'PRIVATE ACTS' AND STRUCTURAL INEQUALITY: LAW AND HOUSING DISCRIMINATION

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This paper focuses on law and housing discrimination within the context of a sociological understanding of the cumulative disadvantageous effects of what are legally considered 'private acts'. It therefore brings a distinct perspective to the examination of vertical versus horizontal rights. The paper particularly focuses on housing discrimination against Muslims in urban areas against the background of marginalisation, conflict, and violence. It seeks to think about housing segregation as both producing discrimination, targeted violence, economic inequality, and social exclusion as well as itself being a product of these factors. Public policy in the form of equal opportunities legislation has been the chosen instrument for tackling similar racial and ethnic discrimination in several countries worldwide. This paper argues that public activism could be significant in embedding values socially and making durable the legislation arising therefrom. At the same time, it calls on the notion of demosprudence to contend that in the context of deep-rooted structured inequalities, as the history of the US civil rights movement also shows, a primary judicial step triggered by the mechanism of social action litigation may be necessary.

I. HORIZONTAL RIGHTS AND
HOUSING DISCRIMINATION

To what extent do the rights to equality and liberty, for instance, of Part III of the Indian Constitution, apply to acts of private individuals and entities who are not part of the definition of State? This is the idea of the horizontal application of rights, as distinct from their vertical application to the relationship between citizens, on the one hand, and the State on the other. Making an argument that the Indian Supreme Court has effectively reinforced the 'separateness of private law', Gardbaum[1] states that there is no general principle that fundamental rights and Constitutional values must permeate private acts. He further argues that the classic case in the matter, relating to housing discrimination – *Zoroastrian Cooperative Housing Society v District Registrar* ('*ZCHS*')[2] – appears to rebuff the relevance of the parallel US case of *Shelley v Kraemer* for thinking about the constitutionality of the Court's role in enforcing restrictive covenants.

This paper examines the issue of the horizontal application of Part III of the Constitution to private acts of housing from a sociological perspective, and with specific reference to housing discrimination in India, particularly taking up the case of Muslims.[3] Housing discrimination, in effect, leads to segregation. In India and elsewhere, the most severe and persistent problems of housing discrimination and segregation arise when a *dominant* community excludes, or has excluded, historically marginalised groups, such as African-Americans, Jews, Muslims, or Dalit-Bahujan castes, who have been largely confined to ghettos. Ghettoisation has produced, or itself been the product of, tense and bitter conflicts as well as civil strife between the segregated groups or communities. The ghetto is certainly not merely an 'undesigned' adaptation

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[1] Stephen Gardbaum, 'Horizontal Effect' in M Khosla, S Chaudhry, and PB Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 613.

[2] *Zoroastrian Cooperative Housing Society Ltd v District Registrar, Cooperative Societies (Urban)*, (2005) 5 SCC 632 ("*ZCHS*").

[3] At the same time, the findings of the paper also apply to Dalits and other marginalised groups. Social and spatial segregation has always been a critical dimension of rural social organisation for Dalits. Recalling the sociological understanding of ghettos, Ambedkar himself wrote that Hindus do not only suspend intercourse with Dalits temporally. 'It is a case of territorial segregation…Every Hindu village has a ghetto. The Hindus live in the village and the Untouchables in the ghetto.' BR Ambedkar, *The Untouchables: Who Were They and Why They Became Untouchables* (Amrit Books 1948) 21–22). This spatial segregation is not confined to villages but emerges even in urban areas, and it is more likely that Muslims end up sharing city space with Dalit-Bahujan communities than others. Sriti Ganguly, 'Socio-Spatial Stigma and Segregation' (2018) 53(50) Economic and Political Weekly 50–57. Though the remedies may overlap, constitutional provisions and the burdens of history distinguish the position of Scheduled Castes from religious minorities and they may require separate analytical understanding. This paper looks particularly at Muslims as a significant and disparaged minority confined spatially due to residential segregation.

and a 'natural area' of the city,[4] which develops straightforwardly as a product of simple inward migration. Following recent scholarship,[5] the ghetto is treated here as a spatial-organisational instrument of economic constraint, social exclusion, and ethnic stigmatisation.

A reading of literature on ghettoisation leads to the argument that three other aspects should be recognised, and they are critical to the thinking of this paper.[6] *First*, while ghettoisation or the process of ghettoising necessarily implicates segregated housing, all forms of segregation are manifestly not ghettos. A rule-of-thumb approach might be to understand that the ghetto is an involuntary spatial confinement, a location from which a marginalised minority cannot get *out*. On the other hand, many upmarket residential localities and gated communities (as well as the Zoroastrian Cooperative Housing Society referred to above) are voluntary sites of exclusion, where those who do not belong cannot get *in*. *Second*, while poverty is often a reality for those in the ghetto, the ghetto is not identified principally by poverty, but by social exclusion and stigma.[7] Thus, working as well as middle-class and high-income residential localities will constitute ghettos if they are segregated and spatially confined on lines such as race, ethnicity, or religion. *Third*, the literature has argued that ghettoisation leads to 'institutional encasement'. This term has been used in the sense that ghettos develop their own social arrangements to ensure basic needs and a sense of cultural consciousness, identity, and belonging. This is because of threats and disparagement from outside, and due to isolation and a consequent lack of political influence. However, what is additionally pointed out here is that the idea of 'institutional encasement' may be extended to encompass the policing and hyper-surveillance that typically mark such ghettos. The increased ghettoising of Muslims in the wake of violence more easily permits the maintenance of such institutional encasement and inequitable procedures for containing violence by the State. A high concentration of Muslims is almost synonymous with heavy policing and the constant presence of police *chowkies* on the borders of these areas. This is, of course, compounded by the fact that most Muslims live in congested, low-income

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[4]   Louis Wirth, *The Ghetto* (University of Chicago Press 1956) ix.

[5]   Liyi Xie, 'Exploring the Concept of Ghetto' (2016) 5(2) Social Sciences 32–36; Loïc Wacquant, 'What is a Ghetto? Constructing a Sociological Concept' (2004) <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.572.465&rep=rep1&type=pdf> accessed 29 September 2021.

[6]   See, for instance, Wirth (n 4); Xie (n 5); Wacquant (n 5); Ambedkar (n 3).

[7]   Urban studies identify the ghetto as emerging out of serious constraint, the enclave as an intentional form of segregation and the citadel, where an upper class within a segregated minority might separate itself off. Here, while agreeing with Galonnier below that these categories, which developed in the American and European contexts, may be applicable to Muslims in urban India, I also use the terms ghettoisation and segregation more generally when speaking of all of these: Peter Marcuse, 'The Enclave, the Citadel and the Ghetto: What Has Changed in the Post-Fordist U.S. City' (1997) 33 Urban Affairs Review 228; Juliette Galonnier, 'The Enclave, the Citadel and the Ghetto. See The Threefold Segregation of Upper-Class Muslims in India' (2014) 39 International Journal of Urban and Regional Research 92.

areas, where crime, petty thefts, smuggling, and prostitution may also thrive. The obtrusive policing only feeds popular perceptions and official definitions of particular areas as 'trouble spots', 'communally sensitive', 'disturbed', or 'volatile'.

From this perspective, the paper sets the jurisprudential interpretation of housing agreements as 'private acts', with the tacit understanding that these are pacts entered into by individuals or entities freely and for their own advantage and therefore, adequately covered by contract law against what such an understanding obscures: the historical and aggregate burdens of unfairness or discrimination that might render such contracts unjust and oppressive, especially and disproportionately on one side. What this juxtaposition clearly exposes is that restrictive covenants in housing create or compound disadvantages not only between individuals but also between social groups. Further, their effects radiate throughout society and reinforce structures of inequality. Indeed, as the paper shows, discrimination may occur through a range of mechanisms apart from restrictive covenants. We are sharply recalled to Ambedkar's words to the Constituent Assembly on November 25, 1949, wherein he portended the implications of deep social inequalities and illiberalism for political democracy:

> On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognising the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.[8]

As it proceeds, the paper moves beyond understandings of housing discrimination couched in terms of attitudinal bias or a strong sense of separateness.[9]

[8] 'Constituent Assembly of India Debates (Proceedings) Volume XI: November 25, 1949' (Constitution of India) Dr BR Ambedkar [11.165.325] <https://www.Constitutionofindia.net/Constitution_assembly_debates/volume/11/1949-11-25> accessed 7 April 2022.

