NITISHA V. UNION OF INDIA: FURTHERING A DISCUSSION ON DISCRIMINATORY INTENT

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Recently, in Nitisha v. Union of India, ('Nitisha') the Supreme Court was concerned with the validity of the requirements that had been put in place by the army to decide upon the grant of a Permanent Commission to women Short Service Commission officers. While examining these requirements, the Court, for the first time, acknowledged 'indirect discrimination' and 'structural discrimination' as tools of Indian equality law. To this extent, the decision is indeed laudatory. However, when outlining the contours of indirect discrimination, the Court has identified 'intention' as an indicium that demarcates indirect from direct discrimination. In this note, I contend that the use of 'intention' as a differentiating point may have a curtailing effect on direct discrimination actions in the future. I argue that 'intention' ought not to be understood as a necessary component of direct discrimination in India for three reasons – first, it is not necessarily linked to the harms involved in discrimination; second, it adds to the evidentiary burden that a plaintiff needs to discharge, and third, it has been understood in an unduly narrow manner, at least in other jurisdictions. Therefore, I propose two alternate ways to understand and apply Nitisha in subsequent direct discrimination actions. The first is to hold that 'intention' is only a sufficient but not a necessary component of direct discrimination. The second is to construe 'intention' itself capaciously.

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I. INTRODUCTION

In *Ministry of Defence* v. *Babita Puniya*, ('Babita Puniya') the Supreme Court of India ('SC') upheld the claim of women Short Service Commission ('SSC') officers to be granted a Permanent Commission ('PC') in the Indian Army.[1] A PC is an option to have a career in the army until one retires. SSC, on the other hand, is a tenured service for a stipulated time period. In Babita Puniya, the SC had *inter alia* held that the denial of a PC was premised on a set of unconstitutional stereotypes which were in violation of Articles 14 and 15 of the Constitution.[2] More importantly, it had passed a slew of directions as regards the assessment of women officers and the grant of PCs to them. In *Nitisha* v. *Union of India*, ('Nitisha') the SC was concerned with grievances arising out of steps taken by the Central Government to implement these directions.[3]

The SC meticulously examined these grievances and held that the measures adopted by the Central Government were discriminatory towards women officers. While this decision is instrumental in advancing the careers of women officers in the army, it is also important for its recognition and grounding of the concepts of 'indirect discrimination' and 'systemic discrimination' in Indian jurisprudence.[4] However, in delineating what is 'indirect discrimination', the SC has also delineated what is not. Put otherwise, it has differentiated indirect and direct discrimination to demarcate the boundaries of the former.

In this comment, I argue that while the SC needs to be applauded for its acknowledgement of 'indirect discrimination', it has misidentified 'intention' as

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1 Ministry of Defence v. Babita Puniya (2020) 7 SCC 469.

2 *Id.*, ¶85.

3 Nitisha v. Union of India, (2021) 15 SCC 125, ¶4 ('Nitisha').

4 Gautam Bhatia, *Lt. Col. Nitisha v. Union of India: The Supreme Court Recognises Indirect Discrimination*, Indian Constitutional Law and Philosophy, March 26, 2021, available at https://indconlawphil.wordpress.com/2021/03/26/lt-col-nitisha-vs-union-of-india-the-supreme-court-recognises- indirect-discrimination/ (Last visited on June 24, 2021); Unnati Ghia, *With Women Officers in Armed Forces, SC Recognises Systemic Biases*, INDIAN EXPRESS, March 30, 2021, available at https://indianexpress.com/article/opinion/women-officers-armed-forces-supreme-court-7251465/ (Last visited on June 24, 2021).

being the distinguishing marker between the two types of discrimination.[5] This, I contend, might have a curtailing effect on the scope of direct discrimination claims. However, it also provides us with an opportunity to initiate a conversation about the role of 'intention' in Indian jurisprudence. In this note, I seek to take forward that conversation by exploring the question – "should intention be a key component of discrimination?". There are three reasons basis which I contend that this question ought to be answered in the negative. First, an 'intention' requirement adds to the evidentiary burden of a plaintiff. Second, there is no nexus between 'intention' and the 'harms' caused by discrimination. Third, 'discriminatory intent' has itself been understood narrowly in practice. I thereafter opine that going ahead, Courts may either have to revisit the nexus between intention and direct discrimination, or alternatively, expand the contours of discriminatory intent itself.

