DOTTORATO DI RICERCA IN DIRITTO COMPARATO

CICLO XXX

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Substantive Equality and the Limits of Law

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"[I]f equality is an answer, what was the question?"

(Sadurski, *Equality and Legitimacy,* p. 101)

Sommario:

Al giorno d'oggi esistono prove concrete che le disuguaglianze socio-economiche sono in crescita, sia all'interno degli Stati nazionali sia a livello globale. Sussiste anche un consenso generale tra i ricercatori che le tendenze future possano essere ancora più allarmanti. Il cambio di ruolo dello Stato e l'aumentato coinvolgimento di attori non-statuali negli affari pubblici, una conseguenza della globalizzazione, hanno reso ancora più complessa la domanda su come affrontare le ineguaglianze socio-economiche. Allo stesso tempo, con l'emergere di nuovi modelli di *governance* e con l'indebolimento delle capacità dello Stato di amministrare in piena autonomia la distribuzione delle risorse della società, il sistema legale e giudiziario sta diventando sempre più importante nell'ambito tradizionalmente riservato alle decisioni politiche. Attraverso il processo di costituzionalizzazione, una significativa parte di pressanti temi di giustizia sociale si è tradotta in richieste individuali di giustizia correttiva e trasferite nei tribunali. La dottrina dell'uguaglianza sostanziale, che si è evoluta da un'interpretazione espansiva teoretica e da un'analisi giudiziaria del concetto legale di uguaglianza, è un esempio primario dell'approccio centrato sui tribunali a questioni di giustizia sociale. Questo studio indaga su quanto la legge possa rispondere alle aspettative collegate alla dottrina dell'uguaglianza sostanziale, con la ricerca sulle principali tendenze (correnti di pensiero?): la costituzionalizzazione dei diritti socio-economici e la trasformazione della legislazione anti-discriminazione in norme di più alto livello con ambizioni distributive. Lo studio segnala tuttavia diverse importanti limitazioni inerenti all'aggiudicazione di diritti socio-economici da parte dei tribunali, che nascono dalle caratteristiche di base del contezioso civile come strumento di risoluzione delle controversie. Attraverso un esame dei principali approcci giudiziari ai casi che riguardano i diritti socio-economici, lo studio dimostra che diritti di questo tipo applicati per via giudiziaria non possono rappresentare il percorso verso una maggiore uguaglianza socio-economica. Si è sostenuto che l'approccio giudiziario possa nella migliore delle ipotesi rappresentare una soluzione provvisoria e frammentaria ai problemi affrontati dai settori più svantaggiati della società. L'indagine sulla capacità della legislazione anti-discriminazione di affrontare disuguaglianze socio-economiche radicate, sanzionando forme complesse di discriminazione (penalizzazione, ghettizzazione?) incarnate nel concetto della discriminazione strutturale, ha portato a conclusioni simili. La discriminazione strutturale non è suscettibile di modifiche attraverso la discriminazione indiretta e misure di azione positiva, come risposte principali della legislazione anti-discriminazione alle forme complesse del fenomeno. La sua natura multiforme è fuori dalla portata non solo degli strumenti concettuali, ma anche dei

potenziali normativi della legge anti-discriminazione. Lo studio porta alla conclusione che le materie di giustizia sociale, insieme al problema delle crescenti disuguaglianze socio-economiche, vanno oltre la legge.

Abstract:

By now there is a solid evidence that socio-economic inequalities are growing, within the nation states and globally, and a general consensus among researchers that the future trends could be all the more disquieting. The changing role of state and an increased involvement of non-state actors in the ordering of public affairs, brought by globalisation, have made the question of how to tackle socio-economic inequalities even more complex. Simultaneously with the emergence of the new governance patterns and weakening of state's capacity to autonomously govern the distribution of societal resources, its legal and justice system is becoming more and more important for matters traditionally in the realm of political decision making. Through the process of constitutionalisation, a significant portion of the pressing social justice issues are translated into individual, corrective justice claims and moved to the domain of courts. The substantive equality doctrine, which has evolved from an expansive theoretical and judicial interpretation of the legal concept of equality, is a prime example of the court-centred approach to matters of social justice. This study investigates to what extent law can respond to the expectations placed before it by the substantive equality doctrine by analysing its main strands: constitutionalisation of socio-economic rights and transformation of anti-discrimination law into a higher-ranked law with the distributive ambitions. The study points to several important limitations inherent to the adjudication of socio-economic rights by the courts, which arise from the basic features of civil litigation as a dispute resolution tool. Through an examination of the main judicial approaches to cases involving socio-economic rights, the study shows that legally enforceable socio-economic rights cannot be the path to the greater socio-economic equality. It is argued that their judicialization can at best provide a piecemeal and temporary solutions to the problems faced by the most deprived segments of population. The investigation of the capacity of anti-discrimination law to address entrenched socio-economic inequalities, by sanctioning complex forms of discrimination epitomised in the concept of structural discrimination, has brought to the similar conclusion. Structural discrimination is not amenable to change through indirect discrimination and affirmative action measures, as the main responses of anti-discrimination law to the complex forms of discrimination. Its multifaceted nature is out of reach of not just the conceptual tools but also of the normative potentials of antidiscrimination law. The study concludes that social justice matters, such as the problem of growing socio-economic inequalities, are beyond law.

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Introduction

For a long while the topic of socio-economic equality was out of fashion, almost gone from the academic and political discourse.[1] In the years after the end of Cold War, with the death of the socialist utopia which spurred on the demise of the Keynesian style welfare state, the widening gap between wealthy and poor was approached as a temporary imperfection of the globally spreading capitalism.[2] When raised, the concerns over growing socio-economic inequalities were quickly shelved. In East, the heavy-duty works on the edifice of market democracy were to be completed before a question of the kind could be asked. In West, a tale was told of the rising tide of economic growth that soon enough would lift all the boats. With "There is no alternative!" echoing in the background.[3] The "work in progress" explanations were complemented with another, as urgent objective of curing democracy from the malady of majoritarianism and securing that the individual choice can flourish as never before. The demands for the fairer distribution of societal resources were replaced with the demands for recognition and accommodation of difference. The quest for greater societal equality was reduced to the endeavour of penetrating the perplexing world of individual and group identities and nurturing diversity through a complex matrix of ever more advanced institutions.

Today, when the US model of market democracy was more or less successfully transplanted all over the world - somewhere perfected, somewhere built from scratch - the question of socio-economic equality is back. Inequalities in living conditions have reached the levels that can no more be easily ignored, and the cult of endless economic growth that would soon enough work for everybody's benefit has lost its appeal. Wrapped into the old concepts with the new roles, such as the notions of "social exclusion", "marginalisation" and similar, the growing socio-economic inequalities are now being approached in the political discourse as a risk for social cohesion and stability. The considerations of socio-economic equality as a matter of justice are moved to the world of law.

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[1] Anne Phillips, *Which Equalities Matter?* (Polity Press, 1999) 1.

[2] As the symbolic victory of capitalism, the end of Cold War enabled finalisation of processes which had already started in the developed western countries in 1970s, and which in Europe resulted in dying out of welfare state and perfecting of the laisse-fair postulates on the new global scene of post-industrial society.

[3] A slogan of British Prime Minister Margaret Thatcher, which she often used in the 1980s, while pursuing policies aimed at dismantling of British welfare state and trade unions in the name of greater competition.

Simultaneously with the erosion of state's factual or even formal authority in many domains of decisive importance for redistribution, law is becoming a vital instrument of strategies for greater societal equality. The trend of seeking a refuge against the vagaries of politics in the law, in the study referred to as a process of constitutionalisation, has turned courts into prime sites for resolving conflicts over societal resources. Many of the distributional disputes, the resolution of which was until recently subject of political deliberation, have come within the sway of judiciary, either directly - by broadened mandates of courts vis-à-vis the newly enacted laws - or indirectly, by widening the range of matters that are to be resolved through litigation. Judicial enforcement of individual claims to socio-economic goods, formulated as the inalienable human rights entitlements, grew into the main tactic of the attempts to preserve the edifice of democracy from crumbling under the burden of mounting socio-economic inequalities. In this way, socio-economic equality became a question of legal justice, of the capacity of courts to navigate the society through the labyrinth of competing claims and inexorable dilemmas immanent to the process of distribution of societal wealth.

The breadth of such ambition is particularly visible in the theoretical works and judicial practice evolving around the notion of substantive equality. The substantive equality doctrine is a facet of the process of constitutionalisation, developed through an expansive theoretical and judicial interpretation of the principles of equal treatment and non-discrimination. The doctrine approaches socio-economic inequalities as a complex phenomenon rooted in the basic structures of society. In that sense, its proponents often invoke the notions of structural inequalities and structural discrimination. The two are used as abstract labels for the sum of socio-economic conditions, generated through the normal operation of societal institutions, which lead to the continuous marginalisation and exclusion of the traditionally vulnerable groups. The right to equality, derived from the principles of equal treatment and non-discrimination, under the substantive equality doctrine becomes the main instrument for realising the demands for a greater social justice. In that way, the doctrine moves the claims for greater equality in the distribution of societal resources to the courtrooms.

Broadly stated, this study is about the capacity of law to embrace this new and demanding task and become a pathway towards greater socio-economic equality. In investigating its subject matter, the study departs from the hypothesis that law is not a suitable mechanism to tackle the matters from the realm of distributive justice, such as the problem of pronounced socio-economic

inequalities. The hypothesis is the result of prior investigations conducted in the field of anti-discrimination law, from which the research started, as well of the basic inquiry into the depth and complexity of socio-economic disparities in the contemporary western societies, which also formed part of the background research. The research hypothesis was tested by exploring the potentials of two main elements of the strategy to tackle socio-economic inequalities by expanding the scope of the right to equality. These are the constitutionalisation of socio-economic rights and the greater recourse to anti-discrimination law as a response to the complex forms of discrimination.

The substantive equality doctrine asks courts to abandon the meagre vision of equality, so far pursued by the traditional equality jurisprudence, and become the backbone of a social change by embracing the ideal of substantive equality. A step in that direction is constitutionalisation of socio-economic rights. For its blindness to the pre-existing socio-economic differences, the reliance on formal equality in the process of distribution often negatively affects access to socio-economic goods of the worse off sections of population. It not only reinforces the existing inequalities, but it also generates new disadvantages across numerous other dimensions which determine the life opportunities of the traditionally vulnerable groups. In that sense, disadvantages in access to the socio-economic goods are an important indicator of structural inequalities. The doctrine seeks an answer to the deficiencies of formal equality and the resulting disadvantages in judicialization of socio-economic rights. In that way the judicially enforceable, individual human rights entitlements become a method to bring substance to the right to equality, as developed by the substantive equality doctrine, and secure an equal access to the socio-economic goods for all.

A broad reliance on anti-discrimination law as an instrument to confront the complex forms of discrimination is another important element of its strategy to seek in law an answer to the societal inequalities. For many sub-variants of the substantive equality doctrine, in particular those developed in the European context, the anti-discrimination law lies at the heart of the project of social transformation through law. The proponents of substantive equality doctrine maintain that persistent socio-economic vulnerability, as a vehicle for the perpetuation of status inequalities, can only be tackled by sanctioning and remedying the complex forms of discrimination epitomized in the notion of structural discrimination. For that reason, the main objective is to enhance the reach of the legal concepts of indirect discrimination and proactive measures, as the principal

methods of anti-discrimination law to tackle more subtle forms of discrimination. The study investigates the fit of these two concepts to come to grips with the complex link between entrenched and patterned inequalities and the basic societal structures. It does so by drawing the contours of the notion of structural discrimination in the language and logic of anti-discrimination law in order to examine to what extent it can be captured by the concepts of indirect discrimination and affirmative action measures. In that way, the study tests the claim of the substantive equality doctrine that, if further developed, anti-discrimination law can become means to secure greater societal equality.

Many of the concepts used in the study are, as it is generally the case with the theoretical legal works, defined differently by different authors and no method exists to arrive at their definite meaning. This is especially the case with the concepts loaded with symbolic content, such as "equality", "social justice", "distributive justice", etc.[4] The disagreement over their content is so profound that "one and the same ideal can be understood as implying two, mutually antithetical, but equally prima facie reasonable, sets of specific prescriptions".[5] The indeterminacy of some of the key concepts used in the analysis, such as "human rights", "rule of law", etc. is also caused by the fact that the study is only partly contextualised and that the greatest part of the analysis is conducted against the background of the globalised, intensively interconnected world. Despite their widespread use across the globe, the world has not yet reached the level of uniformity in the legal sphere which would neutralise the ambiguity surrounding these concepts.[6] Mark Van Hoecke, for whom the objectivity in law is the same as "reasonable" and "justified", even argues that such legal concepts cannot be researched in an objective manner when analysed outside of the national legal systems or international law context, because of the lack of "a sufficiently common framework" to reach an agreement on what is "reasonable" or "justified".[7]

For all these reasons, one could say that in the theoretical legal research the meaning of non-doctrinal concepts at the end of the day reflects researcher's jurisprudential assumptions and

[4] According to Jovan Brkić, although concepts are our way of assigning concrete meaning to the non-concrete, abstract objects of social reality, when it comes to the concepts of this kind, which he calls "emotional concepts", "this relatedness cannot be established in any way which could be satisfactorily tested". Jovan Brkić, *Legal Reasoning: Semantic and Logical Analysis* (Peter Lang 1985) 131.

[5] Wojciech Sadurski, *Equality and Legitimacy* (Oxford University Press 2008) 99.

[6] In the opinion of Ulrich Fastenrath, this indeterminacy is caused by the heterogeneity of the "intellectual background of comprehension". Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 European Journal of International Law 338.

[7] Mark Van Hoecke, 'Objectivity in Law and Jurisprudence' in: Jaakko Husa, Mark Van Hoecke (eds.), *Objectivity in Law and Legal Reasoning* (Hart Publishing 2013) 7-9.

world views. The silent background assumptions found in the studies of natural phenomena, in the studies of social phenomena, including the theoretical studies of law, become the substantial determinants of the very meaning of the concepts under inquiry.[8] In that sense, in the latter category of scientific inquiry, to which the present study obviously belongs, these overtly postulated assumptions are also an important element of the process of evaluation of findings, which is the reason why they need to be made explicit as clearly as possible and as early as possible. In this study some of those ethical and normative premises form the background of the analysis, while others are part of the wider interpretative framework in which the study's main findings are placed in order to arrive to the deeper understanding of the phenomena under investigation. The short presentation of the ethical premises is also a useful way to provide necessary terminological clarifications, given that such premises are also reflected in the terminological choices for some of the non-legal concepts that frequently surface in the analysis.

Ethical and normative premises of the study

The study is premised on the view that distributive justice demands that the "prized public goods", such as health care, education, employment, social security, etc., are distributed to all members of society in a way which is conducive to an unrestrained intergenerational mobility.[9] This, however, does not mean that it approaches inequality from the postulates of strict egalitarianism. Not all socio-economic differences amount to socio-economic inequality. The vantage point on which this study is based is that when the socio-economic differences and inequality are so entrenched and patterned that the intergenerational transmission of inequality becomes a steady characteristic of a societal life, they are not only the path to exploitation and domination, but also a threat to legitimate authority and to liberty. In other words, they become a matter of injustice, and as such a threat to the very foundations of a society, no matter whether the later are defined from the socialist, conservative or liberal perspective. Closely related to this is another important underlying premise of the study: An assumption that pronounced, entrenched and patterned

[8] For a simple yet insightful account of "background assumptions" in the studies of natural phenomena see: Aristides Baltas, 'Classifying Scientific Controversies' in: Peter K. Machamer, Marcello Pera, Aristides Baltas (eds.), *Scientific Controversies: Philosophical and Historical Perspectives* (Oxford University Press 2000) 41-44.

[9] Although distributive justice is a facet of social justice, throughout the study the two are often used interchangeably in accordance with the now dominant usage of the concept of "social justice" as primarily concerned with distribution of benefits and burdens. See on this: Tom Campbell, *Justice* (Macmillan Education 1988) 17.

socio-economic inequalities are incompatible with democracy. Not only that socio-economic inequalities of the kind generate political inequality by decreasing the capacities of citizens from the lower social strata to use their political entitlements. In an even more profound sense, the entrenched socio-economic inequalities affect functioning of the basic political institutions of democracy by taking away a "life perspective" for oneself and persons one cares for, as a key stimulus for the active participation in the political decision-making process.

Another important assumption of the study is that persistent and patterned socio-economic inequalities cannot be analysed as a behavioural issue, a consequence of personality traits and individual choices, but that their source is to be found in the institutional set-up of a society. Institutions are rules, standards, policies and practices which, among else, regulate the distribution of societal resources. For the variety of reasons, they are dominantly shaped by persons who belong to the socio-economically better off sections of society. As a consequence, institutions tend to grant a privileged position in the process of distribution of societal resources to those who had the main say in their formulation. This happens either intentionally or due to blindness to the differences in socio-economic positions of other segments of population. This leads to the unequal treatment of persons from different socio-economic backgrounds in the process of distribution of societal resources. The result is that institutions which, by preserving the disadvantaged position in access to the basic societal goods of some segments of population, maintain, if not augment, the existing patterns of socio-economic inequalities. These patterns are further reinforced or deepened through the process of self-perpetuation of socio-economic inequalities, which renders the causal relationship between societal institutions and disadvantages in access to the basic social goods even more vague. It is the basic premise of this study that the persistent and pronounced socio-economic inequalities are always consequence of disadvantages brought about through the unequal treatment in the process of distribution of societal wealth. The term "socio-economic inequalities", as used in the study, reflects this view and stands for unjust socio-economic differences which are not of a transient character.

The analysis is situated in the larger context marked by the process of globalisation, rapid technological advancement and global spread of neoliberal capitalism. Although the study occasionally points to the negative trends ensuing from the current wave of globalisation and technological development, they are, nonetheless, seen as a consequence of the way the contemporary society responds to these two phenomena and not as their inherent features. The

study's view of neoliberal capitalism and the related processes of neoliberalization and marketization greatly differs from this basically neutral stance towards globalization and technological development. That is clear already from the choice of terminology, given that the term "neoliberalism" and all its derivates are generally avoided by the main advocates of the current economic order and widely used by its critics.[10] The global spread of neoliberal capitalism is interpreted in the study as an essentially negative trend for its tendency to intensify commodification in the broad realms of human and societal existence, and for turning the market into the central organizing framework of social and individual life. Through the process of neoliberalization, "[m]arkets become the organizing principle for our economies, politics, *and* societies", the installation and maintenance of which is consciously or unconsciously elevated above all other considerations.[11] As a consequence, the distinction between the market and non-market mediated spheres of human and societal action became porous to the point where its postulates are "incorporated in the common-sense way many of us interpret, live in, and understand the world".[12] This is rather a worldview than an ethical premise, but it is presented here as part of the broader context against which the findings of the study are subsequently interpreted in order to arrive at a deeper understanding of the phenomena under investigation.

Last but not the least, the study is premised on the view that law needs to be aiming at justice to be called law or, simply said, that even if appropriately enacted and enforceable, norms lose legal validity when extremely unjust.[13] The essence of law is here seen as an unceasing quest for what is just, the scales which are perpetually in motion. The study holds that it is this very essence which makes law a value per se, value which cannot be reduced to its instrumental usefulness for the efficient realisation of other societal ends. However, the study approaches law as the social phenomenon with double nature, as sketched by Radbruch and further theorized by a number of contemporary legal philosophers. Law is in the study taken to signify both a specific technique of social organisation, to use Kelsen's words, the primary task of which is to make an ordered and

[10] Kean Birch, *A Research Agenda for Neoliberalism* (Edward Elgar Publishing 2017) 1-8. In the study, the term "neoliberalism" is used as reference for the set of economic postulates which have been guiding the economic practice and mainstream economic thought since 1980s.
[11] ibid 2.
[12] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 3. Similar on this: Nicolette Makovicky, 'Me, Inc.? Untangling Neoliberalism, Personhood, and Postsocialism' in: Nicolette Makovicky (ed.), *Neoliberalism, Personhood, and Postsocialism: Enterprising selves in changing economies* (Ashgate 2014) 6.
[13] This view has been formed under influence of the philosophy of law of Gustav Radbruch, as shaped after his Second World War experience.

peaceful societal life possible in spite of all its complexities,[14] and an autonomous source of reason that guides the conduct of its members. However, the primary analysis approaches law taken in its first meaning of a system of rules which should make sure that state acts towards realizing public and not private ends, and that its subjects are provided with an acceptable level of certainty about the legal effects of their acts. In other words, law is here analysed in its mundane form, absorbed in the task of providing for legal certainty while justice is seen as inherent to it. The view of law in its second meaning comes to the fore in the broader conclusions, drawn from the analysis of positive law now faced with the expectations to correct certain societal frailties which were so far a matter for political deliberation.

Scope of the study and its limitations

The analysis conducted in this study has as its subject the relationship between law and socio-economic inequalities in the developed western societies, in particular in the old European democracies. At the same time, the research was conducted in a manner which was aimed at situating the study and its findings in the global context. This was in fact an unavoidable direction for the inquiry, not only because of the highly abstract nature of its subject, but also given the level of interconnectedness of different parts of the globe through the trends brought about by globalization, technological advancement and the spread of neoliberal capitalism. These trends have tangible and intangible effects on the analysed phenomena - some of which have been embraced by the analysis - and they make the contemporary societies more and more alike each other in many respects despite the vast differences in material wealth and maturity of their institutional and legal systems. Yet, even though this has to some extent broaden its scope, the limitations ensuing from the study's focus on developed western societies remain a property of its findings. Despite the efforts to at least partly detach the analysed phenomena from their social milieu, the study remains in the realm of "contextualised" basic research.[15]

[14] Hans Kelzen, *General Theory of Law and State* (Transaction Publishers 2006, originally published in 1949 by Harvard University Press) 5.

[15] According to Karen A. Hegtvedt and Karen S. Cook, the basic research does not need to be detached from the "real life context" of the phenomenon under investigation, i.e. the examination of the basic theoretical concepts can also be conducted in a specific context. Karen A. Hegtvedt, Karen S. Cook, 'Distributive Justice: Recent Theoretical Developments and Applications' in: Joseph Sanders, V. Lee Hamilton (eds.), *Handbook of Justice Research in Law* (Kluwer Academic Publishers 2002) 95.

A short note on methodology

The study belongs to the category of basic research in law.[16] It aspires towards a fuller understanding of the social role of law by investigating the limits of legal action, and it is not guided by the objective to provide answers to the concrete policy needs. Enrique Zuleta Puceiro explains basic research in law through the relationship between law and social change. Legal dogmatics relies on "a certain set of implicit presuppositions - both of a strictly theoretical nature as well as cultural, ideological and political". According to Puceiro, in the periods in which these predispositions "lose their tacit nature" researchers are forced "to transcend the strict horizons of their specific discipline in order to pose questions which are, to some extent, related to the basic form of questioning, characteristic of philosophical thinking".[17]

Given that it seeks to illuminate the relationship between law and socio-economic inequalities as a matter of distributive justice, the study operates with the concepts drawn not only from law but also from the classical social sciences. This necessitated that the question of methodology is approached with as much openness as possible. In its first phase, the doctrinal legal method was the main methodological tool as a consequence of the study's initial focus on anti-discrimination law as a response to societal inequalities, as well of the researcher's academic background. But, as observed by Borivoje Pupić, "method is always a prior knowledge about the phenomenon under study".[18] The more the research was advancing the stronger was the need to employ some other legal and methods borrowed from classical social sciences. The end result is a mixture of methods belonging to both fields. As a traditional jurisprudential tool, the analysis of court decisions was used to add a real-life dimension to the rather dense theoretical elaborations of the process of constitutionalisation, as well to test the main propositions of the substantive equality doctrine in a way which would soften the highly abstract character of the research subject. The case study

[16] There are different names used in the scholarly texts for this type of research. Jaakko Husa, for instance, places it under the category of general legal science, and points to its non-doctrinal nature by recalling the term "non-doctrinal basic research of law" (*Grundlagenforschung*) used in German legal sciences (Jaakko Husa, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in: Mark Van Hoecke (ed.), *Methodologies of Legal Research* (Hart Publishing 2011) 209). Paul Chynoweth uses the term "fundamental research" (Paul Chynoweth, 'Chapter 3 - Legal Research', in: Andrew Knight, Less Ruddock (eds.), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29, 31.

[17] Enrique Zuleta Puceiro, 'Legal Dogmatics as a Scientific Paradigm' in: Aleksander Peczenik, Lars Lindahl, Bert van Roermund (eds.), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11-14, 1983* (D. Reidel Publishing Company 1984) 17.

[18] Borivoje Pupić, 'Suština normativno-dogmatskog metoda' (1972) 6 Zbornik radova Pravnog fakulteta u Novom Sadu 195.

method was employed to gain in-depth insights of the fundamental aspects of the link between socio-economic inequalities and societal institutions.[19] At the same time it served to describe the intrinsic complexity of the phenomenon of socio-economic inequality as the preparation for the subsequent analysis of the notion of structural discrimination. Throughout the study, axiological method was used to make an inventory of the values and ensuing goals found beyond the expansion of human rights rhetoric and its different manifestations and consequences. Nonetheless, in studying the subject of the inquiry, the research preserves its internal legal perspective and, despite this mixture of methods, retains its primarily legal character.[20]

[19] For the basic characteristics of the case study method: Robert K. Yin, *Case Study Research: Design and Methods* (SAGE 2003); Robert E. Stake*, The Art of Case Study Research* (SAGE 1995); Helen Simons, *Case Study Research in Practice* (SAGE 2009); Gary Thomas, *How to Do Your Case Study: A guide to students and researchers* (SAGE 2011).

[20] Jaakko Husa sees in the "internal legal perspective" the main difference between the non-doctrinal legal research and the sociology of law. Jaakko Husa*,* 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' (n 16) 209.

CHAPTER ONE

Contemporary socio-economic inequalities and their complexities

The present chapter outlines the contemporary socio-economic inequalities. It analyses their nature and structure in order to set the scene for the subsequent investigation of the role and the reach of the legislative and court-centred strategies for building a more equal society. To this aim the chapter first points to the complexity of contemporary socio-economic inequalities. Then it attempts to show the rootedness of persistent and entrenched socio-economic inequalities in the process of distribution of societal wealth. It is argued that the level and structure of socio-economic inequalities is intrinsically linked to the make-up of societal institutions and the way they provide access to the basic socio-economic goods. The case study is meant to support this argument through a real-life illustration of how the new inequalities are born and the existing reinforced as a consequence of unequal distribution of benefits and burdens among individuals and groups from different socio-economic backgrounds. In that way the chapter paves the way for the later presentation of the substantive equality doctrine and its notions of structural inequalities and structural discrimination. The chapter also sketches the initial contours of changes brought by the rapid globalisation and technological advancement as an important element of the explanations of the growing importance of law as a method for addressing socio-economic inequalities. The last part of the chapter is reserved for the theories which sidestep the question of how to remedy the profound socio-economic inequalities by situating the ideal of greater equality in the abstract future that should bring more affluence to distribute, or by redirecting the focus to the realm of civil and political rights as the final and definite measure of equality.

1.1. Persistent inequalities

The socio-economic inequalities, seen in the most general way as the comparatively varying levels of individual and group access to resources and power, are an undisputable feature of modern

societies. The evidence of deepening social inequalities within the nation states and globally, which have started in mid 1980s, is growing and there seems to be a consensus among the researchers that the trends are disquieting by most standards.

In his ground-breaking study on historical dynamics of wealth and income, Thomas Piketty portraits the contemporary distribution of wealth in global and in the national categories.[1] According to his analysis, the wealthiest 10 per cent of people on the planet today own roughly 80 to 90 per cent of total global wealth in aggregate, while the bottom 50 per cent of the world's population lives of about 5 per cent of the global wealth.[2] In Europe, the upper class (top 10 per cent of the population) owns 55 per cent of total income, while the bottom 50 percent receives 25 per cent of total income.[3] According to Piketty, these figures are only to a limited extent consequence of unequal pay for work, but to a much greater degree a result of the disparities in income from capital, which come as a consequence of the extreme concentration of wealth.[4] The low rates of economic and, in particular, of demographic growth in Europe in the last decades are, according to him, another two factors that have brought to the deepening of income inequalities. [5] "When the rate of return on capital significantly exceeds the growth rate of the economy", he says, "it is almost inevitable that inherited wealth will dominate wealth amassed from a lifetime's labour by a wide margin, and the concentration of capital will attain extremely high levels - levels potentially incompatible with the meritocratic values and principles of social justice fundamental to modern democratic societies."[6] The "comeback of inherited wealth" is further reinforced by other factors, such as the sharper increase of return rate on capital when the initial capital is higher, the transfer of public wealth into private hands through intensive privatisation, and the ever greater importance being given to private wealth in the strategies for economic development.[7]

[1] Thomas Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press 2014).
[2] ibid 438.
[3] ibid, Table 7.3 "Inequality of total income (labour and capital) across time and space" 249. The figures show even greater inequalities at the level of individual, western European societies and USA. According to Piketty, in France, Germany, Italy and Britain, the wealthiest 10 per cent today owns around 60 per cent of national wealth, compared to USA where the richest decile owns around 72 per cent of national wealth and the poorest 50 per cent not more than 2 per cent. 257. All of the quoted figures date from 2010.
[4] ibid 51.
[5] According to Piketty, population of the European countries has either being stagnant or has decreased between 1990 and 2012. ibid 84, 168.
[6] ibid 26.
[7] ibid 24, 173.

The same is observed in the studies of Branko Milanović, whose work has also become the standard reference in the analyses of global wealth disparities. Although Milanović's analysis is primarily based on the household survey data, a method which Piketty and some other researchers criticise as inaccurate and biased,[8] he also identifies the worrying levels of disparities in income distribution within and between countries. On the global level, according to his research, the inequalities are so sharp that the richest 5 per cent receive one-third of total world income or, as he illustrates it, "[t]he richest people earn in about 48 hours as much as the poorest people earn in a year."[9] While analysing his much discussed "elephant chart", a graphical representation of the relative gain in household per capita income between 1988 and 2008, Milovanović finds that the greatest looser of the globalisation is the lower middle class of the rich world, before all of the western European countries, and that the income gaps between the top and the bottom have considerably widened during the last thirty years.[10]

The empirical data collected by other researchers and international organisations confirm the same trends. The OECD researchers argue that income inequalities are at the historical heights.[11] OECD reports also stress a rapid increase in capital income inequality in comparison to earnings inequality, as a consequence of which income gap between the rich and poor in advanced European societies, such as United Kingdom and Italy became ten to one, and six to one in the traditionally egalitarian countries, such as Germany, Denmark and Sweden.[12] These figures look even grimmer when inequality is measured by comparing the totality of personal wealth. According to the OECD data from 2012, the wealthiest ten per cent in the OECD member countries hold half of all total household wealth in comparison to only three per cent controlled by the poorest 40 per cent.[13] Similarly to Piketty's concerns with the low economic and demographic growth, as factors that can fuel further increase of inequalities, the OECD researchers wonder over the question of what is to be expected in the future, if the gap between the rich and poor had

[8] ibid 329-330. See also the OECD study from 2016, according to which the main shortcoming of the household surveys, as one of the two main ways to gather income data, is that better-off persons often do not respond to surveys or fail to reveal their full financial situation, while those who are worst-off may be to such a great extent excluded from the society that the survey may fail to reach them. In: Brian Keeley, *Income Inequality: The Gap between Rich and Poor* (OECD Publishing 2015) 24.

[9] Branko Milanović, 'Global Income Inequality: What It Is and Why It Matters' in: Jomo K. Sundaram, Jacques Baudot (eds.), *Flat World, Big Gaps. Economic Liberalization, Globalization, Poverty and Inequality* (Zed Books 2007) 11.

[10] Branko Milanović, *Global Inequality: A New Approach for the Age of Globalization* (The Belknap Press of Harvard University Press 2016) 29, 41.

[11] OECD, 'Income Inequality Update' (November 2016) 1.

[12] OECD, 'Divided We Stand: Why Inequality Keeps Rising' (OECD Publishing 2011) 17.

[13] The European countries make up 26 out of 35 OECD members. Brian Keeley (n 8) 3.

widened so much in the decades of sustained economic growth.[14]

According to the European Commission report from 2010, the European workers have not benefited from the higher productivity levels brought by the technological advancement, and one third of the working adults are in poverty.[15] The wage polarisation of the workforce in the European Union "impedes career progression and increases the difficulty of redressing the intergenerational transmission of inequality".[16] As it will be seen in the case study (part 1.4.), the process of deindustrialization coupled with globalisation of the neoliberal trade patterns, have enabled a rapid increase of the various forms of atypical labour, which has brought to even more complex forms of inequality.[17]

Income inequality is at the same time a source and a consequence of other important dimensions of personal well-being. As an indicator, income inequality captures only a narrow aspect of inequality and needs to be supplemented by data which address the non-income dimensions of individual and group well-being. For that reason, the concept of socio-economic inequalities includes both income and non-income objects of measurement, such as access to education and educational attainment, access to health care and health, longevity, etc.

1.1.1. The non-income indicators of socio-economic inequalities

Although the relationship between educational attainment and important social outcomes, such as employment, earnings and health, is beyond the dispute both in theory and in practice, inequality in education has increased in Europe over the last decades.[18] According to a number of studies, the low socio-economic status is among the main determinants of underachievement in education.[19] The aggregate EU level data obtained through the PISA testing show that as many as

[14] OECD, 'Divided We Stand: Why Inequality Keeps Rising' (n 12) 3.
[15] Diane Perrons, Ania Plomien, 'Why Socio-Economic Inequalities Increase? Facts and policy responses in Europe (European Commission Report, Publications Office of the European Union 2010) 24.
[16] ibid 25.
[17] This has increased the inequality of the working population in a way which can no more be measured only through the monetary category of wage.
[18] Diane Perrons, Ania Plomien (n 15) 29; OECD, 'Educational Opportunity for All: Overcoming Inequality throughout the Life Course' (OECD Publishing 2017) 38.
[19] European Commission, 'Education and Training Monitor: Executive Summary' (Report, November 2017) 6. The NESSE Network of Experts argues more specifically that boys from working class families, no matter to which ethic of minority group they belong, are at the greatest risk of having literacy difficulties and leaving school early. Kathleen Lynch, Maggie Feeley, 'Gender and Education (and Employment): Gendered imperatives and their implications for women and men' (Report of NESSE Network of Experts, European Commission, 2009) 14.

33.8 per cent of pupils from the bottom segment of the PISA index of socio-economic and cultural status (ESCS) do not arrive to the basic level of competence in science, in comparison to 7.6 per cent of pupils from the top 25 per cent of this index.[20] It has been also reported that 80 per cent of students from disadvantaged backgrounds are more likely to repeat grade in primary or secondary school than their peers from advantaged backgrounds.[21] The same relationship between the socio-economic background of parents and the educational achievement of their children is observed in tertiary education. According to EUROSTAT, the educational attainment levels of the population have improved significantly over the last thirty years, and many of the EU member states have already surpassed the EU 2020 Strategy target of at least 40 per cent of 30 – 34-year-olds with the university degree.[22] However, this does not in itself signify that the educational gap, with its strong effects on the socio-economic status of individuals, has become smaller. As observed by Jan Koucký and Aleš Bartušek, although the level of educational attainment of all groups have increased through the expansion of tertiary education, "it is only when the demand for tertiary education on the part of upper classes has been nearly saturated that less privileged social groups get a chance, and overall inequality therefore decreases as a result.[23] In an article on the relationship between education and social stratification in Europe, Marios Vryonides and Iasonas Lamprianou claim that even though we may not anymore speak about class-based exclusion in access to universities, given an increased number of lower class students, the new forms of inequalities in tertiary education now ensue from differences among the educational institutions.[24] With the marketization of education brought by the neoliberal paradigm, in the last decades the educational system has become highly differentiated in a way which makes the relationship between the educational attainment and socio-economic inequalities subtler and less discernible. The quantitative development of tertiary education has not decreased but have instead changed the character of inequality by assigning greater importance to factors such as field of study, prestigiousness and selectiveness of the university, etc.[25]

[20] According to the same report, behind these aggregate figures are significant differences among and within single EU member states. European Commission, 'Education and Training Monitor: Executive Summary' (n 19) 6.
[21] OECD, 'Educational Opportunity for All: Overcoming Inequality throughout the Life Course' (n 18) 31.
[22] In 2016, 39.1 % of the population aged 30–34 in the EU-28 had completed tertiary education (see Figure 1). EUROSTAT, Educational attainment statistics, *Data extracted in June 2017. <http://ec.europa.eu/eurostat/statistics-explained/index.php/Educational_attainment_statistics>* accessed 25 January 2018.
[23] Jan Koucký, Aleš Bartušek (n 25) 20.
[24] Marios Vryonides, Iasonas Lamprianou, 'Education and Social Stratification Across Europe' (2013) 33 International Journal of Sociology and Social Policy 81, 94.
[25] Marios Vryonides, Iasonas Lamprianou (n 23) 94; Jan Koucký, Aleš Bartušek, 'Access to a Degree in Europe: Inequality in tertiary education attainment 1950- 2011' (Charles University in Prague, Education Policy Centre 2013) 4.

Health is another public good which strongly determines degree of socio-economic inequality between individuals and groups.[26] Access to health care, as critical component of universal health coverage, is hindered by financial barriers, and the unmet medical needs are disproportionally present among the people from the lower socio-economic sections of a society, such as persons with low income, unemployed, older, girls and women, and persons who did not complete secondary education.[27] According to the available figures, in the European Union on average four times greater number of persons from low income groups claim to have unmet health care needs caused by financial, geographic and waiting time reasons, in comparison to the persons from high income groups.[28]

The empirical research in overall points to a strong correlation between the degree of past inequality and the present socio-economic status. The concept of intergenerational mobility serves to express the level of co-relatedness of the socio-economic position of parents and that of their children across some of its dimensions, such as educational attainment or income. By observing the relationship between inequality and factors such as birthplace, gender, family background and race, Brunori, Ferreira and Peragine provide evidence that these "exogenous factors", negatively affect inequality in income distribution.[29] Several research projects financed by the European Commission bring forth evidence that income inequality exhibits a strong tendency to be transmitted from parents to children. One research shows that 53 per cent of persons aged 25 who were growing up in poverty remain in poverty. Some other found that intergenerational transmission of inequality is considerable in all EU member states, but that its degree varies in a way which indicates its dependence from the overall shape of the welfare systems in the observed countries.[30] There is also abundance of evidence of strong correlation

[26] In an interesting article on the link between social inequalities and health, Elizabeth Goodman and Nancy E. Adler argue that the exposure to stress is exacerbated in lower socio-economic environments due to the demand for constant adaptation to the changes. For them, the unequal allocation of physiological costs of that adaptation over time "creates a fundamental injustice that is made manifest by the differential distribution of disease in our society". Elizabeth Goodman, Nancy E. Adler, 'The Biology of Social Justice: Linking Social Inequalities and Health in Adolescence' in: Cecilia Wainryb, Judith G. Smetana, Elliot Turiel, (eds.), *Social Development, Social Inequalities, and Social Justice* (Taylor & Francis Group 2008) 125.

[27] European Commission Expert Panel on Effective ways of Investing in Health, 'Access to Health Services in the European Union' (Opinion of 3 May 2016) 15.

[28] OECD/EU, 'Health at a Glance: Europe 2016 – State of Health in the EU Cycle' (OECD Publishing, 2016) 154.

[29] Paolo Brunori Francisco H. G. Ferreira Vito Peragine, 'Inequality of Opportunity, Income Inequality and Economic Mobility: Some International Comparisons' IZA Discussion Paper No. 7155 (January 2013) 16.

[30] See, for instance: Gabriele Ballarino, Fabrizio Bernardi, 'The Intergenerational Transmission of Inequality and Education in Fourteen Countries: A comparison' in: Fabrizio Bernardi, Gabriele Ballarino (eds.), *Education, Occupation and Social Origin: A Comparative Analysis of the Transmission of Socio-Economic Inequalities* (Edward Elgar Publishing

between the socio-economic status of parents and the educational level of their children, as one of the main pointers of the degree of intergenerational transmission of inequality. [31] The concept of intergenerational mobility shows that an analysis of socio-economic inequalities needs to recon with a great number of variables which spring from the nature of societal networks to which an individual belongs, starting from the most basic ones, such as family unit, to the complex milieu of formal and informal societal groups.

1.2. Socio-economic inequalities and their complexities

The deepening of socio-economic inequalities is well documented, yet the abundance of the available statistical evidence we have just looked at does not make the topic less complex. Although the methods for measuring different aspects of inequality have become very sophisticated with the advancement of information technology, the figures they produce cannot provide a complete understanding of its causes and consequences.

There are number of reasons which limit the utility of quantitative measuring of societal inequality. The most obvious limitation of quantitative measures is that no matter how detailed account of inequality they provide, they will always remain incomplete without a wider theoretical elaboration of the social categories that could adequately represent inequality. [32] Another limitation of the quantitative research is that it mostly results in unidimensional indexes which are incompatible with the multidimensional nature of inequality.[33]

The general difficulty in capturing and explaining the many different facets of the concept of inequality has been explained by Sen as the problem of "stretching a partial ranking into a complete ordering". Sen argues that the standard measures of inequality "lead to some rather

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2016) 255; Stefanos Papanastasiou, Christos Papatheodorou, 'Causal Pathways of Intergenerational Poverty Transmission in Selected EU countries' (2018) 12 Social Cohesion and Development 5.

[31] Diane Perrons, Ania Plomien (n 15) 75-76.

[32] While most of the contributors of the debate on the contemporary social inequalities agree that indicators, such as distribution of income, cannot explain the structure of inequality, there is no consensus on social categories that could adequately represent inequality.

[33] The debate on whether unidimensional indicators such as income and consumption can adequately measure poverty has commenced already four decades ago, with Amartya Sen raising very compelling arguments among those who insisted on a multidimensional nature of poverty and inequality. Today we could say that there is some kind of general agreement, even among the economic scholars, that socio-economic inequalities, such as poverty and other deprivations, need to be observed as multidimensional phenomena. See: Achilla Lemmi, Gianni Betti, 'Introduction' in: Achilla Lemmi, Gianni Betti (eds.), *Fuzzy Set Approach to Multidimensional Poverty Measurement* (Springer 2006) 1.

absurd results precisely because each of them aims at giving a complete-ordering representation to a concept that is essentially one of partial ranking".[34] This is even more pronounced in the problem of capturing the "conversion variations between the resources and capabilities"[35], which lays at the heart of Sen's capability approach:[36]

> **"**There can also be some 'coupling' of disadvantages between different sources of deprivation, and this can be a critically important consideration in understanding poverty and in making public policy to tackle it. Handicaps, such as age or disability or illness, reduce one's ability to earn an income. But they also make it harder to convert income into capability, since an older, or more disabled or more seriously ill person may need more income (for assistance, for prosthetics, for treatment) to achieve the same functionings (even if that achievement were, in fact, at all possible). Thus, real poverty (in terms of capability deprivation) can easily be much more intense than we can deduce from income data.**"**[37]

Not only that different manifestations of inequality cannot be reduced to one or few basic indicators, but there is no certainty either as to the cause-effect relationship between them. The intersectionality approach to inequality brings to our attention the fact that different aspects of inequality mutually reinforce each other. The so-called "self-reinforcing loops of inequality" tell that inequality across some dimensions produces inequality in other dimensions, which in turn reinforces the inequality which was firstly observed.[38] A related problem in understanding inequality is found in the phenomena of reverse causality and simultaneity, that are particularly present in the analysis of the social outcomes such as education and health.[39]

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[34] Amartya Sen, 'Conceptualizing and Measuring Poverty' in: David B. Grusky, Ravi Kanbur (eds.), *Poverty and inequality* (Stanford University Press 2006) 48. In "The Idea of Justice", Sen provides a more cogent explanation of this problem: "There are indeed schools of thought which insist, explicitly or by implication, that all the distinct values must be reduced ultimately to a single source of importance. To some extent that search is fed by fear and panic about what is called non-commensurability – that is, irreducible diversity between distinct objects of value. This anxiety, based on the presumption of some alleged barriers to judging the relative importance of distinct objects, overlooks the fact that nearly all appraisals undertaken as a part of normal living involve prioritization and weighing of distinct concerns, and that there is nothing particularly special in the recognition that evaluation has to grapple with competing priorities." Amartya Sen, *The Idea of Justice* (The Belknap Press of Harvard University Press 2009) 395.

[35] Amartya Sen, *The Idea of Justice* (n 34) 264.

[36] Sen's capability approach proposes shift from the resource-centred evaluative approaches to a new understanding of inequality that would include evaluation of the relative importance of different resources through the focus on the actual opportunities a person has. Amartya Sen, *The Idea of Justice* (n 34) 241.

[37] Amartya Sen, *The Idea of Justice* (n 34) 256.

[38] Giovanni Guidetti, Boike Rehbein, 'Theoretical Approaches to Inequality in Economics and Sociology. A Preliminary Assessment' (2014) 5 (1) Transcience 10.

[39] Oxford Policy Management, 'DFID Shock-Responsive Social Protection Systems Research: Literature review' (Oxford Policy Management 2016) 11.

The inadequacies of measuring can be also a consequence of a mismatch between the categories which are the object of measurement and the societal milieu in which the measurement takes place. Giudetti and Rehbein point to an easily observable problem of the reliance on occupationally based class schemes although the world of labour has been profoundly changed through the flourishing of diverse forms of atypical work.[40] The technological advancement and the current wave of globalisation have changed our society to the point that many, if not most of the categories that were used to depict social stratification in the past, cannot serve that purpose anymore. The fragmentation of the contemporary society has occurred in many dimensions that were connecting individual and group existence, and it is becoming harder and harder to classify individuals in categories (other than poverty) which are based on the sufficient level of common life experience and are at the same time measurable.

An issue of particular importance for this study is the relational, comparative nature of inequality. The relative neglect of the conceptual foundations of equality measurement, which occurred simultaneously with the shift of the academic interest to the empirical studies, have led to a more pronounced focus on the non-relational aspects of inequality, such as the disparities in access to certain goods and the absolute measures of inequality.[41] For instance, although there is no dispute that the concept of absolute poverty,[42] which measures poverty against an internationally agreed minimum amount required to meet the basic material needs such as food, clothing and shelter, is indispensable for the analysis of the global patterns of wealth disparities, its operational value becomes rather questionable when it comes to the disparities at the level of a single society. In his often-cited example of a European "creditable day-labourer [being] ashamed to appear in public without a linen shirt", Adam Smith wrote more than two centuries ago about the relational aspect of poverty and social inequality.[43] The level of socio-economic disparities cannot be adequately expressed without considering the way in which the socio-economic indicators that determine person's socio-economic position, relate to the overall wealth of the population of a given society. The relational nature of socio-economic inequalities brings us straight to the issue of distribution

[40] They note that a serious shortcoming of the national statistics is that they mostly use a notion of professional group as a proxy for class. Giovanni Guidetti, Boike Rehbein (n 38) 3.

[41] Martha C. Nussbaum, 'Poverty and Human Functioning: Capabilities as Fundamental Entitlements' in: David B. Grusky, Ravi Kanbur (eds.), *Poverty and inequality* (Stanford University Press 2006) 47.

[42] Cranston defines absolute poverty as a concept that provides for the poverty to be measured "in relation to the minimum subsistence needs derived from the opinion of the experts on what a person need to maintain physical health", in comparison to the concept of relative poverty that takes into account the standard of living achieved in particular society. Ross Cranston, *Legal Foundations of the Welfare State* (Weidenfeld and Nicolson 1985) 6.

[43] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776 University of Chicago Press reprint 2008) 1168.

of benefits and burdens, institutions which carry this distribution and their role in the emergence and sustenance of the socio-economic inequalities.

1.3. Socio-economic inequalities and institutions

While it can be said that the global increase of inequalities is closely connected to the impersonal forces shaping the era in which we live, such as the rapid technological advancement and the international trade patterns dictated by the globally dominant neoliberal capitalism, these can elucidate only part of the picture when it comes to the inequalities observed in individual societies. The variations in the inequality levels observed between and within different countries, direct the analysis of the socio-economic inequalities to the similarities and differences between their institutional make-up. In summarising the main conclusions which he has reached while analysing data on the historical distribution of income and wealth, Piketty convincingly argues that the level of socio-economic inequalities depends to an important degree on the choices made through the public policies:

> "What are the major conclusions to which these novel historical sources have led me? The first is that one should be wary of any economic determinism in regard to inequalities of wealth and income. The history of the distribution of wealth has always been deeply political, and it cannot be reduced to purely economic mechanisms. In particular, the reduction of inequality that took place in most developed countries between 1910 and 1950 was above all a consequence of war and of policies adopted to cope with the shocks of war. Similarly, the resurgence of inequality after 1980 is due largely to the political shifts of the past several decades, especially in regard to taxation and finance. The history of inequality is shaped by the way economic, social, and political actors view what is just and what is not, as well as by the relative power of those actors and the collective choices that result."[44]

There are innumerable treads that connect into strong causal relationship the societal institutions and the socio-economic stratification of a society, viewed as differentiation along the patterns of socio-economic positions of its members. The variations in the level of socio-economic inequalities in different societies, even if analysed across regions, are the prime indication of the

[44] Thomas Piketty (n 1) 20. Note the extent to which the still dominant approach of neoclassic economics, based on the postulate that economic behaviour is driven by the underlying laws of demand and supply, differs from Piketty's conclusions.

interconnectedness between the societal setup and the social stratification. Another, often emphasized by the researchers of socio-economic inequalities in western Europe, is the overlap of the period of significant contraction of the socio-economic inequalities between 1930s and 1970s, with the expansion of welfare states.[45]

The causal relationship between the societal institutions and the socio-economic position of individuals and groups within society also ensue from those definitions of institutions which point to their redistributive function. Peter A. Hall, for instance, defines them in a relatively narrow way as the formal rules, procedures, and customary practices that regulate distribution of valuable societal goods.[46] The focus on formal societal institutions, which are created through the intentional, purpose-oriented human activity, helps us to establish a clearer link between the process of distribution of societal goods and the structure and degree of socio-economic inequality of a society.