[9] See, for instance, 'Interview with Tarunabh Khaitan: Ending Discrimination: "It is not just about majority and minority but also about attitudes"' (*Scroll*, 26 March 2017) <https://scroll.in/article/832386/ending-discrimination-it-is-not-just-about-majority-and-minority-but-also-about-attitudes> accessed 13 September 2021 (Interview with Tarunabh Khaitan); Gautam Bhatia, 'No Flats To Let For Muslims?' (*Outlook*, 4 February 2022) <https://www.

The following section shows that discrimination and ghettoisation have a long history, and are linked to patterns of collective conflict and violence. Drawing on recent scholarship, the next segment brings out the significant relationship (beginning to be acknowledged in India) between ghettoisation and access to critical social goods, such as health, education, and the like. What emerges is that the problem of iniquitousness in this regard goes very deep and needs proportionate legal and policy address. The paper then turns to the current jurisprudential understanding framed by the Supreme Court's *ZCHS* judgment, which, as is argued, does not suffice. At the same time, it is shown that legislation has, to date, failed to take off the ground. Finally, the paper steers a course between appealing to the courts in each case of discrimination on the one hand and the espousal of political solutions on the other, by drawing on the notion of demosprudence. Going beyond the original instance of the oral dissent of judges, demosprudence is seen as the work of activists, scholars, and lawyers meticulously initiating social action litigation. Such work could in turn call forth appropriate judicial response, and perhaps pave the way for policy change in due course.

II. COLLECTIVE VIOLENCE AND THE PROCESS OF GHETTOISATION

Histories going back to time before independence have marked Muslims in India as the 'Other'. Muslims have been portrayed as somehow bearing the burden of responsibility for the Partition, and of being heir to a violent tradition of Islam on the subcontinent, associated with a long trail of temple destruction and 'forced' conversions.[10] Ritual and embodied markers of Muslim identity such as circumcision, the skull cap, or *burqa* are ridiculed and stigmatised, in the sense in which Goffman speaks of 'undesired differentness' which turns 'normals' away.[11] In communal attacks, mobs descending on Muslim-dominated areas have been known to shout slogans such as "*Kamar pe lungi muhn men pan, bhago landiya Pakistan*" (You who wear *lungis* and chew betel

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outlookindia.com/website/story/no-flats-to-let-for-muslims/289983> accessed 13 September 2021.

[10] The efforts of a large body of scholarship, including Richard Eaton, *The Rise of Islam and the Bengal Frontier 1204-1760* (OUP 1997); Carl Ernst, *Eternal Garden: Mysticism, History and Politics at a South Asian Sufi Center* (SUNY 1992); ZH Zaidi, 'Conversion to Islam in South Asia: Problems in Analysis' (1989) 6(1) American Journal of Islamic and Society 93; Stephen Dale, 'Trade, Conversion and the Growth of the Islamic Community in Kerala' in Rowena Robinson and Sathianathan Clarke (eds), *Religious Conversion in India: Modes, Motivations and Meanings* (OUP 2003), to contest and thoroughly complicate this entrenched and highly simplistic popular view appears to have had little success, at least with right-wing majoritarian thinking.

[11] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1973).

leaves, you circumcised ones leave for Pakistan),[12] "*Landiya ko pakdo*" (catch the circumcised), "*kaat do uski*" (cut it off), and the like. Even today, Muslims continue to be considered as strong opponents of Hindus, and a 'fifth column' in the Indian nation. Their patriotism is constantly called into doubt and they often bear the stigma of being viewed as obscurantist, with their men seen as a threat to the honour of Hindu women. Spatial segregation allows the Hindus, particularly of upper and middle classes, to create 'pure areas' from which Muslims are excluded.

In India, spatial separation and ghettoising mark urban areas across the country and have contributed to tension and communal conflict over the decades, especially between Hindus and Muslims.[13] In turn, successive incidents of violence have led to the displacement of families and greater and more marked segregation.[14] Collective violence has had severe impact on minorities in terms of lives and property lost, and it is particularly Muslims who have been targeted in violent social crimes.[15] States in northern and western India, such as Uttar Pradesh, Gujarat, Bihar, and Maharashtra, have seen recurrent Hindu-Muslim conflict since independence. On the other hand, some states in eastern and southern India, such as Orissa or Kerala, remained relatively peaceful. However, it is generally agreed[16] that the curve of communal violence took an upward turn from the late 1970s onwards. More areas of the country began to see violence in the 1980s, including those which were earlier unaffected. Further, each spell of collective violence was marked by greater organisation and planning.

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[12]   AA Engineer, *Communalism in India: A Historical and Empirical Study* (Vikas Publishing House 1995) 162.

[13]   See, for instance, Rowena Robinson, *Tremors of Violence: Muslim Survivors of Ethnic Strife in Western India* (Sage 2005). The intermeshing of partition history with subsequent tensions and displacements of urban Indian Muslims has been specifically examined, for instance, in the context of Delhi. See Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (Columbia University Press 2007).

[14]   Veena Das (ed), *Mirrors of Violence: Communities, Riots and Survivors in South Asia* (OUP 1990); Shail Mayaram, *Resisting Regimes: Myth, Memory and the Shaping of a Muslim Identity* (OUP 1997); Robinson (n 13).

[15]   See 'A Narrowing Space: Violence and Discrimination against India's Religious Minorities' (Center for Study of Society and Secularism, and Minority Rights Group International 2017) <https://minorityrights.org/wp-content/uploads/2017/06/MRG_Rep_India_Jun17-2.pdf> accessed 26 September 2021. In 1984, after the assassination of Indira Gandhi, Sikhs were targeted.

[16]   NL Gupta (ed), *Communal Riots in India* (Gyan Publishing House 2000); AM Basu, 'The Demographics of Religious Fundamentalism' in K Basu and S Subrahmanyam (ed), *Unravelling the Nation: Sectarian Conflict and India's Secular Identity* (Penguin 1996) 129–156; PR Rajgopal, *Communal Violence in India* (Uppal Publishing House 1987); Stanley Tambiah, *Leveling Crowds: Ethnonationalist Conflicts and Collective Violence in South Asia* (Vistaar Publications 1997); Ashutosh Varshney, *Ethnic Conflict and Civic Life: Hindus and Muslims in India* (Yale University Press 2002).

It has been argued that in the 1980s and 1990s, Hindu-Muslim hostility and communal violence grew against the backdrop of the Babri Masjid-Ramjanambhoomi issue. In this period, attacks on Muslims increased in ferocity and scale of execution.[17] The *rath yatras* to 'free' the birthplace of Ram left a bloody trail of communal violence in their wake. The worst riots suspiciously began to take on the dimensions of a pogrom. In Mumbai, after the demolition of the Babri Masjid, there were several attacks by Muslims on Hindu temples and shrines in the city. Apart from other sporadic incidents of violence, in early January 1993, 6 Hindus were killed in a slum in Jogeshwari. This became the justification for violence wreaked on Muslims throughout Mumbai in the days that followed. In 2002, on February 27, more than fifty persons aboard a train at Godhra in Gujarat – most, if not all, Hindus - were burnt to death. Suspicion fell on some Muslims in Godhra for their involvement in the crime. The horrendous felony was used to legitimise the killing, rape, and looting of thousands of Muslims across a large part of the state. Over the last decade or so, mob lynching and cow vigilante attacks, as well as assaults over 'love jihad', have occurred throughout the country.[18] The move to extend the National Register of Citizens ('NRC') across all states, in combination with the Citizenship Amendment Act, threatens to render a large number of Muslims in the country stateless.[19] The global vilification of Muslims fuelled by terrorist activity, often attributed to militant outfits in Southwest Asia, has only reinforced stereotypes about the community, even within the country.[20] Thus, recent times have seen the growing vulnerability and insecurity of Muslims, which is also manifested in their increasing residential displacement and ghettoisation.

In the North Indian plains, it is common to hear a man going to the toilet, that impure *sandas* (privy) often located outside or behind the home, refer to his visit as "going to Pakistan". As seen, in communal discourses the Indian Muslim *is* a Pakistani, a scorned being who should "go to Pakistan". It is often

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[17] See Gupta (n 16); Rowena Robinson, 'Betwixt Kin and Community: Muslim Women and the Family in the Wake of Ethnic Strife in Western India' (2008) 4 Asian Population Studies 177, 180–181; Robinson (n 13).

