

Indirect Discrimination and Sexual Orientation or Gender Identity

October 2020 Workshop Proceedings



Human Rights Program
Research Working Paper Series

The views expressed in the HRP Research Working Paper Series are those of the author(s) and do not necessarily reflect those of the Harvard Law School or of Harvard University. Research Working Papers have not undergone formal review and approval. Such papers are included in this series to elicit feedback and to encourage debate on important public policy challenges.

Copyright belongs to the author(s). Papers may be downloaded for personal use only.

Table of Contents

October 2020 Workshop Proceedings	1
Introduction	1
Segment One: Comparative Survey	2
Segment Two: Purpose(s) of the Prohibition against Indirect Discrimination	3
Segment Three: Methodology of the Norm: Scope	6
Segment Four: Methodology of the Norm: Justification and Evidence	9
Segment Five: Religion and SOGI	12
Segment Six: International Oversight of National Application	14
Segment Seven: Are Legal Arguments Based on Indirect Discrimination Productive or Counterproductive in This Context?	19
Appendix I: References from the Workshop Discussion	24
Appendix II: Concept Note for the Workshop on Indirect Discrimination and Sexual Orientation or Gender Identity	26
Appendix III: Partial List of Participants in the Workshop	32
Appendix IV: Working Papers	33
Eva Brems	34
Mary Anne Case	42
Laurence R. Helfer & Clare Ryan	47
Alice M. Miller	56
Gerald L. Neuman	63

Indirect Discrimination and Sexual Orientation or Gender Identity

October 2020 Workshop Proceedings

Introduction

The Harvard Law School Human Rights Program (HRP), in collaboration with the Human Rights Institute of Columbia Law School (HRI), convened a workshop on October 16, 2020, for the purpose of exploring in a comparative and cross-disciplinary manner the concept of indirect discrimination (or practices with discriminatory impact) on the basis of sexual orientation or gender identity.¹ This Report presents a summary of the discussion that took place (virtually) at the workshop, including divergent perspectives expressed. It does not attempt to synthesize the arguments offered into a commonly shared set of conclusions—the polyphonic character of the summary is intended as one of its virtues.

Legal norms prohibiting indirect discrimination may be found in a variety of national laws, treaties, and other human rights instruments. The positive legal norms may differ in several dimensions, including the purposes they are understood to serve, the public and/or private actors they regulate, the activities in which indirect discrimination is prohibited, the methods of demonstrating differential effect, and the standards for justifying differential effect. In the context of international human rights norms, other questions relate to the nature of the international oversight of the application of nondiscrimination rules by national authorities.

Discussion at the workshop included examination of these questions, but also questions such as the strategic value of framing arguments in terms of indirect discrimination, and the circumstances in which indirect discrimination arguments may be counterproductive. Participants included academics from Harvard and other universities within and outside the United States, former and current human rights mandate holders, and human rights advocates from organizations within and outside the United States. The conversation proceeded in seven segments with overlapping content, as follows:

1. Comparative Survey
2. Purpose(s) of the Prohibition against Indirect Discrimination
3. Methodology of the Norm: Scope
4. Methodology of the Norm: Justification and Evidence
5. Religion and SOGI
6. International Oversight of National Application
7. Are Legal Arguments Based on Indirect Discrimination Productive or Counterproductive in This Context?

¹ This workshop was part of a series, including a prior workshop on indirect discrimination on the basis of religion or belief held in April 2020. Preliminary papers prepared for that workshop were posted online by the Harvard Human Rights Journal at <https://harvardhrj.com/symposia/>, and several more formal papers resulting from that workshop will be published by the Harvard Human Rights Journal in the spring of 2021.

A list of formal references for some of the sources mentioned in the discussion is provided in Appendix I. The Concept Note for the workshop is reproduced in Appendix II.

A partial list of participants may be found in Appendix III. The organizers of the October 2020 workshop included HRP Co-Director Gerald L. Neuman; Victor Madrigal-Borloz, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, who is also the Eleanor Roosevelt Senior Visiting Researcher at HRP; Sarah H. Cleveland, Faculty Co-Director of HRI; and Catherine de Preux de Baets of the Office of the High Commissioner for Human Rights in Geneva. Dana Walters of HRP and Olivia Daniels of Duke Law School provided essential logistical support.

Finally, Appendix IV consists of papers submitted for the workshop discussion, possibly as revised after the workshop.

Segment One: Comparative Survey

The first segment involved discussion of some comparative legal facts as background to the later segments. The segment's **moderator** (Gerald Neuman) began with US constitutional and statutory law. The equal protection clause of the US constitution does not include a prohibition of actions with discriminatory impact based on sex or sexual orientation or gender identity. Certain statutory provisions that apply to certain fields of activity, such as employment and housing at the federal or state level do. The federal statute Title VII prohibits employment discrimination "because of sex," and applies both a "disparate treatment" concept of intentional discrimination and a "disparate impact" concept of discriminatory effect. In June 2020, a majority of the US Supreme Court held in *Bostock v. Clayton County* that intentional discrimination based on being homosexual or transgender amounts to intentional discrimination because of sex. But the decision was limited to that statute, and its implications for indirect discrimination claims have not been determined. In the United States, a showing of differential impact often requires the use of statistics, and then a finding of differential impact leads to a requirement of justification, under a standard that is not clearly defined and not very demanding. State law on similar issues varies from state to state, and often imitates federal law, but not always.

The moderator then contrasted international human rights law, including the so-called "core" human rights treaties at the global level, and the three regional systems, with independent courts (African, Inter-American, and European). In all of these the prohibition of discrimination on the basis of status is understood as including both "direct" and "indirect" discrimination, sometimes expressed in the treaties and sometimes by interpretation. Under the Covenant on Civil and Political Rights and in the regional systems, a prima facie showing of indirect discrimination on the basis of status requires proportionate justification. At the global level and in the Inter-American and European systems, discrimination on the basis of sexual orientation or gender identity receives particularly close attention; this may be less settled in the African system. However, in the European system the doctrine of the margin of appreciation may make the effective standard of justification vary from context to context. At the global level there is not much case law regarding indirect discrimination on the basis of sexual orientation or gender

identity, and so the translation of the abstractly stated standard into practical consequences is uncertain. That is one of the reasons why this workshop was convened.

One expert pointed out that in the United Kingdom, “direct” discrimination is interpreted differently, so that a mental element such as intention is sufficient but not necessary. Many cases that would be considered indirect discrimination in other jurisdictions would be direct discrimination in the UK, mainly those where the groups benefited and harmed by a policy correlate 100 percent with a dominant and a vulnerable group, even if there is no intention.

Moreover, in Canada, at least in the statutory context the distinction between direct and indirect discrimination has been eliminated and a unified test is employed.

Another expert offered some comments on the Inter-American system. First, according to the Inter-American Court of Human Rights, equality and non-discrimination are not only a basic principle for the exercise of human rights, but have entered into *jus cogens* or peremptory norms of international law. This is very important in relation to LGBT rights in the Inter-American system. Second, two further conventions from 2013, the Inter-American Convention Against All Forms of Discrimination and Intolerance, and the Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance both refer explicitly to the concept of indirect discrimination, and both impose a duty on the state to prevent and to combat indirect discrimination whether in the public or private sphere. Third, the expert highlighted the importance of disaggregated data. The Inter-American Commission has recommended to states to adopt policies to collect and analyze statistical data on violence and discrimination affecting LGBTI persons. Such empirical data can be important for proving indirect discrimination, applying the principle of proportionality and the intersectional approach.

Segment Two: Purpose(s) of the Prohibition against Indirect Discrimination

The segment **moderator** explained that the prohibition of indirect discrimination serves two purposes. First, there is what might be called a “bad faith” situation, in which the indirect discrimination norm acts as a backup to prevent circumvention of the prohibition of direct discrimination. (For example, an effort to ban Islamic face veils may be phrased in neutral terms as a ban on covering the face in public, but with the bad faith intention of targeting the particular group.) Second, there are “good faith” situations, or less clear situations, where the prohibition is really about impact on a certain group and not about bad faith or intentions, and the prohibition might offer a tool to tackle structural or systemic discrimination, as in the *DH v Czech Republic* case (ECHR 2007).

The first category may be illustrated by using discrimination on the basis of marital status as a proxy in order to discriminate on the basis of sexual orientation, especially in systems where sexual orientation discrimination is prohibited but marriage equality has not been enacted. The European Court of Human Rights currently does not require marriage equality, and it has been confronted with this tension in its application of the margin of appreciation. In some cases involving survivors’ benefits the Court has rejected such claims of indirect discrimination. However, in *Taddeucci and McCall v. Italy* (2016) the Court did find indirect discrimination, and

it is striking that this case involved immigration benefits, normally a very sensitive topic for the Court. The moderator expressed optimism that this judgment at the intersection of two sensitive topics foreshadowed the future path of the Court.

With regard to structural discrimination, a blatant example concerns the structuring of society, institutions, and law along binary notions of gender, to the detriment of individuals whose gender identity does not fit the binary model. The moderator encouraged participants to discuss whether the indirect discrimination norm provided a suitable means for addressing this kind of structural discrimination. One objection would be that an individualized and ad hoc approach should not be used to address such a pervasive issue; on the other hand, one has to start somewhere and a step by step approach may be appropriate. Another objection may be the potential unsuitability of proportionality analysis applied in indirect discrimination cases to situations where a small number of individuals seek to change a structure regarded as beneficial for the great majority.

One expert (Victor Madrigal-Borloz) observed that, with regard to the binary model, policymakers often have insufficient knowledge of how norms based on the binary affect people who self-identify and live outside the binary, but also of how they affect others as well. This is not necessarily a question of intent, but a question of visibility.

Secondly, indirect discrimination norms are often described as dealing with apparently “neutral” policies that create a discriminatory impact. This phrasing suggests a tolerance of public policy makers’ not having access to information about the predictable detrimental impact of the policy. There may be a lack of statistical information, or they may be unaware of developments within society. In other cases, as in the well-known Human Rights Committee decision on face covering in France, legislators were given information about the disproportionate effect of the policy. More broadly, this raises the question of when indirect discrimination turns into direct discrimination because the policy maker knows enough that not changing the policy becomes an act of hostility toward the affected group.

Another expert commented on the purposes of the indirect discrimination norm. One purpose is smoking out pretextual discrimination when there is a lack of explicit evidence of intent to target the group; this probably accounts for the landmark US case of *Griggs v Duke Power Company*. The second purpose relates to more hidden structural discrimination. In the world of legal practice it makes sense to put both of these under the same category “indirect discrimination,” but they pose very different conceptual and normative challenges. In normative terms, pretextual discrimination is like direct discrimination, and it is intuitively bad to most people who agree that discrimination is wrong. But when it comes to hidden structural discrimination, that is where the “fair world” hypothesis is firmly entrenched in the minds of dominant groups. One can frame this in terms of whose point of view is relevant here—from the victims’ point of view, what matters is the experience of discrimination, not what the discriminators had in mind, while from the alleged discriminators’ point of view, they weren’t at fault, they did nothing wrong personally, and so why are they being sued? There is a good chapter on this subject, analyzing the attitudes of judges of the European Court of Human Rights who are hostile to claims in the second category because they share the belief that the world is generally fair, with some problematic bad actors (see *Barbara Havelková, “Judicial Skepticism of Discrimination at the*

ECtHR”). Other theoretical arguments about the wrongfulness of indirect discrimination, including the argument that it compounds injustice, challenge the fair world hypothesis. One can also find in the practice literature and in some judgments powerful arguments for shifting the case from the discriminator’s point of view to the victim’s point of view.

A third expert offered comments that dovetail with the points just made. Whether the act of indirect discrimination should be seen as wrongful or evil is a distraction. One of the advantages of indirect discrimination claims is that they can challenge structural discrimination. If we phrase it in terms of “efficiency,” much indirect discrimination is societally inefficient. For example, some of the remedies arising from the Black Lives Matter movement will help not only Black people, but everyone affected by the police, and may result in more women and more people who are gender feminine being hired by police departments. This win-win aspect of correcting structural discrimination should get more attention. This links to the question of “bad faith”—there may be political advantages and disadvantages in calling something bad faith when it is indicative of deeply held views that vast segments of society hold regarding discrimination on grounds of sex or sexual orientation and gender identity (SOGI).

A fourth expert built on the preceding comments, specifically in the context of the European Court of Human Rights. One of the challenges with using a “bad faith” model for indirect discrimination is that unlike in the case of the veil, where a state could not directly discriminate on the basis of religion, the European Court has not been clear on when direct discrimination on grounds of sexual orientation or gender identity is permissible. Particularly so long as protecting traditional families is considered a proper purpose. A benefit of indirect discrimination claims comes from showing by statistical data, not that the purpose is improper, but that the discrimination is not necessary. As was said about efficiency, or cost-benefit analysis, relying on the necessity prong of the indirect discrimination standard may be more fruitful.

A fifth expert observed that the Human Rights Committee does not distinguish clearly between direct and indirect discrimination. In its case on the French full face veil ban, the Committee seemed to express strongly that the facially neutral law was really directed at banning the full face veil for Muslim women, but did not decide explicitly whether it was direct or indirect discrimination. Second as regards treating the prohibition on same sex marriage as direct discrimination, but the consequential effects of that prohibition as indirect discrimination, such as restrictions on adoption and restrictions on recognition of both parents of a child as parents, it could be questioned whether these really are unintended and indirect if they are predictable effects of direct discrimination and thus also direct. There are two cases involving Australia (*C. v Australia* (2017), and *G. v Australia* (2017)) that concern penumbras of Australia’s prior ban on same-sex marriage. One involved a same-sex couple married abroad who wanted a divorce in Australia, and the other a couple legally married as an opposite-sex couple before one spouse transitioned and wanted to change gender on the birth certificate; in both Australia denied the requested action in order to avoid recognizing same-sex marriage. The Committee found these denials of benefit disproportionate and overbroad in violation of the ICCPR, without reaching the core question of the underlying ban on same-sex marriage (which has since been repealed).

A sixth expert said that although clearly one purpose of the indirect discrimination norm was to protect individuals who are harmed, one could ask what the purpose was vis-à-vis government. What kinds of harmful behaviors does it restrain government from engaging in? The singling out of groups that are harmed (as conditioning benefits on marriage can harm same-sex couples if the government does not recognize same-sex marriage), or instead imposing restrictions that also pull in a more diffuse group of people to be harmed (as many other unmarried people are harmed by conditioning benefits on marriage). In situations of the latter kind, the claims are harder to win as a practical matter.

A seventh expert observed that one way to think about the purpose of indirect discrimination norms is that they compel government, or other actors subject to the norms, to actively think about or know about the lives of people who are not like themselves. The sources of culpability justifying the norms may include knowingly ignoring disparate impact, or just having failed to think enough about how a provision or policy will affect people other than themselves. The prohibition on indirect discrimination thus seems to impose a duty to know and a duty to actively care about people who are different, in contrast with the prohibition on direct discrimination, which in some sense is a duty not to care about or actively think about differences. From a historical perspective, governments used to impose duties on businesses to deny service, for example in bars, which essentially required bartenders or business owners to endorse certain stereotypes of what gay people were like, and essentially apply this particular cultural knowledge of other communities to exclude some people from service. Thus one way of thinking about discrimination provisions is that they regulate what a reasonable person in society ought to know about marginalized groups and people who are unlike themselves.

Segment Three: Methodology of the Norm: Scope

The segment **moderator** identified three broad questions that emerged from the papers relevant to the panel. First, the relationship between sexual orientation or gender identity and other grounds (such as marital status, or poverty, in discussions of sex work). Second, the relationship between direct and indirect discrimination, which may turn on complicity or culpability, as discussed in the previous segment. Third, the possibility of extending discrimination law to the domain of the family as actors who should also be regulated.

An expert raised an issue about the relationship between this segment and the previous segment, considering that indirect discrimination is linked to structural and historical discrimination. From a legal point of view, how should we identify a state's legal duties in remedying indirect discrimination—a duty to prevent, adopting due diligence, duty to investigate, to prosecute, punish, and repair. The Inter-American system has adopted the institution of comprehensive reparation. Where there are structural violations of human rights, it is necessary to deal with the structural causes, and there is an ambitious view of a transformative mandate to promote new public policies. This would be an interesting aspect to discuss further.

The **moderator** responded that as an issue of scope, this may relate specifically to the duties of the public sector. In the United Kingdom, the positive duty to do some homework before adopting a policy applies to the public sector.

Another expert offered two “provocations” for the discussion. First, does indirect discrimination have to have a normative valence? It may be useful to think about normatively bad and normatively acceptable forms of indirect discrimination, just as the philosopher Alan Wertheimer has argued that there can be mutually beneficial forms of coercion that are normatively acceptable. Second, does adopting this conception of indirect discrimination require abandoning conceptions of suspect classifications, or the idea that the beneficiaries of protection against indirect discrimination are identifiable groups. Imagine for example that we have an artificial intelligence system that was asked to pick out a parameter to maximize some benefit or minimize some cost, and the end result is that there is a group of people who are disadvantaged as opposed to another group who are advantaged. This hypothetical is designed to remove the possibility of bad faith, because the result was unpredictable ahead of time. This results in indirect discrimination against some group, but does it matter whether the group disadvantaged turns out to be sexual orientation or race, as opposed to people with high body mass index or dog owners? Does the adoption of too robust a conception of indirect discrimination require us to abandon that idea that only certain groups can be victims of discrimination, and instead we are all possible discrimination victims who should have the same claims under antidiscrimination law?

A **third expert** said that the issue of scope raises underlying value questions of when the anti-discrimination right gets so robust that everyone’s freedom is subject to it. This presages the discussion in a later segment on when the arguments become counterproductive. Under CEDAW for example we have the norm against gender stereotyping, and the language of gender stereotype is capacious as a discrimination norm, but it does run squarely into the problem mentioned earlier that if the consequences are too capacious then the claimants are likely to lose. But we are already squarely in that world.

A **fourth expert** said that because there are certain existences, from the victim perspective, that fall outside the assumptions of norms, there are situations in which either policymakers or artificial intelligence would establish a framework that excludes certain groups that have been victims of historical discrimination (the most extreme examples in the present context being trans or nonbinary individuals). And may even be “efficient” to discriminate by means of such criteria as standards for a job or other benefit. So we need the outreach or the social change to ensure that the legal framework can be effective to address certain aspects of discrimination that otherwise the norm doesn’t take into account because of the historical factor.

A **fifth expert** said that the second “provocation” concerning the breadth of protected groups is the animating concern that has limited the reach of disparate impact law in the United States. Once there are constitutional disparate impact claims based on something like class or wealth inequality, the whole system would crumble, and the courts resist that logic. So one strategy for successful disparate impact claims has been to cabin claims of wealth inequality, for example by focusing on equality with respect to fundamental rights, such as the right to marry, or right to

vote, or right to education (at the state level). In the family law context, claims that could be seen doctrinally as disparate impact claims get framed as questions of family law doctrine. The US context seems very different here. With regard to bans on same-sex marriage, they are clearly disparate treatment, but in the US there are plausible arguments that they are disparate treatment on the basis of sex, not on the basis of sexual orientation. The Supreme Court in *Obergefell v. Hodges* (2015) never even paused on that question. This seems to reflect some social meaning understanding of what sexual orientation discrimination is, which may also challenge our rigid categories of disparate treatment versus disparate impact, or direct versus indirect discrimination.

The segment **moderator** commented in response to what was just said and the earlier speaker's second "provocation," that in the United Kingdom this floodgates concern has not arisen, despite a full embrace of indirect discrimination and removing statistical proof as a required element.

