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Equality in the theory of international society: Kelsen, Rawls and the English School

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Abstract. This article examines the idea of equality in the theory of international society. Contrary to the widespread contemporary notion of equality as a corollary principle to sovereignty, the central argument of the article is that equality and sovereignty can and ought to be disconnected, and that the concept of equality, when uncoupled from sovereignty, is a better point of departure when theorising international society than is, for example, non-intervention or sovereignty. An alternative approach to deal with equality of states and other entities within international society is sketched out.

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Introduction

This article examines the idea of equality in the theory of international society. International society is here understood to be a particular form of human association that is thought to include and somehow organise the relations among different bounded political communities. Hedley Bull once wrote that an international society exists when 'a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.'[1] The kind of human association hereinafter referred to as modern international society is generally thought of as being constituted by notions of state sovereignty. Richard Tuck's description of the modern sovereign states and its place in international society captures some of the essential characteristics of that understanding:

> The sovereign state, on this account of international relations, is on the one hand an autonomous agent without any affective relationships; on the other hand, it is not entitled to treat other agents as moral nullities, but has to recognize some general principles governing its conduct towards them, albeit of a much thinner kind than would be the case in a developed civil society.[2]

[1] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977), p. 13.
[2] Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), p. 9.

Among the 'general principles' governing conduct within international society, equality is one. In this context equality is generally dealt with in terms of equality of states or as legal equality of states. Often equality is treated as an element of sovereignty or as a principle that is derived from sovereignty. Accordingly, Bull writes about equality of states as a 'corollary principle' to sovereignty, the latter being the 'basic rule of coexistence'.[3] Similarly, Robert Jackson argues that sovereignty is a 'precondition of international society' and that sovereignty is a 'normative foundation' for a society of independent states in which 'equal sovereignty' is 'necessarily basic'.[4] However, the intimate relation between sovereignty and equality has also been questioned, notably by Hans Kelsen, who argues that the rules of equality of states are 'valid not because the States are sovereign, but because these rules are norms of positive international law'.[5]

In his major study *The Doctrine of Legal Equality of States* (1964) Pieter Kooijmans starts from the assumption that perfect equality is not possible in any context. This is so because even two objects that are identical or equal in all aspects, are at least not that when it comes to place, that is, their position in space. Equality therefore 'presupposes plurality' of some kind.[6] An essential characteristic of an international society is some degree of pluralism, that is, there has to be, within international society, some degree of tolerance for the fact that different bounded communities are organised in different ways and that international society is a means of achieving 'unity in diversity'.[7] The question, of course, is what kind of differences that ought to be tolerated and for what reasons. The concept of equality is one way to deal with that normative issue, because if inequality is the natural condition the principles of equality will have to be invented. The prevailing understanding of equality and its role in international relations is of course historically contingent, but essentially, the question of equality is a normative question.

Moreover, Kooijmans argues that equality is not a characteristic of an object but based on some characteristics certain objects have in common.[8] Hence, equality should not be viewed as a characteristic of a state, but rather as something that results from some property that the units that enjoy equality have in common, that is, a *common descriptive property*. Throughout this article, equality is understood as a normative principle that is supposed to regulate the relations of states or other units. Therefore it is important to specify the type normative arguments that provide the justification for a particular understanding of equality, that is, to identify the common descriptive property upon which such an argumentation is based. Such a normative argument might be structured in the following way:

[3] Bull, *Anarchical Society*, pp. 36–7.
[4] Robert Jackson, *Classical and Modern Thought on International Relations: From Anarchy to Cosmopolis* (London: Palgrave, 2005), p. 75. See also, Benedict Kingsbury, 'Sovereignty and Equality', in Andrew Hurrell and Ngaire Woods (eds), *Inequality, Globalization, and World Politics* (Oxford: Oxford University Press, 1999).
[5] Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization', *The Yale Law Journal*, 53:2 (March 1944), p. 207.
[6] Peter Kooijmans, *The Doctrine of Legal Equality of States: An Inquiry into the Foundations of International Law* (Leiden: A.W. Sijthoff, 1964), p. 8.
[7] Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), p. 22.
[8] Kooijmans, *The Doctrine of Legal Equality*, p. 8.

State A and State B should be treated equally with regard to aspect C because of D.

Spain and Finland should be treated equally with regard to membership in the UN because both units are sovereign states.

The units involved in this example are states. The most important part of the argument is 'D' which is the common descriptive property, that is, the particular property that the units should possess if they are to be treated equally. In this example 'D' is sovereignty.

The example above clearly describes a conventional 'Westphalian' understanding of the equality of states. However, concepts of equality were also central to the older, pre-Westphalian, literature about international society, and that ever since, there has been a variation of the idea and place of equality in the theory of international society.

Thus, the deeper meaning of international society may differ over time and place, reflecting different contextual circumstances. The concept of equality therefore is meaningful only in relation to particular understandings of international society. And when relating the concept of equality to different concepts of human association, like international society, the meaning of equality will be explicated as much through its relation with that wider concept as through the precise definition of equality.

It seems that notions of equality are somehow involved when attempts are being made to understand or improve the understanding of international society. This is urgent at a time when the normative foundations for international society are being questioned, for instance in the cosmopolitanist literature on international justice and in the solidarist literature about an emerging post-Westphalian era.[9]

Two central aspects of the present debate about international society, both in theory and in practice, are the changing understanding of sovereignty, and the commitment for human rights.[10] This article confronts both issues. It questions the widespread idea that equality and sovereignty are necessarily related, and it searches for ways to deal with equality and humanitarian concerns. There are three separate questions to be dealt with:

1. What, in the history of modern international society, has counted as a common descriptive property offering justification for the principle of equality among political communities?
2. How can, within the framework of modern international society, the concept of equality among communities be disconnected from the concept of sovereignty?
3. How can, within the framework of modern international society, the concept of equality take into account humanitarian concerns and the fostering of descent domestic conditions within communities?

