

The Theory of Indirect Discrimination: Application to the Lived Realities of Lesbian, Gay, Bisexual, Trans, and Other Gender Diverse (LGBT) Persons

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INTRODUCTION

The Universal Declaration on Human Rights establishes that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹ A significant proportion of international human rights doctrine is built upon this principle. This includes the concept of indirect discrimination, which describes situations in which a seemingly neutral norm, criterion, or practice nonetheless triggers a disadvantage that is deemed unacceptable under international human rights provisions because of its connection with a protected category. Three elements lie at the core of the concept: detriment of impact, connection with the protected category, and neutrality of intent.

Insofar as it provides a procedural route for states to achieve knowledge on detrimental impacts on their citizens’ enjoyment of human rights, indirect discrimination is a fundamental tool for identifying and articulating state responsibilities of non-repetition. In that context, it is remarkable that conceptualizations of indirect discrimination are largely absent from the doctrine and case law of United Nations (“UN”) human rights treaty bodies and special procedures.

The aim of this Commentary is to present formulations of indirect discrimination that might be used by UN treaty bodies and independent experts in the furtherance of their work. It explores the example of indirect discrimination on grounds of religion or belief, and draws comparisons with sexual orientation and gender identity (“SOGI”) as a means of testing the understanding of indirect discrimination as a comprehensive construction under international human rights law. At the same time, given the pervasive nature of persecution perpetrated against persons on the basis of their

1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 2 (Dec. 10, 1948).

SOGI, and how commonly it is executed through religious dogma, this Commentary will also address current debates of global relevance on the impact of religious beliefs when confronting the human rights of LGBT persons.

This Commentary concludes that indirect discrimination is a useful and indeed necessary concept in the catalogue of tools available in the analytical work of UN treaty bodies and independent experts. However, the concept requires significant development to delimit its relationship with direct discrimination and, particularly, with issues of state responsibility in the gathering, management, and use of evidence and data on the lived realities of the persons living under their jurisdictions. It also concludes that robust legal, political, and sociological thinking is available within international human rights law to solve apparent conflicts between both direct and indirect discrimination on the basis of religion or belief and the human rights of LGBT persons—conflicts that, in a majority of cases, appear to be the instrument of regressive discourse rather than a substantive concern.

I. INDIRECT DISCRIMINATION AS THE ABSENCE OF DISCRIMINATORY INTENT

Arguments of indirect discrimination are largely absent in the doctrine of UN treaty bodies and special procedures. Advocacy before these entities appear to aspire to demonstrate that the regulation or law being challenged is only *seemingly* neutral when isolated from its context, but when analyzed within it can be connected to a conclusion of discriminatory intent. In *Yaker v. France*,² a woman challenged her conviction and fine for wearing a *niqab* (a full-face veil) under 2010 legislation stipulating that “[n]o one may, in a public space, wear any apparel intended to conceal the face.”³ The Human Rights Committee built its conclusions by carefully analyzing the context existing in France at the time of the issuance of the scrutinized legislation. This included bringing into the evidentiary base a resolution adopted shortly before the challenged legislation, through which the French National Assembly declared the wearing of a full-face veil as contrary to the values of the Republic and that “the fight against discrimination and the promotion of equality between men and women to be priorities of public policy.”⁴ Equally important was the Committee’s consideration that while

2. *Yaker v. France*, CCPR/C/123/D/2747/2016, No. 2747/2016, U.N. Hum. Rts. Comm., Views adopted by the Committee under Article 5(4) of the Optional Protocol at its 123rd session, ¶ 2.2 (July 17, 2018).

3. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 11, 2010 on Prohibiting the Concealment of the Face in Public Spaces], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, art. 1 (“Nul ne peut, dans l’espace public, porter une tenue destinée à dissimuler son visage.”).

4. Human Rights Council, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2747/2016, ¶ ¶8.1–8.13, U.N. Doc. CCPR/C/123/D/2747/

less than two-thousand women wore the full-face veil in France, most checks conducted under the questioned act concerned these veiled women.⁵

Indeed, the regulation in question appears to be created or put in place to *defend* a certain majority view from being influenced by certain minority mores or customs, such as the wearing of the veil in France. As the French state said in its submission to the Committee, “showing one’s face signals a person’s readiness to be identified as an individual by the other party and not to ‘unfairly’ conceal one’s frame of mind,” this being “the minimum degree of trust that is essential for living together in an egalitarian and open society.”⁶ In *Yaker*, as in many other similar cases, there appears to be little doubt of the discriminatory intent, and therefore the defense of the rights of the minority was foundational to the legal reasoning in the case.

