More Equal than Others?

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Perspectives on the Principle of Equality from International and EU Law

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Foreword

> Fourth, we will endeavor… to further the enjoyment by all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.
>
> —Joint Statement by Franklin D. Roosevelt and Winston Churchill, 'The Atlantic Charter' (1941)

> The obvious inadequacy of the traditional conception of State sovereignty as set down in 1945 in the Charter of the United Nations, becomes manifest. This conception, defined in terms of political factors to the exclusion of economic considerations, has made it possible to confer on a new State the visible and external signs of its sovereignty—a flag, a national anthem, and a seat in the United Nations—while the reality of power resides elsewhere. Behind the artificiality of the legal and institutional structures set up to lend some verisimilitude to the national sovereignty of the new State, can be discerned forms of real dependence, based on organized economic subordination which is utterly incompatible with the true notion of sovereignty. Traditional international law has helped to make independence a completely superficial phenomenon, beneath the surface of which the old forms of domination survive and the economic empires of the multinational corporations, and the powers that protect them, prosper.
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> —M. Bedjaoui, *The New International Economic Order* (1979) 81.

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

distinguish three ways of thinking about this relationship in terms of domination, emancipation, and fluctuation.

First, one way of seeing the relationship between formal and substantive equality as one of domination is to argue, as classically done by Karl Marx, that rights abstract from concrete conditions of inequality in a way that not only leaves those conditions entirely intact, but even entrenches and justifies them.[1] The argument there as elsewhere has been that a society built on rights, on formal equality, releases its members into conditions of material inequality and dependence. Another way to think about that same relationship in terms of domination is to argue—as is well established in international legal scholarship—that law's origins lie in the process of colonial expansion during which other people were treated as formally equals, only to then be treated differently in the practical operation of the law.[2] They were included only to then be subjugated.

Giulia Gabrielli expands on such a critique in Chap. 4, in which she takes up the pioneering work of Third World Approaches to International Law (TWAIL). Sometimes referred to as a critique of "double standards", the point is rather that the *same* standards create drastically different outcomes as they hit the ground because of differentiating principles that operate in tandem with claims to equality—such as degrees of civilization and development. *Lorenzo Gradoni*'s marvelous contribution (Chap. 15) on international law's fictional engagement with an *Animal Farm* turned real makes a similar point that mirrors postcolonial critiques of international criminal law. Pigs are accepted as legal subjects in his narrative only to be subjugated by the law, sentenced under it.

Claims to formal equality are powerless in this line of critique because it is the law as an instrument of domination that defines equality and legal subjectivity in the first place.[3] Law, in this view, is not legitimized through sovereign consent, by states or citizens, but it *makes* states and citizens in an expression of power. *Fulvia Ristuccia*'s argument goes in this direction in the present volume (Chap. 7) when she highlights the discriminatory and arbitrary effects of how workers are defined in the practice of EU free movement law, and how that bears on what it means to be an EU citizen.

A second way of thinking about the relationship between formal and substantive equality knows of the dynamics of the first, but still sees an emancipatory potential in the postulation of formal equality. Some of the critics of formal equality as an

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[1] Marx, Karl. (1843) 2006. Zur Judenfrage. Reprinted in *Marx Engels Werke*, vol. 1. 347–77. Berlin: Karl Dietz Verlag, p. 347.

[2] This is shown with great force in Anghie, Antony. 2005. *Imperialism, Sovereignty, and the Making of International Law*. New York: Cambridge University Press. Also already consider the work of the then crown jurist for the Nazis, Schmitt, Carl. 1940. Völkerrechtliche Formen des modernen Imperialismus. In *Positionen und Begriffe*, ed. Carl Schmitt. Hamburg: Hanseatische Verlagsanstalt, p. 164. Cf. von Bernstorff, Jochen. 2019. The Critic. In *Concepts for International Law*, eds. Jean d'Aspremont and Sahib Singh, 154–163. Cheltenham and Northampton: Edward Elgar Press, p. 154.

[3] Pahuja, Sundhya. 2011. *Decolonising International Law: Development, Economic Growth and the Politics of Universality*. New York: Cambridge University Press.

instrument of domination also appreciate the relationship between formal and material equality in this second way. As unsparing as their critique of the law and claims to formal equality may be, they would not want to give up on these claims either. That, too, is borne out by TWAIL scholarship.[4] The direction of the critique is then one of adjusting the way in which equality should be realized. There is a productive dialectic between the concrete application and the general aspiration to universal equality, as the present volume's editors also note.

