Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach

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Abstract
This article explores horizontal non-discrimination rights under the Constitution of India (Indian Constitution). The Indian Constitution is unique in that it expressly prohibits private discrimination on the grounds of sex, race, caste, religion, etc. for the purpose of, inter alia, “access to … shops” (Article 15(2)). The article argues that a historically grounded understanding of the word “shops”, in the context of the transformative purposes of the Indian Constitution, necessitates a broad reading that covers all private economic transactions where goods and services are offered to the public at large. Furthermore, seemingly contrary Supreme Court precedent, if it is constitutionally justifiable, must be restricted to its own facts. In sum, Article 15(2) of the Indian Constitution provides a radical constitutional remedy that is directly horizontally applicable to private conduct, and goes far beyond remedies developed in other jurisdictions, which have often needed to turn to legislation in order to adequately combat private discrimination in the economic and social sphere.

In early 2014, it was reported that the Indian government was considering setting up an “Equal Opportunities Commission” (EOC).¹ This move was based upon the Sachar Committee Report of 2006, which had found that the Indian Muslim community was significantly disadvantaged along a host of parameters, including access to social and physical infrastructure, standards of living, and literacy. According to the Report, the task of the EOC, like its counterparts in the United States and

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¹ Press Trust of India, “Govt to Set Up Equal Opportunities Commission for Minorities” The Times of India (20 February 2014) and The Hindu (20 February 2014); Express News Service, “Cabinet Clears Equal Opportunities Panel” The Indian Express (21 February 2014).
European countries, would be – *inter alia* – to check discrimination against minority communities in employment, housing, accommodation, and so on.

After the 2014 election, plans for an EOC appear to have been shelved for the foreseeable future. In this article, I will propose a constitutional solution to the problem that necessitates the existence of an EOC. This is the problem of horizontal discrimination, i.e., discrimination suffered by private entities at the hands of other private entities (individuals or corporations), on the basis of constitutionally proscribed markers: sex, race, caste, religion, place of birth, etc. I will argue that in contrast to countries like the United States, where horizontal discrimination had to be tackled by federal government legislation, the *Constitution of India* (Indian Constitution or Constitution) contains a unique set of tools to address this issue.

Horizontal discrimination can take a variety of forms: restrictive covenants, denial of access to public spaces, exclusion from economic transactions, and so on. These disparate ways of discrimination all involve, in some manner, a clash between the associative rights of private individuals (including their right not to associate with others, and to exclude others from associating with them) on the one hand, and the rights of individuals and groups against non-discrimination and to full participation in the economic and social life of the community on the other. In this article I shall examine horizontal discrimination through the lens of one particularly invidious avatar: housing discrimination on the basis of religion. This is partly because housing discrimination has become a pervasive feature of the Indian social landscape in recent times; but more importantly, because the Indian Supreme Court’s engagement with horizontal discrimination arose in the context of a housing case, and provides us with a point of departure from which to analyse the constitutional questions at issue, and how the Court dealt with them.

At first blush, housing discrimination appears to be a straightforward violation of Article 14 of the Indian Constitution, which guarantees the equal protection of laws, and Article 15(1), which guarantees non-discrimination on the basis of, *inter alia*, caste and religion. Of course, matters are complicated by the fact that most housing societies are private, while the equality and non-discrimination guarantees of Articles 14 and 15(1) are addressed to the State. This is not a problem unique to

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5. For example, Article 19(1)(c) of the *Constitution of India* expressly guarantees the freedom of association.
India, since constitutional rights in modern democracies are primarily (although by no means exclusively) enforceable against the State.

Is there a remedy? In the first part of this article, I examine various possible solutions to the problem, by looking to the decisions of other constitutional courts (I). I then examine the greatest obstacle that lies in the way of similar legal developments in India – the 2005 Supreme Court decision in Zoroastrian Cooperative – and argue that its reach must be narrowly limited to its specific factual matrix (II). I go on to analyse the Supreme Court’s landmark 2011 decision in IMA v Union of India, and argue that contra Zoroastrian Cooperative, it lays the groundwork for a constitutional, horizontally applicable civil rights jurisprudence, grounded in an expansive reading of Article 15(2) of the Constitution, which goes beyond the solutions advanced in other jurisdictions (III). I end by discussing how this interpretation, a seeming departure from the principles of classic political and constitutional liberalism, is philosophically and historically justified, given the transformative character of the Indian Constitution (IV).

I do not here intend to join the theoretical debate on horizontality in constitutional interpretation, or to examine the various modes in which horizontality operates. The goal of this article is to excavate the Indian Constitution’s unique approach towards the problem of horizontal discrimination (which has received next to no attention in comparative constitutional literature), and to justify it within the context of its transformative purpose and values.

### I. RESTRICTIVE COVENANTS IN COMPARATIVE CONSTITUTIONAL LAW

Housing discrimination is often carried out through “exclusionary covenants”, which restrict the sale, transfer, or occupation of real property on the bases of race, caste, religion, ethnicity, sex, nationality, or other such grounds that are prima facie discriminatory. Exclusionary covenants present a troublesome legal problem, because they fall at the intersection of the private right of contract (which capitalist societies and liberal constitutions consider significant) and the pernicious social evil of discrimination. Often, the groups at the receiving end of the exclusionary covenant have, until recently, been formally treated as second-class citizens in law and/or fact, and only lately been legally emancipated. Exclusionary covenants then become a substitute for official state-perpetrated discrimination, and other direct forms of suppression that are no longer permitted by law.

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13. Cases dealing with restrictive covenants, as we shall see below, have involved blacks in the United States and South Africa, and Jews in Canada and the United Kingdom.
A survey of comparative constitutional jurisprudence (drawn from jurisdictions that broadly respect the freedom of contract, while also enshrining a constitutional guarantee of non-discrimination) reveals that courts have been acutely aware of this problem, and have devised creative solutions. Arranged along a spectrum of horizontality between one end where the sanctity of contract is given great deference, to the other, where the constitutional value of non-discrimination is accorded priority, three distinct solutions emerge. They are: non-enforcement; invalidation on the contractual grounds of vagueness and public policy; and invalidation on the ground of public policy as drawn from the Constitutional guarantee of non-discrimination. These solutions track each jurisdiction’s differential understanding of the relationship between private actors, private law, and the Constitution, which in turn is often drawn from specific textual provisions.\textsuperscript{14} While it is beyond the scope of this article to locate their approach to housing discrimination within these broader jurisdiction-specific philosophies of horizontality,\textsuperscript{15} let us nonetheless consider the specific findings that these Courts have returned when cases of housing discrimination have been before them.

