Traditions of Equality and Economic and Social Rights

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1. Introduction

At the beginning of his article 'Rights of Man and Rights of the Citizen'[1] Etienne Balibar speaks about the contemporary significance of the French Declaration on the Rights of Man and the Citizen of 1789 as being found in the essence of a paradox[2] located within its terms. As he puts it, the Declaration

> is accompanied by the consciousness of an apparently irreducible split between concepts (freedom and equality) that are nonetheless felt to be equally necessary. Contemporary liberalism is not alone in positing that, outside of very narrow limits (those of a juridical form), "freedom" and "equality" are mutually exclusive. This conviction is widely shared by socialism at the very moment that claims for freedom and equality can be clearly seen to depend upon one another in practice.[3]

Freedom and equality, in other words, seem to be both practically entwined, yet conceptually or ideologically separate. This separation Balibar recognizes in several, apparently, self-evident axioms that occupy liberal discourse: that equality is economic or social, whilst freedom is juridico-political in nature; that the realization of equality occurs through state intervention, whilst the preservation of freedom is effected through the limitation of this intervention; that equality is a collective goal whilst freedom is essentially individual.[4]

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[1] Balibar E., 'Rights of Man and Rights of the Citizen: The Modern Dialectic of Equality and Freedom', in *Masses, Classes, Ideas* (trans Swenson, 1994) 39.

[2] Or, more precisely, in the relationship between 'the aporetical character of the text and the conflictual character of the situation in which it arises and which serves as its referent'. *Ibid*, p. 41.

[3] *Ibid*, p. 39.

[4] *Ibid,* p. 40. One may understand Balibar's account here as being a version of that articulated by Berlin in his celebrated essay 'Two Concepts of Liberty' in Berlin I., *Four Essays on Liberty* (1990) 118. See especially his introduction (p. liii):
'It is important to discriminate between liberty and the conditions of its exercise. If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him, but it is not thereby annihilated. The obligation to promote education, health, justice, to raise standards of living… is not made less stringent because it is not necessarily directed to the promotion of liberty itself, but to conditions in which alone its possession is of value, or to values which may be independent of it. And still, liberty is one thing, and the conditions for it another.'

Albeit the case that, for the most part, Balibar's attention is subsequently drawn towards addressing this paradox through the advancement of an interdependent concept of 'equaliberty'[5] (to which we will return),[6] his initial presentation of the issue has some obvious interest for the way in which the idea of equality might operate in the context of economic and social rights. As he describes them, the axioms dividing the idea of freedom from that of equality seem to parallel those that historically have been understood to divide civil and political rights from economic, social and cultural rights. Of course to think about equality solely in terms of economic and social rights, or indeed liberty purely in terms of political freedoms is to deny much of the historic scale and force of such concepts. But it does, at the very least, point to an idea of some interest and that is the apparent connection that seems to exist between action directed towards the promotion of equality (and one must include here law prohibiting discrimination) and the furtherance of economic, social and cultural rights. To what extent, it might be asked, are these parallel or indeed even identical agendas? Is the advancement of economic and social rights merely the working out of the idea of equality?

Before exploring this idea further, however, it is worthwhile pausing briefly upon the terms of the French Declaration itself. As Balibar notes, article 2 of the Declaration of 1789 describes the 'natural and imprescriptible rights of man' to be 'freedom, property, security and resistance to oppression'. What is notably absent from this, of course, is any mention of equality, or indeed of social or economic rights.[7] And this, of course, sustains the longstanding notion that rights 'emerged' in generations: the Declaration being concerned, above all else, with civil and political rights, whilst concern for economic or social rights was something that developed in the course of the 19th Century.[8] It would be wrong to suppose, however, that the notion of equality is entirely absent from the Declaration as a whole. Indeed it finds its traces in other articles - most notably in article 1 ('Men are born free and remain free and equal in rights') and article 6 ('All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents').[9]

That article 1 speaks of men being born 'free and equal in rights' is classically taken to constitute an appeal to natural rights.[10] It certainly did not represent, as Bentham subsequently pointed out, a statement of fact.[11] And it was in virtue of the obvious chasm between the bold affirmation of equal rights on the one hand and the reality of differentiated social and economic entitlements on the other, that made transparent the

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[5] As he puts it elsewhere 'equaliberty' stands for the proposition that 'equality is impossible without liberty and liberty impossible without equality, and *therefore* that liberty and equality stand in relation of mutual implication'. Balibar E., 'Is a Philosophy of Human Civic Rights Possible? New Reflections on Equaliberty', South Atlantic Quarterly (2004) 311, p. 313.

[6] This exercise, in many senses, may be construed as a response to Marx's critique of the French Declaration on the Rights of Man and the Citizen in 'On the Jewish Question' (1843)., in McLellan D., *Karl Marx: Selected Writings* (2000) 46

[7] The Declaration of 1793, by contrast, defines the rights as 'equality, liberty, security, property' and contains liberal references to both equality and to social and economic rights. E.g., article 5 (equal eligibility to public employment); article 21 (right to public relief); article 22 (right to education). These were not to survive in the Constitution of 1795, however, nor were they such as to persuade Marx that any of the rights went 'beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community'. The reference to equality, in his view, simply referred to the idea that 'each man shall without discrimination be treated as a self-sufficient monad'. *Ibid*, p. 61.

[8] See generally, Marshall T., 'Citizenship and Social Class', in *Class, Citizenship and Social Development* (1964)

[9] French Declaration on the Rights and Duties of Man, 1789.

[10] See e.g., Vlastos G., 'Justice and Equality', in Waldron J. *Theories of Rights* (1984) 41, p. 43; Vincent R., *Human Rights and International Relations* (1986) 25

[11] Bentham J., 'Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution', in Waldron J. (ed) *Nonsense upon Stilts* (1987) 46.

fact that the rights in contemplation were not those already recognized in daily life, but those that were asserted to exist as a consequence of an individual's humanity. Indeed, it is possible to go further than this and argue that only in virtue of this reference to equality was it made perfectly clear that the key consideration for purposes of having such rights was that of being 'human' rather than social status, merit, or exchange.[12]

Of course, it was perfectly evident that the mere fact of being human was far too indiscriminate a test in the circumstances of the French Revolution not least because it put on the table the possibility that rights might also inhere in women[13] and even slaves.[14] Even if one takes as read, a general shift between the Jacobin and subsequent Thermidorian phases of the Revolution,[15] it was nearly always clear that neither of these implications were fully intended (in the case of women, the very title of the Declaration was all the clarification needed), and the subsequent introduction of property qualifications on the right to vote (and even more extensive qualifications on the right to hold office) merely affirmed that the kind of equality envisaged here was, at best, a severely constrained one. At worst it was mere hypocrisy.[16]

Yet Balibar suggests a somewhat different function for this reference to equality in the Declaration. As he sees it, the place occupied by the idea of equality was such as to allow it to operate as a *substitute* for human nature rather than merely its affirmation. He points out, after all, that:

> The Declaration does not posit any "human nature" before society and the political order, as an underlying foundation or exterior guarantee. Instead it integrally identifies the rights of man with political rights and, by an approach that short-circuits theories of human nature as well as those of theological significance, identifies man, whether individual or collective, with the member of political society.[17]

On this reading, the concept of equality provided the means by which the Revolutionaries could avoid the problem of having to determine the 'origin and modalities of association' (which would have required reference to some developed metaphysics of human nature) and did so by effectively merging the idea of human rights with citizens' rights.[18] If the rights in question were the political rights of the citizen (the right to vote or be elected to office), equality merely affirmed the basic postulate of civic republicanism namely that all those designated as 'citizens' should have equal access to the realm of the political (under

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[12] This was a point emphasised by Arendt in her classic account of the 'Perplexities of the Rights of Man", where she argued that the rights of man are the rights of those who have been stripped of any other meaningful connection with others in society – where they are merely 'human'. Arendt H., *The Origins of Totalitarianism*, (1968) pp. 297-8, 302.

[13] See Scott J. *Only Paradoxes to Offer: French Feminists and the Rights of Man* (1996); Naish C., *Death Comes to the Maiden: Sex and Education 1431-1933* (1991) pp. 136-7; Heuer J., *The Family and the Nation: Gender and Citizenship in Revolutionary France 1789-1830* (2005).

[14] See James C., *The Black Jacobins: Toussaint d'Ouverture and the San Domingo Revolution* (1980) 140). For a general critique see Douzinas C., *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000) esp. 96-100.

