Lucia Serena Rossi · Federico Casolari
Editors

The Principle of Equality in EU Law

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Preface and Acknowledgments

This book discusses what are currently the most challenging implications and dimensions of the principle of equality in the European Union (EU). In all democratic systems the principle of equality forms the basis of every contemporary social contract and is also a cornerstone of the European integration process.[1] In the EU's legal order, the principle applies both to relations between the Union and its Member States and to relations between the EU and individuals. It is a multifaceted principle, having several corollaries and different dimensions. In relations between the Union and Member States its formal dimension means equality before the EU Treaties and is bound up with the principle of loyal cooperation, while its substantive meaning is tied to other principles, such as solidarity, *effet utile*, and territorial and social cohesion. In relations among individuals it applies to the wide and consequential domain of fundamental rights, finding significant support in the EU Charter of Fundamental Rights, in the Treaties, and in the case-law of the Court of Justice of the European Union (ECJ).

Although the EU principle of equality has in the past been an object of important theoretical studies and analyses in the legal literature,[2] not all its implications and relations to other principles have so far been explored. Moreover, recent developments on the European stage—notably the economic and financial crisis of 2008 and the EU's response, the Brexit referendum and the related disentanglement process, the 'refugee crisis' and its handling—suggest a pressing need to reassess the role that equality plays (or should play) in the EU's current 'existential crisis'.[3]

The analysis carried out in this book has been structured in three complementary parts: 'Equality and States: Are Some States More 'Equal' than Others?' (Part I),

[1]See Tridimas (2006), p. 60.

[2]Among the works offering an overview of the EU principle of equality, see Croon-Gestefeld (2017), Besson and Levrat (2014), Ellis and Watson (2012), Biagioni and Castangia (2011), Potvin-Solis (2010), Favilli (2008), and Bell (2002).

[3]See Juncker (2016), p. 6.

'The Structural Aspects of the Principle of Equality in the EU' (Part II), and 'Equality in Specific Policy Domains of the EU' (Part III).

Part I (Chaps. 1–3) addresses a peculiar aspect of EU equality that is mostly overlooked in the investigations devoted to this topic, namely, equality among *States*. This part analyses how the principle is applied in the relations between the EU and its Member States (Rossi and Wouters & Schmitt), as well as in the contractual obligations the Union has initialled with third countries (Casolari). The first two contributions point out an opportunity to fill a gap in the relevant legal scholarship and commentary, shedding light on the close intertwinement that exists between the two dimensions of EU equality, namely, the inter-individual dimension and the inter-State one. The affirmation and enforcement of equality among Member States has indeed proved to be an important tool for preventing discrimination against individuals, thus leading to a more effective implementation of the inter-individual dimension of equality. The third contribution focuses on obligations the Union owes to non-EU countries, illustrating the progressive differentiation in the effectiveness of these obligations acknowledged at internal level, a trend that in turn is leading to an illogical differentiation among contractual partners and, most importantly, to the general risk of undermining the equality principle on the international scene.

More to the point, Chap. 1 (Rossi) reconstructs the evolution of the principle of equality among EU Member States, highlighting its supranational nature and its interaction with other general principles of the Union. According to Rossi the differentiation that can develop between Member States under EU law may come up against limitations deriving from the need to respect the principles of equality and non-discrimination. Also evincing the close interplay between the inter-individual and inter-State dimensions is Article 4(2) TEU, specifically as reworded through the innovations introduced with the Lisbon Treaty. In fact, this provision—the very first recognition in primary law of the equality that holds among Member States—says that the 'Union shall respect the equality of Member States before the Treaties [. . .]', thus clearly echoing the language of the formal equality clause incorporated into Article 20 of the EU Charter of Fundamental Rights, namely, 'Everyone is equal before the law'.

Chapter 2 (Wouters and Schmitt) examines the impact the principle of equality among EU Member States has on the differentiation mechanisms used in the European integration process, which mechanisms have become particularly relevant in the response to the latest economic and financial crisis, and which seem to be destined to play a significant role in relaunching the European integration process. The analysis highlights a 'multiplayer game' that includes Member States (in their capacity as the EU's *pouvoir constituant*, as authorities implementing EU law, or simply as sovereign States), their national (constitutional) courts, the EU courts, and other international courts and bodies. Although this 'multilayer' and 'multiplayer' setup may be a source of uncertainty for differentiation mechanisms, it also helps to ensure respect for the principle of equality.

Chapter 3 (Casolari) is focused on the most recent practice of EU political institutions relating to the EU's signing and conclusion of major international

agreements. This practice leads to an express denial of the direct effect of such agreements, marking a significant shift away from the previous trend, which has so far been one of self-restraint as concerns the agreements' internal legal effects, thereby introducing a differentiating factor in the Union's contractual relations. At the same time, the direct effect of contractual provisions is acknowledged to be closely interdependent with the need to ensure respect for legal equality, and so that new trend risks fragmenting the implementation of EU agreements, as well as the role played by equality and non-discrimination in the Union's external action.

