LOCATING INDIRECT DISCRIMINATION IN INDIA: A CASE FOR RIGOROUS REVIEW UNDER ARTICLE 14

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For long, disparate impact or indirect discrimination has been absent from Indian discrimination law jurisprudence. Recently though, some decisions by the Supreme Court and the High Courts have recognised this type of discrimination. However, even in this nascent jurisprudence we notice a dichotomy. While some judges situate indirect discrimination under Article 14, others have located it under Article 15(1). In this essay, I contend that indirect discrimination is textually, evidentially and normatively incompatible with Article 15(1). Article 15(1) must only cover cases of direct discrimination. Nevertheless, discrimination along the lines of certain prohibited markers which are tied to individual dignity and autonomy ought to be treated differentially even under Article 14. I argue for a heightened standard of review under Article 14.

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I. INTRODUCTION

Generally understood, discrimination can be of two types — direct and indirect. When a person adversely distinguishes because of, or on the grounds of a certain marker of discrimination, the discrimination is said to be direct. When a person adopts a neutrally worded measure that is equally applicable to all, but in practice tends to disproportionately disadvantage persons belonging to one group, the discrimination is said to be indirect. For long, indirect discrimination has been conspicuous by its absence in Indian jurisprudence. Recently though, a few decisions rendered by the Supreme Court of India ('SCI') and by the High Courts have recognised this type of discrimination.[1]

The question that interests me in this paper is whether this type of discrimination ought to be located in Article 14 or Article 15 of the Constitution of India. As I will illustrate in this paper, Article 15(1) is in the nature of an absolute prohibition, whereas Article 14 is not.[2] Therefore, once discrimination is made out, there is no scope to justify or excuse it under Article 15(1). Justifiability here refers to the reason why a discriminatory measure was adopted. When these reasons are found to be acceptable either by statute or on judicial review, the measure is held to be legal. Consequently, there is a tangible difference in the implications of locating discrimination under Article 14 or Article 15(1).

At the same time, the difference between direct and indirect discrimination has also been a contested question. Across several common law jurisdictions, indirect discrimination is generally justifiable. Direct discrimination, on the other hand, is absolutely prohibited, or justifiable to a lesser degree in some cases,[3] or justifiable to the same extent as indirect discrimination.[4] Therefore, the approach towards a difference, if any, between direct and indirect discrimination has also varied across jurisdictions. As the Indian law on indirect discrimination evolves, questions as to the difference between direct and indirect discrimination, and as to the location of indirect discrimination will have to be answered by Indian Courts as well.

In this paper, I contend that indirect discrimination should be located in Article 14. Controversial as it may be, Article 15(1) must only cover cases of direct discrimination. This is because, Article 15(1) is in the nature of an absolute prohibition.[5] There is a difference between direct and indirect discrimination in terms of first, causation, second, mode of proof,[6] and third, moral wrongness.

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1 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1; Madhu v. Northern Railways, 2018 SCC Online Del 6660.

2 Ram Krishna Dalmia v. S. R. Tendolkar, AIR 1958 SC 538.

3 Equality Act, 2010, §13 (United Kingdoms); *See* Ricci v. DeStefano, 2009 SCC OnLine US SC 82 US (Supreme Court of the United States).

4 The Constitution of the Republic of South Africa, 1996, §9(3).

5 See *infra* Part II.

6 See *infra* Part III.

[7] This difference makes indirect discrimination incompatible with Article 15(1) textually, evidentially, and normatively. Moreover, this interpretation lends a coherent structure to Articles 14 and 15(1) without seeing Article 15(1) diminish in meaning.[8] I also contend that indirect discrimination along the lines of certain prohibited markers should be subject to a higher level of judicial scrutiny under Article 14.

This paper is divided into four parts. In Part I, I explore how there appears to be a judicial dichotomy even in the nascent jurisprudence on indirect discrimination in India as to its location. This controversy necessitates resolution. Notably, this controversy arises only if firstly, Article 15(1) is in the nature of an absolute prohibition and secondly, if there is a difference between direct and indirect discrimination. If discrimination under Article 15(1) were justifiable, it does not matter whether the discrimination is direct or indirect. Similarly, if there is no difference between direct and indirect discrimination, it does not matter whether the prohibition in Article 15(1) is absolute or not. It would cover both.

In Part II, I contend that Article 15(1) is in fact in the nature of an absolute prohibition. I make this argument based on a literal, structural, and comparative interpretation of the text. This interpretation is supported by the manner in which several High Courts have dealt with Article 15(1).

In Parts III and IV, I elaborate on the difference between direct and indirect discrimination. I contend that Article 15(1) is worded such that it cannot cover instances of indirect discrimination. Moreover, direct and indirect discrimination track different kinds of wrongs. Direct discrimination appears to tackle a recognition harm, one that appears to be normatively compatible with the absolute prohibition under Article 15(1). On the other hand, indirect discrimination seems to counter a distributive harm — one that seems to necessitate justification on a wider scale.

Finally, in Part V, I argue that it is not sufficient to locate indirect discrimination in Article 14. There must be a higher level of judicial scrutiny when indirect discrimination comes to be along the lines of certain prohibited markers.

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[7] See *infra* Part IV.

[8] Here, I do not wish to say that we return to the days of A.K. Gopalan v. State of Madras, 1950 SCC 228, and that the Constitution be interpreted in silos. However, it has long been said that Article 15(1) while powerful in its phraseology has been under-developed in its jurisprudence; *See* Tarunabh Khaitan, *Equality: Legislative Review under Article 14* in The Oxford Handbook of Indian Constitution 727 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, 2016) (Locating indirect discrimination in Art. 15(1), it threatens to further dent the emphatic nature of Article (1) and diminish its purpose).

II. DISENTANGLING THE TENSION

Article 14 states that every person shall be equal before the law and shall be entitled to equal protection of the law. Traditionally, the second part of this provision has been interpreted to mean that when the State creates a difference, it must be intelligible and must have a rational nexus to the object that it wants to achieve. This test is popularly known as the 'reasonable classification' test. Over the years, this doctrine was found to be inadequate and was supplemented with a doctrine of arbitrariness. Article 15(1) states that the State shall not discriminate on the grounds of race, religion, caste, sex or place of birth.

The question is whether Article 15(1) covers both direct and indirect discrimination. Decisions by the SCI and the High Courts have answered this question either way. On one hand is the decision of the SCI in *Navtej Johar* v. *Union of India* ('Navtej Johar') which was welcomed for bringing indirect discrimination within the fold of Article 15(1).[9] Chandrachud J. opined,

> "If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex (emphasis added)."[10]

The opinion then goes on to cite affirmatively that portion of the Delhi High Court decision in *Naz Foundation* v. *Union of India* ('Naz Foundation') which said that §377 of the Indian Penal Code, 1860 ('the IPC, 1860') was a facially neutral measure which had a disproportionate impact on homosexuals.[11] This part of the opinion was widely welcomed. Gautam Bhatia said that this may eventually lead our Courts to look at the *effects* of certain discriminatory measures.[12] Similarly, Gauri Pillai opined that this opinion laid the foundation for disparate impact or indirect discrimination in Indian constitutional law.[13] Tarunabh Khaitan, commenting on the predecessor of this case, *i.e.* Naz Foundation, equated a finding of indirect discrimination rooted in Article 15 with reading 'Swaraj' into the Constitution.[14]

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9 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

10 *Id*., ¶438.

11 *Id*., ¶441.

12 Gautam Bhatia, *Civilisation has Been Brutal: Navtej Johar, Section 377, and the Supreme Court's Moment of Atonement*, September 6, 2018, available at https://indconlawphil.wordpress.com/2018/09/06/civilization-has-been-brutal-navtej-johar-section-377-and-the-supreme-courts-moment-of-atonement/ (Last visited on June 21, 2020).

13 Gauri Pillai, *Naz to Navtej: Navigating Notions of Equality*, 12(3-4) Nuis L. Rev. (2019).

14 Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for all Minorities*, Vol. 2(3), Nujs L. Rev. 419, 430 (2009).

Similarly, the Delhi High Court was asked to examine the validity of a practice in the Northern Railways where medical insurance was denied to those family members of an employee whose names had been struck off by that employee.[15] The Court said that even a facially neutral decision can have a disproportionate impact on a constitutionally protected class — women and children.[16] It said that a classification which had a disproportionate effect on women was constitutionally untenable under Article 15 and struck it down.[17]

On the other hand, some of the other opinions in Navtej Johar, including that of Chandrachud J., found §377 of the IPC, 1860 to be manifestly arbitrary under Article 14. However, in doing so, the analysis adopted was that of disparate impact. Chief Misra J., speaking for himself and Khanwilkar J.,[18] said that first, the provision did not create a distinction between consensual and non-consensual sexual activity; second, it impacted a vulnerable group of people who shared an immutable characteristic; and third, this disadvantage was in terms of criminalisation and social stigma. Chandrachud J. himself said that §377 is a blanket offence which compels homosexuals to accept a certain way of life and criminalises the physical manifestation of their love. Malhotra J. too, held that §377, although neutrally worded, was discriminatory in its operation.[19] Therefore, following the analysis usually adopted for indirect discrimination, these opinions found §377 to be manifestly arbitrary under Article 14 and not Article 15(1).