[9] See Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999); John Rawls, *The Law of Peoples* (Cambridge Mass.: Harvard University Press, 1999); Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (London: Polity Press, 1998).

[10] See R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986); Adam Roberts, *Humanitarian Action in War: Aid, Protection and Impartiality in a Policy Vacuum, Adelphi Paper, 305* (Oxford: Oxford University Press, 1996); Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000).

The first two parts of the article examines the development of the idea of equality in international society from the reception of Aristotle's *Politics* in the mid-thirteenth century to the contemporary debate.[11] Two distinctions are discernible when dealing with this literature. First, equality is viewed as either *natural* or *constructed*. By naturalist concepts of equality are meant both to the modern idea that states are natural equals as well as the classical Aristotelian natural law approach to political community. The term constructivist refers to the idea that rules in human association are not natural but human constructions. The move from naturalism to constructivism corresponds in time with the demise of the classical natural law tradition in political and legal philosophy; the shift was towards liberalism, individualism and legal positivism. Secondly, equality of states is regarded as either a *moral* principle, where equality is founded on moral theory, or as a *pragmatic* rule, that is, a code of conduct with no explicit moral motives. The result of these dichotomies is four different concepts of equality: naturalist-moral, naturalist-pragmatic, constructivist-pragmatic and constructivist-moral. All four are represented in the literature and are relevant for understanding the place of equality in the theory of modern international society. The last two sections of the article are inspired by the work of Kelsen and Rawls respectively. Kelsen and Rawls have in different ways challenged the modern consensus about equality of states. The third section deals with the relationship between sovereignty and equality in international society, proposing a separation between the two ideas, and thereby opening the door for theorising equality and community in International Relations independently of sovereignty. The fourth section draws on Rawls' notion of a moral hierarchy of peoples and to what extent this is serviceable for rethinking the concept of equality in the theory of international society.

Naturalist concepts of equality

The reception of Aristotle's work in the mid-thirteenth century led to a new understanding of equality as a *political* ideal.[12] In the early medieval writings of St. Ambrose and St. Augustine, equality is dealt with as a theological rather than a political ideal. According to their view, inequality is understood as the consequence of the arrival of sin in the world, which takes away the natural equality of men and makes inequality part of the human condition.[13] Temporal government is then thought to provide an element of order in a fallen world, but it is not supposed

[11] Not much has been written at length on the topic. Tuck's book *The Rights of War and Peace* (1999) and two major studies on the subject of legal equality of states, Kooijmans's *The Doctrine of Legal Equality* (1964) and Edwin Dickinson, *The Equality of States in International Law* (Cambridge Mass.: Harvard University Press, 1920) have been much relied on for the historical parts of the article. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004) is a recent contribution showing how a pluralist society of states based on sovereign equality have accommodated great power politics.

[12] Jean Dubabin, 'The Reception and Interpretation of Aristotle's *Politics*', in Norman Kretzmann, Anthony Kenny, Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism 100–1600* (Cambridge: Cambridge University Press, 1982).

[13] R. A. Markus, 'The Latin Fathers', in J. H. Burns (ed.), *The Cambridge History of Medieval Political Thought c. 350–c. 1450* (Cambridge: Cambridge University Press, 1988), pp. 99, 121.

to promote or restore the natural equality of men. By contrast, Aristotle emphasised the equality of the members of the *polis* as 'the government of men free and equal'.[14] The dominant thinker of the reception, St. Thomas Aquinas, rejected the republicanism of Aristotle and focused instead on the perfection of political community, and it is in this context that the idea of the equality among communities was conceptualised.

According to Thomas, a perfect community can only be found among autonomous communities where the laws are subordinated to the natural and eternal law of God.[15] The critical question is of course how the human law of a community is derived from natural law. Thomas mentions two different methods: derivation and determination. According to the first method legal rules are derived from more general principles of natural law by means of deduction. According to the second method the rules are determined with regard to specific cases as a result of practical reason.[16] Both methods can be employed by all communities and result in two different bodies of legal rule depending on the method applied. The *ius gentium* (the law of nations) consists of 'all those conclusions which are directly derived from natural law as immediate conclusions', whereas the *ius civile* (the civil law of the bounded community) consists of rules 'which any city determines according to its particular interests'.[17] From this follows that *ius gentium* consists of universal rules common to all perfect communities, whereas the *ius civile* differ even between perfect communities. Hence, there can be several perfect communities although the civil laws of the communities differ. If several communities are perfect, yet in this way different, then they can be considered to be equals.

Thus, the thomist position on equality in international society is related to the notion of the perfect community understood as a community in which natural law is practiced; such perfect communities ought to be considered as equals and ought to be treated as such. Hence, the common descriptive property to be found among perfect equal communities is compliance with natural law. But as long as not all communities live up to natural law, not all ought to be considered as equals or treated as equals. The result is a notion of a moral hierarchy of communities that seems very much at odds with the modern pluralist, or 'Westphalian', understanding of the equality of all states but which was in fact a central theme in the early modern literature.

This notion of equality was later developed and integrated into the modern understanding of international law by Francisco de Vitoria in the 1530s and by Francisco Suarez in the early 1600s. The idea of a universal society of mankind is an important element of this approach. Such a universal society is thought to embrace all perfect communities so that they are united on a higher level and in a moral sense, whereas the legislative powers remain a concern for the bounded community.[18] Vitoria and Suarez shared the idea of a perfect community and also accepted the *ius gentium* as partly a natural legal order, partly a result of agreement

[14] Aristotle, *Politics* (Cambridge Mass.: Harvard University Press, 1932), p. 29.
[15] Aquinas, *Selected Political Writings*, A. P. D entrèves (Oxford: Basil Blackwell, 1948), p. 145.
[16] Ibid., p. 129.
[17] Ibid., p. 131.
[18] Benedict Kingsbury & Adam Roberts, 'Introduction: Grotian Thought in International Relations', in Hedley Bull, Benedict Kingsbury, Adam Roberts (eds), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990), p. 10.

between states.[19] And while they did conceive of the *ius gentium* as something common to all political communities of Europe, they did not think that it was shared by all peoples of the world. Especially in Vitoria's times, the relations between his native Spain and the so-called 'new world' called for a philosophical and legal response which he sought to provide. Vitoria and Suarez developed a theory of international law of practical relevance for the emerging European states-system. Essentially, their outlook was thomist.

