

# ANALYSIS OF THE INDIRECT DISCRIMINATION TEST IN THE LIGHT OF COVID-19 RESTRICTIONS

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*The Indian government imposed a countrywide lockdown in the wake of the COVID-19 pandemic. As a result of the lockdown, India witnessed the deplorable plight of thousands of migrant workers who were unable to avail transportation to return to their native places, and were forced to either travel back on foot, or survive in the city they worked in, without their daily wages. The plight of the migrant workers brought to light the importance of the discourse around the disparate impact of measures which are facially neutral. The Equality Code (Articles 14 to 18) under the Indian Constitution has endured the test of time to ensure that measures which directly discriminate between people on the enumerated protected grounds, are struck down. However, with evolving times, it is imperative to address neutral measures which, albeit applicable to all, affect different segments of the population differently. While the Supreme Court has analysed indirect discrimination in a recent judgement, this article is an attempt to analyse whether facially neutral measures can be considered discriminatory under our constitutional framework. The authors conclude that Article 15 can be interpreted to consist of safeguards against facially neutral laws with disparate impacts. The jurisprudence of certain countries regarding discriminatory facially neutral measures has been examined to bolster this analysis. At the end, a sliding scale theory is proposed to analyse the constitutionality of a facially neutral measure, while also examining the constitutional validity of the imposed lockdown vis-à-vis the disproportionate impact it has posed on the migrant workers.*

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## I. INTRODUCTION

On March 24, 2020, the Ministry of Home Affairs imposed a nationwide lockdown, ordering the shut-down of all commercial and industrial establishments and suspending all forms of non-essential transport services.<sup>1</sup> These lockdown restrictions brought to light the situation of the migrant workers, who were arguably amongst the most hard-hit by the lockdown.<sup>2</sup> The 2011 Census revealed that the major migrant destinations were tier-1 cities such as Delhi, Mumbai, Chennai, Hyderabad.<sup>3</sup> With the shutting down of all factories and offices,<sup>4</sup> the lack of daily wages and isolation from their families led to mental deterioration and anxiety among the workers.<sup>5</sup> While the entire country was coming to terms with social distancing, the migrant workers had other daunting tasks to confront as well, including hunger, shelter, and being stuck in a migrant land with no means to survive.<sup>6</sup> As a result, the workers were forced to travel miles on foot from their workplaces to their homes.<sup>7</sup> A 2020 study on the psychological impact of the pandemic on the migrants revealed that three-fourths of the participants

<sup>1</sup> All transport services—air, rail, roadways—will remain suspended. Exceptions were provided for transportation of essential goods, fire, law and order and emergency services, operations of railways, airports and seaports for cargo movement, relief and evacuation and their related operational organisations, and similar essential activities, *see* Ministry of Home Affairs, Order No. 40-3/2020-DM-I(A) (Issued on March 24, 2020).

<sup>2</sup> Radhicka Kapoor, COVID-19 AND THE STATE OF INDIA'S LABOUR MARKET, No. 18, ICRIER Policy Series, June 2022, available at [https://icrier.org/pdf/Policy\\_Series\\_18.pdf](https://icrier.org/pdf/Policy_Series_18.pdf) (Last visited on June 5, 2022); Ranjana Choudhari, COVID-19 Pandemic: Mental Health Challenges of Internal Migrant Workers of India, Vol. 54, Asian Journal Of Psychiatry, 102254 (2020); THE HINDU (Priscilla Jebaraj), *Coronavirus Lockdown | 26 Lakhs Migrant Workers in Halfway Houses, Says Official Data*, June 5, 2020, available at <https://www.thehindu.com/news/national/coronavirus-lockdown-26-lakh-migrant-workers-in-halfway-houses- says-official-data/article31751222.ece> (last visited on November 30, 2020).

<sup>3</sup> Office of the Registrar General & Census Commissioner, India, 2011 Census Data, *Population Enumeration Data, Disabled Population by type of Disability, Age & Sex*.

<sup>4</sup> *Id.*

<sup>5</sup> Asima Mishra & Neha Sayeed, *COVID-19 and Migrant Workers: Clinical Psychologists' Viewpoints in COVID-19 PANDEMIC: CHALLENGES AND RESPONSES OF PSYCHOLOGISTS FROM INDIA*, 43, 43-56 (2020).

<sup>6</sup> Krishan Kumar et al., *The Psychological Impact of COVID-19 Pandemic and Lockdown on the Migrant Workers: A Cross-sectional Survey*, Vol. 53, ASIAN JOURNAL OF PSYCHIATRY, 102252 (2020).

<sup>7</sup> THE HINDU (Priscilla Jebaraj), *Coronavirus Lockdown | 26 Lakhs Migrant Workers in Halfway Houses, Says Official Data*, June 5, 2020, available at <https://www.thehindu.com/news/national/>

were diagnosed with depression, with 50 percent of them experiencing the fear of death.<sup>8</sup> Another 2020 study suggested that only 4 percent of the total population of the migrants received rations allotted by the government, and 29 percent did not receive rations despite having ration cards.<sup>9</sup> A survey conducted across 179 Indian districts revealed that around 35 percent of the migrants went without any meal the whole day, from June to July of 2020.<sup>10</sup>

The deplorable state of the migrant workers, along with other sections of the society, led to petitions being filed challenging the lockdown. A Public Interest Litigation petition to espouse the cause of employees and employers who were laid off or on the verge of bankruptcy due to the lockdown.<sup>11</sup> Other petitions were filed to challenge the order issued by the Ministry of Home Affairs, which mandated employers to pay full wages to employees or labourers despite the lockdown.<sup>12</sup> These petitions requested the court to quash the order as it was irrational and adversely affected employers, who were themselves out of business during the lockdown. Moreover, the petitioners believed that it was the State's duty to provide compensatory funds to the employees. The Supreme Court issued interim measures asking the employers to simply negotiate with employees on wages until a final call could be taken on the validity of an order dated March 29, 2020, that mandated full wages to be paid to the employees.<sup>13</sup> This uncertainty aggravated the difficulties for migrant workers, who were left to fend for themselves while the State and the employers shifted the burden of employee welfare onto each other.

The proposed lockdown restrictions highlight the concept of a facially neutral measure having a disparate impact on different groups due to various structural or institutional factors.<sup>14</sup> The concept of discrimination can be divided into two segments; direct and indirect discrimination.<sup>15</sup> A provision is said to be directly discriminatory when it distinguishes between two classes on the face of

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coronavirus-lockdown-26-lakh-migrant-workers-in-halfway-houses-says-official-data/article31751222.ece (Last visited on November 30, 2020).

<sup>8</sup> Kumar, *supra* note 7.

<sup>9</sup> Mridusmita Bordoloi et al., *Social Security for Informal Workers in India*, Centre for Policy & Research (2020).

<sup>10</sup> THE TIMES OF INDIA (Ambika Pandit), *1 in 4 Migrants Went Home on Foot During Lockdown: Survey*, available at <https://timesofindia.indiatimes.com/india/1-in-4-migrants-went-home-on-foot-during-lockdown-survey/articleshow/77474165.cms> (Last visited on January 29, 2022).

<sup>11</sup> Aditya Giri v. Union of India, WP(C) D. No. 10981 of 2020 (Supreme Court) (Unreported).

<sup>12</sup> B4S Solution Pvt. Ltd. v. Union of India, W.P. (C) No. 484 of 2020 (Supreme Court) (Unreported); Ficus Pax (P) Ltd. v. Union of India, (2020) 4 SCC 810.

<sup>13</sup> Ministry of Home Affairs, Order No. 40-3/2020-DM-I(A) (Issued on March 24, 2020).

<sup>14</sup> The European Parliament and the Council of 5 July 2006, *Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation*, Directive 2006/54/EC, July 26, 2006, available at <http://data.europa.eu/eli/dir/2006/54/oj> (Last visited on July 28, 2022); Navtej Singh Johar v. Union of India, (2018) 10 SCC 1; JOHN RAWLS, A THEORY OF JUSTICE (Harvard University Press, 1971).

<sup>15</sup> Oran Doyle, *Direct Discrimination, Indirect Discrimination and Autonomy*, Vol. 27(3), OXFORD JOURNAL OF LEGAL STUDIES, 537 (2007).

it, under a proscribed ground.<sup>16</sup> On the other hand, indirect discrimination sprouts from a seemingly neutral measure which has discriminatory effects.<sup>17</sup> Facially neutral measures having a disparate impact are unconstitutional under Article 15 of the Indian Constitution. Facially neutral laws are neutrally worded measures like the statement “an applicant must never bear a child during the ten-year employment contract”, which seems to create a blanket bar on bearing children for every applicant. However, men are biologically incapable of the same, and this rule disparately impacts women, who would be stripped of motherhood in order to pursue this career and may have to completely give up on bearing children due to the biological constraints on women’s chances at pregnancy.<sup>18</sup> The Constitution of India, under Article 15, prohibits the State from discriminating between people on grounds of ‘religion, race, caste, sex, place of birth’<sup>19</sup> or grounds analogous to them.<sup>20</sup> While this provision has always been interpreted to prohibit measures which explicitly discriminate against the protected classes,<sup>21</sup> it can be argued that it also covers facially neutral measures which have a disparate impact.<sup>22</sup> The concept of substantive equality requires such measures to be held unconstitutional even if they do not explicitly discriminate between two classes.

This paper is an attempt to highlight the importance of judicial scrutiny of facially neutral measures under our Constitution, such that true meaning is given to the equality guaranteed by the document. In the absence of such a test, the possibility of discrimination being practised under the guise of neutral laws is left open. This goes against the concept of substantive equality, which our Constitution seeks to achieve through the inclusion of the marginalised sections of society.<sup>23</sup> The discriminatory effect of facially neutral measures is hence no less worthy of scrutiny than acts which are explicitly discriminatory.

In order to understand the constitutional validity of facially neutral laws, with a special focus on the lockdown measures and its disparate impact on migrants, Part II of this paper describes the relative advantages of examining facially neutral measures having disparate impacts under Article 15 of the Constitution as compared to Article 14. Further, Part III highlights how Article 15 can be interpreted to prohibit indirect discrimination provided the disparate impact is on the basis of one of the prescribed grounds, and some degree of intention to discriminate can be attributed to the alleged discriminator. This is followed

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, at 538; Wayne B. Chew, *Discrimination: Facially Neutral Action*, Vol. 10(1), GOLDEN GATE U. L. REV., 60 (1980).

<sup>18</sup> Whether this rule is an instance of direct or indirect discrimination is dependent on the presence of intention. For the process to determine the same, see Part V.

<sup>19</sup> The Constitution of India, 1950, Art. 15.

<sup>20</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶198 (per Indu Malhotra J.).

<sup>21</sup> *D.P. Joshi v. State of Madhya Bharat*, 1955 SCC OnLine SC4; *Air India v. Nergesh Meerza*, (1981) 4 SCC 335; *AIIMS Students’ Union v. AIIMS*, (2002) 1 SCC 428.

<sup>22</sup> *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90; *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1.

<sup>23</sup> The Constitution of India, 1950, Art. 15.

by Part IV, which traces the judicial scrutiny of facially neutral measures and the relevance of intent or reason in scrutinising the validity of measures in different jurisdictions. Part V then proposes an intention-based sliding scale theory for facially neutral measures. Finally, Part VI analyses the present situation of the migrant workers under the test laid down in Part V, followed by the concluding observations in Part VII.

## II. THE JUDICIAL DEFERENCE UNDER ARTICLE 14 OPPOSED TO THE STRICT SCRUTINY UNDER ARTICLE 15

Articles 14 and 15 guarantee equality under the Indian Constitution. While the former guarantees every individual equality before the law, the latter prohibits discrimination against select classes of people.<sup>24</sup> While both articles, along with Article 16, safeguard equality and equal opportunity under the Constitution, the objective and analysis of each is independent in its own sphere.<sup>25</sup> This part attempts to locate constitutional safeguards against facially neutral measures with disparate impacts. In furtherance of the same, this part shall analyse how Article 14 has not been able to prevent discrimination against the protected classes because of the deference given to state policies under the provision. As a consequence, it is submitted that Article 15, with its strict scrutiny test,<sup>26</sup> is the appropriate provision to address the disparate impact of neutral measures.