A belief that our societies are societies of equal individuals, in which everybody has equal chances to lead the life he or she chooses, lays in the foundations of modern democracies. However, the very existence of social stratification, Sorokin argues, makes this belief to be nothing more than a "mental aberration […] not warranted by the facts".[47] The social stratification shows that there is "unequal distribution of rights and privileges, duties and responsibilities, social values and privations, social power and influence among members of a society".[48] It is the unequal treatment of individuals and groups from the different socio-economic milieu in the process of distribution

[45] Many researchers explain the reduction of socio-economic inequalities in this period by linking it to the redistribution policies pursued with vigour in the western European countries between the 1930s and the 1970s. Piketty adds to this that shrinking of inequality was also a consequence of the shocks caused by the two world wars.

[46] Peter A. Hall, 'The Movement from Keynesianism to Monetarism: Institutional analysis and British economic policy in the 1970s' in: Sven Steinmo, Kathleen Thelen, Frank Longstreth, *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge University Press, first printed in 1992, 5th edition, 1998) 96. For the present study, an important aspect of this definition of institutions, as noted by Stefan Svallfors, is that it "only includes deliberately designed objects, such as social security systems, political party systems, collective bargaining systems, and so on, while leaving social facts such as family interactions, class structures, and norms outside the definition". Stefan Svallfors, 'Introduction' in: Stefan Svallfors (ed.), *Analysing Inequality: Life Chances and Social Mobility in Comparative Perspective* (Stanford University Press 2005) 5.

[47] Pitirim Sorokin, *Social Mobility* (Volume III, first published in 1927, Routledge/Thoemmes Press 1998) 138.

[48] Sorokin defined social stratification as "[t]he differentiation of a given population into hierarchically super-posed classes", the essence of which "consist of unequal distribution of rights and privileges, duties and responsibilities, social values and privations, social power and influence among members of a society." He further observes that: "If the economic status of the members of a society is unequal, if among theme there are both wealthy and poor, the society is economically stratified, regardless whether its organisation is communistic or capitalistic, whether in its constitution it is styled the "society of equal individuals" or not. Labels, signboards and "speech reactions" cannot change nor obliterate the real fact of the economic inequality manifested in the differences of incomes, economic standards and in the existence of rich and poor strata." ibid 11.

that leads to the reinforcement of the existing or to the creation of new socio-economic inequalities.

To make the link between the process of distribution of societal resources and socio-economic inequalities somewhat clearer, under the danger of an oversimplification, it can be said that the distribution of societal resources takes place through the process of definition and application of rules that regulate distribution of burdens and benefits in a society. These rules define societal goals (which to a great extent shape the desirable individual goals), and criteria that determine the weight to be attached to different individual and group resources in the process of attainment of these goals.[49] If we depart from the presumption that these rules are in a formal sense neutral i.e. founded on the principle of equal treatment, we can see that there are two basic ways in which the societal institutions place disadvantages on those who are worse off in the social stratification.[50] Firstly, institutions create disadvantage upon some segments of population by making their access to the societal goods, in particular the enabling socio-economic goods such as work, education and health care, conditional, in direct or indirect way, on the resources they lack or possess them in scarcity. These resources can be financial means, spare time, or the very goods in question, such as certain level of education or good health. The second way in which the societal institutions operate to the disadvantage of those from the lower social strata is by creating tangible or intangible advantages in the competition for the access to the socio-economic goods on the side of those who are better off in the social stratification.

By definition, the rules for distribution of societal goods generate disadvantages that affect socio-economic position of some segments of population in a way which cannot be characterised neither as truly deliberate nor as truly incidental. This is because the disadvantage is result of the mutual interaction of a number of rules from the different fields of social praxis. In addition, every abstract rule suffers from the problems of over- and under-inclusion, which in itself makes the link between a rule and its effects less predictable. The relationship between the socio-economic inequalities and institutions is also very complex because it is the inequality itself that influences the process of formulating the rules of distribution through, what is called, the "self-reinforcing loops". The simplest illustration of this is found in rather intuitive postulation of the relationship

[49] As well the criteria that determine the degree to which the resources accumulated by parents are passed on to their children.

[50] The analysis will for the moment leave aside the process of creating disadvantages through practices which can be traced to individual and institutional prejudices and bigotry.

between the income inequalities and the reduced political agency of low-income groups. With the caveat that empirical studies cannot control all the variables that influence the political participation and the socio-economic position of individuals and groups, researchers have presented the evidence of the negative correlation between the socio-economic inequality and voter turnout in developed western European countries. If assumed that the major public policies are directly responsive to the preferences of the citizens expressed in the elections, this means that public policies are ordinarily shaped by the better-off groups in a way that favours them (at least in the short-term perspective), which in turn can bring to an even greater increase of income inequality and further dishearten the low-income groups with regards to their political participation.[51] Number of theoretical and empirical studies provide other accounts of the effects which the socio-economic inequalities can have on the process of shaping of important societal institutions, such as tax or educational systems.[52]

Obviously, one of the major difficulties in the analysis of the relationship between the socio-economic inequalities and the disadvantages ensuing from the process of distribution of social goods with regards those who are worse off in a society, is the question of what precedes what. However, no matter how complex this question is, there is enough evidence to assume that a significant portion of the existing inequalities is a consequence of unequal treatment of persons from different socio-economic backgrounds in the process of distribution of societal resources.[53] This is the main presumption of the present study with regards the question of the relationship between societal institutions and socio-economic inequalities, which will be illustrated through the case study on the unemployment benefits in the developed European countries.

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[51] Beatrice d'Hombres, Anke Weber, Leandro Elia, 'Literature Review on Income Inequality and the Effects on Social Outcomes' (Report, Publications Office of the European Union, 2012) ch 3.6.

[52] There are, for instance, number of studies which analyse the way in which the neoliberal dogmas that primarily benefit the better off section of the society, such as those embraced by the human capital theory, shape the educational process in contemporary societies. They largely arrive at the conclusion that in the educational systems tailored to deliver goals dictated by these neoliberal dogmas, education becomes a commodity, a positional good in the market place, the consumption of which eventually depends on the prior socio-economic status of an individual: Les Bell, Howard Stevenson, *Education Policy: Process, Themes and Impact* (Routledge 2006) ch 3; Ken Jones, 'Remaking Education in Western Europe' (2005) 4 European Educational Research Journal 228. See also a study which, although not focused on western European countries, provides solid empirical evidence of the use of educational policies as mechanism to ensure support from elite groups in a society: Joseph Wales, Arran Magee, Susan Nicolai, 'How Does Political Context Shape Education Reforms and Their Success? Lessons from the Development Progress project' (Overseas Development Institute 2016). On the way the level of socio-economic inequalities can influence the way in which a tax system is conceived see: Kenneth L. Sokoloff, Eric M. Zolt, 'Inequality and Taxation: Evidence from the Americas on how Inequality May Influence Tax Institutions' (2006) 59 Tax Law Review 201.

[53] Here, I am not referring to the informal systems within institutions, which sustain inequality but are hidden behind the formal and purportedly transparent institutional systems, but to the correlation between the socio-economic inequalities and unequal distribution of societal goods as an intrinsic property of the rules, practices and standards which govern the process of distribution of societal resources.

1.4. Case study: "Atypical jobs" and the unemployment insurance in Europe

1.4.1. Introduction

The deindustrialisation and decline of available jobs in developed countries came with technological changes which have enabled low-cost relocation of production to the countries with the low-cost labour. The process of deindustrialisation went hand in hand with the internationalisation of trade of a magnitude not witnessed before. At the same time, the rapid financialization of capital and the raise of financial markets have brought to the final erosion of the dogma of economic growth as the "raising tide"[54] that would lead to more jobs and higher wages for all.

The spread of automation, which does not show any tendency to subside in the decades to come, has reduced the productivity of labour and the number of available jobs.[55] While the rapid technological and digital advancement are automatizing profession after profession, jobs that are left are becoming more and more "flexible" both with regards to the time and the physical place needed for their realisation. For many persons, job has already become something like a "gig" for musicians, as there is ever-greater demand for temporary, commissioned labour in what has been termed "The Gig Economy".

The digital revolution, the non-stop technological innovations and the ways in which our societies have been responding to these changes, have had two important effects on the labour markets: entrenched unemployment and the growing size of underemployed working age population.[56] The later phenomenon, which relates to the situation when a person works fewer hours than is willing and capable to work, or works in temporary jobs with frequent, involuntary alterations of unemployment and short-term employment, is closely connected to the spread of the so-called

[54] Referring to a phrase "a rising tide that would lift all the boats", commonly used by advocates of the neoliberal policies to stress that all market participants will eventually be better off thanks to a more competitive market and production.

[55] Piketty notes that, differently from the traditional agrarian societies, one of the most prominent features of the contemporary society is myriad of ways in which labour can be substituted by capital. (Thomas Piketty (n 1) 223).

[56] These two phenomena are the result of interaction of many other features of the globalised economies but it is important to point to the technological changes, which have made them possible in the first place. However, the author is of the opinion that equally significant are the ways in which our societies have been responding to these changes.

"non-standard employment forms" or "atypical jobs".[57]

What are the effects of these changes of the landscape of work on the national unemployment insurance systems? Have they been adapted to cover the growing number of those who are involuntary employed below their potentials? Before answering these questions, the case study provides a short overview of changes that have occurred in the European labour market as a consequence of the technological advancement, as well as of the ways in which national laws and policies have led to the expansion of non-standard employment forms. Then it proceeds to examine how were those changes echoed in the social security systems of the developed European countries, in particular in their unemployment insurance schemes. To this aim the analysis primarily looks into the eligibility criteria in order to examine to what extent the national unemployment insurance schemes reflect the changing nature of employment brought by the post-industrial era.

The analysis is illustrative only given that it includes only a few selected eligibility criteria, but it should suffice to point to the complex interlinkage between the growing socio-economic inequalities, the rapid and profound changes in the labour markets and related fields of the societal orders, and the ways in which national institutions have responded to these changes.[58] The illustrative potential of the case study is based on the fact that the employment rates are particularly telling about the degree and structure of inequalities within countries.[59] Equally important, the case study introduces into the analysis the matter of security-related deprivation, as another key element needed for a deeper understanding of socio-economic inequalities.[60]

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[57] In this study the terms "non-standard employment" and "atypical employment" are used interchangeably in order to allow an easier reference to the literature dealing with this phenomenon. Yet, the author does not consider the terms entirely adequate. Given the statistics and the identified trends, the full-time indeterminate employment cannot anymore be considered to be a standard employment form, as it was the case in the post-1945 period.

[58] The analysis is confined to the developed European countries. Given its limitations the study could not include in the analysis the informal labour – a problem which plagues economically less developed European countries and has important repercussions on the way their labour markets and unemployment insurance systems operate. More on this in: Bob Deacon, 'Eastern European Welfare States: The Impact of the Politics of Globalization' Journal of European Social Policy 10/2000; Wouter van Ginneken, 'Extending Social Security: Policies for Developing Countries' (ESS Paper No. 13) International Labour Office, Geneva 2003.

[59] Alexander Lenger, Florian Schumacher, 'The Global Configurations of Inequality: Stratification, Glocal Inequalities, and the Global Social Structure' in: Alexander Lenger, Florian Schumacher (eds.), *Understanding the Dynamics of Global Inequality* (Springer 2015) 23.

[60] "In the light of the International Bill of Rights", the United Nations Committee on Economic, Social and Cultural Rights defines poverty as "a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, *security* and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights." UN Committee on Economic, Social and Cultural Rights, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty

1.4.2. The changing nature of employment

In the last decades the high unemployment has been accompanied with underemployment, since the growing share of non-standard jobs became one of the main features of the post-industrial employment structure.[61] The OECD defines the non-standard employment as deviation from "the 'norm' of full-time, regular, open-ended employment with a single employer (as opposed to multiple employers) over a long time span".[62] In most of the studies on the subject, this category comprises three broad forms of employment: part-time jobs, fixed-term or temporary contracts, and self-employment.[63] From the perspective of unemployment insurance, the principal feature of the involuntary non-standard employment is high employment and/or wage insecurity given its unpredictability vis-à-vis hours of work and duration of employment.[64] Another important characteristic of non-standard jobs are lower wages in comparison to the standard employment "since in most countries, a large share of the growth in non-standard employment has been in low-skilled jobs in the bottom part of the wage distribution".[65] According to a research note prepared for the European Commission, in 2014 around 42 per cent of the active working population in the European Union was engaged in the non-standard employment.[66]

The atypical work arrangements are not only a consequence of technological innovations, but also of policies and laws that directly or indirectly foster their creation. In fact, one could say that the legislative and institutional changes aimed at deregulation of employment relationship and employment casualization were decisive steps in this direction. Enacted in the name of greater competitiveness, the measures undertaken as part of the so-called "labour deregulation" resulted in the decline of organised labour and further weakened the position of workers, which was already affected by the transformed role of labour in the deindustrialised European societies. An

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and the International Covenant on Economic, Social and Cultural Rights' Statement, 4 May 2001, E/C.12/2001/10 para. 8, emphasis added.

[61] Daniel Clegg, 'Europe' in: International Social Security Association, 'Labour Market Megatrends and Social Security' (ISSA 2013) 55.

[62] Organisation for Economic Cooperation and Development, 'In It Together: Why Less Inequality Benefits All' (OECD Publishing 2015) 138.

[63] The European Commission, for instance, under the notion of non-standard work refers to "fixed-term contracts, temporary agency work, part-time work and independent contract work'. See: European Commission, 'Employment and Social Developments in Europe 2014' (Publications Office of the European Union 2014) 30 footnote 68.

[64] When it comes to the unpredictability with regards the provision of work and the duration of employment, an exception from this rule is the part-time continuous employment.

[65] Organisation for Economic Cooperation and Development, 'OECD Employment Outlook 2015' (OECD Publishing 2015) 88.

[66] Manos Matsaganis, *et al.*, 'Non-Standard Employment and Access to Social Security Benefits' (Research note 8/2015, Publications Office of the European Union 2016) 10.

important element of "labour deregulation" is the process of "*contractualisation*", a term used by Guy Standing to refer to a "global trend towards individualised labour contracts".[67] Decline in the legal protection of workers lead to the spread of labour contracts that are negotiated individually between the worker and the employer, even in those professions in which the collective bargaining could be possible, which due to their unequal bargaining power strongly benefit the later.

The raise of non-standard employment is also stimulated by the economic and fiscal policies that have abandoned the paradigm of full-employment characterising the industrial society. Officially, the fight against unemployment is still high on political agendas but, as E. Stockhammer notes, the neoliberal policies guided by the paradigm of price stability and balanced budgets is "what history books will record about these decades".[68] As a response to the upsetting unemployment rates, the policy makers have been encouraging creation of the new 'atypical' employment forms, such as casual work, portfolio work, voucher-based work, zero-hour contracts, co-working, etc., characterized by "unconventional work patterns and places of work, or by the irregular provision of work".[69]

As a matter of fact, the official statistics generally do not differentiate between the standard employment and involuntary non-standard employment,[70] although the later can be taken to represent a "kind of disguised unemployment".[71] For instance, the European Union Labour Force Survey defines persons in employment as "those aged 15 and over, who, during the reference week, performed *some work, even for just one hour per week*, for pay, profit or family gain".[72] Nor the statistics take into account the high job turnover rates, thus overlooking the probability that the low unemployment levels recorded in the recent years have actually come about as a

[67] Guy Standing, 'Economic Insecurity and Global Casualisation: Threat or Promise?' (2008) 88 Social Indicators Research 24.

[68] Engelbert Stockhammer, *The Rise of Unemployment in Europe: A Keynesian Approach* (Edward Elgar Publishing 2004) 1.

[69] Eurofound, 'New Forms of Employment' (Publications Office of the European Union 2015) 1.

[70] Jorgen Goul Andersen *et al.* (eds.), *Europe's New State of Welfare: Unemployment, Employment Policies and Citizenship* (Policy Press 2004) 70; David Dooley, Joann Prause, *The Social Costs of Underemployment: Inadequate Employment as Disguised Unemployment* (Cambridge University Press 2004) 12.

[71] David Dooley, Joann Prause (n 70) 1. Another problem of statistics, as observed in ISSA report on labour market megatrends, is underemployment which is "often underestimated, mainly due to problems of measurement of the phenomenon and the more challenging responses required to respond to it". Simon Brimblecombe 'Executive Summary' in: International Social Security Association, 'Labour Market Megatrends and Social Security' (ISSA 2013) 3.

[72] See: Eurostat, 'Labour market participation statistics' (Data from January and March 2013) http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Labour_market_participation_statistics&direction=next&oldid=172483 accessed 4 July 2017.

consequence of intensive "job churning".[73]

While the European population is becoming older and older, the figures on long-term unemployed young persons are reaching worrying levels.[74] The paradox of high youth unemployment is one of the consequences of the quick-fix policies, which encouraged the later labour force withdrawal to resolve the problem of aging population.[75] According to the study on the labour market megatrends and social security, the shortage of work opportunities for this age group and its limited access to the social security programmes might result in the creation of a "lost generation".[76]

The decentralisation of wage setting procedures has aided the pairing up of the non-standard employment with in-work poverty. Although the recession caused by the 2009 financial crisis is over, in many EU Member States "in-work poverty is on the rise, driven by a combination of factors including low pay, low work intensity, instability of employment, and the way that tax-benefit systems work […]".[77] In 2014, nearly one in ten (9.6%) of working people in EU lived below the poverty line.[78] The low wages characterising atypical jobs are also followed with the deepening wage gap. According to da Silva and Turrini, "workers on permanent contracts earn[ed] on average 14.9% per cent more than observationally similar workers on fixed-term contracts" in the EU countries in 2015.[79] The trend is further aggravated with the decreasing labour mobility, which signifies that those in atypical employment have high chances to remain in "low wage careers"[80] or end up perpetually "cycling between unemployment and low-paid jobs".[81]

[73] David Dooley, Joann Prause (n 70) 5.
[74] See: Organisation for Economic Cooperation and Development, 'OECD Employment Outlook 2016' (OECD Publishing 2016) 222, Table D. Unemployment rates by selected age groups; Eurofound, 'Long-term Unemployed Youth: Characteristics and policy responses' (Publications Office of the European Union 2017).
[75] Daniel Clegg (n 61) 49.
[76] Daniel Clegg (n 61) 47.
[77] Abigail McKnight, *et al*., 'Low Pay and In-Work Poverty: Preventative Measures and Preventative Approaches' (Evidence Review, Publications Office of the European Union 2016) 11.
[78] ibid 52.
[79] António Dias da Silva, Alessandro Turrini, 'Precarious and Less Well-Paid? Wage differences between permanent and fixed-term contracts across the EU countries' (Economic Papers 544, Publications Office of the European Union 2015) 10. According to the OECD, in 2012 this difference was 25 per cent (in: A. McKnight, *et al*., (n 77) 78).
[80] Abigail McKnight *et al*., (n 77) 24-25.
[81] Organisation for Economic Cooperation and Development, 'OECD Employment Outlook 2015' (OECD Publishing 2015) 11. For instance, the recent figures on Italy, characterised by the significant increase of young workers in the non-standard employment, show that people who finish education or training and start working through non-standard employment contracts, including persons with high educational qualifications, have greater chances to experience repeated spells of atypical employment rather than a fast move into standard employment (Diane Perrons, Ania Plomien (n 15) 32).

Apart from the low earnings and low prospects to find a more suitable job, those who unwillingly find themselves in atypical employment are often affected by an intensive economic and social insecurity. As it will be seen in the following analysis, one of the effects of the "end of traditional jobs and careers" [82] was the fragmentation of the social security systems, including the unemployment insurance schemes, which have had negative effects on persons in the non-standard employment.

1.4.3. Unemployment insurance and underemployment

Public unemployment insurance is the standard element of the social security systems in most of the advanced economies and there is no European country that does not provide coverage for this risk.[83] Its basic function, as it is the case with the social security programmes covering other risks, is to provide a collective mechanism for the protection of individual members of society from unemployment.[84] Through the unemployment insurance the active members of a society share collectively the unpredictable losses caused by the incident of unemployment that would be too onerous to bear individually. Hence, its core function is to make sure that those who were laid off have adequate income while in search for new employment. An important consequence of the unemployment insurance is income redistribution; income from work is redistributed temporarily, across different phases of individual's employment course, as well inter-personally, from those who were lucky enough not to be unemployed to those who have experienced this social risk.[85]

The unemployment insurance provides a good example why certain social functions cannot be

[82] David Dooley, Joann Prause (n 70) 8.

[83] Miroslav Beblavý, Gabriele Marconi, Ilaria Maselli, 'A European Unemployment Benefit Scheme: The rationale and the challenges ahead' (Working paper, Publications Office of the European Union 2015) 22.

[84] Yet, it should be observed that there is a tangible tendency to see the social security programmes as a way to enhance economic growth and reduce social conflicts. See on this: International Social Security Association, 'Labour Market Megatrends and Social Security' (ISSA 2013). According to McKnight, Duque and Rucci, "the economic inequality was high on the agenda at recent meetings of the World Economic Forum (WEF) [and] from 2012, inequality has been identified by WEF members as the most likely threat to the global economy." In: Abigail McKnight, Magali Duque, Mark Rucci, 'Creating More Equal Societies. What Works?' (Evidence Review, Publications Office of the European Union 2016) 10.

[85] According to P. Plamondon *et al*., income maintenance and income distribution cannot be seen as the primary goals of unemployment insurance but rather a consequence of the way the unemployment insurance programmes operate. Yet, they stress, unemployment insurance "also comprises social and welfare characteristics, which are irrelevant to private insurance, thus earning it the designation of social insurance." (Pierre Plamondon *et al*., *Actuarial Practice in Social Security* (International Labour Office and International Social Security Association 2002) 288-289). Different on this in: International Social Security Association, 'Unemployment Benefit Provision: Measuring multivariable adequacy and the implications for social security institutions' (ISSA 2016) 2: Wayne Vroman, 'International Evidence on Unemployment Compensation Prevalence and Costs' (Technical report, International Social Security Association 2008) 1.

privatized and need to remain in the collective hands. Although it resembles a standard insurance plan in many respects,[86] it cannot be provided via private insurance scheme for a number of reasons.[87] Some of them arise from the nature of unemployment as an insurable risk, such as the cyclical nature of business productivity levels.[88] Yet, the most important obstacle, if one sees the unemployment insurance as a social good, [89] is related to the fact that for a private insurance company some segments of the active working population would simply be uninsurable.[90] Imagine, for instance, a person stuck in the fixed-term part-time job, or in an even more insecure type of a "marginal job", who has found herself in such situation not because that suits her and make it easier to reconcile work and family life, as the authors of "flexicurity"[91] imagined, but who has simply had no other choice given her labour market prospects. One could hardly think of any insurance plan that would at the same time pay off to the insurance company and be within the reach of a client coming from this category of workforce. The privatization of unemployment insurance would necessarily lead to the two track insurance plans where one would be reserved for persons in stable, highly remunerated jobs, while the second, with expensive premiums, would be there for those in the risky, non-standard employment.[92]

The unemployment insurance schemes vary widely in their design and other basic features. Their typology is usually linked to the classification of welfare regimes. The most often invoked classification is the one of Esping-Andersen and Myles who define the welfare states as liberal, social democratic, and continental/corporatist, according to the ideological frameworks that are predominantly shaping the relationship between the state, the labour market and the family.[93] By

[86] For a summary on the relationship between the unemployment insurance and the standard insurance concepts: Pierre Plamondon *et al*. (n 85) 288-289.

[87] On the arguments of those claiming that private unemployment insurance is a good idea see, for instance: Chris Edwards, George Leef, 'Failures of the Unemployment Insurance System' (Cato Institute, June 2011) http://www.downsizinggovernment.org/labor/failures-of-unemployment-insurance accessed 3 July 2017.

[88] Janine Leschke, *Unemployment Insurance and Non-Standard Employment* (VS Verlag für Sozialwissenschaften 2008) 40-44.

[89] The protection from unemployment is a social good given the importance of income security for individuals. A large body of research shows the adverse effects of the unemployment and income insecurity on health. See, for instance, Richard Wilkinson, Michaek Marmot (eds.), 'Social Determinants of Health: The Solid Facts' (World Health Organization, 2nd edn, 2003) 20-21.

[90] See on this: Ola Sjöberg, 'Social Insurance as a Collective Resource: Unemployment Benefits, Job Insecurity and Subjective Well-being in a Comparative Perspective' (2010) 88 Social Forces 1281.

[91] See European Union Council Conclusions on the common principles of "flexicurity" (16201/07), adopted by the Council on 5/6 December 2007 and endorsed by the European Council on 14 December 2007.

[92] Janine Leschke (n 88) 42.

[93] Gøsta Esping-Andersen, John Myles, 'Economic Inequality and the Welfare State' in: Brian Nolan, Wiemer Salverda, Timothy M. Smeeding (eds.), *The Oxford Handbook of Economic Inequality* (Oxford University Press 2009) 639-660. The more recent research suggests the existence of the fourth category, determined as the "Mediterranean" or the Southern European welfare state regime.

looking at their bases of entitlement (universalism v. targeting), level of benefits and the modes of governing, Korpi and Palme classify the social security systems into five ideal types as targeted, voluntary state subsidized, corporatist, basic security, and encompassing models.[94] The main value of these typologies is that they single out the basic elements of the different types of social security systems and enable comparative analysis of the ways in which they have responded to the recent economic, technological and other changes. The patterns of changes of these basic elements identified through such analysis point to the conclusion that the different welfare systems are becoming more and more similar to each other. One can also hypothesize that this trend of convergence is a consequence of the European countries being exposed to the same challenges facing their labour markets and the overall capacity of the state to regulate the system of distribution of societal resources. In the last decades, most of the social protection systems have undergone profound transformations, which make their features less clear-cut than in the past and more and more remote from the traditional Bismarck v. Beveridge models characterising the post Second World War period. Two clearly identifiable trends, no matter to which type a given social security system belongs, is that they have begun to encompass to a greater extent the need-based targeted programmes, including those directed at unemployed, and that state has been given a greater role in their financing.

These trends are a direct consequence of the above-mentioned policy and legislative choices that have profoundly reshaped the European labour markets. The processes of labour deregulation and casualization have affected not only the world of labour but have also had multiple effects on the national social security programmes. The high rates of unemployment and underemployment have depleted the financial bases of the social security systems in general, and even more so of the unemployment insurance schemes. The race for greater competitiveness that has instigated the "labour deregulation" has also led to the descaling of the level of compulsory social security insurance burdening employers. The tightening of the unemployment insurance coverage,[95] supported by the mainstream economic thinkers who see the unemployment benefits as "wage push factor", was dictated by the imperative of a more competitive European labour market.[96] The

[94] Walter Korpi, Joakim Palme, 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries' (1998) 63 American Sociological Review 665-670.
[95] Abigail McKnight, Magali Duque, Mark Rucci (n 84) 7.
[96] Engelbert Stockhammer (n 68) 2.

tangible reduction of the public social security expenditures occurred as well as the side effect of austerity measures dictated by the fiscal consolidation strategies.[97]

The increasing participation of state in the financing of the unemployment insurance programmes is another important factor that has smoothed the difference between the national unemployment schemes. Their mode of financing is, at least theoretically, strongly correlated with the nature of the individual entitlements to the unemployment benefits. In that sense, theoretically, there should exists a pronounced difference between the social insurance type of unemployment schemes in which the entitlements are, at least nominally, derived from the previous work-based contributions, and the unemployment assistance or other schemes of a non-contributory nature financed through the general revenues. Yet, the trend common to all European welfare regimes is that the state has become an important guarantee of the financial sustainability of unemployment schemes no matter to which type a scheme belongs.[98] The shocks brought by the 2009 financial crisis and the subsequent financial pressures caused by the high unemployment and underemployment levels, forced many European states to cover the deficits in the funds of the unemployment insurance programmes even if they were entirely based on the individual contributions, such as those belonging to the corporatist/continental type. Their financing from the general public revenues was also a consequence of the overall transformations of the social security systems that have led to a greater role being given to the targeted assistance. A good illustration of this is Germany, a birthplace of the first nationwide unemployment insurance system financed through the work-related contributions, which was in the last decades reconfigured to enable a greater participation of the general revenues and targeted programmes to support the unemployed.[99]

The orientation towards the social assistance schemes shaped by the concepts of basic needs and targeting, rather than towards the unemployment insurance that is premised on contributions and the philosophy of universalism, has also been a response to the growing share of underemployed persons i.e. those involuntarily engaged in atypical jobs.[100] In all developed European countries the unemployed who do not qualify for the unemployment insurance are assisted under the minimum

[97] International Labour Organisation, 'World Social Protection Report 2014-2015' (ILO 2014) 5.
[98] Oxford Policy Management, 'DFID Shock-Responsive Social Protection Systems Research: Literature review' (Oxford Policy Management 2016), 6.
[99] Janine Leschke (n 88) 110-111.
[100] See Kenneth Nelson, 'Social Assistance and Minimum Income Benefits in Old and New EU Democracies' (2010) 19 International Journal of Social Welfare 367–368.

income schemes and/or the social assistance programmes.[101] This has important repercussions on their right to social security in case of unemployment, given that under the social assistance schemes the entitlements become more vague and restricted. The negative effects of this are in practicual faced by the persons engaged in atypical jobs. As it will result from the following analysis, workers in atypical employment are often not covered by the unemployment insurance schemes due to the exclusionary effects of certain eligibility rules, no matter to which type of welfare state the national unemployment insurance system belongs.

1.4.4. Unemployment insurance schemes and the non-standard employment forms

As it is the case with the other insurance plans, the eligibility for the unemployment insurance is determined by a system of rules which sets the conditions a worker needs to fulfil in order to a) enter the scheme and b) to qualify for its benefits. Given the obligatory nature of the unemployment insurance in the greatest majority of European countries, the eligibility rules exempt certain types of employees and employers from the duty to contribute to the scheme. In that way they in effect exclude these categories of employees from the benefits the scheme provides. Some national rules on eligibility, this being in particular true for the countries where the entry to the unemployment insurance is voluntary, make the scheme open to all workers, but due to the operation of the eligibility requirements different categories of workers are in unequal position when it comes to the receipt of benefits.[102]

Both the rules on entry and those on the receipt of benefits set the conditions that an individual contributory record needs to satisfy in order to create an entitlement for its holder. These conditions are generally related to the length of prior employment i.e. sum of contributions that needs to be paid within a predetermined period of time, the number of hours worked and the earnings level. The persons in non-standard employment are usually excluded or worse off in comparison to the persons in standard employment not through the operation of separate rules on their entry or access to the benefits, but rather through a cumulative effect of the rules of general application that, as it will be shown, tend to work to their detriment. The picture is even

[101] Some European countries also have the unemployment assistance which, similarly to the general social assistance, supplements unemployment insurance schemes through the non-contributory, often means-tested benefits applicable if the person did not qualify for the unemployment insurance scheme.
[102] Unemployment insurance systems are voluntary in Sweden, Denmark and Finland. See more on this in Janine Leschke (n 88) 44-46.

more complex given that the different categories of persons in atypical jobs are in different ways affected by the eligibility rules.

1.4.4.1. Self-employed

Most of the national unemployment schemes nominally do not distinguish between the standard and non-standard employment. An important exception to this is the category of self-employed persons, who are not entitled to enter the unemployment insurance in many European countries.[103] In the post Second World War period this could be explained by the fact that the vast majority of persons were employed in standard, full-time and continuous jobs. However, the raising rates of self-employed, which started in the 1980s, have changed this picture. According to the available statistics, about 4 per cent of those who work in the European Union countries are employers (self-employed with employees), and about one in ten workers (10.3 %) is the so-called "own-account worker" i.e. self-employed without employees.[104]

The latter category is particularly important for the analysis of the level of inclusiveness of the unemployment insurance schemes given that for many of the "own-account workers" work evolves around one activity and the risk of bankruptcy in numerous ways resembles the risk of unemployment.[105] Moreover, although the official statistics are generally silent on this issue, there are signs that many of those who declare a status of self-employed actually work for a single company on a sub-contract basis and do the same work as ordinary employees. The term "bogus self-employment" was coined to point out to the practices of abuse of the status of self-employed, which occur "when a person is declared as self-employed while fulfilling the conditions characteristic of an employment relationship".[106] The "bogus self-employment" is similar to the undeclared work since the main motive for abuse is to avoid legal or fiscal obligations arising from the employment, including the unemployment insurance contributions.

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[103] For instance, Belgium, Italy, Cyprus, Latvia and Netherlands. See: Manos Matsaganis, *et al.* (n 66)15.

[104] See: Eurostat, 'Labour market and labour force survey statistics for 2015' (Data extracted in June 2016) *http://ec.europa.eu/eurostat/statistics-explained/index.php/Labour_market_and_Labour_force_survey_(LFS)_statistics#Self-employed* accessed 4 July 2017. Yet, there is a great variation between countries. For instance, in Greece, own-account workers, that is self-employed without employees, in 2015 made up almost a quarter of all employed persons, while in Denmark 4.7 per cent of workers were in this group.

[105] International Social Security Association, 'Unemployment Benefit Provision: Measuring Multivariable Adequacy and the Implications for Social Security Institutions' (ISSA 2016) 14.

[106] Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work (L 65/12), para. 8.

The available statistics show that about 55 per cent of the self-employed in the European Union are at risk of not being covered by the unemployment insurance schemes.[107] The self-employed persons whose actual performance largely resembles work of employees are mostly not covered even in those countries in which the unemployment insurance is organised on the voluntary basis, because of the disproportion between their usually low earnings and the cost of contributions.[108]

1.4.4.2. Persons with part-time and fixed-term contracts

When it comes to the other two major forms of non-standard employment, although the national laws in principle do not limit access of persons in part-time and temporary jobs to the unemployment insurance schemes, many of them are *de facto* excluded due to operation of various eligibility rules. As it was already noted, the eligibility for unemployment insurance benefits is primarily determined on the basis of employee's contributions record. A particularly important eligibility rule is the one on the required length of the contribution period i.e. how many months a person must have been insured prior to becoming unemployed in order to receive benefits. This condition can be particularly disadvantageous for the persons with fixed-term contracts.

a) Minimum contribution period

One of the most obvious characteristics of fixed-term employment is that its duration is tied to a specific date, completion of a specific task or occurrence of a specific event. The problem with the access to unemployment insurance of persons with fixed-term contracts is that their employment often lasts shorter than a prescribed contribution period. According to Leschke, on average the fixed-term employment in the EU countries lasts less than a year.[109] At the same time, the minimum contributions payment period in almost half of the EU member states is 12 months, while in some of them double that period is required to qualify for the unemployment benefits.[110]

The effects of the eligibility requirements related to the minimum contribution period depend not only on its length but also on the reference period - a period within which the minimum

[107] Although the self-employed without employees can be distinguished in the data, the less "genuine" among them – those who have been termed "bogus self-employed" – cannot be singled out. Manos Matsaganis *et al.* (n 66) 18.
[108] Manos Matsaganis, *et al.* (n 66) 18.
[109] Janine Leschke (n 88) 127.
[110] Manos Matsaganis, *et al.* (n 66) 14 Table 1: Conditions for entitlement to unemployment benefits in EU Member States, as at July 2015

contributions are to be accrued. "The longer the minimum contribution period and the shorter the reference period," as Leschke observes, "the less likely temporary workers are to qualify for benefits".[111] In many national unemployment insurance schemes this limitation has very negative impact on the persons in temporary jobs. For instance, in the above-referred EU countries in which the minimum contribution period is 12 months the reference period is 24 to 36 months, which significantly decreases the chances of persons in temporary jobs to fulfil this eligibility criterion.[112]

Another important question is whether separate spells of employment can be accumulated when the contribution period is calculated. If a new reference period begins after each period of unemployment benefit receipt, which is often the case, even a long reference period would not improve the situation of persons in fixed-term jobs.[113] Those whose carrier record is characterized by the frequent involuntary transitions between temporary employment and unemployment are particularly hit by such rule. The position of this category of employees is especially bad in countries in which the level of unemployment and the percentage of persons working in short-term employment are so high that many individuals become repeatedly unemployed throughout their careers.[114]

The combination of the analysed rules and the increasing significance of the temporary jobs lead to a situation in which a considerable segment of the European workforce is under the risk of not being covered by the unemployment insurance. In 2015, on average 11.1 per cent of employees aged 20–64 worked on a contract of limited duration.[115] The share of fixed-term employment differs between the EU countries, with more than one in five employees working on fixed-term contracts in Spain (20.7 %) comparing to 6.2 per cent in UK.[116] According to the data presented in

[111] Janine Leschke (n 88) 127.
[112] Manos Matsaganis, *et al.* (n 66) 14 Table 1: Conditions for entitlement to unemployment benefits in EU Member States, as at July 2015
[113] Janine Leschke (n 88) 128.
[114] Janine Leschke (n 88) 195.
[115] Organisation for Economic Co-operation and Development 'Data on Temporary Employment' https://data.oecd.org/emp/temporary-employment.htm accessed 4 July 2017.
[116] One should be aware that these statistics can be misleading given that various forms of very marginal jobs for a number of reasons might not be included in the figures. Compare, for instance, the UK Office for National Statistics data on persons working on the so-called "zero-hours contracts", according to which in 2016 there were 1.7 million contracts that did not guarantee a minimum number of hours where work had actually been carried out under those contracts. According to these 2016 statistics, this subcategory of temporary employment already accounted for 6% of all employment contracts. UK Office for National Statistics, 'Contracts that do not guarantee a minimum number of hours: September 2016'

a research note on non-standard employment in the EU, 32 per cent of persons working in the temporary full-time jobs are at risk of not qualifying for the unemployment benefits, while the percentage is even higher for the temporary employees who work on a part-time basis (40%).[117]

When it comes to the part-time workers and the length of contribution period, a deficient benefit entitlement is usually a consequence of rules which dictate the method for the calculation of the contribution period. If the contribution period were calculated by the counting of working hours or days instead of weeks, the part-time workers would need more time to gain access to benefits than full-time workers.[118] As it will be seen below, this category of workers is even more affected by the rules related to the intensity of work and the wage levels.

b) Hours and earnings thresholds

While the minimum length of contribution period can seriously impede the access of workers with temporary contracts to the unemployment insurance, for those working on the part-time basis the obstacles lay in hours and/or earnings thresholds. Many European Union countries use hours and earnings thresholds to delineate workers whose employment and income are in the economic sense significant enough to be protected from the risk of unemployment, from those whose employment is of the low economic intensity and does not merit the same level of protection. For instance, in Finland persons working less than 18 hours per week are not covered by the national unemployment insurance, while in Sweden the threshold is 10 hours per week. One of the basic requirements for being entitled to receive the unemployment benefits in Austria is to earn at least the minimum wage.[119] The exclusionary nature of these rules becomes even more evident when one considers that persons with part-time contracts often have lower wages than standard employees.[120]

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/september2016> accessed 4 July 2017.

[117] Manos Matsaganis, *et al.* (n 66) 21.

[118] Janine Leschke (n 88) 115.

[119] Manos Matsaganis, *et al.* (n 66) 13.

[120] Organisation for Economic Co-operation and Development, 'In It Together: Why Less Inequality Benefits All' (OECD Publishing Office 2015) 137. Differently, Desmarez, who analyses the relationship between the employment forms and income levels in Belgium, France, Italy, Portugal, Sweden, UK, argues that it is not possible to establish a systematic link between the two categories (In: Abigail McKnight, *et al*., (n 77) 80).

1.4.5. Conclusion

While the tight eligibility rules for access to the national unemployment insurance schemes may have made some sense in the industrial period when the permanent, full-time job was a standard employment form and the unemployment rate was low enough to ensure adequate employment and income to a majority of those who wanted to work, the described labour market changes have diluted the very logic of these rules. A host of persons who today accept part-time and temporary jobs are doing so involuntarily.[121] The employment through the non-standard contracts for many is not a matter of personal choice anymore, but of the shortage of full-time, permanent jobs combined with the high unemployment rates. As noted by Janine Leschke, "for some groups of workers […] atypical employment has already become 'typical'".[122]

The case study shows that the unemployment insurance systems in developed European countries exclude a significant portion of persons working in atypical jobs, despite the fact that the high unemployment rates have become a steady feature of these economies and that public institutions have directly and indirectly facilitated and encouraged the expansion of non-standard employment. As demonstrated, the growth of non-standard employment forms was not only a consequence of technological advancement, but also of the different legal and policy instruments used by states to cope with the challenges brought by the post-industrial era.

The new employment landscapes charted by the case study, should help us to contour the real-life instantiations of the main propositions on which this study is based. The case study demonstrates that the socio-economic inequality is a complex mixture of inequalities in various domains of individual socio-economic status. It shows that their correlation is characterised by an elusive, hard to prove cause-effect relationship in which different aspects of socio-economic inequality simultaneously reinforce each other. As seen, the transformation of the European labour markets has had particularly negative effects on at least two groups of individuals: those lacking the non-routinised cognitive skills which are now in demand, meaning the persons with the lower educational qualifications; and those who have no financial resources to withstand the long or frequent unemployment spells on meagre social assistance provisions until a more secure and

[121] See, for instance, Figure 2.5 "Trends in involuntary temporary employment as a percentage of temporary employment, 2007 and 2014" in: International Labour Organisation, 'Non-Standard Employment Around the World: Understanding challenges, shaping prospects' (ILO 2016) 57.
[122] Janine Leschke (n 88) 80.

better paid employment opportunity would arrive. The case study also shows that it is hard to classify persons for the purpose of an accurate measurement of socio-economic inequalities. The public policies and laws which enabled and stimulated the spread of atypical jobs, in interaction with the unemployment insurance schemes modelled after the standard of full-time indeterminate employment, affect individuals who come from diverse social groups: youth, persons with lower education or those whose skills have been replaced by the new technologies, women who are traditionally prevalent among the part-time employees, etc. The findings of the case study also point to the importance of relational, comparative nature of inequality. In the rich western European societies in which the ethos of work is central to the social recognition, relegation of the unemployed to the social assistance schemes means more than low purchasing power, in terms of self-esteem, stigmatisation and social acceptance of those who became captives of the low-paid temporary jobs and the uncertainties they bring.[123] If seen through the prism of difference between the unemployment insurance benefits and the unemployment assistance, the greater involvement of European states in the financing of contribution-based unemployment schemes and the effective tightening of the unemployment benefits coverage (given that the full-time indeterminate employment opportunities are in decline), outline another important premise of this study: that the socio-economic inequalities occur in the process of distribution of benefits and burdens. These formally neutral rules and policies lead to the situation which is beneficial to the employers. They are relieved from the financial burdens tied to more secure employment forms and at the same supplied with the cheap labour force i.e. increasing number of those who have no other choice than to accept the low paid and insecure work arrangements. The exclusion from the unemployment insurance schemes of persons who have lower chances to obtain a "standard employment", i.e. lack resources such as education, skills, income from other sources, etc., illustrate the argument that unequal treatment of individuals and groups with different socio-economic background in the process of distribution of socio-economic goods leads to the reinforcement of the existing or to the creation of new socio-economic inequalities. The fact that these restrictive eligibility rules operate in the context of public policies and laws which favour spread of atypical jobs, and hence lead to the shrinking of the financial basis of social security systems and to the weakening of the bargaining position of workers, demonstrates that the socio-economic disadvantages come as a result of the complex interaction

[123] According to Ross Cranston, social assistance involves more stigma than social security because of stigmatization which is, among else, caused by the fact that persons need to subject their personal affairs to the scrutiny of public officials in order to prove that they qualify for assistance. To illustrate this, he cites the UK case of *Boaks v. Associated Newspapers*, in which the court of appeal held that it could be defamatory to say that a person was dependent on national assistance. Ross Cranston, *Legal Foundations of the Welfare State* (Weidenfeld and Nicolson 1985) 221, 224.

of rules from the different fields of social praxis. Last but not the least, the analysed unemployment insurance schemes provide illustration of structural causes of socio-economic inequalities. In that way the case study sets the scene for the analysis of the notions of structural inequalities and structural discrimination, which are among the central propositions of the substantive equality doctrine.

1.5. Mainstream explanations of socio-economic inequalities

Although the present study departs from the postulate that socio-economic inequalities reflect outcomes of the process of distribution of important societal goods, and that they are as such strongly affected by societal institutions, its research question mandates an examination of the ways in which these inequalities have been explained and addressed in the contemporary society. The analysis of law as centrepiece of different strategies to tackle societal inequalities can be undertaken only after prior investigation of the background assumptions on which these strategies are built.

1.5.1. Individual merit

Among the numerous tractates written with the aim to explain social inequalities, those which seek the answer in the notion of individual responsibility are prevailing. The "meritocracy" theories, founded on the belief that inequalities are consequence of an uneven distribution of individual talent as well of unequal efforts individuals exhibit throughout their economic activity, are more than theories. They are a necessity of the contemporary democracies troubled with the persistent inconsistency between the declared equality of rights of citizens and the actual inequality of their living conditions. The "meritocracy" theories are there to mend this inconsistency through a set of rational and universal principles that can explain inequalities in a coherent and logical way through the notion of individual talent and responsibility rather than as a result of arbitrary contingencies.[124] In this way, the initial question of how to remedy the existing socio-economic inequalities becomes reformulated into a task of finding their symbolic

[124] Thomas Piketty (n 1) 422. An expressive example of the sudden growth of influence of meritocracy theories with the advent of neoliberal capitalism at the end of Cold War is given by Forbath, who speaks about the US Congress replacing in 1996 the Act on Aid to Families with Dependent Children, the only federal act that was guaranteeing welfare rights, with the Personal Responsibility and Work Opportunity Reconciliation Act (William E. Forbath, 'Constitutional Welfare Rights: A History, Critique and Reconstruction' (2001) 69 Fordham Law Review 1824).

legitimation.

The first and most obvious weakness of the "meritocracy" theories, is their failure to explain the phenomenon of intergenerational transmission of inequality. As a longitudinal measure of inequality, the concept of intergenerational transmission of inequality, also expressed through the opposite concept of intergenerational mobility, indicates how great are the chances of each new generation to climb up the societal ladders and improve various segments of the socio-economic status in which individuals were born. There is a rich history of scholarship aimed at capturing and explaining various dimensions of intergenerational transmission of inequality through the concepts such as human capital, inherited wealth, discrimination, etc. But, no matter how we measure it and explain it, the existence of intergenerational transmission of inequality is irreconcilable with the accounts of inequality which are built on the concept of individual merit.

If we go back to the above presented figures on the socio-economic inequalities, another basic case against theories which explain them in terms of individual choices and actions can be found in the comparison of inequality of income from labour and inequality of income from capital. As already noted, since 1980s wages have grown much less than productivity, which has led to a greater increase of income from capital than of income from labour.[125] But in a simple postulation of social reality presented by the proponents of meritocracy theories it is the category of labour that is more intimately linked to the concepts of individual merit, since capital tends to reproduce itself even if its owner is economically dormant.[126] Given this, to explain the fact that inequality of income from capital is far greater than inequality of income from labour, by reference to individual skills, choices and working habits, becomes as hard as to explain income from inherited wealth through a metaphor of an extraordinary combination of talent and hard work.

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[125] Thomas Piketty (n 1) 255-256. The ILO Global Wage Report for 2016/17, records an increase in wage growth in developed western European countries, but raises a doubt that this could be a singular event rather than a new trend. ILO, 'Global Wage Report 2016/17: Wage inequality in the workplace' (International Labour Organization 2016) xvi 8; A sharp increase of the salaries of managers in financial and several other sectors in some countries, is an exception to the trend of a growing gap between the growth of wages and growth of productivity. Piketty explains this phenomenon, which he calls "the raise of supermenagers", through their power to determine own salaries that is in itself a consequence of the institutional framework of the relevant societies. Thomas Piketty (n 1) 315. Stiglitz notes a sharp inconsistency between the basic postulates of the marginal productivity theory and the fact that in the last three decades wages have grown much less than productivity, and links it to an increased exploitation. Joseph Stiglitz, 'Inequality and Economic Growth' in: Michael Jacobs, Mariana Mazzucato (eds.), *Rethinking Capitalism* (Hoboken, Wiley-Blackwell 2016) 134.

[126] Piketty argues that "[n]o matter how justified inequalities of wealth may be initially, fortunes can grow and perpetuate themselves beyond all reasonable limits and beyond any possible rational justification in terms of social utility" which is the main justification for the introduction of progressive and global tax on large fortunes (Thomas Piketty (n 1) 443).

An equally useful illustration of the inconsistency between the meritocracy theories and the structure of existing inequalities can be found in the figures which indicate that there is an ever-greater number of persons holding a university degree. Although the average educational level of the European population has been on constant increase since the Second World War, this has not diminished the disparity between income from labour and income from capital. To the contrary, as just seen, the gap between income from capital and income from labour has grown bigger in the last thirty years. This gap is mostly explained as a consequence of a greater concentration of privately owned capital, of a phenomenon that is a direct outcome of the neoliberal objectives shaping the major public policies of the western European societies in the last decades.

