

The European Convention on Human Rights and the Additional Protocol no 12

Introduction.

Inequality is universally recognised to be a problem of modern society. The principle of equality values each person as an individual who is free and equal in dignity and rights. The need for this principle to be effective at every level is real and urgent, but not always fully understood in Government.

Shortcomings of the European Convention on Human Rights

In looking at the new discrimination protocol to the European Convention on Human Rights (ECHR) it is important to understand the limitations of the existing equality provision in Article 14. This provides that:-

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This is the only Article in the ECHR that explicitly prohibits discrimination, although other Articles of the ECHR may have an impact on discriminatory situations. It is widely recognised to be inadequate because it only gives protection from discrimination in relation to the enjoyment of the other rights in the Convention and is not a 'free-standing' equality right. This right can only be used in combination with one of the other convention rights.

The European Court of Human Rights has tried to ameliorate the harshness of this article by ruling that a breach of article 14 can be considered by the Court if, when there is not a breach of another article, it can be shown that the area of another article is 'engaged'. Hence, in *Abdulaziz, Cabales and Balkandali v UK*¹ the European Court of Human Rights (ECtHR) ruled that in order to rely on article 14 it was not necessary to show that there had been a breach of another article as well as article 14, it merely had to be shown that the action in question fell within the scope of another article.

According to the Court's established case-law, Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions- and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter.

So that, in this case, three women of a third country nationality challenged the refusal of the UK government to grant residence rights to their husbands. Under the UK immigration law at the time a man with permission to remain in the country could bring his wife into the country but a woman in a comparable position could not necessarily bring in her husband. The ECtHR concluded that there had not been a breach of Article 8 (the right to family life), however, the facts fell within the ambit of Article 8 and the UK government had discriminated in the application of these rights so it was in breach of article 14 taken together with Article 8.

¹ [1985] 7 EHRR 471.

Often once the Court has found a breach of a substantive Article it has chosen not to determine whether there has been a breach of Article 14². In the case of *Dudgeon v UK*³ the ECtHR considered whether there had been a violation of Article 8 taken together with Article 14 in respect of the legislation in relation to homosexual behaviour as well as the different ages of consent for heterosexual and homosexual behaviour in Northern Ireland. The ECtHR concluded that they did not need to consider whether there had been a breach of Article 14 saying:

Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case.

This has even been so when the complaint itself concerned the appropriate treatment for a discrimination claim.⁴ As a result the European Court of Human Rights has barely developed this area of its jurisdiction.

The need for change was recognised by the European Court of Human Rights itself when it said in its Opinion:

*certain forms of discrimination cannot be brought within the ambit of Article 14....Protocol 12 provides a clear legal basis for examining discrimination issues not covered by Article 14.*⁵

So the Council of Europe's decision to propose its replacement by an independent equality right was extremely welcome.

Historical background

The various organs of the Council of Europe examined and discussed ways of providing a further guarantee of equality and non-discrimination through an additional protocol since the 1960s. This problem came to a head in 1990, at the 7th International Colloquy on the European Convention on Human Rights. It was recognised firstly that the principles of equality and non-discrimination are fundamental elements of international human rights law and, secondly, that case law under Article 14 could not give comprehensive effect to these principles. As a result the examination of how to strengthen the ECHR's equality guarantees was commenced.

Subsequently the European Commission against Racism (ECRI)⁶ and the Steering Committee for Equality between Women and Men (CDEG)⁷ both made proposals for free standing equality rights in their respective areas. As a result of this in 1994 the Steering Committee for Human Rights of the Council of Europe (CDDH) was asked by the Committee of Ministers to consider the necessity and feasibility of the inclusion of a fundamental right of equality between women and men. In 1996 the Council of Ministers then asked the CDDH to consider a provision against racism and intolerance. The CDDH recommended an

² E.g. *Smith and Grady v United Kingdom* [1999] IRLR 734.

³ (1981) 4 EHRR 149.

