

# Indirect Religious Discrimination: Resisting the Temptations of Premature Normative Theorization

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## INTRODUCTION

Several jurisdictions appear to be grappling with the concept of *indirect religious discrimination* at an increased rate. The concept connects intriguingly to the concept of *freedom of religion* in a way that some legal practitioners describe as familial. Additionally, scholars contest its normative foundations. This Essay focuses on legal measures addressing indirect religious discrimination and seeks to cast some light on each of these issues, particularly the concept's normative foundations. In doing so, the Essay highlights the experience of the development and use of indirect religious discrimination in several European jurisdictions: The United Kingdom—including Northern Ireland, which adopts a somewhat different legal position—France, the European Union, and the European Court of Human Rights (“ECtHR”). The use of indirect religious discrimination beyond these and other European jurisdictions is not addressed in any detail, and international human rights law, except the European Convention on Human Rights (“ECHR”), is not considered. Drawing from these diverse sources, this Essay argues that a convincing general normative theory of indirect religious discrimination law—one which seeks to reflect current legal practice rather than supplant it—is premature in its present state of development.

The Essay is organized in four Parts. Part I offers some conceptual distinctions, defining indirect discrimination and its relationship with *disparate impact*, and considering the meanings of *religious discrimination*. Part II suggests some variables that appear to affect the role and function of indirect religious discrimination in practice. Part III considers two differences (at least of emphasis) that arise in the practice of indirect religious discrimination law in the jurisdictions considered in this Essay. Part IV critiques

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Tarunabh Khaitan's 'ideal-theorizing'<sup>1</sup> of indirect religious discrimination in this Issue, identifying some foundational assumptions that he makes which undermine his ambitious attempt at providing an underlying normative justification of the legal practice. Such attempts, though stimulating, risk freezing a concept that is evolving and dynamic.

## I. CONCEPTS

Two concepts are critical to the argument this Essay seeks to develop: indirect discrimination and religious discrimination. Given their centrality to any examination of indirect religious discrimination, it will be useful to provide some brief, initial conceptual clarification of the meanings that this Essay adopts. Next, this Essay provides a brief introduction to the range of claims of indirect religious discrimination that arise in practice.

### A. *Some Conceptual Distinctions*

Indirect discrimination refers to the conception of unlawful discrimination that concentrates on the adverse effects of an apparently neutral policy or practice on a particular group, and assesses whether such adverse effects are otherwise justified.<sup>2</sup> With some variations, this conception is adopted across Europe, for example in the United Kingdom<sup>3</sup> (including in Northern Ireland),<sup>4</sup> in the Member States of the European Union,<sup>5</sup> and under Article

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1. The description is taken from Tarunabh Khaitan & Sandy Steel, *Theorising Areas of Law* (forthcoming). See also Laura Valentini, *Ideal vs. Non-Ideal Theory: A Conceptual Map*, 7 PHIL. COMPASS 654 (2012).

2. See EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW 29–31 (2011).

3. The Equality Act 2010 c. 15, § 19 (UK) defines indirect discrimination as follows: "A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. For [these] purposes . . . a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—A applies, or would apply, it to persons with whom B does not share the characteristic, it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, it puts, or would put, B at that disadvantage, and A cannot show it to be a proportionate means of achieving a legitimate aim. The relevant protected characteristics are— age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; sexual orientation." This Act does not apply in Northern Ireland. *Id.*

4. The Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998/3162 (N. Ir. 21) art. 3 defines indirect discrimination on the ground of religious belief (and political opinion) as follows: "A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of this Order if . . . he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it; and which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied; and which is to the detriment of that other because he cannot comply with it." *Id.*

5. See Council Directive 2000/78/EC, 2000 O.J. (L303) 16 (EC) (establishing a general framework

9 of the ECHR,<sup>6</sup> among others. Indirect discrimination in the European context is a close relative of, and was significantly derived from,<sup>7</sup> the *disparate effects* conception of discrimination originally developed by the U.S. Supreme Court in its interpretation of Title VII of the Civil Rights Act 1964 in the *Griggs* case,<sup>8</sup> and subsequently rejected for Equal Protection purposes in *Washington v. Davis*.<sup>9</sup> Indirect discrimination, in those jurisdictions in which the term is used (including most common law countries and all EU states), is usually contrasted with *direct discrimination*, which is somewhat equivalent to *disparate treatment* discrimination in the United States. These comparisons bear a strong health warning. Although there was a close family resemblance when the disparate effects doctrine was transplanted, indirect discrimination is not now the same as disparate effects, just as direct discrimination is not now the same as disparate treatment.<sup>10</sup> In brief, disparate treatment is considerably more focused on the intention of the perpetrator than indirect discrimination. Disparate effects applies in considerably fewer circumstances than indirect discrimination.

*Religious discrimination* means discrimination on the grounds of religious affiliation or belief, but this trite definition camouflages a fundamental distinction between two identifiable types of religious discrimination, largely

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for equal treatment in employment and occupation prohibits direct and indirect discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation). It provides, in Article 2, that “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief . . . at a particular disadvantage compared with other persons unless: that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.” *Id.* at art. 2. See generally CHRISTA TOBLER, LIMITS AND POTENTIAL OF THE CONCEPT OF INDIRECT DISCRIMINATION (2008); CHRISTA TOBLER, INDIRECT DISCRIMINATION: A CASE STUDY INTO THE DEVELOPMENT OF THE LEGAL CONCEPT OF INDIRECT DISCRIMINATION IN EC LAW (2005).

6. The European Convention on Human Rights, Article 14, provides: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” European Convention on Human Rights art. 14, Nov. 4, 1950, 213 U.N.T.S. 221. This has been interpreted by the European Court of Human Rights as incorporating a prohibition on indirect discrimination at least since *Tblimmenos v. Greece*, 2001-IV, Eur. Ct. H.R. See Rory O’Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-discrimination in the ECHR*, 29 LEGAL STUD.: J. SOC’Y LEGAL SCHOLARS 211, 221 (2009).

7. On the U.S. influence on indirect discrimination, see Christopher McCrudden, *Institutional Discrimination*, 2 OXFORD J. LEGAL STUD. 303, 336–43 (1981); Ioanna Tourkochiriti, “Disparate Impact” and “Indirect Discrimination”: Assessing Responses to Systemic Discrimination in the U.S. and the E.U., 3 EUR. J. HUM. RTS. 297, 313–15 (2015); Julie Suk, *Disparate Impact Abroad*, in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 283, 287–90 (Ellen D. Katz & Samuel Bagenstos eds., 2015).

8. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The U.S. Supreme Court has subsequently interpreted other anti-discrimination statutes as also prohibiting disparate effects. See, e.g., *Texas Department of Housing v. Inclusive Communities Project*, 576 U.S. 519 (2015) (interpreting the Fair Housing Act of 1968).

9. *Washington v. Davis*, 426 U.S. 229, 238 (1976).

10. For a useful discussion, see Tarunabh Khaitan, *The Past 40 Years Have Seen Significant Divergence Between the US and the UK Around the Law on Indirect Discrimination*, LSE BLOG (July 29, 2015), <https://blogs.lse.ac.uk/usappblog/2015/07/29/the-past-40-years-have-seen-significant-divergence-between-the-us-and-uk-around-the-law-on-indirect-discrimination/>.

based on the different roles religion plays in different societies.<sup>11</sup> In the first, often called *freedom of religion*, religious discrimination usually relates to a disadvantage a religious person experiences in carrying out specified religious obligations; in this form, it is often associated with belief. An example: I (a nurse) am dismissed from my employment because I refuse to be involved in an abortion procedure, owing to my religious belief that carrying out abortions is morally wrong and contrary to the doctrines of my religion. In the second type of religious discrimination, religion is a marker of ethno-political differences in some societies, such as in Northern Ireland, making religious discrimination much more similar to ethnic or racial discrimination. An example: I (an academic) am refused employment at a university in Belfast because I am considered 'Catholic' in the cultural sense, irrespective of whether I believe in the doctrines of the Catholic Church.

The distinction between these two types of religious discrimination is not always clear, however. When a woman chooses to wear a hijab in public but is prohibited from doing so, is she being discriminated against as a result of her religious belief, her association with a minority religious community, or her perceived identification with a particular political ideology? The distinction between religious discrimination and ethnic discrimination may be ambiguous as well.<sup>12</sup> For example, in *JFS*, a boy who claimed to be Jewish was excluded from a Jewish school; the school did not consider him to be Jewish because his mother was not Jewish by birth and had not converted to Judaism according to Orthodox practice.<sup>13</sup> The statutory provisions prohibiting discrimination contained an exception from religious discrimination for religious schools, but not from discrimination on grounds of ethnic origin.<sup>14</sup> As a result, the boy successfully alleged discrimination on the grounds of his ethnic origins, not religious discrimination.<sup>15</sup>

### B. *Claims of Indirect Religious Discrimination*

Courts and tribunals in Europe have considered whether a claimant has been indirectly discriminated against on grounds of religion or belief in a considerable range of situations across a range of European jurisdictions. Courts have considered, for example, a refusal to give an employee time off

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11. For a discussion, see KERRY O'HALLORAN, RELIGIOUS DISCRIMINATION AND CULTURAL CONTEXT: A COMMON LAW PERSPECTIVE 69–77 (2018).

12. See also EQUINET EUROPEAN NETWORK OF EQUALITY BODIES, STRATEGIC LITIGATION 15 (2017) (citing Equality Ombudsman v. Western Union Financial Services GmbH (Stockholm District Court T 9176-08) (finding that a financial institution's blocking of all transactions from persons whose names matched those on a terrorist suspects list, based on a post-9/11 measure requiring companies to block money transfers from suspect persons, amounted to indirect discrimination on grounds of ethnicity since it overwhelmingly affected persons with Arab or Muslim names)).

13. R. (on the application of E) v. Governing Body of JFS, [2009] UKSC 15, [57], [2010] 2 AC 728 (appeal taken from EWCA (Civ)).

14. *Id.* at 51, 175.

15. *Id.*; see generally Christopher McCrudden, *Multiculturalism, Freedom of Religion, Equality, and the British Constitution: The JFS Case Considered*, 9 INT'L J. CONST. L. 200 (2011).

for religious observance;<sup>16</sup> a prohibition of wearing religious dress or religious symbols in the workplace;<sup>17</sup> dismissal of a marriage registrar because of her unwillingness to carry out same-sex partnership ceremonies;<sup>18</sup> a failure to employ a person who refuses to shake hands with a person of the opposite sex because of religious scruples;<sup>19</sup> a school's prohibition of wearing a hijab to class;<sup>20</sup> a refusal to allow the wearing of burkinis in a municipal swimming pool;<sup>21</sup> a refusal to allow a Muslim dentist to use disposable underarm protections as an alternative to uncovering her underarms for reasons of hygiene;<sup>22</sup> a school's prohibition of students performing religious rituals at the school;<sup>23</sup> a local Catholic Church's refusal to employ supporters of same-sex partnerships;<sup>24</sup> and a rejection of a nurse's application for employment

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16. *Mba v. London Borough of Merton* [2013] EWCA (Civ) 1562 (Eng.); *Cherfi v. G4S Security Services* [2011] UKEAT 0379/10/DM (Eng.); *Fugler v. MacMillan-London Hair Studios Ltd.* [2005] ET 2205090/04 (Eng.).