A **sixth expert** said that it was difficult to separate the purpose and scope questions. To bring this back to SOGI rights and equality, if we are thinking about what we are trying to achieve in discussing equality norms the distinction between scope and purpose should ideally collapse. An earlier speaker brought up CEDAW and the concept that a rule should not be based in discriminatory stereotypes, and this is also developed in feminist legal theory and in US law, as in *Price Waterhouse v. Hopkins* (1989). In the SOGI context it could be asked whether these rules are permissible when they are grounded in a sexual stereotype or if there is gender bias, implicit or explicit. Rather than trying to focus on the state's intent or trying to find a level of complicity, ask whether the rule is based in gender norms that impact the wide range of knock-on effects. This applies to developing norms in international human rights law, looking at the purpose or effect of a rule to ask whether it constitutes discrimination. The fear of what we might lose in terms of categories seems misplaced if we think about the broader goals of equality law and eliminating these categories. Everyone has a sexual orientation and a gender identity. These categories are not fundamental in such a way that everyone should exist within these categories. Your vulnerability comes from what has happened before in terms of how you have been restricted by norms and practices of those in power. So when we think about scope in the case of SOGI, we need to think about how this should be collapsed with purpose, if our goal is to eliminate norms discriminating on the basis of gender.

The segment **moderator** observed that what was just said resembled the approach of the Canadian Supreme Court, which has abolished the distinction between direct and indirect discrimination. For UK law, there would be a doctrinal cost to doing that, because the rules for justifying direct and indirect discrimination currently differ.

A **seventh expert** agreed that the scope of the norm and the purpose of the norm are inseparable. It may not be best to think of "indirect discrimination" as a species of discrimination, which leads us to assume that the grounds and context in which these norms apply are the ones in which ordinary understandings of discrimination apply. There may be some legal framings that impose this terminology. But apart from those, the way to build a theory of this subject would be to ask what are the harms to social welfare and social justice that depend on the way in which the distribution of effects of a practice is patterned in terms of some social identity. One needs to identify those harms and give an account of who can fairly be held to a legal duty in relation to

those harms, and the answer to that question will depend on context. A generalized prohibition of indirect discrimination is not likely to capture that very well. For example, the reasons for being concerned about employment practices that disproportionately exclude Black Americans from high paying jobs, and why from the point of view of social welfare and social justice in the United States employers can fairly be held to a duty to avoid causing that harm—that story is going to be different from why a policy in some other context has a distribution of effects that correlates in a particular way with sexual orientation or with religion. Packing these situations in with other forms of discrimination invites a unitary understanding of what is wrong, rather than attending to the moral and legal consequences that flow in different situations from a distribution of effects.

The segment **moderator** added a discussion of some developments in India. India does not have a comprehensive anti-discrimination statute. In the context of proposals for reform, Indian SOGI activists' main reaction to the concept of direct and indirect discrimination was that they could see how this would be helpful but reacted very sharply to the idea that this does not apply to the family. The main problem is that much sexuality expression is policed by the family, and yet anti-discrimination law has left the family out of its domain. So we should think about the family as a potential addressee of anti-discrimination laws, similar to the way that the problem of domestic violence has been creatively dealt with in the family domain.

An **eighth expert** (Gerald Neuman) briefly addressed the reason for separate segments on purpose and then scope. The two are certainly related, but it may be helpful to speak first about purpose and then about scope, bearing in mind what had been said about purpose. It was unlikely that the participants would all agree about purpose, and the discussion has continued in the segment on scope, and it would presumably continue in later segments as well.

Regarding the second “provocation” on the breadth of groups included in indirect discrimination analysis, that was potentially the nightmare of “other status” discrimination in Article 26 of the Covenant on Civil and Political Rights and similar provisions – that “other status” is all-inclusive. If the question whether liquor stores have to close while restaurants remain open, or vice versa, becomes the subject of anti-discrimination law, then there is reason to worry about the role that courts and other institutions will play.

Segment Four: Methodology of the Norm: Justification and Evidence

The segment **moderator** began the discussion with three introductory points. First, one can think differently about indirect discrimination in the context of political advocacy and grassroots advocacy than in the context of litigation and adjudication. In the context of litigation and adjudication, recall the question of remedy that was raised earlier. There are important questions about the scope of remedy that a court might order in response to a finding of indirect discrimination, which may depend on whether the victims constitute a narrow, particularly vulnerable group or a more diffuse group.

Second, in relation to adjudication, questions of indirect discrimination implicate judicial legitimacy in profound ways. Indirect discrimination claims and findings can have the potential to take down a whole system. Courts have a significant worry about line-drawing, for example when a small group challenges a widely applicable classification such as the gender binary or favorable treatment of married couples. In the US, courts did not pick up on the sex discrimination aspect of the same-sex marriage cases. They may have feared that it would lead to a slippery slope to no distinctions between men and women socially.

Third, in discussing justification and evidence, it may be useful to consider some of the examples provided in the concept note for the workshop, such as requiring parental permission for a school club, or requiring shoes to be worn in a public building, and so forth. Assuming that the policymaker did not intend to harm any group on the basis of sexual orientation or gender identity, what kinds of evidence would be persuasive in proving an indirect discrimination claim, and what kinds of justifications would be persuasive in disproving it?

One expert observed that in evaluating justifications, it is important to bear in mind the historical perspective and context of the particular society. There is a difference between a legislature that directly targets a group and a legislature that may merely be unaware of how a rule may affect a group. With regard to a region where there is criminalization of same-sex activity and direct discrimination, it is difficult to consider viable justifications for indirect discrimination.

Another expert (Victor Madrigal-Borloz) described how COVID-19 has presented a very specific magnifying glass as a case study in his mandate. A long process of consultation led him to classify his findings into three main threads of concern for LGBT communities. (1) First, some states were actively using the pandemic as an excuse to persecute and achieve objectives that had become politically viable, such as Hungary's denial of legal recognition of gender identity to trans persons, or raiding homeless shelters specifically dedicated to LGBT persons when no other shelters were raided. These are clearly discrimination. (2) Second, there are gender-based quarantines in Latin America, allowing women to leave their homes on some days and men to leave their homes on other days in order to reduce the number of people in the streets. Gender-diverse persons are essentially prohibited from going out because their appearance makes them avoid one set of days and their documents make them avoid the other. As a result, they are subject to humiliation, they are not accessing health care, they are not able to shop for food and so forth. Arguably states should have foreseen this consequence, and would have if they lived up to their duty to care for these people, as suggested earlier. (3) Third, hardships of the pandemic are added to groups that are already disproportionately homeless, and with lower average health indicators, and other injustices.

Thus, marriage equality is only one component of the indirect discrimination problem, along with access to health, access to employment, access to housing, and other social conditions. We are producing evidence of social injustice because social injustice is disparate impact. Then the question becomes who are you comparing to as the comparator group, or the rest of the population. What are the tools for creating a specific discourse about injustice based on sexual orientation and gender identity in societies with high levels of social injustice across the board?

The segment **moderator** observed that different discourses may be better received in different forums. When we are having this discourse in US courts, they make quite incremental decisions, and broader transformative arguments may be more suited to different types of forums that feel empowered to order a transformative remedy.

A **third expert** made two points. First, in *D.H. and Others v. Czech Republic*, the European Court of Human Rights went quite beyond the usual understanding of indirect discrimination, because it did not link it to a particular causal rule, but said that the entire Czech public education system was producing the outcome and it should be fixed. That example is quite important to thinking about evidentiary issues. Second, statutory remedies for indirect discrimination violations are frequently a slap on the wrist, and in the British context courts can't give mandatory orders to employers. That must reframe how we approach questions of evidence and justification.

A **fourth expert** observed that there is an important distinction between what is doctrinally legally possible and what is politically possible. As others have said, there is an aversion on the part of decision-makers to take sex discrimination analysis to where it logically goes. But in the SOGI context, the sex discrimination tools are really good to use, and the opposition to stereotyping in CEDAW doctrine makes it easier to address nonbinary issues relating both to bisexuals (who haven't been discussed yet) and to people who do not identify with the gender binary. For the latter, there are too many different kinds of people who do not fit into the gender binary for them to have a clear common claim for litigation.

A **fifth expert** commented on the previous discussion of COVID-19. The Inter-American Commission on Human Rights held a webinar on the human rights effects of quarantine policies in Panama, Colombia and other countries. The Commission received a good response from Panama, explaining that the outcome was not intended or expected, and that they had changed the policy based on the evidence that it had a harmful impact on trans women.

A **sixth expert** reported not having previously focused on indirect discrimination in SOGI advocacy. It may also be useful to link the discussion of gender-based quarantines with a recent Brazilian Supreme Court decision on the prohibition of blood donations by men who have sex with men. Both examples have their biomedical or biopolitical source in an asserted public health rationale. Public health measures and public health capacities can be one main source of indirect discrimination. The specific indirect discrimination is easier to debate than the structural dimension of the gender binary.

A **seventh expert** continued on this point and said that if there were a public health necessity to adopt such criteria, he would have a different opinion about it, but what is happening is regulation through gender stereotypes that are politically acceptable in the society generally. Political acceptability cannot be treated as a sufficient justification; reducing the number of people in the street by using skin color as a criterion for quarantine might be accepted politically in some societies.

An **eighth expert** observed that in India the government is treating the health pandemic as a law and order issue, and using criminal laws that are seemingly connected to health, as well as laws

on obedience to a public servant, that are being enforced in discriminatory ways, including against trans people.

Segment Five: Religion and SOGI

The segment **moderator** (Victor Madrigal-Borloz) began by stressing the need in his mandate for a fair, politically viable narrative regarding the point of intersection between freedom from discrimination and violence because of sexual orientation and gender identity and freedom of religion and belief. The UN Special Rapporteur on Freedom of Religion and Belief has recently issued a report that relates to this issue. There has been increasing use of religion or belief to deny reproductive health and sexual rights, to criminalize protected conduct and to deny the equal personhood of LGBT+ persons. One problem that people who identify as LGBT or gender diverse experience is exclusion from being considered as spiritual beings. And yet as others have observed, everyone has a sexual orientation and a gender identity. At the same time, some people from faith-based communities that hold strong beliefs about what are acceptable ways of living claim that protection in relation to sexual orientation and gender identity leads to indirect discrimination on grounds of religion, including in the context of prohibitions of “conversion therapy.” Rather than viewing these rights as in conflict, can we identify the common foundation of these rights as a place where they can relate to each other?

A **first expert** observed that the issues of indirect discrimination that arise in some societies with regard to marriage equality and connected issues of legal recognition of relationships differ from in other societies with much broader issues of violence and discrimination, and these differences affect the discussion of the purposes of indirect discrimination as addressing bad faith or as addressing structural or systemic problems. One might ask to what extent there is value in framing some of these structural and systemic problems as issues of indirect discrimination, or whether another human rights lens or set of strategies would be more impactful. If the goal is to convince different communities that they should care about these issues, disparate effects or indirect discrimination may not be the most effective framings.

A **second expert** explained that in the United States, and increasingly in Europe and Latin America, religious liberty has become the dominant language of opposition to LGBT equality, and it is important to elaborate a legal response that progressives who have traditionally supported conscientious objection and religious accommodation for minority religious practitioners can get behind. One promising focus may be the issue of third-party harm resulting from accommodations, not solely as a reason to deny accommodation, but as showing the need to structure religious accommodations in a manner that mitigates the material and dignity harms to those whom antidiscrimination law aims to protect. The refusal to mitigate these harms indicates the same lack of concern for LGBT citizens that was the reason for the invalidation of official discrimination.

Secondly, in the past the claim of religious liberty in the United States, as a free exercise claim under the First Amendment to the US Constitution, was analogous to equal protection arguments

of disparate treatment and disparate impact. That could be seen in Justice Brennan's decisions, such as *Sherbert v Verner* (1963) in favor of religious accommodation, in Justice Scalia's decision in *Employment Division v Smith* (1990), opposing exemptions from neutral and generally applicable laws just as he was a critic of disparate impact, and even in Justice Kennedy's decision in *Church of the Lukumi Babalu Aye v City of Hialeah* (1993), distinguishing *Smith* because practitioners of Santeria were being targeted, with a hostility toward a religion that sounds in equal protection. That linkage has gone away in the United States. And now there's a case about to be argued in the Supreme Court, *Fulton v City of Philadelphia*, in which the city's application of nondiscrimination on the basis of sexual orientation to adoption placement agencies that contract with the city is being challenged by Catholic social services who don't want to place children with same sex couples. Religious free exercise claims are now sounding in special privilege, not equal treatment. The argument is not that there is a problem merely when the government treats religious practitioners differently or with hostility. Instead, religion gets a special privilege because it is named in the Constitution. In addition, claimants are arguing that antidiscrimination law is not neutral and generally applicable, because there is often some set of actors that are not covered by the law, and religious objectors are entitled to the same treatment as any interest excluded from the law's coverage.

A **third expert**, trying to be concise, said that objections based on religion are often objections against sexual orientation. The current workshop on indirect discrimination based on sexual orientation or gender identity and last semester's workshop on indirect discrimination based on religion are quite similar. In the case of a marriage registrar who claims to be a conscientious objector to same-sex marriage, or a hotel owner who excludes people saying it's because they are not married when they don't want same-sex couples in the room, it may not be useful to distinguish between direct and indirect discrimination. It may be better to think in terms of conflicting rights, and it is important to recognize both rights in this conflict. There should be an extremely careful and transparent balance struck, because the expressive function of law is very important here, and the idea of giving recognition to people's deeply held feelings. The expert had a suggested method for structuring the analysis, and concluded that usually the religious freedom claim does not prevail over the equality claim. Nonetheless it was necessary to perform this carefully, and perhaps an incremental approach might be appropriate, especially at the level of a supranational jurisdiction, in order to respect the choice of national legislators to implement this gradually. For example, the Netherlands has temporarily allowed conscientious objections of some marriage registrars, which have later been withdrawn. This is a field where a very old, maybe the oldest human right, that is losing ground (at least in some systems) is confronted with a relatively new human right that still has to conquer hearts and minds.

A **fourth expert** called attention to the distinction that international human rights draws between the *forum internum* and the *forum externum* with respect to freedom of religion. The right to believe as you choose is absolute, but the expression of those beliefs can be limited by the state in very particular circumstances where necessary to protect, among other things, the rights and freedoms of others, and the limitation has to be proportionate. That distinction creates a different playing field that exists in some parts of the world, and it avoids these ideas that there is fundamental incompatibility between the two rights. The limitations can include denial of certain

accommodations or conscience-based claims that fundamentally undermine the rights and freedoms of others, including on the basis of sexual orientation or gender identity, or gender or sex or otherwise. One must be careful not to cede to the actors who are using the right to freedom of religion or belief to make broad claims of complete incompatibility by insisting that their right to religion or belief is being violated because they are not able to exist and express their views. And these arguments create a sense that there are monolithic religious communities around the world who are not existing on a level playing field and that everyone within the group is impacted if one individual's right to conscientiously object is denied. Whereas in fact others argue that their right to express their freedom of religion or belief within their own communities is denied because they are gay or because they are trans or because they are women. But the dominant narrative sees religion as homogeneous.

On the other hand there does exist a conflict with regard to protection for the institutional autonomy of a religious or belief group—the autonomy to determine the rules for appointing religious leaders or for governing “monastic life,” allows religious communities, for example, to appoint only cisgender men as leaders or to promote norms that penalize minority sexual orientation and gender identity, or to prohibit comprehensive sexuality education in certain religious schools. Such autonomy is supposed to fall within the *forum externum* dimension of the right of freedom of religion or belief, which can be restricted when necessary under international law. The move among certain actors at the moment is to describe this institutional autonomy as part of the *forum internum*. Both Article 30 of the Universal Declaration of Human Rights and Article 5 of the ICCPR clarify that no human right may be invoked to destroy another human right.

A **fifth expert** expressed the view that it was important to keep naming the political use of religion to limit rights, and to expose how the impression of a contradiction of rights is used in a manipulative way.

A **sixth expert** agreed and called attention to current developments relating to the General Assembly of the Organization of American States, on the subject of parental control of religious and moral education, and the African Commission on Human and Peoples' Rights, on the subject of traditional values.

Segment Six: International Oversight of National Application

The **segment moderator** focused his opening remarks on the regional human rights systems and international judicial review by those tribunals, without meaning to limit the scope of the following discussion. International oversight plays at least two distinct roles. The first is a normative development role. The discussion in the workshop has revealed how unsettled and contested the law regarding indirect discrimination is, including differences at the domestic level and in the approaches of the international bodies. So one role of international review is to provide additional opportunities to clarify the ways in which indirect discrimination can arise and the types of justificatory arguments that governments can make when faced with those

issues. Looking in the European human rights system, there has been divergence about the standards, but there will be substantial opportunity to engage with these issues in the coming years, as there are literally dozens of cases pending that are likely to raise issues of indirect discrimination based on sexual orientation.

The second role is supervisory, when international bodies review national legislation, administrative policies and domestic court decisions. That raises the question whether an international tribunal should give deference to national actors, and if so how much and under what circumstances. That's a very different role because the question of diverging approaches to indirect discrimination is refracted through an institutional structure where one can make plausible or strong arguments for some degree of deference to another set of decision-making.

How then do these two roles, the normative development and the supervisory role, relate to each other? There is real potential for cross-fertilization and dialogue over what kind of evidence is necessary for proving a prima facie case of indirect discrimination, or over justifications, over what kind of necessity and proportionality showing is required. One thing that supranational systems can do is provide a way to see what some different international jurisdictions are doing and potentially develop a set of ideas or best practices over time that might be picked up by other institutions. This gives a lot of new empirical information about different approaches, and that raises the question of whether, for example, it is appropriate for a national system to choose one kind of indirect discrimination to focus on, given its broad effect in that society, at least for some period of time. That is one way in which the two roles interact. The second concerns jumpstarting social or political change at the national level, in part as a result of the remedies that these tribunals can order. A single supranational case can have knock-on effects through the system that the tribunal reviewed. In Europe, one of the ways in which advocates are very carefully and strategically developing these legal norms is by sequentially bringing cases in a manner that allows the European Court of Human Rights to move slowly over time toward what may or may not be the endpoint of marriage. At a minimum we see an evolution that over time begins to shape what arguments governments make in justifying indirect effects and also in squeezing out the space for direct discrimination.

One can contrast the European model, which like the US model is quite incremental, having lots of litigation for many different subunits within the same system, with the Inter-American system, where the Inter-American Court exercises a different kind of oversight. Thus in 2017 the Inter-American Court essentially leapfrogs over several decades of European jurisprudence and adopts a very bold and expansive advisory opinion in response to a request to Costa Rica. The Court articulates a set of norms that are nominally nonbinding but practically highly influential as a political as well as legal matter. The Court then expects them to be taken up by all the different member states, even if it can't force them to, and these cases are unfolding in Chile and Peru and Ecuador and elsewhere, in a surprisingly positive way. In some ways this interacts with the manner in which the Inter-American system, which has fewer contentious cases, often issues very expansive remedies in the cases it does have, to deal with structural injustices. Not just financial remedies but restorative and reparative in a wide variety of contexts. We have yet to see precisely how that plays out in this context.

Finally, a word or two about these institutions and how potentially fragile they are and subject to contestation and potential backlash. So in Europe, for example, in addition to the rise in violence and discrimination, especially in the former Soviet bloc states, we also see the Court itself become a site of contestation of religious freedom and its intersection with sexuality. In the last few years amicus briefs by the Alliance Defending Freedom and its European analog the European Center for Law and Justice take positions on freedom of religion and the traditional family. They are actively looking to litigate in Strasbourg and in the Americas. We haven't spoken yet about the "gender ideology" movement, which is being used to challenge LGBT rights. On the issue of how and when to construct arguments about indirect discrimination in legal terms and in political terms, there is a very fraught relationship. There was a time when the idea of a UN independent expert holding a mandate on sexual orientation and gender identity seemed far in the future. More recently things have changed and the environment at the international level has become fairly receptive to these nondiscrimination arguments in the SOGI context. That is coming under pressure, and that pressure reverberates to the institutions themselves—and here one could refer to the recently published *Human Rights in a Time of Populism: Challenges and Responses*, ed. Gerald Neuman (2020).

