

Indirect Discrimination and the COVID-19 Pandemic

February 2021 Workshop Proceedings
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Introduction

The Harvard Law School Human Rights Program (HRP) convened a workshop on February 12, 2021, for the purpose of exploring in a comparative and cross-disciplinary manner the phenomenon of indirect discrimination (or practices with discriminatory impact), on grounds including but not limited to sexual orientation and gender identity, during the COVID-19 pandemic. This Report presents a summary of the discussion that took place (by remote technology) 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, with regard to discrimination on bases including age, disability, ethnicity, race and culture, gender, indigeneity, and religion, as well as intersectionality, but also questions such as the strategic value of framing arguments in terms of indirect discrimination, in comparison with other rights framings, and the relationship between remedies for particular groups and remedies directed at broader reforms. The workshop built on a previous HRP workshop in October 2020 that dealt specifically with indirect discrimination on the basis of sexual orientation or gender identity, and many of the participants in February had also attended the prior event.¹ Participants in February included mandate holders of United Nations special procedures and the Inter-American Commission on Human Rights, current and former members of international treaty bodies, academics from

¹ Proceedings of the October 2020 workshop are posted as a Working Paper on the HRP website, http://hrp.law.harvard.edu/wp-content/uploads/2021/05/IndirectDiscrimination_WorkshopProceedings_October2020.pdf, and on SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3843395. These workshops were part of a series, which began with an April 2020 workshop on indirect discrimination on the basis of religion or belief. Papers from the April 2020 workshop were published as the Summer 2021 issue of the Harvard Human Rights Journal, <https://harvardhrj.com/symposia/>.

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, followed by a closing discussion of next steps to be taken:

1. Short recapitulation of the October workshop
2. Discussion of hypotheticals in the Concept Note
3. Particular elements of indirect discrimination: Theory and purpose(s) of the prohibition against indirect discrimination
4. Particular elements of indirect discrimination: Evidence
5. Particular elements of indirect discrimination: Justification
6. Particular elements of indirect discrimination: Reparations
7. International oversight of national application

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 February 2021 workshop were HRP co-Director Gerald L. Neuman and Victor Madrigal-Borloz, the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, who is Eleanor Roosevelt Senior Visiting Researcher at HRP. Dana Walters, Ellen Keng, Chetna Beriwalla and María Daniela D. Villamil provided essential logistical support.

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

Segment One: Short recapitulation of the October workshop

Victor Madrigal-Borloz provided an overview of the discussion at the October 2020 workshop on the concept of indirect discrimination on the basis of sexual orientation or gender identity. It had followed the previous workshop on indirect discrimination on the basis of religion, and some of the discussions in the October workshop addressed the dilemmas of confluence or conflict, real or apparent, between freedom of religion and belief and the right to live free of discrimination and violence based on sexual orientation and gender identity. That workshop had about 25 participants, similar to the number in the present workshop.

The October workshop was divided into seven segments and one brainstorming segment. It began with a comparative survey in which United States, European, Inter-American, and international human rights law standards were analyzed, describing commonalities and differences in how indirect discrimination has been codified. A main line of discussion running

through the workshop began in the second segment, relating to the purpose of the prohibition against indirect discrimination, and in particular the fact that structural discrimination is often the result of a strong disconnect between the dominant group and victims in society; one expert pointed out that this is about regulating what a reasonable person in society ought to know about marginalized groups and people who are unlike themselves. This idea of responsibilities in relation to the knowledge of the other has a number of dimensions that are not only strictly legal but also from the angle of ethics. Participants explored during the workshop certain perhaps counterintuitive traits of the concept of indirect discrimination, including its relation with notions of absence of wrongfulness, the exploration of culpability and complicity, and its possible relation with notions of efficiency in society.

All of these discussions formed part of the point of departure in the second segment related to purpose, but also flowed into the third segment related to the aspect of scope and the methodology of the norm, and the fourth segment related to justification and evidence. Then came particular thematic discussions related to religion and sexual orientation and gender identity, which tried to separate arguments that have been amalgamated in public, political and other types of discourse, especially combining issues of transcendence and legal protections and the behavior of religious and faith-based institutions.

Within this set of segments, a number of observations aimed at highlighting and discussing the different contexts in which direct and indirect discrimination are used; in particular, they moved to the analysis of how indirect discrimination is a tool in the field of political advocacy that may have different traits from indirect discrimination when used in the language of litigation and adjudication. This led to a discussion of reparations, which will be summarized in more detail at the beginning of a separate segment on that subject in the present workshop, which will begin with the idea of non-repetition as a main driver of litigation about indirect discrimination.

Two further observations – first, that a brief summary does not do justice to the richness of the dialogue, which has been documented to ensure that it becomes part of the knowledge stock. And second that the workshop in October verified the importance of intersectional thinking in the analysis of discrimination. When talking about sexual orientation and gender identity, it was often noted that the analysis involving power relations must also take into account issues of poverty, gender violence, and other basic determinants of experiences of privilege or discrimination for different persons.

The final segment in the workshop, after one on international oversight, focused on the open question whether legal arguments based on indirect discrimination are useful or counterproductive in the current situation. Hopefully the present workshop will show that indirect discrimination can be an extraordinarily useful construction for the purpose of addressing violence and discrimination in the lived experiences of people.

Segment Two: Discussion of hypotheticals in the Concept Note

The **segment moderator** began by recalling the three hypotheticals in the concept note, and hoping that it would be possible to address all three of them in the segment.

The first hypothetical is about access to health services, specifically gynecology, for transgender persons, with a number of subquestions about when this is an issue of discrimination and how it should be approached in national or international law. This brings us immediately to the issue of structural discrimination, and a particular type of structural discrimination that has been recognized relatively recently, which gives rise to even more questions regarding who can fairly be held responsible for this type of discrimination. One participant, Pieter Cannoot has discussed this hypothetical extensively in his paper, identifying a number of challenges inherent in the application of an indirect discrimination framework to this case, and also proposing several frameworks. Also the paper of Alice Miller and Jessica Tueller highlights in the context of this hypothetical how social activism can draw on work already done by sexual and reproductive health advocates and how this can be a terrain for joint advocacy work on gender.

A **first participant** said that he was drawn to this hypothetical because his work has focused extensively on the experience of trans persons, especially within the autonomy framework, which is often connected to one of the core struggles that trans persons face in society, the legal recognition of gender identity. He has been thinking about the inherent value of the autonomy framework to move beyond some of the issues that an inequality/nondiscrimination framework confronts us with, particularly the idea that the equality framework presents a certain assimilation, that women can aspire to rights that are already experienced by men in society. The emerging right to gender autonomy can be applied to the hypothetical where a trans person is confronted with the negative consequences of the structures of society, including how trans persons are overlooked in general health care settings. In the Belgian context it was striking that when the gender recognition act was being changed nobody was really talking about the effects of gender self-determination on the structure of society. The idea was pretty much that gender recognition was only a trans issue, that gender autonomy was only a trans issue, and that it would not have any consequences to the structure of society. Perhaps we can overcome some of the inherent challenges of indirect discrimination by focusing instead on a framework of gender autonomy which would imply negative obligations but also positive obligations on behalf of the state to work towards structural change, cultural change, not only in the vertical relation between state and individual but also in the horizontal relation between individuals. That would potentially also involve a private medical professional (as in the Hypothetical) who does not have any expertise in treating trans persons – whether within the autonomy framework that would be seen as a limitation on the capacity of a trans person to live up to their potential or to be enabled by good health to explore their own ambitions in society.

A **second participant** added observations from the Inter-American experience. First, Advisory Opinion No. 24 from the Inter-American Court explained that the lack of recognition of gender and sexual identity could result in lack of legal protection. It is a priority for the Inter-American Commission on Human Rights and its Rapporteur for rights of LGBTI persons to disseminate the advisory opinion on gender identity rights. Second, there is definitely an association between indirect discrimination and structural violence and violations of human rights. The Inter-American Commission needs to attack the causes of structural discrimination and institute comprehensive reparations. State legal duties to prevent based on guarantees of non-repetition require transformative change in public policy and efforts to guarantee substantive equality.

A **third participant** observed that the world of sexual and reproductive health advocacy, and programming and policy work, has really addressed this issue in the context of both individual provider competence to do particular forms of care that are necessary to realize rights, and also of health justice, the notion that in health, structural determinants of health are always already to be studied and intervened in. The recent report of the Office of the High Commission for Human Rights in regard to questions raised by the regulation of athletes, the report on race and gender in the context of sport, has raised possibly for the first time the notion of autonomy as an element to be spelled out in the human rights framework. The concept of autonomy requires multiple forms of rights guarantees – it is not only individually exercised, but is built on material conditions, which include access to the information necessary to understand what the rights constitute, the ability to have the legal right to act on it, and the material conditions, including both access to services and accountability for the competency of those services. In the health world this is assessed according to availability, accessibility, acceptability and quality. All of these standards being built up as a health justice component are very useful to the present conversation.

Another issue involves questions of fertility, and the way in which “trans-competent care”, and other forms of care are needed for people to guarantee the ability of both their bodies and their selves to reproduce, whether as a matter of biology or as a matter of social reproduction. Infertility is caused by and becomes a component of discriminatory practices for many people who are gender diverse or sexually different.

A **fourth participant** added that previous gains by sexual and reproductive health advocates include General Comment No. 22 of the Committee on Economic, Social and Cultural Rights (CESCR). It basically tells us that an individual provider could refuse care, but if there is an entire system that is refusing care, then we have a violation of the human right to health. Current efforts to change such systems by abortion advocates would change medical education by training providers to provide care that would be considered controversial or unknown. This is an opportunity for joint advocacy work between groups.

A **fifth participant** asked, as a bit of a provocateur, whether attempts to distinguish infertility from what is sometimes called disfertility – that is, fertility problems that are not a result of medical reasons, as for single women, or lesbian women, or trans people – are an appropriate site

for analysis in terms of indirect discrimination. One might hold the view that, as a matter of healthcare obligations, the distinction between infertility and dis fertility was justified and not discrimination, and yet still consider that in terms of the state's broader obligations it is discriminatory not to provide a non-health benefit to dis fertile individuals to allow them to achieve what infertile people achieve by means of a health right. Is that too clever or too cute an argument, or too much separate spheres, or does it sound correct?

To clarify further, when we consider what a "right to health" encompasses, it's not all well-being or happiness, but rather there is something narrower called "health." One's concept of health might be connected with something like species-typical functioning, or another kind of definition by which infertility is a deviation from a proper health state, and people with infertility can make a claim similar to people with other disabilities, that they are missing something – as opposed to the claim of dis fertile people who want to realize their particular life plan but need assistance for reasons not relating to a deficit in their species-typical functioning. One's claim as a gay person for the state to pay for one's childbearing and childrearing resembles more the claim (to borrow an example from T.M. Scanlon) that the state should pay for me to tithe to my God, because both further a life plan that might be a worthwhile life plan, but are not a life plan that's related to health.

Another participant responded that the stated assumption about "species-typical functioning" sets up fertility and reproduction as a norm in a normatively objectionable manner. There are other ways of understanding the sort of human conditions that give rise to a concern for infertility as a human right beyond access to health care. This would be an interesting discussion, but probably one that we don't have time for in this workshop, before we could get to the specific question that the fifth participant raised.

The **sixth participant** added further aspects of infertility to the discussion, particularly relating to indigenous peoples, including forced infertility as a result of chemical fertilizers and forced sterilization of indigenous women and men.

The **segment moderator** called attention to Hypothetical No. 6 in the Concept Note for the workshop, involving an imaginary gender community that goes barefoot as an expression of their gender identity, and members of that community who migrate to another country that has traditionally banned going barefoot in public buildings on public health grounds. This hypothetical resembles examples of religious discrimination against minorities, such as headscarf bans, and burkini bans, and so raises a classic reasonable accommodation case where the question is whether to grant an exemption from a general rule. When the cases concern religion, they can be discussed in terms of religious freedom, or sometimes freedom of expression or the right to privacy, or alternatively as discrimination on grounds of religion, or sometimes on grounds of gender. In domestic law, the choice of the discrimination approach or the substantive right approach can lead to very different types of reasoning. But in international human rights law, there is often parallel reasoning, whether it's a discrimination framing or a substantive right

framing, and the case will really turn on proportionality analysis. Whether the restriction of the human right or the lack of differentiated response is proportionate or not with regard to a legitimate aim. The European Court of Human Rights will generally examine such a case under the substantive right, and then it will either say that it is not necessary to examine the discrimination claim, or examine it briefly but refer to its reasoning developed under the other right. If so, then what do we expect an indirect discrimination claim to add? Another choice for a supranational body is that they can either examine the facts relating to the justification of the measure and evaluate the evidence themselves (for example the contested public health effect of going barefoot in the hypothetical), or they can do a more procedural type of review, on whether the national authorities reasonably came to the conclusion that the measure was justified. This latter is of course a development that we see lately in the European Court of Human Rights, which is getting a very mixed review from scholars.

The **seventh participant** began by emphasizing the difference, discussed in the October workshop, between a reasonable accommodation that privileges people on the basis of fitting into identity boxes and a disparate impact remedy that basically asks whether there is a sufficient justification for the rule as applied to anyone. In the United States, it seems that the privileging of religion is intensifying, and is encouraging people to fit their desires and needs into preset boxes, especially the religion box; but it is not helpful just to add the gender identity box. A more fruitful way of proceeding is to ask as the philosopher Brian Barry did years ago: if there is not a sufficient justification to impose this rule on members of particular identity groups, is there a reason to have the rule at all? The barefoot example illustrates this well, and there don't seem to be many trade-offs in saying that anyone who wants to go barefoot may do so, although perhaps there should be publicity about the risks of earth-borne diseases or cuts in the theatre, whatever the health justifications or other material justifications there were for the rule in the first place. Rather than antidiscrimination reasoning, it would be better to rely on a right to privacy or private life as in Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

Segment Three: Particular elements of indirect discrimination: Theory and purpose(s) of the prohibition against indirect discrimination

The **segment moderator** began by describing lessons from the discussion in the October workshop of the theory and purposes of the prohibition of indirect discrimination. One easily accepted use of indirect discrimination relates to situations where intentional discrimination is covered up, for example, where a government that is ideologically opposed to abortion closes down all non-urgent medical services in the context of the pandemic, labeling abortion services as non-urgent. Evidence of discriminatory intent may be difficult to provide in such cases, but evidence of discriminatory impact may suffice. Intuitively, for ordinary citizens as well as for

judges, this type of indirect discrimination is wrong for the same reasons that direct discrimination is wrong, and in that sense they can be considered easy cases, although in practice they may still be difficult to win. In a harder set of cases, the discriminatory impact of a measure may not have been anticipated, or its problematic character may not have been recognized on account of the novelty of the issue or its complexity. These are cases of more hidden structural discrimination. Now, from the perspective of the persons undergoing discrimination, some said in October, the discriminatory effect is what matters; yet persons belonging to a dominant group may have a “fair world hypothesis” entrenched in their minds, as one of the interveners called it (i.e., an assumption that the system is generally fair and that instances of discrimination are isolated exceptions), and this attitude is an obstacle to recognizing nonintentional discrimination. This may explain why judges are often more hesitant to accept this kind of claim.

In October, Victor Madrigal-Borloz pointed out the disadvantage of thinking in terms of intent, or good or bad faith. Arguably, there is a human rights obligation for policymakers to collect information on potential detrimental impact of policies on certain groups. This suggests that in reality there may not be such a clear line between those categories of cases, but rather a continuum that includes policymakers deliberately targeting a group while covering it up, as well as policymakers who anticipate disparate impact yet consider it acceptable collateral damage, and policymakers who don't care to consider potential disparate impact. It was pointed out in October that one of the benefits of the indirect discrimination framing is that it compels anyone subjected to the prohibition to think actively about impact on people who are not like themselves; this was framed as an effect of the rule, but we could also see it as an obligation in human rights law.

A lot of this reasoning in October seems to have in mind the responsibility of public authorities, not so much private parties. Should there be a distinction, perhaps, between the due diligence required of public authorities and that required of private parties, if we think in terms of an obligation to inform oneself of these disparate impacts? Or should we instead talk about different standards and approaches between court-like settings and other settings of human rights monitoring, such as reporting procedures and special rapporteurs? Since the current participants include a good representation of persons who work inside different supranational human rights mechanisms, it would be interesting in this segment on theory and purpose of the indirect discrimination norm to hear how the purpose or potential benefits are seen in the context in which they work supranationally.

The **first participant** referred to the dense experience of the Inter-American institutions in dealing with discrimination. For the Inter-American Court of Human Rights, equality/non-discrimination is a peremptory norm, part of *jus cogens*. The Inter-American Commission's rapporteurship on rights of LGBTI persons engages with the states especially to generate disaggregated data. In the Inter-American system it is important to have empirical data, especially disaggregated data to demonstrate indirect discrimination, to show the impact, the

effect, and then we have to deal with the principle of proportionality, and then after the diagnosis of this empirical basis, the question is how to react in terms of a transformative mandate to change this reality. And here one would emphasize the notion of comprehensive reparation, in order to deal with structural violations and foment social change. It is also important to mention the Inter-American Convention Against All Forms of Discrimination and Intolerance, which was adopted in 2013, and includes the concept of indirect discrimination, with a broad scope of legal obligations implementing the right not to be subjected to discrimination. Indirect discrimination is a preferred instrument for reaching the transformative goals that the Inter-American system aspires to, but at the same time in order to foment social change and deal with the structural human rights violations, the reparations approach is needed.

Victor Madrigal-Borloz said his mandate had gained substantial information in relation to these issues throughout the COVID-19 response and recovery. No one had predicted the way that COVID-19 would produce impacts, the impact on economic conditions, the impact in terms of physical limitations, the way that sanitary measures would manifest themselves. In this context, the question arises of what seemingly neutral policies have created effects that ended up being discriminatory. This account may be contested, but in his report on COVID-19, indirect discrimination analysis became a main motor, with contributions from some of the other participants in the current workshop. One example involves gender-based quarantines implemented with a strong adherence to a binary understanding of how women and men look. Allowing people to go out and do their grocery shopping, on Mondays, Wednesdays and Fridays for one gender and Tuesdays, Thursdays and Saturdays for the other, immediately condemns persons who do not necessarily fall within those boxes to stay at home. States that are not at the more progressive end of the spectrum as regards legal recognition of gender identity may possibly have adopted such measures in ignorance of the potential impact. But once the evidence is provided, and you get video footage of people being harassed and beaten and ridiculed because they are appearing as female on a day designated for males to go out, because that's what their identification documents say, then you see the impact, and it is the duty of the state to act on it.

One could also discuss at what point the failure to act on the evidence becomes and reveals discriminatory intent, but throughout his report on COVID-19 and the hundreds of submissions received from states and civil society were examples of the indirect discrimination resulting from measures taken in the context of COVID-19. As previously mentioned, states are more and less diligent, and more and less negligent, in relating to the lived experiences of people who are under their jurisdiction. These examples underlined for him the importance of having tools that disassociate from the notion of wrongfulness and allow us to go directly into analysis of impact, without having to do the analysis of intentionality. His set of recommendations in his report relating to COVID-19 include the "ASPIRE" guidelines, an acronym in English in which the "I" stands for indirect discrimination, to understand it as a real risk and to bring it into your risk analysis in relation to all measures that you adopt.

As a last example, the mandate learned that when religious and community leaders were part of the chains of distribution of sanitary kits and food, it was more often than not the case that trans and gay and lesbian people would go hungry, or would go without having any kind of support, because it is precisely those community leaders who know who the trans people and the gay people are.

The **segment moderator** asked the previous speaker to address Hypothetical No. 7 in the concept note, which hasn't been discussed so far, involving gay waiters affected by restaurant regulations in response to COVID-19. It is a difficult example. Gerald Neuman's short paper had suggested that there was no indirect discrimination here; the segment moderator saw the added value, but also some drawbacks, in applying indirect discrimination to this example.

Victor Madrigal-Borloz agreed that the question was complex, but it raises several questions. First, in a context where the data exists and is available, one could make a reasonable case that the state had not properly taken into account good data as to how the impact was going to manifest itself. The only country that actually has such granulated data on particular representation of LGBT people in such industry sectors is the United States, where the Williams Institute has the data available. When data is available, when it has been presented to states, or in hearings before the Inter-American Commission, in reports of independent experts and so forth, there can be an argument about the ability of the state to understand and foresee the impact of a particular measure. Second, when the data is not available, what kind of assumptions can one make based on understanding of the lived realities of people – for example, it is known that there is an extraordinary representation of trans women in sex work. Then states should know that trans women will be immediately impacted by curfews, for example we know that in Honduras people who were killed during the coup d'état in 2009 were trans women going out to carry out sex work because they could not otherwise eat. Governments need to make reasonable assumptions about that because they include components that do understand that reality. In Argentina, for example, the state actually used an indirect discrimination analysis to foresee impact, and the result was a specific moratorium on evictions and a specific creation of food banks for trans women who lost their income on day one of the pandemic. This was also possible because trans women were represented in the commissions creating the pandemic response. Third, as the Hypothetical illustrates, there are dynamics that can be analyzed and studied – that can be done for right reasons or wrong reasons. The Egyptian government continues to analyze where gay men are gathering, with the purpose of persecuting them. But the information can be put to the right use, for example indirect discrimination as a point of analysis for people's ability to access safe spaces. Given the realities of cruising, for example in parks at night, that has had a dynamic with the pandemic and curfews, and all those elements help identify how a group is particularly present in space and time and circumstances in a way that the pandemic and response will particularly impact.

The **segment moderator** said that this reply was very illuminating, and the example of the trans persons on the board that made the decision was helpful, because if one road to complying with the due diligence obligation is massive data gathering, then one can see many problems that would arise – data can be used for the wrong purposes, there may be privacy obstacles, etc. – but participation in the decision making is another way to get there and be able to predict impact.

A **third participant** expressed points of both agreement and disagreement with Victor Madrigal-Borloz's account, emphasizing the governments that did not change their policies after the evidence of impact was brought to their attention, in some cases quite quickly, by human rights organizations. Moreover, why is gender even an acceptable criterion for allocating opportunities to go outdoors during lockdowns, or in other contexts? Allocating by ethnicity or race would not be regarded as acceptable. In fact, when the government of Peru withdrew its gendered quarantine rule, it was not only because of the impact on transgender women, but because the streets were much more crowded on days when women were authorized to buy groceries than on days when men were authorized to circulate, precisely because of gender roles. Data are very helpful when available, to demonstrate problems, but the emphasis on data makes it quite difficult from the civil society perspective to frame the best cases for international bodies when disaggregated data are not available, as often for trans communities.

A **fourth participant** mentioned that the Working Group on Discrimination against Women and Girls (one of the special procedures under the auspices of the UN Human Rights Council) would be issuing a report later in the year on sexual and reproductive rights and health, though it will not use the framing of indirect discrimination. The Working Group has employed the tool of indirect discrimination analysis in country visits, for example its recent report on Romania, and on Greece and Poland. The Working Group emphasized the effect of austerity measures and certain economic policies that indirectly and disproportionately affected women.