Like these opinions, even when the Andhra Pradesh High Court found a legislative measure to be void for being indirectly discriminatory, it did so under Article 14.[20] When asked to examine the constitutional validity of a provision in the Hindu Marriage Act, 1955, which provided for a decree of restitution of conjugal rights, the Andhra Pradesh High Court said that such a section irretrievably alters the life of a wife while not having any such impact on the husband.[21] It is the wife who has to beget a child and the practical consequences of such a decree could cripple her future plans.[22] While the marker at play was evidently 'sex', the decision was not rendered under Article 15(1).[23]

Furthermore, the Supreme Court has even explicitly refused to find a breach under Article 15(1) for indirect discrimination.[24] Faced with a case where an admission form to a medical college asked for the 'nativity' of a person, the court observed that even though nativity may be a camouflage for the place of

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15 Madhu v. Northern Railways, 2018 SCC Online Del 6660.
16 *Id*., ¶17.
17 *Id*., ¶29.
18 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶254.
19 *Id*., ¶¶637.9-637.10.
20 T. Sareetha v. T. Venakata Subbaiah, 1983 SCC Online AP 90.
21 *Id*., ¶19.
22 *Id*., at 39.
23 *Id*.
24 P. Rajendran v. State of Madras, AIR 1968 SC 1012.

birth and that in most cases nativity may mean the place of birth, the admission form did not ask for place of birth. Therefore, Article 15(1) could not be said to have been violated.[25]

Therefore, although nascent, there is an apparent dichotomy that seems to be emerging in this area of law. While some judicial opinions have located indirect discrimination under Article 14, others have done so under Article 15(1). The short question then is whether Article 15(1) also covers cases of indirect discrimination. Before delving into this question, I will first examine the nature of the prohibition under Article 15(1) itself, which I argue is an absolute prohibition.

III. ABSOLUTE PROHIBITION IN ARTICLE 15(1)

Admittedly, the SCI has not examined the scope of Article 15(1) in as much depth as one might have desired. On a couple of occasions, it has even applied the traditional test of 'reasonable classification' as applicable under Article 14 to Article 15(1).[26] Some High Courts too have adopted this approach.[27] Scholars have relied on these decisions to say that there is an incoherence in our constitutional scheme.[28]

However, this has not been the predominant trend. Article 15(1) has been litigated quite often before the High Courts and they appear to have treated it in the nature of an absolute prohibition. To make out my case in this Part, I will first examine the text and structure of Article 15 in the scheme of Part III of the Constitution. I will then adopt a comparative approach with the Constitutions of the United States of America, Canada, and South Africa. Finally, I will discuss some High Court decisions which interpret Article 15(1) as an absolute prohibition.

A. THE TEXT

To begin with, at the cost of repetition, let me first turn to the text of Article 15(1). It states:

> "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth or any of them".

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[25] *Id*., ¶9.

[26] C.B. Muthamma v. Union of India, (1979) 4 SCC 260., ¶7; Narayan Sharma v. Pankaj kr. Lehkar, (2000) 1 SCC 44, ¶14 ('Narayan Sharma'). (In Narayan Sharma the court interprets an earlier decision in Chitra Ghosh v. Union of India, (1969) 2 SCC 228, to hold that Article 15(1) applies the test of reasonable classification. However, in my opinion, Chita Ghosh does not lay down a test applicable for Article 15(1)).

[27] Satyendra Kumar Tripathi v. State of U.P., 2004 SCC Online All 1340, ¶¶34-35; Mamta Dinesh Wakil v. Bansi S. Wadhwa, 2012 SCC Online Bom 1685, ¶84.

[28] Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement*, Vol. 50(2), Journal of the Indian Law Institute 177, 192 (2008).

As has been mentioned earlier, the provision is emphatic in its choice of words. It chooses the words "shall not". A literal interpretation of this clause suggests that it is mandatory in nature. A mandate is cast upon the State to not adopt a certain course of action, *i.e.*, discrimination. The State is not merely warned or cautioned against that course. Nor is it said that there shall be no discrimination except in the case of select eventualities, or subject to certain criteria. The Constitution merely says that the State shall not do so.

In fact, it is owing to the absolute nature of this clause that some of the other provisions of the Constitution become necessary. For instance, Article 15(3) states:

> "Nothing in this article shall prevent the State from making any special provision for women or children".

Similarly, Article 15(4) states:

> "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".

In my view, these provisions were simply not necessary if the prohibition under Article 15(1) were not envisaged as an absolute one, *i.e.*, if discrimination on the grounds mentioned in Article 15(1) were not barred without any scope for justification. Were a reasonable classification test or a measure of proportionality applicable even to Article 15(1), these measures could have been justified by the State under clause (1) itself. The State would not have required an independent enabling power in the form of clauses (3) or (4). The Constitution very evidently expresses a concern and envisages a scenario where the potentially symmetric nature of Article 15(1) may hamper efforts of the State to promote equality and therefore, accounts for this possibility. In that sense, the structure of Article 15, *i.e.*, the various sub-clauses, their interpretation and their relation *inter se*, too sheds light on the meaning of clause (1). In fact, some High Courts, like the Madras High Court in *Dennision Paulraj* v. *Union of India*,[29] have culled out this structural relationship by justifying the need for a power like Article 15(3) in light of the prohibition under Article 15(1).

This is where the opinion that Article 15(1) only creates a heightened standard of review also comes into the fray. Some have argued that a coherent difference between Articles 14 and 15(1) can be maintained by subjecting cases falling within the purview of Article 15(1) to a more rigorous standard of review.[30]

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[29] Dennision Paulraj v. Union of India, 2009 SCC Online Mad 697, ¶8.

[30] Khaitan, *supra* note 28, at 195.

Cases falling therein could be subjected perhaps to a strict scrutiny.[31] According to me, this too is not a plausible alternative. If clause (1) only directed the courts to apply a heightened standard of scrutiny, there still remains little justification for the inclusion of clauses (3) and (4) to Article 15. The Constitution would then have needed affirmative action measures to be justified by a more rigorous standard, or would have instead needed Courts to apply an asymmetric approach. The State did not need an independent enabling power only because some classifications were suspect; Not to mention that this opinion just does not sit comfortably with the text of clause (1).

We could take this argument a step further — were Article 15(1) not in the form of an absolute ban, the entire scheme of Article 15 would become redundant. Suspect classifications could be said to have been created under Article 14 itself, and affirmative action measures could have been justified by the traditional reasonable classification test.

B. COMPARATIVE LENS

1. United States

In fact, the Constitution of the United States of America ('U.S.') is a testament to this approach. The Fourteenth Amendment to the U.S. Constitution says,

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (emphasis added)."[32]

Over the years, the words, "nor deny to any person within its jurisdiction the equal protection of the laws" have been interpreted to mean that classifications based on markers such as race, sex or sexual orientation are suspect.[33] When a classification is suspect, it must pass an elevated level of judicial scrutiny to be constitutionally valid. The notion of suspect classifications emerged from a famous footnote in the decision of the Supreme Court of the United States in *United States* v. *Carolene Products*.[34] It said that when a statute that is directed at particular religious, national or racial minorities or where a prejudice is expressed against discrete and insular minorities, such a statute may need to be subjected to a more searching judicial enquiry.[35] Today, classifications based on race are subject

[31] Anuj Garg v. Hotel Assn. of India, (2008) 3 SCC 1.
[32] The Constitution of the United States, Fourteenth Amendment, 1868.
[33] Reva Siegel, *Equality Divided*, Vol. 127(1), Harvard Law Review 1, 18 (2013).
[34] United States v. Carolene Products Co. 1938 SCC OnLine US SC 93 (1938).
[35] The Constitution of India, 1950, Part II.

to strict scrutiny.[36] 'Strict scrutiny' implies that the objective which the measure seeks to achieve must be 'compelling' in nature and the measure itself must be 'narrowly tailored' to meet this objective. Similarly, classifications based on sex or sexual orientation are subject to an intermediate scrutiny.[37] Like the Fourteenth Amendment, the text of Article 14 is wide enough to include suspect classifications and differential standards of review.[38] Therefore, the point remains that the presence of Article 15(1) cannot be justified if its purpose were only to signal to the judiciary to adopt a deeper standard of scrutiny.

2. South Africa

The fact that Article 15(1) does not allow for any justifications becomes clearer when we look at §9 of the Constitution of the Federal Republic of South Africa. Clauses (1) to of §9 state:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (emphasis added)."[39]

The important word in this provision is 'unfairly'. Unlike the Indian Constitution, its South African counterpart has qualified discrimination.[40] It says, "the State may not unfairly discriminate". Were we to omit the double negative adopted by the provision, it would say, "the State may fairly discriminate". No such qualifier is present in Article 15(1), only making its prohibitive nature more evident.

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36 Seigel, *supra* note 33, at 30-31.

37 United States v. Virginia, 1996 SCC OnLine US SC 74 (1996).

38 Admittedly, the affirmative action jurisprudence in the United States has attracted considerable criticism for its symmetric approach. A symmetric approach here means that an affirmative action measure based on race would be subject to strict scrutiny just as a suspect classification would be; *See* Siegel, *supra* note 33. However, the point remains that Art. 14 could have been interpreted to include all affirmative action measures. Its interpretation could even have shelved a symmetric approach. Therefore, there is a need to independently justify the presence of Articles 15(1), (3) and (4).