Measures which are arbitrary or discriminatory are struck down under Article 14.<sup>27</sup> Article 14 entails the reasonable classification test that enables the courts to examine whether there is an intelligible differentia between the individuals or groups subject to differential treatment, the existence of a reasonable nexus between the differentia and the state's objective and whether the classification is manifestly arbitrary.<sup>28</sup> Essentially, Article 14 allows for differential treatment between different sections of the population if such differential treatment is based on a reasonable classification.<sup>29</sup> Reasonable classification exists when the differential treatment is based on a legitimate public policy objective and if it has a rational nexus with achieving such an objective.<sup>30</sup> While Courts have struck down facially neutral measures under Article 14 for being arbitrary, measures having disparate impacts on protected classes have often escaped the teeth of Article 14.<sup>31</sup> The reason behind it is the judicial deference accorded to state policies wherein the

<sup>24</sup> The Constitution of India, 1950, Arts. 14-15.

<sup>25</sup> *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310.

<sup>26</sup> Tarunabh Khaitan, *Beyond Reasonableness: A Rigorous Standard of Review for Article 15 Infringement*, Vol. 50(2), JOURNAL OF THE INDIAN LAW INSTITUTE, 177, 177-208 (2008).

<sup>27</sup> *State of Mysore v. S.R. Jayaram*, 1967 SCC OnLine SC 7.

<sup>28</sup> *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

<sup>29</sup> *Raj Bala v. State of Haryana*, (2016) 1 SCC 463 ('Rajbala'); Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities*, Vol. 2(3), NUJS L. REV., 419 (2009).

<sup>30</sup> *Id.*

<sup>31</sup> *Supra*, *Raj Bala; Javed v. State of Haryana*, (2003) 8 SCC 369; Khaitan, *supra* note 27.

judiciary yields to the judgement of the Executive and accords it a larger leeway in determining whether a measure is in the interests of public policy and if it has a rational nexus with the same.<sup>32</sup> The Apex Court has itself once stated that courts make anxious attempts to find some justification behind laws which threaten the equity which Article 14 seeks to uphold.<sup>33</sup>

One of the most highly debated judgements for the judiciary's supposed disregard for glaring evidence against disparate impact is the case of *Rajbala v. State of Haryana*.<sup>34</sup> This case dealt with a law which disqualified persons who lacked a certain level of educational qualification and did not have toilet facilities in their homes from either contesting elections to the Panchayats or voting in them.<sup>35</sup> It would even remove from office such members who lacked these qualifications.<sup>36</sup> This neutrally worded law had a disproportionate impact on women, scheduled castes and people below the poverty line.<sup>37</sup> When presented with statistical evidence showing the large proportion of such classes of people who would be disqualified from contesting elections, the court disregarded all the evidence.<sup>38</sup> It held that the law was constitutional as the state had a legitimate objective to achieve, that is, higher education and better sanitation in the villages and districts. In light of this justification advanced by the state, the court did not even attempt to explore other measures by which the same objective could have been achieved without trampling on the rights of people to contest and vote in elections. Similar justifications can be witnessed in cases such as *Javed v. State of Haryana*.<sup>39</sup> In this case, a law which prohibited people having more than two children from contesting elections was upheld.<sup>40</sup> The court ignored the fact that it clearly discriminated against Muslims, whose religion permitted them to have four wives, which led to the law potentially impacting them more adversely than people from other faiths. The court also failed to acknowledge the fact that the law would differentially impact the marginalised communities and candidates with lower economic bandwidth and simply accepted the state's argument of the measure being a step towards increasing awareness about family planning and controlling population growth.<sup>41</sup>

<sup>32</sup> *Supra*, Raj Bala, at ¶91.

<sup>33</sup> LIC v. Consumer Education & Research Center, (1995) 5 SCC 482, ¶14.

<sup>34</sup> *Supra*, Raj Bala.

<sup>35</sup> The Haryana Panchayat Raj (Amendment) Act, 2015.

<sup>36</sup> *Supra*, Raj Bala, at ¶80.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Javed v. State of Haryana, (2003) 8 SCC 369.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; An empirical case study of 23 districts from 5 States, where such disincentives were being enforced, observed that out of a total of 111 respondents whose legal rights to contest elections were directly affected by these disincentives, 40 belonged to the Scheduled Caste ('SC'), 5 belonged to the Scheduled Tribe ('ST'), and 44 belonged to the Other Backward Classes ('OBC') category. Additionally, out of these 111 respondents, 53 had an income of less than INR 20,000 per annum. Moreover, a significant number of those marginalised castes (SCs, STs & OBCs) which had not been affected by such disincentives, revealed to have undertaken pre-natal sex determination tests, and aborted female fetuses. These statistics notably reveal the fact that, unfortunately,

The above cases have been highlighted for several reasons. First, both the cases clearly highlight a disparate impact on protected classes, namely sex and caste in *Rajbala* and religion in *Javed*. However, the cases were not even challenged under Article 15, which directly prohibits discrimination on these grounds. The impugned law in these cases did not create any distinction on the face of it and applied to everyone equally. Since Article 15 has been interpreted to cover cases only where measures are clearly differentiating between two classes,<sup>42</sup> it was not discussed in the cases. Second, the cases highlight how discriminatory laws can easily be justified by the state under Article 14. In *Rajbala*, the court ultimately reasoned that the main objective of the programme was to ensure access to toilets for all rural families to achieve open defecation-free status and upheld the same.<sup>43</sup> Article 14 scrutiny relies on intelligible differentia and rational nexus, and as held by Chandrachud J. in the *State of T.N. v. National South Indian River Interlinking Agriculturist Assn.*, courts show a higher degree of deference to policy matters compared to other civil and political rights.<sup>44</sup>

While there are cases within the Indian jurisprudence that have identified disparate impact of facially neutral laws on the touchstone of Article 14, the same do not mitigate the concerns against courts taking a deferential approach vis-à-vis Article 14. For instance, a single judge bench of the Andhra Pradesh High Court, in *T. Sareetha v. T. Venkata Subbaiah*, declared §9 of the Hindu Marriage Act, which dealt with restitution of conjugal rights, as unconstitutional, null and void.<sup>45</sup> Choudary J. laid focus on the differences between men and women and held that when a decree of restitution is enforced, the life pattern of the wife irretrievably changes because she has to beget and bear the child, which keeps women from using the right of restitution while men can enforce the same without no practical change to their lives, making the legal right more accessible to men, which disparately impacts women.<sup>46</sup> However, at the same time, Choudary J. also stated that

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people with access to resources can still have access to illegal pre-natal sex determination techniques and informal abortions, in order to comply with the mandate of the two-child policy and preclude themselves from getting debarred or disqualified from contesting elections. This puts a blanket burden on the other part of the masses who do not have access to such resources and succumb to the prevalent mindset of preferring a male child (without having the means to access illegal abortion or sex selection procedures) while having to forego their right to contest elections. In other words, the citizens who are already vulnerable to caste-based discrimination have to eventually bear the brunt of the disincentives of the policy”, see Tanishk Goyal, *Reconciling Reproductive Autonomy with the Public Interest Obligation of the State: A Look at the Prospect of a Two-Child Policy in India*, NATIONAL LAW SCHOOL OF INDIA REVIEW, June 23, 2020, available at <https://nlsir.com/reconciling-reproductive-autonomy-with-the-public-interest-obligation-of-the-state-a-look-at-the-prospect-of-a-two-child-policy-in-india/> (Last visited on July 28, 2022).

<sup>42</sup> Khaitan, *supra* note 27.

<sup>43</sup> *Supra*, *Rajbala*, at ¶54.

<sup>44</sup> *State of T.N. v. National South Indian River Interlinking Agriculturist Assn.*, 2021 SCC OnLine SC 1114 (case dealt with an economic policy).

<sup>45</sup> *T. Sareetha v. T. Venkata Subbaiah*, 1983 SCC OnLine AP 90.

<sup>46</sup> By treating the wife and the husband who are inherently unequal as equals, §9 of the Act offends the rule of equal protection of laws. For that reason, the formal equality that §9 of the Act ensures cannot be accepted as constitutional, *see Id.*

“it is clear that whether or not Section 9 of the Hindu Marriage Act suffers from the vice of over-classification...it promotes no legitimate public purpose based on any conception of the general good”.<sup>47</sup> Therefore, despite Article 14 being the base for nullification of a facially neutral law, ‘public purpose’ always remains a viable counter to the safeguard.

In both *Rajbala* and *Javed*, the court simply accepted the justification of the State, i.e., the policies aim for greater public good and, as a consequence, are reasonable and constitutionally valid. It is important to remember that while judicial non-intervention in policy matters is essential to compartmentalise the different functions of the three branches of the government, it is the judiciary’s responsibility to ensure that the fundamental rights of the people are not encroached upon in the process of achieving the policy objectives formulated by the state. The deferential scrutiny under Article 14, therefore, enables measures to escape from constitutional scrutiny on the basis of public policies.<sup>48</sup> However, no such mitigating factor of reasonability can be imported into Article 15, which is an absolute prohibition.<sup>49</sup> This has been explained forthwith.

The text of Article 15 states, ‘the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them’.<sup>50</sup> There is a direct prohibition on discriminating on the grounds mentioned in Article 15. The case of *Anuj Garg v. Hotel Association of India* has stated that a heightened standard of judicial review is expected in cases where a disadvantage is caused to a vulnerable group based on a characteristic relating to personal autonomy.<sup>51</sup> In *Navtej*, the court held that Article 15 embodied personal autonomy.<sup>52</sup> Therefore, Article 15 negates the scope for deference if a provision discriminates on the mentioned grounds.<sup>53</sup> The exceptions to Article 15(1), which arguably are not exceptions but the furtherance of equality, are sub-clauses 3, 4 and 5 of

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<sup>47</sup> *Id.*, at ¶39.

<sup>48</sup> *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217; *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310; *see also Ram Krishna Dalmia v. S.R. Tendolkar*, AIR 1959 SC 538; §33-A (1) of the Bombay Police Act which prohibited dance performances in eating houses, permit rooms, or beer bars, and §33-B which allowed such dances in establishments with restricted entry or three starred or above hotels was under challenge. The two Judge Bench stated that if a general consensus is shared by the ‘majority population’ on the harm posed by an activity, then the court may base its decisions on classification based on the degrees of harm, *see State of Maharashtra v. Indian Hotel and Restaurants Assn.*, (2013) 8 SCC 519.

<sup>49</sup> *Khaitan*, *supra* note 27.

<sup>50</sup> The Constitution of India, 1950, Art. 15.

<sup>51</sup> *Anuj Garg v. Hotel Asson. of India*, (2008) 3 SCC 1.

<sup>52</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (Malhotra J. and Dipak Mishra C.J., writing for himself and A.M. Khanwilkar J., referred to Art. 15 grounds as illustrative of personal autonomy).

<sup>53</sup> Nivedhitha K., *The Citizenship (Amendment) Bill is Unconstitutional*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, December 5, 2019, available at <https://indcon-lawphil.wordpress.com/2019/12/05/guest-post-the-citizenship-amendment-bill-is-unconstitutional/> (Last visited on June 5, 2022).



