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Chapter V

Gender issue in John Rawls' concept of equality

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Equality is the soul of liberty; there is, in fact, no liberty without it.

Frances (Fanny) Wright (1795–1852)

Gender equality is more than a goal in itself. It is a precondition for meeting the challenge of [...] promoting sustainable development and building good governance.

Kofi Annan (b. 1938)

I. The idea of equality is not only a political slogan. It has been also (at least since the French Revolution) one of the fundamental principle both in law and political philosophy. However, there is a controversy in defining the precise notion¹ itself as well as in specifying the relation between equality and justice.

The social sciences have provided — next to the general concept — variety of different specific conceptions of equality (e.g.: libertarianism, utilitarianism). Equality may be basically viewed as a combination of aspects and principles — from formal equality (legal aspect), proportional equality (distributive aspect) up to moral equality (aspect of dignity and respect).²

The common ground for different conceptions is a complex and multifaceted nature of equality and its connection with social (distributive) justice. “Above all it serves to remind us of our common humanity, despite various differences.”³ It

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¹ Gr. *isotes*, Lat. *aequitas*.

² The moral equality — in terms of equal dignity and equal respect constitutes the ‘egalitarian plateau’ for all contemporary political theories — Will Kymlicka, *Contemporary Political Philosophy*, Clarendon Press, Oxford 1990, p. 5.

³ Stanford Encyclopedia of Philosophy: <http://plato.stanford.edu/entries/equality/>.

results with the need of establishing common basic social principles, rules and norms that ensure the just social order.

II. One of the most popular and successful current approaches to the issue of equality and justice is John Rawls' concept described mainly in *Theory of Justice*.⁴

It tries to escape from the utilitarian perspective and to create an alternative to it. This approach points out (as all the egalitarians) the formal aspect of equality — that everyone counts as one and no one as more than one and the interests of all should be treated equally, but in the same time provides such substantive version of the distributive aspect that served best the utility principle (*argumentum at utile*), neglecting the separateness of persons.⁵ In Rawls' opinion such approach cannot provide a satisfactory account of the basic rights and liberties of the citizens as free and equal persons. Justice 'does not allow that the sacrifices imposed on a few [or less powerful counted as a few — A.K.] are outweighed by the larger sum of advantages enjoyed by many.'⁶

In other words — utility principle cannot serve as a decent and proper base for 'well-ordered society'. It follows that the primary subject of justice is a basic structure of society, namely: the division and distribution of fundamental rights and duties (goods and burdens). This structure in a significant way influence everyone's life prospects. "Men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances."⁷ *Ergo* — the principles of social justice must in the first place apply to these inequalities. All basic social goods — liberty and opportunity, income and wealth, and the bases of self-respect, etc. are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored. As other egalitarians, Rawls does not hold inequality to be negative *per se* — not every case of unequal distribution must lead to social injustice. Nevertheless, the principles of justice shall serve the elimination of involuntary disadvantages.

Rawls' theory brings back and refresh the idea that is basic and fundamental not only for European, but entire so-called 'Western' political, social and legal culture — the idea of social contract. This, in turn, is based on assumption that people's nature is neither entirely altruistic nor purely egoistic and that the society is a combination of common and conflicting interests. Thus, the society must decide on fundamental principle of its own structure. Public conception of justice deriving

⁴ See also previous papers mentioned at: John Rawls, *Theory of Justice*, (revised edition), Cambridge, MA 1999, p. XX ('Preface'). Also idem, *Political Liberalism*, Columbia University Press, New York 1993.

⁵ Idem, *Theory of Justice*, p. 166–168.

⁶ *Ibidem*, p. 3.

⁷ *Ibidem*, p. 7.

from common acceptance — a ‘civil friendship’ — and based on the fundamental agreement. Such agreement⁸ is a result of a dialog between free, equal and rational persons in pluralistic society. Naturally free people (persons of equal liberty) rationally determine the principles of justice. Such principles provide a distribution of various social goods in order to prevent or solve the conflicts. Such rules shall be settle without any social prejudice or privileges, so “the original position of equality corresponds to the state of nature in the traditional theory of the social contract”⁹

As autonomous individuals, we all bear responsibility both for the consequences of our actions and for ameliorating unequal conditions. Freedom, however, does not indicate that individuals are responsible for circumstances beyond their control — race, sex, and skin-color, but also intelligence and social position — which thus are excluded as distributive criteria. In this context equal opportunity is insufficient because it does not compensate for unequal innate gifts. Human beings should have the same initial expectations of ‘basic goods’. This in no way precludes ending up with different quantities of such goods or resources, as a result of personal economic decisions and actions.

Since justice shall serve the elimination of inequalities, its principles shall be best chosen behind a veil of ignorance, where

no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.¹⁰

This way no one is able to design principles to favor his particular condition — which make initial situation as well as a result of the contract fair. This explains the name of the concept ‘justice as fairness’.

Thus, “a set of principles is required for choosing among the various social arrangements which determine [...] this division of advantages and for underwriting an agreement on the proper distributive shares”¹¹ There arise the question, whether such arrangements shall change with other social circumstances as a part of a social progress.