A **first expert** commented on the Inter-American Court's advisory opinion no. 24 just mentioned. The Inter-American Commission's rapporteurship on sexual orientation and gender identity has been publicizing the Inter-American standards. This could be a tool for social change in the region, compensating national deficits and empowering social actors. There have been judicial decisions in Ecuador, Costa Rica, and Brazil based on the advisory opinion, and last week the Inter-American Commission held a hearing on same-sex marriage in Panama, also based on the advisory opinion.

The **segment moderator** observed that the Ecuador Constitutional Court decision was by five votes to four, and there was also quite a near miss in Costa Rica, at the time of the advisory opinion, where the presidential election could have produced a very different situation. So the issue may be on a knife's edge where slight changes could cause some real shifts.

A **second expert** (Victor Madrigal-Borloz) added an observation about the different standards of proof applied by regional and domestic tribunals. The Inter-American system sees nonrepetition as an essential consequence of indirect discrimination, which means that a finding of discriminatory impact in one case is enough to trigger an order to amend or repeal. The European system does not embrace the same remedial approach. And the African system has not yet taken emblematic cases in relation to indirect discrimination. When you move down to national supreme courts the standards are also different in terms of what evidence is required for nonrepetition orders. One might contrast Costa Rica, where the reparation schemes are influenced by the Inter-American system, and the US Supreme Court, which more strictly requires statistical proof of disproportionate impact.

A **third expert** posed a question that could be on the table for any supranational rights body with a broad mandate, such as the UN Human Rights Committee or a regional human rights court or commission. The question is why frame a case as a case of indirect discrimination instead of framing it differently, given that they do have this choice, and can also accumulate frames, and

especially the European Court often chooses. The distinction we made earlier between structural discrimination that is not intentional, and preventing efforts to circumvent the ban on direct discrimination, is relevant here. In cases of intentional discrimination, it is important as a matter of doing justice to an applicant to name the discrimination, but in those other cases, there may be more powerful instruments for undoing structural discrimination, for example the potential of autonomy, self-determination rights. These can be powerful in the area of women's rights or children's rights, but also in the area of gender identity. For example, the first intersex case is coming before the European Court and an amicus brief chooses the route of gender autonomy.

A **fourth expert** observed that the campaigns against gender and “gender ideology” proceeded both in the Americas and in Europe, and they have moved beyond attacking national legislation to attacking the instruments of the regional system. National responses to the international system vary not only across countries but across time. For example, in Brazil there was good acceptance of the Inter-American ruling on gender-based violence in the early 2000s, which led to national legislation, but the response to the CEDAW decision *Alyne da Silva Pimental Teixeira v Brazil* (2011) on maternal mortality was very disappointing.

The **segment moderator** agreed, and mention threats to withdraw from the Istanbul Convention on violence against women, and also disengagement from the regional system in Africa, where several states have withdrawn their consent to individual access to the African Court of Human and Peoples' Rights.

A **fifth expert** addressed the issue of strategy in international law and the expressive role of law, with regard to the position of Muslims. First, their position in non-Muslim-majority countries is often similar to what LGBTQ people face in terms of hatred and prejudice against them, and there should be opportunities for coalition building. The religious intervenors opposing SOGI rights in Western countries have been Christian groups, and Muslim groups have been relatively silent because they have their own problems to deal with as minorities. Second, perhaps more provocatively, in thinking about Muslim majority countries, there might be a need to cleave sexual orientation and gender identity, as in Iran and Pakistan the transgender question has not been a source of difficulty, and this might actually allow for more rapid progress in the international sphere.

A **sixth expert** observed that the Human Rights Committee does not have a margin of appreciation doctrine, and it doesn't engage in this sort of grand deference to national jurisdictions. On the other hand, particularly in the context of LGBT issues, it has a very broad geographic set of state parties with much more diverse practices on these issues than either the European or the Inter-American Court. Probably for that reason, the committee has been particularly hesitant to pronounce on certain LGBT issues in a way that would appear to be universally applicable. Not regarding criminalization, on that they are very clear and categorical, but the closer you get to marriage equality, the more likely they are to try to reach a decision that finds a violation that is particular to the internal domestic legal system the way they did in *Toonen v. Australia* (1994), so that it doesn't mean that every other member state has to follow suit. On the point made about choosing to view cases from a discrimination perspective or other claims, in gender cases before the committee, privacy claims and cruel-inhuman-or-degrading-

treatment (CIDT) claims were more palatable to the committee than discrimination claims, because discrimination claims tended to suggest a more structural condemnation of the practices within the state. Even though the privacy violation and the CIDT violation could be equally applicable to any other similarly situated person, think about *Mellet v. Ireland* (2016) regarding abortion. But there is this sense that the discrimination claim says something more foundational and structural across the board about the violation in the society. Finally, it could be asked whether we are seeing a regression in the composition of the European Court that parallels the illiberal movement in Eastern European member states that could have adverse consequences for the progressive trend on LGBT issues.

The **segment moderator** called attention to a recent empirical paper that studies the ideology spectrum of the recently appointed judges of the European Court and found that the more conservative states are clearly putting forward more conservative candidates and they are getting appointed. Given the composition of the Court and of its chambers, the effects are not yet apparent, and it may still be moderated by the fact that all candidates have human rights experience. But the appointments process is becoming more politicized.

A **seventh expert** observed that advances in human rights norms on SOGI fuel religious attacks that become challenges to the multilateral system, and then disengagement leads to active efforts to dismantle the international system. One could ask whether the multilateralism of human rights systems becomes a site where governments' sovereigntist interests and anti-LGBT/anti-reproductive rights focuses merge.

An **eighth expert** said that the point about the Human Rights Committee shying away from findings of discrimination when other rights bases are available ties back with the previous discussion. The idea of blameworthiness that is associated with discrimination, as a moral failing, not just judgment but judgmentalism, really feels worse in some ways from a supranational body vis-à-vis a nation and its government.

Second, it was said earlier that faith-based arguments for exemption from antidiscrimination laws have moved from arguments of equal treatment to arguments of special protection. It is also a move from "we're not trying to discriminate, we're not bad people" to "we have these special protections and that's all we're seeking here."

Third, in the United States, early claims regarding sexual orientation discrimination failed, but the early successes were in the context of the First Amendment, which protected the right of LGBT groups to exist, and to send a magazine in the mail. When a court receives these claims, it feels less like passing judgment and more like creating space for people to exist, and as we think of next steps in the face of increasingly hostile decision-making bodies, linking more deliberately to the rights of the person and integrity of the person and the ability to express oneself may turn out to be stronger ground.

An **expert** (Victor Madrigal-Borloz) said that participants seemed to agree that the ability of international organs and tribunals supervising the performance of states in relation to indirect discrimination depends on how willing and able they are to explore actively arguments

concerning disproportionate impact, but also simple impact, and to connect them with overarching issues such as social justice.

Segment Seven: Are Legal Arguments Based on Indirect Discrimination Productive or Counterproductive in This Context?

The **segment moderator** observed that the way rights work is always at the intersection of law and social movements. Sexuality and gender are both issues in themselves and stalking horses that allow things to be evaded. The initial part of the conversation was about the doctrines and the shape that doctrines and law can take. Litigation is not only about law and successes, but the litigation itself is also a narrative and becomes a point of connection where movements organize themselves, tell different stories, understand whether they are on the same side or in disparate places. This segment is the explicit moment where we can take on the question of other ways in which both the doctrine and practice of distinguishing indirect from direct discrimination matter, and how it matters for what we understand to be context building, coalition building, and narratives. To get meta on us all, we spoke earlier about the way in which there's a change in context regarding what you are held to know when you act. In trying to devise strategy around exclusion and inclusion about both sexual orientation and gender identity as well as other related ways that people are excluded, what is it we now know that changes how we shall behave in the future.

Some of the things we know from our discussion today include that the notion of systemic discrimination is central to the way in which indirect discrimination reveals practices of exclusion. At the same time, we know that the fear of big transformative change is precisely where the courts will hold back. So we are in this position where we have to think about what ethical incrementalism would be. There are a set of questions for us to discuss there.

I also want us to move to the way in which the narrative of law matters for social movements and for the visibilization of people who weren't in the room when the court case was being argued. As we think about ethical incrementalism and how we form doctrines and think about scope and purpose, there is always this question about, once we've made an argument, who else might be able to use that argument and with what modifications. A very important point was made earlier, that necessity is probably a more progressively open place where ethical incrementalism could allow more groups to enter. There is also this question of remedies and the way in which remedies will matter for other differently situated people who are affected by the same so-called neutral law. Those are all places where even the formal conversation about direct and indirect discrimination and how it fits with the project matters.

There is also the question of how the expressive function of law is connected to the way in which movements organize themselves around legal cases and how there are other regulations that have different functions. We have pointed out the way in which school life, workplace life, is not the same as regulations under criminal law. It really shifts how we think about the coalitions that will care about it and the underlying values that those normative regulations are upholding. From one perspective, the criminal regulation problem is a freedom problem, not an equality problem.

For example in Amnesty International's work against the death penalty, it was intensely useful to call attention to racial discrimination, but the goal was not to make the death penalty racially neutral but rather to abolish the death penalty, so it was necessary to demonstrate that the system couldn't work for anyone by showing the salient flaws, and pulling those flaws back to the essential elements of the system.

Some of the problems discussed earlier raised issues about what might be called biofundamentalism, which is how to think of family formation as essentially linked to biology. That is not only a SOGI problem, but also a broader question of family formation and how we think of biology. Who would be in that coalition as we tell those stories? More generally, we need to think about the nature of the norm we are challenging, whether it is an equality or freedom issue, when as said earlier we want to name the harm. Is it an equality harm or is it a freedom harm? Then that helps us think about how ethical incrementalism, both in the form of litigation and in the form of documentation, will matter for how we do the work.

There is an interesting example of the Working Group on Discrimination Against Women and Girls, where they started with the position that criminal adultery laws are discriminatory against women and girls, but they ended with the position that criminal adultery laws must be abolished because there is no way to make them right, because their essential premises will always be gendered.

A **first expert** added that one of the limits of the discrimination framework lies in its ability to deal with multiple discrimination, even if that is formally part of the antidiscrimination norms. If we think for example about a trans individual who is affected by poverty, but also by a certain racial background and so forth, it can be difficult to capture the life experience of certain individuals within a litigation framework. Perhaps if not in litigation, in advocacy.

A **second expert** (Gerald Neuman) posed a question for discussion about coalition and conflict. We have spoken about conflicts between SOGI rights and asserted religious rights. But what about conflicts within SOGI rights? Is the optimistic story true that what harms one group harms all groups within this category, so that litigation that produces transformative and highly detailed Inter-American Court prescriptions for how the state should respond can be led by one group and benefit all, or are there in fact conflicts that we should discuss between different subgroups that want or need different things. A second related question reflects some skepticism about Inter-American Court remedial expensiveness—are courts perhaps too quick rather than too slow to decide on what the details of transformative change should be.

The **segment moderator** replied that the conflict question was a big discussion that is needed. There was a suggestion earlier that rights be cleaved, and it is an artificial notion that SOGI rights are in fact a family of congenial rights and one speaks for the whole family. Still, we are left with the acronym, and the acronym has both political and doctrinal meaning.

A **third expert** (Victor Madrigal-Borloz) described the approach he had taken in his mandate to the population-specific aspect of the problem, which could lead to significant challenges. The fact that the mandate is defined in relation to violence and discrimination that originates on the basis of sexual orientation or gender identity makes it possible to focus on what is a human

characteristic that becomes a foundation for stigma and discrimination. In that particular understanding of the work, sexual orientation and gender identity become a point of entry for analyses of lived experiences that are by definition intersectional. In this approach, the expression “SOGI rights” does not have a meaning. Rather he works with the human rights of certain persons interpreted from the point of view of violence and discrimination that originates in sexual orientation or gender identity. Doing so avoids two pitfalls, first because as we know many people do not identify with the identitarian elements of being gay or lesbian or trans, but identify themselves differently; second because it facilitates going on to a wider context. One can still enter into discussions that are defined in terms of the acronym. And as participants have pointed out and written in the past, everyone has a sexual orientation and gender identity. No person doesn't have one, and protection from violence and discrimination on the basis of sexual orientation and gender identity becomes an overarching human rights concern, because it is basically about not having that particular human trait be at the origin of discrimination and violence. This approach may appear simplistic, and it doesn't necessarily address all the intricacies of theoretical and academic discourse.

That was an answer to that very specific aspect, and in relation to the second question about remedial expansiveness, that skepticism is founded and can be backed up by reality. When you look at the supervision of judgments mechanism of the Inter-American Court, the agenda is still open, for example when you look at the *Aloeboetoe v Suriname (1993)* case, where education of the whole population became part of the judgment of the Court itself, then you say, well that's the developmental agenda that the Court is setting. The Court sees itself as an inspiration for progress and change, and indeed a different kind of judicial actor than the very pragmatic and very specific ones that we typically see in the common law tradition.

A **fourth expert** said that thinking strategically as a practitioner, there are gaps in the documentation especially at the international level. Academics and large organizations like Human Rights Watch would benefit from closer engagement with the activism locally, because you see a lot of nuances at the local level based on lived experiences that don't get noticed internationally. One example is article 534 in Lebanon, which criminalizes unnatural sex, and is usually applied to homosexuality. But if you look at the cases it is actually disproportionately affecting immigrant communities, and specifically immigrant trans communities because they are the most visible and receive a lot of the police abuse and get arrested more. This is a big topic of discussion in Lebanon but you don't see it so much at the international level. The Iran experience is also very interesting. The reason the trans community was able to carve a place for itself in the legal system is because it was decoupled from gay rights. The argument in trans rights is that it is a biological issue, and they can't do anything about it, and Iran has this whole legal framework around support for trans communities, including free gender correction surgeries. Whereas the non-trans LGBT community realized early that if you couple yourself to that, you're opening the door to all sorts of harmful practices like conversion therapy. It is interesting to know what is different in a different local context, and based on lived experiences where you can decouple and where a coalition might be more helpful.

A **fifth expert** pointed to the growing juxtaposition between the rights of LGBT persons and what groups are now defining as women's sex-based/biologically-based rights. In the UK the campaign to stop self-identification for gender identity used two arguments, one based on freedom of religion or belief, and the other based on women's biological sex rights. The word "sex" in international human rights law is being strongly contested now.

Moreover, as a different perspective on the situation in Iran, the medicalized approach is not favored by members of the trans community who wish to assert their gender identity without being required to accept medical interventions.

A **sixth expert** spoke in favor of the multiplicity of bodies of law and the multiplicity of decision-making bodies, and also cautioned that after marriage equality, arguments about biological fundamentalism can get trickier because the marital presumption of parentage and presumption of legitimacy permits arguments that same-sex couples should get married if they want access to family formation and parentage.

A **seventh expert** gave the example of litigation in India leading to the invalidation of Section 377 of the Penal Code, which prohibited sexual activity "against nature." Initially many activists were thinking in terms of indirect discrimination on the basis of SOGI because of its effects. But as the conversation among social movements took place, the claim in court came to be framed around consent, because the women's movement was looking at issues of marital rape, the word "adult" brought the children's rights groups in, the word "consent" brought the sex worker groups in, and so forth. If you read the judgment, a lot of it is about public morality versus constitutional morality, which then becomes a more inclusive space. The litigation began with a SOGI discussion and the word SOGI is not used in the judgment at all.

An **eighth expert** agreed on the importance of the debate regarding "sex" and "gender" and gender identity rights, and referred to a document circulating that openly attacks the Yogyakarta principles as a deviation from what human rights instruments should be. Second, on the subject of intersectionality, in Brazil in order to address violence against persons with different sexual orientation or different sexual identity, it is necessary to do that fully intersected by race and with an understanding of structural violence. By the data Brazil leads in the killing of gays and lesbians, mostly trans people, but 80 percent of those are Black people and poor people. It is also important to remember that the same religious conservative forces that attack SOGI rights also attack other manifestations of religion. There is a form of religious racism because Afro-Brazilian groups are targeted in the same manner as trans and lesbians and gays and feminists and women who abort. It is important to recognize such intersections, particularly when speaking of the role of freedom of religion.

A **ninth expert** responded to the question about transformative Inter-American remedies, and said that the mandate in the Inter-American system is to protect rights but also to contribute to social change, and the guarantees of non-repetition always involve a victim-centric approach based on Inter-American standards and the institution of comprehensive reparations. There are strategies based in legal discourse to empower the political movements, such as for example the emblematic case *Azul Rojas Marín v Peru* (IACtHR 2020), based on violence against a trans

woman, and we have here very valuable guarantees of nonrepetition like the adoption of a protocol to deal with violence against LGBT persons, capacity building programs, implementation of a system of production of statistics, and this could be a tool to reinforce the legal discourse, which would reinforce the political and social movements. Finally, the Inter-American Commission addresses intersectionality more and more. For example, in a report about violence against LGBT rights, it highlights that violence against an Afro-descendant trans woman who is internally displaced in a rural area is different from violence or discrimination that could affect a wealthy white gay man living in an urban area. And then in the case of the Afro-descendant trans woman living in a rural area facing deep poverty, the state's duty to protect can be developed in a more reinforcing way.

A **tenth expert** said that the lesson taken from the conversation may be both to go big and go small. For example, going small may mean having real people talk about their experiences, while going big may mean making the big claims about how to justify an outcome that provides meaningful protection to people who are harmed in the ways we've been discussing. In the litigation context, one can ask how to frame argument so that they are not seen as threatening social stability. Second, one can ask what the costs are of making imperfect arguments and how to mitigate those costs, because we will always be making arguments that have imperfections in one way or another. And third, one can ask what the costs are of not making the big arguments, and how do we find the places to make those big arguments in a manner that doesn't hurt us in front of those with whom we need to be quite incremental.

The **segment moderator**, in closing, said that what was just said was an outline of ethical incrementalism.

Appendix I: References from the Workshop Discussion

Advisory Opinion OC-24/17, Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), 24 Inter-Am. Ct. H.R. (ser. A) (2017)

Aloeboetoe v Surinam (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) (1993)

Bostock v. Clayton County, 140 S. Ct. 1731 (U.S. Sup. Ct. 2020)

British Columbia Government and Service Employees' Union v. Government of British Columbia (Public Service Employee Relations Commission), [1999] 3 S.C.R. 3 (Can. Sup. Ct. 1999)

C. v. Australia, UN Doc. CCPR/C/119/D/2216/2012 (Human Rights Committee 2017)

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (U.S. Sup. Ct. 1993)

DH and others v Czech Republic, App. No. 57325/00 (ECtHR 2007) [GC]

Employment Division v Smith, 494 U.S. 872 (U.S. Sup. Ct. 1990)

Fulton v. City of Philadelphia, cert. granted, 140 S. Ct. 1104 (U.S. Sup. Ct. 2020) (No. 19-123)

G. v. Australia, UN Doc. CCPR/C/119/D/2172/2012 (Human Rights Committee 2017)

Griggs v Duke Power Company (U.S. Sup. Ct. 1971)

Mellet v. Ireland, UN Doc. CCPR/C/116/D/2324/2013 (Human Rights Committee 2016)

Obergefell v. Hodges, 576 U.S. 644 (U.S. Sup. Ct. 2015)

Alyne da Silva Pimental Teixeira v Brazil, UN Doc. CEDAW/C/49/D/17/2008 (CEDAW 2011)

Price Waterhouse v. Hopkins, 490 U.S. 228 (U.S. Sup. Ct. 1989)

Azul Rojas Marín v Peru, 420 Inter-Am. Ct. H.R. (ser. C) (2020)

Sherbert v. Verner, 374 U.S. 398 (U.S. Sup. Ct. 1963)

Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India Sup. Ct.)