\textbf{A. Non-Enforcement}

\textit{Shelley v Kraemer}\textsuperscript{16} is an American Supreme Court decision concerning a covenant that prohibited certain property from being “occupied by any person not of the Caucasian race”, and signalled an express intent to exclude “people of the Negro or Mongolian race”. Notwithstanding this, a parcel of land was sold to the Shelleys, the petitioners, who were black. The respondents (parties to the original restrictive covenant) invoked the restrictive covenant to argue that this contract was void. The petitioners argued, on the other hand, that the covenant violated their \textit{Fourteenth Amendment} constitutional right to the equal protection of laws.\textsuperscript{17}

At the outset, the Court clarified that “the \textit{Fourteenth Amendment} erects no shield against merely private conduct, however discriminatory or wrongful.”\textsuperscript{18} Consequently, it refused to invalidate the covenant. Nonetheless, here it was the Court, one wing of the State, that was being asked to enforce the terms of the exclusionary covenant.\textsuperscript{19} As the Court observed, because:

\begin{quote}
the owners of the properties were willing sellers; and contracts of sale were accordingly consummated ... it [was] clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.\textsuperscript{20}
\end{quote}

\begin{footnotes}


17. \textit{US Constitution}, amend XIV.


\end{footnotes}
Consequently, this was a clear case of state action, and the Court was able to find that judicial enforcement of the exclusionary covenant would violate the constitutional requirement of equal protection of laws. The covenant was held to be unenforceable.

*Shelley* has been criticized by commentators on the ground that it invalidated mere State acquiescence in a voluntary, private system. Laurence Tribe, however, provides an alternative, narrower reading. He argues that *Shelley* can be distinguished from ordinary cases of State acquiescence, such as the judicial enforcement of facially neutral trespass laws to allow a bigoted homeowner from excluding only blacks from his property. In *Shelley*, on the other hand, the exclusionary covenant created an exception to the general property law principle of no restraints upon alienability, an exception that was founded in racial discrimination. Consequently, *Shelley* was not a case of the State facilitating permissible private discriminatory conduct, but an instance of active State discrimination. This distinction, as we shall subsequently see, is crucial in assessing the Indian position on restrictive covenanting.

**B. Contractual Solutions – Vagueness and Public Policy**

In *Re Drummond Wren*, a Canadian case, a restrictive covenant prohibited land from being sold to “Jews or persons of objectionable nationality.” It was argued before the Ontario High Court that this exclusionary covenant was void as it was in violation of public policy, a common law exception to the freedom of contract. In order to determine the content of public policy, Justice Mackay went into international instruments like the *San Francisco Charter* (to which Canada was a signatory), the *Atlantic Charter*, and local legislation such as *The Racial Discrimination Act* and the *Insurance Act*, all of which condemned discrimination, both public and private. Consequently, he held that:

> nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups … than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas.

Thus, the crucial point was that the exclusion of certain groups from geographical areas would, in a stratified society, invariably mean their exclusion from economic and social life. Ghettoization could not but lead to discrimination and deepening inequality, both of which were contrary to public policy. Therefore, Justice Mackay held the covenant void. He also held it void on more familiar common law grounds, for restraining the freedom of alienation, as well as being impermissibly vague and uncertain.

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23. *Re Drummond Wren* [1945] OR 778 (Ont HC).
25. Ibid at para 30.
It was this last, more conservative argument, that was picked up by the Canadian Supreme Court six years later in *Noble v Alley*. At issue was an exclusionary covenant that prohibited the sale of land to “any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood.” The majority held the covenant void. Three judges specifically held it void for uncertainty, holding that “it is impossible to set such limits to the lines of race or blood as would enable a court to say in all cases whether a proposed purchaser is or is not within the ban.”

C. Constitutional Public Policy

Lastly, consider the 2010 South African case of *The Curators v University of Kwa-Zulu Natal*. At issue was a will creating a charitable trust, which was to be administered solely for the benefit of white women seeking a tertiary education. The will was defended on the ground that the freedom of testation – as an aspect of the freedom of property – was a fundamental right guaranteed by Section 25 of the Constitution of the Republic of South Africa. Both the High Court and the Supreme Court of Appeal rejected this argument, and invalidated the offending provision. In its decision, the Supreme Court of Appeal referred to the equality provisions in the *South African Constitution*, and the Preamble of the 2000 Promotion of Equality Act, which called for “the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy.” That *Act, inter alia*, prohibited racial discrimination in educational institutions, leading the Court to observe that the principle of equality obtained even in person-to-person relations.

The Court then held – in language reminiscent of German Constitutional doctrine – that “public policy ‘is now rooted in our Constitution and the fundamental values it enshrines, thus establishing an objective normative value system ....’”. In other words, a Constitution not only lists out a set of rights and corresponding State obligations, but also expresses an objective order of values (e.g., of dignity, equality, etc.) that may be invoked not only against State action, but also have a “radiating effect”, serving as background interpretive principles for adjudicating private law disputes. In the famous *Luth* case, the German Constitutional Court had held: “every provision of private law must be compatible with [the Basic Law’s] system of values, and every such provision must be interpreted in its spirit.”

The South African Court directly linked public policy with the objective order of values embodied within its Constitution, observing that “[i]n considering questions of

27. *Noble v Alley* [1951] SCR 64.
28. *Ibid* at 70, following *Clayton v Ramsden* [1943] 1 All ER 16.
29. *Curators v The University of Kwa-Zulu Natal* [2011] 1 B Const LR 40 (SCA) [*Curators*].
32. *Ibid* at para 38 (quoting *Napier v Barkhuizen* [2006] 4 S Afr LR 1 (SCA), para 7 [*Napier*]).
34. BVerfGE 7 198.
public policy ... the Court must find guidance in ‘the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism’.” These public policy concerns, grounded in constitutional values, overrode the freedom of testation, and did not unjustifiably deprive the individual of his property.

Let us sum up. Exclusionary covenants are private contractual acts. Nonetheless, for reasons explained above, there is a strong social interest in preventing them when they are used to discriminate against historically marginalized and subordinated groups. Because of the respect for private contracts, and a general hesitation to apply fundamental rights horizontally against individuals, Courts in various jurisdictions have not directly held them constitutionally invalid, but have searched for other remedies. These include judicial non-enforcement, weak contractual remedies such as vagueness, and stronger contractual remedies such as voidness for public policy, where public policy may be dawn from constitutional values. Thus, the Constitution is not invoked to invalidate private contractual acts, but is invoked indirectly to interpret private law in a manner that achieves the same result.