[18] 'Love jihad' is a term used by those claiming that there is a 'conspiracy' to lure Hindu girls and convert them to Islam through marriage. 'Madhya Pradesh: Minor Bashed up on Suspicion of "Love Jihad"' (*The New Indian Express*, 4 September 2021) <https://www.newindianexpress.com/nation/2021/sep/04/madhya-pradesh-minor-bashed-up-on-suspicion-of-love-jihad-2354349.html> accessed 1 October 2021.

[19] See Nayanima Basu, 'CAA, NRC Could Render Huge Numbers of Indian Muslims Stateless, Says Ashutosh Varshney' (*The Print*, 5 March 2020) <https://theprint.in/india/caa-nrc-could-render-huge-numbers-of-indian-muslims-stateless-says-ashutosh-varshney/376008/> accessed 29 September 2021.

[20] Certainly, Muslims are not a homogeneous or cohesive community. Nevertheless, they are constructed as a monolithic community in political and communal discourses (the reference to the 'Muslim vote', for example), and are increasingly obliged to see themselves as one when it comes to struggles against discrimination, state-sanctioned or otherwise, or the compulsions of pursuing a common safety in the face of violence.

easy to pinpoint Hindu and Muslim areas in cities. Indeed, as the social geography of Indian cities manifests, the Muslim in fact *lives* in Pakistan, *many* Pakistans, *mini* Pakistans. This understanding of ghettoisation takes into consideration the 'mental maps' through which residents interpret the history of their city, perceive city spaces, and imagine the city's future trajectory and their own experiences, security, and place within it.[21] As I have argued elsewhere, every city in India that has seen major conflict between Hindus and Muslims has acquired a history of spaces that mimics international borders: boundaries, innocuous or otherwise, designate 'India' (Hindu-dominated areas) from 'Pakistan' (Muslim-dominated areas).[22] These boundaries are reinforced during times of violence; most violence is in what people designate as 'border' areas, places where Hindus and Muslims "*takkar pe aate hain*", (come into conflict). This pattern is itself a product of the segregation of residential spaces. Communal segregation of spaces by no means averts violence but simply relocates it. Moreover, each bout of violence can yield a further uprooting and reorganisation of the boundary lines. This can have deeply problematic implications.

Research shows that many Muslims have been forced to migrate – within the same city to other places, sometimes to other states– as a direct result of communal violence.[23] For instance, in Mumbai, greater concentration of Muslims is found in the 'older' parts of the city, such as Dongri, Nagpada, or Mohammad Ali Road. In the years after 1993, Muslims moved to 'safe' areas; Hindus did so to a much lesser extent. Muslims moved into areas where there were already fair numbers of their own, and this movement has taken at least 3 directions.[24] Some areas in Central Mumbai have seen greater concentration, such as Nagpada, Madanpura, Bhendi Bazar or Mohammad Ali Road as well as parts of Wadala, such as Kidwai Nagar, or Byculla. Moving further outwards, Jogeshwari (West) saw considerable in-movement of Muslims, as also Kurla and Govandi. Millat Nagar, a large complex of apartments off Lokhandwala in Andheri (West) is a sanctuary for middle-class Muslims. Finally, Mira Road, a distant suburb in north-west Mumbai, and Mumbra, one in north-east Mumbai, have become noticeable areas of Muslim concentration. In Jogeshwari, it has been shown that Muslims have systematically, over the decades, been pushed into a small settlement area at the peak of a hill. They are surrounded by Hindu settlements all around and have almost no access routes out of their pocket except through these Hindu areas. In the 1970s, Muslims and Hindus were interspersed throughout the area, though there were

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[21] Raphael Susewind, 'Muslims in Indian Cities: Degrees of Segregation and the Elusive Ghetto' (2017) 49 Environment and Planning A: Economy and Space 1286.

[22] Robinson (n 13) 42-73.

[23] Robinson (n 13) 181.

[24] Alongside such moves, Muslims may also sometimes send children away from the city to live with relatives in the village or elsewhere to protect them against future conflicts and to distribute the costs of rebuilding life after violence. See ibid 185.

larger and smaller religion-based pockets here and there. Each bout of violence, however, led to further concentration of Muslims. As Muslims moved inward from the boundary line, the boundary itself shifted further towards the interior, thereby reducing considerably the space available for habitation.[25] Today Muslims are largely ghettoised in Prem Nagar which is East Jogeshwari's 'Pakistan', and the road that divides it from the Hindu area is, ironically enough, Gandhi Market road. Prior to 1973, Jogeshwari (East) comprised one political ward. At that time, facilities came to the entire ward, and serious political attempts were made to unite communities. In 1973, the area was bifurcated into two wards, one of them comprising mainly Muslims. By 1992, the number of wards had increased, but again Jogeshwari's Muslim pocket comprised a separate ward. Thus, the construction of ward boundaries legitimised the segregation and political isolation of Muslims.[26]

In Baroda too, Muslim *mohallas* may be readily identified.[27] While a few areas such as Fatehgunj continue to struggle to retain their pluralistic identity, long years of conflict have ensured that ethnic demarcations in the city have sharpened. The 2002 violence was inclined towards 'purifying' particular neighbourhoods by driving the few Muslims out. Certain areas, such as Pratap Nagar, Raopura, Mandvi, or Tandalja, the last located suitably far from the city's centre, became the recourse for displaced Muslims. In Ahmedabad, Rajagopal shows how decades of violence and vulnerability has led to the eastern side of the city being dominated by Muslims, while the western section has become almost entirely Hindu.[28] Areas which became the refuge of Muslims following the violence of 2002 include Juhapura, the Muslim society in elite Navrangpura, Shahpur, Khanpur and Jamalpur, and even old city wards such as Kalupur and Dariapur. Paldi, which saw a lot of violence, has been increasingly deserted in favour of areas such as Juhapura. Parts of the city, west of the river Sabarmati, including Vastrapur, Drive In Road, Gurukul, or Satellite areas have largely closed to Muslims, regardless of class.[29]

Other cities show similar patterns. A study using administrative data of over 3000 Indian cities and 100,000 neighbourhoods has shown that residential segregation of Muslims does not limit itself to older cities but is also a characteristic of younger ones.[30] Moreover, residential segregation is manifest not only

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[25]   Miloon Kothari and Nasreen Contractor, *Planned Segregation: Riots, Evictions and Dispossession in Jogeshwari East* (YUVA 1996).

[26]   ibid; Jyoti Punwani, 'Without Any Stakes in the Riot' (*The Independent*) (6 January 1991) 5.

[27]   Robinson (n 13) 49.

[28]   Arvind Rajagopal, 'Special Political Zone: Urban Planning, Spatial Segregation and the Infrastructure of Violence in Ahmedabad' (2010) 1 South Asian History and Culture 529.

[29]   Robinson (n 13) 48.

[30]   Adukia and others, 'Residential Segregation in Urban India' (*Center for Effective Global Action*, 2019) <https://cega.berkeley.edu/wp-content/uploads/2020/03/Tan_PacDev2020.pdf> accessed 1 October 2021.

in slums or low-income housing, but also middle and high-end properties.[31] Data from all 5,481 urban wards in Karnataka show that there is segregation *of* urban wards as well as *within* urban wards. Intra-ward segregation is a crucial driver of ghettoisation of spatially marginalised groups such as Muslims in urban India. Further, there is no correlation of the degree of residential segregation with levels of urbanisation. Rather, high levels of segregation exist across urban settlements, from the semi-urban to the global metropolis.[32] Additionally, several writers have recorded that Muslim tenants face the humiliation of being rejected by house owners across different cities in India. Such tenants are steered towards Muslim ghettos by agents and brokers, and made to feel unwelcome outside the ghettos. Mixing is limited to the workplace, markets, or other such public areas where it is unavoidable.[33] It is suggested that the rapid pace of urbanisation has, on the whole, thwarted systematic government intervention with regard to access to housing. It has allowed 'dysfunctional land markets', rather than state regulation, to control access to urban land.[34] However, it is also pointed out that processes of global capitalism[35] and political and bureaucratic measures to "clean up" cities, remove encroachments,

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[31] Soutik Biswas, 'Why Segregated Housing is Thriving in India' *BBC News* (10 December 2014) <https://www.bbc.com/news/world-asia-india-30204806> accessed 23 September 2021.