Suarez's protestant follower, Hugo Grotius, accepted the *de facto* division of self-governing communities and the view that the autonomy of political communities had to be anchored in a wider legal system founded on natural law. But Grotius presented a different theoretical foundation.[20] He hoped to address problems of international law from a point of view acceptable to both Catholics and Protestants. His approach relied on a concept of universal reason common to all humans, and just like the thomists, Grotius viewed the bounded community as a part of a wider hierarchical legal and philosophical system.[21] Sovereignty was thus understood as an element of a system or norms, and the equality of states therefore still meant equality 'from above' through natural law, not 'from below' reflecting the views of free and equal citizens.

The early modern understanding of states and the association of states gradually came to involve a new concept of equality, that was formulated largely in opposition to the thomist tradition of thought, and that responded to the practical political problems facing early modern Europe. This new concept of equality was inspired by social contract theory, and based on the idea of states as natural equals. The eighteenth century consensus around this doctrine is founded on the writings of Samuel von Pufendorf and Eméric de Vattel.[22] The following quotation from de Vattel is illustrative:

> Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights.[23]

Judging from de Vattel states are natural equals in much the same way as individuals are thought to be equals by nature in the state of nature. In other words, equality is natural and pre-political.

Pufendorf argues that the social contract is not primarily about security and order, but about sociability. And this has important implications for the idea of international society, because for Pufendorf the state of nature is not characterised by the absence of law. The fact that states uphold peaceful relations is for him a proof that Hobbes's view of the state of nature as a state of war is wrong, concerning both the life of individuals in the state of nature and concerning the nature of the international relations of states.[24] Pufendorf argues that international

[19] Tuck, *Rights of War and Peace*, p. 77; Kooijmans, *Doctrine of Legal Equality*, pp. 57–65.
[20] Tuck, *Rights of War and Peace*, p. 78.
[21] Kooijmans, *Doctrine of Legal Equality*, pp. 69–70; Dickinson, *Equality of States*, pp. 47–9.
[22] Kooijmans, *Doctrine of Legal Equality*, pp. 76–80; Dickinson, *Equality of States*, pp. 83–9.
[23] Vattel, *Droit des gens, Préliminaires*, § 18–19, quoted in Kooijmans, *Doctrine of Legal Equality*, p. 84.
[24] Tuck, *Rights of War and Peace*, pp. 150–2.

society is hold together by quasi-legal principles (*lex imperfecta*). The equality of states is due to their capacity to transform *lex imperfecta* to *lex perfecta* owing to the powers of the sovereign.[25]

Moreover, in the eighteenth century a body of literature appeared that rejected the theories of Grotius and Pufendorf, and suggested instead a permanent federation of states. Accordingly, Rousseau argued that peace among political communities can only be secured if states form a 'confederation' which is a 'perpetual and irrevocable alliance'.[26] In his proposal for a 'Commonwealth of Europe', Rousseau lists nineteen sovereign powers of Europe to be entitled one vote each in the government of the confederation, and all decisions should be taken with 'the unanimous consent of the Confederates'. However, Rousseau regards smaller countries and dominions as 'possessions', and as such not to be entitled independent status and their own vote.[27] Kant suggests a federation of republican states.[28] This idea involves a domestic analogy between individuals as citizens in a republic and states in a republican international society. Accordingly, Kant argues that 'nations, as states, may be judged like individuals in the natural state of society'.[29] But in order to be like moral persons states would have to be independent and republican.[30] Thus, according to both Rousseau and Kant the basis for a theory of equality of states has to be founded on the internal constitution of states, and a permanent confederation of equal states has to be constructed as a necessary means for the achievement of perpetual peace. The principle of equality of states is thus regarded as a moral and political ideal, but it is not thought to be applied on a global scale, and not all states are thought to be equals.

To sum up, the two naturalist approaches differ in at least two significant aspects concerning the justification of equality of states. First, the common descriptive properties are different. The thomist approach focuses upon the notion of a perfect political community and the work of practical reason, whereas authors relying on social contract theory regards states to be natural equals in a pre-political sense. Second, the thomists look for a moral argument in support of equality among political communities. The perfect community is then regarded to be morally superior to other associations, which is the reason for equal treatment. The early modern consensus, represented above by de Vattel, shares a pragmatic account of equality, that is, states are natural equals because states are states. However, the attempt to qualify the content and meaning of equality of states involves hierarchical notions of equality and the ranking of states, such as was suggested by Rousseau.