II. ZOROASTRIAN COOPERATIVE AND ITS DISCONTENTS

The template of remedies discussed above, which are admittedly grounded in each jurisdiction’s constitutional text and doctrine, finds parallels in various aspects of Indian jurisprudence. The fundamental rights chapter (subject to a few specific exceptions) is vertically applicable against the State, narrowly defined. But akin to Shelley (and going far beyond), the Indian Supreme Court has found State action to be implicated in the State’s failure to protect the rights to equality and personal liberty by passing meaningful legislation to deal with sexual harassment in private workplaces. Akin to Canada, it has expanded equity-based public policy exceptions to the law of contract. And akin to South Africa and Germany, it has interpreted and modified common law to bring it in consonance with constitutional values, by reading the New York Times v Sullivan standard into Indian defamation law. Consequently, when dealing with horizontal discrimination and restrictive covenants, Indian constitutional jurisprudence would allow the Court to place itself on any of the points of the spectrum discussed above.

With this in mind, let us now turn to the locus classicus in India, Zoroastrian Cooperative v District Registrar, a 2005, 2-Judge decision of the Supreme Court. The facts of this case closely resemble Shelley v Kraemer. The Zoroastrian Cooperative Housing Society was a registered society with its own bye-laws, under its parent legislation, the Bombay Cooperative Societies Act. According to bye-law

35. Curators, supra note 29 at para 38(quoting Napier, supra note 32, para 7).
37. See infra s II.
No 7 read with No 21, only Parsis (adherents of Zoroastrianism) could become members of the Society. Since housing shares could be transferred only to members, effectively only Parsis could buy plots under the aegis of the Cooperative Society. Nonetheless, Respondent No 2 (a member) entered into negotiations with Respondent No 3, a (non-Parsi) builders’ association, to sell them its property. After a series of decisions in the Tribunals, a High Court single bench and a High Court division bench, all essentially holding that the bye-laws were invalid as a restriction on alienation of property (an argument used, as we have seen, by the Canadian courts), the matter came before the Supreme Court. Note that the decisions of the lower courts reflect Tribe’s understanding of Shelley: this was not merely State facilitation of a private arrangement, but an active departure from the general principle against restrictions on alienability in favour of constitutionally impermissible, religion-based discrimination. As we shall see, however, this distinction was (unfortunately) lost upon the Court.

The Cooperative Society argued that their private covenant was authorized by the bye-laws of the Cooperative Societies Act, which in turn did not infringe the parent statute. The Constitution had no role to play in adjudicating upon such private conduct. In fact, the Society actually invoked the Constitution to support its conduct. It argued that under Article 19(1)(c) – which guarantees to all citizens the freedom of association – Parsis’ right to association could not be infringed by imposing upon them members they did not wish to accept. It also relied upon Article 29, which guaranteed minorities the right to preserve their own culture. On the other hand, the Respondents raised a familiar argument: this kind of restrictive covenant was invalid because it violated public policy, as drawn from various constitutional provisions (in particular, Article 15 and other non-discrimination clauses).

The Court embarked upon an elaborate history of cooperative society legislation in India, finding that “running right through these enactments [is the] the concept of restricted membership in a co-operative society.” The reason for this, the Court found, was that as far as a housing society is concerned, “there should be a bond of common habits and common usage among the members … in India, this bond was most frequently found in a community or caste or groups like cultivators of a village.”

This reasoning is problematic, because one of the whole purposes of the Constitution, as reflected in Article 15(1)’s non-discrimination clause, was to ensure that the invidious modes of identification such as caste, responsible for some of the worst forms of discrimination in Indian history, were to be made legally irrelevant as

41. Ibid, art 29.
42. Zoroastrian Cooperative, supra note 39 at para 9.
43. Ibid at para 10.
44. Article 15(1) of the Constitution prohibits the State from discriminating against citizens on grounds of, inter alia, caste. The framers’ preoccupation with caste is reflected in other parts of the Constitution as well. Article 17 prohibits “untouchability”, the most invidious avatar of caste-based discrimination. Article 25(2)(b) carves out an exception to the principle of religious freedom by allowing the State to make laws that compel Hindu temples to admit entry to all “sections” of Hindus.
far as possible. In selectively referring to caste as a mode of creating harmonious internal bonds, the Court, I suggest, erred. The error was then compounded when the Court examined the public policy argument, and unlike the decisions of other jurisdictions, rejected it in the following terms:

The concept of public policy in the context of the Cooperative Societies Act has to be looked for under the four corners of that Act and in the absence of any prohibition contained therein against the forming of a society for persons of Parsi origin, it could not be held that the confining of membership as was done by bye-law No. 7, was opposed to public policy.  

This reasoning, however, in unconvincing. Following established principles of common law, the Indian Contract Act, under Section 23, has a public policy exception46 that can be invoked to invalidate contracts. Courts have utilized this to hold void, for example, marriage brokerage contracts47 and letting a property for sex work48 – neither of which are found within the “four corners” of the Contract Act. In Delhi Transport Corporation v DTC Mazdoor Congress, the Supreme Court had observed:

in the absence of specific head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest … declare such practice or rules that are derogatory to the constitution to be opposed to public policy.49

This makes perfect sense, since the whole point of a public policy clause is to serve as an exception to the enforcement of statutory rules. To look for public policy within the statute whose provisions are impugned is viciously circular. Matters, admittedly, would have been different if there had been an express statutory provision, designed to carve out an exception to the operation of public policy. The Cooperative Societies Act, however, did no such thing. Consequently, the Court was incorrect to equate statutory policy (the policy embodied in the statute) with public policy (a ground for invalidating contracts).

The Court then responded to the constitutional challenge on the ground of non-discrimination, holding that the Society’s bye-laws were in the nature of the articles of association of a company – not, that is, like a statute, but only “binding between the persons affected by them.”50 In other words, rejecting the radiation approach of indirect horizontality, followed in Germany and South Africa, and in its own cases on defamation law, the Court held that a private, contractual agreement is not subject to general fundamental rights scrutiny, but only under the parent legislation (if it was a

47. See the observations in Sargunam Ammal v Jayarama Padayachi (1994) 1 LW 139, following Gobindaswami Dasi v Radha Ballabh Dasi (1910) 15 CMN 205.
48. Held as early as Bani Muncharam v Regina Stanger ILR 32 Bom 581.
50. Ibid at para 15.
contract, it would be the *Indian Contract Act*; here, it would be the relevant *Cooperative Societies Act*). The Court went on to make the contract analogy even clearer, by holding that the fundamental rights chapter did not in any way interfere with citizens’ rights to enter into contracts. Responding to the contention that the Constitution’s guarantee of non-discrimination should be held to prohibit certain kinds of contracts, which directly discriminated on proscribed ground the Court’s answer was somewhat elusive:

Running through the Cooperative Societies Act, is the theory of area of operation. That means that membership could be denied to a citizen of this Country who is located outside the area of operation of a society.\(^{51}\)

This, of course, in its own right, makes perfect sense, since limiting membership by area does not discriminate on any prohibited head, and is also, not coincidentally, perfectly in consonance with the point of housing societies. *That* logic, however, says nothing about restrictive covenancing based on constitutionally prohibited grounds such as sex or religion. This also explains why the Court’s numerous examples of other Cooperative societies – of agricultural workers, labourers, and even vegetarians\(^ {52}\) – are irrelevant, because there again, there is no discrimination on the basis of a prohibited category.

