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FOREWORD: PERSPECTIVES ON THE PRINCIPLE OF EQUALITY

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Foreword

‘Fourth, we will endeavor... to further the enjoyment by all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity’

Joint Statement by Franklin D. Roosevelt and Winston Churchill,
‘The Atlantic Charter’ (1941).

The obvious inadequacy of the traditional conception of State sovereignty as set down in 1945 in the Charter of the United Nations, becomes manifest. This conception, defined in terms of political factors to the exclusion of economic considerations, has made it possible to confer on a new State the visible and external signs of its sovereignty—a flag, a national anthem, and a seat in the United Nations—while the reality of power resides elsewhere. Behind the artificiality of the legal and institutional structures set up to lend some verisimilitude to the national sovereignty of the new State, can be discerned forms of real dependence, based on organized economic subordination which is utterly incompatible with the true notion of sovereignty. Traditional international law has helped to make independence a completely superficial phenomenon, beneath the surface of which the old forms of domination survive and the economic empires of the multinational corporations, and the powers that protect them, prosper.

M Bedjaoui, *The New International Economic Order* (1979) 81.

The relationship between formal and material equality is complex and unsteady. Its investigation in the present volume is as foundational as it is timely. Levels of global inequality in wealth and resource consumption are just staggering, only aggravated by the climate and health crises. Authoritarian populism pushes back against equal rights for all. And displays of power politics put differences in geopolitical prowess into stark relief. What is the role of the law and its embedded claims to equality? What is its relationship with material, substantive inequality? I want to distinguish three ways of thinking about this relationship in terms of domination, emancipation, and fluctuation.

First, one way of seeing the relationship between formal and material equality as one of domination is to argue, as classically done by Karl Marx, that rights abstract from concrete conditions of inequality in a way that not only leaves those conditions

entirely intact, but even entrenches and justifies them.¹ The argument there as elsewhere has been that a society built on rights, on formal equality, releases its members into conditions of material inequality and factual dependence. Another way to think about that same relationship in terms of domination is to argue—as is well established in international legal scholarship—that law’s origins lie in the process of colonial expansion during which non-European peoples were treated as formally equals, only to then be treated differently in the practical operation of the law.² They were included only to be distinguished and subjugated.

Giulia Gabrielli expands on such a critique in her present chapter in which she takes up the pioneering work of *Third World Approaches to International Law (TWAAIL)*. Sometimes referred to as a critique of “double standards”, the point is rather that the *same* standards create drastically different outcomes when they hit the ground because of differentiating principles that operate in tandem with claims to formal equality—such as degrees of civilization and development. *Lorenzo Gradoni*’s marvellous contribution on international law’s fictional engagement with a—pardon the pun—really existing *Animal Farm* makes a similar point that mirrors postcolonial critiques of international criminal law. Pigs are accepted as legal subjects in his narrative only to be subjugated by the law, sentenced under it.

Claims to formal equality are powerless in this line of critique because it is the law as an instrument of domination that defines equality and legal subjectivity in the first place.³ Law, in this view, is not legitimized through sovereign consent, by states or citizens, but it *makes* states and citizens in an expression of power. *Fulvia Ristuccia*’s argument goes in this direction in the present volume when she highlights the discriminatory and arbitrary effects of how workers are defined in the practice of EU free movement law, and how that bears on what it means to be an EU citizen.

A second way of thinking about the relationship between formal and substantive equality knows of the dynamics of the first, but still sees an emancipatory potential in the postulation of formal equality. Some of the critics of formal equality as an instrument of domination also appreciate the relationship between formal and material equality in this second way. As unsparing as their critique of the law and claims to formal equality may be, they would not want to give up on these claims either. That, too, is borne out by TWAAIL scholarship.⁴ The direction of the critique is then one of adjusting the way in which equality should be realized. There is a productive dialectic between the concrete application and the general aspiration to universal equality, as the present volume’s editors also note.

¹ Marx (1843) 2006 p. 347.

² This is shown with great force by Anghie 2005. Also already consider the work of the then crown jurist for the Nazis, Schmitt 1940, p. 164. Cf. von Bernstorff 2019, p. 154.

³ Pahuja 2011.

⁴ Cf. Al-Attar 2021.

Many of the present contributions argue in this way, highlighting biases and *de facto* discriminatory outcomes. *Giulio Fedele* makes the compelling argument that the European Convention of Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) are based on a heteronormativity—the assumption of heterosexual orientation which leads to discriminatory outcomes for LGBTQ+. *Stefano Dominelli* in turn shows how some states are *de facto* preferred over others in the operation of the EU conflict of laws.

Granted, the law can dominate and discriminate, but the claim to equality is an anchor to work against such domination and discrimination. Where not even formal inequality exists, everything seems to be lost. Formal inequality between subjects—as *Lorenzo Gasbarri* argues regarding international organizations—is a precondition for other kinds of equality. That is also the gist of the contributions by *Lorenzo Acconciamesa*, *Paola Ivaldi* and *Eduardo Benvenuti* who each, in their respective domain of inquiry, want to improve the situation of the weaker party in judicial proceedings. This is the case for *Carlo de Stefano*, too, who wants to tackle the inequality between foreign investors and host states by levelling up the latter. But in this latter case, treating the parties as equals before investment tribunals as we know them may in fact lead to greater material inequality. Rather than re-embedding the economy politically, the suggestion is likely to lead to the opposite, further subjecting politics to market rationality.

