

Introduction

Like any declaration of rights inherited from the Enlightenment tradition, the European Convention on Human Rights, signed under the auspices of the Council of Europe on 4 November 1950 and in force since 3 September 1953, guarantees equality between human beings by prohibiting discrimination. Equality is safeguarded in the Convention by two provisions: Article 14 of the Convention and Article 1 of Protocol No. 12 thereto, which was signed on 26 June 2000 and entered into force on 1 April 2005. They are worded as follows.

Article 14 of the Convention:

“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.”¹

Article 1 of Protocol No. 12 to the Convention:

“1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, lan-

1. The French version of Article 14 uses the expression “sans distinction aucune” while the English version states “without discrimination”. Those drafting Article 14 in 1950 used a term which in the international legal terminology of each of these two languages is traditional in that respect, so that the two versions had scrupulously the same meaning. This drafting reflects the classical tradition of interpretation of the guarantee of equality excluding any notion or possibility of differentiation; this is no longer the case in the modern tradition, which “does not forbid every difference in treatment”, as the Court stated in relation to Article 14 in the first judgment delivered on the issue (see below).



guage, 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.”²

Whereas the Convention, including Article 14, has been ratified by all member States of the Council of Europe, Protocol No. 12, including Article 1, has been ratified by only some of them.³

As we shall see, the obligation laid down in those two provisions is strictly the same: it prohibits Contracting States from introducing discrimination; the only difference is in the extent of their scope,⁴ that of Protocol No. 12 being wider (a “general” prohibition) than that of Article 14 (a “special” prohibition).

A brief terminological point should be settled: how should we refer, generically, to the rule established by Article 14 of the Convention and Article 1 of Protocol No. 12? On the very first occasion on which the Convention supervisory institutions adjudicated on an application invoking Article 14, they used the expression “principle of non-discrimination”,⁵ which is also to be found in the preamble to Protocol No. 12. From time to time, however, the Court has also referred to the “principle of equality”.⁶

2. Article 1 is the only “substantive” provision of Protocol No. 12, which is preceded by a preamble, worded as follows: “Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the 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, provided that there is an objective and reasonable justification for those measures, Have agreed as follows”.
3. – On 1 January 2010, Protocol No. 12 had been signed by all European States (with the notable exception of the following: Bulgaria, Denmark, France, Lithuania, Malta, Monaco, Poland, Sweden, Switzerland and the United Kingdom); but only some of the Signatory States had ratified it; – On 1 January 2010, Protocol No. 12 was in force (and therefore applicable) with respect to the following States: Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, “the former Yugoslav Republic of Macedonia”, Georgia, Luxembourg, Montenegro, the Netherlands, Romania, San Marino, Serbia, Spain and Ukraine.
4. *Sejdic and Finci v. Bosnia and Herzegovina*, 22 December 2009 (Grand Chamber), §§55-56.
5. Eur. Comm. HR, *X v. Federal Republic of Germany*, 16 December 1955, Application No. 86/55, Yearbook 1, p. 198.
6. See, for example: *Schuler-Zraggen v. Switzerland*, 24 June 1993, §46; *Mathieu-Mohin and Clerfayt*, 2 March 1987, §54.



Both expressions will be used without distinction, as will the expressions “equal treatment”,⁷ non-discrimination clause or the right not to be discriminated against.

The question of the prohibition of discrimination is deceptively simple. The problems associated with the interpretation of such a prohibition and with the judicial methods employed in applying it may appear to be rather complex. Ideally, to gain a really clear picture it would be necessary first to have an understanding of equality that is both historical and theoretical.⁸ The present study adopts a more focused approach and proposes to provide an insight into the case-law of the European Court of Human Rights on discrimination with respect to both the main principles which guide its implementation and the specific solutions which the Court has adopted in relation to discrimination.

We shall examine in turn: the question of the scope of the prohibition of discrimination (to what does it apply?), the question of the content of such a prohibition (what precise obligations does it entail?) and, last, the question of judicial review (how does the Court assess compliance with it)?⁹

7. *Belgian linguistic case*, 23 July 1968, Series A no. 6, p. 34.

8. For a study that establishes the guidelines for a general theory of the principle of equality and non-discrimination by proposing that the principle be understood both from the point of view of its historical foundations and from that of its philosophical basis, see: Edel (Frédéric), “Linéaments d’une théorie générale du principe d’égalité”, *Revue Droits, revue française de théorie, de philosophie and de culture juridique*, no. 49, April 2009, pp. 213-242.

