# Horizontality And Non-Discrimination Rights

—Shweta Sivaram*

*As the role of non-state actors in securing economic and social rights in areas such as housing, employment, and education increases, it is necessary to question the traditional understanding of constitutional rights as 'vertically' applicable, or enforceable only against the state and not private individuals. In India, private discrimination along lines of religion, caste, and community is widespread, but, especially in the absence of an anti-discrimination statute, marginalized groups are left with no remedy, as the constitutional protection against non-discrimination contained in Article 15 is inapplicable against private actors. With the growing concentration of power in the hands of private individuals, we must consider whether constitutional rights can be guaranteed without extending their applicability to non-state actors. This paper provides a comparative analysis of the approaches that courts of different countries have adopted in giving 'horizontal' effect to constitutional rights, particularly in cases of discrimination by private individuals. In the Zoroastrian Coop. case, the Supreme Court of India upheld a restrictive covenant limiting membership and sale of land in a housing society to members of one community citing the inapplicability of constitutional rights against private individuals; however, other countries have given horizontal effect to constitutional rights either by directly extending their applicability to private actors, or through judicial means such as requiring common law to be interpreted consistently with constitutional values or reading constitutional rights into public policy exceptions to invalidate discriminatory contracts. This paper also considers what factors influence the manner in which courts construe the applicability of constitutional rights, by examining theories that suggest that countries with a constitutional commitment to social democratic norms and states that play a proactive role in the distribution of resources are more likely to enforce constitutional rights against private actors.*

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## I. Introduction

The traditional conceptualisation of a constitution as a text that regulates the relationship between individuals and the state forms the basis of the understanding that the rights enshrined in constitutional texts have 'vertical' application, whereby constitutional rights are enforceable only against the state – or, where "[the] primary way in which a constitution operates […] is to restrain the state in the kinds of laws it passes and in the manner in which it conducts itself"[1] and "only state conduct may be challenged for the lack of constitutionality."[2] The concentration of power in the hands of private individuals and the growing role of non-state actors in the realisation of economic and social rights raises normative questions about the state's ability to guarantee constitutional rights without extending their applicability to private parties. The understanding that private actors too can threaten constitutional rights, through an exercise of the power that is conferred on them by state laws,[3] forms the basis of a legal framework giving effect to the 'horizontal' application of rights – or, "[the] varying applicability of [a bill of rights] to the conduct of natural and juristic persons."[4]

Constitutional rights may be given horizontal effect at varying degrees. If at one end of the spectrum is the strict vertical application of constitutional rights, wherein rights may be enforced only against the state, at the other end are countries which give constitutional rights direct horizontal effect, by explicitly providing for constitutional rights to be enforceable against private individuals in their constitutional texts or through judicial interpretation. The South African Constitution of 1996 is an example of a constitutional document that gives direct horizontal effect to constitutional rights; the Bill of Rights is applicable not only to the legislature, executive, judiciary, or other organs of state but to natural and juristic persons to the extent applicable, taking into consideration the nature of the right or the nature of the duty imposed by such right.[5] States may also give horizontal effect to constitutional rights *indirectly*. While constitutional rights with direct horizontal application directly govern the actions of private actors, constitutional rights with indirect horizontal application govern the private laws that govern the legal relations between private persons.[6] Halton Cheadle distinguishes between direct and indirect horizontal effect in a similar manner, by contrasting the constitutional regulation of conduct with the regulation of laws that

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1 Halton Cheadle, 'Third Party Effect in the South African Constitution' in *The Constitution in Private Relations: Expanding Constitutionalism* (András Sajó and Renáta Uitz 2005) 58.

2 ibid 58–59.

3 Mark Tushnet, 'The issue of state action/horizontal effect in comparative constitutional law', International Journal of Constitutional Law, vol 1, issue 1, January 2003, 79–98, <https://doi.org/10.1093/icon/1.1.79> 79.

4 Cheadle (n 1) 59.

5 The Constitution of South Africa, 1996, Bill of Rights, s 8.

6 Stephen Gardbaum, 'Where the (state) action is', International Journal of Constitutional Law, vol 4, issue 4, October 2006, 760–779, <https://doi.org/10.1093/icon/mol036> at p 764.

may regulate that conduct.[7] States have evolved different approaches towards giving indirect horizontal effect to rights, such as the judicially-evolved state action doctrine in the United States,[8] or the extension of constitutional principles to the interpretation of public policy exceptions to private law in South Africa.[9]

Article 15(1) of the Constitution of India guarantees to citizens the right to non-discrimination – no citizen shall be discriminated against on the basis of the enumerated protected categories, including religion, caste, and sex. As with most other fundamental rights, the non-discrimination right is vertically applicable; it can only be enforced against the state, and acts of private discrimination cannot be challenged for violating a fundamental right. In the absence of anti-discrimination legislations, the strict vertical application of the right to non-discrimination permits private individuals to engage in some discriminatory practices that result in the further marginalization of minority groups. The civil rights implications of denying constitutional protection in cases of private discrimination in areas like education, housing, employment, and access to goods are magnified when the growing role of non-state actors in these sectors is considered. In India, private discrimination is a pervasive problem, with members of minority groups regularly being denied access to employment opportunities or housing. In an incident made public in 2015, one business entity explicitly stated that they "hire only non-Muslim candidates".[10] Housing discrimination on the basis of religion and caste has become systemic,[11] resulting in the segregation of residential areas in cities and semi-urban areas on the basis of identity.[12] In 2014, it was reported that the government intended to constitute an Equal Opportunities Commission to check discrimination in employment and educational opportunities;[13] however, no headway has been made on this. In 2017, the Anti-Discrimination and

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7 Cheadle (n 1) 58–59.

