
INDIRECT DISCRIMINATION: A SUBTLE BARRIER TO EQUALITY

Yashavardhan Pandey, Rajiv Gandhi National University of Law, Punjab

1. Introduction

Indirect discrimination, a subtle yet pervasive form of inequality, occurs when seemingly neutral policies, practices, or norms disproportionately disadvantage certain groups based on their protected characteristics. Unlike overt discrimination, which involves explicit bias or prejudice, indirect discrimination operates more insidiously, often going unnoticed or unrecognized by those unaffected. This covert mechanism of discrimination can perpetuate systemic inequalities and hinder the full realization of equal rights and opportunities for marginalized individuals and groups. Indirect discrimination manifests in various social contexts, including employment, education, housing, healthcare, and access to services, among others. It can stem from historical injustices, entrenched social norms, unconscious biases, or structural barriers within institutions and systems. While not always intentional, the impact of indirect discrimination can be profound, reinforcing existing disparities and exacerbating disadvantage for vulnerable populations.¹

Addressing indirect discrimination requires a multifaceted approach that involves legal frameworks, public policies, institutional reforms, and social awareness campaigns. Laws prohibiting discrimination based on race, gender, age, religion, disability, sexual orientation, and other protected characteristics play a crucial role in combating indirect discrimination. Additionally, affirmative action measures, diversity initiatives, and inclusive practices aim to level the playing field and promote equal opportunities for all members of society.

In recent years, the concept of intersectionality has gained prominence in discussions of discrimination, highlighting the interconnected nature of various forms of oppression and privilege. Intersectionality recognizes that individuals hold multiple identities that intersect and

¹ Equality and Human Rights Commission, *'What is indirect discrimination?'* (Equality and Human Rights Commission, 2020) <https://www.equalityhumanrights.com/en/advice-and-guidance/what-indirect-discrimination> accessed 15 March 2024.

interact, shaping their experiences of discrimination and privilege in complex ways. This intersectional approach underscores the importance of addressing overlapping forms of discrimination and considering the unique challenges faced by individuals at the intersections of multiple marginalized identities.

The legal principle of indirect discrimination was initially acknowledged by the US Supreme Court in the landmark case *Griggs v. Duke Power*² in 1971. In this case, the Court ruled that practices that appear neutral on the surface and lack discriminatory intent but have a discriminatory effect in practice could still be deemed unlawful under anti-discrimination legislation if they cannot be justified by a legitimate business necessity.

Following the Griggs decision, the concept of indirect discrimination was adopted in various legal systems worldwide; however, it remained noticeably absent in Indian legal doctrine. While some Indian court judgments addressed certain aspects of indirect discrimination, such as moving away from formal equality, the significance of intent, the notion of disproportionate impact, and the perpetuation of historical disadvantage, none provided a comprehensive conceptual framework for indirect discrimination within Indian constitutional law.

Half a century following the Griggs case, on March 25, 2021, a two-judge panel of the Supreme Court of India officially acknowledged the concept of indirect discrimination in the case of *Lt Col Nitisha v Union of India*³. This ruling has been praised for highlighting the significance of indirect discrimination, aligning it closely with a substantive understanding of equality within the Indian legal framework.

By embracing Sandra Fredman's comprehensive framework of substantive equality, the Court linked the protection against indirect discrimination to several intertwined objectives: addressing the perpetuation of disadvantage (termed as 'redistribution'), remedying prejudice, stigma, stereotypes, and violence rooted in protected characteristics ('recognition'), enabling political engagement and societal integration ('participation'), and accommodating diversities while effecting structural reforms ('transformation').⁴

² 401 US 424 (1971)

³ Writ Petition (Civil) No 1109/2020 (Decided 25 March 2021)

⁴ S. Fredman, *Discrimination Law* (2nd edn, Oxford: Oxford University Press, 2011)

2. Statement of Problem

"To what extent does indirect discrimination persist in various sectors of Indian society, and what are the underlying factors contributing to its prevalence, as well as the legal and social implications?"