1.5.2. Scarcity of economic resources

Another set of arguments figuring greatly in the dominant explanations of socio-economic inequalities are those built on the postulate of scarcity of societal resources. The scarcity of resources is seen against a goal of ensuring a perpetual economic development, as the incontestable imperative of modern societies. The imperative of uninterrupted economic growth, which is itself postulated as a *condition sine qua non* of greater equality, warrants that the societal resources be used as efficiently as possible. Accordingly, the only rational way to distribute them is to place them in the hands of those who are the most capable to ensure their maximal utilisation. I this way conceived, the unequal distribution of societal resources becomes a pledge to a greater future. A future in which the level of societal wealth, accrued through the prudent use of societal resources, would finally make possible a prosperity for all.[127] In this interpretation of societal inequalities, they are "just" and "rational", since the greater societal equality can be achieved only in the long run, in a more wealthy society of tomorrow which will be the fruit of our present efforts and sacrifices.[128] In the further elaboration of the postulate of scarcity of societal resources, primarily in the economic theory, a socio-economic status of an individual becomes merely a reflection of his or her contribution to the economic development of a society.[129]

[127] The "trickle-down effect" and the "rising tide hypothesis" are the main arguments used by the proponents of the regressive economic policies who claim that the favouring of those who are already better off would bring to the economic progress the fruits of which would be enjoyed by all.

[128] As the often-quoted Keynes wisdom goes: "In the long run, we are all dead." More on the arguments used by the neoconservative critics of the welfare state in: Slobodanka Nedović, *Država blagostanja: ideje i politika* (Draganić 1995).

[129] According to the marginal productivity theory, everyone who participates in the production process should earn a remuneration equal to her or his marginal productivity. Otherwise, if the distribution of societal resources would not follow in this way conceived individual productivity, that would create strong disincentives for those who can

Today, it is the economic theory itself that rebutted to a great extent the postulate that economic advancement would lead to a more equal society. The "raising tide" hypothesis was abandoned by many of the mainstream economic thinkers, who now state that there is no evidence of the positive impact of economic growth on shrinking of inequality. Fields, for instance, maintains that "[w]hat matters for inequality is not the rate of economic growth or the level of national income but the *type* of economic growth".[130] Some claim that there is indeed a reverse causal relation between growth and inequality. Stiglitz, for instance, argues that inequality harms economy and that "greater equality and improved economic performance are complements".[131] As such, the strategies based on the hypothesis that the economic growth would in the long run result in the decreased levels of income-related and other inequalities have by now ceased to be the holy grail of economic thought.

But even if we leave aside the dilemmas of the economic theory, there still remains a larger question, the question of validity of the proposition that societal resources are scarce, which is inbuilt in the very fundaments of contemporary societies. Among the rare studies which discuss the postulate of scarcity of societal resources in relation to socio-economic inequalities is Marshall Sahlins analysis of the economy of hunting and gathering communities.[132] While investigating the relationship between richness, affluence[133] and equality, Sahlins observes that scarcity cannot be seen as an intrinsic property of economic means "but is a relationship between means and ends".[134] According to him, it is the organisation of primitive societies, premised on the logic of universal needs of all its members, that makes these societies more egalitarian than ours, despite the vast differences between the level of material wealth of the two:

> "The world's most primitive people have few possessions, *but they are not poor*. Poverty is not certain small amount of goods, nor is it just a relation between means and ends; above all it is

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contribute the most to the economic development of a society which would, the theory goes, in the long run be harmful for those with lower productivity levels.

[130] Gary Fields, 'How Much Should We Care About Changing Income Inequality in the Course of Economic Growth?' (2007) 29 Journal of Policy Modelling 579. According to him, the important question is whether the growth has brought to the smaller ratio of high incomes to low incomes, to the lessening of inequality of salient groups and to the growth of equality of opportunity and decrease of poverty.

[131] Joseph Stiglitz (n 125) 149.

[132] Marshall Sahlins, 'The Original Affluent Society' in: Carol Delaney, *Investigating Culture: An Experiential Introduction to Anthropology* (Blackwell Publishing 2004) 110 – 129.

[133] For Sahlins, affluence of a society means that the material wants of all its citizens are easily satisfied. ibid 110.

[134] ibid 111.

> a relation between people. Poverty is a social status. As such it is the invention of civilisation."[135]

Seen from the perspective of the absolute poverty of the primitive societies depicted in Sahlins' studies, the economic means of our societies seem to be everything but scarce and their outcome, the achieved level of material wealth, at least in the developed countries, far from being itself possible source of deprivation. But despite their immense material richness in comparison to the primitive ones, our societies are continuously stretched between two movements that are pulling them to the opposite directions: "enriching but at the same time impoverishing, appropriating in relation to nature but expropriating in relation to man".[136] The ever-greater level of material abundance, reached through an ever more efficient economic production, did not bring us to a more equal society. Instead, the distinction between the need and the desire became blurred[137] to the extent that a man has become "prisoner at hard labour of perpetual disparity between his unlimited wants and his insufficient means"[138]. The ideal of socio-economic equality has become a quest for an ever-greater abundance of material goods.

1.6. Liberty-based accounts of equality

An important companion of the "meritocracy" theories and of the explanations postulated on scarcity of societal resources is the legal and political theory which sees equality primarily as the question of realisation of civil and political rights. Equality is the same with liberty and the civil and political rights, seen in the first place as individual and negative in character, are guarantees of personal liberty of citizens and the true expression of the principle of equal worth of all. In the hierarchy of human rights, which this doctrine postulates, the civil and political rights have superior position in comparison to the socio-economic rights. The source of social inequalities is primarily sought in the imperfections of the institutional framework for the realisation of civil and political rights, and the principal way to address them is to work on its further refinement.

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[135] ibid 129. Sorokin, on the other hand, claimed that economic equality of primitive societies is a myth: "If in many tribes economic differentiation is very slight, and customs of mutual aid approach communism, this is due only to general poverty of the group. Pitirim Sorokin (n 47) 14.
[136] Marshall Sahlins (n 132) 128.
[137] Richard Stivers, *The Illusion of Freedom and Equality* (State University of New York Press 2008) 38.
[138] Marshall Sahlins (n 132) 110.

The generally held view that civil and political rights are the true measure of equality is a consequence of different historical and contemporary contingencies, which can explain both the strength and the function of this conception of equality in the contemporary Europe. The present study will tackle only some of them, in order to chart the main factors that have led to the growing significance being given to law among the strategies for addressing the socio-economic inequalities.

1.6.1. Civil and political rights as the true measure of equality

The universal right to vote and to hold office are among the most important achievements of the modern history that made possible a definite leap from the cast society to the contemporary democracies. But, the memory of the times when the right to civic participation was limited to those who were wealthy enough and born in a male body is still alive. It was not until the late twentieth century when the last vestiges of gender and property qualifications were abolished in all European countries.[139] The victory won with the universal civic rights was so great that it offered to those who were voiceless for centuries a hope in greater societal equality so powerful that it created an almost tangible illusion of equality.

This illusion became even greater with the creation of middle class in the period after the Second World War. The "rise of a propertied middle class"[140], followed by the sharp decline of importance of inherited wealth had strengthened the belief that a day would come when the socio-economic inequalities would finally become nothing more than a matter of a life style.[141]

The end of applied socialism led to the parting of political from economic equality and petrified the already entrenched hierarchy of human rights, with the civil and political rights at its top. While in the decades prior to the fall of Berlin Wall, the question of political equality went hand in hand with the question of access to basic socio-economic rights, with the collapse of socialism the

[139] The property qualifications for juries were in the United Kingdom removed in 1972, while in Liechtenstein women were granted the right to vote only in 1984.
[140] Thomas Piketty (n 1) 263.
[141] Alexander Lenger and Florian Schumacher write about the emergence of the sociological tradition in the period of embedded capitalism, which analysed Western European societies as the middle-class societies characterised by the process of social de-stratification. Alexander Lenger, Florian Schumacher, 'The Global Configurations of Inequality: Stratification, Glocal Inequalities, and the Global Social Structure' in: Alexander Lenger, Florian Schumacher (eds.), *Understanding the Dynamics of Global Inequality* (Springer 2015) 7, 8.

topic of socio-economic inequalities was almost swept from the public discourse.[142] The shift from a broader understanding of equality that have linked the civil and political rights with socio-economic rights, to the one in which the question of living conditions disappeared from the political agenda was in great part encouraged, as Anne Phillips notes, by "there is no alternative" slogan of capitalism, as the winner of the Cold War ideological battle.[143]

The U.S. style, liberty-oriented vocabulary of rights, now professed as the only way ahead, has also had strong influence on reducing the ideal of equality to political equality, in Europe and elsewhere. As Rosco Pound writes in 60's, in American thinking the issue of equal opportunities had been primarily interpreted as equal political opportunities, "since in the pioneer conditions in which our institutions were formative, other opportunities so far the men demanded them, were at hand everywhere".[144] The level of socio-economic inequalities in the United States in the seminal years of American constitutional history was much lower than in Europe at that time thanks to the accessibility of agricultural land which, as Pound explains, made the civil and political liberties the prime values of the American society. In the same vein, the U.S. style "minimal state" doctrine, centred around the liberal goal of preserving the domain of personal freedoms from interferences of a state, provides for a very thin conception of equality. The duty of a state to provide every citizen with equal opportunities, transforms the ideal of equality, under the minimal state doctrine, into a set of individual civil and political rights. [145]

This ideal of equality is becoming even thinner under the neoliberal economic paradigm with its goal to model society and the state in the sacred image of the market.[146] The civil and political liberties are not only a precondition for the freedom of an individual, but their powerful

[142] More on this in Tim Butler, Paul Watt, *Understanding Social Inequality* (SAGE Publications 2007) 3 - 4.

[143] From this perspective, one could argue that the interest in the link between political and socio-economic equality was in fact always dominated by the goal of making socialism to be less tempting to a western voter, kind of a concession of capitalist system in the world that was still escaping the logic of free market as the only manifestation of rationality. Anne Philips also finds in the failure of socialism one of the principal reasons for dispel of economic equality from the political and public discourse (Anne Phillips, *Which Equalities Matter?* (Polity Press 1999) 11). In the similar tone, Lucy White contends that the ideology of liberalism has become so dominant that it is almost impossible to imagine any sensible alternative (Lucie White, 'If you don't pay, you die: On death and Desire in the Post-colony' in Daphne Barak-Erez, Aeyal M Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 66).

[144] Rosco Pound, *Jurisprudence* (West Publishing Co. 1959) s 14, 320.

[145] On the relationship between the prevailing view of the state and the dominant conception of equality see Deborah Hellman, 'Equality and Unconstitutional Discrimination' in: Deborah Hellman, Sophia Moreau (eds.) *Philosophical Foundations of Antidiscrimination Law* (Oxford University Press 2013) 55.

[146] Leerom Medovoi, 'Government' in: Bruce Burgett, Glenn Hendler (eds.), *Keywords for American Cultural Studies*, (New York University Press, Second Edition 2014) 125.

vocabulary makes it also easier to free the market from the pernicious interference of the state. They need to be fostered not only for their own sake, but also because they guarantee the economic freedoms on which the neoliberal capitalism rests. After the end of embedded capitalism, the link between the civil and political rights and the market freedoms has become so direct that it led to the human rights being valued in terms of the extent to which they facilitate better market functioning.[147] As expected, this has bestowed special significance on the negative rights associated with liberty, security and property.[148] The socio-economic rights, on the other hand, have become completely marginalised as it is only the self-regulating market that can provide for the truly unbiased and efficient distribution of social capital.[149] The trend of subjugation of equality to the goals of market efficiency has been particularly pronounced in the European Union, in which the principles of equality and non-discrimination have been firmly anchored to the economic goals from which they initially evolved.[150]

From the perspective of the dominant, monolithic discourse of neoliberalism, there is also a myriad of other, less theoretical and more mundane reasons that make the advancement of civil and political rights preferable over the goal of addressing the existing socio-economic inequalities. To work on removing the subtle barriers to the equal enjoyment in individual civil and political rights not only helps the neoliberal capitalist cause, but it can also serve to silence concerns over the growing socio-economic inequalities.[151] The rapid deepening of socio-economic inequalities was already in Thatcher's era successfully legitimised through the persuasive vocabulary of individual rights. The main element of this strategy was the instrumentalisation of rights talk, when many of the traditional socio-economic rights became translated into a burlesque language of "essential freedoms": the right to form trade unions became an individual right not to belong to a trade union; the right to work became the right to go to work despite a strike; etc.[152] In the

[147] John Morijn, 'Conflict Between Fundamental Rights or Conflicting Fundamental Rights Vocabularies?' – An analysis of diverging uses of 'fundamental rights' in the context of international and European Trade Law' in: Eva Brems (ed.), *Conflict Between Fundamental Rights* (Intersentia 2008) 595.
[148] ibid 609.
[149] Paul O'Connell speaks about "the real-world political, economic and ideological opposition (or at best indifference) to socio-economic rights, in a global climate which privileges "market" solutions to all of society's problems." Paul O'Connell, 'Vindicating Socio-Economic Rights: International Standards and Comparative Experiences' (PhD dissertation, National University of Ireland 2010) 218.
[150] See on this Janneke H. Gerards, 'Fundamental Rights and Other Interests: Should It Really Make a Difference?" in Eva Brems (ed.), Conflict Between Fundamental Rights (Intersentia 2008) ch 3.3. Differently, Raphaële Xenidis argues that they have developed into a genuine fundamental right of equality. See: Raphaële Xenidis, 'Shaking the Normative Foundations of Eu Equality Law: Evolution and Hierarchy Between Market Integration and Human Rights Rationales' (European University Institute Working Papers LAW 2017/04) 13- 22.
[151] Anne Phillips (n 143) 126.
[152] Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 Oxford Journal of

subsequent phases, the neoliberal discourse has become focused on expanding the notion of human rights to the point of its complete relativization. The first step in this direction was to rename them into fundamental rights in order to wipe out their rootedness in human needs. This has enabled stretching of the notion of human rights to the extent that the so-called "fundamental economic freedoms", such as freedom to compete and to have in place set of social arrangements which enable free market competition, could be easily placed under their roof and borrow from human rights their legitimacy.[153]

The modern days dependence on technology has made this process even more intensive and even more complex. For Richard Stivers, who analyses the way the technology has reshaped our society, the view of equality and freedom becomes radically different if we depart from our dependency on technology instead from the question of a dominant political or economic ideology.[154] As the qualitatively completely new phase of human existence that started with the "merchantilisation of knowledge", [155] a process in which knowledge ceases to be a value on its own and is produced to be sold, in today's society the technology has replaced many of the roles carried by the knowledge and culture and it has become an end in itself. The technological progress is not anymore measured by the extent to which it enables achievement of societal goals, but with regards the new levels of efficiency and speed which it can bring, as if the efficiency and speed have value on their own.

Stivers claims that civic freedoms of today bear little resemblance to the liberalism born in the Enlightenment.[156] The obsession with technological progress makes the idea of common societal goals look obsolete, as the very concept of community loses its prior meaning. The sense of

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Legal Studies 24, 35.

[153] John Morijn (n 147). Upendra Baxi similarly notes that "the hallmark of rights in liberal conceptions is that they mark *state-free* spaces" (Upendra Baxi, 'Failed Decolonization and the Future of Social Rights: Some Preliminary Reflections' in Daphne Barak-Erez, Aeyal M Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 44.)

[154] Richard Stivers (n 137) ch 1.

[155] As predicted by Jean-François Lyotard already in 1979. Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge (*University of Minnesota Press 1984) 5. See on this also: Dragana Pavlović – Breneselović, Živka Krnjaja, 'Obrazovanje i nauka u neoliberalnom lavirintu: Gde stanuje kvalitet?' in: Jovan Ćirić, Luka Breneselović (eds.), *Zbornik za percepciju naučnog rada in poznavanje rekvizita njegove ocene* (Institut za uporedno pravo 2017).

[156] Similarly, David B. Goldman warns that "a major theme of the Western legal tradition is that humans invest their constitutions and legal discourses with vital visions for the future which are too easily forgotten when revolutionary urgencies are perceived to have passed. […] Rights can be proclaimed as 'global', 'fundamental' or 'universal' in the service of partisan objectives without thought for the bloody signposts of their evolution." David B. Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge University Press 2007) xi.

belonging to community moves to the realm of symbolic existence now, when it looks like if we don't need any longer each other to satisfy our needs since there is technology to cater for them.[157] In such society, everything becomes relative, or to use the language of postmodernism, the objective reality becomes a myth. The distinction between human rights and individual interests is also questioned and explained through the narratives of context and personal importance.[158] The civic freedoms become reduced to freedom to make choice, often consumer-like choice.

1.6.2. Different yet equal: politics of difference and the socio-economic inequalities

With the focus on civil and political rights, fostered by the neoliberal capitalism and remodelled by the imperatives of the technological civilization, the ideal of a greater equality becomes marked with the contemporary society preoccupation with diversity and difference. As Nancy Fraser explains, the claims for greater social equality became overridden by the claims for the recognition of difference as a new, "postsocialist" condition.[159] The main sources of inequality, now interpreted through the prism of difference, is being sought in injustices "rooted in social patterns of representation, interpretation, and communication".[160]

The so conceived politics of difference is an extension of the idea that civil and political rights are instrumental for the realisation of socio-economic rights, and as such a road to the achievement of greater societal equality. The right to be treated as equal becomes an equal right to participation in societal life that is to be secured through the more and more sophisticated institutions of participatory democracy. The accommodation of differences such as gender, language, ethnicity or religion is seen as essential for the achievement of greater equality and the main question becomes how to create institutions that would enable civic participation of the traditionally excluded groups.[161] As Iris Marion Young observes, the dominant, societal cultural approach to

[157] The film "Happy End", directed by Michael Haneke, portraits in a vivid way our attempt to compensate the lack of relationship with others with the one-way communication and sharing of self through the numb visual texture of YouTube videos and other types of social media livestreaming.
[158] For the further discussion see: Janneke H. Gerards (n 150) 690.
[159] Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (Routledge Press 1997) 2.
[160] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press 2002) 6.
[161] ibid 72. To do justice to the "politics of difference", we should note that the politics of difference in theory cannot be reduced only to the issues of representation. Iris M. Young, who gave important contribution to the theoretical elaborations of politics of difference, distinguishes two versions of a politics of difference: the structural inequality model and the societal culture model. However, she also observes that the society cultural approach dominates the theory and practice of the politics of difference. Iris Marion Young, 'Structural Injustice and the Politics of Difference'

differences "improperly narrows the scope of issues of justice" and "tends to reconfigure conflict concerning group differences from struggles about opportunities for achieving well-being to concerns about tolerance and its limits".[162]

While in the beginning justly concentrated on the demise of the most obvious forms of majoritarianism,[163] in the last two decades the politics of difference has moved its focus on individual rights. [164] At the European soil, it evolved into an extensive system of equality laws, soft laws and policies that classify citizens into an ever-increasing number of categories. Although these strategies recently started to include *de nuovo* the considerations of access to socio-economic rights with the emergence of the "social inclusion" movement, they still seek the solution for social inequalities primarily in the institutional arrangements.[165] Diversity is valued per se and the central question is the one of the most efficient institutional and constitutional design for its accommodation. The ideal of equality becomes interpreted as the imperative to acknowledge and then nurture voices of different groups and subgroups in the different fields of social praxis. The question to what extent is the duty to hear voice of others reflected in the decision so reached remains of lower importance as long as the process of decision making is inclusive.[166] As Amartya Sen observes at the more abstract level, the currently dominant transcendental institutionalism "reduces many of the most relevant issues of justice into empty – even if acknowledged to be 'well-meaning' – rhetoric".[167]

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in: Thomas Christiano, John Christman (eds.), *Contemporary Debates in Political Philosophy* (Blackwell Publishing 2009) 362. For Margaret Moore "the politics of identity/recognition/multiculturalism is […] a fairly loose "tradition"" which tends to focus on political practices or on the analysis of culture (Margaret Moore, 'Liberalism, Communitarianism, and the Politics of Identity' in: Thomas Christiano, John Christman (eds.), *Contemporary Debates in Political Philosophy* (Blackwell Publishing 2009) 322).

[162] Iris Marion Young, 'Structural Injustice and the Politics of Difference' (n 161) 363.

[163] As the source of exclusion that exists when minority cultures are not accommodated within the dominant, majority culture.

[164] Although diversity is both about individual and about group rights, Swiebel argues that in the last two decades the group rights approach has almost disappeared from the European Union laws and policies. Joke Swiebel, 'The European Union's Policies to Safeguard and Promote Diversity' in: Markus Thiel, Elisabeth Prügl (eds.), *Diversity in the European Union* (Palgrave Macmillan 2009) 25, 34.

[165] In his research, Cliff Oswick shows how the previously dominant interest of academic community in economic equality has been replaced by interest in diversity, as an extremely popular area of inquiry both among the researchers and practitioners. Oswick also shows that among the scholars and practitioners, the diversity discourse is often valued by pointing to its instrumental relationship with the business goals. Cliff Oswick, 'The social construction of diversity, equality and inclusion' in: Geraldine Healy, Gill Kirton, Mike Noon (eds.) *Equality, Inequalities and Diversity* (Palgrave Macmillan 2011) 31 – 33.

[166] This can lead to the situation in which, as observed by Eithne McLaughlin, the duty to accommodate excluded groups in the decision-making process becomes "a distraction from inequality [rather] than a pathway to equality." Eithne McLaughlin, 'From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK' (2007) 6 Social Policy and Society 119.

[167] Amartya Sen, *The Idea of Justice* (n 34) 26.

These new liberty-centred views of equality replace the problem of inequality with the problem of how to accommodate the complexity of individual identity. With the hybridisation of identity that today has become "wide registry of multiple identity, crossover, cut'n'mix experiences and styles, matching a world of growing migration and diaspora lives, intensive intercultural communication, everyday multiculturalism, and erosion of boundaries"[168] brought by cultural globalization, further insistence on accommodating diversity becomes an almost pointless objective. This is even more plain when we see how the technology-mediated communication transforms our society into a loose collection of ad-hock interest groups created and dismantled with a click of a mouse, that often exist only thanks to the ease with which technology enables their formation.[169] The particularistic goals pursued by many of the so formed groups bring the diversity discourse even further away from the goal of socio-economic equality.[170]

The efforts to identify and accommodate as much diversity as possible may eventually result in neglect of the relational aspects of equality. In her analysis of intersectionality theory, Nancy Ehrenreich writes about this as "the infinite regress problem".[171] The modern politics' preoccupation with diversity ends up in a limitless elaboration of ever tinier inequality subgroups "until there seems to be no hope of any coherent category other than the individual".[172] With this, the noble goal of intersectionality theory to enable understanding of the oppression within the group through a more meticulous analysis of the group itself, eventually tears down to pieces the very notion of a group and brings us to the individual as the only unit of analysis.[173]

Another feature of the interpretation of equality qua diversity and individual civil and political rights, is its blind insistence on non-comparative and ahistorical understanding of inequalities.[174] The main issue is not anymore whether some individuals are treated worse than others in the

[168] Jan Nederveen Pieterse, *Globalization and Culture: Global Mélange* (Rowman & Littlefield Publishers, 2nd edn, 2009) 97.

[169] An illustration of this can be found in the example brought by Markus Thiel and Elisabeth Prügl, who observe that many of the European protest movements directly target EU institutions without being backed by the more representative national organisations. Markus Thiel, Elisabeth Prügl, 'Understanding Diversity in the European Integration Project' in: Markus Thiel, Elisabeth Prügl (eds.), *Diversity in the European Union* (Palgrave Macmillan 2009) 10.

[170] For Stivers, on the other hand, the ideology of cultural diversity in effect acts as a cover up for the reality of cultural uniformity, which is consequence of our dependence on technology. Richard Stivers (n 137) 63.

[171] Nancy Ehrenreich, 'Subordination and Symbiosis: Mechanisms of Mutual Support between Subordinating Systems' (2002) 71 UMKC Law Review 267.

[172] ibid.

[173] Roseberry, Lynn, Getting Beyond Intersectionality: Toward a Post-Structuralist Approach to Multiple Discrimination (1 September 2010) 8 <SSRN: https://ssrn.com/abstract=1686774 or http://dx.doi.org/10.2139/ssrn.1686774> accessed 10 May 2017. See also: Robert S. Chang, Jerome McCristal Culp Jr., 'After Intersectionality' (2002) 71 University of Missouri-Kansas City Law Review 485.

[174] Upendra Baxi describes this as "ahistorical spacetime of contemporary human rights". Upendra Baxi (n 153) 50.

process of distribution of societal goods, but whether they have access to liberties to which each person is independently entitled. Equality measured as the degree of realization of civil and political freedoms loses its comparative dimension and it becomes in effect the same with freedom, freedom removed from its social context.[175] But this "weird mix of more with less equality", Anne Phillips argues, cannot conceal the pronounced material inequalities:

> "Democracies have been able to recognise their citizens as equal though different. […] It is a confusion of categories, however, to slide from this to saying people can be equal yet unequal. […] Equality might not mean sameness, but can it be compatible with such an extraordinary imbalance in income, life chances and power?"[176]

The parting of political and socio-economic concerns and the emphasis placed on differences in the context of political representation leads to the relativization of the differences in living conditions to the point where we are all "different yet equal". Equality not only stops being relational concept but it becomes an individual matter to be resolved before the final authority of courts.

[175] Sadurski notes that "equality is a relational concept *par excellence*, and it cannot be ascertained without drawing comparisons between individuals", no matter whether we approach it as individualized or collective concept. Wojciech Sadurski, *Equality and Legitimacy* (Oxford University Press 2008) 151.
[176] Anne Phillips (n 143) 128.

CHAPTER TWO

Law as panacea for societal inequalities

Despite the attempts of the mainstream theories to interpret equality in a way which would reconcile the proclamations of equal human worth with the sharp differences in living conditions, the reality of societal inequalities continues to breed new questions. Until two centuries ago people stayed in rather rigid socio-economic positions throughout their life, in the conditions which were seen as natural or God-given.[1] But with the advent of modern democracies, founded on the pledge to equality, the question of how to tackle the pronounced socio-economic inequalities have become unavoidable. "Strict equality may not be necessary to sustain equality of worth (given the unlikelihood of achieving such an equality one can only hope this isn't a necessary condition)", Anne Phillips says, "but ideals of equal citizenship cannot survive unscathed by great differentials in income and wealth".[2]

This chapter looks into the process of constitutionalisation of human rights, which represents the newest attempt of the contemporary western society to come to grips with the persistent and pronounced societal inequalities. It first examines some of the main characteristics of the domestic level constitutionalisation, as well the broader conditions which have contributed to its development. Than it investigates rationale behind the constitutionalisation of human rights and some of its principal controversies. In this way, the chapter sets the scene for the analysis of the substantive equality doctrine, which is the theoretical backbone of the two strands of constitutionalisation entrusted with the task to make of law the main road to the greater socio-economic equality.

[1] Julian Lamont, Christi Favor, 'Distributive Justice', *The Stanford Encyclopaedia of Philosophy* (Winter edn, 2017) https://plato.stanford.edu/archives/win2017/entries/justice-distributive/ accessed 18 February 2018.
[2] Anne Phillips, *Which Equalities Matter?* (Polity Press, 1999) 131.

2.1. Globalisation, weakening of nation state and constitutionalisation

The power of a citizen to influence societal decision-making in the important fields, such as distribution of societal wealth, is also questioned in the light of the ever-greater interconnectedness of the local and global brought by the current wave of globalisation. Although globalisation, defined by Anthony Giddens as "the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa"[3] is not a new phenomenon, its intensity is certainly a novelty.[4] The dependency between the different parts of the globe developed in the context of rapid technological advancement, internationalisation of trade, production and financial markets, is growing day by day. Given that the pace of globalization is dictated by the developments in the field of communication, transportation and information technology, which are constantly evolving, there is nothing on the horizon that would suggest that the level of interconnectedness would soon stabilize.

The complexity of this increasing dependency in many different ways generates embedded unpredictability and systemic uncertainty. David Held notes that globalisation is "multidimensional phenomenon involving diverse domains of activity and interaction", where each sphere exhibits different patterns of interaction.[5] Goldman also emphasises its complexity by observing that as a consequence of globalisation "[s]ingle events may give rise to a variety of interpretations and ramifications across a multiplicity of communities."[6] Twining adds to this that the interdependency between the local and global, brought about by globalisation, is not a linear process and that the global and the local interact in complex, sometimes even contradictory ways.[7]

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[3] Anthony Giddens, *The Consequences of Modernity* (Polity Press 1990) 64.

[4] Most of the authors stress that globalization is not a new phenomenon. Twinning, for instance, traces globalization back to the 16th century, while Piketty speaks about the "first globalization" of finance and trade that took place between 1870 and 1914, and of the "second globalization" that is under way since the 1970s (William Twining, *Globalisation and Legal Theory* (Butterworths 2000) 7; Thomas Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press 2014) 28). The same is claimed by Hirst, Thompson and Bromley (Paul Hirst, Grahame Thompson, Simon Bromley, *Globalisation in Question* (Polity Press, 3rd edn, 2009) 27). David B. Goldman also speaks about the contemporary globalization being in many respects "revolutionary in terms of scale, although not necessarily in terms of conception" (David B. Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge University Press 2007) 316). In this study the term globalisation is used in the meaning of "the current phase of globalisation".

[5] David Held, *Models of Democracy* (Stanford University Press, 3rd edn, 2006) 294.

[6] David B. Goldman (n 4) 296. He explains this on by now widely familiar example of "September 11" and its ramifications.

[7] William Twining (n 4) 5.

The unpredictability and uncertainty also stem from the decline of the old and rise of new actors as the bearers of political and legal authority. The common theme of the studies on globalisation is how the growing economic interdependency has unleashed power of the non-state actors, power that is not confined only to the global economy but has important ramifications in almost every field of social activity. Even the most modest attempts to understand the reality in which one lives require that an adequate account is given to the variety of other, less formal but important players, such as multinational corporations, transnational governmental and non-governmental organisations, etc. The new players have become "major political actors and important sites of law production, whose decisions have an enormous impact on people's lives, affecting where they live, how they work, what they eat and the quality of their environment".[8] In this new constellation, the state is no longer capable to claim the exclusive political and legal power in the society.[9] "[I]n the context of significant sites of non-state authority in the global economy", Gavin Anderson argues, "the state is often no longer able to command, while the commands of other bodies are at times more authoritative".[10]

A significant segment of public power in the fields of security, financial regulation, competition, trade, environmental protection, etc. is now being exercised by supranational bodies of regional or global character through the new international regulatory arrangements.[11] Given the importance of these fields for the distributional and other functions of the state, it can be said that globalisation brought a pronounced incongruity between the scope of political and the capacities of the state to provide a transparent framework for the political decision-making.[12] The notion of government is being gradually replaced by the notion of governance, as a reflection of the changing role of state and the degree of involvement of non-state actors in the overall process of ordering and regulating issues of public interest.

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[8] Gavin W. Anderson, *Constitutional Rights in the Age of Globalisation* (Hart Publishing 2005) 145.

[9] For the more elaborate arguments on this see: ibid ch 2. For the opposite view consult, for instance, Paul Hirst, Grahame Thompson and Simon Bromley who claim that globalization rhetoric in all its dimensions, including the growing feebleness of the nation states, can be excessively inflated: "One key effect of the concept of globalization has been to paralyse radical reforming national strategies, to see them as unfeasible in the face of the judgement and sanction of global markets. If, however, we face economic changes that are more complex and more equivocal than the extreme globalists argue, then the possibility remains of political strategy and action for national and international control of market economies in order to promote social goals." Paul Hirst, Grahame Thompson, Simon Bromley (n 4) 26.

[10] Gavin W. Anderson (n 8) 10.

[11] Martin Loughlin, 'What is Constitutionalisation?' in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 63.

[12] Petra Dobner, Martin Loughlin, 'Introduction', in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) xi.

The decline of the nation state as the traditional political authority, has made the issue of socio-economic inequalities even more complex, both with regards to the attempts to understand their causes and with regards to the strategies to address them. Since the Washington consensus, as a symbolic beginning of the trend of imposing the interest of global capital over public policy values, the distribution of societal goods in many domains has been entrusted to the private enterprises and given over to the free market laws.[13] Rapid privatizations together with regressive tax systems, have depleted the public capital to be used by state in the provision of public goods.[14] The entire process has been simultaneously backed up by a forceful conflation of the notion of public interest with narrow, profit-oriented concerns. In addition, the trend of atomization of societies animated, among else, by the proliferation of ad hock interest groups enabled by the ease and superficiality of technology-mediated communication, and nurtured through the over-dominant discourse of diversity, have brought into question the traditional methods of identifying the common public interest.[15]

Yet, oddly enough, these processes do not signify the end of a nation state. The increased interdependency of different parts of the globe and the growing power of non-state actors have not brought to the centralisation, or greater homogenisation in the governance of the so globalised world affairs.[16] The interdependency and the raise of new and powerful players brought by the globalisation has undermined the authority and the capacity of state to perform its traditional functions, but we are far from a new form of governance. Although globalisation in practice challenges the idea that the state is primary locus of politics, the state has nominally retained its main functions.

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[13] The term 'Washington Consensus' originates in the paper from 1989 of English economist John Williamson, who coined it to denote to ten principal economic policy prescriptions considered to constitute the "standard" economic reform package pushed for by the major international economic institutions, such as the International Monetary Fund (IMF) and World Bank. Soon the term started to be used in a broader and more symbolic sense as the replacement of the Keynesianism with the neoliberal policies.

[14] According to Piketty, the gradual privatisation and transfer of public assets to private hands between after 1970 have completely changed the national capital structure. In France and Germany, for instance, between 1950 and 1970 the net public capital represented as much as a quarter or even a third of total national wealth, while today it counts for not more than few percent of the national capital. Piketty presents data which indicate that there is a general trend in the developed European countries of the ratio between public and private wealth being changed to the detriment of the later. (Piketty (n 4) 123-124, 173.

[15] Gunther Teubner sees the "radical fragmentation of society" as a characteristic of contemporary society (Gunther Teubner, 'Fragmented Foundations: Societal Constitutionalism Beyond the Nation State' in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 331, 336, 337). Goldman, on the other hand, claims that the increasing fragmentation of society is not a specificity of our times but a "testament to the ties which bind humans, highly selectively and even contingently, to one another" (David B. Goldman (n 4) 211).

[16] William Twining (n 4) 5. See also David Held (n 5) 294.

Simultaneously with the declining capacity of state to manage autonomously the societal affairs, the authority of its legal and justice systems is growing. They have gained in importance as kind of a substitute for the lack of ability of state to have last say on the major distributive questions. In the academic writing, this phenomenon is mainly analysed under the notion of constitutionalisation.

2.2. Quasi-compensatory constitutionalisation

This is first and foremost visible in the intensive exploitation of the language and symbolic powers of the notion of constitution, taking place in the last decades. The phenomenon, which is commonly referred to as "constitutionalism" or "constitutionalisation"[17], embraces a wide spectrum of practices and processes, from the attempts to structure modes of governance in the global realm, to the changes occurring in the domestic political and legal spheres.

Although most of the legal scholars under this term analyse the attempts to provide legitimacy and create checks for the newly emerging transnational sites of governance[18], in this study the phenomenon will be primarily examined with regards to its manifestations taking place at the national level.[19] Constitutionalisation in the later sense stands for different practices and processes through which an increasing number of societal matters, matters that were so far a domain of political institutions, have come within the purview of judiciary, by being included in the constitutions, interpreted as matters of constitutional importance, or regulated by the higher ranked laws.[20]

[17] There is no uniformity in the way different authors name the phenomenon under study. The most often used are terms "constitutionalism" and "constitutionalisation", with different adjectives such as new, global, neo -, transformative, progressive, etc.

[18] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden Journal of International Law 579; Aydin Atilgan, *Global Constitutionalism: Socio-legal perspective* (Springer 2017) ch 3.1.1.3.; Klaus Armingeon, Karolina Milewicz, 'Compensatory Constitutionalism in Comparative Perspective' (Paper prepared for the workshop on "Policy Ideas, Discourses and Debates in the Globalisation Process, Have Developing Countries a chance to compete?" at the ECPR Joint Sessions, April 2006, Nicosia). However, there are also authors who analyse the process of constitutionalisation at the domestic level. See, for instance: Ran Hirschl, 'The Political Origins of the New Constitutionalism' (2004) 11 Indiana Journal of Global Legal Studies 71; Stephen Gill, 'New Constitutionalism, Democratisation and Global Political Economy' (2007) 10 Pacifica Review: Peace, Security and Global Change 23.

[19] With the clear understanding that the two dimensions of the phenomenon of constitutionalisation are in many respects intertwined.

[20] Similarly, for Martin Loughlin "constitutionalisation embraces a set of different processes, guided by the goal of subjecting ever greater areas of public life, in particular of governmental activities, to the norms of liberal-legal constitutionalism" (Martin Loughlin, 'What is Constitutionalisation?' (n 11) 47).

Constitutionalisation for some represents just a next, more advanced phase of the theory and political practice of constitution-making, directed at setting ground rules for legal ordering and political organisation of a society. In this study, however, constitutionalisation is seen as a relatively new phenomenon emerging simultaneously with the intensification of globalisation-related processes in the last few decades. A phenomenon which needs to be distinguished, at least at the European soil, from the evocative, French style constitutionalism.[21] In the countries of continental Europe, constitutionalisation denotes a "reconfiguration of the political theory of constitutionalism" in the course of which it is replaced by a more legalistic approach to constitution.[22]

Through this new paradigm, the constitution which was thus far embodying the highest law of the country, that sets the fundamental principles by which it is to be governed, becomes the source of the expanding authority of judiciary to decide on the matters that were traditionally in the sphere of political decision-making. As Gavin Anderson describes it, constitutionalisation is now a privileged methodology for structuring and deciding important societal issues: "there is one form of social power operating in society (the state), one privileged methodology (normative argument directed to courts), and one optimum form of promoting autonomy (constitutional adjudication upholding individual rights)."[23]

The process of constitutionalisation is in its major part inspired by the US constitutionalism and, as such, is an emanation of the growing influence of common law on continental law systems and their tradition of formal-legal analysis. In accordance with its US model, the primary function of constitution as portrayed in the process of constitutionalisation is "taming of the Leviathan".[24] This

[21] The first important feature of the French style constitutionalism that makes this distinction meaningful is that, traditionally, the Constitution was not seen as the source of positive law as it was the case with the American style constitutionalism. Although in the French style constitutional theory the constitution is the supreme law of the land, it is not a source of positive law in the way the Constitution of the United States is, and its application is narrowly set. More on this in: Martin A. Rogoff, 'A Comparison of Constitutionalism in France and the United States' (1997) 49 Maine Law Review 21. When it come to the theory of constitutionalism, the Oxford Handbook of Political Institutions describe the French tradition of constitutionalism as "a species of the 'old institutionalism' in that it is descriptive, normative, and legalistic [that] focuses on the formal-legal aspects of institutions, but not on case law." (Sarah A. Binder, R. A. W. Rhodes, Bert A. Rockman (eds.), *The Oxford Handbook of Political Institutions* (Oxford University Press 2006) 96. Some authors, on the other hand, distinguish between the term constitutionalism and constitutionalisation by using the first to refer to the academic approach and the second as the practice of constitutionalism. See on this: Anthony F. Lang, Jr., Antje Wiener, 'A Constitutionalising Global Order: an introduction' in: Anthony F. Lang, Jr., Antje Wiener (eds.), *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017) 15 – 17.

[22] Martin Loughlin, 'What is Constitutionalisation?' (n 11) 61.

[23] Gavin W. Anderson (n 8) 146.

[24] Ulrich K. Preuss, 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept? in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 24.

is achieved through expanding the list of matters that become susceptible to the judicial review, either directly, through power to strike down laws or declare them unconstitutional, or indirectly, by widening the range of issues that can be the subject of individual rights litigation. Yet, the results of constitutionalisation go beyond the goal of limited government that American constitutional fathers had in mind.[25] It leads to a shrinking of the dominion of representative institutions and "transformation of judicial institutions into major political actors".[26]

The main manifestations of constitutionalisation are constitutional reforms, either through adoption of new constitutions or through constitutional revisions that can include creation of some sort of bill of rights or higher ranked laws, and of some form of active judicial review.[27] Its end result is, as Martin Loughlin expressed it, "the conversion of the Constitution into a species of ordinary law (albeit with "higher" status), and the consequent establishment of the judiciary as the authoritative determinants of its meaning."[28] In developing countries these changes, instigated under the "rule of law" banner, have been carried out by the governmental and civil society organisations through the blooming number of projects focused on domestic legal reform,[29] denoted by the World Bank as the main "post-Washington consensus" development strategy. In the old democracies, they have commenced as reforms aimed at giving more content to individual human rights and hence at curing the limitations of majoritarianism. In the countries of western Europe, the phenomenon of constitutionalisation was further steered by the "non-political mode of decision making" and "over-constitutionalisation" characterising the project of European integrations.[30] The entire process is reinforced by, what comparative lawyers call, a "cross-fertilisation of the field", taking place through the convergence of the constitutional practice built around the universalising nature of the human rights discourse.

In fact, the unifying narrative of the diverse manifestations of constitutionalisation found in different countries evolves around an abstract individual and his/her human rights. Human rights

[25] David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) 30-39.
[26] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004) 214.
[27] The constitutionalisation is a worldwide phenomenon, in Europe taking place both in the old, western European democracies with the long-standing constitutions, and in the countries of former Soviet dominance which, after the collapse of the communistic regimes, mostly enacted new constitutional texts. Given that it takes place in so different constitutional milieus, the modes in which constitutionalisation is manifested differ greatly from country to country. Yet, one can still speak about a common trajectory of changes that have occurred as a consequence of it, evolving around the notions of fundamental rights and judicial review.
[28] Martin Loughlin, 'What is Constitutionalisation?' (n 11) 63.
[29] Anne-Marie Slaughter, 'Judicial Globalization' (2000) 40 Virginia Journal of International Law 1117.
[30] Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21 European Law Journal 470.

and how best to shield them from the precariousness of every day politics are the privileged theme of constitutionalisation.

2.3. Constitutionalisation and human rights

Human rights are the "centralising philosophy" of constitutionalisation, to borrow the words of Martin Loughlin.[31] Through the "rule of law" developmental strategy, and the constitutional revisions in the old democracies, the symbolic, emancipatory force of human rights has been translated into an expanding catalogue of justiciable individual rights.[32] The individual and societal are not anymore bound together only through the solemn aspirations laid down in the constitution. Instead, the aspirations have become the fully-grown legal norms aimed at governing the public decision-making, and the entire provinces of individual and societal life have come under the sway of judiciary as the authoritative determinant of their meaning.

The "legalisation of politics" in the meaning of setting the limits of political decision-making, of the "red line" which ought not be crossed, is nothing new.[33] What is new is the extent to which this process now evolves around the concept of individual human rights, and the extent to which the so conceived human rights have redefined the relationship between the three branches of state and their relationship with citizens.

The primary goal of constitutionalisation of human rights is not only to make sure that the basic societal values will guide the political praxis, or to prevent repeal of human rights provisions in the future laws. While the apprehension from "totalising tendencies of the political matrix within society"[34] is growing, the human rights are evolving into constitutional or quasi-constitutional legal provisions[35] that bring the promise of a more predictable life, into a stronghold for a citizen lost in the confusing new world of intensive globalisation, technological advancement and single-minded pursuit of profit.

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[31] Martin Loughlin, 'What is Constitutionalisation?' (n 11) 61.

[32] A brief account of the relationship between human rights and the rule of law in: András Sajó, 'Universalism with Humility' in: András Sajó (ed.), *Human Rights with Modesty: The Problem of Universalism* (Springer 2004) 1, 2.

[33] Dieter Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 5.

[34] Gunther Teubner, 'Fragmented Foundations: Societal Constitutionalism Beyond the Nation State' in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 335.

[35] On the concept of quasi-constitutional legislation see the last chapter.

The process of human rights constitutionalisation mostly takes place through the conversion of human rights standards into justiciable constitutional provisions, bills of rights or other forms of quasi-constitutional legislation. Translated into domestic legal norms, they become "broadly drawn statements of rights and open-ended exception clauses which place the full weight of legislative responsibility on the 'interpretations' of courts".[36]

The court-centred protection of human rights is the fundamental consequence, for some the prime achievement, of the process of constitutionalisation of human rights. For the greatest part of the mainstream political and legal theory, one begins to imply another, and the rejection of court-administered bills of rights is seen as a blasphemy against the human rights themselves.[37] The court-centred human rights provisions are praised as the universal cure for the maladies of modern democracies.

"The veneration for fundamental rights", Campbell notes, "is to an extent tied in with the fact that they are seen as removed from the banalities and trade-offs of routine politics."[38] The legal empowerment becomes a strategy for a more just and dignified societal order, not susceptible to the ebb and flow of daily politics that have long lost the substantive dose of transparency.[39] As Jeremy Waldron describes it on the example of Great Britain, the cradle of parliamentary democracy:

> "People have become convinced that there is something *disreputable* about a system in which an elected legislature, dominated by political parties and making its decisions on the basis of majority-rule, has the final word on matters of right and principle. It seems that such a forum is thought unworthy of the gravest and most serious issues of human rights that a modern

[36] Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (UCL Press 2004) 41.
[37] ibid 15.
[38] ibid 187.
[39] The word 'transparency' is not used here in the meaning of a demand that information of public interest should be easily accessible and that the formal features of the decision-making process should be identifiable and predictable. It is used in its less technical meaning to point that something can be comprehended by those who have interest to comprehend it. It is claimed that, with the current wave of globalisation, and even more so in the context of European integrations, the public decision-making has become so complex that citizens generally do not manage to fully grasp it. On the other hand, the public discourse is overwhelmed with the demand of transparency in the first meaning. The transparency, in words of Ida Koivisto, became the socio-legal ideal with the self-justificatory metaphorical authority and its importance is constantly growing (Ida Koivisto, 'The Anatomy of Transparency: The Concept and its Multifarious Implications' (European University Institute Working Paper, MWP 2016/09) 1). Some authors canonize transparency as a cross cutting human rights principle, together with the principle of non-discrimination (see: Magdalena Sepúlveda, Carly Nyst, 'The Human Rights Approach to Social Protection' (Ministry for Foreign Affairs Finland, 2012) 19.

> society confronts. The thought seems to be that the courts, with their wigs and ceremonies, their leather-bound volumes, and their relative insulation from party politics, are a more appropriate place for resolving matters of this character."[40]

Through individual and justiciable character of the legal affirmations of human rights, the courts are given an entirely new role in the process of societal decision-making, at least on the face of it. Apart from the much-discussed question of the capacity and the authority of a non-elected body to set the limits of political decision-making through the binding interpretations of human rights provisions,[41] there are number of other important issues arising from constitutionalisation of human rights which are of direct interest for this study.

2.3.1. Human rights and value pluralism

The first is found in the fact that, since there is no a pre-set rank of rights, the constitutional and quasi-constitutional provisions embodying human rights inevitably exhibit a "foundational value pluralism", as phrased by Zucca.[42] The value pluralism that is boosted by the expansion of the notion of human rights undermines the very basic idea of human rights as "trump cards"[43] and eventually leads to their trivialisation. For Dimitrina Petrova, the trivialisation comes from the overabundance of issues framed as individual, judicially enforcable human rights: the basic premise that human rights are vital for society is interpreted through the rights approach as an imperative demand that each societal issue that comes within the ambit of human rights is eventually approached as legal right.[44] Rolf Künnemann, on the other hand, sees this as a problem of morals talked about in a "rights language". For Künnemann, an appeal to human rights in

[40] Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 4, 5.

[41] These issues are to a great extent beyond the ambit of the study, yet, since they are the dominant topic in the discussions between the proponents and opponents of the judicial enforcement of socio-economic rights, there is rich literature to revert to. See, for instance: Evelyne Maes, 'Constitutional Democracy, Constitutional Interpretation and Conflicting Rights' in: Eva Brems (ed.), *Conflict Between Fundamental Rights* (Intersentia 2008) 69; David M. Beatty (n 25); Paul O'Connell, 'Vindicating Socio-Economic Rights: International Standards and Comparative Experiences' (PhD dissertation, National University of Ireland 2010).

[42] Lorenzo Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' in: Eva Brems (ed.), Conflict Between Fundamental Rights (Intersentia 2008) 21.

[43] The famous Ronald Dworkin's metaphor suggesting that rights trump all non-rights goals that arise as background justification in political decision-making. Ronal Dworkin, 'Rights as Trumps' in: Jeremy Waldron (ed.), *Theories of Rights* (Oxford University Press 1984) 153-167.