8 *Shelley v Kraemer* 1948 SCC OnLine US SC 59, 92 L Ed 1161, 334 US 1 (1948).

9 *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v University of KwaZulu-Natal*, (510/09) [2010] ZASCA 136 [34].

10 Press Trust of India, 'Man denied job for being Muslim, police registers case', *Business Standard* (May 21, 2015) available at <https://www.business-standard.com/article/pti-stories/man-denied-job-for-being-muslim-police-registers-case-115052101505_1.html> (accessed April 20, 2020).

11 Rina Chandran, 'No Muslims, no single women: housing bias turning Indian cities into ghettos', January 23, 2017, available at <https://www.reuters.com/article/us-india-cities-ghettos/no-muslims-no-single-women-housing-bias-turning-indian-cities-into-ghettos-idUSKBN15726C> (accessed April 20, 2020).

12 Soutik Biswas, 'Why segregated housing is thriving in India', December 10, 2014, available at <https://www.bbc.com/news/world-asia-india-30204806> (accessed April 20, 2020); Naveen Bharathi, Deepak Malghan and Andaleeb Rahman, 'Village in the City: Residential Segregation in Urbanizing India', IIMB Working Paper No 588, April 2019, available at <https://www.iimb.ac.in/sites/default/files/2019-04/WP%20No.%20588.pdf> (accessed April 20, 2020); Amy Kazmin, 'Muslim apartments highlight housing segregation in India', October 5, 2014, available at <https://www.ft.com/content/62e72d98-39a3-11e4-93da-00144feabdc0> (accessed April 20, 2020).

13 'Govt to set up Equal Opportunities Commission for minorities', *The Hindu*, February 20, 2014, available at <https://www.thehindu.com/news/national/govt-to-set-up-equal-opportunities-commission-for-minorities/article5709081.ece> (accessed April 20, 2020).

Equality Bill was introduced in the Lok Sabha, but lapsed when the lower house was dissolved. Thus, India remains without a specific anti-discrimination legislation under which people may seek legal redress against acts of private discrimination. Individuals who have faced discrimination at the hands of private actors have instead tried, with little success, to register FIRs under sections of the Indian Penal Code that are unrelated to private discrimination, such as Section 153(1)(b), which criminalises asserting or publishing that any class of persons, by virtue of their religion, caste, or community, should be deprived of their rights as citizens.[14] The absence of a suitable remedy has permitted discrimination to pervade private spheres such as education, employment, and housing – so much so that Tarunabh Khaitan observes that the 'right to discriminate' is viewed as a private entitlement in India.[15] Individuals, particularly from minority communities, are consequently excluded from participating as equal members of society.

I argue that in the absence of a remedy to private discrimination, it is necessary to develop a constitutional framework extending the application of fundamental rights, and the non-discrimination right in specific, to private relations. The authority on the horizontal application of fundamental rights in India is the Supreme Court's decision in *Zoroastrian Coop. Housing Society Ltd. v District Registrar, Coop. Societies (Urban)*, where a restrictive covenant in a housing society's bye-laws that prohibited the sale of plots of land to individuals outside of a particular religious group was upheld.[16] Part II of this paper examines the Indian position on the horizontal application of non-discrimination rights through a discussion of the reasoning in the *Zoroastrian Coop.* case. In Part III, I examine how several other jurisdictions have approached the question of enforcing constitutional non-discrimination rights in instances of private discrimination. I focus on jurisdictions that have given indirect horizontal application to constitutional rights, and the manner in which this has been done. Having considered the approaches adopted by different countries in giving horizontal effect to constitutional rights, I examine why some countries are better placed to do so than others. It has been suggested that several factors influence the ease with which a judicial system is able to extend constitutional rights to private actors. These factors include the country's commitment to social democratic norms and social and economic rights, and the role of the state in society. In Part IV, I discuss these suggestions, and argue that there is an inconsistency between India's commitment to social welfare norms and the Supreme Court's reluctance to give horizontal effect to non-discrimination rights.

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[14] Abhishek Sudhir, 'Religious apartheid: India has no law to stop private sector from discriminating on grounds of faith', June 4, 2015, available at <https://scroll.in/article/731392/religious-apartheid-india-has-no-law-to-stop-private-sector-from-discriminating-on-grounds-of-faith> (accessed April 20, 2020).

[15] 'In India "right to discriminate" seen as a "private entitlement" ', *National Herald*, March 17, 2017, available at <https://www.nationalheraldindia.com/news/interview-a-comprehensive-anti-discrimination-law-is-long-overdue-in-india-says-dr-tarunabh-khaitan> (accessed April 20, 2020).

[16] *Zoroastrian Coop Housing Society Ltd v District Registrar, Coop Societies (Urban)* (2005) 5 SCC 632.

## II. The *Zoroastrian Cooperative* Case

The Zoroastrian Cooperative Housing Society was a private housing society registered under the Bombay Cooperative Societies Act, 1925, constituted for the purpose of selling plots of land that it had acquired from the government for the construction of residential buildings.[17] According to its bye-laws, only people who belonged to the Parsi community could become members of the society. While members were permitted to sell their land, they were required to obtain the prior permission of an elected committee, which could grant or withhold such sanction. Further, members could only sell their shares in land to other members; since only Parsis could become members of the society, the rule effectively prohibited the sale of shares in land to non-Parsis.[18] When one member of the society tried to sell their land to a non-Parsi, the Zoroastrian Cooperative Housing Society sought the enforcement of the bye-laws against this member. A single bench, and later a division bench, of the High Court held that the bye-laws were invalid for restricting the alienation of property by limiting membership, and consequently the sale of land, to people from the Parsi community.