In this sense, *Yaker* is a good example as to how advocacy before treaty bodies or special procedures usually aims for a finding of intent. Indeed, the structure of the Human Rights Committee’s analysis and findings in this case led to such a finding. In contrast, cases where issue may be taken with state action or inaction on the basis of indirect discrimination usually relate to considerations of the majority’s interest *vis-à-vis* its impact on certain minorities, and intent should therefore be, by definition, absent from the argumentation.

II. DISCRIMINATION IN THE INTERSECTION BETWEEN SOGI AND RELIGION

As a preliminary matter, I clarify what I mean by SOGI. Sexual orientation is each person’s capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.⁷ Gender identity is each person’s deeply-felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms.⁸

2016 (Dec. 7, 2018); *see also* *Yaker*, *supra* note 2, ¶8.13 (explaining that “from the text of the Act . . . the debate preceding its adoption and its implementation in practice . . . the Act is applied mainly to the full-face Islamic veil, which is a form of religious observance and identification for a minority of Muslim women.”).

5. *Yaker*, *supra* note 2, ¶ 8.2.

6. *Id.* ¶ 8.9.

7. Preamble, *The Yogyakarta Principles* (Nov. 10, 2017), <https://yogyakartaprinciples.org>.

8. *Id.*

Religion and belief is a category consistently protected in an explicit manner in international human rights instruments.⁹ Increasingly, SOGI have been considered protected categories by a plethora of jurisdictional and quasi-jurisdictional bodies at the national, regional, and global level,¹⁰ but we are far from universal consensus on this understanding. A great proportion of the acts of discrimination and violence perpetrated against LGBT persons around the world every day are formally and openly sponsored through state law or public policy. At the date of this Commentary, sixty-nine countries still criminalize homosexuality, lesbianism, or some forms of gender identity, and thirteen of them retain the death penalty in their legislation, which means that a staggering two billion people live in these criminalized environments.¹¹ These forms of institutional persecution are compounded with social exclusion existing in a significant proportion of the rest of the world. In most of these environments, religion is used as a powerful driver for criminalization.¹²

The study of indirect discrimination in the contexts of religion and belief and SOGI can take two points of departure. The first is *concurrency*—situations in which religion and belief and SOGI are all factors that must be considered in the analysis of the possible violation. The second is *conflict*—situations in which religion and belief appear to be competing values in cases where different stakeholders may claim indirect discrimination.

9. G.A. Res. 217 (III) A, *supra* note 1, art. 18; *see also* International Covenant on Civil and Political Rights art. 18, *opened for signature* Dec. 16, 1966, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171.

10. It is noteworthy that 113 State Members of the United Nations from all regions have voluntarily accepted, in the context of the universal periodic review, at least one recommendation to address violence and discrimination based on SOGI. *See* Rep. of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (2017), transmitted 19 July 2017 from the U.N. Secretary-General, ¶ 16, U.N. Doc. A/72/172 (July 19, 2017).

11. *Sexual Orientation Laws in the World*, The International Lesbian, Gay, Bisexual, Trans And Intersex Association, (Dec. 2020), https://ilga.org/sites/default/files/downloads/ENG_ILGA_World_map_sexual_orientation_laws_dec2020.png.

12. Some faith-based organizations are instrumental in the promotion of cruel, inhumane, and degrading treatment of LGBT persons through various practices. For a discussion of the use of conversion, see Victor Madrigal-Borloz (Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Rep. on Practices of So-Called "Conversion Therapy"*, ¶¶ 50–54, U.N. Doc. A/HRC/44/53 (May 1, 2020). For a discussion of faith-based organizations perpetuating social exclusion, see Vitit Muntarbhorn (Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Rep. of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, transmitted from the Secretariat to the H.R.C., ¶ 60, U.N. Doc. A/HRC/35/36 (April 19, 2017). For a discussion of the promotion of hate speech, see Victor Madrigal-Borloz (Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Rep. on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, transmitted from the U.N. Secretary-General to the G.A., ¶¶ 27–28, U.N. Doc. A/74/181 (July 17, 2019). For a discussion on faith-based organizations perpetuating criminalization, see Ahmed Shaheed (Special Rapporteur on Freedom of Religion or Belief), *Gender-Based Violence and Discrimination in the Name of Religion or Belief*, ¶¶ 19–24, U.N. Doc. A/HRC/43/48 (Aug. 24, 2020).