This research paper aims to investigate the existence and nature of indirect discrimination in India across different spheres such as employment, education, housing, and public services. It seeks to understand the underlying reasons for its persistence, including cultural norms, institutional practices, and socio-economic factors. Additionally, the research will explore the legal framework addressing indirect discrimination in India and evaluate its effectiveness in protecting the rights of marginalized groups. Finally, the study will examine the social implications of indirect discrimination, including its impact on equality, inclusion, and social cohesion in Indian society.

3. Research Questions

1. What are the legal frameworks and definitions of indirect discrimination in India and the USA?
2. How do Indian and American laws address indirect discrimination in employment practices?
3. What are the key judicial precedents and landmark cases related to indirect discrimination in both countries, and how have they influenced legal interpretations and protections?

4. Research objectives

1. To analyze and compare the legal frameworks and definitions of indirect discrimination in India and the USA.
2. To examine the extent to which Indian and American laws address indirect discrimination in employment practices and other areas.
3. To identify and analyze key judicial precedents and landmark cases related to indirect discrimination in both countries, and assess their impact on legal interpretations and

protections.

5. Research methodology

The Researcher has adopted doctrinal methodology on this paper. The researcher has used various primary and secondary sources which include judicial pronouncement, journals and articles.

6. Concept of Indirect Discrimination in United States

Indirect discrimination, a legal concept that has evolved significantly over time, has played a crucial role in combating systemic bias and promoting equality in the United States. Stemming from historical struggles against discrimination based on race, gender, religion, and other protected characteristics, the recognition of indirect discrimination has marked a pivotal shift in legal paradigms.

Discrimination has deep roots in American history, perpetuated through overt acts of bias and systemic inequalities. From slavery and segregation to the marginalization of women and immigrants, various groups have faced discrimination based on their race, ethnicity, gender, religion, and other factors. The Civil Rights Act of 1964 was a landmark legislative achievement aimed at dismantling discriminatory practices and promoting equal opportunity for all citizens. However, it soon became evident that bias persisted in more subtle and insidious forms, necessitating a more nuanced legal approach to combat discrimination effectively.

6.1 Griggs v. Duke Power Company⁵

Griggs v. Duke Power Co. (1971) stands as a landmark case in United States jurisprudence, particularly in the realm of employment discrimination law. This pivotal decision marked a significant shift in legal understanding by recognizing and addressing the concept of indirect discrimination, also known as disparate impact discrimination.

The case originated from Duke Power Co.'s policy, which required employees in certain positions to possess a high school diploma or pass intelligence tests. These requirements disproportionately affected African American employees, as they had historically been denied

⁵ 401 US 424 (1971)

educational opportunities and were less likely to have obtained a high school diploma or performed well on standardized tests due to systemic racism.

The Supreme Court's ruling in *Griggs v. Duke Power Co.* established the legal principle that employment practices that appear neutral on their face but have a disproportionately adverse impact on protected groups constitute unlawful discrimination. In other words, the Court held that practices with discriminatory effects, even if not intentionally discriminatory, could still violate Title VII of the Civil Rights Act of 1964.

The Court reasoned that Title VII prohibits not only intentional discrimination (disparate treatment) but also practices that have a disparate impact on protected groups (disparate impact). This decision significantly broadened the scope of anti-discrimination law, recognizing that systemic biases and structural barriers could perpetuate inequality in the workplace.

Crucially, the burden of proof in disparate impact cases shifted to the employer. Under the *Griggs* decision, employers must demonstrate that any selection criteria or employment practices that result in disparate impact are job-related and consistent with business necessity. If an employer cannot justify the necessity of such requirements, they may be found liable for discrimination.

Griggs v. Duke Power Co. had far-reaching implications beyond the specific facts of the case. It led to increased scrutiny of employment practices across industries and prompted employers to reassess their hiring and promotion criteria to ensure compliance with anti-discrimination laws. Moreover, the decision highlighted the importance of considering the broader societal context and historical inequalities when evaluating seemingly neutral policies.