On appeal, the matter came before the Supreme Court. The Housing Society contended that Article 19(1)(c) of the Constitution granted the Parsi community the fundamental right to association, and that invalidating the restrictions on membership and sale in their bye-laws would infringe that right. They relied on Article 29 of the Constitution[19] to establish that the Parsi community, being minorities, had the right to conserve their culture. To the extent that the bye-laws infringed neither the parent Act nor any rules made thereunder, they could not be held to be invalid. Further, it was argued that the bye-laws did not place an absolute restraint on alienation. The respondents contended that the bye-laws, by restricting membership to a certain denomination, community, caste, or creed was opposed to public policy, as drawn from the Constitution's non-discrimination clauses. On this line of reasoning, the Housing Society stated that Part III of the Constitution was enforceable only against state action.

The Supreme Court overturned the decision of the division bench and held that the bye-laws were valid. Examining the history of cooperative societies, the court noted that the purpose for the formation of such societies was to lend funds to a confined group of members belonging to the same caste, tribe, class, or occupation. Thus, the concept of restricted membership was foundational to cooperative societies. It was deemed to be 'essential' that members of housing societies

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[17] ibid 1.

[18] ibid 2.

[19] Art 29, Constitution of India (Art 29 reads as follows: 'Protection of interests of minorities. (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.').

have 'a bond of common habits and common usage among the members which should strengthen their neighbourly feelings'[20] – a bond that the court noted was usually found within members of the same community. The right to association under Article 19(1)(c) was held to imply association with those who are voluntarily admitted into an association; therefore, the Housing Society had the right to admit only people with whom their members wished to associate. Restricting the Housing Society from determining whom they wanted to associate with would constitute a violation of their Article 19(1)(c) rights. As regards non-members, the fundamental right to freedom of association did not include the right to become a member of a cooperative society – the latter is a statutory right subject to the qualifications prescribed by the society. With this reasoning, the court appears to permit segregation or exclusion along lines of caste or religion – a stark contrast to the goals of societal integration and harmony that diverse societies like India aspire to. In *Zoroastrian Coop*, the restrictive covenant limited membership to one community, but the broad line of reasoning adopted by the court appears to permit covenants that deny membership to one community (for example, a restrictive covenant preventing only Muslims from purchasing land), making this ruling particularly pernicious in a country where marginalised groups are routinely targeted and prevented from equally accessing opportunities.

On the question of public policy, the Supreme Court held that public policy must be understood within "the four corners" of the applicable legislation (here, the Bombay Cooperative Societies Act, 1925), and in the absence of any prohibition against the formation of societies for only persons of Parsi origin, the restrictive covenant remained valid. Gautam Bhatia has highlighted the circularity of this reasoning[21] – public policy clauses serve as *exceptions* to a statute; hence, an understanding of public policy cannot be derived from the statute itself. This finding appears to contradict a previous observation of the Supreme Court, that public policy must be determined "in consonance with public conscience and in keeping with public good and public interest".[22] Further, by limiting themselves to the confines of the Bombay Cooperative Societies Act when determining the scope of the public policy exception, the court rejected the respondents' argument that public policy must be drawn from constitutional values, an approach that has been adopted in countries like South Africa. The court went on to hold that it could not declare bye-laws of a cooperative society to be unconstitutional for restricting membership on the basis of religion, caste or sex, as the bye-laws do not have the force of a statute and are binding only between the persons affected by them. As members of the cooperative society entered it voluntarily, the court could not relieve them of their contractual obligations under the bye-laws by

[20] *Zoroastrian Cooperative* (n 16) 10.

[21] Gautam Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach,' Asian Journal of Comparative Law, vol 11, issue 1, July 2016, 87–109, 95.

[22] *DTC v DTC Mazdoor Congress* 1991 Supp (1) SCC 600, AIR 1991 SC 101.

invoking non-discrimination rights under Part III. Hence, the judgment places upon courts an obligation to enforce private contracts regardless of their discriminatory nature.

As a result of the *Zoroastrian Coop.* case, constitutional rights in India remain unenforceable against private actors. In the absence of a constitutional framework for horizontal application, the most suitable remedy to discrimination by private actors lies in the creation of an anti-discrimination statute. In 2019, the Centre for Law and Policy Research published a draft Equality Bill seeking to giving effect to Articles 14 and 15 of the Constitution.[23] The Bill aims to promote the advancement of historically disenfranchised individuals and communities by, *inter alia,* prohibiting discrimination in areas such as employment, education, healthcare, and housing. However, there is no indication that the government intends to pass such an anti-discrimination law. Alternatively, Bhatia has suggested that the existing constitutional framework can provide for the extension of non-discrimination rights to private individuals – rather than giving indirect horizontal effect to fundamental rights, the word 'shops' in Article 15(2) can be read to include any form of economic transaction, thus rendering the judgment in the *Zoroastrian Coop.* case redundant.[24] While these are compelling alternatives, the focus of this paper is to examine the horizontal applicability of non-discrimination rights and contrast the approach of Indian courts with that of other countries when faced with the question of giving horizontal effect to constitutional rights.