III. CONCURRENCE: WHEN RELIGION AND SOGI CONTRIBUTE TO EXPERIENCES OF DISCRIMINATION

Discrimination does not occur in a vacuum. As my mandate has stated, acts of violence or discrimination “often appear not as singular events but as part of a prolonged vicious circle. They are multiple and multiplied—inextricably linked emotionally, psychologically, physically and structurally.”¹³ For these reasons, work around these areas must be mindful of the confluence of conditions and identities that create unique experiences of privilege or discrimination. Indeed, intersectional approaches are the only methodology that has proven capable of revealing human rights concerns that otherwise fall through the cracks. For example, the 2020 Report of the UN Special Rapporteur on the Right to Religious Freedom or Belief stated:

For women and LGBT+ individuals, realizing religious freedom is often about realizing their agency and equality within religion. The Special Rapporteur submits that the ability of women, girls and LGBT+ persons to belong to a faith of their choice without being discriminated against is vital to realizing their right to freedom of religion or belief, as well as their right to be free from gender discrimination. International law protects the right of persons to exit a religious or belief community, but it may also recognize the right of those persons to take part on an equal basis in the process of defining that community (A/67/287, para. 79 (g) and (h)).¹⁴

In cases of indirect discrimination, the extent to which one particular factor may be extricated from others when analyzing possible violations is a central question. Let us take the example of some well-known European case-law on indirect religious discrimination concerned with the wearing of the hijab.¹⁵ In the analysis of these connected claims of disproportionate impact, some factors will be essential. First, the hijab is a religious more applicable only to women. Second, in the European context, bans on facial veils disproportionately affect women who are, or are perceived as, aliens, of color, and of lower economic status. In addition to these more familiar grounds, we can identify the fact that the bans will likely only affect women who are legally recognized as having a female gender identity.

Intersectional theory offers the methodological recourse to adequately incorporate this existential complexity into the analysis. Indeed, one of the

13. Muntarbhorn, U.N. Doc. A/HRC/35/36, *supra* note 12, at ¶ 39.

14. Shaheed, U.N. Doc. A/HRC/43/48, *supra* note 12, at ¶ 73.

15. See, e.g., Case C-157/15, Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV, 2017 EUR-Lex CELEX LEXIS 62015CJ0157 (Mar. 14, 2017); see also Case C-188/15, Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole SA, formerly Micropole Univers SA, 2017 EUR-Lex CELEX LEXIS 62015CA0188 (Mar. 14, 2017).

findings of the Special Rapporteur is that “the role of religious groups in perpetuating norms that promote gender inequitable attitudes is complex because religious communities themselves are not monolithic.”¹⁶ Discriminatory or exclusive actions against a person will often result from intersecting factors that create a continuum of violence and a dynamic of disempowerment. For example, a woman feeling profound emotional, affective, and sexual attraction for other women may choose to self-identify as a lesbian or as bisexual, but discriminatory actions against her will also relate to other equally relevant factors that shape who she is in the context in which she lives, such as race, ethnicity, health, status, age, class, and caste, as well as migration or economic status. Within this range of factors, religion and belief plays a fundamental role in the definition of an LGBT person’s values, role, and position in the community.

A corollary of this finding relates to the issue of evidence. Given that detrimental impact and causation are at the foundation of analysis pertaining to indirect discrimination, intersectional analysis will also be crucial in the determination in the design of data sets used to prove the nature of the impact and its connection to the protected grounds.¹⁷

IV. ARE RELIGION AND SOGI COMPETING VALUES AND, IF SO, HOW DOES THIS IMPACT INDIRECT DISCRIMINATION CLAIMS?

The number of conflicts occurring at the intersection of SOGI and religion appears to be on the rise, as is the absolute nature of the argumentation built around them.¹⁸ For reasons that are not yet fully explored, these conflicts also occupy a disproportionate space in the public interest. Cases involving “gay cakes”¹⁹ and clerical refusals to recognize same-sex marriages or gender identity²⁰ now form a substantial part of cultural debate. The tension between the relatively recent legal framework for LGTB inclusion, in the few contexts where it exists, and the demands that it places on persons whose beliefs oppose them—in particular because they consider them sinful—is one of the great conversations of our times.

