

RESEARCH ARTICLE

# The transformative forces of international law? Questioning equality regimes from a multi-level perspective

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## Abstract

This article approaches current constitutional conservatism in Europe, focusing on the limits of equality rights regimes. These frameworks, it is argued, provide little leverage for positive discrimination to become articulated, let alone for them to be implemented by public policies. Equality regimes are further disentangled by means of a multidimensional reading of legal orders: particular attention is devoted to international human rights law (IHRL) and European Jus Commune that may inspire shifts in constitutional thinking at domestic levels. In that sense, equality frameworks steadily open up towards an inclusive understanding of human rights based on the transformative forces of international law. A pluralistic idea of those subjected to such regimes will be embraced, hence developing a clearer conception of rights holder categories and ultimately peoples affected in daily practice, particularly minorities. A dedicated focus is placed on ethnic, cultural, religious and linguistic grounds. This may similarly concern intersectionalities and the complexities of overlapping grounds of discrimination. It is stressed that equality is best addressed by means of a multivariate approach to legal orders, their dynamics and ultimately virtuous effects of application.

**Keywords:** equality regimes; positive discrimination; constitutional conservatism; transformative international law; legal orders; positive obligations

## 1. Introduction

Discrimination commonly finds expression in the mundane spaces of everyday life, with the workplace<sup>1</sup> and educational spaces being emblematic of places where violations frequently occur and are documented; these are eventually addressed in the courtroom. Yet another societal malaise is apparent in relation to social justice affairs, including

<sup>1</sup>Eugenia Relaño Pastor, 'Religious Discrimination in the Workplace: Achbita and Bougnaoui', in Uladzislau Belavusau and Kristin Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart, Oxford, 2018).

socio-economic inequalities on the one hand and gender-based infringements on the other. These constitute common concerns that remain largely unaddressed by existing equality frameworks. In fact, socio-economic rights hardly enter the constitutional realm of human rights protection,<sup>2</sup> leaving labour rights and issues of housing and food largely in the hands of the free market. Similarly, gender-based rights are commonly subjected to generic equality language, with a powerful illustration being gender parity in parliaments with only a few exceptions.<sup>3</sup> Yet equality rights deserve closer examination as a regime and a constitutional category, as demanded by international law, as part of a three-tier human rights framework and as a regime negotiated in international relations theory.

In fact, legal theory and international law alike establish what could be understood as a triadic framework of human rights obligations, consisting of the duty to respect, protect and fulfil.<sup>4</sup> To begin with, equality frameworks may be understood as tantamount to negative rights or obligations (*respect*) while building on a wide Berlinian conception of negative freedom,<sup>5</sup> contrary to any form of coercion. Notably, equality rights allude to the classical notion of freedom from interference<sup>6</sup> that found recognition in the early phases of human rights history. The widely celebrated Universal Declaration of Human Rights illustrates this by generically establishing four freedoms: freedom from want, freedom from fear, freedom of speech and freedom of belief (preambular paragraphs). In fact, the Universal Declaration would initiate a period of considerable political divides, materializing in different human rights categories—so-called human rights generations.<sup>7</sup> Traditionally, civil and political rights (CPR) would be associated with the principle of non-interference, whereas economic, social and cultural rights (ESCR) imply proactive steps and measures to be taken. In practice, boundaries have become blurred; negative and positive obligations have been recognized for both categories of rights. Positive discrimination,<sup>8</sup> by contrast, largely draws on positive rights or obligations (*protect, fulfil*) beyond mere non-intervention, requiring additional measures of protection or safeguards to be put in place. If attempted to build bridges with political theory, we could be inclined

<sup>2</sup>Jessika Eichler, ‘“Migrating Recognition” or “Constitutionalism Reversed”: Relating Andean Plurinational Constitutionalism and European Integration Politics’ (2020) 42 *Human Rights Quarterly* 790.

<sup>3</sup>Éléonore Lépinard and Ruth Rubio-Marín, *Transforming Gender Citizenship: The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press, Cambridge, 2018); Mathias Möschel et al., ‘Debate: Gender Parity in Parliaments’, *VerfBlog* 16 July–24 August 2020.

<sup>4</sup>Christian Tomuschat, ‘From “Negative” to Positive Duties: The Different “Generations” of Human Rights’, in Christian Tomuschat (ed), *Human Rights: Between Idealism and Realism* (Oxford University Press, Oxford, 2014); Andrew Clapham, *Human Rights: A Very Short Introduction* (Oxford University Press, Oxford, 2015).

<sup>5</sup>Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, Oxford, 1969).

<sup>6</sup>Kim Treiger-Bar-Am, *Positive Freedom and the Law* (Routledge, London, 2019).

<sup>7</sup>Karel Vasak, ‘A 30 Year Struggle: The Sustained Effort to Give the Force of Law to the Universal Declaration of Human Rights’ (1977\_3 *UNESCO Courier* 11; Spasimir Domaradzki, Margaryta Khvostova and David Pupovac, ‘Karel Vasak’s Generations of Rights and the Contemporary Human Rights Discourse’ (2019) 20 *Human Rights Review* 423.

<sup>8</sup>‘Positive discrimination’ refers to ‘actively favouring one category of people over others because they are considered to be disadvantaged and thereby discriminating against those others’: see Jonathan Law, ‘Positive Discrimination’, in Jonathan Law (ed), *A Dictionary of Law* (Oxford University Press, Oxford, 2018). The concept was defined elsewhere, denominated as ‘a key instrument of a “politics of catching up” between different groups as it finds articulation in international law and numerous states where it is being practised. It strives to promote a greater de facto equality among those groups or at least to guarantee those members of disadvantaged groups a real equality of opportunities’: Gwénaële Calvès, *La discrimination positive* (Presses Universitaires de France, Paris, 2010).

to derive at a reverse understanding of positive freedom here, notably by turning interference with a given third party into an obligation to enact positive action in the sense of facilitating, supporting or strengthening the enjoyment of a certain human right.

In that sense, positive discrimination deeply relates to social justice theories, including Rawlsian equality approaches<sup>9</sup> and a politics of differentiation.<sup>10</sup> Indeed, it would confine the logics of equality orders in their application to people enjoying comparable socio-economic (starting) conditions. Classical political theory provides a first entry point into such thinking. By declaring positive freedom a ‘freedom to’ be or do,<sup>11</sup> or alternatively to refer to a third party that permits or enables a given rights holder to be or do,<sup>12</sup> we necessarily touch upon basic duties. It is in this sense that human rights need to be understood, namely as implying obligations on the part of the state and third parties, including liability for violations. Positive discrimination proves emblematic in that sense by spelling out widening, deepening and strengthening human rights obligations – especially towards those rights-holders who are particularly vulnerable while being treated unequally. Despite myriad critical remarks such as those relating to negative impacts on the rights-holders, positive discrimination has been praised for its potential to establish structural conditions and, albeit belatedly, to allow for respective ‘radical, transformative change towards equality’ to materialize.<sup>13</sup> Others have highlighted the dangers accompanying liberal approaches on equality law – that is, its focus on rights-holders as abstracts individuals without ‘extraneous identity categories ... and some common core’.<sup>14</sup> Group rights and collective identity that would allow for some distinct legal category to be established are hence essentially ruled out. Socio-legal and socio-political approaches may shed further critical light on such fundamentals. Most notably, broader societal tendencies, including stereotyping forms of exclusion and their accommodation under the umbrella of state institutions, are commonly overseen.

