discourse*, Princeton University Press, Princeton, N.J. 1990. A very good critical overview of attitudes and discussions concerning the (non)emptiness of the substance of the equality idea advocated in the Anglo-American theory by Westen, Kymlicka, Dworkin, Waldron, Hart, Rawls and others, as well as a comprehensive critical overview of legal (legislative and court) practices can be found in Nicholas Mark Smith, *Basic Equality and Discrimination: Reconciling Theory and Law*, Ashgate, Farnham–Burlington 2011.

⁶ Peter Unger in his recently published book, *Empty Ideas: A Critique of Analytic Philosophy*, Oxford University Press, Oxford–New York 2014 — differentiates between ‘concretely substantial’ and ‘concretely empty’ ideas, and demonstrates that the contemporary analytic philosophy deals primarily with ‘empty ideas’, purely conceptual issues, and not with any ‘concretely substantial’ issues, important for the concrete reality.

Do these two Peters have a point? It seems so. Unger is right when he discusses the emptiness of ideas of analytic philosophy, which by itself deals with nothing ‘concretely substantial’, thus lacking any significant insight into concrete reality. In a way, 34 years later, Unger provides philosophical and epistemological foundations for Westen’s⁷ critical view of the empty idea of equality based (either consciously or unconsciously) on the analytic philosophy, which has dominated the Anglo-American intellectual world throughout the XX century. However, Westen himself is mistaken in approaching the equality principle in the same manner, as a thousand-years-lasting *fixture* of western thought, which caused the principle of equality to be empty of content. For, it is precisely through the universalization and generalization which are not based on and connected to unavoidably partial, parochial, specific realities that the content of the equality principle was rendered empty. The principle itself, transformed into a notion, has been analysed logically and conceptually in different branches of analytic philosophy, including analytical legal philosophy, without any linkages to actual reality.⁸ On the other hand, Westen — seemingly on the tracks of Unger, but actually, in a way anticipating him — considers that the principle of equality, in order to be meaningful, has to incorporate specific external values determining which persons and actions are equal or similar. However, once these external values are established, the very principle of equality becomes redundant, and, moreover, a source of confusion and logical fallacies, so the equality rhetoric should then be abandoned. Hence, Westen is correct that concretely substantial principles of equality are always in a certain manner linked to specific, partial, parochial, concrete realities and, so to speak, contextualized by them; that their meaning is determined by these contexts, i.e. concrete realities. But, Westen refrains from engaging in contextual deconstruction of the content of ideas or principles of legal equality, considering instead that this universal idea empty of any content should be abandoned together with the equality rhetoric. And this is where, in my opinion, Westen is wrong. The equality principle is not an outdated, nor redundant, let alone logically harmful idea in concrete, as well as postmodern reality.

We shall now abandon the analytic philosophy’s theoretical framework and turn to the contrasting framework of continental philosophy, but not the XX century one, nor even modern continental philosophy. We will return to its very foundations. Let us first go back to Aristotle. Why? Because, as we have seen, he explained to us the origin of such dialectic complexity of links between (in)equality, (in)justice and (un)fairness, as well as their universal (or general) and

⁷ Peter Westen, *Idea of Equality*, p. 537 *sqq.*

⁸ For basics of analytical jurisprudence, see Brian H. Bix *Analytical jurisprudence / Analytical legal philosophy*, in: *A Dictionary of Legal Theory*, Oxford University Press, Oxford–New York, p. 6–7. This is the tradition which, according to some, begins with Bentham, continues with Austin, and in the XX century was followed primarily by Hart, and then many others.

concrete (or specific) traits which have presented a stumbling block and a Gordian knot for both Anglo-American analytic philosophy and Anglo-American jurisprudence more than two millennia after Aristotle, as we have been informed by the two Peters. But that is not all. With Aristotle's help we can gain several more important insights.

The renowned fifth book of Aristotle's *Nicomachean Ethics* tells us that equality (as ordinary or essential or absolute equality, and as proportionate or relative equality, i.e. proportionality) lies at the core of the idea of justice as a perfect, complete, greatest virtue, or supreme legal value. Justice as a specific type of equality, hence, is stretched between the idea of identity as sameness or identicalness, and the idea of fairness as uniqueness.

Let us first review how equality and identity 'stretch' justice. Only the essentially equal or at least essentially similar phenomena are called the same, identical, equitable. This is precisely where the first problem arises. Essence⁹ is an inherent principle of phenomena (i.e. beings), which is, in the logical sense, expressed by a definition (i.e. by the closest genus and the specific difference). Essence surpasses all individual phenomena (i.e. individual beings), but it is absent, non-existent outside of those individual beings. Aristotle's teaching on identity points out another, even greater source of problems.¹⁰ This teaching

⁹ Aristotle, *Metaphysics*, bk. V, 1017 b 23–26.