Regarding discrimination in the field of economic, social and cultural rights, we should be careful that indirect discrimination be used as a complementary or parallel tool, and not displace analysis of direct violations. The CESCR Committee has recently been analyzing communications about right to housing, right to water, right to health, rights that depend on macroeconomic measures and are sometimes difficult to pinpoint as individualized human rights violations. The Committee is not, or not necessarily, framing these as indirect discrimination; for example in cases regarding access to social housing for people living in conditions of poverty it has found direct violations of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and it would be troubling if we moved away from such recent advances in the analysis of economic, social and cultural rights at the UN level. They have also been tied to rights to reparation, such as guarantees of non-repetition, used by the Committee with regard to the right to housing as well as in the Inter-American system.

A **fifth participant** discussed indirect discrimination on the basis of disability. The drafters of the UN Convention on the Rights of Persons with Disabilities (CRPD) did not refer expressly to

direct and indirect discrimination, although the Committee on the Rights of Persons with Disabilities, the corresponding treaty monitoring body, has later used these tools. Instead the drafters of the CRPD focused on the root cause of why there has been so much invisibility of persons with disabilities, with ripple effects in terms of indirect discrimination in society – namely, personhood or lack of personhood, or lack of valuing of the intrinsic worth of people with disabilities. The CRPD was then structured to get at these ripple effects of the lack of personhood in various domains, such as education or employment, and fashioning the obligations to reverse those patterns of structural indirect discrimination. Thus it has in a sense leaked beyond the traditional jurisprudential analysis of whether direct or indirect discrimination exists, and tried actually to dissolve some of the blockages and reverse the effects of indirect discrimination. Thus, despite not using that language, the intellectual structure owes everything to indirect discrimination.

Second, the speaker agreed with the idea about what could be called “indirect intent.” A classic example of this occurred in a case in the Council of Europe’s body on economic and social rights, involving housing rights of the Roma. The Greek government was fastidious in providing for housing rights of Roma people, but placed their houses on top of municipal dumps. It was a very obvious way of rigging social entitlement, in order to directly humiliate them without seeming to do so. That was an easy case for the Committee, and Greece absolutely lost. The other case that comes to mind -- and maybe we should be thinking of intention a bit more broadly, because it’s not just the unintentional referral back to an actor, but also the passive acquiescence of others around that actor -- involves Ireland, the way that unmarried mothers were treated in the 1940s, 1950s and 1960s. They were institutionalized, their children were taken away from them and forcibly adopted, they were subjected to humiliation and violence, and there was an unholy alliance between church and state to do that then – by the way, all churches, not just one church. Everybody knew about it, and in a certain sense they passively acquiesced in it. Maybe the costs to resist it were too high, given that it was a highly closed, almost authoritarian culture at the time; maybe people benefited from that directly and indirectly, that is financially and tangibly; and maybe there was a certain level of tolerance for wrong in the society that people now feel hard to come to terms with. So we can think of intention in terms of culture, possibly acquiescing in something that’s blatant. In this regard we could look to the work of Linda Radzik on moral repair in society, because she goes precisely to these kinds of phenomena, and then justifies for example public apologies and atonement, and reparations from the point of view of making good on this almost indirect guilt through passive acquiescence. (This is also relevant to the reversal of Reconstruction in the United States.)

Segment Four: Particular elements of indirect discrimination: Evidence

The **segment moderator** (Victor Madrigal-Borloz) began by recalling the conversations in October on evidence and data. Some of the focus was placed on differences in the standards of proof that are used at different levels and within different venues, including comparisons between different countries. Some countries such as the United Kingdom draw the distinction between direct and indirect discrimination differently than others, making evidence of actual intent less determinative. There was also discussion of the Human Rights Committee's decision on the ban on face covering in France, and the type of evidence that would demonstrate intent to target Muslims. One participant made the powerful point that in the reality of advocacy and litigation it is important to distinguish between what is doctrinally legally possible and what is politically possible, and that this difference may also impact the way that you want to prove your case. Decision makers may be averse to taking sex discrimination analysis as far as it logically goes, for example when political actors want to oppose violence and discrimination, but disassociate discrimination from equal recognition of gay marriage or adoption rights etc. One may be able to provide evidence that these are inextricably connected, but doing so may be counterproductive if it makes the case politically nonviable.

In the circumstances of COVID-19 and the unfolding events of the pandemic, the evidence of discriminatory impact in the early stages was essentially anecdotal, giving an indication of how patterns were manifesting themselves. But the level of evidence that is available on disparate or disproportionate impact of the COVID-19 response and recovery is poor, because that's not what people are focusing on. In the majority of the world civil society organizations are concentrating on service provision, and states are generally not gathering evidence on impact in a manner that is useful for this purpose. In some specific instances that evidence is requested through the effort of UN special procedures, and the Inter-American Commission on Human Rights has also done very significant work. That leaves the question what it is reasonable to request, and what effect the available evidence should have on the reversal of the burden of proof.

A **first participant** took up the point on reversal of the burden of proof. In relation to economic, social and cultural rights, the CESCR Committee and other bodies have said that it is for the state to prove that there is not discrimination in the right to housing, when we see the clear effects of a certain policy or lack of action. When people have been requesting social housing for 10 or 12 years, and haven't gotten access, and people end up living on the streets or inside a car, including children, it is for the state to prove that it is not responsible for violating the right to equality. The Committee and the European and Inter-American courts take note of indirect structural discrimination. For example in the *Yean and Bosico* case of the Inter-American Court of Human Rights (*Case of the Girls Yean and Bosico v. Dominican Republic* (2005)), the individual violation is part of a broader social context in which these individual violations were made possible.

A **second participant** agreed that absence of data was a serious problem in relation to effects on older persons. There are many age brackets in the data coming from different countries. We have also witnessed this during the pandemic. When we try to figure out what was really the idea behind some measures, it seems they didn't think about older persons, even though older persons are very visible in the discussions now, but not when they first brought up their new ideas, for example about social and physical distancing. They didn't think about what will happen in institutions, or to people living alone without any support, because there is no support available right now. Also on intersectionality, older women are the most affected, also when we think about the resources. Or LGBTI older persons in institutions, who should get special care, or should have a chance to choose. They didn't collect the data, and now everyone is speaking about older persons because of the high number of deaths.

They never take into account that we have many more years left, we are living much longer now, and the segments in old age are different now. This is not really taken into account, not in data, not in measures, not in politics and also not in the laws. This was not made an issue when most of the human rights laws were written, and we see there is a big gap, because age is not a specific ground of discrimination, and it's very hard to prove indirect discrimination on the basis of age.

The **segment moderator** (Victor Madrigal-Borloz) responded that this dimension has helped show the importance of working within a concept of intersectionality. It provides a lens for things that are otherwise completely invisible. Older LGBT persons have a particular problematic that is counterintuitive to how people thought this was going to work. LGBT youth have a different problematic. Shedding light on these issues is fundamental.

A **third participant** returned to the indirect discrimination against trans persons in the context of COVID-19. On 4 February 2021, the Inter-American Commission adopted a press release addressing the gendered quarantine measures in Panama, after receiving 45 reports of violence and discrimination against trans persons between April 2020 and January 2021. On this empirical basis, the Commission called on Panama to act in order to provide protection for gender rights, and to investigate those 45 cases in accordance with its duty of due diligence, and also in terms of guarantees of non-repetition and preventive measures to adopt capacity building programs based on equality, nondiscrimination and human rights of LGBT persons. The Commission had already issued a press release in April 2020 raising a flag about these policies in Peru, Panama and Colombia.

A **fourth participant** stressed the importance of data connected to the duty of diligence in order to avoid future occasions of indirect discrimination. For example in Belgium there is now a legal obligation to recognize nonbinary persons in law, and efforts were being made to persuade the government to collect data on how recognition of nonbinary persons will confront structures in law and social practice that could lead to indirect discrimination. Otherwise a rapid solution may be adopted and not carried through thoughtfully. Second, it was striking during the pandemic that not only were the measures taken in Belgium not based on data, but there was no human

rights expert present at the table to assist the government and the medical professionals in finding balanced solutions, if not based on data, then at least based on knowledge of what disparate impacts would be caused.

A **fifth participant** said that in the public health world, although there were surprises about the details of the virus, there were no surprises about how a health pandemic affects the most precarious. There are reasons to be skeptical of the claim that governments were caught unawares when they chose crisis responses that reinforced hierarchies of power and discrimination that they already had in place. The crisis response was instrumentalized. Thinking about the willful ignorance problem, the speaker deferred to colleagues in the Inter-American system about the *Cotton Field* case (*Case of González et al. ("Cotton Field") v. Mexico* (2009)), and when governments can claim not to know something, how that might help us. Willful ignorance can only reach so far, and in regard to both precariousness under COVID and the gender binary we may have reached a point where that willful ignorance no longer bears weight. That isn't really a problem of not having the data to prove impact, it is that the states are not interested in knowing, and it should be reframed in that way. There is some really important work done in the health world about understanding that social fault lines, preexisting social groupings of disadvantaged people, always reappear as a health injustice. So this is not a surprise.

The **segment moderator** (Victor Madrigal-Borloz) said that the interventions thus far have reinforced the tenor of the discussion in October, that the nature of evidence will be determined by a number of things including the practical availability of evidence. Practical availability is determined by political will to actually ensure practical availability. So it is important that we understand that historical processes of lawyering and advocacy have a place in the sequencing. It may be that some identities, or the lived realities of certain persons, might be more opaque in a certain context, but when persuasive evidence of particular impact has been made available to a government over the years, the possibility of the government to excuse inaction is fading, and evidentiary arguments play a role in that connection as well.

Segment Five: Particular elements of indirect discrimination: Justification

The **segment moderator** (Gerald Neuman) began with a brief recapitulation. He observed that under the usual international approach to indirect discrimination, a practice that results in a differential effect on a protected ground can be justified if the practice serves a legitimate purpose and if there is proportionality between the benefit achieved by the practice and the differential harm it causes. There may be some variants that don't recognize this, for example the CRPD Committee may not recognize this; but this is the usual international law approach.

In the discussion in October on justification, various points were made about the difference between political advocacy and judicial litigation as settings in which arguments about justification can be made. What it takes for a court to find a valid claim of indirect discrimination and declare a practice unlawful is different from how a political argument can be made that a practice should be changed because of its effects.

Many courts, not all courts, tend to give incremental decisions, asking whether the particular practice is justified despite its effects, rather than viewing the practice as part of a broader social and legal context that produces unjust effects. For example, in the context of sexual orientation and gender identity, one could challenge the entire binary gender structure, or one could instead assume its presence in the background and challenge a particular practice within it. Courts are more likely to feel legitimate in making these narrow decisions, rather than transforming the entire structure.

The requirement of justification can be used to guard against situations where the reasons put forward in favor of a practice are pretexts for intended discrimination. Or instead, the requirement can be used where the legitimate goals advanced are outweighed by the disadvantage that they impose differentially on a protected group.

The conversation thus far in the present workshop included some discussion about the difference between what can reasonably be expected of individuals or private institutions, and what can be expected from the state; and about what the state's overall duty is to deal with structural discrimination. More might be said on that issue in this segment, which focuses on the criteria for justification. The workshop is dealing with possible discriminatory effects in the pandemic on a wide variety of grounds, race or sex or age or disability or sexual orientation and gender identity or religion or language or indigeneity or culture or poverty or residence or any other status. What can be said about the strength of justification that is required, and the methods for comparing the benefits of a practice with the unintended harms? Do we simply say that the standard is proportionality and leave it at that? Or are there more specific parts of the evaluation that can be identified, parts relating perhaps to the particular ground of discrimination, to the type of differential effect, to the characteristics of the alleged discriminator, to the subject matter of the practice, or otherwise?

A **first participant** observed that there was a difference between discrimination arising from errors of description and discrimination involving a normative component. Rulemakers might assume that everyone had certain characteristics, e.g., being able-bodied, or instead they might desire that everyone should have those characteristics, e.g., certain gender identities. For example, in the context of family relations, there may be a gold standard of how families ought to be. But laws should also deal with the world of the second best. Putting aside what the gold standard might be *arguendo*, the fact that not everyone has that kind of family relationship is not a sufficient reason not to provide other forms of family or other forms of relationships with the care and access they need. The pandemic is a good opportunity to focus on that reality.

Victor Madrigal-Borloz observed that the argument of proportionality sometimes meets the wall of the unavailability of evidence. For example, in Hypothetical No. 7, where gay men are disproportionately represented in the service industry, that conclusion could be based on very good data, generated on principles that are nondiscriminatory and that deconstruct stigma and ensure privacy and ensure all the guarantees. Or the conclusion might be based on stereotype. This raises the following question: if there is a flawed logic in the construction of the argument, should the whole construction be considered as completely flawed, regardless of the outcome? A lot of groups and identities and communities come to him and say, we don't care whether we are *disproportionately* impacted in relation to homelessness – we don't want to be *impacted* in relation to homelessness, and your analysis of whether that is disproportionate in relation to the rest of the population is of very little use to the people that we are defending. That takes us, of course to the diffuse margin between claims of indirect discrimination and developmental objectives and incremental compliance.

A **third participant** spoke about the effect of COVID-19 on indigenous peoples, which was the subject of an October 2020 report of the Special Rapporteur on the rights of indigenous peoples. The results have included both direct and indirect discrimination. Many measures that have been taken at the national level have affected indigenous peoples indirectly, because indigenous people are disproportionately involved in the informal economy as their means of obtaining food. These effects are linked with structural racism and the stigmatization of indigenous people. Indigenous people are accused of being responsible for spreading COVID-19 because of negative characteristics that are attributed to them.

Against this bleak backdrop of the devastating effect of COVID-19 on indigenous people, there is the further indirect discrimination against indigenous people on the basis of sexual orientation and gender identity. Taking the intersectional approach to address multiple identities one can speak of indigenous LGBTQI2+ peoples, with “2” referring to the two-spirited, people with both masculine and feminine spirit along the gender identity sexual orientation spectrum. There is a very good study by Manuela L. Picq and Josi Tikuna, *Indigenous Sexualities: Resisting Conquest and Translation* (2019). They write, “Sexual diversity has historically been the norm, not the exception, among indigenous peoples. Ancestral tongues prove it. In Juchitán, Mexico, *muxes* are neither man nor woman, but a Zapotec hybrid identity. In Hawai'i, the *māhū* embrace both the feminine and the masculine. The Māori term *takatāpui* describes same-sex intimate friendships ...” So there are many examples within indigenous peoples. The effects are going to be worse for transgender indigenous people who are living in urban areas. Indeed the lockdowns that have been imposed on the general society have affected indigenous people and human rights defenders, and the accompanying presence of military and police forces in communities, are worsening the situation for indigenous communities.

A **fourth participant** expressed the wish that special rapporteurs and mandate holders and members of working groups had more opportunities to come together for discussions of this

kind. Those who are seeking to work on indirect discrimination and cultural life are encouraged to look at General Comment No. 21 of the Committee on Economic, Social and Cultural Rights, dealing with Article 15 ICESCR, which focuses on the right to take part in cultural life. In paragraph 23 of that general comment, the Committee specifically references the relevance of both direct and indirect discrimination to cultural rights. The general comment also defines necessary conditions for cultural rights to be enjoyed on the basis of nondiscrimination, the availability of cultural goods and services for everyone, and the issue of accessibility of effective and concrete opportunities to enjoy culture fully. It is an important tool for people wanting to work in that area.

Next, a bit of friendly pushback to some of the references that have been made to the issue of religious symbols in public schools in France. Both as a specific point, and as a general point about how international human rights mechanisms and experts engaging with issues of discrimination may be listening to some actors and not to others. Having worked for many years with feminist movements and women human rights defenders in North Africa and the diaspora, it is noticeable that some (not all) of them greatly support the ban on religious symbols in public schools in France, because they are worried about discrimination against women and girls from nonstate actors who are specifically targeting education as a sphere in which to impose what they consider the Islamic dress code, which some experience as an ideological practice and not as a religious or cultural practice. Not everyone may agree with this observation, and there may be very real issues of religious discrimination, but this component of the conversation gets rendered invisible in international human rights discourse, especially in English, which is often based on listening to self-appointed community leaders who are often men. This is discussed in an essay called “The Law of the Republic versus the ‘Law of the Brothers’” (2009), which addresses these kinds of conflicting intersectional discriminations. It is important to try to engage with the relevant range of actors and arguments.

A forthcoming report of the UN Special Rapporteur in the field of cultural rights deals with a number of issues in relation to the pandemic. Cultural rights defenders are very angry about closures of some cultural institutions while commercial institutions are open, such as shopping malls as opposed to theaters. Trying to be very cautious about the relevant health expertise in making these judgments, one can call for further discussion and networking between health rights and other kinds of human rights experts. Other human rights experts are sometimes asked to opine on things, such as the safety of burial practices, on which quite frankly they may not have the health and public health expertise to judge. To avoid discrimination, there should be greater transparency in applying scientific criteria to decision making, especially when some businesses that may have a higher degree of transmission risk remain open while some cultural institutions that may have a lower transmission risk are closed.

A **fifth participant** offered what may be a more technical legal point. Earlier discussion had addressed a positive obligation of the state to organize itself in such a way as to anticipate the

impacts of its policies by having the information and by including participation in the decision making processes in order to comply with another positive obligation to prevent or mitigate disparate impact. In the area of justification, proportionality analysis is central – that is where attention to these obligations can be built into the legal reasoning, turning proportionality analysis into a beneficial type of procedural review. At the same time, for a supranational body, that is a safer thing to do, because it is a kind of procedural type of review that is seen as not too intrusive and respects subsidiarity.

The **segment moderator** (Gerald Neuman) observed that no other participants wished to speak during this segment, and so convened the next segment.

Segment Six: Particular elements of indirect discrimination: Reparations

The **segment moderator** (Victor Madrigal-Borloz) began by combining a recapitulation of conversation in October with elements from previous segments of the present workshop. Reparations had been discussed from different angles, including theoretical analysis, the activist perspective, and the international supervisory function that some participants exercise. The question of why indirect discrimination should be addressed is related to the question of what particular approach to adopt to reparations for indirect discrimination. As had been mentioned both in October and here, one purpose of banning indirect discrimination is to prevent states from circumventing the prohibition on direct discrimination when proof of intent was not easily available. In other situations, there are elements of good faith, or not-so-clear bad faith, that are the typical ones where we need to tackle structural or systemic discrimination. That leads to the question what happens after a finding of discrimination is made, and so what is achieved by bringing these cases.

A big question is whether there is an inextricable logic of non-repetition attached to cases of indirect discrimination. To a different degree, international and regional bodies relate to a framework of reparations in which cessation of the violation will become a first step, and then you have a plethora of mechanisms to remedy the individual situation, and then you move to an element of non-repetition. The nature of structural claims raises the question in what circumstances, or always, findings of indirect discrimination need to lead to recommendations on public policy, law reform, or access to justice.

For example, in the case of gender-based quarantines, the essential element of reparation was cessation; we asked the states to stop the gender-based quarantine immediately, and to put in place some other measure that would really serve the useful purpose of trying to limit the number of people on the street. But there was also an expectation of non-repetition, which in some cases such as Panama was very sadly not respected (gender-based quarantine was later readopted). Meanwhile, victims of seclusion from gender-based quarantine have no possibility of getting

individual reparation for the time in which they have to stay at home, or even reparation for the mistreatment that they received at the hands of the police during the quarantine. In that case, resort to the Inter-American Commission or to international bodies might be the only way to get some reparation. Another example involves networks of distribution of sanitary kits, or food. Again, the element of cessation was immediate, the element of non-repetition was immediate, but there is no expectation of reparation for the damage inflicted in the meantime at the domestic level.

When these discourses are actually brought forth in domestic jurisdiction, the experience shows very little evidence of remedies addressing the damage perpetrated to individuals, and the logic of systemic reform appears to be favored. This is also a trend that one can see in the judgments of the Inter-American Court of Human Rights -- individual reparations for cases that qualify as indirect discrimination have been reduced in terms of economic content; compensation seems to have some sort of discredit in the jurisprudence of the Court. It's more systemic change that appears to gain prestige in relation to these issues. Interrogating the dynamic at the international level might be important for all of our work.

Gerald Neuman made one brief point, that if cessation and reform is a necessary remedy, then there remains the question of which reform, and who decides which reform. Some practices can just be stopped and then do nothing, but it may be necessary to stop it and replace it with something else. The question on how to replace it, is that a judicial decision or a legislative decision, is the decision made at the international level or at the domestic level, and so forth.

A **second participant** pointed out that the situation of the pandemic raises the question of the state of exception, which creates so many conflicting interests, and how that will affect the actual opportunities for reparations other than cessation (which can happen quickly). It will be interesting to see how domestic courts react, and then international courts and human rights bodies, to this problem.

A **third participant** explained that the Committee on Economic, Social and Cultural Rights considers individual communications alleging violations of rights under ICESCR, and some of these involve the kinds of issues that are being discussed at the workshop. The Committee takes into account many different kinds of vulnerability in its decisions, but most of the time it doesn't go into questions of indirect discrimination, and instead treats vulnerability as a factor related to claims under economic, social and cultural rights. Of course, these types of analysis are related. With regard to reparation, when the Committee adopts a decision finding a violation (Views), it usually adopts a specific recommendation for the victim and then general recommendations for the state to reform its legal framework on specific issues, or to take into account specific aspects. Thus the Committee could deal with indirect discrimination within such a general recommendation in a decision, and the question would arise how to phrase the recommendation in a specific manner that would be clear enough for the state to implement. That could be tricky

in drafting the recommendation, and it could be important here for the lawyers bringing the cases before the Committee to offer the Committee ideas on how to deal with that.

It was also mentioned, with regard to repetitive cases and issues dealing with structural aspects, that the Committee is in the course of revising its Rules of Procedure to address that kind of question and would soon make the draft revision public for comment.²

A **fourth participant** observed from a United States perspective that the choice of the term “reparations” to describe remedies might be counterproductive, at least in some national contexts. The term evokes the polarized U.S. debate about reparations to the African-American community, and also the term seems infused with a notion of fault rather than merely of compensation. These concerns may not be relevant to other countries and languages, but it might be considered as a strategic question.

The **segment moderator** (Victor Madrigal-Borloz) concluded the segment, in the absence of any further requests to speak. He agreed that the terminology of reparations could pose important strategic or tactical questions in some contexts, although it was well established in international law. Also substantively, the question of whether reparation implies either culpability or complicity is important. At the root of the notion of reparation is the idea that something has been broken because of fault and therefore needs to be repaired. It is unclear whether the framework of consequence will depend on a causal factor that needs to be complicity or ill intent, or whether it will turn on the need for the state to put structures in place to ensure non-repetition when there is a finding of detrimental impact.

