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## **The Declaration of Principles on Equality and activities of the Council of Europe**

Report<sup>1</sup>

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Boriss CILEVIČS, Latvia, Socialist Group

### *Summary*

The report examines the concept of the rights to equality and non-discrimination, long regarded as purely accessory human rights both by the Council of Europe and by its member states.

At the European level, protection against discrimination is not ideal and there are many disparities between European Union member and non-member states and among the European Union members themselves. Most Council of Europe member states have not yet ratified Protocol No. 12 to the European Convention on Human Rights, which contains a general prohibition of discrimination, often for outmoded and unconvincing reasons.

Today equality must be regarded as an effective legal right. States should adopt and implement legislation aimed at eradicating discrimination and promoting equality at all levels, particularly through “positive action”.

The “Declaration of Principles on Equality”, published in 2008 and drafted on the basis of a consensus among international experts, defines equality and the principle of non-discrimination as free-standing fundamental rights. Thus it can serve as a benchmark for the Council of Europe and national legislators for instituting more progressive equality norms and policies.

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<sup>1</sup> Reference to committee: Doc. 12022, Reference 3609 of 2 October 2009.

## A. Draft resolution<sup>2</sup>

1. The Parliamentary Assembly reiterates the crucial importance of the principles of equality and non-discrimination, as an essential integral part of the international protection of human rights, already enshrined in the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966.

2. On several occasions, the Assembly has taken a firm stance on combating all forms of inequality and discrimination of different persons and groups, including vulnerable groups such as national minorities or persons with disabilities. In particular, in its Resolution 1547 (2007) on the state of human rights and democracy in Europe, it has called upon all member states of the Council of Europe to combat effectively all forms of discrimination based on racial, ethnic or religious origin, gender or sexual orientation, and to better protect the rights of persons belonging to national and other minorities.

3. The Assembly recalls that, on 1 April 2005, Protocol No. 12 to the European Convention on Human Rights (ETS No. 177) entered into force, enlarging the scope of the non-discrimination principle laid down in Article 14 of the European Convention on Human Rights (ETS No. 5, "the Convention"). Protocol No. 12 lays down a general prohibition of discrimination in the "enjoyment of any right set forth by law".

4. However, so far only 18 of the 47 member states of the Council of Europe have ratified this instrument. Nineteen other member states have signed, but not yet ratified it. The Assembly stresses that the ratification of Protocol No. 12 by all States Parties to the European Convention on Human Rights is necessary to ensure the full respect of the principle of non-discrimination throughout Europe and to align the Council of Europe standards on non-discrimination with the existing universal norms on human rights protection.

5. The Assembly therefore reiterates its call on the states parties to the Convention which have not yet done so to sign and/or ratify Protocol No. 12, without reservations or restrictive declarations.

6. The Assembly considers that the full realisation of the principle of equality requires not only legislative measures, but also the adoption and implementation of policies aimed at erasing and preventing *de facto* inequalities and protecting vulnerable groups (such as national minorities, persons with disabilities or immigrants) from discriminatory practices.

7. The Assembly welcomes the efforts of international non-governmental organisations (NGOs) and experts aimed at strengthening the idea of equality and non-discrimination, and in particular the Declaration of Principles on Equality ("the Declaration"), published in October 2008. Signed initially by 128 prominent legal practitioners, academics and human rights activists from 44 countries, including the Council of Europe Commissioner for Human Rights, it has subsequently been endorsed by hundreds of individual signatories and organisations.

8. The Assembly notes that the Declaration defines equality and the principle of non-discrimination as basic and free-standing human rights and therefore considers it as a benchmark for progressive equality norms and policies in the 21st century.

9. Consequently, the Assembly calls on the Council of Europe member states to:

9.1. identify and abolish outdated legislation, generating or permitting discrimination towards persons belonging to disadvantaged groups;

9.2. adopt effective equality legislation aimed at eradicating discrimination and promoting equality. Such legislation should in particular:

9.2.1. identify discriminatory conduct and, as appropriate, penalise breaches;

9.2.2. set out effective remedies available to alleged victims of discrimination;

9.2.3. cover all relevant grounds of discrimination, as well as its multiple and compound forms;

9.2.4. establish strong independent anti-discrimination/equality bodies;

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<sup>2</sup> Draft resolution adopted by the committee on 6 June 2011.

9.3. promote and develop effective equality policies, in particular through the application of positive measures in favour of disadvantaged groups;

9.4. develop and implement anti-discrimination measures in close dialogue and co-operation with civil society.

10. The Assembly calls on member states to take into account the principles contained in the Declaration when adopting equality and non-discrimination legislation and policies.

**B. Draft recommendation<sup>3</sup>**

1. Referring to its Resolution ... (2011) on the Declaration of Principles on Equality and activities of the Council of Europe, the Parliamentary Assembly recommends that the Committee of Ministers:

1.1. enhance efforts aimed at speeding up ratification of Protocol No. 12 to the European Convention on Human Rights (ETS No. 5) by the members states which have not yet done so;

1.2. disseminate information on good practices in the implementation of policies aimed at combating discrimination and inequalities;

1.3. ensure that the Declaration is taken into account in the work of the different Council of Europe bodies and expert groups dealing with the issues of equality and non-discrimination;

1.4. promote the Declaration in its dealings with external actors, and in particular with policymakers from the Council of Europe member states;

2. Moreover, recalling the necessity of harmonising the interpretation and implementation of the rights to equality and non-discrimination, the Assembly recommends that the Committee of Ministers:

2.1. step up co-operation with the European Union on the consolidation of standards in the area of non-discrimination and promotion of equality;

2.2. pursue co-operation with other international organisations, in particular the Organization for Security and Co-operation in Europe (OSCE), the United Nations and its Committee on the Elimination of Racial Discrimination, with a view to achieving coherent interpretations of the principles of equality and non-discrimination and the implementation of common policies in the field of combating discrimination and inequalities.

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<sup>3</sup> Draft recommendation adopted by the committee on 6 June 2011.

## C. Explanatory memorandum by Mr Cilevičs, rapporteur

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### 1. Procedure to date

1. The motion for a resolution on “The Declaration of Principles on Equality and activities of the Council of Europe” was transmitted on 2 October 2009 to the Committee on Legal Affairs and Human Rights for report.<sup>4</sup> At its meeting on 16 November 2010, the committee appointed me as its rapporteur.

