Introduction

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While unitary states find it easy – at least in theory – to pledge equal rights to all geographic entities and all citizens of the country, the principle of equality raises several complex issues in states which guarantee autonomy rights to one, several or all constituent entities or which provide for specific regimes for distinct groups, such as national minorities or indigenous groups. As the guarantee of self-rule is fundamental to all federal systems, their subnational units, regions or communities are empowered to autonomously adopt and apply their own rules. Autonomy implies that the rules can differ from one unit to another, which is why it necessarily impacts on equality; different rules apply to the citizens of the same state. It comes as no surprise that proponents of the principle of equality and equal citizenship often oppose federalism in all its forms or attempt to limit self-rule whenever it clashes with equality. Different rules are often blamed for leading to – or increasing – inequalities within one and the same state, for challenging unity, and for questioning solidarity.

Why would we then publish a book that points out the challenges federal countries face with regard to the principle of equality, a book that would potentially unveil problems intrinsically linked to autonomy, a book that focuses on challenges federal systems struggle to overcome and that might give arguments to its adversaries? It might be easier and seem more rewarding to present the successes countries encounter along their journey, rather than highlighting the many conceptualisation and implementation issues faced when putting into practice federalism, decentralisation or any other power-sharing regime. However, addressing such challenges and difficulties, as well as the strategies employed to eventually overcome them, is more worthwhile. On the one hand, it is intellectually stimulating to explore the many facets of autonomy and of equality and to discover both common ground and contradictions. On the other hand, tackling the controversial issues of diversity, autonomy, unity and solidarity at its roots offers a fascinating opportunity to unpack deep reluctance towards power-sharing and investigate its relevance. Taking this kind of hesitancy and opposition seriously and openly questioning its justification or groundlessness seems to be the best way to open new ways of thinking about both federalism and diversity as well as unity and equality, and to add inspirational shades of grey to the still commonly bleak, black-and-white approach.

Respecting the principle of equality and reconciling it with equality is undoubtedly no easy task in the context of countries which have adopted

federal or decentralised systems or any other arrangement allowing for the accommodation of groups or territories with a distinct identity. How much equality does state unity require? How much inequality is acceptable in order to respect diversity? There is an important but largely unexplored theoretical and conceptual difference in the understanding of the principle of equality in federal and decentralised states which grant autonomy to regions and, on the other hand, unitary states which provide for homogenous rules applied uniformly throughout the country. Furthermore, there are challenges with regard to the protection of minorities on the federal level and the protection of minorities within minorities in autonomous regions. The equal or unequal representation of regional units in the institutions of the central governments as well as the distribution or non-distribution of resources can constitute a serious difficulty. How is such difficulty dealt with? What experiments have been undertaken with rather unconventional solutions and what new solutions could be suggested with regard to particular problems?

The answers to these questions are not merely of a legal nature, but need to be tackled from a political, economic, social and cultural perspective as well. Such is the ambition of this volume. Its purpose is not so much to cover a maximum of countries with individual case studies, but rather to develop a reflection on concepts and issues that might challenge other federal states, as well as centralised systems. Hence, the following volume addresses a variety of topics with a well-balanced geographic representation of case studies, and brings together authors from varied disciplines, all of them experts in their own field of research, yet all connected through their interest in federalism and decentralisation, ensuring a multifaceted view on the issues at stake. In addressing these questions, this volume tries to provide deep insight into the different case studies and comparative analyses and hopes to pave the path for future studies on the relation between equality, autonomy and diversity.

Looking at the principle of equality in diverse states is an important undertaking for many reasons. All states subscribe to the principle of equality, view equal rights and opportunities for all as a fundamental aspect of justice, and have committed to guaranteeing equal rights and freedoms to all without discrimination. At the same time, all states deal with diversity and most have adopted special regimes or autonomy arrangements for some regions or groups, such as islands, unpopulated territories, capitals, metropolitan areas, national minorities or indigenous groups. This is true for federations but equally so for most unitary states. Although the concept of 'one language, one culture, one people, one nation' still survives in some states, diversity is increasing overall. If it is not ethnic and cultural diversity which forcefully comes to the fore, it is geographic, social, economic or political diversity or, most often,

a combination of these elements. In fact, only very few countries still have – or hope for – an omnipotent centre making decisions that apply equally to everyone in the entire country. Even emblematic centralised states deal with diversity: France by regionalising and accommodating overseas territories, Finland by granting autonomy to the Sami people and accepting a special regime for the Åland Islands, or China by tolerating a special status for Hong Kong and Macau and special rules for ethnic minorities.