Second, ideas that are often present in cases of direct discrimination need to be carefully interrogated when we deal with cases of indirect discrimination. For example, in the example of home seclusion during the pandemic, home seclusion may be a perfectly reasonable measure from the point of view of sanitary conditions required to address the pandemic. We know that home seclusion created a very difficult situation for youth who are LGBT and are confronted with non-accepting family members and have to share computer equipment, bandwidth, and spaces for conversation. From anecdotal evidence submitted to his mandate, this is also the case for older LGBT persons who were forced into sharing spaces with family members of following generations who were not accepting of their sexual orientation or gender identity, and they suffered violence as a result. These facts do not necessarily lead to the conclusion that home seclusion is unreasonable, but it points to evidence of impact which may or may not be disproportionate in relation to the impact on other communities. Maybe the logic of cessation does not work in this context, and it is not reasonable to tell states that they need to find a better method than home seclusion. But then the question becomes the need to give a notion of

² See Committee on Economic, Social and Cultural Rights, Rules of procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Draft prepared by the Working Group on Individual Communications, UN Doc. E/C.12/69/R.1 (March 2021).

consequence, for example in the duty of states to create specialized hotlines and to create campaigns of awareness so that youth can know those hotlines exist and can actually call them. Spain implemented hotlines for older persons and youth, and the levels of use of those hotlines revealed a clear need. Thus, in moments where the logic of cessation does not work, there still may need to be a notion of consequence.

Ideas of reparation that are more in the sphere of individual damage – compensation, satisfaction, and elements of rehabilitation – are probably difficult to imagine in this context, and the Committee on Economic, Social and Cultural Rights will be dealing with these questions for years to come.

Finally, these lessons led him to the ASPIRE guidelines, which are his basic approach to pandemic response and recovery. These include: (A) *acknowledging* that LGBT persons exist everywhere; (S) *supporting* LGBT organizations; (P) *protecting* LGBT people from discrimination, (I) assessing *indirect* discrimination as a risk, (R) ensuring *representation* of LGBT persons in bodies that decide on response and recovery, and (E) ensuring *evidence-based* approaches.

Segment Seven: International oversight of national application

The **segment moderator** (Gerald Neuman) began by repeating some discussion from the October workshop. It was noted then that international oversight plays at least two distinct roles, one is normative development, articulating abstractly the more detailed standards that follow from treaty norms; the other is supervisory, evaluating concretely the national legislation, policies, or domestic court decisions involved in the case before it. In the supervisory context, the question arises whether the international body should give deference to national actors, and how much deference under which circumstances.

The European Court of Human Rights and some other international bodies tend to develop standards incrementally, while the Inter-American Court of Human Rights often makes large advances all at once, as for example in its Advisory Opinion No. 24 on sexual orientation and gender identity. One might want to accumulate a number of repetitive cases before one makes a decision as to what the scope of the problem is, and what kind of recommendation one makes. That is different from taking the first case as the immediate occasion for detailing the scope of large scale reform. Either way, incremental decisions or rapid adoption of standards, in sensitive areas decisions may give rise to backlash.

When cases are brought to a court or commission or other international body, they may face a choice between framing the analysis in terms of indirect discrimination, or framing it as a violation of the relevant substantive right, (or doing both). That issue has come up several times

already in the discussion. Does the body really want to think about this as a problem of indirect discrimination in relation to a particular social, economic or cultural right (or other kind of right), or is it better to think of it as analysis in terms of the right which is at stake?

When the discrimination is intentional, it may be important for doing justice to the victim to name the violation as discrimination; when the discrimination is structural and unintended, framing the violation in relation to the substantive right may provide a more effective way of producing change.

The European Court applies a margin of appreciation doctrine, which varies the degree of deference depending on the ground of discrimination alleged and on other contextual factors, but the Human Rights Committee and other bodies do not apply a margin of appreciation. Nonetheless, the Human Rights Committee has been hesitant in certain cases of sexual orientation and gender identity discrimination to make an easily generalized finding of discrimination, rather than to rely on a thicker description of the inconsistencies in domestic law to find a violation in the particular case, leaving open whether a different situation in a different country would also produce a violation. There is concern about the sweeping judgment that a finding of discrimination can express.

Thus the conversation in October identified some relevant considerations, but did not settle on criteria for when international bodies should review national findings that there was no indirect discrimination deferentially, and when they should review them with less or no deference.

In the European Court, it seems to matter what is the ground of discrimination alleged; whether it is public discrimination or private discrimination; what is the field of regulation involved; and also whether there is a predominant European approach to the question at issue. That is a very European methodology.

Other bodies may adjudicate individual cases and find violations without the margin of appreciation doctrine; and international bodies that are not courts also confront possible situations of indirect discrimination in procedural settings where they are engaged in oversight without necessarily adjudicating claims of violation.

In this workshop we are dealing with possible discriminatory effects in the pandemic, on a wide variety of grounds – race, or sex, or age, or indigeneity, or disability, or sexual orientation or gender identity, or religion, or language, or culture, or poverty or residence or any other status. (The limitless potential of “other status” is quite worrisome.) The effects might arise from pretextual use of emergency powers, or from the unforeseen effects of good faith public health measures, or from unequal exposure to the disease, or from inequalities in health care. What can we say about the proper role of international oversight?

A **first participant** discussed the Working Group on Discrimination against Women and Girls. Its mandate is quite broad, and understood as covering both direct and indirect discrimination

across a wide range of subject matters, including social, family and cultural life. The Working Group has engaged with recommendations to states at the executive, legislative and judiciary level and also to private and nonstate actors. In general those recommendations have been well received, though of course there are certain historically controversial issues, for example sexual and reproductive rights. The Working Group has been keen as well to emphasize good practices where they see them. On the point of reparations, and to link it with international oversight, there is a duty of cessation, but in terms of the traditional principles articulated by Theo Van Boven, the typical form of reparation is restitution, that the situation should be restored to what it was before the violation. But in the case of gender inequality in deeply patriarchal societies or societies with deeply entrenched racism or other structural discrimination, we don't want to go back to that, we want reparations that are transformative, and that really address these issues of structural discrimination. There is a need to seize the opportunity as human rights mechanisms, and as activists and scholars, to point to those deeply entrenched inequalities and intersectional and life cycle forms of discrimination and to use the tools at hand not only to signal the violations, but to use transformative reparations through guarantees of non-repetition and other forms that we may devise. It remains to be seen how to actually do this in a COVID and post-COVID world with all the emphasis that has been placed on recovery, but it's important to keep that at the center of discovery.

The **segment moderator** (Gerald Neuman) asked about the nature of the Working Group's recommendations as definite descriptions of the legally required method of reparation or as suggested methods of reparation among other possibilities.

The **first participant** replied that the Working Group calls them recommendations, for example in its annual thematic report. Their legal nature is precisely as a recommendation, not legally binding, but showing the states how to address the forms of discrimination that have been identified. In other reports such as those stemming from country visits, the recommendations may be framed in softer language as to how the state could act to better improve their level of compliance.

A **second participant** expressed support for the distinction the segment moderator had made between types of recommendations. It is not always clear in the output of supranational human rights bodies where the line lies in that regard, but the distinction is important. On a separate point, one could ask whether supranational bodies should always insist that an issue that could be framed in terms of indirect discrimination should necessarily be addressed by the state in those terms – quite possibly not, given that other ways of framing and analysis could also reach very good results, sometimes even better results. The supranational body could make a recommendation that a state focus on the discrimination factor, but without insisting on this as required by the state's obligations. Nonetheless, it would be desirable for the supranational body to include the discrimination analysis in its own reasoning, as part of its pedagogical function, to show how to integrate it into a human rights analysis.

A **third participant** spoke about indirect discrimination as it relates to disability discrimination, and observed that this aspect was undertheorized and underutilized. One reason for this is that there is often pushback that if the group is so diverse, then how can we think about systemic discrimination, and that combines with the practical reality that litigation is often framed in terms of individual remedies. But as far as oversight and COVID are concerned, in the United States there was zero federal guidance, at least until early January 2021, relating to indirect discrimination. The crisis standards of care, which vary from state to state, frequently include indirect discrimination against people with disabilities, either by using criteria like long-term survival effects, once you leave the hospital, which ought to be irrelevant, or various criteria for even providing treatment at point of contact. We are seeing it repeated again with vaccinations, where individuals who are similarly at risk vary from state to state as to where they are prioritized. Massachusetts happens to be particular bad in this regard – cancer survivors are not on the list, people with pre-existing conditions are not on the list. At the international level, it would have been great if the previous Special Rapporteur on the rights of persons with disability had thought about indirect discrimination in her remarks and writings about COVID. Most of her work addressed direct or overt discrimination, as in ventilator removals, and lack of access to direct care for COVID, but not about the implications of indirect discrimination. The current Special Rapporteur is encouraged to think more deeply along those lines as well.

Finally, one thing that seems to unite across all kinds of different intersectionality is the mental health effects, and how that is going to implicate every one across all groups and how it is going to have particular salience in different ways for different groups.

A **fourth participant** said that one of the roles of international bodies regarding indirect discrimination in particular would be to reveal the structural aspects of norms and institutions that do contribute to indirect discrimination. To analyze the systems and norms, and if some aspects do contribute to indirect discrimination, then to explain and try to deconstruct the norms, and to show what problems they may generate. This is quite difficult to do in the work of treaty bodies and working groups and even in the work of special rapporteurs, because that work of deconstruction is not obvious at all – it requires a methodology that we don't always have. This is one of the very important points, even before they can recommend solutions they have to reveal this kind of aspect.

A **fifth participant** referred to problems in some of the case law of the European Court of Human Rights concerning legal gender recognition. Trans persons have been successful at the court in obtaining findings of violation concerning certain prerequisites that states were asking for, but the court has consistently refused to look at these legal frameworks for legal gender recognition from the perspective of discrimination. In contrast, the Inter-American Court of Human Rights in its advisory opinion has clearly stated that requiring these medicalized conditions for trans persons to be recognized in their gender identity is discriminatory, because this is basically not expected from cis-gender persons. The European Court has never engaged

with this kind of reasoning, although all the applicants have raised the prohibition of discrimination in their cases. Moreover, the European Court has also not been engaging much with the impact of the absence of gender recognition in terms of access to housing, to health care, to employment, and so forth. Engaging with the discrimination would probably not have led to a different outcome for the applicant, because a different kind of violation was found. But in terms of the pedagogical function of the court, pointing out the structures in which the violation took place, it failed to really meet its obligation.

A **sixth participant** said that especially for indigenous peoples, discrimination has to be an integral part of the work of the international human rights bodies. As an example, there is a municipality in a state that is starting to dump garbage onto indigenous land, which not only contaminates the land but brings illness to the community, pollutes the air and the water. When asked why they have done that, whether it is against the law, they reply yes, but it is Indians, and so who cares? There are many such examples, and if we are going to work on human rights bodies, we must have in mind that discrimination is very important to take into account, and has to be part of the analysis and part of the order. If it is only a matter of goodwill and optional recommendations, states will decide whether to fulfill it or not. Even when they have a binding legal instrument they don't have a political will to fulfill those human rights. We must have in mind to apply the international human rights instruments to defend people who don't have the power or the capacity or the possibility to defend themselves.

A **seventh participant** highlighted the added value of the role of international bodies, in particular with regard to the Independent Expert on Sexual Orientation and Gender Identity, looking at the case of COVID-19 and all the processes that led to the drafting of the report of the Independent Expert to the General Assembly. The whole process had value in unveiling the impact of structural discrimination. There is a lot of information in the report, including the specific cases of Uganda, where shelters for LGBT persons were raided, and Hungary, where COVID-19 measures were used as an excuse for issuing restrictive legislation. The Independent Expert's open door policy gave access and visibility to people who lack access and even capacity to bring cases to international human rights bodies. The special procedures have a specific role to play because their country visits and thematic reports can really go back to the root causes of structural discrimination. The reports highlight the recurrent themes of stigmatization, pathologization, criminalization, and denial. They also explain why cases of direct and indirect discrimination are not going through courts, partly the lack of evidence, but also the element of stigmatization in the justice system, by the judges and by all the justice personnel. For example, in cases of trans sex workers being recorded as men, and placed in male wards in the prison system, and made invisible throughout the justice system.

An **eighth participant** mentioned that age is not currently an explicitly listed category at the international level, it's just "other status," and it takes a long time until states really think about age discrimination. We have seen through the pandemic that the digital divide was a major issue

on why older persons could not get access to health care, and to support. It is also evident that older persons don't go to court, because they think at their time of life it's not useful to go to the courts because it takes too long. So we don't see many age cases in the human rights system, because first they have to go through the national system and then to the international system, and it doesn't make sense for them to use the system. On the other hand, we don't have a treaty that is dedicated to older persons, and so they don't see themselves as being part of the treaties and as rights holders. The mandate on rights of older persons really needs to spell out what ageism is as a first step, and then come to age discrimination, and the next step would be indirect discrimination. It is easier to see this on a case by case basis or a country by country basis.

The **segment moderator** (Gerald Neuman) observed that his expressed concern about the "other status" category related to its completely open-ended nature, as discussed in his short paper for the workshop, and illustrated by the example of whether "restaurant workers" are a category protected as such against indirect discrimination in Hypothetical No. 7.

Subsequently, **Victor Madrigal-Borloz** explained that in his own work as Independent Expert he distinguished between two levels of recommendations. One type informed states that a particular policy was not in conformity with international human rights law standards, for example in cases of criminalization of same-sex activity. For the other type, he gathered good practices, as in the example of hotlines that he had mentioned earlier – here he pointed states to an idea that he had seen working elsewhere, making a recommendation in the more ample sense of the word.

Closing Discussion: Next steps

In addition to describing the form of written outputs that would result from the present workshop, the conveners inquired whether future similar meetings among Special Procedures mandate holders with others would be beneficial.

One **participant** observed that there were few opportunities for holders of different mandates to get together for substantive discussions among themselves and with other experts, as opposed to dealing with administrative matters, and that further meetings of this kind would be helpful.

A **second participant** suggested that a later workshop be held in collaboration with the Geneva Academy with wider attendance by mandate holders, and also that further discussion of the difficult issues of remedy and redress should be part of that event, as well more on intersectionality.

A **third participant** would welcome regular methodology workshops for special procedure mandate holders with experts in relevant fields, on these and other issues. Zoom may continue to

be a useful method for convening these even after the pandemic. It would be helpful to find a way to do this with interpretation for fuller inclusion of speakers of different languages.

A **fourth participant** observed that the discussion of indirect discrimination had involved some quite technical issues that benefited from the legal expertise of the participants. Conveying these ideas to a broader public would benefit from a more simplified presentation. In fact, not all treaty body members have legal training and familiarity with the operation of these concepts.

The conveners thanked all the participants and looked forward to future collaboration.

Appendix I: References from the Workshop Discussion

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Appendix II: Concept Note for the Workshop on Indirect Discrimination, on Bases Including Sexual Orientation or Gender Identity, in the COVID-19 Pandemic

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 February 12, 2021, for the purpose of exploring in a comparative and cross-disciplinary manner the application of the concept of indirect discrimination (or practices with discriminatory impact) to measures taken during the COVID-19 pandemic, particularly but not only with respect to effects based on sexual orientation or gender identity. This workshop follows a prior workshop in October 2020 on the concept of indirect discrimination on the basis of sexual orientation or gender identity more generally.

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.

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 race, sex, religion, political opinion, national origin, 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. A goal of the workshop is to explore the appropriate content of such norms, and the relationships between them, including their usefulness as means of addressing situations where multiple norms are implicated.

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 in the context of individual health and public health. The following hypotheticals are stylized in order to isolate certain issues that may arise in the analysis of indirect discrimination, using the example of sexual orientation or gender identity. We do plan to discuss them explicitly at the workshop,

in addition to other problems raised by the participants, including in the short papers that will be distributed in advance of the workshop.

The first two hypotheticals (4 and 6) are modified from the October workshop, while the third hypothetical dealing specifically with COVID-19 is new.

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?
- (5) Suppose that each of the claims of indirect discrimination in (1) to (4) are brought to the national courts, which rule that domestic law does not include a prohibition of indirect discrimination that applies to the particular claim, and that the woman brings a complaint to an international human rights body with regard to the gap in national law. How should the international human rights body rule?

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) Anna claims that the law indirectly discriminates against *Ajri* on grounds of gender identity (which could violate Article 26 ICCPR or an equivalent provision). What must be shown to establish indirect discrimination?
- (3) Assume that the national court rejects the indirect discrimination claim in (2) on the ground that the rule is justified by public health considerations, although the professional medical community in Antipodia disagrees about whether a person's walking barefoot in a public building poses a substantial health risk for the person in question or for others. If Anna then brings the indirect discrimination claim to an international human rights body, how should the claim be evaluated?

New Hypothetical No. 7

In the city of Gotham in New Jersey, rates of COVID-19 infection have led to the adoption of various regulatory measures designed to prevent airborne transmission in closed and open spaces. Some of these measures limit the number of people who can be present on the premises of a business simultaneously, and some of the measures require certain types of businesses to cease operating for a period of time. For December 2020 and January 2021, the rule is that schools for children may remain open if they meet certain numerical limitations and physical distancing requirements; liquor stores may remain open if they meet certain numerical limitations and physical distancing requirements; but restaurants must not be open for dining (as opposed to the pickup of take-out orders).

Suppose that the financial impact on restaurants leads to widespread loss of employment for restaurant waitstaff, and that this loss of employment has a statistically disproportionate impact on the basis of sexual orientation, because in Gotham cisgender gay males are disproportionately likely to be employed as waiters. Suppose in addition that cisgender gay males are not disproportionately likely to be employed in schools or in liquor stores. Suppose that these facts

about employment patterns were known before the pandemic began, but that these facts did not motivate the decision to close restaurants while regulating schools and liquor stores.

- (1) If the prohibition of on-premises dining is challenged as indirect discrimination on grounds of sexual orientation, how should the claim be evaluated? Assume that the city will argue that children need quality education more than diners need to eat in restaurants, and that diners remain longer in restaurants than buyers remain in liquor stores.
- (2) If the disproportionate impact of the closing of the restaurants is going to be challenged on behalf of gay male waiters, should the challenge be brought in isolation, or in combination with a challenge to other policies having disproportionate impacts on other groups, either on the basis of sexual orientation or gender identity, or on other bases such as race, sex, or religion?
- (3) Should the challenge be framed primarily as discrimination with regard to the right to work, rather than as indirect discrimination on grounds of sexual orientation?
- (4) What policies should the city of Gotham have adopted with regard to restaurants, to avoid or lessen discriminatory effects while protecting the public health?
- (5) If a claim of indirect discrimination on grounds of sexual orientation resulting from the prohibition of on-premises dining in restaurants fails in the national courts because the judges regard the effects of the rule as proportionate to the public health benefits it achieves, and the complainant then brings the claim to an international human rights court or treaty body, how should the international body review the national court's ruling?

Appendix III: Partial List of Participants in the Workshop

Karima Bennoune, Special Rapporteur on Cultural Rights; University of California at Davis

Eva Brems, University of Ghent

Pieter Cannoot, University of Ghent

Dorothy Estrada-Tanck, Working Group on Discrimination against Women and Girls; University of Murcia

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

Alice M. Miller, Yale University

Gerald L. Neuman, Harvard Law School

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

Michael A. Stein, Harvard Law School

Jessica Tueller, Yale Law School

Appendix IV: Working Papers

Unequal human rights impact of the COVID-19 pandemic: the added value of indirect discrimination framing

Eva Brems¹

In this brief note, I look at the unequal impact of the COVID-19 pandemic from the angle of supranational human rights bodies, such as the European Court of Human Rights, or the UN Human Rights Committee. I first attempt to distinguish different scenarios of unequal human rights impact (I). After that, I look at the way in which a supranational human rights body can address this unequal human rights impact without resorting to indirect discrimination (II). In the last section (III) I reflect on benefits and drawbacks that indirect discrimination framing could bring for the different scenarios identified in the first section. This last section also addresses the desirability of framing hypothetical No 7 in terms of indirect discrimination.

I. Unequal human rights impact

In addition to a global health crisis, the COVID-19 pandemic is a global human rights crisis. The pandemic itself and the measures taken to control it affect the human rights of nearly all persons across the world. Yet there is ample evidence that it affects some more than others. We can broadly distinguish two categories of human rights risks.

1. [Category 1] In the first place, *some individuals are exposed to a higher risk for their health (right to health) and life (right to life)* as a result of – amongst others –
 - a) Factors such as their (high) age and prior health condition, that lead to (much) more serious consequences in case of infection;
 - b) Their chosen occupation, which exposes them to a higher risk of infection: in the first place persons who work with infected persons (such as health professionals), but also persons who meet many other people at work (e.g. school teachers);
 - c) Persons who are in a situation in which their exposure to infection is to an important extent outside their control (e.g. detainees and other persons at least partly deprived of their liberty, such as some categories of migrants in reception centers, persons living in institutional care settings (elderly, persons with disabilities, children placed in institutions), but also people who on account of poverty experience very crowded living conditions);
 - d) Persons who become ill with COVID-19 and have less access to healthcare than others,

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e.g. on account of limited financial means, resulting in a worse health situation.

2. [Category 2] In the second place, the government measures taken to control the COVID-19 pandemic, restrict (sometimes very severely) human rights, including the freedom of movement, the right to protection of private life, the freedom of assembly, the freedom to exercise one's religion, the right to enjoy one's property, the right to education, the right to work, the right to an adequate standard of living. ***These government measures have a higher impact on (the enjoyment of human rights by) some individuals as compared to others.*** This is on account of – amongst others –
 - a) Their greater need for the exercise of a particular right: e.g. children and the right to education; members of a religion in which collective gatherings are key and the freedoms of assembly and of religion; people living in very crowded living conditions and the freedom of movement; people with a transnational lifestyle and the freedom of international movement; people living alone and the right to have contact with others; people with limited financial means and the right of access to free public facilities; people who make a living based on their property (e.g. business owners) and the right to enjoy one's property....
 - b) Choices made in the pandemic control measures: e.g. to close down restaurants but not hotels, theatres but not shopping malls.

II. Human Rights Law Framing (not considering discrimination)

In human rights terms, *category 1 concerns the positive obligations* of the state to take the necessary measures within its powers to prevent loss of life and to protect the right to health. Whereas *category 2 concerns the negative obligations* of the state, which can take rights-restrictive measures for the protection of public health and of the rights of others, provided that these measures have a legal basis and do not restrict rights more than is necessary (proportionality requirement).

In category 1, the assessment by a supranational human rights body whether positive human rights obligations have been violated will take into account the heightened risks for some categories of people in slightly different manners depending on whether the assessment is under the right to life or the right to health. In both cases, the result is that a violation is likely to be found when the measures taken to control the pandemic have not – or have to an insufficient degree – taken into account these heightened risks.

- Under the right to life, e. g. under article 2 ECHR, the question with regard to preventive measures will be whether the government has taken the necessary measures within its powers to prevent, regarding an identifiable category of persons, a risk to life that it knew, or should have known, about;

- Under the right to health, as under ESC rights generally, there is a requirement of priority allocation of resources toward categories of persons who are at a higher risk of seeing their human right to health violated.

An illustrative example

In Belgium, in the 'first wave' of the pandemic (Spring 2020), protective equipment was scarce, and seems to have gone in the first place to hospitals, at the expense of residential care facilities for the elderly, despite their particular risk (half of Belgium's COVID death toll is situated in such facilities). This can be analysed as a potential violation of preventive obligations under the right to life, in the sense that the government knew or should have known that elderly people in a bad health condition, living together in a closed environment, would run a particularly high risk. Under the right to health,² the assessment of the (in)sufficiency of preventive government measures would be impacted by the expectation that the inhabitants of residential care facilities should have been a priority category –hence the finding of a violation is more likely.