39 The Constitution of the Republic of South Africa, 1996, Art. 9(3).

40 Jeanette Harksen v. Michael John Lane NO, (1998) 1 SA 300 (CC) (Constitutional Court of South Africa) ('Harksen').

Interestingly, South Africa too has clauses similar to the Fourteenth Amendment and Article 14 in §9(1). Therefore, one may turn around and say that South Africa too did not need a clause such as §9(3). However, first, the word 'unfairly' incorporates a slightly higher standard of scrutiny than the traditional rational nexus test,[41] and second, §9(5) reverses the burden of proof once a marker in §9(3) is attracted — Discrimination is presumed to be unfair unless it is established to be fair. Therefore, §9(3) appears to occupy an independent place in the South African Constitution.

Furthermore, there is an independent place for §9(2) as well. §9(2) allows the South African State to take an affirmative action measure. The State only needs to show that the measure was addressed at persons disadvantaged by unfair discrimination and that it was designed to enhance equality for them.[42] The Constitutional Court of South Africa ('CCSA') has further interpreted this sub-section to mean that the presumption of unfairness would not apply once the State was able to satisfy these elements.[43] Therefore, the Constitution carves out a separate test of judicial review for affirmative action measures. Moreover, the standard of scrutiny is also lower.[44] In the absence of §9(2), the State may have had to show that the measure was not 'unfair' under §9(3). §9(2) lowers the burden on the State. This relationship between §9(2) and 9(3) buttresses our understanding of the relationship between Articles 15(1) and Articles 15(3) & (4). The latter set of provisions create an enabling power for the State because otherwise a symmetric application of the prohibition under Article 15(1) would stymie the efforts of the State to enhance equality.

IV. CANADA

A contrary position is held by the Canadian Charter of Rights and Freedoms ('Canadian Charter') which in §15(1) states:

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41 In Harksen, the Constitutional Court of South Africa said that the first step was to see if there was a differentiation and if this differentiation could bear a rational connection to a legitimate government purpose. Even so, it said that the differentiation could amount to discrimination. If the differentiation were on a specified ground, discrimination would be presumed to have been established. The State would then have to show that it is not 'unfair'. To show unfairness, the focus is primarily on the impact of discrimination in the circumstances of the victim. In President of the Republic of South Africa v. Hugo, 1997 (4) SA 1 (CC), the Constitutional Court of South Africa enhanced the importance of 'dignity' in this analysis. Goldstone J. approvingly cited a decision of the Canadian Supreme Court (Egan v. Canada, 1995 SCC OnLine Can SC 46) which said that equality entails that society would not tolerate certain distinctions that offend fundamental human dignity. *See also* Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, Vol. 14(2), South African Journal of Human Rights 248 (1998).

42 Minister of Finance v. Van Heerden (2004) 6 SA 121 (CC), ¶37 (Constitutional Court of South Africa).

43 *Id*., ¶33.

44 *Id*., ¶42.

> "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, mental or physical disability".

Evidently, the Canadian Charter does not create an independent prohibition of discrimination like in India, or a presumption of unfair discrimination as in South Africa.[45] To equate Articles 14 and 15(1) would be to effectively read in a clause akin to the Canadian Charter.

While the comparative exercise may also extend to jurisdictions such as the United Kingdom and the European Court of Human Rights, in this portion of the paper, I have confined my analysis to only three countries. The United Kingdom has a different statutory framework which separately defines direct and indirect discrimination, and carves out a separate set of rules for each. The European Convention of Human Rights is similar in its text to the Canadian Charter.[46] Another limitation of my comparative analysis is that it is primarily textual in nature. What it does bring to the fore though, is that Article 15(1) ought not to be interpreted in a manner that includes within its ambit some scope for justification. This also follows from a literal and structural understanding of the provision. Therefore, I contend that Article 15(1) of our Constitution appears to impose a prohibition that is absolute in nature.

A. JUDICIAL TREATMENT

In an early SCI decision of *Kathi Raning Rawat* v. *State of Saurashtra*, Sastri C.J., as he then was, opined that once discrimination on one of the grounds in Article 15 was made out, it would amount to a violation of a constitutional prohibition.[47] This interpretation also comes to the fore in several High Court decisions. Around the same time, the Madras High Court in *Srinivas Iyer* v. *Saraswathi Ammal*, was asked to determine the constitutional validity of the Madras Hindu

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[45] Like Article 15(3) in India though, §15(2) of the Canadian Charter says, "Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." However, unlike India, there have not been several affirmative action cases before the Canadian Supreme Court. In Kapp v. R., 2008 SCC OnLine Can SC 41, it did get an opportunity to look at §15(2). The lead opinion in that case said that §15(2) is in the nature of an enabling provision designed to help governments pro-actively combat discrimination. It further said that through §15(2), the Canadian Charter preserves the right of the government to implement programs without the fear of challenge under §15(1). Therefore, it would appear even as per the Canadian Supreme Court that §15(2) finds a place in the Charter to avoid the possibility of a symmetric interpretation of sub-section (1).

[46] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos. 11 and 14, November 4, 1950, ETS 5, Art. 9.

[47] Kathi Raning Rawat v. State of Saurashtra, (1952) 1 SCC 215, ¶7.

(Bigamy Prevention and Divorce) Act, 1949.[48] As the title of the legislation suggests, it criminalised bigamy, but only for Hindus. A Division Bench of the High Court said that if a statute proceeds to classify based on one of the markers in Articles 15 or 16 of the Constitution, the law could not be justified "on the ground that notwithstanding that it contravenes the prohibition, it is valid on the ground that it attempts at a reasonable classification based upon real, substantial and reasonable grounds".[49] The constitutional challenge was eventually turned down, in my view, on a specious ground that the law only sought to modify the personal law of the parties. It did not classify based on religion.[50] Nevertheless, the Court was clear in its exposition of Article 15(1).

Much later, a bench of five judges of the Punjab & Haryana High Court in *M.C. Sharma* v. *Punjab University*, was asked to determine the constitutional validity of a rule which reserved the post of principal in girls' only colleges for women.[51] Sethi J. said that a classification on one of the markers in Articles 15 and 16, even if it satisfied the tests of intelligible differentia and rational nexus, would be impermissible.[52] Sodhi J. concurred in this opinion.[53] Kumaran J., the third judge in the majority, concurred in the outcome but seemed to be more focussed on the word "only" in Article 15(1).[54] While the decision was eventually overturned by the SCI on the basis that the measure was a special measure under Article 15(3),[55] the SCI did not comment on the opinion of Sethi J. as regards Article 15(1).

The Kerala High Court in *Rajamma* v. *State of Kerala*,[56] has also expressed a similar view. Faced with a situation where the State Government did not recruit women for the post of a peon on the ground that the nature of the work involved was arduous, the Court said that Article 15(1) constituted a specific prohibition and called for 'strict observance'.[57] It said, "Unlike freedoms in Article 19 of the Constitution, there is no scope for restricting the absolute scope of the rights under Article 15(1) of the Constitution. There would be no scope whatever to justify differentiating between the male and female sexes in the matter of appointment."[58] Similarly, the Supreme Court in *State of Rajasthan* v. *Thakur Pratap Singh*,[59] held that the exemption of Harijans and Muslims from the costs to be borne for additional policing in disturbed areas under the Police Act, 1861

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48 Srinivasa Iyer v. Saraswathi Ammal, 1951 SCC OnLine Mad 272.
49 *Id*., at 268.
50 *Id*., at 268-269.
51 M.C. Sharma v. Panjab University, 1995 SCC Online P&H 104.
52 *Id*., ¶36.
53 *Id*., ¶72.
54 *Id*., ¶73.3.
55 Vijay Lakshmi v. Panjab University, (2003) 8 SCC 440.
56 Rajamma v. State of Kerala, 1983 SCC OnLine Ker 75.
57 *Id*., ¶34.
58 *Id*.
59 State of Rajasthan v. Thakur Pratap Singh, AIR 1960 SC 1208.

violates the mandate of Article 15. Examples like these can be multiplied.[60] The moot point though, which emerges from this line of cases is that there is no scope for justification under Article 15(1). The law laid down therein is not that only when discrimination is unreasonable or disproportionate, is it prohibited; Instead, these cases suggest that any discrimination on the grounds mentioned in Article 15(1) is barred.

The absolute nature of Article 15(1) is also evident in those decisions that have posed some difficulty to the Courts. For instance, in *Amit Bhagat* v. *Government of NCT of Delhi* ('Amit Bhagat'), the Delhi High Court was faced with a clause in the Delhi Motor Vehicles Rules which exempted Sikh women from the mandate of wearing a helmet.[61] The Court observed that while Article 14 may allow a legitimate basis to classify on the basis of religion, Article 15(1) forbade such classification.[62]

Applying Article 15(1) would have meant that the clause would have to be struck down — an outcome which it seems the Court wanted to avoid. Therefore, the Court turned its gaze to the word 'discriminate' and observed that to discriminate against means to create an adverse distinction.[63] There must be an element of unfavourable bias and in this case, there was no such hostility towards Sikh women.[64] While the Court may have been correct in wanting to differentiate a mere distinction from discrimination, the distinction in this case was in favour of Sikh women. Therefore, a question of hostility against them did not arise. The Court could instead have adopted an intersectional approach and protected the measure under Article 15(3). An intersectional approach allows the Court to see the various identities of a woman; she is not only a woman, but could also be poor or a Dalit or a Sikh. She possesses more identities than one and a cross-section of them may aggravate her disadvantage. A special provision need not therefore cater to *all* women. It could also be designed to cater to those women who face added or unique disadvantages owing to their intersectional identities.

