

Boosting Positive Action: The Asymmetrical Approach towards Non-Discrimination and Special Minority Rights

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Abstract

Ultimately this article reviews the possible relationship between the legal acceptance of positive action on the one hand and special minority rights on the other. The focus is on equality theory though, and more particularly the assessment of the legality of positive action.

Positive action, affirmative action or preferential treatment (hereinafter: positive action) encompasses a great variety of special measures, policies and practices that are meant to address historical and/or structural disadvantages of particular disadvantaged groups in society. These measures are thus clear-

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ly aimed at realizing substantive or real, genuine equality, while having a noticeable group dimension.

The goal of positive action would seem to denote measures that are to be welcomed, at least in principle. However, these measures tend to be controversial because they concern measures that imply differentiations between persons, and thus often have a tensed relationship with individual rights of equal treatment.

This tension and related controversy is reflected in the often restrictive evaluation of positive action measures by courts. At the same time, divergent views are visible in state practice, as well as the practice of quasi-judicial bodies. Hence it seems worthwhile to investigate the relevant variables that explain the baseline attitude towards the legality of positive action.

It seems logical to first review the potential of the key characteristics of positive action, namely substantive equality and the group dimension of equality, as variables in this respect. To the extent that these two variables do not prove to be decisive in the sense that they do not explain the different baseline attitude of supervisory bodies, an additional variable merits to be investigated. In this article the potential of special minority rights as such an additional variable is investigated, because of the intrinsic relation between special minority rights on the one hand and substantive equality and a group focus to equality on the other. Indeed, special minority rights are meant to put persons belonging to minorities in a substantively equal situation as the rest of the population, while the group dimension of these rights is visible in the way they are framed: rights for persons belonging to minorities.

The hypothesis investigated here is whether and to what extent a receptive attitude on the part of supervisory bodies towards special minority rights influences their attitude towards positive action. In terms of the title, this implies that minority rights and the baseline attitude towards these “special” rights are not the focus as such of this article, but they are considered as a potential variable for the legality of positive action.¹

¹ One could argue that this article combines two lines of investigation pertaining to non-discrimination: one concerning the complex relationship with the protection of minorities (see *K. Henrard*, Non-discrimination and Full and Effective Equality, in: M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies*, 2007, 75 et seq. and references found there), the other regarding the use of different levels of scrutiny when evaluating a possible instance of prohibited discrimination and more particularly what level of scrutiny should be adopted in relation to positive action (including “affirmative action”) measures, as particular forms of differential treatment, potentially falling foul of the prohibition of discrimination (see also *C. McCrudden/H. Kountouros*, *Human*

The supervisory bodies under review here include prominent courts like the European Court of Justice (ECJ); the European Court on Human Rights (ECtHR) and the US Supreme Court on the one hand, and UN Treaty Bodies and other quasi judicial bodies on the other.²

The article will first of all introduce step by step the distinctive more technical building blocks of equality theory, pertaining to substantive versus formal equality, the criteria distinguishing discrimination, the proportionality principle, different levels of scrutiny in relation to suspect grounds, and the symmetrical versus asymmetrical approach concerning the latter. A first bout of case law analysis focuses on the identification of the baseline attitude of supervisory bodies towards positive action, considering their attitude in terms of substantive equality and a group dimension of the equality principle. Subsequently, the possible relevance of the closely related “minority rights” factor is put forward and investigated through a second bout of case law analysis. The relevance of the latter factor can be (and is) traced in the jurisprudence of the ECtHR. The practice of the quasi judicial organs arguably further corroborates this reading. Finally, and prior to tying all the strands together in the conclusion, the potential of the minority rights variable in the jurisprudence of the ECJ is evaluated, with special attention for apparent shifts in the relation between fundamental market freedoms and human rights.

I. Differentiation Versus Discrimination, Formal Versus Substantive Equality

It is generally accepted that not all differentiations amount to prohibited discrimination. Hence it is important to identify what are the criteria used to distinguish between a legitimate differentiation on the one hand and a prohibited discrimination on the other and how these criteria are being applied by supervisory bodies. In general³ it is put forward that when a rea-

Rights and European Equality Law, in: H. Meenan (ed.), *Equality Law in an Enlarged European Union: understanding the Article 13 Directives, 2007, 74 et seq.*

² The supervisory bodies that have been selected here (the courts mentioned above as well as the most prominent international quasi judicial bodies) may be rather distinctive in terms of powers, institutional and broader setting, they have in common that they have long-standing and relatively outspoken lines of jurisprudence pertaining to (the legality of) positive action measures. The European Court of Human Rights (ECtHR) is also included because of its extensive and strongly developing equality jurisprudence.

³ It should be kept in mind that in European Community (EC) law (and in some national jurisdictions) the open justification model (the use of one general formula) only applies to

sonable and objective justification exists a differentiation would not amount to a prohibited discrimination. This “reasonable and objective justification” would require a legitimate aim for the differentiation as well as a relationship of proportionality between the differentiation and the legitimate aim.⁴ The emphasis is undoubtedly on the need for the differentiation to be proportionate to the particular legitimate aim.⁵ As the following discussion will demonstrate, the ultimate conclusion whether or not the prohibition of discrimination is respected depends to a great extent on the level of scrutiny adopted in relation to the proportionality principle.

When analyzing particular dimensions of the equality principle, like the prohibition of discrimination and positive action, it is important to distinguish between mere formal or mathematical equality on the one hand and substantive or real equality on the other. While formal equality is about treating people in exactly the same way, irrespective of the circumstances, substantive equality does take the relevant circumstances and context into account. The so-called paradox of the equality principle refers to the fact that substantive equality might require formally unequal treatment.⁶ In other words, it might be necessary to differentiate, and treat people formally unequally in order to reach real, substantive equality.

II. Proportionality and Levels of Scrutiny: Suspect Grounds

The proportionality test in the broad sense knows different guises.⁷ The proportionality test in the narrow sense is the one which is most widely used. Following this test a reasonable relation between the legitimate aim on the one hand and the differential treatment (and the underlying interests with which it interferes) on the other hand is required.⁸ The less restrictive

instances of indirect discrimination. Explicit differentiations on a particular ground can only be “justified” when an explicit exception clause can be relied upon.

⁴ For the European Court on Human Rights consider *Belgian Linguistic Case*, ECtHR, 23.7.1968, para. 10; *Abdulaziz, Cabales and Balkandali v. UK*, ECtHR, 28.5.1985, para. 72. For the Human Rights Committee, see its General Comment no. 18 on non-discrimination, para. 13. See also *W. Vandenhole*, Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies, 2005, 63.

⁵ *J. H. Gerards*, *Rechterlijke Toetsing aan het Gelijkheidbeginse*, 2002, 193.

⁶ *S. Fredman*, *Providing Equality: Substantive Equality and the Positive Duty to Provide*, SAJHR 21 (2005), 163 et seq.

⁷ *S. Fredman* (note 6), 102.

⁸ *Karner v. Austria*, ECtHR, 24.7.2003, para. 41.

alternatives test⁹ is more demanding and implies an investigation of whether there are no alternatives which can achieve the desired legitimate aim while interfering less with the right to equal treatment.

In any event, when applying the proportionality test, it is very, if not crucially, important, what level of scrutiny is adopted, since the level of scrutiny concerns the intensity of the review of the differential treatment concerned. The level of scrutiny is inversely related to the margin of appreciation left to states,¹⁰ and tends to indicate the actual level of protection provided by the supervisor. Indeed, the intensity of review often has an important, if not always decisive, impact on the outcome of the assessment (of the legality of the differential treatment).¹¹ A heightened level of scrutiny entails stronger demands for the legality of these measures. In other words the stricter the level of scrutiny that is adopted, the less chance there is for the differential treatment to be considered legal.

Working with different levels of scrutiny in relation to the prohibition of discrimination is historically related to the US Supreme Court's jurisprudence. That jurisprudence tended to distinguish three different levels of scrutiny which were primarily determined by the ground of discrimination at issue:¹² two forms of heightened scrutiny, namely strict scrutiny for race, and intermediate scrutiny for gender and the baseline of rational basis review (a rather easy going level of scrutiny) for all the rest.¹³ Arguably this

⁹ This test is also called the subsidiarity test but this term is less suitable in a text which also pertains to the ECJ jurisprudence and European Union (EU) law, considering the particular meaning the word subsidiarity has in that context.

¹⁰ The proportionality principle is indeed not only relevant for human rights, including the prohibition of discrimination see *G. de Burca*, The Principle of Proportionality and Its Application in EC Law, YEL 13 (1993), 105.

¹¹ *W. Sadurski*, Equality and Legitimacy, 2008, 135.

¹² More recent case law would also allow for a more flexible approach, entailing the identification of a fourth level of scrutiny, namely rational basis "with bite", used in all cases for which there are reasons for heightened scrutiny (for example the impairment of fundamental interests), but which do not involve any distinction on recognized suspect grounds. See *J. H. Gerards*, Judicial Review in Equal Treatment Cases, 2005, 515.

¹³ For an elaborate discussion of the three different standards, see *T. Trelogan/S. Mazurana/P. Hodapp*, Can't We Enlarge the Blanket and the Bed? A Comparative Analysis of Positive/Affirmative Action in the European Court of Justice and the United States Supreme Court, *Hastings Int'l & Comp. L. Rev.* 28 (2004-2005), 39, 63 et seq. It has been argued that the idea of more searching judicial was advanced in footnote 4 of the opinion of the Court in *Carolene Products (United States v. Carolene Products Co.)* and more particularly for those situations where prejudice against discrete and insular minorities tends to curtail the operation of these political processes ordinarily relied upon to protect minorities (304 US at 152 et seq., n. 4), see *B. E. Simmons*, Reconsidering Strict Scrutiny of Affirmative Action, *Michigan Journal of Race and Law* 2 (1996), 51, 74.

jurisprudence has inspired other supervisory bodies to adopt heightened scrutiny for suspect grounds.¹⁴

To some extent “suspectness” would be reflected by the explicit enumeration of a ground in the non-discrimination clauses.¹⁵ More fundamentally, it has been argued that suspect classes concern immutable characteristics or characteristics that are inherent to one’s ego, like race and religion respectively.¹⁶ Classes would also be suspect when they refer to a group which has historically suffered from unjustifiable discrimination and hence is especially vulnerable to such treatment.¹⁷ Typical examples that come to mind here are race, especially in the US and South Africa, and gender pretty much everywhere. A characteristic that would be considered irrelevant as basis for action or policy would similarly qualify as suspect, at least in particular contexts.¹⁸ Again gender, race and religion are good examples since in principle, that is in most scenarios, one’s gender, race, or religion should not matter for one’s functioning in society, whether or not one should get a job, a promotion, access to a public service etc.

Not all supervisory bodies are equally explicit about the different levels of scrutiny they adopt. It is nevertheless noticeable that some grounds, and more particularly race and gender, feature in the jurisprudence of all supervisory bodies among the grounds that qualify for heightened scrutiny, while for other grounds like religion and nationality the record is more uneven. Within the framework of issue specific conventions, like the UN Racial Discrimination Convention (ICERD) or the Convention aimed at the Elimination of Gender Discrimination (CEDAW) where only one ground is considered, it is not useful to talk about different levels of scrutiny. Obviously the fact that an entire convention is dedicated to combating discrimination on these particular grounds indicates that they are suspect. The International Covenant on Civil and Political Rights (ICCPR) covers several

¹⁴ J. H. Gerards, Intensity of judicial Review in Equal Treatment Cases, NILR 51 (2004), 162 et seq.

¹⁵ W. Vandenhole (note 4), 183 (in relation to the HRC). However, this analysis clearly does not apply to the European Court of Human Rights (ECtHR) as it has attached heightened scrutiny to grounds that are not explicitly enumerated, like sexual orientation, while no heightened scrutiny has been adopted in relation to several of the enumerated grounds.

¹⁶ J. H. Gerards, Gronden van Discriminatie – de Wenselijkheid van Open en Gesloten Opsommingen, in: C. Bayart et al. (eds.), *De Nieuwe Federale Antidiscriminatiewetten – Les nouvelles lois luttant contre la discrimination*, 2008, 145 et seq., highlights that persons cannot be held responsible for immutable characteristics, but also puts this criterion in perspective since not all immutable characteristics are suspect.