In category 2, the specific impact of restrictive measures on certain categories of persons will be a factor to be taken into account in the assessment whether any particular measure is proportionate in relation to its goal (contributing to containing the pandemic).

Considerations regarding the importance of the activity that is restricted for the individual concerned, and hence the impact of the restriction (category 2, scenario (a)), are typical elements that are taken on board in such an assessment.

The comparison with other individuals who are not struck by similar measures (category 2, scenario (b)) can also be part of the proportionality assessment, as a differentiation exercise can be part of the examination whether the measures do not go beyond what is necessary, i.e. assessing whether well- informed and considered choices have been made.

If it is found that measures result in a disproportionate burden on a particular category of persons, the remedy can consist in an exception to or amended modalities of the measures, or in compensation measures (e.g. financial support for business owners who had to close their businesses).

Two illustrative examples

² Article 12 (2) (c) ICESCR provides that 'The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: [...] (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases'.

This proportionality assessment can be illustrated by two national-level cases, decided on the basis of the European Convention on Human Rights: the French Conseil d'Etat (highest administrative jurisdiction) ruled on 29 November 2020 that a ban on gatherings of more than 30 persons as applied to religious gatherings, was a disproportionate restriction (and hence a violation) of religious freedom. In its proportionality assessment, the Conseil d'Etat compared the restrictions applicable in this case to those applicable to shops, where no absolute limit was imposed, but instead the maximum number of people was defined in relation to the surface of the shop. Another comparison that was included in the proportionality assessment, was that with other establishments, such as restaurants and theatres, that had to remain closed entirely.³ Here, the distinction was made on the basis of the 'essential nature' of collective gatherings for the exercise of religious freedom.⁴

On the other hand, the Belgian Conseil d'Etat ruled on 22 December 2020 that a ceiling of 15 participants for religious gatherings was not a disproportionate restriction of religious freedom, despite the fact that shops, museums and libraries in Belgium were allowed to give access to a number of people that was defined in relation to their surface instead of in absolute terms. The proportionality assessment in this case includes a comparison of the risks of infection in these respective environments.⁵

III. Framing the issue in terms of indirect discrimination

The takeaway point from section II is that international human rights law can adequately address government responsibilities concerning the unequal human rights impact of the COVID-19 pandemic, without needing to resort to indirect discrimination. Hence it is worth looking into the expected benefits and drawbacks of framing the issue (also) in terms of indirect discrimination.

Banning indirect discrimination serves a double purpose:

- ***On the one hand*** indirect discrimination allows to avoid circumvention of the prohibition of discrimination by the use of an apparently neutral criterion. It thus allows to uncover discrimination that is intentional or at least envisaged and accepted, yet that is 'covered up'. In such cases, there is in my opinion always an added value, even an urgency, to highlight

³ Hence a 'category 2, scenario b' argument: the choice made by the government to affect the human rights of some more than those of others, was found not to rest on sufficiently strong grounds.

⁴ Hence a 'category 2, scenario a' argument: the government had not given enough weight to the greater (and human rights protected) need of believers for the exercise of their freedom of assembly.

⁵ Hence a different 'category 2, scenario b' reasoning compared to the one in France: for the Belgian judges, the choice made by the government to affect the human rights of some more than those of others, was found to rest on sufficiently strong grounds, as it was linked to higher risks in one context as compared to the other.

the dimension of discrimination.

In the COVID context, an example could be a temporary ban on non-urgent medical services in hospitals, in order to prevent the spread of the COVID infection and to assign medical staff to the COVID wards. One can imagine a scenario in which such a ban does not make exceptions for medical services that can be considered urgent yet against which the government has ideological objections, e.g. abortions (indirect discrimination of women) or some types of transgender health care (indirect discrimination of trans persons).

- ***On the other hand*** indirect discrimination allows to detect and address unintentional disparate effects. In these cases, my assessment of the added value of a framing in terms of indirect discrimination is more nuanced.

When anti-COVID measures disproportionately affect a group that is already structurally marginalized in society, it is worthwhile to sensitize the government and society to the fact that this is now again happening. Naming a measure indirect discrimination can do that. Yet in some contexts, this benefit would have to be put in the balance with some expected drawbacks.

I would like to distinguish the scenario in which a disproportionate number of members of a certain group are affected by a measure, *but* the nature or degree of the impact of the measure on members of this group is not distinct from the impact the same measure has on other individuals [Type A]; from the scenario in which members of a certain group are affected to a greater extent, i.e. compared to others, they suffer more from the measure concerned [Type B]. In my opinion, highlighting indirect discrimination is more important for type B than for type A.

Type B includes some cases⁶ from **category 2 (a) in section I**.

An example is the impact of many restrictive measures on people living in poverty. They are affected more by a lockdown, because they are more likely to live in cramped circumstances; the children are affected more by the closure of schools because their circumstances may be ill-suited to distance learning; when they lose a job, this may have a dramatic impact on their living circumstances etc.

It is important to point out this additional suffering caused by ‘forgetting’ to take into account the impact of restrictive measures on people who were already marginalized. A remedy for this type of discrimination can consist of exceptions or compensatory measures associated to the restrictive measure. As shown above, the disproportionate impact can also be taken into account in the proportionality analysis concerning the violation of any substantive right. Yet the

⁶ The range of cases that can be framed as ‘indirect discrimination’ cases, will depend on the range of discrimination grounds accepted in the relevant system. Article 26 ICCPR uses an open list, allowing to add discrimination grounds referring for example to one’s professional activities.

(additional) finding of indirect discrimination is a more explicit and expressive way of drawing attention to the same issue, and it is not associated with any manifest drawbacks.

It also includes many cases from **category 1 in section I** (positive obligation cases): the fact that the government has neglected to adopt special protective measures in regard to the greater risk to life and health of certain groups, can be expressed in terms of indirect discrimination.

E.g. a case in which persons with disabilities in residential care institutions are exposed to a disproportionate risk of infection because of lack of protective equipment, and failure to prioritise their needs.

As shown above, a violation of positive obligations under the right to life and/or the right to health can be found in such case. Yet the (additional) finding of indirect discrimination emphasizes the injustice consisting of ‘overlooking’ this already marginalized group at the time of the adoption of the measures.

Type A includes many cases from category **2 (b) in section I** (policy choices in restrictive measures).

A lot of the human rights mobilization around the COVID crisis involves the use of this crisis and the rupture it causes as an opportunity to ‘see again’ certain longstanding human rights issues and to put them higher on the agenda. Emphasizing disproportionate effects can contribute to that agenda. Even if the isolated effect of a restrictive measure on a particular marginalized group is the same as that on other affected persons, the experience of it is likely more negative compared to persons who are more privileged. It can be an important human rights goal to emphasize this. Yet there are also some drawbacks.

One drawback is the risk of *confirming stereotypes*: when a certain group is over-represented in a certain profession (cf. [hypothetical 7](#)), this often results in stereotypes: the female nurse, the gay hairdresser... In a case concerning the human rights impact of a mandatory closure of hairdressers, the benefit of highlighting the disparate impact of the measure on gay men, may be outweighed by the drawback of stereotyping. An additional drawback would be the *accessory effects of perceived exclusion and victim competition* (‘why would the effect of this measure need to be taken any more seriously for gay hairdressers as compared to the other hairdressers?’).

Also, in a complex situation such as the COVID-19 crisis, in which many restrictive measures (and in some countries also many compensatory measures) affect large numbers of individuals, there are likely to be a *very large number of disproportionate impact situations*. In the scenario of hypothetical no 7, where waiting staff includes a disproportionate number of gay men, there may be a similar overrepresentation of women, and an overrepresentation of students. At the same time, the closing of restaurants and bars often goes hand in hand (often in the same decree) with other restrictive measures, forming a package of anti-COVID measures that may have to be assessed as a whole. This results in a multiplication of the disproportionate impact situations

when those resulting from the other measures are also taken into account. For a government trying to ‘do the right thing,’ i.e., to avoid any risk of indirect discrimination, this becomes a minefield, as recognizing the disparate impact on one group but not on the other generates its own problems of discrimination.

The *conclusion* of this cursory analysis is that while indirect discrimination framing is not strictly necessary to account for the unequal human rights impact of the COVID pandemic, it has added value in all cases where the greater impact is on groups that are already structurally disadvantaged. Yet this added value is more manifest in cases in which the impact on any individual member of this group is greater, as opposed to cases in which it is the same as for other individuals, yet more members of this group are affected.

Paper for the Workshop on Indirect Discrimination and Sexual Orientation or Gender Identity (in the COVID-19 pandemic)

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In this brief note, I focus on hypothetical 4 that was included in the concept note for the second workshop on indirect discrimination and sexual orientation or gender identity. I will first contextualise trans persons' vulnerability to structural discrimination in society (1.). Second, I will highlight some of the most interesting and important human rights developments that address trans persons and their position in a gender binary society (2.). Third, I will briefly reflect on the opportunities and challenges that the prohibition of indirect discrimination on the basis of gender identity presents for the emancipation of trans persons (3.). Finally, I will explore some alternative frameworks for emancipating trans persons, that could potentially meet some of the shortcomings of the prohibition of indirect discrimination (4.).

1. Trans persons' vulnerability to structural discrimination

Over the last two decades, our understanding of gender diversity has hugely increased. On the basis of research from multiple disciplines, including medicine, psychology, sociology, gender studies and law, a multifaceted approach to improve the living conditions of trans persons in society has been steadily developing around the globe. Recent population-based research showed much higher prevalence numbers for gender variation than prior studies had indicated. Moreover, the 'trans taboo' seems to be gradually diminishing, as more people find their way to care programmes and trans persons are increasingly positively represented in popular media. The improved registration of and attention to the prevalence of gender non-conformity is accompanied by the international legal attention for the often far-reaching requirements for trans persons to obtain legal recognition of their actual gender identity. Indeed, in many countries worldwide, trans persons have to comply with invasive medical requirements, such as gender affirming surgery, sterility and/or hormonal treatment, in order to have their official (birth) sex registration amended in light of their self-experienced gender identity. However, a small, but rapidly growing number of (mostly European and South-American) States have recently reformed their legal framework of

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legal gender recognition, by allowing trans persons to change their official sex registration on the basis of what is often referred to as gender self-determination.

Nevertheless, much empirical research proves that trans persons continue to remain vulnerable to transphobic stigma, discrimination and violence. These experiences might have a strong impact on their mental health: depression, suicidal thoughts, low self-esteem and a fatalistic attitude are common among members of this group.² At the root of these discriminatory attitudes and behaviour towards gender non-conforming persons, including non-binary persons, lies the binary and cisnormativity of Western societies: the stereotypical belief that there are only two, strictly distinguishable biological sexes, male and female, on which two strictly distinguishable gender identities map, i.e. men and women. These normativities ignore the enormous variation in sex characteristics and gender identity in humans, and through pervasive social constructions, have transformed human realities into oppressed social minorities. In other words, trans persons are faced with various disparities due to the structures along which society is constructed and organised.

More specifically, trans persons often face discrimination or stigma in the context of health care. Besides the challenge of finding access to (affordable and timely) trans-specific care such as hormonal therapy or gender affirming surgery, trans persons face particular difficulties in access to general health care. Empirical research performed in Belgium in 2017 showed that among the biggest concerns are misgendering, unintentional outings through administration, inappropriate curiosity and receiving a lower standard of care due to a lack of expertise in the medical professional concerned.³ Indeed, trans issues are mostly not part of the curriculum medicine students receive at university. A 2020 LGBTI survey by the EU Fundamental Rights Agency (FRA) showed that on average 60% of self-identified trans persons indicate an experience of discrimination during the last 12 months in 8 areas of life (including health care).⁴ A study by the FRA in 2014 showed that on average, 22% of self-identified trans persons in the EU felt discriminated when accessing health care in the last 12 months.⁵ According to the FRA report, for many trans people the discrepancy between gender identity and/or expression and the body can lead to difficulties when accessing healthcare services, as a health care practitioner may want to help but may lack information about trans issues.⁶ These negative experiences may lead to trans

² J. MOTMANS, E. WYVERKENS, J. DEFREYNE, “Being Transgender in Belgium. Ten Years Later”, https://igvm-iefh.belgium.be/sites/default/files/118_-_being_transgender_in_belgium.pdf (last visited 12 January 2021), p. 16-17.

³ J. MOTMANS, E. WYVERKENS, J. DEFREYNE, “Being Transgender in Belgium. Ten Years Later”, https://igvm-iefh.belgium.be/sites/default/files/118_-_being_transgender_in_belgium.pdf (last visited 12 January 2021), p. 78.

⁴ See <https://fra.europa.eu/en/data-and-maps/2020/lgbti-survey-data-explorer>.

⁵ EU FUNDAMENTAL RIGHTS AGENCY, “Being Trans in the European Union”, https://fra.europa.eu/sites/default/files/fra-2014-being-trans-eu-comparative-0_en.pdf (last visited 13 January 2021), p. 42.

⁶ *Ibid.*, p. 43.

persons avoiding seeking access to care for health issues, and experiencing a decline in mental health.

A recent worldwide, cross-sectional survey among self-identified trans persons in high-income and higher-middle-income countries has indicated that, due to their status as a vulnerable social group and the inherent need for transition-related treatment, trans persons are particularly affected by restrictions in access to health care caused by the COVID-19 pandemic.⁷ Over 50% of the participants had risk factors for a severe course of a COVID-19 infection and were at a high risk of avoiding testing or treatment of a COVID-19 infection due to the fear of mistreatment or discrimination. 35.0% of the participants reported at least one mental health condition. One in three participants had suicidal thoughts, and 3.2% have attempted suicide since the beginning of the COVID-19 pandemic. The study concluded that the COVID-19 pandemic exacerbated existing vulnerabilities among trans persons in terms of health, while creating new challenges. These conclusions were also reached by the UN Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity in his report on the COVID-19 pandemic.⁸

2. The emerging right to gender self-determination

Over the last decade, the situation of trans persons has also received much attention from a human rights perspective. States and international human rights bodies have paid particular attention to the development of legal protections for trans persons against discrimination on the basis of gender identity, and the abolishment of so-called abusive conditions for legal gender recognition. In Europe, the European Court of Human Rights found a prohibition of discrimination on the basis of gender identity in the case of *Identoba v. Georgia* (2015). At the level of the EU, the Court of Justice included (at least post-operative binary) trans persons in the scope of the prohibition of discrimination on the basis of sex in several cases.⁹ Many EU Member States have also included grounds such as gender identity, gender expression and gender reassignment in national anti-discrimination legislation.¹⁰ In 2015, the Parliamentary Assembly of the Council of Europe called on Member States to explicitly protect trans persons against discrimination and hate crimes on the

⁷ A. KOEHLER, J. MOTMANS et al., “How the COVID-19 pandemic affects transgender health care in upper-middle-income and high-income countries – A worldwide, cross-sectional survey”, *MedRxiv* 2021, <https://www.medrxiv.org/content/10.1101/2020.12.23.20248794v1> (last visited 13 January 2021).

⁸ Available at: <https://undocs.org/A/75/258>.

⁹ *Inter alia* CJEU 30 April 1996, P v S and Cornwall County Council.

¹⁰ See for a recent comprehensive report P. DUNNE and M. VAN DEN BRINK, “Trans and intersex equality in Europe – a comparative analysis”, https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf (last visited 13 January 2021).

basis of gender identity, including in the context of health care.¹¹ The Parliamentary Assembly also called on States to ensure effective access to affordable (trans-specific and general) health care. We can notice the same calls in the influential Yogyakarta Principles +10.

During the 2010s, we have also seen the emergence of a right to gender self-determination, predominantly in the context of legal gender recognition. On the basis of such right, which is closely connected to more generally recognised fundamental rights such as the right to respect for private life or the right to personal autonomy, legal recognition of a person's sex/gender may only be based on a declaration of that person's self-defined gender identity. Moreover, recognition of a right to gender self-determination also logically leads to a recognition of non-binary gender identities. Several scholars have concluded that a proper recognition of gender self-determination can only lead to an abolition of State sex/gender recognition as such. This right to gender self-determination has been especially developed in (quasi) soft law instruments adopted by international human rights bodies, such as UN treaty bodies and the Parliamentary Assembly of the Council of Europe, an advisory opinion by the Inter-American Court of Human Rights,¹² the Yogyakarta Principles +10, and State practice.¹³ However, as will be explained below, the right to gender self-determination arguably has a much broader scope than the issue of official sex/gender registration by the State.

In the 11th update of the WHO's International Classification of Diseases (ICD), trans specific health care was formally depathologised. Indeed, the diagnosis of gender identity disorder was reformed to a recognition of gender incongruence as a condition related to sexual health. This step is part of a move towards a depathologised, patient-tailored health care model (solely?) based on informed consent.

Interestingly, the developments concerning the legal protection of trans persons against discrimination have coincided with the legal empowerment of intersex persons, who have a variation in sex characteristics. While clear data showing discrimination of intersex persons are less prevalent than with trans persons, it is widely accepted that intersex persons, who do not conform to the binary sex normativity in society, are vulnerable to stigma and discrimination. In some States, including Belgium, Australia and the Netherlands, anti-discrimination legislation has been expanded with a new ground of 'sex characteristics'. Trans persons, who may have undergone some forms of trans-specific health care, may arguably also benefit from a prohibition of

¹¹ COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, "Resolution 2048(2015) Discrimination against transgender people in Europe", <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21736> (last visited 13 January 2021).

¹² IACtHR 24 November 2017, Advisory Opinion OC-24/17.

¹³ In January, the European Court of Human Rights held that a requirement of gender affirming surgery for legal gender recognition violated Article 8 ECHR (right to respect for private life) (EtCHR 19 January 2021, X and Y v. Romania, 2145/16 and 20607/16). In 2017, the Court also found a violation of Article 8 ECHR in the requirement of compulsory sterility for legal gender recognition (ECtHR 6 April 2017, A.P., Garçon, Nicot v. France).

discrimination on the basis of this new ground. In other words, when a policy, rule, practice would constitute direct differential treatment on the basis of sex characteristics (as seems to be the case in hypothetical 4 of the concept note), trans persons would no longer have to claim indirect discrimination on the basis of gender identity due to the disparate effect they experience when their bodies do not correspond to social expectations or norms connected to their gender identity.

3. Prohibition of indirect discrimination to combat structural inequalities

Even though the legal status of trans persons (in some countries) has clearly improved over the last decade, empirical data show that they remain among the most vulnerable groups in society. Moreover, while direct discrimination of trans persons on the basis of gender identity is starting to disappear, societal structures have arguably not sufficiently changed to achieve substantive equality of trans persons. At the very least, binary normativity is still structurally anchored in most (Western) societies.

As was already set out in the short papers for the first workshop on indirect discrimination on the basis of sexual orientation or gender identity, the prohibition of indirect discrimination presents a useful correction for undesired effects of a sole focus on the prohibition of direct discrimination (or formal legal equality). Indeed, on the basis of the prohibition of indirect discrimination, disparities experienced by trans persons due to the way society is structured can be challenged in court.

As Eva Brems pointed out, in general terms, banning indirect discrimination serves a double purpose:

- On the one hand it allows to avoid circumvention of the prohibition of discrimination by the use of an apparently neutral criterion. It thus allows to uncover discrimination that is intentional or at least envisaged and accepted, yet that is 'covered up'. In this way, the prohibition of indirect discrimination is needed to prevent an easy way to circumvent the prohibition of direct discrimination;
- On the other hand it allows to detect and address structural, unintentional, or even accidental discrimination.

Being connected to the notion of substantive (instead of formal) equality, the prohibition of indirect discrimination aims to guarantee equal opportunities or even equal outcomes for a group of persons that suffers from structural oppression on the basis of a protected characteristic such as sexual orientation or gender identity. The prohibition of indirect discrimination could arguably also be considered as being based on a commitment to tackle social exclusion of persons who do not meet the socially constructed norm in society (male, white, heterosexual, able-bodied, cisgender etc.), and to realise a redistribution of resources and opportunities. Alternatively, it may be argued that the prohibition of indirect discrimination serves to protect and enhance the autonomy of individuals by removing unjustifiable barriers to their full participation in society and their choices

in life.¹⁴ There are generally more options to justify indirect discrimination than direct discrimination, which suggests direct discrimination is a greater moral wrong than indirect discrimination, although the concrete impact on the person experiencing discrimination may be very similar (and even direct). Indirect discrimination usually can be justified by a legitimate aim and appropriate and necessary means for achieving that aim.

As Collins and Khaitan indicate, the prohibition of indirect discrimination continues to provoke controversies and debate about *inter alia* the wrongs it intends to overcome, its scope and its potential justifications.¹⁵ Indeed, numerous potential challenges or barriers arise when applying the framework of indirect discrimination. By way of illustration, one can think of the following issues:

- Evidence: the prohibition of indirect discrimination counters the situation where an apparently neutral provision, criterion or practice (would) put(s) (persons belonging to) a group at a particular disadvantage because of a particular characteristic, compared with persons who do not share that characteristic. Although most legal systems only require the applicant to establish a prima facie presumption of discrimination, which must then be justified by the discriminator concerned, providing evidence for such presumption might be challenging. Applicants will often rely on statistical data, showing the disparate impact of a certain ‘neutral’ norm or practice. While many government agencies collect and publish data on matters like employment or social services, or protected criteria like sex/gender (mostly interpreted as the ratio between men and women), age or ethnicity, not all disparities are effectively monitored. Looking at hypothetical 4 in the concept note, it may not be easy for a trans woman who claims to have suffered indirect discrimination to provide evidence of any disparate impact on gender non-conforming persons in the organisation of the medical profession in a certain hospital/city/region/country;
- Proportionality/incrementalism: as Eva Brems already indicated in her paper for the first workshop, since society and law are still generally structured along binary and cisnormative notions of sex and gender, gender non-conforming persons and persons with variations in sex characteristics may have an inordinate number of claims of indirect discrimination. After having recognised in law the wrong of discrimination on the basis of gender identity, the remedy easily seems to be that undoing the binary in all spheres of society and law is required. However, such conclusion may as easily be considered disproportionate in relation to the harm and to the number of persons affected by it. Connected to this is the question of whether the framework of indirect discrimination allows for any room for incrementalism in an area that requires cultural changes in order

¹⁴ H. COLLINS and T. KHAITAN, “Indirect Discrimination Law: Controversies and Critical Questions” in H. COLLINS and T. KHAITAN (eds.), *Foundations of Indirect Discrimination Law*, Oxford, Hart Publishing, 2018, 1-30.