[32] Naveen Bharathi and others, 'Village in the City: Residential Segregation in Urbanising India' (2019) IIM Bangalore Research Paper No. 588 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3377270> accessed 22 July 2022.

[33] Mohsin Bhat, 'Bigotry At Home: How Delhi, Mumbai Keep Muslim Tenants Out — Article 14' (*article 14*, 2021) <https://www.article-14.com/post/bigotry-at-home-how-delhi-mumbai-keep-muslim-tenants-out> accessed 26 September 2021; Aishwarya Dharni, 'Muslim? Ghar Nahin Milega: Shocking Stories Of Discrimination While House Hunting In India' (*India Times*, 2020) <https://www.indiatimes.com/lifestyle/muslim-ghar-nahin-milega-shocking-stories-of-discrimination-while-house-hunting-in-india-504788.html> accessed 26 September 2021; Rina Chandran, 'No Muslims, No Single Women: Housing Bias Turning Indian Cities into Ghettos' (*Reuters*) (23 January 2017) <https://www.reuters.com/article/us-india-cities-ghettos-idUSKBN15726C> accessed 26 September 2021; Mohsin Bhat and Asaf Ali Lone, 'Cities Divided: How Exclusion Of Muslims Sharpens Inequality' (*India Housing Report*, 2 March 2021) <https://indiahousingreport.in/outputs/opinion/cities-divided-how-exclusion-of-muslims-sharpens-inequality/> accessed 26 September 2021; Jasan Miklian and Niranjan Sahoo, 'PRIO Policy Brief No. 3' (2016) <http://file.prio.no/publication_files/prio/Milkian,%20Sahoo%20-%20Supporting%20a%20More%20Inclusive%20and%20Responsive%20Urban%20India,%20%20PRIO%20Policy%20Brief%203-2016.pdf> accessed 21 September 2021. It has also been noted that communal propaganda through pamphleteering in recent decades asks Hindus 'to save our country by boycotting Muslims economically and socially' (Janyala Sreenivas, 'Communal Harmony Is Drama: VHP Pamphlet' *Indian Express* (12 April 2002) 1-2) and to keep away from business establishments that are run by Hindu and Muslim partners so that the latter cannot benefit from their profits and the Hindus will learn a lesson and break away from the Muslim partners (Rajeev Khanna, 'Hate Tracts Being Distributed in Gujarat Towns' (*The Asian Age*) (26 April 2002) 9). Muslims are seen as undesirable even in municipal parks or *maidans* (Robinson (n 13) 56-57) and in recent years, there have also been warnings issued to minorities to stay away from festival celebrations in which they customarily participated. See 'Hardline Indian Hindu Group Aim to Exclude Muslims from Festival' (*Reuters*) (25 September 2014) <https://www.reuters.com/article/uk-india-religion-idUKKCN0HK1J620140925> accessed 27 September 2021.

[34] Adukia and others (n 30) 6.

[35] Ghazala Jamil, *Accumulation by Segregation: Muslim Localities in Delhi* (OUP 2017).

or resettle 'unauthorised' residents have led to large-scale evictions of Muslims.[36] In sum, it appears that residential segregation of Muslims in Indian cities builds upon capitalist accumulation as well as practices of discrimination by builders, developers, housing societies, estate agents, and brokers, apart from government and State action. It further implicates a high degree of rental discrimination.[37] Ghettoisation emerges not only as a product of past collective violence but also in anticipation of future violence. It may have serious consequences for outcomes and opportunities such as with regard to health, education or employment, as the following section proceeds to examine.

III. DEPRIVATION, DISCRIMINATION AND RESIDENTIAL SEGREGATION[38]

More Indians than ever before live in urban areas (over 30%). This means that the attributes of urban neighbourhoods are increasingly significant for determining people's opportunities and overall socio-economic development.[39] Further, more than 40% Muslims, in comparison to 29% Hindus, are residents of towns and cities, and the rate of increase of the urban population of Muslims is also more than Hindus. This may be related in part to security-related concerns of Muslims.[40] Indeed, India has one of the world's largest populations of Muslims.[41] In combination, these facts bring home the significance, for Indian society as a whole, of the material and social circumstances of Muslims in our cities. At the same time, it is only very recent research that has begun to connect ghettoisation in Indian cities with social and economic disadvantage for historically stigmatised and excluded groups.

Indian Muslims have a historical experience of discrimination, and they are one of India's most deprived communities. The literacy rate among Muslims is far below the national average, and this gap is greater in urban areas and for women. Further, significant disparities emerge between the educational status

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[36]   Yasir Hameed, 'Not in My Neighboourhood' (*Contested Cities*, 2016) <http://contested-cities. net/wp-content/uploads/sites/8/2016/07/WPCC-163014-HameedYasir-NotMyNeighborhood. pdf> accessed 22 July 2022.

[37]   ibid.

[38]   The data in this section largely relies on the Government of India report titled Sachar Committee, 'Social, Economic and Educational Status of the Muslim Community in India' (2006) <https://www.minorityaffairs.gov.in/sites/default/files/sachar_comm.pdf> accessed 25 September 2021. When other sources are relied on, these have been cited separately.

[39]   Adukia and others (n 30) 1.

[40]   Subodh Varma, 'More Religious Minorities Live in Urban Areas than Rural' *The Times of India* (26 August 2015) <https://timesofindia.indiatimes.com/india/more-religious-minorities-live-in-urban-areas-than-rural/articleshow/48680765.cms> accessed 26 September 2021.

[41]   See, for instance, 'Muslim Population by Country 2022' <https://worldpopulationreview.com/ country-rankings/muslim-population-by-country> accessed 1 November 2022.

of Muslims and that of other socio-religious categories (except SCs and STs).[42] Both Mean Years of Schooling ('MYS') and attendance levels of Muslims are low in absolute numbers, as well as in comparison with other socio-religious groups. However, Muslim enrolment rates have shown an increase. While Muslims had the lowest enrolment rate of all socio-religious groups in 1999-2000, the rate improved significantly in five years. While still lower than the average enrolment rate, it was slightly higher than that of OBCs. It is a falsehood that Muslims prefer to send their children to *madrasas*, where they acquire religious and other education. Across the country, only 3% of all Muslim children of school-going age are enrolled in *madrasas*. Many children may attend *maktabs* for religious education, but this is in addition to regular schooling and not a substitute for it. While the number of those with Urdu as their mother tongue requires delivery of education through this medium in different states, Muslims are not opposed to mainstream schooling and have shown increasing inclination towards English education for their children.

At the same time, there is significant Muslim disadvantage in higher education. This may be related to several factors including their poor economic status and generally low education levels. It may also be due to the lack of employment opportunities as the unemployment rate among Muslim graduates is seen to be the highest among socio-religious communities, both poor and not poor. Muslims do not see education as necessarily translating into formal employment. This is because *firstly*, they have a low presence in formal employment and, *secondly*, they perceive that they will be discriminated against in recruitment for salaried jobs. The low perceived returns from education contribute to the non-retention of Muslims in the education system. The disparity in graduation attainment levels between Muslims and all other groups has been widening since the 1970s. In the initial stages of planning, Muslims had a higher graduate attainment rate than SCs and STs, but subsequently, the latter overtook them. The probability of Muslims and SCs and STs completing graduation is lower than for all other socio-religious groups, especially in urban areas and for men. However, the pool of those eligible for higher education has been increasing faster for SCs and STs than for Muslims. This must be related partly to affirmative action, and the higher perceived returns from education for the former groups. Hence, being Muslim reduces the chances of obtaining education at secondary, and then at higher levels.