9. The present study takes account of the case-law of the Convention supervisory institutions from the beginning (see footnote 5 above) to 1 April 2010.



Part 1. The scope of the prohibition of discrimination

The scope of Article 14 of the Convention and Article 1 of Protocol No. 12 can be considered from two angles: personal scope and material scope; however, the latter merely explains the former more fully. The scope *ratione personae* denotes the circle of those having the right not to be discriminated against (it refers to the idea of “person”). The scope *ratione materiae* defines the extent of the legal interests in respect of which such a right may be invoked, the range of specific circumstances in which discrimination is prohibited (it refers to the idea of “situated person”).

The personal scope is the same for Article 14 of the Convention and for Article 1 of Protocol No. 12. In the words of both Article 14 and Article 1 of Protocol No. 12, those having the right not to be discriminated against are strictly the same, namely everyone within the jurisdiction of the Contracting States. The material scope differs according to whether it is seen from the angle of Article 14 or from that of Article 1 of Protocol No. 12. Generally speaking, persons have an infinite number of interests, covering all spheres of social life, and even all spheres of life. However, not all interests are covered by the guarantee of non-discrimination. The function of the material scope is to determine the legal interests in respect of which unequal treatment is prohibited. This sphere is wider in the context of Article 1 of Protocol No. 12 than in the context of Article 14 of the Convention.



Chapter 1 – Scope *ratione personae*

Whether deriving from Article 14 of the Convention or from Article 1 of Protocol No. 12, the principle of equality has an application *ratione personae* which is strictly the same: it directly concerns all persons within the jurisdiction of the member States within the meaning of Article 1 of the Convention.¹⁰ Whether these persons are nationals of the Contracting State in question or foreign nationals, whether they are natural persons or even legal persons, they are all fully entitled not to be discriminated against.

Section 1. Nationals and foreigners

In the aftermath of the Second World War, the Universal Declaration of Human Rights proclaimed that all human beings are equal whatever their nationality. Its ambit is world-wide: it applies to all human beings. This universalist equality belongs largely to the sphere of moral discourse, as this instrument has no real binding force. With the European Convention on Human Rights, equality is characterised, as it were, by its universality at European level: it applies to all persons within the legal order formed by the European Convention on Human Rights, whatever their nationality. This intra-European equality is a reality of positive law linked to the binding force of the Treaty signed in Rome. The Preamble to the European Convention on Human Rights of 4 November 1950 expresses very well this transition from the universalist claim to be of application for all human beings to the effective realisation of that claim in the case of all Europeans, when it says that European States are resolved to “take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”.

Thus, since the early years of the Convention, it has been accepted without difficulty that aliens – whether nationals of another State Party to the Convention¹¹ or of a non-party State,¹² refugees¹³ or stateless per-

10. Article 1 ECHR: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.



sons¹⁴ – are able to rely before the Commission¹⁵ and the Court¹⁶ on the right not to be discriminated against set forth in Article 14. All in all, it is rather symbolic that the first application to the Commission relating to