[15] See Gauthier F., *Triomphe et mort du droit naturel et Revolution 1789-1795-1802* (1992)

[16] See Elster J., 'Throwing a Veil over Equality: Equality and Hypocrisy in the Revolutionary Era', in Sypnowich C. (ed) *The Egalitarian Conscience: Essays in Honour of G.A. Cohen* (2006) 36.

[17] Balibar, *supra*, n. 1, p. 45.

[18] Ibid, p. 45 (the rights of man and the rights of the citizen 'are exactly the same'). His inspiration here, of course, was Arendt's critique of the rights of man. He makes the point, however, that the 'man' alluded to in the Declaration was not the private individual Marx identified in *On The Jewish Question*, but rather the citizen whose identity came to be recognized in the act of founding a new State. It is arguable, nevertheless, that Balibar therefore merely takes Marx's conclusion as his starting point – Marx's conclusion being that the actual individual need 'recognize his own forces as social forces' and not be inclined to separate them from himself as political forces – and insists that the Revolution did not affect the kind of separation of which Marx complains. (*supra*, n. 6, p. 64)

the rubric perhaps of 'one man one vote' or its notional equivalent).[19] This meant, of course, that the enjoyment of rights was to be mediated through 'citizenship' as a category and which thereafter pushed attention towards the terms under which citizenship might be enjoyed (encouraging, in the process, the articulation of new distinctions between active and passive citizenship[20]). Yet it also made clear that the key to the Declaration was this idea of equal access to politics[21] which Balibar sees to be expressive of an emergent idea of 'equaliberty'.[22]

As this suggests, Balibar's point was more than simply to note how this conflation of human rights with civil rights through the reference to equality enabled the 'bracketing', or avoidance, of natural rights arguments.[23] In part also it was to articulate how, in this context, the ideas of freedom and equality were effectively coeval: the demand for freedom always going hand in hand with a demand for equality. He notes, for example, that the 1789 revolutionaries had two, apparently distinct, agendas: one being to combat absolutism (the negation of freedom), the other privilege (the negation of equality). Yet, he contended, when explored more carefully it was evident that each of these evils were historically and politically intertwined: the affirmation that 'the royal will is law' (absolutism) was not so different from the idea that 'might makes right' (privilege). Whatever the conceptual distinctions, in other words, the practice of emancipation was such as to make the agenda of freedom indistinguishable from that of equality.[24]

At this point, Balibar seems to come very close to understanding equality merely in terms of a demand for what might be called the 'lateral' extension of political rights to categories of the excluded – to salaried workers or dependents, women, slaves and the colonized – a demand which, given its close affinity to the idea of a 'right to have rights', again reflects upon his debt to Arendt.[25] That this might also be problematic is fully evident from another contemporary reading of the demand for equality that ran in an entirely different direction. As Buonarroti's account of the Conspiracy of Equals of 1796 makes clear, the mere expansion of the franchise was seen by many at the time as a poor substitute for those broader concerns associated with the idea of equality in conditions and enjoyments of life[26] and which had found partial recognition in the earlier draft Declaration of 1793. As Dunn puts it, 'the friends of equality clearly recognized the destructiveness of

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[19] On the distinction between this form of 'status equality' associated with political rights, and a 'distributional equality' associated with social and economic rights see Moyne S., *Not Enough: Human Rights in an Unequal World* (2018) pp. 3-4.

[20] See Elster, *supra*, n. 16, pp. 42-51.

[21] Balibar, *supra*, n. 1, p. 49 ('But it can also be understood that the signification of the equation man= citizen is not so much the definition of a political right as the affirmation of a *universal right to politics*').

[22] *Ibid,* p. 46 (the proposition of equaliberty being that 'equality is identical to freedom, is *equal to freedom*, and vice versa. Each is the exact measure of the other'), and p. 49 ('you cannot have discrimination without also having subjection (or, in the language of tradition, "tyranny"); conversely you cannot have subjection or tyranny without also having discrimination and inequalities.')

[23] Balibar deliberately sets himself against a Platonic account of the ideas of liberty and equality which would seek to discover or unveil their 'essence'. Rather his account is experiential or historical: the de facto historical conditions of freedom being the same as the de facto historical conditions of equality (*ibid*, p. 48).

[24] For a discussion of the analytics of this relationship, see Waldron J., *Liberal Rights: Collected Papers 1981-1991* (1993) 1-34.

[25] *Supra*, n. 12. Cf also Schmitt C., *The Crisis of Parliamentary Democracy* (1925, trans Kennedy E. 1985) 9 ('Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity.')

[26] Buonarroti P., *La conspiration pour l'égalité*, (1830, Editions Sociales, Paris. 1957). The *Manifesto of the Equals* (1796), penned by Sylvain Maréchal, spoke as follows: 'What do we need beside equality of rights? We need not only that equality of rights be written into the Declaration of the Rights of Man and the Citizen; we want it in our midst, under the roofs of our houses.' See further Moyne, supra, n. 19; pp. 22-23; Rosanvallon P, *The Society of Equals* (2013) p. 51.

concentrating on constitutional reconstruction at the expense of real equality of condition.'[27]

But it is clear that Balibar does not intend to confine his understanding of equality in this way. To begin with, it should be noted that his reading of the Declaration is not one that sees it as marking the triumph of the idea of human nature over divine right, but as representing 'the irreversible beginning of the crisis of classical natural right' in which a 'new ideological field' was to open up in the following century.[28] The Revolution, at the end of the day, was neither exclusively bourgeois, nor foundational (no mention, for example, being made of a 'contract' of government), but was rather formed by a complex alliance between the bourgeoisie and the people (or the 'nonbourgeois masses' as he puts it). Its broad appeal was obtained only by way of keeping open-ended and contested the very character of the act of political association. The Revolution, in that sense, was 'always chasing the unity of its opposites'.[29] The meaning of the terms 'equality' or 'liberty' within the Declaration, thus, could not be taken as expressive of historically stable ideals, nor did they have a determinate essence capable of being discovered or unlocked.[30] Rather, they contained within themselves the very indeterminacy and contestation that marked the Revolution itself, and therefore merely delimited an 'indefinite sphere of politicization'. The apparent lack of fixity, in other words, was thus the primary strength of the Declaration enabling perhaps the contemplation of schemes of justice that are more open-ended, and more capable of engaging with the problems of both domination and distribution (oppression and injustice) rather than one at the expense of the other.[31]

One important insight, here, is the idea that every moment at which the content of equality has come to be fixed, is also a moment in which it has come to be fixed as a form of exclusion, the effects of which may be read as a denial (in one context) of the very equality that is proclaimed (in another).[32] There is nothing novel, for example, in the observation that it took another 50 years for the political equality invoked by Declaration on the Rights of Man to be extended to the slave populations elsewhere in the Empire, and yet another 100 for it to enable women the right to vote.[33] Nothing unusual either in the idea that initial demands for political equality were later extended into demands for social and economic equality (from employment to education, social security, health, housing and food). The genealogy of the concept of equality, thus, may be told in terms of sequential moments of re-articulation in which the limits of the prevailing conception of equality are laid bare leading to the formulation of a new provisional consensus, whose own terms will be successively contested. This, of course, is not a historical process that can be understood in terms of the working out of a pure egalitarian ideal, nor as one in

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[27] Dunn J., Setting the People Free: The Story of Democracy (2005) 125; Furet F., *The French Revolution 1770-1814* (1988, trans 2006) 169-177.
[28] Balibar, *supra*, n. 1, p. 43.
[29] *Ibid*, p. 44.
[30] *Ibid*, p. 47.
[31] For a critique of the prevailing emphasis on the question of distribution see Young I, *Justice and the Politics of Difference* (1990), pp. 15–16 ('I find two problems with the distributive paradigm. First, it tends to focus thinking about social justice on the allocation of material goods such as things, resources, income, and wealth, or on the distribution of social positions, especially jobs. This focus tends to ignore the social structure and institutional context that often help determine distributive patterns. … [Secondly, and when] metaphorically extended to nonmaterial social goods, the concept of distribution represents them as though they were static things, instead of a function of social relations and processes.... I wish rather to displace talk of justice that regards persons as primarily possessors and consumers of goods to a wider context that also includes action, decisions about action, and provision of the means to develop and exercise capacities. The concept of social justice includes all aspects of institutional rules and relations insofar as they are subject to potential collective decision. The concepts of domination and oppression, rather than the concept of distribution, should be the starting point for a conception of social justice....').
[32] Cf. Menke, *Reflections of Equality* (2006) whose dialectical understanding of equality sees it as both an affirmation and denial of individuality (see esp. pp. 7-8)
[33] On which see Douzinas, *supra*, n. 14, pp 96-100.

which the content of 'equality' will ever be entirely exhausted.[34] Indeed its very discriminatory function is such as to ensure that its moments of repose (the moments at which it appears that there is some kind of agreement as to what 'equality' might mean) are those in which its purchase as an idea fomenting change will come to the fore.