⁴ *John Tinnelly & Sons & ors v United Kingdom*, Case no 62/1997/846/1052-53 [1998] EHRLR 758.

⁵ Council of Europe, Steering Committee for Human Rights (CDDH), Strasbourg, 1 February 2000, cddh\2000\48.

⁶ The Council of Europe's principle body responsible for combatting racism.

⁷ Intergovernmental Committee responsible for equality issues between men and women within the Council of Europe.

additional protocol to the ECHR. In 1998 the Committee of Ministers asked the CDDH to draft an additional protocol broadening the field of application of article 14.

It is in this context that a new additional Protocol no12 was developed by the Council of Europe to strengthen the content of the non-discrimination provisions of the ECHR. It was opened for signature on November 4th 2000 since then 35 Member States have signed it and 11 have ratified it (as of February 2006). It came into effect in those countries which had signed and ratified it three months after 10 ratifications were received, this occurred on April 1st 2005.⁸ It is currently unsigned by Andorra, Bulgaria, Danmark, France, Lithuania, Malta, Monaco, Poland, Sweden, Switzerland and the UK.

The text of Protocol 12 reads as follows :-

Protocol no 12.

The new Protocol states :-

Preamble : *'Having regard to the fundamental principle of equality before the law and equal protection of the law;*

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the protection of Human Rights and Fundamental freedoms signed at Rome on 4 November 1950;

Reaffirming that the principle of non discrimination does not prevent States Parties from taking measures in order to promote full and effective equality,

Article 1 :

1. *The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
2. *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'*⁹

Effect of protocol no 12

Preamble

The preamble to the protocol is intended to aid interpretation of the protocol. It was inserted by way of a compromise between those member states who wanted an express provision of equality before the law and equal protection of the law as a part of the new protocol and those who did not.

The Explanatory Report¹⁰ to the Protocol notes that the principles of non-discrimination and equality are closely intertwined and that the principle of equality requires that equal situations

⁸ For current table of signatures and ratifications see

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=19/02/2006&CL=ENG>

⁹ Articles 2-6 deal with the protocol's territorial application, relationship to the convention, signature and ratification, entry into force and depository functions. It is available at

¹⁰ This has been prepared with the Protocol and is an aid to its intended interpretation, I have attached it as an appendix to this paper, it is available at <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>.

are treated equally and unequal situations differently. This is now a widely recognised principle in European Community equality law and implicitly includes the concept of both direct and indirect discrimination¹¹.

The preamble also makes clear that the non-discrimination provision does not prevent Member States from taking affirmative action in order to promote equality providing that there is an objective and reasonable justification for such measures.

Article 1

There is no definition of discrimination within the Article, however, the basic concept of discrimination in this Article is meant to be interpreted in the same way as the concept of discrimination in Article 14. Article 14 covers both direct and indirect discrimination.¹² No intention to discriminate has to be shown, it is enough that the purpose or effect of the action in question is discriminatory. A difference in treatment is not discriminatory if there is an objective and reasonable justification for it. An objective justification will be established if the differential treatment pursues a legitimate aim, and if there is a reasonable relation of proportionality between the means employed and the aim sought to be realised.¹³ However, the Court does adopt a stricter scrutiny in respect of some grounds, such as race¹⁴. Additionally, as a matter of public international law, member states have a margin of appreciation.¹⁵

The extension of the concept of justification to direct discrimination is an issue that has concerned discrimination lawyers, this is perhaps balanced by the broadening of the classes for which there is protection, it also opens the door to permitting positive action measures where there is sufficient justification.

'Rights set forth by law'

The protected rights will be all those rights protected by the law. This will include rights under statute law and common law rules¹⁶, rights inferred from a clear obligation of a public authority under national law, rights resulting from the exercise of discretionary power by a public authority and rights resulting from any other act or omission of a public authority. The Explanatory Report also notes that the word law may also cover international law although this does not mean that the ECtHR would have jurisdiction to decide on compliance with other international conventions.¹⁷ It seems likely that for countries with a dualist view of their international law obligations (such as the UK) this would not mean that international human rights obligations would be directly enforceable in their courts were this Protocol to be ratified and incorporated as part of their domestic legislation.¹⁸

¹¹ See *Kingdom of Spain v Council of the European Communities* Case 203/86 [1988] ECR 4563, *Gillespie and others v Northern Health and Social Services Board* [1996] IRLR 214 and *Secretary of State for Trade and Industry v Cook* [1997] IRLR 150.