¹⁵ *Ibid.*

to overcome (potentially rather recently ‘discovered’) disparities suffered by trans persons. Indeed, full emancipation of trans persons in all spheres of life requires adjustment to deeply and sincerely held beliefs with many persons in society. Does the law of discrimination need to provide time for individual persons who are raised in normative social constructions (like a gynaecologist who has never treated a trans woman before and hasn’t been trained to do so) to ‘see’ the injustice and change their attitudes and behaviour? If so, how much time is proportionate? Should the State or State institutions (like a public university not paying any form of attention to trans persons in the curricula offered to students in medicine) be allowed sufficient time to fulfil their obligations under human rights law to realise cultural change in the context of gender identity? Interestingly, by taking into account potential effects on the normative majority, the justification mechanism in the framework of indirect discrimination still shows assimilationist dynamics;

- Judicial ‘overreach’ and remedies: as was argued during the first SOGI workshop, indirect discrimination claims may be ‘uncomfortable’ for judicial actors, *inter alia* because courts are reluctant to interfere with the opinions of for instance employers, schools, hospitals, medical professionals etc. on how to conduct their operations. This seems to be especially true for international/supranational human rights bodies, who also have to take into account their subsidiary role in human rights protection vis-à-vis the national State authorities. Finding indirect discrimination where policies do not seem unreasonable (because they are fully entrenched in the normative construction in society) or harm was truly unintended may seem an overreach and a violation of a sense of justice felt by many. If, for instance, an individual medical professional does not have any expertise with treating persons that show a particular combination of sex characteristics and declines treatment due to ethical and legal concerns, should a court nevertheless conclude that that professional indirectly discriminates trans persons by the disparate impact of their lack of expertise? Could or should a court of law decide which kinds of expertise an individual medical professional, or even a hospital should offer? Should a court of law decide which courses students in medicine need to receive in their training, taking into account the endless possibilities of intersections in individual patients? Even if the answer to these questions would be affirmative, do these issues have to be dealt with from a perspective of discrimination (potentially stigmatising discriminators who acted in good faith) or rather substantive fundamental rights which give rise to negative and positive obligations?

To be clear, I do not necessarily argue against the use of the framework of indirect discrimination to combat structural inequalities on the basis of gender identity (or sexual orientation). Given the relative lack of power LGBTIQ+ persons have in society, bringing claims of indirect discrimination before national and international courts might present a very useful tool to create momentum to achieve cultural change. Framing a case in terms of indirect discrimination will be especially important when a ‘neutral’ provision actually covers intentional (in various degrees)

differential treatment. Naming a policy/action/norm discriminatory has an important symbolic and sensitising value.

4. Other frameworks to ensure trans inclusion

Given the potential challenges or barriers connected to the prohibition of indirect discrimination, other routes could be explored. Within the context of hypothetical 4, suitable candidates would be the right to health and the right to gender self-determination. Alternatively, the analytical framework of substantive equality developed by Sandra Fredman appears to be particularly suitable to address the situation of trans persons in hypothetical 4. Naturally, these alternative routes come with their own challenges and limitations. In any case, a comprehensive discussion of these alternatives goes beyond the scope of this short paper.

(An intersectional approach to the) right to health and access to health care

As the COVID-19 pandemic has shown, the importance of the right to health and access to health care cannot be overlooked. The right to health is included in several international human rights instruments as well as in numerous national constitutions around the globe. Trans persons who struggle finding access to high quality, appropriate and affordable trans-specific or general health care due to public policies (adopted by State bodies or institutions) could consider bringing a claim before the courts based on the right to health, to the extent the provision has direct effect in the jurisdiction concerned. Public policies, such as any form of prioritisation of certain medicines, techniques, services, reference centres etc., could lead to a unjustifiable exclusion of certain vulnerable patients who are generally overlooked by society. In human rights terms, the State would have violated its positive obligations under the right to health.

It would be especially interesting to bring this claim under the right to health from the perspective of an intersectional approach to human rights. While in law intersectionality has been primarily conceptualised as a critique of the framework and application of the law of equality, there seems to be no inherent reason to limit the scope of intersectionality to discrimination law.¹⁶ Since structural disadvantage and exclusion mechanisms linked to persons' multiple identities influence how they experience the realisation of their human rights, any claim of a violation of fundamental rights could (or should) be informed by considerations of intersectionality. As we know from research, trans persons (and especially trans women of colour) globally experience intersecting forms of social marginalisation, leading to disproportionate vulnerability to physical and mental health problems, as well as barriers in accessing health care.¹⁷

¹⁶ S. ATREY, "Introduction: Intersectionality from Equality to Human Rights" in S. ATREY and P. DUNNE (eds.), *Intersectionality and Human Rights Law*, Oxford, Hart Publishing, 2020, p. 2-3.

¹⁷ L. M. WESP et al., "Intersectionality Research for Transgender Health Justice: A Theory-Driven Conceptual Framework for Structural Analysis of Transgender Health Inequities", *Transgender Health* 2019, vol. 4, 287-296.

Looking at hypothetical 4, recourse to (positive obligations under) the right to health probably does not seem to be suitable to address the refusal by the individual gynaecologist to treat a particular trans woman. Arguably, it would be a disproportionate burden on the State to guarantee that all individual medical professionals at any time would be able to treat all patients that present themselves to the professional concerned. However, a lack of attention for trans persons in the organisation of State hospitals or training of health care professionals could be targeted under the right to health.

Right to gender self-determination/autonomy

As mentioned in section 2 of this short paper, a right to gender self-determination/autonomy seems to be emerging in international human rights law. Until now, the right to gender self-determination has been predominantly seen as the foundation for the required abolition of so-called abusive conditions for legal gender recognition (medical conditions, age requirements, divorce requirements etc.). However, there does not seem to be a good reason to limit the future potential of gender autonomy to the context of State registration of sex/gender.

Traditionally, the concept of ‘personal autonomy’ refers to the idea that, provided others are not harmed, each individual should be entitled to follow their own life plan in light of their beliefs and convictions.¹⁸ Specifically in the context of sexual minorities, the right to autonomy also comes down to a right to be free from oppressive socially constructed normative expectations regarding sexual identity. Indeed, postmodern feminist and queer scholars see autonomy as a beacon against normative social constructions which constitute what persons are allowed to be, to do, how they are able to think and conceive of themselves, what they can and should desire and what their preferences or opportunities in life are. In this regard, it may be argued that pervasive binary and cisnormative expectations in the medical world about the innate entanglement of sex and gender identity unjustifiably interfere with trans persons’ right to gender autonomy. As Fredman argues, what people can achieve is not only influenced by economic opportunities, political liberties, social powers, but also by the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives.¹⁹

Focussing on (gender) autonomy instead of the prohibition of (in)direct discrimination (on the basis of gender identity) deviates somewhat from the way in which human rights instruments have traditionally addressed the situation of structurally oppressed groups in society. Lessons can be drawn from feminist scholarship and legal developments concerning women’s rights. For instance, the CEDAW Convention provides the basics for the realisation of *equality* between women and men through ensuring women’s *equal* access to, and *equal* opportunities in public and private life. However, feminist legal scholars have argued that a focus on non-discrimination created a

¹⁸ J. MARSHALL, *Personal Freedom through Human Rights Law. Autonomy, Identity, and Integrity under the European Convention on Human Rights*, Leiden, Nijhoff Publishers, 2009, p. 57.

¹⁹ S. FREDMAN, “Substantive equality revisited”, *International Journal of Constitutional Law* 2016, 730.

structural dynamic of comparison whereby women's rights can only be conceptualised as far as matching the rights that are already enjoyed by men. Wendy O'Brien argues that the overall result of such framework is the creation of a legal system in which women are offered formal equality as objects of a protectionist law, rather than substantive rights bearers with full legal capacity.²⁰ One of the critical questions raised by feminists has therefore been: How to address oppression and discrimination against women without reinstating protective narratives and stereotypes of vulnerable women that eventually could impede women's emancipation in law and society?²¹ This challenge arguably also presents itself for the legal and social emancipation of trans persons. Although claims concerning equality are of considerable strategic and moral importance for oppressed groups, rhetoric of equality and tolerance is also considered to hide discourses of normalisation of difference.²²

In other words, an emphasis on autonomy arguably radically and critically unpacks the protective dimension under which trans persons have been addressed under human rights law, seeing sexual minorities as inherently vulnerable and weak. Although such an approach should not be considered as negative per se, given that any form of protection against human rights violations is in itself a good thing, an emphasis on protection could be seen as an expression of paternalism that reinforces stereotypes.²³ It may therefore be stated that the best way of protecting the rights of sexual minorities is to grant them the autonomy to live their lives according to their own choices and experiences.

The right to gender autonomy clearly has a strong negative component, as is the case with most civil and autonomy-based rights. Indeed, it generates the obligation for the State (and depending on the jurisdiction, also for individuals) to refrain from expressing or acting upon stereotypes and other normative expectations regarding a person's gender identity. In the context of health care, it could mean that actors like public universities or public hospitals may not simply rely on a stereotypical assumption of binary cisnormativity in designing curricula or the provision of health care services. In its positive dimension, the right to gender autonomy could be qualified as being part of so-called 'emancipation rights', which are intended to correct a legacy of structural discrimination of specific groups and to provide the members of those groups equal opportunities and equal enjoyment of their human rights. One of the crucial features of emancipation rights is that their substantive and sustainable realisation not only takes place within the vertical relations between the individual and the State, but that they also present some of their challenges within the horizontal relations between individuals, such as for instance an individual patient and a health

²⁰ W. O'BRIEN, "Can International Human Rights Law Accommodate Bodily Diversity?", *Human Rights Law Review* 2015, Vol. 15, p. 9.

²¹ L. PERONI and A. TIMMER, "Gender Stereotyping in Domestic Violence Cases. An Analysis of the European Court of Human Rights' Jurisprudence" in E. BREMS and A. TIMMER (eds.), *Stereotypes and Human Rights Law*, Cambridge, Intersentia, 2016, p. 48.

²² F.R. AMMATURO, *European Sexual Citizenship*, London, Palgrave, 2017, p. 2-3.

²³ *Ibid.*, p. 96.

professional.²⁴ In other words, a substantive and sustainable realisation of a fundamental right to autonomy regarding sexual identity would rely on the implementation of the State's positive obligation to bring about cultural change regarding the conceptualisation of gender in law and society. In order to effectively realise emancipation rights, private individuals need not only to change their actions and expressions, but also their way of thinking,²⁵ so that they respect the rights of people who are (actually or seemingly) different from themselves and see the types of harm that were previously invisible to them. A government cannot be held fully responsible for the fact that segments of its society do not embrace inclusion on grounds of gender identity. But a government arguably should be held responsible for failing to show evidence of working toward the realisation of such cultural change. Nevertheless, the aforementioned issue of incrementalism also remains an important factor in the autonomy-based framework.

Substantive equality as a four-dimensional analytical framework

Another alternative framework that appears particularly suitable to address hypothetical 4 in the concept note, is the substantive equality framework developed by Sandra Fredman. Considering the many critiques towards formal equality, she proposed a four dimensional approach of substantive equality: to redress disadvantage; address stigma, stereotyping, prejudice and violence; enhance voice and participation; and accommodate difference and achieve structural change.²⁶ As Fredman explains, the four-dimensional approach is deliberately framed in terms of dimensions, to permit us to focus on their interaction and synergies, rather than asserting a pre-established lexical priority.²⁷ It is thus not a definition, but an analytic framework to assess and assist in modifying laws, policies and practices in order to be responsive to those who are disadvantaged, demeaned, excluded or ignored.

As Fredman explains, disadvantage should not only be understood in terms of material objects or resources, but can also be understood as a deprivation of genuine opportunities to pursue one's choices in life.²⁸ Being deprived of the access to patient-centred appropriate health care would certainly qualify as a disadvantage, given the enabling role health plays in a person's life. Secondly, as has been explained above, it is clear that the challenges experienced by trans persons in accessing appropriate health care are rooted in the organisation of all spheres of society along binary cisnormative lines. The third dimension of substantive equality relates to participation: substantive equality not only provides compensation for the lack of social and political power

²⁴ E. BREMS, "Lessons for children's rights from women's rights? Emancipation rights as a distinct category of human rights" in E. BREMS, E. DESMET, W. VANDENHOLE (eds.), *Children's Rights Law in the Global Human Rights Landscape. Isolation, Inspiration, Integration?*, London, Routledge, 2017, p. 95.

²⁵ *Ibid.*

²⁶ S. FREDMAN, "Substantive equality revisited", *International Journal of Constitutional Law* 2016, 713.

²⁷ *Ibid.*

²⁸ *Ibid.*, 729.

oppressed persons/groups have to put their interests ‘on the agenda’, but also aims to facilitate social inclusion of oppressed persons in society. The last aim of substantive equality is to achieve structural, transformative change in society: rather than requiring ‘non-conforming’ persons to live up to dominant social constructions, existing social structures must be changed to accommodate diversity. Although a framework focussing on disparate impact rather than disparate treatment already serves to correct the negative effects of formal equality, Fredman’s model of substantive equality might better address the remaining ‘assimilationist’ tendencies of the justification to indirect discrimination. As Fredman argues, substantive equality is not satisfied with justifications that too easily go along with the interests of the normative majority. At the very least, substantive equality requires additional efforts to enable the excluded group to have the same opportunities as people who already meet the norm.

5. Conclusion

It is clear that trans persons challenge some of the basic structures of society. Experiences of exclusion, stigma and discrimination (which might be exacerbated in times of a global pandemic) not only lead to socioeconomic disadvantages that hinder the realisation of one’s potential and life choices, but also to reduced mental and physical well-being. In these circumstances, highlighting structural disparities on the basis of gender identity through the prohibition of indirect discrimination could have a clear added value compared to an approach based on substantive human rights. Nevertheless, this note has touched on some challenges the framework of indirect discrimination presents, for both the individual and broader law and society. While indirect discrimination helps to uncover injustices that otherwise could remain hidden, it might also be a figurative sledgehammer that unintentionally hinders the realisation of long term emancipation objectives. Therefore, other frameworks, such as the emerging right to gender self-determination, might have to be explored. While much research still needs to be done, it is clear that these alternative frameworks would also be accompanied by their own limitations and challenges.



MANDATE OF THE WORKING GROUP ON DISCRIMINATION AGAINST WOMEN AND GIRLS

**Indirect discrimination in the understanding and
action of the UN Working Group on
Discrimination Against Women and Girls
(WGDAG)**

*Document for the Workshop on indirect discrimination,
Harvard Human Rights Program, Dorothy Estrada-
Tanck, member of the Working Group*

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Under CEDAW's Article 1, differences in treatment may constitute discrimination against women if they have the effect or purpose of "impairing or nullifying" women's rights directly or indirectly. Direct discrimination arises where differential treatment is "explicitly based on grounds of sex and gender".¹ However, identical treatment may still be indirectly discriminatory if it has the effect of impairing or nullifying women's rights. This may occur when "a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure".²

The issue of indirect discrimination is at the core of the WG's mandate although the WG has not used the terminology so explicitly and frequently in practice. The WGDAG was created by the UN Human Rights Council in 2010, and the original name of the mandate actually mentioned "in law and in practice" which suggests direct discrimination as in provisions in law

¹ CEDAW Committee, General Recommendation No 28 on the core obligations of States Parties under article 2 of CEDAW, 2010, UN Doc CEDAW/C/GC/28, para 16.

² Ibid.

and indirect discrimination as in the reality of women's life. This is most clearly demonstrated in the reports of the WG's country visits, where the mandate starts with a review of the legal framework before looking at the realities of women's life in all spheres, and demonstrates that even when law is in place formally, women still experience discrimination in practice. In most of the countries, and especially in the EU context, a good legal framework is in place, so there is not significant direct discrimination as such. But in practice, women face a discriminatory reality in many ways [country visit examples will be used to illustrate these points].

In terms of direct discrimination in law, it has been concerned mostly with the areas of family law, inheritance, personal status law. The WG sent a number of communications on issues of nationality, family law, and adultery. In the position paper on adultery, it is argued that even when the law is the same for both women and men, women are impacted differently.

The very first thematic report of the WG setting out its vision (A/HRC/20/28) has the following which is relevant:

19. The Working Group intends to identify practices that have strengthened States' efforts to achieve equality and to respect, protect and fulfil women's human rights. The Working Group will examine:

(a) The extent to which States have met the obligation to respect women's rights to equality and to the exercise and fulfilment by women of human rights and fundamental freedoms. This will involve surveying existing and newly introduced discriminatory laws and practices. The Working Group will pay special attention to the direct *or indirect inclusion of discriminatory provisions in legislation or case law* that apply discriminatory interpretations of statutory, customary, religious or deontological regulations. The Working Group will compile good practices in the elimination of laws and regulations that are both directly and indirectly discriminatory to women. The examination of good practices for this purpose would include constitutional amendments, judicial review, legislative reform, litigation and case law, policy and institutional reform, independent human rights monitoring, political action, and religious or cultural hermeneutic projects.

The 2014 WG's report on economic and social life with a focus on economic crisis may provide further illustrations of what indirect discrimination may look like in reality, e.g. regarding pension gap. The WG signaled that there is a gender pension gap both in wealth accumulation and income. It further explained that the balance of pension entitlements within multipillar systems has a direct impact on the gender pension gap. Social (World Bank "zero pillar") schemes, which give basic flat rate citizens' pensions, are non-contributory and do not, as such,

differentiate between men's and women's pension entitlement, thus producing equality. The WG thus highlighted that the trend to diversify pension systems to include contributory first and second pillar systems, which base a substantial element of pension entitlement on working life contributions, impacts women adversely, increasing the gender pension gap, as women's contribution to these funded pension schemes is lower because of the structural factors in their labour market and care work.³

On the other hand, the 2016 thematic report on health and safety may be interesting in terms of arguing the matter from another perspective, referring to the meaning of equality in women's health and safety: "In the area of health, the distinctly different biological and reproductive functions of women and men necessitate differential treatment and proper algorithms are required to make sure that women have equal access to and enjoy the highest achievable level of health treatment. An identical approach to treatment, medication, budgeting and accessibility would in fact constitute discrimination."⁴

Particularly since 2017, the WGDAWG has highlighted the importance of constitutional and legal guarantees of gender equality, and of defining gender discrimination and setting forth provisions against direct and *indirect discrimination*. It also emphasized, though, that such laws often generated social controversy and backlash because of the perception that they represent an attack on "family values".⁵ In 2018, the WG concluded that the continuing existence of direct and indirect discrimination, both visible and invisible, is the reason why women lag behind in nearly all human progress indicators.⁶

The WG also highlighted in 2020 how, despite increased female education, occupational and sectoral segregation remains deeply entrenched globally, with women remaining clustered in low paid jobs and sectors, with limited prospects for career progression. The global gender pay gap stands at an unwavering 20 per cent and is wider for women who experience multiple and intersecting forms of discrimination. Systemic disadvantage experienced by mothers in the workplace contributes to a large pay gap and dramatically lower retirement savings or pension contributions, known as the "motherhood penalty". Globally, only 27.1 per cent of managers are women, a figure that has changed very little over the past 27 years. Such data not only reflects the persistent barriers women face, but also the low societal value ascribed to the work that women

³ A/HRC/26/39 (2014), Report of the Working Group on the issue of discrimination against women in law and in practice, para. 99.

⁴ Report of 2016, para. 22.

⁵ A/HRC/35/29 (June 2017) Report of the Working Group on the issue of discrimination against women in law and in practice, 'Challenging discrimination: gender sensitive education for cultural change', para. 54.

⁶ A/HRC/38/46 (June 2018), Report of the Working Group on the issue of discrimination against women in law and in practice, para. 18.

do.⁷

It also pointed out that discriminatory family and personal status laws in some countries continue to have a negative impact on women's ability to engage in paid work. For Roma women in many parts of Europe the lack of access to education, coupled with residential segregation and discrimination, exclude them from the formal labour market, forcing them to take up precarious and low paid work, creating a poverty trap. According to information received by the Working Group, Dalit women in India disproportionately experience discrimination at work, even in urban settings and in skilled work. Dalit women earn half the average daily wage earned by non-Dalit castes. Transgender women experience disproportionate levels of poverty and economic insecurity because of the discrimination they face in accessing employment. Young women with disabilities are much more likely to be excluded from education and employment, as compared with both men with disabilities and women without disabilities.⁸

In the Statement by the WGDAWG, 'Responses to the COVID -19 pandemic must not discount women and girls', while not referring specifically to indirect discrimination, the WG makes a case of the disproportionate effect of the pandemic on the situation of women and girls. Indeed, the WG had already signaled that 'Women in vulnerable forms of informal work, such as domestic workers, market vendors and waste-pickers, are particularly vulnerable to harassment and violence in the course of their work'.⁹ And given that part of that work, particularly domestic work, as well as care functions, are disproportionately carried out by women globally, the lockdown, loss of formal jobs and deepening economic crisis caused by COVID-19 leave women vulnerable to or suffering direct and indirect discrimination.

It thus recommended States to systematically gather disaggregated outbreak-related data, to examine and report on the gender-specific health effects of COVID-19, both direct and indirect as well as on the gender-specific human rights impacts of COVID-19 and utilize this data in the formulation of responses.

⁷ A/HRC/44/51 (June 2020) Report of the Working Group on discrimination against women and girls, 'Women's human rights in the changing world of work', para. 14.

⁸ See Ibid., paras. 16 and 17, as well as UN Secretary General Report, E/CN.6/2020/3, paras. 55 and 322.

⁹ Ibid. WGDAWG 2020 Report, para. 15.

Notes on a theme: Indirect discrimination on bases including sexual orientation and gender identity in the context of health and in light of commitments to cross-movement solidarity*

Alice M. Miller and Jessica Tueller,

with contributions from Jaime Todd-Gher and Payal Shah

INTRODUCTION: Health, health justice, and the multi-directional operations of indirect discrimination claims

Here, we build on the “centrifugal and movement thinking” of Ali Miller’s earlier paper for this workshop series,¹ which asked whether the ways in which we identify, define, and document the doctrinal and narrative aspects of sexual and gender rights (including, but not limited to, rights arising in the sexual orientation and gender identity (SOGI) framework) tend to open or close the possibilities for coalitions and joint advocacy work among rights groups. As our discussion in the fall made clear, indirect discrimination almost always implicates the rights of more than one group and the consequences of such discrimination are often multiple and distinct across different populations, including for those within the SOGI world.

This commentary centers health, and a health justice approach,² as particularly revealing of the potential and pitfalls presented by the multi-directional operations of indirect discrimination claims because health encompasses so many distinct processes at the individual body, intra- and inter-personal, and institutional level. Health justice is both a field of work and an analytic framing:

* If we had more time, this would be shorter [apparently per Cicero, Pascal, and Mark Twain]

¹ Alice Miller, “Indirect Discrimination: Turning a Regressive Space into a Site for Coalitional Action” (paper presented at the Workshop on Indirect Discrimination and Sexual Orientation and Gender Identity, Harvard Law School, 16 October 2020), available at http://hrp.law.harvard.edu/wp-content/uploads/2021/05/IndirectDiscrimination_WorkshopProceedings_October2020.pdf.

² Emily A. Benfer, “Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Justice,” *American University Law Review* 65 (2015): 275; Angela P. Harris and Aysha Pamukcu, “The Civil Rights of Health: A New Approach to Challenging Structural Inequality,” *UCLA Law Review* 67 (2020): 758; Amy Kapczynski, “The Right to Medicines in an Age of Neoliberalism,” *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 10, no. 1 (2019): 79-107; Gregg Gonsalves and Amy Kapczynski, “The New Politics of Care,” *Boston Review*, 27 April 2020, <http://bostonreview.net/politics/gregg-gonsalves-amy-kapczynski-new-politics-care>.

here, we use the frame to enable us to consider law-associated discriminations as both a *cause and a consequence of ill-health*.³ We begin, for example, with a case study of the gendered quarantine measures implemented in some Latin American countries and cities as an example of indirect discrimination arising in COVID times that highlights not only the harms to gender-diverse individuals but also the fact that these measures derive from and perpetuate gender stereotypes in a way that harms a wider range of individuals, especially cis-gender women. We argue that the gendered quarantine measures reveal the potential and even the need for joint advocacy work on gender to address the ways that COVID-19 regulations and other societal responses to crises invoke and entrench stereotyped norms.