Article 15, which enable the state to make special laws in furtherance of protecting women, scheduled castes and scheduled tribes.<sup>54</sup>

Thus, violations under Article 15(1) are subject to stricter scrutiny, which pays less deference to executive discretion as compared to Article 14.<sup>55</sup> They should fall under one of the three enumerated exceptions. Another reason which warrants a stricter standard under Article 15 is that it is a special provision for equality which furthers the broad version of equality enshrined under Article 14.<sup>56</sup> The existence of a separate provision for select protected classes shows that the constitutional mandate requires special protection for such classes of people. Hence, the ways in which the state can justify measures under Article 14 by proving a 'rational nexus' with the objective sought to be achieved is not permissible under Article 15.<sup>57</sup> This way, a balance is maintained between the text of the Constitution as well as its purpose to eliminate individual, systemic and institutional discrimination against disadvantaged groups.

It is hereby submitted that Article 15 is the appropriate provision to deal with neutral measures having disparate impacts on protected classes because of the stricter scrutiny of laws under this provision. The way in which Article 15 can be interpreted to include facially neutral measures has been elaborated in the succeeding sections of this paper.

### III. SIGNIFICANCE OF A TEXTUAL INTERPRETATION

Scholars have divided opinions as to the rules of interpretation which guide the 'reading of the Constitution'.<sup>58</sup> On the one hand, it is an originalist interpretation, wherein scholars rely on the plain meaning of the text and interpret it in the context in which it has been written.<sup>59</sup> On the other hand, it is a purposive interpretation wherein the interpreter goes beyond the plain meaning of the text and interprets it to fulfil the purpose for which the provision had been drafted.<sup>60</sup> Along with such opposing interpretations, we also have scholars like Lawrence

<sup>54</sup> State of Madras v. Champakam Dorairajan, 1951 SCC 351; M.R. Balaji v. State of Mysore, AIR 1963 SC 649; Rajesh Kumar Gupta v. State of U.P., (2005) 5 SCC 172; Chokhi v. State, 1953 SCC OnLine Raj 52; Ajay Kumar Singh v. State of Bihar, (1994) 4 SCC 401; Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217.

<sup>55</sup> Khaitan, *supra* note 27.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Arvind P. Datar & Rahul Unnikrishnan, *Interpretation of Constitutions: A Doctrinal Study*, Vol. 29(2), NATIONAL LAW SCHOOL OF INDIA REVIEW, 136 (2017).

<sup>59</sup> HON. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 23-38 (Princeton University Press, 1997).

<sup>60</sup> RONALD DWORKIN, LAW'S EMPIRE, 387-389 (Cambridge, Harvard University Press, 1986); Thomas C. Grey, *The Constitution as Scripture*, Vol. 37(1), STANFORD LAW REVIEW, 1, 19 (November, 1984); Henry P. Monaghan, *Our Perfect Constitution*, Vol. 56, N. Y. U. L. Rev., 353 (1981).

H. Tribe, who have propounded a middle ground between the two. This Part shall analyse the different ways in which Article 15 can be interpreted to either include or exclude the concept of indirect discrimination. It subjects this provision to all the three above mentioned theories of interpretation and finally proposes a borderline-textual approach which is in line with the Indian Constitutional jurisprudence to argue that this provision prohibits that form of indirect discrimination, which is not solely based on the disproportionate effects of a measure.

### A. DWORKINIAN INTERPRETATION - A PURPOSIVE APPROACH

Ronald Dworkin, stressing the abstract nature of a constitution, propounded that the object and purpose of this document assume paramount importance in its interpretation.<sup>61</sup> According to him, the construction emanating from the object and purpose may even override the text, such that the words used in the Constitution almost lose their significance. Dworkin thus advocated a virtuous reading of the Constitution such that any interpretation in accordance with the interpreter's 'larger vision of what a good constitution should be like' should be favoured.<sup>62</sup>

It is often witnessed that Indian courts rely on Dworkin's principles of Constitutional interpretation to import various shades of meaning to the text.<sup>63</sup> For instance, in the SR Bommai case, Ramaswamy J. first discussed the originalist argument, wherein one should "*stick close to the text*", but later rejected it by citing Dworkin's normative theory of interpretation.<sup>64</sup> Holding that some parts of constitutional interpretation stand independent of what its framers intended to achieve, the case concluded that the President's power to impose an emergency under Article 356 is not absolute and that it is subject to judicial review.<sup>65</sup> Application of the above principles to Article 15 can lead to a very inclusive version of anti-discrimination.<sup>66</sup> A Dworkinian interpretation would read this provision in a way to broadly prohibit discrimination in all its forms.<sup>67</sup> The initial phrasing, 'the State shall not discriminate', would be interpreted to include both intentional as well as unintentional discrimination. Since the text is silent as to the

<sup>61</sup> RONALD DWORKIN, *LAW'S EMPIRE* 387-389 (Cambridge, Harvard University Press, 1986).

<sup>62</sup> *Id.*; Thomas C. Grey, *The Constitution as Scripture*, Vol. 37(1), *STANFORD LAW REVIEW*, 1, 19 (1984); Henry P. Monaghan, *Our Perfect Constitution*, Vol. 56, *N. Y. U. L. REV.*, 353 (1981).

<sup>63</sup> Navtej Johar v. Union of India, (2018) 10 SCC 1; S.R. Bommai v. Union of India, (1994) 3 SCC 1; K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1; State of U.P. v. Jeet S. Bisht, (2007) 6 SCC 586.

<sup>64</sup> S.R. Bommai v. Union of India, (1994) 3 SCC 1.

<sup>65</sup> *Id.*

<sup>66</sup> The Constitution of India, 1950, Art. 15 (State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them).

<sup>67</sup> Abhishek Sudhir, *Discovering Dworkin in the Supreme Court of India-A Comparative Excursus*, Vol. 7(1) *NUJS L. REV.*, 13 (2014); M. Nagaraj v. Union of India, (2006) 8 SCC 212.

motive or intent of the alleged discriminator, a purposive approach would adopt the ‘best answer to the moral question’<sup>68</sup> that considers discrimination as a moral<sup>69</sup> wrong.<sup>70</sup> Morality being subjective, the same provision might be interpreted by different judges in a different manner, thus leading to uncertainty in interpretation. Further, a Dworkinian principle would prohibit looking at the intention of the State behind enacting any law and would solely focus on the effect or the result of a measure.<sup>71</sup> It would probably read the text as ‘The State shall not discriminate, either intentionally or unintentionally [...]’ in order to achieve the final goal of having a society that prohibits discrimination in all its forms. Further, the ambiguity in the words “or any of them” has immense potential to be read very widely and prohibit discrimination against any distinctive section of the population, even if it does not fall within the enumerated grounds or grounds analogous to them.<sup>72</sup>

We, therefore, submit that a Dworkinian interpretation, which does not showcase even a slight form of fidelity to the text, may be unfavourable as it tends to give unfettered discretion to the judges to interpret the Constitution. While a purposive interpretation is not incorrect, it must not be such that it cannot be traced back to the text of the law *at all*. Judges, in that situation, become law-makers instead of fulfilling their judicial function of interpreting and applying the law. This heightened degree of judicial discretion has the possibility of opening a floodgate of cases on the basis of Article 15. This is because India is a country with a heterogeneous population where any socio-economic measure will definitely impact people differently because of the huge gap in living standards that exists between them in the society. However, a purely effects-based discrimination test is not permitted by the text of the Indian Constitution.<sup>73</sup> The relevance of intention or motive has been analysed in detail in Part V of the paper.

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<sup>68</sup> This would be in line with Dworkin’s theory of interpretation wherein he believes that the task of interpretation is open-ended. Since every text can be interpreted in various ways, Courts should adopt that interpretation which serves the interests of the people in the best manner possible (best answer to a question). Thus, even if such an interpretation cannot be literally drawn from the text and was not contemplated by the framers of the law, it is still valid as per Dworkin, by virtue of the fact that it is morally upright.

<sup>69</sup> David Wasserman, *Discrimination, Concept of* in ENCYCLOPEDIA OF APPLIED ETHICS, 805-814 (Academic Press, 1998).

<sup>70</sup> DWORKIN, *supra* note 61.

<sup>71</sup> *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217; Sudhir, *supra* note 68.

<sup>72</sup> As per the *Navtej Johar* judgment, discrimination against grounds analogous to the enumerated grounds is also prohibited. Here too, the Dworkinian method of interpretation can be noted wherein the Supreme Court broadened the ambit of prohibited grounds of discrimination by holding that grounds which are analogous, that is, are based on the principles of ‘immutable status’ and ‘fundamental choice’ (like the enumerated grounds in the provision), are also protected under Article 15, *see Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>73</sup> *Washington v. E. Davis*, 1976 SCC OnLine US SC 105 (1976) (Supreme Court of the United States); Shreya Atrey, *Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15*, Vol. 16, THE EQUAL RIGHTS REVIEW, 160 (2008).

## B. SCALIAN INTERPRETATION- AN ORIGINALIST APPROACH

The theory of originalism believes in the supremacy of the text of the Constitution.<sup>74</sup> According to Justice Scalia, one of the most forceful modern advocates of originalism, the Constitution means what the drafters meant it to ‘objectively’ mean at the time when it was adopted. He propounded that that meaning should not be considered to have changed over time, and judges should attempt to construct that meaning when interpreting the Constitution. Justice Scalia focuses on the plain meaning of the text and interprets it in the context in which those words appear at the time of framing the document.<sup>75</sup> This approach to interpretation is known as textual originalism.<sup>76</sup> Originalists are opposed to exceeding the limits of the Constitution by engaging in a purposive interpretation, which in their opinion, does not amount to ‘interpreting’ the text, but ‘revising’ it.<sup>77</sup> Such an interpretation has immense potential to allow the personal biases of the interpreters to play a role, thus changing the originally intended meaning of the Constitution. Hence, while an originalist approach is not an entirely textual approach as it permits exploring what the Constitution meant for the public at the time when it was adopted, it believes in the text having a single meaning which cannot be broadened or changed without a formal amendment.

According to the above means of interpretation, Article 15 would have a very restrictive scope. This is because an insight into the Constituent Assembly Debates shows that the framers of the Constitution stated that the objective of Article 15 was to prohibit ‘evil elements’ who might make attempts to discriminate against people based on their religion, race, caste, etc.<sup>78</sup> This shows that the framers intended to include only measures which amounted to explicit discrimination as a prohibited form of conduct under Article 15(1). The debates revolve around eliminating different forms of discriminatory treatments meted out against people wherein access was denied to several places on the grounds of a person’s religion or underprivileged caste.<sup>79</sup> An originalist, like Justice Scalia, would hence interpret the words discrimination ‘on grounds of’ to only include discrimination explicitly based on one of the categories mentioned in Article 15 of the Constitution.

Being highly theoretical, an originalist approach fails to address the substantive equality that our Constitution seeks to achieve. While the concept of substantive equality is quite elusive, scholars have elucidated various core

<sup>74</sup> HON. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, 23-38 (Princeton University Press, 1997).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*, at 23.

<sup>78</sup> CONSTITUENT ASSEMBLY DEBATES, November 29, 1948 speech by SYED A ROUF 52, available at [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/7/1948-11-29](https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-29) (Last visited on November 30, 2020).

<sup>79</sup> *Id.*

meanings of the same, namely, equality of results, opportunity and dignity.<sup>80</sup> It requires a constant evaluation of existing laws and policies to ensure that they adapt to the progressing times such that the factual realities reflect the actual realisation of equality goals.<sup>81</sup> It is very easy for discriminatory measures to be framed in neutral words and impose unequal obligations or deprive people of benefits unequally. A purely originalist interpretation would not hold such measures to be discriminatory since the facially neutral measure would not be explicitly discriminating between two groups. Thus, the disparate impact of such measures would have no redressal under the Constitution and would continue to persist. If the objective of this provision was to remove the vice of inequality in society,<sup>82</sup> any restrictive interpretation of a provision which derails this provision from its objective should be avoided. Thus, a middle ground needs to be reached between the overly inclusive purposive approach and the restrictive originalist approach. This can be reached by using Lawrence Tribe's balanced approach, which has been discussed forthwith.