Taddeucci and McCall v. Italy, App. No. 51362/09 (ECtHR 2016)

Toonen v. Australia, UN Doc. CCPR/C/50/D/488/1992 (Human Rights Committee 1994)

Yaker v France, UN Doc. CCPR/C/123/D/2747/2016 (Human Rights Committee 2018)

Federal Supreme Court of Brazil, Press release, “Proibição de doação de sangue por homens homossexuais é inconstitucional, decide STF,” 9 May 2020, available at:

<http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=443015&ori=1> (with further links)

Association for Women’s Rights in Development (AWID), Rights at Risk: The Observatory on the Universality of Rights Trends Report 2017, available at:

<https://www.awid.org/publications/rights-risk-observatory-universality-rights-trends-report-2017>

Oran Doyle, “Direct Discrimination, Indirect Discrimination and Autonomy,” 27 Oxford Journal of Legal Studies 537 (2007)

Barbara Havelková, “Judicial Skepticism of Discrimination at the ECtHR,” in Foundations of Indirect Discrimination Law, ed. Hugh Collins & Tarunabh Khaitan (Hart Publishing 2018)

Laurence R. Helfer and Erik Voeten, “Walking Back Human Rights in Europe? (September 22, 2020). iCourts Working Paper Series, No. 196,” Forthcoming in European Journal of International Law, Duke Law School Public Law & Legal Theory Series No. 2020-50, Available at SSRN: <https://ssrn.com/abstract=3633877> or <http://dx.doi.org/10.2139/ssrn.3633877>

Human Rights in a Time of Populism: Challenges and Responses, ed. Gerald L. Neuman (Cambridge University Press 2020)

Human Rights Watch, This Alien Legacy: The Origins of ‘Sodomy’ Laws in British Colonialism (2008), available at: <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>

Ramy Khouili and Daniel Levine-Spound, Article 230: A History of the Criminalization of Homosexuality in Tunisia (2019), available at: <https://article230.com/en/article-320-eng/>

Scott Alan Kugle, Homosexuality in Islam: Critical Reflection on Gay, Lesbian and Transgender Muslims (Oneworld Publications 2010)

Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, Violence and discrimination based on sexual orientation and gender identity during the coronavirus disease (COVID-19) pandemic, UN Doc. A/75/258 (2020)

Special rapporteur on freedom of religion or belief, Gender-based violence and discrimination in the name of religion or belief, UN Doc. A/HRC/43/48 (2020).

Øyvind Stiansen and Erik Voeten, “Backlash and Judicial Restraint: Evidence From the European Court of Human Rights (August 17, 2018),” International Studies Quarterly (forthcoming), Available at SSRN: <https://ssrn.com/abstract=3166110> or <http://dx.doi.org/10.2139/ssrn.3166110>

[UK] Equality and Human Rights Commission, “Public Sector Equality Duty,” at <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty>

Appendix II: Concept Note for the Workshop on Indirect Discrimination and Sexual Orientation or Gender Identity

Gerald L. Neuman and Victor Madrigal-Borloz

The Harvard Law School Human Rights Program (HRP), with the help of co-sponsors, is convening a workshop on October 16, 2020, for the purpose of exploring in a comparative and cross-disciplinary manner the concept of indirect discrimination (or practices with discriminatory impact) on the basis of sexual orientation or gender identity. This workshop follows a prior workshop on indirect discrimination on the basis of religion, in which analogous questions were discussed.

Legal norms prohibiting indirect discrimination (the usual international phrasing) may be found in a variety of national laws, treaties, and other human rights instruments. The positive legal norms may differ in several dimensions, including the purposes they are understood to serve, the public and/or private actors they regulate, the activities in which indirect discrimination is prohibited, the methods of demonstrating differential effect, and the standards for justifying differential effect.

In the context of discrimination on the basis of sexual orientation or gender identity (SOGI), antidiscrimination norms may also coexist with other norms that have related content. For example, article 26 of the International Covenant on Civil and Political Rights broadly requires states to protect against discrimination on grounds including sex or other status, and article 17 of the same treaty guarantees the right not to be subjected to arbitrary or unlawful interference with privacy, including certain forms of intimate conduct, and certain ways of expressing gender identity. Moreover, when an antidiscrimination norm prohibits indirect discrimination on grounds of “sex” or “other status,” one may ask whether indirect discrimination on the basis of sexual orientation and/or gender identity are covered by the former or the latter, and whether the answer to that question affects the relevant analysis. A goal of the workshop is to explore the appropriate content of such norms, and the relationships between them.

In the context of international human rights norms, other questions relate to the nature of the international oversight of the application of nondiscrimination rules by national authorities.

This note is not intended to limit the scope of discussion at the workshop, but to illustrate some of the range of issues that may shed light on the concept of indirect discrimination based on SOGI. The following hypotheticals are stylized in order to isolate certain issues that may arise in the analysis of indirect discrimination. We may discuss some of them explicitly at the workshop, but we will also discuss relevant problems raised by the participants, including in the short papers that will be distributed in advance of the workshop.

As a preliminary simple example, in a society in which same-sex relationships are criminalized, there are likely to be numerous follow-on consequences, such as benefits conditioned on marriage, that appear facially neutral but that have disproportionate effect; in a society in which same-sex relationships are lawful, but are not formally recognized, there are also likely to be such consequences; and in a society which has changed its laws in the recent past to provide marriage equality, there may be rules that in operation have disproportionate effect in the present because they take into account factors such as the duration of a marriage.

Similarly, the degree to which the law recognizes gender identity on the basis of self-identification determines how systems and procedures impact the individual's experience of discrimination, ranging from civil registration and identification to access to the wide range of services provided by the State or under regulatory frameworks put in place by it (i.e. health, education, housing). While complete absence of legal recognition of gender identity has been described as direct discrimination, the criteria under which all systems historically designed on binary terms can be directly or indirectly discriminatory is still not clearly established; neither is what is a reasonable standard of State diligence when designing or implementing measures that take gender binary as point of reference.

In all of these instances, there may still remain questions about what standard of justification applies if a defense is offered for the effect.

Hypothetical No. 1

Landlock High School is a public high school; assume it is non-pandemic time, and schools are open in the traditional way. As background, the school has traditionally allowed students to form their own extracurricular clubs, and to join them without parental permission. From time to time, parents have protested to the school when their children join certain organizations, and the one that has drawn the most objections is the Gay-Straight-Alliance (GSA), which meets to discuss relevant social justice issues.

More recently, the school has discovered that the Auto Racing Club, originally founded by students who wanted to share their interest in watching auto races, has evolved into a club that engages in its own auto races, which are dangerous and potentially illegal. The school closes down the Auto Racing Club, and institutes a new policy on student organizations: no student can participate in a student organization without presenting a signed parental permission slip to the Principal's office. As it turns out, this new policy has minimal effect on most student organizations, but is devastating the GSA. The GSA has lost 90% of its members, because many of the parents refuse permission, and some of the members are afraid even to ask. Former member M claims to be a victim of indirect discrimination on grounds of sexual orientation.

- (1) Is this a case of direct, or indirect, discrimination?

- (2) For M to make the indirect discrimination claim, does M need to show differential impact on the basis of M's own particular sexual orientation, or differential impact based on non-straight sexual orientations in the aggregate, or is either sufficient?
- (3) Suppose that the rule does have differential impact on the basis of sexual orientation. Does it necessarily also have differential impact on the basis of sex, or would additional evidence be required to make that showing?
- (4) What empirical evidence should be required to make the showing of differential impact based on sexual orientation?
- (5) Assume that the required showing of differential impact has been made, and the inquiry shifts to the justification for the rule. What level of justification should be required?

Hypothetical No. 2

Similar facts, but suppose instead that instead of being a public school, Landlock is a private religious school, and that the rule on parental permission is based on the relevant religion's principles regarding parental control of children's education.

- (1) If the indirect discrimination norm applies, and assuming differential impact on grounds of sexual orientation, how should the justification be evaluated?
- (2) Suppose that by statute most public and private schools are prohibited from indirectly discriminating on grounds of sexual orientation, but that private religious schools are exempt from that statutory norm. Should providing that exemption be found to violate article 26 of the ICCPR, or equivalent provisions of other human rights treaties?

Hypothetical No. 3

Suppose that in country X the following rules of citizenship at birth have long been embodied in statute.

- (1) Any child born within the territory is a citizen.
- (2) If a child is born outside the territory, and the biological parents of the child are married at the time of the birth and are both citizens, then the child is a citizen.
- (3) If a child is born outside the territory, and only one of the biological parents of the child is a citizen, or the biological parents are not married at the time of the birth, then the child is a citizen at birth only if certain additional factors are satisfied, including facts relating to the prior residence in the territory of a citizen parent.

Suppose that country X currently recognizes same-sex marriage as formally equivalent to opposite-sex marriage, and that it has adopted full legal recognition of gender identity on the basis of self-identification only, but that the citizenship rule has not been changed.

Assume that this rule dates from long before the contemplation of assisted reproduction, same-sex marriage, or legal recognition of gender identity, and that nothing in the process of the rule's inception points to a discriminatory intent on these bases. Assume that the rule is said to be justified on the basis of traditional ideas of the role of both parents in educating children in their family in the values of country X, and note that the rule as written is neutral with regard to sex, sexual orientation, and gender identity.

(If I have gotten the assumptions right, then) under this system, a child born abroad to two cis-gender citizen parents in a same-sex marriage can never get the benefit of rule number (2), and is always subject to the limitations of rule number (3), whereas children born abroad to two cis-gender parents in an opposite-sex marriage will often, though not always, get the benefit of rule number (2). (If one or more of the married parents is transgender, the possibilities are more complicated to describe, and depend on whether both partners to the marriage can be biological parents of the same child.)

Focusing first on the effects described above, does this rule indirectly discriminate on grounds of sexual orientation? Are any additional facts required to demonstrate the disproportionate impact of the rule? How should the rule be evaluated?

Does the rule indirectly discriminate on grounds of sex?

Alternatively, does the rule indirectly discriminate on grounds of gender identity?

(derived from *Kiviti v Pompeo* (D. Md. 2020))

Hypothetical No. 4

Assume that it sometimes happens that a transgender woman seeks medical advice and treatment from a gynecologist and the gynecologist declines to deal with the problem because the presence of male anatomical features results in the gynecologist's sincerely feeling medically unqualified to provide treatment.

- (1) If a sole practitioner declines to treat the patient for this reason, is it an issue of direct or indirect discrimination on grounds of gender identity, and if it is an issue of indirect discrimination what standard of justification applies?
- (2) If the entire staff of a medical practice group declines to accept the patient for this medical reason, is the failure to have anyone on staff who has the training to treat the patient an issue of indirect discrimination on grounds of gender identity, and what standard of justification applies?

- (3) If there is no one in public or private practice in the city who is willing to treat the patient, because they all feel unqualified, is the city government potentially responsible for indirect discrimination on grounds of gender identity, and what standard of justification applies?
- (4) If a university medical school does not train its physicians to deal with specialized medical problems of transgender women, is the university potentially engaged in indirect discrimination on grounds of gender identity, and what standard of justification applies?

Hypothetical No. 5

A standardized test with writing components is graded by machine, and it turns out that test-takers who use the nontraditional gender-neutral third person pronoun *Axe@* receive lower grades because the software does not recognize the pronoun.

- (1) Assume that statistics show that the category of people disadvantaged in this way is disproportionately composed of people with gender identities other than cisgender male or cisgender female. Does the later use of the test grades in allocating educational or employment advantages amount to indirect discrimination on the basis of gender identity? Does it matter whether the grades are later used in the public sector or the private sector, education or employment, and by what standard should an attempt to justify the use of the test grades notwithstanding this effect be evaluated?
- (2) What empirical evidence should be required to show that the failure of the software to recognize “xe” does in fact have disproportionate effect on the basis of gender identity?

Hypothetical No. 6

In the country of Hyperborea, a socially recognized category of gender identity relates to the *Ajri*, whom the Hyperborean Supreme Court has described as “third gender,” neither male nor female. They form a disadvantaged social status group, they often live in separate communities, and by tradition many of them earn a living either through sex work or as dancers. The *Ajri* traditionally go barefoot, and that is regarded as an expression of their gender identity.

In an era of global migration, some *Ajri* have gone to live in other countries. Very few *Ajri* have traveled as far as the country of Antipodia, which now has a few dozen *Ajri* residents. There is very little social awareness in Antipodia of the presence of the *Ajri*. One concern for *Ajri* living in Antipodia is that domestic law has traditionally prohibited going barefoot in most public buildings, on asserted public health grounds. This law is enforced when violations are noticed, either by ordering the barefoot person to leave the building, or by means of a civil fine. Assume

that the *Ajri* are the only group defined by sexual orientation and gender identity on whom this rule has differential effect.

Anna is an *Ajri* immigrant to Antipodia, who has been fined for entering the city hall of the main city of Antipodia barefoot.

- (1) Anna claims that the enforcement of this law violates Anna's right to express *Ajri* gender identity, under Article 17 ICCPR or an equivalent provision. Has this right been violated, and how should that question be analyzed?
- (2) Assuming that the right has been violated, does it automatically follow that the law indirectly discriminates against Anna on grounds of gender identity (which could violate Article 26 ICCPR or an equivalent provision)?
- (3) Putting aside questions (1) and (2), if Anna claims that the law indirectly discriminates against the *Ajri* on grounds of gender identity, what must be shown to establish indirect discrimination? Does it matter whether the *Ajri* are a socially salient category in Antipodia?

General questions

The above hypothetical cases involve public or private action in a variety of fields of activity – membership in student associations in schools, acquisition of nationality at birth, access to medical treatment, employment, education, and access to public buildings.

- (1) Should the standards used to evaluate the claims of indirect discrimination depend on whether the antidiscrimination norm being applied focuses particularly on the relevant field of activity, or is a broadly phrased norm that applies across all fields of activity?
- (2) Should the standards require a higher level of justification in some fields of activity than in others?
- (3) How should the right not to be subjected to indirect discrimination on the basis of sexual orientation or gender identity interact with the right to manifest religion or belief in practice?
- (4) Should it be an affirmative goal of public employment to ensure that, to the extent possible, all sexual orientations and gender identities are represented among the state's employees? All *socially salient* sexual orientations and gender identities within the given society?
- (5) How should international human rights tribunals, such as regional human rights courts and commissions and global treaty bodies, review the decisions of national courts that find that a practice does not amount to indirect discrimination on the basis of sexual orientation or gender identity?

Appendix III: Partial List of Participants in the Workshop

Eva Brems, University of Ghent

Mary Ann Case, University of Chicago

Sarah H. Cleveland, Columbia Law School

Catherine de Preux de Baets, Office of the High Commissioner for Human Rights

Laurence R. Helfer, Duke University School of Law

Tarun Khaitan, Oxford University/Melbourne University

Victor Madrigal-Borloz, UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Harvard Law School

Alice Miller, Yale University

Douglas NeJaime, Yale Law School

Gerald L. Neuman, Harvard Law School

Flávia Piovesan, Inter-American Commission on Human Rights; Catholic University of São Paulo

Cynthia Rothschild, Independent

Clare Ryan, Louisiana State University

Michael A. Stein, Harvard Law School

Appendix IV: Working Papers

Workshop on Indirect Discrimination and Sexual Orientation or Gender Identity

Eva Brems

In these comments, my angle is that of a scholar studying supranational human rights monitoring bodies (in particular the European Court of Human Rights (ECtHR)), and more specifically, the modes of reasoning of such bodies.

1. The double purpose of the prohibition of indirect discrimination and the discrimination ground 'marital status'

In general terms, banning indirect discrimination serves a double purpose:

- On the one hand it helps prevent circumvention of the prohibition of discrimination by the use of an apparently neutral criterion. It thus allows one to uncover discrimination that is intentional or at least envisaged and accepted, yet that is 'covered up'.
- On the other hand it allows one to detect and address unintentional discrimination.
 - o This can be "collateral damage" — a result of oversight or lack of information, e.g. hypothetical number 1 in the Concept Note.
 - o It can also be the result of slowness/insufficient thoroughness in amending rules and practices after a recent legal change, e.g. hypothetical number 3 in the Concept Note.

In the second scenario (unintentional discrimination), one would typically expect relatively little resistance to correcting such situations, and hence not many cases going to court, let alone to supranational human rights bodies.

The first scenario (intentional or accepted discrimination) has arguably a higher "human rights urgency," yet is not represented in the hypotheticals in the concept note.

A prominent example of indirect discrimination of the 'intentional' kind on the ground of sexual orientation might involve discrimination on the ground of marital status in a jurisdiction that bans discrimination on the ground of sexual orientation, but that does not provide for marriage equality. One can think of a hotel owner who refuses to host a same sex couple in a double room on the ground that they are not married.²

It is in fact a typical pattern in the progression of LGBTIQ rights that non-discrimination rights are granted before marriage equality (and after decriminalization). [ILGA data of 2019](#) list 27

² Cf. two British cases under the Equality Act (Sexual Orientation) Regulations 2007 and predating the introduction of same-sex marriage in the UK in 2014: *Bull and another v. Hall and another*, UK Supreme Court [2013] UKSC 73; *Black and Morgan v. Wilkinson*, Court of Appeal of England and Wales [2013] EWCA Civ 820. In both cases, however, a majority of the judges found that the facts constituted *direct* discrimination.

states that have marriage equality, and 57 states that have broad legal protection against discrimination on the ground of sexual orientation, which implies that in at least 30 states, indirect sexual orientation discrimination by using the criterion “marital status” can occur.

Interestingly, the current state of European human rights law as interpreted by the ECtHR is such that discrimination on the ground of sexual orientation is banned, yet the absence of marriage equality is not considered a human rights violation. The latter is considered to be a matter within the “margin of appreciation” of the national authorities.

In the hypothetical situation that in either of the British cases mentioned in footnote 1, the national courts had not found discrimination, the ECtHR could have ruled that there was indirect discrimination on grounds of sexual orientation. Other examples where the “marital status” criterion has adversely affected same-sex couples, could include a rule that reserves social benefits after the death of a life partner for married couples only, or a rule that in COVID-19 times allows up to 100 persons to attend a wedding, but only up to 20 for “other private parties or events.”

For a supranational body in the position of the ECtHR, such cases raise the principled question of whether or not to extend their margin-of-appreciation-based tolerance of the exclusion of same-sex couples from access to marriage to other exclusions based on the criterion of “marital status.”

Arguably, this is where a supranational body shows how comfortable it is (or is not) with its position that tolerates marriage exclusion, and hence a pointer to whether or not this can be considered a solidly entrenched position, or rather a provisional one.

In cases of survivors’ pensions reserved to married partners in states without marriage equality, the ECtHR dismissed claims of indirect discrimination on grounds of sexual orientation in 2001,³ 2010⁴ and 2016.⁵ In 2001 and 2010, the argument was based on a broad margin of appreciation in the pursuit of the “legitimate aim” of “the protection of the family based on the bonds of marriage.” In combination with the fact that these cases were dismissed as “manifestly ill-founded” (and hence inadmissible), this suggests a very solid position of the Court, in which the disproportionate impact on same-sex couples’ social rights was seen as an acceptable consequence of the fact that it was (is) allowed under the ECHR to exclude them from marriage. The same consequences cannot be drawn from the 2016 case, where the motivation of the state’s margin of appreciation refers instead to the situation of legal transition (after the adoption of the law on marriage equality in Spain, but before its entry into force), and to leeway for incrementalism in “an area which was regarded as one of evolving rights with no established consensus.”

³ *Mata Estevez v Spain*, 10 May 2001, see summary in annex.

⁴ *Manenc v France* 21 September 2010, see summary in annex.

⁵ *Aldeguer Tomás v. Spain*, 14 June 2016, see summary in annex.