16. Shaheed, U.N. Doc. A/HRC/43/48, *supra* note 12, at ¶ 38.

17. Victor Madrigal-Borloz (Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Rep. on Data Collection and Management as a Means to Create Heightened Awareness of Violence and Discrimination Based on Sexual Orientation and Gender Identity*, ¶¶ 13–15, U.N. Doc. A/HRC/41/45 (May 14, 2019).

18. See, e.g., Abby Ohlheiser, *Kentucky Clerk Kim Davis on Gay Marriage Licenses: ‘It is a Heaven or Hell Decision’*, WASH. POST, (Sept. 1, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/09/01/kentucky-clerk-kim-davis-on-gay-marriage-licenses-it-is-a-heaven-or-hell-decision/>. To justify her defiance of the Supreme Court’s ruling legalizing same-sex marriage, Kim Davis, a former Rowan County Clerk in Kentucky, stated, “I never imagined a day like this would come, where I would be asked to violate a central teaching of Scripture and of Jesus Himself regarding marriage. To issue a marriage license which conflicts with God’s definition of marriage, with my name affixed to the certificate, would violate my conscience.” *Id.*

19. See, e.g., *Masterpiece Cakeshop v. Colo. Civil Rights*, 138 S.Ct. 1719 (2018).

20. See Ohlheiser, *supra* note 18; see also *Miller v. Davis*, 267 F. Supp. 3d 961 (E.D. Ky. 2017).

Naturally, these defensive mechanisms also extend to the private sphere, in which individuals may resist the intersection of their daily lives with views, customs, or mores that conflict with theirs. Two “gay cake” examples illustrate this point well. In *Lee v. Ashers Baking Company*, the United Kingdom’s Supreme Court did not find the refusal of a business that self-identified as Christian to bake a cake with the message “Support Gay Marriage” to be discriminatory because “[t]he reason for treating [the customer] less favourably than other would-be customers was not his sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way.”²¹ In contrast, in *Masterpiece Cakeshop Limited v. Colorado Civil Rights Commission*, the U.S. Supreme Court ruled that the latter failed to consider with the “religious neutrality that the Constitution requires” a baker’s opposition to creating a wedding cake for a gay couple, after finding that statements made by two members of the Commission during their deliberations exhibited hostility toward the baker’s religious beliefs.²² Both cases nonetheless follow one common thread: the distinction in the analysis between the refusal to sell a cake to anyone when that cake conveys a particular message, and the refusal to sell a cake to one person because of a particular characteristic—in that case, the person’s sexual orientation.

Notwithstanding the merits of these findings, both cases provide material for reflection in relation to the protection that they afforded to the objecting businesses. In both cases, the Christian religious beliefs of the business owners were given great deference. Would the reasoning have been the same if the case had involved, for example, a Muslim baker equally opposed to producing a cake for the wedding of a gay couple because of their sincerely-held religious grounds? One can imagine that a court or state might take a very different approach in a case involving a hypothetical Muslim baker than the French National Assembly’s emphasis on “the fight against discrimination and the promotion of equality between men and women [as] priorities of public policy” in its submissions to the Human Rights Council in *Yaker*.²³ Indeed, that the deeply-held beliefs are *majority* or *dominant* beliefs appears substantially important in this equation.

When confronted with the conflict between deeply-held religious beliefs and sexual orientation or gender identity, courts may rely on existing human rights doctrine, which has consistently affirmed the principle that the exercise of certain rights, including right of religion and belief, is subject to limitations prescribed by law that are necessary in a democratic society and have a legitimate aim in the protection of public safety, order,

21. *Lee v. Ashers Baking Company* [2018] UKSC 49 [¶¶ 12, 23].

22. See *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

23. H.R.C., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2747/2016, *supra* note 4, at ¶ 8.13.

health, or morals, as well as the protection of the rights and freedoms of others,²⁴ which necessarily includes the protection against discrimination.