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60 Ramchandra Machwal v. State of Rajasthan, 2015 SCC Online Raj 9660 (In this case, the municipal body in question had allotted specific plots for the cremation of dead bodies to members of the Scheduled Caste. The court found this to be a breach of Article 15(1)); Pragati Varghese v. Cyril George Varghese, 1997 SCC Online Bom 184 (In this case, the constitutional validity of §10, Indian Divorce Act, 1869 was under challenge to the extent that it needed a wife to prove an additional fault besides adultery to claim divorce); R. Vasantha v. Union of India, 2000 SCC Online Mad 856 (In this case, the constitutional validity of §66(1)(b) of the Factories Act, 1948 was impugned. It said that women would not be allowed to work in a factory after seven o'clock in the evening. In both Pragati Varghese and R. Vasantha, the Courts found that the classification was based only on sex and struck them down. There was no question of any justification at all. A similar approach is also seen in G.K. Pushpa v. State of Karnataka, 2012 SCC Online Kar 8725).

61 Amit Bhagat v. Govt. of NCT of Delhi, 2014 SCC Online Del 7020.

62 *Id*., ¶¶23-24.

63 *Id*., ¶24.

64 *Id*.

However, it is difficult to do so when the measure was in favour of Sikh men. The Bombay High Court in *Girish Uskaikar* v. *Chief Secretary* ('Girish Uskaikar') was faced with precisely such a situation — an exemption from the helmet rule for Sikh men wearing a turban.[65] To save the rule and escape the force of Article 15(1), the court said that the decision was founded in necessity and was not a classification on the grounds of religion. It upheld the rule as one of reasonable classification under Article 14.[66] The Delhi High Court in Amit Bhagat discussed Girish Uskaikar and differed with its conclusion. It said an exemption for men wearing a turban was necessarily based on religion, but it did not offer a way to save the rule. Both these cases are difficult in the sense that the Courts wanted to accommodate certain religious practices, which was made difficult by the text of Article 15(1). While these cases may provoke a debate on both ends of the spectrum, what they show is that Courts too have consistently viewed Article 15(1) to be prohibitive in nature.

In fact, I would also suppose that the insistence on the word "only" has at times been motivated by this absolute nature. Courts have held that for a measure to fall foul of Article 15(1), it must solely be based on the grounds mentioned therein. There must be an exclusive causal link between the grounds of discrimination and the impugned State action.[67] While on several occasions, Courts have accepted virtually any explanation offered by the State,[68] at times, they have latched onto the word 'only' to save the legislative or executive action at hand. In the facts of Amit Bhagat, a different Court may have said that this differentiation was not based solely on religion, but also on religious necessity, and was therefore constitutional. This is not to say that this has been a judicious approach and does not warrant correction. It does however reinforce a consistent judicial sentiment as to the absolute nature of Article 15(1).

Therefore, with the judicial interpretation of Article 15(1) also leaning in favour of an absolute bar on direct discrimination, it becomes germane to discuss the scope of the word discrimination itself. Does it cover both direct and indirect discrimination? In Part II, I contended that there is a dichotomy on this question in the nascent case law on indirect discrimination in India. To resolve this dichotomy, I now turn to explore if there is a difference between these two types of discrimination.

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65 Girish Uskaikar v. Chief Secretary, 2001 SCC OnLine Bom 41.

66 *Id.*, at 11.

67 Shreya Atrey, *Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15*, Vol. 16, Equal Rights Review 160, 167 (2016).

68 *See* Dayandeo Dattatraya Kale v. State of Maharashtra, 1994 SCC Online Bom 507.

V. DIRECT V. INDIRECT DISCRIMINATION

Direct discrimination, at its core, is based on the formal understanding of equality that likes should be treated alike.[69] No person should be treated less favourably than another because of a protected characteristic, such as race, sex, religion, caste etc., that they possess.[70] Women cannot be barred from working in factories after seven o'clock in the evening, whilst men are permitted to do so. Dalits cannot be asked to burn their dead on the lower ends of a ghat, whilst the other portions are used by upper castes. Muslim men cannot be penalised for divorcing their spouse, whilst Hindu, Christian or Parsi men are not. All of these are instances of direct discrimination.

Indirect discrimination, on the other hand, seems to focus on the effects of a measure. The origin of the concept can be traced to a decision of the United States Supreme Court in *Griggs* v. *Duke Power*.[71] The employer in this case had adopted a practice of discriminating against black workers by excluding them from certain jobs. However, this was no longer permissible after the enactment of the Civil Rights Act, 1964. Therefore, the employer put in place a requirement of high-school education and a certain threshold score in an aptitude test as pre-conditions for those jobs. This was a neutrally worded pre-condition that applied to all. However, it was seen that black workers were disqualified in substantially larger proportions than their white counterparts on account of their inferior education. Importantly, neither of the two requirements set as pre-conditions were shown to be necessary for the jobs in question. Burger C.J., delivering the judgement for the Court said that while a practice could be fair in form, it might be discriminatory in operation.[72] Therefore, unless the touchstone of business necessity could be satisfied for such practices, it would be prohibited.[73]

The concept of indirect discrimination quickly travelled across the Atlantic and was incorporated first by the United Kingdom in the Sex Discrimination Act, 1975[74] and soon thereafter by the European Union.[75] However, since then, the question of a difference, if any, between direct and indirect discrimination has been a vexed one.

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69 Sandra Fredman, Discrimination Law 166 (Oxford University Press, 2nd ed., 2011).

70 *Id*.

71 Griggs v. Duke Power Co., 1971 SCC OnLine US SC 47 (1971) (Supreme Court of the United States).

72 *Id*., at 431.

73 *Id*.

74 Simon Forshaw & Marcus Pilgerstorfer, *Direct and Indirect Discrimination: Is there something in between?*, Vol. 37(4) Industrial Law Journal 347, 350 (2008).

75 Fredman, *supra* note 69, at 178.

A. CAUSATION

An intuitive answer is to suggest that the difference lies in causation. Direct discrimination comes to be when a prohibited marker is the basis for classification in an executive or legislative action. Indirect discrimination comes about when a neutral provision or practice applicable equally to all has a disproportionately adverse effect on members of a group defined by a common protected characteristic. For instance, a supermarket outlet owner might say that she will provide pension benefits only to full-time employees.[76] Women who usually occupy household activities in patriarchal societies might be more likely to take up part-time jobs. In such a case, the practice of the supermarket outlet owner might have a disproportionate impact on women. But the discrimination does not come about because the owner said, "I will only provide pension to men". Therefore, it would be indirect and not direct discrimination.

In fact, some of the prominent cases of indirect discrimination further this distinction. Consider the cases of *DH* v. *Czech Republic* ('DH') [77] before the European Court of Human Rights ('ECtHR') and of *R.* v. *Secretary of State, ex. P. Seymour Smith* ('Seymour Smith')[78] before the House of Lords as examples.

In DH, psychological tests were administered to school children to assess whether they needed more attention and were to be sent to 'special' schools. In reality, these schools were undemanding in terms of educational output and inferior in terms of quality. Studies showed that Roma children were over-represented in these schools over time. When the Grand Chamber of the ECtHR finally admitted this case, it primarily relied on this statistical evidence to uphold a claim of indirect discrimination.

Similarly, in Seymour Smith, the legislation in question excluded from protection against unfair dismissal only those employees who had been employed for two years or more. The challenge was that the two-year eligibility

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[76] *See* Bilka-Kaufhaus GmbH v. Karin Weber von Hartz, Case 170/84, [1986] ECR 1607 (European Court of Justice). (These facts are very similar to those before the Court of Justice for the European Union in this case).

[77] D.H. v. The Czech Republic, Application No. 57325/00, 2007, at 3 (The European Court of Human Rights, Grand Chamber decision):

"The Court noted that in the reports they had submitted in accordance with the Framework Convention for the Protection of National Minorities, the Czech authorities had accepted that in 1999 Roma pupils made up between 80 % and 90 % of the total number of pupils in some special schools and that in 2004 "large numbers" of Roma children were still being placed in special schools. Further, according to a report published by ECRI (European Commission against Racism and Intolerance) in 2000, Roma children were "vastly overrepresented" in special schools. The Court observed that, even if the exact percentage of Roma children in special schools at the relevant time remained difficult to establish, their number was disproportionately high and Roma pupils formed a majority of the pupils in special schools."

[78] R. v. Secretary of State, ex p. Seymour Smith, (No.) (2000) 1 WLR 435, ¶¶444(H), 446(D), 447-449 (House of Lords, United Kingdom).

criterion discriminated against women. To make this claim, it was said that the proportion of women who could comply with this criterion was considerably lower than that of men. Statistics over a five to six-year period showed that the ratio of qualified men to qualified women was ten is to nine. The House of Lords admitted this statistical evidence, commenting that while the difference was not much, it was persistent and showed a disparate impact.

Like in the example of the supermarket outlet, in both these cases, there was no classification made by the State on the grounds of race or sex. The State merely put in place measures to create special schools or to regulate protection from unfair dismissal. It was when these policies were implemented that they were found to disadvantage a vulnerable group. There was no classification in the policy itself between this vulnerable group and others. In fact, these two cases are only illustrative of larger trends in indirect discrimination cases which differ from direct discrimination in terms of how the disadvantage or harm is both caused and proved.

This difference in terms of both causation and proof is readily traceable to Article 15(1) because of the words "on the grounds only of". When the State shall not discriminate on the grounds of caste, it implies that the State shall not make a classification or distinction on that ground. It does not imply that the State shall not put in place a measure which may have a discriminatory effect along the lines of caste. Moreover, statistical evidence, the most prominent form of evidence in indirect discrimination cases,[79] also works towards proof of a disproportionate adverse effect and not towards proof of the basis of the decision. Using statistical evidence alone, one may not be able to satisfy the parameters of Article 15(1).