Viewed in the abstract, this article strives to offer a problematizing account of equality frameworks while juxtaposing equality with positive discrimination. It does so by exploring equality as it finds articulation in different legal frameworks, which we may call a multivariate approach on legal orders. Indeed, constitutional law, European orders, international frameworks and their intersections provide a rich empirical basis for developing a sense of the difficulties that equality may cause for minorities. Conversely, positive discrimination may be positioned at the opposing extreme end of the spectrum, being realizable most essentially through positive obligations. The article approaches these concepts through contextualized, legal-historical and comparative lenses, drawing larger conclusions for democratic theory, minority rights and public policy. One main indicator – serving inter-alia comparative purposes – lies in the nature of obligations.

<sup>9</sup>John Rawls, *A Theory of Justice* (Cambridge University Press, Cambridge, 1971); John Rawls, ‘The Idea of an Overlapping Consensus’ (1987) 7(1) *Oxford Journal of Legal Studies* 1.

<sup>10</sup>James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 2006); Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political Philosophical Exchange* (New York: Verso, 2004); Charles Taylor, *Multiculturalism* (Princeton University Press, Princeton, NJ, 1994); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1996).

<sup>11</sup>Treiger-Bar-Am (n 6).

<sup>12</sup>Berlin (n 5).

<sup>13</sup>Mike Noon, ‘The Shackled Runner: Time to Rethink Positive Discrimination?’ (2010) 24(4) *Work, Employment & Society* 728.

<sup>14</sup>Ben Smith, ‘Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective’ (2016) 16 *The Equal Rights Review* 73.

Positive human rights obligations may establish important thresholds to measure the degree to which equality and positive discrimination differ, offer distinct responses or find unique contextualization throughout legal frameworks. Indeed, the broad spectrum of rights across constitutional law, European *Ius Commune* and international law offers many analytical entry points to critically (cross-)examine legal sources, interpretations and tendencies in the fields of equality and positive discrimination.

Yet equality rights regimes and positive discrimination also need to be examined on the basis of the perspectives of those whose interests these standards pretend to protect – those who are subjected to their very realm of protection. First, constitutional equality regimes tend to be limited to those enjoying citizenship rather than providing protection to all those subjected to their territorial jurisdiction.<sup>15</sup> Indeed, refugees, migrants or stateless persons may not benefit from the protection granted by the law to those residing on a state's territory – voting, residence or basic labour rights being illustrative of these limits. Second, the level of recognition and codification of dedicated grounds of discrimination may vary depending on the state, its current government and its policies. These different grounds may also coexist and exert multiplying effects to the detriment of a given group of people<sup>16</sup> beyond the 'single-axis models of discrimination law'.<sup>17</sup> Namely, vulnerabilities may be produced on the basis of several intersecting grounds – in other words, intersectionalities<sup>18</sup> come into being.<sup>19</sup> The latter are to be distinguished from cumulative, compound or multiple forms of discrimination building on 'discrete, sequential and severable identity factors'.<sup>20</sup> Emphasis will be placed on the second dimension here, dealing with a multiplicity of grounds. The latter merits further problematization for several reasons, one being of a judicial nature in that separate proofs are required for each ground; another reason relates to structural and root causes that demand detailed examination beyond the legal discipline.<sup>21</sup> Similarly, we may approach non-discrimination on the basis of multiple inequalities that are produced and eventually find formalization.<sup>22</sup> These are broadly addressed by current anti-discrimination law and equality bodies, moving towards integrated approaches and

<sup>15</sup>Dimitry Kochenov, *Citizenship* (MIT Press, Cambridge, MA, 2019); Kymlicka (n 10).

<sup>16</sup>Marie Mercat-Bruns, 'Multiple Discrimination and Intersectionality: Issues of Equality and Liberty' (2018) 67(3) *International Social Science Journal* 223.

<sup>17</sup>Smith (n 14).

<sup>18</sup>See the following work, understanding intersectionality as a term that 'was introduced in the late 1980s as a heuristic term to focus attention on the vexed dynamics of difference and the solidarities of sameness in the context of antidiscrimination and social movement politics. It exposed how single-axis thinking undermines legal thinking, disciplinary knowledge production, and struggles for social justice': Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis* (2013) 38(4) *Signs: Journal of Women in Culture and Society* 785.

<sup>19</sup>Raphaële Xinidis, 'Multiple Discrimination in EU Anti-Discrimination Law: Towards Redressing Complex Inequality?', in Uladzislau Belavusau and Kristin Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Oxford: Hart, 2018); Anna Lawson and Dagmar Schiek, *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate, Farnham, 2011).

<sup>20</sup>Joanna Bourke Martignoni, 'Sexual and Reproductive Rights at the Crossroads: Intersectionality and the UN Treaty Monitoring Bodies', in Emmanuelle Bribosia and Isabelle Rorive (eds), *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation* (intersentia, Cambridge, 2018).

<sup>21</sup>Iyiola Solanka, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Hart, Oxford, 2017).

<sup>22</sup>Andrea Krizsan, Hege Skjeie and Judith Squires, 'Institutionalizing Intersectionality: A Theoretical Framework', in Andrea Krizsan, Hege Skjeie and Judith Squires (eds), *Institutionalizing Intersectionality: The Changing Nature of European Regimes* (Palgrave Macmillan, London, 2012).

new forms of institution-building.<sup>23</sup> As empirical findings suggest, equality regimes in Europe have undergone a transformative institutional shift: former specialized mechanisms dealing with single protection grounds have now become absorbed by integrated equality bodies, which would potentially better deal with intersecting forms of equality, the multiplicity of grounds and their social complexity.<sup>24</sup>

The article proceeds in the following way. First, it will delve deeper into the logics underlying European constitutionalism as far as equality law is concerned. Departing from a legal perspective, a focus will be placed on domestic constitutionalism and EU equality law; further observations relate to their forms of institutionalization. Second, the article will approach what could be considered an extended or deepened equality regime, namely by conceptualizing the principle of positive discrimination or affirmative action.<sup>25</sup> The latter are dealt with by means of multiple legal lenses while paying due regard to the transformative potential inherent in international law and regional jurisprudence, including European, inter-American and African realms. Some attention is further paid to manifestations of politicization, both through instrumentalizing positive discrimination in the name of, for instance, integration politics and with the dedicated aim of establishing genuine protection frameworks and relating them to larger debates on democracy. Finally, answers are sought in different legal orders and in their interaction when dealing with equality and frameworks of positive discrimination. The extent to which legal protection and its effectiveness depend on legal hierarchies, dynamics and the virtuous side-effects of multivariate approaches on legal orders is examined. Apart from a cross-jurisprudential analysis, other issues inform the article, albeit to a less-comprehensive extent, namely the nature of institutions such as supranationalism or intergovernmentalism, agenda-setting and decision-making, which relate to current policy paradigms establishing positive discrimination.

## II. Equality in European realms: Enshrining human rights conservatism in constitutional frameworks

A form of 'human rights conservatism' shines through existing constitutional legacies – or what may be called the classical constitutional realm at the domestic level. European comparative constitutionalism in particular reveals a persisting reluctance in recognizing minorities, being emblematic of a limited understanding of non-discrimination approaches. Constitutional frameworks in France and Germany, for instance, illustrate such denial of internal cultural distinctions that are confined to the private sphere (France) or become submerged under the umbrella of a culturally collective whole (Germany).<sup>26</sup> Both approaches may be attributable to the republican idea, which generally avoids any distinction being made between individuals – including social particularities – based on the principle of equality in dignity and rights of all human

<sup>23</sup>Ibid.