Moreover, in the same year 2016, in a different but even more sensitive area (migration), the ECtHR found indirect discrimination on grounds of sexual orientation where the formal ground of differentiation was marital status.⁶ The fact that the state's margin of appreciation was narrowed in this case, increases the tension around the Court's position on marriage equality.⁷

2. *Other issues that may be interesting for discussion in this area*

2.1. *Discussions on the position of supranational human rights bodies in relation to national authorities*

- Is it important that supranational bodies should flag to national judiciaries the need/desirability to name and address the indirect discrimination dimension of the case, even if they have addressed the substance of the matter in a different manner? Arguably, that would be overreaching, and a pragmatic attitude focusing on the result of the domestic procedure may be preferable (also the supranational body may not have any way to achieve any impact with such reasoning)
- Is it important that supranational bodies themselves highlight the indirect discrimination dimension of the case, even if it can be dealt with under other provisions? Historically, ECtHR case law in the field of LGBTIQ rights first developed under the right to privacy (art 8 ECHR) – the omission of the discrimination dimension was criticized (and the later reframing in these terms applauded), amongst others, because discrimination framing better represents the actual harm that is experienced in a case. Arguably, this argument remains valid when the discrimination is indirect, even if it is non-intentional: the harm then resides in the fact that those who make decisions have overlooked the impact of that decision on a minority group. If this is the harm the supranational body wants to flag, it may be useful to stipulate state obligations of a procedural nature, concerning the inclusion of the interests of sexual minorities in decision-making processes.
- Is there any room for incrementalism in an area that requires cultural change as well as legal change, and how does that fit in with the concept of indirect discrimination?

2.2. *How to deal with proportionality when indirect discrimination is institutional?*

This issue seems particularly salient when it comes to gender identity. As society and many of its institutions, including many fields of law, are structured along binary notions of gender, individuals whose gender identity does not fit in this binary model, may have an inordinate number of arguable claims of indirect discrimination. The proportionality analysis that characterizes most human rights reasoning, including in the field of indirect discrimination, may not be a suitable tool to address this. The underlying idea might all too easily be that the remedy

⁶ Taddeucci and McCall v. Italy, 30 June 2016, see summary in annex.

⁷ Schalk and Kopf v Austria, 24 June 2010, see summary in annex.

that would be required (undoing the binary) would be disproportionate in relation to the harm and to the number of people affected by it.

How to deal with this? Can there be an alternative, for example one that is inspired by the “inclusion” reasoning that characterizes the human rights of persons with disabilities? The matter of the burden of proof may be key when claims of massive disproportionality are raised: is it for the applicant to show that an alternative conception is feasible, or is it for the state to show that it is not? In any case, it is important that supranational human rights bodies should not accept such claims at face value, but rather unpack them and assess them in concrete terms.

2.3. Broadening the discussion to include positive obligations regarding the facilitation of cultural change required in SOGI matters

In hypothetical 1 in the Concept Note, the involvement of indirect discrimination may be contested, as members of the gay-straight alliance are not necessarily gay, and intolerant parents may want to keep their children away from those clubs regardless of their children’s sexual orientation. If I were on a supranational court dealing with this case, I would probably highlight the matter of children’s privacy and autonomy rights (arguably the school’s ruling is disproportionate in its requirement of parental consent for an unjustifiably broad range of activities).

More to the point of the workshop, in the SOGI sphere, a very relevant angle in my mind is the state’s positive obligation to facilitate tolerance and a positive climate toward diversity, which arguably would lead it to offer particular protection to such school clubs. At least it would require them to systematically consider the impact of school decisions in these terms. The fleshing out of such a positive obligation in my opinion deserves more attention from supranational human rights bodies than it has received so far.

Broadening the point (away from the hypothetical): International human rights law is strongly committed to the promotion and protection of the rights of members of groups that have been subjected to structural discrimination and/or marginalization in the past, such as women, children, ethnic minorities, and persons with disabilities. The realization of the rights of these individuals requires a change of the way society at large views members of those groups, and international texts impose state obligations to help realize that change. Specific state obligations to this effect are included amongst others in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, art 5(a)), the Convention on the Rights of Persons with Disabilities (CRPD, art 8), and the Yogyakarta Principles (+10) on LGBTIQ rights.⁸ It is important to recognize this dimension of LGBTIQ rights. Like all emancipation struggles, it

⁸ Principle 2, sub (f) (Principle 2: The rights to equality and non-discrimination): “States Parties shall (...) [t]ake all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.”

requires adjustment of deeply and sincerely held beliefs. Cultural resistance to rights that challenge beliefs with strong cultural roots is not necessarily an expression of bad faith; it is deeply human. The role of the state in this process has been clearly set out in international human rights law. A government cannot be held fully responsible for the fact that segments of its society do not embrace equality on grounds of sexual orientation and/or gender identity. But a government arguably should be held responsible for failing to show evidence of working toward the realization of such cultural change. One way for a government to fulfil its international human rights obligations toward the realization of cultural change for equality, is by supporting the work of societal actors who combat discrimination and prejudice. One way for a government to violate such human rights obligations, is by failing to offer robust protection for the work of such actors.

In my opinion, it is worth discussing whether/how such positive obligations can be introduced in cases involving indirect discrimination.

In one ECtHR case (as recent as 2017), the Court accepted that the state's goal to strive for gender equality in heterosexual couples legitimated the exclusion of a woman from paternity leave on the occasion of the birth of her partner's child.⁹ Arguably, an analysis that included the state's positive obligation to strive for more inclusive gender equality could have contributed to a different outcome.

⁹ Hallier and others v France, 12 December 2017, see summary in annex.

Annex: case summaries (in chronological order)

Mata Estevez v. Spain

10 May 2001 (decision on the admissibility)

The applicant complained in particular of the difference of treatment regarding eligibility for a survivor's pension between *de facto* homosexual partners and married couples, or even unmarried heterosexual couples who, if legally unable to marry before the divorce laws had been passed in 1981, were eligible for a survivor's pension. He submitted that such difference in treatment amounted to unjustified discrimination which infringed his right to respect for his private and family life.

The Court declared the application **inadmissible** as being manifestly ill-founded, finding that Spanish legislation relating to eligibility for survivors' allowances pursued a legitimate aim (the protection of the family based on the bonds of marriage), and that the difference in treatment could be considered to fall within the State's margin of appreciation.

Schalk and Kopf v. Austria

24 June 2010

The applicants are a same-sex couple living in a stable partnership. They asked the Austrian authorities for permission to marry. Their request was refused on the ground that marriage could only be contracted between two persons of opposite sex; this view was upheld by the courts. Before the European Court of Human Rights, the applicants further complained of the authorities' refusal to allow them to contract marriage. They complained that they were discriminated against on account of their sexual orientation since they were denied the right to marry and did not have any other possibility to have their relationship recognized by law before the entry into force of the Registered Partnership Act.

The Court found that there had been no violation of Article 12 (right to marriage), and no violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the Convention. It first held that the relationship of the applicants fell within the notion of "family life," just as the relationship of a different-sex couple in the same situation would. However, the Convention did not oblige a State to grant a same-sex couple access to marriage. The national authorities were best placed to assess and respond to the needs of society in this field, given that marriage had deep-rooted social and cultural connotations differing greatly from one society to another.

Manenc v. France

21 September 2010 (decision on the admissibility)

This case concerned the refusal of reversionary pension to the survivor of a civil partnership between two people of the same sex on the ground that the requirement of a lawful marriage, sanctioned by a marriage certificate, had not been met. The applicant alleged that this requirement was discriminatory, in particular towards persons who had entered into a civil partnership agreement, and more especially same-sex couples.

The Court declared the application inadmissible as being manifestly ill-founded. It noted in particular that the survivor's pension had been refused to the applicant solely on the ground that he had been in a civil partnership. Consequently, the French legislation on survivors' benefits pursued a legitimate aim, namely the protection of the family based on the bonds of marriage; the limiting of the scope of the legislation to

married couples, to the exclusion of partners in a civil partnership regardless of their sexual orientation, fell within the broad margin of appreciation accorded to the States by the European Convention on Human Rights in this sphere. Hence, the domestic legislation was not manifestly without reasonable foundation.

Aldeguer Tomás v. Spain

14 June 2016

This case concerned the applicant's complaint of having been discriminated against on the ground of his sexual orientation in that he was denied a survivor's pension following the death of his partner, with whom he had lived in a *de facto* marital relationship. The applicant had been unable to marry his partner under the law in force during the latter's lifetime. Three years after his partner's death, the law legalizing same-sex marriage in Spain entered into force.

The Court held that there had been no violation of Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life) of the Convention and Article 1 (protection of property) of Protocol No. 1 to the Convention, finding that there had been no discrimination in the applicant's case. In particular, his situation following the entry into force of the law legalizing same-sex marriage in Spain in 2005 had not been relevantly similar to that of a surviving partner of a heterosexual cohabiting couple, who had been unable to marry his or her partner before the law legalizing divorce entered into force in 1981 and who qualified for a survivor's pension by virtue of a provision of that law. Moreover, States had, at the relevant time, a certain room for maneuver ("margin of appreciation") as regards the timing of the introduction of legislative changes in the field of legal recognition of same-sex couples and the exact status conferred on them, an area which was regarded as one of evolving rights with no established consensus.

Taddeucci and McCall v. Italy

30 June 2016

This case concerned the inability of the applicants, a gay couple one of whom is an Italian and the other a New Zealand national, to live together in Italy on account of the Italian authorities' refusal to issue the second applicant with a residence permit on family grounds because the national immigration legislation did not allow unmarried partners to obtain a family member's residence permit. The applicants alleged in particular that this refusal amounted to discrimination based on their sexual orientation.

The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life) of the Convention, finding that the refusal to grant a residence permit to the applicants on family grounds was an unjustified discrimination. The Court found in particular that the situation of the applicants, a gay couple, could not be understood as comparable to that of an unmarried heterosexual couple. As they could not marry or, at the relevant time, obtain any other form of legal recognition of their situation in Italy, they could not be classified as "spouses" under national law. The restrictive interpretation of the notion of family member constituted, for homosexual couples, an insuperable obstacle to the granting of a residence permit on family grounds. That restrictive interpretation of the concept of family member, as applied to the second applicant, did not take due account of the applicants' personal situation and in particular their inability to obtain a form of legal recognition of their relationship in Italy. The Court therefore concluded that, in deciding to treat

homosexual couples in the same way as heterosexual couples without any spousal status, Italy had breached the applicants' right not to be subjected to discrimination based on sexual orientation in the enjoyment of their rights under Article 8 of the Convention.

Hallier and Others v. France

12 December 2017 (decision on the admissibility)

The applicants – two women who had been living as a couple for many years and were in a civil partnership – complained in particular about the refusal to grant the second applicant paternity leave on the occasion of the birth of her partner's child.

The Court declared the application inadmissible as being manifestly ill-founded. It noted in particular that the institution of paternity leave pursued a legitimate aim, namely to allow fathers to play a greater role in their children's upbringing by being involved at an early stage, and to promote a more equal distribution of household tasks between men and women. Furthermore, the difference in treatment whereby, at the relevant time, only the biological father was eligible for paternity leave had not been based on sex or sexual orientation. Lastly, the Court noted that, following amendments introduced by a Law of 17 December 2012, the mother's partner was now entitled to carer's leave under the same conditions as paternity leave if he or she was not the child's biological parent.

Beyond Identitarian Accommodation as a Remedy For Indirect SOGI Discrimination

Mary Anne Case

The terms of art “disparate impact” (common in the US) and “indirect discrimination” (common in much of the rest of the world) are often used somewhat interchangeably. There may, however, be a difference in what the default remedy for a successful claim tends to be. At least in the cases with which I am familiar, a successful claim of indirect discrimination tends to result in an accommodation mandate—the indirectly discriminatory rule or practice remains generally in place, but members of the group recognized as suffering indirect discrimination on its account are granted an exemption or accommodation from the rule or practice. By contrast, in a successful disparate impact case, the rule or practice that has a disparate impact tends to be struck down across the board. If, for example, a height requirement for job applicants is held to have an impermissible disparate impact on women, the conventional remedy of striking it down will benefit not only women and Asian men, who on average tend to be shorter, but also shorter men from ethnic groups whose members are on average quite tall.

A remedy that goes beyond mere accommodation has many advantages—it facilitates synergistic and coalitional thinking rather than a zero-sum approach with its attendant competition and resentments. (It thus functions more like a curb cut and less like a handicapped parking space.) It absolves those seeking relief from having to fit themselves precisely into an identitarian box as a precondition of being accommodated. And it helps open the way to a more generally fruitful rethinking and improvement in ways of proceeding, because it reveals that rules and practices once thought to serve goals such as business necessity actually fail effectively to do so; they may instead reflect little more than deliberate or unthinking conformity to traditional power relationships and prejudices. Going beyond an accommodation remedy can therefore, along multiple dimensions, be a win/win solution.

An across-the board remedy also, of course, has its risks, which include mirror images of some of the aforementioned advantages. For example, a society may be more comfortable and reassured if change is confined to a small and discrete number of exceptionally accommodated persons, avoiding widespread transformation. And explicit recognition of identitarian claims may be precisely what some groups and some individuals within those groups most crave.

Before getting down to cases, then, let me be explicit about my own normative priors. I am strongly inclined to resist the identitarian turn. I would like to see rights extended not on the basis of sex, gender, or orientation identity categories, but to all—regardless of the identity categories they may identify with or be categorized into. Instead of reinforcing the SOGI silo, I would like to see greater recognition by advocates for freedom of sexual and gender expression that not only gays and lesbians have a sexual orientation and not only those who identify as trans

have a gender identity in need of protection. I associate myself with the Gender 360 project Ali Miller has discussed in her working paper for this session. I also think that a greater descriptive focus on and normative embrace of the ways in which a very large percentage of indirect SOGI discrimination is direct discrimination on the basis of sex would benefit both feminists and advocates for SOGI rights.

These commitments lead me to the cases I will highlight below, exhibiting a recent tendency among leading US SOGI antidiscrimination advocates, in both constitutional and statutory cases, to insist that they are not categorically challenging sex-respecting rules, such as dress codes, but simply seeking an accommodation from them for their gay, lesbian, or trans clients.

This tendency was most prominently on exhibit recently in the briefing and oral argument before the US Supreme Court of *Bostock* and related cases, leading to an opinion by Justice Gorsuch that discrimination on grounds of sexual orientation and transsexual status constituted sex discrimination in employment under Title VII.¹⁰ Against the advice of many SOGI, sex discrimination, and employment discrimination experts (including me), David Cole of the ACLU and Pam Karlan of Stanford, who argued the cases, took pains explicitly to reassure the Court that there was, in general, no problem with an employer's sex-specific dress and appearance codes. This clearly confused members of the court, who wondered on what statutory basis they could distinguish those for whom, in the advocates' words, the dress codes caused at most "a trivial harm" and those for whom they would cause "significant harm."¹¹

But the difficulties with this approach go far beyond judicial confusion about who might be entitled to an accommodation. It would be tragic if, in an effort to shore up the protections for transgender status under Title VII and similar laws, protections already solidly entrenched in existing precedent for those whose conduct and appearance violate imposed "sex stereotypes concerning how [they] should look and behave"¹² now are unnecessarily put at risk. These existing protections against mandated conformity to sex stereotypes extend far beyond matters of dress and appearance, but it certainly includes them in ways that countless employees and students, whether trans or not; gay or straight; butch, femme, or everything in-between; male, or female have come to rely.

Consider just a few other current clients of the ACLU itself. *Teen Vogue* published an editorial by an ACLU fellow with the scare headline, "[Trump's Department of Justice Could Allow Women to Be Forced to Wear Skirts.](#)"¹³ The ACLU lawyer goes on correctly to read the foundational precedent of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), as opposing this

¹⁰ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

¹¹ See e.g. Transcript of Oral Argument, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, at 9-10 (2019) (companion case to *Bostock*).

¹² *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

¹³ Emma Roth, (Nov. 4, 2019), <https://www.teenvogue.com/story/trump-transgender-workplace-protections>.

result and then to discuss the ACLU Women’s Rights Project’s recent federal district court victory on behalf of girls who objected to their North Carolina public charter school’s requirement that required girls wear skirts so as to promote “chivalry” and “mutual respect between boys and girls.” Inter alia, the girls had complained that their freedom of movement, comfort in cold weather, and ability to concentrate on their studies rather than how their legs were positioned were all hampered by this sex-specific dress code. The ACLU website also describes another client who is a paradigmatic example of who might be harmed if too many unnecessary concessions are made by advocates and then endorsed by courts with respect to sex-specific dress codes. Under the headline [“Chili’s Denied Meagan Hunter a Promotion Because She Needed to ‘Dress More Gender Appropriate,’”](#)¹⁴ ACLU lawyers, again relying on *Hopkins* as determinative precedent, describe their client showing up for an interview for a manager’s job in an outfit similar to those she’d seen male managers wear—a button-up shirt, fitted slacks, and boat shoes—only to be told she was “inappropriately dressed” and that the chef’s coat she wanted to wear was “for boys.” Meagan Hunter is a lesbian; it will do her little good to preserve a right to sue for discrimination in employment on account of her sexual orientation if she can be fired the next day for failure to elect a femme over a butch clothing style. And the problem she will face if the concessions made by advocates in *Bostock* and *Harris* lead the US Supreme Court to cut back on what it offered Ann Hopkins by way of protection from sex stereotypical appearance norms is a problem that will threaten to hit not only trans and gay people, but all who in any way depart from the most traditional gender-conformity in sartorial choices. That means harm to a very large number of people of all sexes, orientations, and gender identities.

Similar problems with stressing targeted accommodation rather than the abolition of sex-respecting rules have plagued cases concerning school dress codes. A greater societal receptivity to sex stereotyping of children’s appearance combined with a greater legal receptivity to identitarian claims made on behalf of LGBT individuals has led to a worrying trend in cases involving school children’s dress and appearance norms which, by analogy, may help illustrate some of the problems with the evolving law of gender nonconformity under Title VII. The post-millennial trend in school dress code cases suggests that students objecting to sex-specific appearance rules seem to have a far clearer road to victory if they claim an identity as transgender, gay, or lesbian rather than simply raising an objection to being stereotyped on grounds of sex. Thus, although Constance McMillen testified that “she wants to wear a tuxedo to the prom so that she can express to her school community that ‘it’s perfectly okay

for a woman to wear a tuxedo, and that the school shouldn’t be allowed to make girls wear a dress if that’s not what they are comfortable in,’” the district court seemed to find her sexual orientation relevant to a ruling in her favor, not only as to her choice of a prom date, but as to her choice of attire—“[t]he record shows Constance has been openly gay since eighth grade and she intended to communicate a message by wearing a tuxedo and to express her identity through

¹⁴ Ria Tabacco Mar and Emma J. Roth, ACLU Blog, (Jan. 16, 2019), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/chilis-denied-meagan-hunter-promotion-because-she-needed>.

attending prom with a same-sex date¹⁵.” And when Pat Doe, a “biologically male” fifteen-year-old, sought to wear “girls’ make-up, shirts, and fashion accessories to school,” the Massachusetts judge who ruled in Doe’s favor stressed that a diagnosis of gender identity disorder meant “that it was medically and clinically necessary for plaintiff to wear clothing consistent with the female gender,” and Doe was “expressing her gender identity and, thus, her quintessence, at school.”¹⁶ Although the actual order issued by Judge Linda Giles “preliminarily enjoined [the school] from preventing plaintiff from wearing any clothing or accessories that any other *male or female* student could wear to school without being disciplined”—and her opinion quoted *Brown v. Board of Education* to the effect that “in the field of public education the doctrine

of ‘separate but equal’ has no place”—the judge distinguished, rather than rejected, earlier cases in which sex-specific dress codes were upheld against challenges by plaintiffs who made no identitarian claims.