¹⁷ S. Joseph/J. Schultz/M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2004, 693.

¹⁸ J. H. Gerards (note 16), 148 et seq.

grounds of prohibited discrimination. Notwithstanding the explicit rejection by its supervisory body, the Human Rights Committee (HRC), of the doctrine of the margin of appreciation, its actual supervisory practice has revealed a differentiation in the level of scrutiny it adopts.¹⁹ All the enumerated grounds and some others like nationality, sexuality, age and disability tend to receive a higher level of scrutiny,²⁰ while race and gender are protected at an even higher level.²¹ Arguably the latter practice confirms the suspect nature of these two grounds that are singled out in ICERD and CEDAW.

The jurisprudence of the two European Courts has developed along very different lines, inter alia due to their respective “setting”. The ECtHR had from the beginning a prohibition of discrimination covering an open-ended number of grounds. Over time the jurisprudence of that Court has required “very weighty reasons”²² to justify differentiations²³ on particular grounds because of their suspect nature: gender, illegitimate birth, sexual orientation, religion,²⁴ race/ethnic origin²⁵ and nationality.²⁶

The prohibition of discrimination in European Union (EU) law knows a very different starting point. Originally only two grounds of discrimination

¹⁹ *J. Bair*, The International Covenant on Civil and Political Rights and Its (first) Optional Protocol, 2005, 117; *S. Joseph/J. Schultz/M. Castan* (note 17), 693; *W. Vandenhole* (note 4), 113.

²⁰ *Gueye v. France*, HRC, Communication no. 196/85; *Foin v. France*, HRC, Communication no. 666/1995; *Miaille v. France*, HRC, Communication no. 689/1996.

²¹ *W. Vandenhole* (note 4), 113.

²² Occasionally other formulae are being used, for example in *Hoffmann v. Austria*, ECtHR, 23.6.1993, para. 36 the Court stipulated that “a distinction based essentially on a difference in treatment based on religion alone is not acceptable”. A similar formula was used in *Timishev v. Russia*, ECtHR, 13.12.2005 in relation to “race”.

²³ *N. Bamforth*, Prohibited Grounds of Discrimination under EU law and the European Convention on Human Rights: Problems, Contrast and Overlap, Cambridge Yearbook of European Legal Studies 9 (2006-2007), 1, 17 et seq. The author does underscore that it is “not entirely clear how far the rhetoric of particularly serious reasons in fact translates into a more intense standard of review in practice” (at 18).

²⁴ In subsequent (to *Hoffmann v. Austria*) judgments pertaining to differentiations on the basis of religion, there is no clear language pointing to heightened scrutiny, not even in cases with a similar factual background as *Hoffmann*, like *Palau-Martinez v. France*, 16.12.2003.

²⁵ The ECtHR was noticeably late in explicitly recognizing the suspect nature of the ground “race and ethnic origin”. *J. Bair* (note 19); 117; *S. Joseph/J. Schultz/M. Castan* (note 17), 693; *W. Vandenhole* (note 4), 113. Concerning race, it was only in the 2005 case of *Timishev v. Russia*, that the Court adopted an unequivocal point of view, which arguably builds on the pointers that were already available in older case law, like *Nachova v. Bulgaria*, ECtHR, 26.2.2004 and *GC*, ECtHR 6.7.2005, and *Moldovan v. Romania*, ECtHR, 12.7.2005.

²⁶ *Gaygusuz v. Austria*, ECtHR, 16.9.1996; *Koua Poirrez v. France*, ECtHR, 30.6.2003. It has been pointed out though that nationality is not always a suspect ground, it depends to a great extent on the context. *J. H. Gerards* (note 12), 205 et seq.

were considered in EU law, namely nationality and gender, both initially because of their intrinsic link to the common market goal. The close link between the prohibition of discrimination on these grounds and the fundamental economic project of the EU also explains why the baseline scrutiny of discrimination by the ECJ was and is relatively high.²⁷

The expansion of discrimination grounds with the Treaty of Amsterdam was remarkable in that five grounds were added, including race/ethnic origin and religion, which arguably confirmed a shift towards a more social (human rights) rationale of the prohibition of discrimination.²⁸ The text of the various non-discrimination directives hints at different degrees of “suspectness” of the grounds, inter alia by providing more or less exceptions to the prohibition of direct discrimination. Hence, there have been speculations about an equality hierarchy.²⁹ However, so far the case law in terms of non-discrimination has given the impression that the Court does not seem to adopt clearly different levels of scrutiny for the respective grounds since “the Court of Justice tends to consider the issue of justifications on a case-by-case basis, rather than specifying in advance that some grounds of discrimination will be subject to more intensive scrutiny than others”.³⁰

The Court’s jurisprudence pertaining to differentiations on the basis of age actually confirmed that the baseline level of scrutiny of the Court is rather high, also for the five “new” grounds of discrimination. While age is generally not considered as suspect as race or gender, because age does matter in several respects for one’s functioning in society, the ECJ still adopted a seemingly high level of scrutiny for the differentiation on the basis of age in the *Mangold* case.³¹

It should be noted that proportionality is an important element in EU law generally, also in relation to the fundamental market freedoms. It has been argued that the Court does modulate the level of scrutiny it adopts in relation to the proportionality test,³² inter alia on the basis of the area or

²⁷ J. H. Gerards (note 12), 307 et seq. See also S. Besson, Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?, HRLR 8 (2009), 647, 671 et seq.

²⁸ M. Bell, Anti-Discrimination Law and the European Union, 2002, 6 et seq., 121.

²⁹ M. Bell (note 28), 32 et seq. See also the following two articles of M. Bell/L. Waddington, More Equal than Others: Distinguishing European Union Equality Directives, CML Rev. 38 (2001), 587; and Reflecting on Inequalities in European Equality Law, E.L. Rev. 28 (2003), 349.

³⁰ N. Bamforth (note 23), 15 et seq. See also S. Besson (note 27), 647, 671; N. Bamforth/M. Malik/C. O’Cinneide, Discrimination Law: Theory and Context, 2008, 114 et seq.

³¹ S. Besson (note 27), 666 and 672. See Werner *Mangold v. Rudiger Helm* [2005] C-144/04, ECR I-621, para. 65. See also D. Martin, L’arrêt Mangold – vers une hiérarchie inverse du droit à l’égalité en droit Communautaire?, J.T.T. 14 (2006), 109.

³² G. de Burca (note 10), 111.

competence field concerned.³³ Hence, it would not be inconceivable that the jurisprudence of the ECJ would become more structured in terms of shifts in the level of scrutiny for suspect grounds of differentiation. A more explicit and consistent argumentation on suspect grounds and the level of scrutiny they trigger as point of departure appears to be called for, especially in light of the open-ended discrimination clause which was added to the panoply of discrimination provisions that form part of EU law by the EU Charter of Fundamental Rights.³⁴ Since the Charter only became legally binding with the coming into force of the Lisbon Treaty, there is no case law yet on discrimination complaints on these additional grounds.

Overall, it can be concluded that the ground of distinction tends to be an important if not the primary indicator of the particular level of scrutiny adopted by supervisory bodies. At the same time, the respective lines of jurisprudence reveal that also other factors have a role to play, like the degree to which consensus would exist about a particular matter,³⁵ or the competence field concerned. As will be further explained in the following alinea, the focus in this article will be on the question to what extent the goal of the differential treatment influences the actual level of scrutiny adopted.³⁶

³³ When the particular matter concerns a policy domain the main competence of which belongs to the member states, a low(er) level of scrutiny is adopted by the ECJ (*J. H. Gerards* (note 12), 312 et seq.). Variations in the intensity of review have also been identified by *Paul Craig and Evelyn Ellis: P. Craig*, *EU Administrative Law*, 2006, 547 et seq.; *E. Ellis*, *The Concept of Proportionality in European Community Sex Discrimination Law*, in: *E. Ellis* (ed.), *The Principle of Proportionality in the Laws of Europe*, 1999, 165 et seq.

³⁴ Article 21 of the EU Charter of Fundamental Rights specifies no less than seventeen grounds but is clearly open-ended since it stipulates “any discrimination based on any ground such as ... shall be prohibited”.

³⁵ See *Petrovic v. Austria*, ECtHR, 27.3.1998, paras. 22 et seq.; *Fretté v. France*, ECtHR, 26.2.2002. See also *J. H. Gerards*, *Gelijke Behandeling en EVRM, artikel 14 en het Twaalfde Protocol: van krachteloze waarborg naar norm met tanden?*, *NJCM-Bull.* 29 (2004), 176, 186 et seq.

³⁶ See *infra* on symmetrical versus asymmetrical approaches.

III. Suspect Grounds, Positive Action and the Symmetrical Versus Asymmetrical Approach

1. Theoretical Considerations on Positive Action and the Appropriate Level of Scrutiny (Symmetry Versus Asymmetry)

There may not exist a set, generally agreed upon definition of the concept of positive action,³⁷ and it may encompass a broad and complex range of measures, policies and practices,³⁸ but these measures tend to concern special measures or differential treatment³⁹ aimed at addressing historical and/or structural disadvantages of particular disadvantaged groups in society. Hence, ultimately positive action measures are about furthering substantive equality, either through measures of redress for previously incurred disadvantages, or through more prophylactic, preventive measures aimed at a workforce, a student body etc. which is representative of the population diversity in a state.⁴⁰

Since positive action implies differential treatment, the criteria of the prohibition of discrimination need to be complied with for it to be legitimate.⁴¹ Indeed, the prohibition of discrimination constitutes the outer limits of legitimate positive action measures.⁴² In other words, positive action measures should serve a legitimate aim and be proportionate to that aim.

³⁷ The relationship between the terms positive action and affirmative action is similarly contested: some argue that the former is the wider (*D. Caruso*, Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives, *Harv. Int'l L. J.* 44 (2003), 331, 332); sometimes affirmative action is considered to cover the biggest load (*C. McCrudden*, Rethinking Positive Action, *ILJ* 15 (1986), 219). See also *T. Trelogan/S. Mazurana/P. Hodapp* (note 13), 40: according to these authors positive action aims both at correcting the effects of past discrimination and promoting equality of opportunity, while on the other hand it covers more or less the same load as affirmative action in the US.

³⁸ *N. Bamforth/M. Malik/C. O'Conneide* (note 30), 340.

³⁹ Positive action does not necessarily amount to preferential treatment, it does concern differential treatment, if only of a more indirect kind. Arguably this is also confirmed by the five basic categories of positive action that *McCrudden* distinguishes: *C. McCrudden* (note 37), 219.

⁴⁰ *N. Bamforth/M. Malik/C. O'Conneide* (note 30), 345; *O. de Schutter*, Three Models of Equality and European Anti-discrimination Law, *N.I.L.Q.* 57 (2007) 1, at 34.

⁴¹ See also *E. Ellis*, EU Anti Discrimination Law, 2005, 297.

⁴² *M. Bossuyt*, The Concept and Practice of Affirmative Action, in: I. Boerefijn et al. (eds.), *Temporary Special Measures*, 2003, 66, 73. The HRC practice clearly reflects that "as with other distinctions, the permissibility of affirmative action measures is judged by reference to the 'reasonable and objective' test" (*S. Joseph/J. Schultz/M. Castan* (note 17), 731).

While the legitimate aim of affirmative action measures seems a given, namely to contribute to the achievement of substantive equality (in relation to particular things), there is still the additional need for the measures concerned to be proportionate to that aim.

In relation to the proportionality principle, the appropriate level of scrutiny needs to be determined. Positive action measures are most often developed for groups that are distinguished on the basis of a “suspect” class, like gender, race or ethnicity. Here the difference between the symmetrical and the asymmetrical approach to the equality principle comes into play. When a supervisory body identifies suspect grounds, this raises the question whether a particular ground of differentiation is suspect per se, and thus per se triggers heightened scrutiny or whether other considerations also play a role so that a ground may be suspect in some instances and not in others.⁴³ The symmetrical approach takes the “per se” position, following which any use of a suspect ground would lead to heightened scrutiny, irrespective of the context and goal of the measure concerned. The asymmetrical approach does not follow this “per se” route. For example, while gender is generally considered to be a suspect ground of differentiation, the asymmetrical approach would question whether heightened scrutiny should be used for differentiations disadvantaging men (and not women). In other words, the asymmetrical approach would consider it relevant what group is disadvantaged by a particular measure.⁴⁴ In so far as a particular measure disadvantages an already disadvantaged group, this would trigger heightened scrutiny. Conversely, if the measure concerned would disadvantage a privileged group, this would not necessarily trigger heightened scrutiny.