¹² See *Thlimmenos v Greece* (appln no 34369/97)

¹³ *Belgian Linguistics Case (no 2)* (1968) 1 EHRR 252.

¹⁴ See, for example, *Gaygusuz v Austria* [1996] 23 EHRR 364 where the Court held 'very weighty reasons would have to be put forward before [it] could regard a difference of treatment based exclusively on nationality as compatible with the convention' at p 381.

¹⁵ Paragraph 19 of the Explanatory Report to the Protocol no 12.

¹⁶ *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

¹⁷ Explanatory Report, Paragraph 29.

¹⁸ I am indebted to Professor Anthony Bradley for his opinion for JUSTICE on this topic.

Scope of protection

The scope of the protection is more problematic. The CDDH say that they have sought to achieve a 'balanced approach' to possible positive obligations but that the prime objective of article 1 is the obligation not to discriminate. It is clear that it is intended to be effective against the state and to impose duties on the courts in the application of the law. The duty imposed is that these rights 'shall be secured' without discrimination. This necessarily implies an active participation in the operation of these rights. The Explanatory Report says:

The article does not intend to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons.....any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law for which the State has a certain responsibility (e.g. arbitrary denial of access to restaurants or other services available to the public, employment contracts, etc.). It is understood that purely private matters would not be affected. Regulation of such matters would also be likely to interfere with everyone's right to respect for his private and family life...¹⁹

The key question is the extent to which this principle must extend to relations between individuals. It is clear that the CDDH intended the new Protocol to define the limits of all relations between individuals and the State but there can be no doubt that the generality of article 1 indicates that relations between individuals must also be covered. The difference must be found in the extent to which such relations are the proper object of legal consideration. Many such relations are non-justiciable. These are not within the scope of the Protocol. In other relations rights may conflict and permit limited justification.

Grounds

The range of protected classes is identical to that in article 14, explicitly including sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, or birth. However, with the inclusion of 'any other status' it is open-ended and hence will provide protection in a wide range of situations. This phrase 'any other status' clearly replicates Article 14 and must be taken to include sexual orientation²⁰, disability, age²¹, birth inside or outside marriage²², marital status²³, trade union status²⁴ and poverty. The CDDH chose not to include all these grounds specifically but to adopt a non-exhaustive list in order not to be exclusive and to permit expansion to reflect changing needs.²⁵ They said that to add further grounds:

was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included.²⁶

¹⁹ Explanatory Report, Paragraphs 25 & 28.

²⁰ *Sutherland v United Kingdom* [1998] EHRLR 117.

²¹ *Nelson v United Kingdom* no 11077/84, 49 DR 170.

²² *Inze v Austria* A 126 (1988) 10 EHRR 394 and *Marckx v Belgium* A31 (1979) 2 EHRR 330.

²³ *Rasmussen v Danmark* A 87 (1985) 7 EHRR 352.

²⁴ *National Union of Belgium Police v Belgium* A 19 (1975) 1 EHRR 578.

²⁵ Explanatory Report, paragraph 20.

²⁶ *Ibid*, Paragraph 20.

However, in seeking to avoid negative inferences about grounds that are not explicitly included they have been criticised for creating a de facto hierarchy between listed and unlisted grounds.²⁷

Public authorities.

These are to be interpreted in the same way as elsewhere in the Convention and will include not only administrative authorities but also courts and legislative bodies. The provision for public authorities is intended to be complementary to the rights set out in paragraph 1.

How has the UK Government responded to Protocol 12?