In Part II (Chaps. 4–6) the focus shifts to the inter-individual dimension of equality. Here the emphasis falls on some major developments that contribute to (re)shaping the global framework of EU anti-discrimination law. In this discussion, the same understanding of the principles of equality and non-discrimination is assumed as the one stated in the ECJ's case-law. As the Court has held, these 'are simply two labels for a single general principle of [... EU] law, which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment'.[4]

Chapter 4 (de Witte and Muir) illustrates a general institutional trend that seems to characterize the current phase of EU anti-discrimination law, requiring Member States to adopt a procedural and institutional framework to facilitate the effective implementation of the relative substantive EU rules. The emphasis is twofold, falling on the one hand on a series of requirements aimed at making it easier for victims of discrimination to actually access justice, and on the other hand on the creation of nonjudicial equality bodies designed to promote a culture of equality.

Unlike de Witte and Muir's contribution, Chaps. 5 and 6 (Benoît-Rohmer and Zaccaroni) offer a global survey of the judicial implementation of the key substantive norms of EU anti-discrimination law. In particular, Benoît-Rohmer's chapter outlines the main arguments the ECJ has developed in the various anti-discrimination areas involved in the cases brought before it, suggesting that through the resulting case-law, significant social progress has been made in protecting victims of discrimination. Zaccaroni's chapter stresses the common threads running through the ECJ's case-law dealing with the different grounds of discrimination covered by EU law, looking to determine whether the same case-law can fill the gaps left by the absence of horizontal legislation.

In light of the general framework outlined in Part II, Part III (Chaps. 7–10) undertakes a more practical investigation devoted to the substantive strands of EU anti-discrimination law, to this end looking at four different case studies. Although the analysis carried out here certainly does not exhaust the area of investigation, the selection of topics does take into account some of the most significant developments that have recently emerged in the matter at issue.

Chapter 7 (McDonnell) is focused on the implementation of equality among EU citizens. The analysis illustrates several shortcomings in the way EU law ensures

[4]ECJ, Case C-422/02 P *Europe Chemi-Con (Deutschland) GmbH v Council and Commission* EU:C:2005:56, para 33.

the equality of citizens. In part, these shortcomings derive from both the fragmented nature of the relevant legal framework and its personal scope of application. In part, they stem from the recent crises the Union has been facing (especially the economic and financial crisis and Brexit), exerting pressures that have undermined the Union's ability to ensure a solid and coherent scheme for its citizenship law. Although not new and largely unfounded, the criticisms directed at free-movement rights linked to EU citizenship have rapidly regained momentum in the current public debate on the European integration process, and several EU countries have begun to advocate—and apply—a narrower conception of such rights, introducing national mechanisms for dealing with free-movement abuses. Most importantly, some EU institutions (including the ECJ) have decided to respond to these criticisms by reinterpreting the benefits of EU citizenship—once more narrowing their scope.

Chapter 8 (Di Federico) addresses the protection against discriminatory practices in another fundamental domain covered by EU law, namely, healthcare. Even in this area, despite the strategic importance of ensuring equal access to emergency and primary healthcare throughout the Union, the relevant practice reveals the fragmentation and ineffectiveness of EU anti-discrimination law. Combating single and multiple discriminations is pivotal not only for the protection of fundamental rights but also for upholding the founding values of the Union. However, legislative inertia impedes the adoption of the Commission's proposal for a directive covering all grounds mentioned in Article 19 TFEU, and applicable to all areas covered by the Racial Equality Directive, including healthcare. Even so, alternative options for securing equality exist, especially after the EU Charter of Fundamental Rights has acquired binding legal force.

Chapter 9 (Ambrosini) turns to the crucial issue of reverse discrimination. This contribution assesses the relevant case-law by looking at the techniques the ECJ has so far evolved to limit the side effects of reverse discrimination. While there is reason to look favourably on the Court's most recent decisions in this area, for they are helping to strengthen the protections afforded to European citizens, more concerning, by comparison, is its previous case-law, which clearly shows that the Court lacks a coherent approach to EU anti-discrimination law, a shortcoming that in turn risks undermining the very rationale of such law.

Significant shortcomings are also highlighted in Chap. 10 (Borraccetti) with regard to the EU legal framework applicable to migration crises. Specifically, Borraccetti keys in on the use of EU legislation designed to fight human trafficking, showing how such legislation, in its essential features, is in significant respects inconsistent with the principle of unconditional access to assistance, as well as with that of equal access to the rights of victims, thus urging a global reconsideration of the Union's response to this phenomenon.

This book is the outcome of a feasibility study on the principles of equality and non-discrimination in European Union law. The study was supported by *Alma Mater Studiorum* – University of Bologna (UNIBO),[5] and under the editor's

[5]Ref. FFBO124051.

supervision it was carried out by a team of researchers at the International Research Centre on European Law (CIRDE, on the Web at http://www.cirde.unibo.it/en/). Two events were organized during the study's lifecycle, so as to enable the CIRDE researchers to present and discuss their findings with leading scholars who have worked extensively on the topic. The first of these events was an international conference held in Bologna on 18–19 May 2015 in cooperation with the Real Colegio de España; the second was a seminar held in Bertinoro on 6–7 July 2016 as part of the 16th edition of the Summer School on the Protection of Fundamental Rights in Europe. The contributions to this book trace their origins to these two events and further develop the scholarly dialogue established under the project, leading to a broader reflection on the current state of equality in EU law.