II. NITISHA: FACTS AND OUTCOME

A. THE MEDICAL REQUIREMENTS: A FINDING OF INDIRECT DISCRIMINATION

Pursuant to the directions issued in Babita Puniya, the Central Government had issued a Governmental Sanction on July 16, 2020, and a set of General Instructions on August 1, 2020.[6] The General Instructions were issued to govern the proceedings of a "Special No. 5 Selection Board 2020", which was tasked with screening women SSC officers for the grant of a PC.[7] Furthermore, the General Instructions also stated that every officer opting for a PC would have to "undergo a medical board at the nearest Military hospital".[8] Only those officers who were "SHAPE-1 or Permanent Low Medical Category" would be permitted to undergo the medical examination.[9] The SHAPE classification, in turn, was explained by an Army Order No. 9 of 2011 as being a classification made after a medical assessment of five factors, namely, psychological, hearing, appendages,

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5 *See also* Dhruva Gandhi, *Locating Indirect Discrimination in India: A Case for Rigorous Review under Article 14*, Vol. 13(4), NUJS L. REV. (2020) (Previously, I have argued that there are different *indicia* to distinguish between direct and indirect discrimination, with causation, intention and the secondary paradigm of indirect discrimination, being prominent among them. The secondary paradigm of indirect discrimination too has been understood differently. While some have argued that indirect discrimination is 'secondary' because it tracks the side-effects of direct discrimination, others have suggested that it is 'secondary' in a temporal sense. It arose after the prohibition of direct discrimination. Hellman has even argued that indirect discrimination is 'secondary' in that it compounds prior injustice. After considering these *indicia*, I have argued that none of them aptly capture the distinction between direct and indirect discrimination. Instead, according to me, the difference between these two types of discrimination lies in the nature of the moral wrong which they seek to combat. Whilst direct discrimination seeks to target stigma, stereotyping and humiliation, indirect discrimination seeks to remedy unjustifiable redistributive wrongs).

6 Nitisha, *supra* note 3, at ¶9.

7 *Id.*, ¶8.

8 *Id.*

9 *Id.*

physical capacity and eyesight.[10] The functional capacity of each officer was denoted by descending order of fitness, denoted from the numbers one to five.[11]

Out of the 615 women officers considered by the Special Board, 422 women SSC officers were recommended for PC.[12] Additionally, the SC also noted that out of the remaining 193 officers, 164 continued to satisfy the SHAPE-1 criterion.[13]

The petitioners argued that the medical criterion stipulated as a precondition under the General Instructions was arbitrary and unjust since women officers in the age group of forty-five to fifty years were required to comply with the medical standards generally applicable to male officers falling in the twenty-five to thirty years age bracket.[14] Furthermore, many women officers before the SC who were being offered a PC belatedly had already undergone medical scrutiny on the completion of their 5th, 10th and 14th year in service.[15] It was also argued that the medical criterion stipulated did not account for the physiological changes that may have occurred with the passage of time.[16] On the other hand, male officers who were granted a PC on the completion of their 5th or 10th year in service continued to occupy different ranks in the army regardless of the fact that their bodies too would have undergone a physiological change.[17]

In response, the Additional Solicitor General ('ASG') contended that women officers could not, on the one hand, seek parity with their male counterparts, and on the other, seek special and unjustified treatment in the eligibility criteria.[18] He also submitted that SSCofficers had never been denied an extension of service on medical grounds.[19] Therefore, a comparison with fitness levels at the 5th and 10th years of service would be entirely baseless.[20] Moreover, the SHAPE-1 assessment was done as per the age and height of the candidate concerned, and therefore, changes occurring with age would anyway be factored in.[21]

When the SC examined the medical criteria, it did not find the criteria itself to be arbitrary.[22] However, it did observe that it could not shy away from the fact that 615 women officers had been subjected to a rigorous medical standard at an advanced stage of their careers only because they had not been considered for

[10] *Id.*, ¶15.
[11] *Id.*, ¶16.
[12] *Id.*, ¶46.
[13] *Id.*, ¶47.
[14] *Id.*, ¶48(ii).
[15] *Id.*, ¶48(iii).
[16] *Id.*, ¶48(vi).
[17] *Id.*, ¶48(vii).
[18] *Id.*, ¶52(iii).
[19] *Id.*, ¶52(ix).
[20] *Id.*
[21] *Id.*, ¶52(xi).
[22] *Id.*, ¶129.

a PC earlier, *i.e.*, on expiry of their 5th or 10th year in service.[23] Thus, the SC found that by insisting on an application of medical criteria in the present day, the army was guilty of indirect discrimination.[24]

B. ANNUAL CONFIDENTIAL REPORTS: 'SYSTEMIC DISCRIMINATION'

In addition to the medical requirements, the Special Board had laid down certain further criteria for selection. As per the Additional Affidavit filed on behalf of the Central Government before the SC, the Special Board, (i) considered annual confidential reports ('ACRs'), discipline and vigilance reports, and honours and awards as on the 5th and 10th years of service, and (ii) compared the total marks of each woman SSC officer with that of a male officer of lowest merit who was granted PC in a corresponding field.[25]

The petitioners submitted that the reliance placed on ACRs was misplaced. Given that women officers were not considered for a PC in the army prior to the decision in Babita Puniya, these reports were often prepared casually.[26] They also quantified participation in junior command courses and specialised courses.[27] Given that women were often denied the opportunity of attending these courses, the corresponding benefit too was absent from their ACRs.[28]

On the point of ACRs, the ASG submitted that the Special Board would have been alive to the reality of certain columns in ACRs not being filled in their entirety for women SSC officers.[29] Furthermore, in Babita Puniya, the petitioners had conceded to the consideration of ACRs being a just and fair criterion.[30] Therefore, they could not now challenge it belatedly.[31]

On this, the SC found that women SSC officers have historically been treated differently while preparing those reports because they were not eligible for

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23 *Id*.