17. *Begum v. Pedagogy Auras UK Ltd (t/a Barley Lane Montessori Day Nursery)* [2015] UKEAT 0309/13/RN (UK); *Azmi v. Kirklees Metropolitan Borough Council* [2007] UKEAT 0009/07/MAA; *Eweida v. British Airways* [2010] EWCA (Civ) 80 (Eng.); *Chaplin v. Royal Devon* [2010] ET 1702886/2009 (Eng.); HR 20 November 2017, NJ 2017 167 m.n.t. (de Nationale Politie) (Neth.), <https://www.mensenrechten.nl/publicaties/oordelen/2017-135> (finding that not allowing a police officer to wear her headscarf with a uniform constituted indirect religious discrimination because although the dress policy pursued legitimate goals, it was not necessary to apply this policy in the specific circumstances of the case, and it was therefore not objectively justified).

18. *Ladele v. London Borough of Islington* [2009] EWCA (Civ) 1357 (Eng.).

19. Arbetsdomstolen [AD] [Labour Court] 2018 case no. 51 (Swed.), <http://www.arbetsdomstolen.se/upload/pdf/2018/51-18.pdf> (finding indirect discrimination of a woman whose refusal to shake hands for religious reasons led to her not being recruited).

20. *Rozsudek Nejvyšší soudu ze dne 27.11.2019 (NS)* [Decision of the Supreme Court of Nov. 27, 2019], 25 Cdo 348/2019, ¶¶ 26–34 (Czech) (concluding that the school's internal policies amounted to a prima facie case of indirect discrimination, and that there was no legitimate aim being pursued by such a rule).

21. *See Tribunal de Première Instance Gand [Civ.]* [First Instance Court of East Flanders, Ghent Department] Ghent, May 7, 2018, *Piscine van Eyck*, Case No. 2018/8813 (Belg.); *Tribunal de Première Instance Gand [Civ.]* [First Instance Court of East Flanders, Ghent Department] Ghent, May 7, 2018, *Piscine Merelbeke*, Case No. 2018/8812 (Belg.) (finding that the ban amounted to indirect discrimination against Muslim women wishing to wear a burkini for religious reasons, and that ban could not be justified on grounds of security or hygiene).

22. Arbetsdomstolen [AD] [Labour Court] 2017 case no. 65, (Swed.) <http://www.arbetsdomstolen.se/upload/pdf/2017/65-17.pdf> (holding that such refusal did not constitute indirect discrimination); European Comm'n, *European Equality Law Review* at 118 (2018), <https://www.equalitylaw.eu/downloads/4639-european-equality-law-review-1-2018-pdf-1-086-kb> (citing Stockholm Municipal Court, case No. T 3905-15, *Equality Ombudsman v. The Swedish State through Karolinska Institutet*, Nov. 16, 2016 (finding that claimant successfully carried their burden of proof in proving indirect discrimination)).

23. Denmark, *Ligebehandlingsnævets* [Board of Equal Treatment] Apr. 27, 2017, case no. 9647, <https://www.retsinformation.dk/forms/R0710.aspx?id=192312> (finding that claimant established a prima facie case of indirect discrimination because only Muslim students performed religious rituals at the school when the new regulations were introduced, but that the regulations were objectively justified by a legitimate aim, which was to secure a safe and peaceful learning environment, and that the prohibition of performing religious rituals was an appropriate means to achieve that aim).

24. European Comm'n, *Country Report: Non-Discrimination, Poland 2018* at 90 (2018), <https://op.europa.eu/s/oQjf> (citing YZ, PTPA on behalf of YZ v. Catholic Diocese of H., *Sad Okregowy*, Mar. 22, 2017, I Ca 75/17) (holding that the Church indirectly discriminated against a journalist when denying them a contract opportunity because of their political opinion, rather than on the ground of sexual orientation, in supporting a petition for legalizing civil partnerships).

in a hospital as a midwife because she refused, for religious reasons, to perform some duties regarding abortions.<sup>25</sup> Although all of these examples are relatively recent cases involving claims of indirect religious discrimination, some of these claims were successful, and others were not. Many relate to employment issues regarding hiring, dismissal, or working conditions. Several, however, arise from educational settings and access to services. Some cases involve Muslim applicants, but in others the claimants are Christian. Ultimately, these examples illustrate the extent to which indirect religious discrimination cases have become a regular tool in the armory of those seeking a legal remedy, as well as some of the common characteristics of such cases.

## II. VARIABLES

There are several variables that appear to affect the role and function of indirect religious discrimination in practice. In this Part, four such variables are highlighted: (i) the relationship between claims of religious discrimination and claims of freedom of religion; (ii) the relationship between direct and indirect discrimination; (iii) the source and coverage of the prohibition of indirect religious discrimination; and (iv) the relationship between indirect religious discrimination and positive equality duties.

### A. *Relationship Between Claims of Religious Discrimination and Claims of Freedom of Religion*

We can identify, first, the extent to which the protection of *freedom of religion*, as distinct from religious discrimination, provides an attractive claim for applicants. The implications of whether an applicant opts to present the case as a religious freedom or a religious discrimination claim are potentially significant, at least in procedural terms. A religious discrimination claim is essentially comparative, for example, whereas a religious freedom claim is not. Toleration is more likely the underlying claim in a religious freedom claim, whereas affirmation more likely underpins a religious discrimination claim. As a rule of thumb, the more attractive the claim of freedom of religion from the perspective of the applicant, the less likely it is in practice that the applicant will resort to a religious discrimination claim, and vice versa.

Arguments concerning the place of religion in the public or private spheres are now frequently reframed in practice as issues of discrimination and equality. This appears to be the result of at least two significant developments. First, legal practitioners now more frequently identify anti-dis-

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25. Arbetsdomstolen [AD] [Labour Court] 2017 case no. 23, (Swed.) <http://www.arbetsdomstolen.se/upload/pdf/2017/23-17.pdf> (finding that the societal interest of having a high standard of health-care constituted a valid justification of the negative impact on the midwife's freedom of religious belief).

crimination arguments as providing ways of avoiding the uncertainties and limitations engendered by the jurisprudence on freedom of religion. Until its judgment in *Eweida*,<sup>26</sup> for example, the ECtHR did not consider a restriction on the freedom to manifest a religious belief to be contrary to Article 9 of the ECHR<sup>27</sup> if the religious believer could manifest that belief elsewhere.<sup>28</sup> Had the ECtHR given a more expansive scope to Article 9 in protecting freedom of religion,<sup>29</sup> *Ladele* would most likely not have been argued as an indirect discrimination claim under Article 14 of the ECHR.<sup>30</sup> Ms. Ladele was effectively dismissed from her position as a marriage registrar for refusing to carry out same-sex civil partnership ceremonies on religious grounds,<sup>31</sup> and chose to claim under Article 14 to avoid the Article 9 argument that she could have exercised her religion in another employment.

The second significant development in the realm of freedom of religion and indirect religious discrimination is that the growth of equality and discrimination arguments generally, and in particular the greater focus on the protection of various identities, has brought to the fore the ‘identity’ dimensions of religion.<sup>32</sup> Understanding this development will be assisted by considering in a little more detail the similarities and dissimilarities between freedom from discrimination and freedom of religion as legal concepts.

Several similarities between freedom of religion and freedom from discrimination on the basis of religion are initially quite striking. There is, in particular, a degree of overlap between the interpretation of freedom of religion and the religious discrimination provisions insofar as freedom of religion itself encompasses an equality dimension. Freedom of religion has been interpreted as encompassing a degree of equality between religions. Indeed, one of the ways in which a breach of freedom of religion is proven is by pointing to more favorable treatment being accorded to another religion

26. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215.

27. European Convention on Human Rights, *supra* note 6, at art. 9 (“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”)

28. *Cha’are Shalom ve Tsedek v. France*, 2000-VII Eur. Ct. H.R. 195, ¶ 74, 80–83 (holding that French authorities’ refusal to approve a Jewish association’s application to access slaughterhouses did not constitute a restriction on the freedom to manifest a religious belief because Jewish people could obtain religiously-compatible meat from other sources).

29. *Eweida*, 2013-I Eur. Ct. H.R. ¶ 40. *Ladele* was one of four cases considered together by the ECtHR and reported under the name of *Eweida*. See Christopher McCrudden, *Marriage Registrars, Same-Sex Relationships, and Religious Discrimination in the European Court of Human Rights*, in *THE CONSCIENCE WARS* 441–462 (Susanna Mancini and Michel Rosenfeld eds., 2018).

30. See European Convention on Human Rights, *supra* note 6, at art. 14.

31. *Eweida*, 2013-I Eur. Ct. H.R. ¶ 40.

32. See McCrudden, *supra* note 15, at 207.

when, other things being equal, they should have been treated similarly. This intuition is captured in the ECHR through Article 14, the original intention of which was to provide that these substantive rights should not be delivered in a discriminatory way.

Beyond these similarities, however, textual differences emerge. In Article 9 of the ECHR, freedom of religion (along with thought, conscience, and belief) is singled out for special treatment, in the sense that freedom of religion has a particular provision that is devoted to enunciating this freedom, whereas the provision prohibiting religious discrimination is located among several other grounds for non-discrimination, including race, sex, and other protected grounds. A second textual difference is more institutional: Unlike the treatment of freedom of religion, freedom from religious discrimination has, in the past, often been the subject of detailed legal treatment in ordinary statute law as well as that of constitutional or human rights provisions.

However, these differences in drafting and institutional elaboration do not preclude significant substantive differences. These differences between freedom of religion and freedom from discrimination are more fundamental than simply differences in drafting style, material scope, legal source, and limitations. Turning to the way in which courts have interpreted these types of provisions, we notice several differences between these provisions.

First, courts interpret the discrimination provisions as essentially comparative. Their approach to the interpretation of the religious discrimination provision emphasizes the nature of discrimination as involving the less favorable treatment of one person *in comparison* with another person, based on the differences in their religion.<sup>33</sup> Freedom of religion protections, on the other hand, are not interpreted as *essentially* comparative. There can be a breach of a provision guaranteeing freedom of religion, irrespective of the same treatment being accorded (or not accorded) to adherents of all other religions, or, indeed, everyone else. Freedom of religion, at least in theory, protects the holding of a belief of that religion and its manifestation on a non-comparative basis. Someone complaining of a breach of freedom of religion does not need to complain that someone else has been treated more favorably.