The editors express their gratitude to all those who have contributed to this study and to all the chairs and speakers who, while not appearing in this volume, took part in the events that have made it possible.[6] Many thanks also go to the Real Colegio de España for its support in making possible the conference held at the University of Bologna, to Oriana Mazzola for her kindness and organizational assistance, and to Filippo Valente for copyediting the manuscript.

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[6]These are in particular Marco Balboni, Yolanda Gomez, Vlasta Kunová, Takis Tridimas, and Alessandra Zanobetti.

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Abbreviations

AA	Association Agreement
ACN	Active Citizenship Network
ACP	African, Caribbean and Pacific Group of States
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General of the European Court of Justice
BENELUX	Belgium, the Netherlands and Luxembourg
BVerfGE	*Bundesverfassungsgericht* (German Federal Constitutional Court)
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific States
CEHR	UK Commission for Equality and Human Rights
CESCR	Committee on Economic, Social and Cultural Rights
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CETS	Council of Europe Treaty Series
CFI	Court of First Instance (now General Court)
CFR	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CSDH	Commission on Social Determinants of Health, World Health Organization
DK	Denmark
DSB	Dispute Settlement Body, WTO
EAW	European Arrest Warrant
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EEA	European Economic Area
EFMS	European Forum for Migration Studies
EHIC	European Health Insurance Card

EMU	Economic and Monetary Union
EP	European Parliament
EPA	Economic Partnership Agreement
EQUINET	European Network of Equality Bodies
ESCB	European System of Central Banks
ESM	European Stability Mechanism
EU	European Union
EUR	Euro
EUROPOL	European Police Office
EUROSTAT	Statistical Office of the European Union
EUROSUR	European Border Surveillance System
FTA	Free Trade Agreement
FTT	Financial Transaction Tax
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GG	*Grund Gesetz* (Basic Law for the Federal Republic of Germany)
HALDE	Haute Autorité de Lutte contre les Discriminations et pour l'Egalité (French High Authority Against Discrimination and for Equality)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IHRL	International Human Rights Law
IRL	Ireland
ISDS	Investor-State Dispute Settlement
JHA	Justice and Home Affairs
LGBT	Lesbian, Gay, Bisexual and Transgender
MEP	Member of the European Parliament
MS	Member State (of the European Union)
NGO	Non-governmental Organization
NHRI	National Human Rights Institutions
ODIHR	Office for Democratic Institutions and Human Rights, OSCE
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union (former Official Journal of the European Communities)
OMT	Outright Monetary Transactions
OOPEC	Office for Official Publications of the European Communities
OSCE	Organization for Security and Co-operation in Europe
PCA	Partnership and Cooperation Agreement
PSC	Political and Security Committee
SADC	Southern African Development Cooperation
TCN	Third Country National
TEC	Treaty establishing the European Community
TEEC	Treaty establishing the European Economic Community
TESM	Treaty establishing the European Stability Mechanism

TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
THB	Trafficking in Human Beings
TTIP	EU-USA Transatlantic and Investment Partnership
UEMOA	West African Economic and Monetary Union
UK	The United Kingdom
UN	United Nations
UNEP	United Nations Environment Programme
UNODC	United Nations Office on Drugs and Crime
US	United States of America
VAT	Value Added Tax
WTO	World Trade Organization

Part I
Equality and States: Are Some States More ‘Equal’ than Others?

Chapter 1
The Principle of Equality Among Member States of the European Union

Lucia Serena Rossi

Abstract The present chapter is aimed at reconstructing the evolution of the principle of equality among EU Member States, a principle first introduced by the Constitutional Treaty and now reaffirmed by the Treaty of Lisbon (Article 4 (2) TEU). The research is divided into two parts, the first one analyzing the relation between equality and sovereignty and the second addressing the way the principle of equality among Member States relates to the principles of sincere cooperation, national identity and solidarity that, as we will see, influence the idea of equality itself. In summary, we will see whether the relations among the Member States of the European Union can be framed by the idea of equality among States as it was developed in international law or whether that idea should rather be reshaped in light of the Union's supranational nature.

Keywords Equality • Member States • Differentiated integration • Principle of conferral • Principle of sincere cooperation • National identities • Principle of solidarity

1.1 Introduction

The present chapter is aimed at reconstructing the evolution of the principle of equality among EU Member States, a principle first introduced by the Constitutional Treaty and now reaffirmed by the Treaty of Lisbon (Article 4(2) TEU).

The research is divided into two parts, the first one (Sect. 1.2) analyzing the relation between equality and sovereignty and the second (Sect. 1.3) addressing the way the principle of equality among Member States relates to cognate principles that, as we will see, influence the idea of equality itself.

In the first part, we begin by looking at the genesis of the principle and its place in international law (Sect. 1.2.1) and in international organizations (Sect. 1.2.2). We will then consider how the idea of equality among EU Member States has evolved

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in the European Union itself in light of the latter's process of integration (Sects. 1.2.3 and 1.2.4).

In the second part, we will first have to see how the principle of equality among Member States can be made consistent with the process of differentiated integration within the EU, asking whether the former can impose constraints on the latter (Sect. 1.3.1). We will then turn to the question of how the principle of equality among Member States relates to other fundamental principles of the EU, particularly those listed in the same Article 4 TEU (Sect. 1.3.2): the principle of conferral, the principle of sincere cooperation among Member States (Sect. 1.3.2.1), and the principle requiring the EU to respect the national identities of its Member States (Sect. 1.2.2). We will finally consider how the principle of equality relates to a further principle invoked in the Treaty of Lisbon, that of solidarity in its twofold dimension, among Member States and between Member States and the Union (Sect. 1.3.3).