The case also underscored the role of the courts in interpreting and enforcing civil rights legislation to address systemic injustices. By recognizing indirect discrimination as a form of unlawful bias, the Supreme Court signaled its commitment to promoting equality of opportunity and dismantling barriers to economic and social advancement.

Griggs v. Duke Power remains a watershed moment in the history of civil rights law in the United States. By establishing the legal principle of disparate impact discrimination, the case challenged entrenched biases and paved the way for greater inclusion and fairness in the

workplace. Its legacy continues to shape anti-discrimination jurisprudence and inspire efforts to combat systemic inequality across society.

6.2 Legal Framework

Following the Griggs decision, a comprehensive legal framework for addressing indirect discrimination began to take shape. The disparate impact theory became a cornerstone of anti-discrimination jurisprudence, allowing plaintiffs to challenge ostensibly neutral policies or practices that had discriminatory effects. Under this theory, plaintiffs must demonstrate that a particular policy or practice has a discriminatory impact and is not justified by legitimate factors. Courts have developed various tests and standards for assessing whether a practice constitutes unlawful discrimination, including the "business necessity" and "job-relatedness" tests.

6.3 Application in Employment Law

Indirect discrimination has significantly impacted employment law, shaping hiring practices, promotions, and workplace policies. Landmark cases like *Albemarle Paper Co. v. Moody*⁶ and *Connecticut v. Teal*⁷ (1982) have played pivotal roles in refining legal standards for identifying and addressing indirect discrimination in the workplace.

These cases have provided guidelines for evaluating the validity of selection criteria used by employers, such as educational requirements and testing procedures. Employers are now required to ensure that these criteria do not disproportionately disadvantage members of protected groups. The courts have emphasized the importance of considering alternative methods that minimize adverse impacts on these groups while still serving the legitimate needs of the business.

Albemarle Paper Co. v. Moody (1975) established the principle that selection criteria must be job-related and consistent with business necessity to avoid being deemed discriminatory. Similarly, *Connecticut v. Teal* (1982) highlighted the need to assess the overall impact of employment practices on different groups, even if no discriminatory intent is present. These cases have shifted the burden of proof to employers, requiring them to justify the necessity of

⁶ 422 U.S. 405 (1975)

⁷ 457 U.S. 440 (1982)

their selection criteria and demonstrate that they are not perpetuating systemic biases or barriers to equal opportunity.

Overall, the application of indirect discrimination in employment law has led to increased scrutiny of workplace practices and policies, promoting fairness and inclusivity in the workforce. These legal developments have contributed to a more equitable employment landscape, where individuals are judged based on their qualifications and abilities rather than factors unrelated to job performance.

Expansion to Other Areas:

Indirect discrimination, which was first recognized in employment law, has seen its application extend to various other domains, including education, housing, and public accommodations. In the realm of education, landmark cases like *Lau v. Nichols*⁸(1974) addressed discriminatory practices within public schools, particularly those impacting non-English-speaking students. This case emphasized the obligation of educational institutions to provide adequate support and resources to ensure equal opportunities for all students, regardless of their language proficiency. In this case, following the integration of the San Francisco, California school system, a significant number of students of Chinese heritage, totaling over 2,856 individuals, who lacked proficiency in English, were enrolled. Despite this demographic shift, only approximately 1,000 of these students were provided with additional English language instruction. Furthermore, instruction within the school system was conducted exclusively in English.

Subsequently, Lau and other students of Chinese descent, who were unable to speak English and had not received supplementary English language courses, initiated a class action lawsuit against the officials of the San Francisco Unified School District. Their contention was that the failure to offer supplemental English classes resulted in unequal educational opportunities, thereby violating the Fourteenth Amendment and the Civil Rights Act of 1964.