¹⁰ Idem, *Topica*, book VII, especially chapter I. Here Aristotle focuses on three basic types of identity: 1) numerical (which is actually the identity of designations of one single phenomenon, in the same way synonyms signify a single phenomenon, e.g. house and building), 2) specific identity (which is in turn the identity of phenomena, and not of their designations, more precisely the identity according to species, e.g. Tutsi and Hutu — two different peoples, i.e. two different types of ethnic groups both in Burundi and Rwanda), and 3) generic identity (which is also the identity of a phenomenon, and not of its designations, but in this instance the identity by genus, e.g. a black and a white may designate identity of two men, or two humans, or two horses, or two animals, i.e. a black person and a white horse). When identity is discussed, Aristotle says that the majority of persons refers to the numerical identity which can be: a₁) nominal (i.e. synonymous identity, for example house and building) or else a₂) definition identity (square and isosceles right-angled quadrilateral), b) proper identity (man and being capable of laughter) and c) accidental identity (Professor at University of Belgrade Faculty of Law present in Łódź on September 28, 2014 and Jasminka Hasanbegović). We should note that, when it comes to numerical identities (as identities of designations, i.e. meanings of terms) we have two designations (i.e. two terms) and a single concept and a single phenomenon (i.e. being or event or thing), while in the case of specific and generic identity (as identities of beings or phenomena or events or things) we have three designations (i.e. three terms) and three concepts, and two phenomena (or beings or events or things). It should also be noted that out of four numerical identities (as identities of designations, i.e. meanings of terms) only one — definition identity — relates to the *essence*, or, more precisely, to the *designation of the essence* of a being (or phenomenon or event or thing), and most precisely, to the *designation of a total essence* of a being, while the other two identities — specific and generic (as identities of beings or phenomena or events or things) refer to the *essence* too, but only to their respective *part of the essence* of a being or phenomenon or event or thing. For more on this, see Jasminka Hasanbegović, *Topika i pravo [Topica and Law]*, CID, Podgorica 2000, especially p. 33, 66–67 *et passim*.

clearly points out the comprehensive ontological and epistemological difficulties and inherent limitations arising in the course of determining and expressing identity, and in that context of equality. These should always be kept in mind, especially in philosophy and jurisprudence.

Now let us address the proportional or relative equality, i.e. proportionality. When a legislator achieves it, namely when it is achieved in a general, abstract manner, we talk about just laws. Of course, this general, abstract proportional equality is only one of the prerequisites of a law's justness. And when the proportional or relative equality is achieved by a judge in a specific case, in relation to previous, identical or similar court practice cases, we talk about a fair judge. But we have to keep in mind that the specific proportional equality in relation to adjudicated identical or similar court cases remains nothing but one of the conditions a judge needs to meet to be regarded as fair.

And finally, how do equality and fairness 'stretch' justice? By placing it between equality as the essence, or at least core, heart of justice, and then, again both equality as qualitative, essential equality of beings (or events, phenomena, things),¹¹ and equality as quantitative, proportional equality of beings (or phenomena) on one side, and fairness on the other, and more precisely, fairness as uniqueness, as unique justness, which is not only justice, but more than justness in a specific case, precisely because it gives importance to some non-essential but specific circumstances of a being (or phenomenon).¹² This is exactly the dialectics of paradox. And it seems to be the maximum that – on the universal, general, abstract level – can be said about justice set between equality and fairness. Hence the impression of *nothing new after Aristotle* — not only in theories of justice, but also in its various understandings — is basically correct.

Altogether, even Aristotle's notions of justice and equality would also be empty ideas if they had been developed only in his fifth book of *Nicomachean Ethics*, or if we disregard all other Aristotle's works, especially *Politics*, and his views on the issue of (in)equality of human beings. Inequality of slaves, barbarians, women, children — both in comparison to each other, as different family or society members, and primarily in relation to the Greeks — is explained by Aristotle as natural, as inequality founded in their unequal, different natures, first and foremost, in the different *logos* of all these beings, designating simultaneously their *language* and their *reason*.¹³ Still, some nuances should be highlighted. A reconstruction of Aristotle's notion of a man in this context would

¹¹ Which, as we have seen, represents the mentioned unattainable identity.

¹² I.e. because it takes into consideration some non-essential but specific, proper or even accidental traits of the case at hand (or as Aristotle would phrase it: it also takes into consideration some temporary properties and accidentalities).