In summary, we will see whether the relations among the Member States of the European Union can be framed by the idea of equality among States as it was developed in international law or whether that idea should rather be reshaped in light of the Union's supranational nature.

1.2 Equality Among States and Sovereignty in International Law and in EU Law

1.2.1 The Principle of Equality Among States in International Law

The principle of equality among States initially established itself in legal literature as an offshoot of natural law theory and the Enlightenment[1]: it was based on an analogy between the rights of individuals and those of States, while others held that it was rooted in an idea of 'innate cosmopolitanism.'[2] Francisco de Vitoria suggested that States could be included in the idea of the natural equality of individuals and of peoples. The principle was then given an iconic statement by Emmerich de Vattel, who remarked that 'just as a midget is a man no less than a giant, so a tiny republic is no less sovereign than the most powerful of kingdoms.'[3]

The principle was, after all, functional to the idea of the sovereign State[4]: considering that a disorganized community lacks any hierarchically higher

[1]For a historical reconstruction of the concept, see Kooijmans (1964), Kokott (2011), Lee (2004) and Dunoff (2012).

[2]Gordon (2012).

[3]De Vattel (1758), Bok. IV, Chap. 6, para 78.

[4]According to Hassan (2006) it was the Peace of Westphalia that paved the way for the concept of sovereign equality among States.

authority,[5] and that law comes into being as a way for the State to limit its own sovereignty, every sovereign State has a right to be considered equal to other States, precisely because it recognizes no superior authority (*superiorem non recognosens*),[6] and regardless of its size, weight, or wealth.

The principle, which over time solidified into something of a postulate,[7] was a statement of formal, or legal, equality before the law, and it was intended to protect the smaller or weaker States.[8] There also flowed some corollaries from it, especially that States are independent, that there can be no interference in their internal affairs, and that each State is immune from the jurisdiction of other States.[9] In a 2012 case on whether Germany ought to be recognized as immune from Italian civil jurisdiction in connection with circumstances that trace back to the Nazi occupation of Italy, the International Court of Justice found that the principle of immunity for *iure imperii* acts rests precisely on the principle of formal equality among States.[10]

It is clear, however, that formal equality among States rarely, if ever, entails substantive equality, meaning an equality of power relations, and on that account it came under the criticism of legal positivism. Thus, wrote Hans Kelsen in 1944[11]:

> Equality is the principle that under the same conditions States have the same duties and the same rights. This is however an empty and insignificant formula because it is applicable even in case of radical inequalities.[12]

Kelsen rejected the then-dominant view that the principle of equality among States is closely bound up with that of the autonomy of States as subjects of international law. Indeed, he thought it impossible to extract rules from a legal concept like that of sovereignty, in that rules are born of practice.

The principle of equality was upheld at the international peace conferences held at The Hague in 1889 and 1907, where it was captured in the motto 'One State, one vote,' but it gave rise to much friction when it came to setting up a permanent international arbitration court entrusted with settling international disputes. No mention was made of the principle in the Covenant of the League of Nations, which did not rest on a principle of formal equality but rather gave greater weight to

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[5]According to Anand (2008), p. 14, the sovereignty and the equality among States 'are really two sides of the same coin.'

[6]See Vellano (2011).

[7]Anand (2008), p. 14.

[8]The principle was characterized by Oppenheim (1905), p. 161, as 'an invariable quality derived from their International Personality.'

[9]See Oppenheimer (1922) and Kingsbury (2014).

[10]Cf. *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, 99: 'The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order' (para 57 of the ruling).

[11]Kelsen (1944).

[12]Kelsen (1945), p. 252.

the nations that had defeated Germany, but since the organization had no ability to bind States not taking part to its decisions, substantive equality was not violated.[13]

The United Nations Charter overturned the situation. On the one hand, in the preamble, it formally stipulated equal rights of 'nations large and small,' while also stating, in Article 2(1), that the 'Organization is based on the principle of the sovereign equality among all its Members,'[14] a principle in fact reflected in the functioning of its General Assembly. But on the other hand, unequal representation in the Security Council meant that its resolutions were binding even on those States that did not take part in the decision-making process.[15] But then, because nuclear powers were emerging on the world scene, and the need arose to limit nuclear proliferation, it soon became clear that international security could not be guaranteed without accepting that not all States were entitled to equal rights.

The principle of the sovereign equality among States was asserted once more by the UN General Assembly in its Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.[16] Having defined sovereign equality as meaning that all States 'have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature,' the Declaration lists the specific contents of that equality,[17] stating that all the principles contained in the Declaration itself are interrelated, for one thing, and that they 'constitute the basic principles of international law,' for another. The Declaration reflected an era when decolonization was in process and equality among States was widely perceived as a corollary of their independence as subjects of international law.

But because formal equality can be voluntarily limited by an international treaty freely underwritten by a State, thus giving rise to differentiated situations so shaped *by law*, it is clear that even if there is formal equality in the formation of a treaty, its content can reflect the unequal power relations between the signatories[18]: illumi-

[13]Weinschel (1951).