## III. Foreign Approaches To Indirect Horizontality

### A. South Africa

The Constitution of South Africa provides for the direct horizontal application of constitutional rights. The South African Bill of Rights contains an extensive list of constitutionally-guaranteed socio-economic rights, including the right to adequate housing, the right to freedom of trade, occupation, and profession, the right to health care, food, water, and security, and the right to property. Section 8 extends the applicability of these rights to natural and juristic persons, in addition to the organs of state. Nick Friedman outlines the connection between the horizontal effect of constitutional rights in South Africa, and the country's social democratic aspirations –

> "*Seen against the backdrop of South Africa's past, the demand for horizontality is immediately apparent. Firstly, it commits individuals to the rebuilding of the ethical relations so radically shattered during apartheid,*

[23] Centre for Law and Policy Research, The Equality Bill, 2019 – Draft (June 1, 2019) available at <https://clpr.org.in/wp-content/uploads/2019/06/Equality-Bill-2019-4.pdf>.

[24] Bhatia (n 21).

> *through the undertaking of legal duties to improve their communities. Secondly, given the enormous task of reconstruction faced by the new South Africa, the limited resources of the state, and the grossly unequal and enormous wealth which resides in the private sector, horizontality breathes new hope into the possibility of creating a more equal and just society in the medium term. Thirdly, by requiring individuals to uphold their moral duties towards one another and to cooperate in realising a new vision for a shared future, horizontality reaffirms the human dignity of those who bear such duties as much as it does those who benefit from their performance."*[25]

Put succinctly, the basis for the direct horizontal application of the Bill of Rights in the Constitution can be traced back to South Africa's emphasis on maintaining harmonious ethnic relations and affirming socio-economic rights.

The approach adopted in the Constitution varies from that of the Interim Constitution of South Africa of 1993, which did not provide for the enforceability of the Bill of Rights against the judiciary, or against natural and juristic persons. In *Du Plessis v De Klerk*,[26] a case under the Interim Constitution, a newspaper being sued for defamation argued that their right to freedom of expression protected them from liability. The South African Constitutional Court ruled that the Bill of Rights did not have direct horizontal effect and could not be invoked in matters between private parties. However, Section 35(3) of the Interim Constitution stipulated that courts shall have "due regard to the spirit, purport and objects" of the Bill of Rights whilst interpreting any law. Thus, the Bill of Rights was to have an influence on the development of the common law that governs private individuals. The Constitutional Court relied on this Section to give indirect horizontal effect to the Bill of Rights, holding that while a private litigant may not invoke the Bill of Rights against another private litigant, they may contend that the law at issue is inconsistent with the Bill of Rights (therein invoking the "relationship between himself and the legislature"[27]) or rely upon the Bill of Rights in the interpretation of the common law applicable between the two parties. It is important to note that the basis of the extension of constitutional rights to common law was not sourced from an interpretation of the Bill of Rights, but from Section 35(3) of the Interim Constitution.

The court examined decisions of countries such as the United States, Canada, Germany, and Ireland in relation to the horizontal application of constitutional rights. The majority observed that the extension of the applicability of the Bill of Rights to the legislature and the executive, but not the judiciary could

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[25] Nick Friedman (2014) 'The South African Common Law and the Constitution: Revisiting Horizontality', South African Journal on Human Rights, vol 30, issue 1, 63–88, 67.

[26] *Du Plessis v De Klerk*, (CCT8/95) 1996 SCC OnLine ZACC 10, [1996] ZACC 10.

[27] ibid 47.

not be considered an oversight; a doctrine of judicial non-enforceability of private conduct violative of constitutional rights similar to the state action doctrine developed in the United States in *Shelley v Kraemer* thus could not be imported.[28] While the court is bound to apply constitutional law, it cannot override limitations on whom the Bill of Rights is enforceable against. Justice Kriegler's dissenting opinion in *Du Plessis v De Klerk* argued that the Bill of Rights applied to all law and that courts are required to apply its "spirit, purport, and objects" in the adjudication of even non-constitutional matters.[29]

While the Constitution of South Africa provides for the direct application of constitutional rights against natural persons, the judiciary has also adopted an approach of extending constitutional values to the interpretation of private law. In the *Zoroastrian Coop.* case, when determining whether public policy exceptions to the enforcement of private contracts could be drawn from constitutional rights, the Supreme Court confined its examination to the "four corners" of the parent legislation. In contrast, in the South African case of *Barend Petrus Barkhuizen v Ronald Stuart Napier*,[30] the Constitutional Court grounded public policy exceptions in the Constitution. The court was required to determine whether a limitation clause for the institution of legal proceedings under an insurance contract was unenforceable for its alleged inconsistency with the Constitution. The Constitutional Court held that public policy was "deeply rooted in our Constitution and the values which underlie it".[31] In the adjudication of private disputes, courts must rely on interpretive principles derived from constitutional values, and look towards "founding constitutional values which include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism".[32] Similarly, in *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v University of KwaZulu-Natal*,[33] the Supreme Court of Appeal drew from constitutional values to determine the scope of public policy exceptions. The case concerned a will that provided for the creation of an educational fund to be administered solely for the benefit of European girls of British or Dutch South African descent. The will was defended on the grounds that freedom of testation, being a component of the right to property, was a fundamental right. In considering public policy exceptions, the court looked to the equality provisions of the Constitution and endorsed the High Court of South Africa's view that public policy "is now rooted in our Constitution and the fundamental values it enshrines, thus establishing

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[28] Johan van der Walt, 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation between Common-Law and Constitutional Jurisprudence', South African Journal on Human Rights, vol 17, no 3, 2001, 341–363, 345.