¹³ These Aristotle's attitudes, which have attracted attention of different authorities during more than two millennia, are in more detail explained in the first two books of his *Politics* and then also in his *Generation of Animals* (bks. I, II, VI) and *History of Animals* (book IX).

show that for him a man is a Greek (and not a barbarian), a male (and not woman), an adult (and not a child). This is especially important if we recall that for him slaves are “living tools”,¹⁴ that “barbarians and slaves have the same nature”,¹⁵ that “women possess *logos*, but lack the authority, and children lack a complete *logos*”.¹⁶ So, if we accept for Aristotle a man (i.e. human being) is an adult Greek male, then we can state that Aristotle advocates the equality of all men (human beings). Moreover, a few more nuances need to be taken into account. Aristotle considered that a husband and a wife should live in *politeia*,¹⁷ i.e. a system of rule appropriate for the free and the equals,¹⁸ but still stated that a woman should not leave female house quarters, maybe because, as it was previously stated, he believed that a woman possessed *logos*, but lacked authority.

From the contemporary point of view, it could be stated, having in mind not only Aristotle, but almost the entire philosophical thought, that not only the Athenian world (including the period of its democracy), but also the entire Ancient (Greek and non-Greek) world, as well as the entire premodern world in general were ruled by the concept of inequality of human beings — a natural, God-given, or god-ordained as natural inequality of human beings, followed closely by the idea of an entirely natural, God-given *legal* inequality. This idea was realized in different concrete ways, but was almost exclusively taken as unquestionable. It is also necessary to underline that the idea or notion of man in premodern era was very limited in scope and abounding in content, which made conditions that somebody first had to fulfil in order to be considered as and called a man, like it was demonstrated on Aristotle’s example.

This makes it necessary to mention at least briefly a few rare but precious exemptions: sophists Hippias, Antiphon and Alcidamas,¹⁹ and Stoics, as proponents of exactly opposite idea to that which will be prevalent in Europe after them, namely to Christian idea of (in)equality. For, when discussing legal equality of humans, it can be stated that during the entire premodern era, not only in specific social realities, but in the world of ideas as well, almost nothing happened from the aforementioned ancient exemptions to the French revolution.²⁰

¹⁴ Aristotle, *Politics*, book I, chapter IV, §3 — 1253b *in fine*.

¹⁵ *Ibidem*, bk I, ch. II, §2 — 1252b3.

¹⁶ Cf. *ibidem*, bk. I, ch. XVII, §1 *in fine* — 1260a11.

¹⁷ *Ibidem*, bk. I, ch. XV, §1 — 1259a39 and bk. I, ch. XVI, §1 — 1259b1.

¹⁸ *Ibidem*, bk. I, ch. VIII, §3 — 1255b20; bk. I, ch. XVI, §1 — 1259b4–6; bk. III, ch. VII, §1 v 1277b7–9.

¹⁹ Mihailo Đurić, *Ideja prirodnog prava kod grčkih sofista* [*The Idea of Natural Law by Greek Sophists*], PhD thesis (1954), University of Belgrade, Belgrade 1958. I used this work from the second, extended edition of Đurić’s collected works, Belgrade 2009, Vol. 1, p. 181.

²⁰ This is, of course, a rough formulation. It would be more precise to say until Sir Edward Coke and John Locke in theory, and in practice until the English Bill of Rights (1689), Virginia

Hippias of Elis was the first to differentiate between the natural and positive law. Unknown even to the knowledgeable public, he was in early XX century ‘introduced’ to scientific circles as “the ancient Hugo Grotius”.²¹ Hippias considered all humans his fellow countrymen, kin and co-citizens by nature, but not according to human laws, since equals are naturally similar, and the human law is tyrannical and often violates the nature.²² Modern interpretations and understanding of this viewpoint differ, so the question whether Hippias was the first cosmopolitan, more precisely, the first representative of the cosmopolitan worldview, or just one among many Panhellenists — has not been answered in the same manner up till now, but the arguments in Đurić’s research clearly indicate that Hippias was the first jusnaturalist and cosmopolitan, hence a real predecessor of Stoics, if not the first Stoic.²³

Antiphon has been controversial since Late Antiquity: Are Antiphon the sophist and Antiphon the Rhamnusian, orator and politician, the same person? When the fragments of Antiphon’s work *Aletheia (The Truth)* were discovered in early XX century among accidentally unearthed papyri in Egypt as the only original document containing the sophistic teaching on natural law, the question of Antiphon or Antiphons gained importance again and the vivid discussion continued in the current century.²⁴ Antiphon explicitly states that the differentiation between good and bad families, i.e. between aristocracy and plebeians is quite barbaric, and, in his opinion, it is the characteristic of the existing legal order of positive law, since all people, Greeks as well as barbarians, are perfectly equal. Biological equality, according to him, requires legal equality by regulating interpersonal relations.²⁵

Declaration of Rights (1776), North-American Bill of Rights (1789) and the French Declaration on the Rights of Man and Citizen (of the same year, 1789), which were very influential, model legislation of the time.