[14]Preuß (2008) underscores that the expression 'equality of States' has a merely formal meaning and rather means 'equal sovereignty.'

[15]Even the International Court of Justice has the power to hand down binding decisions, but as Weinschel underscores the judges who sit on that Court act in an individual capacity and not as representatives of States (Weinschel 1951).

[16]Resolution 2625 XXV, 24 October 1970.

[17]'In particular, sovereign equality includes the following elements: (*a*) States are judicially equal; (*b*) Each State enjoys the rights inherent in full sovereignty; (*c*) Each State has the duty to respect the personality of other States; (*d*) The territorial integrity and political independence of the State are inviolable; (*e*) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (*f*) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.'

[18]See, in this regard, Roth (2012).

nating in this regard is the debate on ‘unequal treaties,’[19] as well as the more recent practice of the so-called WTO Plus.[20]

And in fact, as the international community is shifting from a scenario of independent States to one of interdependence of States,[21] international organizations have begun to introduce exceptions to the principle of equality (without ever rejecting it outright), and so, just as States are limiting their own sovereignty, they can also be observed to agree to rules that move away from the principle of formal equality, in a way that only occasionally is warranted by considerations of substantive equality.

The relation between the principle of equality and the duty of States to uphold in good faith the commitments they make therefore proves to be especially important, in that, as we have seen, this may justify a substantive limitation of formal equality through the treaties a State freely agrees to enter into. That duty is stated in Article 2 of the UN Charter, which requires States to fulfill in good faith the obligations they take on under the Charter itself, and which also contains a sort of principle of sincere cooperation.[22]

1.2.2 The Principle of Equality and International Organizations: The Representation Tests and the Voting Rules

International organizations, or multilateral systems, are set up on the premise that Member States voluntarily agree to give up some of their own sovereignty so as to confer powers on the organization itself. This self-limitation of sovereignty can also be coupled with a compression of the principle of formal equality. There are two criteria in light of which international organizations have traditionally measured that compression: (*a*) quantitative representation and the weight carried by different states in the organizations they are members of and (*b*) voting majorities.

[19]See, in this regard, the observations offered by Craven (2005).

[20]Accession to the World Trade Organization (WTO) after this multilateral trade system went into effect, on January 1, 1995, has been subject to so-called WTO-Plus commitments, requiring applicants to meet conditions more stringent than the ones required for membership under the original Marrakech scheme. In particular, countries with rich natural resources or countries that exploit their resources intensively (like China) have agreed not to introduce export tariffs on raw materials, this in contrast to the GATT 1947 system and the current WTO scheme, imposed no such conditions, allowing 1995 WTO members to levy whatever export tariffs they see fit. See Baroncini (2013).

[21]Anand (2008), p. 25.

[22]Under Article 2, UN members are required to assist the United Nations in any action the Organization takes under its Charter and to refrain from assisting ‘any State against which the United Nations is taking preventive or enforcement action.’

(*a*) As to the first criterion, it must be noted that the relation the principle of equality holds to democracy is an ambiguous one. These two principles are typically invoked together when speaking of individual rights. So when the principle is brought to bear on the relations among states, it would seem at first sight to combine with the 'One State, One Vote' rule, on the basis of an idea of democracy embraced within the international community. However, as has been underscored in legal scholarship,[23] this rule faces a challenge in light of the trend toward a greater and greater role ascribed to peoples and individuals in international law, for the implication is that the more populous a state is, the greater the weight it should carry.

The concept of democracy in international law is thus ambivalent and raises a basic question: is it more democratic to have a voting rule that gives equal weight to all States in virtue of their equal sovereignty, or is the principle of equality better served by a procedure that takes into account the number of individuals different States represent? In framing a set of voting rules, every international organization must try to balance these two concerns, and must do so with the consent of its members.

It is therefore not uncommon for the principle of equal representation of States to come under considerable exceptions within international organizations, starting from the UN Security Council, whose composition reflects a situation of unequal power among permanent and nonpermanent members, a situation that originated in a specific historical context.

The practice of international organizations can be observed to follow a trend away from *formal* equality—the 'One State, One Vote' criterion—toward criteria of *substantive* equality (or what *ought to* be interpreted that way). It should also be observed, at the same time, that the application of that criterion vary from one international organization to another and can therefore easily draw criticism as questionable or as based on criteria that seem to be unfair.[24]

Depending on the nature of the organization in question, votes can be distributed among members on the basis of a variety of other considerations.[25] This can be appreciated especially with the spread of sector-specific international organizations, an example being the International Monetary Fund, whose Member States vote as if they were shareholders, each State carrying a voting power proportional to that of the contribution it makes to the fund. Another example is that of international organizations whose system of representation is specifically tailored to the features of the organization itself.[26]

[23]Kokott (2011), paras 44–47.

[24]As concerns organizations entrusted with governing the world economy, see the considerations offered in Vellano (2011).

[25]See O'Neill and Peleg (2000), Madeleine (1996) and Zamora (1980).

[26]For a study of the different exceptions to the 'One State, One Vote' rule in international organizations, see Boutros-Ghali (1960).

