

THE BALANCE OF POWER: EQUAL REPRESENTATION OF MEMBER STATES IN EU INSTITUTIONS



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Abstract

The principle of (sovereign) equality has been one of the most important building blocks of modern public international law and it has also been one of the founding principles of European integration. While the Founding Treaties include this principle, Member States remain different in many respects in terms of their size, population and economic output, but also in terms of historical experiences, cultural heritage or constitutional identity. In light of this controversy, the present chapter investigates the different aspects of the ‘principle of equality’ and the dilemma it has been posing throughout the evolution of the integration as well as in its institutional arrangement and before its law. In the course of this study, the Chapter aims to shed light on questions such as European democracy and the principle of equality as well as on its relation to the primacy of European law or its process of ‘constitutionalisation’.

Keywords: principle of sovereign equality, European integration, European institutions, equality between Member States of the EU, the constitutionalising of European law, ‘constitutionalisation’ of European law, primacy of European law

1. Introduction

The principle of equality between States has been long considered as a fundamental – *constitutional* – element of both interstate relations and the international

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community governed by public international law¹ as well as – being part of the European construction – of the European cooperation governed by the European law.² The capacity of states to interact with each other or form a treaty alliance based on the law is secured by their equality. However, as simple as this principle sounds, it becomes much more complicated and difficult to envision, conceptualise and promote in practice.

States are different from each other in terms of their size, population, resources, geographical locations, outputs and so on, and therefore they are in different positions. These factors define or even delimit their capacities to act and their way acting. Their equality therefore refers to their capacities in law and their equality in rights. The question becomes even more complex within the European cooperation. The principle of equality might raise different questions and challenges when Member States act as state entities that are individual sovereigns according to international law (*pouvoir constitutants*) and as part of the European community (*pouvoir constutés*). Besides the dual meaning of the principle of equality – under international and European law – the question of equality between Member States and equality between the citizens can be also raised. Within the context of the European cooperation, a further question is whether the principle of equality is designed to protect the Member States and their participation in the cooperation or the European institutional and legal construction. These dilemmas stem from the dichotomy between the principles of ‘unanimity’ and ‘majority’ and the question of priority that has run through the historical path and evolution of the European integration.³ The Chapter seeks to provide adequate response to some of these dilemmas.

The Chapter first outlines the historical origin, concept and functions of the principle of equality under public international law as well as under the European cooperation. This part will also shed light on the major turning points of the evolution of the European cooperation that have relevance to or have influenced this principle. The following section will explore the question of how the principle of equality is present in the institutional structure and arrangement of the European Union. Both the supranational institutions as well as the participation of the national institutions in the European cooperation will be highlighted. The analysis of the institutional arrangement is followed by the decision-making process and how the principle of equality applies throughout these processes. After the institutional and decision-making process, the Chapter will explore the normative aspects of the principle of equality, i.e. how this principle is enforced under the European law and in its application. Last but not least, the Chapter offers an assessment highlighting

1 See Art. 2, para. 1 of the United Nation Charter: ‘The Organization is based on the principle of the sovereign equality of all its Members’.

2 See Art. 4, para. 2 of the Treaty on the European Union (hereinafter: TEU): ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’.

3 Van Middelaar, 2012, pp. 99–138.

both the importance and limits of the principle of equality in the European cooperation. Furthermore, it also puts forward some reform proposals to better achieve the equality of the Member States as the basis of the European cooperation, as well as the equal protection of Member States. The Chapter will summarise its findings in a concluding part with the objective to enrich the currently ongoing public and legal discourse about the equality of Member States or a multispeed European cooperation in the future.

1.1. Sovereignty and Equality Under Public International Law

The following considerations are based on the earlier chapters on the general question of the principle of equality and are put forward to offer further insights into the relations of this fundamental principle and the institutional arrangement of the European Union.⁴ The principle of sovereignty gained acceptance in international law after the end of the Thirty Years' War, and with the conclusion of the Treaty of Westphalia in 1648.⁵ The era was characterised by the rise of positivism and positivist thinking emphasising the supreme power of the sovereign and led to notions of the sovereignty of states.⁶ By virtue of sovereignty, the states are the primary subjects of international law and the doctrine of the equality of states was added to this capacity by Emer de Vattel in the 18th century. Even though the dominant view of the post-Westphalia era was positivist, the doctrine of equality rather owes its origins to Natural Law thinking. The Montevideo Convention of 1933 on the Rights and Duties of States codified this principle.⁷ Art. 4 of this Convention provides that the 'states are juridically equal, enjoy the same rights, and have equal capacity in their exercise'. The rights of States solely depend on its existence as a person under international law.

This conception was adopted by States in the United Nations Charter of 1945.⁸ Art. 2, para. 1 sets out that the 'organization is based on the principle of the sovereign equality of all its Members'. The principle has become part of the peremptory norms of international law and was further detailed by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States of 1971.⁹ As the Declaration points out '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 formal expression of sovereign equality presents itself as a juridical condition attached to states as subjects of

4 See, cross reference to earlier Chapter of Smigova.

5 See, for example, Nagy, 1999, pp. 82–84.

6 Malcolm and Shaw, 2003, pp. 25–26.

7 The text of the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States.

8 The text of the Charter of the United Nations.

9 The text of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

international law. It also has a significant substantive consequence as international legal rules ought to have a neutral and general application and therefore international law rules apply equally to all international actors.¹⁰

The doctrine of equality between states has become influential in many areas of international law. For example, the state immunity that a state enjoys in the courts of another state derives from the principle of sovereign equality. According to the principle of '*par in parem non habet imperium*' and the 'act of state', no sovereign state should sit in judgment over another sovereign state, because from the perspective of international law, every sovereign state is on an equal footing. The principle of equality between states is also expressed by the rule of one state, one vote in the United Nations General Assembly. Other provisions of international law also reflect this principle, for example, a treaty text is equally authoritative in each language if the treaty has been authenticated in two or more languages.¹¹

However, the doctrine of equality between states remains a 'juridical or legal fiction' and has its limits. On the one hand, states are different from each other in terms of size, population, resources, geographical location, economic output etc. These differences result in factual differences as well as diverse situations along with various leverages to act between sovereign states. On the other hand, even though the principle of equality relates to equal rights and duties, the doctrine has its limitations in regard to law, international legal capacity and institutional arrangements as well.

The doctrine of equality has not fully applied the creation of public international law. The differences between states have had a large influence, for example, in the formation of customary international law. The larger states will always have an influence commensurate with their status since their perspectives and concerns are much wider, their interests much deeper and their power more effective and therefore they are generally in a leading position of customary law formation.¹² The practice that is consistently followed by states in leading positions might have greater weight in the formation of customary rule. One of the lessons of the *Scotia* case decided upon by the US Supreme Court in 1871 was that Great Britain had been in a leading position in shaping the navigational procedures on the high seas.¹³ Similarly, the United States and the Soviet Union were in a leading position of forming the international rules of the outer space.¹⁴

The institutional arrangement has also reflected the differences among states. Accordingly, the collective security mechanism of the United Nations includes the large powers and victors of the Second World War, the United States, Russia, China, France and the United Kingdom. They are permanent members of the UN Security

10 Bederman, 2002, pp. 116–118.

11 See, Art. 33, para. 1 of the Vienna Convention on the Law of Treaties.

12 Malcolm and Shaw, 2003, pp. 192–193.

13 See, for example, Dodge, 2017, pp. 12–31.

14 See, for example, Malcolm and Shaw, 2003, pp. 75–76.

Council and certain measures can only be adopted by their unanimous agreement. Furthermore, the UN Charter can only be amended by their unanimous ratifications. Therefore, the institutional architecture of international law differentiates among states according to their differing situations. Furthermore, the doctrine of equality does not apply to financial institutions such as the World Bank or the IMF as their member states have influence according to the capital they provide.

In summary, the doctrine of equality among sovereigns is one of the constitutive pillars and also peremptory norms of modern international law. It provides that international legal rules ought to have neutral and general application and be equally applied. It also aims to provide states with equal rights and duties as well as equal membership in the international community. Nevertheless, the principle has limitations that reflect factual differences in terms of resources, power, size or populations among states. The doctrine of equality under international law is relevant and important within the European cooperation too, as Member States, who have various capacities, are considered ‘Masters of the Treaties’ when they act as subjects of international law.