Our paper then departs from the context of COVID-19 to discuss the way in which indirect discrimination arises when trans individuals are denied access to medical services. We refer to the human rights standards for the availability of healthcare that advocates for access to abortion and contraception fought to secure to illustrate the potential to build coalitions around the access to sexual and reproductive health services. We also argue that discrimination against trans individuals arises not merely out of inter-personal, “personal animus,” in an institutional setting, but that it is rooted in the underlying ideologies dominant in most medical training (i.e., faith in the binary categories of M/F). This argument again overlaps with the claims of sexual and reproductive health advocates who have pushed the human rights community to recognize that *healthcare is part of a health system* that must be competent to respond to health needs without discrimination *as a system*, regardless of any individual provider’s beliefs. The specific experience of abortion advocates also underscores that professional training is an ideological (and not exclusively scientific) component of all health systems that requires review and alteration.

Our final case study considers the ways in which infertility is differentially (and, we argue, discriminatorily) created amongst LGBTI persons as they confront provider care that is indifferent toward them or incompetent to address their needs, as well as legal frameworks that impede rather than facilitate diverse persons’ access to information or services relevant to fertility. Infertility can also result from the operations of criminal law (here, prostitution law as well as laws criminalizing same-sex sexual conduct or gender-non-conforming expression) when individuals are afraid to seek healthcare because of their “criminal status.” Infertility has distinct rights ramifications across differently gendered, raced, or classed persons, and work here from a SOGI perspective can productively connect to broader reproductive justice frameworks.

Our conclusion reflects back on the case studies. We propose a preliminary three-part framework to guide analysis of and research into indirect discrimination in the context of health and pull out some cross-cutting themes around law as a structuring and constraining power for visibility, social

³ Alexander C. Wagenaar and Scott C. Burris, eds., *Public Health Law Research: Theory and Methods* (San Francisco: Jossey-Bass, 2013).

connection, and disease in the context of sex and gender norms. We then further reflect on these themes as sites for coalitional work.

CASE STUDY 1: Gendered Quarantine Measures (engaging with some of the questions raised by Hypothetical No. 7)

We draw on the example of the gendered quarantine measures implemented in Peru, Panama, and Colombian cities such as Bogotá and Cartagena in April 2020, to show that an effective response to indirect discrimination against gender-diverse individuals requires broader work toward transformative gender equality. Since the measures were born out of gender essentialism, not only did they exclude and make vulnerable gender-diverse individuals, but they also stereotyped and constrained “gender normative” persons in ways that harmed cis-gender women in particular and presumably reified norms around cis-gender men. Although all of the gendered quarantine measures were eventually withdrawn,⁴ the design and implementation of these sex-segregated regimes reveal profound and lasting prejudices that remain to be addressed while illustrating the need for joint advocacy work on gender.

On April 1, 2020, the Panamanian government implemented gendered quarantine measures in response to the arrival of the COVID-19 pandemic in Latin America.⁵ The measures divided the week into three days in which women could leave home for essential goods and three other days in which men could do the same. No one could leave home on Sundays. Peru implemented almost identical gendered quarantine measures on April 3.⁶ On April 13, the Colombian cities of Bogotá and Cartagena followed suit, implementing gendered quarantine measures that assigned men and women separate days on which to leave home for essential goods, basing their regimes on even- and odd-numbered days and on the last digit of national identification numbers, respectively.⁷

⁴ Note that Panama withdrew its gendered quarantine measures in August 2020, but authorized their reinstatement should COVID-19 cases rise. Ministerio de Salud, “Resolución No. 1078,” *Gaceta Oficial Digital* No. 29111-A (11 September 2020): art. 3, https://www.yomeinformopma.org/static/dash/docs/decretos/Decreto_Ejecutivo_N_1078.pdf.

Additionally, in January 2021, Panama introduced a new set of gender-based COVID-19 restrictions that fall outside the scope of this paper. “The IACHR Calls on State of Panama to Guarantee Human Rights of Trans and Gender-Diverse People during Partial Restrictions on Mobility during the COVID-19 Pandemic,” *Inter-American Commission on Human Rights*, 4 February 2021, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2021/024.asp.

⁵ Ministerio de Salud, “Resolución No. 360,” *Gaceta Oficial Digital* No. 28992-A (30 March 2020): art. 2, https://yomeinformopma.org/static/dash/docs/decretos/Resolucion_No_360.pdf.

⁶ Presidente de la República, “Decreto Supremo No. 057-2020-PCM,” *El Peruano* (2 April 2020), <https://busquedas.elperuano.pe/normaslegales/decreto-supremo-que-modifica-el-articulo-3-del-decreto-supre-decreto-supremo-no-057-2020-pcm-1865326-2>.

⁷ La Alcadesa Mayor de Bogotá, D.C., “Decreto No. 106” (8 April 2020): art. 2(5), <https://bogota.gov.co/mi-ciudad/salud/coronavirus/conoce-el-decreto-106-y-las-nuevas-restricciones->

The gendered quarantine measures constituted indirect discrimination on the basis of gender identity and gender expression.⁸ The Panamanian government made no mention of gender-diverse individuals and the Peruvian government stated that no discriminatory intent motivated the measures⁹, while the Colombian cities attempted to address the concerns of gender-diverse individuals by training police officers on diversity¹⁰ and by clarifying in the measures themselves that trans individuals could comply with the quarantine measures in accordance with their gender identities¹¹. Yet, in all three countries, the gendered quarantine measures had a severe discriminatory effect on gender-diverse individuals. Trans individuals, for example, were hurt and harassed by both police officers and private individuals regardless of whether they left home on the day corresponding with their gender identity or the sex marker on their national identification card.¹² They were subjected to fines and arrests for noncompliance and barred from accessing essential goods and services.¹³ For example, one transgender woman in Panama left home for a

para-salir-la-calle; El Alcalde Mayor del Distrito Turístico y Cultural de Cartagena de Indias, “Decreto No. 0539” (13 April 2020), <https://www.cartagena.gov.co/Documentos/2020/Coronavirus/Decretos/Decreto%200539%20de%2013%20abril%202020.pdf>.

⁸ Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, *Violence and Discrimination Based on Sexual Orientation and Gender Identity during the Coronavirus Disease (COVID-19) Pandemic*, A/75/258 (28 July 2020): ¶ 43.

⁹ Alberto Ñiquen G., “Martín Vizcarra, el primer presidente que incluye a los trans en un mensaje desde Palacio,” *LaMula.pe*, 2 April 2020, <https://redaccion.lamula.pe/2020/04/02/martin-vizcarra-el-primer-presidente-que-incluye-a-los-trans-en-un-mensaje/albertoniquen>. The trans community welcomed the President’s recognition of their existence but continued to express concern about the gendered quarantine measures. See, e.g., Gahela Tseng Cari Contreras, “Sr. @MartinVizcarraC nos preocupa cómo se garantizará el derecho de las personas Trans si hasta ahora quienes más han vulnerado nuestros derechos son los efectivos?,” Twitter, 1:18 PM, 2 April 2020, <https://twitter.com/CariGahela/status/1245807717077352450>.

¹⁰ Ana María Montoya Z., “No cede la violencia contra la comunidad trans en Bogotá,” *El Tiempo*, 2 July 2020, <https://www.eltiempo.com/bogota/violencia-de-genero-no-cede-violencia-contra-comunidad-trans-en-bogota-513742>.

¹¹ La Alcadesa Mayor de Bogotá, D.C., “Decreto No. 106” (8 April 2020): art. 2(5), <https://bogota.gov.co/mi-ciudad/salud/coronavirus/conoce-el-decreto-106-y-las-nuevas-restricciones-para-salir-la-calle>.

¹² Julia Symmes Cobb, “Transgender People Face Discrimination, Violence amid Latin American Quarantines,” *Reuters*, 5 May 2020, <https://www.reuters.com/article/us-health-coronavirus-latam-lgbt/transgender-people-face-discrimination-violence-amid-latin-american-quarantines-idUSKBN22H2PT>; “Panama: New Trans Discrimination Cases under Covid-19 Measures: Government Needs to Clarify Gender-Based Quarantine System,” *Human Rights Watch*, 13 July 2020), <https://www.hrw.org/news/2020/07/13/panama-new-trans-discrimination-cases-under-covid-19-measures>; “Recepción de quejas sobre vulneraciones a los derechos humanos de personas trans,” *Defensoría del Pueblo*, 16 April 2020, <http://www.defensoriadelpueblo.gob.pa/portal/recepcion-de-quejas-sobre-presuntas-vulneraciones-a-los-derechos-humanos-de-personas-trans>.

¹³ Juan Manuel Reyes Fajardo, “Hombre trans fue expulsado de supermercado en medio de la jornada de pico y género,” *Publímtero*, 15 April 2020, <https://www.publimetro.co/co/noticias/2020/04/15/hombre-trans-fue-expulsado-supermercado-medio-la-jornada-pico-genero.html>; “Panama: Government Takes

doctor's appointment on a day designated for women when two police officers stopped her and placed her under arrest. She recalled being detained for half an hour at a police station where "there were seven officers and they were laughing at me . . . I was wearing make-up and they were mocking that."¹⁴

While the harm to gender-diverse individuals was the most severe and most visible discriminatory effect of the gendered quarantine measures, these measures should also be understood as growing out of and contributing to structural discrimination and thus also harming the very "gender conforming" people for whom they were designed.

The gendered quarantine measures may not have been born directly out of an intent to discriminate against gender-diverse individuals, but they were born out of sex and gender essentialism. Panama's Ministry of Health, for instance, justified the use of sex segregation in quarantine measures as "[t]he simplest method of cutting the circulation of the population in half,"¹⁵ implying that "men" and "women" are natural, neat categories. A member of Panama's COVID-19 advisory committee, meanwhile, said that "separating men and women appeared to be the easiest way to maintain control,"¹⁶ implying that "men" and "women" are oppositional categories such that law enforcement could tell at a glance, based on a person's gender expression, whether they were in compliance with the gendered quarantine measures. Not only did these justifications ignore the existence of gender-diverse individuals, they also reflected historic limitations on the possibilities of identity and expression for people who do identify as "men" and "women." Ironically, the gendered quarantine measures failed in Peru, not only because of the harm to the gender-diverse, but because their essentialism claimed a false equality which was quickly exposed: traditionally gendered men do not do the shopping.¹⁷ Women continued to be disproportionately burdened with domestic labor, only with fewer days to accomplish that work.

The gendered quarantine measures not only reflected but also perpetuated structural discrimination. Sex segregation increased pressure to conform to gender stereotypes, as in the case of one non-binary Bogotano who said "If you don't go out with make-up on, with a skirt . . . If you

Steps to End Quarantine Gender Discrimination: Protect Transgender People from Police, Security Guard Abuse," *Human Rights Watch*, 18 May 2020, <https://www.hrw.org/news/2020/05/18/panama-government-takes-step-end-quarantine-gender-discrimination>.

¹⁴ "Panama: New Trans Discrimination Cases Under Covid-19 Measures," *Human Rights Watch*, 13 July 2020, <https://www.hrw.org/news/2020/07/13/panama-new-trans-discrimination-cases-under-covid-19-measures>.

¹⁵ Ministerio de Salud de Panamá, "Nuevas medidas para la cuarentena absoluta," Twitter, 2:20 PM, 31 March 2020, <https://twitter.com/MINSAPma/status/1245098676290301952?s=20>.

¹⁶ Lioman Lima, "Coronavirus en Panamá: cómo se convirtió en el país de Centroamérica con más muertos y más casos de covid-19," *BBC News Mundo*, 2 April 2020, <https://www.bbc.com/mundo/noticias-america-latina-52130235>.

¹⁷ Tania Tapia Jáuregui, "Las lecciones que dejó el (fallido) intento del 'Pico y Género' en Perú," *Cerosetenta*, 15 April 2020), <https://cerosetenta.uniandes.edu.co/las-lecciones-que-dejo-el-fallido-intento-del-pico-y-genero-en-peru>.

don't comply with those stereotypes and gender roles then you can't identify yourself or be in a public space.”¹⁸ It also reinforced traditional gender roles, especially the gendered division of labor. Crowding in Peruvian grocery stores on the days assigned to women led the President to withdraw the gendered quarantine measures and a member of Peru's COVID-19 task force to suggest the measures should have assigned women four days to circulate and men only two.¹⁹ Panama, meanwhile, did implement an imbalanced regime in a later iteration of the gendered quarantine measures, assigning women three days and men two days to circulate in five of its provinces.²⁰ The gendered quarantine measures not only reproduced gender inequality, they required it.

Thus, analytic clarity on gender roles not only can produce resistances to a gender binary as a form of indirect discrimination against gender non-conforming persons, it can usefully be part of exposing the gender stereotyping upon which the constraints and discrimination arising out of unarticulated reliance on “women's roles” depends.

CASE STUDY 2: Trans Individuals' Access to Medical Care (Hypothetical No. 4)

We turn next to the scenario presented in Hypothetical No. 4 as an opportunity to highlight the possibility to draw on work already done by sexual and reproductive health advocates, and importantly also to suggest this as terrain for joint advocacy work on gender because the denial of sexual and reproductive healthcare is a concern trans activists share with cis-gender women. Advocates for abortion and contraception access, for example, have helped to establish human rights principles for the availability of care that easily translate to the situation of the transgender woman and the gynecologist in this hypothetical, and their continued fight to secure compliance

¹⁸ Julia Symmes Cobb, “Transgender People Face Discrimination, Violence amid Latin American Quarantines,” *Reuters*, 5 May 2020, <https://www.reuters.com/article/us-health-coronavirus-latam-lgbt/transgender-people-face-discrimination-violence-amid-latin-american-quarantines-idUSKBN22H2PT>.

¹⁹ Ministerio de Economía y Finanzas del Perú, “10/04/20 Desde Tumbes, el presidente Vizcarra informa sobre la situación del Estado de Emergencia,” *Youtube*, 10 April 2020, <https://www.youtube.com/watch?v=WX9nUM16S4Y>; “Matuk sobre restricción de circulación por género: ‘Me equivoqué por exceso de igualdad,’” *Canal N*, 9 April 2020, <https://canaln.pe/actualidad/matuk-sobre-restriccion-transito-genero-exceso-igualdad-me-equivoque-n410638>; “Perú cancela salida diferenciada de hombres y mujeres por coronavirus,” *Infobae*, 10 April 2020, <https://www.infobae.com/america/agencias/2020/04/10/peru-cancela-salida-diferenciada-de-hombres-y-mujeres-por-coronavirus>.

²⁰ Presidente de la República, “Decreto Ejecutivo No. 869,” *Gaceta Oficial Digital* No. 29071-B (17 July 2020): art. 6, https://yomeinformopma.org/static/dash/docs/decretos/Decreto_Ejecutivo_No._869.pdf; Presidente de la República, “Decreto Ejecutivo No. 873,” *Gaceta Oficial Digital* No. 29076 (23 July 2020): art. 6, https://yomeinformopma.org/static/dash/docs/decretos/Decreto_Ejecutivo_No._873.pdf.

with these standards makes them key allies in the struggle against indirect discrimination based on gender identity in the provision of health services.

The human rights standards for availability of sexual and reproductive healthcare are most clearly articulated by the Committee on Economic, Social and Cultural Rights (CESCR) in its *General Comment No. 22 (2016) on the right to sexual and reproductive health*.²¹ Availability, according to the CESCR, means States are responsible for “[e]nsuring the availability of trained medical and professional personnel and skilled providers who are trained to perform the full range of sexual and reproductive healthcare services,”²² which presumably includes the medical advice and treatment the transgender woman in the hypothetical seeks from the gynecologist, since gynecologists specialize in reproductive organs. For instance, the trans woman in the hypothetical might see a gynecologist about metabolic diseases, prostate or breast cancer, or HIV.²³

The CESCR further clarified that “[u]navailability of goods and services due to ideologically based policies or practices, such as the refusal to provide services based on conscience, must not be a barrier to accessing services. An adequate number of healthcare providers willing and able to provide such services should be available at all times in both public and private facilities and within reasonable geographical reach.”²⁴ The ideology that might lead an individual gynecologist to deny medical advice and treatment to a trans woman therefore cannot be the ideology underlying State policies and practices. Whether medical education is privately provided and regulated by private health associations (as it is in the United States) or publicly regulated, it is the responsibility of the State to train medical professionals so they are competent to provide care to trans individuals, require that medical professionals provide this care, and monitor medical professionals’ service provision to ensure that this care is available not only in law but also in practice throughout the country.

Discriminatory barriers to competent fertility-related care can also be usefully analyzed through the care lens. A large majority of healthcare providers lack critical information on the fertility-related needs of non-cis-gender, non-heteronormative people. For example, healthcare providers

²¹ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/22 (2 May 2016): ¶¶ 12-14. State obligations to make available sexual and reproductive health care have also appeared in the work of the Human Rights Committee (the case of *KL v. Peru*) and the Committee on the Elimination of Discrimination against Women (CEDAW Committee). Human Rights Committee, *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (22 November 2005); CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, A/54/38/Rev.1, chap. 1 (1999): ¶ 17.

²² CESCR, *General Comment No. 22*, ¶ 13.

²³ Cécile A. Unger, “Care of the Transgender Patient: The Role of the Gynecologist,” *American Journal of Obstetrics and Gynecology* (2014).

²⁴ CESCR, *General Comment No. 22*, ¶ 14.

often lack accurate information on the impact of hormone treatment for transgender people on fertility, leading to improper counseling and side effects.²⁵ As a result, LBGTI individuals not only lack access to comprehensive and acceptable health information and services for purposes of fertility preservation, but also face barriers when seeking information and medical support to bear children. We will discuss fertility and indirect discrimination in greater detail in our third case study below.

Notably, the idea of “trans-incompetent care” (both in regard to the presentation of bio-medical research on transcare and the scope of needs over the life course, and in regard to counteracting bias) is increasingly on the agenda of a number of advocacy groups, especially associations of medical students and younger faculty seeking to change medical curricula.²⁶ This move to alter medical education can be understood as a key component of meeting the “AAAQ care” standard (acceptability, accessibility, availability and quality),²⁷ and resembles the efforts of sexual and reproductive health advocates to intervene in medical curricula to ensure that enough physicians are competent to perform abortion as provided for in law.²⁸ Trans advocates can therefore draw not only on the human rights standards initially established to ensure the availability of health services such as abortion, but can also join in current efforts of abortion advocates to reform medical school curriculums so as to increase State compliance with these standards.

CASE STUDY 3: Infertility (contribution by Jaime Todd-Gher and Payal Shah)²⁹

While infertility is commonly and narrowly conceived as an issue that predominately impacts cis-gender heterosexual women, it is also a site where LGBTI individuals face both direct and indirect discrimination, opening the possibility of joint advocacy work. LGBTI persons’ inability to exercise their rights to form a family and to determine the number and spacing of their children,

²⁵ Expert interview for OHCHR research report on infertility, November 6, 2020; Khadija Mitu, “Transgender Reproductive Choice and Fertility Preservation,” *AMA Journal of Ethics* 18 (2016).

²⁶ S. E. James et al., *Report of the 2015 U.S. Transgender Survey: Executive Summary* (Washington, DC: National Center for Transgender Equality, 2016); see also Juno Obedin-Maliver et al., *Lesbian, Gay, Bisexual, and Transgender-Related Content in Undergraduate Medical Education*, *JAMA* 306 (2011). These references are drawn from Yumna Ali (DO Candidate at UNTHSC Texas College of Osteopathic Medicine, AP MPH YSPH '21), “How The U.S. Healthcare System Fails Its Transgender Patients” (unpublished manuscript, December 2020), typescript (on file with Miller).

²⁷ For a infographic on the AAAQ framework, which has evolved into a globally accepted assessment tool for health services and materials, see “Availability, Accessibility, Acceptability, Quality: Infographic,” *World Health Organization* (2016), <https://www.who.int/gender-equity-rights/knowledge/AAAQ.pdf?ua=1>.

²⁸ Emily Bazelon, “The New Abortion Providers,” *The New York Times*, 14 July 2010, <https://www.nytimes.com/2010/07/18/magazine/18abortion-t.html>.

²⁹ This section is drawn from a larger research paper currently being prepared by Jaime Todd Gher and Payal Shah for the UN OHCHR. MS on file with authors

among other rights, can be the result of both biomedical infertility³⁰ and social infertility—the latter of which arises from broader structural constraints on reproductive decision-making such as discriminatory laws and policies, lack of social safety nets, systemic barriers to healthcare for marginalized groups, sexual and gender-based violence (GBV), and/or criminalization of sexual and reproductive actions, health status, and certain forms of gender expression.³¹ All of these concerns can be analyzed through indirect and direct discrimination arising out of gender stereotypes that undergird normative reproduction and family life policies.

Lack of access to assisted reproductive technologies (ART)³² is a common barrier to LGBTI individuals' ability to bear children. The violation is often inherent in law and policy, notably in the biological and gendered assumptions built not only into laws, but also arising in individual clinic practices and policies determining access to ART. ART, including in vitro fertilization (IVF), can be critical for specific populations such as HIV sero-discordant couples and LGBTI people.³³ In addition to barriers such as cost and lack of insurance coverage, LGBTI individuals, same-sex couples, couples in which one or both partners are transgender, and/or people living with HIV often face both direct and indirect discrimination when seeking to access ART.³⁴ For example, ART laws can explicitly prohibit access to these individuals and groups or indirectly discriminate against them through facially neutral requirements to access ART (e.g., legal marriage, HIV-negative status, diagnosis of biomedical infertility)³⁵ that have a disparate impact across SOGI.

³⁰ The World Health Organization defines infertility as “a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.” F. Zegers-Hochschild et al., “International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary of ART Terminology, 2009,” *Fertility and Sterility* 92 (2009): 1522. The biomedical infertility of LGBTI individuals is often overlooked due to the focus on social infertility arising from laws excluding LGBTI people from accessing ARTs. However, both areas must be addressed. Several of the examples highlighted reveal how indirect discrimination (often in the form of omission of specific mention of LGBTI individuals from laws/policies) may lead to biomedical infertility.

³¹ Expert interview for OHCHR research report on infertility, October 19, 2020. (information on file with J.Todd-Gher/P. Shah)

³² WHO defines ART as “all treatments or procedures that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy. This includes, but is not limited to, in vitro fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy.” F. Zegers-Hochschild et al., ICMART and WHO Revised Glossary of ART Terminology, 1521.

³³ Ann M. Starrs et al., “Accelerate Progress—Sexual and Reproductive Health and Rights for All: Report of the Guttmacher–*Lancet* Commission,” *Lancet* 391 (2018).

³⁴ Martha F. Davis and Rajat Khosla, “Infertility and Human Rights: A Jurisprudential Survey,” *Columbia Journal of Gender and Law* 40 (2020): 6-7.

³⁵ This ground for concerns arises in the case of laws that do not allow social infertility to be sufficient for access to ART, such as in Argentina.