### *C. TRIBE'S INTERPRETATION - A BALANCED APPROACH*

As elucidated in Parts A and B above, the Dworkinian and Scalian methods of interpretation cannot be adopted to interpret Article 15 to include indirect discrimination because of their unique shortcomings.<sup>83</sup> However, neither of the methods should be discarded entirely. Instead, they together lead us to reach a middle ground, wherein a balance can be struck between Scalia's restrictive originalist interpretation and Dworkin's highly broad purposive interpretation.

Lawrence Tribe, co-founder of the American Constitution Society and a Professor of Constitutional Law at the Harvard Law School, in his Treatise 'On reading the Constitution', describes the significance of the Constitution as a 'standalone' document that runs an entire nation.<sup>84</sup> He advocated that the purpose and object of its provisions definitely guide its interpretation, but only as long as they can be traced from the text itself.<sup>85</sup> Any interpretation that is entirely detached from the text should not be favoured as the interpreter's work is only to 'read' the Constitution and not 'write' one.<sup>86</sup> After all, the 'people' have accepted the document as it was written and not what it was aimed to achieve. While such an analysis clearly critiques the Dworkinian interpretation, the flaw in Justice Scalia's

<sup>80</sup> Sandra Fredman, *Substantive equality revisited*, Vol.14(3), INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 712 (2016).

<sup>81</sup> Chaitanya Singh, *Why do we have Reservations? An analysis of NM Thomas Judgment*, CONSTITUTIONAL RENAISSANCE, February 28, 2021, available at <http://constitutionalrenaissance.in/why-do-we-have-reservations-an-analysis-of-nm-thomas-judgment/> (Last visited on November 30, 2020).

<sup>82</sup> Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1.

<sup>83</sup> See Part A and Part B.

<sup>84</sup> LAWRENCE H. TRIBE, ON READING THE CONSTITUTION (Harvard University Press, 2007).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

originalism is also pointed out by him. He states, very correctly, that even the framers of the Constitution intended some variability to play a role in its interpretation.<sup>87</sup> Any rigid or non-dynamic reading was not envisaged by the drafters themselves.<sup>88</sup> Tribe thus acknowledges that a textual interpretation might reveal multiple meanings of a word and that it is the interpreter's duty to choose one out of those meanings without going beyond them.<sup>89</sup> In this task of choosing any one meaning, we may be guided by an evolutive approach which allows ample scope for normative subjectivity to suit the dynamic needs of the society.<sup>90</sup> He gives an example of the prohibition on racial segregation. He says that initially, racial segregation was valid under the American Constitution, and it was after a long time that it was rendered invalid.<sup>91</sup> This evolutive interpretation does not mean that the meaning of the Constitution 'has changed'.<sup>92</sup> Instead, it only highlights that the interpreters took a long time to concede to the fact that the Constitution indeed prohibited racial segregation.<sup>93</sup>

Putting things into perspective, Article 15 prohibits the State from discriminating "on grounds" of the enumerated categories.<sup>94</sup> Applying the above interpretative tool to Article 15, it can be concluded that this provision cannot be interpreted in a Dworkinian manner to include indirect discrimination. Different jurisdictions such as the United States, the United Kingdom and South Africa have drafted different provisions dealing with direct and indirect or effects-based discrimination.<sup>95</sup> As is evident from the provisions, the wording of indirect discrimination clauses does not include words such as 'on grounds of' as is present in Article 15 of the Constitution.

The words 'on grounds of' or 'on the basis of' allude to a requirement that the differential treatment must be based on one of the enumerated categories. However, this does not mean that the Scalia position should be adopted and only measures which *explicitly* differentiate based on one of the enumerated categories can be brought under the ambit of Article 15, in which case indirect discrimination would not be covered within the provision. Such an interpretation would leave facially neutral measures having a disparate impact unscathed. For instance, if a policy treats people with a capacity for pregnancy differently from others who lack

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> The Constitution of India, 1950, Art. 15.

<sup>95</sup> The Constitution of South Africa, 1996, §9; The Equality Act, 2010, §§13, §19 (United Kingdom), (§ 13: A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others), (§19: A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's); Title VII of the Civil Rights Act, 1964 (United States).

such capacity, it would be discriminatory largely towards women, even though the basis of distinction in treatment is not gender. While such measures would also impact trans-men and non-binary genders (who are also capable of pregnancy), since the majority of its impacted group would be a protected class (women), it could be held indirectly discriminatory.

However, a Scalian approach, in its attempt to adhere to the text ('on grounds of'), might not consider it to be discriminatory since the policy would not discriminate against 'women' explicitly. A detailed analysis of the nature of facially neutral measures which can be brought under the ambit of Article 15 using Tribe's approach, shall be done in Part V after analysing the jurisprudence of certain countries. It is sufficient to mention here that the words, 'on grounds only of', must be interpreted to require discrimination to be intentional in nature. However, what constitutes an intent to discriminate can evolve with times and greater social and legal awareness of the structural and systemic inequities in our society. For example, a measure can be explicitly based on a particular category, thus showing the direct and clear intention of the discriminator to treat two classes of people differently. On the other hand, an evolved interpretation of this intention can be seen in the case of a facially neutral measure, wherein latent stereotypes and prejudices in the mind of the alleged discriminator can also fulfil the requirement of intent.<sup>96</sup> Such an interpretation of 'on grounds only of' permits these sub-conscious forms of intention to fulfil the requirement of intent under Article 15. This justifies the inclusion of indirect discrimination within the ambit of this provision. Thus, Tribe's approach is appropriate as it provides a balanced conclusion, wherein the text is adhered to, while also achieving the progressive and morally upright conclusion of prohibiting indirect discrimination.

Further, the text itself enumerates the classes which are protected under the provision and so indirect discrimination would only be unconstitutional if it affects people on any of the mentioned grounds. The recent judgement of *Navtej Johar v. Union of India*, in light of a progressive Dworkinian interpretation, had interpreted 'or any of them' to include analogous grounds to be protected as well.<sup>97</sup> This means that other grounds, which affect the personal autonomy of an entirely distinct category of the population, would also be included in Article 15.<sup>98</sup> These grounds are either based on the immutable status of certain characteristics that people are born with or a fundamental choice made by them which requires

<sup>96</sup> *James v. Eastleigh Borough Council*, (1990) 2 AC 751 (House of Lords); *Bull v. Hall*, 2013 UKSC 73 (Supreme Court of the United Kingdom); *R(E) v. Governing Body of JFS*, 2009 UKSC 15 (Supreme Court of the United Kingdom); *Black & Morgan v. Wilkinson*, 2013 EWCA Civ 820 (Court of Appeal (Civil Division)); *Equal Employment Opportunity Commission v. Joe's Stone Crab, Inc.*, 220 F3d 1263 (11th Cir. 2000) (United States Court of Appeals for the Eleventh Circuit); *City Council of Pretoria v. Walker*, (1998) 3 BCLR 257 (CC) (South Africa).

<sup>97</sup> *Navtej Johar v. Union of India*, (2018) 10 SCC 1, ¶198 (per Indu Malhotra J.).

<sup>98</sup> *Id.*; *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1; *Khaitan, supra* note 7; *Naz Foundation v. State (NCT of Delhi)*, 2009 SCC OnLine Del 1762.

constitutional protection.<sup>99</sup> Such an interpretation is also in tandem with Tribe's advocacy regarding tools of interpretation, wherein, as long as the evolutionary interpretation can be traced to the black-letter law, it is permissible. Thus, we proceed with the above laid down dictum of the Apex Court and state that facially neutral measures against any of the enumerated grounds and grounds analogous to them are unconstitutional under Article 15.

#### IV. JURISPRUDENCE OF FACIALLY NEUTRAL MEASURES AS DIRECT DISCRIMINATION IN DIFFERENT JURISDICTIONS

The focus of this Part shall be to analyse the jurisprudence of indirect discrimination in other countries. The objective is to establish that clauses which are similar to the text of Article 15 can be interpreted to also prohibit facially neutral measures having disparate impact. In other words, provisions which render direct discrimination unlawful can also be interpreted to prohibit the disparate impact of facially neutral measures.<sup>100</sup> This can be done by establishing intent to discriminate behind measures which are facially neutral. In fact, scholars have termed any form of 'intentional discrimination' as direct discrimination, irrespective of the text or nature of the policy being considered.<sup>101</sup> This means that even if the measure is neutral, the fact that there is an intent to have a disproportionate impact by means of that measure makes it a case of direct discrimination. This shall be further analysed through an analysis of the concept in the United Kingdom (A), United States of America (B) and South Africa (C). These states have established statutory protection against discriminatory measures, with distinct provisions or safeguards against direct and indirect discrimination, in comparison to India's constitutional protection against discrimination, which does not expressly mention 'indirect' discrimination. Moreover, they have a historical background of racial discrimination<sup>102</sup> and their equality jurisprudence has addressed instances of facially neutral measures with disparate impact.<sup>103</sup> Even the Indian judiciary has

<sup>99</sup> Khaitan, *supra* note 27; John Gardner, *On the Ground of Her Sex (uality)*, Vol. 18(1), OXFORD JOURNAL OF LEGAL STUDIES 167, 170 (1998); R v. Mckitka, 1987 BCJ No 3210 (British Columbia Provincial Court); Corbiere v. Canada (Minister of Indian and Northern Affairs), 1999 SCC OnLine Can SC 27 (Supreme Court of Canada); *id.*

<sup>100</sup> Andrew Altman, *Discrimination*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, April 20, 2020, available at <https://plato.stanford.edu/entries/discrimination/> (Last visited on July 28, 2022).

<sup>101</sup> *Id.*; Patrick Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, Vol. 62, HASTINGS LAW JOURNAL, 67-102 (2010).

<sup>102</sup> The United States has witnessed rampant black slavery and racial discrimination; People from Caribbean, Africa and Asia were discriminated against in the United Kingdom; South Africa has witnessed apartheid and historical discrimination against blacks.

<sup>103</sup> See James v. Eastleigh Borough Council, (1990) 2 AC 751 (House of Lords); Washington v. E. Davis, 1976 SCC OnLine US SC 105 (Supreme Court of the United States); City Council of Pretoria v. J. Walker, 1998 SCC OnLine ZACC 1 (Constitutional Court of South Africa).



referred to the equality jurisprudence of these states when analysing the principle of indirect discrimination.<sup>104</sup>

### A. UNITED KINGDOM

The Equality Act, 2010 passed by the United Kingdom, the Parliament addresses the concepts of direct and indirect discrimination separately, that is, it has different provisions prohibiting discriminatory treatment and disparate impact.<sup>105</sup> Special laws like the Equality Act which address indirect discrimination distinctly were enacted quite recently. However, courts had to decide on the validity of neutral measures having disparate impacts even before these laws were enacted or amended. Thus, we analyse such decisions that have dealt with neutral measures. Surprisingly, there is a pattern of UK case laws dealing with facially neutral measures under ‘direct discrimination’ clauses. In this part, we have analysed two such case laws, their factual matrix, and the court’s verdict, to establish the interpretation of facially neutral laws.

§1(1)(a) of the Sex Discrimination Act, 1975, described discrimination as less favourable treatment of women as compared to men while §1(1)(b) described it as an equal treatment which was still detrimental towards women.<sup>106</sup> Thus, while the former addressed direct discrimination, the latter prohibited the disparate impacts of neutral measures. In spite of having a separate clause addressing indirect discrimination, the House of Lords, in 1990, decided a case of discrimination involving a neutral measure under §1(1)(b).<sup>107</sup> The case involved a leisure centre which permitted people who had reached the state pension age to enter the swimming pool freely while the rest had to pay. The policy at play only referred to the ‘pensionable age’, however, the age of pension for a man was 65 years while that for a woman was 60 years as provided under a distinct state law. Consequently, when a 61-year-old man and woman went to the Centre, the woman entered the pool free of charge while the man had to pay for the same services.<sup>108</sup> The court held that this was a case under sub-section (a) and not sub-section (b).<sup>109</sup>

The question of indirect discrimination under §1(1)(b) arises only where the “requirement or condition” applied by the alleged discriminator to a person of one sex is applied by him equally to a person of the other sex. Pensionable age cannot be regarded as a requirement or condition which is applied equally

<sup>104</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>105</sup> The Equality Act, 2010, §§13, §19 (United Kingdom).