1.2. Equality Under the European Law and Throughout the History of the European Construction

The European construction began as an international legal arrangement among states that were regulated by the Paris (1952) and Rome (1957) Treaties.¹⁵ The founding moment was an act of international law, and the founding states acted as sovereigns under international law. Furthermore, by establishing the European cooperation or by creating their subsequent forms by treaty modifications,¹⁶ the Member States have continued to remain sovereign equals within the meaning and scope of international law and when they act under this legal regime. The decisions of some of the national constitutional and apex courts reinforced this characteristic as, according to their view, the Lisbon Treaty of 2007 was signed and ratified by sovereign states who did not create a ‘superstate’, but merely shared and continued to exercise some of their competences.¹⁷ Consequently, the Member States remain sovereign equals under international law whenever they act as constituting powers (*pouvoir constituant*s) of the European cooperation.

The principle of equality is also reflected, albeit from a different perspective, in Art. 4, para. 2 of the Treaty on the European Union (TEU) which declares that ‘[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and

15 The Treaty establishing the European Coal and Steel Community was signed in 1952, while the Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community were signed in 1957.

16 The Member States remained the ‘Masters of the Treaties as the European construction is not able to renew or reform itself on its own’. See van Middelaar, 2009, pp. 161–191.

17 See, for example, Decision no. 143/2010 (VII.14.) of the Constitutional Court of Hungary.

constitutional, inclusive of regional and local self-government'.¹⁸ Under this Art., the principle of equality appears as an obligation of the European Union and their institutions *vis-à-vis* the Member States. Consequently, the principle of equality applies to the States as Member States of the European integration.

The European dimension of the principle of equality has multiple and also increasing aspects, as it has had an increasing importance and relevance throughout the historical evolution of the European cooperation. Three major turning points can be identified that gave new layers and readings to this principle.

The first essential turning point was the separation of European law from international law by the judicial recognition of the doctrine of direct effect in 1963¹⁹ and of the priority of the European law over national law in 1964.²⁰ Prior to these judgments, the European Treaties were considered as arrangements under international law that created rights and obligations among the contracting Member States. However, as a consequence of these judgments, the European law, under certain circumstances, contains rights and obligations for private persons that can be applied and enforced *vis-à-vis* the Member States. The reasoning of the judgment goes:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.²¹

The overall objective of these regulations was to create or facilitate the creation of an internal market, which require the free movement of goods, services, persons and capital along with competition and state aid rules. These require the same, mainly negative, role and conduct from each Member State. To this end, the founding Treaties and regulations impose a largely restrictive legal framework on Member States that they need to observe. In this sense the principle of equality first requires that the European law shall have neutral and general application in every Member State of the European integration. At the same time, a closely related question is the enforcement of this law by the institutions of the European integration. The neutral and general characteristics of the European law requires the limitation or elimination of discretionary decision in those procedures that aim to scrutinise Member States and their implementation of European law. The even-handed application of the European law is therefore considered as a necessary element of their neutral and general characteristics.

A further aspect of the principle of equality is the equal participation or representation of Member States in the institutional setting of the European cooperation as

18 Consolidated version of the Treaty on European Union – Title I Common Provisions – Art. 4.

19 Judgment of the Court of 5 February 1963 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62.

20 Judgment of the Court of 15 July 1964 *Flaminio Costa v. E.N.E.L.*, Case 6-64.

21 See, Grounds of Judgment, on the application of Art. 177.

well as in the decision-making process. The Member States not only act as constitutive powers of the European institutions, but they and their national institutions are also participants as constituted powers in the European governmental arrangement.²² The ways and competences of their participations raise the questions of equality. Furthermore, the European cooperation has increasingly embraced the objective of becoming democratic since the 1970s.²³ It has been searching for the various ways of how to include the peoples of Europe in the European decision-making processes and how to make the questions of the European cooperation part of the national public discourses.²⁴ Some of the democratic aspirations pose challenges to the principles of equality. The equality of the Member States and the equality of the citizens reflected in some of the aspirations are difficult to reconcile as the concept of the 'Union of citizens' would no longer reflect the original setting that has been based on the arrangement of sovereign and equal states.

This aspect of equality between Member States have come to the forefront after the Fall of the Berlin Wall and the subsequent decision by the Maastricht Treaty of 1993 to extend the cooperation beyond market integration to political domains including questions of internal and external security. In these areas, the Founding Treaties and the European law do not only impose obligations, but they rather create a legal basis and opportunity for governance and for adopting normative and individual decisions that also relate to core functions of states. In this dimension, the question of equality between Member States takes a different form and relates to their participation in the decision-making process. In the meantime, the path from the Treaty of Maastricht in 1993 to the failed Constitutional Treaty in 2005 planned to shift constituting power from the states to the citizens and thus contravene to the doctrine of equality.

The major third turning point might rather embrace a longer process by which the Member States of the European Union have become more diverse in terms of their historical experiences, the reasons for their accession as well as their primary expectations from the European Union. Instead of one specific point in time, the process has taken a longer period. However, the Eastward enlargement in 2004 and the subsequent Lisbon Treaty of 2007 can be considered as a defining period in this process. As the European cooperation has deepened but also become more diverse, the question of equality is increasingly linked to the respect and protection of national and constitutional identities of Member States. These dilemmas mostly involve and are present in the procedures of the European Commission as well as of the Court of Justice of the European Union. The doctrine of equality would require the even-handed approach to and protection of national identities. On the other hand,

22 Van Middelaar, 2009, pp. 161–202.

23 The term 'democratic deficit' was introduced and first used by David Ian Marquand in his book, see: Marquand, 1979. Also, the first direct election of the representatives of the European Parliament was held in 1979 as result of an earlier Franco-German compromise.

24 Van Middelaar, 2009, pp. 415–417.

the increasingly diverse European integration has prompted discussions on a broadening enhanced cooperation or multispeed European integration. These proposals, of course, concern and would raise serious questions around the principle of equality between Member States.

The question of equality under European law and between members of a community of states was therefore present throughout the entire evolution and history of the European integration, albeit different aspects of equality was characterised by and posed challenges to the different phases of the integration. The Chapter aims to explore this dynamic by examining the institutional and decision-making aspects and subsequently, the normative aspect of equality.

2. Equality Between Member States in the Structure of the EU Institutions

The second section of the Chapter aims to explore the institutional aspects of the principle of equality between the Member States within the European Union that is the participation of the Member States in the institutional arrangement of the European integration. In this regard, the Chapter differentiates between the supranational institutions and the national institutions that are involved in the European cooperation as constituted powers.

2.1. Equality and Equal Representation in the Supranational Institutions

One of the novelties of the European cooperation was that Member States aimed to establish a supranational structure since the very beginning. As the Schuman Declaration of 1950 pointed out: ‘it proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe’. The Declaration continued: ‘[t]he common High Authority entrusted with the management of the scheme will be composed of independent persons appointed by the governments, giving equal representation’.²⁵ Accordingly, the Paris Treaty established the ‘High Authority of the European Coal and Steel Community’ while the Rome Treaties created the Commission(s).

The supranational institutions were created by, but are independent from the constituting Member States and their institutional arrangements. Their further characteristics include the adoption of binding decisions or norms on the Member States that may have direct effects in their domestic legal systems.²⁶ Therefore, they rep-

²⁵ The Schuman Declaration.

²⁶ Boytha, 2007, pp. 47. and 55.

resent the ‘inner sphere’ of the European integration. Whether and how the principle of equality or equal representation effectuate regarding the supranational institutions is of key importance. The question has two dimensions or aspects.

On the one hand, equality refers to equal representation within the institutional setting of the European Union that is the equal participation in the decision-making process. On the other hand, the principle of equality also includes the equality – and the equal protection and treatment – of Member States before the institutions, i.e. in the course of their operations and application of the law. The reason that these two dimensions or aspects have important intersections is because the legislator, who makes the law and the subjects of the law, as it is the case in public international law, partly overlap in European law, since European law is ultimately rooted in state consensus reflected by public international law.²⁷ Whether and what conception of the principle of equality applies will reveal some of the tensions that characterise the European cooperation. The supranational institutions that define the European cooperation have been the European Commission, the European Parliament and the Court of Justice. The Chapter thus aims to examine the question of the principle of equality and equal representation at each of these organisations.