Constructivist concepts of equality

The political philosophy of Thomas Hobbes revolutionised the concept of equality of states. The state, or commonwealth as Hobbes preferred to call it, is, according

[25] Kooijmans, *Doctrine of Legal Equality*, pp. 76–80.
[26] Rousseau, *Extrait du Projet de Paix Perpétuelle de Monsieur l' Abbé de Saint-Pierre*, 1756, quoted in Howard Williams, Moorhead Wright and Tony Evans (eds), *A Reader in International Relations and Political Theory* (Buckingham: Open University Press, 1993), p. 102.
[27] Ibid., pp. 102–3.
[28] Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (Bristol: Thoemmes Press, 1992), p. 112.
[29] Ibid., p. 128.
[30] Ibid., p. 120.

to him, the result of human design. In *De Cive* he illustrates this by comparing the state to 'a watch, or some such small engine', meaning that the state is not natural but constructed with intention behind.[31] Hobbes's understanding of the state as a construction, an 'Artificiall man', and the concept of equality of fear for the individual persons in the state of nature, makes the Hobbesian idea of equality dramatically different from the notion of pre-political equality to be found in Pufendorf or Vattel. According to Hobbes there is pre-political equality of individual persons, but not of artificial persons. In short, states cannot be in a state of nature. Moreover, the civil laws of the state emanate from the will of the sovereign. Hence, law-making can only take place within the commonwealth, because there has to be a sovereign to make law.[32] For this reason the thomist understanding of *ius gentium* as a body of legal rules common to all communities has to be rejected and replaced by concept of international rules agreed upon voluntarily by states. These rules should not be understood of as civil laws or natural laws, but as charters that are 'donations of the sovereign; and not Laws, but exemptions from Law'.[33] This view later led on to the seminal distinction between internal and international law introduced by Jeremy Bentham in the 1780s.[34]

If there is no natural equality of states, a principle of equality of states will have to result from charters, reflecting the will and interests of diverse political communities. Thus, the principle of equality of states has to be constructed. The common descriptive property justifying equality according to this view is sovereignty. This is so because it is the prerogative of sovereigns to decide which political communities that should belong to the family of states and enjoy an equal standing.[35] Once sovereignty is granted to a political community there is no easy way to change the decision and the fundamental equality remains.

The idea that equality of states derives from sovereignty and the consent of states became the new consensus, and still is. One expression of this is by Lassa Oppenheim (1905):

> Since the law of nations is based on the common consent of states as sovereign communities, the member states of the family of nations are equal to each other as subjects of international law [. . .] as members of the community of nations these are equals whatever differences between them may otherwise exist.[36]

Oppenheim echoes some of the central elements of the older notions of equality of states. Equality of states means formal and not substantial equality, and states are thought of as belonging to a family of nations. As for international organisations, it is argued by several authors, Oppenheim included, that the principle of equality of states is compatible with a majority vote, unequal representation at least

[31] Noel Malcolm, *Aspects of Hobbes* (Oxford: Clarendon Press, 2002), pp. 148–56.
[32] Thomas Hobbes, *Leviathan* (Oxford: Clarendon Press, 1909), p. 203, chap. 26.
[33] Ibid., p. 223.
[34] Jeremy Bentham, *The Principles of Law and Legislation* (Darian: Haffner, 1970), pp. 326–7.
[35] Some authors have discovered in Hobbes's writings evidence for some kind of an international society of commonwealths. See Malcolm, *Aspects of Hobbes* pp. 432–56; Murray Forsyth, 'Thomas Hobbes and the External Relations of States', *British Journal of International Studies*, 5 (1979), pp. 196–209; R. J. Vincent, 'The Hobbesian Tradition in Twentieth Century International Thought', *Millennium: Journal of International Studies*, 10:2, 1981, pp. 91–101.
[36] Oppenheim *International Law*, Vol. I (1905) pp. 19–20, 1905, quoted in Hicks, 'The Equality of States and the Hague Conference', in *The American Journal of International Law*, 2 (1907), p. 534.

concerning minor issues, and international courts provided they are unanimously accepted. However, international legislative bodies are generally rejected and regarded incompatible with the equality of states. The reason why states are equals, according to Oppenheim, is that they are in fact regarded by each other as sovereigns. The *de facto* acceptance of equality of states thus implies the *de jure* commitment for the principle. Similarly, Georg Jellinek argues that sovereignty is based on the 'self-binding' of states.[37] Thus, according to this view, the political act of recognition is of vital importance for the normative principle of equality.

During the late nineteenth century and the early twentieth century, the principle of equality of states became a major concern for publicists, diplomats, and international lawyers. The subject was discussed on several diplomatic occasions of which the most notable was the 1907 Hague Peace Conference. Some delegates at the Conference demanded that states should have equal voting power, regardless of their size and importance in international affairs. Other delegates regarded this as a dangerous practice. Two main arguments were articulated against the principle of equality of states and the application of equal voting power: Firstly, that the principle, being a normative principle with little resemblance to facts, would not protect the small states from great power interventions. Secondly, that if the principle was implemented, including equal voting power, it would render the small states too influential compared to the great powers.[38] The problem of how to balance the interests of small states and great powers later resulted in a compromise. The Covenant of the League of Nations allowed the great powers to dominate the Council, and the Charter of the UN later granted the great powers a privileged position in the Security Council.[39]

Many international lawyers in the early twentieth century were sceptical to the principle of equality of states for theoretical reasons. Traditionally, the doctrine of equality of states had been founded on natural law theory and the idea of a social contract. Those who rejected the idea of equality of states did so because they rejected natural law theory as well, viewing it as based on a 'discarded' political philosophy.[40] An extreme view was presented by Lorimer already in 1886. He claimed that international institutions should be based on the actual interdependence of states and not on formal principles. As a result there should only be 'relative recognition' of states based on the factual rather than the formal aspects. According to Lorimer the great powers should be considered equals and should carry out the grading of other states.[41] But even if Lorimer sought to rely on empirical criteria, a moral argument was involved, namely, that states should have their due in relation to their relative contribution to world affairs.

[37] Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Verlag von Otto Häring, 1914), p. 481.
[38] Hicks, 'Equality of States', pp. 530, 542–3.
[39] Herbert Weinschel, 'The Doctrine of the Equality of States and its Recent Modifications', *The American Journal of International Law*, 45 (1951), pp. 417–42.
[40] Hicks, 'Equality of States', p. 532.
[41] The following criteria are suggested by Lorimer: (1) 'The extent or size of the state, or the quantity of materials of which it is composed.' (2) 'The content or quality of the state, or of its materials.' (3) 'The form of the state, or the manner in which its materials are combined.' (4) 'The government of the state, or the manner in which its forces are brought into action.' James Lorimer, *The Institute of the Law of Nations. A Treatise of the Jural Relations of Separate Political Communities* (1886), quoted in Hicks, 'Equality of States', p. 552.