Many of the present contributions argue in this way, highlighting biases and *de facto* discriminatory outcomes. *Giulio Fedele* in Chap. 8 makes the compelling argument that the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR) are based on a heteronormativity—the assumption of heterosexual orientation which leads to discriminatory outcomes for LGTBQ+. *Stefano Dominelli* in Chap. 10 in turn shows how some states are *de facto* preferred over others in the operation of the EU conflict of laws.

Granted, the law can dominate and discriminate, but the claim to equality is an anchor to work against such domination and discrimination. Where not even formal equality exists, everything seems to be lost. Formal equality between subjects—as *Lorenzo Gasbarri* argues in Chap. 5 regarding international organizations—is a precondition for other kinds of equality. That is also the gist of the contributions by *Lorenzo Acconciamessa* (Chap. 12), *Paola Ivaldi* (Chap. 1) and *Edoardo Benvenuti* (Chap. 13) who each, in their respective domain of inquiry, want to improve the situation of the weaker party in judicial proceedings. This is the case for *Carlo de Stefano*, too, who in Chap. 14 wants to tackle the inequality between foreign investors and host states by leveling up the latter. But in this case, treating the parties as equals before investment tribunals as we know them may in fact lead to greater material inequality. Rather than re-embedding the economy politically, the suggestion is likely to lead to the opposite, further subjecting politics to market rationality.

The divide between spheres of politics and economics takes me to a third way of thinking about the relationship between formal and substantive equality in terms of fluctuation. I read *Carlo Focarelli*'s contribution (Chap. 2) as going in that direction. While he sees the emancipatory potential of sovereign equality as 'spur[ring] practice in the right direction … struggl[e][ing] for a more just law', he also notes that '[t]he most striking feature of the principle is that it appears perfectly compatible with any kind of inequality'. In the third way of thinking about the relationship, however, the capacity of formal equality and material inequality to co-exist is less striking than it is necessary.

It is the defining feature of the liberal divide between politics and the public sphere, on the one hand, and economics and the private sphere, on the other. The principle of formal equality prevails in the former, and freedom reigns in the latter. In international law, the spheres are even separated institutionally, with the United Nations (UN) on one side and the International Financial Institutions (IFIs) on the

[4] Cf. Al-Attar, Mohsen. 2021. Subverting Eurocentric Epistemology: The Value of Nonsense When Designing Counterfactuals. In *Contingency in International Law: On the Possibility of Different Legal Histories*, eds. Ingo Venzke and Kevin Jon Heller, 145–161. Oxford: Oxford University Press.

other.[5] It is no small coincidence that one, the UN, is based on the principle of the sovereign equality of all its Members and the other, the IFIs, reflect inequality in weighted voting.[6]

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

The empire of free trade for 'all states, great or small, victor or vanquished', with 'access, on equal terms', which Franklin D. Roosevelt and Winston Churchill championed, has operated, as Mohammed Bedjaoui pointed out, as a fig leaf for the interests of the powerful. The postulation of formal equality has indeed led to great material dependence. The equality of access to trade and raw materials has been a farce, not only because materially different conditions have upended otherwise supposedly fair competition, but also because the supposed formal equality never existed in practice. The way it was given shape legally was skewed from the outset. The equally applicable law opened markets where it mattered most for the Global North, for example in services, and kept them closed where it mattered to the Global South either formally, for example through tariff spikes, or practically, for example through subsidies. Formal equality, in this rendering, appears as domination. But at no point did Bedjaoui, or other critics from the Global South, want to give up on the emancipatory potential that they saw in political equality and formal sovereignty—it was a truncated, not 'true sovereignty', it was a skewed battlefield and an unfair fight, but sovereign equality was still an unmissable asset.[10] When Bedjaoui spoke for the political intervention in the form of the *New International Economic Order*, that project was rebuffed, especially in the Global North, in the name of freedom.

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[5] Also see Boysen, Sigrid. 2021. *Die postkoloniale Konstellation: Natürliche Ressourcen und das Völkerrecht der Moderne*. Tübingen: Mohr Siebeck.

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

[7] Koskenniemi, Martti. 2005. *From Apology to Utopia. The Structure of International Legal Argument*. New York: Cambridge University Press.

[8] Menke, Christoph. 2018. *Kritik der Rechte.* Berlin: Suhrkamp. 2020. *Critique of Rights.* Translated by Christopher Turner. Cambridge: Polity Press.

[9] Compare Polanyi, Karl. 1944. *The Great Transformation.* New York: Farrar & Rinehart.