²¹ In his writings on the Greek Enlightenment (VII–V century BC), which starts with the Presocratics and continues with Socrates and the sophists, Johannes Geffcken has called Hippias ‘the ancient Hugo Grotius’, comparing him to ‘the father of modern natural law’. See, Johannes Geffcken, *Die griechische Aufklärung*, “Neue Jahrbücher für das klassische Altertum” 1923, Bd. 51–52, p. 15–31, especially p. 23.

²² Cf. Hermann Alexander Diels, *Die Fragmente der Vorsokratiker*, 6th ed. revised by Walther Kranz, Weidmann, Berlin 1952, p. 333. This viewpoint of Hippias is presented in Plato’s *Protagoras* (337c).

²³ Mihailo Đurić, *op. cit.*, p. 203–217.

²⁴ *Ibidem*, p. 239–243. It should be also added that this discussion endures in the XXI century in new books. Thus, Michael Gagarin, a renowned contemporary expert in the Ancient Greek law, rhetoric, literature and philosophy, presents in his book *Antiphon the Athenian: Oratory, Law and Justice in the Age of the Sophists*, University of Texas Press, Austin 2002 — the arguments in favour of identifying Antiphon the Sophist as Antiphon the Rhamnusian, while Gerard Pendrick provides in his book, published that same year, *Antiphon the Sophist: The Fragments*, Cambridge University Press, Cambridge 2002 — arguments that Antiphon the Sophist and Antiphon Rhamnusian are two different persons, and provides the new edition of and commentary on the fragments attributed to the Sophist.

²⁵ Cf. Hermann Alexander Diels, *Die Fragmente der Vorsokratiker*, frg. B, col. I, 35 ff. — referred to in Mihailo Đurić, *op. cit.*, p. 248–254.

According to Antiphon's exceptionally individualistic, humanistic, democratic and cosmopolitan doctrine, his understanding of natural law was as reformatory and revolutionary as Hippias', what Đurić has convincingly demonstrated. In contrast to brute force and mere sanction of human laws, and in contrast to the divisions of human beings into rich and poor, Greeks and barbarians, divisions that are introduced by these human positive laws, Antiphon's *Truth* proclaims freedom of individuals and equality of human beings.²⁶

Finally, when discussing sophists, we should also mention Alcidas of Elaea because of his famous view which elevates legal equality of humans to the level of a well-founded principle, and which states: "God has created all humans free. Nature made nobody a slave".²⁷

Since cosmopolitanism is a characteristic feature of the entire stoic social philosophy from the birth of stoicism in Athens with Zeno of Citium in late IV and early III century BC until Justinian's ban on all pagan philosophical schools in 529 AD we should remind us on this occasion of what Epictetus told us and Diogenes Laertius spread later on, namely, that long ago, at the very beginning of the establishing of the stoic school, Laertius' famous namesake, stoic Diogenes of Sinope, had stated: "I am neither Athenian nor Corinthian. I am a citizen of world — a *kosmopolites*".²⁸ And Epictetus himself later stated: "a man is no longer a man if he is separated from other men. For what is a man? A part of a state, of that first which consists of Gods and of men; then of that which is called next to it, which is a small image of the universal state".²⁹

Having in mind that sophists did not share a single harmonized worldview, but quite the opposite, held not only diverging but completely opposed opinions, the stoicism can be considered the first school of philosophy establishing the principle of legal equality of humans, and founding it on equal human nature of all individuals regardless of their potential differences. This contribution of stoics to the political thought is considered their greatest and deepest.³⁰

Stoic worldview with its central idea of human equality did not only last for a long time as a school of philosophy — more than eight centuries — but was also quite widespread both in Greece and Hellenistic world in general, as well as subsequently in the Roman Empire. Of course, it is impossible to estimate how influential it would have been if the Christian worldview had not suppressed it owing to the aforementioned Justinian's legal ban in 529. Still, it

²⁶ Mihailo Đurić, *op. cit.*, p. 253–261.

²⁷ Scholia on Aristotle, *Rhetoric*, book I, chapter XIII, 1373b18 — referred to in Mihailo Đurić, *op. cit.*, p. 257–258.

²⁸ Epictetus, *Discourses*, bk. I, ch. IX, §1, Greek-Engl. Loeb e-edition; Diogenes Laertius, *The Lives and Opinions of Eminent Philosophers*, bk. VI, ch. II, §VI (72), Greek & Engl. e-eds.