[44] Dimitrina Petrova, 'Social and Economic Dimensions of Universal Rights' in: András Sajó (ed.), *Human rights with modesty: The problem of universalism* (Nijhoff 2004) 187.

relation to societal issues from the sphere of social justice, ethics, etc. reduces rights to a language of morals "that plays in the hands of socially oppressive elites".[45]

In the individual human rights litigations, that typically involve an amalgam of individual and public interests, the courts are necessarily entangled in the delicate process of weighing and balancing, a process that often includes issues which are pre-political, beyond law. This problem is the most visible in the way the constitutionalisation has redefined the relationship between the social and legal justice. Through the process of "legalisation of politics", intensified by constitutionalisation, the significant number of matters of social justice are formulated as the individual, corrective justice claims and thus moved to the domain of legal justice. This is, however, not in accordance with the very nature of the two realms of social praxis which, according to Wojciech Sadurski, render the role of legal justice to be secondary to and derivative from the social justice. In his texts on the relationship between distributive and legal justice, Sadurski argues that the dichotomy between social and legal justice is a false one because the two emerge in different phases of the societal process of setting and applying rules, and concern activities of different societal actors.[46] The first one is about the distributive quality of the societal rules which regulate distribution and is a matter for a legislator, the second one is about complying with the rules and it concerns the work of judges: "Legal justice is at the mercy of social justice: it cannot do any independent job. The only job it can do […] is to translate the postulates of social justice into the language of legal rules and judicial decisions."[47] Similarly, but more from the legal perspective, Bostjan Zupančič shows that the legitimacy of definitions of legal duties lies in the "prior consent" of the interested parties.[48] The law is about keeping the promise, Zupančič says. "Legal formalism, both substantive and procedural, is a barrier to human frivolity. […] It is this promise, which is being defined in all law with the purpose of crystallising it for future reference.[49]

The individually conceived human rights also further the process of fragmentation of society, amplified by the globalisation and technological advancement, by placing an emphasis on independence rather than interdependence. As Neta Ziv reminds, "dependence is not a discarded

[45] Rolf Künnemann, 'How are social justice and human rights related? Four traps to avoid' in: Doutje Lettinga, Lars van Troost (eds.), *Can Human Rights Bring Social Justice? Twelve essays* (Amnesty International 2015) 69.
[46] Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (D. Reidel Publishing Company 1985) 36.
[47] Wojciech Sadurski, 'Social Justice and Legal Justice' in: Hans-W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing 2011) 61.
[48] Boštjan M. Zupančič, *The Owl of Minerva: Essays on Human Rights* (Eleven International Publishing 2008) 419.
[49] ibid 418.

state of being; it is a common condition of life."[50] Yet, the rights approach, as the basic logic behind the process of constitutionalisation, departs from the personhood defined through the concepts of autonomy and independence, to arrive at the maximisation of opportunities as its goal, through integration, participation and choice.[51] The vulnerability and insecurity, although the basic conditions of human life, are treated as special, temporary circumstances that should be addressed by the system through the concepts of "minimum core", targeted measures, "social protection floors", etc.

With this comes as well the overly symmetric pairing up of rights with responsibilities which, being detached from the real life and social solidarity that life implies, easily slips into the discourse of merit and productivity. This opens the door to the instrumentalisation of human rights and their conflation with the free-market essentials.

2.3.2. Conflation of rights and interests

The proliferation of human rights over the last decades brought to the blurring of difference between human rights and other interests. Not only has the rights approach placed the accent on individually conceived human rights, but many of the newly proclaimed human rights are in essence individual interests.[52] This has resulted in the expansion of private interests at the expense of public[53] and, consequently, has intensified the process of changing the boundaries between private and political by narrowing the scope of the latter.

The prevailing terminology mirrors these changes. Through the process of constitutionalisation, human rights became fundamental rights, and with the later notion being detached from the notion of "human" and his/her needs, as the non-negotiable demands of human existence and the original source of human rights, many negotiable interests have creeped their way into the notion of "fundamental rights". This is the most apparent in the terminological and symbolic fusion of market freedoms with the fundamental freedoms.

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[50] Neta Ziv, 'The Social Rights of People with Disabilities' in: Daphne Barak-Erez, Aeyal M. Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 387.
[51] Similar on this: ibid 370.
[52] Janneke Gerards explains the new fundamental rights in some part as "reflecting novel aspects of the conditions of human life". Janneke H. Gerards, 'Fundamental Rights and Other Interests: Should It Really Make a Difference?" in: Eva Brems (ed.), *Conflict Between Fundamental Rights* (Intersentia 2008) 656, 686.
[53] Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' 21 (2015) European Law Journal 470.

The legal framework of the European Union is probably the best illustration of how the neoliberal conception of freedom enables an easy transition of free-market economic rules to the status of fundamental freedoms and, in some situations, even to that of fundamental rights.[54] In the European Union treaty provisions and in the case law of the European Court of Justice, the four economic freedoms (free movement of goods, persons, services and capital) are in effect elevated to the same level of normativity as the constitutional human rights.[55] While it is true that they are fundamental to the integration of the different member states into this admirable supranational project, the use of the words "fundamental" and "freedoms" in the legal norms that should provide for an unhindered circulation across national borders of economic goods, services and capital, as well of persons in the role of economic agents, is very far from the meaning in which the two words are used in national constitutions and international human rights documents.

In the case law of the European Court of Justice, the four economic freedoms are given the status which is very similar to the one assigned to human rights in the national constitutions.[56] That the Treaty provisions guaranteeing the four economic freedoms are accorded status similar to the status of constitutional rights can be firstly discerned from their very broad material scope, as interpreted in the case law of the European Court of Justice.[57] The Court translates them in the prohibition of any national measures which are "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade", which means that the individuals have a very far reaching right to challenge before the courts any public measure which restricts their economic rights guaranteed through the four market freedoms.[58] The "fundamental nature" of the four market freedoms also ensues from those of its rulings in which the Court, while examining the

[54] John Morijn, 'Conflict Between Fundamental Rights or Conflicting Fundamental Rights Vocabularies?' – An analysis of diverging uses of 'fundamental rights' in the context of international and European Trade Law' in: Eva Brems (ed.), *Conflict Between Fundamental Rights* (Intersentia 2008) 593.

[55] See on this: Janneke H. Gerards, 'Fundamental Rights and Other Interests: Should It Really Make a Difference?' in: Eva Brems (ed.), *Conflict Between Fundamental Rights* (Intersentia 2008) 655; Miguel Poiares Maduro, 'Europe's Social Self: "The Sickness unto Death"' in*:* Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 332. For the positive view of this process: GIovanni *Comandé*, '*Co-determining* European Private Law(s) and Constitutionalization Process(es)' in: Stefan Grundmann (ed.), *Constitutional Values and European Contract Law* (Kluwer Law International 2008) 161.

[56] The ECJ refers to the four economic freedoms as the fundamental freedoms, fundamental principles and similar. See, for instance: *Ålands vindkraft AB v. Energimyndigheten* (Case C-573/12) Judgment of the Grand Chamber of 1 July 2014, para. 65.

[57] Sybe A. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 Utrecht Law Review 175.

[58] In cases: *Ålands vindkraft AB v. Energimyndigheten* (Case C-573/12) Judgment of the Grand Chamber of 1 July 2014, para. 66; *Procureur du Roi v. Benoît and Gustave Dassonville* (Case 8-74) Judgment of 11 July 1974, para. 5. See on this: Miguel Poiares Maduro, *We the Court, The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998) 35-60.

national laws, policies and standards that affect exercise of the four economic freedoms, applies the proportionality test which is very much alike the proportionality test developed for the purpose of balancing conflicting constitutional rights.[59] Not only that there is no *a priori* hierarchy between human rights and the free market rules, but when the two clash and the European Court of Justice engages in the balancing exercise, it actually departs from the *prima facie* breach of the free movement rules and, accordingly, shifts the burden of proof to those who argue for the protection of human rights. As Sybe A. de Vries writes: "Where in *Strasbourg* the proponents of economic rights might have to justify a restriction on human rights, in *Luxembourg* the fundamental, human rights proponents will have to justify their actions and establish that the restriction on free movement is justified on the basis of protecting fundamental rights".[60] Equally important, when the European Court of Justice applies so conceived proportionality test - conceived in the way that the measure in question must be justified in the light of market rules - the human rights goals, especially those which spring from the basic socio-economic rights, as seen in the well-known cases *Viking and Laval*, are often treated as the measures of last resort.[61] Last but not the least, there are also examples, such as, for instance, *Danish Bottles case*,[62] in which the EU law is interpreted in a way which sets a "ceiling of protection" of human rights above which the Member States should not go not to jeopardize the realisation of economic integration goals of the Union.[63] Although the example of conflation of economic rules and human rights in the reasoning of the European Court of Justice is limited by the special character of this judicial body and the nature of the project which the Court is called to preserve, the general conclusions are nonetheless valid and follow the general trends.

[59] See the ECJ decisions in the cases referred to it by the national courts for preliminary rulings: *Liga Portuguesa de Futebol Profissional and Bwin International Ltd, formerly Baw International Ltd v. Departamento de Jogos da Santa Casa da Misericórdia de Lisbo* (Case C-42/07) Judgment of Grand Chamber of 8 September 2009, para. 60; *Dieter Kraus v. Land Baden-Württemberg* (Case C-19/92), Judgment of 31 March 1993, para. 32; *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* (Case C-55/94), Judgment of 30 November 1995, para. 6. For the elaboration of the balancing test developed in the German constitutional jurisprudence see: Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers, Oxford University Press, 2010).

[60] Sybe A. de Vries (n 57) 187.

[61] The European Court of Justice asked the national court to ascertain "whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and *does not go beyond what is necessary to attain that objective* (italic added)" (*International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* (Case C-438/05) Judgment of the Grand Chamber of 11 December 2007, para. 84). For the further analysis of the two cases and the comparative constitutional law analysis of the right to strike in the EU and US experience: Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective (*Oxford University Press *2014)* 141 – 192.

[62] *Commission of the European Communities v. Kingdom of Denmark* (Case 302/86), Judgment of 20 September 1988.

[63] For a more in-depth analysis: Federico Fabbrini (n 61) 39.

Seen from the broader perspective, the phenomenon of conflating human rights and economic rules can be observed from two directions. In their neoliberal conception, human rights are understood primarily as freedoms. At the same time, the economic rules on which the neoliberal capitalism is based are named "economic freedoms" and assigned to the rank of fundamental freedoms and fundamental rights. Both serve the same objective, a free legal subject whose freedom is primarily measured by the extent to which he or she is free to participate and pursue own choices in a free market. As Dieter Grimm notes, through their concretisation in the EU treaties, the four economic freedoms are "transformed from objective principles for legislation into subjective rights of the market participants."[64] Under this conception of fundamental rights, the concept of their holder is easily extended to include companies and other profit-making legal persons, as the holders of the right to property, right to fair trial, right not to be discriminated against, right to privacy, and other human rights guaranteed in the international instruments and constitutions.[65] Paradoxically enough, the general insusceptibility to judicial inquiry of the acts of corporations and other profit making legal entities with regards to their effects on individuals have remained almost intact, although they are as likely to result in human rights violations as the acts of state.

For Morijn this is "an opportunistic attempt at co-opting a language with great moral force for narrow instrumentalist reasons".[66] In general, the process of constitutionalisation of human rights results in an instrumental view of human rights. Human rights cease to be a value per see and start to be seen as an instrument for the realisation of other public goals, such as security, social cohesion, more democracy, etc. In the monolithic landscape of public discourse defined by the neoliberal postulates, these goals become easily paired up with the economic ends. The business case for human rights has especially gained in prominence. The importance of the rule of law and human rights approach is now commonly derived from the need to prevent economic stagnation, to prevent social conflict and in general to provide stable and predictable business environment.[67]

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[64] Dieter Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (n 53) 467.

[65] See, for instance, the European Court of Justice case *DEB*, in which the Court held that the fundamental right to have effective access to justice can be invoked by legal persons. *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* (Case C-279/09), Judgment of 22 December 2010.

[66] John Morijn, 'Conflict Between Fundamental Rights or Conflicting Fundamental Rights Vocabularies?' – An analysis of diverging uses of 'fundamental rights' in the context of international and European Trade Law' (n 54) 593.

[67] As the American Bar Association puts it, "there is a growing belief 'that rule of law promotion is the most effective long-term antidote to the pressing problems facing the world community today, including poverty, economic stagnation, and conflict". Cited in: Petra Dobner, More Law, Less Democracy? Democracy and Transnational Constitutionalism' in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 142.

2.3.3. Instrumentalisation of human rights

According to Eduardo Catalán, legalisation of human rights fails to grant any serious protection against "structural sources of human rights degradation" and in certain ways it became instrumental to legitimizing and guaranteeing the global domination of neoliberal capitalism.[68] As Alexy says, "constitutional rights and constitutional rights norms are substantively fundamental, because they incorporate decisions about the basic normative structure of state and society", but this is "quite independent of how much or how little content they are given".[69] In the ambient of human rights inflation and instrumentalisation, human rights lose a significant dose of their emancipatory potential built on their symbolic significance in protecting the oppressed from the powerful and oppressive ruler. Instead, through their constitutionalisation, human rights qua legal rights become a way to divert our attention from the sobering realisation of how much our world has changed in the last decades, how little we have had a say in those changes and how little we understand them. As Somek notes in relation to supranational constitutional projects, but equally applicable to the domestic level constitutionalisation, "[t]he promise that resides in the inherited concept of the constitution becomes drained of its normative force, where major elements of the original context of constitutional law, such as consolidated state authority, can no longer be taken for granted."[70]

The authority of law given to human rights as legal rights does not change the character of issues placed under their flag. Nor does it mean that their content and scope become fixed. Legalisation of human rights cannot and does not change their character of being at once both moral and legal claims. Yet, the legal human rights reasoning structures our way of deliberating about human rights by framing it through the legal concepts of rights and duties, and confining determination of their content and scope to the legal methods of interpretation. Once they are moved from the political forum to the court room, to the courts as the guardians of individualised justice, the human rights qua legal rights start to symbolise a more just, ideologically neutral and predictable solutions to politically charged or to the seemingly infinitely complex problems of globalised world. This quasi-compensatory nature of the constitutionalisation of human rights is even more

[68] Eduardo Salvador Arenas Catalán, 'Back to the Future: Human Rights Protection Beyond the Rights Approach' in: Doutje Lettinga, Lars van Troost (eds.), *Can Human Rights Bring Social Justice? Twelve essays* (Amnesty International 2015) 43.
[69] Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers, Oxford University Press 2010) 350.
[70] Alexander Somek, 'Administration without Sovereignty' in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 269.

apparent in the trend of constitutionalisation of socio-economic rights and the expansive interpretation of the prohibition of discrimination, as the two main strategies of the substantive equality doctrine analysed in this study.

2.4. Substantive equality doctrine

Substantive equality is the notion that connects different strands of constitutionalisation of human rights which have evolved from an expansive theoretical and judicial interpretation of the legal concept of equality.[71] These strands of constitutionalisation are analysed both as manifested in scholarly works on the topic of substantive equality, and in the judicial interpretation of the principles of equal treatment and non-discrimination. In that sense, the term "doctrine" is used at the same time in its continental European meaning of "the doctrinal study of law"[72], i.e. as a reference to the legal scholarship, and in the meaning of the common law notion of "judicial doctrine", referring to a body of rules for the interpretation of a legal concept or a principle arrived at through the judicial activity.[73] Hence, the phrase "substantive equality doctrine" is in this study a label for both types of legal praxis involving arguments on substantive equality.[74]

The doctrine brings an egalitarian promise of a more equal society, to be achieved through the avenue of law. A promise that the contemporary inequalities will be dealt with in a way which is more attentive to the "lived inequalities of the historically disadvantaged",[75] and to the manifold and mutually reinforcing dimensions of these inequalities. As is the case with the other

[71] The notion 'legal concept' in the way it is used here encompasses two basic categories, defined by Frandberg as: concepts with a law-stating function (law-concepts, concepts of law), the function of which is to state the material legal content, and concepts with a juridical-operative function (juridical concepts, concepts about law), which are created through the court's interpretation of the legal content. See, Åke Frändberg, 'An Essay on Legal Concept Formation' in: Jaap Hage, Dietmar von der Pfordten (eds.), *Concepts in Law* (Springer 2009) 2.

[72] The term which Alf Ross used in order to overcome the linguistic confusion arising from the different meaning of the term 'doctrine' in the common law and civil law jurisdictions. Alf Ross, *On Law and Justice* (The Lawbook Exchange, 3rd printing 2004, originally published by the University of California Press 1959) 11.

[73] Gerald Baier, defines judicial doctrine as "set of standards, maxims, tests and approaches to the interpretation of the law that is used to regularize law's application and make it more routine and predictable". Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (UBC Press 2006) 14.

[74] The short clarification of the meaning of the term "doctrine" is provided with the aim to overcome confusion in the use of the term 'doctrine' as a consequence of the fact that in the common law tradition the term is used mostly in the meaning of 'judicial doctrine', while in the continental law countries it is used in the meaning of the "legal scholarship". Alf Ross wrote about the misunderstandings that could ensue from the fact that in English the term "legal doctrine" stands for the body of rules (the law itself) rather than to the knowledge about the rules. Alf Ross (n 72) 10-11.

[75] Catharine A. MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' (2016) 14 International Journal of Constitutional Law 739.

manifestations of constitutionalisation, the doctrine transforms various equality issues into fundamental rights issues, and attempts at moving them from the domain of political to the domain of courts, as a commitment to the more inclusive, firm and reliable response to the existing inequalities.

2.4.1. The notion of substantive equality

The notion had emerged in the feminist legal scholars' critique of the law's formalism in addressing gender inequalities.[76] One of the first references to it is found in the case *Andrews v. The Law Society of British Columbia,* decided in 1989 by the Supreme Court of Canada.[77] The judgment of the case was also the very first time that the Canadian Supreme Court has interpreted and applied the equality provisions of the Canadian Charter of Rights and Freedoms.[78] Mark David Andrews, a law graduate of Oxford University in England and resident in British Columbia, was refused membership in the provincial law society on the grounds that he was a British subject and had no Canadian citizenship. The case was decided in his favour and the Supreme Court of Canada found that discrimination on the basis of citizenship violated the Charter's Section 15(1) equality provision. In the ruling the Court departed from a broad approach to the equality guarantees in the Charter that placed the focus on the effect of particular laws on disadvantaged groups. It also rejected the application of "similarly situated" test, holding that an identical treatment of differently situated individuals and groups may produce serious inequality. The direct reference to the notion of substantive equality is found in the *amicus curiae* brief of Women's Legal Education and Action Fund (LEAF), one of the many Canadian civil society organisations which have intervened in the case, where it argued for a wider conception of the equality clause that would embrace the concept of substantive equality. The organisation claimed that the equal treatment doctrine is nothing else than to say that "laws should be laws", an expression of the rule of law principle, which cannot "assist in deriving the underlying meaning of equality in the context of a claim to *substantive equality*".[79]

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[76] Beverley Baines, 'Is Substantive Equality a Constitutional Doctrine?' (2015) 42 Queen's University Legal Research Paper Series 77 – 78; Paul Stancil refers also to the writings of the critical race theorists as the birthplace of a notion of 'modern substantive equality' (Paul Stancil, 'Substantive Equality and Procedural Justice', (2017) 102 Iowa Law Review 1633).

[77] According to Catharine A. MacKinnon, 'Substantive Equality Revisited: A Reply to Sandra Fredman' (n 75) 739.

[78] Marc Gold, 'Comment: *Andrews v. Law Society of British Columbia*' (1989) 34 McGill Law Journal 1063 – 1064; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 34.

[79] *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, factum, para. 65 (italic added).

Throughout the last two decades, the substantive equality became a dominant theme in the constitutional scholarship and jurisprudence in Canada, South Africa, and India, and in the number of other jurisdictions. The notion intensively influenced interpretation of the relevant treaty and constitutional provisions in the European Union and its Member States, as well the enactment of the new anti-discrimination legislation. In the United States, the doctrine mostly remained confined to the scholarly critique of the procedural approach to the XIV Amendment.[80] However, the legacy of *Brown v. Board of Education* in the Title VII jurisprudence, although it was not explicitly built around the concept of substantive equality, actually served as the main source of inspiration of the substantive equality scholarship in Europe and elsewhere.[81]

The jurisprudence of Canada's Supreme Court and of the Constitutional Court of South Africa are the most often quoted examples of the judicial equality doctrine built around the notion of substantive equality. Starting with *Andrews v. The Law Society of British Columbia*, the Supreme Court of Canada has held that Section 15 of the Canadian Charter of Rights and Freedoms guarantees substantive equality side by side with formal equality. Starting from that premise, in a number of cases the Supreme Court of Canada found violation of Section 15 equality provisions even when discrimination occurred as an effect of a facially neutral law of a general application.[82] Side by side with the Canadian equality jurisprudence, the case law of the Constitutional Court of South Africa arising under the constitutional equal protection clause, places a distinct emphasis on the importance of socio-historical context in the judicial investigation of the discriminatory effects of laws and policies.[83]

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[80] See: Christopher D. Totten, 'Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach' (2003) 21 Berkley Journal of International Law 27; Robin West, 'The Meaning of Equality and the Interpretive Turn' (1990) 66 Chicago-Kent Law Review 469-470; Beverley Baines (n 76) 79. Fredman and West in fact claim that the US Supreme Court interpretation of the Equal Protection Clause stands firmly attached to the concept of formal equality, as illustrated in the recent cases of *Ricci v. De Stefano* (557 U.S. 557 (2009) and *Parents Involved in Community Schools v. Seattle School District* (551 U.S. 701 (2007) (Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 713). Citing number of authors, William E. Forbath, on the other hand, argues that in the past the broader conception of constitutional equality, or as he calls it "the social citizenship tradition", can be traced in courts' decisions and scholarly literature in US (William E. Forbath, 'Constitutional Welfare Rights: A History, Critique and Reconstruction' (2001) 69 Fordham Law Review 1821).

[81] See on this: Bob Hepple, 'The European Legacy of Brown v. Board of Education' (2006) 3 University of Illinois Law Review 605; Catherine Barnard, Bob Hepple, 'Substantive Equality' (2000) 59 Cambridge Law Journal 564.

[82] See, for instance, the case *Eldridge v. British Columbia* ([1997] S.C.R. 624, in which the applicant claimed that the discrimination arose from the law of general application i.e. no evidence of a specific discriminatory rule or standard was furnished.

[83] One of the most often cited cases in which the Constitutional Court of South Africa embraced the substantive equality doctrine is *Brink v. Kitshoff* (1996 (6) BCLR 752 (CC) para. 42). For the comparative law analyses of the equality jurisprudence of these two courts see: Anne Smith,' Equality Constitutional Adjudication in South Africa'

When it comes to the European countries, although the formal conception of equality derived from the constitutional equal protection clause still dominates jurisprudence of their courts, equality is being more and more approached in a broader way, as duty to address subtle forms of discrimination. These developments, primarily reflected in anti-discrimination law, embrace many of the elements of the substantive equality doctrine, such as the concept of indirect discrimination, and endorsement of certain types of affirmative action measures, positive duties and some other strategies aimed at overcoming the limitations of the formal equality approach.[84] The same can be observed in the case law of the European Court of Justice which, according to Marc de Vos, is the story of the gradual discovery of the limits of affirmative action developed under the banner of substantive equality.[85] The European Court of Human Rights which, together with the European Court of Justice, has strongly influenced the judicial doctrine, as well the anti-discrimination legislation in the EU Member States, has also embraced a substantive equality approach to the anti-discrimination provisions contained in the European Convention on Human Rights.[86]

The emanation of the substantive equality doctrine can be also observed in the international realm. The UN treaty bodies, established under the main international human rights instruments, interpret the prohibition of discrimination as embracing the goals of both *de jure* and *de facto*

(2014) 14 African Human Rights Law Journal 609; Po-Jen Yap, 'Four Models of Equality' (2005) 27 Loyola of Los Angeles International and Comparative Law Review 63.

[84] For a comparative overview of the conceptions of equality and non-discrimination pursued by the courts in the European Union Member States see: Christopher McCrudden, Sacha Prechal, 'The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach' (European Commission 2011).

[85] Marc de Vos, 'Beyond Formal Equality: Positive Action Under Directives 2000/43/EC and 2000/78/EC' (European Commission 2007) 11, 18. Some of the ECJ early case law that illustrates this is found in: *Commission of the European Communities v. French Republic* (*Commission v. France)* (Case C-312/86) Judgment of 25 October 1988; *Joseph Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* (*Griesmar)* (Case C-366/99) Judgment of 29 November 2001; *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist* (*Abrahamsson)* (Case C-407/98 Judgment of 6 July 2000. Sacha Prechal argues that in some of its decisions in the field of gender equality, as for instance in case *Thibault,* there is clear recognition of substantive equality (Sacha Prechal, 'Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes' (2004) 41 Common Market Law Review 537).

[86] Since its landmark decision *D.H. and Others v. Czech Republic* ((Application no. 57325/00), Judgment of 7 February 2006), the European Court of Human Rights (ECtHR) has been steadily developing indirect discrimination analysis and the related positive obligations to fulfil the Convention's rights, as the elements of the substantive equality doctrine. Yet, the scope of its adherence to the more substantive conception of equality, even after entering into force of Protocol 12 and despite the ECtHR's attempts to protect certain socio-economic rights via Convention rights, in essence remains limited to the civil and political rights and hence outside of the direct focus of this study. For a more detailed account of the ECtHR case law exhibiting substantive approach to equality see: Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 Human Rights Law Review 1; Rory O'Connell, 'Substantive Equality in the European Court of Human Rights?' (2009) 107 Michigan Law Review First Impressions; Oddný Mjöll Arnardóttir, 'Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?' (2017) 4 Oslo Law Review 150.

equality, where the term "*de facto* equality" is used interchangeably with the term "substantive equality". The substantial equality became the standard for measuring the State's compliance with the prohibition of discrimination in the exercise of guaranteed rights. In General Recommendations no. 16, the UN Committee on Economic, Social and Cultural Rights interpreted the prohibition of discrimination contained in Article 3 as a comprehensive protection against discrimination, which is concerned "with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather *alleviate*, the inherent disadvantage that particular groups experience".[87] A failure to ensure substantive equality between men and women in the enjoyment of Covenant rights, according to the Committee, constitutes violation of that right.[88] Consequently, the State Parties are under an immediate duty to "adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination".[89]

2.4.2. Nature and scope of the concept of substantive equality

Although the notion of substantive equality has become a leading theme in the equality jurisprudence in many jurisdictions around the world, as well as in the international human rights forums, its nature and content have remained vague and analytically underdeveloped. There is neither consensus, nor even an analytically valuable disagreement among the proponents of substantive equality doctrine on what is "substantive equality", as each author offers its own vision of its nature and scope.[90] The same applies to the courts' invocation of substantive equality.

In the scholarly works the notion of substantive equality is used in the variety of meanings and can signify, often simultaneously: an overarching legislative goal, one of the meanings of the

[87] UN Committee on Economic, Social and Cultural Rights, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), 11 August 2005, E/C.12/2005/4, para. 7 (italic added).
[88] ibid, 41.
[89] UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para 8. Similar, the UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 25, on Article 4, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, UN Doc. No. HRI/GEN/1/Rev.7. (2004), para. 8.
[90] Sandra Fredman, for instance, argues that "the precise meaning of substantive equality remains contested" and after analysing several different conceptions of substantive equality develops her own "multi-dimensional approach to understanding and applying substantive equality". Sandra Fredman, 'Substantive Equality Revisited' (n 80) 720.

provisions on the principle of equality,[91] a legal theory[92], an equality conception[93], principle[94], substantive interpretation of the equality rights[95], overarching value that should guide the constitutional jurisprudence[96], judicial doctrine[97], norm[98], a common denominator for equality principles, etc. [99]

Many authors postulate substantive equality to the rank of a right. Catherine Albertyn argues that in the South African constitutional jurisprudence, substantive equality is at the same time an aspirational idea and a legally enforceable right, both being "central to ideas of social and economic 'transformation' and the role of the law in achieving this".[100] Kelley Loper speaks about an international right to substantive equality, which she derives from the provisions of the main UN human rights instruments and from the interpretive materials produced by the respective UN treaty bodies.[101] According to Sandra Fredman, in some national jurisdictions and at the international plain there is a clear trend of the right to equality being interpreted through the principle of substantive equality.[102] For Charilaos Nikolaidis the right to substantive equality exists alongside market equality in the jurisprudence of the European Court of Justice, as vertical obligations (enforceable against the state) and horizontal obligations (enforceable against non-

[91] When it comes to the substantive equality between men and women, some authors argue that substantive equality in that meaning have acquired the status of constitutional principle in some national jurisdictions. See, for instance, Dia Anagnostou, 'Gender equality and parity in European National Constitutions' in: Helen Irving (ed.), *Constitutions and Gender* (Edward Elgar Publishing 2017) 268.

[92] This is primarily the case with the early writings on substantive equality. See, for instance, Michel Rosenfeld, 'Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal' (1986) 74 California Law Review 1687.

[93] Ben Mitchell, 'Process Equality, Substantive Equality and Recognising Disadvantage in Constitutional Equality Law' (2015) 53 Irish Jurist 36.

[94] Bob Hepple, 'Can Discrimination Ever Be Fair?' in: Kitty Malherbe, Julia Sloth-Nielsen (eds.), *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (University of the Western Cape 2012) 11; Sandra Fredman, 'Substantive Equality Revisited' (n 80) 713.

[95] Gwen Brodsky, Day Shelagh, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty ' (2002) 14 Canadian Journal of Women and the Law 207.

[96] See: David Wiseman, 'The Past and Future of Constitutional Law and Social Justice: Majestic or Substantive Equality?' (2015) 71 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 565; Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 South African Journal on Human Rights 245.

[97] Rory O'Connell, (n 86) 129.

[98] Gwen Brodsky, Day Shelagh (n 95) 205, 206.

[99] Catharine A. MacKinnon, '*Substantive Equality Revisited: A Reply to Sandra Fredman*' (n 75) 27.

[100] Catherine Albertyn (n 96) 254 - 255.

[101] Kelley Loper, 'Substantive Equality in International Human Rights Law and Its Relevance for the Resolution of Tibetan Autonomy Claims' (2011) 37 North Carolina Journal of International Law and Commercial Regulation 6, 13.

[102] Sandra Fredman, 'Substantive Equality Revisited' (n 80) 713. See also: Gwen Brodsky, Day Shelagh, 'Beyond the social and economic rights debate: substantive equality speaks to poverty' (2002) 14 Canadian Journal of Women and the Law 188.

state entities and individuals).[103] In the context of the affirmative action measures in the European Union law and in the British Equality Act of 2010, Bob Hepple speaks about the right to substantive equality of opportunity.[104]

The same variety of propositions is found if one tries to answer the question of what does substantive equality include, what is its content and its scope. In her most recent texts, Sandra Fredman, one of the most influential proponent of the substantive equality doctrine, is of the opinion that "substantive conception resists capture by a single principle".[105] Instead, guided by the aim to embrace the multifaceted nature of equality, she merges several different conceptions of substantive equality into a four-dimensional analytical framework that should provide a criteria to determine whether a law, policy, practice, or institution is likely to fulfil the right to equality. These four dimensions are in fact four goals of substantive equality approach: "to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change".[106] In an equally complex manner, Catharine MacKinnon, a prominent American feminist scholar, describes the substantive approach to equality as the one that does not "fully fit into any mainstream equality doctrine" because it attempts to change not only the way the courts adjudicate the discrimination cases but, even more importantly, to "[alter] the circumstances" that have brought to the discrimination. According to MacKinnon, the core insight of substantive equality is that inequality is always a product of social hierarchy and ensuing oppression.[107] In similar vein, for Robin West the substantive meaning of equality "is that legislators must use law to ensure that no social group […] wrongfully subordinates another social group".[108]

Luc B. Tremblay rightly observes that substantive equality is an abstract ideal and an abstract concept that does not contain material premises which could lead us to a single concrete

[103] Charilaos Nikolaidis also claims that the European Court of Justice played a pivotal role in its development. Charilaos Nikolaidis, *The right to equality in European Human rights law: The quest for substance in the jurisprudence of the European Courts* (Routledge 2015) 104.
[104] Bob Hepple, 'Can Discrimination Ever Be Fair?' (n 94) 16. See also study of Päivi Gynther, who speaks about the right to substantive equality in the context of linguistic educational rights (Päivi Gynther, *Beyond Systemic Discrimination: Educational Rights, Skills Acquisition and the Case of Roma* (Martinus Nijhoff Publishers 2007) 280).
[105] Sandra Fredman, Discrimination Law (Oxford University Press, 2nd edn, 2011) 25.
[106] Sandra Fredman, 'Substantive Equality Revisited' (n 80) 713, 738.
[107] Catharine A. MacKinnon, 'Substantive Equality: A Perspective' (2011) 96 Minnesota Law Review 11.
[108] Robin West, 'The Meaning of Equality and the Interpretive Turn' (1990) 66 Chicago Kent Law Review 469.

conception of it.[109] To illustrate his claim, Tremblay points to the tension within the concept of substantive equality between the paradigm of recognition and paradigm of distribution as its main elements.[110] The panoply of different meanings that the concept of substantive equality carries with itself is well illustrated in the study on the UK Anti-Discrimination Law from 1999, in which Sandra Fredman had identified four approaches to equality that can be reflected in the concept of substantive equality: equality of results, equality of opportunity, equality as auxiliary to substantive rights and a broad value driven approach to equality, set on the values of dignity, autonomy and equal human worth.[111]

What is, nonetheless, certain about the concept of substantive equality is that it signifies, in the first place, a drift from the formal equality doctrine.[112] No matter which vision of substantive equality the different authors encapsulate in their studies, their common point of departure are the inadequacies of the concept of formal equality to tackle those inequalities which cannot be reduced to the matters of procedural justice. The Aristotelian conception of equality that likes should be treated alike, translated in the legal imperative of equality before the law, is said to be of no avail in tackling more subtle forms of discrimination.[113] The formalistic and individualistic conception of equality expressed through the negative rights, is only a pledge to consistency that cannot guarantee any particular outcome. Instead of examining whether the laws, policies and other practices make unjustified distinction, the focus of the inquiry moves to the question of what their effects on the position of the already disadvantaged groups are. The proponents of substantive equality doctrine argue that facially neutral laws and policies, which satisfy the requirements shaped by the formal equality doctrine, are often an important source of societal discrimination. They also argue that an adequate response to societal inequalities need to depart from the second part of the Aristotelian formula - that different cases should be treated

[109] Luc B. Tremblay, 'Promoting Equality and Combating Discrimination through Affirmative Action: The Same Challenge - Questioning the Canadian Substantive Equality Paradigm' (2012) 60 American Journal of Comparative Law 204. See also: Nicholas Smith, 'A Critique of Recent Approaches to Discrimination Law' (2007) New Zealand Law Review 499.

[110] Trembley analyses the substantive equality doctrine in the context of the Canadian constitutional law. Luc B. Tremblay (n 109) 201.

[111] Sandra Fredman, 'A Critical Review of the Concept of Equality in U.K. Anti-Discrimination Law: Independent Review of the Enforcement of U.K. Anti-Discrimination Legislation, Working Paper No. 3, (Cambridge Centre for Public Law and Judge Institute of Management Studies, November 1999), paras. 3.7 - 3.19. See also: Paul Stancil (n 76) 1646.

[112] Catherine Barnard, Bob Hepple, 'Substantive Equality' (n 81) 564.

[113] The ironic aphorism of Anatole France, the French Nobel Prize winner from the beginning of last century, that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread", is with the good reason often quoted in this context. Anatole France, *The Red Lily* (Current Literature Publishing Company 1910) 87.

differently - and that the symmetric approach of formal equality needs to be complemented or replaced by the asymmetric one.[114]

2.4.3. The premises of substantive equality doctrine

The inadequacies of formal equality are in the first place to be overcome through the contextualisation of equality claims. Formal equality is blind to the background conditions which generate inequalities. "[T]o be capable of responding to real wrongs", Fredman argues, "[t]he right to equality should be located in the social context".[115] What the social context reveals is that there are persistent and patterned inequalities, the existence of which cannot be explained through the discrimination seen as sporadic, irrational or arbitrary acts. Hence, the first goal of substantive equality is to "acknowledge the complexity of inequality [and] its systemic nature".[116]

2.4.3.1. Structural inequality

To this purpose, many of the advocates of the substantive equality approach employ the term "structural inequality".[117] Equally used by the researchers to emphasise the complex nature and institutional embeddedness of social inequalities is the term "systemic inequality". Those who do not employ either one of the two terms speak instead about the "entrenched"[118] and "patterned inequalities"[119], "deeply rooted" in "social structures"[120] or in "systems and institutions",[121] or

[114] Susanne Burri, Sacha Prechal, 'Comparative Approaches to Gender Equality and Non-discrimination Within Europe' in: Dagmar Schiek, Victoria Chege (eds.), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009) 216.

[115] Sandra Fredman, 'Substantive Equality Revisited' (n 80) 714. See also: Dagmar Schiek, Lisa Waddington, Mark Bell, 'Introductory Chapter: A comparative perspective on non-discrimination Law' in: Dagmar Schiek, Lisa Waddington, Mark Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 28.

[116] Catherine Albertyn (n 96) 255.

[117] In fact, in the same meaning many scholars also use the term "systemic inequality", or do not use any specific term but refer to the entrenched and patterned inequalities which they explain by linking them to the wider societal structures, such as institutions, social values, power relations, etc. Throughout this study, the term "structural inequality" will be used.

[118] Mark Bell*, Racism and Equality in the European Union* (Oxford University Press 2008) 35.

[119] Joanne Conaghan*,* 'Following the Path *of* Equality Through Law*:* Reflections on Baker et al*.,* Equality: From Theory to Action' (2007) 13 Res Publica: A Journal of Legal and Social Philosophy 160.

[120] Claire McHugh, 'The Equality Principle in E.U. Law: Taking a Human Rights Approach?' (2006) 14 Irish Student Law Review 31, 34.

[121] Sandra Fredman, Beth Goldblatt, 'Gender Equality and Human Rights' (2014) 8 University of Technology Sydney Law Research Series (Discussion Paper for UN Women's Progress of the World's Women 2015) 12. See also: Pierre de Vos, 'Transformative Justice: Social and Economic Rights in South Africa's Constitution' in: Peter van der Auweraert, Tom de Pelsmaker, Jeremy Sarkin, Johan van de Lanotte (eds.), *Social, Economic and Cultural Rights: and appraisal of current European and International Developments* (Maku Publishers 2002) 252.

otherwise linked to the "structural factors of discrimination"[122]. The proponents of substantive equality doctrine see the entrenched and patterned social inequalities as an undisputable feature of the contemporary societies, which cannot be explained through the concepts of individual responsibility and merit, furnished by the dominant, meritocratic ideologies. The persistent societal inequalities are socially caused.[123] In order to explain them one needs first to look into the "social structures", understood as broad as "social values and behaviours, the institutions of society, the economic system and power relations."[124]

The problem with the existing inequalities "is not difference per se, but rather the manner in which difference is tied to hierarchies, exclusion and disadvantage".[125] The substantive equality doctrine recognizes that tangible injustices can ensue from the social practices which too easily satisfy the requirements of procedural justice venerated by the principle of formal equality. Its proponents observe that formal equality is often no more than a "cover for substantive inequality".[126]

By not taking into account the entrenched and patterned inequalities, as the context in which a law, policy or standard operates, the facially neutral laws, policies or other rules result in unequal treatment that creates tangible disadvantages for some groups. These disadvantages themselves perpetuate or even intensify the level of socio-economic disparities between different groups. In this way augmented, the socio-economic disparities lead to an even greater mismatch between the standard circumstances, the "reality" from which the neutral laws, rules and policies depart, and the socio-economic position of the disadvantaged. As a consequence, the negative effects of the neutral laws, policies or standards on the latter groups increase. Because the propositions on which they are built become even more remote from the socio-economic position of the disadvantaged groups, these laws, policies and practices start to have even greater exclusionary or directly harmful effects on such groups.[127]

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[122] In the context of persistent ethnic inequality, Mark Bell speaks about structural factors as, "notably the (conscious and unconscious) processes and cultures of institutions which operate to reproduce inequality". Mark Bell, *Racism and Equality in the European Union* (n 118) 180.

[123] Iris Marion Young, 'Equality of Whom*?* Social Groups and Judgments of Injustice' (2001) 9 Journal of Political Philosophy 15.

[124] Catherine Albertyn (n 96) 255.

[125] ibid 260.

[126] Gareth Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International 2003) 41.

[127] Naturally, all of this is in the first place a consequence of the fact that the law mostly departs from the "reality" of the groups which are somewhere in the middle in the socio-economic stratification. The law simply needs to start from some propositions and the way the contemporary democracies work is to make those propositions being

The central objective of the substantive equality doctrine is to make sure that legislator and courts pay attention to the effects which the facially neutral rules, standards and social practice have on the traditionally vulnerable and disadvantaged groups. By departing from a normative commitment to reduce disparities between groups, or at least to reduce disadvantages placed on the traditionally vulnerable groups, the substantive equality doctrine finds unjustified unequal treatment even where the law purports at the same treatment. The central question becomes, as phrased by the Supreme Court of Canada in the case *Withler v. Canada*, "whether, having regard to all relevant factors, the impugned measure *perpetuates disadvantage* or stereotypes the claimant group".[128]

2.4.3.2. Structural discrimination

A key to this broad understanding of unjustified unequal treatment are the terms "structural" or "systemic discrimination", as the equivalents of the "structural" or "systemic inequality". The two terms, which are often used interchangeably, denote the complex forms of discrimination which cannot be fully embraced by the judicial process. The complex forms of discrimination are about "problems that cannot be isolated to a particular act or actor, that involve dynamics of interaction and evaluation producing marginalization or exclusion, [and] that are inextricably linked with activities that we actually value".[129] They come about as a consequence of systemic, cumulative and incremental ways in which social structures work to produce structural inequalities. The terms "structural" or "systemic discrimination" also point to the various ways in which structural inequalities reinforce themselves.[130] The notion of structural discrimination implies as well that the patterned disadvantages come through the interaction of discriminatory laws, rules, policies and practices from different areas of social life.[131]

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identified and shaped by the individuals who, as a rule, do not come from the groups at the bottom of the social ladder. As Piketty says: "t]he history of inequality is shaped by the way economic, social, and political actors view what is just and what is not, as well as by the relative power of those actors and the collective choices that result." (Thomas Piketty (n 4) 21) See also the association between the political abstinence and the low socio-economic status in Chapter one, p. 20.

[128] *Withler v. Canada* ([2011] 1 S.C.R. 396) para 3 (emphasis added).

[129] Susan Sturm, 'Equality and the Forms of Justice' (2003) 58 University of Miami Law Review 66.

[130] For a view of systemic discrimination which emphasis this mutually reinforcing character of the relationship between the discrimination and disadvantage see the case *Action Travail des Femmes v. Canadian National Railway Company* ([1987] 1 SCR 1114, 1138 -1140). In this case, the Supreme Court of Canada speaks in particular about the exclusion of disadvantaged groups, as a type of disadvantage, which generates further stereotypes and prejudices that lead to an even greater exclusion of these groups.

[131] Snjezana Vasiljević, 'Intersectional Discrimination: Difficulties in the Implementation of a European Norm' in: Markus Thiel (eds.), *Diversity in the European Union* (Palgrave Macmillan 2009) 169.

The complex forms of discrimination are to be identified primarily through their effects of "withhold[ing] or limit[ing] access to opportunities, benefits, and advantages available to other members of society".[132] An important aspect of the substantive equality doctrine is that it attempts to shift the focus of courts and legislators from difference to disadvantage. The focus on disadvantage is essential for the doctrine in two ways. Firstly, as argued by Fredman, it preserves the asymmetry of substantive equality: by taking into account the "pre-existing disadvantage" the courts are able to single out those groups for which a claim of detrimental treatment through a law or policy calls for a heightened judicial scrutiny.[133] Secondly, it enables the courts to find the detrimental treatment even in those cases in which the impugned rule is of a general application to the extent that no direct relationship between the classification and the protected group can be established.

2.4.3.3. Socio-economic disadvantages

The disadvantages can lead to the status-based and socio-economic inequalities. Both kinds of societal inequalities are encompassed by the doctrine of substantive equality. In fact, a significant number of scholars, particularly those coming from Canada and South Africa, sees the substantive equality doctrine as primarily concerned with the socio-economic inequalities. For David Wiseman, a Canadian legal scholar, the redistribution-related inequalities are so much at the heart of the doctrine that he uses the terms substantive equality, social justice and socio-economic equality interchangeably.[134] Catherine Albertyn also holds that there is "a strong relationship between substantive equality and the achievement of socio-economic rights" and argues that the right of substantive equality is a key to the social and economic transformation of South Africa.[135] The European writers are much less inclined to see the greater socio-economic equality as the central objective of substantive equality.[136] Those who argue that the persistent and entrenched socio-economic inequalities should be part of the wider picture offered through the substantive equality doctrine usually see them as just one of the many dimensions of societal inequalities which the

[132] From the definition of discrimination from which the Supreme Court of Canada departed in case *Law Society of British Columbia v. Andrews* (n 79).
[133] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 178.
[134] David Wiseman (n 96) 565.
[135] Catherine Albertyn (n 96) 255.
[136] For an illustrative comparison between the European and the South-African equality jurisprudence see*:* Johan vande Lanotte*,* Jeremy Sarkin-Hughes*,* Yves Haeck (eds.), *The Principle of Equality: A South African and a Belgian Perspective* (Maklu 2001) (in particular the contributions of Jan Theunis (115 – 138) and Pierre de Vos, (139 – 156)).

substantive equality should aim to remedy. Sandra Fredman, for instance, argues for a multi-dimensional approach to substantive equality which is concerned not only with the "redistribution" and "recognition inequalities", but should also address "inequalities in participation, and structural obstacles to equality".[137] For Collins, who writes about the goal of social inclusion, as his own vision of how to realize substantive equality through anti-discrimination law, the distribution of material goods is an important but not the only and the most-important goal to be pursued by the approach to equality he develops. The aim of social inclusion is "removal of barriers to participation in the benefits of citizenship", which include material, as well non-material benefits, such as participation in cultural activities and politics.[138] However, common to the different views of the breadth of the substantive equality goals is a recognition that the socio-economic and status inequalities go hand in hand and that most of the traditionally vulnerable groups experience a mixture of disadvantages that spill from one sphere to another.

2.4.3.4. Group-based nature of inequality

An important assertion of the substantive equality doctrine tied to the concepts of structural inequality is that the focus which is placed on individual victim of discrimination, characterising the formal equality approach, "ignores the group-based nature of inequality".[139] The concept of structural discrimination "entail[s] moving beyond a narrowly individualistic conception of social relations".[140] The goal of eliminating the discrimination in practice, as the UN Committee on Economic, Social and Cultural Rights observes, "requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations".[141] In that sense, the legal inquiry which departs from the group-based nature of disadvantages is "critical to the struggle for substantive equality".[142]

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[137] Sandra Fredman, 'Substantive Equality Revisited' (n 80) 728. See also: Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 South African Journal of Human Rights 214.

[138] Hugh Collins, 'Social Inclusion: A Better Approach to Equality Issues?' (2004-2005) 14 Transnational Law and Contemporary Problems 913.

[139] Sandra Fredman, Beth Goldblatt (n 121) 12.

[140] Melissa Williams, 'In Defence *of* Affirmative Action: North American Discourses for the European Context?' in: Erna Appelt, Monika Jarosch (eds.), *Combating Racial Discrimination: Affirmative Action as a Model for Europe* (Berg 2000) 66.

[141] UN Committee on Economic, Social and Cultural Rights, General Comment No. 20 (n 89) para. 8 (b).

[142] Colleen Sheppard, 'Study Paper on Litigating the Relationship Between Equity and Equality" (Ontario Law Reform Commission 1993) 23.

The legal scholars writing about substantive equality are generally aware that it is hard to establish the direct causal link between structural inequality, manifested through the group-based disadvantages, structural discrimination and a concrete act challenged before the court. They also acknowledge that it is often impossible to trace structural discrimination to a concrete, identifiable wrongdoer. Yet, for them this still does not mean that the problem of structural discrimination is beyond the reach of law. On the contrary, "the elimination of structural discrimination [is] a valid social goal" that can be achieved through law.[143] Hence, it is the task of the theory and practice of substantive equality to "identify the social and economic conditions that […] create unequal and exclusionary consequences for groups and individuals",[144] and to push the boundaries of law in remedying structural inequalities.

2.4.3.5. Proactive equality strategies

The concepts of systemic inequality and structural discrimination provide the key arguments for affirmative action measures, which are among the principal strategies of the substantive equality doctrine.[145] The doctrine sees the negative character of the equality guarantees articulated through the formal approach to equality to be one of the most important limitations of the later. By being concerned with the prohibition of arbitrary differential treatment of two or more persons in analogous situations, the formal conception of equality leaves the "social structures of inequality untouched"[146]. The substantive equality doctrine, on the other hand, does not remain confined to the goal of formal equality, but it transcends it by insisting that the only way to overcome the persistent inequalities is to treat different persons and groups differently. The proponents of substantive equality depart from the second dimension of the Aristotelian conception of equality and argue for proactive, result-oriented strategies to eliminate the existing socio-economic disparities and status-based harms suffered by groups and individuals. The breath of the ambition with which this proactive approach speaks to social inequalities can be seen in the following passage of the UN Committee on the Elimination of Discrimination Against Women General Recommendation No. 25, on temporary special measures:

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[143] Melissa Williams, 'In Defence of Affirmative Action: North American Discourses for the European Context?' (n 140) 74.
[144] Catherine Albertyn (n 96) 259.
[145] Melissa Williams, 'In Defence of Affirmative Action: North American Discourses for the European Context?' (n 140) 66.
[146] Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 169.