2.1.1. *European Commission*

The main function of the European Commission as well as its predecessor, the ‘High Authority’ (*la Haute Autorité*) has been to effectuate the objectives of the Treaties as well as to fulfil a ‘guardian’ role over them.²⁸ One of the most influential novelties of the Founding Treaties was, as Robert Schuman once emphasised, that these Treaties establish supranational institutions that are independent, have autonomous authority and pursue the general interests of the Community instead of providing venue for the resolution of the clash of various national interests.²⁹ Therefore, the supranational structure and its institutions, and especially the Commission, was designed to act in the interest of the ‘spirit of the Community’ (*esprit communautaire*) by overcoming and taking aside the questions of balance of power or diplomatic practice. For these reasons, the Founding Treaties stipulate that members of the Commission carry out their functions in the overall interest of the Community (*‘dans l’intérêt général de la Communauté’*)³⁰ and thus define their independence from

27 First and foremost, the European Council and the Council of the European Union embody these intersections.

28 See, Art. 155 of the Rome Treaty of 1957.

29 Schuman, 1951, pp. 84–92.

30 See, Arts. 8–9 of the Paris Treaty of 1952 and Art. 157 of the Rome Treaty of 1957.

the national governments and set the fundamental rules of conflicts of interests.³¹ Therefore, the dynamic, the opportunities but also the constraints of the operation of the Commission were determined by the parameters of the Treaties and the realisation of the ‘European project’ throughout the first half of the evolution of the European integration. It is for this reason that the Commission holds the monopoly of initiating legislation since the Commission is assumed to act without state or political interests. This dynamic set the stage for a technocratic approach which turned out to be essential throughout the process of market integration as well as in the creation of the internal European market.³²

However, this general framework did not result in a watershed isolation between the commissioners and the Member States. On the one hand, even though the commissioners were not allowed to receive instructions from the authorities of their respective countries, they oftentimes underline certain aspects of a case that are important to their countries of origin.³³ On the other hand, which has significant relevance from the perspective of the equality between Member States within the Commission, the Member States insisted on their right to nominate one commissioner. Until the adoption of the Treaty of Nice in 2002, the large Member States – Germany, France, Italy, Spain and the United Kingdom – nominated two commissioners. The Nice Treaty of 2002 would have introduced a ceiling for the number of commissioners. After the Eastward enlargement, Member States would nominate the commissioners according to the basis of ‘equal rotation’. Consequently, not every Member State could nominate – and be ‘represented’ – in the Commission within a term. The Lisbon Treaty of 2009 would have kept the ceiling provision and the principle of equal rotation; however, the European Council reserved the right to decide otherwise.³⁴ In light of the negative Irish referendum concerning the ratification of the Lisbon Treaty, which demanded that each Member State retain its right to nominate a Commissioner, the European Council in its meeting in December 2008, decided to continue to uphold the permanent and equal representation of Member States in the Commission.³⁵ On the one hand, the Council’s decision clearly reflects the important place the European Commission has been playing in the institutional setting of the European cooperation, especially its monopoly to initiate legislation process³⁶ as well as to monitor the compliance with the Treaties and launch infringement procedures

31 See, Art. 157 of the Rome Treaty of 1957 (*‘Dans l’accomplissement de leurs devoirs, ils ne sollicitent ni n’acceptent d’instructions d’aucun gouvernement ni d’aucun organisme. Ils s’abstiennent de tout acte incompatible avec le caractère de leurs fonctions. Chaque État membre s’engage à respecter ce caractère et à ne pas chercher à influencer les membres de la Commission dans l’exécution de leur tâche’*.) or Art. 9 of the Paris Treaty of 1952.

32 See van Middelaar, 2023, pp. 236–238.

33 See Bertoncini and Chopin, 2010, pp. 163–164.

34 See, Art. 17, para. 2 of the Lisbon Treaty of 2009.

35 See, 17271/1/08 Council of the European Union.

36 Except for the area of common foreign and security policy as set out in Art. 30 of the TEU in the area of common foreign and security policy where the other actors, such as any Member State or the High Representative of the Union for Foreign Affairs and Security Policy can also initiate proposals.

before the Court of Justice of the European Union (CJEU) as it sees necessary. Based on its monopoly to initiate legislation, the Commission can decide whether it wants to formulate a legislative proposal and if so, it can define the precise content and direction of its first draft. On the other hand, the Council's decision is also important as it has expressed the principle of equality between the Member States within the Commission. However, beyond the principle of equality between Member States within the Commission, it increasingly refers to and includes the question of equality between Member States before the Commission.

The dynamic of the operation of the Commission, originally envisioned by the Paris and Rome Treaties of the 1950s, has begun to shift since the early 2000s. One of the primary reasons of this transformation was the extension of the cooperation to non-market or non-economic i.e. more political areas, including issues of internal and external security after the Maastricht Treaty of 1993. In addition (and in parallel) to this development, the Lisbon Treaty of 2009 established the requirement for the European Parliament to provide a vote of consent for the European Commission as a body before it can be appointed. Furthermore, the Treaty also provides that the Commission, as a body, shall be accountable to the European Parliament. Besides the European Parliament's role in the appointment process of the Commission, its enhanced role in stipulating political responsibility has shifted the Commission's character from a technocratic to a more political one. In addition to this, the Lisbon Treaty of 2009 provided a new role to the Commission to initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.³⁷ This treaty provision has increasingly included the Commission in drafting the strategic framework that sets the stage for concrete legislative projects. These new provisions shaped and increased the Commission's ambitions in defining the general interests of the European cooperation or the '*esprit communautaire*'. The Commission's self-image has shifted from an administrative (chief regulator) role to a governmental (leadership) role.³⁸ The 'politicisation' of the Commission has had wide practical implications including, for example, its President's, Ursula von der Leyen's announcement in December 2019 that she wants to envision a 'geopolitical Commission' that would aim to concentrate on external relations as well as on the role of the European Union in the world.³⁹ As the character of the Commission has been transformed and as its weight in the institutional setting increased, the principle of the equality of Member States both within and before the Commission has much greater stake and is increasingly seen as a lever to preserve its impartial and independent or technocratic nature. In light of these shifts along with the guardian role of the institution, the Chapter will subsequently explore the question of equality before and the equal treatment by the Commission.

37 See, Art. 17 of the Treaty on the European Union.

38 Van Middelaar, 2023, pp. 236–241.

39 See, for example, European Commission (no date b).

2.1.2. *The European Parliament*

The question of democracy and democratic oversight of the supranational entity – the ‘High Authority’ and then the ‘Commission’ – have been present since the beginning the cooperation. However, the institutionalisation along with the ultimate aim of this oversight underwent major shifts throughout the early history of European construction. This shift has considerable relevance to the equality or equal representation of Member States as it has posed a dilemma of how to reconcile the principle of equality of the Member States with the equality of citizens of the Member States.⁴⁰ It also posed the question of what role the principle of equality of Member States shall play in today’s European integration.

The six founding Member States originally agreed to provide the arrangement of their national parliaments with oversight functions over the ‘High Authority’.⁴¹ To this end, the Paris Treaty of 1952 envisioned an ‘Assembly’ – *l’Assemblée* – that consisted of 78 representatives from the national parliaments of the Member States. These representatives would be chosen either through direct elections held by a Member State or based on the proportion of each state’s population. Under the institutional structure of the ECSC, the national parliaments were entrusted to fulfil a quite strong (national) democratic control over the operation of the supranational ‘High Authority’. In this model, the democratic oversight was established by the agreement and exercised through the democratic institutions of the Member States and therefore the interests and considerations of the Member States as distinct political communities were also present and represented on an equal basis. Considering these early experiences, the Rome Treaty of 1957 established a common ‘Assembly’ for the European Communities⁴² and accordingly, the delegations of national parliaments continued to provide democratic oversight, and their numbers were increased.⁴³ The scope of competence of the new ‘Assembly’ was more limited compared to the ‘Assembly’ of the ECSC as it only assumed an advisory role and their opinions had no binding effects on the Council of Ministers.⁴⁴

However, at the same time, the Rome Treaty also envisioned the creation of a European election with direct universal suffrage.⁴⁵ This treaty provision set the stage for the transformation of the Assembly as well as for the contemplation about and the

40 Dubout, 2022, p. 23.

41 The model for the arrangement was the previously established Council of Europe and its ‘Consultative Assembly’.

42 The separate Assembly of the ECSC ceased its operation in 1958 and a common Assembly was established for the ECSC as well as for the European Economic Community and for the European Atomic Energy Community.