<sup>24</sup>Ibid.

<sup>25</sup>'Affirmative action' is used interchangeably with the term 'positive discrimination'; the following sections will contextualize the term, relating it to the US context in particular.

<sup>26</sup>Julie Ringelheim, 'Minority Protection and Constitutional Recognition of Difference: Reflections on the Diversity of European Approaches', in Annelies Verstichel, Andre, Alen, Bruno de Witte and Paul Lemmens (eds), *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* (intersentia, Cambridge, 2008).

beings.<sup>27</sup> In that sense, any particularity dimension and, relatedly, any social justice approaches are explicitly omitted from the foundational texts of both states. In fact, the French and the German constitutions pretend to adhere to some form of universalistic constitutional principles when exerting integrative functions; particularisms are rarely, if ever, mentioned.<sup>28</sup>

Indeed, forms of (such) constitutional recognition may find weak expression in European legal frameworks; it could be argued that cultural or ethnic difference has been introduced as a response to international legal standards, especially minority protection.<sup>29</sup> These forms of constitutional recognition in Europe may be further categorized as follows, distinguishing between those frameworks that: (1) stipulate special rights for linguistic groups including territorial autonomy, as illustrated by the Belgian and Spanish contexts respectively; (2) make mentioning of national or ethnic minorities and granting specific rights accordingly, as embraced by several Central and Eastern European States; or (3) address specific ethnic groups that are granted special status in turn, being exemplified by the Slovenian, Italian, Hungarian, Cyprian, Finnish and Norwegian cases respectively.<sup>30</sup> We may hence identify two different forms of constitutional recognition, namely one discerning and establishing distinct groups as rights-holders, and another stipulating distinct (categories of) rights.

### *Problematizing EU equality law: Amalgamations and institutionalizations*

Yet another dimension becomes discernible as what we could term ‘equality institutional regimes’.<sup>31</sup> In fact, we may be inclined to understand the adoption of recent policies in Europe as a way of remedying constitutional failures to recognize positive discrimination by way of constitutional reform or progressive interpretation. Paradoxically, however, it is argued elsewhere that institutional arrangements have been altered by the establishment of new equality institutions, namely those embracing a ‘judicialized equality approach’.<sup>32</sup> A growing institutionalization in the field of equality rights has actually been observed across different legal orders and policy spaces: ever since the adoption of the Racial Equality<sup>33</sup> and Employment Directives in 2000,<sup>34</sup> EU equality law has not only undergone

<sup>27</sup>Yoan Vilain, ‘§ 3 Verfassungsprinzipien’, in Nikolaus Marsch, Yoan Vilain and Mattias Wendel (eds), *Französisches und Deutsches Verfassungsrecht: Ein Rechtsvergleich* (Springer, Cham, 2015).

<sup>28</sup>Ibid.

<sup>29</sup>Ringelheim (n 26).

<sup>30</sup>Ibid.

<sup>31</sup>‘Equality institutional regimes’ refers to institutional changes that have been introduced in contemporary equality regimes such as crystallizing in European constitutional landscapes and policies: see in particular Andrea Krizsan, Hege Skjeie and Judith Squires, ‘European Equality Regimes: Institutional Change and Political Intersectionality’, in Andrea Krizsan, Hege Skjeie and Judith Squires (eds), *Institutionalising Intersectionality: The Changing Nature of European Regimes* (Palgrave Macmillan, London, 2012).

<sup>32</sup>Ibid.

<sup>33</sup>See Marjolein J. Busstra, *The Implications of the Racial Equality Directive for Minority Protection within the European Union* (Eleven International Publishing, The Hague, 2010).

<sup>34</sup>The European judiciary has been responding to such developments, finding application in relation to age-related grounds as illustrated by the early *Mangold* judgement: Lisa Waddington, ‘Recent Developments and the Non-Discrimination Directives: Mangold and More’ (2006) 13(3) *Maastricht Journal of European and Comparative Law* 365.

a procedural turn<sup>35</sup> – including the reversal of the burden of proof<sup>36</sup> – but has also enabled new forms of institutionalization to be established. More precisely, we may witness a gradual ‘cross-national trend to amalgamate equality institutions’.<sup>37</sup> Most notably, forms of pluralization of the EU’s equality paradigm may be noted as early as the beginning of the twenty-first century, being reflective of new developments regarding gender identities, disability and other groups that would eventually find socio-political recognition. In fact, state policies throughout Europe demonstrate a widening of the scope of equality to tackle other inequality grounds.<sup>38</sup> This may be contrasted with the first attempts of codifying equality regimes through EU primary law, which would merely embed ‘gender’ and ‘citizenship’ in the early European *Jus Commune* with the adoption of the EEC Treaty (1958).<sup>39</sup> EU primary law would also eventually facilitate the adoption of the 2000 Directives, finding essential legal bases in Article 13 (EC Treaty 1999).<sup>40</sup> We may hence cautiously pronounce ourselves on a growing awareness of a Human Rights *Jus Commune*<sup>41</sup> at the international level, transcending jurisdictions and, with it, constitutional orders.<sup>42</sup>

EU Equality Law, however, merits a detailed discussion on its own accord. Despite progressive developments following the adoption of said Directives, human rights conservatism shines through in four main ways. The first refers to the EU’s common institutional ills (of enforcement); member states have been delaying necessary implementation of the Directives.<sup>43</sup> This may have called for complementary standards to be drafted: the Racial Equality Directive was in fact complemented by Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, which eventually found its way into domestic law.<sup>44</sup> Relatedly, new member states have been demonstrating difficulties in adhering to

<sup>35</sup>Elise Muir and Bruno de Witte, ‘The Procedural and Institutional Dimension of EU Anti-discrimination Law’, in Lucia Serena Rossi and Federico Casolari (eds), *The Principles of Equality in EU Law* (Springer, Cham, 2017). See also Uladzislau Belavusau and Kristin Henrard, ‘A Bird’s Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives’ (2019) 20(5) *German Law Journal* 614.

<sup>36</sup>Monika Forejtová, ‘The Effort to Achieve Equality with the Help of the Reversal of the Burden of Proof in Anti-Discrimination Litigation’ (2013) 13(1) *International and Comparative Law Review* 135; Kristin Henrard, ‘Sharing of the Burden of Proof in Cases on Racial Discrimination: Concepts, General Trends and Challenges before the ECtHR’, in Emmanuelle Bribosia and Isabelle Rorive (eds), *Human Rights Tectonics: Global Dynamics of Integration and Fragmentation* (intersentia, Cambridge, 2018).

<sup>37</sup>Muir and de Witte (n 35).

<sup>38</sup>Andrea Krizsan, Hege Skjeie and Judith Squires, ‘The Changing Nature of European Equality Regimes: Explaining Convergence and Variation’ (2014) 30(1) *Journal of International and Comparative Social Policy* 53.

<sup>39</sup>Uladzislau Belavusau and Kristin Henrard, ‘The Impact of the 2000 Equality Directives on EU Anti-Discrimination Law: Achievements and Pitfalls’, in Uladzislau Belavusau and Kristin Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart, Oxford, 2017)

<sup>40</sup>Mark Bell and Lisa Waddington, ‘Equality and Diversity: Challenges for EU Anti-Discrimination Law’ (2006) 13(3) *Maastricht Journal of European and Comparative Law* 227.