2. At its meeting on 8 March 2011, the committee held a hearing with the following experts:

- Mr Frédéric Edel, Doctor of Law, Researcher, Ecole Nationale d’Administration, France
- Ms Dimitrina Petrova, Executive Director, The Equal Rights Trust, United Kingdom
- Mr Michal Gondek, Legal Officer, Directorate General for Justice, European Commission

### 2. Purpose of the present report

3. The right to equality before the law and the protection of all persons against discrimination are fundamental provisions of international human rights law. The right to equality is central to the human rights system, both as an autonomous legal right and as a subsidiary right related to all other human rights which must be applied without discrimination. It should be stressed that “non-discrimination” does not have the same meaning as “equality”. However, these two terms are closely intertwined. In its formal meaning, the principle of equality requires that equal situations are treated equally and unequal situations differently; failure to do so will amount to discrimination unless there is an objective and reasonable justification.<sup>5</sup> The word “discrimination” normally imports the notion of difference and in law it generally refers to the different treatment of an individual or a group of individuals compared to others, which results in a disadvantage.<sup>6</sup>

4. The European Convention on Human Rights (ETS No. 5, “the Convention”) does not refer expressly to the principle of “equality” as a free-standing right, but contains non-discrimination and equality provisions (Article 14) only with regard to enjoyment of other rights laid down in the Convention. So far, the case law of European Court of Human Rights (“the Court”) concerning non-discrimination issues has been quite modest.

<sup>4</sup> Doc. 12022 and Reference 3609.

<sup>5</sup> Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), explanatory report, paragraph 14.

<sup>6</sup> Equal Rights Trust, *The Ideas of Equality and Non-Discrimination : Formal and Substantive Equality*, p. 1, [www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf](http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf).

It was only with the adoption of Protocol No. 12 to the Convention that the scope of the principle of non-discrimination was enlarged to “any right set forth by law” and a clear reference to the principle of equality was made (but only in the Preamble of Protocol No. 12). Regrettably, Protocol No. 12 has not yet been ratified by the majority of the member states of the Council of Europe, despite constant efforts by the Council of Europe to that effect, in particular the Assembly.

5. The principle of equality has been recognised in the constitutions of the majority of European states and the legislation of all European states, especially European Union member states, in the form of general provisions outlawing discrimination. However, these provisions are often declarative, fragmented and fail to cover all grounds for discrimination. As recent studies and surveys show, discrimination is still a Europe-wide problem,<sup>7</sup> even within the European Union, which has developed a high standard of protection for certain sectors.<sup>7</sup> For instance, according to the findings of the European Union Fundamental Rights Agency's 2010 report, members of ethnic minorities are on average almost five times more likely to experience multiple discrimination than those from the majority population and people on a low income are also more likely to experience multiple discrimination. The very recent report of the Group of Eminent Persons of the Council of Europe on the topic of “Living together. Combining diversity and freedom in 21st-century Europe” reaffirms that discrimination is especially widespread in areas such as employment, housing, education, health care and social services, and treatment by the police and courts of law.<sup>8</sup> Social exclusion of Roma people due to their high unemployment rate, the education of their children in segregated schools, restrictions on migrants' access to social benefits or a disproportionate number of police checks of members of minorities are flagrant examples of these bad practices. Such phenomena create isolation of these disadvantaged groups from the rest of society and are contrary to the fundamental principles upheld by the Council of Europe.

6. In a major effort to modernise and integrate legal standards relevant to non-discrimination and equality, a group of prominent experts (including Thomas Hammarberg, Council of Europe Commissioner for Human Rights), under the auspices of an independent international non-governmental organisation (NGO) “The Equal Rights Trust”, drew up the Declaration of Principles on Equality<sup>9</sup> (“the Declaration”), which was published in October 2008. The Declaration contains legal principles and highlights the substance of the fundamental right to equality. It covers such essential issues as defining the scope, the right holders and the duty bearers of the right to equality, and obligations and prohibitions and their enforcement.

7. Thus, considering the importance of the principles of equality and non-discrimination for achieving the statutory goals of the Council of Europe, I decided to study the Declaration in more detail in the present report, to promote its principles and to make some proposals concerning improving, if need be, the existing legal instruments and the effectiveness of their application. But before drawing final conclusions, I will also examine closely the existing international and European legal framework concerning equality and non-discrimination principles. In this context, it will also be useful to look at the possible reasons for the non-ratification by many states of Protocol No. 12 to the Convention; indeed, since its entry into force in 2005, there have been too few ratifications.

### **3. Non-discrimination and equality as cornerstones of the modern human rights protection system**

#### *3.1. The universal concept of equality and its added value*

8. There is a range of interpretations of the principles of “equality” and “non-discrimination”. Equality was traditionally understood as a system of formal equality or sameness of applicable rules, and it is only recently that a more sophisticated understanding of equality has been developed.<sup>10</sup> The most widespread traditional understanding of “equality” is indeed that of “formal equality”, which is related to the alleged dictum of Aristotle that “things that are alike should be treated alike”.<sup>11</sup> Another concept of equality – that of “equality of opportunity” represents a departure from this traditional notion and is partially based on a redistributive justice model which suggests that measures must be taken to rectify past discrimination (equality of opportunity is reflected in a number of legal systems, including EU anti-discrimination directives), but also seeks to limit the application of full redistributive justice.<sup>12</sup> The notion of “equality of outcomes”, as opposed to the “equality of opportunity”, attempts to provide more interventionist substance to the concept of equality,

<sup>7</sup> European Union Agency for Fundamental Rights 2010 report, “EU-MIDIS. European Union Minorities and Discrimination Survey. Data in Focus Report. Multiple Discrimination”, p. 4.

<sup>8</sup> Page 18, [www.coe.int/t/dc/files/source/20110511\\_Report\\_GEP\\_en.doc](http://www.coe.int/t/dc/files/source/20110511_Report_GEP_en.doc).

<sup>9</sup> [www.equalrightstrust.org/endorse/index.htm](http://www.equalrightstrust.org/endorse/index.htm).

<sup>10</sup> Equal Rights Trust, *The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality*, op. cit., p. 1.

<sup>11</sup> *Ibid.*, p. 2.

<sup>12</sup> *Ibid.*, p. 3.

by seeking to inject a certain moral precept (namely the desirability of equal distribution of certain public goods) into the application of the equality principle, in particular through a spectrum of policies and compulsory legal mechanisms, including strict quotas (this approach has been adopted in certain areas in the United States of America and Northern Ireland, concerning racial equality and equality between Catholics and Protestants).<sup>13</sup> Certain policies concerning the distribution of educational opportunities and incomes according to social class that were pursued in the former Soviet Union and other “socialist” economies were also reflections of this principle.