<sup>106</sup> The Sex Discrimination Act, 1975, §§1(1)(a), §1(1)(b) (United Kingdom).

<sup>107</sup> James v. Eastleigh Borough Council, (1990) 2 AC 751, ¶2 (House of Lords).

<sup>108</sup> *Id.*, at ¶1.

<sup>109</sup> *Id.*, at ¶6; the reasoning can be better understood by focusing on the text, which I hereby state: In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which sub-section (2) applies, a person discriminates against a woman if 1(1)(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, *see also* the Sex Discrimination Act, 1975, §1(1)(a) (United Kingdom).

to persons of either sex precisely because it is itself discriminatory between the sexes. Whether or not the proportion of men of pensionable age resorting to the council's swimming pool was smaller than the proportion of women of pensionable age was quite irrelevant. Women were being treated more favourably than men because they attained the age to qualify for free admission five years earlier than men.

The court held that since the statutory pensionable age was in itself discriminatory, any treatment which was founded on the discriminatory basis would be direct discrimination 'on the ground of' sex.<sup>110</sup> The causal link established by the court was (a) the basis of the disparate impact on men and women was due to the age of pension (neutrally worded), (b) the age of pension was discriminatory between men and women and (c) since there was an exact correspondence between the basis of discrimination (pension) and a protected class (sex), the measure was directly discriminatory.<sup>111</sup> The court, in effect, held that since the disparate treatment was so obvious, it could be presumed that there was knowledge of such a disparate treatment on the basis of sex.

Therefore, the differential treatment could be presumed to be on the basis of sex as there was no other contributing reason for the disparity. Since there was an inextricable link between that basis or ground and a protected class (sex), it was held to be prohibited. Such prohibition was under a clause which, similar to Article 15, attacked measures which differentially 'treated' protected classes, in spite of the measure being facially neutral.

The above is just one of the many examples wherein courts have decided cases which dealt with measures that did not create distinctions between protected classes on the basis of direct discrimination.<sup>112</sup> Another such case is *Swiggs v. Nagarajan (A.P.)* wherein the House of Lords heard Nagarajan's appeal against the Court of Appeal's judgement.<sup>113</sup> The case was based on the interpretation of the Race Relations Act, 1976. §1(1)(a) of this Act established safeguards against less favourable treatment on the grounds of race.<sup>114</sup> Therefore, it deals with direct discrimination whereas §1(1)(b) addresses indirect discrimination.<sup>115</sup> Mr.

<sup>110</sup> James v. Eastleigh Borough Council, (1990) 2 AC 751, ¶6 (House of Lords).

<sup>111</sup> *Id.*

<sup>112</sup> Bull v. Hall, 2013 UKSC 73 (Supreme Court of the United Kingdom); R(E) v. Governing Body of JFS, 2009 UKSC 15 (Supreme Court of the United Kingdom); Black & Morgan v. Wilkinson, 2013 EWCA Civ 820 (Court of Appeal (Civil Division)); Richard Gillingham, *Direct Discrimination: Causation*, EMPLOYMENT WRITES, February 3, 2019, available at <https://employmentwrites.com/2019/02/03/direct-discrimination-causation/> (Last visited on November 30, 2020).

<sup>113</sup> *Swiggs v. Nagarajan (A.P.)*, (2000) 1 AC 501 (House of Lords) ('Swiggs').

<sup>114</sup> The Race Relations Act, 1976, §1(1)(a) (United Kingdom) ((1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if-(a) on racial grounds he treats that other less favourably than he treats or would treat other persons."

<sup>115</sup> The Race Relations Act, 1976, §1(1)(b) (United Kingdom) ((b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but-(i) which is such that the proportion of persons of the same racial group as that

Nagarajan had applied to the respondent for the post of travel information assistant. However, he was rejected at the interview citing his poor communication skills, with one of the panel lists scoring him a one out of ten for ‘articulacy’ while noting that he was “anti-management”.<sup>116</sup> The point of confusion was that the appellant had been performing the job for several months without any complaints prior to the rejection. The appellant had in the past, filed complaints against the alleged racist actions of his employer.<sup>117</sup>

The court held that the decision to discriminate on racial grounds, that is, the ground to discriminate can very rarely bear direct evidence and therefore, it is on the court to deduce or infer it from the surrounding circumstances.<sup>118</sup> In the present case, the only logical conclusion that the court could deduce for his job rejection was that the Panel lists had knowledge of the discriminatory complaints filed by the appellant and it was their apprehension against the appellant’s history of complaining against them that led to his rejection.<sup>119</sup> The court held that the Panelists’ actions were discriminatory since there was an inextricable link between the basis or ground and a protected class.<sup>120</sup> Similar to *James v. Eastleigh Borough*, even in the present case, the words ‘on the ground of’ in §1(1)(a) were interpreted to mean a basis of the decision and not the intention behind it since the disparate impact was very obviously on the basis of race.

Thus, we see how the UK has decided cases of facially neutral measures on the basis of clauses addressing direct discrimination by creatively interpreting the words, ‘on grounds of’. In both the above mentioned case laws, ‘on grounds of’ has been inferred as any basis for the discriminatory decision, even the mere knowledge or probable deduction of discriminatory knowledge could suffice as per this principle. This approach is broader than the need for ‘intention’ to discriminate and encompasses ‘discriminatory knowledge’ as well.

## B. UNITED STATES OF AMERICA

The law in the USA is settled with respect to the disparate impact of facially neutral measures. Courts have held that laws cannot be held to be discriminatory solely based on their disproportionate effects.<sup>121</sup> In other words, some

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other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it and (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it).

<sup>116</sup> *Supra*, Swiggs.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*, (per Lord Nicholls).

<sup>121</sup> George Rutherford, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, Vol.74, *FORDHAM L. REV.*, 2313 (2006); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, Vol. 53, *UCLA L. REV.*, 701 (2006).

form of intention to discriminate must be established.<sup>122</sup> The jurisprudence on indirect discrimination began in 1971, when the academic qualifications required for employment in a company included a high school diploma and a satisfactory intelligence test score.<sup>123</sup> This was challenged as having a disparate impact against African Americans under the 1964 Civil Rights Act.<sup>124</sup> The plaintiffs alleged that only 18 percent of Blacks had high-school diplomas as compared to 34 percent whites, as a result of which 58 percent of the whites passed the employment exam as compared to only 6 percent of Blacks. The Supreme Court analysed this disparate impact and struck down the employment criteria as being discriminatory. This started the inevitable discourse around the effects-based discrimination test.

While the above case is still followed in similar statutory claims,<sup>125</sup> the Supreme Court discussed the disparate impact test under the Constitution for the first time in *Washington v. Davis*.<sup>126</sup> The plaintiffs challenged the hiring procedures of the police department, wherein they tested the verbal skills of the applicants which was failed disproportionately by the blacks compared to the whites. It was the contention of the plaintiffs that the test of vocabulary and reading comprehension skills was a violation of equal protection guaranteed under the Constitution as it had the effect of disproportionately disqualifying the blacks from the police services.<sup>127</sup> The court however rejected this contention to hold that without any proof of intent to discriminate against a particular race, merely illustrating a disproportionate impact would not suffice to hold the practice as being discriminatory.<sup>128</sup> This case is still good law in the American jurisprudence.<sup>129</sup> However, it is important to note that even statutory claims, that is, claims based on anti-discrimination clauses in statutory enactments, are not satisfied by solely proving the disparate impact of a law. Courts have always looked into the totality

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<sup>122</sup> *Washington v. E. Davis*, 1976 SCC OnLine US SC 105 (Supreme Court of the United States).

<sup>123</sup> *Griggs v. Duke Power Co.*, 1971 SCC OnLine US SC 47 (Supreme Court of the United States).

<sup>124</sup> *Id.*

<sup>125</sup> *Texas Deptt. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 2015 SCC OnLine US SC 42; *Smith v. City of Jackson*, 2005 SCC OnLine US SC 23 (Supreme Court of the United States); *Albemarle Paper Co. v. Moody*, 1975 SCC OnLine US SC 138 (Supreme Court of the United States); *Dothard v. Rawlinson*, 1977 SCC OnLine US SC 148, 433 U. S. 321, 332 (1977) (Supreme Court of the United States); *Connecticut v. Teal*, 1982 SCC OnLine US SC 128, 457 U. S. 440, 453-54 (1982) (Supreme Court of the United States).

<sup>126</sup> *Rutherglen*, *supra* note 122; *Selmi*, *supra* note 122.

<sup>127</sup> *Id.*

<sup>128</sup> *Washington v. E. Davis*, 1976 SCC OnLine US SC 105 (Supreme Court of the United States); Thomas B. Henson, *Proving Discriminatory Intent from a Facially Neutral Decision with a Disproportionate Impact*, Vol. 36(1), WASH. & LEE L. REV., 109 (1979).

<sup>129</sup> *Village of Arlington Heights v. Metropolitan Housing Development Corpn.*, 1977 SCC OnLine US SC 2 (Supreme Court of the United States); *Personnel Administrator v. Feeney*, 1979 SCC OnLine US SC 108, 442 U. S. 256, 278-279 (Supreme Court of the United States); *RICCI v. DeStefano*, 2009 SCC OnLine US SC 82 (Supreme Court of the United States); *Girardeau A. Spann, Disparate Impact*, Vol.98, GEO. L. J., 1133, 1158 (2010); *General Building Contractors Assn. v. Pennsylvania*, 1982 SCC OnLine US SC 160 (Supreme Court of the United States).

of the circumstances which includes any form of conduct which might prove an ‘intention to discriminate’.<sup>130</sup>

Analysing a case of adverse employment action under the Civil Rights Act, the Apex Court made a wide interpretation of the words ‘because of’ in the following provision:

“It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, colour, religion, sex, or national origin; or”<sup>131</sup>

In the above case, namely, *Price Waterhouse v. Hopkins*, a female employee sued her former employer for discriminating against the female sex when they denied her partnership several times even after she had the requisite qualifications and experience. Here, there was no concrete policy which prescribed different criteria for men and women but the court held the employer liable based on his prejudice against the female sex combined with the disparate impact on the employees. It was held that the words ‘because of’ look at all the reasons that played a role in the making of a decision.<sup>132</sup> These reasons included not only direct intention or purpose to discriminate, but also factors such as stereotypes against a particular sex that play a subconscious role in the making of a decision.<sup>133</sup> Since the employee could adduce evidence to show the employer’s prejudice against the female sex such as previous comments and remarks made by him, this was enough to impute intention to discriminate on the employer and the action of denying the plaintiff partnership was struck down as being discriminatory.<sup>134</sup> Another case that highlights a scrutiny of external circumstances to deduce intention to discriminate is *EEOC v. Joe’s Stone Crab*. This case dealt with a restaurant owner’s conduct of recruiting only male staff, wherein initially he had recruited 108 male

<sup>130</sup> General Building Contractors Assn. v. Pennsylvania, 1982 SCC OnLine US SC 160; Rutherglen, *supra* note 122; City of Mobile Alabama v. L. Bolden, 1980 SCC OnLine US SC 77, 446 U. S. 55, 90 (Supreme Court of the United States); Thornburg v. Gingles, 1986 SCC OnLine US SC 170 (Supreme Court of the United States); Serapion v. Martinez, 119 F 3d 982, 990 (1st Cir. 1997) (United States Court of Appeals for the First Circuit); David A Rappaport, *A Coming of Age?: Why Revised EEOC Guidelines May Force Firms to Protect Against Partner Age Discrimination Suits*, Vol.59(3), WASH. & LEE L. REV., 1013 (2002).