<sup>41</sup>For a more elaborated debate on the term, see Olivier de Schutter, ‘The Formation of a Common Law of Human Rights’, in Emmanuelle Bribosia and Isabelle Rorive (eds), *Global and Multilayered Approach of Human Rights* (intersentia, Cambridge, 2018).

<sup>42</sup>Ibid.

<sup>43</sup>Belavusau, and Henrard, 2018 (n 1).

<sup>44</sup>Cengiz Barskanmaz, *Recht und Rassismus: Das menschenrechtliche Verbot der Diskriminierung aufgrund der Rasse* (Springer, Cham, 2019).

such norms, manifesting in lengthy transposition phases.<sup>45</sup> Further challenges come to the fore before the courts: only a few cases addressing these new grounds of discrimination, including race and religion have been litigated by the European Court of Justice.<sup>46</sup> Finally, the EU's new equality age that would genuinely commence with the embracing of the 2000 Directives has been undergoing criticism based on the attachment of its minority protection policy to internal market rationale.<sup>47</sup> Ultimately, questions of competence and hence power permeate EU law, being played out to the detriment of minority rights: the former find their roots in EU primary law, which refrains from establishing dedicated minority rights and instead delegates all remaining competences to the member states (art. 5(3), TEU).<sup>48</sup> EU Equality Law seemingly remains reserved to the specialized realm of secondary law while facing constitutional boundaries – that is, a vicious blend of market rules, only malfunctioning implementation, and missing recognition for the multiplicity and intersecting grounds of discrimination.

### *Equality bodies from within: Integrated approaches or institutionalized particularism?*

We may similarly wonder about the extent to which the legal logics of implementation, harmonization, constitutional blocks, conventionality control and the like may be translatable to the institutional realm. In other words, would we be able to disclose similar hierarchies and forms of enforcement in the multi-layered space of equality governance? Are these logics translatable? Does equality governance remain immune to the top-down functioning of these described forms of institutionalism? In fact, this may be played out differently, requiring us to place emphasis first on the interplay between distinct political administrative equality bodies and second on the inequalities themselves, shifting the focus of analysis to deal with these dedicated grounds. Some grounds may benefit from favourable treatment such as gender, followed by ethnicity in European contexts, depending on the equality institution in charge.<sup>49</sup> The latter approach may, however, fall short of being mainstreamed at domestic levels, throughout state and non-state entities.

Recent years have seen institutional transformations in that regard: equality bodies<sup>50</sup> have demonstrably moved towards an 'integrated approach to multiple inequalities',<sup>51</sup> while institutional transformations towards independent institutions have been undertaken, hence disassociating equality bodies from governments and with it agenda-setting,

<sup>45</sup>Belavusau and Henrard, 2018 (n 1).

<sup>46</sup>Ibid.

<sup>47</sup>Dimitry Kochenov, 'When Equality Directives are Not Enough: Taking Issue with the Missing Minority Rights Policy in the EU', in Uladzislau Belavusau and Kristin Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart, Oxford, 2018).

<sup>48</sup>Ibid.

<sup>49</sup>Krizsan, Skjeje and Squires, 2012 (n 31).

<sup>50</sup>Equality bodies may be specialized agencies or find accommodation under domestic human rights entities – so-called National Human Rights Institutions (NHRI); for a more profound debate on the nature of such bodies, see Jenny E. Goldschmidt, 'Implementation of Equality Law: A Task for Specialists or for Human Rights Experts? Experiences and Developments in the Supervision of Equality Law in the Netherlands' (2006) 13(3) *Maastricht Journal of European and Comparative Law* 323.

<sup>51</sup>Krizsan, Skjeje and Squires, 2012a (n 22)

priority areas and so forth.<sup>52</sup> Such developments may be considered fertile ground for an adequate treatment of multiple, intersecting inequalities<sup>53</sup> and for addressing their very social complexity and inherent disadvantages underlying such inequalities.<sup>54</sup> Integrated approaches may, however, be juxtaposed with particular policy challenges, played out to the detriment of equality rights and their effectiveness. Positive discrimination as a specific method to deal with dedicated grounds has similarly received less attention as it disappears from political agendas<sup>55</sup> and is being withdrawn as a selection criterion from university admission processes<sup>56</sup> or from use as an effective instrument of social change.<sup>57</sup> One-size-fits-all approaches may certainly fulfil the purpose of standardizing and harmonizing response strategies while risking losing sight of the particularities related to the ground at hand. Fulfilling language rights may require streamlined policies to be put in place, resisting the harmonizing umbrella of official language education as it shines through European Court of Human Rights (ECtHR) jurisprudence on Roma minority rights, for instance. By contrast, racism could be understood as a more individualized, less tangible – while not less systematic – form of violation in both public and private relations, hence requiring awareness raising and training, to mention only a few necessary measures to be adopted. Let us now turn to a more nuanced engagement with the possibilities related to such streamlining of measures and its virtuous effects across discrimination contexts.

### III. Beyond equality: Positive discrimination, positive obligations and the transformative forces of the law

Here we will concern ourselves with the theoretical potential lying in positive discrimination – that is, viewing the latter as a new legal-political tool to combat multiple grounds of discrimination, of countering exclusion and stereotyping, and as a multivariate function to enhance societal transformation. We disentangle positive discrimination from its historical roots, limiting their significance contextually to specific moments in time. The Tocquevillian understanding of democracy<sup>58</sup> illustrates this by placing emphasis on equality principles, equality of conditions and homogeneity – a revolutionary conceptualization

<sup>52</sup>Tufyal Choudhury, 'The Commission for Equality and Human Rights: Designing the Big Tent' (2006) 13 (3) *Maastricht Journal of European and Comparative Law* 311.

<sup>53</sup>Xinidis (n 19); Snjezana Vasiljević, 'Intersectional Discrimination: Difficulties in the Implementation of a European Norm', in Elisabeth Prügl and Markus Thiel (eds), *Diversity in the European Union* (Palgrave Macmillan, London, 2009).

<sup>54</sup>Ibid.; Sandra Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) 2 *European Anti-discrimination Law Review* 13.

<sup>55</sup>This has been the case for affirmative action in the United States in particular, with a weakening regime from the early 1990s onwards. For further reference, see Gertrude Ezorsky, *Racism and Justice: The Case for Affirmative Action* (Cornell University Press, Ithaca, NY, 1996); Jennifer Pierce, *Racing for Innocence: Whiteness, Gender, and the Backlash Against Affirmative Action* (Stanford University Press, Stanford, CA, 2012).

<sup>56</sup>Andrea Guerrero, *Silence at Boalt Hall: The Dismantling of Affirmative Action* (University of California Press, Berkeley, CA, 2002).

<sup>57</sup>Philip F. Rubio, *A History of Affirmative Action 1619–2000* (University Press of Mississippi, Jackson, MS, 2000).