Therefore, it appears that Article 15(1) draws a difference between the method of causation and picks only one method, unlike §9(3) of the South African Constitution which we saw explicitly uses the words "directly or indirectly".

Surely, this is a scheme that can easily be subverted through the use of proxies. For instance, a government guest house in Coorg might have a policy which says that double- bed rooms would only be provided to married couples. Everybody else who shares a room would have to do so on a twin-sharing basis.[80] In my view, this is also discrimination 'on the grounds of' sexual orientation. As the laws of our country stand today, marriage is exclusively restricted to heterosexual couples. Exclusion based on marriage coincides entirely with the exclusion of homosexual couples. Therefore, the policy of the guest house uses 'marriage' as

[79] *See* Catherine Barnard & Bob Hepple, *Indirect Discrimination: Interpreting Seymour-Smith*, Vol. 58(2) Cambridge L. Journal 399, 407 (1999); Fredman, *supra* note 69, at 184.

[80] These facts are an adaptation of those in Bull v. Hall, [2013] UKSC 73 (Supreme Court of the United Kingdom) ('Bull v. Hall').

a proxy to exclude homosexuals.[81] This is nothing but direct discrimination on the grounds of sexual orientation.

Likewise, if a Government school in Bihar were to institute a policy that no boy or girl would be allowed to cover their head with any cloth of whatsoever nature, Sikh boys would not be able to wear a turban.[82] Muslim girls might not be able to wear a headscarf. Both religions might say that these are essential aspects of their religion and are not a matter of choice. In such a case, the policy of 'no head cover' only serves as a proxy to exclude Sikhs and Muslims. This too, is an instance of direct discrimination 'on the grounds of' religion.[83]

The text of Article 15(1) does not preclude us from piercing a proxy to see a measure for what it is — less favourable treatment on the grounds of a prohibited marker.[84]

Nevertheless, to say that the difference between direct and indirect discrimination is one of causation and Article 15(1) only allows for one method of causation would not be sufficient. This is because one can label this difference as merely instrumental in nature. Direct and indirect discrimination would only be different routes to attain the same end result. The deeper question pertains to why Article 15(1) opts for only one instrumentality. If there is no answer to this question, a difference in terms of causation may potentially be termed as only technical

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[81] Lady Hale in Bull v. Hall adopted this approach when she said:

"With or without regulation 3(4), I have the greatest difficulty in seeing how discriminating between a married and a civilly partnered person can be anything other than direct discrimination on grounds of sexual orientation. At present marriage is only available between a man and a woman and civil partnership is only available between two people of the same sex. We can, I think, leave aside that some people of homosexual orientation can and do get married, while it may well be that some people of heterosexual orientation can and do enter civil partnerships. Sexual relations are not a pre-condition of the validity of either."

[82] These facts are an adaptation of the facts in Mandla (Sewa Singh) v. Dowell Lee, (1983) 1 All ER 1062 (House of Lords, United Kingdom).

[83] *But see* Mandla (Sewa Singh) v. Dowell Lee, (1983) 1 All ER 1062 (House of Lords, United Kingdom) (The House of Lords arrived at a finding of indirect discrimination under §1(1)(b) of the Race Relations Act, 1976. Importantly though, the Court did not enter into a discussion of whether this might also be direct discrimination. This was a decision rendered nearly three decades before Bull and largely involved an application of the statutory formula).

[84] At this point, I must concede that there is a mathematical weakness in this scheme. If the effects coincide completely with a vulnerable group, it would be direct discrimination. However, if the effects are only felt by 95 percent of the members of a protected group, it would be indirect discrimination. One may ask, what is so uniquely different between 95 and 100? While this is a fair criticism, there will be cases that test the differentiating line between direct and indirect discrimination. However, the causation matters. The proxy does not amount to direct discrimination because it only coincides with all members of a vulnerable group. It amounts to discrimination also because it camouflages the use of a ground as the basis of classification. On the other hand, the 95 percent members of a vulnerable group may come to be affected by a neutrally worded law. As subsequent parts of this paper may show, this difference in causation also tracks a difference in the nature of moral wrong. *See* Hugh Collins & Tarunabh Khaitan, *Indirect Discrimination Law: Controversies and Critical Questions* in Foundations of Indirect Discrimination Law 21 (Hugh Collins & Tarunabh Khaitan, 2018).

in nature. It may only serve to lend strategic advantage, albeit valuable to some claimants. It does not tell us why one type of causation is absolutely prohibited. A case may then be made to surpass this difference. Therefore, it is important to probe a little deeper.

Much has been written about indirect discrimination over the years and it would not be feasible for me to engage with all the debates pertaining to the difference between direct and indirect discrimination here. Khaitan though, has culled out three prominent axes along which this debate has occurred — intention, paradigmatic nature and moral wrongs.[85] I find these axes effectively capture the points of contention in this debate and therefore, I will adopt them in this essay. I will deal with intention and paradigmatic nature in this Part. I will deal with the moral natures of the wrongs at play in the next.

B. INTENTION

One of the foremost differences that has been carved out in scholarship[86] and that has been adopted in the United States is that of 'intention'.[87] Direct discrimination involves an element of intention on the part of the discriminator, whereas indirect discrimination does not. Therefore, the former needs to be treated more vehemently than the latter. In my view, any reliance on intention is misplaced. By 'intention', I do not refer to 'intention' in the narrow sense in which it is understood in criminal law. In criminal law, you may assault a fellow citizen intentionally, accidentally or even negligently. The same metric does not apply to discrimination law. It can hardly be said that a law or policy was drafted accidentally or unintentionally. Instead, in discrimination law, intention answers the '*why*' question. It encompasses what would be construed as motive or wilfulness in criminal law and refers to the reasons why a policy was adopted.[88]

Let us consider the facts of *Volks* v. *Robinson*, a decision rendered by the CCSA.[89] The case concerned the constitutionality of a statutory provision which conferred on surviving spouses the right to claim a maintenance from the estate of their deceased spouse. The petitioner was the survivor of a stable, permanent, but non-marital relationship and contended that the statute was unconstitutional to the extent that it did not afford the same protection to such survivors. The majority declined the contention and upheld the constitutionality of the statute.[90] In a concurring opinion, Ngboco J. said that marriage is an important social

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85 Tarunabh Khaitan, *Indirect discrimination* (Melbourne Legal Studies Research Paper Series, Paper No. 854, 2017).

86 *Id*., at 11.

87 Washington v. Davis, 1976 SCC OnLine US SC 105 (1976).

88 The difference between these concepts and the appropriateness of their transposition from criminal law has been considered in an illuminating opinion by Lord Goff in James v. Eastleigh Borough Council, (1990) 2 AC 751 (House of Lords, United Kingdom).

89 Volks NO v. Robinson, (2005) 5 BCLR 446.

90 *Id*., ¶¶39, 59, 60.

institution and the law may legitimately afford protection to it. To the extent that it does so, it does not discriminate against unmarried people.[91] In their dissent, Mokgoro and O'Reagan JJ. focused instead on the stigma and disapproval experienced by cohabiting partners in society and the grave impact that the exclusion from statutory protection had on them.[92]

Roughly speaking, the majority said the law was not enacted out of any animosity or ill-will. It did not even seek to exclude unmarried couples. It only sought to preserve the sanctity of marriage. Hence, there was no harm and no discrimination. The minority said the law created a differentiation which lead to immense suffering for those excluded. There was wrong done and hence, there was discrimination. The majority placed intention as a constitutive element. The minority placed it outside the framework.

The latter formulation does seem attractive. It shifts focus from whether and why the discriminator acted to whether and how the victim suffered. In doing so, it focuses more on instances of disadvantage. Naturally, an act would inflict psychological harm or deprive an individual of ambitions if it were done with the express intention to do so. However, there are also occasions when people may act unknowingly or out of past biases. This does not mean that no harm is suffered; it may be less, but it is still endured. On the flip side, even an act of indirect discrimination may be done intentionally. From a tactical perspective, shifting intention out of the constitutive framework also means that the State body which discriminates is not able to couch its actions under fabricated intentions to evade legal obligations and to exclude disadvantaged classes. Therefore, the difference between direct and indirect discrimination cannot be traced to intention. In fact, the immateriality of intention in a case of discrimination has been acknowledged by an opinion of Mukherjea J. as far back as 1952.[93]

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91 *Id*., ¶¶87, 88.

92 *Id*., ¶¶127-128.