(*b*) As to the second criterion, the principle of equality among States should in the abstract mean that no majority of states can impose anything on any single state contrary to its will. It follows that in an international organization the principle should translate, at least in theory, into the rule of unanimous voting. The unanimity requirement should protect the smaller States by giving them a veto power no matter how small the State is. But the unanimity rule grinds the decision-making process into gridlock, ultimately undermining the very effectiveness of the organization in question. What follows is a contraposition between equality and effectiveness, a situation that may induce States to accept limitations on the former so as to enhance the latter.

The creation of the UN itself was preceded by a debate on the voting method. Reasoning in part in light of the failure of the League of Nations, whose decision-making ability had been paralyzed by the unanimous voting rule, Kelsen thought that this principle did not exclude the creation of voting rules not based on a criterion of unanimity.[27] In 1960, Boutros-Ghali underscored that whereas the unanimity voting rule played in favour of the smaller States, majority voting (even if by a qualified majority) gave an edge to the more powerful States, which could use it to create a 'clientele' of their own.[28]

Under the terms of charters freely underwritten by the parties, international organizations, especially technical and sector-specific ones, are increasingly embracing voting rules inspired by criteria of efficiency, which accordingly excludes the veto power (though there are some notable exceptions, first among which that of the UN Security Council). There have also developed a couple of practices intended to make it easier to overcome the veto, one being assumed consensus (where one is presumed to agree unless an explicit contrary vote is cast) and the other negative consensus (a presumption of disagreement): most of the time they make it possible to bypass the vote itself.

So it turns out that the principle of equality undergoes a range of exceptions within international organizations, both as concerns weight and representation within these institutions and as concerns the voting procedure. In an organized international community, in which the independence of States is no longer called into question, the principle of formal parity of States seems to play a less prominent role.[29]

The principle of equality which in international customary law is closely bound up with the idea of sovereignty, is increasingly being limited on the reasoning that it is the States themselves that have willingly accepted to limit their own sovereignty by taking part in international organizations based on a system of differentiated representation with no veto power. The reason why smaller States accept such terms—renouncing formal parity and their veto power—is arguably that the

[27]Kelsen (1944), p. 209.

[28]Boutros-Ghali (1960), p. 56. Cf. Focarelli (2007).

[29]This is a point on which there is wide agreement. See, for example, Preuß (2008), Weinschel (1951), Dunoff (2012) and Lee (2004).

guarantees they are offered in exchange, through the institutions and procedures of the international organizations they join, are deemed sufficient.[30]

It can be argued that the more an organization's Member States feel that the organization is independent and capable of dealing impartially and effectively with matters of common interest, the more they are willing to relinquish claims to their sovereign status and, correlatively, to equality. In a sense, this ability of international organizations also forms the basis on which the transfer of sovereignty can be legitimized, and where such ability should become less effective, that transfer of sovereignty would find itself standing on shakier ground and would prove more difficult to justify on the basis of the States' constitutions. After all, States can always withdraw from the international organizations they join (they can do so not only in virtue of specific treaty provisions but also under the *clausola rebus sic stantibus*), and that shows that a State's transfer of sovereignty to an international organization is not irreversible.

1.2.3 How the Principle of Equality Has Evolved Among EU Member States: The 'Classic' Tests of the Representation in the Institutions and of the Decision-Making Procedures

Let us turn now to the question of how the principle of equality among Member States has developed within a specific system, that of the European Union (EU), which is transitioning away from its original status as an international organization toward a supranational union.

To begin with, we should go back to the two criteria (Sect. 1.2.2) for judging an international organization's compliance with the principle of equality, thus taking into account both the voting rules and the State's representation within an organization. These two criteria are closely bound up, in that they have evolved in tandem with the changes made to the organizations' own charters, and with the enlargement in the number of Member States. However, because the process of European integration is markedly supranational, we will need to bring in a third criterion (as discussed in the next Section) in addition to the previous two.

As is known, the process of European integration started out with the European Coal and Steel Community (ECSC), and so with a sector-specific organization. It was made up of six States: on a population basis, three of them were large (France, Italy, and Germany), two were medium-sized (Belgium and the Netherlands), and one was a micro-State (Luxembourg).

[30]Preuß holds that this acquiescence evinces a constitutionalization of the international legal order (Preuß 2008). Gordon argues that limitations of sovereignty amount to a transfer of powers to 'collective agencies' (Gordon 2012).

As to the States' representation within the institutions of the ECSC, its High Authority was composed of more members than were the ECSC States—nine members appointed on the basis of their qualifications and independence. Eight of these members were designated by the governments of the six States (either 'by agreement among themselves'[31] or by a five-sixths majority), and then those eight members would elect a ninth one. Every three years a partial change of the members of the high Authority was made by lot. Seven judges sat on the ECSC Court of Justice: every three-year three and four of them would alternatively be selected, here too by lot, for replacement with other appointees.

As to the voting rules, the Special Council—its presidency held by each member in rotation in the Member States' alphabetical order—decisions were made by an absolute majority of its members, but it was necessary for such a majority to include a State supplying at least 20% of the Community's coal and steel production. The number of seats allotted to each State in the Common Assembly was proportional to its size according to the three previously mentioned tiers: Eighteen seats went to each of the three largest States; ten to Belgium and the Netherlands; and four to Luxembourg.

The ECSC system was thus framed by rules of formal parity, while also taking into account the weight each that member state carried depending on its output and population.