<sup>58</sup>Alexis de Tocqueville, *Democracy in America* (Doubleday, New York, 1969).

of social relations back then.<sup>59</sup> In contemporary contexts, equality of opportunity is referred to instead.<sup>60</sup> More precisely, positive discrimination establishes a regime that in principle counters the disadvantage and discrimination suffered by a given category of people.<sup>61</sup> It commonly entails some form of mitigation of social inequalities based on distinct selection criteria applied to such groups, often based on specific vulnerabilities. Generally, this involves ‘proactive steps to encourage certain groups to participate in the social, economic and political life of a country’.<sup>62</sup> Quota systems<sup>63</sup> and participation in public life similarly establish core criteria constituting positively discriminatory treatment.<sup>64</sup> The very meaning of positively discriminatory treatment may, however, also find itself subverted as a political objective: positive discrimination could be subjected to broader integration strategies, addressing people with migrant background, Muslims, women or persons with disabilities.<sup>65</sup> Historically experienced disadvantage may play a role as well, particularly in the education and employment sectors, hence establishing a common rationale for policies to favour such groups.<sup>66</sup>

Some insights may be gained from ‘affirmative action’ paradigms, especially as these work with forms of categorizations. In fact, the 1990s struggle over affirmative action in the United States<sup>67</sup> can be traced back to the end of slavery around 1865 and ‘the legacy of the historical differential between black and white work’, in challenging the ‘white race as an autonomous, privileged social caste and social control mechanism’.<sup>68</sup> Lessons learnt can be gained from such treatment, most notably for the sake of reconceptualizing these categories in contemporary socio-legal contexts and with the objective of raising awareness of their possible politicization. Current accounts of ‘positive action’ – in the sense of affirmative action – at the domestic level, however, demand more specific action to be taken, requiring specific objectives to be met, such as ‘reducing under-representation ... specific training targeting particular groups ... or alleviating disadvantage experienced by people who share a “protected characteristic”’ (see UK Equality Act 2010), hence embedding positive human rights obligations.<sup>69</sup>

<sup>59</sup>Ivan Jankovic, ‘Das Tocqueville Problem: Individualism and Equality between Democracy in America and Ancient Regime’ (2016) 45(2) *Perspectives on Political Science* 125.

<sup>60</sup>John Scott, ‘Positive Discrimination’, in John Scott (ed), *A Dictionary of Sociology* (Oxford University Press, Oxford, 2015).

<sup>61</sup>Law (n 8).

<sup>62</sup>Shirin Rai, ‘Positive Discrimination’, in Garrett W. Brown, Iain McLean and Alistair Millman (eds), *A Concise Oxford Dictionary of Politics and International Relations* (Oxford University Press, Oxford, 2018).

<sup>63</sup>See, in particular, Nenad Stojanović, *Dialogue sur les quotas: Penser la représentation dans une démocratie multiculturelle* (Presses de Sciences Po, Paris, 2013). On a current debate on quota systems and categories protected under positive discrimination, see Ibrahim Kanalan, ‘Weder revolutionär noch eine Besonderheit: Fördermaßnahmen zwischen verfassungsrechtlicher Zulässigkeit und völkerrechtlicher Verpflichtung’, *VerfBlog* 24 February 2021.

<sup>64</sup>Ibid. See the following work for understanding Roma participation in local politics and forms of representation: Irena Bacliija, Marjan Brezovsek and Miro Hacek, ‘Positive Discrimination of the Roma Minority: The Case of Roma Local Councillors in Slovenia’ (2008) 8(2) *Ethnicities* 227.

<sup>65</sup>Calvès (n 9).

<sup>66</sup>Scott (n 60).

<sup>67</sup>See generally Daniel Sabbagh, *L’Égalité par le droit: les paradoxes de la discrimination positive aux États-Unis* (Economica, Paris, 2003); Daniel Sabbagh, *Equality and Transparency: A Strategic Perspective on Affirmative Action in American Law* (Palgrave, New York, 2007).

<sup>68</sup>Rubio (n 57).

<sup>69</sup>Law (n 8).

### Positive discrimination and its embedment in the multivariate landscape of legal orders

A similar rationale transcends jurisprudential developments at the European level; the European Court of Human Rights in particular has increasingly pronounced itself on positive human rights obligations<sup>70</sup> in recent years.<sup>71</sup> At least in part, these are to be derived from its constitutive instrument, the European Convention on Human Rights and Fundamental Freedoms, entailing various obligations to secure the enjoyment of rights.<sup>72</sup> The court essentially positions itself in accordance with international human rights law; notably, it obliges states parties to the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms’ (art. 1, ECHR) as stipulated in the instrument. Clearly, the wording (‘secure’) resembles ICESCR language, according to which states need to ‘take steps ... with a view to achieving progressively the full realisation of the rights ... by all appropriate means, including particularly the adoption of legislative measures’ (art. 2(1), ICESCR).<sup>73</sup> It has been maintained elsewhere that the European Court assumes an integrative and systematic role in ruling on positive obligations.<sup>74</sup> Other empirical observations certainly remain unaddressed in that regard, especially when drawing up meta conclusions such as the present one. This may concern the different grounds addressed by the decisions, divergence from such findings across time, questions of effective implementation or the socio-legal nexus proving relevant for examining the societal accommodation and reflection of a given measure.

If we were to contrast the ECHR with international legal developments such as the adoption of the UN Declaration on the Rights of Minorities, regional legal language proves to be more restrictive, limiting obligations to, for instance, the ‘promotion’ of minorities’ cultural rights.<sup>75</sup> Yet others highlight the virtuous cross-fertilizing effects of international and regional human rights law,<sup>76</sup> suggesting some form of transposition of mutual learning in the international arena. With the growing specialization of human rights law, more interactions may be noted across the multivariate landscape of positive obligations in the field of cultural, ethnic, religious and language minority rights. Over the course of the last two decades, UN human rights treaty bodies seem to have unleashed

<sup>70</sup>The phrase ‘positive human rights obligations’ is to be used interchangeably with and reduced to its abbreviated form, namely the terms ‘positive measures’ and ‘positive obligations’ to be defined as ‘obligations requiring member states to ... take action, imposing a duty upon states to take affirmative steps to ensure rights protections’: Dinah Shelton and Ariel Gould, ‘Positive and Negative Obligations’, in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, Oxford, 2013).

<sup>71</sup>Brice Dickson, ‘Positive Obligations and the European Court of Human Rights’ 2010 61(3) *Northern Ireland Legal Quarterly* 203; Alastair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, Oxford, 2004); Dimitri Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge, London, 2011).

<sup>72</sup>Dickson (n 71).

<sup>73</sup>For further reference and detailed discussion as to the rationale underlying such obligations, see Dickson (n 71); Tomuschat (n 4); Clapham (n 4).

<sup>74</sup>Rosana Garciandia, ‘State Responsibility and Positive Obligations in the European Court of Human Rights: The Contribution of the ICJ in Advancing Towards More Judicial Integration’ (2020) 33(1) *Leiden Journal of International Law* 177.

<sup>75</sup>William Kurt Barth, *On Cultural Rights: The Equality of Nations and the Minority Legal Tradition* (Brill, Leiden, 2008).

<sup>76</sup>Patrick Thornberry and Maria Amor Martin Estebanez, *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe* (Council of Europe, Strasbourg, 2004).

their interpretative powers, spelling out respective obligations to the benefit of minority rights. Challenges continue to permeate these multivariate orders, while different in nature. Limiting potential certainly lies in the common traditions and wide discretionary powers exercised by member states in the European order(s) that may be favourable to maintaining a conservative positioning. The international community similarly remains mastered by political dynamics, the shaping influence of diplomats and determining outcomes negotiated by state alliances, largely void of a genuine human rights spirit.