### 3.2. *International instruments*

9. The human rights approach to equality is based on the notion of human dignity and is related to the notions of equality of opportunity and, according to some, of equality of outcome.<sup>14</sup> Article 1 of the Universal Declaration of Human Rights of 10 December 1948<sup>15</sup> declares that: “All human beings are born free and equal in dignity and rights” and its Article 7 reaffirms the general principle of equality and non-discrimination.<sup>16</sup> Although this declaration has no binding force, it has had an impact on other international human rights instruments. Thus Article 26 of the International Covenant on Civil and Political Rights of 16 December 1966<sup>17</sup> recognises the right to equality and to non-discrimination as an autonomous human right.<sup>18</sup>

10. According to certain international instruments, states parties are obliged to take specific measures in order to promote equality, because there are certain groups or categories of persons who are disadvantaged *de facto*. For instance, according to Article 4.2 of the Framework Convention for the Protection of National Minorities (ETS No. 157), states parties undertake to adopt measures in order to promote equality between persons belonging to a national minority and those belonging to a majority. Such measures are not considered as acts of discrimination against the majority group (Article 4.3 of the Framework Convention). Similar provisions are included in the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965<sup>19</sup> (Article 1, paragraph 4, and Article 2, paragraph 2) and the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979<sup>20</sup> (Article 4, paragraph 1).

11. The United Nations High Commissioner for Human Rights has placed non-discrimination at the heart of her mandate. In her 2009 Annual Report, she stated that “countering discrimination, in particular racism, xenophobia and related intolerance, discrimination on the grounds of sex, disability, against indigenous groups and national minorities, and against others who are marginalized” was a key priority.<sup>21</sup>

### 3.3. *Council of Europe instruments on non-discrimination and equality*

#### 3.3.1. *The European Convention on Human Rights and the case law of the European Court of Human Rights*

##### 3.3.1.1. *Article 14 of the European Convention on Human Rights*

12. The European Convention on Human Rights contains a non-discrimination provision (Article 14), but only with regard to enjoyment of other rights laid down in the Convention.<sup>22</sup> The list of proscribed grounds of

<sup>13</sup> *Ibid.*, pp. 4 and 5.

<sup>14</sup> *Ibid.*, p. 6

<sup>15</sup> [www.un.org/en/documents/udhr/index.shtml](http://www.un.org/en/documents/udhr/index.shtml).

<sup>16</sup> “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

<sup>17</sup> <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>18</sup> “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>19</sup> <http://www2.ohchr.org/english/law/cedaw.htm>.

<sup>20</sup> [www.un.org/womenwatch/daw/cedaw/text/econvention.htm](http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm).

<sup>21</sup> [ohchr.org/Documents/Press/HC\\_Annual\\_report.pdf](http://ohchr.org/Documents/Press/HC_Annual_report.pdf).

<sup>22</sup> “Article 14 – Prohibition of discrimination. 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.”

discrimination is open-ended (Article 14 prohibits discrimination based on any “other status”<sup>23</sup>) and may be developed further on a case-by-case basis. Under the Convention, protection against discrimination is offered to any person who is within the jurisdiction of a state party (Article 1).

13. The European Court of Human Rights was therefore limited to treating the right to non-discrimination only as an accessory right, namely only in conjunction with other substantive rights enshrined in the Convention (such as the right to life, the right to respect for private and family life or freedom of thought, conscience and religion). The Court is not competent to examine complaints concerning discrimination which concern rights that do not fall within the ambit of those protected by the Convention. As a result, the relevant case law focuses disproportionately on the pivotal significance of the principle of non-discrimination. However, the Court has adopted a wide interpretation of Article 14. Firstly, it may find a violation of Article 14 of the Convention even when it does not find a violation of the substantive right.<sup>24</sup> Secondly, its interpretation may go beyond the letter of the relevant article when the facts relate to issues that are protected by the Convention.<sup>25</sup>

14. The Court, in its case law on Article 14, has specified the meaning of “discrimination” and made it clear that not every distinction or difference of treatment fulfils this definition. According to the Court, “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’”.<sup>26</sup> It also noted that “certain legal inequalities tend only to correct factual inequalities”.<sup>27</sup> Moreover, in the *Thlimmenos v. Greece*<sup>28</sup> judgment, the Court stated that, in some circumstances, the failure to treat differently persons whose situations are significantly different may also be contrary to the principle of non-discrimination.<sup>29</sup>

15. Since the *Nachova and others v. Bulgaria*<sup>30</sup> judgment of 2005, the Court has applied a concept of “positive obligations” to cases concerning Article 14 of the Convention, which means that states are obliged to take the “legislative, regulatory or other” measures aimed at establishing greater or more effective equality.<sup>31</sup>

16. Even though the number of cases under Article 14 has been constantly increasing in the last few years, in particular concerning racial discrimination,<sup>32</sup> this provision has always been treated as an auxiliary one and is not seen as an adequate tool for combating discrimination in Europe. As Mr Edel noted at the hearing in March 2011, the case law of the European Court of Human Rights has always been unambitious, at least until 2000. Since the judgment *Thlimmenos v. Greece*, no other judgment has applied the principle established in this case. Only in 2004 did the Court find a violation of Article 14 on the ground of race/ethnic origin<sup>33</sup> and refer to the notion of indirect discrimination (namely when an apparently neutral legislation or

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<sup>23</sup> Such as, for instance, fatherhood (*Weller v. Hungary*, Application No. 44399/05, judgment of 31 March 2009); marital status (*Petrov v. Bulgaria*, Application No. 15197/02, judgment of 22 May 2008) or membership in an organisation (*Danilenkov and others v. Russia*, Application No. 67336/01, judgment of 30 July 2009).

<sup>24</sup> For instance *E.B. v. France*, Application No. 43546/02, judgment (Grand Chamber) of 22 January 2008. In this case, the Court found a breach of Article 14 taken in conjunction with Article 8 (right to respect for private or family right) due to the French court’s refusal to allow a homosexual person to adopt, refusal which was mainly based on the applicant’s sexual orientation.

<sup>25</sup> *Handbook on European non-discrimination law* (“Handbook”), European Union Fundamental Rights Agency and European Court of Human Rights, Council of Europe, Luxembourg: Publications of the Office of the European Union 2011, p. 61. See, for instance, *Carson and others v. United Kingdom*, Application No. 42184/05, judgment (Grand Chamber) of 16 March 2010; in this case the Court found that even though the Convention did not guarantee a right to social security or pension payments, where the state itself decided to do so, this would give rise to a proprietary interest under Article 1 of Protocol 1 to the Convention (protection of property).

<sup>26</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Applications Nos. 9214/80, 9473/81 and 9474/81, judgment of 28 May 1985.

<sup>27</sup> *Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,”* judgment of 23 July 1968, Applications Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64.