The sceptical attitude that is typical of several authors at the time can partly be explained by the impact of analytical jurisprudence, such as legal positivism and legal realism. The fierce attack on the principle of equality of states by P. J. Baker in 1923 is clearly influenced by this particular tradition. Baker regards the doctrine of legal equality of states as a 'redundant theoretical abstraction' and 'not useful in the scientific system of international law'.[42] Baker's main point is that equality of sovereign states is simply another word for political independence. He regards equal voting power among states as an impediment on the independence of states and as an undemocratic practice, since it does not take into account the size of the population of states.[43]

The most important contribution to the literature on equality of states of this period is probably Edwin Dickinson's book *The Equality of States in International Law* (1920). According to Dickinson there are two different legal ideas involved in the debate. First, there is *equality before the law*, prescribing that states should be equals under international law, that is, international laws should be regarded as general rules for all subjects whom the rules apply to. According to this view unequal voting power or unequal representation in international organisations does not imply that states are unequal in a legal sense.[44] Accordingly, Baker argues that equality in this sense does not mean that all states must be subjects to exactly the same rights. For instance, some individuals or groups within a society may in fact be entitled to certain rights or privileges that are not given to all. The same can apply to states without interfering with the principle of equality of states.[45] Hence, great powers can retain special rights under international law while at the same time all states are regarded as equals before the law. The privileged position of the permanent members of the UN Security Council can be understood in this way.

The second legal idea of equality prescribes *equality of rights* for all states.[46] According to this idea there can be no special rights for some states or groups of states, and equal voting power and representation should be applied. But the idea of equality of rights, as Dickinson new it, derives from classical natural law theory or social contract theory, and neither Dickinson nor Baker accept that type of legal philosophy. Dickinson views equality before the law as an essential component of every legal system whereas he regards the notion of equality of rights as merely a normative ideal. And Baker shows that equality of rights is not generally applied in either municipal law or international law. Whereas Baker is negative and even hostile to equality of rights among states, Dickinson is not entirely negative of the ideal as such but he regards it as 'inapplicable' to international affairs since he thinks that the preservation of plurality is the central concern. 'Insistence upon complete political equality', he argues, 'is simply another way of denying the possibility of effective international organization'.[47]

To recap, the constructivist concept of equality of states led to a new consensus involving at least three central elements: First, the principle of equality of states

[42] P. J. Baker, 'The Doctrine of Legal Equality of States', *The British Yearbook of International Law*, 4 (1923), pp. 1–20, 3.
[43] Ibid., p. 19.
[44] Dickinson, *Equality of States*, pp. 334–5.
[45] Baker, 'Doctrine of Legal Equality', p. 3.
[46] Dickinson, *Equality of States*, p. 335.
[47] Ibid., p. 336.

was derived from sovereignty through recognition; hence, sovereignty became the common descriptive property of the units that were thought to apply to the principle. Second, equality was viewed as a pragmatic rather than a moral principle; that meant a break with older naturalist concepts of equality, particularly thomism. Third, equality of states was limited to equality before the law, whereas the wider notion of equality of rights was generally rejected. Hence, there was a threshold: all sovereign states should enjoy equality before the law.

Kelsen: equality without sovereignty

One of the critics of the new consensus was Hans Kelsen. Kelsen's criticism is of general theoretical importance for two reasons: firstly, because it questions the widespread idea that equality is derived from sovereignty and, secondly, because of the observation that equality before the law is too limited to be meaningful.

As for the question of sovereignty and equality, Kelsen's criticism is founded on his rejection of sovereignty as the basis for international law. He rejects the popular theory that sovereignty is intimately connected to power, and claims that such a theory is metaphysical and a kind of theology 'derived from a tendency to deify the State'. For Kelsen, state sovereignty means 'the legal authority of the States under the authority of international law' and is 'limitable and limited only by international law'.[48] Kelsen's suggestion is that any principle or legal rule becomes valid only with reference to an appropriate source, such as legislation, custom or treaty. Sovereignty and equality are both rules of that kind, and therefore equality of states cannot be derived from sovereignty.[49] Kelsen's views depend on his epistemology in at least two important respects: First, legal monism which teaches that all states are subjects of the international legal system, and that national legal systems are essentially sub-systems. Second, since law and state are not separated, laws cannot be created by the state.[50]

The second point raised by Kelsen is about the meaning and content of equality of states. Initially he does not reject consensus on this point. For instance, he shares the view that states do not have the same rights and duties, but he does that for empirical rather than theoretical reasons. Equality of states is then specified in following way:

> According to general international law all the States have the same capacity of being charged with duties and of acquiring rights; equality does not mean equality of duties and rights, but rather equality of capacity for duties and rights. Equality is the principle that under the same conditions States have the same duties and the same rights.[51]

Thus, Kelsen seems to accept roughly what has been called equality before the law above. However, he regards this to be 'an empty and insignificant formula because it is applicable even in case of radical inequalities'. For instance, great powers could enjoy a number of privileges exclusively on the condition that they are great

[48] Kelsen, 'Principle of Sovereign Equality', p. 208.
[49] Ibid., p. 210.
[50] Neil MacGormick, 'Law', in David Miller (ed.), *The Blackwell Encyclopedia of Political Thought* (Oxford: Basil Blackwell, 1991), p. 269.
[51] Kelsen, 'Principle of Sovereign Equality', p. 209.

powers, and minor powers could be refused most rights under the condition that they are minor powers, and yet, the principle of equality of states would still be valid. Therefore, Kelsen writes, 'the principle of legal equality, if nothing but the empty principle of legality, is compatible with any actual inequality'.[52]

Moving on to the theory of international society, the understanding of equality of states is generally limited to equality before the law as a basic rule, whereas sovereignty is thought to be the fundamental rule. Equality thus becomes a 'corollary principle' to sovereignty.[53] The English School is based on an entirely different philosophical foundation than is Kelsen's legal theory; that is, the English School is neither founded on legal monism nor the assumption that state and law cannot be separated. But Kelsen's suggestion that sovereignty and equality are not related is relevant after all.