> "In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women."[147]

There is a bewildering array of proactive strategies developed under the heading of substantive equality, in theoretical discussions on the topic, as well in practice of private and public bodies. Broadly speaking, the proactive strategies comprise measures aimed at enabling greater recognition of particular style of life or perspectives of the vulnerable groups,[148] measures aimed at catering their access to socio-economic goods, as well those aimed at preventing prejudice and stereotyping.[149] Common for all these different kinds of strategies is that they primarily target members of groups which are socially or economically disadvantaged as a consequence of historical or contemporary discriminatory practices. The examples of private and public-sector strategies, which can be discerned from the various equality policies, mission statements, annual reports and other policy documents of public and private bodies arguing for proactive equality measures, exhibit an incredibly diverse panoply of measures, varying in their targets, field of application and scope: targeted recruitment, mainstreaming, providing language and learning support, internship programmes, grant schemes to increase diversity of an educational institution or similar, measures aimed at enhancing visibility of the disadvantaged groups, greater access to child care facilities, creation of new equality bodies that should monitor realisation of different strategies, etc.[150]

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[147] UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 25, on Article 4, para. 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, UN Doc. No. HRI/GEN/1/Rev.7. (2004) para. 8.

[148] In particular those aimed at their wider participation in public bodies, as promoted through the politics of recognition.

[149] The first type of measures has become particularly dominant in the post-industrial countries in which the equality strategies pursued by feminist and other social movements, have shifted their focus from the matters of redistribution to the matters of recognition and representation. See on this, in the context of gender equality strategies: Judith Squires, *New Politics of Gender Equality* (Palgrave 2007) 7.

[150] For a good overview of different types of affirmative action measures found in the European Union, Canada, United States and South Africa see: European Commission, 'International Perspectives on Positive Action Measures: A

Although, as noted, substantive equality can embrace different conceptions of equality and, in that sense, different ideas of what should be its aims, the proactive strategies advanced under its label in practice rarely pursue equality of results as their goal. Despite the solemn promises of a more equal society to be achieved through its proactive, result-oriented strategies, the ambition of these measures rarely goes beyond equality of opportunity or accommodation of difference. The same can be said with regards to the courts' approach to the question of the legal boundaries of the affirmative action measures, as the most widely discussed type of proactive strategy mandated by the substantive equality doctrine.[151] This discrepancy is the main source of criticism of those who argue for the adoption of broader substantive equality guarantees.

2.4.4. Law, courts and the "social change"[152]

Although the substantive equality doctrine advocates for proactive strategies developed in diverse fields of societal life, a world of laws and courts is the primary locus of the campaign for the greater societal equality waged by the proponents of the substantive equality doctrine.[153] This is yet another reflection of a general tendency of the contemporary societies to see in law, understood as both legislation and judicial decisions, a path to social change.[154] The legal equality tools and strategies are passionately discussed not only by the legal academia, but also by the researchers from the political sciences, sociology and other fields of social sciences, by governmental and non-governmental, international and local organisations pursuing a wide range of goals, as well as by the private sector actors.[155]

Comparative Analysis in the European Union, Canada, the United States and South Africa' (Office for Official Publications of the European Communities 2009).

[151] Apart from quotas for the greater representation of women in public bodies, those used in the recruitment procedures, and quotas for employment of disabled persons, in the European context the affirmative action measures that could bring concrete, quantifiable outcomes are considered off limits both by the courts and the general public. See on this the ECJ cases *Georg Badeck and Others* ((Case C-158/97) Judgment of the Court of 28 March 2000, paras. 55 and 63) and *Hellmut Marschall v. Land Nordrhein-Westfalen* (Case C-409/95) Judgment of 11 November 1997, para. 35.), as well the comparative study on affirmative action measures found in the European Union, Canada, United States and South Africa (ibid 23, 29). On quotas for a more equal representation of both genders in the European countries and elsewhere see: Julie C. Suk, 'Gender Quotas After the End of Men' (2013) 93 Boston University Law Review 1123.

[152] The study uses the phrase 'social change' in the meaning of a large-scale transformation of society in any one of its main domains, be it the economic, political or social.

[153] Catherine Albertyn (n 96) 258.

[154] See on this: Sharyn L. Roach Anleu, *Law and Social Change* (SAGE, 2nd edn, 2010).

[155] See: Cliff Oswick, 'The Social Construction of Diversity, Equality and Inclusion' in: Geraldine Healy, Gill Kirton, Mike Noon (eds.), *Equality, Inequalities and Diversity* (Palgrave Macmillan 2011) 18.

The law and the "contextual, responsive, result-oriented equality rights jurisprudence"[156] are seen as the central methods for the greater application and further development of the substantive equality doctrine. This is observable in the degree to which the analysis of the constitutional equality jurisprudence and of anti-discrimination law dominates the scholarly discourse, as well as in its mostly optimistic tone vis-à-vis the power of courts to instigate the needed social change. In fact, the literature evolving around the notion of substantive equality, in particular in Canada and South Africa,[157] are filled with the exclamations about the "transformative role" of courts, of their duty to challenge the "social structures" which lead to societal inequalities and oppression, in order to enable "social change".[158] In Europe, the importance of laws and courts in the equality discourse is seen in the degree to which the scholarly attention is being placed on the anti-discrimination law, its limitations and its interpretations by the courts, especially on those of its elements which have been inspired by the concept of substantive equality.[159] Even though the concrete manifestations of this fascination with law as a method of social change differ from jurisdiction to jurisdiction, one could say that the substantive equality doctrine is sort of a law-centred approach of the contemporary societies to the matters of social justice.

2.4.4.1. Structural remedies

By being asked to eliminate the complex forms of discrimination which are ingrained in the societal structures, the courts are also asked to find innovative solutions for the institutional practices which are identified as the source of rights' violations. For that reason, in the quest for substantive equality the development of the remedial jurisprudence is as important as the elaboration of the rights' guarantees. Susan Sturm explains this in the following way:

> "Law imposes an obligation to inquire upon a showing of an unexplained pattern of bias. Thus, the legal consequence of exposing a discrimination problem through this normative inquiry is

[156] Olena Hankivsky, *Social Policy and the Ethic of Care* (University of British Columbia Press 2004) 52.

[157] See, for instance, the article written by Pius Langa, who was until 2009 the Chief Justice of the Constitutional Court of South Africa (Pius Langa, 'Transformative Constitutionalism' (2006) 17 Stellenbosch Law Review 351). Eric Kibet and Charles Fombad describe the 'transformative constitutionalism' as an 'antidote' for the weak protection of fundamental rights and freedoms (Eric Kibet, Charles Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 African Human Rights Law Journal 348).

[158] As an illustration: <http://www.westcoastleaf.org/our-workshop/equality-law-social-change/> accessed 12 January 2018.

[159] No doubt, an important part of this picture is the influence of the European Union legal equality guarantees and their interpretation in the case law of the European Court of Justice on the national equality legislation. See on this: Sabrina Tesoka, 'Judicial Politics in the European Union: Its Impact on National Opportunity Structures for Gender Equality' (Max-Planck-Institut für Gesellschaftsforschung Discussion Paper No. 99/2, 1999).

not the imposition of a sanction; it is instead the imposition of a legally enforceable obligation to correct the problem."[160]

Different theorists propose different strategies to overcome inadequacies of the narrow set of tools that courts have for the enforcement of their decisions. Inspired by the US experience in post *Brown v. Board of Education* desegregation process, some argue for "the forward-looking plans created by the courts […] to affect structural change", as a way to address the sources of societal inequalities.[161] Owen Fiss, one of the most influential theorists of a court-centred approach to structural injustice, places adjudication "on a moral plane with legislative and executive action".[162] For him, it is the role of courts to "[preserve] our constitutional values and the ideal of individualism in the face of the modern bureaucratic state".[163] In a series of essays, Fiss developed the notion of structural injunction as a common denominator for several remedial devices to be used by the courts in the structural reform needed for the implementation of the right to equal treatment.[164] The structural injunction, which for many scholars represents a model for an efficient exercise of judicial power in the constitutional equality rights matters, can embrace different types of activities, such as: "selected and assembled mandated policy reforms, budget related orders, continuing judicial supervision, information-gathering, and various types of dispute resolution outside of the courtroom".[165] Its primary purpose is "to alter broad social conditions by reforming the internal structural relationships of government agencies or public institutions".[166]

Although with the end of the civil rights movement, the structural injunction has been to a significant extent replaced with the less ambitious types of remedies,[167] its main consequence, an active and result-oriented judiciary, has remained central for the protection of constitutional values in US. Even more importantly, symbolic potentials of the victories won through the use of

[160] Susan Sturm, 'Equality and the Forms of Justice' (n 129) 67.
[161] Naomi Sharp, 'Equality-Seeking Charter Litigation: Where to From Here? A Vision of Transformative Justice' (May 1999) National Association of Women and the Law Charitable Trust for Research and Education, Thirteenth Essay Competition, Second Prize Winner 24 as cited in: Olena Hankivsky, *Social Policy and the Ethic of Care* (n 156) 51.
[162] Owen M. Fiss, 'The Forms of Justice' (1979) 93 Harvard Law Review 41.
[163] Like most of the US writers, Fiss departs from the position that the main purpose of the constitution and the courts, as its guardians, is to "tame the leviathan", but he adds here as well the need to safeguard public values from the threats posed by the corporations and unions. ibid 44, footnote 92.
[164] See: Owen M. Fiss: 'The Forms of Justice' (n 162); 'The Allure of Individualism' (1993) 78 Iowa Law Review 965; 'Another Equality' [2004] Issues in Legal Scholarship (Symposium: The Origins and Fate of Antisubordination Theory) 1.
[165] Robert E. Easton, 'The Dual Role of the Structural Injunction' (1990) 99 Yale Law Journal 1983.
[166] ibid.
[167] According to Myriam Gilles, the structural injunction was not really abandoned by the courts but, instead, it has been more and more used in cases in which the affirmative action programs are being challenged (Myriam Gilles, 'An Autopsy of the Structural Reform Injunction: Oops . .. It's Still Moving!' (2003) 58 University of Miami Law Review 143).

structural injunction during the desegregation process has made of it an enduring inspiration for the court-centred equality strategies in other jurisdictions. The idea that "systemic discrimination requires systemic remedies"[168] and its elaboration through the remedial jurisprudence developed in US, has inspired the proponents of the substantive equality doctrine in Europe and elsewhere to argue that it is courts' duty to guide the transformation of societal structures which are the source of structural inequality. Even in the civil law countries characterised by the traditional distrust towards the activist judiciary, such as France,[169] there are now clear signs of an expanding role for judiciary in the legislative processes and of the growing significance of the public interest litigation.[170]

The public interest litigation is a particularly important legal transplant, born from the US civil rights movement use of litigation as the strategy of social change and the structural injunction as the courts' response to the movement claims.[171] Praised in many parts of the world by the influential international governmental and non-governmental organisations as an important mechanism for enforcing "rule of law values", such as human rights, government accountability, etc., the public interest litigation has also been promoted as a path towards more equal society. One of its basic features is its "anti-positivist perspective that questions the inevitable legitimacy of majoritarian outcomes".[172] Yet, the public interest litigation has not been used only to give voice to those who are "voiceless". Rather, it has gradually become "part of a broader effort to

[168] Often cited quote from the 1984 Report of the Canada's Royal Commission on Equality in Employment, which has laid ground for the affirmative action measures in Canada. Rosalie Silberman Abella, 'Equality and Employment: Report of the Royal Commission on Equality in Employment' (Ministry of Supply and Services of Canada 1984) 9.

[169] More on this in: Arthur Dyevre, 'The French Constitutional Council' in: András Jakab, Arthur Dyevre, Giulio Itzcovich (eds.), *Comparative Constitutional Reasoning* (Cambridge University Press 2017) 323.

[170] Two novelties in the French legal framework are of particular importance in this regard. The first one is the reform of the French Constitution by Article 61 (1) of the Constitutional Revision Bill No. 2008 -724 of 23 July 2008 (Official Journal of the French Republic No. 171 of 24 July 2008), which grants to the French Constitutional Court the power to exercise a posteriori constitutional review. As Federico Fabbrini observes, this signifies "breaking with the 'Jacobinian' constitutional tradition that considers the law as the expression of a general will that may never be wrong, but also putting the individual, with his bundle of rights and liberties, at the heart of the constitutional cosmos". (Federico Fabbrini, 'Kelsen in Paris: France's Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation' (2008) 9 German Law Journal 1312). The second one is the introduction of class action in matters of discrimination (Articles 61 of the Law on Modernization of the 21st Century Justice No. 1547 of 18 November 2016 (Official Journal of the French Republic No. 269 of 19 November 2016)), which in the practice of US courts and other countries that have class action, associated to one of the typical forms of public interest litigation.

[171] According to Helen Hershkoff, the phrase "public law litigation", which later became to a great extent replaced by the term "public interest litigation", was coined by Professor Abram Chayes of the Harvard Law School "to refer to the practice of lawyers in the United States seeking to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms". Helen Hershkoff, 'Public Interest Litigation: Selected Examples'
<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf> accessed on 11 January 2018.

[172] ibid.

use the tools and principles of legal liberalism as a way to change existing patterns of power and privilege".[173] The practice of public interest litigation around the world shows that its use is not anymore confined to the protection of the civil liberties of the "discrete and insular minorities"[174]. Rather, its symbolic arsenal now includes a promise of systemic law-based reform in a broad range of fields, including the field of redistribution of socio-economic goods.

2.4.5. From the principles of equal treatment and non-discrimination to the right to equality

We have seen that the substantive equality doctrine is a facet of the process of constitutionalisation, which in essence represents an attempt to legalize the basic societal values, to transfer their realisation from the realm of political to the realm of legal. The intensive technological development and globalisation have brought to the rapid reshaping of the institutional setup of our societies. These changes, together with the changes of the overall societal milieu, have generated an intensive feeling of precariousness of the basic societal values.[175] As a response to it, in accordance with the technological rationality which dominates our era, the societal ideals have been transferred to the world of law as a "pledge of faithfulness" to their continual importance and a promise of their greater realisation.

The substantive equality doctrine brings a promise of a more equal society through law by translating the societal ideal of equality, and to it related ideals of social justice, dignity, etc. in the concept of substantive equality. The courts are asked to abandon the meagre vision of equality, so far embraced by law and the traditional equality jurisprudence and embark on the quest for substantive equality. The interpretation of the principles of equal treatment and non-discrimination, as the legal expressions of the ideal of equality, is where this venture begins.[176]

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[173] ibid 7.

[174] "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Company* 304 U.S. 144, (1938) 152, footnote 4.

[175] Selznick on this notes that, while it is true that "[a]ny ideal is subject to attenuation, debasement, or incomplete realization", in certain periods, under special pressures and temptations, some ideals become especially precarious. Philip Selznick, *A Humanist Science: Values and Ideals in Social Inquiry* (Stanford University Press 2008) 57.

[176] In that sense, equality is a concept as an "abstract formulation of the point of a social practice on which people agree", while conceptions, including legal conceptions, are "alternative analysis of what is involved in the concept", of what constitutes equality in the legal sense. Ronald Dworkin, *Laws Empire* (Harvard University Press 1986) 70-72.

Although the two are different legal principles, with distinct content and scope of application, in the theory and practice they are often invoked together, "in one breath", as the two elements of one and the same principle, the principle of equality.[177] This is in particularly observable in the international human rights and constitutional law jurisprudence. In the last three decades, as remarked by Gillian MacNaughton, legal scholars started habitually to refer to the equality before the law and non-discrimination as equivalent concepts.[178] The same is true for judges who often interpret the two principles as elements of the fundamental right to equality.[179] As such, the principle of equal treatment and the principle of non-discrimination are seen as "two sides of the same coin", a negative and positive embodiment of the human right to equality, which is then used to endorse a more substantive legal elaboration of the societal value of equality.[180]

2.4.5.1. Fundamental right to equality

So conceived principle or right to equality has become "the argument of first choice".[181] Westen, observes that "arguments in the form of equality invariably place all opposing arguments on the 'defensive'". "Because the proposition that likes should be treated alike is unquestionably true, it gives an aura of revealed truth to whatever substantive values it happens to incorporate by reference."[182] Although, as Westen notes, equality in the judicial process derives its substantive content entirely from substantive rights,[183] the substantive equality doctrine translates the social ideal of equality in an individual and abstract right to equality. In that way, judge can become engaged in, what Owen Fiss calls, "a meaning- giving enterprise, […] an attempt by the judge to give meaning to constitutional values in practical reality"[184] that is not confined to a strict legal equality before the law.

Yet, the first element of the so formulated principle or right to equality, the principle of equal treatment, leaves too little space for these wider egalitarian interpretations. The principle of equal

[177] Pauline C. Westerman, 'The Uneasy Marriage between Law and Equality' (2015) 4 Laws 82.
[178] Gillian MacNaughton, 'Untangling Equality and Non-Discrimination to Promote the Right to Health Care for All' (2009) 11 Health and Human Rights 47. See also: Sacha Prechal, 'Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes' (2004) 41 Common Market Law Review 543.
[179] See, for instance, case *Mashavha v. President of the Republic of South Africa decided by the Constitutional Court of South Africa (*Case CCT 67/03 (September 2, 2004) para. 51).
[180] Sacha Prechal, 'Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes' 547-551.
[181] Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 538.
[182] ibid 593.
[183] ibid.
[184] Owen Fiss, *The Law as it Could Be* (New York University Press 2003) 34.

treatment is fundamental, yet simple legal requirement that all should be treated in accordance with the rule, no matter what the material content of the rule is. It does not guarantee that the treatment in question will lead to fulfilment of the goal of social justice or any other goal that can be assumed by the societal ideal of equality. As Sadurski explains:

> "The word 'equality' in the notion of 'equality before the law' (at the level of enforcement) does not do any independent work. It is indeed redundant since exactly the same meaning is conveyed by the term 'proper enforcement of a rule', which is enforcement of a rule in accordance with its substance. The word 'equality' in this first sense of legal equality may as well be discarded […]. The persistence of the word 'equality' in this particular context may be explained by rhetorical functions of the notion, and should be respected. However, it is important to realize that 'equality *before* the law' […], in the sense of equality in the enforcement of rules, whatever they are, is a proxy for something else; namely, for the proposition that the valid rules should be enforced as fully as possible in accordance with the stated contents."[185]

The principle of equal treatment cannot offer more social justice than is contained in the rule the enforcement of which it regulates. It does not guarantee equal distribution of the social goods, which is an important promise of the substantive equality doctrine, apart from those cases in which the rule in question is itself about distribution.[186]

Faced with this limitation of the principle of equal treatment, as the standard legal expression of the ideal of equality, the substantive equality jurisprudence seeks solution in the second part of Aristotle's formula, the command that unalike cases should be treated unalike. We have seen that one of the main postulates of the substantive equality approach is that different cases should be treated differently, where different treatment implies that there might be a need to use proactive strategies in order to redress the disadvantaged position of underprivileged groups. But even if broadened in this way, the limitation of the principle of equal treatment is not overcome. Any alternative to the rule that like cases should be treated alike, including the claim that different cases should be treated differently "cannot be articulated in egalitarian terms without running into circularity".[187] That is because "the notion of equal treatment is intrinsically dependent on the

[185] Wojciech Sadurski, *Equality and Legitimacy* (Oxford University Press 2008) 96.
[186] But, again, even in this case, the principle of equal treatment just serves to ensure consistency between the rule and the enforcement.
[187] Wojciech Sadurski, *Equality and Legitimacy* (n 185) 97; The same: Peter Westen (n 181) 547.

existence of categories that inform the decision-maker on what is to count as "like" or "unalike" cases."[188] In other words, one still needs to answer the question of which differences are relevant in the given situation. The attempt to surpass the limitations of the equal treatment principle in this way becomes even more complicated in the light of the fact that the ideal of substantive equality requires that a scrutiny encompasses not only the content of rules but also their effect. The relevant differences can be those that characterize a person or a group, but also differences which are related to the effect of the rule, practice or policy which is examined by the court. To find the answer to the question which differences of a person or a group count, the theory of substantive equality, as shown, introduces the notion of "structural inequality", which points to patterned and entrenched disadvantages. Those disadvantages should provide the trail which the courts and legislature should follow in order to identify which differences are the relevant ones and need to be treated differently. Yet, to single out these differences one still needs a particular perspective, a goal inbuilt in the legal rule, which is to be applied through the principle that different cases should be treated differently. As Pauline C. Westerman observes:

> "[I]nvocation of "the facts" does not help us here. In order to assess what should be counted as relevant factual equalities or inequalities, one needs to adopt a perspective, not necessarily a theoretical perspective but at least some sort of conceptual framework which indicates which "facts" and which inequalities are relevant. From one perspective there may exist inequalities which disappear when viewed from another perspective. Should, for instance, the shorter life-expectancy of men be considered an empirical fact to be taken into account in assessing factual inequalities, leading to a proposal to an early retirement-scheme for men? Without a perspective we don't know which inequalities are the important ones. And such a selection is vital, for there are very few cases of equal treatment in which the outcome is *not* different."[189]

So, again we go back to the problem of circularity, which the jurisprudence attempts to resolve by elaborating the right to equality through the principle of non-discrimination. The principle of non-discrimination, as another important legal expression of equality, adds to the principle of equal treatment a requirement that the legislator should be particularly careful not to differentiate between persons on the so-called suspect grounds. And if it differentiates between the suspect and non-suspect categories, either directly in the substance of its rules, or indirectly through the

[188] Pauline C. Westerman (n 177) 83.
[189] ibid 86 (footnote omitted).

effects which its rules have on the groups defined by the suspect grounds, the principle of non-discrimination requires that those distinctions should be justified and be proportionate to the aim of the rule. Since the suspect grounds are legal proxies for the traditionally vulnerable and disadvantaged groups, such as women, ethnic, racial or religious minorities, etc., the principle of non-discrimination brings the legal conception of equality a step closer to the goals of substantive equality. Under the principle of non-discrimination, the right to equality is not anymore protected only as a subjective right to enjoy equal treatment, but it is enriched with the prohibition of status-harms that arise from unjustified unequal treatment on particular grounds.[190] In that way the non-discrimination principle opens the door of the court-rooms for the reality of entrenched and patterned inequalities.

Yet, the non-discrimination principle stops at the recognition that there are certain distinctions which need to be exposed to a stricter judicial scrutiny. On the other hand, for the substantive equality doctrine this is only a starting position from which it seeks to yield solutions for the complex forms of inequality and discrimination. For that reason, as it will be seen in the next chapter, the substantive equality doctrine adds to this conception of the right to equality the goal of securing equality in the access to the basic social goods through the process of consitutionalisation of socio-economic rights. Another strategy of the substantive equality doctrine to expand the content of so conceived right to equality, as analysed in chapter four, is an innovative approach to anti-discrimination law through the further development of its concepts of indirect discrimination and affirmative action measures.

[190] See more on this in: Christopher McCrudden, Sacha Prechal, 'The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach' (European Commission 2011) 25.

CHAPTER THREE

Constitutionalisation of socio-economic rights and the substantive equality goals

Faced with the weaknesses of the right to equality as derived from the principles of equal treatment and non-discrimination, the substantive equality doctrine seeks a solution for the persistent socio-economic inequalities in the greater judicial protection of socio-economic rights. Given that the impeded access to the basic socio-economic goods is an important if not the most important consequence of structural discrimination and a source of structural inequality, constitutionalisation of socio-economic rights is seen as the path towards substantive equality. This chapter does not go into all cons and pros for the greater judicial protection of socio-economic rights which have been raised in the passionate discussions on the constitutionalisation of socio-economic rights that have been taking place in the legal scholarship over the last two decades. Instead it investigates whether the judicialization of socio-economic rights can bring to the greater socio-economic equality, which is the main argument for the transformation of the social justice matters into judicially enforceable individual rights. It does so by analysing three types of court cases for the protection of socio-economic rights, differentiated according to the scope of the judicial scrutiny and the type of remedies used by the courts. The chapter departs from the presumption that the question whether individualised legal claims of socio-economic rights lead to the greater level of socio-economic equality can be answered only by analysing the effects of the concrete judicial decisions against the broader social, political and economic context in which the socio-economic inequalities are taking place.

3.1. Substantive equality doctrine and the constitutionalisation of socio-economic rights

During the last two decades, in the number of jurisdictions, the public interest litigation started to be used as a strategy to advance a more equal access to the socio-economic rights. Since the mid-1990s, the major international human rights organisations have begun to include the social justice goals in their mission statements, and their human rights advocacy embraced the socio-economic

rights.[1] The same changes took place in the UN and in the other international human rights forums. Calls for a greater social justice have become an integral part of the mainstream international human rights discourse.[2] Finally, when in 2013 the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights entered into force, an individual complaints mechanism for the violations of socio-economic rights was finally in place.[3] The question of justiciability of socio-economic rights was settled, at least in the international human rights law, and it has further instigated their remarkable raise in the comparative legal jurisprudence.[4] For many human rights activists and legal scholars, the equal access to the basic socio-economic goods became one of the "core" human rights issues.[5]

The upsurge of litigation involving socio-economic rights is part of a broader phenomenon often denoted as constitutionalisation of socio-economic rights. Broadly speaking, the constitutionalisation of socio-economic rights is about the theoretical and practical endeavour aimed at having the socio-economic rights enshrined in the constitution and protected by the judiciary through judicial review and/or judicial preview.[6] Yet, given that the objective of laying down the enforceable legal guarantees of socio-economic rights in the national constitutions and bills of rights in many countries is not attainable, the process of their constitutionalisation also embraces the attempts to find other strategies for their judicial protection. This second, less ambitious segment of constitutionalisation is focused on the use of jurisprudence built through the interpretation of the overarching constitutional principles, such as the principles of equal treatment, non-discrimination, dignity, equal human worth, etc., as a method of making the socio-

[1] Koldo Casla, 'Dear Fellow Jurists, Human Rights Are About Politics, and That's Perfectly Fine' in: Doutje Lettinga, Lars van Troost (eds.), *Can Human Rights Bring Social Justice? (*Amnesty International Netherlands 2015) 36.
[2] Jacob Mchangama, 'Against a Human Rights-based Approach to Social Justice' in: Doutje Lettinga, Lars van Troost (eds.), *Can Human Rights Bring Social Justice? (*Amnesty International Netherlands 2015) 53.
[3] UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Resolution adopted by the General Assembly on 5 March 2009, A/RES/63/117. On that occasion the former prompting former UN High Commissioner for Human Rights Navi Pillay stated that the Optional Protocol "would help reinforce social justice as a value of the international community". United Nations Human Rights Office of the High Commissioner, 'High Commissioner backs work on mechanism to consider complaints of breaches of economic, social and cultural rights' (16 July 2007)
http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6155&LangID=E
accessed 11 October 2017.
[4] The raise is particularly remarkable in the light of the fact that judgements and decisions on socio-economic rights were very rare in the previous century although most of the countries had number of laws which were providing a range of social entitlements which could be enforced before the courts. Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 6 Sur International Journal of Human Rights 1.
[5] See, for instance: Dan Chong, 'How Human Rights Can Address Socioeconomic Inequality' in: Doutje Lettinga, Lars van Troost (eds.), *Can Human Rights Bring Social Justice?* (Amnesty International Netherlands 2015) 21.
[6] Cécile Fabre, 'Constitutionalising Social Rights' (1998) 6 Journal of Political Philosophy 263 footnote 2.

economic rights judicially enforceable. In theoretical works, the second approach is often denoted as an "indirect" approach to justiciability of socio-economic rights.[7]

Constitutionalisation of socio-economic rights is part of the broader phenomenon of constitutionalisation of human rights and, as such, its analysis is indispensable for a complete account of the process of "legalisation of politics".[8] The substantive equality doctrine plays an important role in the process of constitutionalisation of socio-economic rights. In the jurisdictions in which the socio-economic rights are protected in the constitutions or bills of rights, the doctrine is relevant for the determination of their material content and scope. As it will be seen throughout this chapter, the case law of the South African Constitutional Court provides a good illustration of this. Where they are only partially guaranteed or where there are no concrete legal guarantees of the socio-economic rights in constitutions or bills of rights, the concept of substantive equality, both in theory and in the practice of courts, provides the main route for their judicial protection.

At the same time, the constitutionalisation of socio-economic rights is among the main strategies of the substantive equality doctrine. As shown in the previous chapter, one of the answers to the inadequacies of the protection provided through the principle of equal treatment identified by the substantive equality doctrine was to link the right to equality to the substantive socio-economic and other rights.[9] Given that greater level of socio-economic equality is a key ingredient of substantive equality, the judicial protection of the right to equality as corollary of socio-economic rights is one of the principal strategies of the substantive equality doctrine in its attempts to tackle structural inequalities. For those socio-economic rights which are not guaranteed in the national constitutions and bills of rights, the principles of equality and non-discrimination alone, or combined with other overarching principles, and translated in an individual and enforceable right, became the means for their protection before the courts.

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[7] Another way for enforcement of socio-economic rights is true broader interpretation of civil and political rights. According to Charilaos Nikolaidis, the "integrated approach" departs from the premise that political rights are of little avail where there are no socio-economic conditions for their proper realisation See: Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (Routledge 2015) 66.

[8] Given its limitations, the study will discuss the issues related to the judicial protection of socio-economic rights leaving aside the rich debate about the pros and cons of concrete legal or constitutional guarantees of socio-economic rights.

[9] Sandra Fredman, 'A Critical Review of the Concept of Equality in U.K. Anti-Discrimination Law: Independent Review of the Enforcement of U.K. Anti-Discrimination Legislation, Working Paper No. 3, (Cambridge Centre for Public Law and Judge Institute of Management Studies, November 1999), paras. 3.7 - 3.19. Westen argues that this is the only possible route because "statements of equality logically entail (and necessarily collapse) into simpler statements of rights […]". Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 542.

One of the main postulates of the substantive equality doctrine is that the complex discriminatory practices can be primarily discerned through their effects i.e. disadvantages which they place on the traditionally vulnerable groups. Disadvantages in the access to socio-economic rights are an important source of structural inequality produced by structural discrimination, and their elimination is among the main goals of the substantive equality doctrine. The impeded access to the resources necessary for the realisation of socio-economic rights is also a tread that connects most of the vulnerable groups which are accorded special protection through the anti-discrimination guarantees. That is another important reason for which in some jurisdictions the substantive equality doctrine places special focus on the goal of greater protection of socio-economic rights. Brodsky and Day, Canadian legal scholars, speak about "gendered dimensions of poverty".[10] For them, poverty and overall economic inequality is "both an overt sign, and a result of women's subordination", a manifestation of their historically disadvantaged position.[11] Formal equality tends to reinforce or even exacerbate the pre-existing inequalities in access to the basic socio-economic goods. These inequalities results in new disadvantages affecting the socio-economic status of vulnerable groups across numerous other dimensions.[12] For that reason, Brodsky and Day argue, one of the principal objectives of substantive equality is to enable women and other traditionally disadvantaged groups to claim from governments to take positive steps towards remedying their disadvantageous socio-economic position.[13]

The protection of socio-economic rights through a more expansive application of the right to equality has been established long ago in the US anti-discrimination jurisprudence, but in the other jurisdiction is relatively recent.[14] The use of broadly interpreted equality guarantees with the direct reference to the goal of substantive equality is particularly prominent in Canada's Supreme Court jurisprudence on socio-economic rights, as well as in the texts of Canadian legal scholars. On the European continent, given that most of the European states, with the notable exception of UK, are nominally the "social states", with at least some general legal guarantees of the socio-economic rights laid down in the national constitutions, the principles of equal treatment and non-discrimination have had less important role in protecting socio-economic rights. When it comes to

[10] Gwen Brodsky, Shelagh Day, 'Beyond the Social and Economic Rights Debate*:* Substantive Equality Speaks to Poverty' (2002) 14 Canadian Journal of Women and the Law 214.
[11] ibid 215.
[12] See on this Chapter one, p. 18, where it was observed that inequality across some dimensions can easily lead to inequality in other dimensions, which in turn reinforces the category of inequality which was first observed.
[13] Gwen Brodsky, Shelagh Day (n 10) 215 – 216.
[14] For a general overview of the enforcement of socio-economic rights by the courts in US, see: William E. Forbath, 'Constitutional Welfare Rights: A History, Critique and Reconstruction' (2001) 69 Fordham Law Review 1821.

the European Court of Human Rights, the protection against discrimination was crucial for the protection of socio-economic rights through the so-called "integrated approach". Given that the European Convention on Human Rights protects only civil and political rights, the European Court of Human Rights has used extensively its Article 14 prohibition of discrimination to extend the protection of individual rights to the wider socio-economic sphere. Through the integrated approach, which departs from the position that "there is no water-tight division separating [the] sphere [of socio-economic rights] from the field covered by the Convention"[15], the court has widened the scope of application of Article 14 and has brought it closer to the more substantive understanding of equality.[16] When it comes to the case law of the European Court of Justice, the socio-economic rights are for the greatest part provided only an auxiliary protection, not through the principle of equal treatment but rather through the protection of the four economic freedoms on which the Union is based. An exception to this is found in the cases decided through the application of the provisions of the EU equality directives, the scope of which covers several important socio-economic rights.

3.2. Challenges of judicial enforcement of socio-economic rights

The domestic level "judicialization" of socio-economic rights, defined by Scheinin as the search for a proper procedure that can provide a remedy for the violation of socio-economic rights,[17] also denotes the phenomenon of a growing number of litigations involving these rights. The judicialization of socio-economic rights is highly contentious subject. The constitutional scholars and judges express conflicting views on the question of whether these rights should be enforced by the courts.[18] Those who argue in favour of the justiciable socio-economic rights often disagree

[15] *Airey v. Ireland* (Application No. 6289/73), Judgment of 9 October *1979*, Series A No 32, (*1979*–80) 2 EHRR 305 para. 26.

[16] Charilaos Nikolaidis (n 7) 66-67. Another important regional mechanism for the enforcement of socio-economic rights, is the collective complaints procedure established by the Additional Protocol to the European Social Charter. The mechanism entitles European social partners and non-governmental organisations to lodge before the European Committee of Social Rights collective complaints of violations of the Charter in one of the thirteen states which have ratified it so far. Given that this mechanism provides, under specified conditions, for direct justiciability of socio-economic rights, the case law of the European Committee of Social Rights will be examined in the later parts of the chapter. (Additional Protocol to the European Social Charter providing for a System of Collective Complaints of the Council of Europe, 9 November 1995, enter into force 1 July 1998, ETS 158).

[17] Martin Scheinin, 'Justiciability and the Indivisibility of Human Rights' in: John Squires, Malcolm Langford, Bret Thiele (eds.), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (University of New South Wales Press 2005) 20.

[18] The main of objection to the judicialization of socio-economic rights raised in the literature is the one invoking the principle of separation of power, as well the institutional competence objection. For a short intro in the debate see: D.

on how far the courts should go in their adjudication. The theoretical disagreements are also mirrored in courts' practice.[19]

Octavio Luiz Motta Ferraz distinguishes between three types of cases on socio-economic rights, differentiated according to the scope of the judicial scrutiny and the type of remedies used by the courts. In the first group of cases, the courts arrive to a decision through a procedural scrutiny, i.e. by examining whether a public body followed the prescribed procedures. In the second group of cases the courts also do not go into substantive review of the content of a socio-economic right but approach the dispute through the administrative law model of reasonableness review. This group includes as well cases in which courts apply to the dispute at hand the non-discrimination principle, and in that way often extend the socio-economic benefits granted by a law or other act to the excluded groups. The last category is made of the cases in which the courts venture into determination of the content of a socio-economic right. In these types of rulings, the courts can order modification of the law, rule or public policy which have been found to be in breach of a constitutional value it embraces.[20]

All three courts' approaches can be assessed with regards to the extent to which they meet the goal of providing for a better and more equal realisation of socio-economic rights, which is at the heart of those who advocate for the more robust judicialisation of socio-economic rights. Seen from the perspective of the main purpose of court proceedings, which is to resolve an individualised dispute and provide remedy for a concrete violation of a socio-economic right, in theory, the judicial protection should lead to an advancement of the socio-economic position of an individual claimant, or of groups of persons in the cases initiated by class action and similar types of judicial review. But whether the judicialization of socio-economic rights really results in the greater level of social justice can be answered only by analysing the effects of a concrete judicial decision against the broader social, political and economic context in which the socio-economic inequalities are born.

M. Davis, Socio-economic rights' in: Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1023 – 1025.

[19] For a short overview see: Victor Abramovich, 'Fostering Dialogue: The Role of the Judiciary and Litigation' in: John Squires, Malcolm Langford, Bret Thiele (eds.), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (University of New South Wales Press 2005) 169-171.

[20] Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (2011) 89 South Texas Law Review 1648-1649.

The literature on socio-economic rights brings a number of examples of public interest litigations involving socio-economic rights which do not support the assertation – central in the human rights discourse on constitionalisation of socio-economic rights - that individualised legal claims of socio-economic rights are the path to a greater level of socio-economic equality. For a number of reasons, some of which will be tackled through the examples encompassing all three types of court cases from the typology proposed by Ferraz, the socio-economic rights litigations at best can provide only piecemeal and temporary solutions to the problems faced by those who are the most deprived. As it will be seen in the following analysis, the court victories sometimes can even retard the socio-economic position of the traditionally vulnerable and disadvantaged groups, or preserve the status-quo by instigating changes which are of rather formal character or of limited reach, and thus creating an illusion that the changes are on the way. The disputes over socio-economic rights, at least those which form part of the agenda of decreasing socio-economic disparities, are of such complexity that many researchers are of the opinion that these disputes are unfit for judicial adjudication.

3.2.1. The problem of "polycentricity" in the disputes on socio-economic rights

Four decades ago, in an article which is today among the main references in the discussion about judicialization of socio-economic rights, Lon Fuller analysed the limits of adjudication with regards the complexity of a dispute. Fuller argued that, although polycentric problems are present in almost all types of cases brought before the courts, in some types of disputes they are so significant and numerous that they go beyond the confines of adjudication.[21] The scholarly texts on the polycentric nature of disputes over socio-economic rights usually depart from the observation that these disputes are in the first place characterised by the high number of affected parties. However, according to Fuller, the problem with polycentric problems actually lays in the fact that the relations of individual parties to one another "are not controlled by principles peculiar to those relations" but involve many other considerations which are equally important for the dispute in question, yet are beyond the vision of courts.[22] This is so because the polycentric

[21] Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 398. For the partly critical view of Fuller's arguments consult Jeff King article on this subject, in which he argues that most of the scholars adopt Fuller's position without critical assessment although the concept of "polycentricity", according to his analysis, is far from being determinative (Jeff King, 'The Pervasiveness of Polycentricity' [2008] Public Law 115-116). See also: Paul O'Connell, 'Vindicating Socio-Economic Rights: International Standards and Comparative Experiences' (PhD dissertation, National University of Ireland 2010) 12-13.

[22] Lon L. Fuller (n 21) 404.

problems entail a fluid state of affairs that follow "from the simple fact that the more interacting centers there are, the more the likelihood that one of them will be affected by a change in circumstances, and […] this change will communicate itself after a complex pattern to other centers".[23]

Translated to the disputes over socio-economic rights, this means that judicial decision in those cases can affect a multitude of parties even though some of them, or even most of them, may not be in the position to present their view before the court. Actually, the affected parties might not even be aware that their interests are the subject of a dispute presented to the court. The range of persons who could be affected by a court decision in these types of cases often cannot be foreseen by the methods available to courts, for the reason of which courts are limited in their efforts to collect necessary information about the matters before them, as well in their attempts to predict the possible repercussions of their decisions.

Among other polycentric elements of the disputes on socio-economic rights, the researchers frequently point to their far-reaching budgetary consequences. The scholars also stress their pronounced collective dimension, which bespeaks of a myriad of interests that intersect in the claims involving the socio-economic rights.[24] This is even more apparent in the socio-economic rights claims shaped by the substantive equality doctrine. Its postulate that the litigation of socio-economic rights should serve to address structural inequalities perpetuated through the instances of structural discrimination brings us to the disputes of great complexity, involving great many parties, with broad budgetary repercussions, etc. Secondly, the substantive equality doctrine mandates that the courts should address factual inequalities, conceived as inequalities in result, by treating different cases differently. Yet, as suggested by Pauline C. Westerman, this task is hard to achieve because "[o]nly *after* the legal and factual consequences of the judicial decision have materialized does the judge know whether the cases should have been perceived as alike or unalike".[25]

[23] ibid 397.
[24] See, for instance: Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (Pretoria University Law Press 2009) 41-50.
[25] Pauline C. Westerman, 'The Uneasy Marriage between Law and Equality' (2015) 4 Laws 86.

3.2.2. Socio-economic rights and the "procedural fairness" approach

In an article on constitutional socio-economic rights in the United States, William E. Forbath writes about the Aid to Families with Dependent Children Act,[26] under which no case was brought before a court for at least thirty years from its enactment. Then, during the welfare rights movement, a great number of impact litigations were initiated with the aim of eliminating the restrictions on access to welfare benefits provided under the law.[27] The impact litigation had twofold consequence. On the one hand, the courts managed to prevent federal states from imposing restrictions and unrelated conditions that had been limiting the number of those who could qualify for the benefits.[28] On the other hand, as a reaction to the expansion of the coverage of the Act i.e. to the fact that more persons became eligible for the benefits, the states, unwilling to increase the allocated budgetary resources, had eventually decreased the amount of individual benefits. Despite the noble intentions behind the public interest litigation in the example raised by Forbath, its positive effect was rather dubious if seen in the wider context: the courts' decisions enabled greater procedural fairness but the effect of this achievement was not an amelioration but a downscaling of the level of social security protection provided through the law.[29]

[26] Pub. L. No. 78–257, 58 Stat. 277 (1944). The Aid to Families with Dependent Children Act was replaced by the Personal Responsibility and Work Opportunity Act in 1996 (Pub. L. No. 104-93, 110 Stat. 2105 (1996). More on this in: Maxine Eichner, 'State Support for Families in the United States' in: John Eekelaar, Rob George (eds.), *Routledge Handbook of Family Law and Policy* (Routledge 2014) 341. Similar example is found in UK, where the Jobseeker's Allowance Regulations of 1996 (S1 1996/207) replaced the National Insurance Act of 1946 (c 67), and in effect brought to end the distinction between distinction between rights-based contributory insurance benefits and conditional means-tested social assistance. More on this in: Mick Carpenter, Stuart Speeden, 'Origins and Effects of New Labour's Workfare State: Modernisation or variations on old themes? in: Mick Carpenter, Stuart Speeden, Belinda Freda, *Beyond the Workfare State: Labour markets, equalities and human rights* (Policy Press 2007) 139.

[27] More concretely, according to data presented by Forbath, between 1968 and 1975, the Supreme Court ruled in eighteen cases arising under the Act, and the lower federal courts ruled in hundreds of cases. William E. Forbath, 'Constitutional Welfare Rights: A History, Critique and Reconstruction' (2001) 69 Fordham Law Review 1862.

[28] The case *Goldberg v. Kelly* is often referred as illustrative of the wave of due process achievements through judicial rulings, which Forbath describes. The case, which concerned the question whether the due process of law clause of the Fourteenth Amendment requires hearings prior to termination of welfare benefits under the Aid to Families with Dependent Children Act, was decided in favour of the plaintiffs by the Supreme Court. The Supreme Court ruled that the welfare benefits were statutory entitlements the termination of which "involves state action that adjudicates important rights […]". Then it ruled that the welfare authorities cannot terminate benefits before giving to recipients the possibility to be heard and to provide evidence of their eligibility in the evidentiary hearings before the given body. *Goldberg v. Kelly*, 397 U.S. (1970) 262; Constitution of the United States of America of 17 September 1787, XIV Amendment (United States Government Printing Office 1938). William E. Forbath (n 27) 1862-1863.

[29] William E. Forbath (n 27) 1862.

3.2.3. Other built-in limitations of the judicial enforcement of socio-economic rights

The cases involving socio-economic rights also exhibit other limitations of judicialization which arise from the very basic features of civil litigation as a tool to resolve disputes. Litigation is costly. It requires a level of legal competence and confidence in relation to law which is rarely found among those who are persistently disadvantaged and situated at the bottom of the social stratification ladder.[30] It is also very technical. This is especially evident in cases involving complex evidentiary procedure characteristic for the claims of indirect discrimination. Langford observes that in adjudication of the socio-economic rights it may be difficult to find comparators or relevant statistical evidence, this being even more so "in cases of structural-based segregation of different groups".[31] In the light of this, litigation can be seen as an "expensive and relatively inaccessible form of social activism".[32]

Even when adjudication of socio-economic rights is claimed to be a "success story", when it results in the positive court decision enforced through structural or other types of injunctions, which place on the government or other public body a duty to come up with or follow a concrete plan for remedying the violation, in effect it can lead to only a partial and temporary solution for the entrenched disparities in access to health, education, social security, etc. This is a consequence of the fact that court rulings are always limited in scope. They are bound by the litigant's formulation of a claim and by his or her choice of arguments to be presented before the courts, both of which generally depend on the assessment which legal strategy has the greater chances for success. They are also tied to the factual context as a unique set of circumstances characterizing the concrete case. Moreover, in the new fields of constitutional jurisprudence, such as the one involving the socio-economic rights, there is a great deal of inconsistency in the way judges interpret and enforce these rights.[33]

A much-discussed case law of the Constitutional Court of South Africa, a country in which the main socio-economic rights are guaranteed in the constitution, is emblematic of this. In the famous *TAC*

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[30] Ross Cranston, *Legal Foundations of the Welfare State* (Weidenfeld and Nicolson 1985) 54. He demonstrates this through the analysis of the phenomenon of unequal utilization of legal services.
[31] Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (n 4) 8.
[32] Dan Chong (n 5) 22.
[33] For other jurisdictions, see, for instance: Patricia Hughes, 'Supreme Court of Canada Equality Jurisprudence and "Everyday Life"' (2012) 58 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 245; Wojciech Sadurski, 'Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe Part I: Social and Economic Rights' (European University Institute 2002).

case, in which an HIV/AIDS activist group challenged the government's policy to restrict access to nevirapine, a drug that reduces risk of mother-to-child transmission of HIV, to a limited number of research and training sites, the court found an infringement of the right to health and ordered the government to remove the restrictions and facilitate the wider access to the drug by the affected population.[34]

In *Grootboom,* another landmark case on socio-economic rights, a large community of poor and landless persons facing yet another forced eviction, this time from a public site, sued the South African government for violating its right to housing. The South African Constitutional Court ruled in favour of claimants. It found that the state's housing program under evaluation did not fulfil the reasonableness standard because "it failed to make reasonable provision within its available resources for persons […] with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations."[35] In rather general terms, the court also ordered the state authorities to "devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing".[36]

While the result of the first case was a very concrete order given to the state that, as reported, has led to a dramatic increase in the distribution of HIV-Aids medication in South Africa,[37] in the second case, although concerned with an equally dramatic human rights situation, the court did not issue any specific remedy and Irene Grootboom, one of the main litigants, died homeless eight years after the court ordered to the state to devise and implement a new housing programme.[38] Common thread in both judgments is that they had little or no implications on budgetary allocations to the right to health and the right to housing, respectively. In the first one because the pharmaceutical companies agreed to donate a five-years' worth of the drug in question,[39] while in the second case the court's declaratory order did not contain anything that would imply greater allocation of resources for the problem of housing. This brings the outcome of the two cases far away from the goal of substantive equality, as the key concept of the South African "transformative constitutionalism", guided by the idea that "transformative change" in the

[34] *Minister of Health v. Treatment Action Campaign*, 2002 (5) SALR 721 (CC).
[35] *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2000 (11) BCLR 1169 (CC) para. 99 2. (c).
[36] ibid, para. 99 2. (a).
[37] Dan Chong (n 5) 21.
[38] Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave (*Cambridge University Press 2016) 58.
[39] As provided in: Katharine G. Young, *Constituting Economic and Social Rights* (Oxford University Press 2012) 403.

country with the pronounced socio-economic disparities can be achieved through the legal and court-driven solutions.[40] One of the central aspects of the South African Constitution, as interpreted by the courts and scholars, is the idea that the concept of substantive equality can give birth to the legal and judicial answers to the colonial and apartheid heritage of systemic inequalities. During the apartheid, the black people could not become owners of property or reside in areas classified as "white", which made up nearly 90% of the South Africa landmass; they could not perform senior jobs; they were denied access to established schools and universities; they were banned from the public sites, such as public parks, libraries and public transportation system, as well from significant portion of privately owned commercial property. Instead, separate and inferior facilities were created for their use. As the Constitutional Court of South Africa said in *Brink v. Kitshoff*, "[i]t is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted".[41]

The public interest litigations can and should shine light on specific instances of clear abuses, as in these two cases.[42] But one thing is to say that the public interest litigation can bring a temporary relief for the plight of those who are perpetually voiceless, quite another to claim that it can address great disparities in the distribution of societal resources captured by the socio-economic rights. The limits of the court-driven solutions to the demands for a greater level of social justice placed before the courts through the human rights claims, was in simple terms expressed by Lord Hoffman in *Matthews v. Ministry of Defence:*

> "Human rights are the rights essential to the life and dignity of the individual in a democratic society. The exact limits of such rights are debatable […] [b]ut they certainly do not include the right to a fair distribution of resources or fair treatment in economic terms—in other words, distributive justice. Of course, distributive justice is a good thing. But it is not a fundamental human right."[43]

[40] See on this: Laura Pereira, 'The Role of Substantive Equality in Finding Sustainable Development Pathways in South Africa' (2015) 10 Journal of Sustainable Development Law and Policy 165. A very similar level of credence in the law and courts as the key to the radical transformative change among the scholars can be also observed in Canada. See: Patricia Hughes (n 33) 257.