On these grounds, then, the Court refused to find the agreement void; but then, it went even further, holding that:

> It is also not open to the authorities under the Act to relieve [the contractual party] of his obligations in the guise of entering a finding that discrimination on the basis of the religion or sex is taboo under the Constitution in the context of Part III thereof.\(^ {53}\)

In this, the Court went even beyond the weak *Shelley v Kraemer* doctrine in not just refusing to invalidate the agreement, but even requiring State enforcement of it – and held a Part III challenge to the contrary *irrelevant*. This is surely incorrect, because even if it is argued that the Court is not the State for the purposes of Part III, statutory authorities most definitely are. Keeping in mind Tribe’s critique of *Shelley*, it is at least arguable that in requiring the State, then, to directly enforce a covenant that discriminates on the basis of a prohibited Article 15 category, the Court effectively compelled it to perform an unconstitutional action.

In sum, therefore, I suggest that the core reasoning in *Zoroastrian Cooperative* is flawed on two grounds: the Court was incorrect in conflating the validity of the restrictive covenant with its enforcement; and it was incorrect in conflating public policy with statutory policy.

Consider, however, the Court’s ancillary invocation of Article 19(1)(c), which guarantees the freedom of association, as an independent constitutional reason to support the Society’s claim. As we have seen above, part of the Court’s public policy

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52. *Ibid* at para 33.
arguments, indeed, appear to turn upon the unconstitutionality of requiring persons to “associate” with others that they do not want to associate with, which – according to the Court – would have been the outcome had the exclusionary covenant been left unenforced.

There is, however, a problem with this argument. The statutory right to contract – which is what the bye-laws of the Cooperative Societies Act authorized – is not the same as the constitutional freedom of association. This is self-evident, because the Indian Contract Act places numerous restrictions upon the freedom to contract that go beyond the permissible limits upon the constitutional freedom to associate under Article 19(4). More importantly, a quick glance at the Constituent Assembly Debates reveals, unsurprisingly, that the freedom of association was considered to be an essential aspect of personal civil liberty, akin to the freedom of speech and the freedom of movement, contractual rights being nowhere mentioned. Historically, the freedom of association has been about protecting the rights of labour unions, religious minorities, and other unpopular groups to organize and defend their rights or their ways of life, as the case may be. The important Indian cases have also understood the freedom of association to be about such purposes.

This confusion went to the heart of the Court’s judgment, when it observed:

An aspirant to membership in a co-operative society, is at arms length with the other members of the society with whom he enters into the compact or in which he joins, having expressed his willingness to subscribe to the aims and objects of that society. In the context of Section 23 of the Contract Act, something more than possible or plausible argument based on the constitutional scheme is necessary to nullify an agreement voluntarily entered into by a person.

The reasoning is flawed because insofar as the Court speaks about arm’s length transactions and holds membership in a Cooperative Society akin to a contract, Article 19(1)(c)’s constitutional freedom of association is not in play. But once the Article 19(1)(c) argument fails, we fall back upon the original, flawed statutory-policy-equates-to-public-policy argument. We are therefore faced with the following situation: to the extent that Zoroastrian Cooperative is based on principles of contract law, the two major bases for the decision – public policy and freedom of association – are incorrect. The case, therefore, can be saved only by arguing that it is not, after all, about contract law – and therefore, crucially, is not precedent for the unconstitutionality of unenforceability of exclusionary/restrictive covenants generally – but about something else that elevates it to the level of the constitutional principle of the freedom of association. What might that be?

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54. These limits are restricted to the sovereignty and integrity of India, public order, and morality. Constitution of India 1949, art 19(4).
56. See e.g. NAACP v Patterson 357 US 449 (1958).
57. See e.g. State of Madras v VG Row AIR 1952 SC 196.
I believe that the strongest argument in favour of the covenant is grounded in Article 29 of the Constitution, which the Court incidentally alluded to at the very end of its judgment, when it observed:

it is open to [a] community to try to preserve its culture and way of life and in that process, to work for the advancement of members of that community by enabling them to acquire membership in a society and allotment of lands or buildings.  

Article 29 of the Constitution guarantees the rights of “any section of citizens ... having a distinct language, script or culture of its own ... to conserve [it].”60 This provision, I would argue, helps us to grasp the only possible justification for Zoroastrian Cooperative. While explaining the purpose of the provision during the Constituent Assembly Debates, Ambedkar clarified that it was meant for the protection of communities that were minorities in the “linguistic and cultural sense”.61 Ambedkar’s specific concern was to ensure that groups of people who migrated between provinces could:

keep their connections ... if this protection was not given to them ... and [if] the local Legislature were to deny them the opportunity of conserving their culture, it would be very difficult for [them] to go back to their province and to get themselves assimilated to the original population to which they belonged.62

At the heart of Ambedkar’s formulation, then, that as far as language and culture go, minorities should have the option of refusing to assimilate with the majority group. In independent India, the controversy around cultural and educational rights has focused upon the extent to which minorities may establish and control access to their own educational institutions.63 In Zoroastrian Cooperative, the Supreme Court – arguably – was extending that logic to argue that living together as an exclusive, geographically-bounded community might be another way of preserving the Parsis’ language and culture. Such an argument is known to philosophical literature,64 and is not unfamiliar within the Indian constitutional context: the Fifth and Sixth Schedules to the Constitution, for instance, empower the State to prohibit the sale of certain tribal land to non-tribals.65 In Samatha v State of Andhra Pradesh, the Supreme Court cited sociological studies to note the link between land and the preservation of culture, observing that “tribals had held large tracts of lands as masters and had their own rich culture with economic status and cohesiveness as compact groups.”66

60. Constitution of India 1949, art 29.
62. Ibid.
63. See e.g. Ahmedabad St Xavier’s College v State of Gujarat AIR 1974 SC 1389.
64. See Will KYMLICKA, “The Rights of Minority Cultures: Reply to Kukathas” (1992) 20(1) Political Theory 140 at 140.
65. Constitution of India 1949, Schedules V & VI.
However, if that was the underlying reasoning of the Court, then surely something more was needed: in particular, evidence that central to the preservation of Parsi culture was a distinct way of life, that would be jeopardized by living in physical proximity with non-Parsis. This, the Court made no attempt to establish.