<sup>28</sup> *Thlimmenos v. Greece*, judgment (Grand Chamber) of 6 April 2000, Application No. 34369/97, paragraph 44.

<sup>29</sup> It should also be noted that, although Article 14 of the Convention is about “the principle of discrimination”, the Court sometimes uses terms like “the principle of equality” or “equal treatment”; *Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,”* op. cit., paragraph 34.

<sup>30</sup> *Nachova and others v. Bulgaria*, judgment (Grand Chamber) of 6 July 2005, Application No. 43577/98.

<sup>31</sup> For a more detailed analysis of this issue, see F. Edel, *The prohibition of discrimination under the European Convention on Human Rights*, Human rights files, No. 22, Council of Europe Publishing, Strasbourg 2010, pp. 72-84.

<sup>32</sup> See, amongst others, *Moldovan, and others v. Romania No. 2*, judgment of 12 July 2005, Application No. 41138/98; 64320/01; *D.H. and Others v. the Czech Republic*, Application No. 57325/00, judgment (Grand Chamber) of 13 November 2007.

<sup>33</sup> *Nachova and others v. Bulgaria*, judgment of 26 February 2004, Application No. 43577/98.



practice results in a disproportionate disadvantage for a particular group without reasonable justification) in the judgment *D.H. and others v. the Czech Republic*.<sup>34</sup>

17. Some violations of the principle of non-discrimination have clearly resulted from the deficiencies of the national legislation itself (see, for instance: *Marckx v. Belgium*,<sup>35</sup> *Mazurek v. France*,<sup>36</sup> *Chassagnou and others v. France*<sup>37</sup> and *Andrejeva v. Latvia*<sup>38</sup>). In these cases, states were obliged to repeal and/or amend the existing laws in order to fulfil their obligation to implement the final judgments of the Court (Article 46 of the Convention).<sup>39</sup>

### 3.3.1.2. Protocol No. 12 to the European Convention on Human Rights

18. The adoption of Protocol No. 12 to the Convention, which emerged out of debates over how to strengthen sex and racial equality in particular,<sup>40</sup> opened a new stage in the development of the Council of Europe's legal framework pertinent to non-discrimination and equality. Protocol No. 12 expanded the scope of the prohibition of discrimination by guaranteeing equal treatment in the enjoyment of any right. Therefore the ban on discrimination does not only relate to the rights which are guaranteed by the Convention, but it creates a free-standing right not to be discriminated against. According to the explanatory report, this provision relates to discrimination:

- a. in the enjoyment of any right specifically granted to an individual under national law;
- b. 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;
- c. by a public authority in the exercise of discretionary power (for example, granting subsidies);
- d. by any other act or omission by a public authority (for example, the behaviour of law-enforcement officers when controlling a riot).

19. It is clear that Protocol No. 12 protects individuals from discriminatory acts of the state, but the question of whether it has a "horizontal" effect, namely whether it also applies to relations between individuals, remains open for the time being.<sup>41</sup> However, according to the explanatory report to Protocol No. 12, such an interpretation is not excluded in situations in which the state would be expected to step in, "for example arbitrary denial of access to work, access to restaurants, or to services which private persons may provide to the public such as medical care or utilities such as water and electricity".<sup>42</sup>

20. The preamble of Protocol No. 12, in the first recital, clearly refers to "the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law".<sup>43</sup> It confirms that member states are resolved to promote this principle through the collective enforcement of a general prohibition of discrimination by means of the Convention (second recital). The third recital of the Preamble reaffirms 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", which is in line with certain international instruments (see paragraph 10 above). However, this provision does not impose any obligation to adopt such measures.

21. So far the European Court of Human Rights has examined only two cases on the grounds of Article 1 of Protocol No. 12<sup>44</sup> and found a violation of this provision only in one of them: *Sejdić and Finci v. Bosnia and Herzegovina*, which concerned the fact that the applicants, of Jewish and Roma origin, were not able to

<sup>34</sup> *D.H. and others v. the Czech Republic*, op. cit.

<sup>35</sup> Judgment of 13 June 1979, Application No. 6833/74.

<sup>36</sup> Judgment of 1 February 2000, Application No. 34406/97.

<sup>37</sup> Judgment of 29 April 1999, Applications Nos. 25088/94, 28331/95 and 28443/95.

<sup>38</sup> Judgment of 18 February 2009, Application No. 55707/00.

<sup>39</sup> Resolution DH(88)3 of the Committee of Ministers in the case of *Marckx v. Belgium*, of 4 March 1988.

<sup>40</sup> The idea of this protocol was especially endorsed by the European Commission against Racism and Intolerance (ECRI), which was of the opinion that the protection offered by the Convention from racial discrimination was not sufficient.

<sup>41</sup> See F. Edel, op. cit., p. 44.

<sup>42</sup> Explanatory report, paragraph 28.

<sup>43</sup> According to F. Edel, it is rather enigmatic why this wording was not included in Article 1 of Protocol No. 12 and may be explained by the effect of repetition or accumulation created by the second paragraph of the preamble. It results from the *travaux préparatoires* that the disagreement between the experts related not so much to the result to be achieved by this new Protocol as to the means of achieving it. F. Edel, op. cit. p. 37.

<sup>44</sup> *Sejdić and Finci v. Bosnia and Herzegovina*, Applications Nos. 27996/06 and 34836/06, judgment of 22 December 2009, and *Savez Crkava "Rijec Zivota" and others v. Croatia*, Application No. 7798/08, judgment of 9 December 2010.

stand in a presidential election.<sup>45</sup> The Court found that this situation amounted to racial discrimination, confirmed that Article 1 of Protocol No. 12 introduced “a general prohibition of discrimination” and stated that its analysis of cases based on this protocol would be identical to that established under Article 14 of the Convention.<sup>46</sup> It also reiterated that racial discrimination is a “particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction”.<sup>47</sup>

22. It will be interesting to see how the case law on Protocol No. 12 evolves in the future, in particular concerning the interpretation of the clause of “any right set forth by law” and the application of the non-discrimination principle to situations concerning private parties through the notion of the state’s failure to fulfil positive obligations deriving from the Convention.