In this article these terms are used to refer to the closely related question, whether the primary goal of a differentiation on a particular ground matters for the determination of the appropriate level of scrutiny. This is indeed the burning question with positive action measures. Clearly, positive action measures concern differential treatment which is beneficial for a particular disadvantaged group. Nevertheless, when a measure advantages some persons (belonging to particular groups) this implies that “others” do not receive that advantage, and could thus be considered to suffer a disadvantage,

⁴³ This can be compared to the anti-classification versus the anti-subordination theory (C. J. van de Heyning, *Is It Still a Sin to Kill a Mockingbird? Remediating Factual Inequalities through Positive Action – What Can Be Learned from the US Supreme Court and the European Court of Human Rights Case Law*, EHRLR 3 (2008), 356, 380) with the former being clearly symmetrical.

⁴⁴ C. McCrudden, *Theorising European Equality Law*, in: C. Costelloy/E. Barry (eds.), *Equality in Diversity: The New Equality Directives*, 2003, 18. See also S. Besson (note 27), 674 et seq.

each time depending on the exact context and the position of the “others”. Still, the primary goal of positive action measures is not invidious discrimination but addressing the disadvantages of particular groups. For example, a measure which facilitates access to child care services provided by the employer for women.

For positive action, the question in terms of the symmetrical versus the asymmetrical approach is then whether the beneficial nature of the primary goal of positive action measures should entail a reduction in the level of scrutiny, or at least not trigger the use of heightened scrutiny. The symmetrical approach implies that no matter what the goal or underlying reason for the differential treatment of a suspect class, such a differentiation will always be scrutinized strictly. However, following the asymmetrical approach one would not resort to heightened scrutiny when the differentiation concerned is aimed at furthering substantive equality.

The symmetrical approach to the prohibition of discrimination and the resulting adoption of heightened scrutiny for positive action measures tends to lead to findings that the differential treatment concerned amounts to a prohibited discrimination. In other words, the adoption of heightened scrutiny for positive action measures implies (more or less) a presumption of illegality for these measures.⁴⁵ The asymmetrical approach would not amount to a presumption of legality of positive action measures⁴⁶ but rather the absence of a presumption of illegality. Consequently, the chance that the differential treatment inherent in the positive action measure would be found to be legitimate, and not to amount to a prohibited discrimination, would be significantly higher when a supervisory body adopts the asymmetrical approach.⁴⁷ The latter approach seems appropriate for positive action measures since these are arguably qualitatively different compared to forms of invidious discrimination. The primary goal of positive action measures is beneficial (towards the disadvantaged group) while the disadvantages for the previously advantaged group are not the primary intention but rather a form of collateral damage.⁴⁸

It needs to be acknowledged that in terms of the proportionality constraint it is relevant that positive action measures cover a wide variety of

⁴⁵ B. E. Simmons (note 13), 78 and 94.

⁴⁶ See also J. H. Gerards (note 12), 169 who points out that when states get a broad margin of appreciation (meaning that a low level of scrutiny is adopted) this implies that the state gets the benefit of the doubt.

⁴⁷ See also T. Loenen, Indirect Discrimination as a Vehicle for Change, Australian Journal of Human Rights 6 (2000), 11 et seq.

⁴⁸ R. L. Brooks, The Affirmative Action Issue: Law, Policy and Morality, Conn. L. Rev. 22 (1989-1990), 323, 353 et seq.

measures that are not equally controversial. This is related to the distinction between measures creating equal opportunities and those that aim at equality of results. The latter concern the “stronger” forms and thus also the more controversial forms of positive action.⁴⁹ These stronger forms of positive action, like the use of strict quota, are more prone to findings of disproportionality, even when one adopts an asymmetrical approach.

Importantly, the investigation here does not disregard these relevant differences in terms of proportionality but focuses on the baseline attitude towards positive action measures, in view of their beneficial goal, aimed at enhancing substantive equality for disadvantaged groups.

In view of the ongoing occurrence of positive action schemes as well as the related controversies and challenges to their legality, it seems worthwhile to identify the most important factors that influence the adoption of the symmetrical or asymmetrical approach by supervisory bodies. Positive action is – following the definition above – fundamentally about furthering substantive equality for particular (disadvantaged) groups, and recognizes that one needs to deal with discriminatory structures which can only be identified at the aggregate or group level.⁵⁰ Hence, the willingness to adopt a group focus and a substantive equality approach to the right to equal treatment appear not only two closely related questions,⁵¹ but also potentially good indicators of a positive baseline towards positive action. Conversely, it has indeed been argued that when a formal equality approach is adopted, this focus on formally equal treatment in individual cases⁵² tends to go hand in hand with the symmetrical approach to the prohibition of discrimination, and thus with a negative baseline regarding positive action.⁵³ In other words, while many different factors may play a role, the basic attitude of a supervisory body to two key characteristics of positive action, namely

⁴⁹ See also *M. Bossuyt*, The Concept and Practice of Affirmative Action, UN Doc. E/CN.4/Sub.2/2002/21, 67. Quotas are particularly problematic in relation to the liberal conception of individual equal treatment since they “overtly sacrifice the principle of individual merit to that of the greater good” (*E. Ellis* (note 41), 302).

⁵⁰ *A. Numhauser-Henning*, On Equal Treatment, Positive Action and the Significance of a Person’s Sex, in: *A. Numhauser-Henning* (ed.), *Legal Perspectives on Equal Treatment and Non-discrimination*, 2001, 217, 38. Advocate General *Tesouro* in *Kalanke* also confirmed this when he underscores that positive action always has a group dimension (focused on eliminating obstacles faced by groups), while this would be typical of substantive equality – in contrast formal equality focuses on the individual right to equal treatment: *Kalanke* [1995] ECR I-3051, at 3058.

⁵¹ *T. Trelogan/S. Mazurana/P. Hodapp* (note 13), 51.

⁵² *A. Numhauser-Henning* (note 50), 237.

⁵³ *D. Caruso* (note 37), 331; *C. O’Cinneide*, Positive Action and the Limits of Existing Law, *Maastricht J. Eur. & Comp. L.* 13 (2006), 359.

substantive equality and a group dimension of the right to equal treatment, appear particularly relevant. Hence, it seems worthwhile to investigate whether these two factors are indeed important variables to explain the baseline attitude to positive action.

The following sections will analyse and evaluate the baseline towards positive action of supervisory bodies and how this relates to their more general position pertaining to substantive equality and the group dimension of equality.

2. Supervisory Bodies with an Open Approach towards Positive Action: Various Quasi Judicial Bodies

It is quite striking that the supervisory bodies of UN human rights conventions are rather open towards positive action and substantive equality more generally⁵⁴ both in their non-legally binding views and observations. For the two issue specific conventions, the one focusing on the ground race⁵⁵ and the other on gender,⁵⁶ this attitude is buttressed by an explicit acceptance in the text of the conventions of positive action measures in order to further the goal of substantive or real equality.⁵⁷ These positive action measures are indeed considered to be applications and not exceptions of the equality principle.⁵⁸ The asymmetrical approach to the prohibition of discrimination and the positive baseline of the UN treaty bodies towards positive action is confirmed by the identification of actual duties to adopt such measures in certain circumstances.⁵⁹ Indeed, accepting that in particular cir-

⁵⁴ The HRC explicitly identifies that the goal of affirmative action is substantive equality and hence is not an exception to the equality principle: *Jacobs v. Belgium*, HRC, Communication no. 943/2000, 7.7.2004, paras. 9.3-9.5.

⁵⁵ Article 2(2) of ICERD even identifies an obligation to adopt positive action in certain circumstances: *S. Joseph/J. Schultz/M. Castan* highlight that: "The HRC has confirmed that affirmative action is certainly permissible under the Covenant, and may have indicated that, in certain circumstances, it is mandatory for States to take such action." (*S. Joseph/J. Schultz/M. Castan* (note 17), 738).

⁵⁶ CEDAW, General Recommendation no. 25 on Temporary Special Measures, paras. 5 and 24, where the supervisory body acknowledges this asymmetrical approach explicitly.

⁵⁷ See Article 4 CEDAW and CEDAW/C, General Recommendation no. 25 (2004), para. 14.

⁵⁸ *W. Vandenhole* (note 4), 265.

⁵⁹ This is visible in the Committee's on the Elimination of all Forms of Racial Discrimination (CERD) practice in terms of Article 2.1 Racial Equality Directive (RED), Directive 2000/43; as well as in General Recommendation no. 30 on Discrimination against non-citizens, para. 37. For CEDAW Committee see its General Comment no. 25 on Article 4, para. 1 on temporary special measures, paras. 4, 8 and 11. See *R. Cook*, Obligations to Adopt

cumstances states are obliged to adopt positive action measures arguably implies that such measures of positive action would at least not be presumptively illegitimate. Such duties are not only visible in relation to the two issue specific conventions, but also in the practice of the supervisory bodies of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), with their open-ended discrimination provision.⁶⁰

The practice of the UN Treaty Bodies also reflect a group perspective, going beyond the pure individual perspective, taking into account the related considerations of structural discrimination. This group perspective is visible in particular measures that are reviewed and accepted as legitimate, like quota.⁶¹ Also the generous embrace of the concept of indirect discrimination confirms this group perspective since indirect discrimination concerns at first sight neutral measures which have a disproportionate impact upon a particular group.⁶²

The practice of the European Committee on Social Rights reveals a similar trend as the UN Treaty Bodies: it embraces positive action as an application of the equality principle which furthers substantive equality and has an outspoken group dimension.⁶³ Its asymmetric approach towards the prohibition of discrimination comes out clearly in its identification of actual state duties to adopt positive action measures.⁶⁴ These measures take the form of

Temporary Special Measures under the Convention on the Elimination of All Forms of Discrimination against Women, in: I. Boerefijn et al. (note 42), 129; *W. Vandenhole* (note 4), 234.

⁶⁰ See HRC, General Comment no. 18, para. 10; HRC, General Comments no. 4 and no. 28 on Article 3; CEDAW Committee, General Comment no. 16 (2005), para. 15.

⁶¹ See for the HRC inter alia its views in *Jacobs v. Belgium* (gender quota for appointment to the High Council of justice as not disproportionate in that particular case: para. 13.11). CEDAW Committee has in its supervisory practice often advocated the use of quota to achieve gender balance in public and political bodies (CEDAW Committee, General Comment no. 23, para. 29). See also *W. Vandenhole* (note 4), 267 et seq. See also CEDAW Committee, General Comment no. 23, which seems to indicate that the Committee considers equality of results as the logical corollary of substantive equality (*H. B. Schöpp-Schilling*, Reflections on a General Recommendation on Article 4(1) of the Convention on the Elimination of all Forms of Discrimination Against Women, in: I. Boerefijn et al. (note 42), 27).

⁶² *R. Craig*, Systemic Discrimination in Employment and the Promotion of Ethnic Equality, 2007, 42 et seq.; *C. McCrudden*, Changing Notions of Discrimination, in: S. Guest/A. Milne (eds.), Equality and Discrimination: Essays in Freedom and Justice, 1985, 84.

⁶³ Regularly, the Committee explicitly identifies duties to adopt measures of positive action, see inter alia European Committee on Social Rights, Complaint no. 31/2005, *European Roma Right Center (ERRC) v. Bulgaria*, para. 42.

⁶⁴ European Committee on Social Rights, Concl. XVI-1, 125 et seq.; Concl. XVI-1, vol. 2 (Norway), 485 et seq.; European Committee on Social Rights, Complaint no. 31/2005, *ERRC v. Bulgaria*, para. 42. See also *G. Quinn*, The European Social Charter and EU Anti-

special measures attuned to the situation of vulnerable groups,⁶⁵ and aimed at ensuring that rights and collective advantages are genuinely accessible by and to all.⁶⁶ The line of case law is strongly developed in relation to minorities⁶⁷ and Roma in particular.⁶⁸

3. Supervisory Bodies with a Critical Approach towards Positive Action: The US Supreme Court, the ECJ and the ECtHR

In contrast to the jurisprudence of the quasi-judicial bodies, the traditional baseline of several⁶⁹ prominent courts towards positive action tends to be restrictive. Without denying differences of degree, the jurisprudence of the US Supreme Court and the ECJ were traditionally seen to reflect the symmetrical approach to the prohibition of discrimination, which resulted in the adoption of a searching scrutiny for positive action measures.