III. According to the above and following Rawls’ thought — minority must not cede its freedom to majority and the rational principles of justice serve the elimination of any inequalities which do not depend on human beings themselves and are accidental — just like a gender matter is. Despite the pure fact, that women are a majority (in

⁸ Further: Banu Kilan, *J. Rawls’ idea of an ‘overlapping consensus’ and the complexity of ‘comprehensive doctrines’*, “Ethical Perspectives” 2009, Vol. 16, No. 1, p. 21–60.

⁹ John Rawls, *Theory of Justice*, p. 11.

¹⁰ *Ibidem*.

¹¹ *Ibidem*, p. 4.

number) in the contemporary society, within the structures of power and decisional processes they still remain the status of a minority — the less favored. This fact not only leads really or potentially to unfair decisions, but also is strongly connected with the gender question—as is being perceived in social mentality, culture and norms.

Gender¹² in its socio-political aspect is defined as is the range of characteristics pertaining to, and differentiating between, masculinity and femininity. Firstly — it was used in a sense other than grammar category (feminine, masculine) in the 1950s by psychologist John Money¹³ and then widespread during the 1970s', when feminism embraced the concept of a distinction between biological sex and the social construct¹⁴ of gender. The feminist roots have attracted numerous antagonists to the idea.

Currently there are many various philosophical and sociological theories about gender — some of them of the radical nature. In short and on average — it may be defined as the relations between men and women, both perceptual and material. Since such relations evolve through times and with the social and cultural development, the legal constructs shall also evolve according to the actual changes.

Gender is neither determined biologically, nor inherently connected to one's physical anatomy. It is rather a result of sexual characteristics of either women or men, but is constructed socially. *Sex* is biological — at birth, it is used to identify individuals as male or female. *Gender* is far more complicated than the sex question.¹⁵ Along with one's physical traits, it is the complex interrelationship between those traits and one's internal sense of self as male, female, both or neither as well as one's outward presentations and behaviours related to that perception. In *Theory of Justice* Rawls does not use such a term as 'gender', though there is a simple mention about the category of 'distinctions based on sex'.¹⁶

Gender may be understood through traditional, transitional and egalitarian approach. In this very context term 'gender' refers mainly to the latter one — to the issue of equality between man and women and the problem of (non) discrimination and it does not mean denying neither differences between man and women nor the borders between biological sex. It is rather on 'fairness' and 'justice' than on denying that men and women are different. It is also connected with such oppositions — or better — interactions as: 'nature and culture', 'private

¹² Latin term *genus*.

¹³ *Vide*: John Money, *Hermaphroditism, gender and precocity in hyperadrenocorticism: psychologic findings*, "Bull Johns Hopkins Hosp.", June 1955, Vol. 96, No. 6, p. 253–264.

¹⁴ At the same time gender fits the social constructionist movement in psychology, that states since "some categories really are social constructions: they exist only because people tacitly agree to act as if they exist" — Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature*, Penguin Books, London 2002, p. 202.

¹⁵ Further reading, e.g.: *Sex versus gender*, in: *International Encyclopedia of Sociology*, Frank N. Magill (ed.), London–Chicago 1995, p. 1180–1181.

¹⁶ John Rawls, *Theory of Justice*, p. 85.

and public', the question of fair balance and harmony. It is on the question of power — and power is connected to the question of justice.

The main assumption is that biological sex is directly tied to specific social roles and expectations that define the behaviors that are 'appropriate' for men and women and determine women's and men's different access to rights. This leads to the creation of gender systems. The issue is that the social roles and in the same time the entire gender identity evolve. Such changes cause changes both in social norms and in legal regulations. Hence, two further questions arise: firstly — that not in every society (state) the political and legal system provides an accurate approval to such changes, the second — that the legal regulations may either hasten or inhibit them.

It is worth to emphasise, that the 'veil of ignorance' theory seems to be easily applied to gender theory. The human being may express, develop and fulfil themselves in a more successful and efficient way if there is no previous prejudice or at least assumption that their characteristics and behaviors shall refer to biological sex and the roles the social constructs provides for them on such ground.

Since an important component of the self-concept is derived from memberships in social groups and categories, the 'well-ordered society' shall follow aforementioned changes in gender-identity to support development of the individuals (in a short perspective) and social (in a further one). Thus, the social contract shall be constantly re-negotiated to match the actual situation and the legal regulations shall both follow and support such action.

The pure fact of having been born to the particular sex cannot automatically determine certain social roles, ignoring *de facto* practices, attitudes and social predispositions of a particular human being. The preserved social and legal constructs facing modern challenges may lead to unjust inequalities. In practice — although the specific nature and degree of these differences vary from one society to the next, they still tend to typically favor men. Since there is still strong 'common acceptance' for traditional gender-identity which may be viewed unfair, law may be a tool for — in some cases following in others supporting actual state. To serve the elimination of unfairness and inequalities certain legal principles (as non-discrimination principle)¹⁷ and institutions (as

¹⁷ The main global and European legal acts are clear on this matter. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". European Convention on Human Rights in its Article 14 (Prohibition of discrimination) states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association

quotas or parities)¹⁸ seem to be — in spite of huge controversy they usually cause at first in almost every society — proper measures to deal with such issues, which has been confirmed by both: the Council of Europe¹⁹ as well as the European Union.²⁰

Despite the aforementioned definition, gender is often misunderstood as being the promotion of women only. It is not, however. It focuses on women and on the relationship between men and women, their roles, access to and control over resources, division of labor, interests and needs.²¹ The impression that it serves the promotion of women solely may derive from the fact, that gender put the emphasis on — *inter alia* — the status of women as an actual minority, the issues of equality and choice as well as the non-discrimination principle.