Other regions similarly demonstrate a steadily growing commitment towards positive obligations, with regional human rights systems<sup>77</sup> and domestic courts such as the Indian Constitutional Court emblematic of this.<sup>78</sup> This trend may be illustrated by a recent case before the Inter-American Court of Human Rights that established positive obligations relating to the right to a healthy environment. These obligations entailed preventive measures in view of violations committed by private actors and similarly established respective control mechanisms, also as far as public actors and private individuals are concerned (*Indigenous Community Members of the Lhaka Honhat Association vs. Argentina*, 2020).<sup>79</sup> The African human and peoples' rights system reveals a similar engagement with positive duties and the particular obligations arising vis-à-vis third parties (ACHPR "Ogoni case" *Social and Economic Rights Action Centre (SERAC) & Another vs. Nigeria*, 2001). It is also referred to similar case-law as developed by the Inter-American framework (IACtHR *Velasquez Rodriguez vs. Honduras*, 1986); natural resource exploitation proves emblematic in that regard.<sup>80</sup> Given the recency of African primary law, the constitutive Charter would embed progressive human rights terminology benefitting from the spirit of the time, including group and community rights. Accordingly, the Commission has gradually established positive and negative duties based on a close reading of the Charter.<sup>81</sup>

At the European level, too, jurisprudence has been contributing to spelling out these new forms of obligations. Understanding its role as one that ought to render rights 'practical and effective', the European Court of Human Rights has come to urge states

<sup>77</sup>See the following work on comparative regional work on positive obligations, cross-fertilizing impacts and in-depth studies on the significance of such obligations as promoted throughout regional legal orders: Martín Nicolás Montoya Céspedes, 'The Inter-American Court of Human Rights' Positive Obligations Doctrine. Between Unidirectional Influence and Judicial Dialogue', in Yves Haeck, Oswaldo Ruiz-Chiriboga and Clara Burbano-Herrera (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (intersentia, Cambridge, 2015); Franz Christian Ebert and Romina I Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention' (2015) 15(2) *Human Rights Law Review* 343. The African framework of human and peoples' rights has similarly developed jurisprudence as relating to positive discrimination, particularly marginalized Indigenous groups: see Jamil Ddamulira Mujuzi, 'The African Commission on Human and Peoples' Rights and Its Promotion and Protection of the Right to Freedom from Discrimination' (2017) 17(2) *International Journal of Discrimination and the Law* 86.

<sup>78</sup>Dickson (n 71).

<sup>79</sup>Maria Antonia Tigre, 'Inter-American Court of Human Rights Recognises the Right to a Healthy Environment' (2020) 24 *ASIL Insights*, available at: <https://www.asil.org/insights/volume/24/issue/14/inter-american-court-human-rights-recognizes-right-healthy-environment>.

<sup>80</sup>Clive Baldwin and Cynthia Morel, 'Group Rights', in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press, Cambridge, 2008).

<sup>81</sup>Gino Naldi, 'The African Union and the Regional Human Rights System', in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press, Cambridge, 2008).

parties to ECHR to ‘take action’ with the objective of protecting the rights stipulated in the instrument.<sup>82</sup> While adhering to the described triadic human rights obligations (the *respect, protect, fulfil* framework),<sup>83</sup> positive obligations may become relevant and apparent where effective remedies are sought – at the same time, constituting a core responsibility of the state.<sup>84</sup> In terms of implementing these obligations, a few ways of realizing positive discrimination in practice have been identified. This may include adopting directives demanding further governmental action, ‘procedural duties’ to establish respective conditions, ‘programmatic duties’ including impact assessments, and ‘progressive realization’ requiring specific measures to be taken on the part of duty bearers.<sup>85</sup>

### *Democratic theory, its virtues and obstacles to positive discrimination*

In a similar vein, positive discrimination could be subjected to forms of instrumentalization by current governments – that is, it may assume a politicizing function. In fact, positive discrimination finds itself reflected in state-centric integration discourses and the far-reaching realm of democracy debates. Positive discrimination may be understood as implying the realization of political rights in a democratic system.<sup>86</sup> It similarly finds application among policy-makers under the umbrella of harmonizing ideologies and majority-oriented conceptualizations. The latter may, however, be actively responded to by ‘statutory equality duties’, and with it dedicated obligations for public policy. This may include preventive, institutional and mainstreaming duties to be respected by organizations and public authorities, such as by establishing respective systems and processes to prevent discrimination and promote equality.<sup>87</sup> Policy responses hence represent a diverse landscape of often-contradictory agendas. Seemingly, equality policies are contrasted with integration-led discourse, the latter proving hostile towards pluralisms and broader paradigms of recognition as demanded by today’s multicultural societies.<sup>88</sup> These technical obligations may in themselves, however, require deeper engagement with basic democratic principles.

Effectively, positive discrimination may also find articulation in democracy debates maintained at the regional level, with the so-called ‘inclusive democratic’ principles promoted by current EU policies being illustrative. The Commission’s action plan

<sup>82</sup>David Russell, ‘Supplementing the European Convention on Human Rights: Legislating for Positive Obligations’ (2010) 61(3) *Northern Ireland Legal Quarterly* 281.

<sup>83</sup>Tomuschat (n 4); and Clapham (n 4). For further insights on how the framework is being applied in IHR, see: CESCR, 1990. General Comment No. 3: The nature of states parties’ obligations (art. 2, para. 1); CESCR, General Comment No. 12: The right to adequate food (art. 11) (1999); CESCR, General Comment No. 13: The right to education (art.13 of the Covenant) (1999); CESCR, General Comment No. 14: The right to the highest attainable standard of health (2000).

<sup>84</sup>Ibid.; Xenos (n 71).

<sup>85</sup>Russell (n 82).

<sup>86</sup>Rory O’Connell, ‘Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy’ (2010) 61(3) *Northern Ireland Legal Quarterly* 263.

<sup>87</sup>European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Union of equality: EU anti-racism action plan 2020–2025* (European Commission, Brussels, 2020).

<sup>88</sup>For in-depth debates on such new orders see: Kymlicka (n 10); Taylor (n 10); Tully (n 10); Fraser and Honneth (n 10); Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford University Press, Oxford, 2013).

‘A Union of Equality: EU anti-racism Action Plan 2020–2025’ stands out in that sense.<sup>89</sup> We may however want to be wary about the general elusiveness of the concept, its catch-all ambition and its limited implementation on the ground; the 1993 Copenhagen eligibility criteria on EU membership are emblematic of its arbitrary application to potential member states. Now, the Commission had identified some key challenges to live up to the very premises of inclusive democracy as laid out by the action plan in the context of the 2019 election to the European Parliament, including ‘legal and administrative challenges, accessibility barriers and institutional difficulties’.<sup>90</sup> When addressing positive discrimination, the Commission places particular emphasis on racial or ethnic minority background. Such an anti-discriminatory approach adopted by the Commission may, however, fall short of what we may call ‘subject-specific denomination’ and its corollary legal stipulation, ‘dedicated grounds’ or ‘rights holder orientation’. This may be ascribed to a form of constitutional conservatism as addressed above, especially as far as constitutional minority paradigms are concerned.<sup>91</sup> Indeed, minority rights protection remains largely unaddressed by policies adopted in the European domestic sphere.