Positive action (most often referred to in the US as affirmative action) is the subject of an extensive literature and on-going debate in the US.⁷⁰ Sev-

discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose, in: G. de Burca/B. de Witte (eds.), *Social Rights in Europe*, 2005, 279 at 285 et seq.

⁶⁵ European Committee on Social Rights, Complaint no. 31/2005 – *ERRC v. Bulgaria* para. 55 (see also para. 42).

⁶⁶ European Committee on Social Rights, Complaint no. 13/2002, *Autism Europe v. France*, para. 52.

⁶⁷ European Committee on Social Rights, Complaint no. 46/2007, *ERRC v. Bulgaria*, para. 49 (see also para. 51).

⁶⁸ In view of the systemic socio-economic discrimination and deprivation of Roma it is not surprising that the Roma feature prominently in this case law. See Complaint no. 27/2004, *ERRC v. Italy*, para. 21. See also Complaint no. 33/2006 – *International Movement ATD Fourth World (ATD) v. France*, paras. 154 et seq. and Complaint no. 39/2006 – *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, which not only concerned travelers (an equivalent of Roma, at para. 167) but also the vulnerable position of migrants (at para. 160). For a recent decision on the merits, see European Committee on Social Rights, Complaint no. 51/2008, *ERRC v. France*, para. 84.

⁶⁹ It should be acknowledged that the courts in some countries explicitly adopt an asymmetrical approach, which aims at substantive equality and takes into account historical disadvantages and on-going prejudices against particular groups in society. For an overview of the relevant jurisprudence of the Canadian Supreme Court, see *C. Sheppard*, *Grounds of Discrimination: Towards an Inclusive and Contextual Approach*, *La Revue du Barreau Canadien* 80 (2001) 893, 910.

⁷⁰ *A. Bhagwai*, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, *U. Pa. J. Const. L.* 4 (2001-2002), 260; *L. Ware*, *Strict Scrutiny, Affirmative Action and Academic Freedom: The University of Michigan Cases*, *Tul. L. Rev.* 78 (2003-2004), 2097, 2098; *R. L. Brooks* (note 48), 323; *K. Forde-Mazrui*, *The Constitutional*

eral authors are rather critical about the heightened scrutiny approach⁷¹ of the US Supreme Court in relation to positive action (especially in relation to race), which they challenge as being too stringent, too demanding and basically inappropriate. Their critique arguably stems from a preference for the asymmetrical approach.⁷² In this respect it is also pointed out that originally the multi-tiered framework of equal protection review developed in relation to suspect classes, not suspect classifications. In other words it depended on the class on whom burdens or disadvantages were imposed: to the extent that these were historically discriminated against, the class would be suspect, conversely when the class who has to bear the disadvantage was historically advantaged, the class would not be suspect.⁷³

The traditional restrictive approach of the ECJ towards positive action measures is well known and documented.⁷⁴ Especially the *Kalanke* judgment triggered hosts of critical reactions due to its formalistic anti-classification approach⁷⁵ and its symmetrical baseline.⁷⁶ Since then most authors identify a re-positioning of the Court towards a comprehensive proportionality approach with a greater embrace of substantive equality thinking.⁷⁷ This proportionality approach is not merely concerned with the type of preferences concerned,⁷⁸ but also takes into account other contextual fac-

Implications of Race-Neutral Affirmative Action, *Geo. L. J.* 88 (1999-2000), 2331. See also *E. S. Anderson*, Integration, Affirmative Action and Strict Scrutiny, *N.Y.U. L. Rev.* 77 (2002), 1195. See also *K. M. Sullivan*, Post-liberal Judging: The Roles of Categorization and Balancing, *U. Colo. L. Rev.* 63 (1992) 293, 311 et seq.

⁷¹ *L. M. Padilla*, Intersectionality and Positionality: Situating Women of Color In the Affirmative Action Debate, *Fordham L. Rev.* 66 (1997-1998), 843, 903. See also Chief Justice *Burger* in *Fullilove v. Klutznick*, 448 US 448, at 490 et seq. However according to *Ashutosh Bhagwai* the US courts are actually more willing to uphold benign racial classifications in comparison with invidious discrimination. According to him there is actually an additional tier of scrutiny, not as strict as strict scrutiny but still more searching than rational basis review – “relaxed strict scrutiny” (*A. Bhagwai*, (note 70), 260, 278).

⁷² *J. Rubenfield*, Affirmative Action, *Yale L. J.* 107 (1997), 427, 465 et seq. See also *B. E. Simmons* (note 13), 51 who argues that strict scrutiny as standard of review for race-conscious affirmative action programs is inappropriate since this symmetric approach (based on an anti-classification theory) is actually inconsistent with the 14th Amendment original remedial objectives (at 70).

⁷³ *J. Rubenfield* (note 72), 427, 465 et seq.

⁷⁴ *C. Barnard*, The Changing Scope of the Fundamental Principle of Equality?, *McGill L. J.* 46 (2001), 960.

⁷⁵ See *C. O’Cinneide* (note 53), 358.

⁷⁶ *C. Barnard* (note 74), 960

⁷⁷ See *C. O’Cinneide* (note 53), 351; *A. Numhauser-Henning* (note 50), 217, discussing C-158/97 *Badeck*, C-79/99 *Schnorbus*, C-319/03 *Bribeche* and C-407/98 *Abrahamsson*. See also *A. Veldman*, De nieuwe Europese arrestenover voorkeursbeleid, 2001, 116.

⁷⁸ Preferential treatment in hiring and promotion is evaluated more searchingly than preferences in access to childcare and other “softer” measures. See also the extensive discussion in

tors, so that the ECJ cannot be said to consider positive action measures presumptively invalid. However, the ECJ does not seem to recognize the primary beneficial goal of the positive action measures as being a relevant factor for the determination of the level of scrutiny.⁷⁹ An ambiguous situation can be noted since on the one hand the ECJ judgments pertaining to positive action have used from the beginning language acknowledging (in different degrees of explicitness) that these measures have substantive equality as goal,⁸⁰ while at the same time positive action measures were qualified as exceptions to the equality principle. This ambiguity is also visible in more recent cases.⁸¹ Since exceptions need to be interpreted restrictively, this seems to invite a heightened scrutiny approach for positive action measures.⁸² Obviously, the fact that since the Treaty of Amsterdam, primary and subsequent secondary law (directives) acknowledges that the aim of positive action is full, substantive equality⁸³ does not seem to make a difference.⁸⁴

Furthermore, it is arguably peculiar that the steady jurisprudence in terms of the general principle of equal treatment (as general principle of EC

C. Costello, Positive Action, in: C. Costello/E. Berry (eds.), *Equality in Diversity: The New Equality Directives*, 2003, 185 et seq.

⁷⁹ J. H. Gerards (note 5), 316 et seq.

⁸⁰ In several judgments the link with substantive equality is only implicit: in *Kalanke* the Court acknowledges that positive action is necessary to eliminate existing inequalities (para. 20); in *Marshall* the Court underscores that the measure concerned is meant to eliminate inequality (paras. 26 et seq.); in *Griesmar* (C-366/99) the goal of the measure was described as offsetting existing disadvantage (para. 61); in *Lommers* (C-476/99) the Court acknowledges that Article 2(4) Equal Treatment Directive (ETD) is intended to reduce actual instances of inequality (para. 32). Even if the concept of substantive equality is not used, the measures concerned are clearly conceived as an application of equality, not as exception. In *Badeck* (para. 32); and *Abrahamsson* (para. 48) the Court explicitly qualifies the national measures as aimed at achieving substantive equality; while in *Bribeche* the Court acknowledges that Article 2(4) ETD aims at achieving substantive equality (para. 25).

⁸¹ The derogation/exception language is not always used (eg not in *Abrahamsson*, *Schnorbus*, and *Griesmar*) but it does feature prominently in *Lommers* (paras. 39 and 47) and *Bribeche* (para. 21).

⁸² In *Kalanke* the Court is most explicit about the derogation quality of Article 2(4) and concomitant need to interpret its scope restrictively (paras. 12 and 21). See also *Marshall* (para. 32). See also *E. Ellis* (note 41), 308.

⁸³ Arguably, already the 1976 revision of the ETD resulted in the inclusion in Article 2(4) of reference to “measures to promote equality of opportunity” and “by removing inequalities ...”. Since the Treaty of Amsterdam, one can find an explicit reference to the goal of “full equality in practice”, while the measures are said to “prevent or compensate disadvantages” (see Article 141(4) EC (now Article 157 Treaty on the Functioning of the European Union), Article 5 Directive 2000/43/EC; Article 7 Directive 2000/78/EC, Article 3 Recast Equal Treatment Directive 2006/54/EC).

⁸⁴ J. Swiebel, *What Could the EU Learn from the CEDAW Convention?*, in: I. Boerefijn et al. (note 42), 55.

law), following which a duty exists to treat differently situations/persons that are substantively different, is not used in the context of positive action measures. Indeed in contrast to the jurisprudence of the quasi judicial bodies studied above, neither the text of the relevant EU law provisions nor the jurisprudence of the ECJ has identified an *obligation* to take positive action measures (in particular circumstances).⁸⁵

In view of the focus of this article, it should be underscored that the absence of the asymmetric approach by the US Supreme Court and the ECJ does not seem to be attributable to a rejection of substantive equality thinking nor to an exclusive focus on the individual right to equal treatment. Both have indeed been at the forefront regarding the inclusion of indirect discrimination in the prohibition of discrimination. Not only is the link between the concept of indirect discrimination and the acceptance of substantive equality generally accepted,⁸⁶ indirect discrimination is furthermore infused by the idea of group justice.⁸⁷

The European Court on Human Rights has not yet been confronted with a hard case of positive action (typically in relation to job applications and promotions), in contrast to the ECJ and the US Supreme Court.⁸⁸ Nevertheless, it did have to rule in two cases on measures which entailed treatment which benefited women, while excluding men, more particularly *Petrovic v. Austria*⁸⁹ (parental leave allowance only for women) and *Van Raalte v. the Netherlands*⁹⁰ (only women above 45 could be exempted from paying a children related levy). In the initial establishment of the appropriate level of scrutiny, the Court seems to favour the symmetrical approach notwithstanding all its pernicious consequences for positive action measures.⁹¹ In *Petrovic* though it took into account that as regards the question of parental leave allowance there was no common European standard yet, which *de facto* reduced the level of scrutiny and enabled the Court to conclude that Art. 14 was not violated. To the extent that the levels of scrutiny for certain grounds of differentiation are not rigid but can be modulated by other considerations, this is to be welcomed.⁹² However, this does not change the identification of the symmetrical approach, since when setting out to identify whether a supervisory body adopts the symmetrical or asymmetrical

⁸⁵ J. Swiebel (note 84), 58.

⁸⁶ C. J. van den Heyning (note 43), 376, at 379.

⁸⁷ C. McCrudden (note 44), 23.

⁸⁸ D. de Prins/S. Sottiaux/J. Vrielink, Handboek Discriminatie recht, 2005, 38.

⁸⁹ *Petrovic v. Austria*, ECtHR, 27.3.1989.

⁹⁰ *Van Raalte v. the Netherlands*, ECtHR, 21.2.1997.

⁹¹ J. H. Gerards (note 5), 202.

⁹² J. H. Gerards (note 5), 210.

approach, the crucial question is whether or not the particular (primary) purpose of a differential treatment has a significant impact on the level of scrutiny adopted.

The ECtHR actually has a rather ambiguous approach towards substantive equality. It seems to embrace substantive equality when it identifies a duty of differential treatment for persons in substantively different situations, as will be more fully explained *infra*. However, *inter alia* the recent Grand Chamber decision in *Orsus et al. v. Croatia*⁹³ shows that the Court continues to struggle with the concept of indirect discrimination.⁹⁴ Consequently, the Court's attitude towards substantive equality and a group dimension of the equality principle remains questionable, to say the least.