A more significant observation, however, is that Balibar wants to take us away from an examination of the concept of equality in isolation from that of freedom. As the rubric 'equaliberty' suggests his insistence is that that the practice of emancipation has always operated by way of an equation between liberty and equality such that the point of tension is found to rest, not upon the immanent analytics of those ideas, but in the relationship between them (when seen as a complementary pair) and the social conditions of dependency and oppression to which they give rise. I shall return to some of these points below, but before doing so it seems necessary to explore more immediately and concretely some of the themes that have run through the thought and practice of the idea of equality and their relationship to the question of freedom.

2. Two Concepts of Equality

As Raymond Williams pointed out, by the time of the revolution of 1789 two very different notions of equality had already established themselves in social thought. As he was to describe them, the first version was one which built upon the idea that all individuals are naturally equal as human beings and which demanded, therefore, a continued process of equalisation of social and economic conditions. This was a concept of equality

> in which any condition, inherited or newly created, which sets some men above others or gives them power over others, has to be removed or diminished in the name of the normative principle.[35]

The notion spelt out here was one which harked back (albeit in far from unqualified terms) to that enunciated by the Levellers in the 1640s[36] and which, as has already been mentioned, reappeared in the context of the French revolution in the form of the agenda set by Babeuf and others as part of the Conspiracy of Equals. The second notion of equality, was concerned more with opportunities than outcomes, and saw itself primarily in terms of the removal of institutional privilege.[37] The object, in other words, was to ensure that people 'start equal' in the competition for social resources even if it was implicit that the same people would eventually become unequal in achievement or condition.[38] This second version is one which has, as its main idea, the elimination of formal impediments to human agency or free choice and finds its most common

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[34] As Balibar puts it, 'if these epochs succeed upon one another, or engender one another, they do not supplant one another like the scenes in a play: for us, and consequently in our relation to the political question, they are all still present in a disunified totality, in a noncontemporaneity that is the very structure of the "current moment".' (*supra,* n. 1, p. 59)

[35] Williams R., *Keywords* (1976, 1988), p. 118. For an argument that the broadening of rights of citizenship in the 20th Century sustain a general agenda of equalisation see Marshall, *supra*, n. 8, pp. 102-3.

[36] The Leveller's agenda was, by and large, purely concerned with the broadening of the franchise to include all 'free Englishmen'. 'Free' in this context meant those who could freely dispose of their own labour or 'property in their own persons' (which excluded, for example, wage labourers). See generally Brailford H. *The Levellers* (1961); Hill C., *The World Turned Upside Down* (1972); Gurney J., *Brave Community: the Digger Movement in the English Revolution* (2007); Marks S., *A False Tree of Liberty* (2021) chapter 4. Moyne argues that 'sufficiency and equality as obligations of social justice only came into view in the eighteenth century, when society itself became newly visible to its members and just social relations became something to bring about through politics and markets'. Moyne, *supra,* n. 19, p. 19.

[37] As expressed in Article 6 of the French Declaration on the Rights and Duties of Man of 1789:
'All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.'

[38] Moyne, *supra,* n. 19, p. 4.

expression in the principles of 'non-discrimination', 'equal treatment', and 'equality of opportunity'.[39]

Looked at from one direction, it is possible to regard these two modulations of the notion of equality as being broadly co-terminous. The concept of equality of opportunity, for example, invites reflection upon the kinds of social arrangement that may be productive of advantage or privilege. A limited version of this, of course, would be to think only of those formal, and overt, forms of discrimination associated with inherited or unchosen attributes that might hinder equality of access to public goods (such as class, race, or gender).[40] Here, the distinction between the formal, or procedural, notion of equality and that concerned with outcomes or results is clear enough: what is entertained is merely the elimination of certain grounds for differentiation, leaving presumptively untouched inequalities that might emerge as a consequence of other 'legitimate' kinds of discrimination such as those associated with skill, aptitude, or hard work or those that are purely a product of individual life-choices. Another broader conception of equality of opportunity however might engage with the factors that condition the acquisition of the presumptively 'personal' attributes of talent, intelligence or endeavour[41] (the 'social production' of such valued abilities through schooling, the family and other environmental factors[42]) for which the conclusion might be that only with a systematic and ongoing programme of social and economic reform will equality of opportunity ever be achieved. The latter conception of equality of opportunity, in other words, would represent the point at which an argument about the value of autonomy merged into an argument about substantive justice.[43]

As much as these two notions of equality might be pushed together, each version seems to model the relationship between equality and freedom in a slightly different way. The first seems to suppose that equality should be the measure of freedom: freedom perhaps being constituted in those privileges and immunities which may be enjoyed consistent with the same social and economic advantages for all. The second seems to suppose, by contrast, that freedom should be the measure of equality: that any egalitarian desire to address privilege or disparities in wealth should be conditioned by whatever is conceived

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[39] One may read, for example, the contrasting stances of Nozick, Rawls, Dworkin, Nagel and others as consistently engaged in the (Aristotelian) problem of trying to determine which considerations (biology, social class, talent etc) need to be excluded for purposes of ensuring equality of opportunity or the just distribution of social resources. See Rawls J. *A Theory of Justice*, (1971) pp. 71-75; Dworkin R, 'What is Equality?', Parts I and II, 10 Philosophy and Public Affairs (1981); Nozick R., *Anarchy, State and Utopia* (1974) pp. 149-231; Nagel T., *Equality and Partiality* (1991). See generally Kymlicka W., 'Left-Liberalism Revisited' in Sypnowich C. (ed) *The Egalitarian Conscience: Essays in Honour of G.A. Cohen* (2006) 9.

[40] See e.g., Tawney R., *Equality* (4th ed., 1964) p. 113 ('What is repulsive is not that one man should earn more than others, for where community of environment, and a common education and habit of life, have bred a common tradition of respect and consideration, these details of the countinghouse are forgotten or ignored. It is that some classes should be excluded from the heritage of civilization which others enjoy, and that the fact of human fellowship, which is ultimate and profound, should be obscured by economic contrasts, which are trivial and superficial'). This is what Scanlon refers to as 'status equality', Scanlon 2018, chapter 3).

[41] See Williams B., 'The Idea of Equality' in Bedau H., *Justice and Equality* (1971) 116, p. 132 (Equality of Opportunity requires 'not merely that there should be no exclusion from access on grounds other than those appropriate or rational for the good in question, but that the grounds considered appropriate for the good should themselves be such that people from all sections of society have an equal chance of satisfying them.')

[42] This was the original idea behind the term 'meritocracy'. See Young M., *The Rise of the Meritocracy* (1958); Arendt H., 'The Crisis in Education' (1958). See more recently, Miller, *Principles of Social Justice*, (1999); Littler J. *Against Meritocracy: Culture, Power and Myths of Mobility* (2018); Markovits D., *The Meritocracy Trap* (2019). An element in some meritocratic thought, however, appears to be a determination to distinguish between 'environmental' and 'genetic' endowments the effect of which is to merely shift the point of differentiation between the 'social' and the 'personal' rather than eliminate it entirely. For discussion of this point in light of Rawls' critique see Sandel M., *Liberalism and the Limits of Justice* (1982) 72-77.