In *The Anarchical Society* (1977) Bull is clearly influenced by the legal philosophy of H. L. A. Hart. It is well known that Hart sought to separate politics from law. Hart wanted to avoid the idea that the authority of legal rules depended on political power. Instead Hart argues that legal rules receive their authority from so-called 'secondary rules'. There are three such 'secondary rules': The 'rule of recognition' that specifies the features of legal rules; the 'rule of change' regulates the procedures according to which legal rules can be enacted; the 'rule of adjudication' defines the institutions that can settle legal disputes.[54] According to Hart, international law lacks secondary legal rules as a matter of fact.[55]

Bull shares Hart's ideas on these matters and consequently rejects the idea that there is an international legal system of the same kind as national legal systems. However, there is clearly a set of rules that is generally complied with by states and regarded to be binding on them out of 'habit' or 'inertia'. According to Bull states comply with international law due to 'the *fact* that they so often judge it in their interests to conform to it'.[56] Bull regards political power to be important for the political order of international society and even in order to make the system of international law effective, but international law does not receive its authority or validity from political power.[57]

Thus, Bull's strategy is rather the opposite of Kelsen's. Instead of closing the door for a dualistic concept of state and law, Bull, being influenced by Hart, attempts to separate the two spheres: the legal and the political. In that way he is able to isolate power politics within the political realm. As a consequence the content and the authority of international law are not viewed as a direct result of political power. Sovereignty may play a part in all this, but the rules of sovereignty are not the result of power politics but of international law.[58] Hence, following Bull's arguments on these matters, there is really not the connection between

[52] Ibid., p. 209. According to Kelsen, this observation has fostered attempts to specify the content of the principle, generally leading to the idea that the principle of equality of states is safeguard for the autonomy of states viewing them as legal subjects of international law.
[53] Bull, *Anarchical Society*, pp. 36–7.
[54] H. L. A. Hart, *The Concept of Law*, 2nd edition (Oxford: Clarendon Press, 1990), pp. 94–5.
[55] Ibid., p. 236.
[56] Bull, *Anarchical Society*, pp. 139–40.
[57] Ibid., pp. 131–2. See also Ronnie Hjorth, 'Hedley Bull's Paradox of the Balance of Power: A Philosophical Inquiry', *Review of International Studies*, 33 (2007), pp. 606–9; Peter Wilson, 'The English School's Approach to International Law', in Cornelia Navari (ed.), *Theorising International Society: English School Methods* (London: Palgrave, 2009).
[58] Bull, *Anarchical Society*, pp. 140–1.

sovereignty and equality which he himself indicates.[59] Perhaps Bull was not aware of this inconsistency himself. Inconsistency is sometimes to be found upon closer scrutiny of Bull's work, and there seems to be more room for normative reflection in his theory of international society than Bull wanted to admit himself.[60]

Anyway, once the intimate connection between sovereignty and equality is avoided, the principle of equality becomes a normative principle on its own merits. This means, for instance, that equality in international society must not be limited to equality of sovereign states, but that other units than states can be taken into consideration as well. Rawls's concept of the equality of peoples is one of several interesting ways to approach the issue of equality. However, before paying attention to Rawls's theory the other aspect of the consensus needs to be addressed, that is, the concept of equality before the law.

The best reason why equality before the law is difficult to reject is probably because there seems to be few if any realistic alternatives to it. The challenge to be faced is not to replace equality before the law but to make room for a more inclusive and meaningful concept of equality without disturbing the rigidity of the existing principle.

One way to proceed might be to make use of Peter Singer's distinction between *equal consideration of interest* and *equal treatment*. Singer argues that there is no reason to believe that differences of capacity between two persons justify an unequal consideration of their interests. This is so because equality is a normative principle, not a statement about facts. According to Singer, we ought to take into account of interests because they are interests and not because they are articulated by particular persons or groups. This is the principle of equal consideration of interests. The only capacity that is important here is the capacity to have an interest. However, equal consideration of interest does not imply equal treatment. According to Singer, unequal treatment is acceptable if it brings about a less unequal situation for all parties concerned.[61]

A particular characteristic of equality before the law is that it is thought to be applied symmetrically to all states that, to borrow Kelsen's phrase, 'have the same capacity of being charged with duties and of acquiring rights'.[62] R. J. Vincent notices that states have lesser or greater capacity of rights but that equality before the law nevertheless secures an equal treatment by the law.[63] This view, defending consensus, implies that equality is one way or another related to sovereignty, because only sovereign states, weak or strong, can benefit from an equal treatment under international law. However, the capacity may not be attributable only to states, and not all states may in fact possess it. As is noted by Jackson, a state may be a 'quasi-state', lacking a number of capacities normally understood as implicated in the notion of sovereign statehood.[64] The fact that a state lacks

[59] Ibid., pp. 36–7.
[60] Hjorth, 'Hedley Bull's Paradox'; K. J. Holsti, 'Theorising the Causes of Order: Hedley Bull's *The Anarchical Society*, in Navari, *Theorising International Society*.
[61] Peter Singer, *Practical Ethics* 2nd edition (Cambridge: Cambridge University Press, 1993), pp. 23–6.
[62] Kelsen, 'Principle of Sovereign Equality', p. 209.
[63] R. J. Vincent, *Nonintervention and International Order* (Princeton: Princeton University Press, 1974), p. 41.
[64] Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990).

capacities is not a problem for the principle of equal consideration of interests since only the capacity to have an interest is important, but the focus on sovereignty leads to an unjust exclusion of non-state actors.