IV. Special Rights for Persons Belonging to Minorities and the Asymmetrical Approach

1. Identifying Another Relevant Factor

The preceding analysis has shown that openness to both substantive equality and a group focus (concerning the right to equal treatment) cannot in themselves explain a particular approach towards positive action, notwithstanding the fact that they concern two defining characteristics of positive action. It is undoubtedly overambitious to try to come up with exhaustive and conclusive answers in this respect, since it is not unlikely that very many different factors may play a role, several of which may interact.

Here, the baseline attitude towards special minority rights has been selected for further scrutiny as a potential factor that influences the scrutiny of positive action measures. This choice appears justified because a receptive attitude towards special minority rights (protecting and promoting minorities' separate identity and distinctive lifestyle) on the part of supervisory bodies signals a particularly strong embrace of both substantive equality and a group dimension to the equality principle. Indeed, special minority rights belong squarely in the camp of measures aimed at promoting substantive equality, while these measures have a prominent group dimension

⁹³ *Orsus v. Croatia*, ECtHR (Grand Chamber), 16.3.2010.

⁹⁴ For an extensive discussion of the case law of the ECtHR pertaining to indirect discrimination up to the Grand Chamber decision in *D. H. et al. v. Czech Republic*, see K. Henrard, A Patchwork of "Successful" and "Missed" Synergies In the Jurisprudence of the ECHR, in: K. Henrard/R. Dunbar (eds.), *Synergies in Minority Protection*, 2009, 322 et seq.

in the sense that they are granted to persons belonging to particular groups, namely minorities.⁹⁵

The remainder of this article investigates whether openness towards special minority rights functions as a trigger for supervisory bodies to adopt the asymmetrical approach, following which positive action measures are not presumptively invalid. It should be underscored that the factor introduced here does not concern so much the beneficiaries of the positive action measures,⁹⁶ but rather the kind of measures for persons belonging to minorities, namely measures pertaining to the protection and promotion of the separate cultural identity and distinctive lifestyle and the related accommodation of population diversity.

Indeed, the following analysis of the text of special minority rights demonstrates that when the positive action measures concern special rights for persons belonging to minorities, the international community seems to accept that this calls for the asymmetrical approach (2.). This reading is also identified in a recent Grand Chamber judgement of the ECtHR and subsequently traced throughout its earlier jurisprudence (3.). The quasi jurisprudence of several UN treaty bodies can at least be argued not to contradict the relevance of the “minority rights variable” (4.).

Since the position of the ECJ in this respect is far from crystallized, the promising shifts that can be noted merit a fuller discussion in a separate section (V).

2. Minority Rights Instruments: Special Measures for Minorities as “Special” Kind of Preferential Treatment

When considering minority specific instruments, the equality provision of each of the international documents explicitly notes that special measures for minorities are not contrary to the prohibition of discrimination. This is visible not only in the Framework Convention for the Protection of National Minorities, but also in the OSCE’s Copenhagen Document on the Human Dimension and in the UN Declaration on the Rights of Persons

⁹⁵ *P. Thornberry*, *International Law and the Rights of Minorities*, 1991, 173.

⁹⁶ It is in any event striking that the literature concerning positive action in the US is tied to “minorities”. *R. L. Brooks* (note 48), 323, 366 et seq.; *L. Ware* (note 70), 2097, 2107 and throughout the text in *K. Forde-Mazrui* (note 70), 2331. The great majority of references to positive action measures in the quasi-jurisprudence of the quasi-judicial supervisory bodies (with the exception of CEDAW Committee) also concerns “minorities”.

belonging to National or Ethnic, Religious and Linguistic Minorities.⁹⁷ While the Framework Convention for the Protection of National Minorities (FCNM) is still not ratified by all members of the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE) Document is adopted by consensus and the UN Minorities Declaration was also unanimously adopted. Hence, it seems legitimate to denote an international consensus about the provisions concerned.

The relevant clause in the FCNM and the Copenhagen document at first sight even stipulate outright that these special measures for minorities do not violate the prohibition of discrimination.⁹⁸ However, it would be strange if minority specific rights could under no circumstances amount to discrimination. The UN Minorities Declaration recognizes this when it states that such measures “shall *not prima facie* be considered contrary to the principle of equality ...” (Art. 8, para. 3, emphasis added). What is not *prima facie* might still be after closer analysis. Indeed, in terms of the criteria for discrimination: the aim of substantive equality for persons belonging to minorities in relation to their right to identity is clearly considered to be a legitimate aim. Still this does not grant a *carte blanche*, more particularly it would not absolve from respecting the proportionality principle. This is acknowledged by the Explanatory Report to the FCNM, which stipulates that special measures for persons belonging to minorities “need to be adequate”, that is in conformity with the proportionality principle, in order to avoid violation of the rights of others as well as “*discrimination against others*”.

Still, the clauses concerned would appear to indicate that notwithstanding the differentiations on the basis of ethnicity, special measures for minorities are presumed not to violate the prohibition of discrimination. While this presumption is rebuttable, the mere fact of having this presumption in the first place amounts to a rejection of heightened scrutiny for the differential treatment concerned. A teleological and holistic interpretation of minority specific instruments further confirms this reading. Indeed, these instruments are essentially about special rights for persons belonging to minorities, ai-

⁹⁷ Article 4, para. 3 FCNM, Copenhagen Document, para. 31; Article 8, para. 3 UN Minorities Declaration.

⁹⁸ These formulations arguably lead to over simplistic statements by authors to the effect that positive action measures are generally not considered discriminatory (*M. Tomei*, Discrimination and Equality at Work: A Review of the Concepts, *International Labour Review* 142 (2003) 401, 405-406). The mere fact that the measures concerned aim at ensuring equality of treatment and opportunity in practice would suffice for these measures not to amount to discrimination. This gives the improper impression that proportionality considerations would not matter.

med at the promotion of their separate identity and substantive equality. If strict scrutiny would be applied to these special measures, it would be close to legally impossible to have and maintain them. In other words, strict scrutiny for special minority rights would seem contrary to the international consensus about the essence of minority rights instruments, as captured in the minority rights instruments discussed here.

This approach to minority identity rights seems particularly appropriate in view of the kinds of benefits concerned and the (related) fact that these benefits tend to be confined to measures promoting equal opportunities. Typical for the internationally recognized special minority rights is that the grant of these rights does not have negative repercussions for other groups. To the contrary, special minority rights tend to extend benefits already enjoyed by the “majority” to persons belonging to minorities. For example the right to education in the minority language or the right to communicate with the administrative authorities in the minority language does not reduce the pre-existing right to mother tongue education of persons belonging to the majority. Consequently, special minority rights are indeed a special kind of positive action measures because there is no (apparent) tension with the individual right to equal treatment. This implies that it is not self-evident that supervisory bodies that adopt an asymmetrical approach in relation to special minority rights will be equally ready to do so for other positive action measures. If this does happen, it can be argued that special minority rights work as a trigger in this respect.

It can be noted that the formulation of the provisions on positive action in EU law appears to be similar to the minority rights provisions in several respects. Already since 1976 the relevant provision in the Equal Treatment Directive stipulated that the prohibition of discrimination would not apply to measures to promote equality of opportunities in particular by removing inequalities.⁹⁹ However, in the framework of EU law there is no similar starting point or sub-text of promoting special, differential identity-related measures. Arguably, the dominance in EU law of the individual right to equal treatment – and its link to the central common market rationale – prevented that this formulation entailed a reduction of the level of scrutiny for positive action measures. Furthermore, neither the texts, nor the case law of the ECJ identify an obligation to adopt special (positive action) measures, notwithstanding the potential in the general principle of equal treatment.

⁹⁹ Since the Treaty of Amsterdam the relevant Treaty provision and provisions in equality directives added that these special measures have as goal “to ensure full equality in practice”.

3. ECtHR: Fusing “Correcting Factual Inequalities” with Special State Duties towards Minorities’ Identity (Rights)

The understanding that special measures aimed at the protection of minorities would not trigger heightened scrutiny notwithstanding the implication of ethnicity seems confirmed (at least reflected) in the recent Grand Chamber judgment of the European Court of Human Rights in *Sejdic and Finci v. Bosnia and Herzegovina*.¹⁰⁰ In that case a person from Roma and one from Jewish origin challenged the power sharing arrangements in that country following which only persons belonging to the three constituent peoples (the Bosniacs, the Croats and the Serbs) are allowed to stand for election to parliament. This arrangement clearly constitutes a differentiation along ethnic lines. In view of their intrinsic relation to the accommodation of population diversity, power sharing arrangements can also be considered relevant for minority protection. In casu the three constituent peoples can be considered minorities as none of them is numerically in the majority while seemingly not being dominant and having the wish to hold on to their own separate identity.

The Court does seem to show a willingness to accept in principle differentiations on the basis of ethnicity in this type of minority protection-power sharing setting, aimed at restoring the peace, ending a period of conflict and ethnic cleansing, and in the end at ensuring “effective equality between the constituent peoples”. Notwithstanding its acknowledgement that differentiations on the basis of ethnic origin tend to trigger heightened scrutiny,¹⁰¹ the Court highlights that “Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct ‘factual inequalities’ between them”.¹⁰² As will be explained more fully infra, this expression can be understood as indicating that such measures are not presumed to be illegitimate, which would imply that it is actually not necessary to adopt heightened scrutiny. The actual level of scrutiny adopted by the Court indeed does not appear to be particularly demanding as the Court even exhibits sympathy for the adoption of power sharing arrangements in this particular context. However, the differentiations on the basis of ethnicity inherent in the specific power sharing arrangement amounted to a total exclusion of representatives of the other communities. Arguably, the radical na-

¹⁰⁰ *Sejdic and Finci v. Bosnia and Herzegovina*, ECtHR (Grand Chamber), 22.12.2009.

¹⁰¹ *Sejdic and Finci v. Bosnia and Herzegovina* (note 100), para. 44: “where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible”.

¹⁰² *Sejdic and Finci v. Bosnia and Herzegovina* (note 100), para. 44.

ture of the arrangement is such that it would have been difficult not to conclude to a disproportionate measure, even under regular scrutiny.

Hence, notwithstanding the eventual finding of a prohibited discrimination, this judgment can be read as indicating that the ECtHR would be willing to adopt the asymmetrical approach to the prohibition of discrimination in relation to minority protection measures. The protection of minorities is in any event accepted as a legitimate aim on a par with “correcting factual inequalities”.¹⁰³

It should be acknowledged that the “correcting factual inequalities” formula already features in the 1968 *Belgian Linguistics Case*,¹⁰⁴ which tends to be considered as the case which set the precedent for the non-discrimination jurisprudence of the Court. A deeper analysis of this line of jurisprudence¹⁰⁵ thus seems in order, to identify the settings in which this sentence is used, and the extent to which it indicated and indicates the asymmetrical approach also when no special minority rights are in play.

As in the case of the minority rights clauses, this formula gives the impression that there is no proportionality constraint when a differential treatment aims at correcting factual inequalities. However, the equality jurisprudence of the ECtHR has clearly established that the proportionality requirement needs to be complied with at all times.¹⁰⁶ It was already indicated that the Court has developed heightened scrutiny for particular suspect grounds. The formula discussed here could be seen to demonstrate the willingness of the Court to adopt a relatively low level of scrutiny when the differential treatment aims to “correct factual inequalities”, notwithstanding

¹⁰³ Although the Court states in para. 46 that it does not need to decide whether the upholding of the contested constitutional provisions after ratification of the Convention could be said to serve a “legitimate aim”, four paragraphs later it does “agree with the Government that there is no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina” (para. 48).

¹⁰⁴ The analysis *infra* will show that the formula was slightly simpler in the *Belgian Linguistics Case*.