[29] *Du Plessis* (n 26) 137–143.

[30] *Barend Petrus Barkhuizen v Ronald Stuart Napier* 2007 SCC OnLine ZACC 5, [2007] ZACC 5.

[31] ibid 28.

[32] *Bafana Finance Mabopane v Makwakwa* [2006] ZASCA 46 [11].

[33] *Curators* (n 9).

an objective normative value system".[34] The Indian Supreme Court has rejected the extension of constitutional values to an understanding of public policy in *Zoroastrian Coop.*, thus precluding the possibility of extending constitutional non-discrimination rights to cases of private discriminations as in the *Curators* case.

## B. The United States Of America

The American approach to horizontality differs from the South African approach, or the approach of countries like Germany and Canada. Rather than invalidating private contracts by enforcing non-discrimination rights against private individuals, extending constitutional values to the interpretation of common law, or drawing from constitutional rights when carving out public policy exceptions, the United States has adopted a doctrine of judicial non-enforcement of discriminatory contracts. The 'state action doctrine', as it is known, was laid down in 1948 by the Supreme Court of the United States in *Shelley v Kraemer.*[35] Central to this case was a restrictive covenant preventing the sale of a house to African-Americans. When the Shelley family, an African-American family, moved into the house, a property owner in the neighbourhood sued for specific enforcement of the covenant. The petitioners argued that the covenant violated their Fourteenth Amendment rights to equal protection of the law. The Supreme Court of Missouri held that the covenant was enforceable as it was a private agreement that ran with the land. In a similar case in Michigan,[36] racially restrictive covenants had been enforced by the court. On appeal, both cases were heard before the Supreme Court, which considered two questions – *first,* whether racially restrictive covenants between private parties violate the Fourteenth Amendment rights; and *second,* whether such restrictive covenants can be enforced. The Supreme Court held that private agreements could not be regarded as violative of any rights guaranteed by the Fourteenth Amendment; hence, private individuals remain free to impose and abide by discriminatory conditions in their contractual relations. However, private parties may not seek the judicial enforcement of racially restrictive covenants, as such judicial enforcement would constitute a discriminatory state action, therein violating the equal protection clause of the Fourteenth Amendment. The decisions of the Supreme Courts of Missouri and Michigan were not merely cases of abstention from action in the face of private discrimination; instead, "these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or colour, the enjoyment of property rights."[37] The distinction is an important one; rather than

[34] *Minister of Education v Syfrets Trust Ltd* 2006 SCC OnLine ZAWCHC 14, [2006] ZAWCHC 65 [24].
[35] *Shelley* (n 8).
[36] *Sipes v McGhee* 316 Mich 614 (Mich 1947).
[37] *Shelley* (n 8) 19.

render private discriminatory contracts invalid on grounds of violating constitutional rights, the court held that racially restrictive covenants cannot be enforced as that would constitute a state action in violation of the Fourteenth Amendment. It is important to note that the implication of this ruling is that discriminatory covenants can be entered into, and would not violate the Fourteenth Amendment; however, individuals may not seek their enforcement before courts without attracting the application of the state action doctrine to invalidate the contract.

One possible method of enforcing constitutional rights against private actors is through a broader interpretation of the word 'state'; when private individuals exercise powers similar to those within the state's mandate, then courts may extend the applicability of constitutional rights to them. In *Bivens v Six Unknown Named Agents*,[38] the plaintiff alleged that agents of the Federal Bureau of Narcotics searched his home and arrested him without a warrant, in violation of the Fourth Amendment protections against unreasonable searches and seizures. When Bivens sued the individual officers for monetary damages, the agents argued that they were private citizens and that constitutional rights could not be enforced against them. The Supreme Court of the United States held that, in the absence of other remedies, an implied cause of action could be inferred upon the violation of a constitutional right and the private remedy of monetary damages could be sought. However, the question in *Bivens* was limited to civil lawsuits against federal government officials; the court distinguished the harm caused by individuals in exercise of federal power from the harm that private individuals can cause one another. It is only because the agents were acting in an official capacity that private remedies could be sought against them for Fourth Amendment violations. This judgment affirms the position that constitutional rights are vertically enforceable in the United States – or, enforceable only against the state or private individuals who exercise state power. In India, a similar position has been adopted; while constitutional rights can be enforced only against the state, private actors who are "financially, functionally, or administratively"[39] under the control of the government can be brought within the definition of the state under Article 12, therein imposing upon such actors certain constitutional duties. However, it should be noted that this approach is distinct from applying constitutional rights horizontally; instead of extending the applicability of rights to non-state actors, it expands the definition of who a state actor is, and is thus more consistent with a vertical understanding of constitutional rights.

[38] *Bivens v Six Unknown Named Agents* 1971 SCC OnLine US SC 134, 29 L Ed 2d 619, 403 US 388 (1971).

[39] *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* (2002) 5 SCC 111, (2002) 3 SCR 100.