Worker population ratios are lower for Muslims, and more so for Muslim women, than for any other socio-religious community. Additionally, there is a very high concentration of Muslims in self-employment activities. Their engagement in despised occupations such as butchering further marginalises

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[42] In accordance with available data, the Sachar Committee (n 38) identifies socio-religious categories as Hindus, Muslims, other minorities, SCs and STs.

and stigmatises certain Muslims groups.[43] The concentration of Muslim work-ers in casual labour, daily wage work, and self-employment – street vending, small trades, and enterprises – ensures perhaps that the community is far more exposed to the disruptions and damage caused by urban conflict and violence, lockdowns, curfews, and the like. They are very poorly represented in regular, salaried employment. Only about 27% of Muslim workers in urban areas are engaged in regular work, while the share of such workers among SCs and STs, OBCs, and Hindu upper castes is 40%, 36%, and 49% respectively. The par-ticipation of Muslims in formal sector employment is far less than the national average. Further, they tend to be more insecure and vulnerable in terms of conditions of work. This is not only because of their sizable presence in infor-mal sector employment but also because their job conditions (length of con-tract, social security benefits, and the like) even as regular workers are poorer than those for other socio-religious groups. Muslim men are over-represented in street vending (more than 12% against the national average of <8%), and women tend to work from home to a much larger degree (70%) than the aver-age (51%).[44] Traditional barriers to women's mobility, as well as childcare and other household responsibilities, may be partly responsible for keeping Muslim women within the limits of their homes and close to the neighbourhood. However, Muslims are also confined to certain parts of cities within ghettos, and urban conflict and the threat of violence result in the further huddling of Muslims in community-dominated localities. Women especially harbour a great sense of fear of going beyond the boundaries of these neighbourhoods, within which they feel their security, and that of their children, is better assured.[45]

The immense precarity of Muslim participation in the economy and the low level of their asset accumulation in general further intensify their vulnerabil-ity to physical and economic displacements and disruptions caused by commu-nal strife. Research shows that Muslims are far more likely than most other Indians to live in poorer cities, and cities with a higher Muslim share in the population have significantly lower per capita consumption levels. While both Muslim and SC/ST neighbourhoods have lower consumption levels than neigh-bourhoods in the same city that have fewer marginalised groups, cities with greater Muslim concentration overall have worse access to schools and to public hospitals and doctors. Generally, segregated cities have worse educa-tional outcomes for Muslims.[46] Muslims have poor access to bank credit, and

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[43] See Zarin Ahmad's interesting study of the Qureshi butchers of Delhi: Zarin Ahmad, *Delhi's Meatscapes: Muslim Butchers in a Transforming Mega-City* (OUP 2018).

[44] This is an overall picture, though some differences emerge across states and regions with Muslims in the south and to an extent in the west doing better on a range of indicators than those in the north, central and east of the country. See, for instance, Hasan and Menon, *Unequal Citizens: A Study of Muslim Women in India* (OUP 2004).

[45] Fear, discrimination, and segregation together make for the insecurity of urban Muslims, and women are particularly disadvantaged. See Robinson (n 13); Nida Kirmani, *Questioning the 'Muslim Woman': Identity and Insecurity in an Urban Indian Locality* (Routledge 2013).

[46] Adukia and others (n 30).

the average size of credit is meagre and low compared to other socio-religious groups. Banks use the practice of negative geographical zones within which credit and other financial services are not easily provided. This unacknowledged practice of 'redlining'[47] has serious implications for Muslims because such 'negative' zones usually include poorer neighbourhoods where Muslims form a majority of the population.[48] Such financial exclusion has far-reaching consequences for an economically vulnerable and educationally deprived community.

Urban spaces occupied by Muslims are also typically characterised by decay and a notable lack of civic services. Muslim-concentration areas are marked by poorly tarred and badly maintained roads, and poor sewage and garbage collection systems. While Muslims share in this deprivation with Dalits and the mass of the urban poor, they are the worst off in terms of conditions of living and access to various kinds of resources in comparison with other religious communities.[49] Moreover, such conditions continue to feed the popular images of Muslims as 'dirty', 'unhygienic', and even expendable. Muslims clearly lack political influence and are unable to make demands on collective resources that merit attention.

Overall, the data indicates the residential segregation of Muslims throughout urban India, both with regard to rented and owned properties. Further, they show targeted violence as a mechanism and outcome of the dislocation and confinement of Muslims to restricted areas of the city, and distinct bias in public service provisioning regarding education, physical infrastructure, and health facilities in such Muslim-concentration areas.[50] Discrimination with respect to financial services, credit, and banking also marks these urban zones. In other words, wealth and poverty, opportunity and disadvantage are spatially concentrated across urban India. These distinctions overlap with each other as well

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[47] Redlining is a term used particularly in the US to designate systematic discriminatory practices that put financial or other services out of reach for residents of certain neighbourhoods, typically based on race or ethnicity.

[48] Saumya Roy and Gargi Banerjee, 'Loan Approvals Depend on Borrowers' Address' (*Live Mint*) (8 April 2008) <https://www.livemint.com/Money/f0Rtetble3Chhd5PoAZ2KJ/Loan-approvals-depend-on-borrowers8217-address.html> accessed 21 September 2021. Dupont's study of Mayur Vihar-Trilokpuri in East Delhi also shows that Muslims are largely in poorer settlements. While they represent 11% of the zone's population, their proportion reaches 43% in squatter settlements, becomes marginal in Delhi Development Authority flats, and almost nil in co-operative housing societies. See Veronqiue Dupont, 'Socio-Spatial Differentiation and Residential Segregation in Delhi: A Question of Scale?' (2004) 35 Geoforum 157.

[49] Azra Razzack and Anil Gumber, *Differentials in Human Development: A Case for Empowerment of Muslims in India* (NCAER 2002); Abusaleh Shariff, 'Relative Economic and Social Deprivation in India' (International Development Research Centre, Oxford University 2000).

[50] See also Niranjan Sahoo, 'A Tale of Three Cities: India's Exclusionary Urbanisation' (2016) ORF Brief No 156 <https://www.orfonline.org/wp-content/uploads/2016/09/ORF_IssueBrief_156.pdf> accessed 22 July 2022.

as the divide between Hindus (particularly upper castes) and Muslims. Thus, ghettoisation effectively has corresponding and cumulative consequences on the social and economic aspirations and life-chances of Muslims. It plays a role in pushing down levels of achievement, fixing Muslim expectations at a low level, and sustaining a subdued or defensive cultural profile.

Racial and ethnic residential segregation is an aspect of many countries across the world. Scholars have pointed out that what needs examination is which minority or minorities are segregated, for what reasons, and who impelled them into a segregated situation.[51] Then again, racially determined spatial segregation has been particularly manifest in the United States, a country deeply divided by a history of Black oppression. Studies have shown that disadvantaged minorities such as African-Americans do worse off in segregated areas when it comes to schooling and employment, and are likely to have higher rates of single parenthood.[52] The sociological interest in, and importance of residential segregation by race in the United States overlapped with the expanding civil rights movement. However, the stage for grassroots initiatives in the struggle for civil rights may have been set in part by some earlier events. Among these was an executive move: Truman's 1948 order ending discrimination in the military. The other, notably, was judicial, and this was the landmark US Supreme Court judgment in the *Shelley v Kraemer* case on racial discrimination in housing, which came out in the same year. The judgement asserted that judicial enforcement of racially restrictive housing covenants violated the Equal Protection Clause of the Fourteenth Amendment of the US Constitution.[53]

The analysis of the preceding sections has uncovered the systematic and pervasive character of urban residential discrimination faced by Muslims in India. It has further pointed out the associations of such discrimination with violence and insecurity, and its implications on education, health, employment, and overall social and economic outcomes of the community. Hence, a

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[51]   HJ Gans, 'Involuntary Segregation and the Ghetto: Disconnecting Process and Place' (2008) 7 City and Community 353; Xie (n 5).

[52]   David Cutler and Edward Glaeser, 'Are Ghettos Good or Bad?' (1995) NBER Working Paper 5163 <https://www.nber.org/papers/w5163> accessed 22 July 2022.

[53]   92 L Ed 1161: 334 US 1 (1948). The Kraemers filed against an African-American couple (the Shelleys), trying to prevent them from purchasing property in a residential neighborhood where Whites had a private agreement to not sell property to non-Whites. Arguing that the State cannot enforce private contracts when these violate the basic protections of the Constitution and asserting that State action included actions by legislative bodies as well as courts and judicial officials, the US Supreme Court struck down the Supreme Court of Missouri's decision to enforce the restrictive covenant. See '*Shelley v Kraemer*' (Jrank) <https://law.jrank.org/pages/24793/Shelley-v-Kraemer-Significance.html> accessed 2 October 2021. The Court looked at restrictive covenants as 'private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes.'

sociological grasp of this issue moves it beyond analysis in terms of 'attitu-dinal',[54] transactional or service-provision bias, or even apartness or segrega-tion, however 'virulent'.[55] The analysis points towards a fuller understanding of urban residential discrimination as a form of deep, structural inequality that lies embedded in social institutions and processes throughout society, which is continuously reproduced through inequitable practices and is not only the expression or the outcome of discrimination but constitutes a mechanism to *produce* or enhance cumulative and crosscutting economic, social, and politi-cal disadvantage. The next section of the paper turns to the law on exclusion-ary housing covenants in terms of the jurisprudential understanding of these as private acts. Such covenants, while implicating horizontal discrimination, have not been considered as violative of Constitutionally-guaranteed fundamental rights.