¹⁰⁵ *Case relating to certain aspects of the laws on the use of languages in education in Belgium*, ECtHR, 23.7.1968, para. 10; *Stec et al. v. UK*, ECtHR, 12.4.2006, para. 51; *Zeeman v. Austria*, ECtHR, 29.6.2006, para. 32; *Hobbs, Richard, Walsh and Geen v. UK*, ECtHR, 14.11.2006, para. 52; *Runkee and White v. UK*, ECtHR, 10.5.2007, para. 35; *D. H. and Others v. Czech Republic*, ECtHR, 13.11.2007, para. 175; *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, ECtHR, 31.7.2008, para. 96; *Andrejeva v. Latvia*, ECtHR, 18.2.2009, para. 28; *Munoz Diaz v. Spain*, ECtHR, 8.12.2009, para. 48; *Sejdic and Finci v. Bosnia and Herzegovina*, ECtHR, 22.12.2009, para. 44; *Orsus and Others v. Croatia*, ECtHR, 16.3.2010, para. 149.

¹⁰⁶ See the steady jurisprudence in this respect since the *Belgian Linguistics Case* of 23.7.1968. See also *P. van Dijk et al.* (eds.), *Theory and Practice of the European Convention on Human Rights* (chapter on Article 14, revised by A. W. Heringa/F. van Hoof), 2006, 1041 et seq.

the use of a suspect ground. In other words, in these “settings” the ECtHR appears amenable to the asymmetrical approach to the prohibition of discrimination. The combination with the identification of a state duty to correct such inequalities between groups further confirms this reading.

What can be deduced from the settings in which the Court (allegedly) used this formula, and thus the asymmetrical approach?¹⁰⁷

In the *Belgian Linguistics Case* the Court actually did not use the exact formula but stated that “the competent national authorities are frequently confronted with situations and problems, which, on account of differences inherent therein, call for different legal solutions, moreover, certain legal inequalities tend only to correct factual inequalities”.¹⁰⁸ This can be considered as a mere hint at the statement that formal inequalities that correct factual inequalities would not (necessarily) be prohibited by Art. 14.¹⁰⁹

Again in *Thlimmenos v. Greece* the exact wording of the formula is not to be found, but para. 44 is quoted in all subsequent instances where the formula does feature. In that paragraph the Court for the first time established that the prohibition of discrimination would also be violated when states, without an objective and reasonable justification, would fail to treat differently persons whose situations are significantly different. Arguably, this confirms that the identification of obligations to adopt special measures implies that these measures are not subject to heightened scrutiny. Put differently, the identification of duties of differential treatment signals the asymmetrical approach as much as the correcting factual inequalities formula.

It is rather striking that the oldest cases in this line of jurisprudence concern not only groups that can be qualified as minorities, but also identity related rights, namely language of instruction (*Belgian Linguistics Case*) and the manifestation of one’s religion (*Thlimmenos*). The *Thlimmenos* judgment is noteworthy also for its timing: it was pronounced only a few months prior to another landmark ruling by the Court, more particularly

¹⁰⁷ It should be acknowledged that sometimes the Court restates the “correcting factual inequalities” formula in an “empty” way, without actually making use of it in the application to the facts; or in an obscure way where it is not clear what the quote is intended to convey. Three judgments pertaining to minorities do contain the “correcting factual inequalities” formula but the cases concern instances of invidious discrimination against the minority group concerned. In each of these cases the Court adopts, justifiably, a rather searching scrutiny. See *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, ECtHR, 31.7.2008, para. 98; *Andrejeva v. Latvia*, ECtHR, 18.2.2009, paras. 87 et seq.; *Orsus v. Croatia*, ECtHR, 16.3.2010, paras. 156 et seq.

¹⁰⁸ *Belgian Linguistics Case*, ECtHR, 23.7.1968, para. 10.

¹⁰⁹ *Belgian Linguistics Case*, ECtHR, 23.7.1968, para. 10.

the Grand Chamber judgment in *Chapman v. UK*.¹¹⁰ In *Chapman* the Court for the first time established not only that article 8 ECHR enshrines a right to respect for the own way of life, but also that states have positive obligations to facilitate the gypsy way of life.¹¹¹ *Chapman* is widely recognized as an important (theoretical) shift in the jurisprudence of the Court towards the acceptance of (some level of) special measures for persons belonging to minorities.¹¹²

The following cases that contain the “correcting factual inequalities” formula pertain to differentiations on the basis of gender, mostly concerning differential pension ages and the availability of pensions for the surviving spouse.¹¹³ These differences benefited women and meant to compensate for the differences between men and women’s working lives. The first relevant judgment is by the Grand Chamber and evaluated differential rights to social security entitlements related to and because of differences in pensionable ages between men and women. The Court confirmed the relevance of the proportionality requirement also in relation to the formula.¹¹⁴ The Court started its identification of the margin of appreciation by indicating that “as a general rule, very weighty reasons would have to be put forward” to justify a differential treatment on the basis of gender.¹¹⁵ However it goes on to reduce the level of scrutiny (inter alia)¹¹⁶ because of the original aim to correct “factual inequalities” between men and women.¹¹⁷ In other words, the Court reduced the level of scrutiny because of the particular beneficial goal, and is thus (since 2000 at least) willing to adopt the asymmetrical approach to the prohibition of discrimination also in cases that do not turn on special minority rights. This willingness is equally visible in a long list of similar cases against the UK pertaining to pensions for the surviving spouse,

¹¹⁰ *Chapman v. UK*, ECtHR (Grand Chamber), 18.1.2001. See also the virtually identical judgments of the same date in *Beard v. UK*, *Coster v. UK*; *Lee v. UK*; *Jane Smith v. UK*.

¹¹¹ *Chapman v. UK*, ECtHR (Grand Chamber), 18.1.2001, para. 96.

¹¹² *M. A. Martin Estebanez*, Council of Europe Policies concerning the Protection of Linguistic Minorities and the Justiciability of Minority Rights, in: N. Ghanea/A. Xanthaki (eds.), *Minorities, Peoples and Self-Determination*, 2005, 280.

¹¹³ *Runkee and White v. the United Kingdom*, ECtHR, 10.5.2007 is followed by several repetitive cases concerning the same issue, and with the same holdings, hence all pronounced against the UK, including: *Arkwell*, 25.9.2007; *Geen*, 4.12.2007; *Cummins*, 1.4.2008; *Twizell*, 20.5.2008; *Wakeling*, 8.7.2008; *O’ Brien*, 17.7.2008; *Shireby*, 9.12.2008; *Turner*, 3.2.2009 and *Blackgrove*, 28.4.2009.

¹¹⁴ *Stec et al v. UK*, ECtHR (Grand Chamber), 12.4.2006, para. 51.

¹¹⁵ *Stec et al v. UK*, ECtHR (Grand Chamber), 12.4.2006, para. 52.

¹¹⁶ *Stec et al v. UK*, ECtHR (Grand Chamber), 12.4.2006, para. 53.

¹¹⁷ *Stec et al v. UK*, ECtHR (Grand Chamber), 12.4.2006, para. 54.

where the Court appeared swayed to conclude the absence of discrimination by the fact that the primary aim of the measures was beneficial.¹¹⁸

The underlying link between *Chapman*, *Thlimmenos* and “factual inequalities” reasoning was acknowledged in *Munos Dias* (8.12.2009), where the court links the “factual inequalities” formula not only to the *Thlimmenos* line (and the duties to adopt differential measures of persons that are situated differently) but also to the identification of (“*Chapman*”) duties to adopt differential measures so as to take into account the special needs arising from the separate identity of the (Roma) minority.¹¹⁹

Interestingly the Court here “uses” the “correcting factual inequalities” formula as an example of how the margin of appreciation can vary.¹²⁰ This confirms that when the aim of a differential treatment is correcting factual inequalities, the level of scrutiny would be reduced and rather low. This reading is confirmed by the subsequent paragraph which states “similarly, a wide margin [and thus a low level of scrutiny] is allowed ...”.¹²¹

Arguably the above analysis has revealed that since the *Chapman* judgment of January 2000 the Court has not only opened towards special minority rights and special state duties to protect and promote the minority way of life, but has also shown a willingness to adopt the asymmetrical approach to the prohibition of discrimination. This asymmetrical approach manifested itself first of all in relation to minorities and the special needs arising from their distinctive identity. Later this line of thinking was extended to the field of gender discrimination. More recently, in *Munoz Diaz* the Court (*de facto*) acknowledged that identifying duties to treat minorities with special care and consideration, implies that these special measures do not trigger heightened scrutiny, notwithstanding the implicated differentiations on a suspect ground. Finally, in the *Sejdic and Finci* judgment, the Grand Chamber further developed the minority protection rationale while adopting the asymmetrical approach (also) concerning power sharing arrangements aimed at the accommodation of population diversity more generally.

¹¹⁸ The Court also took into account that the measure pertained to general economic or social strategy as well as several other contextual factors: acknowledging on the one hand that there are indeed important developments concerning women’s working lives, and on the other that it is legitimate to reform slowly when equality is realized through leveling down instead of leveling up.

¹¹⁹ *Munos Dias*, ECtHR, 8.12.2009, para. 61.

¹²⁰ (note 119).

¹²¹ (note 119), para. 49.

4. The Practice of the UN Treaty Bodies

It is difficult if not impossible to establish a timeline and outspoken sequence for the UN treaty bodies between an opening towards special minority rights (pertaining to identity questions) on the one hand and the adoption of the asymmetrical approach on the other.

The supervisory practice of the Human Rights Committee and of the Committee on the Rights of the Child is obviously guided by the fact that both the ICCPR and the Convention on the Rights of the Child contain a provision with minority specific rights.¹²² The treaty bodies concerned have been confronted with this provision from the beginning, hence this cannot explain a particular shift towards the asymmetrical approach. Still, the fact that these bodies have been willing to concede the legality of positive action measures early on can be considered to confirm – to some extent – that when a supervisory body is familiar with the rationale behind special minority rights, they are willing to adopt the asymmetrical approach also more broadly: namely not only in a minority context, but for example also in cases on women and women's rights.

ICERD is generally perceived as of special importance for minorities, notwithstanding the fact that it does not mention the word minority once. It addresses questions of discrimination on the basis of racial and ethnic origin in respect of the enjoyment of all rights, hence also the more cultural ones of relevance to the right to identity of minorities. The practice of the CERD takes part in the “synergies in minority protection” that have been identified, and has increasingly attention for special needs of minorities arising from their distinctive ethnic identity.¹²³ In any event, the Convention text itself calls for the adoption of the asymmetrical approach. Indeed, ICERD is the only international instrument which obliges contracting states to adopt positive action measures “when the circumstances so warrant”.¹²⁴

In terms of the International Covenant on Economic, Social and Cultural Rights, the supervising Committee has recognized the special needs of minorities regarding effective equal access to employment, social services and education, in a way which has repercussions for their language and educa-

¹²² Article 27 ICCPR and Article 30 CRC. Article 27 ICCPR is even considered to be the most basic minority rights provision in international law.

¹²³ See the chapter (on ICERD) by *I. Garvalov*, *Synergies in Minority Protection*, in: K. Henrard/R. Dunbar (note 94), 247 et seq.

¹²⁴ Article 2(2) ICERD.

tional rights.¹²⁵ The Committee furthermore obliges states to take into account the distinctive identity of minorities and indigenous peoples and requires them to recognize indigenous peoples' rights to exercise traditional economic activities,¹²⁶ while underscoring the importance of recognizing land rights pertaining to the ancestral lands of indigenous peoples.¹²⁷

There is surely a progression noticeable in the extent to which this treaty body embraces special identity rights for minorities. Still, it is much more difficult and complex to tie this development to the adoption of the asymmetrical approach concerning discrimination. To some extent these two developments can be considered to go hand in hand, but this is less straight forward since both lines were already visible from the beginning and have only gradually become more pronounced.¹²⁸

The practice of the European Committee on Social Rights may often concern to persons belonging to minorities, and Roma and travellers more particular, there has not been a marked interest in identity questions in this regard. At most there is an awareness about the own way of life of Roma, which according to the Committee needs to be accommodated in relation to housing and access to other social services.¹²⁹ Notwithstanding the lack of pronounced readiness to engage with identity issues of minorities, the Committee has adopted a marked asymmetrical approach. This is visible in the numerous identifications of actual duties to adopt positive action.¹³⁰

The practice of the UN treaty bodies may not be seen to confirm the hypothesis investigated here, it does not negate it either. Similarly the practice of the European Committee on Social Rights does not negate the hypothe-

¹²⁵ International Convention on Economic, Social and Cultural Rights (CESCR) Committee, Concluding Observations on Latvia, E/C.12/LVA/CO/1(2008), paras. 12 and 38 (language requirements); CESCR Committee, General Comment no. 13 on the Right to Education, E/C.12/1999/10, para. 50 (mother tongue education); CESCR Committee, General Comment no. 14 on the Right to Health, paras. 12 and 27. See also *M. A. Martin Estebanez*, The United Nations International Convention on Economic, Social and Cultural Rights, in: K. Henrard/R. Dunbar (note 94), 213, at 233.