Certainly, Singer's notion of the capacity to have an interest is an entirely different idea than that of the capacities referred to by Kelsen and others. However, it does open the door for an equal consideration of interests of communities other than states, such as peoples that are not sovereign states but which nevertheless possess the 'capacity of being charged with duties and of acquiring rights'. Because, if the legal idea of equal treatment before the law is retained and if at the same time the connection between sovereignty and that legal idea is rejected, the specification of the units to be treated as equals cannot be solved by sovereignty, but still, the concept of a 'capacity of being charged with duties and of acquiring rights' can be retained, however not as an alternative to the capacity to have an interest, but rather as something that is required for equal treatment, that is, a necessary condition for equal treatment by the law. Before the rules of equal treatment can be settled – or, in other words, before the specification of the units in question to potentially enjoy equal treatment is made – an equal consideration of interests will have to take place. Understood in this way, equality before the law is more inclusive than originally conceived of.

Rawls: the equality of peoples

In *The Law of Peoples* (1999) Rawls writes about the equality of peoples rather than the equality of states, thus indicating a shift from states to peoples. Ideally, a people should be a liberal people, according to Rawls. A liberal people should have a 'reasonably just constitutional democratic government', share 'common sympathies' and possess 'a moral nature', that is, 'a firm attachment to a political (moral) conception of rights and justice'.[65] Liberal peoples are of course not identical but can nevertheless count as equals. Furthermore, Rawls seeks to find a way to tolerate and to include other than liberal peoples into 'a society of peoples'. To tolerate, in this context, argues Rawls, is 'to recognize [. . .] nonliberal societies as equal participating members in good standing of the Society of Peoples'. Here Rawls formulates what could be interpreted as a principle of equality of peoples: When different peoples compose a society of peoples they should 'offer other peoples public reasons to the Society of Peoples for their actions'.[66]

According to Rawls, peoples should be at least 'well-ordered' in order be considered equals. The category of well-ordered peoples includes both liberal peoples and so-called decent peoples, the latter living up to the threshold. Thus, peoples should be considered as equals and treated as such if they observe human rights, if the people are consulted on major issues, and if a right of dissent is accepted. Moreover, the reasons offered in defence of the internal policies have to be tolerable to other peoples. These are the minimal characteristic of a well-ordered people. The common descriptive property justifying equality is then

[65] Rawls, *Law of Peoples*, pp. 23–4.
[66] Ibid., p. 59.

that peoples should be treated as equals if they live up to the standard of being 'well-ordered':

> People A and People B should be treated equally with regard to all aspects of international relations if they are well-ordered peoples and because they offer other peoples public reasons to the Society of Peoples for their actions.

In opposition to the modern consensus on a pragmatic approach to equality, Rawls's theory involves a moral hierarchy. When looking back on the literature, there is a similarity between Rawls's conception of the equalities of peoples and Thomas's theory of the equality of perfect communities.[67] The similarity is due to the fact that both authors view equality of communities or peoples as something to be derived from normative philosophical reasoning independent of actual political conditions. But contrary to the thomist literature that was based on natural law theory, Rawls focuses upon the way principles of justice are constructed. In that sense Rawls is a constructivist.[68] Even if Rawls has opened the door for a collectivistic ontology of peoples when placing so-called 'decent peoples' in the category of ideal theory, the view that only individuals are moral persons is really not challenged.[69] Anyway, the task remains to analyse to what extent Rawls's concept of equality of peoples is serviceable for the concept of equality in international society.[70]

The distinction between a moral and a pragmatic concept of equality involves the question of hierarchy.[71] Those who defend the concept of equality from the moral point of view typically arrive at a notion of relative equality and of a hierarchy of communities, whereas the defence of a pragmatic concept of equality results in a limited concept of equality, such as equality before the law, to be applied to all states. However, what at first seems to be a choice between two theoretical positions – moral hierarchy and an anarchical order of equal and sovereign states – is rather a question of the right reasons for hierarchy. Since the principle of equality before the law allows so much inequality among the units that are supposed to be equals and since it excludes the non-sovereign peoples, the relevant choice is perhaps a choice between, on the one hand, a hierarchy founded on moral arguments and, on the other hand, a hierarchy founded on conditions,

[67] Rawls mentions the similarities between his theory and Christian natural law theory, such as thomism, and he even argues that his own theory can be supported by natural law theory (p. 104). It is striking that the type of ideal political community envisaged by Thomas might perhaps have been accepted by Rawls as a 'well-ordered' people.

[68] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 89–99.

[69] Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004), p. 73.

[70] It is recognised by Charles Beitz in the new afterword to the second edition of *Political Theory and International Relations* (1999), Rawls's *The Law of Peoples* and R. J. Vincent's seminal work *Human Rights and International Relations* (1986), a solidarist English School classic, are at the heart of a paradigm Beitz labels 'social liberalism', and according to which '[. . .] state-level societies have the primary responsibility for the well-being of their people while the international community serves to establish and maintain background conditions in which just domestic societies can develop and flourish' (p. 215). For some critical remarks concerning the Rawls's *The Law of People* and the classical international society approach, see Jackson, *Classical and Modern Theories*, pp. 157–79.

[71] Gerry Simpson discriminates between two types of hierarchy within international society: legalised hegemony and liberal antipluralism. The former is associated with constitutional privileges and is relevant, for example, in the application of legal equality of states to UN Security Council (see above), and the latter to the kind of moral hierarchy discussed by (for example) Rawls, but also the 'nonliberal' antipluralism of (for example) Aquinas. Simpson, *Great Powers*, pp. 67–83.

such as the distribution of power. When viewing equality as a normative principle, only the first alternative is acceptable. This is why 'the capacity of being charged with duties and of acquiring rights' is too low a threshold for a normative concept of equality in international society.