Second, a significant part of the appeal for litigants in using an argument based in freedom from religious *discrimination* is the opportunity it offers to benefit from affirmation of their status as religious persons, particularly when they operate in the public sphere. The opportunity to secure affirmation, rather than toleration, is notoriously more limited using freedom of religion. Under a freedom of religion approach, there is a possibility that courts would apply a narrow 'autonomy' approach, significantly limiting religion to the private sphere. Alternatively, courts may focus on particular

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33. LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE 127 (2008).



‘conduct’ regarding the manifestation of a set of religious practices, rather than a protection of the status of being religious in the much broader range of circumstances covered by anti-discrimination law. An analogy drawn from sexual orientation discrimination helps explain this second difference between freedom of religion and religious anti-discrimination approaches. There has long been an important debate within the community of gay activists in Europe, as well as elsewhere, as to whether a strategy based on privacy or equality is more appropriate in addressing the treatment suffered by those who are gay.<sup>34</sup> Similarly, the question as to whether to litigate religious issues as a question of religious freedom or religious equality arises.

The ECtHR has long addressed scenarios that may be considered under either Article 9 alone or Article 14 read with Article 9, as being better dealt with under Article 9 alone.<sup>35</sup> The ECtHR’s attempt in *Ladele* to break from this practice was only partially successful because the approach to margin of appreciation that was applied to questions of justification in an indirect discrimination context was the same as that which would have been applied if the issue had been considered under Article 9 alone. This suggests that the same approach to justification generally will be applied to Article 9 claims and Article 14 indirect religious discrimination claims. The argument that the standard of justification should be more onerous because religion should be treated as similar to race, gender, and sexual orientation in requiring a heavier burden of justification was not successful in *Ladele*, for reasons to be discussed subsequently. However, whether that will remain the case is uncertain.

### B. *Relationship Between Direct and Indirect Discrimination*

The relationship that exists in a particular jurisdiction between indirect and direct discrimination is a second important factor in determining the role that ‘indirect’ religious discrimination plays. This relationship is important in different ways and can be analyzed by asking three questions. First, are direct and indirect discrimination regarded, legally, as overlapping concepts, or are they regarded as separated to such a degree that they cannot overlap? In the United Kingdom, for example, the legal concepts of direct and indirect discrimination cannot overlap; an action is either direct discrimination or indirect discrimination—it cannot be both.<sup>36</sup>

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34. Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. AFR. L.J. 450, 462–65 (1993).

35. Janneke Gerards, *Prohibition of Discrimination*, in *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1001* (Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak eds., 5th ed. 2018) (explaining that “in most cases, the [ECtHR] leaves the non-discrimination case undecided if the case can be readily ‘solved’ by applying one of the Convention’s substantive guarantees.”).

36. *R. (on the application of E) v. Governing Body of JFS*, [2009] UKSC 15, [57], [2010] 2 AC 728 (Lady Hale). Oran Doyle argues, however, that theoretically, “there is no reason why the concepts

Second, to what extent does direct discrimination in a given jurisdiction go beyond a focus on intentional discrimination to also cover an action that is not calculated to discriminate on the prohibited ground but necessarily has that consequence? A U.K. sex discrimination case illustrates the issue: A local council operates a practice of allowing those who are over the state pension age free swimming in the municipally-owned swimming pool. The state pension age is sixty-five for men and sixty for women. Is this direct or indirect discrimination? In the U.K., it is direct discrimination<sup>37</sup> not because the local council intended to discriminate against men, but because the council's practice was, as a subsequent case put it, "indissociable"<sup>38</sup> from sex. That is, the only people between ages sixty and sixty-five who were able to satisfy the condition of being of pensionable age were women. No men could satisfy that condition.

Third, can direct discrimination be *justified*, in the sense that good reasons can be adduced as to why the perpetrator's unfavorable treatment of another on a prohibited ground is nevertheless lawful? One of the reasons why a claim of direct discrimination is more popular than a claim of indirect discrimination is because the grounds for rebutting the former are considerably narrower than for rebutting the latter. Whereas a *prima facie* case of indirect discrimination can be rebutted if it is established that the adverse impact was otherwise *proportionate*, no such argument can be made regarding direct discrimination, except under Article 14 of the ECHR. There are exceptions to the coverage of direct discrimination, but these are narrowly drafted and specific, rather than the open and general exceptions to indirect discrimination, making it so claimants are more likely to want their cases to be considered as direct discrimination claims.

The combination of these three features of the relationship between direct and indirect discrimination can have significant effects on whether and how indirect discrimination is deployed. For the applicant, where direct or indirect discrimination are exclusive categories, direct discrimination may be used to make an 'effects'-type argument, without the perpetrator being able to advance a proportionality justification. On the other hand, the test of what is 'indissociably' connected is narrower than an indirect discrimination-based 'effects' test. For example, in the *Ashers* case, in which a bakery refused a gay man's request to produce a cake decorated with the slogan "Support Gay Marriage," the claimant presented his complaint as a case of direct discrimination on the basis of sexual orientation.<sup>39</sup> This argument failed on the basis that being gay and wanting a cake with that slogan were not 'indissociably connected.' Had the litigant argued instead that the

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of direct and indirect discrimination do not overlap. . . . Conceptually, . . . there is no such rigid division." Oran Doyle, *Direct Discrimination, Indirect Discrimination and Autonomy*, 27(3) OXFORD J. LEGAL STUD. 537, 542 (2007).

37. See *James v. Eastleigh Borough Council* [1990] UKHL 6, [1990] 2 AC 751 (UK).

38. *Lee v. Ashers Baking Co.* [2018] UKSC 49, [25] (UK) (Lady Hale).

39. *Id.* at [1].

bakery's refusal constituted indirect discrimination, a different result might have been achieved because establishing an adverse impact on the affected individual would have been more straight-forward than satisfying the standard test of 'indissociability.'<sup>40</sup> However, it could not legally be both direct and indirect discrimination in the United Kingdom.<sup>41</sup>

The take-away point is that the broader the conception of direct religious discrimination, the less likely it is that litigants will choose to go down the route of alleging indirect discrimination because no justification defense is available to the perpetrator in a direct discrimination claim. This is particularly true in jurisdictions like the United Kingdom, where an act cannot constitute both indirect and direct religious discrimination. The choice is likely to be dictated not only by litigation strategy, but also by perception that established cases of direct discrimination carry greater moral opprobrium than cases of indirect discrimination. Indeed, in some jurisdictions this greater moral opprobrium is reflected in the remedies that are available. For example, in the United Kingdom damages are not available for indirect discrimination that is shown to have been unintentional.<sup>42</sup>

### C. *Source and Coverage of the Prohibition on Indirect Religious Discrimination*

The third factor affecting the role that a prohibition of indirect religious discrimination plays is the legal status of the prohibition. Prohibitions on indirect religious discrimination that are broadly 'constitutional'—in the sense that they apply to legislation as well as other actions by public bodies and persons—are distinguishable from prohibitions that are 'statutory,' which tend not to apply to prohibit discriminatory legislation and apply to commercial bodies and persons.

This difference is important in several respects. In Canada, for example, Section 15 of the Canadian Charter of Rights and Freedoms has been interpreted as capable of prohibiting indirect religious discrimination in legislation,<sup>43</sup> but a series of separate provincial statutes prohibit indirect religious discrimination by commercial operators.<sup>44</sup> If the source of the prohibition of religious discrimination is broadly 'constitutional,' it is more likely that the origin of indirect religious discrimination in that jurisdiction will be *judicial*. There are relatively few examples in which there is a clear distinction drawn between direct and indirect discrimination at the constitutional level, with South Africa as a notable exception.<sup>45</sup> In the bulk of jurisdictions, indirect discrimination arrives as a result of judicial interpretation of

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40. Christopher McCrudden, *The Gay Cake Case: What the Supreme Court Did, and Didn't, Decide in Asbers*, 9 OXFORD J. L. & RELIGION 238 (2020).

41. *Id.* at 242.

42. Equality Act 2010, § 124(4) (UK).

43. *Adler v. Ontario*, [1996] 3 S.C.R. 609 (Can.).

44. *See, e.g.*, Ontario Human Rights Code, RSO 1990, c.H.19, §1.

45. *See S. AFR. CONST.*, 1996 § 9(3), (4).

broadly-framed prohibitions on discrimination.<sup>46</sup> Where the origin of indirect religious discrimination is statutory, however, the tendency is for a more specific, textually-based, definition to be provided which channels judicial discretion.<sup>47</sup>

If the source of the prohibition of religious discrimination is broadly ‘constitutional’ it is also likely to be primarily focused on preventing religious discrimination by *public* bodies. In other words, it is more likely to have vertical rather than horizontal effects, and to have a very broad coverage in the public sector. The development of indirect religious discrimination is therefore likely to be tailored to fit a vertical, public context. Where the origin is statutory, however, the coverage is likely to be more closely defined and focus on particular covered activities, such as employment or housing as in the examples provided above, each of which applies the prohibition to a limited range of specific practices.

Indirect discrimination provisions arising from general international human rights treaties are more similar to those arising from national constitutional than national statutory sources.<sup>48</sup> As in the national constitutional context, the texts of international treaties often do not distinguish between direct and indirect discrimination. So, in the context of Article 14 of the ECHR, indirect discrimination came through judicial interpretation and applies vertically, not horizontally.<sup>49</sup> For a claim of discrimination under Article 14 to succeed, applicants must show that they were either (a) *treated differently* from other persons in analogous, or relevantly similar situations—equivalent to direct discrimination, or (b) *treated similarly* to persons in relevantly different situations—equivalent to indirect discrimination.

An illustrative example of the ECtHR approach to indirect religious discrimination in practice is found in *Ladele*, which concerned an allegation of discrimination brought against a public body in which the Court drew on a judicially-created test of indirect discrimination to address a novel issue.<sup>50</sup> In failing to treat her differently from staff who did not have a conscientious objection to registering civil partnerships, Ms. Ladele argued that the local authority failed “to treat differently persons whose situations are significantly different,” as the Court put it in *Thlimmenos v Greece*.<sup>51</sup> The ECtHR

46. Patrick Macklem & Adrienne K. Wing, *Race and Ethnicity Discrimination*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 313, 319–21 (Mark Tushnet, Thomas Fleiner, Cheryl Saunders eds., 2013).

47. See CHRISTOPHER MCCRUDDEN & SACHA PRECHAL (EUROPEAN EQUALITY LAW NETWORK), THE CONCEPTS OF EQUALITY AND NON-DISCRIMINATION IN EUROPE: A PRACTICAL APPROACH, 35–37 (2009).