24 *Id*., ¶¶132–134. In my opinion, this finding of the SC is questionable. By compelling women officers to re-take a rigorous medical examination, the Indian Army may have been guilty of direct discrimination. This is so because only women officers in the age group of forty-five to fifty years were subjected to a medical examination. None of their male counterparts in the same age bracket were. Therefore, all the members of the affected group, SSC officers aged forty-five to fifty years and subjected to a medical examination, overlapped with members of a group – women officers – characterised by a marker of discrimination – sex. The criterion adopted in this case was thus only a proxy, and the discrimination at hand was direct in nature. *See* Hugh Collins & Tarunabh Khaitan, *Indirect Discrimination Law: Controversies and Critical Questions* in FOUNDATIONS OF INDIRECT DISCRIMINATION LAW 21 (Hugh Collins & Tarunabh Khaitan, 2018).

25 Nitisha, *supra* note 3, at ¶¶46(ii)–46(iv).

26 *Id*., ¶48(xi).

27 *Id*., ¶48(xiii).

28 *Id*.

29 *Id*., ¶52(xxi).

30 *Id*., ¶52(xxii).

31 *Id*.

the grant of a PC.[32] The SC also observed that the casual manner in which ACRs were prepared for women was an instance of structural discrimination.[33] As to the criteria vis-à-vis ACRs, honours, awards *et al.*, adopted by the Special Board for determining whether or not women officers must be granted a PC, the SC found the belated application of such a general policy as an instance of indirect discrimination.[34] Although the criterion of ACRs was facially neutral, in practice, it had a disparate impact on women officers.[35] Further, the SC observed that a formalistic application of such pre-existing policies was an extension of systemic discrimination.[36] The SC understood systemic discrimination as a framework where societal patterns of discrimination are constituted and compounded by social and economic structures.[37] This framework also entailed combining direct and indirect discrimination analyses to remedy these systemic wrongs.[38]

After similarly examining the other criteria adopted by the army, the SC concluded that the army had sought to adopt facially neutral standards while implementing the directions issued in Babita Puniya.[39] The fact that there was no scheme devised to exclude women from the grant of PCs was irrelevant, and the SC was primarily concerned with the 'effect' of the criteria adopted.[40] Given that women had been excluded from PCs for reasons entirely beyond their control, the SC returned a finding of indirect discrimination.[41]

C. EXTERNAL BENCHMARKING: A RED HERRING

In addition to the medical criteria and the requirement of ACRs, the petitioners also assailed the criteria of benchmarking, whereby a woman officer was compared against the benchmark of the last selected male officer with the lowest merit in a particular year.[42] Male officers had not been required to meet any external benchmark.[43] Moreover, unlike women officers, they were required to compete *inter se* only when the number of qualifying candidates exceeded the number of vacancies.[44]

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[32] *Id.*, ¶113.
[33] *Id.*, ¶115(i) (Interestingly, in this paragraph, and at a few other locations in the judgment, the SC uses two different phrases, i.e., 'structural discrimination' and 'systemic discrimination'. To my mind, both these phrases have been used interchangeably and the SC was not referring to two different types of discrimination by using the word 'structural' instead of 'systemic').
[34] *Id.*, ¶116.
[35] *Id.*, ¶143.
[36] *Id.*, ¶118.
[37] *Id.*, ¶97.
[38] *Id.*
[39] *Id.*, ¶120.
[40] *Id.*, ¶122.
[41] *Id.*
[42] *Id.*, ¶53(iii).
[43] *Id.*
[44] *Id.*

The SC dealt with the aspect of benchmarking the marks obtained by women SSC officers against the lowest competitive merit of a male counterpart by observing that this argument was fallacious because a total of 615 women officers across thirty-two batches were considered for the grant of PCs in the present instance.[45] Not only that, a need for competitive merit amongst male cadres in any given year arose only when the candidates satisfying the cutoff threshold exceeded the vacancies available.[46] If the ceiling limit itself had not been crossed, a question of benchmarking women against male counterparts was only a red-herring.[47]

III. THE INDIRECT DISCRIMINATION FRAMEWORK

A. DEFINITION, MANNER OF PROOF & JUSTIFIABILITY

Evidently, the SC's decision in this case was largely concerned with the concept of indirect discrimination. Indirect discrimination occurs when a neutrally worded measure disproportionately disadvantages members belonging to a certain group. The SC began by observing that unlike the formal and symmetric conception of anti-discrimination law, a substantive approach to equality law pursued more ambitious objectives.[48] Citing the work of Professor Sandra Fredman, Chandrachud J. observed that factual equality can only be attained if ground realities are accounted for.[49] A mere uncritical adoption of laws and practices could at times perpetuate an unjust *status quo*.[50] Indirect discrimination, according to the SC, was closely tied to a substantive concept of equality,[51] and thus, it proceeded to examine the notion in a little more detail.