²⁹ Epictetus, *ibidem*, bk. II, ch. V, §26.

³⁰ Charles H. McIlwain, *The Growth of Political Thought in the West: From the Greeks to the End of the Middle Ages*, Macmillan, New York 1932, p. 114–115.

can unquestionably be stated that the early Christian thought borrowed and used many central stoic ideas, philosophical concepts and even terms.³¹

Though it can be asserted that Christianity — unlike other religions at the time — represented the first universalistic religion and preached the equality of all humans: Jews, Greeks, Romans, poor, rich, women, men, it preached the equality of all before God, in (His) Final Judgement, and not the equality according to human laws, i.e. not the equality before human laws, or courts and tribunals. Throughout the centuries, the relationship of Christianity towards the state authorities has been expressed by Jesus Christ's famous saying: "Render unto Caesar". That means: "Render unto Caesar the things that are Caesar's; and unto God the things that are God's".³² As it is well known, during the course of its history, Christianity split into different confessions, i.e. churches, but the attitude towards the legal equality of human beings according to human, i.e. terrestrial laws (*per leges terrenaе* or *per leges terrae*) has remained essentially unchanged. In that sense, the historically recent attitudes of protestant, and Roman catholic church, i.e. the Vatican (but not only them) towards Nazism and similar governments and legal orders, e.g. in Croatia at that time, or elsewhere, represent a special problem.³³ Hence, it seems that, in the period after World War II, the views of different Christian and all other confessions or churches on terrestrial legal (in)equality of human beings should be evaluated on the basis of their attitude towards human rights. But, this is a vast topic that cannot be opened on this occasion.³⁴

Is it so, that nothing has really happened after the aforementioned three sophists (Hippias, Antiphon and Alcidas) and Stoics until the American and French revolution and their constitutions and Declarations of Rights? Is it so, that

³¹ For more on this, see the standard work on historical, social, political, cultural, religious, philosophical and other relevant backgrounds of the birth of Christianity: Everett Ferguson, *Backgrounds of Early Christianity*, (1st 1987) 3rd expanded & revisited ed., William B. Eerdmans Publishing Company, Grand Rapids, MI 2003, p. 3 *sqq. et passim*, especially p. 354–369.

³² In Gospel by Matthew (22:15–22), Mark (12:13–17) and Luke (20:20–26), as well as in non-canonical Gospel by Thomas (100).

³³ There is a comprehensive body of literature on this, so we refer only to the newest, without any pretension to critical expertise: Chris McNab, *The Third Reich*, Amber Books Ltd., London 2009; Robert Michael, *Holy Hatred: Christianity, Antisemitism, and the Holocaust*, Palgrave Macmillan, New York 2006; David Redles, *Hitler's Millennial Reich: Apocalyptic Belief and the Search for Salvation*, New York University Press, New York–London 2005; Roger Griffin, *Fascism, Totalitarianism and Political Religion*, Routledge, Oxon–New York 2005; Robert Anthony Krieg, *Catholic Theologians in Nazi Germany*, Continuum International Publishing Group, London 2004.

³⁴ On that topic, see some relevant 'BCMS' literature in our (Bosnian-Croatian-Montenegrin-Serbian) language: Enes Karić (prir.), *Ljudska prava u kontekstu islamsko-zapadne debate [Human Rights in the Context of Islamic-Western Debate]*, Pravni centar, Sarajevo 1996; Eliezer Papo (prir.), *Judaizam i ljudska prava [Judaism and Human Rights]*, Pravni centar, Sarajevo 1998; Velimir Blažević (prir.), *Ljudska prava i Katolička crkva [Human Rights and Catholic Church]*, Pravni centar, Sarajevo 2000.

neither in the history of the idea of legal equality nor in social practice nothing has really happened during this period of twelve and a half centuries? This could almost be accepted as such. For, the idea of terrestrial equality of men before the law and courts flared up for a moment in the Antiquity, and then was transcended by the Christianity to the State of God, so it reappeared in the earthly domain only in the modern age, now as an important, essential feature, criterion of modernity, and only then did it start to be slowly and arduously implemented in practice, in reality.

However, the idea of legal equality — as idea of equality of men before the law and courts — did not appear out of thin air in the modern times, nor were the aforementioned twelve and a half centuries just a river of time whose flow brought nothing. There is a legal, political, social and cultural event deserving of our full attention. Not because of what it meant on that day, June 15, 1215, when John Lackland met his 25 barons (and 12 bishops and 20 abbots who served as witnesses) at Runnymede, on the bank of Thames near Windsor Castle, but primarily due to what it has been meaning for the centuries afterwards. The event in question is, of course, the signing of *Magna Carta Libertatum*.³⁵ As the first document imposed on a king by his feudal subjects attempting to limit by law his power, and to protect their proper rights, the Great Charter of the Liberties of England has only subsequently, during its long and complex history, become an important part of the modern constitutionalisation of government, a precursor of human rights, and a legal model even outside of England. As Lord Denning declared, *Magna Carta Libertatum* was “the greatest constitutional document of all times — the foundation of the freedom of the individual against the arbitrary authority of the despot”.³⁶

From the perspective of equality, the most important, and still valid, is the provision 29 (and later 39 and 40), which states:

Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre.

Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam.³⁷

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.

To no one will we sell, to no one will we deny or delay right or justice.

But who is *liber homo*, freeman? In 1215, only a King’s subject who is a feudal noble: a baron, an earl or a lord, or a male offspring of theirs — but naturally

³⁵ James Clarke Holt, *Magna Carta*, 2nd ed., Cambridge University Press, Cambridge 2010, p. 1–22, *sqq.*

³⁶ Cited according to Danny Danziger & John Gillingham, *1215: The Year of Magna Carta*, Hodder and Stoughton, London 2004, p. 278.

³⁷ James Clarke Holt, *op. cit.*, p. 460–461.

neither an ordinary man, nor serf — was a freeman, *liber homo* referred to by *Magna Carta Libertatem*. However, it was already by the law adopted in 1354 that the provision 29 was revised, and then *freeman* became simply *a man*, i.e. *man of whatever estate or condition he may be*, and the phrase on ‘*due process of law*’ for *lawful judgement of his peers or the law of the land* was added to the text of the provision. Hence, it is no surprise that already Sir Edward Coke tried to deny the King’s sovereign rights by invoking the Great Charter: “*Magna Carta* is such a fellow, that he will have no ‘sovereign’”.³⁸ Coke considered that laws held the absolute power, not the King.³⁹ We should notice this as a completely *modern* view: It is not the king who is sovereign, but the laws, namely the legislator, i.e. the Parliament. But, following Coke’s idea that *Magna Carta* is “a fellow without sovereign”, we reach the *postmodern* view: Neither the King, nor the laws, i.e. legislator — the Parliament are the ones who are sovereign, but precisely the *Magna Carta*, namely the rights and liberties of man (later named human rights) that are contained therein (or in any other document).⁴⁰

English constitutionalist ideas, which began as premodern ideas of *Magna Carta Libertatum*, were gradually developed and amended throughout centuries, and then transplanted during American and French revolution into their constitutions and declarations on rights, and subsequently, during two following centuries, disseminated all around the world. Thus we could draw the conclusion that the principle of legal equality of human beings was also realized without any questions or problems, once it was established, i.e. constitutionalised in modern states. But, it didn’t happen in that way. Nowhere. Here are several examples, just for illustration purposes.

England is considered the cradle of *modern* democracy. Yet, until 1948 some people were ‘more equal’ than others, namely ‘more equal’ from the aspect of electoral rights. For example, the representatives of bourgeoisie were allowed to enter the House of Commons only after the reform of 1832, and the new reform implemented in 1867 additionally lowered the property qualifications in accordance with a new Law, so a large number of industrial workers received

³⁸ Cited according to Ralph V. Turner, *Magna Carta*, Longman, London 2003, p. 157.

³⁹ *Ibidem*.

⁴⁰ See on this, from another angle, Jasminka Hasanbegović, *Retoricitet prava i pravnost države — O nespojivosti suverenosti i pravne države* [*Rhetoricity of the Law and Legality of the State — On the Incompatibility of Sovereignty and Legal State (Rechtsstaat)*], in: Danilo N. Basta, Diter Miler (prir.), *Pravna država — poreklo i budućnost jedne ideje* [*Legal State (Rechtsstaat) — The Origin and the Future of One Idea*], Pravni fakultet u Beogradu — Centar za publikacije and Nemački kulturni i informativni centar u Beogradu, Beograd 1991, p. 52–61; Jasminka Hasanbegović, *Rhetorizität des Rechts und Rechtlichkeit des Staats — Über die Unvereinbarkeit von Souveränität und Rechtsstaat*, “Rechtstheorie”, Berlin, Sonderheft Jugoslawien, herausgegeben von Danilo Basta, Werner Krawietz, Dieter Müller, *Rechtsstaat — Ursprung und Zukunft einer Idee*, Symposium zum 150jährigen Bestehen der Belgrader Juristischen Fakultät, 1993, Band 24, Heft 1–2, p. 63–80.