### 3.3.1.3. State of ratification of Protocol No. 12

23. Regrettably, most of the Council of Europe member states have not yet ratified Protocol No. 12. So far, this instrument has been ratified only by 18 member states of the Council of Europe, out of which seven are European Union member states (Cyprus, Finland, Luxembourg, the Netherlands, Romania, Slovenia and Spain). Only two founding members of the Council of Europe and the European Union, Luxemburg and the Netherlands, have ratified it. Most of the states which ratified this instrument are recent member states of the Council of Europe (Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Georgia, Montenegro, Romania, San Marino, Serbia, “the former Yugoslav Republic of Macedonia” and Ukraine). For the majority of them, the ratification of Protocol No. 12 was a formal commitment taken upon accession to the Council of Europe and has been followed up in the framework of the monitoring of compliance with the state’s obligations and commitments.<sup>48</sup>

24. It is particularly striking that eight out of the ten states which have not signed Protocol No. 12 are members of the European Union (Bulgaria, Denmark, France, Lithuania, Malta, Poland, Sweden and the United Kingdom) and some of them are not only long-established democracies but also founding members of the Council of Europe (Denmark, France, Sweden and the United Kingdom).

### 3.3.1.4. Possible reasons for non-ratification of Protocol No. 12

25. The state of ratification of Protocol No. 12 shows that EU member states have undertaken different levels of obligation in European non-discrimination law. The refusal of EU member states to sign and/or ratify Protocol No. 12 is often justified by the existence of non-discrimination provisions in EU legislation. Some states are also reluctant to sign/ratify Protocol No. 12, because they consider that their national legal system provides for better protection against discrimination (like the United Kingdom), or because they are uncertain about the future interpretation that the Court will give to it and concerned about the increase in its workload. Some states are therefore postponing ratification until a reform of the Court has been carried out.<sup>49</sup>

26. When reflecting on the reasons for non-ratification of Protocol No. 12, I would like to revert to what Mr Edel pointed out at the hearing in March 2011: member states are afraid of the concept of equality, due to the case law and its history. Since Protocol No. 12 has a very general scope and covers all acts of any public authority, member states may fear that the European Court of Human Rights could become another appeal court. However, as Mr Edel convincingly proved, these fears are not justified. Firstly, most of the cases brought to the Court concerning discrimination have been dismissed as inadmissible. Secondly, although the scope of obligations stemming from Protocol No. 12 still remains uncertain, their interpretation will be aligned with that of Article 14 of the Convention. Thirdly, although the judicial criteria for determining whether discrimination has occurred or not remain abstract and formal (such as “objective and reasonable justification”), the case law of the Court has been very cautious so far. The only major advances have concerned the inequalities between children born in and out of wedlock.<sup>50</sup>

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<sup>45</sup> Following a power-share agreement between the three main ethnic groups (Bosniac, Serb and Croat), only candidates declaring affiliation to one of these groups could stand for elections.

<sup>46</sup> *Sedjic and Finci v. Bosnia and Herzegovina*, paragraph 55.

<sup>47</sup> *Ibid*, paragraph 43.

<sup>48</sup> [http://assembly.coe.int/Conferences/2010Limassol/Principedendiscrimination\\_E.pdf](http://assembly.coe.int/Conferences/2010Limassol/Principedendiscrimination_E.pdf).

<sup>49</sup> *Proceedings of the Seminar marking the entry into force of Protocol No. 12 to the European Convention on Human Rights* (“Proceedings of the Seminar”), Strasbourg, 11 October 2005, Council of Europe Publishing 2006, p. 93.

<sup>50</sup> For instance, *Marckx v. Belgium*, *op. cit.*

### 3.3.2. Other Council of Europe instruments

#### 3.3.2.1. Other conventions

27. Article 20 and Article E (Part V) of the revised European Social Charter (ETS No. 163) include both a right to equal opportunities and equal treatment in matters of employment and occupation, protecting against discrimination on the grounds of sex. Moreover, some provisions concerning the prohibition of discrimination are also included in the Framework Convention for the Protection of National Minorities (ETS No. 157) (Articles 4, 6.2 and 9), the Convention on Action Against Trafficking in Human Beings (CETS No. 197) (Article 2.1) and the Convention on Access to Official Documents (CETS No. 205).

#### 3.3.2.2. European Commission against Racism and Intolerance

28. The European Commission against Racism and Intolerance (ECRI) was created following a decision of the Vienna Summit of 9 October 1993. It is an independent monitoring body of the Council of Europe, composed of independent experts. Its tasks consist in combating racism, racial discrimination, xenophobia, anti-Semitism and intolerance from a human rights perspective, in the light of the European Convention on Human Rights, its additional protocols and related case law (Article 1 of ECRI's Statute).<sup>51</sup> ECRI's objectives are to review member states' legislation, policies and other measures to combat racism, xenophobia, anti-Semitism and intolerance, and their effectiveness; to propose further action at local, national and European level; to formulate general policy recommendations to member states and to study international legal instruments applicable in the matter with a view to their reinforcement where appropriate.

29. As regards ECRI's general policy recommendations, Recommendation No. 7, adopted on 13 December 2002, on "National legislation to combat racism and racial discrimination" is of particular importance in this context. It contains elements proposed by ECRI to be included in national legislation in order to effectively combat racism and racial discrimination and advocates the adoption of a comprehensive anti-discrimination legislation, including provisions covering areas such as employment, housing, education and access to social and public services.<sup>52</sup>

#### 3.3.2.3. Commissioner for Human Rights

30. The Council of Europe Commissioner for Human Rights has consistently called for "robust and fully comprehensive" anti-discrimination legislation in all Council of Europe member states.<sup>53</sup> He has taken a firm stance against all forms of discrimination in several viewpoints, on issues like discriminatory stops and searches, discrimination of Roma, rights of people with disabilities and poverty.<sup>54</sup>

### 3.4. Combating discrimination in European Union legislation and policies

31. Equality was one of the fundamental values upon which the European Union was based (now to be found in Article 2 of the Treaty on the European Union). The European Union Charter of Fundamental Rights includes a provision on non-discrimination (Article 21<sup>55</sup>) and a Chapter III on equality. The EU institutions and its member states are bound by these provisions, but only when implementing EU law.<sup>56</sup>

32. In the area of non-discrimination, the European Union has developed comprehensive legislation, which must be implemented by member states in their domestic legislation. The EU prohibition of discrimination is free-standing, but limited to particular contexts. The proscribed grounds expressly include: sex, racial or ethnic origin, age, disability, religion or belief and sexual orientation. Discrimination on the

<sup>51</sup> Committee of Ministers' Resolution Res(2002)8 on the statute of the European Commission against Racism and Intolerance (ECRI), [www.coe.int/t/dghl/monitoring/ecri/about/ECRI\\_statute\\_en.asp](http://www.coe.int/t/dghl/monitoring/ecri/about/ECRI_statute_en.asp).

<sup>52</sup> [www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N7/Recommendation\\_7\\_en.asp](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/Recommendation_7_en.asp).

