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THE PREJUDICED NEED NOT APPLY: CHALLENGING THE DISCRIMINATORY EFFECTS OF PRIVATE TRANSACTIONS IN INDIA

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ABSTRACT

This paper seeks to question the philosophical and constitutional basis of the 'freedom to discriminate' of private parties under private laws of India. To that end, it situates this issue in the Rawls-Nozick debate of libertarian vs. egalitarian conceptions of property rights. It probes the stand of India's equality code in this debate and teases out its unique contribution to the Rawlsian idea of 'justice as fairness'. But the roadblocks in horizontal application of non-discrimination rights remain a pressing concern. Reliance is placed on contemporary theories of non-discrimination to solve this problem. Lastly, the possible concrete ways of ensuring non-discrimination in private law are discussed, and the best negotiated path is identified.

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I. INTRODUCTION

There is a consensus among liberals that personal autonomy should be secured in liberal democracies. One of the critical ways of doing it is by engaging in transactions in the free market. However, given the historical social structure, disadvantages accrue to 'individuals' because of their membership in certain groups and markets are known to perpetuate this discrimination.[121] Jurists like John Rawls have sought to alleviate this *'liberty-diminishing'* aspect of free-market based transactions, but have stopped short of entering the *'private realm'*. Other egalitarian philosophers extend Rawls to the private realm and argue that personal autonomy can only be upheld by this interference.

This paper situates this debate in the issue of housing discrimination in India. The Indian context is particularly rife with caste, religious and gender based structural inequalities and therefore, a great place for theorising about these issues. The constitutional jurisprudence of equality and discrimination is adequately evolved to see how these issues play out.

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[121] Vikram Pathania and Saugato Datta, *For whom does the phone (not) ring? Discrimination in the rental housing market in Delhi, India*, UNU-WIDER WORKING PAPER (2016), *available at* https://www.isid.ac.in/~epu/acegd2015/papers/VikramPathania.pdf; *See*, United Nations, Press Statement by UN Special Rappoteur on the right to non-discrimination (April 2016), *available at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19861&LangID=E; *See also,* Rina Chandran, *No Muslims, No Single Women: Housing Bias turning cities into ghettos*', REUTERS (January 23, 2017), *available at* https://in.reuters.com/article/india-cities-ghettos/no-muslims-no-single-women-housing-bias-turning-indian-cities-into-ghettos-idINKBN157266.

In Part I, I go into some detail of the jurisprudential questions underlying property rights, as an extension of liberty. Nozick and Rawls and their differing approaches have been highlighted. Both, as I point out, agree on individual distinctiveness and need for personal autonomy (**the liberal consensus**). I rely on AT Kronman to extend Rawls' principles to private law and challenge the philosophical foundations of property rights. The inevitable role of the state's interference in this process is also highlighted. In Part II, I summarise India's equality jurisprudence to show how, like Rawls, it secures equality as an important facet of autonomy. Here, I also identify how this understanding permeates into private law and horizontal application of non-discrimination rights. Kronman's idea that status quo provides 'illegitimate advantage to certain groups in private transactions' proves a useful tool here to show how infringement of Article 15(2) violates freedom of contract. I assess the wrongness of the Supreme Court in *Zoroastrian Housing Society v. District Registrar* [hereinafter "**Zoroastrian Case**"],[122] a decision which allowed alienation of property made to the exclusion of other religious groups. The Zoroastrian Case is particularly problematic because till today it serves as the precedent to justify housing discrimination in the courts of law. In Part III, I rely on Prof. Tarunabh Khaitan's work to show that the navigation of this public-private divide without infringing private liberties will need placing of anti-discrimination duty on some 'public' persons. Kronman's idea can be given concrete shape using Prof. Khaitan's work. In Part IV, I will tackle issues of addressing discrimination in private laws in India. I will also

[122] Zoroastrian Cooperative Housing Society v. District Registrar, (2005) 5 SCC 632 (India) [*hereinafter* "Zoroastrian Case"].

ascertain various ways of doing distributive justice over and above the tools available in the present Indian legal scenario.

II. PROPERTY LAW: CHANGING PHILOSOPHICAL UNDERSTANDING FROM LIBERTARIANISM TO EGALITARIANISM

In this part, I seek to provide a jurisprudential basis for non-discrimination in private transactions. This must mean a shift from the Nozickian conception of rights to the Rawlsian conception. More importantly, I will rely on the work of AT Kronman to show how Rawls' ideas can be extended, even to private law.

A. NOZICK

Robert Nozick in his book 'Anarchy, State and Utopia'[123] presents the strongest contemporary defence of property rights, which underlies much of our philosophy of property law. Nozick starts with the assumption that individuals own themselves and therefore, their produce, which is an outcome of their labour, is nothing but an extension of themselves.[124] For any transaction to happen consent becomes very important. Thus, property can be held if three principles are satisfied: justice in acquisition, justice in transfer and justice in rectification.[125] Principles of acquisition determine the circumstances in which someone can acquire property rights in formerly un-owned resources. Principles of transfer determine the way in which ownership of resources may be

[123] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 120-232 (1974) [*hereinafter* "Nozick"].
[124] *Id.* at 173-182.
[125] *Id.* at 151.

transferred from one person to another. The principle of rectification provides that an unjust transaction can be corrected only if it falls foul of the aforementioned principles.