The institutional system of the European Economic Community, in part based on the ECSC system, likewise coupled the Member States' formal parity with some adjustments to correct for their size. But in some respects the system was different from that of the ECSC, the former being general in its aims and the latter sectoral.

The voting system within the Council (at the time Europe's only legislative organ) was mostly based on unanimity, except for rare occasions on which decisions were made by simple majority or by qualified majority. Whereas in unanimity and simple-majority voting it was the 'One State, One Vote' principle that governed, qualified-majority voting tempered that principle by allotting a number of votes on a weighted basis. The system thus struck a balance between the need for more populous States to be more represented than less populous ones and the need to make sure that the latter wouldn't systematically wind up in the minority. So the larger States were allotted more votes, but with a corrective skewed in favour of the smaller States. A similar criterion of degressive proportionality was used to apportion seats in the European Parliament. It must, however, be borne in mind that in the beginning all but a handful of decisions were adopted by the Council of Ministers and by unanimity, with the Parliament being relegated to a simple consultative role, and so even the smallest state enjoyed a veto power.

As to the States' representation within European institutions, the 6-month rotating presidency of the Council of Ministers—next to which came, in the 1970s, the presidency of the European Council—emphatically underscored the formal parity of all Member States, which take turns in exercising the

[31] Article 10 ECSC Treaty.

policy—and lawmaking functions. And as much as the larger States appointed more members both to the European Commission and to the European Court of Justice, the persons so appointed did not represent their own States but were rather entrusted with promoting the general interest and protecting the common European legal order, respectively.

As a whole, the Community system was thus designed to pursue a 'substantive' equality, tweaking the system in favour of the smaller States. Absent such tweaks, it would have been difficult in postwar Europe to convince the Benelux States to sign on to the integration project with the larger states, especially Germany and Italy.

For a long time, this institutional framework evolved by treaty revision, and with the first enlargements its numbers grew, though without altering its underlying philosophy. However, starting from the Single European Act, European powers expanded and more policy areas went from unanimity to qualified-majority voting, with a consequent elimination of veto power. Even the increased lawmaking role assigned to the European Parliament in the European Union, especially with the codecision procedure introduced under the Maastricht Treaty, has contributed to increasing the weight of the larger States, nonobstant an allotment of seats based onthe principle of degressive proportionality.

After German reunification, the country, and in particular its Federal Constitutional Court,[32] began to criticize the allotment of votes in the Council and of seats in the European Parliament, arguing that the population of the larger States had been underrepresented. A debate on the fairness of the system ensued that betrayed a growing skepticism about the Union's ability to fairly represent the interests of all Member States and their populations, and the debate became even more heated in light of the sizable enlargement that brought in twelve new Member States.

An attempt to deal with these increasing tensions and mutual mistrust was made in the Treaty of Nice, under which the number of German members of the European Parliament was increased relative to that of the other large States, though keeping in place the criterion of degressive proportionality. The Treaty also kept in place the rule under which the larger Member States could each appoint two commissioners, but the rule has since become that each State can only designate one representative.

The Treaty of Nice readjusted the weighting of votes by increasing the gap between large States and small ones,[33] and it also introduced a new method for calculating what counts as a qualified majority in the Council by taking a triple threshold into account: the number of votes (at least 260, after Croatia joined the Union); the number of Member States (either a simple majority, if the proposal comes from the European Commission, or a two-thirds majority, in all other cases);

[32]An example is the way the role of the European Parliament was framed by the Court in German Federal Constitutional Court (BVerfGE), 2 BvR 2134/92, 2 BvR 2159/92, 12 October 1993, where the issue was whether the Maastricht Treaty is compatible with the *Grundgesetz*, or Basic Law for the Federal Republic of Germany.

[33]It should further be noted here that the weighting is based not on each country's number of citizens but on that of its residents.

and EU population (at least 62%). It should finally be borne in mind that in the European Investment Bank, and now also in the Treaty Establishing the European Stability Mechanism (ESM), each State's voting rights are proportional to its economic contribution to the ESM, in much the same way as is the case with international financial organizations.

In reality, the controversies on representation and on voting rules seemed more a matter of status and comparative advantage than a concern with not being pushed into the minority. Indeed, a study done at the time found that only rarely has the Council resorted to a vote, usually proceeding by consensus, and most of the votes have been unanimous, even in policy areas where the law permits qualified-majority voting.[34]

This is not to say, however, that the founding Treaties' gradual move away from unanimity toward qualified-majority voting has been without consequence: when States lack veto power, they have an incentive to work toward a solution that can garner general consensus. This practice thus seeks to temper the efficiency of non-unanimity voting with correctives designed to protect equality. Taking a vote is therefore not the rule but rather marks a moment of crisis, a breakdown in the consensus mechanism (designed to protect smaller States from being pushed into the minority).[35]

The Treaty of Lisbon provided for this system to be reformed as from November 1, 2014.[36] Accordingly, qualified-majority voting (which became part of the regular legislative procedure, so the most widely used procedure) has since been based on so-called double-majority voting, and for the first time the weighting system was abandoned.[37] Qualified majority now requires 55% of the Member States voting in favour (at least 15 States) representing at least 65% of Europe's population (the 55-percent threshold increases to 72 percent when deliberating on a proposal not originating from the European Commission). As a measure protecting the smaller States, a blocking minority must comprise at least four States; otherwise, the act will be deemed to have been adopted. Furthermore, until March 31, 2017, any member of the Council may request that any qualified-majority deliberation within the Council follow the weighted-voting system provided by the Treaty of Nice.