43 Art. 138, para. 2 of the Treaty of Rome.

44 It is also true, however, that the gradual formation of the common and then internal market rather required the technocratic mindset and approach of the European Commission (the previous ‘High Authority’).

45 See, Art. 138 of the Treaty of Rome of 1957, ‘*L’Assemblée élaborera des projets en vue de permettre l’élection au suffrage universel direct selon une procédure uniforme dans tous les États membres*’.

evolution of a European democracy.⁴⁶ On the one hand, the Assembly has begun to increasingly assume a supranational function. On the other hand, the *demos* problem that is the concept of who is or are represented by the Assembly has become increasingly blurred or subject to debates and undergone a major transformation that has led to tensions with the principle of equality or equal representation of the Member States. The Founding Treaties partly reflect this transformation. While the Maastricht Treaty of 1992 provided that the ‘European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty’, the Lisbon Treaty of 2007 states that ‘(1) the functioning of the Union shall be founded on representative democracy and (2) citizens are directly represented at Union level in the European Parliament’.⁴⁷ If the European Parliament is an institution or power that is constituted by the treaty arrangement of the (equal) Member States, then its ultimate function is to represent the political communities and peoples of the Member States. However, in contrast, if the European Parliament is a (future) constituting power of the European Union, then what it aspires to represent is a single people. The former is based on the principle of equality between the peoples and citizens as members of political communities (along with the corresponding Member States), while the latter is rather based on the formal equality between the citizens. Furthermore, in connection with this, the direction of the Parliament’s development has also been raising tensions because it reflects a growing divide between what the European Parliament envisions and what the treaty arrangement lays down as well as between the public discourses in the Member States and the political discourse and action on a European level.

The European Parliament reflects the (equal) representation of the Member States in terms of the allocation of seats as well as in terms of the *de facto* presence and influence of national interests in their operation.⁴⁸ The European Parliament’s elections are organised by and within the Member States (constituency) and the number of seats of the Members of Parliaments are allocated according to the principle of ‘degressive proportionality’ that fulfils a balancing role. Its role is to provide smaller Member States to have more MEPs per population so that they are adequately

46 The process began with a semantic and thus rather symbolic debate on the denomination of the ‘Assembly’. Even though its official name was ‘Assembly’ in the treaty text, the Assembly adopted a ‘Rules of Procedure’ to declare itself a ‘Parliament’ in March 1958. The primary motivation and objective were to show its desire to represent the European (sovereign) people on the one hand and to become gradually a legislative forum on the other. For a long time, many of the Member States – including France and the United Kingdom – refused to accept this semantic shift. Only the Single European Act of 1986 adopted and incorporated the name ‘European Parliament’ in the text of the treaty.

47 See, Art. 189 of the Maastricht Treaty (Nice consolidated version) and Art. 10 of the Lisbon Treaty (Treaty on the European Union).

48 Bertoni and Chopin, 2010, pp. 164–166.

represented.⁴⁹ Consequently, the number of people that each MEP represents is subject to significant variations.⁵⁰ Even though it has been criticised as violating the formal equality between citizens, the principle, in fact, aims to protect the equality of the political communities and Member States within the cooperation and, consequently, the substantial (or informal) equality of citizens.⁵¹ The presence of national or Member States' interests in the European Parliament is reflected in the multiple roles the MEPs have. The MEPs, being aware of their own country's legislative, financial, cultural and other aspects, are also representing and defending the interests of their countries or their European characteristics. They are working together separately within the political groups which are divided into national delegations. National delegations usually formulate the common positions they represent or coordinate their votes within the political group or in the work of the committees as well as in the plenary sessions of the European Parliament. The treaty arrangement therefore envisioned and aimed to protect the equal representation of the various peoples within the cooperation.

Nevertheless, since the introduction of the notion of a 'democratic deficit' into European academic and political discourse in the 1970s,⁵² the progressive expansion of the competences and scope of action of the supranational European Parliament has been repeatedly – though misleadingly – justified as a necessary correction, often at the expense of institutional balance with the Council as co-legislator. This development has been coupled with the – as the Rome Treaty of 1957 set out in its Art. 138, para. 3 – establishment of the direct election of the representatives of the European Parliament. It has created not only a further reference point of direct legitimacy and thus a basis for a continuous increase of the competence of the European Parliament but also a shift away from the potential roles and equality of the national political communities, democracies and parliaments towards an integration into *one demos*. This way of development has accelerated after the adoption of the Maastricht Treaty in 1992 and has continued after and even despite of the failure of the adoption of the Constitutional Treaty in 2005.⁵³ The proposal of the European Parliament to introduce a 'transnational list' that would gradually replace the constituencies of the Member States represents a further step in this direction.⁵⁴

These aspirations of the European Parliament aim to create a supranational structure along the lines of unitary democratic considerations with a single European

49 See, Art. 14, para. 2 of the Treaty on the European Union: 'Representation of citizens shall be progressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats'.

50 For example, the constituency of a German MEP is much larger than the constituency of an MEP from Malta therefore represents much more electors.

51 See, Cheneval, 2022, pp. 307–308.

52 See, for example, van Middelaar, 2009, pp. 417–437.

53 For a detailed description, see Sándor, 2023, pp. 14–17.

54 European Parliament Resolution of 26 November 2020 on Stocktaking of European Elections [2020/2088(INI)].

political space. For these reasons, they refer to and rely on the formal equality between citizens. However, at the same time, the formal equality of citizens actually acts against and weakens the principle of equality between Member States. Furthermore, it also decreases the equality of the voting weights of citizens as members of various political communities because the formal equality of citizens ignores the divides and fault lines created by, amongst others, historical experiences, cultural roots, the level of development in an arrangement that consists of multiple states or political communities that have their own public discourses. The European political space can be built instead on the multiplicity of national public discourses.⁵⁵ The equality between Member States therefore functions as a balancing principle that empowers the meaningful political participation of the citizens as members of their political communities and thus as European citizens. For these reasons, the principle of equality between Member States, in fulfilling its balancing role, substantially contributes to the solidification of European democracy.

2.1.3. *The Court of Justice of the European Union*

Even though the operation and adjudication of the CJEU seems more behind the scenes than that of the Commission and the Parliament, it has been decisive throughout the evolution of the European cooperation since the early 1960s. The European law as a different subset of law with its direct effect and primacy was a landmark and so were the innovative judgments of the CJEU in the *Van Gend & Loos* (1963)⁵⁶ and in the *Costa v. E.N.E.L.* (1964)⁵⁷ cases. These early judgments, rather than the Member States or the treaty arrangement, shaped the nature and characteristics of European law. They also distinguished it from public international law in an era of market integration. This set the stage for the autonomy of European law, as guaranteed by the CJEU, and allowed for its evolution. Additionally, it sparked various academic and judicial debates regarding the coexistence and relationship between European law and national law, especially in an era characterised by an increasing level of political cooperation.⁵⁸ The European law fulfils an essential role and has a cohesive force in the European construction because it is first and foremost a legal (and judicial) construction. But since it is a legal construction, the role of the judge as well as the role of the court (and who is judging) are central.⁵⁹

Even though this dynamic was present since the birth of the European construction, it has further amplified in recent decades for multiple reasons. On the one

55 See also, van Middelaar, 2009, pp. 466–467.

56 Judgment of the Court of 5 February 1963. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*. Reference for a preliminary ruling: Tariefcommissie, Pays-Bas, Case 26-62.

57 Judgment of the Court of 15 July 1964. *Flaminio Costa v. E.N.E.L.* Reference for a preliminary ruling: *Giudice conciliatore di Milano*, Italy. Case 6/64.