48. The Convention on the Elimination of All Forms of Racial Discrimination [CERD] and the Convention Against All Forms of Discrimination Against Women [CEDAW] are exceptions, since both specifically include a reference to an ‘effects’ understanding of discrimination. CERD art. 1(1), Dec. 21, 1965, 660 U.N.T.S. 195; CEDAW art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13.

49. *Thlimmenos v. Greece* [G.C.], 2000-IV Eur. Ct. H.R. 263 ¶¶ 44–49.

50. See *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215 ¶ 87.

51. *Thlimmenos*, 2000-IV Eur. Ct. H.R. at ¶ 44. This case has often been seen as having introduced the idea of ‘indirect’ discrimination into ECHR jurisprudence. See Gerards, *supra* note 35, at 1005.

agreed that she had correctly identified the relevant comparators, holding that the “relevant comparator in this case is a registrar with no religious objection to same sex unions.”<sup>52</sup> The ECtHR further agreed with Ms. Ladele’s argument that failing to treat her differently from those staff did, indeed, mean that the local authority failed “to treat differently persons whose situations are significantly different.”<sup>53</sup> The ECtHR also agreed with the applicant’s contention “that the local authority’s requirement that all registrars . . . be designated as civil partnership registrars had a particularly detrimental impact on her because of her religious beliefs.”<sup>54</sup> This, the ECtHR concluded, constituted a *prima facie* case of indirect discrimination under Article 14, although the ECtHR went on to find that whether it was justified fell within the ‘margin of appreciation.’<sup>55</sup>

#### *D. Relationship Between Indirect Religious Discrimination and Positive Equality Duties*

Lastly, in some jurisdictions the importance of prohibitions on indirect religious discrimination is somewhat lessened in practice where there is a legal mechanism in place that imposes on some actors a more general duty to secure equality or equality of opportunity on the grounds of religion. This is a duty which goes beyond most prohibitions of indirect religious discrimination in two respects. First, it shifts from a negative obligation (‘do not . . .’) to a positive obligation (‘actively promote . . .’). Second, it shifts from a focus on discrimination to a broader, more encompassing focus on equality or equality of opportunity. For example, in Northern Ireland, there is a broad, positive obligation on the public sector to pay “due regard to the need to promote equality of opportunity” between (inter alia) persons of different religious beliefs.<sup>56</sup> This encompasses, but goes well beyond, an obligation to refrain from indirectly discriminating on the grounds of religion. The effect may be to take some weight off complaints-based indirect discrimination litigation, given that public authorities are supposed to examine their practices proactively, without waiting for an indirect discrimination claim.<sup>57</sup>

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52. *Eweida*, 2013-I Eur. Ct. H.R. ¶ 104.

53. *Id.* ¶ 87.

54. *Id.* ¶ 104.

55. *Id.* ¶ 106.

56. Section 75, Northern Ireland Act, 1998, c. 47. For the origins and intended scope of this provision, see generally Christopher McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 *FORDHAM INT’L L.J.* 1696 (1998). The equivalent provision in Great Britain is Equality Act 2010, § 149.

57. See *The Queen on the Application of Bapio Action Ltd v. Royal College of General Practitioners, General Medical Council* [2014] EWHC 1416 (Admin), [31] (challenge to adoption and application of skills assessment of physicians); see generally Sandra Fredman, *Addressing Disparate Impact: Indirect Discrimination and the Public Sector Equality Duty*, 43 *INDUS. L.J.* 349 (2014).

### III. PRACTICALITIES

This Part considers two differences that arise in the practice of indirect religious discrimination law in the jurisdictions considered in this Essay: the proof of indirect religious discrimination, and the justification standard that is sufficient to rebut a *prima facie* case of indirect religious discrimination.

#### A. *Proof of Indirect Discrimination*

Statistics are generally the primary evidence advanced to establish a *prima facie* case of disparate impact discrimination in the United States.<sup>58</sup> Beyond the United States, a requirement that an allegation of indirect discrimination be supported by statistical evidence has been evident in some European jurisdictions, such as in Spain,<sup>59</sup> and in Ireland.<sup>60</sup> More recently, however, statistics have become only one among a number of methods of proving indirect discrimination. In the vast majority of the jurisdictions considered in this Essay, the presentation of statistical evidence is sufficient but not necessary to establish indirect discrimination. In other words, in these jurisdictions statistical evidence is admissible where it is available but is not required.<sup>61</sup> In the European context, there would be significant difficulties in requiring indirect discrimination on grounds of race, ethnicity, or religion to be established through the use of statistical evidence. This is because such evidence is simply not available in many jurisdictions, and the collection of such information is sometimes subject to significant legal restrictions in some jurisdictions or is outright prohibited in others, such as in France.<sup>62</sup>

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58. Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 773–74 (2009).

59. María Amparo Ballester Pastor, *Challenges to the Effectiveness of the Protection against Indirect Discrimination on the Ground of Sex in Spain*, in ANTI-DISCRIMINATION LAW IN CIVIL LAW JURISDICTIONS 262, 266 (Barbara Havelková & Mathias Möschel, eds., 2019) (“The Spanish courts also use exclusively the same old statistical or quantitative approach and do not even mention the possibility that other ways to identify indirect discrimination exist. It should be mentioned as well that, given that there are not many cases of indirect discrimination in Spain, there are no judicial doctrines regarding the way in which statistics must be applied either.”).

60. *Stokes v. Christian Brothers High School Clonmel*, [2015] IESC 13, at ¶ 12.8 (Ir.), <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a09897a48211897980257df6005a3c31?OpenDocument>.

61. The Recitals to the Racial Equality and Employment Discrimination Directives state that rules of national law or practice “may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.” Council Directive 2000/43/EC, 2000 O.J. (L 180) 22, 23, Recital 15.

62. Marie Mercat-Bruns, *Tackling Indirect Discrimination in Employment in France: A Relative Success?*, in ANTI-DISCRIMINATION LAW IN CIVIL LAW JURISDICTIONS 244, 252 (Barbara Havelková & Mathias Möschel eds., 2019) (“To this day, there have been no cases on indirect racial discrimination in France and this might be because of the impossibility of gathering statistics on race and proving the particular disadvantage based on race. This selective application of indirect discrimination to certain grounds in France might confirm the way in which French judges apply the concept of indirect discrimination,

Different jurisdictions take different approaches as to what evidence is used to establish a prima facie case of indirect discrimination in the absence of, or in addition to, statistical evidence.<sup>63</sup> Belgian anti-discrimination legislation specifies that, in addition to statistics, facts that are common knowledge, as well as the use of an intrinsically suspect distinction criterion, are permitted forms of evidence.<sup>64</sup> The Irish Labor Court has adopted a similar position, stating that “[i]t would be alien to the ethos of this Court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence to prove matters which are obvious to the members of the Court by drawing on their own knowledge and experience.”<sup>65</sup>

In all of these jurisdictions, a key element concerns the definition of the ‘religious group’ with which the applicant seeks to identify, and the comparator group which the applicant claims is more favorably treated. In none of the jurisdictions is it mandatory to establish that the organized religion the applicant identified with considered it an obligation to do or not to do what the applicant wishes to do or not to do. It is necessary, however, for the applicant to carefully define the group, and that the contested criterion or practice puts or would put at least some individuals of the claimant’s religion at a particular disadvantage compared with persons not of that religion.<sup>66</sup>

### B. *Justification Standard in Indirect Discrimination*

In the jurisdictions with which this Essay is primarily concerned, a prima facie case of indirect discrimination is subject to rebuttal. This ‘justifica-

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which is through an interpretation based on the disadvantage exposed in the rule rather than based on a statistical disparity proven by the plaintiff comparing pools of people affected by the rule.”)

63. Julie Ringelheim, *The Burden of Proof in Anti-Discrimination Proceedings. A Focus on Belgium, France and Ireland*, 2 EUR. EQUAL. L. REV. 49, 54–55 (2019).

64. Loi tendant à lutter contre certaines formes de discrimination [Law Against Certain Forms of Discrimination], B.S., May 30, 2007, art. 28(3), [https://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg\\_2.pl?language=fr&nm=2007002099&la=F](https://www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=fr&nm=2007002099&la=F;); Loi du 10 mai 2007 modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme et la xénophobie [Law of 10 May 2007 Amending the Law of 30 July 1981 Criminalizing Certain Acts Inspired by Racism or Xenophobia], B.S. May 30, 2007, art. 30(3), [http://www.diversiteit.be/diversiteit/files/File//wetgeving\\_legislation/national/Loi%20du%2010%20mai%202007\\_24pg.pdf](http://www.diversiteit.be/diversiteit/files/File//wetgeving_legislation/national/Loi%20du%2010%20mai%202007_24pg.pdf); Loi tendant à lutter contre la discrimination entre les femmes et les hommes [Law Against Discrimination Between Men and Women], B.S., May 30, 2007, art. 33(3), [http://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a1.pl?language=fr&la=F&cn=2007051036&table\\_name=loi&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sq\]=\(Text@ontains+\(%27%27\)\)#LNK0016](http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=2007051036&table_name=loi&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sq]=(Text@ontains+(%27%27))#LNK0016).

65. NBK Designs Ltd. v. Inoue [2002] 14 ELR 98 (Ir.).

66. See, e.g., Case C-668/15, *Jyske Finans A/S v. Ligebehandlingsnævnet*, ECLI:EU:C:2017:278, ¶¶ 15, 36 (Apr. 6, 2017) (finding that to constitute indirect ethnic discrimination requires that it be shown that a particular ethnic group is put at a particular disadvantage, and concluding that the practice at hand could not be found to amount to indirect discrimination on the ground of ethnic origin); see also *Trayhorn v. Secretary of State for Justice* [2017] IRLR 502 (EAT) ¶¶ 72–80 (UK) (upholding Employment Tribunal decision finding that claimant failed to prove that Christians were disadvantaged “singly or as a group”).

tion' test has varied over the years but has now broadly coalesced around a classic 'proportionality' test.<sup>67</sup> This is often formulated in different ways, but can be seen as comprising a core approach, according to which the adverse impact can be rebutted if it can be shown: First, that the practice causing the adverse impact is intended to pursue a legitimate aim; second, that there is a nexus between the contested practice and the legitimate aim; third, that other less adverse practices could not have achieved that legitimate aim; and fourth, that it was otherwise reasonable to adopt the practice. Whereas the proportionality test is intended to place the onus on alleged discriminators to justify their practices, the test says little about the intensity of scrutiny engaged in by the court assessing the contested practices.<sup>68</sup> In practice, the intensity of scrutiny varies considerably from jurisdiction to jurisdiction, making an accurate prediction as to the outcome close to impossible.