voting rights and a theoretical option to have workers' representatives in the House of Commons. Voting rights were provided exclusively to men until 1918, when they were awarded to women as well, barring those under the age of 30. It wasn't until 1928 that the voting rights of men and women were completely equal, and awarded to persons of both sexes above the age of 21.⁴¹ But, it was not until the reform of 1948 that the last cases of double or plural voting right were eliminated,⁴² and only then did the voting right in England become completely universal and equal for all.⁴³

In spite of the fact that on the issue of legal equality of men and women from the aspect of voting rights, a great library of books could be collected, there would still be many unwritten facets of that topic waiting for research and analysis and deserving them. Hence, we should use this opportunity to name at least some illustrative data. As early as in the 18th (in just a few countries such as Sweden and Poland) and 19th century, voting rights were beginning to be awarded to women, but only if they were taxpayers (either as guild members or widows), or only at local level. It could be stated that Australia was the first country where women — although not Aboriginal ones — were awarded the voting rights at federal level in 1902. With regards to Europe, Finland was the first country to introduce universal, active and passive voting rights in 1906 regardless of a person's gender, financial situation, race or social position. Some of the countries that follow its example are: 1917 — Poland and Soviet Union; 1918 — Germany; 1920 — USA, after the adoption of the 19th Amendment,⁴⁴ although that still did not enable a complete exercise of universal voting rights in that country; 1945 — France and Yugoslavia; 1965 — USA provided universal voting rights in accordance with the Voting Law which prohibits race, gender, education and language based

⁴¹ For more on this, see Miodrag Jovičić, *Veliki ustavni sistemi: Elementi za jedno uporedno ustavno pravo* [*Great Constitutional Systems: Elements for One Comparative Constitutional Law*], IRO "Svetozar Marković", Beograd 1984, p. 29–30.

⁴² The Representation of the People Act from 1948 abolished the right of university professors and property owners to vote two or more times: in the constituency they live in and in their university's constituency; or in the constituency they live in and in the constituency they have property; or three times: in the constituency they live in, in the university's constituency, and in the constituency in which their property is located (of course, if those constituencies are different); as well as any other plural voting rights in general — e.g. in the constituency professor lives in, in his university constituency, and the constituencies in which his properties are located (again, of course, if those are different constituencies). Cf. Hilaire Barnett, Robert Jago, *Constitutional & Administrative Law*, 8th ed., Routledge, Abingdon–New York, 2011, p. 344. It now seems clear where Orwell could also have got his inspiration for all animals being equal, but some more equal than the others on his Animal farm.

⁴³ Miodrag Jovičić, *loc. cit.*

⁴⁴ The Nineteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex".

discrimination in relation to voting rights; 1971 — Switzerland introduced the universal voting rights by including women into electoral processes at federal level, and at cantonal from 1958 to 1990; 2006 and 2011 — United Arab Emirates introduced the limited voting rights for women, and mildly relaxed them, respectively; and 2015 — Saudi Arabia will introduce voting rights for women and allow them to be elected at local level.⁴⁵

This glance on the issue of achievement of legal equality for all regardless of their gender in the field of election and voting seems to clearly indicate that many more similar efforts will need to be invested in the achievement of the general legal equality principle, which remains one of the foundations and criteria of modernity.⁴⁶ But, we should note that even before the biggest part of that modernisation task was completed, new postmodern issues and questions that need to be resolved arose. Let us mention just a few of those related to the legal equality of human beings:

Positive discrimination — or, affirmative action — as a phenomenon of a ‘more equal’ treatment of some groups of people is directly opposite to the principle of (formal) equality of human beings and — only at first glance, paradoxically — represents an attempt to eliminate or at least alleviate as quickly as possible the negative consequences of previously existing and now prohibited discrimination, in the name of justice, fairness and future equality achieved precisely through this unequal treatment, which will in future become unnecessary or at least considerably less necessary.⁴⁷

Legal equality of human beings is expressed indirectly in the international law by the principle of sovereign equality of countries. Postmodern era brings a multitude of new, burning issues that need to be resolved primarily within the framework of international criminal law, but brings also a new type of cosmopolitanism appropriate for these times.⁴⁸

⁴⁵ See http://en.wikipedia.org/wiki/Timeline_of_women's_suffrage (access 27.07.2014).

⁴⁶ On other issues of gender equality around the world, see Susan H. Williams (ed.), *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Cambridge University Press, Cambridge 2009; and on national equality and minority legal tradition, see William Kurt Barth, *On Cultural Rights: The Equality of Nations and the Minority Legal Tradition*, Martinus Nijhoff Publishers, Leiden–Boston 2008.

⁴⁷ On this see in detail in the aforementioned comprehensive analysis by Nicholas Mark Smith, *Basic Equality and Discrimination: Reconciling Theory and Law*, especially p. 89–216; also Tilmann Altwicker, *Menschenrechtlicher Gleichheitsschutz*, with English Summary: *International Equal Protection Law*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Bd. 23, Springer, Heidelberg–New York etc. 2011, p. 551.