The UK Government says that it agrees in principle that the ECHR should contain a provision against discrimination that is free-standing and not parasitic on the other Convention rights. However, they feel unable, at the moment, to accept the final text of the protocol. They set out their position in appendix 6 of their Report on the outcome of an Inter-Departmental Review conducted by the Department of Constitutional Affairs:

The Government has reviewed its position but, in the absence of any caselaw from the European Court of Human Rights, considers that there remain unacceptable uncertainties regarding the impact of Protocol 12 if it were incorporated into UK law:

- *The drafting of the Protocol is very wide, covering any difference in treatment. It would apply to everything done by a public authority, and its application to 'rights set forth by law' would cover many, perhaps almost all, provisions in statute or common law. This could lead to an explosion of litigation as people sought to clarify the extent of the new law.*
- *Moreover, the coverage of 'rights set forth by law' as cited in the Protocol may have the unintended effect of including other international instruments to which the UK is a party.*
- *Finally, until the European Court of Human Rights addresses the new Protocol, there cannot be complete certainty that it permits a defence of objective and reasonable justification on the same basis as under Article 14 ECHR.²⁸*

To deal with these objections in turn, the first relates to the wide drafting of the Protocol. The counter argument is that open-ended grounds for discrimination enable the Courts to accommodate the changing needs of society and no unjustified discrimination should be permitted to continue. Under the ECHR all discrimination whether direct or indirect can be justified. It is worth noting that as these grounds already replicate the existing grounds of article 14 such open-ended grounds are already incorporated into our law as part of the Human Rights Act 1998.

The wording of the Protocol does not make it clear whether 'rights set forth by law' includes international law as well as domestic law. The Government is particularly concerned that provisions in international Treaties such as the International Covenant on Economic, Social and Cultural Rights, which were not considered appropriate to incorporate into UK law, will be covered by the Protocol. As the Protocol would not create independent rights to substantive benefits it is only when the Government chooses to provide benefits, whether under national or international law, that they are placed under an obligation not to discriminate. This clearly does not allow for the incorporation of entire international Treaties.

²⁷ U O'Hare, *Enhancing European Equality Rights: a new regional framework*, (2001) 8 Maastricht Journal of European and Comparative Law, 133.

²⁸ International Human Rights Instruments: the UK's position, *Report on the outcome of an Inter-Departmental Review conducted by the Department of Constitutional Affairs*, 2004, Appendix 6, page 41.

They are concerned that the Protocol does not make specific provision for 'objective and reasonably justified distinctions' to be permitted, this concern arises from the fact that the Court is not bound by previous judgements and its interpretations of the Convention do evolve, so the concept of 'discrimination' under the Convention may change and the provisions on justification may be removed. However, the provisions enabling discrimination to be justified if there are 'objective and reasonable' grounds for the differential treatment are well established under the ECHR. It is extremely unlikely that the Court will abandon this principle.

Conclusions.

This Protocol brings the prospect of a real and substantial right to equality within the framework of the European Convention on Human Rights and is thus very welcome. It should enable the ECtHR to move away from its cautious and unsatisfactory approach to the interpretation of the current Article 14 towards an opportunity to grapple with the real issues of equality and unequal treatment. It is only when each of the different communities within any state are valued and given full equality both under and before the law that society will be cohesive and able to build upon the talents of all its parts.

Gay Moon.
April 2006.



PROTOCOL NO. 12 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

[\(ETS No. 177\)](#)

[Français](#)

Explanatory Report

I. The Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up within the Council of Europe by the Steering Committee for Human Rights (CDDH). It was opened to signature by the member States of the Council of Europe on 4 November 2000.

II. The text of the explanatory report prepared by the CDDH and adopted by the Committee of Ministers of the Council of Europe on 26 June 2000 does not constitute an instrument providing an authoritative interpretation of the text of the Protocol although it may facilitate the understanding of the Protocol's provisions.