[41] *Brink v. Kitshoff* (1996 (6) BCLR 752 (CC) para. 40

[42] In the European context a good example is the case *Nencheve and Others v. Bulgaria*, litigated with the assistance of the Bulgarian based Association for European Integration and Human Rights, which concerned the death of 15 disabled children at a state-run care institution, in the winter of 1998, caused by the lack of food, heating and basic care during the time of serious economic crisis in Bulgaria. *Nencheve and Others v. Bulgaria* (Application No. 48609/06) Judgment of 18 June 2013.

[43] *Matthews v. Ministry of Defence* [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163. para 26.

3.3. The "minimum core" approach to socio-economic rights

Even though the substantive equality doctrine departs from the premise that only the profound changes of basic social structures can lead to the significant reduction of structural inequalities, in reality, the cases argued or decided by recourse to the aim of substantive equality mostly pertain to the minimum provision of socio-economic rights to the disadvantaged groups.[44] The goal of securing minimum access to the socio-economic rights is what is emphasised by most of scholars and activists who argue for their greater judicialization under the umbrella of substantive equality. In such reading of it, the judicialization is not anymore about bringing an end to the entrenched socio-economic inequalities but about a minimalist focus on the core duties of state institutions aimed at tackling the violations of socio-economic rights hampering the most basic levels of livelihood of the poor and marginalized.[45] The constitutionalisation of socio-economic rights should ensure that the political branches of the state are responsive to the constitutional rights of the least privileged in society, that they "do not lose sight of their suffering in the inevitable political games of compromise and horse-trading".[46]

This interpretation of substantive equality is consistent with and one could even see it as a reflection of the "minimum core" standard for the realisation of socio-economic rights developed in the international human rights law.[47] Since the adoption of General Comment no. 3, the UN Committee on Economic, Social and Cultural Rights has constantly held that state parties are under an obligation to guarantee at all times that people living under their jurisdiction enjoy at least the essential levels of protection of the economic, social, and cultural rights guaranteed in

[44] Ellie Palmer also notes that the "search for indications that human rights and social welfare are combined in a forward trajectory" does not go any further from the observation that "the courts […] have been, generally, content to set the most basic standard addressed to the alleviation of destitution, limiting their concern to destitution of a most aggravated kind". Keith D. Ewing, 'Book review: Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*. Hart Publishing, 2007; Mark Tushnet, *Weak Courts, Strong Courts: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton University Press, 2008' (2009) 7 International Journal of Constitutional Law 166-167.

[45] Dan Chong (n 5) 24

[46] Jeanne M. Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' (2003) 38 Texas International Law Journal 773. There are, of course, also those scholars who place greater ambitions before the notion of substantive equality by explicitly linking it to the more just distribution of public resources for the universal and equal access to the prized social goods. See, for instance, Takele Soboka Bulto, 'The Utility of Cross-Cutting Rights in Enhancing Justiciability of Socio-Economic Rights in the African Charter on Human and Peoples' Rights' [2010] 29 University of Tasmania Law Review 142.

[47] On the development of the concept of "minimum core" and the three main approaches to it that have emerged in the practice of the Committee and the related literature see: Katharine G. Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113.

the Covenant.[48] The "minimum core" standard was developed in search of an interpretation of Article 2 (1) of the Covenant i.e. of a duty of progressive realisation of socio-economic rights "to the maximum of its available resources", that could be broad enough to encompass very different levels of societal wealth to be allocated for the realisation of socio-economic rights in state parties.[49]

With the passage of time, the standard has become closely related to the concept of targeting and targeted programmes, as a way to protect the vulnerable members of society "even in times of severe resources constraints, whether caused by a process of adjustment, of economic recession, or by other factors".[50] As we can observe today, although created for an international human rights forum that needs to take into account the great differences in the amount of societal wealth available to government of different countries[51] for the realisation of socio-economic rights, the "minimum core" standard and targeted measures became kind of a self-fulfilling prophecy. They are an essential part of the rule of law and sustainable development agendas pursued through the rights-based approach, that are perfectly adjusted to the neo-liberal pursuit of maximum efficiency in the provision of basic socio-economic goods.[52]

[48] UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, para. 10.

[49] "On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party." (ibid, para. 10). See, also: UN Committee on Economic, Social and Cultural Rights, Statement: An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant, 10 May 2007, E/C.12/2007/1, paras. 6, 10; International Commission of Jurists, 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (26 January 1997) para. 9.

[50] UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, para 12. In the context of the right to social security (Article 9 of the UN Covenant on Economic, Social and Cultural Rights), the concept of targeting for the realisation of the "minimum core" socio-economic rights has been developed through the concept of "social protection floors" that in fact covers not only to the right to social security but also to the minimum core of other basic socio-economic rights. According to the Social Protection Floors Recommendation No. 202 of the International Labour Organization, the landmark document on the concept, the national social protection floors should include at the minimum four essential guarantees: (a) access to at least essential health care, including maternity care; (b) basic income security for children, providing access to nutrition, education, care and any other necessary goods and services; (c) Basic income security for persons of working age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; (d) Basic income security for older persons. International Labour Organisation, Social Protection Floors Recommendation No. 202, adopted at 101st session of the General Conference of the International Labour Organization on 14 Jun 2012, para. 5. See, also: United Nations Office of High Commissioner for Human Rights, 'Report on social protection floors and economic and social rights' A/HRC/28/35 (2015).

[51] This refers to the countries which have ratified the UN Covenant on Economic, Social and Cultural Rights.

[52] The space does not allow the author to go into an in-depth analysis of the concept of targeting and its application but, on this occasion, it is worth pointing to the stigmatization as the first and foremost problem with targeting, which is in itself a source of socio-economic inequalities. In the analysis of concept, Sen invokes John Rawls's argument that "self-respect is perhaps the most important primary good on which a theory of justice as fairness has to concentrate"

The "minimum core" standard has also influenced, in practice but to some extent in theory as well, those elements of the substantive equality doctrine which are tied to the realisation of socio-economic rights. The concept of substantive equality, and to it related constitutionalisation of socio-economic rights, become primarily concerned with reaching the non-comparative thresholds rather than with the reduction of persistent disparities. In this way the substantive equality doctrine became perfectly fit to the neoliberal paradigm of efficient and "market friendly" use of public funds, which have led to the replacement of the universal and public provision of socio-economic rights with the privatized services and targeted anti-poverty policies.[53] The strategy of using selective and targeted measures to look after those who were left behind became the principal cure for the society-wide increase of socio-economic inequalities resulting from the idolatry of free-market and economic efficiency.[54]

3.4. The rights rhetoric and socio-economic inequalities

Another very important although unintentional consequence of the process of judicialization of socio-economic rights is conflation of human rights and social justice goals with other legal interests that can surface in the process of their adjudication. These other legal interests, as it will be illustrated through the Brazilian courts' jurisprudence, emerge in the process of determination

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(footnotes omitted). Amartya Sen, 'The Political Economy of Targeting' in: Dominique van de Walle, Kimberly Nead (eds.), *Public Spending and the Poor* (The John Hopkins University Press for the World Bank, 1995) 13.

[53] For instance, the increase of the provision of health care through private insurance schemes was actively supported by the World Bank in many middle or low-income countries, under the reasoning that in that way the resources will be more efficiently allocated to the needs of those who cannot provide for the private health care. This, however, has very serious repercussions on the quality of the health care services provided to the lower-income groups and for the overall level of socio-economic inequality. David McCoy, 'Financing Health Care: For All, for Some, for Patients or for Profits?' in: Lois L. Ross, Maureen Johnson, William Meyer (eds.), *The Global Rights to Health: Canadian Development Report 2007* (Renouf Publishing 2006) 70.

[54] Many decades before the birth of this neoliberal paradigm Lucas, whose anti-egalitarian position is on the opposite end from the author's, observes in numerous examples that many of the arguments which egalitarians use are not egalitarian at all. See: John R. Lucas, 'Against Equality' (1965) 40 Philosophy 296; John R. Lucas, 'Against Equality Again' (1977) 52 Philosophy 255. In effect, the analyses of minimum threshold approaches to socio-economic rights point to simple conclusion that they in fact ignore the equality dimension as key dimension for the realization of socio-economic rights and as such cannot result in greater socio-economic equalities. See on this: Gillian MacNaughton, 'Beyond a Minimum Threshold: The Right to Social Equality' in: Lanse Minkler (ed.), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press 2013) 283. See on this also the much discussed "paradox of redistribution" identified in 1998 by Korpi and Palme, who explain that the lack of broader electoral support characteristic for the targeted measures in comparison to the universal benefits, make them less generous and more stigmatizing and, hence, less efficient than the universal social policies. They say: "if we attempt to fight the war on poverty through target efficient benefits concentrated at the poor, we may well win some battles but are likely to lose the war". Walter Korpi, Joakim Palme, 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries' (1998) 63 American Sociological Review 683.

of the content of socio-economic rights in the judicial proceedings. Or, as the analysed case law of the European Court of Justice shows, they can also arise in the litigations involving socio-economic rights as the competing economic values dressed in one size fit all garments of fundamental rights. Common to both situations is that they take place in the judicial proceedings initiated by individual plaintiffs claiming from the public authorities the provision of a specific good or service.[55] Although they do not nurture aspirations of rights-based struggles for greater social justice to the extent the public interest litigations on socio-economic rights do, these judicial proceedings still present an important aspect of the process of judicialization of socio-economic rights. An aspect that needs to be taken into account for a more complete understanding of the effects of the process of judicialization of politics brought by the constitutionalisation of socio-economic rights.

3.4.1. The middle-class social justice jurisprudence

In the previous section we have seen that the public interest litigation, as an important strategy of the process of constitutionalisation of socio-economic rights, tends to place an emphasis on the access to the "minimum core" of these rights for the disadvantaged groups, without much regard for the overall equality in their realisation. Even though that is clearly not the intention behind it, one could say that by aiming at piecemeal solutions the public interest litigation in a way leads to the preservation of the status quo. To seek a resolution of the individualised violations of socio-economic rights by insisting on the fulfilment of the "minimum core" obligations brings with itself an implicit recognition that the existing system of distribution of the basic socio-economic goods is generally adequate. A recognition that the system of distribution of societal wealth is in accordance with the value of equality on which contemporary democracies are built, and that it needs only occasional mending where it does not recognise the different starting points of the historically disadvantaged groups when compared with the rest of the population. By primarily approaching the problem of socio-economic inequalities of disadvantaged groups in absolute terms, via absolute poverty or other non-comparative indicators of hindered access to the socio-economic rights, the public interest litigation argues for only a minimal, situational change. But, as we have seen in the first chapter, the data on entrenched, increasingly diffused, and deepening socio-economic inequalities, combined with the more and more shrinking capacities of the contemporary states to provide socio-economic goods, paint the picture of the contemporary

[55] Exception to this are claims brought against private insurance companies in the consumer protection cases.

world in much darker colours. The two indicate that the difficulties of the disadvantaged individuals and groups to realise their socio-economic rights are not about isolated cases but about the problems intrinsic to the deeper premises of the societal arrangements on which the distribution of basic socio-economic goods is based.

This section shows that the relationship between the entrenched socio-economic inequalities and the judicialization of socio-economic rights is all the less black and white and that the later can even become a tool for the reinforcement of the existing privileges, resulting in further downgrading of the living standards of those at the bottom of the societal ladder. The case law on the right to health of Brazilian courts, which will be shortly presented for this purpose, can also serve as an illustration of the previously raised argument that adjudication, as a conflict resolution technique,[56] has its own limitations, which make it more beneficial for the groups that are in possession of financial resources and knowledge needed to access courts. The main source of data used in the ensuing analysis are two studies: a study based on the quantitative and qualitative survey of health and educational rights litigation in five Brazilian states prepared by Florian F. Hoffmann and Fernando R. N. M. Bentes, and an article on the distributive effects of the social rights litigation in Brazil, written by Octavio Luiz Motta Ferraz.[57]

3.4.1.1. The Brazilian "right to health" jurisprudence

After the adoption of the new federal Constitution in 1988,[58] which embraced direct legal guarantees of certain number of socio-economic rights, including the right to health, Brazil has witnessed a rapid increase of the right to health-related cases. While before its adoption

[56] J. Woodford Howard, Jr. defines adjudication as "a method of peaceful *conflict resolution* in which parties present arguments and evidence to a neutral third party for a decision in their favour according to established procedures and rule of law (footnote omitted)." J. Woodford Howard, Jr., 'Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers' (1969) 18 Journal of Public Law 339.

[57] Florian F. Hoffmann, Fernando R. N. M. Bentes, 'Accountability for Social and Economic Rights in Brazil' in: Varun Gauri, Daniel M. Brinks (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008) 100; Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (2011) 89 South Texas Law Review 1643.

[58] The Constitutions sets the list of protected socio-economic rights in Article 6. In Article 196 it contains explicit guarantees of the right to health: "Health is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery." The provisions about the organisation of health services are elaborated in Articles 197 to 200. Constitution of the Federative Republic of Brazil, entered into force on 5 October 1988, Constitutional text of 5 October 1988, with the alterations introduced by Constitutional Amendments No. 1/1992 through 64/2010 and by Revision Constitutional Amendments No. 1/1994 through 6/1994 (Chamber of Deputies, 3rd edn, 2010).

"[Brazilians] staked their hopes for a (social) rights revolution […] on crafting a rights-heavy constitution and pushing for implementing legislation", once the socio-economic rights were laid down in the Constitution, "the focus has shifted from Congress to the courts".[59] Even though the right to health is in the Brazilian Constitution laid down in the abstract language characterising the constitutional norms, which does not specify the concrete goods to be provided by the public authorities, the Brazilian courts have shown an extraordinary willingness to venture into its substantive review. The result of it are numerous decisions in which the courts have made very concrete pronouncements on the content of the right to health in terms of specific goods, such as medicines or health treatment, that were claimed by individual claimants in the reviewed cases.

The increase of health related litigation primarily came through the individual access-to-medicine and access-to-treatment legal actions.[60] By combining a number of indicators of the social status of plaintiffs, Hoffman and Bentes, as well as Ferraz, found that most of the health-related claims have been filed by the middle-class petitioners rather than by the persons from the poor and disadvantaged groups.[61] Consequentially, these legal actions were not about the elementary health goods but predominantly evolved from the disputes over access to the high cost medications and health treatments, which were not covered by the public health system due to their high price or non-availability in the local market.[62] The claims were largely successful: the sample of cases analysed by Hoffman and Bentes showed that they were resolved with 82 percent success rate.[63]

Ferraz illustrates his main findings through a paradigmatic case from 1997, initiated by a man who suffered from a rare genetic degenerative disease leading to the serious muscle disorder and, progressively, to the death.[64] At the time of the proceedings there was no officially approved medical treatment for the disease in Brazil and the plaintiff placed his hopes in a treatment

[59] Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 141.
[60] ibid 140 - 141.
[61] Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1660-1662; Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 109-111.
[62] Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1661. Hoffman and bents also add that the court rulings primarily concern award of high-cost and exceptional medicines for the treatment of rare diseases and for the long-term treatment of the chronically ill (Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 140-141).
[63] The quantitative analysis covered cases trialed before the state tribunals and the two federal courts with the constitutional prerogatives in the period between 1994 and 2004. Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 116, 119, Table 3.2. Plaintiffs' success rates across three judicial levels.
[64] S.T.F., Petition No. 1246-1, Relator: Sepúlveda Pertence, 10.04.1997, DIÁRIO DA JUSTIÇA [D.J.], 17.04.1998, 64, 65, as cited in Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1656.

provided by a US private clinic, which claimed to be able to cure his condition through a cell-transplantation therapy. By invoking his right to health, the plaintiff argued that this treatment, the total cost of which at the time amounted to about twenty times Brazil's nominal GDP per capita, should be paid from the public funds. Both lower court and the court of appeal ruled in favour of the plaintiff. The main approach of the Brazilian Federal Supreme Court[65] in the appellate proceedings was to see the dispute as a matter of balancing of the individual rights to life and health and the financial interests of the state. The Federal Supreme Court dismissed the argument furnished by the government that the public resources are limited and need to be allocated among competing health needs of the population at large. Instead, it adopted the view that the objectives of the state are of secondary importance when confronted with the subjective inalienable right to life and health, as guaranteed in the Brazilian Constitution:

> "Between the protection of the inviolable rights to life and health, which are subjective inalienable rights guaranteed to everyone by the Constitution itself […], and the upholding, against this fundamental prerogative, of a financial and secondary interest of the State, […] ethical-juridical reasons compel the judge to only one possible solution: that which furthers the respect of life and human health […]."[66]

In this way the Federal Supreme Court established, according to Ferraz, an absolute individual right to "maximum health attention", which became a blueprint for the subsequent decisions in other middle-class health-related cases.[67] Hoffman and Bentes refer to a similar case in which the Bahia state court ordered the public authority to provide the plaintiff with four doses per week of an imported medicine for the treatment of cancer, with the cost of each doze being approximately 1,500 US dollars.[68] Flavia Piovesan, another researcher who analysed the health related litigation in Brazil, also cites number of subsequent rulings of the Federal Supreme Court in which the duty of the state, as defined by the court, was to provide to those in need "not just any form of

[65] The Supreme Federal Court is the highest court of appeal in the constitutional matters, and a specialized constitutional court for abstract review of legislation under the prescribed conditions.
[66] S.T.F., Recurso Extraordinário No. 271.286-8, Relator: Min. Celso de Mello, 12.09.2000, D.J., 24.11.2000, 1418, as cited in Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1658.
[67] Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1658.
[68] Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 139.

treatment, but *the most suitable and effective treatment*, capable of providing the patient the greatest dignity and least amount of suffering".[69]

The right to health interpreted in this way has been enforced by the Brazilian courts through the mandatory injunctions issued with the aim to compel the public authorities to immediately provide the relevant goods and services to individual litigants. As a rule, the courts were not undertaking any form of substantive cost or economic impact analysis before deciding a case.[70] On the other hand, Hoffman and Bentes observe that, as much as the Brazilian courts have shown firm readiness to define the content of the right to health in individual cases and modify decisions of public authorities which did not coincide with the judicial definition, they have also been very reticent to engage with the structural remedies. Even though the Federal Supreme Court rulings in individual cases had tangible impact on the allocation of public funds, the court has preserved a classical liberal approach to the separation of powers in many public class actions cases in which it was confronted with *erga omnes* claims.[71]

After analysing the available empirical data on the main trends of the Brazilian courts' right to health jurisprudence, Octavio Luiz Motta Ferraz arrives to several observations which, according to him, can be applied to the similar jurisdictions and other socio-economic rights.[72] He summarises them in the following way:

> "As the Brazilian experience indicates, when courts […] "give teeth" to constitutional norms that recognize social rights, they end up transforming a collective and intractable issue of resource allocation among the numerous competing needs of the population into a bilateral

[69] Flavia Piovesan, 'Brazil: Impact and Challenges of Social Rights in the Courts' in: Malcolm Langford (eds.), *Social Rights Jurisprudence*: *Emerging Trends in International and Comparative Law (*Cambridge University Press 2008) 186 and footnote 14 at 186 (italic added).

[70] Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 131. The often-raised argument against more assertive judicialisation of socio-economic rights is the one of the limited capacity of courts to collect evidence needed for the analysis of complex matters with wide socio-economic impact, matters which often surface in the litigations on socio-economic rights. See previous discussion on Fuller's concept of polycentric problems.

[71] Flavia reports that Brazilian Superior Court of Justice, which adjudicates cases involving federal law, has repeatedly ordered the use of government severance indemnity funds to pay for the treatment of plaintiffs with serious health conditions when this was not provided for in law, and at the same time has been very reluctant in getting involved in cases that were not about individual claims (Flavia Piovesan (n 69) 187). Hoffman and Bentes show that "the litigation "success story"" in effect applies only to individual actions. They have found that the courts have uses two types of scrutiny depending on the type of action. In most of the cases initiated through individual claims it was enough that the plaintiff shows prima facie evidence of medical need for a claim to stand, whereas in public class action cases, the courts have not been willing to influence actions of public administration by conceding *erga omnes* claims, which have the potential to address many hundreds or thousands of individual actions on the same subject matter (Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 141).

[72] Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1646.

> dispute between single, needy individuals and a […] state. When the situation is framed in such a way, the overwhelming incentive is to satisfy the individual litigant's needs over the state's, irrespective of the consequences (and costs) involved. Given that resources are necessarily limited, such "protection" can be dispensed only to some individuals (the litigating minority) at the same time and at the expense of the needs of others (the nonlitigating majority). When litigants are already privileged in terms of living standards—as they tend to be, given that access to courts is costly […] —social rights litigation serves to reinforce these privileges rather than improve the living standards of the poor or diminish inequalities."[73]

In less sharp tone, speaking about the wider economic and social impact of the Brazilian jurisprudence, Hoffman and Bentes arrive to more or less the same conclusion. The two authors first note that there is no evidence that the courts favour middle class over litigants from indigent sections of the society.[74] Yet, they observe a number of side effects of the enforcement of socio-economic rights through individual actions, which call into question the goal of a more equal protection of a constitutionally guaranteed right to health. The "queue-jumping phenomenon", as they call it, is the main side effect they analyse. It refers to the situation in which the granting of medicines and treatments through mandatory injunctions undermines realization of the established policy priorities, such as the objective to meet the health needs of vulnerable groups, and in general drains resources earmarked for the realisation of public policy objectives.[75] "Given overall scarcity of funds and stringent administrative rules on extra-budgetary expenditure", they say, "the effect of this injunction flood is generally not any fundamental change in health policy, but rather the ad hoc shifting of funds toward litigant patients".[76]

On the basis of that Hoffman and Bentes draw a wider conclusion that the increasing share of expenses for litigated medicines and treatments in the public health budget favours individualized high-cost health goods over low-cost health goods which are aimed at providing collective benefits, such as vaccines or primary health care provision.[77] Ferraz also notes that, in the context of entrenched and deep socio-economic inequalities characterising Brazil, the enforcement of the right to health in the way that is carried by Brazilian courts also means an increased risk that the

[73] Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1662-1663.
[74] Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 142-143.
[75] See a broader examination of the 'queue-jumping', seen as a general problem of the human rights strategies in: David Kennedy, 'The International Human Rights Movement: Part of the Problem' (2002) 15 Harvard Human Rights Journal 113.
[76] Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 142.
[77] Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 140.

public funds available after the resource allocation through the courts' rulings might not suffice for the elementary medications and health treatment of the population at large.[78]

3.4.2. Rights consciousness and the social justice goals

The jurisprudence evolving around the right to health and other socio-economic rights, which tends to nurture only or primarily the interest of the middle class because of the latter group's greater capacity to use law and judicial proceedings for their own benefit, has not been confined only to the Brazilian courts. By furnishing similar examples from other, not only Latin American jurisdictions, David Landau argues that "we need to re-evaluate what social rights do […] and re-envision them as a largely middle-class phenomenon".[79] Landau supports his clam with the evidence which he has collected through the fieldwork in Columbia, complemented with the evidence from Hungary, South Africa and a few more countries presented by other researchers. According to him, the theoretical claims that judicial enforcement of socio-economic rights can usher social change are overstated. The empirical reality, Landau asserts, is completely different: "When courts in the developing world prevent pension reforms or salary cuts that would affect civil servants, when they order the state to […] pay a pension to a middle-class professional, or when they force the state to raise subsidies for homeownership, they are deciding cases that help mainstream rather than marginalized groups."[80]

Yet, Landau's discontent with the judicial enforcement of socio-economic rights springs primarily from his credence that only the strong judicial remedies, like structural injunction, can lead to the tangible improvement of the life of marginalised and poor. Ferraz, for whom the South African Constitutional Court reasoning in *Soobramoney*[81] is a model of a proper court's approach to the enforcement of socio-economic rights, however, argues altogether against the assertive judicial

[78] Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57).
[79] Landau claims that individualized enforcement of the rights to health and social security is common in comparative constitutional law. David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 230, 246.
[80] ibid 191.
[81] *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC). *Soobramoney* was the first case in which the Constitutional Court of South Africa has engaged directly with the enforcement of socio-economic rights. The case was initiated by a patient who had been denied dialysis treatment at the local hospital due to its limited resources. After applying a reasonableness test, the Court found that the decision of the hospital was rational and taken in good faith and that the constitutional guarantees of socio-economic rights are not absolute but may be limited because of the resource scarcity.

interpretation and enforcement of socio-economic rights.[82] According to him, the greatest mistake of Brazilian courts is that they interpret the right to health as an absolute individual right.[83] This is contrary to the epistemic and normative uncertainty which lays in the nucleus of the right to health. The precise and definite answer on what is the content of an individual entitlement based on the right to health cannot be given because of the problem of limited public resources which need to be allocated to a myriad of competing and shifting needs.[84]

When the courts engage in the substantive review of the right to health their reasoning is conditioned by, what Gross calls, "telescopic vision": claimants in a concrete case evoke instant sympathies of judges because of the nature of their needs with which judges can easily sympathise, for the reason of which they might not be able to see the needs of other groups.[85] But, as much as the poor and otherwise disadvantaged persons are "more likely to become victims of injustice [they are] less likely to use the legal system to their advantage".[86] Combined with the fact that access to justice requires legal competence and considerable financial means, this leads to the enforcement system which in effect favours those who are better off. When these factors are seen in the wider perspective of limited public resources, one arrives at the rather common-sense conclusion that litigation evolving from an individual right to health, interpreted as an absolute right, leads to the reallocation of resources from universal programs, aimed at satisfying health needs of the general population, to the needs of the more privileged sections of society.[87] The judicialization of the right to health becomes even more controversial when the analysis is broadened to include other constitutionally guaranteed socio-economic rights, each of which compete for their share in the limited public resources.

Although the justiciability dimension of socio-economic rights was not the main subject of their study, the same conclusion is reached by Christian Bjørnskov and Jacob Mchangama who looked

[82] For Ferraz, the appropriate task for courts is to review the decisions of political branches of the state through principles of non-discrimination and reasonableness. More on this in: Octavio Luiz Motta Ferraz, 'Poverty and Human Rights' (2008) 28 Oxford Journal of Legal Studies.
[83] Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1659.
[84] ibid 1658-1659.
[85] Yet, although Gross recognise that individual cases obscure broader perspective on protection of socio-economic rights, he also believes that there are also some advantages of seeing the real person affected by some human rights problem. Aeyal M Gross, 'The Right to Health in an Era of Privatisation and Globalisation: National and International Perspectives' in: Daphne Barak-Erez, Aeyal M Gross (eds.), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 328-329.
[86] Ross Cranston, *Legal Foundations of the Welfare State* (Weidenfeld and Nicolson 1985) 54.
[87] Or, as Ferraz phrases it, to the "privileged litigant minority and its unreasonable demands from the public health system". Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1660.

into the socio-economic effects of constitutionalisation of socio-economic rights.[88] The two authors investigated whether constitutionalisation of socio-economic rights positively affects the socio-economic outcomes of the society at large, which is the main proposition of the proponents of constitutionalisation. They did it by tracing the constitutional status of the right to health, education and social security and then analysing its effect through a comparison of selected socio-economic indicators in 160 countries in the period between 1960 and 2010. The main findings of the study brought them to the conclusion that there is no robust evidence in support of the proclaimed positive effects of constitutionalisation of the right to health, education and social security. Contrary to the mainstream theoretical discourse, Bjørnskov and Mchangama claim that there is evidence of "a negative medium-run effects of introducing the right to education, and adverse effects of introducing rights to social security on child mortality, which is a known correlate of deep poverty".[89] In a later article Jacob Mchangama sought to explain these findings through the hypothesis similar to the one furnished by the authors who have analysed Brazilian experience with the individually enforceable right to health. The newly introduced socio-economic rights cause the disruptions in the system, which primarily affect the position of groups without political and legal leverage. This is because constitutionalisation of socio-economic rights does not mean that states would have more resources for their realization. "What is more likely to occur", Mchangama says, is that "governments [would] reallocate scarce resources towards those more likely to claim their newly given rights".[90]

This brings new and important arguments to the discussion on judicialization of socio-economic rights, given that the main premise of the rich literature on the topic is that the judicial enforcement of socio-economic rights is about more social justice for marginalised and disadvantaged groups and the greater socio-economic equality. There is no doubt that constitutionalisation of socio-economic rights leads to an increased awareness that the right to health establishes a duty of the state to provide universal and equal access to health services, that it brings to a greater level of rights consciousness and, consequently, to the greater de facto

[88] Christian Bjørnskov, Jacob Mchangama, 'Do Social Rights Affect Social Outcomes?' (Arhuus University Economics Working Papers No. 18, 2013).
[89] ibid 26.
[90] Jacob Mchangama, 'Against a Human Rights-based Approach to Social Justice' in: Doutje Lettinga, Lars van Troost (eds.), *Can Human Rights Bring Social Justice? (*Amnesty International Netherlands 2015) 55. Note also that Hoffman and Bentes observe that the judicialization of right to health and education in Brazil "has led to a slow but perceptible change in the attitudes and practices of public administrators, more oriented toward preventing litigation in the first place by generating effective outputs." Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 141.

accountability of public institutions.[91] But it seems that the growth of rights consciousness, when it comes to socio-economic rights, does not imply more equal realisation of these rights. Seen from the perspective brought by the above-presented studies, it becomes debatable whether judicialization leads to the fairer distribution of the basic socio-economic goods.[92] For Ferraz, individually enforceable socio-economic rights are not the path to more social justice and more equal society because this goal demands radical redistribution which cannot be brought about by the courts:

> "As much as social rights supporters (like me) might wish to eradicate poverty and inequality from our societies, this depends strongly on the political will to radically change the inegalitarian ethos that supports the current regressive taxation structure and expenditure policies of the state, not on the unlikely will and ability of courts to do so. We should spend more time and effort trying to change that ethos than putting our faith in social rights litigation."[93]

As shown in the introductory chapter, the socio-economic inequalities, including inequalities in realisation of the right to health, are in most of the countries on such levels that only the systemic remedies can bring the changes needed for the greater level of socio-economic equality. For the reasons presented above, the judicial enforcement of socio-economic rights through the individual remedies provided to individual petitioners is not the road that can lead towards this aim. The only thing that so conceived enforcement can do is to feed an illusion that we are all equal in rights and that the whole matter is about remedying the minor imperfections of the system in place.[94] Or even worse, to turn the nominal equality of rights into a new source of inequalities.

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[91] Florian F. Hoffmann, Fernando R. N. M. Bentes (n 57) 141.

[92] Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1646. Compare with Flavia Piovesan who speaks in positive tone about the trends in the adjudication of socio-economic rights by Brazilian courts ((Flavia Piovesan (n 69)). More generally, Helen Hershkoff and Stephen Loffredo also argue for the individually justiciable socio-economic rights claiming that although "aspirational orders […] may produce long-term benefits by influencing political culture and energising political mobilisation, they are of cold comfort to a family that has lost its home or cannot secure needed medical treatment" (Helen Hershkoff, Stephen Loffredo, 'Tough Times and Weak Review: the 2008 Economic Meltdown and Enforcement of Socio-economic Rights in Us State Courts' in: Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2016) 243).

[93] (footnotes omitted) Octavio Luiz Motta Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' (n 57) 1668.

[94] Similar, David Kennedy notes that the most misleading promise of human rights movement is that "[h]uman rights offers itself as the measure of emancipation". David Kennedy (n 75) 117.

3.5. Conclusion

The more vigorous litigation of socio-economic rights does not seem to be the path towards the greater level of socio-economic equality, as postulated by the advocates of the constitutionalisation of socio-economic rights. Although the judicially enforceable socio-economic rights can help to remedy the basic forms of deprivation, legal process is too much of an "elitist" character and too much immersed into details to be able to deliver comprehensive and durable solutions to the sweeping societal problems, such as the growing socio-economic disparities. Judicial adjudication is costly and requires resources and a prior level of legal competence which is rarely at the disposal of those at the bottom of the social stratification ladder. It is also limited both with regards to the scope of judicial review, as well as with regards to the reach of judicial remedies. Even if eager to look into the broader socio-economic background of the matter at hand, the courts remain bound by the litigant's formulation of a claim and by his or her choice of arguments. The judges' ambition to go into a more comprehensive evaluation of a legal claim presented to them is always and necessarily tied to its factual context. Even more importantly, the disputes over socio-economic rights are polycentric disputes the complexity of which escapes the confines of legal proceedings. "The thick formalistic fingers of the law, which historically evolved in clear-cut monocentric conflict resolution processes", Boštjan Zupančič says, "are always too crude to deal with subtle polycentric issues."[95] The multifaceted nature and interconnectedness of the many diverse interests they tie together go beyond the capacity of courts to collect and evaluate facts which would enable adequate consideration of polycentric disputes. Their level of complexity prevents the courts from understanding broader, long-term effects of own decisions.

The judicial enforcement of socio-economic rights can offer a piecemeal and temporary solution in cases of grave deprivation of socio-economic rights experienced by the most vulnerable social groups. But the judicialization of socio-economic rights cannot ensure their greater socio-economic equality with the rest of the population. Neither can it tackle the problem of growing insecurity caused by the intensive commodification and the decreased availability of the universal services for the provision of basic socio-economic goods, which now affect much broader segments of population of the developed western democracies. The reason is simple: the constitutionalisation and ensuing judicialization of socio-economic rights are not a warranty that a state will have more resources for their realisation. Instead, as noted by Mchangama, they can

[95] Boštjan M. Zupančič, *The Owl of Minerva: Essays on Human Rights* (Eleven International Publishing 2008) 421.

only bring to the shifting of public spending priorities towards the needs of those who are more capable to claim their individualised socio-economic entitlements via legal proceedings.

Although it departs from the ambition to reduce the existing level of socio-economic disparities by transforming a number of social justice matters into actionable and enforceable individual human rights, in practice the project of judicialization retains a minimalist focus on the core duties of state to remedy the deprivations hampering the basic levels of livelihood of the most poor and marginalized. By framing the problem of socio-economic inequalities through the non-comparable socio-economic indicators, such as absolute poverty, extreme deprivation, etc., it demands only a minimal change and it remains faithful to the existing societal arrangements for the distribution of societal resources. Even though that has not been the intention of their proponents, the "minimum core", "social protection floors" and other similar approaches to socio-economic rights, in effect go hand in hand with the neoliberal paradigm of efficient and "market friendly" use of public funds, and to it related replacement of the universal and public provision of socio-economic rights with the privatized services and targeted social security policies.

On the other hand, the persistent and diffused character of today's socio-economic inequalities, as seen in the first chapter, means that the hurdles of disadvantaged individuals and groups to realise their socio-economic rights are not about sporadic cases to be treated by the selective and temporary measures, but about the main propositions on which the distribution of socio-economic goods is based. By offering a one-off solution for the identified "weaknesses" of the existing institutional set-up for the realisation of socio-economic rights, and by translating these "weaknesses" into recognitional or procedural matters, judicialization creates an illusion that greater socio-economic equality is possible without the major changes of the neoliberal premises of that system. As David Kennedy observes while analysing the strategies of human rights movement, "[h]uman rights remedies, even when successful, treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself".[96] As seen through the analysed case law, "rights ideology" as the backbone of the process of constitutionalisation of socio-economic rights also preserves status quo by preserving and reinforcing the privileged position of better-off groups.[97] Combined with the constant decrease of

[96] David Kennedy, 'The International Human Rights Movement: Part of the Problem' (2002) 15 Harvard Human Rights Journal 118.

[97] Paul O'Connell also notes that the rights discourse, which now prevails in the contemporary debates on entrenched socio-economic disparities not only reflects but also privileges the existing societal relations. However, he is of the

the available universal public services for the provision of socio-economic goods, this leads to the further deterioration of the position of traditionally vulnerable societal groups and induces even deeper socio-economic disparities.

The rights discourse cannot give an answer to the problem of limited public resources which need to be allocated to a myriad of competing and shifting needs of the population at large. The non-political mode of decision-making which it promotes does not eliminate the essentially political character of courts decisions in many of the above analysed cases. The translation of the basic socio-economic entitlements into constitutional rights can be used as a catalogue of the principal social justice values of a society that can inspire public discussion and mobilize public opinion, but they cannot serve as a substitute for the institutionalised political decision-making. "[T]he real question is not whether health, education and adequate living standards are supremely important goods essential for human nourishing", Jacob Mchangama says, "but whether these goods are apt to be realized through the matrix of (justiciable) human rights".[98] The socio-economic rights as the new trump cards make little sense when seen from the perspective of limited public resources and the diversity of competing needs.[99] While governments around the world are pursuing cost-cutting agendas and run the "race to the bottom" for capital, courts seem to offer a refuge against growing uncertainty generated by diminished provision of public services. Seen in this context, the fundamental right to equality in access to the socio-economic goods, as shaped by the substantive equality doctrine, becomes a pledge of equal access to the crumbs left over after the big shares of societal resources have already been taken.

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opinion that although "formally entrenched rights are not a panacea for society's ills", they have an important place in "struggle for political change" and that courts can have a principled role in vindication of socio-economic rights (Paul O'Connell, 'Vindicating Socio-Economic Rights: International Standards and Comparative Experiences' (PhD dissertation, National University of Ireland 2010) 215, 217, 218, 221).

[98] Jacob Mchangama, 'Against a Human Rights-based Approach to Social Justice' in: Doutje Lettinga, Lars van Troost (eds.), *Can Human Rights Bring Social Justice? (*Amnesty International Netherlands 2015) 54.

[99] ibid 56.

CHAPTER FOUR

Anti-discrimination law as the response to structural inequalities

The previous chapter looked into judicialization of socio-economic rights, used as a method to bring substance to the fundamental right to equality, as developed by the substantive equality doctrine. An expansive reliance on anti-discrimination law is another important strategy of the substantive equality doctrine in its attempt to devise legal responses to the entrenched and patterned societal inequalities. Both strands of substantive equality doctrine are part of the broader process of constitutionalisation. A process which has placed number of public matters within the purview of law, as a guarantee that fundamental societal values will be preserved in the times of intensive changes brought by globalisation and rapid technological advancement.

The substantive quality doctrine dedicates itself to the task of making anti-discrimination law responsive to the complex forms of discrimination by refining the anti-discrimination principle to the point in which it can reach the very essence of societal inequalities. It is believed that by remedying the complex forms of discrimination, which are seen as the source of structural inequalities, the anti-discrimination law can bring to the social transformation and the attainment of greater equality. This chapter investigates to what extent anti-discrimination law, in particular the one shaped by the European Union equality legislation, can respond to such ambition. It first describes the position of anti-discrimination law in Europe where, through the process of constitutionalisation it was raised to the level of quasi-constitutional legislation. Then it examines the way in which the notion of structural discrimination, as a label for the complex forms of discrimination, has been used in legal and non-legal studies dealing with the problem of persistent inequalities. With the aim of giving to the concept of structural discrimination an analytical content, which is missing in the rather vague references to it found in the legal texts, the next section provides a short overview of the basic elements of the notion. The given exercise is subsequently used in an attempt to chart the contours of a legal definition of structural discrimination. All of this forms the theoretical background for the last two sections of the chapter, which investigate the fit of anti-discrimination law to respond to the challenges raised by

structural discrimination through its concepts of indirect discrimination and affirmative action measures.

4.1. Anti-discrimination law as "super statute"

Anti-discrimination law is another stronghold of strategies relying on legal means to bring more equality to the contemporary societies. Its great symbolic resources are founded on the gradual rejection of various specific forms of status inequalities, which had been taking place throughout the second half of the last century and is still going on today. Built on the symbolic and practical significance of the Civil Rights Act of 1964[1] in bringing to end the segregation of African American community in the United States, anti-discrimination law became the key method for fighting the racial, ethnic, religious and other status-based discrimination elsewhere. Throughout the western world, the major political struggles against racism, segregation, patriarchal subordination of women, homophobia, etc. have been crowned in the enactment of anti-discrimination laws or in the subsequent broadening of their scope and deepening of their reach. The importance of anti-discrimination law in preserving these victories, in making sure that they become (hopefully) lasting accomplishments of our societies is undisputable. By translating them to the language of law and entrusting their protection to the courts, the anti-discrimination law brought to those who were demeaned, stigmatised and oppressed the promise of equal citizenship.

Built on such an impressive patrimony, anti-discrimination law of today bears all the hallmarks of what Eskridge and Ferejohn call the "super statute".[2] It was born from the civil rights movement in US and later brought to Europe on the wings of the same demands being voiced against racial, women's and other forms of oppression on the streets of its capitals.[3] It implements one of the central constitutional imperatives, the prohibition of discrimination, and it has far-reaching effects which go beyond its "four corners". The fundamental or quasi-constitutional nature of anti-discrimination law gives it a special place in the domestic legal systems and shapes its relationship

[1] Civil Rights Act (Pub. L. 88–352, 78 Stat. 241), enacted on 2 July 1964, amended by Civil Rights Act of 1991 (Pub. L. 102-166, 105 Stat. 1071), enacted on 21 November 1991.
[2] William N. Eskridge Jr., John A. Ferejohn, 'Super-Statutes' (2001) 50 Duke Law Journal 1215; William N. Eskridge Jr., John A. Ferejohn, 'Super-Statutes: The New American *Constitutionalism'* in: Richard W. Bauman, Tsvi Kahana (eds.), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006) 320.
[3] The adoption of Race Relations Act of 1965 in UK, for instance, came after the "race riots" which took place in the summer of 1958. See: Cristopher McCrudden, 'British Anti-Discrimination Law: An Introduction' (1983) 2 Penn State International Law Review 66.

with other laws.[4] According to Vanessa MacDonnell, the "super statutes" or quasi-constitutional laws have special place in the legal system because they implement "constitutional obligations […] that emanate from the rights-conferring aspects of the Constitution".[5] In the case of conflict, they prevail over ordinary laws.[6] Their "imperial quality", Eskridge and Ferejohn argue, also affects the way other laws are drafted and interpreted.[7] In applying them, courts are in particularly prone to use purposive methods of interpretation and to read their provisions broadly in order to give maximum effect to their purposes.[8]

The "super statues" are an important tool of the process of constitutionalisation. Through them certain topics are raised to the level of higher legal norms and in that way, as Martin Loughlin notes, "greater swathes of public life are [being] […] disciplined by formal legal procedures."[9] They transform the new fields of societal practice into constitutional matters and move them to the domain of courts in a way which is unhindered by the formal-institutional set up of a polity. This concerns not only issues which are subject matter of a "super statute", but also those which are only partially within its purview. Although anti-discrimination law is primarily concerned with sanctioning discriminatory acts within its narrowly construed material scope, its broadly set purpose and broad application by the courts can have major effects on the rules for distribution of social goods. [10] Through the implementation of "super statutes", "new American

[4] The term quasi-constitutional legislation is widely used by the scholars. The first reference to it is found in the Supreme Court of Canada decision in case *Hogan v. The Queen* from 1975 ([1975] 2 SCR 574, p. 597), in which a dissenting judge referred to the Canadian Bill of Rights as the "quasi-constitutional instrument". Some scholars use the similar term "constitutional legislation", or simply point to fundamental or constitutional nature of certain laws. See for instance: David Feldman, The Nature and Significance of 'Constitutional' Legislation (2013) 129 Law Quarterly Review 344. In UK, a country without written constitutions, certain statutes, such as Human Rights Act, are referred to as the constitutional statutes in the meaning of statutes which are of constitutional character. Tarunabh Khaitan, '"Constitution" as a Statutory Term' (2013) 129 Law Quarterly Review 591, footnote 11; See also: Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (2014) 10 European Constitutional Law Review 37. Luc Tremblay takes a more procedural view on the concept of quasi-constitutional legislation: "'[q]uasi-constitutional legislation' may be defined as legislation enacted in accordance with the existing ordinary legislative process in respect of which a particular provision […] provides that the statute must have primacy over all other ordinary inconsistent enactments, even those enacted after it, unless these other enactments fulfil a certain number of specific conditions often referred to as a manner and form requirements". According to Trembley, to characterise such statutes as "quasi-constitutional" has nothing to do with the importance of their content. Luc B. Tremblay, *The Rule of Law, Justice, and Interpretation* (McGill-Queen's University Press 1997) 88.

[5] Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) Osgoode Hall Law Journal 511.

[6] ibid 536.

[7] William N. Eskridge Jr., John A. Ferejohn, 'Super-Statutes: The New American Constitutionalism' (n 2) 338

[8] *Ontario Human Rights Commission v. Simpsons-Sears* ([1985] 2 S.C.R. 536) para. 12.

[9] Martin Loughlin, 'What is Constitutionalisation?' in: Petra Dobner, Martin Loughlin, *The Twilight of Constitutionalism?* (Oxford University Press 2010) 61.

[10] For Julie Chi-hye Suk and number of other authors, certain functions of anti-discrimination, as well duties it imposes can be better explained by the goals of distributive justice than by corrective justice (Julie Chi-hye Suk, 'Antidiscrimination Law in the Administrative State' [2006] 2 University of Illinois Law Review 407.

constitutionalism", as Eskridge and Ferejohn refer to it, which today is neither new nor only American, changes public norms and constitutional principles in a way which bypasses the rigid rules for amending constitutions.[11] The changes in public norms and constitutional principles have become "incremental and continuous rather than dramatic and episodic".[12] This strengthens the position of courts in the process of public deliberation on fundamental societal norms and turns them into prime sites for resolving societal conflicts. The application of "super statutes" instils new content to the old constitutional norms and changes the normative and institutional culture in a way which has far-reaching implications for the interpretation and role of individual rights.[13]

"Super statutes" reflect and instantiate public values,[14] translate them in the language of law, and make of the law the principal method for realizing and defending these values. The human rights "super statutes" do so by reshaping political demands to fit the fundamental rights logic. This is particularly evident in the case of anti-discrimination law, the strong moral appeal of which makes its purpose at least partly symbolic.[15] The fact that anti-discrimination law symbolises the long road we have passed from the overt, ubiquitous discrimination against racial and other groups - discrimination which was, not so long ago, interwoven in laws, public policies and private practices - gives it a central role in the new equality battles to be fought. Its great symbolic weight makes the popular consciousness prone to seek in law refuge against the growing societal inequalities. For the same reason in the eyes of general public equality is primarily negatively conceived, as the right not to be discriminated against and the courts as its main guardians.[16] A similar enthusiasm about the importance of anti-discrimination legislation in addressing societal inequalities pervades scholarship from the different fields of social sciences.[17] Equality is often interpreted as the absence of discrimination and it is believed that "upholding [of] the principle of non-discrimination will produce equality between groups".[18] Anti-discrimination law is seen as a rope which in slow

[11] William N. Eskridge Jr., John A. Ferejohn, 'Super-Statutes' (n 2) 1266.
[12] William N. Eskridge Jr., John A. Ferejohn, 'Super-Statutes: The New American Constitutionalism' (n 2) 349.
[13] ibid; William N. Eskridge Jr., John A. Ferejohn, 'Super-Statutes' (n 2) 1216.
[14] According to Eskridge and Ferejohn this is a general feature of super statutes no matter from which legal field they come. William N. Eskridge Jr., John A. Ferejohn, 'Super-Statutes' (n 2) 1215.
[15] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Press 2007) 64.
[16] Colm O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?' (2008) 1 University College London Human Rights Review 96.
[17] See, for instance, the exploratory investigation of academic and public discourse conducted by Cliff Oswick: Cliff Oswick, 'The Social Construction of Diversity, Equality and Inclusion' in: Geraldine Healy, Gill Kirton, Mike Noon (eds.), *Equality, Inequalities and Diversity* (Palgrave Macmillan 2011) 18.
[18] Ann F. Bayefsky, 'The principle of Equality or Non-discrimination in International Law' (1990) 11 Human Rights Quarterly 5.

but steady way is pulling our societies towards the future in which the grand proclamations of equality would finally become the reality.

4.2. Anti-discrimination law and socio-economic inequalities

As we have seen in chapter one, with the end of Cold War, the mainstream equality strategies have become almost exclusively focused on the matters from the domain of recognitional, status equalities. Side by side with the constitutional jurisprudence built through the interpretation of the principles of equal treatment and non-discrimination, the non-discrimination law has been playing a prominent role in cleansing our societies from prejudices, stereotypes and other sources of status inequalities. As the overt, blatant forms of discrimination were slowly but certainly receding from the societal arena, anti-discrimination law became dominated by the symmetric, non-comparative approach to equality. [19] A non-comparative or "liberty-centred understanding of discrimination", as Hellman names it, emerged as an ahistorical account of equality focused on individual instead of group positions. Discrimination became objectionable not so much because someone is being treated worse than others, but because a person is denied a right to which he or she is entitled.[20] The central issue of this approach to discrimination is whether the access to a prized public good protected by the anti-discrimination law is being denied or limited without adequate justification. The characteristics of the victim of discrimination seen through the lenses of entrenched and patterned inequalities, i.e. question of his/her belonging to the traditionally vulnerable groups are given only secondary importance.[21] Instead, whether the access to a prized public good was denied or limited in unacceptable way is assessed against the standard of "morally irrelevant characteristics": discrimination on the basis of race or other prohibited grounds is wrong because it allows the use of "morally irrelevant characteristics" in the allocation of benefits and burdens. Through the symmetric reasoning about discrimination the history of past discrimination and the ensuing special vulnerability to discrimination of some groups became irrelevant. Men and women, members of majority and minority groups, homosexuals and

[19] Selmi notes that until the late 1970s discrimination in US was so much permeating societal life that the main issue was not how to define it but how to remedy it. Michael Selmi, 'Indirect Discrimination and the Anti-discrimination Mandate' in: Deborah Hellman, Sophia Moreau (eds.), *Philosophical Foundations of Antidiscrimination Law* (Oxford University Press 2013) 251.

[20] Deborah Hellman, 'Equality and Unconstitutional Discrimination' in: Deborah Hellman, Sophia Moreau (eds.), *Philosophical Foundations of Antidiscrimination Law* (Oxford University Press 2013) 55.