## C. Germany

The *Lüth* decision[40] from Germany was a seminal case on the horizontal effect – or "radiating effect" – of constitutional rights. During World War II, a prominent film director made an anti-Semitic film in conjunction with Nazi politician Joseph Goebbels, for which he faced criminal trial. Subsequent to the war, the director released another movie, upon which a public official, Lüth, called for a boycott of the film. The director approached a civil court which relied upon a provision in the German Civil Code on causing intentional damage to another person and passed an injunction against Lüth, preventing him from calling for people to boycott the movie. Lüth moved the German Constitutional Court, claiming that the injunction violated his constitutional right to freedom of speech enshrined in the German Basic Law. The Constitutional Court ruled in favour of Lüth, finding that the civil courts had failed to interpret private law in the "spirit" of the Basic Law. When issuing the injunction against Lüth, the civil court was required to take into consideration Lüth's constitutional rights. The Constitutional Court noted that while the primary purpose of the Basic Law and the rights enshrined therein was to protect individual liberties from interference by public authorities, the Basic Law established an order of values that must affect all spheres of law. Thus, when interpreting the German Civil Code and deciding whether to grant an injunction, the civil courts should have taken into account the Basic Law and its guarantee of the freedom of expression. The position here may be compared to the South African cases examined above; both approaches require the interpretation of private law to be drawn from constitutional values – a view that has been rejected by the Indian Supreme Court. In contrast, the Supreme Court of the United States shielded private conduct, "however discriminatory or wrongful",[41] from Fourteenth Amendment rights, therein granting greater protection to individual liberties such as the freedom to enter into a contract on one's own terms.

## D. Canada

The *Dolphin Delivery*[42] case, heard before the Supreme Court of Canada, pertained to members of a union who were striking against one employer, and threatened to strike against another employer who provided services to the first. When a court enjoined the union from proceeding with the second strike, the union challenged this as a violation of their freedom of expression and association. The Supreme Court held that the Charter's guarantee of the right to strike could not be applied to the private litigation between the second employer and

[40] Lüth, 7 BVerfGe 198 (1958).

[41] *Shelley* (n 8) 13.

[42] *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* 1986 SCC OnLine Can SC 69, (1986) 2 SCR 573.

the union. However, this was "a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative."[43] Hence, while private parties do not owe constitutional duties to one another, the Charter of Rights and Freedoms is "far from irrelevant"[44] in the adjudication of disputes between private litigants involving the interpretation of common law. This indirect horizontal effect by which constitutional rights influence the interpretation of the law governing private relations is similar to the doctrine adopted by the South African Constitutional Court in *Du Plessis v De Klerk* and the German Constitutional Court in the *Lüth* case.

Further, Canada's approach to invalidating discriminatory agreements on public policy grounds may be contrasted with the South African approach. In *The Curators* case, the Supreme Court of Appeal of South Africa ruled against the validity of an educational fund constituted for the benefit of only European girls by drawing from the constitutional protection against non-discrimination to determine the scope of public policy exceptions. In *Re Drummond Wren*,[45] the Ontario High Court adjudicated over the validity of a racially restrictive covenant that prohibited the sale of a plot of land to "Jews, or persons of objectionable nationality". The covenant was found to be invalid on public policy grounds, for being discriminatory. However, unlike in *The Curators* case or as the respondents in *Zoroastrian Coop.* argued, the court did not draw from the Charter's non-discrimination protections to interpret public policy; rather, it drew from international charters that Canada was a signatory to, to hold that the court had a moral duty to repel "all fissiparous tendencies which would imperil national unity". As the racially restrictive covenant was calculated to "create or deepen divisions between existing religious and ethnic groups" by segregating areas and excluding certain groups from residential areas, it was invalid. Unlike the approach in South Africa, the decision in *Re Drummond Wren,* striking down a discriminatory covenant was not based on the Constitution; instead, it was Canada's international commitments that informed the decision. In both approaches, however, the courts have drawn from an overarching or greater system of values that the country has committed to when considering the validity of a private action. It is worth noting that India is also a signatory to the UN Charter, which the Ontario High Court made reference to when interpreting the public policy exception.

[43] ibid 39.
[44] ibid.
[45] *Re Drummond Wren* [1945] OR 778.

## IV. Horizontality, Social Democracies, And The Role Of The State

When confronted with the question of the horizontal applicability of constitutional rights, courts in different countries have adopted different approaches, with some favouring a position closer to strict verticality than horizontality. Having examined these approaches, a more foundational question arises: are some countries more likely than others to give horizontal effect to constitutional rights? Are some constitutions so framed that the extension of constitutional rights to private actors is consistent with the outcomes that the constitution seeks to achieve? What factors influence the ease with which a constitutional court gives horizontal effect to constitutional rights? Mark Tushnet suggests[46] that countries with social democratic constitutions, or a strong commitment to social democratic norms, find it easier to apply constitutional rights horizontally against private actors. Central to a social democratic state, Tushnet argues, are ideals of fraternity and solidarity, the belief that members of a society have a duty to consider the welfare and interests of other members. At the other end of the spectrum is a commitment to liberal autonomy, or the belief that the actions of private individuals and the reasons therefor should be shielded from state interference. A constitution that commits to this ideal is thus interested in protecting private action from constitutional interference. Countries committed to social democratic norms, on the other hand, prioritise social welfare over individual liberty. Tushnet posits that countries like Germany, Canada, and South Africa – all countries with a strong commitment to social democratic norms – are thus able to give horizontal effect to constitutional rights with more ease than countries with a weaker commitment, such as the United States. Elsewhere, Tushnet has suggested that the rise of the 'activist state' in countries influences the question of horizontality.[47] An activist state, defined as one that concerns itself with the level and distribution of important goods,[48] is more likely to intervene when free market transactions result in unequal outcomes – as is the case when groups of individuals are excluded from accessing goods such as housing, education, and employment. The role of a state in society, as well as a larger constitutional commitment to social democratic norms and the equitable distribution of resources, thus influences the horizontality question.