Introduction

1. Article 1 of the Universal Declaration of Human Rights proclaims: "All human beings are born free and equal in dignity and rights". The general principle of equality and non-discrimination is a fundamental element of international human rights law. It has been recognised as such in Article 7 of the Universal Declaration of Human Rights, Article 26 of the International Covenant on Civil and Political Rights and in similar provisions in other international human rights instruments. The relevant provision in the European Convention on Human Rights (ECHR) in this respect is Article 14. However, the protection provided by Article 14 of the Convention with regard to equality and non-discrimination is limited in comparison with those provisions of other international instruments. The principal reason for this is the fact that Article 14, unlike those provisions in other instruments, does not contain an independent prohibition of discrimination, that is, it prohibits discrimination only with regard to the "enjoyment of the rights and freedoms" set forth in the Convention. Since 1950, certain specific further guarantees concerning only equality between spouses have been laid down in Article 5 of Protocol No. 7 to the ECHR.

2. Various ways of providing further guarantees in the field of equality and non-discrimination through a protocol to the Convention have been proposed or studied from the 1960s onwards by both the Parliamentary Assembly and the competent intergovernmental committees of experts of the Council of Europe. An important fresh impetus was given by work carried out in recent years in the

field of equality between women and men and that of combating racism and intolerance. The European Commission against Racism and Intolerance (ECRI), the Steering Committee for Equality between Women and Men (CDEG) and the Steering Committee for Human Rights (CDDH), have actively considered a possible reinforcement of ECHR guarantees in these two areas.

3. Participants at the 7th International Colloquy on the European Convention on Human Rights (Copenhagen, Oslo and Lund, from 30 May to 2 June 1990) affirmed that the principles of equality and non-discrimination are fundamental elements of international human rights law. With regard to the possibility of broadening, through the development of the Strasbourg case-law, the protection offered by Article 14 of the Convention beyond the above-mentioned limit (see paragraph 1 above), participants recognised that there was little scope for further expansion of the case-law on this score since the prohibition in Article 14 is clearly accessory to the other, substantive guarantees in the Convention.

4. Since 1990, the examination of a possible strengthening of the Convention's guarantees with regard to equality and non-discrimination was initially pursued separately, and from specific standpoints, by the Steering Committee for Equality between Women and Men and the European Commission against Racism and Intolerance.

5. In the course of its work, the CDEG underlined the fact that there is no legal protection for equality between women and men as an independent fundamental right in the context of the binding instruments of the Council of Europe. Considering that a legal norm to that effect is one of the prerequisites for achieving de jure and de facto equality, the CDEG focused the major part of its activities on the inclusion in the European Convention on Human Rights of a fundamental right of women and men to equality. The work of the CDEG resulted in a reasoned proposal to include such a right in a protocol to the ECHR. In 1994, the Committee of Ministers instructed the Steering Committee for Human Rights to consider the necessity for and the feasibility of such a measure, taking into consideration, inter alia, the report submitted by the CDEG. On the basis of the work of its Committee of Experts for the Development of Human Rights (DH-DEV), the CDDH agreed in October 1996 that there was a need for standard-setting work by the Council of Europe in the field of equality between women and men but expressed reservations, from the point of view of the principle of universality of human rights, about a draft protocol based on a sectoral approach. Further to a request made by the CDDH, the Committee of Ministers subsequently (in December 1996) instructed the CDDH to examine, and submit proposals for, standard-setting solutions regarding equality between women and men other than a specific draft protocol to the ECHR.

6. In the meantime, work in the Council of Europe on the problem of racism and intolerance had intensified as a direct result of the 1st Summit of Heads of State and Government of its member States, held in Vienna on 8 and 9 October 1993. The Declaration and Plan of Action on combating racism, xenophobia, anti-Semitism and intolerance adopted at this meeting expressed alarm over the resurgence of these phenomena as well as the development of a climate of intolerance. As part of a global approach for tackling these problems set out in the Plan of Action, the heads of state and government agreed to establish the European Commission against Racism and Intolerance and gave it, among other things, the task of working on the strengthening of the guarantees against all forms of discrimination and, in that context, studying the applicable international legal instruments with a view to their reinforcement where appropriate.