When examining the concept of indirect discrimination, the SC first conducted an extensive study of the approach adopted in the United States of America ('USA'),[52] the United Kingdom ('UK'),[53] South Africa[54] and Canada.[55] After consolidating the position across these jurisdictions, the SC proceeded to draw a distinction between direct and indirect discrimination. It observed,

> "Second, and as a related point, the distinction between direct and indirect discrimination can broadly be drawn on the basis of the former being predicated on intent, while the latter is based on effect (US, South Africa, Canada). Alternatively, it can be based on the fact that the former cannot be justified, while the

45 *Id.*, ¶¶105-106.
46 *Id.*, ¶104.
47 *Id.*, ¶108.
48 *Id.*, ¶56.
49 *Id.*, ¶57.
50 *Id.*
51 *Id.*, ¶58.
52 *Id.*, ¶¶67-72.
53 *Id.*, ¶¶73-76.
54 *Id.*, ¶¶77-79.
55 *Id.*, ¶¶80-82.

> latter can (UK). We are of the considered view that the intention versus effects distinction is a sound jurisprudential basis on which to distinguish direct from indirect discrimination. This is for the reason that the most compelling feature of indirect discrimination, in our view, is the fact that it prohibits conduct, which though not intended to be discriminatory, has that effect [...] (emphasis added)."[56]

Therefore, by drawing a distinction between direct and indirect discrimination based on the presence of discriminatory intent, the SC held that when a practice has a discriminatory effect, it results in indirect discrimination. After so conceptualising indirect discrimination, the SC proceeded to examine how it may be proved. It observed that it was eschewing an absolutist position insofar as the nature of the evidence that could be used to prove indirect discrimination was concerned.[57] The SC consciously avoided laying down any quantitative thresholds which must be met for a statistical disparity to qualify as indirect discrimination.[58]

The SC then dealt with the burden that must be discharged by a litigant to make out a claim of indirect discrimination,[59] and that which must be discharged by the defendant to show that the neutrally worded measure was in fact justifiable.[60] As to the former, the SC approved[61] of a two-pronged test adopted by the Supreme Court of Canada in *Fraser* v. *Canada (Attorney General)* ('Fraser').[62] According to the Canadian Supreme Court, at the first stage, a plaintiff must show that the effect of a measure was to impose a differential treatment based on protected grounds.[63] At the second stage, it must be shown whether the differential treatment had the effect of reinforcing, perpetuating or exacerbating disadvantage.[64] As to the justifiability of a measure, the SC held that a judge would have to see whether a provision, criteria or practice was necessary for a successful performance of the job.[65] Whilst some amount of deference must be accorded to the views of the defendant, the SC cautioned that a judge must also examine whether the same objectives could be attained with less discriminatory measures.[66]

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[56] *Id.*, ¶84.
[57] *Id.*, ¶85.
[58] *Id.*
[59] *Id.*, ¶86.
[60] *Id.*, ¶87.
[61] *Id.*, ¶86.
[62] Fraser v. Canada (Attorney General), (2020) SCC 28 (Supreme Court of Canada) ('Fraser').
[63] Nitisha, *supra* note 3, at ¶82.
[64] *Id.*
[65] *Id.*, ¶87.
[66] *Id.*

B. *INFERRING 'DISCRIMINATORY INTENT' AS A KEY COMPONENT OF DIRECT DISCRIMINATION*

After having laid out the decision of the SC on facts and having explored the framework of 'indirect discrimination' delineated by it, I will now proceed to examine what I consider to be one of the key takeaways from the judgment. In Nitisha, the SC rejected the UK approach towards differentiating between direct and indirect discrimination and instead adopted the one followed in the USA.[67] In the UK, a case of direct discrimination is made out by satisfying a 'but for' test — 'but for' the affected party possessing one of the markers of discrimination, they would have been treated differently.[68] The intent of the perpetrator is not *per se* relevant to this test. As the SC in Nitisha also observes,[69] the difference in the UK between direct and indirect discrimination instead lies in the justifiability of a measure. Whereas direct discrimination is non-justifiable, indirect discrimination is justifiable.[70] In the USA, on the other hand, to make out a case of disparate treatment, a plaintiff must establish discriminatory intent on the part of the perpetrator.[71] These are, by and large, considered to be the two prominent approaches towards conceptualising direct discrimination.

As mentioned above, the SC explicitly rejected the UK approach to differentiate the two types of discrimination. It would then be possible to infer that to make out a case of direct discrimination in India, the 'but for' test may not be applicable. Consequently, one may have to adopt the approach followed in the USA to prove disparate treatment. Moreover, the SC even went on to say that the 'intention versus effects distinction' is a sound basis to demarcate indirect discrimination from direct discrimination. This observation, in my opinion, buttresses the contention that for future cases, the SC effectively made 'intention' a necessary component of direct discrimination. Should this, however, be the way forward? In the next Part, I explore three reasons why this question ought to be answered in the negative. While intention may be a 'sufficient' component of discrimination, it should not be understood as a 'necessary' component.