Two contrasting cases illustrate diverging applications of the proportionality test: the first arising in the ECtHR, which considered the justification issue extensively in *S.A.S. v. France*<sup>69</sup> under freedom of religion; the second, contrasting approach arising in the *Achbita* judgment by the Court of Justice of the European Union ("CJEU").<sup>70</sup> The issue in *S.A.S.* was whether a ban on the wearing of a full-face veil was contrary to the ECHR.<sup>71</sup> The ECtHR held that France was justified in imposing such a ban because it could be considered necessary for ensuring the conditions of social life, under the rubric of protecting the rights of others. The ECtHR reasoned that there is a requirement on all in society to engage in public with others, an obligation which cannot be sustained if the face is fully covered. What is striking about the approach adopted by the ECtHR is the 'light touch' review standard applied. The Grand Chamber acknowledged that the ban was broad, was supported by criminal sanctions, affected Muslim women more than any other group in French society, and restricted the autonomy of women who choose to wear a veil over their faces.<sup>72</sup> Despite this analysis, the ECtHR weighed in the balance the fact that the ban only applied to limited types of clothing, the penalty for a violation was minor, and the ban

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67. Under EU anti-discrimination law, for example, in Case C-170/84 *Bilka-Kaufhaus GmbH v. Weber von Hartz*, 1986 E.C.R. 1607 ¶ 37, the Court of Justice of the European Union held that indirectly discriminatory measures could be justified only if they "correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end." See generally Aaron Baker, *Proportionality and Employment Discrimination in the UK*, 37 *INDUS. L.J.* 305 (2008).

68. See generally Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 *CAMBRIDGE L.J.* 174 (2006); AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (David Dyzenhaus & Adam Tomkins eds., 2012).

69. See *S.A.S. v. France* [GC], 2014-III Eur. Ct. H.R. 341.

70. See Case C-157/15, *Achbita v. G4S Secure Solutions NV*, ECLI:EU:C:2017:203 (Mar. 14, 2017).

71. *S.A.S.*, 2014-III Eur. Ct. H.R. at ¶ 3.

72. See *id.* at ¶¶ 145–46, 151.



was not based on religious motives,<sup>73</sup> and found that the balance was one for France to strike.<sup>74</sup>

Contrast this approach with that adopted by the CJEU in *Achbita*.<sup>75</sup> The case concerned G4S' dismissal of A because of her refusal to remove her Islamic headscarf. A, a Muslim, was employed by G4S at a time when the company had an unwritten rule that prohibited employees from wearing visible signs of their political, philosophical, or religious beliefs in the workplace. Several years later, G4S approved the rule. After this, A was dismissed because she refused to comply with the rule not to wear the Islamic headscarf at work. The CJEU concluded that the prohibition of wearing an Islamic headscarf did not constitute direct discrimination based on religion or belief within the meaning of the Directive.<sup>76</sup> However, most importantly, the Court left open whether her dismissal constituted *indirect* discrimination under the Directive:

In the present case, it is not inconceivable that . . . the internal rule at issue in the main proceedings introduces a difference of treatment that is indirectly based on religion or belief, . . . if it is established—which it is for the referring court to ascertain—that the apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage.<sup>77</sup>

The CJEU emphasized, however, that “such a difference of treatment does not . . . amount to indirect discrimination . . . if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.”<sup>78</sup> Although, said CJEU, it was “ultimately” for the national court, “which has sole jurisdiction to assess the facts and to determine whether and to what extent the internal rule at issue in the main proceedings meets those requirements.”<sup>79</sup> Nevertheless, the CJEU was “called on to provide answers that are of use to the national court, [and] may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to

73. *Id.* at ¶¶ 151–52.

74. *Id.* at ¶ 1533 (“[T]he respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society (see paragraph 128 above). It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.”).

75. *Achbita*, ECLI:EU:C:2017:203.

76. The rule treated all employees of the undertaking in the same way, notably by requiring them, generally and without any differentiation, to dress neutrally. It was not evident from the material available to the Court that the internal rule was applied differently to A, as compared to other G4S employees. Accordingly, such an internal rule does not introduce a difference of treatment that is directly based on religion or belief, for the purposes of the directive. *See id.* ¶ 30.

77. *Id.* ¶ 34.

78. *Id.* ¶ 35.

79. *Id.* ¶ 36.

enable the national court to give judgment in the particular case pending before it.”<sup>80</sup> This is what it then proceeded to do, particularly as regards assessing the proportionality of the prohibition.

The CJEU applied the classic approach to proportionality, considering first the legitimacy of the aim pursued. The CJEU acknowledged “that the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate.”<sup>81</sup> However, the CJEU implicitly limited the type of employees who could legitimately be included within the scope of the policy: “An employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business . . . and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.”<sup>82</sup>

The CJEU considered next the appropriateness of an internal rule such as that imposed by the employer here in furthering this aim, and determined that “the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner.”<sup>83</sup> In that respect, said the CJEU, “it is for the referring court to ascertain whether G4S had, prior to [A’s] dismissal, established a general and undifferentiated policy of prohibiting the visible wearing of signs of political, philosophical or religious beliefs in respect of members of its staff who come into contact with its customers.”<sup>84</sup>

Turning then to the third element in the proportionality test, whether the prohibition at issue was necessary, the CJEU stated:

In the present case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.<sup>85</sup>

In that framework of strict necessity, the CJEU went on, in a critically important move, to query whether G4S could have reasonably accommodated A’s desire to wear the Islamic headscarf, instead of dismissing her:

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80. *Id.*

81. *Id.* ¶ 37.

82. *Id.* ¶ 38.

83. *Id.* ¶ 40.

84. *Id.* ¶ 41.

85. *Id.* ¶ 42.

It is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her. It is for the referring court . . . to limit the restrictions on the freedoms concerned to what is strictly necessary.<sup>86</sup>

#### IV. NORMATIVE THEORY

Can we identify a convincing normative theory that underpins the legal prohibition of indirect religious discrimination sketched out above, one that is not stated at such a high level of abstraction that it is banal? In this last Part, I suggest that we cannot, despite the best attempts to do so, at least at the current stage of the concept's development. I suggest further that attempts to do so run the risk of unduly limiting a potentially novel concept that fills a conceptual gap in some jurisdictions.

At the risk of stating the obvious, the law of indirect religious discrimination brings together three definitive elements: (i) it concerns indirect rather than direct discrimination; (ii) it concerns religious discrimination rather than discrimination based on other grounds or characteristics, such as race or sex; and (iii) it concerns discrimination, rather than some other attempts to protect religious beliefs, such as freedom of religion. Despite its relative longevity as a concept, the analysis of indirect discrimination in the jurisdictions we are concerned with is complex and is relatively under-theorized, with some exceptions.<sup>87</sup> The phenomenon of religious discrimination, and its relationship with other grounds of discrimination, is also under-theorized, again with some exceptions.<sup>88</sup> And although there is a lively debate about the theoretical underpinnings of freedom of religion, there is no

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86. *Id.* ¶ 43.

87. See generally Christopher McCrudden, *Institutional Discrimination*, 2 OXFORD J. LEGAL STUD. 303 (1982); COLLINS & TARUNABH KHAITAN, *FOUNDATIONS OF INDIRECT DISCRIMINATION LAW* (Bloomsbury, 2018); CHRISTA TOBLER, *INDIRECT DISCRIMINATION: A CASE STUDY INTO THE DEVELOPMENT OF THE LEGAL CONCEPT OF INDIRECT DISCRIMINATION UNDER EC LAW* (Intersentia, 2005); Oran Doyle, *Direct Discrimination, Indirect Discrimination and Autonomy*, 27 OXFORD J. LEGAL STUD. 537 (2007); Andrew J. Morris, *On the Normative Foundations of Indirect Discrimination Law: Understanding the Competing Models of Discrimination Law as Aristotelian Forms of Justice*, 15 OXFORD J. LEGAL STUD. 199 (1995); Michael P. Foran, *Discrimination as an Individual Wrong*, 39 OXFORD J. LEGAL STUD. 901 (2019).

88. See generally Christopher McCrudden, *Marriage Registrars, Same-Sex Relationships, and Religious Discrimination in the European Court of Human Rights*, in *THE CONSCIENCE WARS* 414 (Susanna Mancini & Michael Rosenfeld eds., 2018); Gwyneth Pitt, *Religion or Belief: Aiming at the Right Target*, in *EQUALITY LAW IN AN ENLARGED EUROPEAN UNION: UNDERSTANDING THE ARTICLE 13 DIRECTIVES 202* (Helen Meenan ed., 2007).

clear agreement,<sup>89</sup> so any attempt to compare and contrast claimed underpinnings of freedom of religion with discrimination law means entering highly contested territory.<sup>90</sup> Given that so many of the elements of indirect religious discrimination law are contested or under-analyzed, and that its use in legal practice is evolving, it is a brave scholar who offers a normative theory of the concept at its current stage of development, and, so far, few have tried.<sup>91</sup>

### A. *Practice-Dependent and Practice-Independent Approaches*

There are two methods commonly adopted in order to identify the ethical foundations, if any, of a concept, such as justice, equality, or dignity. The first approach is inductive, or bottom-up—sometimes called a practice-dependent method.<sup>92</sup> This involves attempting to identify one or more principles that can be derived from the actual practice of the concept. In other words, we attempt to understand this practice, and from our assessment of this practice, we then identify the ‘best’ ethical justification for this practice. This involves an immanent critique of the practice that results in the identification of the best normative explanation for this practice. The effect of this approach is that some principles that are normatively preferable to the one that best justifies the practice may be seen as beyond the pale because they cannot be derived from that practice.

The second approach is deductive, or top-down—sometimes called a practice-independent approach.<sup>93</sup> This involves attempting to identify one or more ethical principles that are said to underpin the concept and then deriving the practical details of what properly flows from these principles. As a result, some interpretations or practical applications that are said to flow from the principle in legal practice may be seen as inappropriate because they cannot be derived from the preferred normative foundations. Practice plays a role in both the inductive and the deductive approaches, but it is a significantly different role in each. In the deductive approach, the theory seeks to explain and justify the practice which is front and center,

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89. See, e.g., FREEDOM OF RELIGION: AN AMBIGUOUS RIGHT IN THE CONTEMPORARY EUROPEAN LEGAL ORDER (Hedvig Bernitz & Victoria Enkvist eds., 2020) (presenting a variety of perspectives on freedom of religion from Sweden, Nordic countries, and other European countries); THE EUROPEAN COURT OF HUMAN RIGHTS AND THE FREEDOM OF RELIGION OR BELIEF (Jeroen Temperman, T. Jeremy Gunn & Malcolm Evans eds., 2019) (describing both the contributions and flaws of the ECtHR’s religious jurisprudence since *Kokkinakis v. Greece*).