93 State of W. B. v. Anwar Ali Sarkar, (1952) 1 SCC 1, ¶47. (This case concerned the constitutionality of the West Bengal Special Courts Act, 1950. As the title of the legislation suggests, it sought to create special courts for the speedier trial of certain offences. Mukherjea J. observed, "I am not at all impressed by the argument of the learned Attorney General that to enable the respondents to invoke the protection of Article 14 of the Constitution, it has to be shown that the legislation complained of is a piece of "hostile" legislation. The expressions "discriminatory" and "hostile" are found to be used by American Judges often simultaneously and almost as synonymous expressions in connection with discussions on the equal protection clause. If a legislation is discriminatory and discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter, it cannot but be regarded as 'hostile' in the sense that it affects injuriously the interest of that person or class. […] But if it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him, before he can claim relief on the basis of his fundamental rights, to assert and prove that in making the law, the legislature was accentuated by a hostile or inimical intention against a particular person or class. For the same reason I cannot agree with the learned Attorney General that in cases like these, we should enquire as to what was the dominant intention of the legislature in enacting the law and that the operation of Article 14 would be excluded if it is proved that

C. SECONDARY PARADIGM OF INDIRECT DISCRIMINATION

A second difference which Khaitan culls out from scholarship relates to the secondary nature of indirect discrimination.[94] The phrase 'secondary nature' has been interpreted variedly.[95] John Gardner has understood it to mean that direct discrimination is primary because a prohibited marker is an operative premise based on which a discriminator acts and indirect discrimination is secondary because it is constituted by the side-effects of an operational decision.[96] However, as Oran Doyle points, Gardner's choice of the phrase 'side-effects' only shows that discriminatory effects may be unintended and not that they are of less importance.[97] In any case, as I have submitted above, direct discrimination may also be unintentional.

Another sense in which indirect discrimination has been said to be 'secondary' is 'temporality'.[98] Indirect discrimination tracks the wrongs already caused by previous direct discrimination. The point on temporality too has been addressed by Doyle.[99] In cases of discrimination based on sexual orientation, indirect discrimination may have been temporally prior to direct discrimination.[100] Criminalisation of sexual choice through neutrally worded laws has been prevalent for decades.[101] The dismissal from employment of a gay individual, on the other hand, may be a more recent phenomenon. While this may technically be true, it seems implausible that there was no direct discrimination against gay persons even before sexual choices were criminalised. The more relevant criticism of this argument, according to me, is that priority in time does not determine priority of importance.

Deborah Hellman understands the 'secondary' nature of indirect discrimination in a third way. She says that indirect discrimination compounds prior injustice.[102] To elaborate on 'prior injustice', she takes the example of a girl student who has been a victim of sexual assault. A school teacher decides to use some

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the legislature has no intention to discriminate, though discrimination was the necessary consequence of the Act.").

94 Hugh Collins & Tarunabh Khaitan, *Indirect Discrimination Law: Controversies and Critical Questions* in Foundations of Indirect Discrimination Law 16 (Hugh Collins & Tarunabh Khaitan, 2018).

95 *See* Collins & Khaitan, *Id*.

96 John Gardner, *Liberals and Unlawful Discrimination*, Vol. 9(1), Oxford Journal of Legal Studies, 1, 5-6 (1989); John Gardner, *On the Grounds of her Sex(uality)*, Vol. 18, Oxford Journal of Legal Studies, 167 (1998).

97 Oran Doyle, *Direct Discrimination, Indirect Discrimination and Autonomy*, Vol. 27(3), Oxford Journal of Legal Studies 537, 548 (2007).

98 Collins & Khaitan, *supra* note 94, at 18.

99 Doyle, *supra* note 97, at 549.

100 *Id*.

101 Collins & Khaitan, *supra* note 94, at 18.

102 Deborah Hellman, *Indirect Discrimination and the Duty to Avoid Compounding Injustice* (University of Virginia School of Law Public Law and Legal Theory Research Paper Series, Paper no. 53, 2017).

graphic details in a class on sensitisation of students on sexual assault and harassment.[103] These details bring back memories of sexual abuse for that girl student and she is put under considerable mental stress. According to Hellman, the act of using graphic imagery in class compounded the prior injustice of abuse.[104] For her, indirect discrimination is wrong because it similarly compounds prior injustices for the affected vulnerable group.

While Hellman's account of the compounding of injustice does address some of the wrongs associated with indirect discrimination, it does not cover all possible instances of this type of discrimination. Consider once again the case facts of *Mandla* v. *Lee* — A school headmaster devised a rule which did not allow students to cover their heads with any clothing. This prevented Sikh students from wearing a turban.[105] The UK House of Lords held this to be an instance of indirect discrimination. It is difficult to fit the facts of this case in Hellman's model. The wrong involved in this case seems to be an autonomy-based wrong. There does not seem to be any prior injustice suffered by the Sikh students which is compounded. Hellman acknowledges this limitation of her proposal and says that other instances of indirect discrimination are prohibited only as a matter of good social policy. Be that as it may, what is relevant for our purposes is that Hellman's work too does not tell us why direct and indirect discrimination differ. Under her model, even direct discrimination may compound prior injustices. It does not even tell us why indirect discrimination should be prohibited in an absolute manner.

VI. ALIGNING INDIRECT DISCRIMINATION WITH ARTICLE 15(1)

Over and above 'causation', I have thus far tried to explore whether the difference between direct and indirect discrimination lies in 'intention' or in the 'primary or secondary nature of the paradigm'. According to me, the difference between direct and indirect discrimination lies in the nature of the moral wrong involved, a point captured effectively by Sandra Fredman.

A. FREDMAN: DIFFERENT MORAL WRONGS OF DIRECT & INDIRECT DISCRIMINATION

According to Fredman, equality law has a four-pronged objective — first, to redress past disadvantage, second, to address stigma, stereotypes and prejudice, third, to accommodate difference and fourth, to transform societal structures of hierarchies and subordination.[106] According to her, direct and indi-

[103] Hellman does not use this precise fact. To that extent, the example has been tweaked slightly.
[104] Hellman, *supra* note 102, at 7.
[105] For prior reference to these facts, see *supra* note 82.
[106] *See* Sandra Fredman, *Substantive Equality Revisited*, Vol. 14(3), International Journal of Constitutional Law, 712 (2016).

rect discrimination serve different ends of this framework. For direct discrimination, she says,

> "Its primary contribution is in relation to the recognition dimension: namely to address stigma, stereotyping, and humiliation because of a protected characteristic. Enhanced judicial sensitivity to the dangers of stereotyping have indeed made direct discrimination an effective instrument in this respect. As Baroness Hale puts it, 'the object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group'."[107]

On the other hand, a prohibition of indirect discrimination furthers the redistributive dimension[108] and to some extent, the transformative dimension of equality law.[109] It attacks structures in society that may serve to disadvantage particular vulnerable groups and it also helps accommodate difference by examining apparently neutral practices which may in fact only toe the time of the hegemonic religion, culture or sex. A law which sets the maximum age of qualification into the civil service as twenty-eight may disadvantage more women in a patriarchal society because many of them may spend their twenties giving birth and caring for their children.[110] A construction policy that does not provide for ramps and lifts at appropriate locations may fail to accommodate people with disabilities. To this extent, the wrong involved in indirect discrimination is different.

I argue that the reason why the wrong underlying direct discrimination — namely, stigma, stereotyping and humiliation — tracks the complete prohibition in Article 15(1) and that of indirect discrimination does not, is that the former constitutes the very least which a State is mandated to comply with. It is not because indirect discrimination is less worthy than direct discrimination. It is because at the very least the State must not perpetuate the stigma and humiliation associated with direct discrimination on the grounds mentioned in Article 15(1). The State cannot tell Christian women that their husbands may divorce them only on the grounds of adultery, but they must prove adultery and cruelty to obtain a divorce. It cannot tell Dalits that they must live outside the borders of a village where only the upper castes may reside. It cannot tell mothers that only a father would be the primary guardian of a child. In other words, an avoidance of direct discrimination constitutes the minimum obligation of the State.

This is not to say that some cases of indirect discrimination may not involve stigma or dehumanisation. Navtej Johar itself has been a prime

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[107] Fredman, *supra* note 69, at 176.
[108] Fredman, *supra* note 69, at 181; John Gardner, *Liberals and Unlawful Discrimination*, Vol. 9(1), Oxford Journal of Legal Studies 1, 5-6 (1989).
[109] Fredman, *supra* note 69, at 182.
[110] Fredman, *supra* note 69, at 181.

example of stigmatic harm. Similarly, the proposed application of the Citizenship (Amendment) Act, 2019 along with the National Register for Citizens may lead to the de-humanisation of Muslims in certain parts of the country.[111] Therefore, there may be some instances of indirect discrimination that perpetuate the humiliation that Fredman associates with direct discrimination. Interestingly though, there is also an overlap of direct and indirect discrimination in these cases. To take the Citizenship (Amendment) Act, 2019, the text of the law excludes the word 'Muslim'. Moreover, it also excludes certain neighbouring countries which are known to have a sizeable population of persecuted Muslim minorities. Arguably, it uses nationality as a proxy for religion.[112] Likewise, Navtej Johar necessitated statutory interpretation. Once consensual homosexual intercourse was taken out of the ambit of the phrase "against the order of nature", acts of arrest, prosecution, and harassment of homosexuals constituted direct discrimination.

B. INDIRECT DISCRIMINATION: UNJUSTIFIABLE DISTRIBUTIVE WRONGS

Instead, a large chunk of indirect discrimination cases may involve an equality of results or a redistributive dimension. At times, there are neutrally worded State policies that create disparities among groups. On other occasions, disparities may come about in the course of implementation of those policies and may need to be addressed. These are also wrongs that the State must strive to eradicate. However, they need not always constitute the bare minimum that the State is expected to do because they may necessitate structural changes that cannot always be immediately mandated on the State.

For instance, returning to the illustration we took earlier, the State may institute a policy of scholarships for students enrolled in public schools. Parents of a particular religion may be prevented from sending their children to public schools on account of an essential religious tenet. As a consequence, children of that religion may feature considerably lesser among the scholarship recipients. [113] Similarly, Air India may have far fewer women pilots. This could be because of a policy that creates a structural disadvantage, such as a minimum

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[111] *See* The Wire (Sushil Aaron), *CAA+NRC is the Greatest Act of Social Poisoning by a Government in Independent India*, December 23, 2019, available at https://thewire.in/communalism/caa-nrc-bjp-modi-shah (Last visited on June 21, 2020).