7. Having studied all existing international human rights instruments which deal with discrimination issues, ECRI submitted its findings to the Committee of

Ministers. ECRI considered that the protection offered by the ECHR from racial discrimination should be strengthened by means of an additional protocol containing a general clause against discrimination on the grounds of race, colour, language, religion or national or ethnic origin. In proposing a new protocol, ECRI recognised that the law alone cannot eliminate racism in its many forms vis-à-vis various groups, but it stressed also that efforts to promote racial justice cannot succeed without the law. ECRI was convinced that the establishment of a right to protection from racial discrimination as a fundamental human right would be a significant step towards combating the manifest violations of human rights which result from racism and xenophobia. It emphasised that discriminatory attitudes and racist violence are currently spreading in many European countries and observed that the resurgence of racist ideologies and religious intolerance is adding to daily tension in our societies an attempt to legitimise discrimination.

8. In the light of ECRI's proposal, the Committee of Ministers decided in April 1996 to instruct the Steering Committee for Human Rights to examine the advisability and feasibility of a legal instrument against racism and intolerance taking account of ECRI's reasoned report on the reinforcement of the non-discrimination clause of the ECHR.

9. On the basis of preparatory work done by the DH-DEV, which included the identification of arguments for and against possible standard-setting solutions (namely, an additional protocol based on ECRI's proposal; an additional protocol broadening, in a general fashion, the field of application of Article 14; a framework convention or other convention; or a recommendation of the Committee of Ministers), the CDDH adopted, in October 1997, a report for the attention of the Committee of Ministers concerning both the question of equality between women and men and that of racism and intolerance. The CDDH was of the opinion that an additional protocol to the ECHR was advisable and feasible, both as a standard-setting solution regarding equality between women and men and as a legal instrument against racism and intolerance.

10. It was on the basis of this report that, at the 622nd meeting of the Ministers' Deputies (10-11 March 1998), the Committee of Ministers gave the CDDH terms of reference to draft an additional protocol to the European Convention on Human Rights broadening in a general fashion the field of application of Article 14, and containing a non-exhaustive list of discrimination grounds.

11. The CDDH and its committee of experts, the DH-DEV, elaborated the draft protocol and an explanatory report in 1998 and 1999. As had been the case during previous stages of this activity, the CDEG and ECRI were associated with this work through their representatives. During this period, further support for the rapid conclusion of the elaboration of the draft protocol was expressed by the participants at the European regional colloquy "In Our Hands – The Effectiveness of Human Rights Protection 50 Years after the Universal Declaration" (Strasbourg, 2-4 September 1998), organised by the Council of Europe as a contribution to the commemoration of the 50th anniversary of the Universal Declaration of Human Rights, and in the political declaration adopted by the Committee of Ministers on 10 December 1998 on the occasion of the same anniversary.

12. The CDDH, after having consulted the European Court of Human Rights and the Parliamentary Assembly, finalised the text of the draft protocol at an extraordinary meeting held on 9 and 10 March 2000 and decided to transmit it, together with the draft explanatory report, to the Committee of Ministers.

13. The Committee of Ministers adopted the text of the Protocol on 26 June 2000 at the 715th meeting of the Ministers' Deputies and opened it for signature by member states of the Council of Europe on 4 November 2000.

Commentary on the provisions of the Protocol

Preamble

14. The brief Preamble refers, in the first recital, to the principle of equality before the law and equal protection of the law. This is a fundamental and well-established general principle, and an essential element of the protection of human rights, which has been recognised in constitutions of member states and in international human rights law (see also paragraph 1 above).

15. While the equality principle does not appear explicitly in the text of either Article 14 of the Convention or Article 1 of this Protocol, it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists (see paragraph 18 below). The Court, in its case-law under Article 14, has already made reference to the "principle of equality of treatment" (see, for example, the Court's judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A, No. 6, paragraph 10) or to "equality of the sexes" (see, for example, the judgment of 28 May 1985 in the case of Abdulaziz, Cabales and Balkandali v. the United Kingdom, Series A, No. 94, paragraph 78).