The difficulties associated with minorities’ meaningful participation and representation in the public space may be emblematic of this;<sup>92</sup> wider debates on the fundamentals of democratic principles and related systemic questions are hence much needed. Ironically, the very systemic questions that make sense of democratic thought commonly undermine minority rights. Classical democratic theories in particular may be working against or finding realization to the detriment of minorities. First, contemporary democratic thought finds its roots in the post-absolutist age of autocratic regimes – the so-called ‘age of equality’, which used to place emphasis on the masses while differentiating between a ruling class or individuals and those subjected to their rule.<sup>93</sup> Indeed, the early beginnings of democratic thought are commonly understood in the light of its main achievements, that is a rethinking of the distribution of powers and main institutions of governance, ultimately the state.<sup>94</sup> Equality regimes hence assume a strong institutional rationale: the contributions and particular relevance of classical democratic thought<sup>95</sup> hardly show any potential for historical decontextualization, theoretical mainstreaming or the like. Albeit relatedly, the second critical remark concerns the illusionary pretensions of such egalitarian orders. The ‘age of equality’ largely builds on the premises of absolute, supposedly observable equality among human beings.<sup>96</sup> Social justice dimensions, unequal ‘starting positions’ and the conditions inherent to minority contexts are thereby overseen. The related concept of ‘representation’ illustrates what has been termed

<sup>89</sup>European Commission (n 87).

<sup>90</sup>European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Report on the 2019 Elections to the European Parliament* (European Commission, Brussels, 2020b).

<sup>91</sup>See, for instance, Ringelheim (n 26).

<sup>92</sup>Revise the situation of the Roma minority in European jurisdictions for instance: see Baclija, Brezovsek and Hacek (n 64).

<sup>93</sup>Alexis de Tocqueville, *Das Zeitalter der Gleichheit* (Springer Fachmedien Wiesbaden GmbH, Stuttgart, 1967).

<sup>94</sup>Louis de Secondat, Baron Montesquieu, *Esprit des Loix, Livres I-V* (Librairie Ch. Delagrave, 1892); Maurice JC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, Indianapolis, 1998).

<sup>95</sup>To be traced back to Ancient Greece; see, for instance, Herodotus’ thought on the principle of equality in relation to democracy: Herodotus, *The Histories: Book III*. English translation by AD Godley (Harvard University Press, Cambridge, MA, 1920).

<sup>96</sup>de Tocqueville (n 93).

'tyranny of the majority' following both Tocquevillian and Millian conceptions of democracy.<sup>97</sup> A natural corollary to such findings would inevitably consist of adopting extraordinary measures or embracing positive discrimination, including but not limited to minority-specific quota systems<sup>98</sup> and other participatory procedures. It is through the realm of the law that these operationalize, also given the virtuous effects of regulatory detail. This time, the law's automating functions may work in favour of minority rights. Indeed, the ordinary top-down functioning of the law thereby proves fundamental for invoking and ultimately implementing positive discrimination. As a complementary monitoring instance, international law spells out the specificities of minority rights protection, especially where constitutional law proves majority oriented or follows the legacies of traditional democratic thought. The complexities inherent to legal orders and their interaction hence require some further observation.

#### IV. By way of closing: Towards a multivariate approach on legal orders – positive discrimination, its embrace by international law and its institutions

The merits of international law as a complementary monitoring instance to examine human rights compliance cannot be stressed enough. Moreover, regional orders such as the European one have been contributing to the establishment of a direct relation between the individual and the transnational order beyond the classical interstate nature of international law.<sup>99</sup> This may suggest a form of alienation from the state-oriented public legal perspective and its focus on specific jurisdictions, building on a dichotomous relationship between rights holder and duty bearer in a given state. Conversely, the underlying rationale of international law suggests some form of Rousseauian conception of direct relation, exercised by the individual vis-à-vis international mechanisms rather than sovereign states. New forms of autonomy are hence invoked by the very nature of the international legal system. Others describe such a relationship as a dialectic one, attributing reinforcing capacities to the interplay of multilevel legal orders. Accordingly, theoretical accounts stress the dual nature of IHRL and constitutional law, evolving to some form of 'dual positivation'.<sup>100</sup> Yet other accounts demonstrate some form of accommodation or integration of one order into the other. Classically, this may find realization by means of a monist or dualistic transposition of international legal norms and their integration into the domestic legal order. 'Constitutional blocks'<sup>101</sup> conferring constitutional or supra-legal status to international human rights treaties,<sup>102</sup> or legal or

<sup>97</sup>Rüdiger Voigt, 'Repräsentation. Eine Schlüsselkategorie der Demokratie', in Rüdiger Voigt (ed), *Repräsentation: Eine Schlüsselkategorie der Demokratie* (Nomos, Baden-Baden, 2019).

<sup>98</sup>Stojanović (n 63).

<sup>99</sup>Robert Howse, 'Europe – What's Left? Toward a Progressive Pluralist Program for EU Reform', in Andrew Arato, Jean Cohen and Astrid von Busekist (eds), *Forms of Pluralism and Democratic Constitutionalism* (Columbia University Press, New York, 2018).

<sup>100</sup>Gerald L Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55(5) *Stanford Law Review* 1863.

<sup>101</sup>Manuel Eduardo Góngora-Mera, 'The Block of Constitutionality as the Doctrinal Pivot of a *Ius Commune*', in Armin von Bogdandy, Eduardo Ferrer MacGregor, Mariela Morales Antoniazzi and Flávia Piovesan (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New *Ius Commune** (Oxford University Press, Oxford, 2017).

<sup>102</sup>Roberto Gargarella, 'The "New" Latin American Constitutionalism: Old Wine in New Skins', in Armin von Bogdandy, Eduardo Ferrer MacGregor, Mariela Morales Antoniazzi and Flávia Piovesan (eds),

regulatory transplants,<sup>103</sup> prove illustrative of such legal transmission. Conversely, others have been identifying domestic constitutional traces in international law, resulting in a so-called ‘constitutionalization of international law’<sup>104</sup> or, alternatively, the establishment of a ‘Human Rights *Ius Commune*’<sup>105</sup> on a global scale.

The international legal landscape may, however, not present itself as a harmonized collective whole. Decisions such as the *Kadi I* and *Al Barakaat* cases demonstrate the appropriation of human rights and their interpretation by international mechanisms – in the case at hand, EU law and its interaction with the international legal order.<sup>106</sup> The decisions problematize the relation between two conflicting concerns: the rights and freedoms of an individual suspected of terrorist acts on the one hand and international security concerns protected and promoted by the UN Security Council through its sanctions procedure (Chapter VII of the UN Charter) on the other. The judgements also portray the complex dynamics between different interpretative authorities in the international sphere, including the EUCJ as a quasi-human rights court and the UN Security Council with its mandate steered towards resolving conflicts at large scale. The European Court, in turn, exercised basic judicial reviews functions by testing a community act that would implement the UNSC resolution against its commensurability with fundamental rights, the latter forming an integral part of community law. Apart from a certain human rights-proneness that stands out when contrasting European *Ius Commune* with UN Security Council resolutions, regional systems have been attributed pivotal roles based on their intrinsic interwovenness with political developments and regional integration.<sup>107</sup> In fact, the very nature of regional mechanisms may have proven to facilitate the exertion of political leverage, surely more than entities operated by the international community: supranational institutionality, including majority-based decision-making, has clearly facilitated the deepening and widening of human rights protection.

The extent to which legal hierarchies and dynamics condition the promotion of positive discrimination remains to be explored, as well as which legal order(s) stand(s) out as particularly progressive in that regard, and what kind of spill-over effects or conflicts may become apparent or are being produced in such a context. Comparative research reveals the common lines shining through Inter-American and European legal orders: differential treatment is defended by the respective courts whenever criteria such as reasonableness, objectiveness and proportionality (IACtHR) or adequacy, necessity and proportionality (ECJ) prove justifiable enough to the bench.<sup>108</sup> A critical

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*Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, Oxford, 2017).