Doe v. Yunits is often paired in discussion with the nearly contemporaneous case of Nikki Youngblood. When having her yearbook photo taken, Youngblood objected to wearing the “velvet-like, ruffly, scoop neck drape” girls were required to wear and asked instead to pose in “a white shirt, tie, and dark jacket,” as was required of boys.¹⁷ Her request was refused, her photo excluded from the yearbook, and she brought suit on the claim that her school had “created a discriminatory dress code policy...based on stereotypes of how they believe males and females should dress.” Youngblood’s complaint described her as someone who had long rejected “gender stereotypes,” had not worn skirts since second grade, and would find it “emotionally damaging” to be forced to wear “stereotypically feminine attire,” but the only identity she claimed was “female.” After briefing heavily featuring Title VII cases in which the school made an “equal burdens” defense, the district court dismissed Youngblood’s complaint. In the course of an appeal to the Eleventh Circuit, the case settled, with an agreement providing that in the future “[s]tudents may request an exception to the dress code from the principal, who will grant the exception when good cause is shown.” No specification, however, was made of what shall constitute “good cause.” It is unsurprising, therefore, that a subsequent challenge to identical yearbook photo requirements in another Florida school noted the plaintiff was a lesbian and included a sexual orientation nondiscrimination provision in the resulting settlement.

Several things are noteworthy about these yearbook settlements, especially when considered in light of Title VII cases such as *Jespersen v. Harrah’s*, 444 F.3d 1104 (2006), in which the Ninth Circuit en banc enforced sex specific grooming codes against an employee who offered no identitarian claim, only the plea that conforming with the female dress code was inconsistent with her sense of self and made her job harder. Most relevant here is that the settlements did not categorically strike down sex-specific grooming rules, but only allowed specific exceptions for

¹⁵ *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 702, 705 (N.D. Miss. 2010).

¹⁶ *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1, *7 (Mass. Super. Ct. Oct. 11, 2000).

¹⁷ Complaint for Damages & Demand for Jury Trial at 2, *Youngblood v. Hillsborough Cnty. Sch. Bd.*, No. 8:02-CV-1089-T-24MAP (M.D. Fla. June 19, 2002), ECF No. 1.

objecting individuals with good cause. This was a settlement Jespersen herself was offered but declined to take, in part because she did not see herself as exceptional in objecting to the makeup requirement, only in her willingness to sue, and she did not want to be “singled . . . out in a problematic way” from her female coworkers.¹⁸

I discussed these dress and appearance cases in such detail because they presented the clearest and simplest example of both the ways in which indirect SOGI discrimination is direct sex discrimination and the potential advantages all around of moving beyond an accommodation approach to those complaining of SOGI discrimination. While the analysis would be more complex and the complicating considerations more substantial, I think arguments for going beyond a limited accommodation remedy also can and should be pursued in a number of other instances where indirect SOGI discrimination claims with a somewhat less direct but still traceable link to direct sex discrimination can be brought, including cases involving discrimination in relationship recognition (such as those in *Taddeucci and McCall v. Italy*), discrimination in access to the new reproductive technologies, adoption, and parentage recognition, discrimination in the criminalization of sexual and related activity (such as discriminatory bans on sexual solicitation and the sale and use of sex aids). I also would argue that an accommodation approach limiting any relief to those able to raise identitarian SOGI discrimination claims is not the best remedy in a number of the hypotheticals raised in the concept note for the workshop, such as those involving school clubs, uncommon pronouns, and bare feet, and look forward to an opportunity to discuss further.

¹⁸ Jennifer C. Pizer, *Facial Discrimination: Darlene Jespersen's Fight Against the Barbie-fication of Bartenders*, 14 DUKE J. GENDER L. & POL'Y 285, 312 n.113 (2007).

Indirect Sexual Orientation Discrimination Before the European Court of Human Rights

Laurence R. Helfer & Clare Ryan

This paper analyzes indirect discrimination on the basis of sexual orientation under the European Convention on Human Rights (the Convention). The European Court of Human Rights (ECtHR or the Court) has only recently recognized that claims for indirect discrimination are cognizable under Article 14 of the Convention,¹⁹ and the standards for proving indirect discrimination remain somewhat uncertain. The Court has issued only one judgment—*Taddeucci and McCall v. Italy* (2016)—upholding a claim of indirect discrimination on the basis of sexual orientation, although it has considered sexual orientation issues in other cases raising indirect discrimination claims.

In addition, several applications currently pending before the ECtHR implicate such claims. These include complaints by same-sex couples challenging the inability to enter into a civil union or registered partnership and the resulting exclusion from tax and administrative benefits available only to different-sex married couples or family members;²⁰ the inability to register the birth certificate of a same-sex couple's child;²¹ the refusal to recognize the genetic parent-child relationship of one member of a same-sex couple;²² and a challenge to a domestic court's rejection of a nondiscrimination complaint against a bakery that refused to prepare a cake with a message supporting same-sex marriage.²³

The remainder of this paper is organized as follows. Part I provides a distillation of ECtHR case law on indirect discrimination. Part II summarizes the *Taddeucci and McCall* decision and the resolution of the indirect discrimination claims raised in that case. Part III discusses an issue

¹⁹ Article 14 provides: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Article 14 is always considered in conjunction with other substantive rights contained in the Convention.

²⁰ See, e.g., *Meszkes v. Poland*, App. No. 11560/19 (Communicated Case) (June 20, 2020), <http://hudoc.echr.coe.int/eng?i=001-203743>; *Formela v. Poland*, App. No. 58828/12 (Communicated Case) (June 20, 2020), <http://hudoc.echr.coe.int/eng?i=001-203734>; *S.K.K. and A.C.G. and 7 other applications v. Romania*, App. No. 5926/20 et al. (Communicated Case) March 3, 2020).

²¹ *A.D.-K. and Others v. Poland*, App. No. 30806/15 (Communicated Case) (Feb. 26, 2019), <http://hudoc.echr.coe.int/eng?i=001-192049>.

²² *R.F. and Others v. Germany*, App. No. 46808/16 (Communicated Case) (Jan. 13, 2017), <http://hudoc.echr.coe.int/eng?i=001-170890>. In *R.F.*, the second and the third applicant entered into a same-sex civil partnership. The second applicant had donated an ovum which was inseminated by an anonymous sperm donor and transferred into the third applicant's womb, resulting in the birth of the first applicant.

²³ *Lee v. United Kingdom*, App. No. 18860/19 (Communicated Case) (March 6 2020), <http://hudoc.echr.coe.int/fre?i=001-202151>. For a discussion of the litigation of this case in the United Kingdom, see Eugenio Velasco Ibarra, *Lee v. Ashers Baking Company Ltd and Others: The Inapplicability of Discrimination Law to an Illusory Conflict of Rights*, 83 MOD. L. REV. 190 (2019).

that the ECtHR is likely to face in future cases—the relationship between direct and indirect discrimination against same-sex couples in light of the ECtHR’s interpretation of the Convention as a living instrument that responds to legal and social changes within the member states.

I. Indirect discrimination claims before the ECtHR

The ECtHR first interpreted Article 14 to encompass indirect as well as direct discrimination in 2007. In *D.H. and Others v. the Czech Republic*, the applicants alleged that Czech special education screening tests caused a disproportionate number of Roma children to receive sub-par education, resulting in discrimination on the basis of race or ethnic origin.²⁴ The Court agreed, reasoning that “a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.”²⁵ An applicant raising an indirect discrimination claim is not obligated to show discriminatory intent by the legislature, administrative body or other actor that adopted or enforced the neutral provision.²⁶

An applicant must allege and prove three elements to make out a prima facie case of indirect discrimination before the ECtHR:

- (1) A “neutral rule, criterion or practice” that applies to all similarly situated groups in the respondent state;²⁷
- (2) The neutral provision adversely affects a “protected group”;²⁸ and
- (3) The effect of the neutral provision is to disadvantage members of the protected group when compared to other groups that are similarly situated.²⁹

The respondent state may justify the indirect discrimination by showing that:

- (1) The practice pursues a legitimate aim; and
- (2) The means to achieve that legitimate aim (i.e. the measure resulting in disparate effects) are proportionate and necessary to achieving the aim.
- (3) Proportionality is satisfied if:
 - a) there are no means of achieving the aim that would cause the protected group less harm than under the current means; and

²⁴ ECtHR [GC], *D.H. and Others v. the Czech Republic*, No. 57325/00, 13 November 2007, paras. 3, 19–24.

²⁵ *Id.* at para. 184.

²⁶ *Id.*

²⁷ See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE, HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW 54 (2018).

²⁸ *Id.* at 56.

²⁹ *Id.* at 57.

b) the aim to be achieved is sufficiently important to justify the harm.³⁰

To prove a prima facie case of indirect discrimination, applicants will often introduce statistical evidence showing that a protected group is disproportionately affected compared to a group that is similarly situated. The ECtHR commented on the use of statistical evidence in *D.H.*:

“[S]tatistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce.”³¹ When assessing statistics, the Court seeks “evidence that a particularly large proportion of those negatively affected is made up of that ‘protected group.’”³² When sufficient statistical information is proffered, the Court will “infer[] violations in individual cases from the finding of disproportionate prejudicial effect of measures on the [affected group] as a whole.”³³

However, statistics are not necessary for applicants to make out a prima facie case of indirect discrimination. For example, in *Oršuš and Others v. Croatia*, which concerned the disparate effects of an education rule on Roma children similar to that in *D.H.*, the ECtHR relied on the fact that the relevant provision “was applied exclusively to the members of a singular ethnic group, coupled with the alleged opposition of other children’s parents to the assignment of Roma children to mixed classes” as sufficient for the applicants to prove a violation of Article 14.³⁴

With regard to the respondent state’s burden of justification, the ECtHR will consider the legitimacy and proportionality of a measure in light of the objectives the government seeks to achieve. In *Eweida and Others v. the United Kingdom*, for example, the Court considered a challenge by a local official who refused, on the basis of her Christian faith, to register civil partnerships between same-sex couples.³⁵ The ECtHR treated the case as one of indirect discrimination, since the regulations applied in the same way to all registrars, but “had a particularly detrimental impact on [the applicant] because of her religious beliefs.”³⁶ The Court then considered whether the neutral policy – and the government’s refusal to make an exception

³⁰ *Id.* at 218. The ECtHR has not made a sharp distinction between direct and indirect discrimination claims when considering the legitimacy and proportionality of allegedly discriminatory measures.

³¹ *H. and Others, supra note,* at para. 188.

³² HANDBOOK, *supra note,* at 57.

³³ Barbara Havelková, *Judicial Skepticism of Discrimination at the ECtHR*, in FOUNDATIONS OF INDIRECT DISCRIMINATION LAW 87 (Hugh Collins & Tarunabh Khaitan eds., 2018).

³⁴ ECtHR [GC], *Oršuš and Others v. Croatia* [GC], No. 15766/03, 16 Mar. 2010, para. 155; *see also* ECtHR, *Biao v Denmark*, No 38590/10, 24 May 2016, para. 113 (attachment requirement for family reunification indirectly discriminated on the basis of race and ethnicity because it adversely affected mainly naturalized Danish nationals with non-white ethnic origins).

³⁵ ECtHR, *Eweida and Others v. United Kingdom*, Nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013, para. 26.

³⁶ *Id.* at para. 104.

for the applicant and others in her situation – “pursued a legitimate aim and was proportionate.”³⁷

With regard to legitimacy, the Court noted that requiring all registrars to solemnize civil partnerships achieved the “overarching policy of being ... a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others.”³⁸ The ECtHR further noted that the policy aligned with the Court’s own case law, which recognizes that “same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship,” and that “differences in treatment based on sexual orientation are particularly serious reasons by way of justification.”³⁹

On the issue of proportionality, the ECtHR first recognized that “the consequences for the applicant were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job.”⁴⁰ Yet the Court considered that the government’s policy “aimed to secure the rights of [same-sex couples] which are also protected under the Convention,” and that “the national authorities [enjoy] a wide margin of appreciation when it comes to striking a balance between competing Convention rights.”⁴¹ In these circumstances, “the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant’s discrimination claim” had not acted disproportionately.⁴²

II. The ECtHR confronts indirect discrimination on the basis of sexual orientation

Since the *D.H.* judgment in 2007, the ECtHR has decided at least sixteen cases of indirect discrimination.⁴³ In only one of these cases did the Court uphold a claim of indirect discrimination on the basis of sexual orientation. By contrast, the Court has addressed *direct* discrimination claims on the basis of sexual orientation for decades and has considerably expanded rights protections for same-sex couples. To date, however, the Court has held that the Convention does not require member states to extend full marriage rights to same-sex couples.⁴⁴

³⁷ *Id.*

³⁸ *Id.* at para. 105 (internal quotations omitted).

³⁹ *Id.*

⁴⁰ *Id.* at para. 106.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Havelková, *supra* note_, at 89 (explaining that the precise number of decisions is difficult to determine because the ECtHR sometimes assesses indirect discrimination claims without labeling them as such).

⁴⁴ *See* Part III.

In *Taddeucci and McCall v. Italy*, the applicants were an Italian national and a New Zealand national who had lived in New Zealand as an unmarried same-sex couple since 1999.⁴⁵ When the couple moved to Italy in 2003, the non-Italian partner applied for a residence permit “for family reasons.”⁴⁶ The authorities denied the application in 2004 and the applicants appealed the decision. In 2009, the Court of Cassation held that “the concept of ‘family member’ extended only to spouses” and could not be extended to “cohabiting partners.”⁴⁷ The court also rejected the claim of nondiscrimination on the grounds of sexual orientation, reasoning that “the non-eligibility of unmarried partners for a residence permit for family reasons applied to opposite-sex couples as well as same-sex partners.”⁴⁸ The couple then moved to the Netherlands and filed an application with the ECtHR, claiming that the denial of the residence permit constituted indirect discrimination on the basis of sexual orientation contrary to Article 14 in conjunction with the right to respect for family life protected by Article 8 of the Convention.⁴⁹

The ECtHR ruled in favor of the applicants, finding that the Italian government had engaged in indirect discrimination without an objective and reasonable justification. The Court initially accepted that the family residence policy applied equally to unmarried same-sex and different-sex couples. It thus (implicitly) concluded that Italy had not *directly* discriminated on the basis of sexual orientation because “it does not appear that the applicants ... were treated differently from an unmarried heterosexual couple.”⁵⁰ However, the Court found that this formally equal treatment did not resolve the *indirect* discrimination claim because the applicants’ situation cannot, however, be regarded as analogous to that of an unmarried heterosexual couple. Unlike the latter, the applicants do not have the possibility of contracting marriage in Italy. They cannot therefore be regarded as “spouses” under Italian law. Accordingly, as a result of a restrictive interpretation of the concept of “family member” only homosexual couples faced an insurmountable obstacle to obtaining a residence permit for family reasons. Nor could they obtain a form of legal recognition other than marriage, given that at the material time the Italian legal system did not provide for the possibility for homosexual or heterosexual couples in a stable relationship to enter into a civil partnership or

⁴⁵ ECtHR, *Taddeucci and McCall v. Italy*, No. 51362/09, 30 June 2016, para. 8.

⁴⁶ *Id.* at para. 9.

⁴⁷ *Id.* at para. 21.

⁴⁸ *Id.* at para. 22.

⁴⁹ *Id.* at paras. 25, 35. The applicants married in The Netherlands in 2010. The ECtHR defined the period of interference with their rights as beginning when the government denied their application for a family residence permit in 2004 and ending in 2009 when the Court of Cassation affirmed the denial and the applicants moved to the Netherlands. For this reason, the Court declined to consider whether the applicant’s subsequent marriage outside of Italy made them eligible for a residence permit in Italy for family reasons. *Id.* at paras. 61-62.

⁵⁰ *Id.* at para. 82.

a registered partnership certifying their status and guaranteeing them certain essential rights....⁵¹

The ECtHR also rejected the government's claim that the applicants' were merely "cohabiting partners" whose relationship could not be analogized to an opposite-sex married couple. Noting that Taddeucci and McCall had "obtained the status of an unmarried couple in New Zealand" and later married in the Netherlands, the Court reasoned that the applicants' "situation cannot be compared to that of a heterosexual couple who, for personal reasons, do not wish to contract a marriage or a civil partnership."⁵²

Once the Court determined that the applicants had presented a prima facie case for indirect discrimination, it proceeded to assess the legitimacy and proportionality of the Italian law. Citing to past direct discrimination cases, the Court emphasized that "differences based solely on considerations of sexual orientation are unacceptable under the Convention."⁵³ In this case, although "protection of the traditional family" *could* in principle be a legitimate state aim, the state must present "particularly convincing and weighty" reasons for discriminating on the grounds of sexual orientation.⁵⁴ Ultimately, the Court concluded that Italy had failed to present an adequate justification to exclude same-sex couples from obtaining residence permits.

The indirect discrimination argument was also raised in *Chapin and Charpentier v. France*.⁵⁵ In addition to challenging the restriction of marriage to different-sex couples as a form of direct discrimination, they also challenged France's civil union law, which was available to all couples, as a form of indirect discrimination. The applicants acknowledged that they could have registered their relationship as a *pacte civil de solidarité* (PACS) under the French Civil Code.

However, they claimed that the legal protections offered by the PACS were "far less than that resulting from marriage," in particular "as regards the right of residence, nationality, survivor's pension or property acquired during the union."⁵⁶ A third-party intervention

⁵¹ *Id.* at para. 84. In this respect, the ECtHR agreed with the arguments in a third-party intervention which argued that an "unmarried same-sex couple must be compared not with unmarried opposite-sex couples – who after all are permitted to marry – but with married same-sex couples." Taddeucci & McCall v. Italy, Written Submission of the International Commission of Jurists (ICJ), International Lesbian and Gay Association (ILGA)-Europe, and the Network of European LGBTIQ* Families Associations (NELFA) (May 18, 2012), para. 30. The brief also reviewed the decisions of "[a] number of courts around the world [that] have found that a difference in treatment based on marital status can have the effect of discriminating on the basis of sexual orientation when same-sex couples are prohibited from marrying." *Id.*

⁵² *Taddeucci & McCall, supra note,* at para. 85; see also Giulia Dondoli, *An overnight success a decade in the making: Indirect discrimination on the grounds of sexual orientation*, 18 INT'L J. DISCRIMINATION L. 5, 8-9 (2018).

⁵³ *Taddeucci & McCall, supra note,* at para. 89.

⁵⁴ *Id.* at para 93.

⁵⁵ ECtHR, *Chapin and Charpentier v. France*, No. 40183/07, 09 June 2016 (available only in French).

⁵⁶ *Id.* at para. 45 ("Ils admettent avoir accès au Pacs, mais font valoir que la protection juridique qu'il offre est largement inférieure à celle résultant du mariage. Ils énumèrent les différences entre les deux régimes, notamment en matière de droit au séjour, de nationalité, de pension de réversion ou de régime des biens acquis durant l'union.").

framed the difference between the two legal regimes as a type of indirect discrimination, reasoning that where “a same-sex couple ... seek[s] a right or benefit attached to marriage but are legally unable to marry,” the state must “provid[e] them with another means of qualifying for the right or benefit,” such as “an exemption from a requirement that they be legally married.”⁵⁷

The ECtHR declined to find a violation of the Convention. The Court first “reiterate[d] that States remain free under Article 14 taken in conjunction with Article 8 to open marriage only to heterosexual couples and that they enjoy a certain margin of appreciation in deciding the exact nature of the status conferred by other methods of legal recognition.”⁵⁸ It then reasoned that the legal differences between marriage and PACS regimes “correspond on the whole to the trend observed in other Member States” and did not exceed the State’s “margin of appreciation in the choice it made regarding the rights and obligations conferred by the PACS.”⁵⁹

Although the *Chapin and Charpentier* case falls more squarely within the direct discrimination framework (the main claim being that same-sex couples were expressly excluded from the full protection of marriage), it illustrates an important point about the relationship between direct and indirect discrimination claims before the ECtHR. When the Court holds that direct discrimination – such as exclusion from marriage – falls within the State’s margin of appreciation, it need not reach the question of indirect discrimination. When formal exclusion is permissible, then the disparate effects of that exclusion are also permissible. The next Part addresses the relationship between direct and indirect discrimination claims in more detail.