The divide between spheres of politics and economics takes me to a third way of thinking about the relationship between formal and substantive equality in terms of fluctuation. I read *Carlo Focarelli's* contribution as going in that direction. While he sees the emancipatory potential of sovereign equality as 'spur[ring] practice in the right direction ... struggle[ing] for a more just law', he also notes that '[t]he most striking feature of the principle is that it appears perfectly compatible with any kind of inequality'. In the third way of thinking about the relationship, however, the capacity of formal equality and material inequality to co-exist is less striking than it is necessary.

This co-existence is the defining feature of the liberal divide between politics and the public sphere, on the one hand, and economics and the private sphere, on the other. The principle of formal equality prevails in the former, and freedom reigns in the latter. In international law, the spheres are even separated institutionally, with the United Nations (UN) on one side and the International Financial Institutions (IFIs) on the other.⁵ It is no small coincidence that one, the UN, 'is based on the principle of the sovereign equality of all its Members' and the other, the IFIs, reflect inequality in weighted voting.⁶

The question is whether the tensions between these two spheres is productive. Many commentators suggest that it is not, that is rather a dead-end not unlike

⁵ Also see Boysen 2021.

⁶ See respectively Art. 2(1) UN Charter; Article V, Section 3, IBRD Articles of Agreement; Article XII Section 5, IMF Articles of Agreement.

the structure of international legal argument in which claims oscillate inescapably between apology and utopia.⁷ Following the work of Christoph Menke, it seems that there is an analogous oscillation between the private and public spheres, between politics and the economy.⁸ While the greatest formal freedom in the private realm would lead to greatest material dependence, welfarist interventions that aim at material equality could in turn be criticized, if taken to ever greater levels, in the name of private freedom. Interactions across this divide only stabilize and legitimize both sides, constituting each as the necessary other. But even then, the divide is not stable, but it fluctuates.⁹

The empire of free trade for ‘all states, great or small, victor or vanquished’, with ‘access, on equal terms’, which Franklin D. Roosevelt and Winston Churchill championed, has operated, as Mohammed Bedjaoui pointed out, as a fig leaf for the interests of the powerful. The postulation of formal equality has indeed led to great material dependence. The equality of access to trade and raw materials has been a farce, not only because materially different conditions have upended otherwise supposedly fair competition, but also because abstract claims of formal equality have always been at odds with material conditions on the ground. The way equality was given shape legally was skewed from the outset. The equally applicable law opened markets where it mattered most for the Global North, for example in services, and kept them closed where it mattered to the Global South either formally, for example through tariff spikes, or practically, for example through subsidies.

Formal equality, in this rendering, appears as domination. But at no point did Bedjaoui, or other critics from the Global South, want to give up on the emancipatory potential that they saw in political equality and formal sovereignty. It was truncated, not ‘true sovereignty’, it was a skewed battlefield and an unfair fight, but sovereign equality was still an unmissable asset.¹⁰ When Bedjaoui spoke for the political intervention in form of the *New International Economic Order*, that project was rebuffed, especially in the Global North, in the name of freedom. The ‘real new economic order’ was instead the one of neo-liberalism.¹¹ As of late, calls for a political re-embedding of the economy have again become louder. The relationship between formal and substantive equality continues to fluctuate. Stories of domination, emancipation, or fluctuation compete in their account of historical facts while the choice between them also expresses beliefs about what needs to be known in the present and for the future. They all have some traction.

⁷ Koskenniemi 2005.

⁸ Menke 2018.

⁹ Compare Polanyi 1944.

¹⁰ Bedjaoui 1979, pp. 90, 95, 244. Cf. von Bernstorff and Dann 2019.

¹¹ Mazower 2012.

Finally, a step back: Menke's *Critique of Rights* proceeds from a puzzle that Karl Marx saw in the revolutions of the 18th century and their proclamation of equal rights. That proclamation was a revolutionary political act, so Menke with Marx, whose consequence was however a total depoliticization. The postulation of equal rights would legitimize the arbitrary pursuit of interests in the private sphere, constraining politics to securing that private interaction would function well. Law and politics should serve the rights that precede it. Hans Kelsen was one of those who rejected this view, discarding it as the ideological justification for excessive property protection. Rights, Kelsen argued, emerge through law and do not exist before it.¹² One could similarly say that sovereignty does not constrain international law but, as *Carlo Focarelli* does via Kelsen in the present volume, that sovereigns are constituted by international law, that they come into being as sovereigns only through law.

What Menke adds is an inquiry into the *form* of rights, rather than their justification, contents, or effect. That form, in his view, locks critique in that fluctuation between welfarist intervention and private freedom without being able to do anything about the arbitrary pursuit of self-interest. Law may try to channel it, but otherwise presumes and naturalizes arbitrary pursuit of self-interest. One might counter that the operation of rights has always been more socially embedded than Menke or Marx suggest, even if dynamics of alienation through law are no doubt real. The critique of the form of rights does anyway point to an additional sphere of virtue and morality outside and beyond the law for thinking about equality. It is a slippery slope, but the argument that moral conflict, not the law, could be the sphere for an emancipatory dialectic is not new.¹³ Via the rich contributions in the present volume, this slippery slope points further ahead: What spurs the law forward, or backward, after equal rights?

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¹² Menke 2018, p. 24, with reference to Kelsen (1934) 2008, p. 53.

¹³ Honneth 2011.

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