<sup>53</sup> For example, in his "Contribution by the Council of Europe Commissioner for Human Rights to the Durban Review Conference"(20-24 April 2009).

<sup>54</sup> "Equality, discrimination and poverty" in *Human rights in Europe: no grounds for complacency. Viewpoints by Thomas Hammarberg, Council of Europe Commissioner for Human Rights*, Council of Europe Publishing, 2011, pp. 43-45, 57-79, 127-142 and 194-196.

<sup>55</sup> "Any discrimination on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

<sup>56</sup> Therefore individuals can complain about EU legislation or national legislation that implements EU law if they consider that the Charter has not been respected and national courts can seek guidance on the correct interpretation of EU law from the Court of Justice of the European Union through the preliminary reference procedure (under Article 267 of the Treaty on the Functioning of the European Union).

ground of nationality is prohibited only in the particular context of the free movement of persons, although there are some exceptions concerning “third-country nationals”.<sup>57</sup>

33. Whilst the core purpose of the European Communities<sup>58</sup> (preceding the European Union) was the stimulation of economic growth through the establishment of an internal market covering all member states, it was gender equality that developed first, with a number of directives banning discrimination in areas such as pensions, pregnancy and statutory social security regimes.<sup>59</sup> Protection from discrimination based on other grounds was added later, in 2000, when two directives<sup>60</sup> were adopted: Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin in the area of employment and occupation, social security, education, supply of goods and services (Racial Equality Directive), and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, concerning discrimination based on religion or belief, age, disability and sexual orientation. These directives prohibit direct or indirect discrimination, guarantee access to a court, oblige member states to reverse the burden of proof and provide for sanctions. On 13 December 2004, Directive 2004/113/EC was adopted, implementing the principle of equal treatment between men and women in the access to and supply of goods and services and expanding the scope of sex discrimination to these areas.<sup>61</sup> Since sexual orientation, religious belief, disability and age are only defined as proscribed grounds for discrimination in the context of employment, the EU institutions are currently debating a proposal to extend protection against these grounds to the area of accessing goods and services (“Horizontal Directive”, proposed by the European Commission in 2008).<sup>62</sup>

34. The ban on discrimination under these directives covers three areas: employment, the welfare system, and goods and services, and currently, only Directive 2000/43/EC – “Racial Equality Directive”, applies to all three areas. Directive 2000/78/EC – “Framework Employment Equality Directive” applies only to employment (though a proposal to extend it to all three areas is under discussion), while the “Gender Equality Directive (Recast)” (2006/54/EC) and the “Gender Goods and Services Directive” (2004/113/EC) apply to employment and access to goods and services, but not to access to the welfare system.<sup>63</sup>

35. The European Court of Justice (ECJ – now the Court of Justice of the European Union) has adopted an approach construing areas of application of the said directives very widely in order to give full effect to the rights of individuals under EU law.<sup>64</sup> The ECJ has, in particular, interpreted broadly such concepts as “access to employment”, “working conditions”, “vocational guidance and training” and “social advantages.”<sup>65</sup>

36. Reports of the European Commission have shown that many practical difficulties have arisen in implementing the EU directives at the national level.<sup>66</sup> The directives have been implemented in national law, but not fully – half of the member states have not fulfilled their obligations in terms of scope, definitions or provisions on assistance to victims.<sup>67</sup>

37. Combating discrimination and ensuring equal opportunities in the field of employment and social affairs is of great concern for the European Union, which is currently implementing the PROGRESS programme – a Community programme for Employment and Social Security, for the years 2007-2013.<sup>68</sup> The programme has a budget of € 743 million and finances analysis, mutual learning, awareness-raising and dissemination activities.<sup>69</sup>

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<sup>57</sup> For further details, see Handbook, pp. 58-59.

<sup>58</sup> The original Treaty Establishing the European Economic Community (1957) contained a provision prohibiting discrimination on the basis of sex in the context of employment. This was to prevent member states gaining a competitive advantage over each other by offering lower rates of pay or less favourable conditions of work to women.

<sup>59</sup> Handbook, p. 14.

<sup>60</sup> Based on Article 13.1, now Article 19.1 of the Treaty on the Functioning of the European Union: “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

<sup>61</sup> See also “Gender Recast Directive” – Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>62</sup> COM(2008)426. See also Handbook, p. 14.

<sup>63</sup> Handbook, p. 64.

<sup>64</sup> Handbook, p. 85.

<sup>65</sup> Handbook, pp. 65-68 and 70.

<sup>66</sup> Proceedings of the Seminar, pp. 95-96.

<sup>67</sup> [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/combating\\_discrimination/dh0001\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/dh0001_en.htm).

<sup>68</sup> Decision No. 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Security – Progress.

<sup>69</sup> [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/combating\\_discrimination/c11332\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/c11332_en.htm).

### 3.5. Protection under European Union law and the European Convention on Human Rights: a comparison

38. There are some differences between the relevant EU norms and the Council of Europe standards in promoting equality and combating discrimination. The EU non-discrimination law has evolved mainly in order to facilitate the functioning of the internal market and was mainly confined to the area of employment. It is based on a sectoral approach and applies both to public and private parties. If national legislation is not within the competence of the European Union, EU anti-discrimination directives and the European Union Charter of Fundamental Rights do not apply. Although both sets of rules are complementary,<sup>70</sup> there are many areas in which the protection under the Convention surpasses the protection offered under EU non-discrimination law. The personal scope of EU law protection is more limited, for instance with respect to third-country nationals.<sup>71</sup> Moreover, the material scope of the non-discrimination under Article 14 of the Convention goes beyond EU law, since the Convention guarantees “civil and political” rights and also certain “economic and social rights” and therefore protects rights in such areas as family and private life, political participation or criminal law matters.

#### 4. National legislation and the problems of implementation of non-discrimination concepts

39. Along with the provisions of international human rights instruments, the national legislation of all Council of Europe member states also includes general provisions to outlaw discrimination. In certain national legal systems equality legislation now contains legal concepts, definitions, approaches and jurisprudence that have taken the protection against discrimination and the realisation of the right to equality to a higher level. Several member states of the Council of Europe have relatively strong and detailed anti-discrimination legislation (Belgium,<sup>72</sup> Bulgaria,<sup>73</sup> Sweden<sup>74</sup> and the United Kingdom<sup>75</sup>).<sup>76</sup>

40. In the last decade, higher standards of protection against discrimination have evolved in EU member states, following the adoption of the non-discrimination directives. There are examples of comprehensive anti-discrimination laws, establishing independent equality bodies with strong mandates: in Belgium – the Centre for Equal Opportunities and the Fight against racism; in Bulgaria – the Commission for Protection against Discrimination; in France – the High Authority against Discrimination and for Equality (*Haute autorité de lutte contre les discriminations et pour l'égalité*); and in Hungary (Equal Treatment Authority). These bodies, created mostly to implement EU legal obligations, are particularly important in informing and assisting victims in the solution of disputes concerning discrimination. On the impulsion of the European Union, non-discrimination directives minimum standards have been established in national legislation. Numerous member states which did not have national bodies dealing with equality had to create such bodies.