[43] For a discussion see Sadurski W., *Equality and Legitimacy* (2008) pp. 41-93.

necessary to preserve and promote the ability of individuals to choose for themselves their own version of the 'good life'. The orientation of each of these positions, of course, is important. The second version's emphasis upon agency and choice is such as to allow the possibility of greater inequalities in the enjoyment of social goods or benefits emerging over time in a way that appears to be denied by the first. Its concern is essentially with the process rather than the substance of distributive justice.[44] In similar spirit, the first version's emphasis upon the continued equalisation of social and economic conditions is to invite measures that progressively reduce the scope for the pursuit of individual life choices in a condition of semi-autonomy in a way that appears to be denied by the second.[45] The first leans more towards a democratic notion of equality insofar as it implicitly understands its operative domain to be bounded by the outer edges of the polis (the process of equalisation necessarily being mediated through political institutions); the second towards a liberal notion of equality whose individualist ethic is universal in orientation and which merely serves to demarcate the permissible limits on the power of political institutions rather than provide the justification for them.[46]

Of course, what is reflected here is neither an historical account of the relationship between equality and liberty, nor one that finds perfect expression in any particular formal setting. Rather, they are tendencies or orientations to the question of equality that may simply dispose interpretive activity in one direction or another. Importantly, however, the two traditions of thought may be said to have informed, if not animated, the post-1945 divisional architecture of international human rights law, giving particular impetus to the emergent separation between economic and social rights, on the one hand, and civil and political rights on the other.

The Universal Declaration of Human Rights of 1948 ante-ceded the formal division of rights that was to occur at the behest of the Commission of Human Rights in the early 1950s. It was drafted, as Moyne notes,[47] at a time in which the influence of national welfare state was dominant. Drawing upon themes redolent in the work of those such as Marshall[48] and Polanyi[49] it provided, amongst other things, a template for the national welfare state emphasising a certain form of 'distributive justice' as much as 'the liberties of mind, speech, and person'.[50] Whilst the references to equality in the Declaration invoke, for the most part, the idea of equal rights and non-discrimination,[51] (and hence

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[44] Rosanvallon, *supra,* n. , p. 255-6. As Scanlon points out, however, an emphasis upon 're-distribution' may detract attention away from the necessity of justifying initial distributive arrangements eg. in relation to property rights. Scanlon T., *Why Does Equality Matter?* (2018), chapter 7.

[45] See e.g., Flew A., *Equality in Liberty and Justice* (1989)

[46] For this distinction between liberal and democratic equality see Schmitt, (n. 22 above), pp. 9-13.

[47] Moyne, *supra,* n. 19.

[48] *Supra,* n. 8.

[49] Polanyi K., *The Great Transformation* (1944)

[50] Moyne, *supra,* n. 19, p. 44. Moyne is, in fact far more assertive on this point, arguing that it's original valence was radically different from that attributed to it in later years. It concerned 'national communities and their redemption, not primarily a warrant for supranational concern'. It envisaged the welfare state at home as a talisman against the geopolitics of war, not some supranational authority for politics of atrocity prevention abroad…. And the Universal Declaration was connected with the believable empowerment and intervention of the State, not the prestige of non-governmental action or the cautious reform of judges with which social rights became bound up in a neoliberal age'.

[51] The preamble speaks of the 'equal and inalienable rights of all members of the human family' and the 'equal rights of men and women'. Article 1 declares that '[a]ll human beings are born free and equal in dignity and rights', and article 2 that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind'. Finally, article 7 declares that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law'. Further references to equality are to be found in article 10 ('Everyone is entitled in full equality to a fair and public hearing… in the determination of his rights and obligations'), article 16 ('Men and women… are entitled to equal rights as to marriage, during marriage and at its dissolution'), article 21 ('Everyone has the right of equal access to public service') article 23 ('Everyone, without any

William's idea of equality of opportunity), its inclusion of a range of social and economic rights – including the rights to education, to 'a standard of living adequate for health and well being', and to 'rest and leisure' - gestured towards a more substantive, if not egalitarian, conception of equality. There, it was to be assumed, States would utilise the instruments available to them, to guarantee, at the very least, minimal levels of enjoyment of the rights in question.[52] And in the context of the mixed-market liberal democracies of the 1950s, that would usually involve active measures of re-distribution through taxation and public provisioning.

This idea was to be made much more explicit in terms of the UN Covenant on Economic, Social and Cultural Rights that was to be drafted in the decades following the adoption of the Universal Declaration. The Covenant was to re-affirm as binding commitments, many of the economic and social rights found in the Universal Declaration (excluding, notably, the right to rest and leisure), whilst premising their full realisation upon programmes of state intervention. States were to use the 'maximum of available resources', both national and international, for purpose of the 'progressive realisation' of the rights in question (eg food, health, housing, work and education).

On the face of it, the Covenant appears to rehearse the welfarist preoccupations of the Universal Declaration, and in so doing appears to contemplate a very modest form of egalitarianism. What appears to be in contemplation is not so much the question whether individuals have access to such social goods in equal measure, but whether they have access to them at all. And in so far as the central concern is the fulfilment or otherwise of such rights - conceived perhaps as 'basic needs'[53] - it may seem to be premised upon an agenda that falls some way short of a demand for the continued elimination of disparities of wealth, income or access to other social goods in the fields of housing, education or health care.[54]

Whilst article 11 – which speaks of the right to an 'adequate standard of living' – would appear to confirm the welfarist hypothesis (ie. that it constituted nothing more than a minimum substantive guarantee) the Covenant also hints at something more radical. It speaks, for example, of the objective of achieving, in a progressive manner, the 'full realization' of the rights including not merely the right to work, to housing, food or education, but the right to the 'highest attainable standard of physical and mental health' (a phrase adopted from the WHO). And here, one may espy not only a conception of rights whose substantive content was to be read as ever 'advancing', but also, and as a consequence, an agenda of equalisation 'from the bottom up' so to speak.

By way of contrast, instruments such as the UN Covenant on Civil and Political Rights, and the European Convention on Human Rights, that combine the recognition of civil and political rights with non-discrimination clauses are arguably oriented towards the second idea of equality, namely the preservation of equality of opportunity in its more limited sense. The central motif, in other words, is that of ensuring that people are treated impartially by way of prohibiting certain kinds of grounds for differential treatment – such as those based on sex or race – in a context in which there is no standing assumption that there should be any positive entitlement to the social goods, opportunities or services in question.[55] Thus, it was entirely consistent for the European Court in the *Belgian*

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discrimination, has the right to equal pay for equal work'), and article 26 ('Higher education shall be equally accessible to all on the basis of merit').

[52] Moyne argues that in absence of a 'ceiling on inequality', the Universal Declaration 'paid no mind to distributive equality' (*supra,* n. 19, p 60). This may be partially true insofar as it points to the difference between a conception of equality that is attentive to the relative differentials in wealth between rich and poor rather than once that is concerned with 'sufficiency', but it overlooks, at the same time, the distinction between a sufficiency model of equality (premised, perhaps on need) and one that is concerned solely with 'merit'.

[53] See eg Shue,

[54] See eg Moyne, *supra*, n. 19.

[55] For a discussion of the extent to which the European Court recognizes economic and social rights see Clements L. and Simmons A., 'Sympathetic Unease' in Langford M. (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) p.409.

Linguistics Case to assert *both* that the principle of non-discrimination in article 14 of the European Convention on Human Rights had been violated as a consequence of the discriminatory arrangements governing access to linguistic education, *and* that there was no governing right to receive such education.[56] The concern, in other words, is not to ensure that the State does actually engage in a process of economic and social equalisation, but simply that where it does act, it does so on a non-discriminatory basis.

Yet, as much as this might be a rough intuition it is by no means one that maps out onto institutional practice in any straightforward way. To begin with, for example, it is clear that the semi-independent character of the principle of non-discrimination in article 14 of the European Convention (semi-independent in the sense that whilst a violation of article 14 does not presuppose a simultaneous violation of a substantive right[57] it still must fall within the 'ambit' of such a right[58]) has not precluded claims being made in respect of economic and social entitlements.[59] And in case of the Human Rights Committee this has been particularly palpable given its interpretation of the equal rights clause in article 26 ICCPR as an autonomous right.[60] Even so, the stance of the latter is not radically different from that adopted by the European Court insofar as it has still tended to stop short of insisting that the prohibition of discrimination entails the creation of regimes of specific entitlement[61] or otherwise necessitate broader measures aimed at the promotion of social equality.[62]

If the stance of both the European Court of Human Rights and the UN Human Rights Committee may be regarded as somewhat equivocal when it comes to equality claims that touch upon social and economic rights, the UN Committee on Economic, Social and Cultural Rights, has encountered a different challenge – namely how to understand the relationship between the provisions in the Covenant guaranteeing equality and non-discrimination and the broader substantive agenda of promoting economic and social well-being.