11. See, for example: *Piermont v. France*, 27 April 1995, §1 (a German national against the French State; comparison with French citizens resident in Polynesia and New Caledonia); *Darby v. Sweden*, 23 October 1990, §§7-9 (a Finnish national against the Swedish State; comparison between a Finnish national not resident in Sweden and Swedish nationals and non-nationals resident in Sweden).
12. See, for example, with regard to nationals of non-European countries: *Moustaquim v. Belgium*, 18 February 1991, §§48-49 (a Moroccan national against the Belgian State; comparison with minors of Belgian nationality and with nationals of other Community member States); *Beld-joudi v. France*, 26 March 1992, §1 (an Algerian national against the French State; comparison between the applicant and persons having different religious beliefs and different ethnic origins) *C. v. Belgium*, 7 August 1996, §§37-38 (a Moroccan national against the Belgian State; comparison with nationals of Community member States); *Gaygusuz v. Austria*, 16 September 1996, §§36-41 (a Turkish national against the Austrian State; comparison with Austrian nationals).
13. Eur. Comm. HR, report of 4 October 1983, Application No. 8007/77, DR 72, pp. 5-6, 49 and 51: in this case the State of Cyprus acted on behalf of Greek Cypriots, and in particular the 170,000 refugees displaced following the invasion of Cyprus by Turkish troops. The Commission renewed the finding of discrimination made in its report on Applications Nos 6780/74 and 6950/75 (§503) since the acts violating the Convention were directed exclusively against one of the two communities in Cyprus.
14. Chronologically, the first example of substantive examination by the Court of a complaint by foreign nationals under Article 14 was in the *Abdulaziz, Cabales and Balkandali* judgment of May 1985. This example is especially well known because it was one of the first cases in which the Court found a violation on the basis of Article 14, but it must be made clear immediately that the discrimination had its origin in the sex and not the nationality of the applicants, who were foreigners legally established in the United Kingdom: Ms Abdulaziz was a stateless person and Ms Cabales and Ms Balkandali were nationals of a country not a Party to the Convention.
15. See, for example, the following decisions: Eur. Comm. HR, *Agee v. the United Kingdom*, decision of 17 December 1967, Application No. 7729/76, DR 7, p. 176 (according to this decision, the status of alien would, in itself, provide objective and reasonable justification for a treatment different from that applied to nationals: *ibid.*, p. 164); Eur. Comm. HR, *Luedicke v. Federal Republic of Germany*, decision of 11 March 1976, Application No. 6210/73, DR 4, p. 200. Eur. Comm. HR, decision of 15 December 1977, Application No. 7229/73, not published; not published; Eur. Comm. HR, decision of 9 December 1980, Application No. 8874/80, not published; Eur. Comm. HR, decision of 12 December 1981, Application No. 9504/81, not published; Eur. Comm. HR, decision of 6 July 1982, Application No. 9285/81, DR 29, p. 205 (pp. 209-210); Eur. Comm. HR, decision of 6 May 1985, Application No. 10914/84, not published; Eur. Comm. HR, decision of 8 May 1985, Application No. 10901/84, not published; Eur. Comm. HR, decision of 6 January 1992, Application No. 14501/89, DR 72, p. 118; Eur. Comm. HR, decision of 20 October 1994, Application No. 23241/94, DR 79, p. 121. See also: Eur. Comm. HR, *Lithgow and others v. the United Kingdom*, report of 7 March 1987, 9006/80 and others, §440.
16. Apart from the judgments already cited, see also: *Caballero v. the United Kingdom*, 8 February 2000, §1 and §§25-27; *Hussain v. the United Kingdom*, 21 February 1996, §63; *Beyeler v. Italy*, 5 January 2000, §1 and §§123-125; *Hans-Adam II de Liechtenstein v. Germany*, 12 July 2001, §1 and §§88-94; *McShane v. the United Kingdom*, 28 May 2002, §1 and §§132-136.



Article 14, which gave rise to the *X v. the Federal Republic of Germany* decision of 16 December 1955,¹⁷ was introduced by a person who was not a national of the State against which the application was lodged.

Section 2. Natural persons and legal persons

Equality applies primarily to natural persons, whatever the other legal categories in which these persons may be placed. Provided they are within the jurisdiction of the member States of the Convention, natural persons are direct holders of the right not to be discriminated against without the slightest regard to their nationality, as has just been emphasised, or their residence,¹⁸ civil status¹⁹ or capacity.²⁰ It goes without saying that minors²¹ as well as the mentally ill²² benefit fully from the principle of equality.