41. Many Council of Europe member states have recently adopted comprehensive anti-discrimination legislation (Albania, Czech Republic, Serbia, etc.) or are currently developing or upgrading it (“the former Yugoslav Republic of Macedonia”, Moldova, etc.). Meanwhile, a number of Council of Europe member states still lack comprehensive anti-discrimination legislation. In most national legal systems, anti-discrimination law is fragmented and contains many gaps. The reasons for the fragmentation are various: different grounds for discrimination (gender, race, religion, etc.) are regulated differently, protection against discrimination is not

<sup>70</sup> Proceedings of the Seminar, p. 96.

<sup>71</sup> Handbook, p. 59.

<sup>72</sup> On 10 May 2007, a series of laws to combat discrimination and racism were adopted. They have improved the civil-law machinery penalising racial discrimination and other forms of discrimination on several points and they clarify the requirements for adducing evidence of discrimination before the civil courts. See ECRI Report on Belgium (fourth monitoring cycle), adopted on 19 December 2008 and published on 26 May 2009, CRI(2009)18, p. 7.

<sup>73</sup> In 2004, the Protection against Discrimination Act came into force. It prohibits discrimination on grounds such as race, religion, ethnic or national origin and nationality and covers amongst others things education and employment. See ECRI Report on Bulgaria (fourth monitoring cycle), adopted on 20 June 2008 and published on 24 February 2009, CRI(2009)2, p. 7.

<sup>74</sup> A new anti-discrimination act entered into force in 2009.

[www.humanrights.gov.se/extra/pod/?id=85&module\\_instance=2&action=pod\\_show](http://www.humanrights.gov.se/extra/pod/?id=85&module_instance=2&action=pod_show).

<sup>75</sup> For more details concerning the United Kingdom legislation, see for instance, speech by Mr John Kissane “Protocol No. 12 – UK Government’s position”, in the *Proceedings of the Seminar marking the entry into force of Protocol No. 12 to the European Convention on Human Rights*, Strasbourg, 11 October 2005, Council of Europe Publishing, 2006, p. 93.

<sup>76</sup> D. Petrova, *The Unified Perspective on Equality*, p. 2.

[www.equalrightstrust.org/ertdocumentbank/The%20Unified%20Perspective%20on%20Equality.pdf](http://www.equalrightstrust.org/ertdocumentbank/The%20Unified%20Perspective%20on%20Equality.pdf).

provided in all relevant sectors of social life (administration of justice, education, employment, etc.) and there is too little co-operation between different actors such as state authorities and advocacy groups.<sup>77</sup>

## 5. The Declaration of Principles on Equality

42. The Declaration of Principles on Equality was published in October 2008. The Principles were drafted and signed initially by 128 prominent legal practitioners, academics and human rights activists from 44 countries (including Thomas Hammarberg, the Council of Europe Commissioner for Human Rights), and subsequently endorsed by hundreds of individual signatories and organisations.

43. The Declaration advocates a wiser and fairer international and national law, built on the recognition of differences and on the presumption that human rights are only achievable when we have equality. It contains 27 legal principles which:

- define equality as a basic human right – stating that equality should be seen as an autonomous human right in itself, rather than as subsidiary or accessory to other rights: “The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law” (Principle 1);
- suggest a comprehensive framework which i) provides protection in areas where experience shows that discrimination is likely to occur, and ii) includes a “test” through which new prohibited grounds for discrimination and therefore new vulnerable groups can be protected, thus mitigating the risk of prejudice, hostility and discrimination;
- re-define positive action – departing from the concept of formal equality and construing positive action as inherent in substantive equality rather than as an exception;
- ensure consistency and fairness – enabling stakeholders in all nations to enshrine the right to equality in a way that addresses the gaps, inconsistencies and hierarchies of current equality regulations.

44. The Declaration provides a substantive notion of equality based on international human rights law which moves beyond the formal notion of equality that is largely applied in many Council of Europe member states and whereby individuals would be treated in identical ways regardless of their relative capabilities for participation in economic, social, political, cultural or civil life. The Declaration defines the right to equality as going beyond formal equality and comprising the following elements:

- the right to equality before the law;
- the right to equal protection and benefit of the law;
- the right to recognition of the equal worth and equal dignity of each human being;
- the right to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.

45. It should be stressed that the content of the right to equality in the Declaration goes beyond the notions of equality before the law and equality of opportunity.<sup>78</sup> Its meaning is closer to the EU directives, which refer to “ensuring full equality in practice”.<sup>79</sup> It is also closely related to the notion of human dignity as articulated in Article 1 of the Universal Declaration of Human Rights.<sup>80</sup> According to the Declaration of Principles on Equality, the right to equality and to non-discrimination is not necessarily related to an existing right (contrary to the Convention and Protocol No. 12); thus, for instance, in a country where national law does not recognise a right to employment, one should still have the right to equality (and non-discrimination).<sup>81</sup> Therefore, it goes considerably further than existing international human rights law in proclaiming a free-standing right to equality.<sup>82</sup> Moreover, according to Principle 8, “the right to equality applies in all areas of activity regulated by law”, which means that it encompasses activities by public and private actors, including transnational corporations and other non-national legal entities.<sup>83</sup>

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<sup>77</sup> *Ibid.*, pp. 4 and 5.

<sup>78</sup> Declaration of Principles on Equality, The Equal Rights Trust, 2008, Commentary by D. Petrova, p. 29.

<sup>79</sup> See Article 7.1 of Directive 2000/78/EC.

<sup>80</sup> Declaration of Principles on Equality, *op. cit.*, p. 30.

<sup>81</sup> *Ibid.*, p. 31.

<sup>82</sup> *Ibid.*, p. 33.

<sup>83</sup> *Ibid.*, p. 35.

46. Principle 2 of the Declaration defines equal treatment as an aspect of equality which is not equivalent to identical treatment and states that in order “to realise full and effective equality it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals”.