¹²⁶ CESCR Committee, Concluding Observations on Finland, E/C.12/FIN/CO/5 (2008) para. 11. See also *M. A. Martin Estebanez* (note 125), at 237 et seq.

¹²⁷ CESCR Committee, Concluding Observations on Finland 2008, para. 11; CESCR Committee, Concluding Observations on Paraguay, E/C.12/PRY/CO/3 (2008) para. 18 and 34; CESCR Committee, Concluding Observations on Bolivia, E/C.12/BOL/CO/2 (2008) para. 46.

¹²⁸ See also *W. Vandenhole* (note 4).

¹²⁹ European Committee on Social Rights, Complaint no. 27/2004, *ERRC v. Italy*, para. 21.

¹³⁰ See European Committee on Social Rights, Complaint no. 31/2005, *ERRC v. Bulgaria*, para. 41; European Committee on Social Rights, Complaint no. 46/2007, *ERRC v. Bulgaria*, paras. 49 et seq.

sis. Arguably, it merely shows that working with special minority rights is not the only trigger for the adoption of the asymmetrical approach. A proper negation of the hypothesis would require a supervisory body which embraces special minority rights but still adopts a symmetrical approach to positive action.

V. The ECJ: From Negation to Confirmation? About Shifting Relationships between Fundamental Freedoms and Human Rights

When considering older jurisprudence of the ECJ pertaining to minority protection standards of the national countries, it seems to negate the hypothesis investigated here. Indeed, insofar as the national minority protection measures entailed a restriction on one of the fundamental market freedoms amounting to a differentiation on the basis of nationality, the ECJ was not willing to adopt a lower level of scrutiny. In other words, the fact that the measure aimed at minority protection did not withhold the Court to adopt a strict scrutiny approach for the resulting differentiation on the basis of nationality. Several authors¹³¹ noted in this respect that EU law might hinder national minority protection policies because the fundamental market freedoms with their economic integration focus outweigh these national policies.¹³² In *Groener*,¹³³ the Court found itself indeed in the particularly thorny predicament that it needed to balance the market based free movement of community workers with a Member State's constitutional language policy.¹³⁴ The case concerned the requirement for all teachers to have some knowledge of the first national language. This obviously has a disproportional

¹³¹ According to *Dimitry Kochenov*, however, the ECJ has an active approach, viewing non discrimination as allowing for positive measures of minority protection: *D. Kochenov*, A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection, *B. C. Int'l & Comp. L. Rev.* 31 (2008) 1, 12. This may be true to the extent that the ECJ recognizes that the protection of a linguistic minority may be a legitimate aim of state policy, but is not true for the level of scrutiny adopted in the proportionality test.

¹³² See inter alia the references in the following footnotes to the articles from *Gabriel von Toggenburg*, *Francesco Palermo* and *Nich Shuibhne*.

¹³³ ECJ, C-379/87 *Anita Groener v. Minister for Education and the City of Dublin Vocational Education Committee*, [1989] ECR 3967.

¹³⁴ *N. N. Shuibhne*, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights*, KLI 2002, 80. She does argue that "although the Court clearly based its decision on the constitutional status of Irish, it did not declare that such recognition would always be necessary before Member State language policy could be justified" (note 134).

tionate impact on nationals of other member states who might be interested in working in Ireland, since they are not likely to have that competence. The interesting situation in Ireland is that the first national language is de facto a minority language and consequently the national measure could also be seen as a minority protection measure¹³⁵ and a particular type of positive action measure.

It needs to be acknowledged though that the ECJ did not so much focus on the minority protection aspect but rather on the particular exercise of a national competence.¹³⁶ Indeed, the Court acknowledged that language policy is primarily a matter of member state competence. Still, the supremacy of EU law does entail that national choices in the national competence domain should not encroach disproportionately on the fundamental market freedoms,¹³⁷ and their underlying prohibition of discrimination on the basis of nationality.¹³⁸ Notwithstanding the conclusion of the Court that in casu the linguistic requirement was legitimate, and did not fall foul of the prohibition of discrimination on the basis of nationality, it cannot be said that the Court conducted a particularly easy going level of scrutiny. Arguably the Court investigated meticulously whether the particular level of knowledge that was required was reasonable in these circumstances.¹³⁹ A contrario if the linguistic requirement would have been more demanding: it would have been found to violate the prohibition of discrimination on the basis of nationality. It is clear that the ECJ refused to “provide the area of national language policy with a general exemption from the process of European integration”.¹⁴⁰ Put differently, the fundamental market freedoms carry in any event greater weight and the ECJ was not willing to adopt a lower level of scrutiny pertaining to the prohibition of discrimination on the basis of na-

¹³⁵ *F. Palermo*, The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ, MJ (Antwerp) 8 (2001) 299, 306 et seq.

¹³⁶ Notwithstanding the fact that the ECJ took the particular linguistic situation of Ireland into account, and thus also the de facto minority status of the protected language, the judgment seems not to be really about the ECJ condoning the promotion of a minority language. See also *G. N. von Toggenburg*, The Protection of Minorities at EU-level: A Tightrope Walk between (Ethnic) Diversity and (Territorial) Integrity, in: E. Lantschner et al. (eds.), European Integration and Its Effects on Minority Protection in South Eastern Europe, 2008, 109 who questions whether the ECJ would be similarly protective languages that are non official language of the country.

¹³⁷ *F. Palermo* (note 135), 316.

¹³⁸ *F. Palermo* (note 135), 307. See also *N. N. Shuibhne* (note 134), 96 and 290.

¹³⁹ *N. N. Shuibhne* (note 134), 86.

¹⁴⁰ *G. N. von Toggenburg* (note 136), 108.

tionality when this differentiation is caused by a national minority protection measure.¹⁴¹

The preliminary ruling pertaining to the criminal proceedings against *Bickel and Franz*¹⁴² is in several respects relevant. Trento Adige is a region in Italy with a special linguistic regime, namely German is in addition to Italian an official language of the region.¹⁴³ Italian citizens resident in that region are entitled to use German in court. However, this right is not granted to other citizens. On the one hand the ECJ for the first time makes explicit that the protection of minorities may constitute a legitimate aim for states.¹⁴⁴ On the other hand, this does not stop the Court from scrutinizing rigorously the resulting interference with the fundamental market freedoms.¹⁴⁵ Indeed, the prohibition of discrimination on the basis of nationality requires that states extend the reach of the minority language rights to nationals of other member states.¹⁴⁶ Insofar as the extension of the minority measures would endanger the feasibility or functionality of the minority protection measure, the ECJ would seem to consider that as less important and thus less weighty than the respect for the fundamental market freedoms.¹⁴⁷

However, this jurisprudence of the ECJ actually reflects that at that time special minority rights were indeed not part of EU law. In other words, the ECJ was indeed not sympathetic towards special rights for persons belong-

¹⁴¹ See also *F. Palermo* (note 135), 307 and 316.

¹⁴² C-274/96 Criminal proceedings against *Bickel and Franz* [1998] ECR I-7637.

¹⁴³ The preliminary ruling in *Angonese v. Cassa di Risparmio di Bolzano SpA*, C-281/98, 6.6.2000 also concerned the Italian region of Trento Adige but did not concern a particular language right or a linguistic requirement as such, but rather the restricted possibility of proving one's language competence (required for a particular position). Hence it is not really relevant for the analysis here.

¹⁴⁴ *Bickel-Franz*, ECJ, C-274/96, para. 29. Judgment of the Court of 24.11.1998. Criminal Proceedings against *Horst Otto Bickel and Ulrich Franz*. Reference for a preliminary ruling: Pretura circondariale di Bolzano, sezione distaccata di Silandro – Italy. *Palermo* sees this as a very important development with lots of growth potential. *F. Palermo* (note 135), 308 and 317.

¹⁴⁵ See also *G. N. von Toggenburg* (note 140), 109.

¹⁴⁶ *F. Palermo* (note 135), 312.

¹⁴⁷ See also *G. N. von Toggenburg* (note 140), 111 who correctly notes that breaking the rules open towards EU citizens does matter for quantity sensitive rules (in view of the financial and political costs involved) and might not give protection anymore, e.g. when it concerns quota for minority group in local public administration. It should be acknowledged though that the ECJ actually requires the extension of the national minority protection measure to another type of minority, namely a group of new or immigrant minorities: the nationals of other member states more particularly.

ing to minorities as something that required protection within the EU.¹⁴⁸ Without denying the possibility of mainstreaming minority concerns internally, that is to take minority concerns into account in the exercise of EU competences, there is no explicit competence base on minority protection issues in EU law. It should be kept in mind that notwithstanding the steadily expansion of its competences, the EU is not yet an entity with full sovereignty. Since the residual competence resides with the member states, the EU only has those competences specifically assigned to it, and minority protection is not one of them.

While in principle the ECJ is less likely to adopt a high level of scrutiny to the extent that particular matters primarily fall within the competence of the member states, this is different when a very important Community interest, like the fundamental market freedoms, is adversely affected.¹⁴⁹ Hence, it is not surprising that within the EU legal order special rights for persons belonging to minorities did not trigger a lower scrutiny of state measures favouring minorities, when the measures concerned restricted one of the fundamental market freedoms.

More fundamentally, the particular specificity of the EU as an organization that was (and still is to a great extent) primarily concerned with economic integration should not be discounted.¹⁵⁰ Human rights may have obtained the status of general principle of EC law fairly early on, it was claimed that (initially at least) these rights were rather seen as instrumental to the central economic integration project.

It is not the intention to give an exhaustive overview of the jurisprudence of the ECJ pertaining to the interaction of fundamental human rights and fundamental market freedoms. However, it seems useful to point out that also here the impression used to be that the common market rational and thus the fundamental market freedoms reined supreme. In regard to the *ERT* line of jurisprudence the ECJ was often criticized for using fundamental human rights for the enhancement of market integration.¹⁵¹

¹⁴⁸ This stands in sharp contrast to the demands imposed on third states and candidate countries. The rather extensive literature about double standards concerning the EU and minority protection attests to that.

¹⁴⁹ *G. de Burca* (note 10), 112.

¹⁵⁰ *R. Niblett*, *The European Disunion: Competing Visions of Integration*, *Washington Quarterly* 20 (1997), 91, 96 et seq.; *B. de Witte*, *Politics versus Law in the EU's Approach to Ethnic Minorities*, in: J. Zielonka (ed.), *Europe Unbound. Enlarging and Reshaping the Boundaries of the EU*, 2002, 485.

¹⁵¹ For an extensive analysis, also pointing towards more beneficial readings of the ECJ's case law, more particularly in relation to *Grogan* (C-159/90) and *Carpenter* (C-60/00), see *T. Perisin*, *Interaction of Fundamental (Human) Rights and Fundamental (Market) Freedoms in the EU*, *Croatian Yearbook of European Law and Policy* 2 (2006), 69, 73 et seq.

The case law pertaining to minorities discussed above arguably reveals that fundamental market freedoms trumped national human rights measures, especially when they protected rights without EU equivalent.

Arguably, in the mean time human rights generally obtained an ever growing importance within EU and EU governance. These rights have come increasingly in their own right, in the sense of not being primarily instrumental to the economic integration process. The Treaty of Amsterdam did not only recognize that human rights are part of the principles upon which the Union is founded, it also drastically expanded the prohibited grounds of discrimination in a way which squarely added a social policy dimension.¹⁵² The adoption in 2000 of the EU Charter of fundamental rights marks another important step towards a stronger human rights dimension in EU law and policy,¹⁵³ which was further enhanced by the Commission's decision to systematically screen its legislative proposals for compatibility with the Charter.¹⁵⁴ The status of the Charter was significantly strengthened when it obtained binding legal force on a par with the treaties with the coming into force of the Lisbon treaty.