Initially, the district court dismissed the claim, ruling that the policies of the school system did not contravene the provisions of the Fourteenth Amendment or the Civil Rights Act. This decision was subsequently upheld by the United States Court of Appeals for the Ninth Circuit,

⁸ "Lau v. Nichols." *Oyez*, www.oyez.org/cases/1973/72-6520. Accessed 9 Apr. 2024.

with a request for a full court hearing being denied. Dissatisfied with the appellate court's ruling, the students opted to appeal the decision.

The court confronted with the issue whether it is a violation of the Fourteenth Amendment or the Civil Rights Act of 1964 for a school district to solely instruct in English and neglect to offer supplemental English language courses to students who are not proficient in English?

Certainly, Justice William O. Douglas authored the opinion on behalf of a unanimous court. The Court concluded that the failure of the school system to provide additional English language instruction to Chinese-speaking students who were not proficient in English violated the California Education Code, as well as Section 601 of the Civil Rights Act of 1964. This omission deprived these students of the opportunity to fully participate in the public education program.

Justice Potter Stewart penned a concurring opinion, joined by Chief Justice Warren E. Burger and Justice Harry Blackmun, supporting the outcome. He deliberated on the appropriateness of statutory directives requiring proactive remedial measures for linguistically disadvantaged children.

Additionally, Justice Harry Blackmun authored a concurring opinion, joined by Justice Burger, emphasizing that approximately 1,800 children were being deprived of a meaningful education in this scenario. He qualified the Court's ruling by indicating that if only a small number of children spoke a language other than English, the decision might not necessarily mandate supplementary language instruction.

Similarly, in the context of housing, cases such as *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*⁹ confronted discriminatory housing policies that disproportionately affected minority communities. These cases highlighted the pervasive nature of indirect discrimination in housing practices and underscored the importance of addressing systemic bias to ensure fair and equitable access to housing opportunities for all individuals.

The expansion of indirect discrimination beyond employment law reflects a broader recognition of its implications across different sectors of society. By addressing discriminatory

⁹ 576 U.S. 519 (2015)

practices in education, housing, and public accommodations, these legal interventions aim to promote greater inclusivity and equality for marginalized groups. Moreover, they serve as important reminders of the ongoing challenges faced in combating systemic discrimination and the need for proactive measures to address underlying inequalities in various aspects of public life.

Challenges and Controversies:

Despite its significant impact, the concept of indirect discrimination continues to face challenges and controversies. Critics argue that the legal framework for proving indirect discrimination is overly complex and burdensome for plaintiffs, making it difficult to challenge discriminatory practices effectively. Additionally, there is ongoing debate about the appropriate standard for assessing whether a particular practice constitutes unlawful discrimination. Some argue that the current legal standards are too stringent and fail to adequately address the subtler forms of bias that persist in society.

Looking ahead, the recognition of indirect discrimination is likely to remain a critical issue in US law and society. As societal understandings of discrimination evolve and new forms of bias emerge, the legal framework for addressing indirect discrimination will continue to adapt. Efforts to promote diversity, equity, and inclusion in all aspects of life will play a crucial role in shaping the future trajectory of anti-discrimination law in the United States. Moving forward, it will be essential to continue refining legal standards, enhancing enforcement mechanisms, and raising awareness of the importance of combating all forms of discrimination.

Indirect discrimination represents a significant advancement in the fight against bias and inequality in the United States. From its origins in landmark legal decisions to its broader application across various areas of law, indirect discrimination has reshaped the legal landscape and fostered greater awareness of the nuanced ways in which bias can manifest. As the US continues to strive for a more inclusive and equitable society, the recognition and understanding of indirect discrimination will remain essential for advancing principles of justice and equality for all. By addressing systemic bias and promoting diversity and inclusion, the United States can continue to move closer to its ideals of equality and opportunity for all citizens.

7. Indirect Discrimination in India

Indirect discrimination, a concept rooted in the principle of equality, refers to situations where

seemingly neutral policies, practices, or rules disproportionately affect certain groups based on protected characteristics such as race, gender, religion, caste, or disability. While the concept has been recognized and developed in jurisdictions like the United States and the United Kingdom, its formal acknowledgment and application in Indian law have been relatively recent.