90. See e.g., LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE (2d ed., Bloomsbury 2016) (2008) (attempting to define the scope of religious freedom in the workplace in light of the complexities of operationalizing religious discrimination law).

91. John Adenitire, *Protecting Solitary Beliefs Against Indirect Discrimination*, INDUS. L.J., (2020) (arguing that the requirement of group disadvantage in indirect belief discrimination is incompatible with freedom of religion and should be dispensed with in interpreting the U.K. Human Rights Act).

92. See, e.g., Andrea Sangiovanni, *Justice and the Priority of Politics to Morality*, 16 J. POL. PHIL. 137 (2008) (arguing that first principles of justice are practice-dependent).

93. See *id.* at 139.

whereas in the inductive approach, the theory purports to be initially independent of the practice and serves, indeed, to critique the legal practice.

In this Issue, Tarunabh Khaitan adopts what he has described as the application of an “ideal type” normative theorizing, based on his previous work with Jane Calderwood Norton.<sup>94</sup> Khaitan’s self-identified method is practice-dependent: It begins from the intuition that the way we should understand concepts such as freedom of religion or antidiscrimination is to see them in the institutional or cultural contexts in which they arise. Although I am not sure that Khaitan’s theory is in fact inductive, that is how he conceives of it, and that is thus how I will proceed with my analysis.<sup>95</sup>

To help understand and critique Khaitan’s approach, we can refer to Lea Ypi’s analysis of inductive approaches, as it identifies a broadly similar process to that adopted by Khaitan in his Article, although he does not explicitly identify himself as doing so. Ypi suggests that practice-dependent approaches involve three stages of analysis: (i) “com[ing] up with a sufficiently uncontroversial description of such practice;” (ii) “articulat[ing] its function and purpose;” and (iii) “choos[ing] between interpretations that best reflect the normative commitments implicit in” the practice identified.<sup>96</sup>

In the first stage, the task is to provide “an uncontroversial description of the basic features of a specific practice in need of being articulated and criticized.”<sup>97</sup> This is an “essentially observational” enterprise, in which the task is to identify “basic, uncontroversial, sociological facts in need of critical scrutiny and interpretation.”<sup>98</sup>

94. See generally Tarunabh Khaitan, *supra* 34 HARV. HUM. RTS. J. 231 (2021); Tarunabh Khaitan & Jane Calderwood Norton, *The Right to Freedom of Religion and the Right Against Religious Discrimination: Theoretical Distinctions*, 17 INT’L J. CONST. L. 1025, 1125 (2019) [hereinafter Khaitan and Norton, *Right to Freedom of Religion*]; Tarunabh Khaitan & Jane Calderwood Norton, *Religion in Human Rights Law: A Normative Restatement*, 18 INT’L J. CONST. L. 1, 111 (2020).

95. One difficulty in being sure whether his methodology amounts to adopting the inductive or deductive approach is his reference to ‘ideal type’ rather than ‘ideal theory.’ The latter would place the analysis more securely in the deductive camp. ‘Ideal type’ seems to hint toward Weberian sociological analysis, and perhaps therefore an attempt to capture and systematize observable reality, which is then assessed from a normative perspective—the inductive. A second difficulty lies in his use of legal practice. Khaitan is, at best, ambiguous in which of the two approaches to practice he adopts, whether his theorizing seeks to explain and justify the practice, or is independent of the practice and serves to critique it. In his Essay in this Issue, he appears initially to emphasize how “wrong” courts have been. Tarunabh Khaitan, *supra* 34 HARV. HUM. RTS. J. 231, 233 (2021). I initially understood Khaitan to apply the deductive approach, and that he was in fact referring to ‘ideal theory’ as used in current philosophical writing. However, when I described to Khaitan my understanding of his method as deductive, he rejected this characterization and insisted that it was inductive, in that his Essay builds upon and takes for granted the account of discrimination law, based on legal practice, that he provided in his earlier monograph. Email from Tarunabh Khaitan to Christopher McCrudden (Aug. 3, 2020, 14:17 EST) [on file] (referring to TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* (2015)). It seems sensible to take him at his word—after all, he should be assumed to know best what he was trying to do.

96. LEA YPI, *GLOBAL JUSTICE AND AVANT-GARDE POLITICAL AGENCY* 50 (2011).

97. *Id.* at 52.

98. *Id.*

In the second stage, “those engaged in rational critique seek to offer a plausible account of the function and purpose of the practice previously identified as the relevant unit of analysis.”<sup>99</sup> Here, the task is to reflect on these basic facts and “come up with a moralized reading of the function and purpose of the commitments and concerns reflected in them.”<sup>100</sup> An appropriate reading “relies heavily on views that are part of a generally accepted understanding of those practices, as revealed by the public views of participants and also (as appropriate) by historical texts, important legal documents, or reflected in other relevant institutional arrangements.”<sup>101</sup> In reconstructing practice, we are asked to look for an account of the concept that fits the practice and is coherent from the perspective of the actors in the system. We aim to identify how far there is a common understanding among actors as to what is involved in operationalizing the concept. In particular, we are concerned with whether there is any common understanding as to the substantive meaning and grounds of the concept that exists.

The most popular form of reconstruction involves not only coming up with an account that best fits the practice, but also one that is most appropriate from the perspective of moral and political philosophy. Here, the aim is not simply to identify whether there is a common understanding of constitutional or human rights among the participants in the system, but to establish whether there is a common set of justified moral principles at work that makes it worthwhile. The ‘best’ explanation is one that fits both the legal practice and that moral evaluation. This might lead to a conclusion that there is no explanation of legal practice that is ‘coherent’ in this sense and that the legal practice should not therefore continue. Much more frequently, however, the analysis leads to a conclusion that there is a ‘correct’ reconstruction of the legal materials; this is a reconstructive account that has both moral merit and fits the legal materials well enough for it still to be plausible for the reconstruction to be seen as connected to legal practice. It seeks to deny the apparent gap between theory and practice, by showing how legal practice, *properly understood*, involves a hidden underlying theoretical coherence that can be identified. The effect of this is to downplay actual practice in favor of ‘reconstruction.’ Indeed, in a third, post-interpretative stage, “critics come up with specific normative principles for reforming the practice and seek to do so in a way that best expresses its function and purpose.”<sup>102</sup>

Practice-dependent approaches are, indeed, attractive, in appearing to offer significant advantages over alternative approaches. In emphasizing the *institutional* practice within which human rights arise and are defined and

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

interpreted, they place human rights within a context in which we ask what the *functions* of human rights are in these institutional contexts. Combining a broadly functional approach with an appreciation of context—including being sensitive to the way that the function of human rights may differ in different institutional settings—means that we begin to understand why we see the pluralistic interpretations of human rights that are so clearly evident within and between jurisdictions and states. With the emphasis on practice, institutions, and function, we are also offered the opportunity of developing a theoretical understanding that stretches across different national boundaries because the explanation is not dependent on acceptance of any *a priori* set of moral or ethical propositions, and this chimes with the practice of human rights in seeking to be capable of having *universal appeal*.

Although practice-dependent theories adopt the view that the “content, scope, and justification of a conception . . . depends on the structure and form of the practices that the conception is intended to govern,” it is not the case that “*all* variations in underlying practices are associated with corresponding variations” in content, scope, and justification, but only “*some* differences.”<sup>103</sup> The methodological problem is how to decide *which* variations in underlying practice are relevant. Simmons suggests that practice-dependent theories may “underestimate[ ] the difficulties involved in giving a clear and uncontroversial account of the purposes and trajectories of human rights claims in domestic and international politics.”<sup>104</sup> This is because, as Ypi suggests, there is a basic methodological problem in the way that practice-dependent approaches proceed. This problem arises from the fact that there is no sharp distinction between the first two stages we identified earlier, because “[a]ny observed account of factual evidence that can be offered to support specific interpretations is itself theoretically laden.”<sup>105</sup> There are, in short, suggests Ypi, two main problems with practice-dependent approaches that proceed according to the method described. First, “they seem to lack uncontroversial criteria for selecting the unit within which existing normative commitments can be observed. Secondly, they fail to provide a persuasive, internal account of what makes a specific interpre-

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103. Sangiovanni, *supra* note 92, at 138.

104. John Simmons, *Human Rights, Natural Rights, and Human Dignity*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS LAW* 149 (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 2015).

105. Ypi, *supra* note 96, at 53. In an important analysis of this difficulty, she writes, “Far from being simply observed in reality, the units of analysis are chosen, and that choice reflects a precise theoretical commitment. The selection of contexts and practices in need of being scrutinized, and the emphasis on specific concerns and commitments reflected by these practices, are themselves a matter of theoretical controversy. However basic, our understanding of sociological facts and their impact on human life is not simply given to us and cannot be observed without theoretical lenses. The kind of factual evidence that is considered relevant reflects the interpreter’s own preference for a particular way of understanding human affairs, a specific analysis of the claims and agents under consideration, and a particular ordering and ranking of the commitments expressed by the institutions that affect them . . . . At best, the interpretations emerging might neglect important social phenomena that are not captured by a particular interpretive ‘telescope’, a telescope which might itself require more careful critical scrutiny.” *Id.* at 53–54.

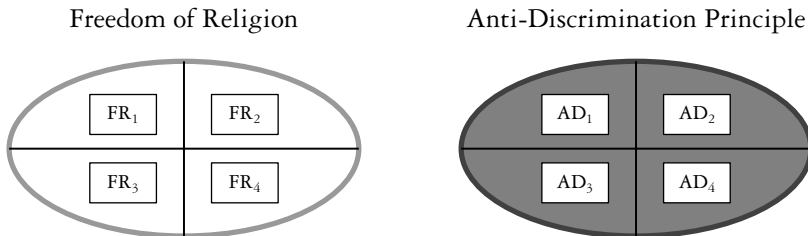
tation of these practices authoritative and non-biased.”<sup>106</sup> To be convincing, therefore, someone advancing a practice-dependent normative analysis must address, and overcome, these difficulties. Does Khaitan succeed in doing so?

### B. Khaitan’s Practice-Dependent Analysis

There are two significant elements of Khaitan’s theory: First, the principle of freedom of religion and the anti-discrimination principle each have a single underlying normative foundation; and, second, the underlying normative foundation of each principle differs from the other. Both these elements are highly questionable. Instead, the analysis conducted earlier in this Essay suggests an alternative understanding: First, that neither the principle of freedom of religion nor the principle of anti-discrimination have a single underlying normative foundation; and, second, that the underlying normative foundations of one principle may overlap with the underlying normative foundations of the other.