58 See, for example, Kwiecień, 2019, pp. 13–38.

59 See Bertoni and Chopin, 2010, pp. 245–246.

hand, as mentioned before, the integration process has been extended to political areas and increasingly includes questions of values,⁶⁰ identity and (fundamental) rights,⁶¹ hierarchy and competences. A process of ‘constitutionalisation’⁶² has begun during the regime change and continued even after the failure of the adoption of the Constitutional Treaty in 2005. Furthermore, the legal and institutional structure of the European construction is being envisaged as separate or autonomous and not irreducible to that of the Member States. Amongst these developments, the CJEU increasingly assumes a constitutional adjudication power. This includes acting as the final arbiter in interinstitutional and competence issues between the Member States and the European Union. The Court is also responsible for interpreting, applying, and protecting fundamental rights, as well as ensuring the coherence, autonomy, and uniform application of European law. This ‘constitutional adjudication’ role, exercised through the various competences of CJEU, is also used *vis-à-vis* Member States to discipline them in order to reach compliance with European law. Relatedly, the CJEU has also seen its own role or function as a ‘centraliser’ or a ‘force of centralisation’ in the institutional arrangement of the European cooperation. On the other hand, (and the same time), the European cooperation has become much more diverse due to the Eastward enlargement in 2004, 2007 and 2013. As a result, not only has a group of 15 Member States become a group of 28 with 13 new Member countries but the newly joined countries have different historical experiences, different reasons for joining the integration and therefore different expectations compared to the original countries.⁶³ The two parallel developments – the ‘constitutionalisation’ dynamic of the European law and the increased diversity of an enlarged cooperation – have led to significant tensions within the cooperation⁶⁴ and also heightened academic and public debates around the role of the CJEU as well as on its relations to national constitutional or apex courts or on the judicial dialogue in the European cooperation.⁶⁵ How can this complex dynamic of ‘constitutionalisation’ accommodate the increasing diversity of Member States and the European cooperation?

Against this background, as the role of the CJEU increased, the principle of equality between the Member States both within the CJEU and before the CJEU

60 Art. 2 of the Treaty on the European Union enumerates these values.

61 The adoption of the Charter of Fundamental Rights of the European Union that became effective with the Lisbon Treaty in 2009 aims to introduce the concept of fundamental rights on a European level.

62 In its case-law, the CJEU elevated the Treaties on the level of ‘constitution’, see e.g. the Judgment of the Court of 23 April 1986. *Parti écologiste ‘Les Verts’ v. European Parliament*. Action for annulment – Information campaign for the elections to the European Parliament, Case 294/83.

63 Former U.S. Secretary of Defense Donald Rumsfeld used the term ‘Old’ and ‘New’ Europe to illustrate the different characteristics and approaches. See: U.S. Department of Defense, 2003. Also see, Sándor, 2024, pp. 120–135. about the different evolutionary paths of the European countries, see, Todd, 2024, pp. 117–136.

64 One of the most intense debates during the Brexit negotiations was the jurisdiction of the CJEU over the United Kingdom.

65 See, for example, Grabenwarter et al., 2021, pp. 43–61.

has become increasingly important. The participation in the operation of the CJEU would represent the aspect of equal opportunities of the Member States. To this end, the Lisbon Treaty provides for a one state/one judge principle or provides for an equal number of judges principle both in the case of the Court of Justice as well as the General Court.⁶⁶ A related question was the number of Advocate Generals whose role is to assist the Court with their impartial reasoned briefs. The Treaties of Paris and Rome provided for two Advocate Generals, and they were appointed by the two most populous countries, France and Germany.⁶⁷ With the subsequent enlargements of the European cooperation, France, Germany, Spain, Italy and the United Kingdom could appoint one permanent Advocate General out of the eleven. Over the intergovernmental conference of Lisbon Treaty, Poland asked and obtained a permanent Advocate General seat while the United Kingdom left the European integration. Therefore, the remaining 6 Advocate General seats are shared by the rest of the Member States on a rotational basis. This could raise potential problems in regard to the principle of equality between Member States *within* the CJEU. So far, for example, amongst others, Hungary could not appoint an Attorney General.

The other side of the principle of equality is whether the CJEU could or is willing to accommodate the increased diversity and different historical experiences of the cooperation. This aspect can be called the equal treatment or equal protection of Member States by the CJEU and the way it applies the doctrines of European law.

2.2. Equality Between the National Institutions Participating in the European Construction

The European construction has been constituted by the common will of the sovereign equal Member States, as constituting powers, which manifest itself in the form of international – founding – treaties. The European construction thus exists and operates, and it could be reformed within the parameters constituted by the founders. In parallel, some of their institutions have been participating and acting, as constituted powers, in the decision-making of this cooperation since the very beginnings. The Member States therefore have a double role, on the one hand, acting as constituting powers of the European cooperation and, on the other hand, acting as part of the institutional arrangement of the construction. The complex relationship between the Member States' governments and the Community has been subject to intense debates, and tensions at times since the founding, but their central role in the evolution and operation of the cooperation is beyond doubts. Accordingly, the Paris Treaty of 1952 already included the Council of Ministers in the institutional structure of the ECSC.⁶⁸ The role and weight of the Council of Ministers have dramatically increased in the Rome Treaty of 1957 as the chief institution where decisions

66 See, Art. 19, para. 2 of the Treaty on the European Union.

67 See, Art. 10 of the Treaty of Paris in 1952 and Art. 166 of the Treaty of Rome in 1957.

68 Arts. 26–30 of the ECSC.

are adopted.⁶⁹ Furthermore, as the institutionalised form of the European concert and summits, the heads of states and governments, as a leadership institution, have been fulfilling an increasingly important function since the 1970s. The dynamic of the evolution of the European construction also shows that national parliaments and constitutional courts are increasingly considered to be acting as constituted power and therefore the question of equality could arise in their respective relations, too.

This section will primarily focus on the principle of equality in the European Council and in the Council of Ministers and it will also raise some of the dilemmas of the contemporary participation of national parliaments in the European cooperation.

2.2.1. *European Council*

The European concerts have a longstanding historical tradition in Europe since the 19th century. Its main purpose was to define and maintain the European balance of power within and between the spheres of influence out of Europe. These summits provided a regular venue for the heads of states and governments of European powers. The early decades of the history of the European cooperation already raised the question of how the cooperation can represent their political, geopolitical or other interests *vis-à-vis* third countries and how is it able to elaborate and form their strategy and vision. While the market integration advanced according to the pace and within the framework of the Founding Treaties, the cooperation was in a need of a ‘focus of authority’ and broader leadership outside of the treaty arrangement.

Based on the initiation of the French President, Giscard d’Estaing, the informal summits that were based on classic diplomacy and international law gave place to the more formal, yet not institutionalised European Council in 1974.⁷⁰ The European Council soon became a so-called ‘*Chefsache*’, that is the leadership institution of the European construction and began to fulfil a widespread role as the European integration embraced various aspects and dimensions of political cooperation since the 1990s and entered into a period of several internal, such as the financial crises, and external, such as the migration or coronavirus crises, since the 2000s. The European Council can act in situations which the other institutions are incapable of resolving or deciding upon. These can include crises or situations which the other institutions could not decide on or when a strategic decision or a general direction needs to be adopted or when the founding structure or the scope of membership needs to be changed for reasons of enlargement or withdrawal.⁷¹

The source of the legitimacy and authority of the decisions of the European Council is rooted in the democratically elected or legitimised and accountable heads

69 Arts. 145–154 of the Treaty of Rome.

70 Van Middelaar, 2009, pp. 62–65. and 277–280.

71 Van Middelaar, 2023, pp. 212–217.

of state or government.⁷² Partly because of their strong democratic legitimacy and partly because of the weight of their decisions, the meetings and debates of the European Council attracts the most attention across Europe. The voting scheme also significantly contributes to the ‘political drama’ of their meetings as ‘the decisions of the European Council shall be taken by consensus’.⁷³ The requirement of unanimity creates an atmosphere that prefers and stimulates compromises and avoids hard and dividing votes and at the same time also reflects the dual characteristics of the European Council that serves as a bridge between the relations of the Member States and the institutional arrangements of the European construction. Furthermore, based on its unique position, the European Council could provide the general programme and legislation of the European construction with legitimacy in the national democratic communities.⁷⁴

Considering this arrangement, both the participation on an equal footing and the unanimity rule genuinely reflect the principle of equality between the national democratic communities, as the heads of state and governments act as the representatives of their respective (*sovereign*) states. The unanimity rule allows the Member State to oppose a proposal or decision that they, for some reason, consider undesirable and it also guarantees the equal protection of each national democratic community in the European Union.⁷⁵ However, the unanimity rule also highlights the shared framework that unites the Member States, fostering ongoing discussions until a mutual compromise is reached.

2.2.2. Council of Ministers

In contrast to the European Council, the Council of Ministers has been an integral part of the institutional arrangement of the European construction since its foundation. Furthermore, the Council, holding the main legislative and decision-making power of the European Union, has been also involved in the dynamic of the power and legitimacy rivalry with the European Parliament for the past 50 years.⁷⁶ At the same time, however, the Council itself has been a primary site of rivalry among Member States with their relations and dynamics or evolution reflected within this institution. It is highly relevant and important because the Council adopts decisions and norms that are binding on the Member States. This dynamic also reveals that Member States, while working together in this institute as constituted powers of the European construction,⁷⁷ are no longer necessarily on an equal footing in the sense of public international law.