India's history is replete with instances of discrimination based on various factors such as caste, religion, and gender. The caste system, in particular, has been a pervasive form of social stratification, leading to systemic inequalities and discrimination against marginalized communities. While India's Constitution guarantees equality before the law and prohibits discrimination on various grounds, including caste, race, sex, and religion, achieving substantive equality remains a challenge due to entrenched social hierarchies and historical injustices.

7.1 Legal Framework

In India, the legal framework for combating discrimination is primarily established by the Indian Constitution, notably through Articles 14, 15, and 16. Article 14 serves as the cornerstone, guaranteeing the right to equality before the law and equal protection of the laws. It ensures that individuals are treated equally by the state and are not subjected to arbitrary or discriminatory treatment.

Article 15 of the Constitution prohibits discrimination on several grounds, including religion, race, caste, sex, or place of birth. This provision aims to promote social justice and prevent unfair treatment based on inherent characteristics or circumstances beyond an individual's control. It underscores the importance of creating a society where all citizens have equal access to opportunities and resources, regardless of their background.

Article 16 addresses equality of opportunity in matters of public employment. It mandates that the state shall not discriminate against any citizen in matters of employment or appointment to any office under the state on the grounds of religion, race, caste, sex, descent, place of birth, residence, or any of them. This provision emphasizes meritocracy and fair access to employment opportunities in the public sector, ensuring that appointments are based on qualifications and suitability rather than discriminatory factors.

In addition to constitutional provisions, India has enacted various anti-discrimination laws and statutes at both the central and state levels. These laws address specific forms of discrimination in different spheres of life, including education, employment, housing, and access to public services. They aim to provide legal remedies and protections to individuals who experience discrimination based on their protected characteristics, such as caste, religion, gender, or disability. Overall, the legal framework in India seeks to promote equality, diversity, and inclusion while combating discrimination in all its forms.

7.2 Judicial interpretation

While the concept of indirect discrimination has long been recognized in jurisdictions like the United States and the United Kingdom, its formal acknowledgment in Indian law is relatively recent. The Supreme Court of India formally recognized indirect discrimination in the case of *Lt Col Nitisha v Union of India*¹⁰ in 2021. This landmark judgment marked a significant step in the evolution of Indian anti-discrimination jurisprudence.

In *Lt Col Nitisha*, the Supreme Court adopted a multidimensional framework of substantive equality, drawing inspiration from international human rights standards. The Court emphasized that freedom from indirect discrimination is closely linked to the broader goals of equality, including the eradication of historical disadvantage, the recognition of diversity, and the promotion of social inclusion.

The recognition of indirect discrimination in India has important implications for various sectors, including employment, education, housing, and public accommodations. It requires policymakers, legislators, and adjudicators to scrutinize seemingly neutral laws, policies, and practices to ensure that they do not perpetuate systemic inequalities or disadvantage marginalized groups.

In the realm of employment, for example, indirect discrimination may manifest in hiring practices, promotion criteria, or workplace policies that inadvertently disadvantage certain groups based on their characteristics. Similarly, in education, indirect discrimination may arise from curriculum choices, admission criteria, or disciplinary measures that disproportionately affect students from marginalized communities.

¹⁰ Writ Petition (Civil) No 1109/2020 (Decided 25 March 2021)

Overall, the recognition of indirect discrimination in India represents a significant step towards promoting substantive equality and social justice. By acknowledging the hidden ways in which discrimination can occur, Indian courts and policymakers can work towards creating a more inclusive and equitable society for all its citizens.

7.3 Lt Col Nitisha v Union of India¹¹

In this case, the Supreme Court delved into the intricacies of systemic discrimination and inequality within the promotion practices of the Armed Forces. The case revolved around the historical exclusion of women from Permanent Commissions in the Indian Army until February 2020. Previously, women could only serve as Short Service Commission officers with limited tenure, while Permanent Commissions offered the opportunity to serve until retirement.