The more prominent status of human rights within the broader EU integration project is also visible in several landmark judgments of the ECJ.¹⁵⁵ In both *Omega*¹⁵⁶ and *Schmidberger*¹⁵⁷ the ECJ allowed national authorities to take measures in order to safeguard human rights (as conceived at national level) notwithstanding the restriction that entailed on fundamental market freedoms, and thus also with the underlying prohibition of discrimination on the basis of nationality. Both these cases are characterized by

¹⁵² *M. Bell* (note 28), 121.

¹⁵³ For an extensive analysis see *C. McCrudden/H. Kountouros* (note 1), 91 et seq.

¹⁵⁴ The compliance check started in March 2001 but was further strengthened in 2005: Communication from the commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals: Methodology for systematic and rigorous monitoring, COM(2005)172 final of 27.4.2005.

¹⁵⁵ That the exercise of fundamental rights may lead to legitimate restrictions on the fundamental freedoms of the EU was explicitly taken up and confirmed in the *Viking and Laval* Cases: *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line*, C-438/05, 11.12.2007; *Laval v. Svenska Byggnadsarbetareförbundet*, C-341/05, 18.12.2007. To some extent the ECJ gave a more restricted impact to the human rights concerned, in that it did not regard the exercise of the right to take collective action as a legitimate aim in itself: the latter depended also on the aim of the strike itself. See also *A. C. L. Davies*, One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ, ILJ 37 (2008), 126, 141.

¹⁵⁶ *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004], C-36/02, ECR I-9609.

¹⁵⁷ *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003], C-112/00, ECR I-5659.

a conflict between fundamental market freedoms on the one hand and the protection of fundamental rights on the other, where the protection of the latter was invoked by a member state to justify a restriction on the former. Strikingly, the ECJ recognized that the fundamental rights prevailed in the specific circumstances of the case.

In *Schmidberger* the ECJ had to evaluate Austria's allowance of a manifestation on the Brenner Pass by an environmental protection group which lasted for about 24 hours and de facto made transit (and movement of goods) impossible during that time frame. The government only relied on the need to protect fundamental rights in its defence to justify a restriction of one of the fundamental freedoms of the treaty. The Court accepted that the application of EU law may not illegitimately restrict fundamental rights. Considering that the fundamental rights concerned are not absolute and that restrictions on the fundamental freedoms are also not excluded,¹⁵⁸ it proceeds with a balancing act of all interests involved in a way which revealed a noticeable sensitivity towards the individual rights concerned.¹⁵⁹ It is generally accepted that the Court used a relatively low level of scrutiny for the underlying discrimination on the basis of nationality in the sense that it recognized a wide margin of appreciation of the member state.¹⁶⁰ Some even argued that the ECJ in *Schmidberger* decided on the hierarchy between the two categories of rights and gave primacy to the fundamental rights.¹⁶¹ Irrespective of any intended message about a general hierarchy between these categories of rights, the judgments show that the ECJ is open to weigh the respective interests/all relevant circumstances of the case in such a way that fundamental freedoms can potentially win.¹⁶²

Omega concerned a German prohibition of laser games, which was considered necessary to protect human dignity. The focus was not so much on whether human dignity would be protected as a human right in itself (which is not common among the member states). The Court accepted the invoca-

¹⁵⁸ See also in terms of conflicts of rights, *J. H. Gerards*, Fundamental Rights and Other Interests: Should It Really Make a Difference?, in: E. Brems (ed.), *Conflicts between Fundamental Human Rights*, 2008, 665, 667 et seq.

¹⁵⁹ See also *A. Bonelli*, Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights, *EHRLR* 1 (2004) 51, 59 et seq. See also *R. Lawson*, Over Laserguns, rode sterren en een ontluikende liefde tussen twee dames op leeftijd, *NJCM-Bull.* 31 (2006), 146 at 161 et seq.

¹⁶⁰ See also the case note by *A. Woltjer* in *EHRC* 2009/60.

¹⁶¹ *G. Gonzales*, EC Fundamental Freedoms v. Human Rights In the Case C-112/00 *Eugen Schmidberger v. Austria* [2003] *ECR I*- 5659, *LIEI* 31 (2004), 219, 223.

¹⁶² C-112/00, para. 90. See also *M. Humphreys*, Case Note: Free Movement and Road-blocks: The Right to Protest In the Single Market, *Environmental Law Review* 6 (2004), 190, 193; *T. Perisin* (note 151), 90 et seq.

tion of public policy¹⁶³ to justify the restriction of trade, recognizing a wide margin of appreciation for the member state, and hence adopting a low level of scrutiny.¹⁶⁴ This diverges from the usual position of the Court which tends to review restrictions to fundamental market freedoms strictly. In other words, the Court was once again willing to relax its level of scrutiny and reduce its strong protection of economic market freedoms (and the underlying prohibition of discrimination on the basis of nationality) in order to allow a member state to live up to its obligations in terms of human rights. This reduction in the standard of review arguably denotes a certain shift¹⁶⁵ away from a predominantly economic focus in EU law.¹⁶⁶

Arguably this implies that by 2003-2004 some inroads are being made in the outlook of the EU as predominantly economically oriented since the two cases can justifiably be seen as revealing that fundamental rights get an ever stronger status in EU law.¹⁶⁷ One can speculate about the impact of the coming into force of the EU Charter of fundamental rights in this respect, not in the least because the Charter is intended to make fundamental rights more visible within the EU.

The fact that now the rights of persons belonging to minorities are mentioned explicitly in primary law,¹⁶⁸ while “minorities” feature more prominently in internal policy documents, might also give concerns of member states to protect minorities within their territory more weight.¹⁶⁹ The apparent willingness of the Court to reduce the level of scrutiny concerning restrictions on the fundamental market freedoms, and the underlying prohibition of discrimination on the basis of nationality, when this restriction results from a measure protecting fundamental human rights, might similarly trigger the adoption of a more asymmetrical approach to the prohibi-

¹⁶³ See also *R. de Lange*, The European Public Order, Constitutional Principles and Fundamental Rights, *Erasmus Law Review* 1 (2007), 3, especially 6 et seq.

¹⁶⁴ *Omega Spielballen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* (note 156), paras. 31 and 37 et seq.

¹⁶⁵ In *Omega* the shift is rather remarkable considering the fact that there seems to be everything but a common European standard or even a common German standard about the dangers for human dignity of games like laser games: see also the case note by *J. H. Gerards* in EHRC 2007/46.

¹⁶⁶ See also *L. M. Broughton*, Subsidiarity and Proportionality in European Law, http://works.bepress.com/links_broughton/1 who underscores that “maintaining the internal market rules and regulations is the main purpose of the ECJ” (at 16).

¹⁶⁷ See also *T. Perisin* (note 151), 69, 95.

¹⁶⁸ Article 2 of the consolidated version of the Treaty on European Union.

¹⁶⁹ See also *L. Barnes*, Equality Law and Experimentation: The Positive Action Challenge, CLJ 68 (2009) 623, 645, who points out that the “EU policy discourse on equality has recently evidenced typical features of the management trend related to diversity”, while diversity was clearly intended to also encompass ethnic diversity.

tion of discrimination in relation to minority rights type positive action measures.

VI. Conclusion

A great discrepancy can be noted concerning the basic attitudes towards the evaluation and the ensuing legality of positive action measures between UN Treaty Bodies and other quasi judicial bodies on the one hand and prominent courts like the European Court of Justice, the European Court on Human Rights and the US Supreme Court on the other. While the UN Treaty Bodies are seen to embrace positive action, and to identify multiple positive obligations on states to adopt special measures for persons belonging to particular (disadvantaged) groups, these prominent courts tend to emanate a rather restrictive approach.¹⁷⁰

This different baseline is intrinsically related to the adoption of the symmetrical or the asymmetrical approach to the prohibition of discrimination. The UN Treaty Bodies and other quasi judicial bodies adopt the asymmetrical approach, following which the use of a suspect ground of differentiation, like ethnicity, does not necessarily trigger a heightened level of scrutiny. This improves the chances of concluding that positive action measures are legal. The courts under review here tend to adopt the symmetrical approach, in which case any use of a suspect ground, also in positive action measures, does trigger heightened scrutiny, thus reducing the chances that they will be considered legal.¹⁷¹

An apparent difference in approach to the legality of positive action between courts with the power to pronounce legally binding judgments on the one hand and quasi judicial bodies that can merely deliver authoritative views on the other begs the question, why that is. While it may be difficult if not impossible to give a comprehensive and conclusive answer, some of the relevant variables can be and have been identified.

Arguments have been put forward that the asymmetrical approach goes hand in hand with an acceptance of substantive equality as opposed to mere

¹⁷⁰ For an argument that the US Supreme Court is even stricter than the ECJ, and is less willing to adopt an asymmetrical approach to the prohibition of discrimination, see *Tb. Trelogan/S. Mazurana/P. Hodapp* (note 13), 39, 90et seq.

¹⁷¹ Throughout the article the definite article is used with symmetrical and asymmetrical approach, because of the linguistic confusion of the use of the indefinite article (a) in relation to these concepts.

formal equality and of a group approach as opposed to a pure individualistic approach to equal treatment.

However, the analysis of the relevant lines of jurisprudence has revealed that these two variables in themselves are not conclusive: the ECJ and the US Supreme Court seem to embrace both substantive equality and a group dimension to the equality principle but still do not adopt the asymmetrical approach to positive action.

Hence, it seems important to identify an additional variable that might explain the adoption of the asymmetrical approach by supervisory bodies. In view of the fact that both a group dimension and a substantive equality approach are essential for minority protection, the angle of minority protection and more particularly respect for special minority rights has potential as additional variable in this respect. This is not only confirmed by the formulation of the equality provision in minority specific instruments but also by the analysis of the jurisprudence of the European Court of Human Rights. The quasi jurisprudence of the UN Treaty Bodies might not provide an unequivocal confirmation of the hypothesis, it can be noted that an embrace of special minority rights is compatible with the asymmetrical approach to the prohibition of discrimination. The practice of the European Committee on Social Rights poses more of a challenge because special minority rights do not feature while the Committee clearly adopts the asymmetrical approach to the prohibition of discrimination. Still, this practice merely demonstrates that the minority rights factor may be a sufficient, but not a necessary condition for the adoption of the asymmetric approach.

Within EU law, the specificities of the organization with its limited and predominantly economic competences, explained the absence of EU standards on special minority rights. It was not surprising that national minority rights did not trigger a lower scrutiny when the measures concerned restricted one of the fundamental market freedoms (and the underlying prohibition of nationality discrimination). The above analysis revealed that in the mean time human rights have obtained a stronger place in EU law, even when they are in tension with the fundamental market freedoms and the underlying prohibition of discrimination on the basis of nationality.

In the end, the hypothesis investigated here, about the potential of a receptive attitude towards special minority rights as a variable that helps explain the adoption of the asymmetrical approach to the prohibition of discrimination by supervisory bodies, does not yield a conclusive answer. While the jurisprudence of the ECtHR indeed showed that an opening towards special minority rights went hand in hand with a willingness to adopt the asymmetrical approach to non-discrimination, the supervisory practice

of the UN Treaty Bodies and other quasi judicial bodies cannot be considered to fully confirm the hypothesis. Still, it does not negate it either, since that would require a supervisory body which embraces special minority rights, and still does not adopt the asymmetrical approach to non-discrimination. The practice of one of these bodies furthermore shows that a receptive attitude towards special minority rights is not the only trigger for the adoption of the asymmetrical approach towards non-discrimination.

In other words, further research is needed concerning the variables that help to explain why supervisory bodies adopt the asymmetrical approach to non-discrimination, and thus a positive baseline towards positive action measures. In relation to the EU further research is also needed regarding the “minority rights variable”. The first question is whether the growing minority parlance in EU policy documents and the inclusion of respect for these rights as one of the foundational values of the EU in primary law will lead to the emergence of special minority rights as part of EU law. If that is indeed the case, it merits investigation whether this works as a possible trigger of a more general asymmetric approach to the prohibition of discrimination.

In any event, there is a long way to go to unravel the intricacies of the baseline attitude of supervisory bodies towards positive action measures, including the exact impact of the “minority rights variable” in this respect.