VI. ‘Combining’ such issues with the aforementioned concept of equality — according to Rawls’ ‘strict compliance theory’²² predicates that, as mentioned, in the hypothetical well-ordered society the rational principles of justice serve the elimination of any inequalities which do not depend on individual human beings themselves and are accidental — just like a gender matter is.

with a national minority, property, birth or other status.” The Charter of Fundamental Rights of the UE in article 21 provide: “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” Further, in Article 23 (Equality between men and women) states: “Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.” Thus, it is clear that prohibition of discrimination is an element of the principle of equality.

¹⁸ Further reading: Mieke Verloo, *Another Velvet Revolution? Gender Mainstreaming and The Politics of Implementations*, IWM Working Paper No. 5/2001, Vienna 2001; Stina Larsrud, Rita Taphorn, *Designing for Equality. Best-fit, medium-fit and non-favourable combinations of electoral systems and gender quotas*, International Institute for Democracy and Electoral Assistance, Stockholm 2007.

¹⁹ E.g.: *Gender Mainstreaming — Conceptual framework, methodology and presentation of the good practices*, Final Report of Activities of the Group of the Specialists on Mainstreaming, Section on Equality between Woman and Men, Directorate of Human Rights, Strasbourg, May 1998, http://www.gendermainstreaming-planungstool.at/_lccms_/downloadarchive/00003/Europarat.pdf (access: 15.05.2015).

²⁰ *Vide e.g.*: Communication from The Commission: Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities, Brussels, 21.02.1996, COM(96) 67 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51996DC0067&from=EN> (access: 11.04.2015).

²¹ More: Heidi Bravo-Baumann, *Gender and Livestock: Capitalisation of Experiences on Livestock Project and Gender*, Working Document, Swiss Agency for Development and Cooperation, Bern, September 2000, *passim*.

²² A normative approach to the principles of justice as rational rules, that would regulate an ideal and hypothetical well-ordered society.

It is not deniable that through most of the history, law has constrained women and legal regulations have supported their exclusion from sociopolitical processes based on biological differentiation. This fact has created the sources of inequality and led to a situation of social injustice (understood as a lack of justice) and inadequacy. Nevertheless, as said, not every case of unequal distribution must lead to social injustice. It is worth deliberating what, then, could justify unequal distribution?

The first justification that Rawls' conception argues with aforementioned argumentum *ad utili* (the principle of utility) — does not seem to be compatible with the conception of social cooperation, since

it hardly seems likely that persons who view themselves as equals, [...] would agree to principle which may require lesser life prospects for some simply for the sake of a greater sum of advantages enjoyed by the others. Since each desires to protect his interests, [...], no one has a reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance of satisfaction.²³

Also the second argument that usually enters the debate, exceptionally permitting an unequal distribution (for example of wealth and authority) only if it results in compensating benefits for everyone, and in particular for the least favored²⁴ is not to be applied, because the aforementioned situation does not benefit everyone, on the contrary — it deprives 'less advantaged' of their benefits.

According to Rawls — most likely we finally settle upon a variant of the utility principle — but we at least can try to look for better solutions. Especially, we should not furnish a basis for inequality: that rather one should find mechanisms for securing equality, despite valued differences.

The legal regulations on non-discrimination and equality in the gender aspect seem to be linked mostly with creative, distributive, preventive, motivating and — last but not least — with educational functions of law, which in this case is a device for changing a social consciousness as well as socio-political manners and practice. There are no doubts though, that law may encourage to some social practice and discourage from another. It may also, eventually, change, form or at least affect the social attitude. Thus, such regulations preserve the principle of equal participation in social consciousness and then turn into established social practice. They are supposed to bring near that real possibilities for participation in all aspects of social life should be equally distributed.

Ergo, except for regulations on non-discrimination or parities/quotas the equal distribution demands support in various levels and aspects of the social structure in order to support not only formal equality (which is nowadays rather undeniable), but also its proportional and moral aspect.

²³ John Rawls, *Theory of Justice*, p. 14.

²⁴ Idem, *Political Liberalism*, p. 35; idem, *Theory of Justice*, p. 14–15.

It seems to correspond with Rawls' idea of organizing society as a 'fair system of cooperation' (based on rationality, reciprocity, impartiality and mutual advantage) and his concept of one of the main components of egalitarianism — an authentic equality of chances.²⁵ Fair equality of opportunity implies that not only must the competition regulated by quality of opportunity be procedurally fair, it must also minimize the impact of differences in social background of the competitors as a result.

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²⁵ *Idem*, *Political Liberalism*, p. 36 and 47–56.