The turning point came in 2020 with the case of *Secretary Ministry of Defense v. Babita Puniya*, where the Supreme Court ruled against categorical exclusion of women from Permanent Commissions, denouncing gender discriminatory practices in the armed forces. Subsequently, a selection board was established to facilitate the appointment of female Permanent Commissions, albeit with criteria that some petitioners deemed unfavorable to women applicants.

The grievances presented to the Supreme Court primarily centered on three grounds. **Firstly**, the medical fitness criteria applied to female applicants were assessed at their current age, contrasting with male officers who had their fitness tested earlier in their careers. **Secondly**, the process of drafting Annual Confidential Reports (ACRs) for female applicants lacked the same diligence as for male officers. **Lastly**, various training modules were either inaccessible to women or lacked incentives due to the absence of Permanent Commissions.

The two-judge bench, led by Justice Chandrachud and Justice M.R. Shah, ruled that the promotion practices of the Armed Forces constituted indirect discrimination. Justice Chandrachud elucidated five principles to grasp the essence of this indirect discrimination, drawing insights from comparative jurisprudence.

Firstly, discrimination could stem from unconscious biases and structures perpetuating injustice, irrespective of intent. **Secondly**, the focus should be on the effect of unfair treatment

¹¹ Writ Petition (Civil) No 1109/2020 (Decided 25 March 2021)

rather than intent. *Thirdly*, evidence of discrimination need not always be statistical but could be qualitative as well.

The fourth principle emphasized a two-step inquiry to assess discrimination, examining both disproportionate effects and whether the law reinforced disadvantage. *Lastly*, the test to evaluate challenges based on indirect discrimination should scrutinize the necessity of measures for successful job performance and explore less discriminatory alternatives. The court underscored the interconnectedness of direct and indirect discrimination and the need for judicial intervention to address structural inequality.

In light of this case, the Supreme Court mandated that medical fitness be tested within a specific timeframe and that any delays in granting women Permanent Commissions should not disadvantage them. Additionally, past lack of opportunities for women should be considered while evaluating ACRs. This landmark case serves as a crucial insight into the prevalence of indirect discrimination and its contribution to systemic inequality in India.

Conclusion

In conclusion, indirect discrimination represents a complex and multifaceted challenge in both India and the United States, albeit with distinct legal and social contexts. In India, the formal recognition of indirect discrimination in recent jurisprudence marks a significant step forward in addressing systemic inequalities and promoting substantive equality. The Supreme Court's acknowledgment of the concept in *Lt Col Nitisha v Union of India* underscores the importance of scrutinizing seemingly neutral policies and practices to ensure they do not perpetuate disadvantage or marginalization based on protected characteristics.

Similarly, in the United States, the evolution of indirect discrimination jurisprudence, particularly exemplified by landmark cases like *Griggs v. Duke Power Co.*, has reshaped legal paradigms and contributed to greater awareness of the hidden ways in which bias can manifest. The recognition of disparate impact discrimination and the burden-shifting framework established in *Griggs* have been instrumental in promoting fairness and inclusivity in the workplace and beyond.

However, challenges and controversies persist in both countries. Critics argue that the legal frameworks for addressing indirect discrimination may be overly complex or burdensome,

making it difficult for plaintiffs to challenge discriminatory practices effectively. Additionally, there is ongoing debate about the appropriate standards for assessing whether a particular practice constitutes unlawful discrimination.

Moving forward, it is imperative for legal systems in both India and the United States to continue refining their approaches to indirect discrimination, taking into account evolving societal understandings and emerging forms of bias. Efforts to promote diversity, equity, and inclusion must be coupled with robust enforcement mechanisms and public awareness campaigns to address systemic inequalities effectively. Ultimately, by recognizing and addressing indirect discrimination, both India and the United States can strive towards creating more inclusive and equitable societies, where all individuals have equal opportunities to thrive regardless of their background or identity.