3. Equality in the International Covenant on Economic, Social and Cultural Rights

The International Covenant gives specific recognition to the principle of equality in a number of different provisions. At the outset, the Preamble to the Covenant asserts that treaty is based upon the idea of the 'equal and inalienable rights of all members of the human family'[63] the sense of which may be to allude to nothing much stronger than a bare idea of universality – that the rights in the Covenant extend to 'everyone' without exception. Yet it is also clear that equality has a further connotation here – it describes not merely those who may regard themselves as entitled to enjoy the rights, but also appears to say something about the content of those rights. Thus article 3 makes specific

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[56] *Belgian Linguistics Case* (1979-80) 1 EHRR 252, p. 283.

[57] In many contexts, however, it does, and for this reason the European Court has often avoided remarking upon the issues of discrimination raised in particular claims even if they were arguably the central concern. See e.g. *Lustig-Prean and Beckett v. United Kingdom* (2000) 29 EHRR 548; *Smith and Grady v. United Kingdom*, (2000) 29 EHRR 493.

[58] It is described, in this sense as 'parasitic'. See e.g., *Petrovic v Austria* (2001) 33 EHRR 307; *Sidabras v. Lithuania* (2006) 42 EHRR 6

[59] See e.g., *DH and Others v. Czech Republic* (2007); *D v. United Kingdom* (1997) 24 EHRR 423; *Fábián v Hungary* app. 78177/13, 5th Sept. 2017. See generally Leijten I., 'Economic Inequality, Fundamental Rights Adjudication, and the (Limited) Potential of Non-Discrimination Review', *Rivista di Diritti Comparati* (2019) 113.

[60] *Broeks v. The Netherlands* Comm No. 694/1984, Views of 9th April 1987; General Comment No. 18, para. 12 ('article 26 provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities'.)

[61] See e.g., *Waldman v. Canada*, Comm No. 694/1996 ('the Covenant does not oblige states parties to fund schools which are established on a religious basis'); *Zwaan de Vries v The Netherlands* Comm No. 182/1984, View of 9th April 1987 (States parties were not obliged to provide social security).

[62] See eg. *Sprenger v The Netherlands*, Comm No. 395/1990.

[63] Ibid, preamble, para. 1.

reference to the equal rights of men and women,[64] the sense of which must be understood as implying not merely that 'women have rights too', but that the rights they enjoy should be equal in some qualitative sense to those enjoyed by men. Here the empty universalism of 'humanity' is replaced by the idea of a more concrete political frame in which comparison may be usefully made.

What may actually follow from the idea of equal rights, however, is less easy to articulate and is certainly made more complex by the terms of article 2(1) which proceeds on the basis that the full realization of the rights in the Covenant may be undertaken over time, progressively, and with a view to what resources are available to the State at any given moment.[65] How then might this idea of equal rights operate in a shifting context of continuing and progressive implementation? And what kind of equality might be envisaged in the fields of health, or housing, or education for example?

An indication of what might be entailed is found in the various substantive articles within the Covenant in which equality itself finds mention. Article 7 for example refers to 'equal remuneration for work of equal value', to 'equal pay for equal work', and to 'equal opportunity for everyone to be promoted'. Article 13(2)(c) similarly provides that 'higher education shall be made equally accessible to all'. All of these formulations are either conditional (in the sense that they depend upon a calculation as to what work is to be regarded as 'equal' or of 'equal value'[66]) or procedural (in the sense that they are concerned with the conditions governing 'access' to certain social goods rather than the direct provision of those goods themselves).

These references to equality, however, point in two different directions. On the one hand, the concern with 'access' in article 13 seems to suggest that the main issue is that of equality of opportunity – ensuring that there are no barriers to entry into higher education other than those that might be relevant such as 'capacity'. On the other hand, the provisions regarding equal pay clearly imply something more substantive in the sense that they seek to ensure that the only relevant criteria for differentiating between levels of pay should be those related to the characteristics of the job to be undertaken. Nevertheless, insofar as the latter still assumes the existence of 'relevant' differentials in remuneration and goes no further in engaging either with the kinds of considerations that might legitimately warrant a difference in pay, or with the structural conditions that determine who might come to obtain what job, they still remain broadly oriented towards Williams' second concept of equality outlined above, namely one which is concerned with opportunities rather than outcomes. This view, furthermore, appears to be reinforced by the terms of article 2(2) of the Covenant in which the idea of equality is given its most comprehensive expression.

3.1 Equality as Access and Opportunity

Article 2(2) of the Covenant contains the general non-discrimination clause the sense of which is to obtain to each and every right within the Covenant:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any

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[64] This is the formulation given earlier recognition in Article 1(3) UN Charter and article 2 of the Universal Declaration on Human Rights. On article 3 of the Covenant see General Comment No. 16 (2005), UN doc. E/C.12/2005/4.

[65] Article 2(1) ('Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'). See generally, General Comment No. 3 'The Nature of States Parties' Obligations', U.N. Doc. HRI/GEN/1/Rev.6 at 8 (2003).

[66] On this see CESCR General Comment No. 23 (2016) 11 ('Not only should workers receive equal remuneration when they perform the same or similar jobs, but their remuneration should also be equal even when their work is completely different but nonetheless of equal value when assessed by objective criteria'). The key question remains, however,

> kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

As with most non-discrimination clauses, this approaches the idea of equality from a particular standpoint. In their barest, and most formal sense, non-discrimination clauses such as this are oriented, as their title suggests, towards the elimination of those practices of 'discrimination' whose effects are to cement or propagate forms of unfair or unjustifiable privilege. They do not, obviously enough, prohibit all forms of differential treatment: they highlight only those forms which are presumed or taken to be arbitrary or unjustifiable (such as race, sex, ethnicity etc) or which may otherwise be formulated in terms of some analogous 'status'. Personal traits[67] however described (intelligence, carelessness, hard work, laziness, and even luck perhaps) are, by implication, excluded, and an idealised gap is thus maintained between structure and agency, opportunity and outcome.

To the extent, then, that non-discrimination clauses are typically concerned with practices of arbitrary decision-making, they tend to frame the underlying claim to equality in an almost entirely negative way. Equality, it seems, is that which emerges from a failure to discriminate: positive social action in favour of particular disadvantaged groups being legitimised only as a temporary expedient by way of 'special measures of protection'.[68] In the words of the UN Committee on Economic, Social and Cultural Rights, only 'as long as such measures are necessary to redress *de facto* discrimination' is such 'differential treatment' legitimate.[69] The implication being (albeit rarely if ever actuated) that once the practice of discrimination has been overcome, the justification for continued special treatment would fall away.[70]

The general problems associated with the principle of non-discrimination are well known: its characterisation of all claims of disadvantage in terms of deviations from a standard norm (the experience of the heterosexual white male perhaps);[71] its conflation of all types of disadvantage within a singular framework (gender inequality being structurally the *same* as racial inequality);[72] its failure to recognize that discrimination might be multilayered or intersectional rather than unitary or segmented;[73] its attentiveness to the problem of identity and difference rather than that of power or domination;[74] its apparent

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[67] For a critique of the differentiation between 'immutable' and 'non-immutable' classifications see Sadurski, (above n. 43), pp. 93-147.

[68] Cf. Article 10(2) ICESCR ('Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.')

[69] See, General Comment No. 16, UN doc. E/C.12/2005/4, para. 15. Dworkin's classic response to this question was to suggest that what should be in contemplation in such cases is not 'equal treatment', but 'equal consideration'. Dworkin,

[70] General Comment No. 20, para. 9; General Comment No. 13, para. 32; General Comment No. 16, para 15 (The principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others. Temporary special measures aim at realizing not only de jure or formal equality, but also de facto or substantive equality for men and women. However, the application of the principle of equality will sometimes require that States parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination. As long as these measures are necessary to redress de facto discrimination and are terminated when de facto equality is achieved, such differentiation is legitimate.).

[71] MacKinnon C, *Feminism Unmodified—Discourses on Life and Law* (1987), 32–45.

[72] Butler J., *Gender Trouble: Feminism and the Subversion of Identity* (1990) 13 ('[L]isting the varieties of oppression… assumes their discrete, sequential coexistence along a horizontal axis that does not describe their convergencies within the social field'.)

[73] Crenshaw K., 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' *University of Chicago Legal Forum* (1989) 139. For an overview of intersectionality studies see Cho S., Crenshaw K., and McCall L. 'Toward a Field of Intersectionality Studies: Theory, Applications and Praxis', 38 *Signs* (2013) 785.

[74] MacKinnon C., 'Intersectionality as Method: A Note' 38 *Signs* (2013) 1019

focus upon process rather than outcome (formal not substantive equality), to name but a few.