However, even if the Court was justified in invoking Article 29 as the legitimating provision for the exclusionary covenant, then it is important to note that the same constitutional provision limits the nature of the covenants that can take its shelter. There are two essential requirements that must be fulfilled under Article 29. The first refers to whom it applies: a “section of citizens having a distinct language, script or culture of its own”. The second determines what it applies to: conservation of said language, script, or culture. Conceivably, the Parsi community, as a besieged minority, might rely upon the combination of Articles 19(1)(c) and 29, which we discussed above, to argue that living together in groups is a crucial way in which it can preserve its distinct culture. The same argument, clearly, will not apply to exclusionary covenants where these specific circumstances are not present.

The claim of the exclusionary covenant in Zoroastrian Cooperative to not just validity (contra legitimate public policy concerns), but actual enforcement, must surely rest upon this basic idea: insofar as a community believes that the survival of its own set of cultural values qua community depends on its members living together exclusively with each other (and not upon a politically illiberal conception of race/cultural/religious superiority, the eradication of which is the whole point of Article 15), the principles of Article 19(1)(c) and Article 29 are attracted, and the contrary non-discrimination principle of Article 15 is not. In such cases, the exclusionary covenant is both valid, and may be judicially enforced. Of course, the Court must look into whether the claim in question is actually justified as a matter of fact – and in Zoroastrian Cooperative, as I have attempted to argue, it did not do so.67

### III. IMA AND ARTICLE 15(2) OF THE INDIAN CONSTITUTION

I will now argue that in general cases of horizontal discrimination, the Indian Constitution contains the tools to go one step beyond the solutions advanced in other jurisdictions. Article 15(2) of the Constitution, on my proposed reading, will provide a horizontally applicable constitutional remedy for holding racially/religiously restrictive covenants void. Unlike the jurisdictions we have studied, therefore, the Indian Constitution can be brought to bear directly upon the issue of horizontal discrimination, in the sense that it does not just apply to private law (such as the law of contract) that might be at issue in a dispute between two non-State actors, but it applies also to private action.

67. Admittedly, by virtue of the 97th Amendment to the Constitution, passed in 2012, the term “cooperative societies” has been added to Article 19(1)(c) of the Constitution. This does amount to a post facto validation of the Court’s holding that membership in a Cooperative Society is protected by Article 19(1)(c). It does not, however, affect my argument: a fundamental right to the freedom to form cooperative societies does not necessarily imply that every act carried out by a Cooperative Society – including acts that exclude persons from arm’s length economic transactions on the basis of prohibited markers under Article 15(1) (as was the case in Zoroastrian Cooperative) – are ipso facto valid.
Article 15(2) states, in relevant part:

No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to ... access to shops, public restaurants, hotels and palaces of public entertainment ....

In *IMA v Union of India*, decided by the Supreme Court in 2011, the question was whether a private, non-minority higher educational institution that admitted students only on the basis of their scores in an entrance test violated Article 15(2). The claim was based on the disparate impact of test-based admissions programs upon educationally underprivileged castes. But before the Court could even reach that question, it had to decide whether, on its terms, Article 15(2) was attracted in the first place. How did educational institutions fit within “shops, public restaurants, hotels and places of public entertainment?”

The Court held that Article 15(2) was indeed applicable, because educational institutions were covered by the term “shops”. It quoted – and endorsed – Dr Ambedkar’s speech in the Constituent Assembly Debates, where the Constitution’s principal drafter had observed:

To define the word ‘shop’ in the most generic term one can think of is to state that ‘shop’ is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service ... I should like to point out therefore that the word ‘shop’ used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to.

In other words, the Court rejected the standard uses of the word “shop” – that is, a store, “a building or room where goods are stored”, “a building stocked with merchandise for sale”, “a small retail establishment or a department in a large one offering a specified line of goods or services” – in favour of an extremely abstract, rarefied, “generic” usage, to shoehorn educational institutions into the definition.

What is this “generic” meaning, that allows a school to count as a shop? There can be only one answer: a shop, as Ambedkar understood it in 1949, and as the Supreme Court interpreted it in 2011, is any place where an abstract seller offers an abstract thing to an abstract buyer. Or, in other words, a “shop” is merely the concrete expression of the idea of the impersonal, abstract market of the modern liberal-capitalist economy. This is the only way that the Court succeeds in bringing educational institutions within the ambit of 15(2). But note that, once the Court does so, obviously, the reach of “shop” is not limited to educational institutions. If “shop” merely embodies the abstract market, then the reach of 15(2) extends to private economic market transactions generally, and not just the business of education. And

69. Indian Medical Association v Union of India (2011) 7 SCC 179.
70. Ibid at para 113.
71. All these definitions may be found in the Merriam-Webster Dictionary, online: Merriam-Webster <http://www.merriam-webster.com/dictionary/shop>.
Covenants for the lease of property are examples *par excellence* of such transactions. The logic of *IMA v UoI*, therefore, inescapably brings such covenants under Article 15(2), which applies horizontally. If such these covenants discriminate against persons on prohibited grounds – race, religion, sex, etc. – they are unconstitutional.

Note that this conclusion is not as radical as it sounds. While we have argued for a broad reading of the word “shops”, clearly, its scope is not limitless. The word itself, which indicates a commercial relationship, as well as Ambedkar’s focus on “terms of service”, suggests that Article 15(2) is limited to economic transactions (which, in any event, in accordance with classical economic theory from the time of Adam Smith, are supposed to take place at arm’s length). It would not apply to non-economic, associative relationships. For instance, if I wanted to sell or supply certain goods or services on the market, Article 15(2) would apply to prohibit me from discriminating on the basis of the proscribed markers; but if I wanted to gift the same goods or services to someone, it would not. Apart from the nature and history of the word “shops”, it must also be noted that a broader mandate for the intervention of Article 15(2) would also run up against Article 19(1)(c) of the Indian Constitution, which, as we have seen above, guarantees the freedom of association. Restricting the scope of 15(2) to commercial relationships is one way of harmoniously reading the two provisions.