16. The third recital of the preamble refers to measures taken in order to promote full and effective equality and reaffirms that such measures shall not be prohibited by the principle of non-discrimination, provided that there is an objective and reasonable justification for them (this principle already appears in certain existing international provisions: see, for example, Article 1, paragraph 4, of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women and, at the regional level, Article 4, paragraph 3, of the Framework Convention for the Protection of National Minorities). The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected. Indeed, there are several international instruments obliging or encouraging states to adopt positive measures (see, for example, Article 2, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4, paragraph 2, of the Framework Convention for the Protection of National Minorities and Recommendation No. R (85) 2 of the Committee of Ministers to member states on legal protection against sex discrimination). However, the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable.

Article 1 – General prohibition of discrimination

17. This article contains the main substantive provisions of the Protocol. Its wording is based on the following general considerations.

18. The notion of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 of the Convention. In particular, this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example, in the judgment in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*: "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'" (judgment of 28 May 1985, Series A, No. 94, paragraph 72). The meaning of the term "discrimination" in Article 1 is intended to be identical to that in Article 14 of the Convention. The wording of the French text of Article 1 ("sans discrimination aucune") differs slightly from that of Article 14 ("sans distinction aucune"). No difference of meaning is intended; on the contrary, this is a terminological adaptation intended to reflect better the concept of discrimination within the meaning of Article 14 by bringing the French text into line with the English (see, on this precise point, the Court's judgment of 23 July 1968 in the "Belgian Linguistic" case, Series A, No. 6, paragraph 10).

19. Since not every distinction or difference of treatment amounts to discrimination, and because of the general character of the principle of non-discrimination, it was not considered necessary or appropriate to include a restriction clause in the present Protocol. For example, the law of most if not all member states of the Council of Europe provides for certain distinctions based on nationality concerning certain rights or entitlements to benefits. The situations where such distinctions are acceptable are sufficiently safeguarded by the very meaning of the notion "discrimination" as described in paragraph 18 above, since distinctions for which an objective and reasonable justification exists do not constitute discrimination. In addition, it should be recalled that under the case-law of the European Court of Human Rights a certain margin of appreciation is allowed to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background (see, for example, the judgment of 28 November 1984 in the case of *Rasmussen v. Denmark*, Series A, No. 87, paragraph 40). For example, the Court has allowed a wide margin of appreciation as regards the framing and implementation of policies in the area of taxation (see, for example, the judgment of 3 October 1997 in the case of *National and Provincial Building Society and Others v. the United Kingdom*, Reports of Judgments and Decisions 1997-VII, paragraph 80).

20. The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in the case of *Salgueiro da Silva Mouta v. Portugal*).

21. Article 1 provides a general non-discrimination clause and thereby affords a scope of protection which extends beyond the "enjoyment of the rights and freedoms set forth in [the] Convention".

22. In particular, the additional scope of protection under Article 1 concerns cases where a person is discriminated against:

- i. in the enjoyment of any right specifically granted to an individual under national law;
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

23. In this respect, it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1. It should also be borne in mind that the distinctions between the respective categories i-iv are not clear-cut and that domestic legal systems may have different approaches as to which case comes under which category.

24. The wording of Article 1 reflects a balanced approach to possible positive obligations of the Parties under this provision. This concerns the question to what extent Article 1 obliges the Parties to take measures to prevent discrimination, even where discrimination occurs in relations between private persons (so-called "indirect horizontal effects"). The same question arises as regards measures to remedy instances of discrimination. While such positive obligations cannot be excluded altogether, the prime objective of Article 1 is to embody a negative obligation for the Parties: the obligation not to discriminate against individuals.

