CHAPTER TWENTY-FOUR

THE PROHIBITION ON DISCRIMINATION: NEW CONTENT
(ART. 14 ECHR AND PROTOCOL 12)

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1. General Meaning of Art. 14 ECHR. Its Relationship with
Additional Protocol No. 12

Article 14 is based on the general postulate that all human beings are
equal, laid down in art. 1 of the 1948 Universal Declaration of Human
Rights, however it does not reproduce the principle nor those set forth
in art. 7 of the Universal Declaration of Human Rights or art. 26 of the
1966 International Covenant on Civil and Political Rights. In short, the
article does not enshrine the general principle of equality but estab-
lishes the prohibition on discrimination1 in respect of rights protected
by the Convention. There is no general recognition of the right to equal
treatment, only in relation to Convention rights. However the most

1 On the difference between the general principle of equality and the prohibition on
discrimination, see J.M. Bilbao Ubillos and F. Rey Martínez: “El principio constitucio-
nal de igualdad en la jurisprudencia española” in M. Carbonell (Comp.), El principio
constitucional de igualdad, Comisión Nacional de Derechos Humanos, Mexico, 2003,
p. 112.
recent ECtHR case law has extended this understanding of the prohibition on discrimination under art. 14 to cover other rights not expressly included in the Convention. And the case law has also extended the normative scope of art. 14 ECHR to cover new content including the prohibition on indirect discrimination, the inclusion of new, not expressly contemplated grounds for discrimination and the legitimisation of “positive action” measures as we shall see below.

It is not clear from the travaux préparatoires why the general principle of equality was not enshrined in the Convention. In the initial draft, produced by a committee of experts, there was a provision identical to that in the Universal Declaration of Human Rights. However, it disappeared without explanation from the official documents sent to the Committee of Senior Officials who produced the version that was submitted to the Council of Europe’s Consultative Assembly and no amendment was put forward on this point. Some authors have pointed out that the vague general nature of the principle of equality before the law meant that it was considered to be a source of dangerous legal constructions, thereby raising serious doubts over the usefulness of including such a principle in the Convention. Furthermore, it was feared that Convention organs would be called upon to correct any discrepancies between the States’ jurisdictional bodies, alleging breach of the principle of equality in application of the law, bringing them to a state of collapse due to a vast number of complaints.2

A general prohibition on discrimination, not limited to the rights set forth in the Convention, but extending to any fundamental or legal rights is contained in Additional Protocol Number 12 (P12) to the European Convention on Human Rights, opened for signatures in Rome on 4 November 2000 on the occasion of the 50th anniversary of the Convention. P12 came into force on 1 April 2005 after ratification by 10 Council of Europe member states. By June 2010 it had been ratified by 17 states.

Various studies carried out by the Council of Europe in the 1960s in the field of equality for men and women and the fight against racism and intolerance were important in the gestation of this Additional Protocol and initially, the intention was to produce one or two instruments on equality in those particular areas. Finally, however, it was decided to establish a general protocol with an open-ended list of grounds of

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