[112] *See* Unnati Ghia, *Suddenly Stateless: International Implications India's New Citizenship Law*, Opinio Juris, February 5, 2020, available at https://opiniojuris.org/2020/02/05/suddenly-stateless-international-law- implications-of-indias-new-citizenship-law (Last visited on June 21, 2020); Suhrith Parthasarthy, *Why the CAA Violates the Constitution*, The India Forum, January 17, 2020, available at <https://www.theindiaforum.in/article/why-caa-violates-constitution> (Last visited on June 21, 2020).

[113] Jonnette Watson Hamilton & Jennifer Koshan, *Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter*, Vol. 19(2), Review of Constitutional Studies 191, 203-04 (2015) (Critiquing the decision in Adler v. Ontario, 1996 SCC OnLine Can SC 109, in which similar facts arose, for failing to arrive at a finding of indirect discrimination).

weight or height requirement. However, it could also be because there are fewer women with the necessary training to be appointed as a pilot. [114] Air India may be expected to take measure to increase the number of women in the catchment pool, but it does not mean that the present recruitment policy ought to be invalidated. These distributive wrongs may not always constitute the bare minimum of what the State is expected to address. Therefore, there is some force in the argument to not prohibit them absolutely.

Earlier in this paper, I had mentioned that most countries seem to make indirect discrimination justifiable, and for good reason — perhaps, this is why. Justifiability of indirect discrimination may be a necessary constitutive element because otherwise indirect discrimination may be reduced to a mere disparity in numbers. It is the unjustifiable use of certain policies that converts this disparity into discrimination. The unjustifiability transforms the distributive wrong into discrimination. For instance, a substantially higher number of men than women may have cleared the Common Law Admission Test ('CLAT') in the last five years. There is a disparity in numbers. However, this disparity may amount to indirect discrimination only if it can be shown that the CLAT carried questions which favoured men because of the superior education they have received in the past. The use of these questions, in the absence of proof as to necessity, would be unjustifiable. That is when the administration of the CLAT would amount to indirect discrimination. Therefore, not only in terms of causation but also in terms of the moral wrong it addresses, which is in the nature of unjustifiable distributive wrong, indirect discrimination cannot be aligned with the absolute prohibition under Article 15(1). Article 15(1) does not lend any scope for the justification of a measure by the State. On the other hand, the moral wrong tracked by indirect discrimination has a close nexus with the element of unjustifiability. Thus, by implication, Article 15(1) and indirect discrimination are mutually incongruous.

C. PRAGMATIC BASIS TO EXCLUDE INDIRECT DISCRIMINATION FROM ARTICLE 15(1)

There is also a practical dimension here that cannot be lost sight of. Leaving aside everything I have argued thus far, suppose, indirect discrimination was incorporated in Article 15(1) and both direct as well as indirect discrimination were absolutely prohibited. In such a scenario, the disparity in numbers seen in the case of CLAT or the recruitment of pilots would mean that indirect discrimination is made out and the law or policy in question ought to be struck down. This is likely to make judges uncomfortable. There is likely to be an intuitive desire to not strike down such measures as constitutionally void and to find a way to protect them. The only way to do so might be to return a finding that there was no indirect discrimination.

[114] *See* Fredman, *supra* note 69, at 181.

Critics of adverse effect discrimination in other countries have already argued that courts are reluctant to *see* the adverse effects in some cases.[115] This reluctance would only increase if a mere disparity in Cumbers were to lead to laws and policies struck down as constitutionally infirm. The practical point I seek to advance here is that the location of indirect discrimination in Article 15(1) may be counter-productive in practice because of the nature of the wrong it seeks to address. In practice, there may be limited instances where courts *see* indirect discrimination if it were incorporated in Article 15(1).

Importantly, this reluctance would be different from that which we have observed on part of the courts to return a finding of direct discrimination by having recourse to the word '*only*'. For instance, consider the case where the constitutionality of §354 of the IPC, 1860 was challenged before the Madhya Pradesh High Court.[116] This provision makes it an offence to outrage the modesty of a woman. The court recognised that Article 15(1) casts an absolute prohibition on discrimination.[117] However, to uphold the validity of this provision, the court took recourse to the word 'only' and said that the provision was based on considerations of public morals, decency and rectitude.[118]

Similarly, the Bombay High Court was faced with a case where a Co-operative Bank did not recruit women at all for the position of clerks and peons.[119] While the petition was dismissed on grounds of maintainability, the court nonetheless commented on the aspect relating to Article 15(1). It said that peons and clerks at times had to be transferred to remote locations where sanitary arrangements and proper housing facilities were at times absent.[120] The policy to not hire women was based on this consideration and hence, constitutionally valid.[121] In such cases where the Courts have been reluctant to return a finding of direct discrimination, they have actually been reluctant to dismantle a stereotype or a gendered role. According to me, these would be cases of judicial error. The bar under Article 15(1) ought to have been applied. This is different from a case where a judge *sees* the adverse effects but may be reluctant to return a finding of indirect discrimination because the measure is seemingly justifiable and striking it down would only lead to unwarranted disruption of policy. Therefore, there is a practical dimension as to why we should be hesitant to read indirect discrimination into Article 15(1).

One may still suggest that Article 15(1) covers both direct and indirect discrimination, just that instances of direct discrimination are non-justifiable whereas those of indirect discrimination are justifiable. However, the text of Article 15(1) does not allow for such demarcation. To the contrary, it could

[115] Hamilton & Koshan, *supra* note 113, at 199-203.
[116] Girdhar Gopal v. State, 1952 SCC OnLine MP 202.
[117] *Id*., at ¶5.
[118] *Id*., at ¶5.
[119] *See* Dayandeo Dattatraya Kale v. State of Maharashtra, 1994 SCC Online Bom 507.
[120] *Id*., ¶49.
[121] *Id*., ¶51.

be suggested that irrespective of the text of Article 15(1), both direct and indirect discrimination under Article 15 should be justifiable on a uniform standard. Normatively, this is a levelling down argument. To fit indirect discrimination into the text of Article 15(1), the protection offered against direct discrimination is also lowered. Moreover, if these measures were to be justifiable on a traditional test of rational nexus, there would be little difference between Articles 14 and 15(1). It might even lead to a degree of incoherence because the purpose of a separate Article 15(1) would be hard to explain. Strategically, it disadvantages claimants by increasing the burden of proof to proscribe certain State actions that perpetuate stereotypes and stigma.

This is not to say that direct discrimination does not have its set of flaws. A prominent weakness of direct discrimination is that it can tend to be symmetrical. A maternity benefit legislation would amount to a classification based on sex. A food subsidy for Dalit labourers would be termed as one based on caste. Therefore, a standalone prohibition on direct discrimination without independent enabling powers would be counter-productive. A desire to avoid this explains the presence of Articles 15(3) and (4) in our Constitution.

It is for these reasons that I would say there is an absolute prohibition cast by Article 15(1) and this prohibition aligns only with an inclusion of direct discrimination. Possibly, this might even explain the few Indian cases that have shied away from arriving at a finding of indirect discrimination under Article 15(1).

VII. A DIFFERENTIAL STANDARD OF REVIEW WITHIN ARTICLE 14

A. FLAW IN THE MODEL PROPOSED

Evidently, the interpretation proposed in this paper would have a strategic advantage for litigants. Once direct discrimination is made out, the measure at hand would be *ultra vires*. Indirect discrimination must be argued only under Article 14. However, on the flip side, it would also carry a structural flaw. Article 14 may cover instances of indirect discrimination even on grounds, say, of disability or language, over and above the grounds of race, religion, caste, sex and place of birth. For the purposes of Article 14, these grounds would potentially be analogous and this analogy appears justifiable. Like caste or sex, disability too is in the nature of an immutable characteristic one has little choice over and merits protection. In this manner, Article 14 may offer protection from indirection discrimination on several grounds. Article 15(1) though, is a closed list and offers protection from direct discrimination only on five grounds.[122] This creates doubts over the significance or meaning of grounds of discrimination.

[122] Gautam Bhatia, *Round-Up: The Delhi High Court's Experiments with the Constitution*, Indian Constitutional Law & Philosophy (June 26, 2018), available at https://indconlawphil.wordpress.

There is a different dimension to this disparity as well. Direct discrimination between men and women is absolutely prohibited under Article 15(1); whereas direct discrimination between disabled and able-bodied individuals, which will have to be argued under Article 14, is not. There is an apparent incoherence and there is no easy answer to this.

According to me, this might be an element of incoherence embedded in our Constitution. One way to address this issue might be to say, as Shreya Atrey does, that the word "only" in Article 15(1) is used in the sense of 'simply', 'merely' or 'just' — as an indicium of certain markers.[123] In that case, clause (1) would not be a closed list but would also cover direct discrimination on analogous grounds.[124] However, clause (1) does not contain the phrases, 'like', 'such as', 'in the nature of' or 'etcetera', which would usually be indicative of an inclusive list. Moreover, as a matter of positive law, Article 15(1) is still a closed list.