IV. HOUSING DISCRIMINATION IN THE LAW

Indian jurisprudence continues to treat private acts, including exclusion-ary housing covenants, as effectively shielded from the provisions of Part III of the Constitution. This is no doubt not idiosyncratic, but a legacy of a lib-eral understanding inherent in the discourse of rights itself. This understanding historically grew out of an anxiety to limit the power of the State to curtail individual freedoms, especially but not only economic freedoms in emerging bourgeois democracies. It predicated itself on a sharp public-private divide that located not only the domain of the familial but also that of the market out-side the writ of the State and constitutional rights.[56] In contrast, the Indian Constitution has articulated particular rights in an affirmative language, rather than only negatively as restrictions on State action.[57] While this could be the basis for reading discriminatory actions by non-state actors as also violating

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[54] Interview with Tarunabh Khaitan (n 9).

[55] Bhatia (n 9).

[56] These are the historical outcomes of the bloodless and bloody revolutions in England and France, countries struggling against monarchical and feudal regimes, as well as the US. They perhaps explain something of the negative language in which such rights have been framed (in the US, for instance, 'Congress shall make no law…').

[57] Martha Nussbaum argues that in contrast to the phraseology of the US Constitution that essentially sees fundamental entitlements as prohibitions against State intervention, the Indian Constitution 'typically specifies rights affirmatively'. According to her: "Thus, for example: 'All citizens shall have the right to freedom of speech and expression; to assemble peace-ably and without arms; to form associations or unions; ….etc.' (Art 19). These locutions have usually been understood to imply that *impediments supplied by non-state actors may also be deemed violative of Constitutional rights*" (Martha Nussbaum, 'Poverty and Human Functioning: Capabilities as Fundamental Entitlements' in DB Grusky and R Kanbur (eds), *Poverty and Inequality* (Stanford University Press 2006) 54, emphasis added). In contrast to this view, as Gardbaum has shown (Stephen Gardbaum, 'Horizontal Effect' in M Khosla, S Chaudhry, and PB Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016)), Indian jurisprudence in the context of Article 13 has generally restricted fundamental right application to State action.

constitutional rights, critical Supreme Court judgments have largely held back from such an interpretation.

Indeed, the paradigmatic case in this regard is *ZCHS*. In this case, a Parsi cooperative housing society, registered under Bombay Cooperative Societies Act, excluded non-Parsis from becoming members of the society in accordance with its bye-law 7 read with 21. When a member wanted to sell a plot to a non-Parsi builders' association, the tribunal and Gujarat High Court found the bye-laws to be invalid, as they restricted the right to alienate property.[58] On the other hand, ZHCS argued on the basis of Article 19(1)(c) (Right to form associations) and Article 29 (Right of minorities to preserve their culture). It also pointed out that the restriction did not violate the parent enactment. The State argued that this kind of restrictive covenant was invalid because it violated public policy, as drawn from various non-discrimination provisions of the Constitution. In its judgment, the Supreme Court called on the freedom of association in Article 19(1)(c) and the freedom of contract to uphold the restrictive covenant. Effectively viewing statutory policy as public policy, it argued that in this context public policy was defined by the 'four corners' of the enactment under which a member of a cooperative society gets their rights and which governs the society's bye-laws. The members are therefore not entitled to question their constitutionality.[59]

The Court asserted that while it is a constitutional goal to do away with discrimination based on religion or sex, this must be achieved "by legislative intervention and not by the Court coining a theory that whatever is not consistent with…Part III or Part IV [of the Constitution] could be declared to be opposed to public policy". It held that no related amendment had been brought to the cooperative societies enactments in the various states and they did not prohibit such a restriction. Hence, the Court could not direct societies to go against their bye-laws based on its own criteria.[60] In making this argument, the Court effectively denied the American Supreme Court's reasoning in *Shelley v Kraemer*. It ended up enforcing a discriminatory private housing covenant, rather incongruously, by calling on the safeguard of freedom of association.[61] The judgment in this case may be defensible on the grounds of protecting the culture and identity of the Parsi minority under Article 29. However, it is not a good test case for the broader issues under discussion here because the kinds of residential segregation and ghettoisation described above operate, more often than not, as efficient mechanisms for the exclusion of stigmatised and

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[58] 1999 SCC OnLine Guj 183, AIR 2000 Guj 9.

[59] ZCHS (n 2) [13].

[60] ibid [32].

[61] Gautam Bhatia, 'Horizontal Discrimination, Article 15(2) and the Possibility of a Constitutional Civil Rights Act' (*Academia*, 2014) <https://www.academia.edu/9736139/ Article_15_2_and_a_Constitutional_Civil_Rights_Act> accessed 22 September 2021.

marginalised groups.[62] Cooperative societies may employ their bye-laws to perpetuate exclusionary practices against marginalised groups in housing markets, thereby ensuring that the collective rights of the cooperative society effectively outweigh individual rights.[63]

At the same time, as mentioned earlier, courts in other countries have also held back from generally applying fundamental rights horizontally against private actors. This has been seen in cases claiming discrimination in private housing covenants. In such cases, courts in various jurisdictions have not directly held such contracts as constitutionally invalid, but have sought alternative remedies to handle them. In the US, as the case of *Shelley v Kraemer* manifested, the Court refused to enforce a discriminatory private covenant, without holding it illegal per se. Such weak indirect protection is given in the UK as well.[64] In Canada, statute law is subject to the Charter of Fundamental Rights and Freedoms when it comes up in private litigation, but not common law. However, courts are expected to take the Charter's values into consideration while scrutinising and developing the common law.[65] Indeed, Canadian courts have voided discriminatory housing contracts on the ground of violating public policy such as in *Re Drummond Wren* of the Ontario High Court.[66] In this case, Judge McKay argued: "It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity." The judgment further stated that:

> …nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of

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[62] See Gardbaum (n 1); Interview with Tarunabh Khaitan (n 9); Gautam Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2016) 11(1) Asian Journal of Comparative Law 87. Bhatia is one of the few legal scholars who has written consistently on housing discrimination and has helped my own grasp of the legal implications of *ZCHS* and related judgments. In India, the right to property is not a fundamental right. In a comparative perspective, it has been noted that the right to property may clash with other economic, social, cultural, and even civil and political rights. It was not therefore included in the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966) 993 United Nations Treaty Series 3 (ICESCR) (1976). In order to minimise such conflicts, for instance with the right to equality before the law, the right to property is commonly hedged by public interest constraints in most jurisdictions. It is within this context that anti-discrimination provisions with regard to property and its disposal must be placed. See, for instance, Curtis Doebbler, *Introduction to International Human Rights Law* (CD Publishing 2006) 141- 142.

[63] Professor Rahul Sapkal (personal communication, 10 November 2021).

[64] Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' (1999) 62 Modern Law Review 824, 833-34.

[65] Canadian Charter of Rights and Freedoms 1982, s 32(1).

[66] *Re Drummond Wren* 1945 OR 778 Ont HC <https://www.canlii.org/en/on/onsc/doc/1945/1945canlii80/1945canlii80.html> accessed 5 October 2021.

land transfer which would permit the segregation and confine-
ment of particular groups to particular business or residential
areas, or, conversely, would exclude particular groups from
particular business or residential areas.

Among newer constitutional jurisdictions, South Africa is distinct as
constitutional values such as equality and non-discrimination have been
directly applied to individuals and non-State entities, such as in the 2010
case of *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith
Educational Fund v University of KwaZulu-Natal*.[67] In this case, the Court
invalidated a racially restrictive testament by calling upon these constitutional
values and argued that they can be invoked against both State-sanctioned dis-
crimination and private acts.