It may be useful to illustrate in diagrammatic form what I understand Khaitan to be arguing. Let us call the two concepts he is considering the principle of ‘freedom of religion’ (“FR”) and the ‘anti-discrimination’ principle (“AD”). Freedom of religion has several elements, such as the freedom of belief and non-belief, the freedom to manifest and not to manifest that religion in public, the freedom of collective association that organized religions possess, and so on—let us call them FR<sub>1</sub>, FR<sub>2</sub>, FR<sub>3</sub>, and so on. The anti-discrimination principle also has several manifestations, such as non-discrimination on the basis of race, on the basis of gender, on the basis of religion, etc.—let us call them AD<sub>1</sub>, AD<sub>2</sub>, AD<sub>3</sub>, and so on.

For Khaitan, the relationship between these elements appears to be something like the following:<sup>107</sup>



To sustain Khaitan’s understanding requires a diagnostic character with two elements. First, the diagnostic character must result in a clear discontinuity between FR and AD such that neither occupies the same space—something that puts clear blue water between the two principles. Second,

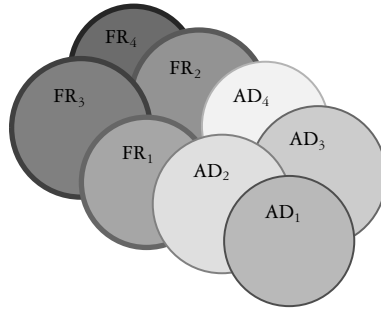
106. *Id.* at 56.

107. See generally Khaitan & Norton, *Right to Freedom of Religion*, *supra* note 94; Tarunabh Khaitan, *supra* 34 HARV. HUM. RTS. J. 231 (2021).



the diagnostic character must result in each of the elements that are comprised within FR and AD clearly occupying the same space, with no clear blue water between them.

An alternative understanding of both the anti-discrimination principle and freedom of religion looks somewhat messier.



This graphic is intended to capture two significant elements of my suggested alternative to Khaitan’s theory. To sustain *this* understanding requires a convincing argument that there is continuity between FR and AD, such that both occupy some of the same space—where there is no clear blue water between the two principles—as well as a convincing argument that the elements that are comprised within each concept may occupy different normative spaces.

### C. *An Assessment of Khaitan’s Normative Theory*

Practice-dependent theorizing purports to provide a procedure for coming up with evidence for choosing which description is more convincing through the observation and analysis of existing practice. However, both of the problems identified earlier with practice-dependent theorizing beset Khaitan’s analysis. The aim of the first stage, to quote Sangiovanni, is “to fix the basic contours of the practices we seek to interpret;” this stage requires “a shared understanding of what counts as paradigmatic instances of the institution.”<sup>108</sup> This step must be relatively ‘uncontroversial’ for the method to work. The problem is that identifying a shared understanding of the paradigmatic instances of the principle of freedom of religion and of the anti-discrimination principle is itself highly controversial, and is the subject of heated debates within the discourse associated with each principle.<sup>109</sup> In situations of such intense controversy, how do we determine what are the paradigm instances of both principles? Although we shall see that Khaitan’s analysis is somewhat supported in that it reflects *some* elements of that practice, there is no basis for saying that his description reflects anything ap-

108. Sangiovanni, *supra* note 92, at 148.

109. See, e.g., FREEDOM OF RELIGION: AN AMBIGUOUS RIGHT IN THE CONTEMPORARY EUROPEAN LEGAL ORDER, *supra* note 89.

proaching a settled understanding about the practice of indirect religious discrimination law.

This problem is seen prominently in his Essay in this Issue. He himself recognizes that his argument about the distinctiveness of the right to religious freedom and the right against religious discrimination conflicts with judicial practice.<sup>110</sup> Rather than suggesting that we should simply abandon practice, thereby placing him firmly in a practice-independent camp, he resorts instead to a different mode of ‘practice:’ ‘established tenet[s] of legal interpretation;’ the ‘distinct interests’ that we have in religion; and the drafting of anti-discrimination law protections.<sup>111</sup> This ‘conceptual and normative’ reasoning should not overcome the ‘messiness’ of legal practice.<sup>112</sup> We are not told, however, why this should be so—why, in other words, one element of practice should trump another. Although I agree that some elements of judicial practice might appropriately be regarded as outliers without conflicting with practice-dependent approaches, to simply reject substantial amounts of contrary judicial practice wholesale is problematic.

We move from problems with the first stage of applying a practice-dependent approach, to problems with the second stage, focusing on the question posed by Ypi: What makes a particular interpretation of practice “authoritative and non-biased”?<sup>113</sup> The aim of the second stage, we should recollect, is to “determine the point and purpose of the institution in question,”<sup>114</sup> and “to reconstruct what reasons [the participants] might have for affirming its basic rules, procedures, and standards.”<sup>115</sup> The interpreter in this context “assumes the point of view of the participants,”<sup>116</sup> but without deriving the conception of human rights from their beliefs. The second stage is, therefore, subject to considerable risks. Not least, an interpretation at the second stage may “apply standards of value that we already endorse independently of the institutions we are considering,”<sup>117</sup> and thus “make the interpretative step in the justification . . . viciously circular.”<sup>118</sup> How do we determine ‘the best’ interpretation of that practice, without engaging in circular reasoning?<sup>119</sup> Here too, Khaitan’s approach is problematic.

Khaitan’s description is based on identifying an artificial distinction (in the sense of being inconsistent with judicial practice) between the two principles, combined with identifying an artificial unity within each of the two

110. Tarunabh Khaitan, *supra* 34 HARV. HUM. RTS. J. 231, 231 (2021).

111. *Id.* at 233.

112. *Id.*

113. Ypi, *supra* note 96, at 56.

114. Sangiovanni, *supra* note 92, at 148.

115. *Id.*

116. *Id.*

117. *Id.* at 149.

118. *Id.*

119. Communication from Kai Möller to Christopher McCrudden [on file].

principles,<sup>120</sup> based on a single value rather than a plurality of overlapping values. Khaitan arrives at his ‘description’ only by radically limiting the data-set on which he bases his analysis. He does this in two ways: limiting the data set in time, by substantially ignoring the historical development of both concepts; and limiting the data set in space, by excluding from consideration a range of jurisdictions, including non-anglophone Europe.<sup>121</sup> By limiting his data set in this way, he eliminates the intermediate forms of practice, where elements overlap or are not clearly distinguished from each other, both within and between the concepts under analysis. Even if we focus on the limited jurisdictions he *does* consider, however, the distinction he seeks to defend is still unconvincing.

Let us take Khaitan’s first argument: that freedom of religion and non-discrimination on the ground of religion are normatively different, with the right to freedom of religion protecting “our interest in decision autonomy in relation to religious adherence (and non-adherence),”<sup>122</sup> and the right against religious discrimination “safeguarding our interest in not being saddled unfairly by the (actual or perceived) membership of our religious group.”<sup>123</sup>

However, if the British courts’ interpretation of prohibitions on religious discrimination is any basis for predicting future trends elsewhere, anti-discrimination norms in the context of religion will be seen as simply another way of putting the freedom of religion approach into practice, and therefore as something of an anomaly in the equality law sphere. In Britain, for example, the anti-discrimination provisions dealing with religion have been interpreted as encapsulating a choice-based approach borrowed directly from freedom of religion, rather than an identity-based approach borrowed from race cases.<sup>124</sup> Moreover, British courts interpret the provisions as encapsu-

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120. In a forthcoming paper, Khaitan refers to this as “normative coherence.” Khaitan & Steel, *supra* note 1.

121. For an attempt to capture the varying interpretations of discrimination across EU countries, including non-anglophone Europe, see CHRISTOPHER MCCRUDDEN & SACHA PRECHAL, *THE CONCEPTS OF EQUALITY AND NON-DISCRIMINATION IN EUROPE: A PRACTICAL APPROACH* (European Commission, 2009), <https://www.equalitylaw.eu/downloads/2812-concepts-of-equality>. For examples of the varying interpretation of indirect discrimination across the EU, see CHRISTA TOBLER, *THE LIMITS AND POTENTIAL OF INDIRECT DISCRIMINATION* (European Commission, 2009) <https://www.equalitylaw.eu/downloads/2720-limpot08-en>. On variations regarding religious discrimination across the EU, see ERICA HOWARD, *RELIGIOUS CLOTHING AND SYMBOLS IN EMPLOYMENT* (European Commission, 2017), available at: <https://www.equalitylaw.eu/downloads/4493-religious-clothing-and-symbols-in-employment-pdf-928-kb>, and LUCY VICKERS, *RELIGION AND BELIEF DISCRIMINATION IN EMPLOYMENT – THE EU LAW* (European Commission, 2006) <https://www.equalitylaw.eu/downloads/2505-religion-and-belief-en>. For a sustained attempt to capture the specific approaches of civil law jurisdictions (and the differences between them and common law jurisdictions, see BARBARA HAVELKOVÁ & MATHIAS MÖSCHEL eds., *Anti-Discrimination Law in Civil Law Jurisdictions* (2019).

122. Tarunabh Khaitan, *supra* 34 HARV. HUM. RTS. J. 231, 233 (2021).

123. *Id.*

124. For example, in *Eweida v. British Airways*, Lord Justice Sedley distinguished protection from discrimination on the grounds of “age, disability, gender reassignment, marriage and civil partnership, race . . . sex and sexual orientation” from protection from discrimination on grounds of religion or belief, observing that, “[o]ne cannot help observing that all of these apart from religion or belief are

lating a view that religion is a private matter rather than a public matter, again borrowing directly from freedom of religion;<sup>125</sup> and as focused on conduct rather than identity, again borrowed directly from freedom of religion.<sup>126</sup> What seems to emerge from this somewhat patchy jurisprudence is an approach that seeks to distance religious equality from all other types of status equality, and to relegate religious equality to becoming simply another variant of freedom of religion, and therefore subject to the same type of constraints as freedom of religion. This emerging approach, if such it is, seems to be due in part to the structure of Article 14 of the ECHR. Article 14 is parasitic on other Convention rights, meaning that the ECtHR has determined that Article 14 does not come into play unless the case raises an issue that is at least “within the ambit” of another Convention right.<sup>127</sup> In the context of religious discrimination, Article 9 is the obvious candidate, and the approach adopted in the interpretation of Article 9 tends to dominate when Article 14 is read together with Article 9.

Let us now consider Khaitan’s second argument: that the right not to be discriminated against on grounds of religion shares the same normative foundations as other parts of anti-discrimination law. To establish this, we would want courts to be willing to see religion as truly analogous to other grounds that they regard as appropriately protected by anti-discrimination law, such as race, or gender, or sexual orientation.<sup>128</sup> Attempting to isolate a principled reason for why some groups are protected from being discriminated against and others not brings courts face to face with a major, unresolved issue in anti-discrimination law theory: What is it that anti-discrimination law is attempting to do, and to what extent do prohibitions of religious discrimination fit that telos? In practice, courts are wary of attempting to articulate any answers to these questions, but their actions sometimes speak volumes. Instead of seeing discrimination on grounds of religious belief as sharing the same fundamental underpinnings as discrimination on other grounds, judges seem to consider that prohibitions of religious discrimination are outside the mainstream of anti-discrimination law<sup>129</sup> and see such prohibitions as an extension of freedom of religion.