III. Direct and Indirect Sexual Orientation Discrimination and the “Living Instrument” Doctrine

The ECtHR’s case law regarding the legal recognition of same-sex relationships has been incremental. In its 2010 judgment *Schalk and Kopf v. Austria*, the Court avoided the question of whether any form of legal recognition for same-sex partnership was required under Articles 8 and 14 of the Convention, emphasizing the margin of appreciation available to states in

⁵⁷ *Chapin and Charpentier v. France*, Written Statement of FIDH (*Fédération Internationale des Ligues des Droits de l’Homme*), ICJ, the AIRE Centre, and ILGA-Europe (Oct. 27, 2009), paras. 29, 30.

⁵⁸ *Chapin and Charpentier v. France*, *supra* note, at para. 48 (“La Cour rappelle que les États demeurent libres au regard de l’article 14 combiné avec l’article 8 de n’ouvrir le mariage qu’aux couples hétérosexuels et qu’ils bénéficient d’une certaine marge d’appréciation pour décider de la nature exacte du statut conféré par les autres modes de reconnaissance juridique (*Schalk et Kopf* précité, § 108 et *Gas et Dubois* précité, § 66).”).

⁵⁹ *Id.* at para. 51 (“Pour autant que les requérants font valoir les différences existant entre le régime du mariage et celui du pacte civil de solidarité, la Cour réitère qu’elle n’a pas à se prononcer en l’espèce sur chacune de ces différences de manière détaillée (*Schalk et Kopf* précité, § 109). Elle note en tout état de cause, comme elle l’a relevé dans cet arrêt, que ces différences correspondent dans l’ensemble à la tendance observée dans d’autres États membres et ne discerne nul signe indiquant que l’État défendeur aurait outrepassé sa marge d’appréciation dans le choix qu’il a fait des droits et obligations conférés par le pacte civil de solidarité (*ibidem*).”).

regulating family recognition.⁶⁰ In 2013, the Grand Chamber held in *Villianatos v. Greece* that, while it was not ruling whether states were required to provide for civil unions or registered partnerships, if a state chose to offer a legal alternative to marriage, it must extend it to include same-sex couples.⁶¹ Finally, in 2015, the ECtHR held that states must provide some form of legal recognition for same-sex couples.⁶² In *Oliari v. Italy*, the Court explained that in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship.”⁶³

As noted in the introduction, several cases are currently pending before the ECtHR challenging the exclusion of same-sex couples from marriage, civil unions, and/or registered partnerships as well as from the administrative, tax, inheritance, and other benefits available only to opposite-sex married couples. Given the Court’s incremental expansion of what the Convention requires regarding recognition of same-sex relationships and sexual orientation discrimination in general, it seems likely that the ECtHR will rule in favor of the applicants in one or more of these cases in the near future.

The question for this paper is: How does the Court’s incremental erosion of permissible forms of direct discrimination against same-sex couples affect indirect discrimination claims?

Our preliminary answer to this question is as follows:

As long as direct discrimination is permissible, indirect discrimination will remain invisible; lawmakers are not obliged to even attempt facially neutral laws. However, the evolution of the Court’s case law, driven by growing European consensus, has resulted in the dismantling of laws that directly exclude same-sex couples. As these expressly discriminatory laws disappear, situations in which same-sex couples are excluded from neutral laws become more evident.

To illustrate this point, consider a parentage law that only permits a woman to adopt a child if the birth mother’s parental rights have been terminated. Such a law has a disproportionately harmful effect on same-sex couples in which two women have a concurrent parental relationship with the child. An indirect discrimination claim challenging such a facially neutral law would not arise, however, in a country that excluded LGBT individuals from adopting or that did not recognize same-sex relationships as conferring the legal status to trigger parental rights claims. In states where direct discrimination against same-sex couples is permitted, indirect discrimination is *a fortiori* also permissible.

⁶⁰ ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, paras. 103-109.

⁶¹ ECtHR [GC], *Villianatos v. Greece*, No. 29381/09, 07 November 2013, para. 92.

⁶² ECtHR, *Oliari v. Italy*, No. 18766/11, 21 July 2015, para. 185.

⁶³ *Id.* at para. 174.

Consequently, as the ECtHR chips away at laws and policies that directly discriminate against same-sex couples, we predict that more indirect discrimination claims will arise. This is especially likely in the European human rights context because of the incremental and evolutionary nature of the Court's jurisprudence.

Finally, because the ECtHR has not (yet) recognized that same-sex and different-sex couples must be treated identically, and because the Court relies on evolving European trends regarding the legal recognition of non-traditional relationships, countries that wish to resist a growing regional consensus in favor of equality have an incentive to create facially neutral laws that indirectly discriminate against same-sex couples. The Court has relied on applications that challenge laws that expressly exclude same-sex couples to develop its incremental narrowing of member state's margin of appreciation when it comes to matters of sexual orientation.

Governments are well aware that laws which directly discriminate are likely to come under particularly intense scrutiny by the ECtHR and that those laws may become the next stepping-stone in the Court's evolving equality jurisprudence.

At the same time, the Court still recognizes that the "protection of traditional families" is a legitimate justification under the Convention. Therefore, laws that are facially neutral as to sexual orientation, but which have the effect of excluding same-sex couples (such as laws involving adoption, parentage rights, and access to social benefits), may still fall within the state's margin of appreciation, even though similar laws that directly exclude individuals on the basis of sexual orientation are unlikely to pass muster under the Court's current test. The Court's case law thus allows for enough ambiguity for states that oppose LGBT rights to either (1) retain existing laws that have the effect of excluding same-sex couples from the benefits of marriage or

(2) devise new means of exclusion that achieve the same ends that is no longer permissible via directly discriminatory laws.

Indirect discrimination: turning a regressive space into a site for coalitional action

Alice M. Miller

As anyone who knows my work on sexuality, gender, and rights will attest, I tend toward centrifugal and inter-movement thinking—i.e., how does work “spin out into the world.” Even more particularly, in regard to the focus of this workshop on indirect discrimination in regard to sexual orientation and gender identity (SOGI), I would ask: how does argument and analysis in this discussion affect others not in the room, but who have stakes in how we argue for sexual and gender rights?

Thus, while much of this workshop may focus on the important doctrinal questions of how best to articulate the scope of norms of indirect discrimination vis a vis treaty or national law, or the evidentiary/documentation questions posed by how to demonstrate the operation of indirect discrimination, I want to ask a different question: *Do the ways that we identify, define and document harms to sexual rights* (here, the doctrinal frames and narrative structures used to bring claims under an indirect discrimination claim in the SOGI framework) *tend to open or close the possibilities for coalitions and joint advocacy work among related but not identically situated sexual and gender rights groups?*

My primary focus in this workshop is in regard to discrimination claims arising from the operation of the criminal law. I am motivated by the desperate need for stronger coalitional and solidarity politics around efforts to limit the role for policing, prosecution and incarceration vis a vis sexuality and gender expression, a solidarity which I believe is necessary to solve some of the many problems created by criminal law, which manifest in most societies as problems of equality, exclusion and racialized hierarchies.⁶⁴

Specifically, in regard to the question of indirect discrimination, I think we need to think about the implications of how we argue for “indirect discrimination” by producing fact patterns to show arbitrary, disparate, or aggravated impact against stigmatized sub-groups in those contexts in which the offending law is at least textually gender/sex identity neutral. As I will sketch out below, others *not* in the SOGI family also face discriminatory harms from laws which condemn adultery or debauchery, or criminalize prostitution or the risk of HIV transmission. I also push one step farther, asking us to think about the coalitional impacts of emerging norms crafted by sub-groups resisting what they see as the discriminatory application of gender neutral norms, such as what we can detect in the emergence of norms of “meaningful consent” in the face of gender neutral rape laws. In the claim of meaningful consent crafted by the sub-group of cis-gendered women, the concept of “informed consent” has begun to slip into the legal claim, such

⁶⁴ Miller, Alice and Roseman, Mindy (eds) BEYOND VIRTUE AND VICE: RETHINKING HUMAN RIGHTS AND CRIMINAL LAW (Univ of Penn Press, 2019)

that a differently situated sub-group (trans persons) may be facing new discriminations in the application of this new norm.

In what follows, I sketch out a few “eruptions” of disparate impact claims made for SOGI-related rights under gender neutral appearing statutes or law and then one emerging, apparently progressive (but I think, dangerous), norm against rape—informed consent—to consider the ways that the way sub-group specific claims are made visible can matter for how and whether we have potential for joint action across and among the many differently gendered sub-groups affected by criminal laws. I will close with some thoughts on some inclusive steps that show promise (in the context of adultery) and some possible principles, including using the frame of “gender stereotype” to highlight both difference in treatment and its connection to the treatment of other-gendered others, which we might want to also articulate to further delineate the scope of indirect discrimination.

I. Eruptions and partial evolutions of indirect discrimination resulting from gender neutral laws

It is important to note at the outset that as of yet, rights-based challenges to prostitution law and HIV criminalization have not met with total success at a global level, although there has been some movement in certain national and transnational spaces.⁶⁵ This means we are at an interesting (i.e. fraught) moment in crafting rights-based challenges to prostitution law and HIV criminalization: I would argue that, given that precarity, there is great importance to understanding how differently crafted challenges to indirect discrimination work not just for the named sub-group, but the unnamed.

a. Partial challenges to gender-neutral debauchery and prostitution laws (Egypt and the U.S.)

Although Law 10/1961 was enacted in Egypt to “combat debauchery and prostitution”⁶⁶ by persons of any gender, almost all the human rights-oriented documentation on this law calls attention to the unjust way that this law is used against male same-sex conduct in Egypt. There are numerous reports, generated locally as well as by INGOs, that focus on the arbitrary crackdowns, and abusive arrests and detention of gay-identified men, on the street or on the

⁶⁵ <https://www.nswp.org/nswp-plus/human-rights> , see also: https://law.yale.edu/sites/default/files/area/center/ghjp/documents/the_law_and_sex_work.pdf and <https://www.nswp.org/sites/nswp.org/files/framework-on-rights-of-sex-workers-cedaw-1.pdf> among the many documents which are beginning to address overarching rights claims.

⁶⁶ Articles of Law 10/1961 on the Combating of Prostitution. “Article 1:

(a) Whoever incites a person, be they male or female, to engage in debauchery or in prostitution, or assists in this or facilitates it, and similarly whoever employs a person or tempts him or induces him with the intention of engaging in debauchery or prostitution, is to be sentenced to imprisonment.....”

internet, under cover of this law.⁶⁷ Most of the gay rights world, I would hazard, thinks of this law as an “anti-gay law.” Human rights reports that document the facts call out the homophobia and abuse attached to the application of the law to gay-identified men—positing this as a clear case of (indirect) discrimination of a gender neutral law, and analyzing its application for violations of privacy, health, freedom from arbitrary arrest, freedom from torture, and other rights. I would note that although most human-rights oriented coverage of this law typically talks about it as affecting the “LGBTQ” population in Egypt, until recently, all the documentation focused on the G and the T (gay and trans) part of the acronym, with little evidence regarding how women identified as lesbians might be repressed under this law.⁶⁸ The “false solidarity” of inclusion of lesbians in rhetorical efforts to document laws as “anti-LGBTQ” is one kind of impact of unreflective, sub-group (here gay men and some trans) focus of documentation and analysis.

However, there is at least one more problem arising from the gay dominated/partial analysis through indirect discrimination claims, of the Egyptian debauchery and prostitution law. The partial, indirect discrimination analysis tends to support, not a full-throated abolition of this law, but perhaps having it “re-defined/read down” so as *not* to include same-sex sexual conduct. For a full move to decriminalize sex work, advocates *might* want to know about how this law is used to arrest and presumably abuse the rights of all persons—especially women of any kind—arrested for sex work or the exchange of sex for money. There is very little rights reporting in English on the application of this law to conventionally gendered women—and what little I found on its application in the context of prostitution to “women” is not linked, in analysis or in regard to impact, to the work on abuse of gay men under the law.⁶⁹

If the unjust application of the law to a sub-group is the focus of rights advocacy—here, in the Egyptian prostitution and debauchery law case, it would be built as an aspect of indirect discrimination—then the goals of law reform, and our definition of success will likely be much different—and in my opinion, partial, if measured in the achieving of sexual rights for all.

I also note that general prostitution laws (where they are gender neutral, as they are in most U.S. states) have a pattern of disparate application in place and time: here, think of the recent litigation in New York City challenging loitering for purposes of prostitution (also known as “walking while trans*”) which highlighted the intersection of racism and transphobia in the

⁶⁷ The Tahrir Institute for Middle East Policy, <https://timep.org/reports-briefings/timep-briefs/timep-brief-lgbtq-human-rights-in-egypt/>

⁶⁸ HRW <https://www.hrw.org/news/2020/03/20/egypts-denial-sexual-orientation-and-gender-identity>

⁶⁹<https://www.undp.org/content/dam/rbas/doc/Gender%20Justice/English/Full%20reports/Egypt%20Country%20Assessment%20-%20English-min.pdf>. Notably, the UNDP report notes that 40% of the women in jail for prostitution charges may meet the standard of having been ‘trafficked’—leaving even more unsaid about the practice and experience of women arrested under this law.

patterns of arrest.⁷⁰ One might make the claim that all prostitution law is applied disparately across the populations who sell sex: street-based vs hotel- and Internet-based; “foreign women” vs local populations, gay sex, trans sellers of sex, conventionally gendered women, etc. But some efforts to deploy indirect discrimination have had more success in making inroads into the application of the law than others. The game, if one is not interested in merely moving one’s sub-group up the sexual hierarchies of legitimacy and respectability is to attend to those who may be left out of the story and ensure that they are not “kicked to the curb.”⁷¹

b. Partial analyses of HIV criminalization laws (U.S.)

In the U.S., there are some 28 states (35+, depending on how you count enhanced punishment and/or aggravated felony statutes) which have HIV-specific criminalization laws.⁷² Social science research has demonstrated wildly uneven patterns of arrest: a few specific counties, for example in Michigan, Florida and California, produce almost all of the arrests.⁷³ In other states the laws are almost never used, or only used in “notorious” cases (which are often highly racialized, as in the case of the young black man accused of having sex with/potentially infecting some number of young white women.)⁷⁴ Notably, data on actual arrest practices (arrests, disposition, demographics of the arrested, etc.) are very hard to find across jurisdictions. What data there is, is highly local and almost always collected in ways that suggest that county arrest practices follow certain sub-group discrimination patterns, such as working through homophobia and primarily affecting men who have sex with men (MSM) and gay-identified men in Michigan,⁷⁵ or working through both racism and what Gail Pheterson referred to as the “whore stigma,” affecting almost exclusively women in California.⁷⁶ If we were to argue for highlighting the negative impact of these laws on MSM—which we certainly might want to do, to highlight the arbitrary, homophobic, and discriminatory nature of enforcement (and to a large extent, historical roots of the substance of these laws) and their undoubted effect on exacerbating stigma for MSM, we would miss—both as a matter of documentation and analysis of rights affected—their use on, and abuses experienced by women arrested and charged under the same laws elsewhere in the U.S.

⁷⁰ <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/peal-the-walking-while-trans-ban>; see also Kate Mogalescu, “Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk.” Univ of Miami L Rev (forthcoming)

⁷¹ Miller, Alice M., and Carole S. Vance. “Sexuality, human rights, and health.” (2003): 5.

⁷² <https://www.hivlawandpolicy.org/resources/map-hiv-criminalization-united-states-center-hiv-law-and-policy-updated-july-2020>

⁷³ Hoppe, Trevor. “From sickness to badness: The criminalization of HIV in Michigan.” *Social Science & Medicine* 101 (2014): 139-147.

⁷⁴ T. Shevory. Notorious HIV: The media spectacle of Nushawn Williams (University of Minnesota Press, 2004)

⁷⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5218970/>

⁷⁶ <https://williamsinstitute.law.ucla.edu/publications/hiv-criminalization-ca-penal/>

c. Sub-group status, disparate impact and the trouble with (partial) new norms

Because I am most interested in the ways we harness discrimination claims to the broader goal of law reform for all in sex regulation, my last sketched-out example draws from a “progressive” norm shift: the taking of consent to sexual conduct seriously. As articulated by women’s groups, the importance of consent to distinguish sex from rape has a long and storied history in women’s rights campaigning.⁷⁷ Notably, there has also been an effort to include both conventionally gendered men and trans* persons as rape victims: a push to gender neutral (regarding both perpetrator and victim in most but not all case), which is producing new documentation on the specific targeting of gay men/transwomen for rape.⁷⁸ In light of my concerns for attending to the differences governing sub-groups and their experiences of indirect discrimination, it is worth noting that the journey to inclusion of persons identified as men as rape victims has a very different trajectory to that of conventionally gendered women: recognizing men as rape victims at the hands of other men has meant recognizing a right to say yes to sex with men (i.e. distinguishing protected sex from criminal sodomy), whereas recognizing cis-gendered women as rape victims has meant recognizing a right to say no to sex (with men.)⁷⁹

In this effort, attention to what is “meaningful consent”—i.e., moving away from an assumption that women always say “yes” to sex, toward a substantive and contextually sensitive right to say no—has produced some new formulations of consent. In these new formulations, meaningful consent, sensitivity to context has begun to include a requirement that there be the transmission of key information, such as marital or HIV status of a sexual partner

This focus on meaningful consent has seen the migration of “informed consent” as a phrase in medical ethics of research participation move into inter-personal rights around sex, and into the business of the criminal law.⁸⁰ The notion of informed consent has proven dangerous already to one sub-group: what some advocates refer to as “having sex while trans*”—as a handful of cases suggest, including a number in the U.K. that “gender variance” can become a stand-in for gender fraud, with non-disclosure of one’s trans status a proxy for lack of [full and informed] consent.⁸¹

⁷⁷ Alice M. Miller with Tara Zivkovic, *Seismic Shifts: How Prosecution Became the Co-To Tool to Vindicate Rights* in Miller, Alice and Roseman, Mindy (eds) *BEYOND VIRTUE AND VICE: RETHINKING HUMAN RIGHTS AND CRIMINAL LAW* (Univ of Penn Press, 2019)

⁷⁸ HRW They Treated Us in Monstrous Ways at: <https://www.hrw.org/report/2020/07/29/they-treated-us-monstrous-ways/sexual-violence-against-men-boys-and-transgender>.

⁷⁹ Alice M. Miller, *What is the gender of conflict related sexual assault? An inter-disciplinary genealogy of current disputes*, *SEXUAL AND REPRODUCTIVE HEALTH MATTERS* (publication forthcoming).

⁸⁰ Carole S. Vance, “Interrogating Consent” #2 of *Global Dialogue, Criminalization, Choice and Consent* (CREA et al, Bellagio 2014) at: <http://www.creaworld.org/blog/global-dialogue-decriminalisation-choice-and-consent>

⁸¹ Sharpe, Alex. *Sexual Intimacy and Gender Identity' Fraud': Reframing the Legal and Ethical Debate*. Routledge, 2018.

This is a case of an effort toward progressive norm building in criminal law which harms through its partiality of sub-group origin.