25. On the one hand, Article 1 protects against discrimination by public authorities. The Article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons. An additional protocol to the Convention, which typically contains justiciable individual rights formulated in concise provisions, would not be a suitable instrument for defining the various elements of such a wide-ranging obligation of a programmatic character. Detailed and tailor-made rules have already been laid down in separate conventions exclusively devoted to the elimination of discrimination on the specific grounds covered by them (see, for example, the Convention on Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, which were both elaborated within the United Nations). It is clear that the present Protocol may not be construed as limiting or derogating from domestic or treaty provisions which provide further protection from discrimination (see the comment on Article 3 in paragraph 32 below).

26. On the other hand, it cannot be totally excluded that the duty to "secure" under the first paragraph of Article 1 might entail positive obligations. For example, this question could arise if there is a clear lacuna in domestic law

protection from discrimination. Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could come into play (see, *mutatis mutandis*, the judgment of the Court of 26 March 1985 in the case of X and Y v. the Netherlands, Series A, No 91, paragraphs 23-24, 27 and 30).

27. Nonetheless, the extent of any positive obligations flowing from Article 1 is likely to be limited. It should be borne in mind that the first paragraph is circumscribed by the reference to the "enjoyment of any right set forth by law" and that the second paragraph prohibits discrimination "by any public authority". It should be noted that, in addition, Article 1 of the Convention sets a general limit on state responsibility which is particularly relevant in cases of discrimination between private persons.

28. These considerations indicate that any positive obligation in the area of relations between private persons would concern, at the most, relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc). The precise form of the response which the state should take will vary according to the circumstances. It is understood that purely private matters would not be affected. Regulation of such matters would also be likely to interfere with the individual's right to respect for his private and family life, his home and his correspondence, as guaranteed by Article 8 of the Convention.

29. The first paragraph of Article 1 refers to "any right set forth by law". This expression seeks to define the scope of the guarantee provided for in this paragraph and to limit its possible indirect horizontal effects (see paragraph 27 above). Since there may be some doubt as to whether this sentence on its own covers all four elements which constitute the basic additional scope of the Protocol (the question could arise in particular with respect to elements iii and iv – see paragraph 22 above), it should be recalled that the first and second paragraphs of Article 1 are complementary. The result is that those four elements are at all events covered by Article 1 as a whole (see paragraph 23 above). The word "law" may also cover international law, but this does not mean that this provision entails jurisdiction for the European Court of Human Rights to examine compliance with rules of law in other international instruments.

30. The term "public authority" in paragraph 2 has been borrowed from Article 8, paragraph 2, and Article 10, paragraph 1, of the Convention and is intended to have the same meaning as in those provisions. It covers not only administrative authorities but also the courts and legislative bodies (see paragraph 23 above).

Article 2 – Territorial application

31. This is the territorial application clause contained in the Model Final Clauses adopted by the Committee of Ministers in February 1980. Paragraph 5 follows closely Article 56, paragraph 4 of the Convention.

Article 3 – Relationship to the Convention

32. The purpose of this article is to clarify the relationship of this Protocol to the Convention by indicating that all the provisions of the latter shall apply in respect of Articles 1 and 2 of the Protocol. Among those provisions, attention is drawn in particular to Article 53, under the terms of which "Nothing in this Convention shall be construed as limiting or derogating from any of the human

rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party". It is clear that this article will apply in the relations between the present Protocol and the Convention itself. It was decided not to include a reference to Article 16 of the Convention in this Protocol.

33. As has already been mentioned in paragraph 21 above, Article 1 of the Protocol encompasses, but is wider in scope than the protection offered by Article 14 of the Convention. As an additional Protocol, it does not amend or abrogate Article 14 of the Convention, which will therefore continue to apply, also in respect of States Parties to the Protocol. There is thus an overlap between the two provisions. In accordance with Article 32 of the Convention, any further questions of interpretation concerning the precise relationship between these provisions fall within the jurisdiction of the Court.

Article 4 – Signature and ratification

Article 5 – Entry into force

Article 6 - Depositary functions

34. The provisions of Articles 4 to 6 correspond to the wording of the Model Final Clauses adopted by the Committee of Ministers of the Council of Europe.