47. The Declaration also defines the right to non-discrimination and the most important types of discrimination (direct, indirect, harassment, discrimination by association and by perception).<sup>84</sup> As stressed by Ms Petrova at the hearing in March 2011, non-discrimination is defined as a free-standing and separate right in two senses: i) in the sense that it is a separate right which can be violated even if a related right is not (like in the case law of the European Court of Human Rights) and ii) in the sense of an autonomous right not related to any other right set forth by law (like in the EU anti-discrimination legislation and the national legislation in a number of EU member states in areas such as employment, education, health, goods and services, public functions, etc). Concerning the question whether there should be a limitative enumeration or an open list of grounds for discrimination, the Declaration contains a three-step test: the definition of discrimination in Principle 5 contains the possibility of extending the list of “prohibited grounds” and includes three criteria, each of which could be sufficient to recognise a further characteristic as a “prohibited ground”.<sup>85</sup>

48. Laws and policies must also protect individuals against “multiple discrimination”, that is discrimination based on more than one ground (Principle 12) and special attention should be also given to combating poverty, which may be both a cause and a consequence of discrimination (Principle 14 states that measures to alleviate poverty should be co-ordinated with those aimed at combating discrimination).

49. According to Principle 3 of the Declaration, the right to equality requires positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, in order to be effective. Principle 11 specifies the types of measures that the state shall take in order to give full effect to the right of equality, such as: appropriate constitutional, legislative, administrative and other measures, relevant policies and programmes and measures to ensure that all public authorities and institutions act in conformity with the right to equality. Equality laws and policies should be comprehensive and sufficiently detailed to encompass different forms and manifestations of discrimination and disadvantage (Principle 15) and states are also under the obligation to raise public awareness about equality (Principle 17). Positive action does not constitute discrimination as long as the difference in treatment is aimed at achieving full and effective equality and the means adopted are proportionate to that aim.<sup>86</sup> Therefore positive measures are a part of the implementation of the equal treatment principle.<sup>87</sup>

50. The Declaration also contains principles on the enforcement of the right to equality, in particular the right to seek legal redress and an effective remedy in judicial and/or administrative procedures (Principle 18), rules on sanctions for breaches of the right to equality (Principle 22) and on establishing specialised bodies (Principle 23). It also contains rules on gathering and disseminating information. States must also collect and publicise information, in order to identify inequalities, discriminatory practices and patterns of disadvantage, and analyse the effectiveness of measures to promote equality (Principle 24). Laws and policies adopted to implement the right to equality must be accessible to all persons (Principle 25).

51. One of the intellectual strengths of the Declaration is that it overcomes two historically constructed dichotomies that stand in the way of enacting good laws and implementing good practices today: the Cold War era division of human rights into civil and political rights on the one hand and economic, social and cultural rights on the other; and the even deeper division between identity-based equality (such as gender, race, religion) and equality of economic status. The Council of Europe Commissioner for Human Rights, highlighting the comprehensive approach of the Declaration of Principles on Equality and its usefulness for all stakeholders, called for measures to implement the principles and in particular to overcome the artificial distinction between status-based discrimination and social injustice.<sup>88</sup> Although the Declaration is only a

<sup>84</sup> Principles 4 and 5.

<sup>85</sup> Principle 5, second indent: “Discrimination on any other ground must be prohibited where such discrimination i) causes or perpetuates systemic disadvantage; ii) undermines human dignity; or iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.”

<sup>86</sup> Declaration of Principles on Equality, D. Petrova, op. cit., p. 31.

<sup>87</sup> Ibid., p. 32.

<sup>88</sup> [www.coe.int/t/commissioner/Viewpoints/090511\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/090511_en.asp).

general and abstract set of principles on equality, it documents a degree of consensus among global activists in the field.

## 6. Conclusion

52. For too long non-discrimination has been regarded and applied as merely an accessory human right both by the Council of Europe and its member states. Consequently, the right to equality has been undermined by two opposite but equally limiting assumptions: i) being seen as a general principle only and ii) being subjected to an overly formal procedural approach, ignoring factual inequalities. This approach must now evolve: equality must be understood as an effective legal right.

53. Due to the disparity between international, regional and national approaches to equality, a major effort is required to modernise and integrate legal standards related to the protection against discrimination and the promotion of equality. At the European level, protection against discrimination is not ideal and there are many discrepancies between the EU member states and non-EU member states, as well as among EU member states themselves. In particular, Protocol No. 12 should be ratified by all member states of the Council of Europe in order to harmonise the level of protection and ensure coherence with other binding international norms. The reasons invoked for non-ratification of this additional protocol are unconvincing and anachronistic, as shown above.

54. A lot still has to be done at the level of national legislation. States should adopt and implement legislation aimed at eradicating discrimination and promoting equality; such legislation should identify unacceptable behaviour, specify remedies applicable to the alleged victims of discrimination and cover all relevant grounds of discrimination, as well as multiple and compound forms of discrimination. Any arbitrary ground for discrimination should be considered as proscribed.<sup>89</sup> Strong independent anti-discrimination/equality bodies ought to be set up in order to monitor anti-discrimination legislation and receive complaints, since experience has shown that such bodies are particularly efficient and accessible to the alleged victims.

55. It should be stressed that one should struggle not only for legal, but also for factual equality. It is indispensable to incite political action to promote equality at all levels, in particular through "positive action".

56. The Declaration of Principles on Equality, drafted following a consensus reached between international experts on equality and non-discrimination principles, may serve as a benchmark for legislators towards a more progressive set of equality norms and policies in the 21st century. It may also assist the efforts of the judiciary, civil society organisations and anyone else involved in combating discrimination and promoting equality.

57. Given the outstanding importance of the concept of equality for the statutory goals of the Council of Europe, the Council's institutions should promote and take into consideration the Declaration of Principles on Equality, which defines equality and non-discrimination as free-standing rights. Taking into consideration the main ideas of the Declaration may provide a basis for the progressive interpretation of equality norms, including Article 14 of the European Convention on Human Rights and its Protocol No. 12, and Article E of the revised European Social Charter, and for improving the Council of Europe's standard setting and procedures. The promotion of the Declaration could also strengthen and broaden the consensus among human rights and equality experts reflected in the Declaration. It will also generate interest and debate and thus contribute to reaffirming and developing the right to equality.

58. As stated by the Commissioner for Human Rights, a full and effective realisation of equality requires asserting the equal worth of people by treating them differently according to their different circumstances and enhancing their ability to participate in society as equals.<sup>90</sup> The right to equality may not be easy to achieve, but states have no excuse for not taking steps to implement this right.

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<sup>89</sup> D. Petrova, *The Unified Perspective on Equality*, op. cit., p. 5.

<sup>90</sup> "Equality, discrimination and poverty" in *Human rights in Europe: no grounds for complacency. Viewpoints by Thomas Hammarberg, Council of Europe Commissioner for Human Rights*, op. cit., p. 197.