[10] Bedjaoui, Mohammed. 1979. *Toward a New International Economic Order*. New York and London: Holmes & Meier Press, pp. 90, 95, 244. Cf. von Bernstorff, Jochen and Philipp Dann (eds.). 2019. *The Battle for International Law. South-North Perspectives on the Decolonization Era.* New York: Oxford University Press.

The 'real new economic order' was instead the one of neo-liberalism.[11] As of late, calls for a political re-embedding of the economy have again become louder. The relationship between formal and substantive equality continues to fluctuate. Stories of domination, emancipation, or fluctuation compete in their account of historical facts while the choice between them also expresses beliefs about what needs to be known in the present and for the future. They all have some traction.

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

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

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[11] Mazower, Mark. 2012. *Governing the World: The History of an Idea, 1815 to the Present*. London: Penguin.

[12] Menke, see note 8 *supra*, p. 24, with reference to Kelsen, Hans. (1934) 2008. *Reine Rechtslehre*. Leipzig and Vienna: F. Deuticke. Reprint, Tübingen: Mohr Siebeck, p. 53.

[13] Honneth, Axel. 2011. *Das Recht der Freiheit: Grundriß einer demokratischen Sittlichkeit*. Berlin: Suhrkamp. 2014. *Freedom's Right: The Social Foundations of Democratic Life*. Translated by Joseph Ganahl. Cambridge: Polity Press.

Preface

The principle of equality plays a vital role in public and private international law, as well as in European Union law. It is all too easy to note that it permeates both inter-state and inter-individual relations. The equality of States constitutes one of the cardinal principles both of the international legal order, being a corollary of its horizontal nature, and of the European Union order, where it is codified in the founding treaties; in private international law the idea that there is an (at least apparent) equality between States in relation to their claims to regulate a certain dispute runs through transnational legal relations. At the inter-individual level, both international law and European Union law offer protection against many types of discrimination. Moreover, in private international law, rules aimed at avoiding unequal treatment, such as in the case of weaker parties (consumers, insured persons, workers), are well-developed.

Several factors, however, undermine this traditional egalitarian narrative. On the one hand, the existence of politically and economically hegemonic states affects the effective realization of equality, both at the international level and within the European Union. In addition to institutionalized inequalities, the main example of which is provided by the United Nations Security Council, there are frequent accusations of "double standards" in the application of law or in the functioning of international institutions. In these cases, the principle of formal equality between states seems to retain its ideal force as a guiding principle of international relations, but also lends itself to being invoked in an instrumental sense. On the other hand, the very normative dimension of formal equality has come under criticism, especially in the framework of the so-called "critical approaches" to international law. It has been felt that the continued centrality of the principle of equality could have the effect of hiding forms of domination both between states and between individuals. Furthermore, the model of economic liberalization pursued by international institutions and within the framework of the European Union has been accused of having favored the spread of intolerable social and economic inequalities. There are also inequalities on a procedural level: consider, for example, the so-called asymmetry of international investment law, in which an investor has the right to take a state to court for violation of the rules protecting investments, but the opposite is not possible. The risk of generating inequalities is also inherent in traditional private international law

reasoning, where the application of a certain connecting factor, as well as the choice of whether or not to apply a certain foreign rule or recognize a legal situation created abroad, can lead to significant substantive consequences.

In public and private international law, as well as in European law, therefore, there seems to be a dialectical tension between the egalitarian thrust and institutional, social, and economic inequalities, as well as between different conceptions (formal or substantial) of the same principle of equality. Hence the need to reflect on the role and relevance of the principle of equality in contemporary international and European law, on the multiple manifestations of inequality among international actors, and on the legal instruments to deal with such inequalities. Does the traditional paradigm of an international and European law with an egalitarian dimension still correspond to reality or are our disciplines today to be considered possible vectors of inequalities?

It is against these considerations that, in 2020, following a now well-established tradition in Italy, we decided to launch a call for papers addressed to Italian early career researchers. Responses to the call were enthusiastic and a conference was successfully (albeit remotely) held in December 2020. This book is first and foremost aimed at collecting the stimulating contributions that young (public, private, and EU) legal scholars provided to the debate on the topic. In addition, it includes papers written by senior scholars, who kindly accepted our invitation to enrich the volume with their insightful reflections on the principle of equality.

It goes without saying that this book would not have seen the light of day without the efforts of all those directly or indirectly involved in the project, and particularly of the young Italian academics, who proudly carry forward the tradition of the Italian international and EU legal scholarship. This book is dedicated to them.

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