72 Art. 10 of the Treaty on the European Union.

73 Art. 15, para. 4 of the Treaty on the European Union.

74 Weiler, 1999, p. 85.

75 Also see, Cheneval, 2022, pp. 299–309.

76 Bertoincini and Chopin, 2010, pp. 191–201.

77 Art. 10, para. 2 of the Treaty on the European Union.

While each Member State participates and thus has retained the right to be represented in the Council's meetings, the weight of their decision-making power or vote began to change with the introduction of the majority rule. This raises questions not only about the principle of equality but also, even more fundamentally, about the relationship between the Member States and the European construction and the formation of a political community. One of the unique developments of the European cooperation is the transition from a construction that is based on the unanimous operation of the Member States to a community that embraces the rule of majority in various forms. Many of the historical turning points of the development of the European cooperation as well as its ongoing dialogue and discussion on its future reforms⁷⁸ is a true reflection of the tensions between the principle of unanimity and majority.⁷⁹

The majority rule also provides a more efficient decision-making process in a cooperation that has a much larger membership, increasing from the initial six to twenty-seven Member States, as well as a much more complex operation that embraces multiple areas of cooperation. The introduction of the majority rule thus helps avoid the paralysation of the European integration. Accordingly, the Treaties provide for three methods of decision-making in the Council: (1) unanimity (2) simple majority (3) qualified majority. Among the three methods, the qualified majority decision-making has become the principal method within the institutional arrangement of the European Union. The principle of 'qualified majority' rule envisions an intermediary voting system between the unanimity and the simple majority and is based on a unique legitimacy that somehow aims to consider a sufficiently large number of Member States to accept a decision and, at the same time, as it opens the opportunity for a limited number of them to block a decision. Therefore, the qualified majority principle aims to create a balance between the sovereign equality of the Member States and their heterogeneity and actual differences in terms of population, territory and other factors. Different votes are granted to different Member States based on their population and other political considerations including, for example, the Member State's allocated seats in other institutions, such as in the European Parliament or in the European Commission. The voting power of a certain Member State in the Council is therefore also a result of complex negotiations and ultimately a political compromise.

The calculation of qualified majority has been also subject to compromises. While the Treaty of Nice introduced three criteria (the majority of Member States (1), the qualified majority of votes (2) and demographic criteria (3)),⁸⁰ the Lisbon Treaty provides for a system of double majority of States and population (55% of the States and

78 For example, the Conference on the Future of Europe and the paper of the Franco-German working group in 2023: *Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century*.

79 See, van Middelaar, 2009, pp. 73–80.

80 See, Protocols Art. 3 (Provisions concerning the weighting of votes in the Council) of the Treaty of Nice of 2001.

65% of the population). The voting scheme of the Lisbon Treaty can be conceived as and broken down into a two-step process. In the first vote each Member State retains one vote which also reflects the principle of equality between them. Nevertheless, the second step stresses the equality between the (European) citizens which, in turn, provides more leverage to more populous Member States. However, this way the qualified majority rule increased the inequality between Member States. At the same time, it also reveals a more profound contradiction and tension between the rival theories behind the direction of the European cooperation. On the one hand, the introduction of the demographic criteria is built on the concept of the equality of votes between the European citizens, that is the ‘one person, one vote’ principle. This concept aims to express and manifest that the European citizens form – or at least are on the way to forge – a single political body and *European demos* while, in the meantime, it leads to greater inequality between national democratic communities in the decision-making process of the Council. On the other hand, Art. 10, para. 2 of the Treaty on the European Union stipulates that national democratic communities are represented in the Council and thus it provides for the equality between democratic communities that is the equality of the votes between national democratic communities and Member States. The two opposing requirements highlight the ambivalent and double nature of democracy or democratic legitimacy in Europe and embody two different visions of the European cooperation.⁸¹

Although the method of qualified majority voting is now frequently used and has become a common approach to decision-making, the lasting legacy of the 1965 empty chair crisis and the 1966 Luxembourg compromise is still evident. When a vital or fundamental interest of a Member State is at stake, Member States ‘will endeavour, within a reasonable time, to reach solutions which can be adopted by all the members of the Council’. Discussions must continue until unanimous agreement is reached. The Luxembourg Compromise did not become treaty text, it has taken the form of a ‘political compromise’. While this political compromise highlighted the importance of a ‘common table’ along with the community character of the European Union, it also secured the right of objection (or veto) for every Member State under certain circumstances by inducing the requirement of unanimity.⁸² The practice introduced by the Luxembourg Compromise led to consensus decision-making in practically all instances where a majority decision was possible. It thus revealed the political and practical reality of the European construction: that European decisions need to be based on the consensus of the Member States in order to be implemented and enforced. While the shadow of the Luxembourg Compromise has created a strong culture and tendency of compromise during the decision-making process, it also sheds light on some aspects of the equality of the Member States. Even though the different voting powers reflect the differences among the Member States, the decision-making in the Council is generally characterised by a willingness of consensus and

81 See Rittleng, 2022, pp. 196–201.

82 Van Middelaar, 2009, pp. 99–138.

compromise. This reflects the ultimate foundations of the European construction that are the sovereign and equal Member States as well as its ultimate purpose which is to settle difficult questions of cooperation in a peaceful manner.⁸³ Even though the Luxemburg compromise was officially abandoned with the adoption of the Lisbon Treaty along with the introduction of the ‘ordinary legislative procedure’ and a new ‘*Ionianina compromise*’, ample and also recent examples show the continued existence of the rationale and consequences of the Luxembourg Compromise as an informal commitment or political reality instead of a legal obligation. It is still being used in the debates on fundamental questions which is partly due to the increased diversity and political characteristics of the integration.⁸⁴ One of the factors that tends to weaken this commitment is the increasing role and influence of the CJEU and the values set forth in Art. 2 of the TEU in European public discourse and politics. In addition, the increased number of Member States as well as the strengthening of the German-Franco views as a result of Brexit also contributed to this process.

One of the legacies of the Compromise is a culture or commitment of possible consensus seeking. The qualified majority method therefore incites to search for compromise in various situations.⁸⁵ This culture or atmosphere of compromise might also include ‘package deals’ or ‘cross-compromises’ among various subjects as well as derogation clauses that provide temporal exemptions under accepted decisions that contravene the vital interests of a Member State. One of the recent examples of this is the derogation under the sanctions against Russia that concerns the crude oil import via pipeline.⁸⁶

To summarise, even though the Council is the institution where the interests of Member States meet and are to be represented, it also provides a venue or crossroad for the different ideas of the European construction based on the various voting systems. It is therefore a meeting point of the different conceptions on the basis of democratic legitimacy of the European construction. One that envisions a single European *demos* as the basis of legitimacy and relies on the national democratic communities. It is also the institution that ultimately reflects the political reality of the European cooperation that is based on the will of the Member States and its success depends on their compromise.

2.2.3. *National Parliaments*

The participation of the national parliaments in the European integration can be considered as an ‘old-new’ phenomenon and, at the same time, it sheds light on the question of the sources of democratic legitimacy. In the first decades of the European cooperation, national democracies have provided the democratic oversight of the

83 Bertoncini and Chopin, 2010, p. 161.

84 See also Beukers, 2017.

85 Dubout, 2022, p. 197.

86 European Council, no date b.

supranational institutions. The ‘Assembly’ was composed of the delegates of the national -parliaments and was the representative of the peoples of the (equal) Member States.⁸⁷ The period between the 1970s and the draft Constitutional Treaty of the early 2000s was marked by a continuous transformation of the representation of the peoples in which the national democratic communities would have given place to a transnational concept European democracy.⁸⁸

Apart from a weaker attempt,⁸⁹ the role of national democratic communities re-emerged after the failure of the Constitutional Treaty in 2005 and with the adoption of the Lisbon Treaty in 2007.⁹⁰ A reduced participatory role, called early warning system (hereinafter; EWS) has included the national parliaments in the legislative process by providing them with the right to indicate whether a proposal would fall under national competence and exceed the competence of the European Union. In other words, the community of national parliaments gained a right of *subsidiarity* review and, as a main rule, where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments, the draft must be reviewed. However, the reasoned opinions of the national parliaments – both the so-called yellow and orange card procedures⁹¹ – have remained non-binding throughout the decision-making process. In this process, each national Parliament has two votes, equally divided between two chambers in case of a bicameral Parliamentary system.⁹² This allocation reflects the principle of equality between Member States and also between the national democratic communities that have constituted and forged the European cooperation.