⁴⁸ On this, see almost all papers in Janne E. Nijman, Wouter G. Werner, Vol. Eds., *Netherlands Yearbook of International Law 2012: Legal Equality and the International Rule of Law: Essays in Honour of P. H. Kooijmans*, Asser Press/Cambridge University Press/Springer, The Hague–Cambridge–Heidelberg 2013, pp. 266, especially, Janne E. Nijman, Wouter G. Werner, *Legal Equality and the International Rule of Law*, p. 3–24; Brad R. Roth, *Sovereign Equality and Non-*

Among postmodern issues, those stemming from the attitude towards human homosexuality remain especially important and difficult. Until recently treated as a felony, homosexuality then was transferred into law-free space (in German *rechtsfreier Raum*), i.e. became something that is not and should not be regulated by legal norms, something legally irrelevant, so that under certain circumstances has to be tolerated. Additional steps forward have recently been taken so that homosexual relationships are afforded legal protection of similar or same nature as the legal regulation of marital bonds. Commonly, legally registered homosexual relationships are not officially called marriages, but in some places such couples are permitted to adopt children.⁴⁹

Is it possible to have new concepts of equality, fairness, freedom, reasonableness, subject, object, right, responsibility and other basic modern ideas as an articulate system of philosophy, a worldview with consistent legal philosophy appropriate for our time?⁵⁰ Of course, but without intending them to express the one and only possible truth and rightness, without empty analytic philosophy ideas, and also empty idea of equality, and with full consciousness of every *zoon politikon* on their important piece of legal, moral, political and every other *responsibility* for themselves, their modern democratic polis, i.e. their national state, and their cosmopolis, i.e. mankind, including all (un)bearable legal (in)equalities, all identities and differences. For, every society in its proper time, every generation, hence, human beings are always the ones who fill all the otherwise empty concepts with content, including the concept of legal (in) equality of human beings. Humans are also those who empty the concepts of content not only in philosophy but in practice too. This is precisely why in modern

Liberal Regimes, p. 25–52; Tony Carty, Xiaoshi Zhang, *From Freedom and Equality to Domination and Subordination: Feminist and Anti-Colonialist Critiques of the Vattelian Heritage*, p. 53–82; Gerry Simpson, *Great Powers and Outlaw States Redux*, p. 83–98; Jeffrey L. Dunoff, *Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations*, p. 99–127; Rosalyn Higgins, *Equality of States and Immunity from Suit: A Complex Relationship*, p. 129–149; Sarah M.H. Nouwen, *Legal Equality on Trial: Sovereigns and Individuals Before the International Criminal Court*, p. 151–181; Geoff Gordon, *Legal Equality and Innate Cosmopolitanism in Contemporary Discourses of International Law*, p. 183–203.

⁴⁹ On this and other contemporary equality issues in USA, but not from the angle of conservative Supreme Court, than from the angle of constitutional laws of federal states and their supreme courts prone to increasing equality and freedom, see very informative, critical and theoretically well founded book Jeffrey M. Shaman, *Equality and Liberty in the Golden Age of State Constitutional Law*, Oxford University Press, New York 2008, pp. 269.

⁵⁰ One, not very successful attempt, is presented in Jürgen Ritsert, *Gerechtigkeit, Gleichheit, Freiheit und Vernunft: Über vier Grundbegriffe der politischen Philosophie*, Springer, Wiesbaden 2012, pp. 123, but it should be mentioned as an exemplification of what analytic philosophy does in Europe, moreover, in Germany, what is exactly the object of Peter Unger's criticism because it results in empty ideas, concretely nonsubstantial ideas. As opposed to him, we have Sionaidh Douglas-Scott, *Law after Modernity*, Hart Publishing, Oxford–Portland, OR 2013, pp. 413, who points out the difficulties, and critically reviews some basic concretely substantial postmodern legal ideas.

democracies people are, and should be held accountable for their decisions. The validity of those decisions can be derived from the majority principle, but that doesn't make them adequate nor correct. Hence, modern democracy offers no possibility to hide behind the majority, since the majority isn't *eo ipso* right, and hasn't *eo ipso* (sovereign) right(s). Precisely therein lies the modernity of the democratic principle. It is much more than the majority principle. Modern democracy is also substantial protection of minorities, substantial protection of not only everyone individually but also of specific minorities. That is to say, it is also concrete substantiality of the idea of (in)equality, identities and differences, and accountability for those concrete substantialities, when we care, and only seemingly paradoxically, even greater accountability when we do not care.

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