17. Eur. Comm. HR, *X v. Federal Republic of Germany*, 16 December 1955, Application No. 86/55, Yearbook 1, pp. 198-199. Following a detailed examination, the application in this case, submitted by an Italian, was eventually rejected as “manifestly ill founded” (in reality, it was, rather, inadmissible *ratione materiae*); but the Commission’s reasoning clearly shows that the application was indeed admissible *ratione personae*.
18. See, for example: *Belgian linguistic case*, 23 July 1968, §§29-32 (Series A no. 6, pp. 64-71); *Gillow v. the United Kingdom*, 24 November 1986, §§63-65; *Darby v. Sweden*, 23 October 1990, §§28-34.
19. See, for example: Eur. Comm. HR, *48 Kalderas Gypsies v. Federal Republic of Germany and the Netherlands*, decision of 6 July 1977, §57, DR 11, p. 221: the refusal to issue identification papers to members of a nomadic group may be considered in the light of Article 14 in conjunction with Article 3.
20. See, for example: Eur. Comm. HR, *Stewart-Brady v. the United Kingdom*, decision of 2 July 1997, Applications Nos 27436/95 and 28406/95, DR 90, §4, pp. 45-46 and 54. In this case, the applicant considered that he had suffered discrimination contrary to Article 14 in conjunction with Article 6 §1 on account of his incapacity. It should be noted that in the Commission’s view it is not discriminatory to require that a mentally incapacitated adult act through another person, who must himself be represented by a lawyer.
21. See, for example: *Tyrer v. the United Kingdom*, 25 April 1978, §42; see in particular the decision of the European Commission of Human Rights of 19 July 1974 in the same case.
22. See, for example: *X and Y v. the Netherlands*, 26 March 1985, §§31-32 (or, in the same case, Eur. Comm. HR, decision of 17 December 1981, Application No. 8978/80, DR 27, pp. 176 and 180): in this case, the applicant alleged that Dutch legislation introduced discrimination contrary to Article 14 in conjunction with Article 8, which originated in a discrepancy between the statutory provisions, which required that the victim of a sexual nature against a female over the age of 16 lodge her complaint in person, and the situation of the applicant, who, as a mentally handicapped female over the age of 16, was in a different situation in relation to persons of the same sex and the same age who were not mentally handicapped.



Can legal persons, in that they have legal personality and indirectly represent individuals,²³ also claim to have the right not to be discriminated against? In the *Lithgow and others* judgment of 8 July 1986, which involved both individuals and businesses, the European Court of Human Rights declared that Article 14 “safeguards persons (including legal persons) who are ‘placed in analogous situations’ against discriminatory differences of treatment”.²⁴ The following have thus been recognised as having the right to apply to the Convention supervisory institutions and to rely on the right set forth in Article 14: profit-making or not-for-profit legal persons, such as commercial companies;²⁵ trade unions;²⁶ religious organisations;²⁷ political parties;²⁸ charitable or social associations;²⁹ or again legal persons governed by public law but exercising no public power and having complete autonomy from the State.³⁰ It is now well established

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23. On this idea that the principle of equality is applicable to legal persons (governed by private law) since protection afforded to the legal person is intended to benefit the individuals of which it is composed, see: German Federal Constitutional Court: BverGE (2 May 1967) 21, 362 (369); BverGE (6 March 1968) 23, 153 (163); BverGE (13 January 1976) 41, 126 (149); BverGE (20 July 1954) 4, 7 (12). French Constitutional Council, decision no. 81-132 DC, 16 January 1982, *Nationalisations I*, paragraph 29.
 24. *Lithgow and others v. the United Kingdom*, judgment of 8 July 1986, §177: in this case, Sir William Lithgow and Sir Eric Yarrow were British citizens, while Ms Augustin-Normand was a French citizen; the remaining applicants were all companies incorporated and registered in the United Kingdom.
 25. *Pine Valley Developments Ltd and others v. Ireland*, 29 November 1991, §§8. Of the three applicants in this case, the first two were incorporated companies: the subsidiary company Pine Valley and the parent company Healy Holdings. The third applicant, on the other hand, was a natural person: Daniel Healy was the managing director and sole beneficial shareholder of Healy Holdings. *Vereinigung demokratischer Soldaten Österreichs und Gubi v. Austria*, 19 December 1994, §7. Of the two applicants in this case, the first was an association which published a monthly magazine. *Informationsverein Lentia and others v. Austria*, 24 November 1993, §§1, 8-16 and 44. In this case, the applicants were: an association of co-owners and residents of a housing development comprising apartments and businesses, a natural person (Jörg Haider), an Austrian association and a member of the Fédération européenne des radios libres, a natural person who was a shareholder in an Italian company operating a commercial radio station and a limited company incorporated under Austrian law. *Matos e Silva, Lda and others*, 16 September 1996, §§1 and 96: the applicants were two limited liability companies incorporated under Portuguese law. *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society*, 23 October 1997, §6: the applicants had the status of “mutual societies” under English law and not the status of companies.
 26. *National Union of Belgian Police v. Belgium*, 27 October 1975, §§43-49; *Swedish Engine Drivers’ Union v. Sweden*, 6 February 1976, §§44-48.
 27. *Canea Catholic Church v. Greece*, 16 December 1997; *Cha’are Shalom Ve Tsedek v. France*, 27 June 2000.



that the right of application is open to all legal persons other than those forming part of the public administration. Those conclusions clearly hold good for Article 1 of Protocol No. 12.