For the most part, however, countries have used the policy route to pass
equal opportunities legislations combating such forms of discrimination,
including in the area of housing. This is, for instance, the case in the US, the
UK, France, and Germany.[68] In India, while the UPA government dabbled
with the idea of setting up an Equal Opportunity Commission, it soon unob-
trusively dropped it. The *Anti-Discrimination and Equality Bill* was introduced
in the Lok Sabha in 2017 as a private bill, but it lapsed with the dissolution
of the House. In 2021, MP Shashi Tharoor, who had introduced the Bill in
Parliament, submitted a version of it to Kerala's law minister and the leader of
the opposition. He urged the State Government to enact an anti-discrimination
law. He recommended that the Bill go through a process of pre-legislative con-
sultation in order to foster participation and consensus around the issue. On the
other hand, Gujarat passed *The Gujarat Prohibition of Transfer of Immovable
Property and Provision for Protection of Tenants from Eviction from Premises
in Disturbed Areas Act 1991* which was later amended in 2020. Under this
Act, the state can declare an area to be 'disturbed', following which transfer of
property in the area requires the permission of the Collector. This enactment
was ostensibly promulgated to prevent distress sales of property due to fear in
the wake of collective conflict and violence. However, it has been employed
to push Muslims out of 'mixed' areas, and propel them into greater ghettoisa-
tion.[69] In 2021, the Gujarat High Court, pending a full hearing on the matter,

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[67] (2010) 6 SA 518 (SCA).
[68] The US Fair Housing Act 1968; the UK Equality Act 2010 and other related codes. French law
      prohibits discrimination on a range of criteria in the access to goods and services including
      housing and there is also an enforceable right to housing under the DALO Act 2007; Germany
      General Equal Treatment Act 2006.
[69] Under the Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection
      of Tenants from Eviction from Premises in Disturbed Areas Act 1991, the State Government
      can declare an area as 'disturbed' if, in its opinion, there has been intense rioting or mob
      violence for a substantial period, if polarisation or improper clustering of persons belong-
      ing to one community has taken place or is likely to take place, disturbing the demographic
      equilibrium of persons of different communities residing in that area. The 2020 amendments

stopped the government from declaring any locality as a 'disturbed area'. It stated that such declarations could lead to the improper clustering of persons from one community.[70]

Indecisive political attempts, combined with Gujarat's divergent move that effectively legitimises segregation, complicate our understanding of legislative efforts to counter housing discrimination in India. The judicial approach has been conservative in this context and has overall limited the application of Part III of the Constitution to private acts. Although, for instance, the Supreme Court has selectively applied the 'right to health' under Article 21 horizontally against private employers in the context of occupational health hazards.[71] It also held in the *Vishaka* case that sexual harassment violated the fundamental rights of women under Articles 14, 15(1), 19(1)(g), and 21.[72] However, rather than directly seeing these rights as infringed by private actors, it laid upon the State the constitutional duty to protect individuals from sexual harassment in the workplace through effective legislation. Until the passage of law, the Court saw itself as filling the gap with the *Vishaka* guidelines as an arm of the State for the purposes of Article 12.[73]

At the same time, Article 15(2) of the Indian Constitution explicitly prohibits discrimination by private individuals on the grounds of religion, race, caste, sex or place of birth in terms of access to shops, public restaurants, hotels, and places of public entertainment.[74] The understanding of 'shops' in this Article, as it emerges from Constituent Assembly debates, and in particular Ambedkar's response to specific questions on the November 29, 1948, releases it unambiguously from any fixed notion as a physical structure permitting entry. It defines 'shop' generically as including "anybody who offers his services". According to Ambedkar, 'shops' in Article 15(2) "is used in the larger sense of requiring the services if the terms of service are agreed to."[75]

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increased the scope of the term 'transfer' and penalties for violation of the Disturbed Areas Act 1991 and gave the Collector even more powers in ascertaining the likelihood of polarisation or improper clustering in an area. See Parimal Dabhi, 'Explained: What has Changed in Gujarat's Disturbed Areas Act' *Indian Express* (19 October 2020) <https://indianexpress.com/article/explained/gujarats-disturbed-areas-act-amendments-6723215/> accessed 17 October 2021.

[70] See 'Housing Segregation: Gujarat HC Bars State Govt from Declaring Localities "Disturbed Areas"' (*The Wire*, 21 January 2021) <https://thewire.in/law/improper-clustering-gujarat-hc-bars-state-govt-from-declaring-localities-disturbed-areas> accessed 18 October 2021.

[71] *Consumer Education & Research Centre v Union of India,* (1995) 3 SCC 42.

[72] *Vishaka v State of Rajasthan,* (1997) 6 SCC 241.

[73] Gardbaum (n 57).

[74] Constitution of India 1950, art 15(2)(b) prohibits such discrimination in the use of wells, tanks, bathing *ghats*, roads, and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

[75] 'Constituent Assembly of India Debates (Proceedings) Volume VII: November 29, 1948' (Constitution of India) Dr BR Ambedkar [7.62.129] <https://www.Constitutionofindia.net/Constitution_assembly_debates/volume/7/1948-11-29> accessed 10 October 2021.

This interpretation was called upon by the Supreme Court in 2011 in *Indian Medical Assn. v Union of India*.[76] The Army College of Medical Sciences (Delhi Cantonment) wanted to reserve all its seats for wards or children of Army personnel (current and former) and their widows. Quoting Ambedkar, the Court included educational institutions within the meaning of the term 'shops'. It thereby ensured fundamental rights protection to anyone discriminated against by such service providers on the grounds prohibited in Article 15(2).[77] It has been argued that therein lies a constitutional response to horizontal discrimination. The Article, as in this judgment, could be used by courts and judges to directly render void exclusionary private covenants, such as that upheld in *ZCHS*.[78]

V. A CASE FOR DEMOSPRUDENCE

It is tempting to conclude that courts already have an appropriate instrument Article, 15(2), to apply in order to enforce fundamental rights horizontally, such as in cases of housing discrimination.[79] Further, the Delhi High Court's verdict in *Delhi Dayalbagh House Building Society v Registrar, Cooperative Societies*, and its consequent ratification by the Supreme Court could be read as now limiting the wider applicability of *ZCHS*.[80] At the same time, apart from necessitating an approach to the courts for redress in each case,[81] the sociological analysis in this paper has shown that housing discrimination both includes and goes beyond restrictive covenants and cannot be viewed as an isolated element of disadvantage. It is a part of profound

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[76] (2011) 7 SCC 179.

[77] Article 15(2) is the basis for the Protection of Civil Rights Act 1955.

[78] Bhatia (n 62).

[79] Gautam Bhatia, 'Exclusionary Covenants and the Constitution' (*IndConLawPhil*, 14 January 2014) <https://indconlawphil.wordpress.com/2014/01/14/exclusionary-covenants-and-the-Constitution-iv-article-152-ima-v-uoi-and-the-Constitutional-case-against-raciallyreligiously-restrictive-covenants/> accessed 12 October 2021.

[80] (2019) 4 SCC 429. In this case, membership to a housing society was sought to be limited to those belonging to the Radha Soami sect. The society was governed by the Delhi Cooperative Societies Act 2003 (with amendments in 2006 and further rules in 2007). Unlike the Gujarat Cooperative Societies Act 1961 relevant to the *ZCHS* case, the Delhi Cooperative Societies Act specifies the cooperative principles. The first principle is voluntary and open membership without discrimination on the basis of gender, social inequality, racial, political ideologies, or religious consideration. Thus, Dayalbagh could not frame by-laws in contravention of these principles, as the object of the society was housing and not religious activity. The Court reasoned [27] that the *ZCHS* judgment does not apply as appropriate legislation is in place in Delhi to cover the Dayalbagh case. Moreover, it went on to say that the petitioner society was not required to change its fundamental character; this was not a minority community but only a sect of the mainstream Hindu religion. In this sense, the *ZCHS* judgment is not seen as generally applicable because it is limited to the State's Cooperative Society Act under which that society was constituted and also to the specific characteristic of that society, i.e., as composed of a minority community.

[81] Interview with Tarunabh Khaitan (n 9).

structures and processes of inequality, and it further produces negative social and economic effects for those subject to segregation. Ghettoisation does not emerge out of accidental urban growth but is actively manufactured and maintained by the institutional and individual practices of a diverse range of economic and social actors and entities. Further, segregation on community lines cannot contain strife and violence. It merely shifts conflict elsewhere, and may over time even aggravate it because those who live in ghettoised neighbourhoods do not learn about different cultures and end up demonising other communities.[82] The overlapping as well as crosscutting stratifications of class, community, education, health, and employment outcomes that the data reveals underline the fact that segregation is multifaceted and can have overall negative implications for society as a whole.