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[67] *Id.*, ¶84.

[68] Sandra Fredman, *Direct and Indirect Discrimination: Is there Still a Divide?* in FOUNDATIONS OF INDIRECT DISCRIMINATION LAW 31, 36 (Hart Publishing, 1st ed., 2018).

[69] Nitisha, *supra* note 3, at ¶84.

[70] Fredman, *supra* note 68, at 33.

[71] *Id.*

IV. EXPLORING THE PROBLEMS OF 'INTENTION' AS A 'NECESSARY' COMPONENT IN DIRECT DISCRIMINATION CLAIMS

A. A PRELIMINARY OBJECTION: ADDED EVIDENTIARY BURDENS

The first concern pertains to the evidentiary hurdles that may be encountered in proving direct discrimination. A litigant who approaches the court may now have to establish that the defendant was acting with a conscious design to discriminate or with a malicious motive.[72] In a paradigm where the defendant may often be a State functionary or a large corporation, proving such an animus may be far too onerous a hurdle for a litigant to surmount.[73]

The evidentiary burden may appear to be more problematic when one considers the artificiality of 'intention' as a marker of distinction. A perpetrator may adopt a neutrally worded rule, measure or practice with as much of a hostile intention as a marker such as race, caste, and gender, is in an instance of direct discrimination. The facially neutral measure may be prescribed, knowing fully well that it may have a disproportionate impact on certain groups of people. When a case of indirect discrimination can be motivated by as much of an ill-will, it can hardly be said that 'intention' is what sets it apart from direct discrimination.

B. NO NECESSITY FOR INTENTION AS AN ELEMENT

The preceding analysis leads to the second concern with the use of 'intention' as an integral marker for direct discrimination. Conceptually, in my opinion, 'intention' is not germane for adjudication of direct discrimination disputes at all. Sophia Moreau makes this point poignantly when she says,

> "Consider the businesses that impose a dress code requiring only female staff, but not male staff, to wear make-up and short skirts. They too are not aiming at harm: they simply believe this kind of dress code will make their female staff more attractive to clients and hence, garner more clients overall. […] All of these cases of direct discrimination that I have just mentioned – and there are many similar examples that could be cited – are poorly

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[72] *See also* Aziz Z. Huq, *What is Discriminatory Intent?*, Vol. 103, Cornell L. Rev., 1211 (2019) (While studying the notion of discriminatory intent in the United States, Huq observes, "intent now plays a central role whenever an individual litigant invokes the Constitution's protection against official discrimination". Upon making 'intention' a centrepiece of direct discrimination claims, a similar effect may also be seen in India).

[73] *See* Reva Siegel, *Equality Divided*, Vol. 127(1), Harv. L. Rev., 20 (2013).

> explained by the suggestion that the agents were intending harm as an end or as a means to their end".[74]

The conclusion that Moreau inevitably leads us to is that the harm caused by direct discrimination may ensue irrespective of the animus possessed by the perpetrator. The 'deliberative freedoms' which Moreau says discrimination law seeks to protect[75] would be infringed even if the discrimination was unintentional. Deborah Hellman too would concur with this conclusion[76] and contend that the equal moral worth of an individual may be demeaned[77] regardless of the perpetrator's intentions. Leaving aside momentarily the appropriateness of Moreau's and Hellman's views on the objectives which discrimination law tracks, the point remains. The same point was even made by Mukherjea J. in a concurring opinion in *State of W.B.* v. *Anwar Ali Sarkar* ('Anwar Ali Sarkar').[78] This case *inter alia* dealt with the constitutional validity of the West Bengal Special Courts Act, 1950. The Attorney General had argued that for protection under Article 14 to be invoked, the legislation complained of must be shown to be a piece of hostile legislation.[79] Mukherjea J. dealt with this argument in the following terms,

> "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 interests of that person or class. [...] 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 actuated 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 the legislature had no intention to discriminate, though discrimination was the necessary consequence of the Act (emphasis added)."[80]

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74 Sophia Moreau, *The Moral Seriousness of Indirect Discrimination* in FOUNDATIONS OF INDIRECT DISCRIMINATION LAW, 134, 139 (Hart Publishing, 1st ed., 2018).

75 Sophia Moreau, *What is Discrimination?*, Vol. 38(2), PHILOSOPHY & PUBLIC AFFAIRS, 143, 148 (2010) (Moreau has also argued that on her account of discrimination law, there is no deep difference between direct and indirect discrimination).

76 DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (Harvard University Press, 2011).

77 Deborah Hellman, *Equal Protection in the Key of Respect*, Vol. 123(8), YALE L. J., 3055 (2014).

78 State of W. B. v. Anwar Ali Sarkar, (1952) 1 SCC 1.

79 *Id.*, ¶47.