<sup>131</sup> Title VII of the Civil Rights Act, 1964, §703(a)(1) (United States).

<sup>132</sup> *Price Waterhouse v. B. Hopkins*, 1989 SCC OnLine US SC 82, at 490, ¶(c) (Supreme Court of the United States).

<sup>133</sup> *Price Waterhouse v. B. Hopkins*, 1989 SCC OnLine US SC 82 (Supreme Court of the United States).

<sup>134</sup> *Id.*

employees and zero female ones.<sup>135</sup> Even after a discriminatory charge against such practices, he hired 88 food servers, of which only 19 were female.<sup>136</sup> This was challenged as being discriminatory. While the owner did not have any explicit policy of excluding women, the court concluded that there was an ‘implied’ policy to that effect.<sup>137</sup> It relied on prejudicial statements made by the male staff of the restaurant which showed that the employment criteria was based on the ‘gut feelings’ of the employers who believed that there was ‘nothing odd’ in not having even a single female staff.<sup>138</sup> Thus, courts have laid down subtle and unconscious versions of intention which need to be proven to establish discrimination.<sup>139</sup> Factors such as the stereotypes and prejudices in the minds of men, if inferred from other actions and conduct, is enough to bring a case under direct discrimination.<sup>140</sup> However, this proof is not only sufficient but also necessary. Without any proof that race or sex entered into the decision-making process, even in the most subtle manner, a neutral measure would not become discriminatory solely due to its disparate impact.<sup>141</sup> If the discrimination is against one of the protected classes, that is, sex, it would not be a case of indirect discrimination solely because the measure concerned did not create distinctions on the face of it.

An important factor to note here is that the requirement of intent, even if low, is not irrelevant.<sup>142</sup> Judges and scholars have often noted that without any malice, that is, intent to discriminate in the mind of the alleged discriminator, liability cannot be imposed.<sup>143</sup> This is because of two reasons. First, the philosophy behind prohibiting discrimination was to remove the ‘moral wrong’ of discriminating between individuals.<sup>144</sup> Second and more importantly, a solely effects-based test, with no requirement of proving intention, could potentially render a large number of laws irrelevant, even those which are made for the benefit of the

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<sup>135</sup> Equal Employment Opportunities Council v. Joe’s Stone Crab, 220 F 3d 1263 (11th Cir. 2000) (United States Court of Appeal for the Eleventh District).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Regents of the University of California v. Bakke, 1978 SCC OnLine US SC 154, 438 U. S. 265, 307-310 (Supreme Court of the United States); Wygant v. Jackson Board of Education, 1986 SCC OnLine US SC 99, 476 U. S. 267, 274-279 (Supreme Court of the United States); International Brotherhood of Teamsters v. United States, 1977 SCC OnLine US SC 88, 431 U. S. 324, 375-376 (Supreme Court of the United States); Hazelwood School District v. United States, 1977 SCC OnLine US SC 147 (Supreme Court of the United States).

<sup>140</sup> Gross v. FBL Financial Services, Inc., 2009 SCC OnLine US SC 72, 557 U. S. 167, 176 (Supreme Court of the United States); Price Waterhouse v. B. Hopkins, 1989 SCC OnLine US SC 82 (Supreme Court of the United States).

<sup>141</sup> Village of Arlington Heights v. Metropolitan Housing Development Corp., 1977 SCC OnLine US SC 2 (Supreme Court of the United States).

<sup>142</sup> Texas Deptt. of Housing & Community Affairs v. Inclusive Communities Project, Inc., 2015 SCC OnLine US SC 42 (per Thomas, J., dissenting) (Supreme Court of the United States).

<sup>143</sup> Selmi, *supra* note 122.

<sup>144</sup> BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT (Oxford University Press, 2015).

disadvantaged groups.<sup>145</sup> An example could be that of tax laws, which are usually progressive in nature but have a different impact on different classes of people. Low-income groups might challenge income tax laws solely based on how they reduce their income leaving them with a meagre amount of disposable income as compared to the rich classes. A solely-effects based test might render such laws unconstitutional, shaking the foundation of our legal system.

The United States Supreme Court in the case of *Rogers v. Lodge* held that a facially neutral policy was discriminatory, basis the inference of intention from external factors.<sup>146</sup> The case dealt with a policy requiring all the commissioners in a county to be voted upon by the entire population of the county instead of dividing the county into districts.<sup>147</sup> The measure was alleged to be discriminatory against the African-Americans in practice. This was because the African-Americans constituted a majority of the population (however only 38 percent of them were registered to vote) in a county which had never had a single Commissioner.<sup>148</sup> They alleged that this political suppression violated the Equal Protection Clause of the American Constitution.<sup>149</sup> The court affirmed the holding in *Washington v. Davis* that the mere disparate impact of a policy without evidence of discriminatory intent cannot constitute discrimination under the Equal Protection Clause.<sup>150</sup> However, the court held that the intent must be inferred from a totality of circumstances as direct evidence would be difficult to obtain.<sup>151</sup> In this case, the court held that the factors such as the clear evidence of disparate impact on black voters, the past history of political suppression of the blacks and evidence that the elected Commissioners neglected legitimate concerns of the black community, were adequate to infer a discriminatory intent especially since there could be no rational reason behind not districting such a large county.<sup>152</sup> Thus, the court upheld the claim of discrimination based on a facially neutral policy. The judgment relied upon factors such as past evidence of prejudice and evidence of clear disparate impact to prove direct discrimination especially when the court could not derive a public policy benefit behind the policy in question.<sup>153</sup>

Thus, the US Courts have interpreted clauses which prohibit direct discrimination to be prohibitive of disparate impacts of neutral measures provided some form of intention can be established or traced on the part of the discriminator. This is somewhat similar, as shall be explained in Part V, to the Indian position

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<sup>145</sup> *Id.*; *Washington v. E. Davis*, 1976 SCC OnLine US SC 105 (Supreme Court of the United States); Spann, *supra* note 130.

<sup>146</sup> *Rogers v. Lodge*, 1982 SCC OnLine US SC 168 (Supreme Court of the United States).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

wherein the Supreme Court has also required some form of intention to be proven in cases of direct discrimination.<sup>154</sup>

### C. SOUTH AFRICA

The South African Constitution has a provision against both direct and indirect discrimination.<sup>155</sup> §9 of the Constitution prevents discrimination and promotes equality before the law and equal protection of the law.<sup>156</sup> There are fifteen grounds stipulated in §9(3) that one should not be discriminated against on the basis of, directly or indirectly, such as race, gender, ethnic or social origin, etc.<sup>157</sup> §9(3) of the South African Constitution is similar to Article 15 of the Indian Constitution with the difference existing in the number of stipulated grounds and the inclusion of the word ‘indirect’ in the South African Constitution which allows the provision to be applied to cases of indirect discrimination as well. While the legislation does provide for both direct and indirect discrimination, even in South Africa, for determining whether or not a law is facially neutral, courts have looked at whether the contested law discriminates or differentiates against any stipulated grounds under §9(3) of the South African Constitution.<sup>158</sup>

The seminal case on indirect discrimination in South Africa and the §9(3) analysis is the case of *City Council of Pretoria v. J. Walker*. In this case, the respondent Walker was a resident of Old Pretoria, which was an overwhelmingly white district.<sup>159</sup> Old Pretoria was further amalgamated with two black townships to form an administrative district. Although they were part of a single district, the appellant charged higher rates from the respondent and lower rates from the residents of the two black townships for electricity and water. Furthermore, the appellant’s officials also adopted a policy of taking action against selective defaulters.<sup>160</sup> They took legal action for the recovery of arrears from residents of old Pretoria but did not take similar action against the defaulting residents of the townships, where a culture of non-payment for services existed.<sup>161</sup> According to the council, the differentiating policy was for a governmental purpose and was based on geographical factors, i.e., the townships were poverty-stricken with broken or damaged electri-

<sup>154</sup> Colonel Nitisha. v. Union of India, (2021) 15 SC 125.

<sup>155</sup> Ockert Dupper, *Proving Indirect Discrimination in Employment: A South African View*, Vol. 21, INDUS. L. J. (JUTA) 747 (2000).

<sup>156</sup> The Constitution of South Africa, 1996, §9.

<sup>157</sup> 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, *see id.*, §9(3).

<sup>158</sup> *City Council of Pretoria v. J. Walker*, 1998 SCC OnLine ZACC 1 (Constitutional Court of South Africa).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*, at 53; Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, Vol. 117(5), HAR. L. REV., 1378, 1408 (2004).

<sup>161</sup> *City Council of Pretoria v. J. Walker*, 1998 SCC OnLine ZACC 1, ¶¶92-93 (per D. P. Langa J.), ¶126 (per Sachs J.) (Constitutional Court of South Africa).



cal installations and glaringly different from old Pretoria which had valuable property, delivery of services and infrastructure.<sup>162</sup> It argued that the amalgamation had not fixed the disparities and so, the policy could stand its ground.<sup>163</sup>

This case is crucial to prove that irrespective of the inclusion of the word ‘indirectly’ in the South African Constitution, no distinct meaning has been ascribed to it.<sup>164</sup> The court has stated that “it is not necessary in the present case to formulate a precise definition of indirect discrimination”.<sup>165</sup> The court’s analysis did not differ because the discrimination was indirect, rather, the court undertook the same analysis as it did for direct discrimination, by stating that it could see no difference between direct and indirect discrimination.<sup>166</sup> The method followed by the court in determining whether or not the policy discriminated against a particular group dealt with whether the discrimination was based on a stipulated ground under §8(2) of the Interim Constitution, equivalent to §9(3) of the present South African Constitution.<sup>167</sup> In order to determine whether the measure was based on race, which was one of the enumerated grounds, the court examined whether the council had knowledge of the discriminatory impact of the measure.<sup>168</sup> The majority opinion concluded that although the distinction was made on residents of differing geographical areas, it was indirectly on the grounds of race. The difference was made between an ‘overwhelmingly white’ and ‘overwhelmingly black’ area.<sup>169</sup> As per the court, the apartheid laws had led to the inextricable linking of race and geography and therefore, application of the geographical standard, seemingly neutral, could lead to discrimination on the ground of race.<sup>170</sup> Additionally, the majority opined that as per the circumstances, the council officials knew of the policy’s discriminatory effects and despite that, they did not attempt to provide a genuine rationale for the same.<sup>171</sup> Therefore, the knowledge of the council that the facially neutral law would have a disproportionate impact on a particular race was considered to be enough to deem the measure to discriminate on the basis of race. Therefore, City Council of Pretoria is a prime example of how facially neutral laws are dealt with in South Africa. Much like the other jurisdictions, intention is looked into, but it goes a step further and unlike the United States, under the South African threshold even knowledge of disparate impact (let alone intention to cause disparate impact) can invalidate a law vis-à-vis anti-discrimination approach taken by the courts.

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<sup>162</sup> City Council of Pretoria v. J. Walker, 1998 SCC OnLine ZACC 1 (Constitutional Court of South Africa).

<sup>163</sup> *Id.*, at ¶19.

<sup>164</sup> *Id.*, at ¶32.

<sup>165</sup> *Id.*, at ¶32.

<sup>166</sup> *Id.*, at ¶35.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*, at ¶32.

<sup>169</sup> *Id.*, at ¶32.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*, at ¶34.