V. SUPERVENING NOTIONS OF INDIRECT DISCRIMINATION

Cases like the “gay cake” cases are more recent iterations of the conflict between SOGI and religion; other cases grapple with longstanding laws or other state measures. Suppose that upon registration, a person receives a number: an odd number in the case of males, and even in the case of females.²⁵ This immediately raises the question of whether persons who have received legal recognition of gender identity as women after having originally been registered as males can change their registration number, and whether the original registration category will always be evident. Similarly, a vast majority of societies have assigned public holidays on the basis of the religion of the majority, such as Christmas in majority Christian countries, or Ramadan in majority Muslim countries; elected officers take the oath of office while holding a text sacred to the majority; and taxes are imposed to finance state religion. In my opinion, the implication in these examples is that the states have long relied on certain preconceptions, foremost among these the neat division of the world in binary terms between males and females, and the organization of society around the rules of the predominant religion.

What all of these examples have in common is that it would be practically impossible to trace an explicit discriminatory intent to their origin, at least not in a manner that would be relevant to the work before a court. For long periods of time, society has deemed this discrimination acceptable and desirable. It is only by being faced with evidence of damage that policy-makers, judges, or lawmakers eventually deem it necessary to vary the situation.

Gender-based quarantines offer a recent example of how stakeholders can reach the finding that certain dispositions without discriminatory intent will constitute indirect discrimination. In the face of the COVID-19 pandemic, many Latin American countries, with Colombia, Panamá, and Peru as early adopters,²⁶ imposed restrictions to freedom of movement deter-

24. See International Covenant on Civil and Political Rights, *supra* note 9. The restricted catalogue of rights that may be subject to limitations include liberty and security, *id.* at art. 9, movement, *id.* at art. 12, religion or belief, *id.* at art. 18, opinion, *id.* at art. 19, assembly, *id.* at art. 21, and association, *id.* at art. 22.

25. Scandinavian countries employ highly systematized civil registration systems. For example, in Denmark, every resident requires a CPR number, the final four numbers of which indicate the resident's gender, with even numbers for women and odd numbers for men. See *CPR Number*, CITY OF COPENHAGEN <https://international.kk.dk/artikel/cpr-number#:~:text=>

26. See Victor Madrigal-Borloz (Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Rep. on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, transmitted from the U.N. Secretary-General to the G.A., ¶ 43, U.N. Doc. A/75/258 (July 28, 2020).

mined by gender: Males were required to shelter in place on odd days of the week, and females on even days. In contexts in which measures of legal recognition of gender identity for trans and other gender diverse persons are not yet in place, gender-based quarantines immediately created a particular impact on them by effectively condemning them to seclusion.²⁷

VI. HOW LONG DOES INDIRECT DISCRIMINATION REMAIN INDIRECT?

From the existing case law and the claims before my mandate and others, it is evident that there are cases in which norms, criteria, or policies will inflict a disproportionate and detrimental impact for certain persons, communities, and populations; and that in some of those cases the impact has inextricable relation to grounds protected from discrimination by global, regional, or domestic legislation. This is true of laws, policies, and other measures that rely on preconceptions that are then challenged by affected persons, communities, or populations who bring to light evidence of their damage. In this context, the theory of indirect discrimination is a fundamental tool in the catalogue available to UN treaty bodies and independent experts to deal with these cases in a manner that promotes the cessation of the violation and non-repetition.²⁸

Furthermore, due to the realities exposed by intersectional analysis, it is highly likely that persons belonging to identities historically subject to discrimination will find themselves as the victims of indirect discrimination more often than others without those identities. The concept of indirect discrimination will remain a powerful tool in the catalogue of advocates and human rights defenders to bring to light evidence of disparate or disproportional impact to their detriment.

The above discussion leads to a few final questions: Once a state receives notice of the discriminatory impact of an otherwise proportional, necessary, and justified measure, when is the state's duty to provide remedy triggered? And when does the state's intent to defend the measure taint it with an intent to perpetuate the discriminatory impact?

While logic dictates that once a judgment finding indirect discrimination has been issued, states must give effect to its consequences—for example, by reforming the laws, policies, or other measures that led to the violation—the existing treaty body or special procedures doctrine provides little indication as to what may be an applicable time standard for compliance in such situations. Given the increase in the sophistication of approaches used by advocates and human rights defenders, the recognition of strategic litigation as a tool for legal change, and the influence of conversa-

27. See *id.* at ¶ 23.

28. See G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 3 (Dec. 16, 2005).

tions of systemic discrimination such as Black Lives Matter, #MeToo, and the transformative power of claims for equality made by lesbian, gay, bisexual, trans, and gender diverse persons, I expect that this is an area that will be explored in depth in the coming years by UN treaty bodies and special procedures.