Furthermore, there are good philosophical reasons for this: as Tarunabh Khaitan has recently argued – and as cases from the United States and Canada demonstrate – the imperative of non-discrimination has to be balanced against the legitimate right to autonomy in private relationships. According to Khaitan, therefore, it is only certain kinds of private relationships that discrimination law should reach (e.g., relationships of service providers and consumers, landlords and tenants, etc.). The criterion for determining this is the extent to which such relationships have a “public character”, as well as the extent to which they can potentially affect peoples’ ability to lead a dignified life by cutting off access to important physical and social infrastructure. And, as we shall see in the next Section, the rationale for applying – and limiting – the scope of Article 15(2) to economic transactions of a certain type is grounded in some unique aspects of Indian constitutional and political history that speak to precisely this concern.

**IV. “SHOPS”, HORIZONTAL DISCRIMINATION, AND THE TRANSFORMATIVE CONSTITUTION**

Is there *any* warrant for the Court’s reading of Article 15(2)? I will try to argue that there is. To start with, let us consider the most basic objection: the constitutional text. If the framers wanted to apply Article 15(2) to all market transactions, why did they not...
simply say so? Why did they use concrete terms – and not just one concrete term, but shops, restaurants, hotels – to express the abstract concept of the market? To answer that question, let us examine the history and circumstances under which this provision was came into being.

The meaning of “shops” was debated in the Constituent Assembly on the 29th of November, 1948. Shri Nagappa expressed a wish that the clause could have been made “more expansive and explanatory”, and by way of clarification, asked specifically whether “shops” included not just places where goods were bought, but also places where services were contracted for. “When I go to a barber’s shop or a shaving saloon,” he observed, “I do not buy anything concrete, but I purchase labour.” The debate then turned to a host of private, discriminatory practices, the amelioration of which was the objective of Article 15(2), as a whole (not simply as the sum of its isolated terms). Indeed, Shibban Lal Saksena objected to the provision precisely on the basis of its far-reaching character, one that would compel Hindus to go against their religious (as well as casteist) practices involving food. In his words:

I may also point out the revolutionary character of this article. I know that there are hundreds of Hindu shops where food is served to Hindus only. Food is a matter where Hindus have got special habits and they generally will not allow anybody to enter the place where they eat food. I think this is a very serious thing because henceforth it will be a fundamental right of every citizen to enter any Hindu Hotel. Anybody can now claim entry to any place where food is sold. I therefore think that we must prepare the ground to give effect to this change which is of a far-reaching character.

76. Constitutional interpretation often requires attempting to decipher whether a generally worded term covers a concrete situation (e.g., does the “equal protection clause” of the American Constitution mandate desegregation?), and – as in this case – vice versa. An interesting way of understanding such situations is provided by Professor Jed Rubenfeld in his book, Revolution by Judiciary. Rubenfeld proposes the following hypothetical: Odette is married to Swann, and cheats on him with Duke. Ashamed, she vows that she will never deceive Swann again. This vow – or “commitment” – is generally worded. Rubenfeld then argues that the context in which this commitment was made implies that not-sleeping-with-someone-else is the paradigmatic case of deception – i.e., no interpretation of “deception” can fail to take into account the central act that led Odette to make this vow. This makes sense, because ultimately, what Odette agonized about was not sleeping with Duke in itself, but that in doing so, she betrayed Swann’s trust. This explains why she framed her vow in general terms. Jed RUBENFELD, Revolution by Judiciary (Cambridge: Harvard University Press) at 104 – 121.

Let us now reverse the hypothetical. Ashamed and mortified by her act, Odette is asked by a friend, “what did you do last night?”, to which she replies: “I slept with Duke. I’m utterly ashamed. I vow I’ll never do that again.” Now, a few months later, Swann is away, and at a house-warming, Odette finds herself attracted to Marcel. She says to herself, “Well, all I did was vow never to sleep with Duke again. But this is Marcel. So my vow remains unbroken.” Nobody will accept this reasoning. This is because if Odette’s vow is to make any sense, it must be understood as expressing some kind of principle. Odette made her promise because she saw something wrong in what she had done, and the wrongness of the act – sleeping with Duke – lay not in it being Duke, or a man with blue eyes, but her breach of Swann’s trust. Thus, although her vow was framed in specific language, as an immediate response to a situation, its reach was not so. Again, the core idea is that we take Odette’s vow to be grounded in reason – and embodying a principle. And to understand what the principle is, we must study the context and circumstances in which her vow, or commitment, was made. This shows that in certain situations, history tells us that a principle framed in concrete terms nonetheless has broader applications that go beyond the specific context in which it was framed.


78. Ibid.

79. Ibid [emphasis added].
Ambedkar then answered Sri Nagappa in the quotation that the Supreme Court in *IMA v UoI* extracted – about “shop” being used in its “generic” sense. Specifically – and this the Supreme Court did not extract – Ambedkar was asked whether “shop” included a doctor and a lawyer’s chambers. His answer:

> it will include anybody who offers his services … the word ‘shop’ used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to.⁸⁰

The debate made it clear, therefore, that the word “shop” was not understood in its narrow, spatial sense, but in a broader sense of a place defined by an arm’s length transaction on the basis of previously agreed terms and conditions. This is buttressed by the fate of a proposed amendment by KT Shah. Shah wanted to replace the two sub-clauses of the horizontal non-discrimination provision with a single omnibus clause, focused on public spaces. His amendment sought to protect “places dedicated to the use of the general public”, such as theatres and cinemas, parks, gardens or museums, etc.⁸¹ Shah’s amendment was rejected, making it clear the article was not upon guaranteeing access to space, but ensuring that nobody was excluded from participation in the basic economic life of the community – a concept that, in outcomes, would often overlap with a spatial idea of the public, but was very different in its thrust and intent.

And lastly, when, on 22 November 1949, towards the very end of the drafting process, Ajit Prasad Jain discussed the provision, he did so by grounding it in a long history of horizontal, societal, and economic discrimination against women, scheduled castes, untouchables, and other groups that had blighted Indian society.⁸² We can thus see that both the supporters and the opponents of what eventually became Article 15(2) were united in its understanding that the purpose of the provision – as expressed through its language – was to reverse this history, a history in which a part of society was systematically excluded from the normal functioning of economic life. In this context, *IMA v UoI*’s interpretation no longer sounds so untenable.

To understand what the framers of the Indian Constitution were getting at, let us deepen our analysis further. As Mark Tushnet points out, the extent to which horizontality operates within any given jurisdiction depends upon the relative strength of the norms supporting liberal autonomy on the one hand, and social democracy on the other.⁸³ I would like to argue that the interpretation the *IMA* Court placed upon Article 15(2) was correct in the context of the social-democratic commitment of the Indian Constitution, which, not coincidentally, lists “fraternity” as one of the three guiding values in its Preamble, along with liberty and equality.⁸⁴ This commitment, in turn, is an instantiation of the uniquely transformative nature of the Constitution.