Vertical separation of powers has been the global trend for some time. Federalism, decentralisation and other autonomy arrangements usually come with the expectation of solving problems encountered between majority and minority groups and helping to combine democratic majority rule with the existence of minority groups. Federal systems are also perceived as defusing tensions, bringing the state closer to the people, improving service delivery and making the state more democratic and accountable. When faced with separatism, sharing power is usually the only way to soothe tension and avoid confrontation, outbreaks of violence or frozen conflicts. In times of internal conflicts opposing regions or communities, sharing power is usually the only possible road to peace.

However, since the relationship between power-sharing and equality is unclear, the fear of sacrificing equality in favour of autonomy and the anxiety this produces among the majority in terms of losing its grip over its minorities (and its resources), often prevents a peaceful balance between majorities and minorities and the different regions and communities of a country. In addition, defenders of human rights often articulate their criticism towards federal and decentralised states around the following arguments: How can the principle of equality be reconciled with that of autonomy, when the latter accommodates regions and communities by providing them with privileges others do not have? And how can equality prevail in a country in which different regions or communities apply different rules to the citizens of the same state? Is it acceptable that citizens of the same country enjoy different rights and carry different burdens? Can a system be fair when citizens of the same state do not all have access to the same public services and contribute equally to their costs? Critical questions are also raised in the field of democracy. Does implementing federalism and decentralisation necessarily mean that the democratic principle of one person one vote is hampered by balancing voting rights or by reserving seats for specific groups and not for others?

This book tackles these questions and explores the similarities and differences that might exist between the concepts and practices of federal systems and the principle of equality and its implementation. It understands federalism very broadly. For the purpose of this book, federal systems include

established and new federations, regional and decentralised states, and other states providing specific regions or communities with extra rights, privileges or obligations. But the diversity of diverse states should not lead us to forget that the notion of equality is even more disconcerting. In fact, equality can be viewed as being either individual or collective, *de jure* or *de facto*, formal or substantive. It can thus refer to the equality of regions and communities within the same country or to the individuals constituting them. It can focus on the obligation to treat everyone equally by law or on the duty to equalise *de facto* differences and promote equality of chances. When the duty to guarantee equality is not looked at as a static but rather as a dynamic state task, it can also be seen as a mechanism to overcome vulnerabilities or to deal with wrongs of the past, including inequalities.

Some federal states guarantee equal rights and equal responsibilities to all subnational units and ensure proportionate representation of all groups in parliament. Such *de jure* symmetrical relationships may or may not be best to implement the principle of equality. After all, subnational units usually differ greatly in terms of geographical size, population, economic and social development, resources, ethnic composition, as well as culture and history. They may be the dominant unit or the formerly or currently marginalised, neglected or disenfranchised part of the country. Formal equality can thus lead to unequal representation of citizens and variations in power and influence of the units. In other states, the institutional setup provides for differentiation between regional units and asymmetric relationships, e.g. for unequal (but equalising) representation at the centre, for special rights and privileges in favour of one or more regions or groups or other forms of imposed or negotiated compromises on the division of power. All these intricacies contribute to the fact that analysing the autonomy-equality relation is not an easy task, but a highly rewarding one.

Diverse states guaranteeing autonomy must also respond to questions related to the ownership and management of natural resources – which are typically very unequally distributed amongst the units – and design a system of fiscal federalism. Most have developed financial schemes to balance economic, social and other disparities between regions and communities. While some of these fiscal arrangements focus on the equality of the regional units and on the balance of their rights and responsibilities, others are designed to guarantee equal rights and opportunities to all citizens living in different regions. Asymmetric arrangements, which nowadays have become common in federal systems, are designed to recognise and accommodate different kinds of diversity and power relationships in order to react to separatist claims, their needs, priorities and bargaining powers and in an overall attempt to promote

internal cohesion and stability. However, such unequal relationships among regional units raise a number of questions. How can special arrangements that privilege some regional units or groups over the others be justified? Does the principle of equality require that extra-rights are compensated by extra-duties? How and to what extent is it acceptable that the use of asymmetric powers leads to inequality between citizens of different regions in terms of representation, access to power, veto rights, human rights, and access to services? These institutional questions are at the core of the discussion this book attempts to articulate.