[34]See Verola (2004).

[35]See Jacqué (2010), pp. 334–335.

[36]Article 16(4)–(6) TEU: '4. As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. The other arrangements governing the qualified majority are laid down in Article 238 (2) of the Treaty on the Functioning of the European Union. 5. The transitional provisions relating to the definition of the qualified majority which shall be applicable until 31 October 2014 and those which shall be applicable from 1 November 2014 to 31 March 2017 are laid down in the Protocol on transitional provisions. 6. The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union.'

[37]Article 16 TEU, Article 238 TFEU, and Protocol No. 36.

Furthermore, with the Treaty of Lisbon the rules on majorities were for the first time applied as well to the European Council, albeit only in a limited range of cases where the Treaty requires the Council to make binding decisions without specifying any different voting rules. The introduction of the ordinary voting procedure reduced the number of legal bases that require unanimity and thus entail a veto power. However, unanimity is still the rule in crucial policy areas of EU integration, such as fiscal policy under the Common Foreign and Security Policy (CFSP). A majority in the European Council will in any event have to reach a higher threshold when deliberating on proposals not originating from the European Commission.

The decision-making practice within the Council will in any event be strongly based on consent and consociation, and vote-taking continues to be an exception to the consensus-building practice. Guarantees in favour of minorities will be reinforced by keeping in place rules akin to the so-called Ioannina compromise,[38] as well as by virtue of several 'emergency brakes,'[39] enabling any Member State to request the Council or the European Council to reexamine a decision made by qualified-majority voting by taking account, as far as possible, of the concerns expressed by states in the minority.

Experience, on the other hand, shows that most opposing fronts, alliances, and coalitions are not formed between large and small States or between old and new Member States but rather turn on economic or strategic interests that may vary from one policy area to another. As has been observed,[40] a Member State's 'nominal weight' within the EU can differ by a wide margin from its real weight, for the latter depends on a range of factors independent of the size of the State in question, such as access to information, the ability to work out and justify a national stance on a given issue, negotiating power, the ability to build alliances, and the credibility enjoyed with European institutions. Nominal weight can in any event factor into the power to form coalitions in forming the majorities or blocking minorities needed to determine the outcome of a vote.

The voting-procedure and representation tests thus speak to a concern with reconciling the rules of formal equality with considerations of substantive equality, taking into account the weight carried by the larger States while trying to protect the

[38]See Declaration No. 7 and Council Decision 2009/857/EC (*OJ* 2009 L 314/73). 'From 1 November 2014 to 31 March 2017, if members of the Council, representing (*a*) at least three-quarters of the population or (*b*) at least three-quarters of the number of Member States necessary to constitute a blocking minority [. . .] indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue. [. . .] The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council.' The same provisions apply on a permanent basis 'as from 1 April 2017, if members of the Council, representing (a) at least 55% of the population or (b) at least 55% of the number of Member States necessary to constitute a blocking minority [. . .] indicate their opposition to the Council adopting an act by a qualified majority.' On this question, see Jacqué (2010), p. 344.

[39]See Articles 48, 82, and 83 TFEU.

[40]Verola (2004).

smaller States from being locked into minority positions. What can be concluded, as far as these two tests are concerned, is that the voting and representation systems are on the whole intended to strike a balance between the equality among States and the equality of peoples. Finally, the appointment of judges to the Court of Justice and to the General Court is now based on the rule of—respectively—one or two seats per Member State, while an exception to the rule—in favour of larger States—is only made in appointing advocates-general. In conclusion, evolving from an international organization to a new form of supranational one, the EU has been shaped by principles of its own. Therefore, the way of ensuring the equality among member States at institutional level diverges from the classic models of international law.

1.2.4 The Need for a Third Test: The Role of the 'Guarantee Institutions' and the Ability to Ensure the General Interest

As we have seen, states joining an international organization can decide to give up some of their sovereignty, and to a corresponding degree their equality, by relinquishing their power to veto decisions by which they stand affected. And the justification for such a decision will be stronger the more the organization in question can look after the common interest.

The same tension between formal equality and democracy that we have seen repeatedly crop up in international law therefore comes up even more forcefully in EU law, a project conceived to form 'an ever closer union among the peoples of Europe.'[41]

It is in this sense that EEC first and later the European Union, as supranational entities within which Member States are expected to give up a much larger share of sovereignty than would be entailed by membership in an international organization, have been designed with an institutional framework capable of guaranteeing independence and impartiality. This proves especially necessary in a system like that of the EU, whose rules are often approved by majority voting and trump the rights of Member States while having a direct effect on their legal systems. Unlike what happens in other international organizations (like the World Trade Organization), stewardship of the EU is entrusted not to its Member States but to supranational institutions.[42]

So if we are to assess whether the principle of equality among EU Member States is actually being respected, we should apply a third test, considering whether supranational institutions can promote the EU's general interest and enforce the rules of EU law. Indeed, we should not forget here that the principle of equality

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[41]Preamble and Article 1 TEU; preamble TFEU; and preamble of the Charter of Fundamental Rights of the European Union.

[42]Ansong (2012).