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⁸⁰ Ibid.
⁸¹ Ibid.
Let me, at this stage, introduce a terminological scheme. As Hannah Arendt recognized long ago, constitutionalism and revolution sit in an uneasy tension with each other. Constitutions, which are often framed at the culmination of a political revolution, are designed as much to halt revolutionary change as to accelerate it; they are as much about maintaining continuity or marking a return to the past as they are about looking ahead to the future. In the Indian constitutional context, an example of the first kind is the separation between executive and judiciary. In Madras Bar Association v Union of India, the Supreme Court invalidated the National Tax Tribunals Act, holding that it did not provide sufficient guarantees of independence to the tax tribunals that it created, and consequently violated the “Westminster model” of government. As the name suggests, the Westminster Model was an existing institutional arrangement that was simply carried over into the Indian Constitution, representing a colonial continuity rather than a rupture.

On the other hand, soon after independence, in Virendra v State of Uttar Pradesh, Justice Vivian Bose rejected as unconstitutional the invocation of the “Act of State” doctrine as a defence against arbitrary expropriation of property, observing that:

[with the framing of the Constitution] at one moment of time the new order was born with its new allegiance springing from the same source for all, grounded on the same basis: the sovereign will of the peoples of India with no class, no caste, no race, no creed, no distinction, no reservation.

As Bose J recognized, the republican-democratic framework of the Constitution, with its guarantee of individual rights enforceable against the State, was not simply the recognition of an existing institutional and substantive legal arrangement, but the creation of a new one. This would necessitate not just different legal outcomes, but an entirely different approach to legal questions that involved the relationship between the State and the individual.

Let us call the first kind – i.e., constitutional provisions that recognize or entrench an existing set of rights or institutional structures as “declaratory”, or “conservative”, and the second kind, which change them, as “transformative”. I now suggest that transformative constitutional provisions can further be of two kinds: political transformative provisions, such as those involved in Virendra v State of UP, which are designed to alter only the existing legal and political landscape, and comprehensive transformative provisions, that go beyond politics and law, and seek to transform the deepest societal convictions about identity, personhood, and inter-personal relations which underlie and justify the law and political structures of a community. I use the

88. Ibid at para 85.
90. Ibid at para 43.
word “comprehensive” in its Rawlsian sense, referring to doctrines or world-views that “cover the major religious, philosophical and moral aspects of human life.”

As has been argued elsewhere, an example of a comprehensive transformative constitutional provision is the Nineteenth Amendment to the US Constitution, which granted women the right to vote. The Nineteenth Amendment was transformative in the sense that it created a new right where none existed before. It was comprehensively transformative because the denial of the right to vote, based upon the legal fiction of virtual representation and the common law of coverture, was ultimately founded upon a philosophical world-view which held that men and women “naturally” belonged to “separate spheres” – the public and the private – and voting was an exercise of citizenship in the public sphere. The debates around the suffrage campaign reflect the fact that the contest was not merely about a surface change to the scope of the right to vote, but a much deeper challenge to the separate spheres vision that formed the bedrock of the way that society organized itself along gendered lines. The culmination of the suffrage campaign in the passage of the Nineteenth Amendment, therefore, is the reason why that Amendment should be read as repudiating not simply the existing legal structure, but as signifying a deeper transformation, one that would subsequently invalidate all laws that distributed benefits and burdens unequally on the basis of the separate spheres theory of society. And this, indeed, is the American Supreme Court’s present approach to sex discrimination under the US Constitution: the Supreme Court has struck down laws that endorse or entrench stereotypical assumptions about men and women’s roles in society, thus according judicial imprimatur to the Amendment’s comprehensive transformative nature.

I will now argue that the IMA Court’s reading of Article 15(2) was justified because Article 15(2), like the Nineteenth Amendment of the American Constitution, was meant to be a comprehensive transformative provision. That the Constituent Assembly understood it in this way is evident from the Debates cited above. To further place the Debates in their historical and philosophical context, I will sketch a brief outline of the history of the evolution of constitutional rights in Western liberal democracies, before contrasting that with the Indian experience. Needless to say, a full defence of the claims I make would require a far lengthier and more detailed treatment than I can provide here. The following account, therefore, should be treated as a starting point for a deeper investigation into the relationship between bills of rights, their interpretation, and the varying political and historical contexts that birthed them.

Traditionally, civil liberties have been exercisable vertically – individuals against the State. The vertical nature of bills of rights – which arose with the American and French Revolutions – goes hand-in-hand with a separation between State and market, and between the public and private spheres. Critical theorists argue that the State/market and public/private distinction encoded into classical bills of rights reflects the fact that

92. Bhatia, supra note 85.
95. This schema was originally proposed by Habermas. See Nancy FRASER, “What’s Critical About Critical Theory? The Case of Habermas and Gender” (1985) 35 New German Critique 97 at 112.
these revolutions were driven by a rising bourgeoisie class, and targeted at absolutist and centralized State power.\textsuperscript{96} Thus, by addressing bills of rights exclusively to state action, and by creating protected zones under the rubric of the “private sphere”, those liberal Constitutions ensured that all action within the protected private sphere was deemed off-limits, subject to no scrutiny, and beyond the field of politics. Naturally, this meant that inequalities of power, structural violence, and relationships of domination and subordination within the private sphere (which included the market) went untouched and unregulated.\textsuperscript{97}

As a related – but distinct – point, it is also important to note that when bills of rights were first conceptualized (in particular, in the aftermath of the American revolution), they were conceptualized in the context of a distinctly Western idea of sovereignty, of Thomas Hobbes and Jean Bodin: the idea that sovereignty was single, indivisible, and ultimate, and resided at one place in the polity.\textsuperscript{98} For Hobbes and Bodin, sovereignty was concentrated in the figure of the sovereign, but through the American and French revolutions, it came to be thought of as residing in the people. The basic idea of the inherent, unitary, and unified nature of sovereignty, though, remained intact. Thus, when the American Revolution culminated in a system of representative republican democracy, through which sovereign power was delegated by the people to their elected representatives, it made sense to draft a bill of rights designed to check the State, because it was there where the locus of sovereign power (albeit delegated) resided.\textsuperscript{99}

The work of post-colonial scholars informs us, however, that sovereignty in India was always understood very differently: it was inherently decentralized and had its locus at multiple points, especially in the economic sphere.\textsuperscript{100} In addition, as the works of the subaltern historians have shown, unlike the impersonal, vertical market forces of liberal capitalism that have characterized the West, forms of authority in the marketplace (even during the colonial period) continued to be horizontal, person-to-person, and tradition based, in continuance of the multiple, decentralized centres of power-and-sovereignty that had characterized the old Indian polity.\textsuperscript{101} Indeed, one of the objectives of the nationalist movement was precisely to replace this set of relations with a liberal-capitalist order.\textsuperscript{102}

\textsuperscript{96} See e.g. Seyla BENHABIB, \textit{Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics} (New York: Routledge, 1992).