To some extent, of course, such concerns are amenable to creative re-imagination. One can think of discrimination not merely in the formality of intentional differentiation, but as an unintended outcome, or an outcome that is intended but has a disproportionate effect on some vulnerable group.[75] Equally one can emphasise the relative permanence of conditions of inequality in a way that makes the demand for positive measures much more than a temporary expedient. Yet for all of this, it is impossible to avoid the inference that the principle of non-discrimination understands the social problem of (in)equality in terms of identity and difference. And, of course, so long as this remains the predominant mode of orientation, the whole debate remains captured in the neo-Hegelian dialectic of self and other. As has been recognized within feminist literature, women seem to be offered in such contexts either an identity constructed by reference to that which is 'other to man' (i.e. conforming by deviation to a patriarchal standard) or 'absolutely other' in a way that is unable to comprehend the relations of power within which they find themselves.[76] And it has been in response to such dead ends that theorists have sought to either displace[77] or pluralise the theme of difference,[78] or socialise the theme of singularity,[79] as alternative ways of conceptualising the challenge of equality. As Balibar argued, for example, what needs to be sought is a 'right to difference in equality' a right which neither seeks the restoration of an original identity, nor a neutralization of difference, but seeks the 'production of an equality without precedents or models, which would be difference itself, the complementary and reciprocity of singularities'. [80]

For all the difficulties with the notion of non-discrimination, it has nevertheless assumed a considerable importance in the work of the UN Committee as a way of overcoming the perceived indeterminacy of the legal obligations found in article 2(1).[81] By 1999, when the Committee was formulating its General Comment on the subject, it was already clear from the experience of the Human Rights Committee and the European Court of Human Rights, amongst others, that the adjudicative potential of the Covenant lay precisely in the identification of schemes of obligation that were negative or immediate in nature.[82] Given that, at this time, it was pushing forward the agenda for an Optional Protocol for receipt of individual petitions,[83] it was obvious that there was a need to be able to identify contexts in which it was possible to determine definitively when and where a violation had taken place. The principle of non-discrimination provided just such an opportunity. Just because, it was reasoned, States were under an obligation to implement the rights in

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[75] This is the classic formulation found in *Griggs v Duke Power*, 401 IS 424 (1971).
[76] See, Cixous H. and Clement C., *The Newly Born Woman* (1986) pp. 70-71.
[77] Eg Butler, *supra,* n. 72, pp. 147-8 ('I have tried to suggest that the identity categories often presumed to be foundational to feminist politics… simultaneously work to limit and constrain in advance the very cultural possibilities that feminism is supposed to open up. The tacit constraints that produce culturally intelligible "sex" ought to be understood as generative political structures rather than naturalized foundations…. The deconstruction of identity is not the deconstruction of politics; rather, it establishes as political the very terms through which identity is articulated'.)
[78] Eg Young., *supra,* n. .
[79] Eg Rosanvallon, *supra,* n. , pp. 260-69.
[80] Balibar, *supra, n.* 1, p. 56. He explains that what is to be sought is a 'supplement of singularity' which 'prohibits the same content from being attributed to the freedom of men and to the freedom of women, and consequently either of them from being reduced to a model of common subjectivity'. Equality here, he remarks, 'is not the neutralization of differences (equalisation), but the condition and requirement of the diversification of freedoms'.
[81] See e.g. Vierdag (who asserts that the character of obligations assumed in relation to economic, social and cultural rights is such as to make them legally negligible). Vierdag E., 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Neth. ILR* 69.
[82] A parallel initiative, in this respect was the identification of the tripartite categorisation of obligations. See, Eide A., *Right to Adequate Food as a Human Right* (1989); Shue H., 'The Interdependence of Duties', in Alston P. and Tomasevski K. (eds.), *The Right To Food* (1985), 85.
[83] See Optional Protocol to the Covenant on Economic, Social and Cultural Rights (2008).

the Covenant in a progressive manner, this did not entitle them to discriminate in the process. As the Committee was to explain it:

> The prohibition against discrimination enshrined in Article 2(2) of the Covenant is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately ... and encompasses all internationally prohibited grounds of discrimination.[84]

For the Committee, then, the principle of non-discrimination stood outside the regime of progressive implementation: it being implied that at whatever stage a State may have reached in the implementation of the Covenant, there was an absolute duty not to discriminate against particular social groups. Even if it was unable to determine precisely whether a State had taken all necessary steps to implement the right to education, for example, it could at least identify if there had been some element of discrimination in what had, or had not, been done.[85]

In what later appeared to be an entirely logical extension of this reasoning, the UN Committee went on to conclude in its General Comment No 12 that:

> 'any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds [identified in Article 2(2) of the Covenant] ... constitutes a violation of the Covenant.'[86]

To take such a stance, however, was to open up to radical scrutiny the kinds of understandings that might inform the idea of 'discrimination in access to food'. Read in a very narrow sense, of course, this might be construed as merely concerned with forestalling possible discrimination in the context of publicly-managed schemes for food distribution or food relief.[87] Yet its reference to 'any discrimination in access to food' (implying *de facto* as well as *de jure* discrimination) invites broader speculation as to the kinds of economic and social arrangements for which one might legitimately hold the state responsible, and the forms of tolerable distinctions that are allowed to flourish.

The Committee has, like many other human rights bodies, asserted as fundamental the distinction between public and private agency: no direct (state) responsibility exists in relation to the latter, but only an obligation to regulate effectively, to encourage and deter.[88] The Committee has also largely absented itself from discussion as to the preferred methods by which individuals or communities may avail themselves of social goods (ie through the medium of public or private agencies) implicitly invoking, in the process, a doctrine of political neutrality.[89] The combination of these two positions, however, is to radically limit the ability of the Committee to effectively engage with the problem of *de*

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[84] General Comment No. 13, UN doc. E/C.12/1999/10, para. 31. See also General Comment No. 16, para 16. (The equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties) and General Comment No. 20, para. 7 ('Non-discrimination is an immediate and cross-cutting obligation in the Covenant').

[85] See e.g. Limburg Principles, para 35: 'Article 2(2) calls for immediate application and invokes an explicit guarantee on behalf of the States parties. It should, therefore, be made subject to judicial review and other recourse procedures.' See also Klerk Y., 'Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Hum. Rts. Q* 250

[86] See e.g. General Comment No. 12, E/C.12/1999/5.

[87] What one may think that what the Committee had in mind was something along the lines of the example it gave in the following paragraph, namely the deliberate 'denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active.' Ibid.

[88] See Genernal Comment No. 24 paras. 10-24.

[89] See, General Comment No. 3 para. 8 ('The Committee notes that the undertaking 'to take steps... by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question...').

facto discrimination where, for example, that discrimination might arise from the operations of the market,[90] let alone with any broader agenda of substantive equality.

This appears to have been belatedly (if hesitantly) recognised by the Committee itself. In its General Comment No. 24 on business activities it noted, in passing, that it was 'particularly concerned' that goods and services that are necessary for the enjoyment of basic economic and social rights 'may become less affordable as a result of such goods and services being provided by the private sector'.[91] It went on to assert that:

> 'The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead to the enjoyment of Covenant rights to be made conditional upon the ability to pay, which would create new forms of socioeconomic segregation….[such as] where private educational institutions lead to high-quality education being made a privilege affordable only to the wealthiest segments of society'.[92]

The Committee's response to this was to argue that what is thereby required is (more) effective regulation of private actors. Bur the concern it raises points to a much more radical agenda: for if 'wealth' is not be a legitimate ground for conditioning access to food, water, education or health care, for example, then it is hard to see what scope there is for access to those goods to be conditioned upon the operation of private markets at all.[93] And by bringing the question of wealth to the table, it implicitly also places in centre stage the problem of poverty, and that of 'material inequality'. To what extent, it might be asked, can one legitimately engage with the realisation of economic and social rights without also considering the evident inequalities of wealth, both nationally and internationally, that evidently condition access to them?