Sustaining these criticisms fully is not possible within my space constraints. Instead, I will suggest that the approach taken by the ECtHR’s application of Article 14 to religious discrimination claims, as compared with some other grounds, supports my skepticism, particularly concerning

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objective characteristics of individuals; religion and belief alone are matters of choice.” [2010] EWCA Civ 80 [40] (Sedley LJ) (appeal taken from EAT) (Eng.).

125. See generally Andrew Hambler, *A Private Matter? Evolving Approaches to the Freedom to Manifest Religious Convictions in the Workplace*, 3 RELIGION & HUM. RTS. 111 (2008).

126. See *Eweida*, [2010] EWCA (Sedley LJ).

127. See Robert Wintemute, “*Within the Ambit*”: How Big Is the “Gap” in Article 14 European Convention on Hum. Rights? 4 EUR. HUMAN RTS. L. REV. 366 (2004).

128. Considered in more detail in CHRISTOPHER MCCRUDDEN, *LITIGATING RELIGIONS: AN ESSAY ON HUMAN RIGHTS, COURTS AND BELIEFS* 77–86 (2018).

129. See *Eweida*, [2010] EWCA (Sedley LJ).

the ‘key doctrinal implications’ that Khaitan says follow from the normative distinctions that he draws.<sup>130</sup> Claims based on race, ethnic origin, disability, gender, and sexual orientation are considered by the ECtHR to merit a particularly high degree of protection because adverse treatment based on these grounds is thought to merit particular condemnation. As a result, ‘very weighty reasons’ must be adduced by a state to justify discrimination on these grounds.<sup>131</sup> In these cases, the function of Article 14 is not to act as merely ancillary to the other substantive rights but to take on a role in protecting individuals from particular types of status discrimination. When engaging with discrimination on these grounds, the ECtHR now interprets Article 14 in ways much more similar to the classic statutory anti-discrimination law provisions in domestic law, such as those prohibiting racial and gender discrimination. When an Article 14 claim before the ECtHR engages this set of grounds, there is a clear “restriction in the national margin of appreciation.”<sup>132</sup>

Although this approach is not absent from Article 14 jurisprudence engaging with religious discrimination,<sup>133</sup> where the ECtHR does not view the religious anti-discrimination claim as involving a claim to disadvantaged, minority group status, the ECtHR does not yet appear to be willing to grant the claimant membership of a “suspect categor[y],”<sup>134</sup> and is anx-

130. Tarunabh Khaitan, *supra* 34 HARV. HUM. RTS. J. 231, 233 (2021).

131. *Timishev v. Russia*, Judgment, 2005-XII Eur. Ct. H.R. ¶ 58 (establishing that restrictions in a discriminatory manner based on ethnic origin could not be “objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures”); *X v. Austria*, 2013 Eur. Ct. H.R. ¶ 99 (noting that the ECtHR has “repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons.”); *Alajos Kiss v. Hungary*, App. No. 38832/06, ¶ 42 (May 20, 2010), <http://hudoc.echr.coe.int/eng/?i=001-98800> (acknowledging that while the ECtHR gives a wide margin of appreciation for voting prohibitions for disabled persons under guardianship, this margin is “substantially narrower” and requires “very weighty reasons for the restrictions” when applied to a particularly vulnerable group such as disabled persons); *Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) ¶ 78 (1985) (specifying that “very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the [European Convention on Human Rights]”).

132. FRÉDÉRIC EDEL, *THE PROHIBITION OF DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 140 (2010).

133. In several cases the ECtHR has interpreted Article 14 read with Article 9 in somewhat similar ways, in particular where it would appear from the facts of the case that the power of the state was being used to allow one religion to dominate another. Thus, the well-known prejudice against non-Orthodox churches in Greece, and Jehovah’s Witnesses more generally, has led the Court to identify these religions as effectively “minorities” and thus subject to greater protection. In these contexts, where heightened scrutiny is required, the ECtHR is also more likely to impose an obligation of reasonable accommodation on the state. See *Thlimmenos v. Greece* [G.C.], 2000-IV Eur. Ct. H.R. 263 ¶ 44 (holding that Article 14’s prohibition on discrimination includes protection from “[s]tates without an objective and reasonable justification fail[ing] to treat differently persons whose situations are significantly different”); *Hoffmann v. Austria*, 255-C Eur. Ct. H.R. (ser. A) ¶ 36 (1993) (finding a state’s distinction made solely on differences in religion to violate Article 8 in conjunction with Article 14).

134. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215, ¶ 71.

ious to give states a wide margin of appreciation.<sup>135</sup> The ECtHR's approach, therefore, is very context-driven. This explains why we have cases such as *Ladele*, in which the Court appears to understand the *telos* of the religious discrimination provision as the same or very similar to that of freedom of religion, crucially bringing the limitations from freedom of religion jurisprudence into anti-discrimination law.

Why the unease in applying a straightforward anti-discrimination approach? Two possibilities come to mind. First, the unacceptability of some religious beliefs might be thought to be sufficient in itself to distinguish the ground of 'religion and belief' from other protected characteristics. This may lead courts to push religious discrimination claims back to the safer shores of freedom of religion where there is more experience of dealing with bigoted religions.<sup>136</sup>

Courts may interpret the prohibitions on religious discrimination in what they consider to be a very different context from that in which they interpret the laws prohibiting racial or gender discrimination. They have become used to seeing religious discrimination primarily in an ethnic minority context, and seem to have considerable difficulty in accepting that religious identity is a status that is to be protected irrespective of whether that religious identity is connected with a minority ethnic identity or not. In addition, even when the religious discrimination claim does arise from a community that is a minority ethnic community, the claim to protection is met with a post-multicultural skepticism,<sup>137</sup> particularly when courts perceive any whiff of illiberalism in the religious practices of that group. Anti-discrimination claims in general bear the impression of certain core progressive commitments that do not sit at all easily with the views of some religious believers. But it is contrary to the duties of neutrality and impartiality of states and courts to assess the legitimacy of a system of religious beliefs,<sup>138</sup> or the way in which those beliefs are expressed. Courts are more likely to prefer dealing with the problem in a way that does not require such an assessment, by viewing the claim through the narrower lens of freedom of religion.

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135. *S.A.S.*, 2014-III Eur. Ct. H.R. at ¶ 129. However, the matter is still in doubt, and there are decisions in which the Court has adopted the 'very weighty reasons' test. *See, e.g.*, *Vojnity v. Hungary*, App. No. 29617/07, ¶ 36 (Feb. 12 2013), <http://hudoc.echr.coe.int/eng?i=001-116409>.

136. Pitt, for example, argues that unlike other protected grounds, which "express a consensus about particular values of equality and the irrelevance of certain characteristics," the protection of religion and belief "potentially provides protection for the holders of completely abhorrent, or irrational, or bigoted beliefs, including those which would certainly not accord equal rights to others if they were to prevail," and that this "highlights a difference between the religion or belief ground compared with other protected grounds." Gwyneth Pitt, *Religion or Belief: Aiming at the Right Target*, in *EQUALITY LAW IN AN ENLARGED EUROPEAN UNION: UNDERSTANDING THE ARTICLE 13 DIRECTIVES 202, 213* (Helen Meenan, ed., 2007).

137. McCrudden, *Multiculturalism*, *supra* note 15, at 36–37.

138. *Leyla Şahin v. Turkey* [GC], 2005-XI Eur. Ct. H.R. 173, ¶ 107.

A second possible explanation for the unease in treating religious discrimination claims as on par with claims of discrimination on other grounds may be because of the wider implications of doing so. Perhaps sensing that they are likely to get into highly problematic water if religious discrimination litigation becomes widespread, the ECtHR has avoided these future problems by invoking the margin of appreciation, thus leaving the issue to the national authorities.<sup>139</sup> One way of interpreting such decisions is to view the ECtHR as according to European states considerable discretion to weigh religious values according to their own criteria of evaluation, thus allowing the ECtHR to avoid dealing with the highly sensitive issue of established or quasi-established religions in many states. Little of this adds up to support for Khaitan's thesis—rather the contrary.

### CONCLUSION

In this Essay, I have considered aspects of the European practice of indirect religious discrimination. I have suggested several conceptual distinctions, including that between indirect discrimination and disparate impact, and I have distinguished several meanings of religious discrimination. Following this conceptual analysis, I identified several variables that appear to affect the role and function of indirect religious discrimination in practice, including: the relationship between claims of religious discrimination and freedom of religion; the relationship between direct and indirect discrimination; the source and coverage of the prohibition on indirect discrimination; and the relationship between indirect religious discrimination and positive equality duties. I then considered two differences that arise in the practice of indirect religious discrimination law, including the types of evidence that may be used to establish a *prima facie* case, and the types of justification that may be resorted to rebut such a case.

What emerges from this analysis is a patchwork quilt, where the concept of indirect religious discrimination has different roles and functions all loosely sewn together with the various approaches to indirect religious discrimination in the different jurisdictions still clearly identifiable. Building on this analysis of legal practice, my principal purpose was to offer a critique of Khaitan's "ideal-theorizing"<sup>140</sup> of indirect religious discrimination in this Issue, identifying some foundational assumptions that he makes which, in my view, undermine his ambitious attempt at providing an underlying normative justification of the legal practice. Khaitan's proposed normative theory is not supported by European legal practice. Such at-

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139. S.A.S., 2014-III Eur. Ct. H.R. at ¶ 129. The Grand Chamber adopted a similar approach in *Lautsi v. Italy*, App. No. 30814/06, ¶ 68–77 (Mar. 18, 2011), <http://hudoc.echr.coe.int/eng?i=001-104040>, a case dealing with the display of the crucifix in Italian public-school classrooms.

140. Khaitan & Steel, *supra* note 1.

tempts, though stimulating, risk freezing a concept that is evolving and dynamic.

My analysis of the legal practice differs significantly. The messier understanding of both the anti-discrimination principle and the principle of freedom of religion that I sketched out earlier, suggests, in contrast with Khaitan's theory, that neither the principle of freedom of religion nor the principle of anti-discrimination have a single underlying normative foundation, and, that the underlying normative foundations of one principle overlaps with the underlying foundations of the other. A general normative theory of indirect religious discrimination law, one based on the use of a practice-dependent methodology, seems unlikely in the present state of development, not to say quixotic.