These laws are also rife with gender stereotypes and thus provide a basis for thinking strategically across groups subordinated by sex and gender norms.

Criminal law is another structural factor that, perhaps unexpectedly, leads to indirect discrimination against LGBTI individuals in the context of infertility.³⁶ The criminalization of same-sex sexual activity, sex work, and drugs, for example, can deter individuals from seeking preventative healthcare due to stigma and fear of punishment, and/or lead to individuals being denied care or harassed when they do seek healthcare.³⁷ Criminalization also has the effect of suppressing the development of positive policies to ensure preventative healthcare for targeted communities,³⁸ including healthcare necessary to prevent infertility, such as access to information and services to diagnose and treat reproductive tract infections.³⁹ In addition to creating barriers in access to sexual and reproductive healthcare, criminalization also results in incarceration of non-gender or non-heteronormative populations, which further impedes their access to such sexual and reproductive health services. While incarcerated, one's ability to engage in reproductive activity is severely curtailed, if not fully eliminated.⁴⁰

LGBTI individuals also face indirect discrimination when seeking access to information about fertility. Without such access, individuals may not understand the importance of prevention and treatment of STIs to prevent complications that cause infertility.⁴¹ To the extent sexuality education is included in school curriculum in certain areas, fertility awareness is often not included.⁴² Rather, sexuality education is typically taught from the perspective of prevention of pregnancy,⁴³ to promote population control or abstinence until marriage.⁴⁴ For LGBTI individuals who may transgress gender norms, overarching barriers to fertility awareness and sexuality education are further compounded by taboos around sexual orientation and gender identity, as well as social presumptions that LGBTI individuals would not want to or should not reproduce. LGBTI health, wellbeing, and fertility issues are largely absent from sexuality education, thus impeding

³⁶ Human Rights Council, *Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health, Anand Grover, A/HRC/14/20* (27 April 2010): ¶ 2.

³⁷ *Ibid.*, ¶¶ 17-19.

³⁸ *Ibid.*, ¶ 18.

³⁹ Maya N. Mascarenhas et al., "National, Regional, and Global Trends in Infertility Prevalence since 1990: A Systematic Analysis of 277 Health Surveys," *PLOS Medicine* 9 (2012).

⁴⁰ Jess Whatcott, "No Selves to Consent: Women's Prisons, Sterilization, and the Biopolitics of Informed Consent," *SIGNS: Journal of Women in Culture and Society* 44 (2018).

⁴¹ Expert interview for OHCHR research report on infertility, November 12, 2020. (in MS on file with J. Todd-Gher and P. Shah.)

⁴² *Breaking the Silence around Infertility: A Narrative Review of Existing Programmes, Practices and Interventions in Low and Lower-Middle Income Countries* (Share-Net International, 2019).

⁴³ Expert interview for OHCHR research report on infertility, November 9, 2020. (in MS on file with J. Todd-Gher and P. Shah.)

⁴⁴ Expert interview for OHCHR research report on infertility, November 12, 2020. (in MS on file with J. Todd-Gher and P. Shah.)

LGBTI individuals’ understanding of their own fertility and how to prevent infertility in the future. Gender stereotyped perspectives in sexuality education, and their multiple discriminatory effects, feature as key concerns across a range of children’s and women’s rights movements and present possibilities for coalitional work.⁴⁵

GBV, which is disproportionately targeted at persons for gender and sexual non-conformity or identities, should be considered in any review of factors leading to indirect discrimination. GBV, in general, can lead to STIs, unsafe abortions, or higher risk pregnancies, which can in turn impact fertility. For example, LBQ women who do not want (or are perceived not to want) to marry and/or bear children can be subjected to “corrective rape.”⁴⁶ Violence and mistreatment in healthcare facilities can also lead to reluctance to seek preventative healthcare or treatment for medical conditions that impact fertility.⁴⁷ For some individuals, the trauma from sexual violence can also create difficulty in being sexually active later in life, which may eventually interfere with their ability to become pregnant. While laws on GBV may either be gender-specific (direct discrimination) or appear facially neutral (indirect discrimination), either may lead to lack of preventive measures and avenues for accountability and redress for LGBTI individuals. Feminist and women’s rights advocates share an interest in preventing and redressing GBV, making this another potential site of coalitional analysis and advocacy—even though, as has addressed elsewhere by Miller, there are tensions within movements about the scope of “gender” in GBV.⁴⁸

CONCLUSIONS, and some ways forward

The examples discussed above consistently show the multiple processes by which discrimination—direct and indirect—arises in health, particularly at the intersection of gender and sexuality norms and stereotypes. The issue- and practice-based case studies described above demonstrate the many modes by which discrimination can arise: correlated with underlying conditions that affect exposure to risk (which in health are often analyzed through structural determinants research); informal policies that distribute risk/harm according to gendered and other stereotyped beliefs; and practices such as the care that one receives (including in regard to the access to care, as well as determined by the training of one’s caregivers).

⁴⁵ John S. Santelli, and Leslie M. Kantor, “Human rights, Cultural, and Scientific Aspects of Abstinence-Only Policies and Programs,” *Sexuality Research & Social Policy* 5 (2008); Alice M. Miller, and Rebecca A. Schleifer, “Through the Looking Glass: Abstinence-Only-until-Marriage Programs and Their Impact on Adolescent Human Rights,” *Sexuality Research & Social Policy* 5 (2008).

⁴⁶ OHCHR Anglophone Africa Focus Group Discussion, November 12, 2020 (in MS on file with J.Todd-Gher and P.Shah); Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/31/57 (5 January 2016): ¶ 57.

⁴⁷ Expert interview for OHCHR research report on infertility, November 20, 2020.

⁴⁸ Ali Miller, “Fighting over the figure of gender,” *Pace Law Review* 31 (2011).

The ‘why, how, and so what’ of indirect discrimination in our health-related case studies and hypotheticals

We chose these case studies because they help us to think about laws and other measures, as well as the role of structural determinants like access to care, criminalization, and education, as forms of indirect discrimination in the context of health and gender/sexuality-related issues. These analyses reinforce the need to consider carefully the way difference operates across different modes of “becoming well” or facing illness. In this reflection, however, we expand on additional particularities of treating health as a site of justice work.

Communicable and chronic diseases, as well as reproductive health, implicate some common and some radically different ways of analyzing needs for health. In the early phase of the AIDS pandemic, both the association of HIV with same-sex behavior and the lack of real treatment options tended to drive gay rights advocacy away from health systems thinking; conversely, the attention to reproductive health drove the women’s rights movement toward revitalizing health systems to reduce maternal morbidity and mortality.⁴⁹ Both, however, used a non-discrimination framework, and as first anti-retroviral treatments and then preventive medicines/PrEP became more effective, the HIV/AIDS world turned toward concerns for adequately resourced, accessible, and accountable public health policies and health systems. Gaps and antagonisms between the movements nevertheless remain even as their rights claims consistently overlap in juridical and movement articulations of norms and remedies.⁵⁰

Our examples are meant to push the analysis of discrimination—here indirect discrimination—beyond access to services so we can recapture/refocus on some of the strongest insights of the original health and human rights frame about the “inextricable links” between rights and health.⁵¹ Once we accept that “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”⁵² and, critically, that the bulk of health is not produced by healthcare but by the conditions in which we live (housing, environment, education, access to resources including food, clean water, and importantly, conditions of respect and equality),⁵³ then one can ask an ever-widening set of sex- and gender-related discrimination questions, while being

⁴⁹ Mark Heywood, and Dennis Altman, “Confronting AIDS: Human Rights, Law, and Social Transformation,” *Health and Human Rights* 5 (2000); UN Millennium Project, *Who’s Got the Power? Transforming Health Systems for Women and Children* (London: Earthscan, 2005).

⁵⁰ Alice M. Miller, “Sexual but Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights,” *Health and Human Rights* (2000); Dianne Otto, “International Human Rights Law: Towards Rethinking Sex/Gender Dualism,” *The Ashgate Research Companion to Feminist Legal Theory* (2013).

⁵¹ Jonathan M. Mann et al., “Health and Human Rights,” *Health and Human Rights* 1 (1994).

⁵² *Constitution of the World Health Organization* (1946).

⁵³ Elizabeth H. Bradley, and Lauren A. Taylor, *The American Health Care Paradox: Why Spending More is Getting Us Less* (New York: Public Affairs, 2013).

especially attentive to the ways that this harm is exacerbated by racial or class status.⁵⁴ The analysis of the role of law in health can arise in the domains of the intra-personal (as the management of stigma)⁵⁵; inter-personal at family or community level; institutional (media, healthcare, religious institutions); and State interactions.

A provisional multi-part framework for identifying sites, causes and consequences of discrimination, including indirect discrimination, in health

Based on our study of indirect discrimination in the health context, we argue that a comprehensive analysis of the relationship between law and health is comprised of at least three different approaches to identifying sites and processes of direct and indirect discrimination:

1. Analyzing **direct State action on public and private life in the name of health—as implicated in quarantine, isolation and rules regulating social actions and interactions**. This provides a classic entry point for health justice inquiries into direct—and indirect—discrimination on the basis of sex, gender, sexual orientation, and gender identity. Here quarantine measures and the pretextual application of physical/social distancing rules can figure in the analysis, with attention to potential violations of the right to health, the right to participate in public life, and more.
2. Asking how **law and legal frameworks mediate access to health services** including with regard to their acceptability, accessibility, availability, and quality (AAAQ). These standards apply to public and private health services and the AAAQ must be guaranteed by the State as a matter of its obligations. Elements include education of healthcare providers and insurance schemes that have only binary categories of M/F.
3. Attending to **law and legal frameworks as structural determinants of health** with negative impacts through (indirect) discrimination, such as housing regulations, educational access decrees, and criminal laws that are neutral on their face but have a disparate impact on LGBTI individuals, women, etc. The work here is to track the pathways by which the legal frameworks affect health in an adverse manner, as with the case study on infertility.

⁵⁴ Nancy Krieger, “ENOUGH: COVID-19, Structural Racism, Police Brutality, Plutocracy, Climate Change—and Time for Health Justice, Democratic Governance, and an Equitable, Sustainable Future,” *AJPH* (2020): 1620-23; Cary P. Gross et al., “Racial and Ethnic Disparities in Population-Level Covid-19 Mortality,” *Journal of General Internal Medicine* 35 (2020).

⁵⁵ Ilan H. Meyer, and David M. Frost, “Minority Stress and the Health of Sexual Minorities,” in *Handbook of Psychology and Sexual Orientation*, ed. Charlotte J. Patterson and Anthony R. D’Augelli (New York: Oxford University Press, 2013).

Notably, COVID-19 presents a new set of concerns for SOGI rights. On the one hand, some of the first principles in health as a human right arise from Article 12 (2)(c) ICESCR, which locates State obligation in “[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases,” such that gay rights’ first encounters with health rights were with the subjects and objects of epidemic disease which spread through sexual (read “private/intimate”) contact. SARS CoV-2 spreads as a matter of respiration, which is to say, shared public and private space. Unlike HIV, which presented as a disease cloaked in morality and fear of the dangers born in the unnatural, scandalous private lives of others,⁵⁶ COVID-19 fears track the specter of the “infected other” in public life, such as in the grocery aisle or on a bus or train. The fact that COVID-related restrictions have been discriminatorily applied to LGBTI gatherings in public life,⁵⁷ as well as the analysis we present on the gendered quarantine measures, tell us that authorities are aware of the presence of gender and sexually-diverse persons in public life: the pretextual use of COVID restrictions is an invitation to consider more deeply the modes of gender organization of public life, social networks, etc., as aspects of anti-discrimination work, consonant with other rights moves by feminists and anti-racist advocates.

Moreover, in twenty-first-century pandemics, the control of diseases is commonly understood to require States to act individually and together with all relevant technologies, to improve epidemiological surveillance and data collection on a disaggregated basis, and carry out strategies of testing, contact tracing, and immunization.⁵⁸ Each of these practices: data collection, surveillance, and outreach (for testing or immunization), will be fraught spaces for stigmatized groups (sex workers, immigrant workers, sexual or gender non-normative folks) who have little reason to trust the State, even or especially when garbed in the white coats of medical interventions.

As Lynn Freedman wrote almost two decades ago, “[a] vision of ‘defining and advancing human well-being’ ultimately requires overturning deeply-rooted social and political structures that produce ill health and that prevent all people . . . [from] fulfilling their highest potential as human beings The structures that now obstruct human well-being must be changed into modes of social organization and interaction that will promote and support it. The disciplines of public health

⁵⁶ *Public Scandals: Sexual Orientation and Criminal Law in Romania* (New York: Human Rights Watch and the International Gay and Lesbian Human Rights Commission, 1998), <https://www.hrw.org/legacy/reports97/romania>.

⁵⁷ Neela Ghoshal, “Uganda LGBT Shelter Residents Arrested on Covid-19 Pretext,” *Human Rights Watch*, 3 April 2020, <https://www.hrw.org/news/2020/04/03/uganda-lgbt-shelter-residents-arrested-covid-19-pretext>.

⁵⁸ See, e.g., “Introduction to Public Health Surveillance,” *CDC*, 15 November 2018, <https://www.cdc.gov/training/publichealth101/surveillance.html>.

and human rights offer ways of thinking, of working, and of organizing that can ultimately give expression and concrete direction to that endeavor.”⁵⁹

Modes of social organization premised on gender and sexuality definitionally affect—and in our commentary are shown to discriminate—against a wide array of persons facing subordination under gender/sexuality norms, often exacerbated by other social fault lines of race, class, place, etc. This expansive quality may scare courts: as one participant in the October workshop emphasized, findings of indirect discrimination may have broad reach, far beyond the defendant or issue in the case presented, and this may lead to judicial reluctance to embrace indirect/disparate impact discrimination claims. What is necessary for solidarity across movements may indeed be in tension with individual case success, but the more honestly we confront this point, the more inclusive the compromises may be at both movement and individual case decision levels. Participating in using law to overturn unjust social structures, in the context of health as here or more generally, however, requires nothing less than both the honesty and the work.

⁵⁹ Lynn P. Freedman, “Reflections on Emerging Frameworks of Health and Human Rights,” *Health and Human Rights* (1995).

Indirect Discrimination, SOGI, and Public Health Measures in the Pandemic

Gerald L. Neuman

This short paper, building on previous discussions in the workshop series, begins in Part A with some general considerations on indirect discrimination law. Part B then discusses Hypothetical No. 7 on the differential effect of restaurant closings in light of some of these general considerations.

Part A

[1] 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 grounds such as race, sex, or sexual orientation or gender identity. Equal protection doctrine does address certain kinds of discriminatory impact that directly affect constitutional rights such as voting, freedom of speech, and family, but it provides only the most minimal protection for economic and social rights such as health, work, and education. Discriminatory impact is mostly a statutory concept in the United States, found in certain statutory provisions applying to certain fields of activity, such as employment and housing.¹ Some human rights treaties expressly prohibit forms of

¹ For more references on U.S. law regarding disparate impact, see Gerald L. Neuman, Questions of Indirect Discrimination on the Basis of Religion, 34 Harvard Human Rights Journal 177, 181-84 (2021).

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.

[2] 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. Others maintain instead that acts of indirect discrimination, in contrast with direct discrimination, are *not* in themselves morally wrong.²

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 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.

Specifically regarding sexual orientation and gender identity, new developments at the federal level include (1) the Supreme Court's holding in *Bostock v Clayton County*, 140 S. Ct. 1731 (2020), that intentional discrimination based on being homosexual or transgender (the Court's phrasing) amounts to intentional discrimination "because of sex" within the meaning of Title VII, the federal employment discrimination statute, and (2) an Executive Order at the outset of the Biden Administration adopting more broadly the interpretation that "laws that prohibit sex discrimination . . . prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary," Executive Order 13,988, 86 Fed. Reg. 7023 (2021).

² For some references, see Neuman, *supra*, 34 Harvard Human Rights Journal at 179-80.

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

[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 scope of the required protection extends to matters covered by ordinary legislative policy, and not just discrimination with respect to civil and political rights listed in the ICCPR (which is already covered by Article 2(1) ICCPR).

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,”³ but over time this may have become a freestanding ground.⁴ 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.⁵

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. 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.⁶ The regional human rights courts similarly interpret the equality/discrimination provisions of their regional conventions as including indirect discrimination, evaluated by a standard of proportionate justification.

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 has referred to

³ See *Toonen v. Australia*, UN Doc. CCPR/C/50/D/488/1992 (1994), para. 8.7.

⁴ See *X v. Colombia*, UN Doc. CCPR/C/89/D/1361/2005 (2007), para.7.2, but see *id.* para. 9; *Fedotova v. Russian Federation*, UN Doc. CCPR/C/106/D/1932/2010 (2012), para. 10.5

⁵ See CESCR General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/20 (2009), para. 32.

⁶ See *Genero v. Italy*, UN Doc. CCPR/C/128/D/2979/2017 (2020), paras. 7.3-7.6.

vulnerability as one of the factors increasing the needed weight. This practice has some kinship with U.S. constitutional doctrines of suspect classification and tiers of scrutiny. The European 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.⁷ 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.⁸

The other side of the coin from closer examination should be greater deference (or a wider margin of appreciation) for a vast range of less sensitive distinctions drawn in ordinary areas of government regulation and private choice. Even if some highly deferential review to safeguard against arbitrariness is afforded as part of the right to equality, probing more deeply into every isolated differentiation between any two categories of human activity would massively overextend the role of human rights treaties and the institutions that enforce them.⁹ Cases concerning the divergent treatment of coastal fishing and open sea fishing, or differential tax treatment of tips paid to casino croupiers, illustrate the potential range.¹⁰ Indeed, it is difficult to see as a general matter how a project of transformative equality focused on croupiers would be justifiable in most societies (although a fictive scenario can be imagined).

[4] One might then ask, what sort of comprehensive anti-discrimination legislation should states enact, and how should it apply to indirect discrimination in the context of the pandemic, in relation to SOGI or other grounds? 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, or any other protected ground, and that lack a legitimate and proportionate justification? Should 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

⁷ See *Hämäläinen v. Finland*, App. No. 37259/09 (ECHR 2014) [GC], para. 109; *X and Others v. Austria*, App. No. 19010/07 (ECHR 2013) [GC], para. 99, 148; *Taddeucci and McCall v. Italy*, App. No. 51362/09 (2016), paras. 87-89 (indirect discrimination)).

The African Court of Human and Peoples’ Rights has recently including the “gender-nonconforming” among the poor and underprivileged whose right to equality before the law was violated by vagrancy laws. Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter of Human and Peoples’ Rights and Other Human Rights Instruments Applicable in Africa, Request No. 001/2018 (2020), para. 70.

⁸ 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.

⁹ See, e.g., Anja Seibert-Fohr, The Rise of Equality in International Law and its Pitfalls: Learning from Comparative Constitutional Law, 35 *Brooklyn Journal of International Law* 1 (2010).

¹⁰ See *Posti and Rahko v. Finland*, App. No. 27824/95 (ECHR 2002); *Gonçalves v. Portugal*, UN Doc. CCPR/C/98/D/1565/2007 (Human Rights Committee 2010).

its evaluation? Should the evaluation be conducted in the same way in all fields of public and private activity that measures dealing with the pandemic address, 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?

With regard to indirect discrimination by private actors, Prof. 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.¹¹ 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 happen only 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?

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 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, during the pandemic as at other times. 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.

¹¹ Tarunabh Khaitan, *A Theory of Discrimination Law* 198-200 (2015).

Part B

The following are some thoughts regarding aspects of the new hypothetical in the February Concept Note on indirect discrimination arising from restaurant closures during the pandemic. (The Concept Note was written, and the workshop took place, at a time before vaccination was widely available to the public in the United States.)

First, the hypothetical involves a government policy that has differential effects among workers in different categories of businesses; it is not alleged that the policy induces private employers to discriminate among their own workers. I therefore focus on governmental discrimination, not on governmental regulation of private discrimination.

Second, the rule in question affects the right to work for restaurant waitstaff across the board in comparison with school employees, liquor store employees, and perhaps other categories of employees more generally. Are restaurant workers cognizable as an “other status” category under article 26 ICCPR (or under treaties to which the US is not a party, such as article 2(2) ICESCR, article 14 ECHR, or article 2 ACHPR, etc.)? Restaurant workers may share certain vulnerabilities with other categories of workers in the United States, but I do not think they amount to a socially salient vulnerable group in need of specific protection and advancement. If all regulations of restaurants that affect their hiring capacity are the kind of law that must be subject to close examination under antidiscrimination principles, then national courts and international human rights bodies are going to be engaged in highly intrusive review of innumerable industry-specific rules. As indicated above, I believe that would overstrain the project of antidiscrimination law and its norms on indirect discrimination.

Third, how much is changed by the fact that restaurant waitstaff in Gotham City are disproportionately gay men? The hypothetical stipulates that the composition of the workforce did not motivate the rule, and even without the stipulation this could be the kind of situation where it is unlikely that an indirect discrimination norm would protect against action taken for hidden motives.¹² The hypothetical does not suggest that employment as waiters is closely tied in with their sexual identity, in contrast with the barefoot hypothetical No. 6; rather, the employment is empirically correlated with sexual orientation, perhaps for reasons that could be traced, but not as the continuation of a previous legal imposition of work, and perhaps due to highly contingent factors. The hypothetical does not give broader information about the overall incidence of pandemic-related rules on employment of gay males, or of other groups.¹³ It is not

¹² This hypothetical may also illustrate why prior knowledge of the statistically disproportionate effect that a policy will probably have does not make it the equivalent of direct discrimination.

¹³ Assuming that restaurant workers/waitstaff are not themselves a group in special need of protection by antidiscrimination law, the intersection of the groups “cisgender gay male” and “waitstaff” do not call for analysis in terms of intersectionality.

clear how much the purposes of indirect discrimination norms would be served by invalidating the rule.

Meanwhile, the pandemic provides the context for the city's rule, with serious or deadly health risks and severe damage to the local and wider economy among the consequences. The rule is adopted in the pre-vaccination setting, amid substantial uncertainty and developing scientific understanding of the transmission and effects of the coronavirus, and how to treat and prevent it, and also ongoing mutation of the virus that changes the parameters. Governments need some leeway in selecting and modifying implementable public policies that respond to these realities, and to information about the policies' other effects. If the goal is unquestionably legitimate, and the question is the proportionality of the means, then empirical knowledge and empirical uncertainty become central. (The temporary character and duration of the closings are also factors in evaluating the proportionality of their effects.)

Given all these factors, nondeferential adjudication under antidiscrimination law probably does not provide the best method for responding to the city's policy. The U.S. Supreme Court's emergency injunction against New York State's occupancy limits on religious services¹⁴ aptly illustrates the danger of legal rigidity. European human rights law would probably afford a wide margin of appreciation in this context, given the scientific uncertainty and the developing European responses. But other human rights bodies do not adhere to the margin of appreciation doctrine, and yet they do not possess the scientific expertise to evaluate independently the soundness of good faith regulations in the pandemic.