Considering the complexities of disadvantage underlying 'private acts' of housing and other forms of systemic and systematic horizontal discrimination, the comprehensive legislative track followed in other countries seems an appropriate mechanism of prevention. It may appear that the policy route, through the crafting of a well-designed 'statutory scheme' built on local accountability, would be the best way to tackle this problem in India as well.[83] However, there has been political ambivalence over equal opportunity legislation in India. Contradictory moves, such as by Gujarat, instead appear to authorise housing segregation. Moreover, the entrenched historical burden of suspicion and stigma borne by Muslims since partition is not easily erased. Further, the rising sway of majoritarian politics, with electoral successes increasingly linked to deepening lines of religious hostility and violence,[84] may well preclude housing discrimination of this kind from being readily placed on the legislative agenda anytime soon.

Therefore, it appears apposite to return to the idea of demosprudence. This notion seeks to capture the potential of certain legal practices to spark or target social movements, and thereby to become the facilitators of policy change.[85] Demosprudence may be understood as the collective action of proponents of justice on behalf of disadvantaged groups working with legal professionals to influence social change, by pushing for constitutional interpretations that

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[82] 'Naveen Bharathi: Fractal Urbanisation and Residential Segregation in Liberalising India' (*Mittal South Asia Institute*, 14 November 2019), <https://mittalsouthasiainstitute.harvard.edu/2019/11/naveen-bharathi-fractal-urbanization-and-residential-segregation-in-liberalizing-india/> accessed 1 October 2021.

[83] Interview with Tarunabh Khaitan (n 9).

[84] See, for instance, Pradeep Chhibber and Harsh Shah, 'Electoral Wins or Religious Peace?' *The Hindu* (2015) <https://www.thehindu.com/opinion/op-ed/electoral-wins-or-religious-peace/article7220396.ece> accessed 24 September 2021.

[85] Lani Guinier and Gerald Torres, 'Changing the Wind: Notes toward a Demosprudence of Law and Social Movements' (Cornell Law Faculty Publications 2014) 1212 <https://scholarship.law.cornell.edu/facpub/1212> accessed 12 October 2021.

enhance democracy.[86] Recollecting the significance of *Shelley v Kraemer* (and later *Brown v Board of Education*)[87] in catalysing civil rights struggles in the United States with its deep-rooted racial divide, it is argued that the dislodgement of equally ingrained and historically-determined social divisions as spoken of in this paper may require a judicial nudge. It is true that the Supreme Court has so far held to a narrow understanding of the application of constitutional law to exclusionary housing covenants, and in general to the domain of private acts. At the same time, the Indian judiciary practised demosprudence much before Guinier first spoke of the term in restricted association with judicial 'oral dissents'.[88] The space created by the Supreme Court for such 'dialogic' adjudicative co-governance[89] is expansive and includes the labour of a range of legal and social actors in facilitating democratic change. Thus, rather than await decisions in specific appeal matters, the paper has pointed to social science and legal scholarship now available in this regard. This scholarship may be marshalled and honed, if one might so put it, as a 'juridical trigger'. Just as in the *Vishaka* case, women's groups came forward to forge a plea to the Supreme Court against workplace sexual harassment in the name of the fundamental rights of women, what is asserted here is the possibility (and the necessity) for appropriately crafted social action litigation to emerge.[90] Such litigation would call forth a fuller Supreme Court interpretation of Article 15(2) and its relationship to Article 21,[91] and uphold constitutional morality against diverse forms of horizontal discrimination.

Where societal prejudices are strong[92] and political will is wavering, a judicial pronouncement or set of guidelines could fill the gap in the existing legislation.[93] It could also stir a wider conversation in civil spaces of activism and in the media on the costs of conflict and segregation.[94] It would provide "a powerful pedagogical opportunity to open up space for deliberation and engagement" among a range of 'non-judicial actors' including members of

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[86]   This understanding relies on ibid.

[87]   1954 SCC OnLine US SC 44, 98 L Ed 873, 347 US 483 (1954).

[88]   This is argued by Upendra Baxi, 'Law, Politics, and Constitutional Hegemony: The Supreme Court, Jurisprudence and Demosprudence' in S Chaudhry, M Khosla and PB Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 94-109.

[89]   ibid.

[90]   ibid. I follow Baxi in using the term social action litigation.

[91]   For an argument framed in the context of Article 21, see 'Discrimination in Housing' (*Frontline*) (8 July 2016) <https://frontline.thehindu.com/the-nation/discrimination-in-housing/article8745 826.ece> accessed 11 October 2021.

[92]   For instance, Bhat (n 33); Bhat and Lone (n 33); Dharni (n 33).

[93]   In the US, following *Shelley v Kraemer* and the civil rights movements, policy was enacted in 1968 with regard to fair housing.

[94]   For instance, see Gupta (n 16); AR Desai, 'Caste and Communal Violence in Post-Partition Indian Union' in AA Engineer (ed), *Communal riots in post-Independence India* (Sangam Books) 10-32.

think tanks,[95] politicians, and leaders of all kinds as well as ordinary people. It would further enable the commencement of the labour of persuasion required for introducing and stabilising policy change. In doing so, demosprudence would take seriously Ambedkar's understanding that structural inequalities threaten individual rights and political freedoms, and impart meaning to his social and economic democracy. It could also lay the groundwork for that third elusive constitutional promise – fraternity – an idea which, I have argued in detail elsewhere,[96] is particularly pertinent in the context of residential segregation. Indeed, for Ambedkar, democratic citizenship on the ground is fraternity. That, in turn, is nothing other or less than dwelling together, or neighbourliness in its fullest sense as a "mode of associated living, of conjoint communicated experience"[97] and shared interactions in the 'vital processes' of everyday life.[98]

VI. CONCLUSION

In conclusion, the paper has employed a sociological lens to critically query the interpretation of housing agreements as 'private acts' not subject to fundamental rights application in Indian jurisprudence. This notion perceives such acts as freely entered into by persons for their own benefit. However, the paper has uncovered that with regard to the renting and owning of urban property, Muslims are at the receiving end of structural and pervasive patterns of discrimination and inequality, which disadvantage them not only as individuals but also as a despised and stigmatised group. Moreover, as the paper documented, recent research has begun to show the negative effects of housing discrimination on a range of social outcomes including consumption levels, education, health, and the like. This clearly has serious implications for a community that is already economically precarious and socially and politically vulnerable, and calls for legal or legislative redress. While points of view have ranged on either side of these options,[99] it has been argued here, recollecting the US civil rights experience, that political and legislative action may require

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[95] Guinier quoted in Brian Ray, 'Demosprudence in Comparative Perspective' (2011) 47 Stanford Journal of International Law 111.

[96] Rowena Robinson, 'In Search of Fraternity: Constitutional Law and the Context of Housing Discrimination in India' (2015) 50(26-27) Economic and Political Weekly 54.

[97] BR Ambedkar, 'Annihilation of Caste' in Vasant Moon (ed and compiled), *Dr. Babasaheb Ambedkar Writings and Speeches, Volume 1* (Government of Maharashtra 1979) 57 <http://www.mea.gov.in/Images/attach/amb/Volume_01.pdf> accessed 17 December 2017. In this, he is influenced by and is quoting John Dewey. See John Dewey, *Democracy and Education* (Macmillan 1916) 93.

[98] BR Ambedkar, 'Philosophy of Hinduism' in Vasant Moon (ed and compiled), *Dr. Babasaheb Ambedkar Writings and Speeches, Volume* 3 (Government of Maharashtra 1987) 44 <http://www.mea.gov.in/Images/attach/amb/Volume_03.pdf> accessed 3 January 2018.

[99] As the paper has shown, Interview with Tarunabh Khaitan (n 9) argues for specific public policy legislation while Bhatia (n 79 and n 62) suggests that judges can rest on Article 15(2) of the Constitution to adjudicate discrimination cases.

a judicial nudge. Thus, the paper has called on the notion of demosprudence. The paper has contended that effectively honed social action litigation spurred by scholars and legal and social activists may elicit a Supreme Court reconsideration of *ZCHS*, and a clearer judicial pronouncement upholding fundamental rights against various forms of horizontal discrimination. This could in turn perhaps trigger public policy legislation and enable wider democratic change.