<sup>103</sup>For a contextualization of the concept in the transforming constitutional landscape in Latin America, see Rodrigo Uprimny, ‘The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges’ (2011) 89 *Texas Law Review* 1587.

<sup>104</sup>Samantha Besson, ‘Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation’, in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, Oxford, 2015).

<sup>105</sup>de Schutter (n 41).

<sup>106</sup>Gráinne de Búrca, ‘The ECJ and the International Legal Order: A Re-evaluation’, in Gráinne de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, Cambridge, 2012).

<sup>107</sup>Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press, Cambridge, 2020).

<sup>108</sup>Martín Aldao, Laura Clérico and Liliana Ronconi, ‘A Multidimensional Approach to Equality in the Inter-American Context: Redistribution, Recognition, and Participatory Parity’, in Armin von Bogdandy,

examination, however, demands us to rethink these exception-steered and individualized assessments of violations based on difference as examined in the cases at hand. Group rights, wider contexts of exclusion and inequalities thereby remain untouched; indeed, these decisions have undergone severe criticism on grounds of their ad hoc nature, for failing to do justice to structural inequality and ultimately the distinguished nature of disadvantage(d groups), including their particular collective claims demanding the adoption of positive discrimination measures.<sup>109</sup> Similarly, the EUCJ has come to assess the applicability of positive measures in the context of a controversial balancing act subjecting positive measures to the test of proportionality.<sup>110</sup> The aforementioned Equal Treatment Directives have proven more progressive than the rulings in that regard. Accordingly, the principle of equal treatment was not supposed to prevent the member states from adopting measures directed at ‘prevent(ing) or compensate(ing) for disadvantages linked to the grounds covered by the Directives’.<sup>111</sup> Existing case-law also reveals a restrictive, exception-based approach to equal treatment, which is defined by limiting criteria of application – that is, proportionality and other strict parameters.<sup>112</sup> The variety of distinct grounds of discrimination has been considered differently by the courts, with gender representing the only ground enjoying thorough protection by requiring positive measures to be adopted.<sup>113</sup>

The case-by-case basis and ultimately limitation to individual rights in the decisions might hamper any application of positive discrimination by the courts. The reasons are manifold. It could be argued that the stringent equality rationale underlying judicial decisions jeopardizes any progressive developments towards recognizing dedicated situations and, with it, groups and their dedicated rights. Apart from strictly technical considerations, judgments rely heavily on constitutive instruments following the continental European law tradition. These place remarkable emphasis on individual rights as opposed to group or collective rights, hence risking turning any wider debate on societal inequalities and marginalization into an alien undertaking, presumably reserved to other institutions and disciplines. Finally, it could be advanced that the first two arguments are related in the sense that, first, ad hoc judgments have come to be understood as a “normality” or constituent element of the current legal order. Second, the fact that infringements are classified as violations of individual rights contributes to maintaining a legal system that remains closed to the introduction or establishment of collective rights,

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Eduardo Ferrer MacGregor, Mariela Morales Antoniazzi and Flávia Piovesan (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press, Oxford, 2017). For comparative work and insights on non-discrimination as embraced by domestic constitutional orders in Europe, see Talia Naamat, Nina Osin and Dina Porat, *Legislating for Equality: A Multinational Collection of Non-Discrimination Norms. Volume I: Europe* (Brill, Leiden, 2012); Isabelle Chopin and Catharina Germaine, *Developing Anti-discrimination Law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (European Network of Legal Experts in the Non-discrimination Field of the European Commission, Brussels, 2014).

<sup>109</sup>Aldao, Clérico and Ronconi (n 108); see also Marcelo Alegre and Roberto Gargarella, *El derecho a la igualdad: Aportes para un constitucionalismo igualitario* (Abeledo Perrot, Buenos Aires, 2007).

<sup>110</sup>Belavusau and Henrard, 2018 (n 1).

<sup>111</sup>Belavusau and Henrard, 2018 (n 1); Kristin Henrard, ‘Boosting Positive Action: the Asymmetrical Approach Towards Non-Discrimination and Special Minority Rights’ (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 379.

<sup>112</sup>Belavusau and Henrard (n 1).

<sup>113</sup>Ibid.

either as constitutional rights or as special rights constituting a distinct legal system on its own.

Some responses may be found in international law. While international human rights bodies pronounce themselves somewhat hesitantly on group rights,<sup>114</sup> these have come to be addressed – albeit sporadically – in the form of dedicated provisions such as Article 27 under ICCPR. Given the absence of any international human rights court, it could be argued that the (quasi)judicial recommendations and reports issued by treaty monitoring committees may have led to embracing positive discrimination at the international level. Moreover, the specific nature of such documents and the political ease of adopting comments and recommendations may lend themselves particularly well to articulating positive measures. This began with economic, social and cultural rights (ESCR) in the form of dedicated comments<sup>115</sup> and has found similar approval in relation to other rights. The traditional divide between ESCR and CPR, reflecting Cold War dynamics, has disappeared in the light of a comprehensive understanding of human rights, considering the latter ‘indivisible, interrelated and interdependent’.<sup>116</sup> State obligations have been diversifying ever since, and could be steered towards positive discrimination to some extent. This may be attributable to a growing civil society presence, with non-governmental organizations exerting essential oversight functions by means of consultative status in international review sessions such as UPR.<sup>117</sup> Considerable influence has further been exerted by states of the Global South, including Indigenous movements in Latin America or peoples-oriented discourse in African states. Global human rights politics have hence allowed for a multiplicity of actors to negotiate both the norms, eventually guiding interpretative instances, and the procedures that allow for monitoring compliance. Finally, highly specialized agencies of supervision have come to the fore, contributing to enhanced levels of recognition across state reporting and general interpretative exercise. While these generally reflect lower levels of enforcement and compliance, we may testify to what could be understood as a steadily growing standardization of positive discrimination in international law, spilling over from specialized mandates to the broader scenery of human rights oversight.

A multivariate analysis of current equality law and the neighbouring demands for positive discrimination does not provide a clear-cut response to questions related to the intersections of the two fields. Legal codes and jurisprudential developments differ regarding the degree to which equality law and positive discrimination are followed. Determining factors could include, while not being limited to, the level of institutionalization, court culture, degree of specialization, level enforcement capacities, legal hierarchies, orientation of institutional mandates or issues of implementation. Ultimately, equality law and positive discrimination alike have demonstrated particular affinity with

<sup>114</sup>Note that both minority rights and Indigenous peoples’ rights have not entered the realm of international treaty law under the umbrella of the UN High Commissioner for Human Rights: see UN Declaration on the Rights of Indigenous Peoples (UNDRIPS) and Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

<sup>115</sup>CESCR, 1990 (n 83); CESCR, 1999 (n 83) CESCR, 1999 (n 83); CESCR, 2000 (n 83).

<sup>116</sup>Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993.

<sup>117</sup>See, for instance, Claire Charters and Rodolfo Stavenhagen, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, Copenhagen, 2009); Corinne Lennox, *Transnational Social Mobilization and Minority Rights: Identity, Advocacy and Norms* (Routledge, London, 2020).

ground-specific approaches, starting prominently with ethnic background, gender or cultural grounds, at the same time representing weak spots in both frameworks. Let us return to the beginnings and re-state the importance of positive human rights obligations in defining a crucial threshold to appreciate the limits and opportunities inherent to both equality and positive discrimination.