Conversely, a cultural minority, that is to say, a minority group, is excluded as such from exercising such a right.³¹

Chapter 2 – Scope *ratione materiae*

According to Article 14, the obligation not to discriminate applies materially to the enjoyment of every right set forth in the Convention (equality before the Convention). According to Article 1 of Protocol No. 12, the obligation not to discriminate applies materially to the enjoyment of any right set forth by law, in the wide sense (equality before the law). In other words, Article 14 prohibits discrimination in the enjoyment of any right set forth by law which has an impact on the rights recognised by the

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28. *United Communist Party of Turkey and others v. Turkey*, 30 January 1998, §§1 and 62: the applicants were a political party and two natural persons, the Chairman and General Secretary, respectively, of the party in question. *Socialist Party and others v. Turkey*, 25 May 1998, §§7-8 and 55: the applicants were a political party and two natural persons, the Chairman and former Chairman, respectively, of the party in question. *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 8 December 1999, §§1, 8 and 49: the applicant was a political party. *Refah Partisi (Prosperity Party), Erbakan, Kazan and Tekdal v. Turkey*, 31 July 2001, §§1 and 84: the applicants were a political party and three of its officers.
29. *VgT Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, §§8 and 84-89: the applicant was an animal protection society governed by Swiss law which claimed to have suffered discrimination in the exercise of the right to freedom of expression. *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, 2 August 2001, §§8 and 34: the applicant was a private-law association which had articles of association (to which anyone could have access) but did not have legal personality under Italian law; it claimed to have suffered discrimination in the exercise of the right to freedom of association. *Ekin Association v. France*, 17 July 2001, §§1, 39 and 65: the applicant was an association which published a book and claimed to have suffered discrimination in the exercise of the right to freedom of expression.
30. *Holy Monasteries v. Greece*, 9 December 1994, §92.
31. Under European case-law, groups of persons must consist of identified persons, each of whom has authorised the lodging of the application (see Eur. Comm. HR, decision of 9 July 1980, Application No. 8282/78, DR 21, p. 109), and each member of the group must have been directly affected by the measures complained of (Eur. Comm. HR, decision of 7 October 1988, Application No. 12740/87). In our view, it is legitimate to exclude minorities from such a definition since, unlike in the case of a legal person's articles of association, the modes of membership of such groups are not legally organised and are therefore neither identifiable nor verifiable for the purpose of ascertaining whether the mode of affiliation is destructive of freedom or (in particular) discriminatory, whereas it is possible to do so in the case of a legal person, as demonstrated by, for example, the *Chassagnou and others v. France* judgment 29 April 1999.



Convention (a special prohibition of discrimination); Article 1 of Protocol No. 12 prohibits discrimination in the enjoyment of any right set forth by law, whatever it may be, and whether or not it has an impact on the rights recognised by the Convention (a general prohibition of discrimination).

Section 1. The material scope of Article 14 of the Convention

Schematically, to describe the scope of Article 14 is to describe the scope of the Convention and the additional protocols thereto in their entirety, that is to say, the scope of all the substantive rights contained in those texts. This work will confine itself to presenting some typical examples of the applicability of Article 14 in conjunction with another right proclaimed by the Convention. As the question of the applicability of Article 14 is rather subtle, it is essential first of all to set out the terms of the problem in the introductory part before attempting to give a rational presentation of the state of the relevant European case-law.

I. The ancillary or autonomous nature of the material scope of Article 14

In the words of Article 14: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination ...”. The scope of the prohibition laid down in Article 14 does not therefore concern the exercise of any right or freedom but only those coming within the scope of the European Convention on Human Rights. In practical terms, the effect of this is that Article 14 is never applicable on its own. It is always applicable “together” with another Convention article that sets forth a right or a freedom. The scope of the prohibition of discrimination is therefore always the scope of Article 14 “in conjunction with” another Convention article that formulates a right or a freedom (Article 14 + Article 8, Article 14 + Article 10, Article 14 + Article 1 of Protocol No. 1, etc.). Schematically, Article 14 sets forth the obligation for member States to ensure equal freedom for all persons within their jurisdiction.