Even though the EWS – partly due to its relatively weak involvement in the European decision-making process – has so far failed to live up to the original

87 According to Art. 137 of the Rome Treaty, ‘*L’Assemblée, composée de représentants des peuples des États réunis dans la Communauté, exerce les pouvoirs de délibération et de contrôle qui lui sont attribués par le présent traité.*’

88 Sándor, 2024, pp. 120–135.

89 The Conference of Parliamentary Committees for European Union Affairs (COSAC) has served as a consultative forum for members of the relevant committees since its establishment in 1989. The Conference of the National Parliaments of the European Communities comprised the members of the national and European Parliaments, however, despite of an ambitious launch in the aftermath of the fall of the Berlin Wall, it only held one meeting in November 1990. Van Middelaar, 2009, pp. 450–454.

90 See, Arts. 4–9 of the Protocol (No 2) to the Treaty on the European Union on the application of the principles of subsidiarity and proportionality.

91 In the case of the so-called ‘orange card’ procedure, the reasoned opinions of the national parliaments represent at least a simple majority of all the votes allocated to them, the European Commission must review the proposal and decide whether to maintain it. See, Protocol (No. 2) to the Treaty on the on the Functioning of the European Union on the application of the principles of subsidiarity and proportionality.

92 Art. 7 of the Protocol (No. 2) to the Treaty on the on the Functioning of the European Union.

expectations,⁹³ its setting up reveals a general line of thinking of how national institutions could be involved as and could become constituted powers, on an equal footing, of the European integration. Furthermore, this development has been reinforced by the idea of a ‘green card’ procedure that has a more active role in the national parliaments, whereby they would assume a role of initiating legislation.⁹⁴ The same development can be seen in the academic discourse on how to include the national constitution and apex court in the European judicial process by creating a European judicial network.⁹⁵ While the better involvement of national constitutional institutions as constituted powers in the institutional arrangement and decision-making process of the European cooperation not only expresses the principle of equality between Member States but also aims to reinforce the democratic legitimacy of the whole European construction. While placing the democratic sources of the European cooperation in the hands of national communities, this approach, at the same time, would help preserve and strengthen the equality between Member States.⁹⁶

Beyond the question of the equality of Member States as participants and ‘constructors’ of the institutional arrangement of the European cooperation, this principle also presents itself in another context that is the equality before the European law including the institutional competences. The next section will investigate whether Member States can be considered and treated equal before the European law and the ‘*acquis communautaire*’.

3. Equality Between Member States Before the EU Law

One of the structural similarities between public international law and EU law is that – as a main rule – both are built on (voluntary) state consensus and the common will or consensus seeking of sovereign states. At the same time, however, one of the major differences between the two legal regimes is the lack of compulsory adjudicatory or juridical machinery and the subsequent autonomy of international law. In contrast, as Walter Hallstein, the first president of the European Commission

93 The EWS so far has only been activated three times and in none of these three occasions did this process prompt the European Commission to withdraw its proposal based on subsidiarity control. See, Controlling Subsidiarity in today’s EU: the Role of the European Parliament and the National Parliaments (Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies PE 732.058 – April 2022), see: European Parliament, 2022. Boronska-Hryniewiecka, 2017, p. 248.

94 It was first formulated in the 2013 COSAC meeting in Dublin: ‘(...) national parliaments should be more effectively involved in the legislative process of the EU not just as the guardians of the subsidiary principle but also as active contributors of that process’. Contribution of the XLIX COSAC Dublin, 23-25 June 2013. Also, see, Boronska-Hryniewiecka, 2017, pp. 254–257.

95 Grabenwarter et al., 2021, pp. 43–61.

96 Cheneval, 2022, pp. 306–308.

pointed out, the European cooperation is essentially a ‘community of law’. The early judgments of the European Court, which departed from what the Member States initially anticipated,⁹⁷ identified the direct effect and primacy as the distinctive characteristics of European law that have helped create a ‘new legal order’.⁹⁸ The (voluntary) establishment of a treaty framework therefore set up a separate institutional mechanism, whereby Member States jointly exercise certain sovereign competences to create secondary law (directive and regulation) that forges an autonomous legal regime and imposes various binding requirements (obligations and rights) on Member States. However, Member States are inherently different not only in terms of their size, population, wealth or economic structure, and output but also in terms of their culture and historical route. Furthermore, the ultimate reasons that led to their membership in the European construction and thus the expectations they have from the integration are also different. They are the inheritors of a common European civilisation that bounds them together, but they remain inherently different in many ways.⁹⁹ It raises the dilemma of equality or equal treatment before an autonomous European law that enjoys, as a main rule, superiority. One of the relevant questions is therefore whether European law respects the equality of the Member States by taking into consideration their own situations on an equal footing and by treating them equally in equal situations.

From this perspective, it is important to recall that the CJEU introduced the fundamental doctrines of direct effect and primacy throughout the ‘60s to efficiently achieve the central objective of the Treaty of Rome, in other words the formation of an internal market. Consequently, the European community of law was initially built around market integration. This first period was followed by the continuously broadening areas of various political cooperation since the early ‘90s. As Member States play fundamentally different roles and therefore are in different situations in these two big phases of the European cooperation, it is important to properly distinguish them and discuss them separately from the perspective of the principle of equality.

3.1. The Principle of Equality Under Market Integration

For geopolitical factors as well as for other reasons, the gradual achievement of an internal market had been in the forefront of the first three decades of the European cooperation. The establishment of a lasting European alliance was expected as a result of the linkage of markets and economies of participating countries. The economic prosperity, often referred to as the thirty glorious years (*Les Trentes*

97 In their submissions to the European Court, the Member States did not support the position of the Court that overstepped the classic (interstate) structure of public international law by the introduction of these two doctrines. See van Middelaar, 2009, pp. 95–96.

98 See, 2.1.3. of the present Chapter.

99 The European civilisation heritage has been illustrated by the three hills of Europe: the Greek philosophy, the Roman law and Christianity. See Koschacker, 1947.

Glorieuses),¹⁰⁰ that accompanied the first period of the European cooperation justified the assumption that the participating countries were more successful together than they would have been separately. The continued assumption is that economic success of the integration outpaces the necessary disadvantages. The common economic success is still one of the most important factors that holds the countries of the cooperation together.

At the heart of the internal market and ‘economic constitution’¹⁰¹ of the integration lies the implementation of the non-discrimination principle that has played a paramount role in achieving the objective of an internal market.¹⁰² The internal market, as the Treaty on the Functioning of European Union defines, is an ‘area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’.¹⁰³ Together with the common competition policy and state aid regulation, the four freedoms comprise the main pillars of the internal market. What they expect from the Member States is not to block or hinder the free flow of the factors of production. In this sense the Member States are required to implement the non-discrimination (or equality) principle but also to provide a ‘level playing field’ for market players under the competition and state aid rules. These European rules typically have direct effect to limit the regulatory powers of the Member States in favour of the internal market.

Consequently, under the economic integration, it is the markets and companies who play leading roles instead of the Member States.¹⁰⁴ The overwhelming majority of the rules in this area are therefore neutral and treat each Member State equally while pursuing the goal of achieving an internal market. Furthermore, duly circumscribed exemption regimes, such as public morality or public security as part of the broader public order are provided by the TFEU partly to accommodate Member States and to take their differences and specific and legitimate societal, moral, security or other needs into consideration. Each fundamental freedom has its own exemption regime which has been shaped by the relevant case-law of the CJEU.¹⁰⁵ In its case-law, the CJEU recognises and protects the autonomy of the Member States, for example, to define and protect the circumstances and requirements of public morality as part of the public order which might serve as an exemption under the free movement of goods.¹⁰⁶ Member States can reasonably have different views on what they consider essential components of the public interest (public order, public

100 See Le Guern, 2023.

101 Gerber, 1988, pp. 232–265.

102 Art. 18, para. 1 of the TFEU.

103 Art. 26, para. 2 of the TFEU.

104 See van Middelaar, 2009, pp. 297–298.

105 Art. 36 of the TFEU provides the exemption regime for the free movement of goods, Art. 52 for the right of establishment, Art. 62 provides the exemptions for the free movement of services while Art. 65 details the exemption rules for the free movement of capital.