Peter Quint has suggested[49] that the horizontal application of constitutional rights is influenced by whether a constitution places affirmative obligations on the government to act in society. Contrasting the extension of constitutional

[46] Tushnet (n 3).

[47] Mark Tushnet, 'State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations', Chicago Journal of International Law, vol 3, no 2, January 2002, 436–453.

[48] ibid 439.

[49] Peter E Quint, 'Free Speech and Private Law in German Constitutional Theory', Maryland Law Review, vol 48, issue 2, 1989, 247–349, 345–347.

values to private law in Germany and the United States, Quint traces the opposing approaches back to a more foundational difference – that the German Constitution places certain positive social welfare requirements on the government, while the American Constitution excludes provisions that create positive obligations on the state. When constitutions strictly govern the relationship between the state and the individual without requiring the government to act in society to improve overall social welfare, then there is no constitutional requirement of reallocation or ensuring equitable outcomes inter se individuals. Quint suggests that the "withdrawal of the Constitution from society"[50] in the United States is thus consistent with the reluctance of courts to extend constitutional values to private actors; in contrast, the German doctrine requiring private law to be consistent with the Basic Law is "in accordance with the Basic Law's more general acknowledgment of affirmative constitutional requirements affecting society".[51] Thus, the extension of constitutional values to private law is a corollary of constitutions that envisage government intervention in social welfare. At a smaller scale, Helen Hershkoff has examined the relationship between a commitment to social and economic rights and horizontality, in the context of the state of New Jersey, its constitution, and its Supreme Court.[52] Hershkoff describes how the state's commitment to social welfare and the conception of the government as a provider of goods and services has influenced its departure from the federal state action doctrine; the Supreme Court of New Jersey has interpreted contract law and property law in light of constitutional norms and refused to enforce common law entitlements that are unconstitutional. For example, in *Hennessey v Coastal Eagle Point Oil Co.*,[53] when determining whether a private employer could conduct drug tests on employees at random, the Supreme Court of New Jersey drew from the Constitution as a source of public policy to hold that private employees were entitled to a right to privacy. It thus limited the circumstances under which such drug tests could be conducted or used as grounds for termination of employment.

Frank Michelman has examined the protective functions of the state in protecting individuals from intrusions caused by other members of society in light of the founding principles of a constitution.[54] The American Constitution, Michelman suggests, was drafted by framers who were concerned about a state that did too much, rather than too little, for its citizens; thus, constitutional guarantees were envisioned as applying only against the state, with little intervention into private acts. In contrast, Michelman suggests that the European Convention,

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[50] ibid 347.

[51] ibid.

[52] Helen Hershkoff, 'The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action', Albany Law Review, vol 69, issue 2, 2006, 553–559.

[53] *Hennessey v Coastal Eagle Point Oil Co* 609 A 2d 11, 16–17 (NJ 1992).

[54] Frank Michelman, 'The Protective Function of the State in the United States and Europe: The Constitutional Question' in *European and US Constitutionalism* (2005).

for example, was produced at a time that was distanced from this laissez-faire thinking, when it was believed that liberal societies perpetuated power imbalances that enabled the violation of rights by non-governmental actors. The vision at the founding of a constitutional text thus influences its subsequent interpretation. Like Tushnet, Michelman also contends that a court's understanding of whether the state has a role to play in relations between individuals is influenced by the general, political culture of a society – or, whether a country is committed to, at either ends of the spectrum, social democracy or liberal democracy.

Simply put, the question of horizontality is more consistent with some constitutions then others. In countries where the state plays an active role in social welfare or ensuring the equitable distribution of resources, or where the constitution is committed to social democratic norms and the guarantee of social and economic rights, the horizontal application of constitutional rights is far simpler and a corollary to the outcomes that the constitution seeks to achieve. Thus, courts in such countries are better placed to interpret private law in light of constitutional norms, or extend the influence of constitutional law to private action. These theories may be examined in relation to the countries discussed earlier. Consider Germany, for instance, which Tushnet describes as a country with a strong commitment to social democratic norms,[55] citing the German Basic Law's description of the country as a 'democratic and social federal state' and its requirement for the constitutional order to conform with the principles of a social state.[56] In Germany, the Constitutional Court affirmed that the Basic Law and the rights enshrined therein have a radiating effect[57] on the interpretation of private law. Peter Quint has analysed[58] the *Lüth* decision in the context of the German government's attempt at denazification post World War II; the court's holding that private law must be interpreted in consonance with the Basic Law recognised the need for the reconstruction of a deeply divided society with a history of conflict and oppression of marginalised groups. Post-War Germany's commitment to social democracy and its emphasis on constitutional protections for all, thus, likely influenced the outcome in the *Lüth* case. Further, consider South Africa, where the Bill of Rights in the Constitution guarantees an extensive range of economic and social rights to citizens – a factor that Hershkoff and Tushnet argue influences the horizontality question. The South African state has also strived to implement a number of welfare policies aimed at social upliftment and the mitigation of societal inequalities.[59] South Africa's history of racial conflict and

[55] Tushnet (n 3) 89.

[56] Basic Law for the Federal Republic of Germany, 1949, art 20(1). Basic Law for the Federal Republic of Germany, 1949, art 28(1).

[57] Lüth (n 40) 2.

[58] Peter E Quint, 'A Return to Lüth', Roger William University Law Review, vol 16, no. 73, 2011, 73-85.