[21] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (n 15) 514.

heterosexuals are all placed in the same category as the protected groups of anti-discrimination law. "The choice of the appropriate description of an act", Arthur Ripstain notes, "depends on the perspective from which the question is asked."[22] Through the symmetric, non-comparative approach to discrimination, societal inequalities are portrayed as consequence of the concrete, identifiable acts of individual agents, public or private. These acts are unacceptable because they differentiate between persons on the basis of "morally irrelevant characteristics", characteristics that can be clearly delineated from those other which are "morally relevant" and make people responsible for their living conditions.

The same logic makes the anti-discrimination law a handy catalyst of the debates arising from the pronounced socio-economic inequalities. With the death of European welfare states, the anti-discrimination law started to be perceived as a method for addressing socio-economic inequalities. The fight against discrimination through anti-discrimination law has become the new mode of encountering the problem of growing socio-economic disparities. The fields of political and legal have also merged through the new anti-discrimination grounds of age and disability, which were once in the exclusive domain of the welfare state social security system. Through anti-discrimination law, discrimination, disadvantage and ensuing socio-economic inequalities are being reduced to the simple cause-effect relationship as the basis for legal liability. The complex matters of social justice are replaced with the deliberations about the behaviour of individualised distributive agents, assessed along the axis of justifiable – unjustifiable unequal treatment. In that way the difficult questions about the basic conditions of agency, which go beyond the distinction between morally irrelevant and relevant characteristics and link inequalities to the ground rules of redistribution, are successfully avoided.[23]

The transformation of anti-discrimination law into the key element of a societal strategy for tackling socio-economic inequalities is sustained by the changes brought on the wings of globalisation and the world-wide dominance of neoliberal capitalism. As we have seen in chapter one and chapter two, globalisation has generated an intensive interconnectedness of different parts of the globe, of different fields of social practice, and of diverse types of private and public societal agents. On the wave of profound changes which it brought to the institutional architecture of contemporary societies, private agents are increasingly taking over public

[22] Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge University Press 1999) 14.
[23] ibid 35.

prerogatives that were earlier in the hands of state. With the raise of new actors, state is no longer capable to claim the exclusive political and legal power in the society and, consequentially, is less and less in charge of ordering public matters. All of this has made the societal schemes and mechanisms for distribution of basic social goods perplexed to the point of incomprehensibility.

The same as it was observed in relation to the process of constitutionalisation *en general*, transformation of anti-discrimination law into a super statute offers the way out of this perplexity which fits well to the technological rationality of our times. The concept of liability deduced from the causal link between the prohibited discriminatory acts and their consequences, which lays at the heart of anti-discrimination law, provides simple answer to the difficult question of cause and effect relationship between the distribution of basic societal goods and socio-economic inequalities.

The weakening of the nation state's political authority has been also reflected in its reduced capacity to deliver the main socio-economic goods. The rapid privatizations and regressive tax systems mandated by the neoliberal capitalism have depleted the very material foundations for the provision of these goods. This has been complemented with the growing importance of private agents in the distributive process. The question of how to regulate the distributive role of private agents as employers, providers of education and health services, etc. have gained in significance. At the same time the spread of neoliberal paradigm has also resulted in the conflation of public interest and the narrow, profit-oriented concerns. The limitations of the existing political tools for challenging the "rules of the distributive game" have brought to an increased importance of anti-discrimination law, the provisions of which can reach to the acts of these new distributive agents. Thus, anti-discrimination law which to a great extent reduces the matters of social justice to the justifiability of acts of private law entities, has become a vital element of the strategy to tackle socio-economic inequalities.

For all these reasons, anti-discrimination law as "super statute" in effect provides for the further legalisation of the matters of social justice, through which courts are becoming important venues for resolving conflicts over distribution of societal resources. The symbolic significance of anti-discrimination law in securing status-based equalities upholds the promise of a more just redistribution now freshly inscribed in its provisions. Through the judicial victories in individual

cases of unequal treatment the illusion that our societies are slowly but certainly advancing towards greater equality is kept alive.

4.2.1. The substantive equality doctrine and its social justice goals

The substantive equality doctrine, in the meaning of a legal theory which has evolved around the concept of substantive equality, provides the main theoretical stronghold of the efforts to use anti-discrimination law to tackle societal inequalities, including those of socio-economic nature. Although a vague concept, which can be reduced to the rather thin ends of equality of opportunity,[24] substantive equality provides a conceptual framework for the development of anti-discrimination law towards a more redistributionist approach.[25] The concept of substantive equality is at the same time the background justification of the project of legal intervention in the sphere of social justice through anti-discrimination law, as well the goal of that intervention.[26]

The common thread in the scholarly texts advocating for the substantive equality as the goal of anti-discrimination law - a critique of the ineffectiveness of the formal equality approach – opens up the door of anti-discrimination law for the social context in which unequal treatment occurs.[27] The substantive equality doctrine attempts to preserve and enhance the asymmetric approach of anti-discrimination law by insisting that the effects of acts under its scrutiny need to be evaluated against the background of pre-existing socio-economic inequalities. By arguing for greater contextualisation of claims pursued through anti-discrimination law, the substantive equality doctrine opens its narrow confines to the considerations of the role of socio-economic vulnerability as a vehicle for perpetuation of status inequalities. Although not covered by anti-discrimination law itself, the proponents of substantive equality doctrine realise that class

[24] chapter two, 71.

[25] See: Colm O'Cinneide, 'Completing the Picture: The Complex Relationship between EU Anti-Discrimination Law and 'Social Europe'' in: Nicola Countouris, Mark Freedland (eds.), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 135; For Hugh Collins, any conception of equality in anti-discrimination law other than equality of treatment is distributive conceptions of equality. Hugh Collins, 'Discrimination, Equality and Social inclusion (2003) 66 Modern Law Review 17.

[26] Similar observation in relation to the way Sandra Fredman uses the notion of equality while analyzing anti-discrimination law: Nicholas Bamforth, 'Conceptions of Anti-Discrimination Law' (2004) 24 Oxford Journal of Legal Studies 707.

[27] See, for instance: Bob Hepple, Erika M. Szyszczak (eds.), *Discrimination: The Limits of Law* (Mansell 1992).

represents a needed "intersectional backcloth" of an effective approach to discrimination that aims to penetrate into the world of patterned and entrenched inequalities.[28]

As different from the symmetric, non-comparative approach to anti-discrimination law, the substantive equality doctrine does not stop at a narrow goal of eliminating the unfairness particular individuals experience as victims of wrongful conduct. On the opposite, the doctrine engages in the theoretical venture of making anti-discrimination law fit to respond to the challenges of structural inequalities faced by traditionally vulnerable groups. Yet, for most of the authors, the objective is not to transform the socio-economic disadvantage into a new prohibited ground of discrimination. The socio-economic disadvantage should attract the attention of courts only when disproportionately associated with stigma, and prejudice, structural barriers and exclusion.[29] Nor does the doctrine explicitly endorse the goal of just redistribution. Nonetheless, its proponents recognise that the relationship between distributive inequality and "status" inequalities warrants resource allocation and active intervention of state.[30] In that way, the substantive equality doctrine "bridges the gap between the traditional sphere of anti-discrimination law and distributive equality" i.e. between the domain of welfare laws and policies and human rights law.[31]

This is especially the case in Europe, where the doctrine became particularly ambitious in its attempts to place the ideal of greater socio-economic equality into the reign of anti-discrimination law. For the European countries, which still live somewhere in between the memories on welfare state and the reality of neoliberal capitalism, the anti-discrimination law is seen as a way to reconcile the two. Through the expansion of its *ratione personae* and *ratione materiae* scope, the European anti-discrimination law advances towards placing an ever-increasing number of matters from the dominion of welfare policies and laws under its umbrella. That is the reason why the European Union anti-discrimination legislation, as a template through which the national anti-discrimination laws were built, presents particularly useful subject for studying the process of

[28] Geraldine Healy, Gill Kirton, Mike Noon, 'Inequalities, intersectionality and equality and diversity initiatives: the conundrums and challenges of researching equality, inequalities and diversity Geraldine Healy, Gill Kirton, Mike Noon (eds.), *Equality, Inequalities and Diversity* (Palgrave Macmillan 2011) 2.
[29] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 735.
[30] Sandra Fredman goes furthest in these claims. See: Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 163; Sandra Fredman, 'Affirmative Action and the Court of Justice: A Critical Analysis' in: Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 176.
[31] Sandra Fredman, 'Substantive Equality Revisited' (n 29) 729.

constitutionalisation pursued through the transformation of anti-discrimination law into a "super statute".

The theoretical foundation of such development of the European and anti-discrimination laws in other jurisdictions steered by the substantive equality doctrine, is to be found in the understanding that the pronounced vulnerability of certain groups has its origin in "deeper structures of discrimination".[32] The pronounced socio-economic inequalities are the main symptom and the main trail that can help in the identification of these "deeper structures". For that reason, one of the principal strategies of the substantive equality doctrine is to make anti-discrimination law responsive to the complex forms of discrimination, to refine the anti-discrimination principle to the point in which it can arrive to the very core of societal inequalities. This strategy provides the basic blueprint for the project of social transformation through the avenue of anti-discrimination law.

4.2.2. "Deeper structures of discrimination"

The main proposition of the substantive equality doctrine, formulated under the heading of structural discrimination, is rather intuitive. There are persistent, group structured inequalities which are of involuntary nature.[33] The fact that they are patterned, deeply ingrained in the social tissue and that they represent common experience of many generations of groups defined by their race, gender, ethnicity, etc. shows that they cannot be explained through individual, sporadic acts of discrimination. They are consequence of unequal treatment that comes through the operation of impersonal societal structures, the cumulative outcome of which is the reinforcement of existing and/or creation of new inequalities.

Structural discrimination is to be identified primarily through its effects on protected groups, the most perceptible of which is their low socio-economic status. It sustains or worsens socio-economic disparities by hindering or limiting access of these groups to opportunities, benefits, and advantages available to other members of society. Structural discrimination is at the same time the

[32] Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60 American Journal of Comparative Law 265.

[33] As Cranston notes, though not a representative of the substantive equality doctrine, poverty is "because of the structural features of society just as involuntary as sex and race for the bulk of the population". Ross Cranston, *Legal Foundations of the Welfare State* (Weidenfeld and Nicolson 1985) 47.

cause and the consequence of so created disadvantages. The proponents of substantive equality doctrine argue that structural discrimination takes place through a negative synergy of the existing inequalities and the facially neutral laws, policies and practices. By being blind to differences the facially neutral laws, policies and practices perpetuate or even intensify the level of socio-economic and other disparities between groups. Moreover, the resultant socio-economic inequalities have their own self-perpetuating and self-augmenting dynamics. In this way amplified, societal inequalities intensify the mismatch between the socio-economic position of the better off sections of population, as the "reality" from which the neutral laws, rules and policies depart, and the socio-economic position of the disadvantaged individuals and groups. As a result, the negative effect of neutral laws, policies and practices on the latter increases. Because the propositions on which they are built become even more remote from the socio-economic position of the disadvantaged groups, the law, policies and practices start to have an even greater exclusionary or otherwise harmful effects on these segments of population.

The proponents of substantive equality doctrine argue that anti-discrimination law can provide a response to the entrenched and patterned socio-economic inequalities that come as a consequence of structural discrimination. Some authors place them under the ambit of indirect discrimination. They believe that the prohibition of indirect discrimination presents an important step towards a more vigorous use of anti-discrimination law to challenge structural inequalities, and that a direction to go is to work on creating conditions for a greater application of this concept. The substantive equality scholars are unified on the matter of importance of affirmative action measures and other proactive strategies in tackling structural discrimination and the resultant inequalities. In fact, the concepts of structural discrimination and structural inequality are often invoked as the main rationale for the wider use of affirmative action measures, as a way to "mov[e] beyond a narrowly individualistic conception of social relations and of moral responsibility".[34] For that reason, in order to understand whether and to what extent the project of social transformation through the avenue of anti-discrimination law can be realised, one needs to investigate fit of anti-discrimination law to respond to the challenges hidden in the phenomenon of structural discrimination.

[34] Melissa Williams, 'In Defence of Affirmative Action: North American Discourses for the European Context?' in: Erna Appelt, Monika Jarosch (eds.), *Combating Racial Discrimination: Affirmative Action as a Model for Europe* (Berg 2000) 66.

4.3. The notion of structural discrimination

Structural discrimination is in the legal texts usually used as an umbrella term for the complex forms of discrimination, the existence of which mandates employment of proactive strategies as the method of anti-discrimination law.[35] Scholars often refer to it as implicit in the notion of structural or systemic inequalities, which is the starting point of many studies that speak in the critical tone about the underachievement of anti-discrimination law. The term structural discrimination is commonly used interchangeably with the terms "systemic", "institutional", or "indirect" discrimination, and many researchers employ it in the meaning which to a great extent or completely overlaps with these notions.[36]

The term is seldomly defined in the legal studies.[37] In most of them it serves as an abstract foundation for the main propositions of the substantive equality doctrine, without a precisely determined meaning that could be used for the evaluation of the real-life applicability and reach of these propositions. The situation is different in the social research literature, especially in the texts written in the second half of the last century, which bring more profound elaborations of the notion of structural discrimination. This warrants that the analysis of its main elements spans the studies from legal and non-legal disciplines.

[35] According to Christopher McCrudden, one of the first references to the term structural discrimination in the meaning of institutional and structural reasons for exclusion of racial minorities in US is to be found in the study of Leon Mayhew "Law and Equal Opportunity: A Study of the Massachusetts Commission Against Discrimination" from 1968. Christopher McCrudden, 'Institutional Discrimination' (1982) 2 Oxford Journal of Legal Studies 306.

[36] Christa Tobler, for instance, uses the term structural discrimination interchangeably with the terms "systemic discrimination" and "institutional discrimination" (Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of* Indirect Discrimination *under EC Law* (Intersentia 2005) 61). Melissa S. Williams uses interchangeably the terms structural inequality, structural discrimination and systemic discrimination and breaks down the concept of structural discrimination in three subcategories: indirect discrimination, "past-in-present" discrimination and "side-effect" discrimination. Melissa Williams (n 34) 64-65. For Masoud Kamali, the interwoven relationship between structural and institutional discrimination makes their separation almost impossible, which is according to him a plausible explanation why some scholars do not differentiate between the two (Masoud Kamali, *Racial Discrimination: Institutional Patterns and Politics* (Routledge 2009) 42-43).

[37] Michael O'Flaherty, 'Concluding remarks' in: Martin MacEwen, *Anti-discrimination Law Enforcement: A Comparative Perspective* (Aldershot 1997) 242.

4.3.1. Social structures, structural inequalities and structural injustice

Under different names, the notion of structural discrimination is used in the literature by and large to contrast entrenched and patterned discrimination with the discrimination seen as a matter of individual pathology, in the same way as structural inequalities are distinct from "relations of inequality that are transient, accidental or more socially superficial".[38] Given that it represents an attempt to understand the deeper and to a great extent elusive layers of social reality, the concept is very abstract and there is no unified approach to its definition.[39] Different authors emphasise different elements of the notion of structural discrimination. In social sciences the research is primarily focused on elaborations of the link between structural discrimination or structural inequalities with the impersonal societal structures, which is an aspect that remains unelaborated in the legal scholarship. The work of Iris Marion Young, a prominent American political theorist from the last century, provides an insightful account of this link.

Young theorises structural inequality "as a set of reproduced social processes that reinforce one another to enable or constrain individual actions".[40] However, structural inequality cannot be observed through the comparison of social positions of individual members of a society, as much as it cannot be observed in the idiosyncratic characteristics of that position.[41] Only through the group-based comparisons can we identify those aspects of social relations and processes the evaluation of which enables investigations in the realm of social justice.[42] "Identification of patterned inequalities on measures of well-being among these groups", she says, "is […] only the beginning, but an important beginning, of identification of these forms of basic and persisting injustice".[43]

Patterned inequalities are produced and reproduced by social structures.[44] Young provides a vivid description of social structures by invoking Marilyn Frye's metaphor of oppression as a birdcage.

[38] Iris Marion Young, 'Equality of Whom*?* Social Groups and Judgments of Injustice*'* (2001) 9 Journal of Political Philosophy 2.
[39] Concepts are, according to Brkić, our attempt to understand social reality, to give a concrete meaning and reference to non-concrete objects. More abstract and elusive those objects are, the more abstract and complex concepts become. Jovan Brkić, *Legal Reasoning: Semantic and Logical Analysis* (Peter Lang 1985) 126.
[40] Iris Marion Young, 'Equality of Whom*?* Social Groups and Judgments of Injustice*'* (n 38) 2.
[41] Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2011) 57.
[42] Iris Marion Young, 'Equality of Whom*?* Social Groups and Judgments of Injustice*'* (n 38) 15.
[43] ibid 2. By a pattern she means "the mapping of the distribution of some good across all social positions at a particular time". ibid 15.
[44] ibid 2.

The wires of the cage limit the movement of the bird. However, their relationship with the bird's captivity cannot be understood by looking at one wire at the time, for how could a single wire prevent a bird to fly. The bird's lack of freedom can be explained only through an understanding that the cage represents a large number of wires arranged and connected to each other in specific way and with the specific aim.[45] It is the cage as a whole that prevents the bird to fly. While writing about the social structures Young also draws on John Rawls' more legal account of the basic structures of society, in which he points to the process of distribution of fundamental rights and duties through which the main societal institutions determine the division of advantages from social cooperation.[46] For Iris Young, social structures are:

> "the relation of basic social positions that fundamentally condition the opportunities and life prospects of the persons located in those positions. This conditioning occurs because of the way that actions and interactions in one situation conditioning that position reinforce the rules and resources available for other actions and interactions involving people in other structural positions."[47]

Social structures should not be seen as a passive confluence of constraints and opportunities, but as processes which evolve through action and interaction of individuals.[48] People reproduce social structures through the adaptation of their expectations and perceptions.[49] So understood social structures produce structural inequality, which can be seen as the relative constraints to freedom and material well-being encountered by some people that are "the cumulative effect of the possibilities of their social positions, as compared with others who in their social positions have more options or easier access to benefits".[50] Young recognizes that patterned, group-centred nature of structural inequalities is of relative nature. Some members of groups which face these constraints manage to overcome obstacles placed before them through the operation of social structures, while not all members of better placed groups use the opportunities which their social position endorses. This, however, does not change her conclusion that social structures make the

[45] ibid 10.
[46] However, in her posthumously published monograph "Responsibility for Justice", she criticizes Rawls description of basic structures as too limited because of him equalizing social structures with only small subset of societal institutions which he considers more fundamental than others. Iris Marion Young, *Responsibility for Justice* (n 41) 70.
[47] Iris Marion Young, 'Equality of Whom*?* Social Groups and Judgments of Injustice*'* (n 41) 14.
[48] ibid 13.
[49] According to Sen, it is important to observe that "adaptation of expectations and perceptions […] are incremental for the perpetuation of inequalities". In relation to this he recalls the phenomenon of "positionality of observations", which is "about the objectivity of what can be observed from a specified position". Amartya Sen, *The Idea of Justice* (The Belknap Press of Harvard University Press 2009) 157, 283.
[50] Iris Marion Young, 'Equality of Whom*?* Social Groups and Judgments of Injustice*'* (n 38) 15.

individuals from different groups fundamentally unequal and in that way lead to structural injustice.[51]

The notion of social structures is indispensable for the broader judgment about social justice and its antithesis, structural injustice.[52] Structural injustice, which in the studies of Iris Young approximates the notion of structural discrimination we are looking at, is a moral wrong distinct not only from the wrongful action of an individual agent but also for the specific actions and policies of state or other powerful institutions.[53] It is an outcome "of many individuals and institutions acting to pursue their particular goals and interests, for the most part within the limits of accepted rules and norms", against the background set by social structures.[54] Given that structural inequalities are result of structural injustice i.e. are socially caused, democratic political communities are collectively responsible, Young argues, "for remedying such inequalities, perhaps more than they are obliged to remedy the effects of so-called 'brute luck'".[55]

4.3.2. Structural discrimination and the history of oppression

The notion of structural discrimination is often built on a more or less explicit connection between the intergenerational patterns of disadvantage, described through the notion of structural inequality, and the past oppression. The historical forms of exploitation and oppression, be it slavery, colonialism, Jim Crow legal segregation or South African apartheid, to name just few examples, were carried through the ideologies and practices which were inbuilt in social institutions. By being products of their history, Shirley Better says, the institutions of today cannot but perpetuate practices which advantage the historically dominant groups and disadvantage those who lack social power.[56] For that reason, structural discrimination is used by a significant number of scholars from both legal and non-legal disciplines to emphasise the fact that the practices of societal institutions are based on beliefs, values and presumptions which are to a greater or lesser extent a reflection of these past oppressive ideologies. Masoud Kamali, for instance, defines structural discrimination "as systemic acts of inferiorization and the

[51] ibid.
[52] ibid 2, 58.
[53] Iris Marion Young, *Responsibility for Justice* (n 41) 45.
[54] ibid 52.
[55] Iris Marion Young, 'Equality of Whom*?* Social Groups and Judgments of Injustice*'* (n 38) 16.
[56] Shirley Better, *Institutional Racism: A Primer on Theory and Strategies for Social Change* (Rowman and Littlefield Publishers, 2nd edn, 2008) 13.

"Othernization" of some ethnic, religious, and/or immigrant groups by the majority society institutions".[57] The so called "structural approach to discrimination", which has marked the development of antidiscrimination scholarship in the United States at the beginning of this century, departs from the pervasive nature of unconscious bias, as unconscious processes of cognitive categorisation based on stereotypes and prejudices which are the direct legacy of segregation.[58] The commentaries of Article 5 of the UN Convention for the Elimination of Discrimination Against Women interpret it as a legal provision which creates upon a state the duty to combat structural gender discrimination, seen as product of ideologies that assign women to an unequal and subordinate position, which were shaped during their historical oppression and have become entrenched in societal institutions.[59]

There is no doubt that the contemporary societal inequalities to a significant degree draw their roots from the past practices of segregation and oppression and to them related ideologies. However, today, when racism, sexism, and other ideologies of this sort are banished, at least officially, from our societies, and have become replaced with the ideology of merit and unbiased free market, it is hard to establish the link between them and the patterned and entrenched societal inequalities. This is even more the case when the patterns of disadvantage can be clearly identified only through the socio-economic indicators of wellbeing. Fred L. Pincus, an American race-relations sociologist, defined structural discrimination in a way which preserves its connection to the past discriminatory practices but at the same time points to the lack of intention as the main *differentia specifica* between this type of discrimination and institutional and individual discrimination, which are the other two categories in his typology of discrimination. For him, structural discrimination "refers to the policies of dominant race/ethnic/gender institutions and the behaviour of individuals who implement these policies and control these institutions which are race/ethnic/gender neutral in intent but which have a differential and/or harmful effect on minority race/ethnic/gender group".[60] Pincus places an emphasis on the unintended adverse impact on minorities of the anonymous practices which make up structural discrimination. Bank lending practices based on the standard of creditworthiness which mirrors the wealth levels of

[57] Masoud Kamali (n 36) 43.
[58] More on this in: Samuel R. Bagenstos, 'The Structural Turn and the Limits of Antidiscrimination Law' (2006) 94 California Law Review 1.
[59] Rikki Holtmaat, 'Section on Article 5' in: Beate Rudolf; Marsha A Freeman; C. M. Chinkin (eds.), *The UN Convention on the Elimination of all Forms of Discrimination against Women: a commentary* (Oxford University Press 2012) 163.
[60] Fred L. Pincus, 'Discrimination Comes in Many Forms: Individual, Institutional, and Structural' (1996) 40 American Behavioural Scientist 186.

better off sections of society, cuts in the public health insurance and welfare programmes as a consequence of macro-economic strategies for balancing public budget, are just some of the examples which he uses to illustrate the assertion that structural discrimination is carried by "well-intentioned people" through the ordinary societal practices.[61] "Structural discrimination is not intentional, it is not illegal and it is about carrying on business as usual".[62] To confront it, Pincus says, requires not only the examination of basic cultural values but also of the fundamental principles of social organisation.[63]

4.3.3. Basic elements for a legal definition of structural discrimination

Like Young and Pincus, most of the commentators emphasise the embeddedness of structural discrimination in the basic societal arrangements. These societal arrangements were shaped by past injustices or reflect an enduring human predisposition to form and maintain hierarchical and group-based systems of social organization.[64] Structural discrimination occurs, in the first place, in the process of allocation of burdens and benefits determined by these societal arrangements. The objective of such conceptualisation is to enable a holistic observation of a problem of patterned and entrenched inequalities, to ensure that the realities of discrimination are not reduced "to the marginalised individual acts of no general political significance".[65]

Commentators also stress the complexity of the subject matter, which makes the concept of structural discrimination to a great extent vague and escaping a conclusive definition. The elusiveness of the concept comes from its extremely abstract nature as well as from the complexity of the institutional edifice of contemporary societies, even if we confine its scope only to the formal rules, procedures, and customary practices.[66] Even more so, its complexity ensues from the fact that structural discrimination takes place as a cumulative effect of rules, procedures and practices from different fields of social praxis which are essential for the individual

[61] ibid 192.
[62] ibid 192.
[63] ibid.
[64] See the study of Jim Sidanius and Felicia Pratto, who analyse structural discrimination (there referred to as "institutional discrimination") through the conceptual framework of social dominance theory. Jim Sidanius, Felicia Pratto, *Social Dominance* (Cambridge University Press 1999).
[65] Päivi Gynther, *Beyond Systemic Discrimination: Educational Rights, Skills Acquisition and the Case of Roma* (Martinus Nijhoff Publishers 2007) 23.
[66] See the definition of institutions, as formal rules, procedures, and customary practices that regulate distribution of valuable societal goods and in that way structure the relationship between individuals in various units of the polity. Chapter one, 21.

wellbeing.[67] For that reason one of the key aspects of the notion of structural discrimination is the difficulty to individualise specific wrongdoer to whom the discriminatory act can be imputed.[68] Moreover, structural discrimination is so complex that is mostly beyond awareness of its perpetrators and victims.[69] Sidanius and Pratto ascribe the elusiveness of the notion to the intangible but for that reason not less real relationship between the discriminatory nature of social criteria on which favourable institutional responses are based, and the seemingly neutral nature of explicit allocation criteria.[70] Structural discrimination occurs through the practices which are not only far from being illegal, but they are actually seen as normal, as an integral part of the activities which are socially valued.[71] Another source of perplexity around the notion is that structural discrimination is not static, one-time phenomenon but its effects spread across generations and different fields of social activities through "self-perpetuating cycles" of societal inequalities.[72]

The notion of structural discrimination places different levels of institutional practice at a single level of observation and analyses. Being a cumulative effect of interaction of different social rules, policies and practices that can be observed at all three levels of theoretical analysis (micro, mezzo and macro), structural discrimination simultaneously affects an indeterminate number of individuals. Given all of this, structural discrimination can be discerned only by looking at the adverse effects it has on traditionally vulnerable groups through reinforcement or amplification of the existing patterns of socio-economic inequalities.[73] As Colleen Sheppard summarizes it:

> "The dynamics of systemic discrimination operate to entrench and perpetuate inequality. Exclusion reproduces itself as inequitable norms and standards become the unquestioned backdrop upon which anti-discrimination laws are required to function. What is so disconcerting about systemic discrimination is the ways in which it often imperceptibly

[67] Affirmative action and equal protection: hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, Ninety-seventh Congress, first session, on S.J. Res. 41, May 4, June 11, 18, and July 16, 1981, 742.
[68] Rory O'Connell, 'Substantive Equality in the European Court of Human Rights?' (2009) 107 Michigan Law Review First Impressions 129.
[69] Alexander Somek, 'Equality and Constitutional Indeterminacy: An Interpretative Perspective on the European Economic Constitution' (2001) 7 European Law Journal 171.
[70] Jim Sidanius, Felicia Pratto (n 64) 303.
[71] Susan Sturm, 'Equality and the Forms of Justice' (2003) 58 University of Miami Law Review 66. Alexander Somek, 'Equality and Constitutional Indeterminacy: An Interpretative Perspective on the European Economic Constitution' (n 69) 180.
[72] Affirmative action and equal protection: hearings before the Subcommittee on the Constitution of the Committee on the Judiciary (n 67) 742.
[73] As Arthur Ripstein notes, "[a]n historical account of justice is not an account of a game with only one round, but of fair terms of interaction across generations" (Arthur Ripstein (n 22) 44). The concepts of low socio-economic mobility and high intergenerational transmission of inequality are the main indicators of structural discrimination. See chapter one, 12.

> reproduces, reinforces and legitimizes inequality and exclusion. Inequitable opportunities, resources and socio-economic conditions result in unequal accomplishments, which then appear to justify the initial unequitable distribution of social goods."[74]

Another, often accentuated characteristic of structural discrimination is its unintentional character. Intentionality is irreconcilable with its aggregate nature, with the fact that it comes not through an individual act or operation of a distinct rule or practice, but rather as a cumulative effect or rules and practices and on them based acts from different spheres of social organization.[75]

4.3.4. The contours of a legal definition of structural discrimination

The summary of all these fragmentary and less fragmentary descriptions of the notion of structural discrimination can provide elements for an attempt to draw the contours of structural discrimination from the perspective of anti-discrimination law. A rudimentary definition of structural discrimination from which this attempt can depart is that structural discrimination occurs when an apparently neutral act, in interaction with other acts of bodies with public competencies, produces disadvantageous effects on individuals who belong to the groups defined by their race, ethnic origin, gender, religion or belief, and other grounds that are afforded special protection by anti-discrimination law.

As seen above, the term "structural" in the phrase "structural discrimination" is primarily used to denote the existence of institutional framework, which is made up of rules, policies, standards and practices of different levels of universality, within which a concrete act produces disadvantage for persons who belong to the traditionally disadvantaged groups. The wider structures that yield

[74] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (McGill-Queen's University Press 2010) 22, 23.

[75] Alexander Somek, 'Equality and Constitutional Indeterminacy: An Interpretative Perspective on the European Economic Constitution' (n 69) 180. Some authors argue that structural discrimination embraces both intentional and unintentional discriminatory acts. See: Päivi Gynther (n 65) 25; Masoud Kamali (n 36) 43; Colleen Sheppard (n 74) 23. These are primarily researchers who interpret structural discrimination, often under the heading of systemic discrimination, as a contemporary version of segregation i.e. widespread de facto discrimination coloured by intransigent and diffused prejudices about certain groups. In the author's opinion, it makes more sense to keep the two concepts theoretically distinct. In western democracies of today, open expressions of prejudices and negative stereotypes have been to a great extent curbed. Exception to this, in the European context, are two distinct groups, members of Roma and Settlers Communities and recent immigrants. On the other hand, the rising levels of socio-economic inequalities have become patterned in a way which does not coincide with the race, ethnic or religious set-up of our societies but can be primarily identified by looking into the socio-economic status of individuals and groups.

disadvantage through a concrete act can be made up of a myriad of different public acts which more or less directly influence the distribution of societal resources. However, the definition of structural discrimination should not serve to point to an obvious fact that a concrete rule, policy or practice is an embodiment of more general rules and policies up to those which are completely abstract in nature and which do not create individual rights and duties. Rather, it should show that the negative effects of a certain act are the end result of the interaction of that act with other acts, together with which it lays down the conditions for access to the societal goods within the scope of anti-discrimination law.

This aggregate nature of structural discrimination implies that it concerns primarily, if not exclusively, the general acts of public bodies. An important determinant of these acts is that they are applicable to more than one person or more than one case, and that they directly or indirectly determine conditions under which an unknown number of individuals can enjoy their socio-economic and other rights within the ambit of anti-discrimination law. For that reason, as different from the concept of direct and indirect discrimination, the notion of structural discrimination can hardly embrace the acts of natural or juridical persons regulated by private law, even if they affect the rights of more than one individual, as it can be the case with the acts of big corporations in the role of employers, or with the acts of private providers of education or health services. That is because the disadvantage that ensues from structural discrimination always comes through the interaction of various laws, rules and practices, at least some of which are of the public law character for which no private law entity could be held responsible. In other words, state is always and necessarily complicit in structural discrimination, because state is the one that sets at least the ground rules for the access to these goods.

An act that leads to structural discrimination is neutral on face but discriminatory in effect. The question of intent is not relevant for the identification of a certain act as discriminatory given that the essence of structural discrimination is not the act itself but the disadvantage the act produces. The disadvantageous effect of an act of structural discrimination in that sense exists apart from the question of intent to produce it. Moreover, the question of intent cannot be an element of the definition of structural discrimination because structural discrimination is about cumulative effect of related acts of public and private entities.

Disadvantage is a *conditio sine qua non* of structural discrimination, its essential element. The

disadvantage is consequence of a distinction which, as defined by the Canadian Supreme Court in the case *Andrews v. British Columbia*, "has the effect of imposing burdens, obligations or other disadvantages on individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society".[76] The disadvantageous effect of a seemingly neutral law, rule, or practice becomes discernible only after an analysis of the aggregate effect of the broader set of related laws, rules and practices in the relevant fields. So, in the case of structural discrimination, one could say that the source of a concrete disadvantage can be singled out, but that its discriminatory nature can be perceived only when the act is analysed in its interaction with the other related rules.

In fact, although structural discrimination comes through cumulative effect of different acts, that does not mean that a concrete act, which in the final instance produces disadvantage, cannot be singled out. In the complex picture of causes and effects captured by the notion of structural discrimination, the act with discriminatory effect is the one which in direct manner regulates access to the protected goods, i.e. has direct effect on the subjective rights of individual members of protected groups. However, whether an act with disadvantageous effect on protected groups can be singled out needs to be separated from the question whether its discriminatory effect can be individualised and proved in the court proceedings, as well from the question of the capacity of courts to engage in such considerations.

Once charted, the contours of the phenomenon of structural discrimination portrayed in the language and logic of anti-discrimination law make possible an investigation of the basic claim of substantive equality doctrine that anti-discrimination law can provide a means to tackle structural discrimination and, consequentially, can lead to the greater socio-economic equality. Not all the scholars who place substantive equality among the goals of anti-discrimination law argue that at its current development anti-discrimination law can provide a response to entrenched societal inequalities brought about by structural discrimination.[77] But those who do place forward such a claim, believe that the main pathways to confront structural inequalities via anti-discrimination law are the legal concepts of indirect discrimination and the proactive equality strategies.

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[76] *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, 174.

[77] See, for instance, Dagmar Schiek, who argues that structural discrimination is not covered by the prohibition of indirect discrimination and this concept cannot be seen as an adequate response to challenges of structural discrimination: Dagmar Schiek, 'Sex Equality Law After Kalanke and Marschall (1998) 4 European Law Journal 165; Dagmar Schiek, 'Indirect Discrimination' in: Dagmar Schiek, Lisa Waddington, Mark Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 475.

4.4. Indirect discrimination and the challenges of structural discrimination

As shown in chapter two, the failure of prohibition of discrimination shaped by the formal conception of equality to redress persistent inequalities have led to the development of the concept of substantive equality, which opens the door of anti-discrimination law for the ambitions which were so far in the domains of political decision-making and of welfare law. The concept of indirect discrimination is for many representatives of substantive equality doctrine the principal method of anti-discrimination law to confront structural discrimination, as the source of entrenched and patterned socio-economic inequalities. In fact, as it was already noted, scholars often use the two terms interchangeably. Although most of them recognise that there are many problems in its practical application, they also believe that the concept of indirect discrimination has the potential to, if nothing else, expose instances of structural discrimination and hence facilitate their redress through the proactive measures.

According to Christopher McCrudden, the concept of indirect discrimination was born from an understanding that persistent character of racial disadvantage cannot be fully explained by prejudice and bigotry and that the way in which basic societal institutions structure the relationship between racial and ethnic groups need to be taken into account.[78] To this explanation one needs to add the symbolic importance of courts and anti-discrimination law in bringing to an end the process of racial segregation in US, as well as the pervasiveness of racial discrimination in the era of segregation. In the beginning, the concept's primary role was to outlaw practices of disguised intentional discrimination. The transplantation of the concept in Europe in 1980s had an additional dimension: it brought with itself "an additional happy consequence for an economically pressed Government of appearing to justify a less rapid increase in Government expenditure to stimulate supply side changes than would otherwise have been required".[79]

What is in today's Europe known under the notion of indirect discrimination originates from an attempt to develop a legal meaning of discrimination which would encompass the idea of

[78] Christopher McCrudden, 'Institutional Discrimination' (n 35) 303 – 343. In US, the doctrine was first developed in the famous *Griggs v. Duke Power Company* (401 U.S. 424 (1971)) of 1971, in which the US Supreme Court interpreted the Title VII (section 703(a)) of the Civil Rights Act of 1964 in a way which made it unlawful for the employers to use a practice or procedure that disproportionately affects persons from the African American community unless it can be justified by the "business necessity". The court said that an unjustified adverse impact or a rule or practice on members of the given community is sufficient to establish liability.

[79] In fact, McCrudden claims that similar motive can explain, at least partly, the development of the doctrine of indirect discrimination in US as well. Christopher McCrudden, 'Institutional discrimination' (n 35) 304, 339,

"institutional racism", as described by McCrudden in his seminal article on institutional discrimination, and in that way translate the later from a social concern into a legal problem.[80] The new legal meaning of discrimination was built through the government's strategy to "take advantage of the uncertainty of the meaning of discrimination in order to increase the scope of what may be prohibited while, at the same time, trading on the emotive appeal of the traditional usage of the term".[81] The strategy was at the same time aimed at redirecting the focus from the demand for a larger public spending to the new, broadened prohibition of discrimination.[82] The new approach to discrimination had later served as a model for the development of the concept of indirect discrimination in the European Community legal framework on sex discrimination, where it suited well another business related objective, that of levelling the playing field for the enterprises from the different EU member states.[83]

Many commentators argue that the legal concept of indirect discrimination was in the first place created to deal with structural discrimination.[84] For Lynn Roseberry, structural discrimination is even a raison d'être of entire anti-discrimination law.[85] While recognizing that the term structural discrimination refers to much more complex forms of discrimination, Christa Tobler points to the prohibition of indirect discrimination and proactive anti-discrimination measures as the main legal instruments to encounter it.[86] In the language of substantive equality doctrine, the merit of the concept is that by focusing on detrimental effects rather than on the discriminatory acts it makes possible for the anti-discrimination law to overcome the limitations of the formal conception of equality and take into account the social, economic, cultural or other de facto realities of traditionally vulnerable groups.[87] According to John Gardener, by moving away from the issue of

[80] Christopher McCrudden, 'Institutional discrimination' (n 35) 304
[81] ibid 304-305.
[82] ibid 317, 343, This new approach was to some extent influenced by the earlier development of the concept of indirect discrimination in the British Sex Discrimination Act of 1975, which also reflected the view that women's disadvantage is primarily result of structural discrimination. ibid 337-338. See also: Nicola Lacey, 'Legislation Against Sex Discrimination: Questions from the Feminist Perspective' (1987) 14 Journal and Law and Society 411 reprinted in: Christopher McCrudden (ed.), *Anti-discrimination Law* (Dartmouth 1991) 437.
[83] As different from most of other researchers who trace the origins of the concept to the US civil rights case law, according to Dagmar Schiek the first emanations of it can be found in the pre-UN international law. Dagmar Schiek, 'Indirect Discrimination' (n 77) 333.
[84] Evelyn Ellis, 'Definition of discrimination in European Community Sex Equality Law' (1994) 19 European Law Review 572; Rosemary Hunter, *Indirect Discrimination in the Workplace* (The Federation Press 1992) 6.
[85] Karin Lundström, 'Indirect Sex Discrimination in the European Court of Justice's Version' in: Ann Numhauser-Henning (ed.), *Legal Perspectives on Equal Treatment and Non-Discrimination* (Kluwer Law International 2001) 158.
[86] Christa Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (n 36) 61-62.
[87] Sacha Prechal, 'Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes' (2004) 41 Common Market Law Review 537.

fault the concept of indirect discrimination has widened the scope of anti-discrimination law to include the goals of distributive justice.[88] The legal duty not to discriminate indirectly, Garden argues, "focuses centrally on the relative disadvantage of some applicants *as such* rather than on the past actions which established and maintained that relative disadvantage", for the reasons of which, it is "essentially a duty of distributive not corrective justice".[89]

To what extent the anti-discrimination law can fulfil the promise to tackle structural discrimination and serve as an instrument of distributive justice can be discussed both with regards to the general features of anti-discrimination law, as well as with regards to the peculiarities of the concept of indirect discrimination.[90] Many of the general obstacles to the court's engagement with the matters which have a redistributive dimension were already analysed in the relation to judicialization of socio-economic rights. The conclusions reached there to a great extent apply as well to the relationship between anti-discrimination law and structural discrimination and for that reason will be only shortly restated where applicable.

The litigation centred make-up of anti-discrimination law does not seem to fit the basic element of the tentative definition of structural discrimination provided above, the one which points to its aggregate nature. Even though the burden of proof is reversed in indirect discrimination cases, there still needs to be a concrete act with direct consequences vis-à-vis access to the goods within *ratione materiae* scope of anti-discrimination law, from which the judicial scrutiny could depart. The plaintiff needs to at least show that the contested discriminatory impact falls within the scope of the invoked provisions of anti-discrimination law.[91] Moreover, claims of indirect discrimination must rely upon some kind of legal causation, even if it is the one which comes close to an advanced concept of "proximate cause" as the basis for expanded liability. As George Rutherglen observes in relation to the cases based on the theory of implicit bias, yet equally applicable to the

[88] John Gardner, 'Discrimination as Injustice' (1996) 16 Oxford Journal of Legal Studies 360. Similar: Michael Selmi, 'Indirect Discrimination and the Anti-discrimination Mandate' in: Deborah Hellman, Sophia Moreau (eds.), *Philosophical Foundations of Antidiscrimination Law* (Oxford University Press 2013) 250.
[89] John Gardner (n 88) 360.
[90] Although of a general character, the analysis departs from the definition of indirect discrimination contained in the Article 2 (2.b) of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (published in OJ L 180 of 19 July 2000) and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (published in OJ L303 of 2 December 2000), which says that "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons [belonging to a protected group] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".
[91] Christa Tobler, *Indirect Discrimination* (n 36) 73.

present discussion, even though the concepts of proximate cause, liability and discrimination have evolved over twentieth century "[t]his process of evolution has yet to dispense with the need to single out the defendant as the agent responsible for the plaintiff 's harm".[92]

However, the negative effects of a certain act in a claim of structural discrimination are, as it was shown previously, always the end result of the interaction of that act and other acts of different levels of universality, which together lay down the conditions for access to the societal goods within the scope of anti-discrimination law. In this complex picture one could theoretically single out the act with discriminatory effect as the one which in the most direct manner regulates access to the protected goods, i.e. has direct effect on the subjective rights of individual members of protected groups. However, that still does not resolve the question of causal relationship between the disadvantage, which is *causa sine qua non* of structural discrimination, and the given act since, as said, in the case of structural discrimination disadvantage is always a cumulative result of acts of different levels of legal abstraction. Secondly, even if there was a possibility to single out an act as a "proximate cause" of a disadvantage and enable application of the concept of indirect discrimination, given the nature of structural inequality and of structural discrimination, the indirect discrimination litigation could only tackle the "top of the iceberg". Structural discrimination is in both legal and non-legal scholarly texts described as phenomenon embedded in the basic societal structures that regulate process of redistribution, for the reason of which it does not have clearly identifiable boundaries and effects. Thirdly, the aggregate nature of structural discrimination makes the question of who could be singled out as the perpetrator rather difficult. The very fact that state is responsible to set the legal and institutional mise en scène for distribution of important societal goods makes it hard to impute the responsibility for structural discrimination to a private law entity. Given that, theoretically, if all the acts in question are of public law character, one could point to state as the perpetrator. Yet, here we are again back to the old problem of polycentric disputes. To arrive to the necessary connection between a patterned disadvantage and cumulative effects of these acts would place before the courts the task of determining and evaluating social facts of the level of complexity for which the traditional civil adjudication is hardly suitable.[93] And even if the above described obstacles to identify

[92] George Rutherglen, 'Concrete or Abstract Conceptions of Discrimination?' in: Deborah Hellman, Sophia Moreau (eds.), *Philosophical Foundations of Antidiscrimination Law* (Oxford University Press 2013) 133.

[93] Bob Hepple adds to the challenges of polycentric disputes a question whether judges, who mostly come from the dominant groups and hardly have a first-hand experience with discrimination, have the capacity to determine the relevant social facts in the cases of indirect discrimination. Bob Hepple, 'Have Twenty-five Years of the Race Relations

discriminatory act and perpetrator would be surpassed in this way, there would still remain the question of fault. "Although the disparate impact theory is designed to move the judicial inquiry away from issues of intent," Michael Selmi observes, "it cannot escape the question of fault. As a moral issue, discrimination is ultimately about fault—how fault is defined is a different question but our anti-discrimination commitment revolves around fault and responsibility."[94] The civil law concept of fault is too narrow category to embrace legal responsibility in so complex and abstract matters as it is the case with state's prerogatives to direct and manage broadly conceived societal affairs, such as economic, social security, labour and other macro level economic policies, all of which could easily find its place in such an investigation.

The extent to which the concept of indirect discrimination cannot serve as a remedy for structural discrimination and, in that way, as a method to address entrenched and patterned socio-economic inequalities is even more evident from the analysis of the conditions which need to be fulfilled in order to establish disadvantage. Disadvantage is the core element of the concept of indirect discrimination, which "in a nutshell […] says that discrimination on any of prohibited grounds may be present in a rule or practice which does not even mention the ground in question, but which has a detrimental effect on persons meant to be protected against discrimination"[95]. Anti-discrimination law is not concerned with the randomly distributed disadvantage but with the relative group disadvantage. Classificatory grounds and group disadvantage are the central features of anti-discrimination law.[96] According to Tarunabh Khaitan, "discrimination law is primarily concerned with the nexus between group membership and disadvantage […] [and] [i]t is a sensitivity to this special character of *group* disadvantage that is unique to discrimination law, and lacking in socio-economic entitlements and welfare benefit provisions."[97] For the application of its provisions, including the prohibition of indirect discrimination, that nexus has to be enough evident. This is clear from the "particular disadvantage" standard contained in the definitions of indirect discrimination under the EU equality directives, which "require[e] both that all or the vast majority of the members of a group present certain common characteristics, and that these are

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Acts in Britain Been a Failure? in: Bob Hepple, Erika M. Szyszczak (eds.), *Discrimination: The Limits of Law* (Mansell 1992) 25.

[94] Michael Selmi (n 88) 257.

[95] Dagmar Schiek, 'Indirect Discrimination' (n 77) 323.

[96] For a purely theoretical analysis of anti-discrimination law see: Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015).