The theory of international society of the English School involves two loosely defined positions: pluralism and solidarism. Briefly stated, pluralists claim the primacy of sovereignty and an adherence to a strict non-intervention policy unless the international pluralism of states is threatened by acts of aggression or war, while solidarists suggest sovereignty to be conditioned and humanitarian interventions to be acceptable.[72] Both sides take little interest in the issue of equality.

Pluralists seem generally to have no problems to accept the consensual position of equality before the law as a safeguard for the legal independence of states. However, the attempt to reduce the normative principle of equality of states to equality before the law does not provide enough guidance for dealing with the degree of inequality that could be compatible with deeper pluralist ideals. As John Williams has argued, the liberal notion of toleration when applied to international society becomes 'an agreement to disagree on the correct way to order domestic society', and as a result it 'establishes a system of tolerance that is too narrowly focused on states and too broad in the leeway it grants states to practice domestic intolerance'.[73] Hence, equality before the law may turn out to be too limited not only for those who advocate radical change but also for those who argue in defence of pluralism. Moreover, it has been shown that modern international society historically has sought to fulfil two different goals: to establish a regime of toleration or pluralism and to promote a particular understanding of civilisation.[74] If this is true, the traditional view of international pluralism is but one aspect of international society and turns out to propagate rather an idealistic version of liberal international society. Hence, the pluralist position would benefit from a concept of equality that is not implicated in sovereignty and that includes other entities than states.

Solidarists seem generally to accept the state system as a base line, but offer reasons to support a commitment for the humanitarian cause. While solidarists base their thinking a great deal on moral cosmopolitanism and the equality of individuals, they seem unwilling to deal at length with the equality of states, focusing instead on sovereignty and the idea that sovereignty should be conditioned for humanitarian reasons.[75] Viewing equality as a normative principle that is not dependent on sovereignty may prove more serviceable for the solidarist commitment than the problematic task of trying to reconceptualise sovereignty. The progressive ethos of the solidarists involves attempts to open up international society for problem-solving discourses focusing on humanitarian values, the

[72] James Mayall, *World Politics: Progress and its Limits* (London: Polity Press, 2000), p. 14; Nicholas Wheeler, *Saving Strangers*, p. 11; Alex Bellamy (ed.), *International Society and its Critics* (Oxford: Oxford University Press, 2005), pp. 9–11.

[73] John Williams, 'Territorial Borders, Toleration and the English School', *Review of International Studies*, 28 (2002), pp. 740–1.

[74] Eward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002).

[75] Wheeler, *Saving Strangers*, pp. 12–3; Henry Shue, 'Limiting Sovereignty', in Jennifer Welsh (ed.), *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2004).

fostering of 'good international citizenship' and attacking the 'totalising project' of thinking and acting in International Relations.[76] This literature adds concretion and empirical relevancy to Rawls's rather abstract categories when trying to conceive of a moral hierarchy of states and other units to be entrusted with rights and charged with duties.

Conclusion

Equality has for a long time been a central political ideal related to notions of political association. This article shows that equality has also been a central ideal in the theory of international society. The twentieth century consensus is dominated by the concept of equality before the law. This means that the principle of equality of states is thought of as a pragmatic rule derived from sovereignty through the act of recognition. It is shown that this concept is one of several ways to approach equality in international society. It is argued in this article that, contrary to the prevailing understanding and practice, equality and sovereignty should be disconnected. If that is done the moral dimensions of equality can be taken into account regardless of the implications such reasoning might have on sovereignty. The degree of inequality that can be accepted, and for what reasons, is an essential task for a normative theory of international society, since notions of equality have to do with the boundaries of international society, and the question of exclusion and inclusion. Considerations about sovereignty should not restrict normative theorising of this kind.

The practical implications of the uncoupling of sovereignty and equality have not been developed in this article other than by sketching out a way according to which equality might be handled within international society. This involves three stages: First, the application of the principle of equal consideration of interests as a strategy for the inclusion of the actors to potentially be granted equal treatment. Second, a notion of equal treatment based on a formal requirement in terms of capacities of the actors for rights and duties. Third, a moral theory involving humanitarian concerns and the idea of a decent society based on a moral theory, for instance of the kind suggested by Rawls.

When separated from sovereignty, the concept of equality may be a better starting-point for theorising international society than, for example, non-intervention or sovereignty. One reason for this is that equality is a normative idea that does not presuppose a state system. Whether theorising equality from the point of view of individual persons, states or other collectives, the existing or historical state-systems are not foundational for the process of theorising other than providing a contextual element. The assumption that equality presupposes plurality does not imply any particular kind of units or that all units are of the same kind. Using equality as the guiding concept for theorising international society therefore is a way to avoid the limitations of 'Westphalianism'.

[76] Andrew Linklater, *Critical Theory and World Politics: Citizenship, Sovereignty and Humanity* (London: Routledge, 2007).

The English School approach to International Relations has somehow neglected equality. Apart from possibly being influenced by Bull's words about equality as a 'corollary principle' to sovereignty, the reasons might perhaps be that equality is either thought of as a political ideal of the bounded community or just as a speculative idea of a cosmopolitan world society with little resemblance to facts. This article suggests otherwise. Focusing on equality does not mean engaging in theorising that is not anchored in the intellectual history of international society or in diplomatic experience. Equality in international society is not just a philosophical idea of an imaginary world society and at the same time much more than simply legal equality of states. Tim Dunne argues that theorising international society 'should build from the floor up rather than the ceiling down'.[77] This article has shown that principles of equality do not just belong to the ceiling but are also parts of the floor.

[77] Tim Dunne, *Inventing International Society: A History of the English School* (London: Macmillan, 1998), p. 190.