Therefore, we conclude from the inter-jurisdictional analysis that despite the absence of an express provision for indirect discrimination, disparate impact of facially neutral laws can still be safeguarded against and can be brought under the purview of direct discrimination by expansively interpreting terms like ‘on the basis of’, ‘on the ground of’ or ‘because of’ to include intention to discriminate. Such interpretation requires the policymaker or framer of the facially neutral measure to harbour a degree of intention to discriminate against a prescribed ground vis-à-vis the legal provision for direct discrimination, i.e., Article 15 of the Indian Constitution. The threshold of intention required to constitute discrimination varies among jurisdictions, as well as on a case-to-case basis.<sup>172</sup>

## V. ANALYSIS OF THE DISPARATE IMPACT TEST UNDER ARTICLE 15

This Part attempts to establish how Article 15 can be interpreted to bring certain facially neutral measures under its ambit. As has been established in Part IV above, there is no requirement to interpret ‘on grounds of’ to only cover measures which are explicitly discriminatory. Facially neutral measures can also be brought under its ambit.<sup>173</sup> Recently, the case of *Colonel Nitisha v. Union of India* has been lauded in terms of attempting to include indirect discrimination within the framework of Article 15.<sup>174</sup> This case dealt with the validity of requirements for the grant of a Permanent Commission to women Short Service Commission officers. These requirements were such that they subjected women aged 40-50 years old to such tests and medical assessments which are designed for men aged 25-30 years. The court held that while the rule itself was not arbitrary, its impact was such that it effected women disproportionately as compared to men. Relying on a decision by the Canadian Supreme Court, namely, *Fraser v. Canada*,<sup>175</sup> the Apex Court laid down a two-pronged test to establish a case of indirect discrimination. First, the assailant must prove that the measure imposes a differential treatment based on a protected ground.<sup>176</sup> Second, such treatment must have the “*effect of reinforcing, perpetuating or exacerbating disadvantage*”.<sup>177</sup> Applying the same, it held that the pattern of evaluation adopted by the Army disproportionately impacted women.<sup>178</sup> This impact could be attributed to the structural discrimination against women, because of which even a neutral measure placed them at a disadvantage compared to their male counterparts.<sup>179</sup>

The above ruling gives an indication that there is no requirement of intention in cases of facially neutral measures having a disparate impact. However,

<sup>172</sup> According to sliding scale theory has been proposed in Part VI.

<sup>173</sup> See Part IV.

<sup>174</sup> *Nitisha v. Union of India*, (2021) 15 SC 125.

<sup>175</sup> *Fraser v. Attorney General of Canada*, 2020 SCC OnLine Can SC 6 (Supreme Court of Canada).

<sup>176</sup> *Colonel Nitisha v. Union of India*, (2021) 15 SC 125, ¶22.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

such a blanket rule might not hold good in all situations, as will be explained below. Hence, this Part attempts to recommend a sliding scale theory, wherein different degrees of intention are required to be proven in different situations depending upon factors such as the intensity of disparate impact, the purpose behind the measure having a disparate impact and the reasonability of the measure.

The first question is whether the phrase ‘on grounds of’ requires an explicit intention to discriminate against a protected class in order to constitute discrimination.<sup>180</sup> Taking note of the inter-jurisdictional analysis above, it can be concluded that intention can be inferred from the surrounding circumstances, which include either the knowledge of the impact of the measure<sup>181</sup> or a protected class being the basis of the decision-making.<sup>182</sup> There is no requirement to show an overt intent. It is submitted that this approach should be adopted. One of the primary goals of our Constitution is to promote substantive equality.<sup>183</sup> Therefore, the approach which most readily fulfils the goal should be chosen from the various alternatives which are possible by interpreting the text. Demonstrating animus or intent as a subjective phenomenon will be extremely difficult. An objective test looking at the decision-making process fulfils the goals of substantive equality in a more effective manner. This can simply be done by making an expansive interpretation of ‘intention’ to include factors such as mere knowledge of consequences.<sup>184</sup> Thus, it is submitted that a measure is ‘on grounds of’ the enumerated or analogous categories if it can be objectively demonstrated that the basis of the decision is one of those categories.

Therefore, as shown above, if the basis of the decision can be imputed to be on one of the enumerated grounds, direct discrimination is proved. Since the lawmakers can have various reasons for implementing neutrally worded laws with a disparate impact, a sliding scale mechanism is proposed here. The objective is to determine whether there exists any form of the intention behind such

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<sup>180</sup> As per the Navtej Johar judgment, discrimination against grounds analogous to the enumerated grounds is also prohibited. For the purpose of the discussion here, ‘grounds’ refers to both explicitly specified grounds as well as analogous grounds.

<sup>181</sup> *Regents of the University of California v. Bakke*, 1978 SCC OnLine US SC 154, 438 U. S. 265, 307-310 (Supreme Court of the United States); *Wygant v. Jackson Board of Education*, 1986 SCC OnLine US SC 99, 476 U. S. 267, 274-279 (Supreme Court of the United States); *International Brotherhood of Teamsters v. United States*, 1977 SCC OnLine US SC 88, 431 U. S. 324, 375-376 (Supreme Court of the United States); *Hazelwood School District v. United States*, 1977 SCC OnLine US SC 147 (Supreme Court of the United States).

<sup>182</sup> *City Council of Pretoria v. J. Walker*, 1998 SCC OnLine ZACC 1 (Constitutional Court of South Africa); *Australian Iron & Steel Pty. Ltd v. Banovic*, (1989) 168 CLR 165 (High Court of Australia); *James v. Eastleigh Borough Council*, (1990) 2 AC 751 (House of Lords).

<sup>183</sup> *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310.

<sup>184</sup> *Regents of the University of California v. Bakke*, 1978 SCC OnLine US SC 154, 438 U. S. 265, 307-310 (Supreme Court of the United States); *Wygant v. Jackson Board of Education*, 1986 SCC OnLine US SC 99, 476 U. S. 267, 274-279 (Supreme Court of the United States); *International Brotherhood of Teamsters v. United States*, 1977 SCC OnLine US SC 88, 431 US 324, 375-376 (1977) (Supreme Court of the United States); *Hazelwood School District v. United States*, 1977 SCC OnLine US SC 147, (Supreme Court of the United States).

neutral measures to discriminate on the basis of enumerated grounds. For the purpose of understanding, we hereby sketch three points on this proposed scale which will give us an idea of the varying degrees of intention that would be required in different cases.

One extreme end of the scale could be that of a neutral measure which has a clearly discriminatory impact on the basis of a protected ground. Here, the requirement for proof of intention is low. Essentially, if the basis is so clear that the impugned law will impact only one protected class, then it can be presumed that a reasonable person would have considered that factor as a part of their decision-making process. Therefore, the disparate treatment is on grounds of the particular category amounting to direct discrimination. The case of *Bull v. Hall*, decided by the Supreme Court of the United Kingdom, illustrates this point.<sup>185</sup>

In this case, Mr. and Mrs. Bull refused to accept the booking of a double room by a homosexual couple in their hotel as they claimed such rooms to be reserved for ‘married couples’ only.<sup>186</sup> Mr. and Mrs. Bull contested that their policy was against all unmarried couples and not just homosexual couples, therefore, not leading to direct discrimination on the grounds of sexual orientation, i.e., a protected ground.<sup>187</sup> The Court of Appeal took a different stance and held that while the policy seemed to discriminate against both heterosexual and homosexual unmarried couples on its face, it does not impose an express bar on the entry of heterosexual couples since they can get married. However, homosexual couples, even if they are civil partners,<sup>188</sup> can never seek entry into the hotel rooms.<sup>189</sup> The court held that if the reason or basis on which the discriminatory measure was proposed was inextricably linked with the sexual orientation of a person, i.e., a protected ground, the measure was to be deemed discriminatory.<sup>190</sup> Therefore, in a situation where the basis is so closely linked to a protected ground, the threshold of intent required on the part of the policymakers for the measure to be deemed unconstitutional is very low.<sup>191</sup> The only requirement of proof in such a situation is to establish that the measure affected people discriminatingly and that the reason behind such an effect was a direct result of the measure, inextricably linked with the way in which the measure was applied. This has also been illustrated in *James v. Eastleigh Borough Council*, as discussed previously.<sup>192</sup>

<sup>185</sup> *Bull v. Hall*, 2013 UKSC 73 (Supreme Court of the United Kingdom).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*; the Equality Act (Sexual Orientation) Regulations 2007 (Reg. 3: Discrimination on grounds of sexual orientation: (1) For the purposes of these Regulations, a person (“A”) discriminates against another (“B”) if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances).

<sup>188</sup> *Id.*; (the homosexual couple in the present case were civil partners).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*; see also *Black v. Wilkinson*, (2013) 1 WLR 2490 (Court of Appeal (Civil Division)).

<sup>192</sup> *James v. Eastleigh Borough Council*, (1990) 2 AC 751 (House of Lords).

On the other extreme end of the scale, in cases where the neutrally worded measures have an overarching public purpose, the burden (on the person assailing the measure) to prove the hostile intention of the state is the highest. For instance, in the case of *S v. Jordan*, the government had introduced a gender-neutral law that aimed at prohibiting prostitution in South Africa.<sup>193</sup> Prostitution was considered to be a potent social evil at the time. This case was challenged to be discriminatory since a majority of the prostitutes were women, and therefore, it indirectly discriminated on the basis of sex.<sup>194</sup> However, the court opined that since the purpose of the measure was to achieve an overarching objective for the betterment of the society, the discriminatory intent of the policymakers had to be proven to a very great extent, i.e., to prove with concrete evidence showcasing the hostile intent.<sup>195</sup> Thus, the highest threshold of intent has to be proven for a law with an overarching public purpose for it to be held unconstitutional.

A situation which can be considered to be lying in between the above mentioned extreme cases is one where the facially neutral measure does not have a disparate impact on a particular specific category. In this case, the proof that the basis of the measure was one of the enumerated grounds would require higher evidence. It is submitted that in such a situation, knowledge that a facially neutral measure would have a significant impact on one particular category or categories must be imputed to the alleged discriminator. This is especially if no specific benign purpose can be demonstrated for the measure in question.

For instance, in the case of *City Council of Pretoria v. Walker*, a group of people were being discriminated against on the basis of their place of residence, that is, a geographical factor that was neutral in nature, based on a non-protected ground.<sup>196</sup> However, while the expressed basis of discrimination was geographical in nature, both these areas were racially segregated, and the residential area with a mostly white population was discriminated against.<sup>197</sup> Here, the nexus between the basis of discrimination, i.e., geographical factors and the protected ground of race, was not very clear. Thus, the court relied on the knowledge of the policymakers.<sup>198</sup> It looked into whether the policymakers, who represented the State in this case, knew about the racial segregation of the districts prior to taking the aforementioned measure.<sup>199</sup> Since it is easier to impute knowledge to the State with respect to such information as compared to private parties, the defendant was held liable.

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<sup>193</sup> *Jordan v. State*, 2002 SCC OnLine ZACC 25 (Constitutional Court of South Africa).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *City Council of Pretoria v. Walker*, 1998 SCC OnLine ZACC 1 (Constitutional Court of South Africa).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

The most complicated situations for the courts would be when the impact on a particular category is not obvious from the measure and where the measure serves a public purpose. In these situations, it comes down to a judicial assessment based on the importance of the public purpose sought to be protected and the degree of obviousness of the impact to determine whether discrimination has taken place.

Therefore, a sliding scale theory helps segregate the requisite threshold of intent as per the varying factual scenarios. When the basis of discrimination is clearly linked to a protected class, the threshold of intention required for the measure to be held unconstitutional is low.

However, as a middle ground, in a situation where the basis of discrimination is not very clear, the requisite threshold of intention is higher. This intention can also be imputed from knowledge. Lastly, in a situation where the measure has an overarching public purpose, the requisite threshold of intention to discriminate is very high. Thus, this theory provides some clarity to the position of indirect discrimination under the Indian Constitution. While the ultimate decision would undoubtedly depend upon the facts of each case, the sliding scale helps to add a certain degree of certainty by fleshing out the threshold of intention that would be required to be proven in different cases. Part VI of the paper now analyses the operation of this theory amidst the situation of migrant workers during the lockdown imposed due to the pandemic.