80 *Id.*

Therefore, even Mukherjea J. correctly observed that it was artificial to emphasise on 'hostile' intention when the harms of discrimination had in any case been suffered. Given that no account of discrimination law has as its purpose to punish the perpetrator, placing intention at the heart of direct discrimination only shifts focus away from the wrong that needs to be remedied to the moral culpability (or extent thereof) of the perpetrator.[81] Overall, in my opinion, when the discriminatory intent of the defendant is not necessarily linked to the harms caused by direct discrimination, it should not be considered as one of its essential components.

C. LIMITED SCOPE OF 'DISCRIMINATORY INTENT' IN PRACTICE

The third concern with the characterisation of intention as a necessary element of direct discrimination comes to the fore when one considers how 'discriminatory intent' has been understood in practice. Admittedly, the SC did not have an occasion to examine the meaning of 'discriminatory intent'. However, for future cases, a consideration of Aziz Huq's study is certainly germane.[82]

Huq's study, situated largely in the context of US law, desegregates discriminatory intention or manifestations thereof into five categories. The first is a bare desire to harm.[83] The second is a conscious use of suspect classifications as a supposedly efficient means of achieving an illicit goal.[84] The third is when markers of discrimination play a role in government decision making.[85] The fourth is when markers are used to produce and reinforce status hierarchies amongst social groups.[86] The fifth is an implicit bias or a failure to account for structural inequalities.[87] Huq acknowledges that the boundaries between these categories are ambiguous and contestable. However, what concerns him are the evidentiary

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[81] At this juncture, it is important to acknowledge that there are several scholars who opine otherwise as well. They argue that what makes direct discrimination wrongful is the objectionable motivation of the actor. *See* Denise Reaume, *Harm & Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination*, Vol. 2(1), Theoretical Inquiries in Law (2001); John Gardner, *On the Ground of Her Sex(uality)*, Vol. 18, Oxford J. Leg Studies, 182 (1998).

[82] Huq, *supra* note 72; *But see* Andy Yu, *Direct Discrimination and Indirect Discrimination: A distinction with a difference*, Vol.9(2), Western J. Leg. Studies (2019) (Yu argues that intention in discrimination is strictly a matter of knowledge, and nothing further. At first blush, this proposition looks attractive in that it lowers the burden of proof cast upon a plaintiff. However, I disagree with this conception of intention in discrimination law. Unlike tort or criminal law, it is hard to conceive of parallel instances in discrimination law where a perpetrator may be said to have acted negligently or unknowingly. Admittedly, there are cases where a defendant may have acted without a desire to harm but only out of an implicit bias. However, this does not relegate the perpetrator's mindset to one of 'unknowingness'. Much to the contrary, the basic element of knowledge is satisfied in most cases).

[83] Huq, *supra* note 72, at 1242.

[84] *Id.*, 1245.

[85] *Id.*, 1251.

[86] *Id.*, 1257.

[87] *Id.*, 1259.

tools employed by judges to discover various forms of discriminatory intent. He explains that in practice, there has been a "prioritisation of evidence of semantic content of laws over circumstantial, statistical, or testimonial evidence",[88] with the result that Courts have effectively reduced disparate treatment actions to an anti-classification approach, side-lining other forms of direct discrimination.[89]

Huq's point can be amplified with an example from the Indian jurisprudence. In *V. Sunithakumari* v. *K.S.E.B.*,[90] the petitioner had sought employment assistance from the Kerala State Electricity Board after her father died in harness. The petitioner was a married daughter. Under the applicable regulations, only a surviving spouse, a son and an unmarried daughter were entitled to employment assistance. While upholding the regulations, the Kerala High Court observed that the intention therein was to provide immediate relief to the family of the deceased for their sustenance. The exclusion of a married daughter was reasonable because the intention was not to provide employment to one of the heirs of the deceased, but only to one of their dependents.[91] A married daughter belonged to the family of her husband after marriage and was thus, not a dependent.[92] In this case, even though a bare desire to harm was absent, the Court could have identified the discriminatory intention in the implicit bias underlying the regulations or in the conscious use of a prohibited marker to maintain social hierarchies. Instead, it understood intent as the motivations or objectives underlying the measure, and tested the reasonableness of those motivations. As Huq has critiqued, it reduced direct discrimination to an anti-classification approach.

It is precisely this parochial manner in which 'discriminatory intent' has often been understood, or may be understood, which brings out another problem with the insistence on 'intention' as a constituent element of direct discrimination. Limiting the scope of 'intention' in turn limits the scope of a direct discrimination action itself. This is, therefore, the third reason why the Courts must veer away from insisting upon the presence of a discriminatory intent.

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[88] *Id.*, 1285.