Fortunately, human rights monitoring includes other modalities of intervention aside from adjudication of violations and issuance of coercive orders. Treaty bodies maintain reporting procedures that provide opportunities for dialogic interaction, soft expressions of concern, and the making of soft recommendations. They can urge states to consider or reconsider the distributive effects of their policies against the background of discrimination norms or more broadly, without being tied to a particular alleged violation; they can call for increased consultation of affected populations; and they can recommend the adoption of auxiliary policies (such as benefits for displaced workers) to mitigate the effect of restrictions that are otherwise justified. The point is not just that these recommendations are not binding, but that they do not have to be expressed as definitive conclusions in order to have persuasive value.

Special procedures are able to inquire, not merely for confirmation or denial of assumed violations, but to generate genuine dialogue over justifications for policies. They can make recommendations that encourage participation and accommodation, not solely by pushing the

¹⁴ See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (by 5 to 4 vote). This case also motivated the mention of liquor stores in the hypothetical.

envelope in the direction of their particular mandates, but taking into account the need to reconcile these with other human rights, without insisting upon a preconceived outcome.

Consistent with what was said at the end of Part A, the hypothetical may illustrate how requiring abstract uniformity in the implementation of a prohibition of indirect discrimination at the national level, and at the level of international review, does not best serve the protection of the full spectrum of human rights, including in this context the rights of all disadvantaged workers and the right to health.

Indirect Discrimination against LGBTI Persons in the Inter-American Human Rights System

Flávia Piovesan* and Jessica Tueller**

Although the inter-American jurisprudence on the rights of equality and non-discrimination primarily has addressed direct discrimination, both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have increasingly embraced opportunities to address the harms of indirect discrimination.¹ A recent example of this is the April 2020 press release in which the IACHR acknowledged the negative effects of gendered quarantine measures to contain the spread of Covid-19.² Peru, Panama, and certain cities in Colombia had adopted a binary, gender-based scheme to limit the days and times when citizens could leave their houses. The IACHR noted that these measures did not account for non-binary gender identity and/or expression and expressed concern about the detention and abuse of trans women by security forces who were enforcing these measures. The IACHR also observed that some trans individuals were forced to repeat phrases that denied their gender identity, such as “I want to be a man.”

The IACHR was able to identify and expose the disproportionate impact of these Covid-19 restrictions on trans individuals because of the groundwork for findings of indirect discrimination against lesbian, gay, bisexual, trans, and intersex (LGBTI) persons laid out in inter-American treaties, case law, and reporting, which this paper aims to elucidate. Parts I and II explain the basic

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¹ See *Hacienda Brasil Verde Workers v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 318, Separate Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, ¶ 72 (Oct. 20, 2016).

² Press Release, Inter-American Commission on Human Rights, The IACHR Calls on States to Guarantee the Rights of LGBTI People in the Response to the COVID-19 Pandemic (Apr. 20, 2020), http://www.oas.org/en/iachr/media_center/PReleases/2020/081.asp.

framework. Part I provides a brief background on the rights to equality and non-discrimination with respect to sexual orientation, gender identity, and gender expression. Part II then defines indirect discrimination, and explains how indirect discrimination is proved. Next, Parts III and IV highlight key developments in the work of the IACtHR and the IACHR on indirect discrimination. Part III considers the relationship between indirect discrimination and transformative equality primarily through a discussion of the IACtHR case *Artavia Murillo (“In Vitro Fertilization”) v. Costa Rica*. Part IV, meanwhile, draws examples of indirect discrimination from the thematic reports of the IACHR’s Rapporteurship on the Rights of LGBTI Persons (LGBTI Rapporteurship). Finally, Part V concludes by discussing challenges that persist in the general protection of the right to equality and non-discrimination of LGBTI persons.

Before beginning our discussion however, we emphasize that intersectionality is key to inter-American approach to indirect discrimination. Although we focus narrowly on LGBTI persons in this paper for the sake of brevity, analyses of indirect discrimination against LGBTI persons can and should also involve overlapping considerations of race, disability, and more. Examples of an intersectional approach to indirect discrimination can be found in the cases and reports discussed in this paper, such as the case *Artavia Murillo*, in which the IACtHR analyzed indirect discrimination on the basis disability, gender, and financial situation,³ and the report *Violence Against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, in which the LGBTI Rapporteurship analyzed indirect discrimination on the basis of race as well as on the basis of sexual orientation and gender identity.⁴

I. The Rights to Equality and Non-discrimination with Respect to Sexual Orientation, Gender Identity, and Gender Expression

Equality and non-discrimination are foundational principles of international human rights law and have, according to inter-American jurisprudence, entered the realm of *jus cogens*.⁵ The American

³ *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 287 (Nov. 28, 2012) [hereinafter *Artavia Murillo*].

⁴ *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, Inter-Am. Comm’n H.R., OAS/Ser.L/V/II.rev.1 doc. 36 ¶¶ 357, 368 (Nov. 12, 2015).

⁵ *Rocío San Miguel Sosa et al. v. Venezuela*, Case 12.923, Inter-Am. Comm’n H.R., Report No. 75/15, OEA/Ser.L/V/II.156 doc. 21 ¶ 144 (Oct. 28, 2015); *Ángel Alberto Duque v. Colombia*, Case 12.841, Inter-Am. Comm’n H.R., Report No. 5/14 ¶ 19 (Apr. 2, 2014); *Marino Lopez et al. (Operation Genesis) v. Colombia*, Case 12.573, Inter-Am. Comm’n H.R., Report No. 64/11 ¶ 359 (Mar. 31, 2011); *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 110 (Sept. 17, 2003). *Jus cogens*, also known as peremptory norms, are “norm[s] accepted and recognized by the international community of States as a whole as a norm[s] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

Declaration of the Rights and Duties of Man (American Declaration) states that “all [human beings] are born free and equal, in dignity and in rights,” and that “all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”⁶ The American Convention on Human Rights (American Convention) similarly provides that

States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.⁷

The American Convention additionally provides that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”⁸ As a result, States’ obligation to abide by the principles of equality and non-discrimination exists not only in relation to the rights contained in the American Convention but also independently, extending to State measures and actions otherwise unrelated to the American Convention.

Although sexual orientation, gender identity, and gender expression are not expressly mentioned in the text of the American Declaration or the American Convention, both the IACHR and the IACtHR have consistently interpreted these instruments’ equality and non-discrimination clauses to protect LGBTI persons. This interpretation first emerged in 2012, in the landmark case of *Atala Riffo and Daughters v. Chile*, which concerned discriminatory treatment and arbitrary interference in the private and family life of a lesbian woman and her three daughters. In this case, the IACtHR established that sexual orientation and gender identity are protected categories under the American Convention, stating:

Bearing in mind the general obligations to respect and guarantee the rights established in Article 1(1) of the American Convention, the interpretation criteria set forth in Article 29 of that Convention, the provisions of the Vienna Convention on the Law of Treaties, and the standards established by the European Court and the mechanisms of the United Nations, the Inter-American Court establishes that the sexual orientation and gender identity of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person’s

⁶ American Declaration on the Rights and Duties of Man pmb. & art. II, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948, at 38.

⁷ Organization of American States, American Convention on Human Rights art. 1(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁸ *Id.* at art. 24.

sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation.⁹

The standard established in *Atala Riffo* has been confirmed and strengthened in subsequent rulings, including the cases of *Flor Freire v. Ecuador*, *Duque v. Colombia*, and *Azul Rojas Marín v. Peru*.¹⁰ Each case concerns individual instances of discrimination against individuals based on their real or perceived sexual orientation or gender identity, while also revealing a broader social context of structural discrimination against LGBTI persons in the Americas.

II. Defining and Finding Indirect Discrimination

The rights to equality and non-discrimination have expanded not only to protect LGBTI persons but also to address indirect discrimination. The Inter-American Convention against All Forms of Discrimination and Intolerance (2013) is unique among international human rights treaties in its codification of the concept of indirect discrimination.¹¹ This treaty provides:

Indirect discrimination shall be taken to occur, in any realm of public and private life, when a seemingly neutral provision, criterion, or practice has the capacity to entail a particular disadvantage for persons belonging to a specific group, or puts them at a disadvantage, unless said provision, criterion, or practice has some reasonable and legitimate objective or justification under international human rights law.¹²

⁹ *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 91 (Feb. 24, 2012).

¹⁰ *Azul Rojas Marín et al. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 402, ¶ 90 (Mar. 12, 2020); *Flor Freire v. Ecuador*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 315, ¶¶ 118-24 (Aug. 31, 2016); *Duque v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310, ¶¶ 104-05 (Feb. 26, 2016).

¹¹ See Rosa Celorio, *Discrimination and the Regional Human Rights Protection Systems: The Enigma of Effectiveness*, 40 U. PA. J. INT'L L. 781, 806 (2019).

¹² Inter-American Convention against All Forms of Discrimination and Intolerance art. 1(2), June 5, 2013, O.A.S.T.S. No. A-69. Other human rights mechanisms define indirect discrimination similarly. See, e.g., Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 10(b), U.N. Doc. E/C.12/GC/20 (July 2, 2009) (“**Indirect discrimination** refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance,

The Inter-American Convention against All Forms of Discrimination and Intolerance goes on to provide that “The State Parties undertake to ensure that the adoption of measures of any kind . . . does not discriminate directly or indirectly against persons or groups on the basis of any of the criteria mentioned in Article 1.1 of this Convention,”¹³ which includes sex, sexual orientation, gender identity, and gender expression.¹⁴ An almost identical definition of indirect discrimination appears in the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance.¹⁵

The definition and prohibition of indirect discrimination in these treaties built on the work the IACHR and IACtHR had done to develop this concept. In its 2003 advisory opinion on *Juridical Condition and Rights of Undocumented Migrants*, the IACtHR established that States have a negative obligation to refrain from indirect discrimination in the creation, implementation, and interpretation of law or other measures as well as a positive obligation adopt affirmative action

requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.”); Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, ¶ 16, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2020) (“Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure.”). The work of human rights mechanisms on indirect discrimination has been greatly informed by U.S. Supreme Court cases, most notably *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). The Constitutional Court of Colombia likewise has established that discrimination can be direct when the measures establish express categories of exclusion, or indirect when the practices are apparently neutral, but the differential effects generate a disadvantageous situation for the affected group. *See Corte Constitucional [C.C.] [Constitutional Court]*, enero 24, 2017, Sentencia T-030/17. Uruguay, meanwhile, has expressly incorporated international human rights law’s prohibition on indirect discrimination on the basis of gender into its domestic law. *See Aprobación de las obligaciones emergentes del Derecho Internacional de Derechos Humanos, en relación a la igualdad y no discriminación entre mujeres y varones, comprendiendo la igualdad formal, sustantiva y de reconocimiento*, Ley No. 19.846 (Dec. 12, 2019).

¹³ Inter-American Convention against All Forms of Discrimination and Intolerance, *supra* note 12, at art. 8.

¹⁴ *See id.* at art. 1(1).

¹⁵ Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance art. 1(2), June 5, 2013, O.A.S.T.S. No. A-68 (“Indirect racial discrimination shall be taken to occur, in any realm of public and private life, when a seemingly neutral provision, criterion, or practice has the capacity to entail a particular disadvantage for persons belonging to a specific group based on the reasons set forth in Article 1.1, or puts them at a disadvantage, unless said provision, criterion, or practice has some reasonable and legitimate objective or justification under international human rights law.”).

measures.¹⁶ Then, in 2011, the IACHR found that States are under an additional positive obligation to conduct a comprehensive review of existing measures in the interest of identifying and abolishing those which constitute indirect racial discrimination.¹⁷ The IACtHR also clarified in the 2012 case *Nadege Dorzema v. Dominican Republic* that discriminatory intent is not required to prove indirect discrimination; an applicant must only demonstrate “the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups.”¹⁸ The IACHR has stated that proving this disproportionate impact requires empirical data.¹⁹ Once an applicant has shown empirical evidence of disparate impact, the burden of proof shifts to the State to provide a reasonable and legitimate objective or justification.²⁰

III. Indirect Discrimination and Transformative Equality

Indirect discrimination is typically associated with substantive, as opposed to formal, equality.²¹ Substantive equality is based on the realization that equal treatment of people unequally situated can lead to injustice. It goes beyond the formal requirement of equal treatment by aiming for equality of opportunity, resources, or results.²² Substantive equality usually depends on the acknowledgments of social realities where the acts or norms have been applied.²³ In the inter-American human rights system, however, the relationship between indirect discrimination and transformative equality, which targets structural discrimination and stereotyping,²⁴ has also been

¹⁶ Juridical Condition and Rights of Undocumented Migrants, *supra* note 5, ¶¶ 103-04; *see also* Flor Freire, *supra* note 10, ¶ 110.

¹⁷ The Situation of People of African Descent in the Americas, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. doc. 62 ¶ 202 (Dec. 5, 2011).

¹⁸ *Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 234-35 (Oct. 24, 2012); see also* Artavia Murillo, *supra* note 3, ¶ 286; *Access to Justice for Women Victims of Violence in the Americas, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. doc. 68 ¶ 92 (Jan. 20, 2007), para. 92.*

¹⁹ *Access to Justice for Women Victims of Violence in the Americas, supra* note 18, ¶ 91.

²⁰ *Inter-American Convention against All Forms of Discrimination and Intolerance, supra* note 12, at art. 1(2); Artavia Murillo, *supra* note 3, ¶ 286. The inter-American approach resembles the ECtHR approach. *See* Rodoljub Etinski, *Indirect Discrimination in the Case-Law of the European Court of Human Rights*, 47 ZBORNIK RADOVA PRAVNOG FAKULTETA NOVI SAD 57 (2013).

²¹ Kristin Henrard, *Equality of Individuals*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶ 33 (May 2008), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e788>.

²² *See* SANDRA FREDMAN, *DISCRIMINATION LAW 14-19* (2011); Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16 (2003).

²³ Barbara Havelková, *Judicial Skepticism of Discrimination at the ECtHR*, in *FOUNDATIONS OF INDIRECT DISCRIMINATION LAW* 83, 85 (Hugh Collins & Tarunabh Khaitan eds., 2018).

²⁴ *See* Jenny E. Goldschmidt, *New Perspectives on Equality: Towards Transformative Justice Through the Disability Convention?*, 35 NORDIC. J. HUM. RTS. 1, 5 (2017).

emphasized. The IACHR, for example, has noted the role of structural discrimination in “engender[ing] differences in treatment that amount to direct or indirect discrimination.”²⁵

The connection between indirect and structural discrimination is most clearly illustrated in the 2012 IACtHR case *Artavia Murillo (“In Vitro Fertilization”) v. Costa Rica*. In *Artavia Murillo*, the IACtHR found that the root cause of indirect discrimination in relation to gender in this case was stereotypes and prejudice.²⁶ The IACtHR recognized that Costa Rica’s ban on IVF had a disproportionate impact on both women and men due to societal expectations about these genders’ roles and characteristics in reproduction and parenthood.²⁷ The IACtHR also clarified that it was acknowledging these gender stereotypes without endorsing them, even stating that “these gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them.”²⁸ The IACtHR thus addressed not only the individual act of indirect discrimination presented by the case, but also the structural discrimination underlying it, as violations of the American Convention.

The work the IACHR and IACtHR have done to highlight the relation between indirect discrimination and transformative equality expands the possibilities for LGBTI rights allegations and reparations, since the root of harms against LGBTI persons is often stigmatization and stereotyping that must be addressed through transformative change.²⁹

IV. Indirect Discrimination and the Thematic Reports of the LGBTI Rapporteurship

The IACHR has addressed indirect discrimination against LGBTI persons primarily through the thematic reports of LGBTI Rapporteurship. Thus far, the IACHR has produced three such reports, each of which contains a series of recommendations to member States of the OAS.

The first report, *Violence Against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas* (2015), focused on acts of physical violence committed against persons with non-normative sexual orientations, gender identities, and gender expressions, and persons whose bodies vary from the standard for female and male bodies in the Americas.³⁰ In this report, the IACHR discussed indirect discrimination when observing the obstacles trans individuals faced in securing visas:

²⁵ The Situation of People of African Descent in the Americas, *supra* note 17, ¶ 185.

²⁶ *Artavia Murillo*, *supra* note 3, ¶ 294.

²⁷ *Id.* ¶¶ 295-301.

²⁸ *Id.* ¶ 302.

²⁹ See Victor Madrigal-Borloz (Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity), *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, ¶¶ 33, 38-40, 45, 48-49, 52-54, 57-61, 64, 97(c), U.N. Doc. A/HRC/38/43 (May 11, 2018).

³⁰ *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, *supra* note 4.

The IACHR . . . notes with concern the difficulties and obstacles trans persons face in travelling and exercising their right to freedom of movement. . . . [A]lthough there are legitimate reasons for a State to deny granting a visa, there is a risk of indirect discrimination in policies and procedures which might disproportionately disadvantage trans persons, given, for example, the high criminalization of trans persons.³¹

The IACHR went on to note that “90% of trans women in Latin America and the Caribbean are engaged in sex work as their only means of subsistence and thereby face direct or indirect criminalization.”³² The IACHR thus recognized that State migration policies restricting freedom of movement on the basis on of criminal records, while facially neutral, have a disproportionate impact on trans individuals because of the direct and indirect criminalization of this population.

The second report, *Advances and Challenges Towards the Recognition of the Rights of LGBTI Persons* (2018), examined progress made in States around the region to ensure that LGBTI persons can lead fulfilling lives with full autonomy and respect for their own will and free from all forms of violence, from a holistic perspective that takes human rights as interdependent and universal and focuses on the integral safety of LGBTI persons.³³ This report built on the first by expressly calling on States to “[r]epeal laws that criminalize, directly or indirectly, the conduct of persons based on their sexual orientation, gender identity or expression.”³⁴ It also represented a continuation of the IACtHR’s landmark 2017 advisory opinion, which had interpreted the American Convention to require legal recognition of gender identity as well as of same-sex marriage.³⁵ Although, as this was an advisory opinion, there was no specific evidence of disparate impact on which to comment, the IACtHR nevertheless had acknowledged the possibility indirect discrimination in this context, stating, for example:

[A] lack of recognition of gender or sexual identity could result in indirect censure of gender expressions that diverge from cisnormative or heteronormative standards, which would send a general message that those persons who diverge from these ‘traditional’ standards would not have the

³¹ *Id.* ¶ 297,

³² *Id.* ¶ 374 (footnote omitted).

³³ *Advances and Challenges Towards the Recognition of the Rights of LGBTI Persons in the Americas*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.170 doc. 184 (Dec. 7, 2018).

³⁴ *Id.* at 133.

³⁵ *Gender Identity, and Equality and Non-Discrimination of Same-sex Couples: State Obligations Concerning Change of Name, Gender Identity, and Rights Derived 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), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, (Nov. 24, 2017).

legal protection and recognition of their rights in equal conditions to persons who do not diverge from such standards.³⁶

Together, the IACHR and IACtHR suggest that a lack of legal recognition, not only constitutes direct discrimination but could also generate other harms constituting indirect discrimination.

The third report, Report on Trans and Gender-Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights (2020), highlighted the barriers that hinder social inclusion of trans and gender-diverse persons and prevent them from fully developing their potential and access to basic rights from an early age.³⁷ This report reiterated the obligation of States to “[a]void directly or indirectly criminalizing persons’ conduct in exercising their gender identities or expression,”³⁸ and then added a call to States to ensure that individuals do not experience indirect discrimination in education or employment.³⁹ When discussing education, for example, the Commission observed

that trans and gender-diverse persons are not able to matriculate, remain in, and/or join the educational system, leading in the end to the violation of their right to education as a cumulative result of a series of situations that gravely affect and directly or indirectly impact their opportunity to effectively enjoy this right. These situations include being forced out of their homes, which often leaves them facing poverty, homelessness, or unstable living situations with no family support network; a lack of recognition of their gender identity; having to attend educational establishments governed by cisnormative disciplinary and behavioral rules; and harassment and bullying, at the hands of both peers and teachers and authorities.”⁴⁰

These reports demonstrate the IACHR’s increasing attention to indirect discrimination against LGBTI persons, which has grown from an initial concern with disproportionate criminalization into a comprehensive engagement with an array of factors that impede LGBTI individuals’ enjoyment not only of the rights to equality and non-discrimination, but also of the rights to travel, education, work, and more.

V. Continuing Challenges

³⁶ *Id.* ¶ 97.

³⁷ Report on Trans and Gender-Diverse Persons and Their Economic, Social, Cultural, and Environmental Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. doc. 239 (Aug. 7, 2020).

³⁸ *Id.* at 168.

³⁹ *Id.* ¶¶ 167, 173, 237.

⁴⁰ *Id.* ¶ 171.

Several challenges persist in the general protection of the right to equality and non-discrimination of LGBTI persons, including the continuing violence against LGBTI persons across the Americas; the criminalization of sexual orientations, gender identities, and nonnormative gender expressions in several States; the recent adoption of laws and other measures contrary to the principle of equality and non-discrimination; disinformation campaigns and initiatives that perpetuate stigmatization and stereotyping that harm LGBTI persons, including attacks on “gender ideology”; and the expansion of groups and movements organizing against the recognition of the rights of LGBTI persons in government and civil society.

The lack of data regarding potentially disparate impacts of seemingly neutral or inoffensive laws on LGBTI persons also remains a challenge for the majority of countries in the Americas. Since indirect discrimination calls for a sociological, statistical, and evidence-based analysis of social realities, reliable data is needed to identify rights violations. This data is especially difficult to obtain in the case of discrimination based on sexual orientation, since sexual orientation is neither easily identifiable nor regularly documented.⁴¹ Once obtained, however, this data has the potential not only to enable the IACHR and the IACtHR to identify rights violations, but also to alleviate potential situations of indirect discrimination through State interventions and policy changes before they can be brought to the attention of regional or international human rights mechanisms. For these reasons, the IACHR has repeatedly recommended that States collect and analyze statistical data on violence and discrimination affecting LGBTI persons, as well as on other crucial issue areas for lesbian, gay, bisexual, trans and intersex people (e.g. education, work, housing, health), in coordination with all branches of government, and in a disaggregated and systematic manner, and that they use such data in the design, implementation and evaluation of state actions and policies directed toward LGBTI persons.

Another challenge is presented by judges, some of whom are skeptical of adjudicating cases using indirect discrimination. Even among members of regional human rights bodies, this skepticism can arise due to a belief in an unbiased reality, the argument that discrimination must always come from intent and not from result, or an appeal to individuals’ personal responsibility in escaping disadvantage.⁴² States should ensure that judges and magistrates are aware of indirect discrimination and are capable of adjudicating cases in a manner that coincides with States’ obligations under international human rights law, particularly in cases concerning sexual orientation, gender identity, or gender expression.

Finally, we underscore the importance of academic and jurisprudential research on this subject and encourage the development of argumentative tools that both rights-holders and adjudicators can utilize when analyzing potential cases of indirect discrimination based on sexual orientation, gender identity, and gender expression. Additional theorizing about indirect discrimination and

⁴¹ JULE MULDER, *EU NON-DISCRIMINATION LAW IN THE COURTS: APPROACHES TO SEX AND SEXUALITIES* 237 (2019).

⁴² Havelková, *supra* note 23, at 85.

LGBTI persons would help the inter-American human rights system to analyze and address the continued prevalence of discrimination and intolerance regarding diverse sexual orientations, gender identities, gender expressions, and persons whose bodies defy binary sexual characteristics.