3.2 Equality as a Process of Equalisation

If the principle of non-discrimination in article 2(2) of the Covenant largely addresses the question of equality from the standpoint of its negation, it might nevertheless be said, as suggested above, that the International Covenant also addresses the first conception of equality outlined above (that which engages in a process of equalisation) in the context of the general implementation clause in article 2(1). As is now generally recognized, article 2(1) elaborates a regime of progressive implementation in the sense that whilst it holds in place a nominally fixed idea of what the 'full implementation' of the rights might entail, it expects States to move progressively in that direction as expeditiously as possible bearing in mind the limitations of 'available resources'. On its own, of course, this says nothing itself about equality apart from the bare idea, perhaps, that since the rights are prospectively to be enjoyed by everyone, no-one should be left out of contemplation. Yet, so far as the general obligations clause does enjoin States to take action through the use of social resources (both national and international) towards the full realization of the rights to work, housing, education and so on, and so far as the primary mechanism for realising those rights will be redistributive programmes of taxation and social spending, the idea of some process of equalisation is never far in the background. Such a conclusion, however, only appears once one has proceeded to consider the kinds of obligation that might ensue from the recognition of such rights.

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[90] The Committee has made clear on several occasions that it did not confine its understanding of discrimination to merely de jure discrimination. See e.g., General Comments No. 13 and 16. General Comment No. 20, (2009) paras 8 and 11.

[91] General Comment No. 24, para 22

[92] Ibid.

[93] One might note, here, that there is a case for saying that the State is equally responsible for for systems of both public and private ordering (including, for example, the operation of markets and systems of property and exchange). All, at the end of the day, rely upon the State's coercive power. See Hale R., 'Coercion and Distribution in a Supposedly Noncoercive State', 38 Political Science Quarterly (1923) 470. To similar effect see Waldron, (n.21 above) pp. 309-338.

In a very schematic sense, there are at least three 'idealised' approaches to the rights in question. One way of thinking about them might be to regard them as constituting minimum substantive guarantees (the provision of 'a roof over one's head', 'primary health care', or 'a basic level of education' and so on) which the State would be required to fulfil as expeditiously as possible without discrimination.[94] The implications of this, of course, are that so far as the minimal conditions of enjoyment are met, there is no further obligation to move towards the equalisation of social and economic conditions through society. It conceives, in other words, of the persistence of social and economic inequalities at levels above the substantive minimum.[95] Where, however, those minimal conditions are not met, a degree of resource (re)distribution will be necessary through, for example, the institution of social support mechanisms or other forms of direct provisioning.

A second way of thinking about the rights might be to regard them as entirely open-ended commitments (there being no 'innate' content to the idea of the 'full realization' of a right, merely a conception of what would or would not constitute 'progress').[96] In such a context, the emphasis would be placed upon the incremental and continued improvement of social and economic conditions for all sections of society (again, without discrimination), but would not concern itself *per se*, with conditions of inequality. The same level of social inequality might be maintained: the main condition, however, being that there be some measure of improvement in social and economic conditions for the populace in general over time.[97] Here the capacity to 'redistribute' in the sense of shifting social resources around in order, for example, to privilege the least advantaged would be limited by the requirement not to impinge upon current levels of enjoyment of social or economic benefits or opportunities.

A third way of thinking about the rights might be to regard them as claims on the part of those who are relatively disadvantaged when compared to other sections of the community (even if, for example, their conditions of life were considerably better than others living elsewhere in the world). The emphasis in this third case would fall upon Williams' idea of equalisation but in a context in which there is recognition neither of a minimal content of rights, nor that of continued progressive implementation for all segments of society. The wealthy, in other words, would have no cause to demand respect for such rights – indeed might encounter a diminution of what they might otherwise be entitled to enjoy by way of education or health through the redirection of societal resources to disadvantaged sectors of society. It is only this third model, however, that overtly sustains the connection between the realization of economic, social and cultural rights and the pursuit of equality understood as the equalisation of social and economic conditions.[98]

In practice, the UN Committee has chosen none of the above approaches – or at least, not in isolation. In the course of its work it has emphasised the importance of progressive improvement in social and economic conditions,[99] *and* the identification of minimal

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[94] Waldron suggests that there are two possible conceptions of a 'social minimum' – one that would conceive of the minimum in terms of a social dividend, the other in terms of need. See Waldron J., 'John Rawls and the Social Minimum', in Waldron, (n.21 above), p. 250.

[95] Cf Rawls J., *A Theory of Justice* (1971) pp. 75-8 (in which he articulates his 'difference principle' understood as a principle in which social and economic inequalities are to be adjusted so that they are of the greatest benefit to the members of the least favoured social group).

[96] There is a sense, of course, in which the identification of 'progress' requires the identification of appropriate ends or goals. Only once one has identified what the right to food might mean in an ideal sense is one able to determine whether certain changes in the social or economic environment constitute progression or regression. At the same time one may suggest that adequacy and safety are at least intermediate objectives which might structure action without supposing that they are fully determinative of what the right might mean or entail.

[97] For this view see *Five Pensioners' Case v Peru*, Inter-American Court of Human Rights, Judgment of Feb 28 (2003)

[98] Cf T. M. Scanlon, "The Diversity of Objections to Inequality" in Clayton and Williams (eds), *The Ideal of Equality* (2002).

[99] See General Comment No. 3, para. 9.

levels of enjoyment of rights,[100] *and* the targeting of vulnerable or disadvantaged segments of society.[101] So, for example, in its General Comment No. 15, the Committee emphasised that:

> States parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water.[102]

That

> States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities.[103]

And that:

> States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. [104]

This conflation of the various themes lends its approach to the question of equality an undoubtedly complex texture, but one may at least discern two general tendencies. The first is to regard the process of progressive implementation of economic, social and cultural rights as one that is concerned, ultimately, with the protection and advancement of the most vulnerable or marginalised segments of society (the 'socially excluded').[105] The second is a concern to identify, in the process, minimum substantive entitlements that might be regarded as the 'core content' of each and every right.[106] Of course these are overlapping ideas. Even though the former seems concerned primarily with conduct or process, the latter with specific outcomes,[107] they seem to inform one another: resort to an idea of a minimum substantive entitlement generally informs the process by which a group or community can be identified as socially excluded (those without work or housing or education for example). Similarly, the idea of marginalisation or social exclusion informs that which may qualititatively be construed as a minimum entitlement in any particular context (in one, for example, lack of access to primary education, in another secondary education). To the extent, then, that this allows a 'relativisation' of the core entitlements and a continuing engagement with the problem of exclusion or marginalisation,[108] the general thrust of the Committee's position may hesitantly be thought to align itself with Williams' first notion of equality, namely, equality as a process of equalisation of social and economic conditions within society. This is, however, by no means a clear conclusion as it is evident that the Committee is still attached to a quasi-universal idea of absolute need or entitlement the sense of which is in no way dependent upon an argument about equality.

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[100] Ibid, para. 10.
[101] Ibid, para 12 (even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.)
[102] General Comment No. 15 'The Right to Water (Arts. 11 and 12 of the Covenant)' (2002) E/C.12/2002/11, para. 18.
[103] Ibid, para. 15.
[104] Ibid, para. 16. (This paragraph begins, however, with the assurance that 'the right to water applies to everyone').
[105] See eg. General Comment No. 18, para. 31, General Comment No. 24, para. 8.
[106] See eg. General Comment No. 15, para. 37; General Comment No. 18, para. 31.
[107] Cf. General Comment No. 3, para 1 ('Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result.'). See generally, Eide A., *Right to Adequate Food as a Human Right* (1989); Shue H., 'The Interdependence of Duties', in Alston P. and Tomasevski K. (eds.), *The Right To Food* (1985), p85.
[108] On the role that 'social exclusion' may have in the context of the discourse of equality see Collins H., 'Discrimination, equality and social inclusion', 66 Modern law review, (2003) 16.

4. Equaliberty

The question this poses, then, is how one might understand the relationship between the two ideas of equality that appear present in the Covenant – one of which seems to find recognition in article 2(2) in the form of the principle of non-discrimination, the other of which may be seen to form the underlying rationale for the progressive realization of the substantive rights themselves? As suggested above, the dominant scheme has been to think about the principle of equality or non-discrimination as a qualification upon the general, open ended obligations in article 2(1) – a position which seems informed, above all else, by the desire to identify obligations of an immediate or absolute character. If, however, one is to conceive of the general obligation in article 2(1) as being equally concerned with the notion of equality, then it is necessary to face more directly the perceived incompatibility of the two traditions of thought.