[97] Tarunabh Khaitan, 'Prelude to a Theory of Discrimination Law' in: Deborah Hellman, Sophia Moreau (eds.), *Philosophical Foundations of Antidiscrimination Law* (Oxford University Press 2013) 152.

sufficiently well known."[98]

In their claim that anti-discrimination law can embrace distributive goals, the proponents of substantive equality doctrine depart from the premise that the main status categories protected by anti-discrimination law fit the main patterns of entrenched socio-economic inequalities.[99] However, as Colm O'Cinneide observes, in some social contexts there is no clear consensus on the matter.[100] Today, when segregation and other forms of pervasive overt discrimination are far behind us, the disadvantage ensuing from structural discrimination cannot anymore be so easily traced along racial, ethnic, gender and other standard anti-discrimination grounds. The cumulative nature of disadvantage ensuing from structural discrimination cannot be identified through the comparisons that are fit for legal proceedings. On the basis of which criteria to determine the appropriate "pool" for comparison in a case of structural discrimination in which disadvantage ensued from the interaction of "apparently neutral provision, criteria or practice" with the laws, policies and standards from different fields of social practice and of varying level of susceptibility to legal analysis. This brings us to the more general question of adequacy of grounds-led approach to discrimination. "[N]o matter how long or inclusive the list of protected grounds or characteristics", Nitya Iyer says, the categorical approach to equality embedded in anti-discrimination law "cannot accurately describe relationships of inequality, which is a precondition both for redressing particular rights violations, and for succeeding with the larger project of social reform".[101] The capacity of the grounds-based anti-discrimination law to tackle the complex forms of discrimination becomes even more questionable in the light of the data on the more and more diffused socio-economic inequalities, presented in chapter one, especially when analysed in the context of the EU anti-discrimination law with its hierarchy of anti-discrimination grounds.[102]

In McCrudden's view, the prohibition of indirect discrimination takes the groups' characteristics into account "only insofar as it is necessary to do so in order to allow the individual to compete

[98] Olivier De Schutter, 'Three Models of Equality and European Anti-Discrimination Law' (2014) 57 Northern Ireland Legal Quarterly 19.
[99] Gardener argues that the fact that the comparison is made with regards to the relative position of a group and not of an individual also clearly points to the distributive nature of the goals of indirect discrimination. John Gardner (n 88) 357.
[100] Colm O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?' (n 16) 89.
[101] Nitya Iyer, 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 Queen's Law Journal 181.
[102] More on this in: Christopher McCrudden, 'Theorising European Law' in: Cathryn Costello, Eilis Barry (eds.), *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law 2003) 25. For the analysis of the limitations ensuing from the grounds-based approach to discrimination in the relevant UK, US and Canada's case law in: Aileen McColgan, 'Reconfiguring Discrimination Law' (2007) 1 Public Law 74.

unhampered by restrictions which effectively keep individuals within groups and which are irrelevant or detrimental to rational decision-making on merit".[103] Being concerned with the procedural justice, the concept of indirect discrimination "makes no assumption that a particular pattern of distribution of goods should result because "[w]hat should be looked at, in judging the justice of the distribution, is who ends up with what, in addition to the process leading up to that distribution".[104] But to answer the question who ends up with what we need to have answered the question equality of what. As Sadurski argues:

> "Indeed, we usually think of individualized equality as requiring that morally irrelevant factors should not trigger unequal positions in life. But what we consider being relevant or not is a matter of a broader theory of justice. It does not derive from the principle of equality as such."[105]

The procedural concerns of the concept of indirect discrimination, can neither fulfil the promise of decommodification, which is another ambition placed before anti-discrimination by those who argue for its greater role in addressing socio-economic inequalities. An assessment of discriminatory character of a certain act against the standard of individual and institutional choice centred on the notions of efficiency and merit, not only avoids the examination of complex socio-economic factors which lead to socio-economic inequalities, but it actually preserves and even enhances the operation of the market.[106] This is especially visible in the justificatory grounds which can be invoked by respondents faced by the claims of indirect discrimination. With the fine dose of sarcasm, Somek notes that in the case of indirect discrimination: "it can be observed how quickly moral zeal evaporates into thin air with a cost-benefit analysis. Distributive agents can successfully claim a release from their distributive responsibility by showing that the disparate impact of a measure on a certain group is a mere incidental side-effect that arises from pressing business necessity."[107]

Such a narrow reading of indirect discrimination is confined to the cases against employers and other private entities, who can justify their disparate impact practices by invoking "business

[103] Christopher McCrudden, 'Institutional discrimination' (n 35) 344,
[104] ibid 352.
[105] Wojciech Sadurski, *Equality and Legitimacy* (Oxford University Press 2008) 150.
[106] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (n 15) 66.
[107] Alexander Somek, 'Antidiscrimination and Decommodification' (2005) University of Iowa College of Law Legal Studies Research Paper Series (No. 05-03) 5.

necessity". The process of balancing in cases in which the acts of state are under scrutiny admits budgetary constraints and other economic considerations, as well as the management-related issues to be invoked as the legitimate justifications that should be taken into account by the courts. To go back to the case study of structural discrimination provided in chapter one, the European Court of Justice decision in *Megner and Scheffel case* is a good illustration that the proportionality test itself mirrors the "deeper structures" of society, i.e. evolves from the standards built through the basic societal institutions, for the reason of which it cannot be used to assess whether some acts are discriminatory in the sense of structural discrimination.[108]

There the court was asked to evaluate the legality of national legislation which excluded persons in part-time and short-term employment from the compulsory sickness and old-age insurance schemes, as well as from the obligation to contribute to the unemployment insurance benefits.[109] The central question was whether such legislation had been indirectly discriminatory towards women who were inherently more likely to work on a part-time or short-term basis. The German Government placed forward three arguments:

> a) "the exclusion of persons in minor employment from the statutory social security schemes corresponds to a structural principle of the German social security scheme" (para. 25),
>
> b) "there is a social demand for minor employment[.] [The Government] considers that it should respond to that demand in the context of its social policy by fostering the existence and supply of such employment and […] the only means of doing this within the structural framework of the German social security scheme is to exclude minor employment from compulsory insurance" (para. 27);
>
> c) "the jobs lost would not be replaced by full-or part-time jobs subject to compulsory insurance […] [but] there would be an increase in unlawful employment ('black' work) and

[108] *Ursula Megner and Hildegard Scheffel v. Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz* (Case C-444/93), Judgment of 14 December 1995.

[109] When it comes to the part-time works, the exclusion in question was related to the so-called "minor" part-time employment where, according to the German Social Security Code applicable at that time, a worker is regularly engaged in for fewer than 15 hours a week and the monthly remuneration does not regularly exceed one-seventh of the average monthly salary (para. 6 of the Judgment). It is interesting to observe that the respondents in the national proceedings,, the German Government and Firma G. F. Hehl & Co., argued that persons in minor employment are not part of the working population within the meaning of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24), in particular because the small earnings which they receive from such employment are not sufficient to satisfy their needs (para. 17 of the Judgment).

a rise in circumventing devices (for instance, false self-employment) in view of the social demand for minor employment" (para. 28).[110]

In its decision, the ECJ found that the German social and employment policy aims reflected in the examined rule are "objectively unrelated to any discrimination on grounds of sex" and that, despite its disparate impact, "the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve that aim".[111] The *Megner and Scheffel* case demonstrate that, as shown in the above theoretical discussion, indirect discrimination cannot be used as a remedy for structural discrimination.[112] The concept of indirect discrimination and its promise of a more equal society was developed in the era of segregated society. At that time discrimination was so pervasive and tangible that any disregard for the effects of certain practice on racial and other protected groups was almost tantamount to the intent to discriminate. Indirect discrimination was just another tool to expose and remedy effects of discriminatory practices which were entrenched for decades. Structural discrimination is, however, about "business as usual". We live in an era in which the existing inequalities are perpetuated and intensified and new inequalities simultaneously generated on multiple levels. These inequalities are structural as much as the inequalities along racial and ethnic lines were structural in the era when indirect discrimination was enacted. But they are too diffused and too complex to be embraced by a legal concept, no matter how sophisticated it is and how noble were the intentions of its architects. To resort to anti-discrimination law as a means to tackle matters of such proportions, given its moral and emotional appeal, might serve to attract publicity to the problem of entrenched and persistent societal inequalities but this is also where such an endeavour eventually ends.

[110] The arguments of German Government are analysed as cited in the text of the judgment.

[111] *Ursula Megner and Hildegard Scheffel v. Innungskrankenkasse Vorderpfalz* (n 108) para. 31.

[112] Of course, the judgment needs to be read in the light of the allocation of competence between the EU and its Member States, for the reason of which the ECJ leaves a "broad margin of discretion" to the later when the act under scrutiny forms part of a state social policy. with respect to social policy. For the further analysis of the case: Barry Fitzpatrick, 'Converse Pyramids and the EU Social Constitution' in: Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 320-321.

4.5. Affirmative action measures and structural discrimination

The limitations of the concept of indirect discrimination in addressing structural discrimination has led many scholars to place their hopes in proactive equality tools. Although the anti-discrimination law has become increasingly sophisticated in the last decades, Sandra Fredman notes, "deeper structures of discrimination have proved remarkably resilient".[113] The proponents of substantive equality doctrine recognize that negative anti-discrimination duties are of no avail for the persistent inequalities caused by structural discrimination, and that these can only be tackled through the strategies which go beyond the acts of individual perpetrators and harms suffered by individual victims. Affirmative action measures are the most prominent and the most contested type of proactive equality strategies endorsed by the contemporary anti-discrimination laws. The notion today encompasses a broad panoply of regulatory instruments, policies and practices from a wide variety of fields, which are mostly explained by the aims to compensate for the past discrimination or to enable greater diversity through the improved representation of the traditionally underrepresented groups. Although they go against the logic of formal equality, many authors claim that affirmative action measures are not an exception to the norm of non-discrimination but rather an integral part of that norm.

According to Marc De Vos, the concept of indirect discrimination as laid down in the EU equality directives, implies a limited duty of positive action, given that the prohibition of unjustifiable indirect discrimination "effectively demands the avoidance of such discrimination".[114] Similar view of the relationship between the structural discrimination, the prohibition of indirect discrimination and the proactive measures directly or indirectly surfaces in commentaries of anti-discrimination norms contained in the main international and regional human rights instruments.[115] In its General Comment No. 20 the UN Committee on Economic, Social and Cultural Rights stated that "States parties must adopt an active approach to eliminating systemic discrimination […] which will usually require a comprehensive approach with a range of laws, policies and programmes, including

[113] Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (n 32) 265.
[114] Marc De Vos 'Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC' (European Network of Legal Experts in the Non-Discrimination Field, June 2007) 14
[115] For an analysis of the concept of affirmative action under international law see: Olivier De Schutter, 'Chapter 7: Positive Action' in: Dagmar Schiek, Lisa Waddington, Mark Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 781-801.

temporary special measures".[116] In a number of cases, the European Committee of Social Rights interpreted Article E of the Revised European Social Charter as establishing a positive obligation on the state parties to ensure adequate access of the most disadvantaged groups to economic and social rights protected by this instrument, a kind of "due diligence obligation to target vulnerable groups".[117] The same conclusion can be drawn from certain number of cases of the European Court of Human Rights, most of which concern specific position of Roma, where the Court stated that under certain conditions a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the prohibition of discrimination laid down in Article 14.[118] The UN Committee on Elimination of All Forms of Racial Discrimination in its General Recommendation No. 27 on Discrimination against Roma interprets the Convention as establishing positive obligation to use affirmative action, public contracting and other proactive measures in order to tackle entrenched inequalities suffered by this ethnic group.[119] According to Olivier De Schutter, the deepening of the debate on the notion of structural discrimination could be a fruitful ground for the further clarification of the conditions under which a state is under the duty to adopt affirmative action measures under the international human rights law.[120]

According to the proponents of substantive equality doctrine, substantive equality represents not only the goal of affirmative action measures but also "a sound theoretical basis" for their inclusion in anti-discrimination law.[121] For the substantive approach to equality, Sandra Fredman argues, there is no such a thing like a neutral state and for it the very refusal of a state to intervene in order to correct societal wrongs is itself a statement, "a positive statement of state support for continuing societal discrimination".[122] Mellissa Williams is on the same line when she claims that "[t]he concepts of systemic inequality and structural discrimination are integral to the defence of

[116] UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20, para 39.

[117] Olivier De Schutter, 'The Prohibition of Discrimination under European Human Rights Law*:* Relevance for the EU non-discrimination directives - an update' (European Commission 2011) ch 2.2.1., 46.

[118] See, for instance, *Chapman v. the United Kingdom* (Application no. 27238/95), Judgment of 18 January 2001; *Stec and Others v. the United Kingdom* (Applications nos. 65731/01 and 65900/01), Judgment of Grand Chamber of 6 July 2005; *D.H. and Others v. Czech Republic* of 2007 (Application no. 57325/00), Judgment of 7 February 2006.

[119] UN Committee on the Elimination of Racial Discrimination, General Recommendation XXVII on Discrimination Against Roma, 16 August 2000, A/55/18, annex V, paras. 28, 29.

[120] Olivier De Schutter, 'Chapter 7: Positive Action' (n 115) 792.

[121] Sandra Fredman, 'Affirmative Action and the Court of Justice: A Critical Analysis' in: Jo Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 172.

[122] ibid 175. To do justice to Fredman, it should be said that she recognizes that affirmative action cannot "challenge the underlying structural and institutional forces leading to the discrimination" and argues that they should be used as "part of a broad-based and radical strategy which does more than redistribute privileged positions but refashions the institutions which continue to perpetuate exclusion." ibid 188, 195.

positive action".[123] Advocates of substantive equality emphasise that affirmative action can counteract the limitations of the "tort structure of anti-discrimination law" with its requirement to single out the defendant as the agent responsible for the plaintiff's harm.[124] Affirmative action measures, Williams says, imply collective responsibility for systemic inequality, which is the only way to respond to structural discrimination for which no specific perpetrator can be identified.[125] As different from the concept of indirect discrimination, applicable only when the disadvantage can be individualized in the court proceedings, affirmative action measures are in true sense a group justice strategy because they "compensate for the disadvantages experienced on the collective basis".[126] The strongest argument for the affirmative action measures, Williams concludes, "rests on its capacity to combat the unintentional reproduction of unjust inequalities".[127]

Without going into an analysis to what extent affirmative action measures and other proactive equality strategies can deliver the promise of substantive equality when confronted with the limitations contained in the principle of equal treatment, which is argued to be the main obstacle to their greater effectiveness, there are several general remarks which should be made about their relationship with the concept of structural discrimination and the goal of remedying socio-economic inequalities.[128]

Affirmative action measures are in the first place the targeted measures. They imply use of a set of narrowly defined criteria in order to facilitate an easier access to certain social goods. Whether an affirmative action measure can provide an adequate response to a disadvantage it aims to remedy depends to a great extent, if not primarily, on how much these criteria match the disadvantage. What then should be the criteria of an affirmative action measure which should serve as a cure for the disadvantage ascribed to the phenomenon of structural discrimination? The embeddedness of structural discrimination in the basic societal institutions and the fact that it occurs through the

[123] Melissa Williams (n 34) 66.
[124] George Rutherglen (n 92) 133.
[125] Melissa Williams (n 34) 66, 67.
[126] Mark Bell, 'The Right to Equality and Non-Discrimination' in: Tamara K. Hervey, Jeff Kenner (eds.), *Economic and Social Rights Under the EU Charter of Fundamental Rights - A Legal Perspective* (Hart Publishing 2003) 92 footnote omitted.
[127] Melissa S. Williams (n 34) 75.
[128] For an interesting analysis of the tension between the principle of equal treatment and the substantive conceptions of equality mirrored, among else, in the affirmative action measures, see: Hugh Collins, 'Discrimination, Equality and Social inclusion (2003) 66 Modern Law Review 16. For the general problems in the more effective use of affirmative action measures in the European Union see: Colm O'Cinneide, 'Positive Action and the Limits of Existing Law' (2006) 13 Maastricht Journal of European and Comparative Law 351.

interaction of different rules from the different fields of societal praxis and of different levels of abstractness signifies that structural discrimination can affect individuals in a myriad of different ways. To this we should add the complex and self-perpetuating nature of inequalities and the fact that disadvantages from different sources often blend to produce new disadvantages.[129] Seen in this way it becomes clear that no criteria could be comprehensive enough to embrace all the different types of disadvantage that could ensue from structural discrimination. Targeted measures for their very selectivity cannot provide response to structural discrimination and through it created socio-economic inequalities.

Affirmative action measures are built on the premise that membership of certain groups can be taken as a proxy for disadvantage. They are about classifying individuals according to their assumed membership in protected groups, such as race, ethnicity, gender, etc., who should then receive special assistance for an easier access to the relevant social goods. While it is true that socio-economic inequalities ensuing from structural discrimination are patterned, i.e. can be traced along the lines of race, ethnicity, gender, and many other categories protected by anti-discrimination law, these categories cannot provide a firm answer of who should be supported through the affirmative action measures. The disadvantages which come as a consequence of structural discrimination create obstacles to the access to social goods which affect certain groups more than others, but these do not affect equally all their members nor do they exclusively affect members of such groups. Apart from the fact that personal capabilities of an individual member of a group will at the end of the day be decisive for the extent to which these general constraints affect his or her abilities to realise own life plans, the complexity of structural discrimination makes also the relationship between the group membership and the ensuing disadvantages too complex to be susceptible to the approaches based on narrow categorisations and targeting. Today, the low socio-economic status is probably the only pattern which can provide a greater degree of precision in calibrating targeted measures. As shown in the first chapter, the socio-economic inequalities are growing and becoming more and more diffused across entire population, as manifested in the ongoing process of shrinking of the middle class in the developed

[129] Laurence Lustgarten similarly states in relation to racial disadvantage such as underachievement in schooling, higher rates of unemployment, or residential concentration in decaying neighbourhoods, which, according to him, "has a self-perpetuating dynamic of its own and extends much wider and is the product of several additional and even less tangible influences." Laurence Lustgarten, 'Racial Inequality and the Limits of Law' in: Richard Jenkins and John Solomos (eds.), *Racism and Equal Opportunity Policies in the 1980s* (Cambridge University Press, 2nd edn, 1989) 18. For a broader example of blending of disadvantages between different sources of deprivation and an analysis of its consequences for public policy in: Amartya Sen, *The Idea of Justice* (The Belknap Press of Harvard University Press 2009) 256.

western European countries.[130] Yet, affirmative action measures are generally insensitive to the matters of class given that low socio-economic status is rarely among the protected grounds of anti-discrimination law and if so, is seldomly invoked by the courts. The problem of affirmative action measures benefiting the most advantaged members of protected groups is just one among many other consequences of the discrepancy between the affirmative action as the means and the structural inequalities as the target of proactive strategies. Fredman and a number of other researchers claim that the problem could be mitigated through the concept of multiple discrimination.[131] But, as already discussed, the concept of multiple discrimination and similar concepts inspired by the theory of intersectionality themselves give birth to the new identity and relational matters of such a complexity that their practical usefulness in overcoming the problem of fit between the classification and disadvantage becomes rather dubious. At the very least, the whole attempt comes at the cost of an increased incoherence and ambiguity between the goals and criteria of the affirmative action measures. As pointed by Nancy Ehrenreich, these approaches tend to end up with the individual as the only unit of analysis which is left after the meticulous dissection of groups to ever tinier subgroups, which brings them far away from the initial attention for the group-based inequalities.[132] The greater complexity arrived to in this way augments the problems typically involved in the application of the affirmative action programmes, such as resentment, social and group divisiveness, etc., which make of them a hot political topic since their inception.[133] This only adds to the already huge emotional charge linked to the affirmative action measures which, judging by their effectiveness, does not correspond to their results in reducing societal inequalities.

The judicial scrutiny of affirmative action measures, with the proportionality test at the centre of it, reflects even more the narrowness of their reach when compared with the breadth and depth of the phenomenon which they are supposed to address. Affirmative action measures are considered lawful only if they can pass the proportionality test, which is under different names and with varying elements applied by the courts when these measures are challenged as contrary to the principle of equal treatment. The proportionality test, which demands that affirmative

[130] chapter one, 12.
[131] Sandra Fredman, 'Double Trouble: multiple discrimination and EU law' European Anti-Discrimination Law Review (2005/2) 18.
[132] 44; Nancy Ehrenreich, 'Subordination and Symbiosis: Mechanisms of Mutual Support between Subordinating Systems' (2002) 71 UMKC Law Review 278.
[133] As correctly expressed by André Douglas Pond Cummings, affirmative action measures have been since their inception under siege. André Douglas Pond Cummings, 'The Associated Dangers of "Brilliant Disguises," Color-Blind Constitutionalism, and Postracial Rhetoric' (2010) 85 Indiana Law Journal 1277.

action measures be narrowly tailored in scope and in duration and necessary to meet the legitimate and clearly defined ends, is a legal expression of the basic premise on which affirmative action measures are based: that the existing system of provision of the basic societal goods is in accordance with the societal ideal of equality and that it needs only minor and occasional corrections. How can a measure based on such assumption serve as a cure for the entrenched and patterned inequalities generated by societal structures? Devised to remedy negative side effects of the process of allocation of burdens and benefits through the market-based mechanisms, affirmative action measures acknowledge rather than challenge the neutrality of these mechanisms.[134] Similar observation made Alexander Somek to claim, in relation to job quotas as the most ambitious and controversial type of affirmative action measures, that:

> "As applied and widely used, quotas, not unlike anti-discrimination law in general, are as market-correcting as they are market-perfecting. Quotas provide access to positions for the members of disadvantaged groups on the basis of a mechanism which is generally responsible for the reproduction of social division and hierarchy, that is, the interplay of supply and demand for qualified individuals on the market. What may legitimately matter, at the end of the day, are merit, achievement, application, stamina, adaptability, mobility, humility, conformity and submissiveness. In a sense, the quota is a social right with an American twist. It is the most that a liberal class society can make of the idea of a social right."[135]

The same as the targeted measures resulting from the standards of "minimum core" socio-economic rights, social protection floors, etc., which have surfaced in the process of constitutionalisation of socio-economic rights, affirmative action measures direct our focus on particularities of the existing socio-economic and other inequalities. This focus on particularities makes us forget the larger picture. This is especially the case with legal scholars, judges and lawyers who, while being immersed in the no doubt a noble project of translating the ideal of substantive equality into the legal terms of art, lose from the sight many fundamental issues, such as the one of importance of the ceiling on distributional inequality for the modern democratic societies. The affirmative action measures had and still have a vital role in soothing the symbolic but not less real and painful effects of stigma and other similar evils nurtured through the centuries of discrimination and exclusion of racial and ethnic minorities, women, and other groups with similar experiences. But it as an illusion, a risky illusion, to believe that entrenched socio-

[134] Olivier De Schutter, 'Chapter 7: Positive Action' (n 115) 824.
[135] Alexander Somek, 'Antidiscrimination and Decommodification' (107) 12.

economic inequalities, as the manifestations of the cracks in the very foundations of the ideal of equality on which our societies are built, can be mended through affirmative action measures and other piecemeal strategies.

4.6. Conclusion

Anti-discrimination law is an important, if not central element of the substantive equality doctrine, as the theoretical and judicial strategy aimed at realising the societal ideal of greater equality through law. The substantive equality doctrine translates the value of equality into the principle of prohibition of discrimination and makes of anti-discrimination law an important method for its realisation. In this way it brings the entrenched socio-economic inequalities to the purview of law and transforms the courts into prime sites for resolving societal conflicts over access to the basic socio-economic goods. The proponents of the substantive equality doctrine do so in the faith that many complex social justice issues that have piled up over the last decades, which could not be answered by recourse to merit, efficiency and other constituents of the "free market" ideology, would get more just and predictable answers once they are disciplined by the logic of law.

The substantive equality doctrine rightly points to the "deeper structures of discrimination" as the source of patterned and persistent socio-economic inequalities, yet it is mistaken in its belief that structural discrimination is amenable to change through anti-discrimination law. The litigation centred make-up of anti-discrimination law cannot provide a response to the aggregate nature and other complexities of structural discrimination. The maze of acts of different level of specificity which generate structural inequalities escapes the "cause-effect" logic of legal causation. The task of identifying and evaluating facts needed to unravel this maze is beyond the reach of civil adjudication and its concept of legal responsibility. Legal process cannot embrace the cumulative and elusive nature of disadvantage ensuing from structural discrimination, as much as the more and more diffused socio-economic inequalities cannot be dissected to the patterns which would fit the grounds-based anatomy of anti-discrimination claim. The concept of indirect discrimination, being the main tool available to anti-discrimination law to face the complex forms of discrimination, is inapt for this task. It can only mirror the system which it seeks to mend by remaining captive of ethics of merit and efficiency, as the yardstick of "rational choice" standard of the contemporary rationality.

Nor could the limitations of the concept of indirect discrimination in addressing structural discrimination be overcome through the greater use of affirmative action measures and other proactive equality strategies. As shown in the above analysis, no criteria for targeted measures, such as affirmative action, could be comprehensive enough to embrace all the ways in which socio-economic disadvantages ensuing from structural discrimination can affect different individuals. The very selectivity of targeted measures is at odds with the fact that socio-economic inequalities are blend of various types of disadvantage arising from structural discrimination, as well with their diffused and self-perpetuating nature. The relationship between the group membership and the disadvantages ensuing from structural discrimination is also too complex to be susceptible to the approaches based on categorisations and targeting. No matter how subtle, meticulous and comprehensive it is, a classification of individuals along status-based grounds protected by anti-discrimination law cannot capture the diffused character of the contemporary socio-economic inequalities. As Bob Hepple notes, "[l]aw is both too *specific* and too *selective* in its choice of causes in the 'cycle of disadvantage' to be capable, in itself, of delivering real substantive equal rights."[136] The affirmative action measures and other piecemeal strategies for greater societal equality cannot remedy entrenched socio-economic inequalities stemming from the basic societal arrangements for the distribution of the basic societal goods. By departing from the presumed neutrality of these arrangements, which are taken to be beyond the question of fairness for the so considered unbiased and self-directing nature of market on which they rely, proactive equality strategies can only be seen as the maximum effort a neoliberal society can make in its attempt to uphold the value of equality.

While still existing, the European welfare states were mitigating some of the inequalities inherent to the market-based mechanisms for the distribution of societal resources through the universal, public provision of the basic socio-economic goods. It was the public policy rather than the law which determined the nature and scope of benefits and services provided by the state. The role of law was to define the rights of individuals equivalent to the duties of public bodies ensuing from these policies, and to establish the institutional basis for the delivery of benefits and services.[137] With the death of the European welfare states and the general, globalisation-related weakening of a state as such, the socio-economic equality has been transformed from the political question of breadth of universal public services to the right not to be discriminated in access to the more and

[136] Bob Hepple, 'Have Twenty-five Years of the Race Relations Acts in Britain Been a Failure? (n 93) 27.
[137] Ross Cranston (n 33) 2, 4.

more meagre provision of basic socio-economic goods. The law and courts have become guardians of so redefined equality and the symbolic expression of the continuing importance of this value for the neoliberal societies. The aspirations for decommodification, as "the extent to which individuals and families can maintain a normal and socially acceptable standard of living regardless of their market performance"[138], have been placed almost entirely in their hands.

Anti-discrimination law cannot serve as a response to the socio-economic inequalities. They are not only too broad category to be captured by its conceptual tools but they are also beyond the reach of its normative resources. The anti-discrimination law has important task of removing the stigmatizing effects of societal practices and there we should stop. We should not ask from it more than what it can provide. While it is true that the ideal of equality can be broken into a number of separate yet interconnected conceptions, a crucial thing is to understand which conception belongs to which field of social praxis. Factual equality and legal equality are not the same and the first precedes the second. "Every theory of factual equality", Alexy says, "is […] a programme for the distribution of socially distributable goods".[139] Equality before the law, hence, needs that we first answer the question what do we mean by factual equality and to transpose that answer in the legal norms which should then apply equally to all under the guardianship of the principle of legal equality.

To reduce equality to the absence of discrimination is to avoid difficult question of fairness of the basic societal arrangements for the distribution of societal resources. The substantive equality doctrine, in its attempt to place certain social justice matters under the purview of anti-discrimination law forgets that the anti-discrimination principle cannot tell us what the desirable level of socio-economic well-being of a population vis-à-vis the available societal resources is. Not only that the anti-discrimination law often does not cover many of the socio-economic goods which are central for a decent level of well-being, but it also departs from the position of a comparator group as a standard to meet, no matter how low that standard is. It is not important how badly the comparator group is treated as long as the groups compared are treated equally. For that reason, equality as absence of discrimination, Elisabeth Holzleithner argues, "may amount to no more than equality of bad conditions":

> "[I]n the midst of all the (legitimate) fuss about antidiscrimination, one should be reminded

[138] Gøsta Esping-Andersen, 'Citizenship and Socialism: Decommodification and Solidarity in the Welfare State' in: Martin Rein, Gøsta Esping-Andersen, Lee Rainwater (eds.), *Stagnation and Renewal in Social Policy: The Rise and Fall of Policy Regimes* (M. E. Sharpe 1987) 86.
[139] Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers, Oxford University Press 2010) 282.

> that this is but one strategy that can be used in the quest for equality. Concentrating on issues of antidiscrimination law covers up the shortcomings of an approach that tends to ignore questions of material equality, of equality on the other side of the market. Equality must not come to mean equality of disadvantage, but rather equality of dignity with access to a defensible amount of basic goods nobody should have to do without."[140]

Even though it cannot challenge the underlying "market-efficiency" orientation of the societal institutions, and although its scope of substantive legal protection is limited, Colm O'Cinneide believes that the "leftist", as he calls it, critique of anti-discrimination law is overstated.[141] The anti-discrimination law plays a useful role in challenging the social practices which are product of political bargaining and which impose disadvantages upon social groups that lack political power. For that reason, O'Cinneide says, anti-discrimination law is an important tool for enhancing access of marginalised social groups to the key social goods.[142] However, O'Cinneide also recognises that the grand promises placed on the back of equality guarantees can encourage unjustified complacency and sustain status quo even when the entrenched societal inequalities are showing no sign of retreat.[143] Without a political commitment, he says, the judicial elaborations of the prohibition of discrimination faithful to the goal of substantive equality cannot lead to the needed social transformation.[144]

The problem with anti-discrimination law as a method for attainment of redistributive goals is that it can actually be used to remove attention from the existing societal arrangements to the recognitional issues, as a symbolic pledge to the greater equality. Anti-discrimination law can serve to eliminate symbolic manifestation of racial and other forms of oppression, Crenshaw argues, while at the same time being used to sustain the material subordination of these groups.[145] The extensive reliance of anti-discrimination law, and of the rights-based strategies in general, on the legal process only augments the discrepancy between the real and the proclaimed. As it is the case with the judicialization of socio-economic rights, anti-discrimination law as a strategy to address socio-economic inequalities is an attempt to reshape political issues to fit the

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[140] Elisabeth Holzleithner, 'Mainstreaming Equality: Dis/Entangling Grounds of Discrimination' (2005) 14 Transnational Law and Contemporary Problems 957.
[141] Colm O'Cinneide, 'Completing the Picture: The Complex Relationship between EU Anti-Discrimination Law and 'Social Europe'' (n 25) 132.
[142] ibid 131.
[143] Colm O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?' (n 16) 81;
[144] Colm O'Cinneide, 'Completing the Picture: The Complex Relationship between EU Anti-Discrimination Law and 'Social Europe'' (n 25) 136.
[145] See on this: Kimberlé Williams Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 Harvard Law Review 1380-1381.

logic of fundamental rights, which ignores the depth of the problem of widespread and entrenched socio-economic inequalities. Such approach to societal inequalities is a cheap one because it lays the burden of the enforcement of anti-discrimination law upon victims.[146] For that reason, thirty years ago Laurence Lustgarten claimed that anti-discrimination law is in fact "an expression of classical liberalism, albeit in an enlightened form, the inadequacies [of which] expose the severe limitations of that tradition as the basis of social justice."[147] No matter what we do to enhance its reach, anti-discrimination law cannot serve the goals placed before it by the substantive equality doctrine, for the simple reason that the problem with today's inequality is about deprivation ensuing from the withdrawal of the universal services. When there is a system of adequate and universal provision of socio-economic goods, anti-discrimination can be its useful supplement. But anti-discrimination law cannot substitute it.[148] The ascent of anti-discrimination law as "super statute" is an attempt to create a visible commitment to equality side by side with the raise of neoliberal conception of social policy focused on selective measures and "efficient" public spending. The unrestrained belief in law as a social instrument that could address and correct societal failures, such as entrenched and persistent socio-economic inequalities, if we only found the right methods for it, prevents a more complex analysis of their relationship with the politics, as a choice of values to be pursued by the societal institutions.

[146] Laurence Lustgarten (n 129) 23.

[147] ibid 23. See on that as well, McCrudden's explanation of the background motives for the widening of the legal meaning of discrimination through the concept of indirect discrimination: Christopher McCrudden, 'Institutional discrimination' (n 35) 343. In the context of the European Union, anti-discrimination law can signify not only a symbolic substitute for the larger public spending but, it can also negatively affect the existing system of provision of certain socio-economic goods at the national level. See on this, for instance: Deborah Mabbett, 'Age Discrimination in Law and Policy: How the Equal Treatment Directive Affects National Welfare States' in: Malcolm G. Ross, Yuri Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (Oxford University Press 2010) 198.

[148] Similar to this, Somek argues that anti-discrimination law cannot replace the political and legal guarantees of socio-economic rights but can be only "a supplementary measure for it promises access to those who have not benefited from this system in the past" (Alexander Somek, 'Antidiscrimination and Decommodification' (n 107) 17). Colm O'Cinneide, on the other hand, claims that anti-discrimination law "has the potential to play some role in resisting commodification and the logic of the market and thus contribute to the establishment of a more Social Europe" (Colm O'Cinneide, 'Completing the Picture: The Complex Relationship between EU Anti-Discrimination Law and 'Social Europe'' (n 25) 132). Sandra Fredman places credence in the innovative methods of anti-discrimination law, such as positive action measures, to tackle structural discrimination and bring about the necessary social change (Fredman S., 'Breaking the Mold: Equality as a Proactive Duty' (n 32) 265).

Conclusion

While state is having less and less say over resource distribution under the global competitive pressures of capital accumulation, law is becoming increasingly important instrument of the contemporary social justice strategies. Vigorous pursuit of the "rule of law" agenda in the ex-communist countries and the constitutional revisions in the old democracies have converted the symbolic, emancipatory potentials of human rights into an expanding catalogue of justiciable individual rights. Through the process of constitutionalisation, a significant portion of the pressing distributive justice issues are being translated into corrective justice matters and brought within the purview of judiciary. View of law as a vehicle of social change has been particularly visible in the notion of substantive equality. The doctrine has evolved from an expansive theoretical and judicial interpretation of the legal concept of equality and presents the theoretical backbone of several strands of constitutionalisation committed to the goal of greater equality. Central to its ambition to tackle entrenched and patterned inequalities is the judicial enforcement of socio-economic rights and the greater reliance on anti-discrimination law as the remedy for deep rooted societal inequalities.

The study shows that judicialization of socio-economic rights is not the path towards greater level of socio-economic equality, as postulated by its proponents. The judicial enforcement of socio-economic rights can provide at best a piecemeal and temporary solution for the deprivations in the access to the basic socio-economic goods. But the judicialization of socio-economic rights cannot meet the promise of greater social justice because the distributional issues in essence remain outside of such an approach to the enduring socio-economic inequalities. Focused at the floor for protection in the socioeconomic domain, the human rights approach to socio-economic inequalities, Semuel Moyn argues, "has failed to respond to – or even allowed for recognizing neoliberalism's obliteration of the ceiling on distributional inequality".[1]

Neither can the rights approach tackle the problem of growing insecurity caused by intensive commodification and decreased availability of the basic social security services. The constitutionalisation of socio-economic rights is not a warranty that state will have more resources

[1] Samuel Moyn, 'Human Rights and the Age of Inequality' in: Doutje Lettinga, Lars van Troost (eds.), *Can Human Rights Bring Social Justice? Twelve essays* (Amnesty International 2015) 17.

for their realisation. The idea that prohibition of discrimination can secure more equal realisation of socio-economic rights is misleading because the problem of socio-economic inequalities of today is not about some identifiable acts of unequal treatment which prevent vulnerable groups from acquiring basic social goods, but about the deprivation itself.[2] The rights discourse cannot provide an answer to the problem of limited public resources that need to be allocated to a myriad of competing and shifting needs of the population at large. The non-political mode of decision-making which it promotes does not remove the essentially political character of these issues. By translating the social justice matters into the matters of legal justice, the process of constitutionalisation places them on the safe distance not only from the vagaries of everyday politics, but also from the questions over distribution of societal wealth, or what is left of it after the sweeping privatisation, deregulation and redistributive tax cuts.

Not more successful is the strategy to bring the entrenched socio-economic inequalities to the purview of law by expanding the reach of anti-discrimination law. With the death of the Socialist utopia and dismantling of the European welfare states in the years after the Cold War, the socio-economic equality has been transformed from the political question of breadth of universal public services in the right not to be discriminated in the access to the more and more meagre provision of basic socio-economic goods. Equality achieved through the prohibition of discrimination has become the new mantra of contemporary society.[3] The substantive equality doctrine rightly points to the structural discrimination as the source of patterned and persistent socio-economic inequalities, yet it is mistaken in its belief that the complex forms of unequal treatment occurring in the process of distribution of societal goods are amenable to change through anti-discrimination law. Legal process cannot embrace the multifaceted nature of structural discrimination, as much as the more and more profound socio-economic disparities cannot be dissected to the patterns which would fit the grounds-based anatomy of an anti-discrimination claim. As it is the case with the judicialization of socio-economic rights, no matter what we do to enhance its reach, anti-discrimination law cannot serve the goals placed before it by the substantive equality doctrine because the growing socio-economic inequalities are not a transient

[2] Similar on the judicial protection of socio-economic rights in US: Frank I. Michelman, 'The Supreme Court 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment' (1969) 83 Harvard Law Review 13.

[3] O'Cinneide similarly observes that: "[e]quality and the linked concept of non-discrimination are regularly cited by politicians, activists, academics and the media as a basic social good. […] However, the very ubiquity of the idea of 'equality' has served to conceal an absence of clarity about what it actually involves." Colm O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?' (2008) 1 University College London Human Rights Review 92.

feature of the post-Cold War society, but a faithful reflection of its basic conditions. The belief that law, with its dispassionate universalism, can resolve the problem of persistent societal inequalities is a mistaken one. Given the level and nature of today's socio-economic disparities, "[t]o have an effect universalism has to be combined with a strategy of equality which comes closer to the preaching of Matthew than to the practices in Sherwood Forest".[4] Greater equality is about an arduous and ceaseless journey through the word of politics.

Politicization of law

The attempt to place the task of tackling entrenched and patterned inequalities before law "leads not only to the legalization of politics but also to the politicization of law".[5] Such an instrumental use of law undermines law in both its functions: as a specific technic of social organisation that should provide legal certainty, as well as the one ensuing from the view of law as the perpetual quest for justice. The failure of law to successfully accomplish this task eventually leads to its deflation, while the judicialization of politics "threatens [to] delegitimize the legal expertise of the judiciary, arguably, one of its mayor social capitals."[6] Sooner or later, the myth of law that will rescue our societies from the chronic uncertainty generated by the current economic arrangements and instigate a profound social change in the name of freedom and equality,[7] will break under the weight of unmet expectation. But the danger is that with breaking of the myth, law might lose as well its majestic ability to make people believe that reason and justice are foundations of our society. Particularly in Europe, politicization of law can undermine the very essence of law, its internal logic and coherence, so diligently cultivated by the generations of judges, lawyers and legal scholars.

[4] Walter Korpi, Joakim Palme, 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries' (1998) 63 American Sociological Review 683.
[5] Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Hart Publishing 2000) 209.
[6] Koldo Casla, 'Dear Fellow Jurists, Human Rights Are About Politics, and That's Perfectly Fine' in: Doutje Lettinga, Lars van Troost (eds.), *Can Human Rights Bring Social Justice? (*Amnesty International Netherlands 2015) 46. Similar concerns are also expressed in: Guy Haarscher, 'Some Contemporary Trends in Continental Philosophy of Law' in: Martin P. Golding, William A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) 307.
[7] According to Guy Haarscher, this represents "the new myth of the twenty-first century". Guy Haarscher, 'Some Contemporary Trends in Continental Philosophy of Law' (n 6) 310.

But what are the circumstances which have given birth to the trend of legalization of politics and politicization of law. Without understanding its background conditions, we cannot hope to be able to untangle the matters which cannot be tackled through law from those for which law can provide meaningful answers. Neither could we find the way to move the problem of the growing socio-economic inequalities and other distributional matters back to the world of politics with the sound prospects that they will be adequately addressed there. The broader conclusion of this study is that legalisation of politics and the reverse trend of politicization of law are consequences of the impoverished conditions of public discourse.

The problem of public forums drained of civic energy, which turn politics into the discipline for perfecting technocratic and managerial skills, is not a new one. Already at the beginning of the last century, the breadth and complexity of matters to be decided by political means had given wings to the technocratic philosophy which, from the 1960s onwards, has been implanting the public decision-making process with the various forms of technocratic elements. However, it seems that neoliberal capitalism, globalisation and rapid technological development, as the three main organising frameworks of societal life analysed in this study, have so much accelerated the processes which have led to the citizen's disengagement from politics, that it looks as if the post-industrial society is at the verge to lose the very ability to articulate common good.

Political discourse and canonization of instrumental rationality

The most easily observable aspect of the contemporary society, which has an important bearing on the position of law, is the complexity of governance. With the new regulatory architecture of the globalized world, the technocratic governance became a necessity. Its expansion is further instigated by the "Big Data worship", as one of the side effects of the advanced digital technologies.[8] The canonization of instrumental rationality in the domain of public decision-making was accelerated with the "anti-political politics" of human rights. Since 1970s', human rights movement has been inscribing new meaning into the concept of rule of law. Today, rule of law, which in its original meaning "signified a non-instrumental understanding of law – law as 'autonomous' from political or economic goals", is being "frankly promoted as a means to achieve

[8] Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Edward Elgar Publishing 2015) xii.

a range of other public goods and fix an expanding series of ills".[9] This new conception of rule of law has made of law a panacea for societal ills. Together with science, law has become an instrument for value-free public decision-making.

The reign of instrumental reason, as "the social and political shift in priority from ends to means, from worrying about the larger meaning and purpose behind goals to caring only for the efficiency with which those goals are achieved",[10] is also enabled by several other trends underpinned through the coupling of neoliberalism, globalisation and rapid technological development. The liberal view of society as an aggregate of self-interested individuals was brought to yet another level with the neoliberal policies of dismantling the supportive social protection structures of welfare states.[11] In essence, the neoliberal project of capital accumulation alias efficient use of societal resources is based on the premise that "social good will be maximized by maximizing the reach and frequency of market transactions".[12] For that reason, since the end of Cold War, as the end of pseudo cohesion achieved through anti-communism and forcefully imposed socialist ideals, society is being approached as the sum of autonomous individuals who are united around the objective to enhance the "free market" conditions.

The fading ideal of common good

As long as the market is free, we can arrive to the desired societal ends, even if we are not sure what these ends are. The post-modern society is characterised by its diminishing capacity to articulate common ends. For the variety of reasons, the common good ideal "now has a distinctly old fashioned, almost obsolete feel".[13] In the world of today, well-being is conceived as autonomy and independence, measured by the extent to which one is free to pursue own choices. The societal well-being is, accordingly, seen as an aggregate of so defined individual well-beings. Such

[9] Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press 2010) 223.

[10] Such an approach to instrumental rationality, characteristic for the critical theory, has been inspired by the work of Max Horkheimer and Theodor Adorno. See: Ian Buchanan, *A Dictionary of Critical Theory* (Oxford University Press 2010) 249.

[11] A tacit expression of this view is the often-cited statement of Margaret Thatcher that there is no such thing as society. Douglas Keay, Interview with Margaret Thatcher for "Woman's Own", taken on 23 September 1987 and published on 31 October 1987 under the title "Aids, education and the year 2000!". Information retrieved on the Web site of the Margaret Thatcher Foundation https://www.margaretthatcher.org/document/106689 accessed 23 February 2018.

[12] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005) 3.

[13] Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press 2006) 226.

world is built on the classical liberal idea that the "public good is advanced as if by an invisible hand when individuals pursue their own good", and further enhanced by the process of "commodification of information, knowledge, experience, and time, [that makes it] difficult to differentiate between non-commercial and commercial aspects of life".[14] The Aristotelian idea of political society is replaced by society of free, rights-bearing individuals in which communal ends are conceived as means for the efficient realization of narrowly constructed private interests.

Through the process of specialization of knowledge, which in the last three decades has gained new momentum with the sweeping commodification, knowledge became even more fragmented. The enormous quantity of easily available information, enabled by digital technologies, have not led to the flourishing of public discourse. Instead, public deliberation is becoming clogged with data which an ordinary human being has difficulty to select, prioritize and interpret, both for their abundance as well for his/her intellectual horizons being narrowed through the "merchantilisation of knowledge". While a clone of monkey, the closest living relative of a man, is being created in a lab, social media are burning in flames of the passionate debates over vaccines. The information inundation eventually generates fanaticism, born out of ignorance and anxiety, or sense of frustration that becomes the road to passivity and the bystander's attitude towards the world.[15] The exposure to the infinite abundance of information also leads to what is in literature called "continuous partial attention", today a ubiquitous condition for many people which further reduces their ability to see the larger picture.[16] All of this reduced human ability to articulate goals which are beyond prosaicness of earning and consuming.

Public space, which is a physical precondition for public discourse, is shrinking. The process of commodification has transformed many public spaces into commercial sites. The privatization of

[14] Marina Vujnovic, 'Hypercapitalism' in: George Ritzer (ed.), *The Wiley-Blackwell Encyclopedia of Globalization* (Wiley-Blackwell 2017) 2.

[15] This phenomenon was in a metaphoric, yet authentic way depicted by Alan Kirby, a British theorist of post-modern culture and society: "If literary research is like marriage (a mind entwined with the tastes, whims, and thoughts of another for years) and ordinary reading is like dating (a mind entwined with another for a limited, pleasure-governed but intimate time), then Internet reading often resembles gazing from a second-floor window at the passersby on the street below. It's dispassionate and uninvolved, and implicitly embraces a sense of frustration, an incapacity to engage." Alan Kirby, *Digimodernism: How New Technologies Dismantle the Postmodern and Reconfigure Our Culture* (Continuum International Publishing 2009) 67-68.

[16] More on this in: Aaron Balick, *The Psychodynamics of Social Networking: Connected-up Instantaneous Culture and the Self* (Karnac Books 2014) 60. See also: Eileen Wood, Lucia Zivcakova, 'Understanding Multimedia Multitasking in Educational Settings' in: Larry D. Rosen, Nancy A. Cheever, L. Mark Carrier (eds.), *The Wiley Handbook of Psychology, Technology, and Society* (Wiley-Blackwell 2015) 406.

public services, which are now segmented to fit the different wealth section of their users, has increased fragmentation of society by taking away the habitual meeting points created through the universal education and health care, cultural and other activities evolving around the basic human needs. The process of commodification and privatization of natural resources has diminished the sense of community created through the care for common patrimony. At the same time, the virtual public space, today probably even more important that the physical one, is becoming a big "virtual living room". Through the widespread public "confessions" and similar acts of engaging with virtual society, countless number of individuals in fact "remain in their private space and are just expanding it to include others".[17] A new sort of alienation has replaced alienation produced by repetitive and mechanic work.[18] It emerged from the constant exposure to unceasing flow of information and "communication overload". "Not silence, but uninterrupted noise, not Antonioni's *red desert*, but a cognitive space overloaded with nervous incentives to act: this is the alienation of our times", writes a contemporary Italian philosopher to describe overstimulation of brain which results in an estrangement from self and others.[19]

The impoverishment of public discourse is also a consequence of the overall weakening of social solidarity "without which it is hard to imagine a community that can develop the minimal notion of the common good".[20] One could say that weakening of social solidarity is in the first place caused by the imperative of competition brought by the neoliberal capitalism, which reduces the meaning of societal and personal wealth to the economic and purchasing power. The level of social solidarity is also affected by the growing socio-economic inequalities, which lead to further social disintegration. All these different processes have resulted in the public discourse desolated to the point at which the modern epistemological doubt about the possibility of unbiased knowledge grew into a widespread sentiment that the notion of common good is a fiction.

[17] Slavoj Žižek, 'Welcome to the "Spiritual Kingdom of Animals"' in: Costas Douzinas, Conor Gearty (eds.), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014) 312.
[18] For an overview of different meanings of the concept of alienation as used until 1970s: Richard Schacht, *Alienation* (Psychology Press 1979).
[19] Franco "Bifo" Berardi, *The Soul at Work: From Alienation to Autonomy* (Semiotext(e) 2009) 108.
[20] Bogdan Denitch, *The End of the Cold War: European unity, socialism, and the shift in global power* (University of Minnesota Press 1990) xii.

Law as a substitute for politics

The diminished capacity of contemporary societies to construct an idea of public good which is other than aggregate of individual interests, has led to the situation in which common good becomes approached as balance of competing interests, a "success-oriented" as different from "understanding-oriented social action" to use a dichotomy developed by Habermas.[21] A consequence of this is a growing role of law in the matters which have been traditionally in the domain of public decision-making. The prevailing logic behind this tendency is that when there is no prospect of reaching a common understanding of what the common goals are, the process is there "to select or produce the correct outcome".[22] In effect, Tamahaha says, "[t]he combatants over and through law, […] do not necessarily envision themselves as pursuing their particular group interests *at the expense of* the common good". Due to the prevailing social attitudes, such as the one that public good is advanced when individuals pursue their own interest, "it is possible to pursue one's own particular agenda through law with the conviction that one is thereby promoting the public good".[23]

There is one particularly important consequence of this tendency to move a number of political matters from the political forums to the courtrooms. Law further narrows the horizons of public deliberation by "skeletonizing facts so as to narrow moral issues to the point where determinate rules can be employed to decide them".[24] These horizons have already been narrowed through the homogenization of societies brought by globalization and ubiquitousness of technology. They have also been narrowed by the "There is no alternative!" narrative of neoliberalism which is so pervasive that it is hard to think of any sensible alternative. But the problem of growing socio-economic inequalities, and a number of other social justice issues, are large scale problems which, to be tackled, require big picture and a capacity to define common societal ends. However, the big picture in the process of issue formation is not possible without the broader public involvement. This is not a populist claim, but an acknowledgement of "the factual and value-based complexity

[21] Habermas distinguishes between two types of social action: the one in which participants adopt a success-oriented attitude and the one in which they are primarily oriented towards reaching an understanding. Jürgen Habermas, *The Theory of Communicative Action (Volume 1): Reason and the Rationalization* (Beacon Press 1984) 286.
[22] Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (n 13) 224.
[23] ibid.
[24] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books 1983) 170.

of policy matters".[25] Yet, the goal of greater public involvement is hard to arrive at without the invigorating character of common goals. There can be no politics as "an alliance between people for specific purpose"[26] if there is no specific purpose.

To tackle the problem of persistent and patterned socio-economic inequalities, sketched in the first chapter, implies to question the very fundaments of societal organization. What are to be the criteria for the distribution of resources in the workless post-industrial society? How to uphold our "fiduciary responsibility" over natural resources towards the future generations in the world premised on the infinite economic growth and satisfactions of wants and preferences as the measure of well-being? How to create the conditions for distribution that would reflect the global conception of distributive justice which is today, for multiple reasons, a plain necessity. These and number of other questions of similar breadth and complexity need to be addressed not only for the sake of tackling the contemporary distributive justice dilemmas, but as a way to discover the new Archimedean point by which to calibrate the scales of justice.

[25] Sujatha Raman, 'Science, Uncertainty and the Normative Question of Epistemic Governance in Policymaking' in: Emilie Cloatre, Martyn Pickersgill (eds.), *Knowledge, Technology and Law* (Routledge 2015) 22.
[26] For Hannah Arendt this is the political meaning of a society. Hannah Arendt, *The Human Condition* (University of Chicago Press 1998) 78.

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