## VI. ASSESSING THE VALIDITY OF THE COUNTRYWIDE LOCKDOWN DURING COVID-19

The Indian government announced a nationwide lockdown to prevent community transmission of COVID-19.<sup>200</sup> However, the lockdown impacted some sections of the society more adversely than the others. While the upper and middle classes were locked inside the security of their homes, the low-income groups, specifically the migrant workers, were not only left unemployed but were also forced to go back to their hometowns due to the shutting down of all factories.<sup>201</sup> Since all forms of transportation had also been suspended, thousands of workers could be seen walking back home, covering hundreds of miles on foot.<sup>202</sup> A report by the World Bank demonstrates that the nationwide lockdown had impacted more than forty-million internal migrants by forcing them to remain stranded in the

<sup>200</sup> GULF NEWS (Dona Cherian), *COVID-19: Indian PM Modi Announces Complete Lock Down Starting March 25*, March 24, 2020, available at <https://gulfnnews.com/world/asia/india/covid-19-indian-pm-modi-announces-complete-lock-down-starting-march-25-1.1585060911566> (Last visited on November 30, 2020).

<sup>201</sup> Ministry of Home Affairs, Order No. 40-3/2020-DM-I(A) (Issued on March 24, 2020).

<sup>202</sup> THE HINDU (Priscilla Jebaraj), *Coronavirus lockdown | 26 lakh migrant workers in halfway houses, says official data*, June 5, 2020, available at <https://www.thehindu.com/news/national/coronavirus-lockdown-26-lakh-migrant-workers-in-halfway-houses-says-official-data/article31751222.ece> (last visited on November 30, 2020).

states they were working in and not travel back to their native areas, even though they are unemployed.<sup>203</sup> While the lockdown's disparate impact on migrants is acknowledged, there are two major factors in the State's favour which can justify the measure.

Firstly, migrant workers do not fall within the grounds mentioned in Article 15 and are not even covered by grounds analogous to them. Article 15 prohibits discrimination on the basis of religion, race, caste, sex and place of birth.<sup>204</sup> Migrant workers as a group do not fall under any of these grounds. Further, Justice Indu Malhotra, in the *Navtej Johar* case, mentioned that 'analogous grounds', i.e., grounds with characteristics that bear a family resemblance to sex, race, religion, and place of birth, can be covered under Article 15(1).<sup>205</sup> She further went on to stipulate that an analogous ground must be an immutable condition and deeply linked to an individual's personal autonomy. Under this pretext, the court opined "sexual orientation" to be an analogous ground as per Article 15(1) in the *Navtej Johar* judgement.<sup>206</sup> However, migrant workers do not necessarily form a distinct group that can establish an analogous ground. This is because the group of migrant workers, if anything, can be termed as an occupational group with an uncertain payment and negligible job security.<sup>207</sup> However, an occupation cannot be considered an immutable characteristic, and neither is it deeply linked to an individual's personal autonomy. This can be distinguished from the sex workers' case in South Africa, wherein the impact of law was disparate in terms of harming women more than men. Sex being a protected class, the law could be challenged. However, in the case of migrant workers, female and male workers were equally affected by the pandemic and the consequent lockdowns.

Secondly, notwithstanding the fact that migrant workers do not form an "analogous ground", the lockdown measures induced by the Government would not violate Article 15. The lockdown was imposed by an order issued by the MHA, which was a neutrally-worded measure applicable to the entire nation. There was no specific class or group of citizens it had expressly discriminated against in its wording.<sup>208</sup> While it is noted that there existed certain exceptions to the lockdown rules, the only sectors of the economy that were allowed to stay functional were

<sup>203</sup> WORLD BANK, *COVID-19 Crisis through a Migration Lens* (2020) <https://openknowledge.worldbank.org/handle/10986/33634> (Last visited on November 30, 2020); THE ECONOMIC TIMES, *Lockdown in India has impacted 40 million internal migrants: World Bank*, April 23, 2020, available at <https://economictimes.indiatimes.com/news/politics-and-nation/lockdown-in-india-has-impacted-40-million-internal-migrants-world-bank/articleshow/75311966.cms?from=mdr> (Last visited on November 30, 2020).

<sup>204</sup> The Constitution of India, 1950, Art. 15.

<sup>205</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶198 (per Indu Malhotra J.).

<sup>206</sup> *Id.*, at ¶198 (per Indu Malhotra J.).

<sup>207</sup> Shruti Ashok & Prof. Neena Thomas, *A study on issues of inter-state migrant labourers in India*, Vol. 5(7), INTERNATIONAL JOURNAL OF SCIENTIFIC & ENGINEERING RESEARCH, 91-94 (2014); Annie Jain, *A Study on The Internal Migrant Labour-Issues and Policies*, Vol. 6(4), INDIAN JOURNAL OF APPLIED RESEARCH, 81-83 (2016).

<sup>208</sup> Ministry of Home Affairs, Order No. 40-3/2020-DM-I(A) (Issued on March 24, 2020).

essential services such as defence, police forces, hospitals, ration shops, banks, etc.<sup>209</sup> The purpose of announcing the lockdown was to ensure social distancing and curtailment of the virus' spread. Needless to say, the lockdown was the need of the hour and a highly beneficial proposition. This move had an overarching public interest to curb community transmission and limit Covid-19 cases as much as possible. India was not the first nation to propose a lockdown. Other Covid-infested countries had implemented a lockdown and saw an alleviating impact on their Covid cases, and therefore, India just followed suit.<sup>210</sup> This can again be compared to the South African sex workers case, wherein the court had rejected the challenge to the impugned law based on the overarching public interest that it meant to serve. Drawing from the South African City Council case, it could be argued that the policymakers were aware of the disparate impact that the lockdown measures would have on the different sectors of the economy. This awareness imputes the intention to discriminate, which, coupled with the disparate effect, could be held to be violative of Article 15. However, this argument does not stand in light of the fact that the state has to be given some degree of executive discretion wherein they can take such policy decisions in situations of emergency in order to serve the larger public purpose. Such an interpretation is also in line with a purposive interpretation of the Constitution, wherein the test of proportionality is used to analyse whether a certain measure is discriminatory under Article 15.<sup>211</sup> As per this test, a balance needs to be struck between the legitimate aim sought to be achieved and the measures taken to reach that goal.<sup>212</sup> If the measure is not exceedingly disproportionate, it is held to be valid. As has been explained above, the lockdown was aimed at preventing the spread of the coronavirus and hence it was imposed in the interests of public health.

While it is true that a causative link can be drawn between the imposition of the lockdown and the subsequent plight of the migrant workers, the text of Article 15 does not permit a measure to be held unconstitutional solely based on its effects. This provision does not directly address indirect discrimination and as previously mentioned, the use of the words 'on grounds of' envisages not just the impact but even the intent of the alleged discriminator.<sup>213</sup> Therefore, a purely effects-based test cannot be applied.

Referring to the sliding scale theory, in such a case of a neutral measure, which is executed with an overarching public purpose and has no other viable

<sup>209</sup> *Id.*, at ¶4.

<sup>210</sup> THE HINDU (AFP), *50 Nations Impose Lockdown Measures*, March 24, 2020, available at <https://www.thehindu.com/news/international/coronavirus-50-nations-impose-lockdown-measures/article31145919.ece> (Last visited on November 30, 2020).

<sup>211</sup> *State of T. N. v. National South Indian River Interlinking Agriculturist Assn.*, (2021) 15 SCC 534; Gautam Bhatia, *Two New Judgments on Proportionality from the Supreme Court*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, December 11, 2021, available at <https://indconlawphil.wordpress.com/tag/proportionality/> (Last visited on November 30, 2020).

<sup>212</sup> *Id.*

<sup>213</sup> *See* Part IV.



alternative, a high degree of discriminatory intent is required for it to be declared unconstitutional.<sup>214</sup> The measure was detrimental to the population in general, and it is not possible to single out migrant labourers being the only category significantly burdened by the measures. The Government's underlying intent behind imposing a lockdown must be assessed. The Government had taken overt measures to help the migrant labourers throughout the period of lockdown. For instance, the State governments were obligated to provide temporary shelters, food, and healthcare benefits to migrant workers stranded in the corresponding states, unable to go back to their hometowns due to lockdown measures.<sup>215</sup> Furthermore, the Government also requested the industries to pay wages to their workers despite the inactivity of the employees due to the lockdown.<sup>216</sup> Even landlords were obligated to not throw out tenants and provide leeway for the payment of a month's rent.<sup>217</sup> These provisions undertaken by the Government to ensure the safety and security of the migrant workers is a clear indication of its intent to not discriminate against the migrant workers.

Further, the measure does not provide an "inextricable link" between the imposition of the lockdown and its specific effect on the migrant workers in order to reduce the burden of intent needed to be proven for the measure to be unconstitutional. This is further clarified as the distinction between the migrant workers, and the rest of the population is clearly not apparent from the face of the lockdown measures. Therefore, overall, the lockdown imposed by the Government cannot be proved to be unconstitutional.

## VII. CONCLUSION

The restrictions imposed by the government due to Covid-19 caused a disparate impact on the labour community, people below the poverty line and other groups that experienced unique difficulties due to the above-said restrictions.<sup>218</sup> These unprecedented circumstances revitalised the dialogue on indirect discrimination under the Indian Constitution. The analysis of indirect discrimination under the Indian Constitution is an important step for safeguarding protected groups from receiving unfair disadvantages under the garb of neutral laws.<sup>219</sup> The aim of this paper has been to achieve a valid constitutional protection against facially neutral laws with a disparate impact, causing indirect discrimination.

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<sup>214</sup> See Part V.

<sup>215</sup> Ministry of Home Affairs, Order No. 40-3/2020-DM-I(A) (Issued on March 24, 2020).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> HUMAN RIGHTS WATCH, *India: Lockdown Puts Poor People at Risk*, March 27, 2020, available at <https://www.hrw.org/news/2020/03/27/india-covid-19-lockdown-puts-poor-risk> (Last visited on November 30, 2020).

<sup>219</sup> *Supra*, Rajbala; Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1; Javed v. State of Haryana, (2003) 8 SCC 369.

The deference available to facially neutral laws under Article 14 of our Constitution is a threat to the right to equality,<sup>220</sup> as was depicted in the case of *Rajbala v. State of Haryana*, wherein in the name of public good, underprivileged and illiterate people were discriminated against.<sup>221</sup> Moving ahead, it is imperative for us to consider indirect discrimination to be just as violative of fundamental rights as direct discrimination in order to prevent more situations like *Rajbala*. While a Constitutional amendment to include safeguards against ‘indirect discrimination’ is a discussion for the future, through this paper, we claim that our Constitutional provisions are potent enough and just need to be effectively interpreted. On that front, this paper has devised a mechanism to include indirect discrimination under the garb of our Equality code via interpretation of Article 15 of the Constitution.<sup>222</sup>

The inter-jurisdictional analysis has helped configure the meaning of ‘on the basis of’ under Article 15 of the Constitution,<sup>223</sup> that is, one must not only analyse the discriminatory effect of the impugned law but also the intention behind its drafting. However, the policy makers’ varying intentions behind measures with disparate impacts become another impediment in the process. The proposed sliding-scale theory aims to establish a certain degree of intention required for a law to be discriminatory under the Constitution.<sup>224</sup> Therefore, while a provision like the Covid-19 restrictions will require a larger proof of the Government’s discriminatory intent to be termed unconstitutional, a law like the criminalisation of consensual intercourse between homosexual adults will require a lower level of proof for the same. In the latter case, the discriminatory effect of the law is inextricably linked with the sexual orientation of the accused.

To conclude, with an effective interpretation of Article 15, facially neutral discrimination can be safeguarded against by the judiciary. This will further propagate the notion of equality and prevent undue disadvantageous laws and policies brought about as a result of negligible safeguards against facially neutral laws with disparate impacts.

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<sup>220</sup> *Id.*

<sup>221</sup> *Supra*, *Rajbala*.

<sup>222</sup> *See* Part IV.

<sup>223</sup> Altman, *supra* note 101.

<sup>224</sup> *See* Part V.