At the outset it is probably instructive to note that the UN Committee itself has not always been quite as absolute in its approach to the question of non-discrimination. In the early years of its work, the Committee was actually quite evasive in terms of what it saw to be the implications of the principle of non-discrimination for the general obligations of states parties. It neither made great play of the fact that article 2(2) spoke about the requirement to 'guarantee' the enjoyment of rights without discrimination, nor did it categorically distinguish between the three kinds of obligations that were later to be a central theme in the Committee's work (the obligations to respect, protect and fulfil[109]). Indeed the distinctiveness of its early stance may be divined from its approach in general Comment No. 5 on 'Persons with Disabilities'. The starting point for the Committee, in that particular General Comment seemed to be that the principle of non-discrimination, as a 'negative' injunction prohibiting irrational or prejudicial decision making, was far too limited a framework for dealing with the range of issues posed by people with disabilities.[110] Almost immediately, it began talking about the need to adopt measures by way of 'special treatment', highlighting the requirement that States parties must take appropriate measures to the maximum of available resources to enable people to overcome disadvantage.[111] This is made very clear in paragraph 9:

> 9. The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.[112]

What was clearly animating the Committee's approach to the question, here, was the view that the main concern of this particular group of people was not the explicit social bars that were to feature prominently in the history of gender or race discrimination, but the more insidious 'effects based' or 'indirect' discrimination that resulted from them simply not having 'counted' when it came, for example, to the design or construction of educational institutions.[113] Interestingly enough, however, the Committee relates this

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[109] General Comment No. 12 (1999) para. 15; General Comment No. 16. para 17 (The equal right of men and women to the enjoyment of economic, social and cultural rights, like all human rights, imposes three levels of obligations on States parties - the obligation to respect, to protect and to fulfil. The obligation to fulfil further contains duties to provide, promote and facilitate.)

[110] A similar concern may be identified in its General Comment on Sexual and Reproductive Health. See General Comment No. 22, (2016), para. 24.

[111] General Comment No. 5 (1994), para 5.

[112] *Ibid*, para. 9.

[113] See also General Comment No. 22, para. 27 ('Seemingly neutral laws, policies and practices can perpetuate already existing gender inequalities and discrimination against women. Substantive

idea of 'specially tailored measures' to the general obligations of progressive realization found in article 2(1), and not to the traditional idea of special or protective measures which, as noted above, tend to be regarded as a limited exception to the principle of non-discrimination. Dealing with the problem of equality in relation to people with disabilities, it seems, is a matter of rights fulfilment as much as non-discrimination.

One interpretation of this stance is to suggest that the Committee was merely being pragmatic - that it simply regarded it as more politically prudent to emphasise the rights of those with disabilities than to focus upon the injunction to eliminate any form of discrimination. Another, and perhaps better interpretation, is that the Committee viewed the various sectoral problems that are currently associated with different forms of discrimination (race, gender, disability etc) as simply part and parcel of a more general problem of disadvantagement. This, of course, is to invoke a certain sociology: it relies, in part at least, upon the intuition that the disadvantagement in question emerges less from attitudinal discrimination (from prejudicial beliefs or views about the group concerned) and rather more as a matter of the routinised outcomes of social arrangements that condition and configure the emergence and sustenance of disparities in wealth or opportunity within any given society. The identity of the disadvantaged, in this sense, is as much an 'effect' of relations of power as its cause.

The key to thinking in this sense is the necessity of relating the two equality agendas in a way that does not set them in intrinsic opposition to one another as pure ideas, but allows each to work as a form of critical intervention.[114] Rather than take as read the idea that in order to preserve equality of opportunity one must secure a realm of private initiative and enterprise free from any kind of external interference, or that to promote equalisation one has to restrict the capacity for the exercise of individual choice to the point of disappearance, it would seem necessary to construct an understanding of each that sets them in a productive relationship with one another. To do otherwise is to leave them in a condition of being hypostasized 'polar' points in an argument between autonomy or solidarity, the individual or society, and which envisages their supersession to come only in the form of some idealised Hegelian synthesis. As Adorno put it, such an 'ideal of conceptual unification' cannot be 'indiscriminately applied to a society whose unity resides in it not being unified'.[115] The very separation of 'society and psyche', as he puts it, is 'false consciousness' – it merely 'perpetuates conceptually the split between the living subject and the objectivity that governs the subjects and yet derives from them'.[116]

One way of taking this forward might be to start from the proposition that the value of each notion of equality when understood as a critical tool (i.e. one that does not immediately collapse into a justification for authoritarianism or of privilege) is ultimately dependent upon the other. One might say, thus, that the critical value of equality of opportunity is to be worked out not merely by reference to the way in which it may assist in the promotion of individual choice or freedom, but also by reference to its contribution to the equalisation of social and economic privileges advantages within society. One may also suggest that the critical value of the demand for social and economic equalisation is to be assessed not merely through its contribution to the securing of basic conditions of human wellbeing, but by the way in which it also underpins or conditions the acquisition of those socially valuable attributes (skill, determination, entrepreneurial spirit) which are nominally at the heart of the idealised version of equality of opportunity. This would not be to posit the interdependence of these ideas as ethical or sociological postulates or 'conditions' in any positive sense. Their connection would be largely negative: the

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equality requires laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that women experience in exercising their right to sexual and reproductive health.')

[114] I am guided here by Ranciere's observation that '[t]he essence of equality is not so much to unify as to declassify, to undo the supposed naturalness of orders and replace it with controversial figures of division. Equality is the power of inconsistent, disintegrative and ever-replayed division.' Ranciere J., *On the Shores of Politics* (1995) 32-3.

[115] Adorno T., 'Sociology and Psychology', 46 New Left Review (1967) 67, p. 69.

[116] Ibid.

premise being that it is the very plausibility of their division into two idealised domains of social and political action which is problematic.

Two brief examples as to what this might entail will hopefully suffice. On the one side, it would deny the plausibility of social arrangements that institute minimum social guarantees yet envisage the widening of economic and social stratification. Equality of opportunity, in that sense, cannot serve as a justification, or means, for the creation of a *de facto* permanent underclass, nor the broadening of disparities in wealth within society more generally. And here, the critique of 'meritocracy' is particularly relevant given the attention paid to the conditions of social production of the so-called 'meritorious' values (skill, intellect, talent etc). On the other side, it would similarly deny the plausibility of social arrangements that seek to impose a singular, undifferentiated, criterion for access to social goods or benefits in the name of 'equality' that failed to attend to the manifold differences in the capacities, desires, and abilities of individuals that mark any particular society. Here the postulated 'universal subject of rights' has to be brought under critical analysis, and emphasis placed instead upon the multiplication of difference – its effective dispersion rather than being subsumed under a singular formula. The justification for each claim to equality, ultimately, would be both intrinsic and conditional, independent and co-dependent, the interplay between which would be to deny the plausibility of any perfect 'equilibrium' or position of repose in which any one claim to equality could be said to be fully worked through. In this sense, as Balibar put it, equaliberty would represent an indefinite sphere of politicisation – a work in progress, yet a work nonetheless.

Conclusion

At the outset of the article, I posed the question as to the relationship between the realisation of economic, social and cultural rights on the one hand, and the notion of equality on the other. I asked, in particular, whether the realisation of the former might simply be seen to constitute a 'working out' of the latter. The answer, in some ways, has been somewhat equivocal, but not because of some condition of incommensurability that blocks analysis, but simply because the form of idealised analysis required to 'set' the one in relation to the other is inherently problematic. That being said, it may certainly be maintained that the realisation of economic, social and cultural rights do speak to a certain tradition of thought that regards equality as a process of social, economic and political equalisation. Where difficulties arise, however, is in the manner by which one might relate that tradition of equality, with its emphasis upon the combating of social differentiation, with a rival tradition of equality that emphasises, by contrast, the ideal of equality of opportunity.

The suggestion proffered here, and following Balibar's account of equaliberty, is that the two traditions of equality might best be interpreted conjointly, not as idealised (and countervailing) programmes of action, but critical injunctions that place limits on the value of the other. Whilst, as an interpretive strategy, this might not resolve itself in a series of normative holdings, it does, at the very least, open up a form of critical enquiry that draws attention to the latent limits of each of the two traditions of equality, and asks that we keep in play both concepts (non-discrimination and substantive equality) in evaluating the legitimacy of social arrangements. In practical terms this is, no doubt, more challenging given the institutional separation between economic and social rights, on the one hand, and civil and political rights on the other (as indeed it is by the apparent 'internal' separation between the realisation of economic and social rights on the one hand, and the principle of non-discrimination on the other), but we should, at the very least, be aware of the ongoing 'costs' of that separation, and the inequalities that it may spawn.