[89] *Id.*, 1286-1288 (Simply put, an anti-classification approach is one which proscribes the categorisation of persons into different classes based on certain prohibited markers of discrimination. When a classification is unable to satisfy the threshold of review adopted in a particular jurisdiction, it is held to be bad in law. In the USA, for example, a classification made on the grounds of race must, in most cases, pass the strict scrutiny standard of review. According to Huq, discriminatory intent has been reduced to the use of a marker of discrimination in decision-making).

[90] V. Sunithakumari v. K.S.E.B., 1992 SCC OnLine Ker 145.

[91] *Id.*, ¶9.

[92] *Id.*

V. AN ALTERNATE UNDERSTANDING OF NITISHA

A. *INTENTION AS A 'SUFFICIENT' COMPONENT OF DIRECT DISCRIMINATION*

Admittedly, the contours of direct discrimination were not before the SC in Nitisha. The SC thus did not even weigh the pros and cons of discriminatory intent being one of its key elements. Courts must therefore interpret the dictum in Nitisha,[93] in light of the limited facts of the case. Till now, I have proceeded on the basis that the reasonable inference which follows from Nitisha is that intention is a necessary component of direct discrimination. Is there, however, an alternate way to understand the decision? Given that direct discrimination was not squarely in issue in Nitisha, it is, in my opinion, possible to interpret the dictum of the SC to mean that although a large number of direct discrimination cases may be characterised by the presence of a discriminatory intent, intention is only a sufficient but not a necessary component of direct discrimination. This interpretation would draw its strength from and even be in sync with the SC's other observation that "the emphasis on intent alone as the key to unlocking discrimination has resulted in several practices … to fall through the cracks of our equality jurisprudence".[94] Additionally, it would also allow us to understand the SC's dictum in Nitisha and Mukherjea J.'s observations in Anwar Ali Sarkar harmoniously.

It is, therefore, possible to understand Nitisha in a manner that avoids the perils of characterising intention as a key feature of direct discrimination. However, this alternative interpretation too comes with an additional hurdle. What test must a Court adopt for a direct discrimination claim? On shelving an intention-centric approach, the method adopted to prove a disparate treatment action in the USA too would have to be shelved. The other choices that emerge from the comparative jurisprudence considered by the SC are the models adopted in the UK and Canada. As is evident from the decision in Fraser, Canadian Courts follow the same two-pronged test for establishing both direct and indirect discrimination.[95] A plaintiff would therefore have to show that the law or policy creates a distinction based on a protected ground, and the distinction perpetuates, reinforces or exacerbates disadvantage. As to the UK, as mentioned above, the test adopted is a 'but for' test.

In Nitisha, the SC treated the Fraser approach towards indirect discrimination approvingly. Therefore, in future cases, it is possible that the precedential value of this approval may be transposed to direct discrimination claims, and the Canadian test is adopted. There is also a second factor which may weigh in

[93] Nitisha, *supra* note 3, at ¶84 (The SC observed, "We are of the considered view that the intention effects distinction is a sound jurisprudential basis on which to distinguish direct from indirect discrimination").

[94] *Id.*, ¶88.

[95] Fraser, *supra* note 62, at ¶¶49-50.

favour of adopting this test. Canadian Courts have blurred the distinction between direct and indirect discrimination. Given the SC's inclination to move towards a model of systemic discrimination and to avoid an exclusive reliance on tools of direct and indirect discrimination,[96] on this count too, it is certainly possible for future Courts to adopt the Canadian model in both direct and indirect discrimination cases.

However, as I have argued previously,[97] a blurring of lines between direct and indirect discrimination may not conform with the text of Article 15 of the Indian Constitution. Article 15(1) says, "The State shall not discriminate against any citizen on grounds only of …".[98] Whilst Article 15(1) prohibits a distinction on the grounds of a prohibited marker, it does not necessarily cover measures which tend to have a discriminatory effect along the lines of that marker. This point can be amplified with two examples. When free access to a swimming pool is restricted to men above the age of sixty-five but is granted to women above the age of sixty,[99] there is a distinction on the grounds of 'sex'. However, when the State introduces a legislation which extends protection against unfair dismissal only to employees who had been employed for two or more years, and it is found on studying statistics over a five to six-year period that the ratio of men and women who can comply with the two-years criterion is ten is to nine,[100] there is an adverse effect along the lines of 'sex'. On a plain reading, Article 15(1) prohibits the policy in the former example and not the latter. This aspect weighs against an adoption of the Canadian test.

As to the 'but-for' test followed in the UK, it sits well with the text of Article 15(1). Under the 'but-for' test, the only question which needs answering is — but for the plaintiff possessing a prohibited characteristic, would the plaintiff have been treated differently?[101] If this question is answered in the affirmative, the legislation or policy in question is held to be impermissible or prohibited. The text of Article 15(1) is categorical insofar as the absolute nature of the prohibition of distinctions is concerned.[102] Therefore, a 'but-for' test would be in consonance with Article 15(1). Moreover, unlike the UK, direct discrimination is not non-justifiable. A classification on the grounds of a prohibited marker may be permissible if Articles 15(3)-(6) are attracted. Pertinently, while the SC in Nitisha rejected the UK approach to distinguish between direct and indirect discrimination, it did not discuss the merits and demerits of the 'but-for' test.