II. Potentials for solidarity, gender 360 and fighting indirect discrimination in the name of fighting 'gender stereotype' for all

Protecting sub-groups who are harmed under apparently neutral statutes is a critical component of rights work. But it is, at least in my experience, a very tricky one, particularly as here where the issues are of sex and gender, and groups are seeking to make their gender and sexual differences both socially and legally knowable, and yet not legally problematic. This work is also tricky in that we are striving to differentiate and connect sex, sexuality, and gender systems, such that they are not conflated, but also that their connections are salient when appropriate, such as noting how men having sex with men are deemed to violate gender norms, just as women seeking to live alone without male partners are also violating gender norms. They face different systems of privilege and punishment, which vary again depending on age, race and place. Unfortunately, while it would seem these issues are connected, and that for example, concern with undoing gender stereotype and hetero-patriarchal privilege would be the business of a wide range of advocates, the actual advocacy is often very siloed: SOGI and/or LGBTQI+ rights, HIV/AIDS and rights, sex worker rights, GBV norms and rights of a wide range of affected persons (VAW/women's rights, children's rights, etc.).

a. the dangers of synecdoche for human rights campaigning

I believe that a clear-eyed review of these groups would note that they overlap in constituencies and demographics, but also that they tend to be defined by synecdoche: i.e. sub-groups which stand in for the whole, and in that standing in, crowd out other sub-groups.⁸² Of course, each sub-group needs visibility to get recognition for the specific manifestation of harm and barriers to effective rights protection—certainly this has been the story of much of SOGI+ work. But I think we also need more powerful, joined-up claims that focus on liberation from criminal regulation as the mode of social guidance. This is the argument for attending to how and what we document and its relation to others who are also affected but not caught by our fact patterns or our analytic frame.

b. Adultery decriminalization: an unexpected site of decriminalization tout court

⁸² Narayan, Uma, *Undoing the "Package Picture" of Cultures*, *Signs* 25(4): 1083- 86, 2000. Narayan uses the literary term synecdoche to analyze the way that in the 'rights vs culture' contests that arise so often in women's rights, aspects of complex and historically multi-faceted cultural regimes are reduced to a tiny set of practices, without which the culture and nation are said to be at risk.

Notably, in another area of criminal law there has been a fascinating and perhaps instructive alternative result. In 2012, the UN Working Group on Discrimination Against Women took a position favoring full de-criminalization of adultery, despite having received mostly evidence that it was women who were primarily and disparately affected by prosecution/threat of prosecution of adultery—even in countries where the adultery law was gender neutral.⁸³ The Working Group took this position because they determined that equalizing the adultery law (or calling for its equalization) across genders would always tend toward repression of basic rights of privacy and autonomy of everyone, including but not only of women as the subordinated group. It is not a fully coherent position as elaborated, but it is a practical and generous one, rooted, I think, in a feminist understanding of how gender stereotypes run deep and ultimately bind everyone in rights restrictive ways.

In closing, then, one way through the difficulties of searching for indirect discrimination that arises through the disparate and discriminatory application of criminal law is to embrace what some of us are calling a “gender 360 project,” which centers analysis and action on the fact that gender stereotypes are formed relationally: if we see gender, working through and with race, age and [dis]ability among the key vectors, as constructing hierarchies of inclusion/exclusion through role assignments based on ideas of masculinity and femininity *for all persons*, then we can see how if we change a norm of construction for femininity for persons deemed “women,” we may also be re-defining the reach of the gender norm of masculinity to them—and to others.⁸⁴ Thus, a “common voices/ all of us are affected, even if differently” analysis is the site from which I want us to think, with and ultimately through, not only frames of *disparate impact* but frames of *both/and* impacts.

⁸³ <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E>

⁸⁴ Fleming, P. J., Lee, J. G., & Dworkin, S. L. (2014). “Real Men Don’t”: constructions of masculinity and inadvertent harm in public health interventions. *American journal of public health*, 104(6), 1029-1035.]

What is the Right Against Indirect Discrimination on the Basis of Sexual Orientation and/or Gender Identity?

Gerald L. Neuman

The pursuit of equality in international human rights law includes both prohibitions of intentional discrimination and prohibitions of practices with discriminatory impact on groups of persons. The latter category, often designated as “indirect discrimination,” raises numerous questions that have not been fully explored.

Indirect discrimination norms generally require that sufficient justifications must be provided for actions with differential impact on the specified grounds. Some of the questions that arise concern the purpose served by the indirect discrimination norm, the scope of the actions that the norm regulates, the kind of showing of differential impact that must be made before justification is required, and the type or strength of the justification that must be provided. In the context of international human rights norms, other questions relate to the nature of the international oversight of the application of nondiscrimination rules by national authorities.

Such questions can be framed in purely normative terms or in relation to particular legal systems of domestic or transnational law. Under the U.S. Constitution, the Equal Protection Clause does not include a prohibition of actions with discriminatory impact based on sex, sexual orientation, or gender identity, but certain statutory provisions applying to certain fields of activity, such as employment and housing, do. Some human rights treaties expressly prohibit forms of discrimination both with regard to their purpose and with regard to their effect, while other treaties that are more generally phrased are interpreted as doing so.

[1] Theorists disagree on whether indirect discrimination is morally wrong for the same reasons why purposeful discrimination on particular grounds is morally wrong – such as denial of respect, disregard of merit, or irrationality – or whether indirect discrimination is wrong for different reasons.⁸⁵ Others maintain instead that acts of indirect discrimination, in contrast with direct discrimination, are not in themselves morally wrong. Overt discrimination treats like persons differently, conflicting with a vision of formal equality; indirect discrimination rests on a conception of substantive equality that insists on unlike persons being treated in an appropriately different manner. Some arguments for the moral wrongfulness of indirect discrimination depend on the relationship between the indirect discrimination and prior occurrences or existing patterns of direct discrimination. Some arguments distinguish between individuals’ moral duty not to engage in indirect discrimination and the obligation of society as a whole to avoid and prevent indirect discrimination. The latter may require transformative measures to reconfigure the

⁸⁵ For a survey of positions, see Andrew Altmann, “Discrimination,” in *The Stanford Encyclopedia of Philosophy*, **Error! Main Document Only.**<https://plato.stanford.edu/entries/discrimination/> (revised 2020).

structures that cause indirect discrimination. Other theorists assert an individual moral duty not to compound existing societal injustice.

From a purely normative perspective, different accounts of *why* indirect discrimination is wrongful may lead to different conclusions about *when* it is wrongful – for what categories of persons as victims, for what categories of actors, and what features of an action determine its wrongfulness. Whether a group must be socially disadvantaged to count as a subject of indirect discrimination may depend on which explanation applies. Disagreements of this kind may lie behind differing interpretations of indirect discrimination favored by different judges or different legal systems.

Even if indirect discrimination is not considered morally wrong, there may be other reasons to adopt legal rules prohibiting indirect discrimination. Preventing a particular kind of indirect discrimination may be useful as a matter of social policy in a particular time or place. Laws against indirect discrimination have also been defended instrumentally as a supplement to laws prohibiting intentional discrimination, in order to prevent their circumvention and surmount difficulties of proving hidden motives.

These philosophical debates illuminate, but do not fully guide, the proper interpretation of human rights treaties.

[2] A brief indication of the plurality of United States antidiscrimination norms may be useful. I refer to them not as models to be emulated but as illustrating the existing legal variety.

Prohibitions of action with discriminatory impact based on sex form part of statutory antidiscrimination law at both the federal and state level. The U.S. Supreme Court first articulated its “disparate impact” approach to racial discrimination in the field of employment in the famous decision *Griggs v. Duke Power Company* (1971), which has had global influence.⁸⁶ Interpreting Title VII of the Civil Rights Act of 1964, the court held that the Act also proscribed “practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.” A practice that has racially exclusionary effect must “be shown to be related to job performance.” In contrast, the Supreme Court held in *Washington v. Davis* (1976), that the constitutional doctrine of equal protection did not support heightened scrutiny of facially neutral practices with racially disparate impact but no showing of discriminatory purpose.⁸⁷

The development of disparate impact standards in U.S. statutory law over the following half century has been complex. The Supreme Court diluted the content of the disparate impact doctrine under Title VII in 1989, requiring plaintiffs to isolate the statistical effect of specific challenged practices, decreasing the justification required for business necessity, and putting the burden on plaintiffs to prove that alternative measures would be equally effective and not more

⁸⁶ 401 U.S. 424 (1971).

⁸⁷ 426 U.S. 229 (1976).

costly.⁸⁸ Congress pushed back against this dilution in 1991, expressly codifying the disparate impact doctrine, and shifting the burden of proof on business necessity back to the employer, but without successfully clarifying a higher standard of justification.⁸⁹

The Supreme Court has interpreted some other federal antidiscrimination statutes that textually resemble Title VII or have language about effects as also regulating disparate impact, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Fair Housing Act. But merely prohibiting “discrimination” does not suffice to impose a disparate impact norm.⁹⁰

Turning to discrimination on the basis of sexual orientation and/or gender identity, Title VII prohibits employment discrimination “because of [one’s] race, color, religion, sex, or national origin,” and both the “disparate treatment” concept of intentional discrimination and the “disparate impact” concept of discriminatory effect apply to all of these. In 2020, the Supreme Court held in *Bostock v. Clayton County* that intentional discrimination based on being homosexual or transgender amounts to intentional discrimination “because of sex.”⁹¹ The implications of that decision for indirect discrimination claims have not yet been determined.⁹²

Nearly all of the states also have statutes prohibiting discrimination in private employment, and some of those expressly include sexual orientation, or both sexual orientation and gender identity, among the regulated grounds.⁹³ Some of these statutes apply a disparate impact concept as well as a disparate treatment concept.

Where public employment is concerned, and other public policies more generally, other constitutional limitations with regard to sexual orientation or gender discrimination may also become relevant, such as rights to sexual autonomy and family life that receive substantive protection under the Due Process Clause. This clause was involved in the Supreme Court’s decisions in *Lawrence v. Texas* (2003) and *Obergefell v. Hodges* (2015), protecting same-sex sexual activity and same-sex marriage.⁹⁴ The reasoning in those cases leaves somewhat opaque what form of “scrutiny” the court was applying. It is also unclear what methodology the Supreme Court would employ in analyzing constitutional challenges to *intentional* discrimination on the basis of sexual orientation or gender identity. The Equal Protection Clause also formed part of

⁸⁸ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1990).

⁸⁹ See 42 USC 2000e-2(k).

⁹⁰ See *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Texas Dept of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

⁹¹ 140 S. Ct. 1731 (2020).

⁹² In 2021, newly inaugurated President Biden issued Executive Order 13,988, 86 Fed. Reg. 7023 (2021), adopting the interpretation more generally that “laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientations, so long as the laws do not contain sufficient indications to the contrary.”

⁹³ See Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 89 *Law & Contemp. Problems* 115 (2016)

⁹⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

the reasoning in *Obergefell*, and was invoked in the earlier case of *Romer v. Evans* (1996) to invalidate a state constitutional provision designed to totally exclude discrimination on the basis of sexual orientation from the scope of state and local antidiscrimination law; it nonetheless remains difficult to interpret the form of equality analysis that these cases applied.⁹⁵

[3] At the global level, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) guarantees equal protection of the law and requires states to protect everyone against discrimination “on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The Human Rights Committee, the treaty body created to monitor compliance with the ICCPR, interprets this obligation as applying to both direct and indirect discrimination by both public and private actors. The Human Rights Committee interprets Article 26 as including discrimination on grounds of sexual orientation (and of gender identity). Initially the Committee characterized such discrimination as included under the reference to “sex” (see *Toonen v. Australia* (1994), para. 8.7), but over time this may have become a freestanding ground (see *X v. Colombia* (2007), para.7.2; but see id. para. 9; *Fedotova v. Russian Federation* (2012), para. 10.5).⁹⁶ The Committee on Economic, Social and Cultural Rights (CESCR) has expressly categorized discrimination on grounds of sexual orientation or gender identity as “other status” discrimination under article 2(2) of the International Covenant on Economic, Social and Cultural Rights (see CESCR General Comment No. 20 (2009), para. 32).

The Human Rights Committee is in the habit, when it reviews states’ reports on their compliance, of recommending the enactment of comprehensive antidiscrimination legislation that covers all the types of discrimination addressed by Article 26.⁹⁷ The Committee recognizes that practices with differential effect based on a covered ground are not absolutely prohibited, but rather they must be reasonable and objective and serve a legitimate purpose; in this regard, reasonableness includes an inquiry into proportionality.⁹⁸

The European Court of Human Rights similarly understands the concept of indirect discrimination as involving the absence of “a ‘reasonable relationship of proportionality’ between the means employed and the aim sought to be realized.”⁹⁹ The African Court of Human and Peoples’ Rights has interpreted equality under the African Charter as prohibiting indirect

⁹⁵ 517 U.S. 620 (1996).

⁹⁶ *Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992 (1994); *X v. Colombia*, UN Doc. CCPR/C/89/D/1361/2005 (2007); *Fedotova v Russian Federation*, UN Doc. CCPR/C/106/D/1932/2010 (2012).

⁹⁷ See, e.g., Concluding observations on the fifth periodic report of the Netherlands, UN Doc. CCPR/C/NLD/CO/5 (2019), para. 14 (recommending that the state’s legislation “[p]rovides full and effective protection against discrimination on all the prohibited grounds under the Covenant in all spheres, including the private sphere, and prohibits direct, indirect and multiple discrimination”).

⁹⁸ See *Genero v Italy*, UN Doc. CCPR/C/128/D/2979/2017 (2020) paras. 7.3-7.6.

⁹⁹ E.g., *D.H. v The Czech Republic*, App. No. 57325/00 (ECHR 2007) (Grand Chamber), para. 196; *Di Trizio v Switzerland*, App. No. 7186/09 (ECHR 2016), para. 91.

discrimination, subject to a requirement of proportionate justification.¹⁰⁰ The Inter-American Court of Human Rights has asserted that there is a *jus cogens* rule of international law that prohibits all forms of discrimination, both direct and indirect, by all actors, public and private, entailing a requirement of proportionality, and requiring positive action to redress discriminatory situations.¹⁰¹ The Inter-American Court has discussed issues of discrimination based on sexual orientation or gender identity at length in its Advisory Opinion OC-24/17, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (2017).

The common invocation of proportionality in the context of the human right to equality, however, does not preclude a variation in the intensity of the justification required when differential treatment is based on different grounds. Even as to those grounds specifically listed in the relevant treaty provisions, the European Court of Human Rights has made clear that some criteria of differentiation require more “weighty” reasons than others, and at times referred to vulnerability as one of the factors increasing the needed weight.¹⁰² This practice has some kinship with U.S. constitutional doctrines of suspect classification and tiers of scrutiny. The Court has said that differentiation on the basis of sexual orientation or gender identity requires “particularly serious reasons,” or “particularly convincing and weighty reasons,” with a narrow margin of appreciation, but also that this margin of appreciation may vary depending on the subject matter being regulated.¹⁰³ The Inter-American Court has also emphasized a group’s being “traditionally marginalized, excluded or subordinated” as a factor calling for more rigorous examination of the justification.¹⁰⁴

[4] One might then ask, what sort of comprehensive anti-discrimination legislation should states enact, and how should it apply to indirect discrimination on grounds of sexual orientation and/or gender identity? Should all states adopt a generally phrased prohibition on public and private practices that have disproportionate effect on people of any particular sexual orientation, or any particular gender identity, and that lack a legitimate and proportionate justification? Should

¹⁰⁰ *Kambole v. United Republic of Tanzania*, App. No. 018/2018 (Afr. Ct. HPR 2020), paras. 69-72. Toward the end of 2020, the African Court of Human and Peoples’ Rights delivered an advisory opinion on vagrancy laws in which it explained that “laws with discriminatory effects towards the marginalized sectors of society” are not compatible with the equality guarantees of the African Charter, and referred to “the gender-nonconforming” as one of the relevant underprivileged groups. Advisory Opinion 001/2018, *The Compatibility of Vagrancy Laws with the African Charter on Human and Peoples’ Rights and Other Human Rights Instruments Applicable in Africa* (ACtHPR 2020), paras. 73, 70.

¹⁰¹ See, e.g., *Case of the Mapiripán Massacre v. Colombia*, 134 Inter-Am. Ct. H.R. (ser. C) (2005), para. 178; Advisory Opinion OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*, 18 Inter-Am. Ct. H.R. (ser. A) (2003), para. 101-05.

¹⁰² See *Biao v Denmark*, App. No. 38590/10 (ECHR 2016) [GC], paras. 92-93; *Chabauty v. France*, App. No. 57412/08 (ECHR 2012) [GC], para. 50; *Horváth and Kiss v Hungary*, App. No. 11146/11 (ECHR 2013), para. 128.

¹⁰³ *Hämäläinen v. Finland*, App. No. 37259/09 (ECHR 2014) [GC], para. 109; *X and Others v. Austria*, App. 19010/07 (ECHR 2013) [GC], para. 99, 148; *Taddeucci and McCall v. Italy*, App. No. 51362/09 (ECHR 2016), paras. 87-89 (indirect discrimination).

¹⁰⁴ Advisory Opinion OC-24/17, *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, 24 Inter-Am. Ct. H.R. (ser. A) (2017), paras. 66, 81.

application of this general standard be left to case-by-case adjudication without further legislative guidance? Or should more specificity be given with regard to proportionality and the normative weight that attaches to various factors in its evaluation? Does the “weight” attached to indirect discrimination differ from the “weight” attached to direct discrimination, and if so how? Should the evaluation be conducted in the same way in all fields of public and private activity, or should indirect discrimination be more strictly regulated in certain contexts? Should the prohibition of indirect discrimination be truly comprehensive and exceptionless, or is there room for statutory carve-outs, perhaps to accommodate the rights of others – including religious believers, who are also protected by human rights treaties, and who may also be beneficiaries of a prohibition of indirect discrimination? (In fact, the questions I ask here are adapted from questions I formulated for an earlier workshop on indirect discrimination on grounds of religion.¹⁰⁵)

With regard to indirect discrimination by private actors, Professor Tarun Khaitan has pointed out that antidiscrimination law is often asymmetric, regulating employers’ choice of employees but not employees’ choice of employers, landlords’ choice of tenants, and places of public accommodations but not their consumers.¹⁰⁶ These exclusions may have practical reasons or be based in individual liberty, but it is not because discrimination by consumers is never morally wrong. Moreover, antidiscrimination laws sometimes set out limitations on the size of the employers, landlords, and other businesses they regulate.

The disproportionate effect of some public and private practices may be a consequence of prior (or current) direct discrimination, while other examples of disproportionate effect may instead reflect factors that only happen to be empirically correlated with being a member of a particular group of people in a particular society. Should that distinction be relevant to the analysis?

With these questions in mind, one might further ask how much variation in the answers from state to state is appropriate. May or should states concentrate on different fields for regulation, or enact different exceptions? May or should they adapt their legislation to particular patterns of systematic disadvantage in their societies? Or do universal rights require uniform legislation?

In the Concept Note for the workshop, Hypotheticals 2, 4 and 5 were designed to raise issues concerning where indirect discrimination law should intervene in the private sector, among other issues. Hypotheticals 1, 4 and 6 were designed to raise issues regarding consequence, correlation, and social salience, among others.

Evidently legal systems do vary in how they treat these issues, and it may be argued that some variation is appropriate. Leaving all issues of indirect discrimination open for case-by-case adjudication may be unfair to both complainants and defendants and may not provide an

¹⁰⁵ See also Gerald L. Neuman, Questions of Indirect Discrimination on the Basis of Religion, 34 Harv. Hum. Rts. J. _ (2021) (forthcoming).

¹⁰⁶ Tarunabh Khaitan, A Theory of Discrimination Law 198-200 (2015).

effective means of implementation for the norm. Societies cannot really strive to eliminate every conceivable disadvantage that correlates with every characteristic protected in human rights law, and the contexts in which disadvantage is most urgent may depend on local conditions.

If that perspective is correct, then perhaps at the global level, human rights bodies should not insist that all states pursue the same model for regulating indirect discrimination, but should monitor the suitability of each state's legislation to the problems that it faces. In reviewing individual cases that have already been before national courts, global human rights bodies should not assume that each case should be decided exactly as the global body would have decided it in the first instance, but should examine the reasoning that produced the prior decision. At the regional level, the European Court of Human Rights would be justified in affording a certain margin of appreciation – perhaps different from what the Court currently provides in some respects.