Furthermore, equality in states characterised by diversity can be examined from an individual perspective. While constitutions and international human rights conventions guarantee all persons a right to equality and non-discrimination, diverse states often simultaneously provide for specific rights accommodating minorities or other groups. The constitutional or legal guarantee of territorial self-rule in fields such as language, culture policies, education, health, social services and infrastructure, opens a space for regional variations of policies, laws and services, potentially creating tensions with the principle of equality. Both federal and decentralised states have opted for different ways of reconciling the guarantee of equal rights and opportunities to all citizens with the collective rights to autonomy. For some, autonomy is limited by the principle of equality. According to this approach, all citizens, independent of their residence and group belonging, enjoy the guarantee of equality before the law and equal access to public services. In such a system, the autonomy of regional units or groups in the field of legislation or service delivery is largely reduced and there is either no fiscal federalism or full fiscal equalisation. The autonomy of subnational actors is then reduced to the implementation of centrally decided and financed strategies and targets. Even in such a centralised system, service delivery is not necessarily the same in all regions. As with unitary states, highly centralised federal systems often fail to deliver on their promise of ensuring equal citizenship and providing equal access to essential services.

In order to improve governance and better respect the autonomy of subnational units, some states are thus willing to accept a certain degree of *de jure* and *de facto* inequality between citizens of different regional units or even within a unit. Such political systems only provide for national minimal standards and allow regional units or groups to adopt their own legislative regimes and to offer special services. Despite their effects on equality, such systems might be acceptable in a country if all individuals enjoy minimum standards and all units have a fair chance to improve on these. It is true that this kind of decentralised federal system can threaten the cohesion and unity of the

state when some regions or communities do not function optimally, fall below minimum standards, or disadvantage certain groups or minorities within the minority. In these situations, however, the threats do not come from the federal system as such. It is rather the failure of regional powers to perform their tasks and to respect the principle of non-discrimination as well as the failure of central powers to ensure the respect of the minimum standards and to guarantee minority rights, which are at the source of inequality. Re-decentralising is rarely an effective response to such governance failures; empowering regions and communities and establishing and using supportive and supervisory mechanisms seem to be more promising reactions.

In all diverse states, balancing equality and autonomy is a controversial, challenging and continuous task. On the one hand, a comprehensive implementation of equal rights and opportunities throughout the country cannot easily be reconciled with the guarantee of meaningful autonomy. If the principle of equality is fully applied, regional units tend to be reduced to the status of implementation agencies. The national guarantee of equal services in all regions also limits the incentives of regional governments to function efficiently and to mobilise resources in order to better respond to the specific regional needs and to offer better services. On the other hand, the use of autonomy rights can be considered a risk to equality. It can lead to unfair treatment of minorities within minorities, of women or other groups; the very idea of some citizens of the same country enjoying more rights and better services than others can be seen as an unbearable violation of the principle of equality and thus as a threat to the unity and stability of the country.

Part 1 of the book, *Conceptual Determination*, aims at determining the concept of the principle of equality in diverse states. The three chapters elaborate on how equality and autonomy can be conceptualised and aim at uncovering avenues for the reconciliation of the two principles.

In chapter 1, Anna Gamper starts by acknowledging the fact that federalism and equality are often described as principles with opposed purposes. In fact, while the first aims at ensuring diversity management, the second is invoked to establish homogeneity. However, the author demonstrates that both principles share a common narrative, the idea of *suum cuique tribuere* – to give each their own. This narrative is essential for understanding the ways in which federalism legitimises, depending on circumstances, needs, and priorities, the equal or unequal treatment of regions or person.

In chapter 2, Maja Sahadžić uses indicators of constitutional asymmetry in order to offer a comprehensive evaluation of the concepts of constitutional asymmetry and equality from a legal perspective. Her chapter also addresses the way constitutional asymmetry has an impact on equality and therefore on

legitimacy and stability in multinational systems with federal arrangements. Symmetrisation not being a suitable solution for heterogeneous states, the author takes a closer look at the question of how far asymmetry can go before it destabilises or delegitimises a multi-tiered system.

In chapter 3, Eva Maria Belser investigates the balance between autonomy and its centrifugal impetus, on the one hand, and the centripetal aspirations of human rights, on the other. By referring to the case of Switzerland, the author illustrates the frictions and synergies between autonomy and human rights standards, and attempts to sketch a conceptual framework for multilevel human rights protection and promotion.

Part 2 of the book deals with *Institutional Equality*. A great variety of models and situations can be distinguished in this field. In some states, all regional units enjoy equal rights and assume equal responsibilities but these *de jure* symmetries can easily result in *de facto* asymmetries – and vice versa. This part of the book discusses the way in which institutional equality can or ought to be achieved or the way in which institutional inequality can or ought to be justified.

In chapter 4, Erika Arban explores the way solidarity is construed as an aspirational principle fostering equality, particularly in its relationship with regionalism, through the interpretative lens offered by the Italian constitutional court. The author aims at showing how the principle of solidarity plays a crucial role in the Italian legal and constitutional architecture.