[59] *See*, for example, Department of Welfare, Republic of South Africa, White Paper on Social Welfare, 1997, available at <https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf> (accessed May 18, 2020).

segregation and the subsequent need to preserve ethnic relations influenced the direct horizontal effect of the Bill of Rights.[60] The Supreme Court of Appeal has, at several instances, read constitutional values into public policy. On the other hand, consider the United States, a country that Tushnet describes as having a strong commitment to liberal norms, and that Quint describes as a constitutional system where the state is withdrawn from society and does not intervene in relations between private individuals. This is consistent with the Supreme Court's decision in *Shelley v Kraemer*. Recall that the Supreme Court did not invalidate the racially restrictive covenant or find that private actors cannot discriminate on the basis of race because of the Fourteenth Amendment's equal protection clause; rather, the court refused to judicially enforce the racially restrictive covenant as doing so would amount to discriminatory state action. Private parties thus remain free to voluntarily enter into discriminatory contracts or arrangements without state scrutiny.

I argue that India is a country with a constitutional commitment to social democratic norms and social and economic rights, where the state plays an active role in society and in ensuring equitable outcomes in the distribution of resources. The drafting history of the Indian Constitution reflects an intention to commit firmly to the creation of a social democracy. Speaking before the Constituent Assembly, Dr B.R. Ambedkar noted that the aim of the framers must be to create not merely a political democracy, but a social democracy, too, at the root of which lie the principles of fraternity, equality, and liberty.[61] These ideals find place in the Preamble to the Constitution. H.V. Kamath observed that the concept of an economic and social democracy had formed the basis and content of most Congress resolutions passed since 1936.[62] Kamath stated that the incorporation of provisions directing state policy towards equal pay for men and women (now Article 39(d)) and promoting cottage industries (now Article 43) in Part IV of the Constitution formed the "blue-print of economic and social democracy in our country".[63] A Directive Principle of State Policy to secure work at a living wage to all workers, which now forms part of Article 43 of the Constitution, was introduced citing the need to establish a social and economic democracy in India.[64] The Preamble's recognition of India as a socialist democratic republic and the wide array of social and economic goals that form the Directive Principles of State Policy concretise India's constitutional commitment to social democratic norms. Granville Austin described the Indian Constitution as "first and foremost,

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60 Friedman (n 25).

61 *Constituent Assembly Debates*, November 25, 1949, *speech by* BR Ambedkar, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25?paragraph_number=325#11.165.325> (accessed March 6, 2020).

62 *Constituent Assembly Debates*, November 23, 1948, *speech by* HV Kamath, available at <https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-23?paragraph_number=40%2C38%2C37%2C41#7.58.38> (accessed March 6, 2020).

63 ibid.

64 ibid.

a social document",[65] with the "core of the commitment to social revolution" contained in Part III, in the form of Fundamental Rights, and Part IV, in the form of Directive Principles of State Policy. According to Austin, these parts form the "chief instruments" in realising the constitutional goals of social, economic, and political justice. While Part III fosters a social revolution by aiming to create an egalitarian society where the rights of minorities are protected, Part IV is the "clearest statement of the socio-economic revolution".[66] Citing Austin in his judgment in *Minerva Mills Ltd. v Union of India*, Justice Chandrachud noted that "the majority of [the Constitution's] provisions are aimed at furthering the goals of social revolution by establishing the conditions necessary for its achievement."[67] Thus, the constitutional text itself reveals a commitment towards ensuring social democratic norms and social and economic justice.

The Constitution further commits to ensuring an equitable distribution of resources and rectifying social inequities not only in its guiding Directive Principles of State Policy, but in Part III of the Constitution as well – for example, in Articles 15 and 16 which permit the government to implement reservations for socially and economically backward classes in public employment and education, or Article 21A which mandates free and compulsory education for all children aged 6-14 years. The government has, at various times since 1950, enacted several welfare policies, including employment schemes in rural areas, the public distribution system, the provision of LPG connections to poor households, public healthcare, and mid-day meal schemes. Legislations such as the Dowry Prohibition Act and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act have been enacted to secure the rights of specific sections of society, while legislations such as the Minimum Wages Act and the Industrial Disputes Act ensure minimum standards of labour welfare in the private sector. India has thus committed to an ideology of state intervention to ensure equitable outcomes in market transactions, which the horizontal application of constitutional rights is consistent with. The decision in the *Zoroastrian Coop.* case that strictly insulates private law from influence by constitutional values stands in stark contrast to this constitutional commitment.

## V. Conclusion

The vertical applicability of constitutional rights is based on the premise of an imbalance of power between the state and individual citizens, whose liberties must thus be protected from interference. As the concentration of social, economic, and political power in the hands of non-state actors increases, constitutional protections cannot truly be guaranteed to citizens without extending

[65] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (1966) 50.
[66] *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625, AIR 1980 SC 1789.
[67] ibid.

their applicability to private actors. While fundamental rights remain enforceable only against the state in India, in nations with similar histories of stratification or conflict and with similar commitments to social democratic principles, constitutional rights have been given horizontal applicability. As India remains without an anti-discrimination legislation, Article 15 protections cannot be ensured without a constitutional framework that gives horizontal effect to constitutional rights. The approach that South Africa (under its interim Constitution), Germany, and Canada have adopted can be described simply as extending constitutional values to the adjudication of private law, whether by drawing public policy exceptions from the constitution, or interpreting common law in consonance with the constitution; the first approach was rejected in India in the *Zoroastrian Coop. case*. This decision ought to be revisited, with the constitutional question of horizontal application answered in a manner consistent with India's constitutional commitment to social welfare, social democratic norms, and a state that plays an active role in ensuring the equitable distribution of resources.