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[96] Nitisha, *supra* note 3, at ¶¶88-97.

[97] Gandhi, *supra* note 5.

[98] The Constitution of India, 1950, Art. 15(1).

[99] *See also* James v. Eastleigh BC, (1990) 2 AC 751 (House of Lords, United Kingdom) (The facts of the illustration are an adaptation of this case).

[100] *See also* R. v. Secy. of State for Employment, ex p Seymour-Smith (2000) 1 WLR 435 (House of Lords, United Kingdom) (The facts of the illustration are an adaptation of this case).

[101] Fredman, *supra* note 69.

[102] Gandhi, *supra* note 5, at 5.

Overall then, neither the text and structure of Article 15 nor its consonance with different tests to prove direct discrimination were considered by the SC in Nitisha. Therefore, in my opinion, it is possible for subsequent Courts to *first*, understand Nitisha to mean that although intention may be a sufficient condition to prove a claim of direct discrimination, it is not a necessary one, and *second*, adopt a test not based on intention to prove such a claim. At the very least, there must be a deeper exploration of the concept of discriminatory intent, and the SC's decision in Nitisha provides an appropriate starting ground for this. There is, however, a second alternative that I believe Courts could adopt in subsequent cases.

B. UNDERSTANDING 'DISCRIMINATORY INTENT' CAPACIOUSLY

In this Part, thus far, I have argued that subsequent Courts could possibly understand 'intention' only as a sufficient as opposed to a necessary requirement of discrimination. However, even if they do not do so, there is a second alternative that could be pursued. In the previous Part, I explored how in practice, 'intention' has come to be understood narrowly, and this has been a part of the problem. However, this issue too is on that can be remedied. Even if subsequent Courts were to understand Nitisha to mean that intention is a necessary component of direct discrimination, it is possible to prevent the scope of direct discrimination actions from being unduly narrowed. Given that the meaning of 'discriminatory intent' was not before the SC in Nitisha and, therefore, not considered by it, subsequent Courts can interpret that phrase itself broadly. Huq's five-pronged approach, for one, is an interpretation that Courts could possibly explore.

Having said that, my thoughts on the course that 'discriminatory intent' ought to take must not be understood to mean that the reasons motivating a defendant are entirely irrelevant in direct discrimination. They may, in fact, be material when considering the justifiability of a measure. For instance, when considering a direct discrimination claim under Article 15(1) of the Constitution, the reasons or objectives motivating a State actor may be important to see whether Articles 15(3) or 15(4) of the Constitution are attracted. The debate around the threshold that must be satisfied for an intention or a policy to merit protection under those provisions though, is a debate beyond the scope of this note.

VI. CONCLUSION

In summation, the SC in Nitisha has provided a comprehensive framework for the prosecution of an indirect discrimination action. However, in laying down a framework for indirect discrimination, it has misidentified 'intention' as the marker that demarcates direct and indirect discrimination. In the process, it has led to a situation where Courts in the future may reasonably interpret the decision in Nitisha to mean that 'intention' is a necessary component of direct

discrimination. This is problematic for three reasons. Firstly, intention is not integral to the harms caused by direct discrimination. They may be suffered regardless, and ought to be redressed whether or not the defendant bore a discriminatory intent. Secondly, an insistence on intention increases the evidentiary burden on a plaintiff. Thirdly, given how narrowly discriminatory intent has been understood in practice, locating intention as a necessary component of direct discrimination unduly limits the scope of the protection offered by the law. In this note, I have offered two possible alternatives to avoid these problems. One is to understand the decision in Nitisha to mean that while intention is sufficient to prove direct discrimination, it is not a necessary element. The other is to interpret the phrase 'discriminatory intent' itself in as broad a manner as possible. In any case, following Nitisha, it is important to initiate a discussion around 'discriminatory intent' in India.

Nevertheless, it is also important to acknowledge that the SC identified a need to move away from the pigeonholes of direct and indirect discrimination, and to recognise the systemic nature of the problem.[103] It even acknowledged the need to account for discrimination along "multiple axles".[104] In what may prove to be a seminal observation in times ahead, the Court observed that it was the duty of constitutional Courts to "structure adequate reliefs and remedies that facilitate social redistribution by providing for positive entitlements that aim to negate the scope of future harm".[105] Therefore, if the notion of 'systemic discrimination' as propounded by the SC is followed, the niceties of direct and indirect discrimination claims may not curtail us. Presently, however, identification of 'systemic discrimination' remains an ideal for Courts to adopt. The contours of the concept continue to remain hazy, and therefore, litigants approaching may continue to frame their actions as direct or indirect discrimination claims. Thus, it is important that these concepts are defined in a manner that may best advance the objectives of discrimination law.

[103] Nitisha, *supra* note 3, at ¶90.
[104] *Id*.
[105] *Id*.