\textsuperscript{97} And thus also, a central tenet of contemporary feminism has been a challenge to the very concept of “privacy”. Feminists have argued that privacy rights serve to mask and legitimize violence and oppression within the family.


\textsuperscript{100} Sudipta KAVIRAJ, \textit{Trajectories of the Indian State: Politics and Ideas} (Ranikhet: Permanent Black, 2010).

\textsuperscript{101} Ibid.

\textsuperscript{102} Borrowing from Gramsci, Partha Chatterjee calls this a “passive revolution”. See e.g. Partha CHATTERJEE, \textit{Nationalist Thought and the Colonial World} (Minneapolis: University of Minnesota Press, 1986).
This understanding of authority as decentralized, horizontal, and consisting of multiple foci, was mirrored by the evolution of the concept of rights, which were never understood exclusively as bulwarks against State power. For instance, as the historian Tanika Sarkar argues, while examining the three great social reform movements of the nineteenth century that were aimed at women (i.e., the age of consent for sexual intercourse, widow remarriage, and outlawing the custom of *sati*), the vocabulary of a woman as a rights-bearing individual was first framed horizontally, in opposition to the “community as a culture-bearing entity”\(^{103}\) (and not in opposition to the State). Similarly, even as the nationalist movement was articulating a set of vertical civil and political rights against the colonial authority through a series of Constitutional charters,\(^{104}\) Ambedkar himself invoked the vocabulary of rights against the horizontal structures of the caste system, which excluded Dalits from the social and religious life of the community. In particular, he led movements to guarantee the right to take water from public watering places (horizontal social exclusion), and the right to enter Hindu temples, on parity with other Hindus (horizontal religious exclusion).\(^{105}\) As we shall see at the end of this Section, both these rights would ultimately be incorporated into the Constitution.

What this admittedly sketchy outline tells us is that unlike the American and French revolutions, the Indian independence movement always had twin focal points – political independence from an authoritarian colonial power (which explains the predominance, in the fundamental rights chapter, of classic liberal civil and political rights against the State), as well as horizontal independence from exclusionary systems of authority and control, manifested most clearly in various reform movements aimed at the emancipation of women and the eradication of the caste system.\(^{106}\) The vocabulary of rights was central to both foci. Within this framework, the Constituent Assembly Debates that I referred to above make it doubly clear that the Indian Constitution was transformative in two ways: it sought to transform not only (in part) the British colonial system (politically transformative), but also the underlying pre-colonial relations based on caste, untouchability, and gender oppression (comprehensively transformative). And one of the characteristic features that it sought to address was, precisely, the horizontal exercise of power relations in an exclusionary manner, including in the sphere of economic transactions. Therefore – to return to Tushnet’s point – the very different Indian experience with political and civil rights movements leading up to, and influencing the framing of, the Constitution indicates that there is enough warrant for the Court to strike the balance between autonomy and social democracy in a manner that is more skewed towards the latter,


than it has been in other commonwealth Constitutions. This further buttresses the broad reading that the IMA Court provided to Article 15(2).

Importantly, this understanding of the Constitution’s role is borne out by other guarantees under Part III of the Constitution. These include horizontally applicable provisions guaranteeing the abolition of untouchability107 (which was widely used as a tool of private economic oppression) and of forced or bonded labour108 (another economic weapon), as well as a provision overriding the right of religious freedom in order to allow the State to make laws for the throwing open of Hindu religious institutions to all classes of Hindus.109 In PUDR v Union of India,110 the Supreme Court expanded the term “forced labour” under Article 23 to cover the non-payment of the living wage,111 noting the inequalities of bargaining power between management and workmen. In other words, the Court held that the market – itself an aggregate of thousands of “voluntary” private relationships – could be coercive in a manner that could give rise to a constitutional claim against forced labour. Much like IMA v Union of India, PUDR’s founding premise is a rejection of the market-State dichotomy that has structured the system of constitutional rights in Western liberal democracies, according to which the market, with its extant arrangement of wealth and power, is a background condition under which rights are exercised against the State (or private actors), and not itself capable of facilitating or violating those rights. As argued above, the framers clearly understood that in India the market, and economic relations, were systematically used as a mechanism of domination and subordination. Consequently, Articles 15(2) and 23, as interpreted in IMA and PUDR, reflect the commitment of the Constitution to transform an unjust society, in which horizontal distributions of authority, extended into the marketplace, ensured that sections of the community were excluded from equitable access to basic physical and social infrastructure.

Lastly, this commitment is further reflected by the other parts of Article 15(2) itself. In addition to shops, Article 15(2)(a) guarantees access to “public restaurants, hotels and places of public entertainment.”112 Article 15(2)(b) does the same for “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.”113 In the face of all this, it makes perfect sense that the framers, through Article 15(2), which is also clearly transformative, were attempting to do away with traditional discriminatory practices that pervaded the private economic realm. Their use of the word “shops” – and Ambedkar’s clarification of its meaning – was one way of doing so, and fulfilling the transformative promise of India’s constitution.

108. Ibid, art 23.
110. PUDR v Union of India AIR 1982 SC 1473.
111. Ibid at para 20.
V. CONCLUSION

Let us briefly sum up. Article 15(2)(a) contains an inbuilt framework broadly akin to a civil rights act, which prohibits discrimination even within the private economic realm, insofar as such discrimination operates to exclude persons from access to core economic, social, and physical infrastructure. It makes the right to non-discrimination horizontally enforceable. This interpretation turns upon a historically grounded reading of “shops”, which understands that word to be embodying the abstract market of arm’s length, economic transactions. The specificity of the text of Article 15(2) is not an insurmountable bar against a broad reading of “shops”. The Constituent Assembly debates support a broad reading. The structure of Part III supports it. And finally, the uniquely transformative nature of India’s constitution – with respect to a long history of horizontal discrimination, fighting against which was one of the goals of the national movement – justifies the use of horizontal constitutional rights against discriminatory economic transactions in the private sphere. *IMA v. UoI*’s interpretation, therefore, is faithful to the structure and philosophy of India’s bill of rights. It ought to be upheld, and its reasoning taken to its logical conclusion.