In chapter 5, Andrea Filippetti presents a comparative analysis based on 42 European countries and their 167 subsequent regions and analyses the relationship between diversity, access to local public services and regional autonomy. While he starts by showing that citizens are less satisfied with public services in regions characterised by higher diversity, he then examines whether regional autonomy can mediate this problem or not.

In chapter 6, Jayampathy Wickramaratne addresses Sri Lanka's current constitutional reform process and its historical evolution characterised by 29 years of limited devolution with successive governments taking back devolved powers. He highlights the challenge of this process, which is to forge a settlement that guarantees equality as well as genuine autonomy and that would ensure the cohesion of the country.

While Parts 1 and 2 predominantly focus on the institutional aspects of equality, the other chapters dealing with specific aspects of equality often come back to institutional issues. In fact, federalism and other power-sharing arrangements cannot be fully understood by separately analysing their legal, political, economic, cultural or social dimensions. As a consequence, the issues of implementing the principle of equality in federal states cannot easily be

divided into 'institutional', 'economic', 'political' and other aspects. To understand one of those dimensions, the other dimensions need to be included and thus further reflections on institutional equality will follow in the next chapters.

Part 3 presents case studies on *Economic Equality* and elaborates on how asymmetry, *de facto* and *de jure*, can lead to inequalities on the economic level. These may arise between both the citizens and the subnational entities. While some of the mechanisms adopted to balance economic, social and other disparities focus on the equality of the regional units, others are designed to guarantee equal rights and opportunities to all citizens living in different regions.

In chapter 7, Nico Steytler recalls that the motives of power-sharing are often grounded in practices and perceptions of racial, ethnic, linguistic and cultural discrimination and marginalisation. As centralised government often serves a narrow partisan group, federalism and decentralisation is seen as the best way forward. The constitutional processes in Solomon Islands, and Trinidad and Tobago, however, illustrate that marginalised groups often claim preferential access to resources hereby creating new risks for equality and development.

In chapter 8, Miguel Angel Asensio analyses the Argentinian case and the process aiming at reaching 'equivalent development'. The author unveils some of the major obstacles this process has encountered in the past, highlights some of the crucial challenges and limits faced by the federal fiscal system and examines options to overcome uneven development.

In chapter 9, Peter Hänni presents the considerable autonomy the Swiss Federal Constitution leaves to the cantons and to the communes with respect to the determination of direct tax rates. The chapter shows the consequences on the financial burdens of taxpayers and discusses the federal mechanisms of equalisation of financial resources and burdens.

In chapter 10, Giulia Maria Napolitano and Gabriella Saputelli refer to the situation in Italy in order to draw attention to the increasing tensions between the central state and regions in the field of social care policy. They examine to what extent these tensions are sourced by the effects of social care policy on the respect and implementation of the principle of equality.

In Part 4, the focus lies on *Political Equality*. As both symmetric as well as asymmetric federal systems can lead to unequal representation of citizens and variations in power and influence of the units at the federal level, the following chapters take a closer look at the premise of 'one person one vote' and address the different ways federal systems try to ensure a balance between equal and fair representation.

In chapter 11, Sérgio Ferrari addresses representation issues in the Brazilian bicameral system and analyses the extent to which equality is effective when

it comes to the political representation of citizens from the different units. Stating that federalism may clash with democracy, the author presents these tensions in relation to Brazil's first chamber.

In chapter 12, Soeren Keil discusses constitutional equality in Bosnia and Herzegovina by analysing a judgement by the European Court of Human Rights challenging ethnic aspects of the constitution. The author demonstrates that the judgement, which is still not implemented, questions one of the key elements ensuring peace in post-war Bosnia and Herzegovina.

In chapter 13, Dejan Vanjek states that Bosnia and Herzegovina, constituting a hybrid federal model with a multileveled-asymmetrical structure, cannot be analysed based on classical federal theory. He claims that in countries where groups are explicit actors of the federal order, unconventional mechanisms are required to achieve a balance of autonomy and co-decision making across the political system and institutional structure.

In chapter 14, Yonatan Tesfaye Fessha addresses the empowerment of ethnic communities in the Federal Democratic Republic of Ethiopia and discusses the status and treatment of individuals belonging to different peoples, nations and nationalities. He argues that, despite the constitutional commitment to uphold both individual and collective rights, the constitutional practice gives more weight to collective rights and frustrates claims based on the individual right to equal treatment.

The concluding chapter recapitulates the key findings of the book and clarifies the tensions which might exist between autonomy and diversity, on the one hand, and unity and equality on the other. It summarises the many ways in which the two sides of the justice coin can be reconciled and opens avenues for further research.