

Rethinking the ‘Ancillary’ Nature of the Prohibition of Discrimination Set Out in Article 14 ECHR

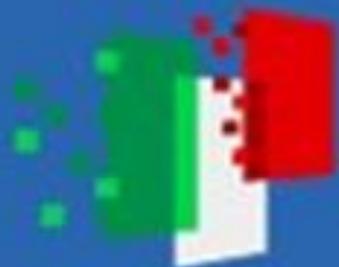
Dr Lorenzo Acconciamezza

Assistant Professor of International Law

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Structure of the presentation

I. Introduction to the topic

II. The Court's reasons not to examine discrimination allegations

III. Counter-reasons for examining discrimination allegations

Introduction to the topic

PART I

Contradictions concerning the prohibition of discrimination

S.A.S. v. France,

1 July 2014

para. 149

FUNDAMENTAL VALUE:
«the values of tolerance, social peace and non-discrimination [...] underlie the Convention»

T.H. v. the Czech Republic

12 June 2025

para. 62

SYSTEMATICALLY DISAPPLIED: «the Court considers it **unnecessary to examine** whether there has been a violation [...] of Article 14»

Concerns raised by the non-independent and ancillary nature of Article 14 ECHR

Theoretical concerns

- «**deprives this fundamental provision in great part of its substance and function** in the system of substantive rules established under the Convention» (*Dudgeon v. the United Kingdom*, 22 October 1981, Dissenting opinion of judges Evrigenis and Garcia de Enterría)

Practical concerns

- Coexistence of several possible approaches
 - Lack of foreseeability
-

The Court's reasons not to examine discrimination allegations

PART II

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

**Principled
reasons**

**Practical
reasons**

Principled reasons not to examine discrimination allegations

Nature and scope of Article 14

- **No independent existence:** it forms an integral part of the other substantive rights and freedoms
- **No autonomous human right:** it is a modality through which the other rights and freedoms must be safeguarded (a «free-standing right» is provided exclusively in Article 1 of Protocol No. 12)
- **Ancillary and complementary provision** unless it is considered to be the «essential» or «central» issue or «sole reason»

Principled reasons not to examine discrimination allegations

Normative content of Article 14

- **Substantive overlap** with the Convention of other Convention obligations
- **Absorbtion** by findings concerning other Convention provisions

Practical reasons not to examine discrimination allegations

Evidentiary hurdles

- **Lack of evidence** of discrimination;
- **Perceived complexity** of the assessment of the evidence concerning a discrimination allegation

Judicial policy

- **Procedural economy** (avoid multiple assessments);
- **Judicial deference** (avoid strong accusations towards States)

Counter-reasons in favour of examining discrimination allegations

PART III

1. Autonomous nature of the prohibition of discrimination

2. The possibility of overcoming practical hurdles

3. The importance of individual and general redress

The autonomous nature of the prohibition of discrimination as set out in Article 14

Textual indications

- An **autonomous and independent right** with a limited scope of application

Historical reasons

- Importance attributed to equality and non-discrimination in the *travaux préparatoires*
- **Evolution of the importance of non-discrimination in European societies**

Scope and purpose of the ECHR

- The need to guarantee the right in a **practical and effective way**

Systematic reasons

- Prohibition of discrimination needs to have the **same meaning** in different provisions

The possibility of overcoming practical hurdles

- a) The *de minimus non curat praetor* principle as admissibility requirement
- b) The evolution of the rules on the **distribution of the burden of proof**: the sufficiency of *prima facie* evidence and the shift of the burden to the Government
- c) The **sufficiency of credible allegations** for triggering procedural obligations

The impact of measures of redress in discrimination cases

Individual redress (moral damage)

- Higher compensation for multiple violations
- Discrimination as causing further distress and frustration and therefore justifying the award of higher compensation for moral damage
- Bringing the Court closer to the people

General measures (systemic)

DISCRIMINATION AS AN AGGRAVATING FACTOR OF HUMAN RIGHTS VIOLATIONS

«rendering this fundamental aspect of the crime invisible and of no criminal significance» is not acceptable for the Court when assessing domestic proceedings, why should it be acceptable in the Court's proceedings themselves?

Thanks for the attention!

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