A second way to resolve this issue is to say that the grounds enlisted in Article 15(1) are not indicative only of immutable characteristics or individual autonomy or structural disadvantage, but also of a political compromise. They are indicative of what a polity has agreed upon as prohibited markers of discrimination. This perhaps explains the difference between the list of grounds found in India, Canada, South Africa and the UK. Therefore, although disability, language, and citizenship may also be immutable or impact personal autonomy in a similar way, they are not grounds which our polity has agreed upon as yet. This is an unfortunate solution, but one which seems to explain why only five to six markers are prohibited. Be that as it may, the text of Article 14 allows for the recognition of additional or analogous grounds and for the differential treatment of grounds. Therefore, the limitation that flows from a short list of grounds in Article 15(1) can be mitigated to some extent by a higher level of judicial review for a wider list of grounds under Article 14.

B. DIFFERENTIAL STANDARDS OF JUDICIAL SCRUTINY

Over the years, Article 14 of our Constitution has evolved to cover a wide variety of cases. At one end, it encompasses cases where a distinction is drawn between secured and unsecured creditors in the voting process of a company undergoing insolvency resolution.[125] At the other end, it would also cover a case where the constitutional validity of the Unlawful Activities Prevention (Amendment) Act, 2019 is challenged on the grounds that a disproportionate

com/2018/06/26/round-up-the-delhi-high-courts-experiments-with-the- constitution (Last visited on June 21, 2020).

123 Atrey, *supra* note 67, at 182.

124 *Id*.

125 *See, e.g.,* Essar Steel (India) Ltd. Committee of Creditors v. Satish Kumar Gupta, (2020) 8 SCC 531.

number of those labelled as terrorists are Muslim men.[126] The point is that it covers a wide spectrum of cases, some of which involve an immutable personal characteristic or a characteristic that embodies historical and structural disadvantage, others which do not. Intuitively, the two ends of this spectrum are not the same and there is a need to distinguish between them.

There is good reason to do so, one which is linked to the purpose of the grounds. Even if grounds may involve an element of political compromise, they are also indicative of certain personal characteristics that an individual has little or no choice over. Sometimes, these personal characteristics are even a matter of fundamental choice or an embodiment of historical disadvantage. Therefore, to differentiate based on these grounds may impair human dignity and curtail personal autonomy. [127] In the process, the societal disadvantage that is attached to one's identity is also reinforced. Structures of hierarchy and subordination continue to restrain an individual and the ambition of becoming a more equal society remains distant.[128] This is not the case when an unsecured creditor is differentiated from a secured one in an insolvency legislation or when a tea seller is differentiated from a coffee seller in a tax statute.

Therefore, the traditional test of reasonable classification ought not be applicable to both sets of cases — one which involves protected markers of discrimination an another, which does not.[129] In fact, in practice this test has been one of considerable deference to the legislature and executive.[130] The legitimacy or necessity of the objective proposed to be achieved is not questioned and the State only needs to show a rational nexus. It does not need to show that the objective was compelling or substantial or that the means chosen were the only alternative

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126 *See Back to the Future: India's 2008 Counterterrorism Laws*, Human Rights Watch (July 27, 2010), available at https://www.hrw.org/report/2010/07/27/back-future/indias-2008-counterterrorism-laws (Last visited on June 21, 2020). This Report quotes one of UAPA's sister laws, the POTA had a disproportionate impact on the Muslims in terms of arrests.

127 *See* Ghaidan v. Godin-Mendoza 2004 UKHL 30, ¶130 (House of Lords, United Kingdom). (Baroness Hale summed up the role of grounds succinctly when she said, "It is not so very long ago in this country that people might be refused access to a so-called 'public' bar because of their sex or the colour of their skin; that a woman might automatically be paid three quarters of what a man was paid for doing exactly the same job; that a landlady offering rooms to let might lawfully put a 'no-blacks' notice in her window. We now realise that this was wrong. It was wrong because the sex or colour of the person was simply irrelevant to the choice which was being made. […] It was wrong because it was based on an irrelevant characteristic which the woman or the black did not choose and could do nothing about." *See supra* note 40, Harksen (The Constitutional Court of South Africa observed, "… there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.").

128 *See* Fredman, *supra* note 69, at 138 on 'Historical Disadvantage'.

129 Tarunabh Khaitan, *Equality: Legislative Review under Article 14* in The Oxford Handbook Of Indian Constitution 727 (Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, 2016) (Khaitan makes a similar point when he compares the difference between a tea seller and a coffee seller with that between a Hindu and a Muslim).

130 *Id*.

available. The Court does not even consider whether less restrictive alternatives were available.

To consider our example of the supermarket outlet once again,[131] suppose the supermarket chain was state-owned. Under the reasonable classification test, there is an intelligible differentia between part-time and full-time employees and there is a rational nexus to a purported objective of incentivising employees who work with the supermarket over a long period of time. The State does not need to explain whether provision of pension to only long- term employees was necessary to attain the objective of employee retention. Some part-time employees too may have been working there for a decade or more. With a low standard of review, the disproportionate impact on women persists. The potential of indirect discrimination to redistribute gains or transform societal practices remains only theoretical.

In fact, it is precisely such weak standards of scrutiny in cases of indirect discrimination along the lines of prohibited markers that have attracted considerable criticism in some other jurisdictions.[132] To consider an example, the High Court of England and Wales was confronted with a challenge to the 'Clinical Skills Assessment' component in a higher examination for General Practitioners.[133] The pass percentage showed considerable disparities among various ethnic groups. Among the U.K. Graduates, nearly ninety-three percent of those who described themselves as 'white' passed. However, the pass rate for those who identified as 'South Asian' or 'black' was about seventy-six and seventy-two percent respectively. These differences were visible even among the non-U.K. Graduates and were a consistent trend over several years.

Along expected lines, a legitimate aim was not too difficult to establish for the respondent — ensure that General Practitioners in the U.K. met a certain standard so that their patients were safe. However, instead of applying a test of necessity, the Court only applied a balancing test. It said that the balance between the aims of the examination when it was put in place and the disadvantage caused must be scrutinised.[134] The argument that the same ends could have been achieved by other means which were less unequal was rejected. The Court said that only because the means could be improved upon did not invalidate the present means.[135] Therefore, a weak standard of scrutiny meant that the ability of indirect discrimination to redress distributive wrongs was curtailed.

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[131] For prior use of this example, see *supra* Part IV.A. on causation.

[132] Barnard and Hepple, *supra* note 72; Sandra Fredman, *Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty*, Vol. 43(3), Industrial Law Journal (2014).

[133] R. (on the application of Bapio Action Ltd.) v. Royal College of General Practitioners and General Medical Council, [2014] EWHC 1416 (High Court of Justice, Queen's Bench Division, The Administrative Court, United Kingdom).

[134] *Id.*, at ¶44.

[135] *Id.*, at ¶44.

It is for these reasons that I say that while it is important to locate indirect discrimination under Article 14, it is also important to treat indirect discrimination along the lines of certain personal characteristics that are immutable or are a matter of fundamental choice or are reflective of historical and structural disadvantages, differently. Moreover, if by "equal protection of the laws" we mean to attain substantive and not merely formal equality, a higher standard of review is imperative. Unlike Article 15(1), the text of Article 14 even accommodates this higher standard.

The words "equal protection of the laws" include within their sweep a need to look at suspect classifications more rigorously so that structural inequities and historical disadvantages are not perpetuated. It is for these reasons that I contend that indirect discrimination on grounds of language, citizenship, race, disability, gender, sex and the like should be subject to an intermediate or rigorous scrutiny under Article 14. There should be a heightened standard of scrutiny every time indirect discrimination occurs along the lines of one of the protected markers of discrimination. It could be that for some markers such as caste, Courts may choose to apply a standard of strict scrutiny; whereas for others such as language they may only apply a standard of intermediate scrutiny. Under an intermediate scrutiny standard, the State must offer "an exceedingly persuasive justification" for its actions.[136] In this paper though, I do not wish to suggest what the appropriate level of scrutiny for each marker ought to be.

VIII. CONCLUSION

There has been an emerging trend to expand the frontiers of discrimination law in India to include indirect discrimination within its ambit. The issue though, lies with its location. While some scholars and judges have included it within Article 15(1), others have found indirect discrimination under Article 14. In this paper, I have tried to explain why the correct placement of claims of indirect discrimination is important. Failure to do so may render our constitutional scheme incoherent.

Therefore, in this paper, I looked at the meaning of Article 15(1) and contended that it casts an absolute prohibition on discrimination of certain types. This is an emphatic statement and one that needs to be fleshed out fully. I then tried to assess whether indirect discrimination can be located within Article 15(1). For reasons of causation and for the fact that the moral wrong countered by indirect discrimination does not align with the absolute prohibition cast under Article 15(1), I argued that indirect discrimination must be located within Article 14. However, this is not enough. There is a need to differentiate between indirect discrimination along the lines of protected markers of discrimination and other instances of indirect discrimination because of what 'grounds' signify in discrimination law.

[136] United States v. Virginia, 1996 SCC OnLine US SC 74, at 531.

In this paper, I proposed that indirect discrimination along the lines of protected grounds in discrimination law must be subject to a heightened standard of judicial scrutiny.

Some may critique this essay by saying that I have wedged out a difference between direct and indirect discrimination only to fit one of them into Article 15(1) and that there is no difference between direct and indirect discrimination. My response to them would only be that there might be hard cases which test my argument. However, hard cases cannot define concepts. Conceptually, direct and indirect discrimination track different wrongs. Direct discrimination tracks a wrong which only warrants limited scope of justifiability. Indirect discrimination, on the other hand, tracks a wrong which is made out only when the measure is non-justifiable.