106 See, for example, CJEU, *Regina v. Maurice Donald Henn and John Frederick Ernest Darby*, Case 34/79 (ECLI:EU:C:1979:295).

morality, public security, etc.). These differences reflect their conceptions of social structure, way of life, and coexistence as a political community. The exemption regime of the four freedoms allows them to uphold these differences in a non-discriminative manner. This way, the exemption regime could provide the necessary flexibility to consider different situations on an equal footing and thus helps enhance the principle of equality between the Member States.

In addition, the application of the European law by the Member States is checked, among others, within the framework of the infringement proceedings of Art. 258 of the TFEU. The number of single market related infringement proceedings have been continuously decreasing compared to the total number of such proceedings that include common European policies.¹⁰⁷ This ratio also shows that the single market requirements are well-accepted and implemented by the Member States partly because this rather mechanic and neutral framework affects them in an equal manner or at least does not raise significant concerns in terms of the principle of equality between them.

While the European cooperation began as a market integration, it evolved into an alignment with increasing constitutional and political aspects that pose more difficult questions in terms of equality before the European law.

3.2. The Principle of Equality Under ‘Political Integration’

In contrast with market integration, the political integration that has accelerated since the adoption of the Maastricht Treaty of 1992 places the Member States in a much different position. On the one hand, rather than having a passive and mechanical role, Member States and their community assume a more active, governance or leadership role in a cooperation of political nature partly because of the primary democratic legitimacy they possess. On the other hand, the decisions and rulemaking within such a cooperation necessarily entail and relate to value-choices, the question of a certain way of life and the way a society is organised, the conviction or the internal and external security of the political communities.

In order to remain viable in the long run, a cooperation that has a political nature is ultimately organised and arranged under a common narrative and a common story that the different and, in many respects, unequal, participants of the cooperation can identify with. Furthermore, measuring the success of the market integration is more straightforward: a common method is to determine whether the economies of European countries are more competitive together than when they operate separately. In contrast, measuring the success of a political cooperation poses much more difficult dilemmas. One of its components entails the alignment of the expectations the cooperation can fulfil in the future. It requires intense and continuous consensus-seeking in more challenging situations and in more divisive questions, as well as more complex compromises. For example, the free movement of citizens

¹⁰⁷ See European Commission, no date a.

is not equal with the free movement between the Member States. Because of the security aspects, the abolition of border controls between Member States was first achieved outside of the institutional framework of the European cooperation. The Schengen Treaties were respectively signed in 1985 and in '90 as international interstate treaties by a narrower range of Member States without Italy, the United Kingdom, Ireland, Denmark and Greece. Borders, border protection and immigration policy are integral parts of sovereignty. Only the Treaty of Amsterdam of 1997 integrated the Schengen *acquis* into the institutional framework of the European Union. From the time when the financial crises of 2008 and '09 broke out, the Members States of the European cooperation had been undergoing multiple external and internal crises, including the Euro area crisis, migration crises, the Russo-Ukrainian war or the coronavirus health crises that have revealed and magnified the difficulties of consensus-seeking and political cooperation. In parallel, the 'decision-making' or 'interventions' of the European Union in the public policies of Member States has taken an increasing number of forms from normative to financial or budgetary to juridical, and has been representing growing weight in recent decades. The '*acquis communautaire*' the Member States need to assume has been continuously increasing over the years.¹⁰⁸

Since the developing European legal regulation in this area affects and could interfere with inherited convictions and sovereign democratic choices of political communities, it could more likely raise concerns regarding the principle of equality and equal treatment of Member States, which are, in many respects, different and are in various circumstances. Furthermore, as it was mentioned earlier, a process of 'constitutionalisation' has begun within the European law that was extended beyond the areas of market integration. This forms part of a broader development, whereby elements of a 'European identity' and the 'Europeanisation of public policy and public space' have been formed. This development dates all the way back to the 1970s with the adoption of the Copenhagen Declaration on European Identity¹⁰⁹ as well as of the Copenhagen accession criteria of 1993. The early solidification of the elements of a 'European identity' serves as a basis for unity both within the community and for those states aspiring to join. It aims to consolidate cooperation into a single unit *vis-à-vis* third countries. In the subsequent decades, it set the stage for the further 'treatification' of values and requirements, a process whereby values and certain readings or interpretation of values have become part of the primary European law. The introduction of both 'the rule of law mechanism'¹¹⁰ and 'the general regime of conditionality for the protection of the Union budget'¹¹¹ reflects a significant development in the governance of the European Union. This advancement

108 Bertoncini and Chopin, 2010, pp. 436–437.

109 Document on The European Identity published by the Nine Foreign Ministers on 14 December 1973, in Copenhagen.

110 European Council, no date a.

111 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

has been further reinforced by the case-law of the CJEU, which includes the doctrine of effective protection of EU law.¹¹² Additionally, the adoption of various ‘symbols’, such as the flag and anthem of the European Union, underscores this progress. The question here is whether this broader process respects the principle of equality by considering the unique situation of each Member State and treats them equally.

Since the European cooperation is first and foremost a community of law originated in the Founding Treaties, the respect of the ‘*acquis communautaire*’ by the Member States remains essential for preserving its cohesion. At the same time, however, the political cooperation has so far revealed tensions, raising the question whether Member States are treated equally. From this perspective, two relevant and important factors need to be considered.

On the one hand, the political cooperation has been achieved largely by the extension of the same (supranational) institutions and the same methods used in the process of market integration. Since Member States are in different positions and have a varying nature of engagements under market integration and under political cooperation, the organisational structure of the market integration offers inadequate institutional guarantees for the principle of equality to prevail under co-operations that have a political nature. While the ‘constitutionalisation’ process of European law has begun and made significant progress within the political cooperation for the past decades, neither the content and precise meaning, nor the institutional check of the principle of equality between the Member States has been elaborated.

Secondly, the proposals, such as the Conference on the Future of Europe or the Franco-German paper¹¹³ that favours the majority decisions at the expense of the requirement of consensus are deactivating one of the guarantees of the principle of equality. The primacy of European law and the essential requirement for consensus-seeking and consensus among Member States have been the core elements of European cooperation. While the primacy of European law guarantees its coherence and autonomy, the requirement of consensus considers the political reality of the integration that is based on the cooperation of equal sovereign states.

4. Conclusion

The Chapter highlighted that while the principle of (sovereign) equality has been one of the most important building blocks of modern public international law, it has been also one of the focal points of the European integration. While Member States agreed to declare the principle of equality in the Founding Treaty, they remain different in many respects even beyond their size or population. They are and remain

¹¹² Ravo, 2012, pp. 110–111.

¹¹³ Report of the Franco-German working group on EU institutional reform, 2023.

different in terms of their own historical experience, their cultural heritage and identities, the reasons that led them to join the European cooperation as well as their expectations.

Nevertheless, the question of equality between Member States has been present and poses a core question throughout the entire evolution of the European integration, albeit the different aspects of equality have come to the forefront and the question of equality raised different dilemmas. One of the major turning points was the evolution of the European cooperation beyond market integration. Two main sides of the principle of equality can be distinguished. One of them secures the equal participation in the institutional arrangement of the European Union while the other one raises the question of equality before the European law. Although interrelated, the two aspects need to be examined separately.

One of the core dilemmas of the principle of equality within the institutional arrangement is the question of European democracy that is how to reconcile the principle of equality of the Member States with the equality of citizens. Two fundamentally different and conflicting European visions lie behind this question of equality. However, as the chapter explained, this conflict is not irreversible and the equality between Member States has a balancing role that empowers the meaningful political participation of the citizens as members of their political communities and thus as European citizens.

The principle of equality, as the chapter concludes, should have an increasing role in securing equality before the European law. The original process of integrating the markets of Member States into a single market and the legal regime or institutional framework necessary to achieve this have not seriously challenged the principle of equality between Member States before European law. In contrast, the extension of the cooperation into political areas revealed that Member States, in many respects, have remained different. Respecting equality means paying closer attention to the unique characteristics of each Member State to avoid unequal treatment when applying the same text to very different contexts. Furthermore, it also brought a process of 'constitutionalisation' of European law which should place a significant balancing role on the principles of equality between Member States. However, so far neither the interpretation of the meaning, nor the institutional guarantees of this principle are sufficiently strong to shield the equality of Member States in the areas of political integration.

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