It is significant to note that much of modern-day property law begins from the idea of the distinctiveness of persons. Any infringement of property by the state, which violates the aforesaid principles, therefore violates the liberty of an individual. Notice that no comment is made about the 'consequence' of the perpetuation of these 'procedurally just' transfers on the larger community or on the disadvantaged sections of the society. In fact, if the state were to propose a scheme to distribute property or wealth it would be unjust. Property law, therefore, relies on 'historic entitlement to property' and 'procedural laws' (laws which lay down how acquisition and transfer should happen) to test the justness of any transaction.[126]

Among contract and private law scholars, this understanding dominates. There is a nearly universal agreement that private law has three legitimate functions: first, to specify which agreements are legally binding and which are not, second, to define the rights and finally, to indicate the consequences of an unexcused breach.[127] Thus, according to dominant contact law, changes in the existing property regime or correcting structural restrictions should not be done by restricting private law transactions.

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[126] Nozick, *supra* note 123 at 150 and 153.

[127] *E.g.*, Chapter I-III of the Indian Contracts Act, 1872 deal with legally binding agreements; Chapter IV-V explore relationships created by contracts and Chapter VI explores breach of contract.

B. RAWLSIAN OBJECTION

Nozick, as we saw, relies on 'self-ownership' and 'historical entitlement', to make the case for property rights, even against state interference. However, the basis for building this theory of property is his belief in the 'distinctiveness of persons', i.e., the idea that individuals own themselves and owe little to the collective. A partial attack to this comes from Rawls who while accepting 'liberty rights' delinks property rights from it. Rawls says that individuals are who they are as a result of a 'lottery of births' and we have done nothing to deserve the talents, wealth and the timing of our births.[128] If that is so then we have no 'moral right' over wealth or property we produce. Then a rational choice maker, who is unencumbered by his position in the society (veil of ignorance/original position), must choose two principles: fair equality and the difference principle.[129] Fair equality provides equal access to everyone who has equal talents in the society, i.e., it seeks to make the societal structure more accessible. The Difference Principle is re-distributive as it provides that inequality in society will only be tolerated if it 'benefits the least advantaged'. Least advantaged people are unable to form conceptions of good life for lack of access to primary goods. Their social goods include civil and political rights, liberties, income, wealth and the social basis for self-respect.[130] It may be noted that access to these social goods is restricted based on historical injustices and affect pursuits of life.

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[128] JOHN RAWLS, A THEORY OF JUSTICE 63-64 (1972) [*hereinafter* "Rawls"].
[129] *Id.* at 47.
[130] *Id.* at 78.

Rawls who is called an 'egalitarian liberal' is, therefore, trying to balance liberty with equality, by recognising the vast inequality in wealth and talents amongst individuals and groups (something which Nozick completely ignores). Rawls, like Nozick, wants people to develop their own personal conception of 'good life' but he realises that most people are just unable to exercise their liberties to pursue their goals. Thus, he seeks to redistribute wealth and improve access to better aid each person's pursuit of the good life. Minimum wage laws, unemployment allowance, taxation, etc., are the real ways of achieving the difference principle.[131] Affirmative action, free education and healthcare are ways of achieving 'fair equality' conditions.[132]

C. RAWLS CONCEDES TO THE PUBLIC-PRIVATE DIVIDE

Interestingly, even Rawls shies away from applying his principle to everyday private transactions. He provides that the state should redistribute wealth, but the application should only extend to the 'basic structure of the society' and not to individual transactions.[133] Scholars have speculated about why Rawls would do so. Simmonds argues that this is an acknowledgement on Rawls' part that the patterned theory of justice must respect the moral importance of market transactions.[134] That is to say, Rawls does this because he feels that any measure which would interfere in private transactions of the market necessarily violates 'liberty'.

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[131]Rawls, *supra* note 128, at 245-251.
[132] *Id.*
[133] JOHN RAWLS, POLITICAL LIBERALISM 257 (Expanded ed., 2005) [*hereinafter* "Rawls Liberalism"].
[134] NIGEL E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS 32-62 (Indian Imprint, 2003) [*hereinafter* "Simmonds"].

It is only through markets that differing wants and preferences of people be co-ordinated and is, therefore, an important forum for preserving liberty.[135] So, the preservation of these liberty maximizing wants and needs warrants preservation of the market.[136] Free disposition of property is for many, a major constituent of their idea of the good life, and even Rawls' egalitarian theory of redistribution respects it.

It is not justified, therefore, to interfere in individual transactions to better redistribute wealth, because the end goal is not to have a society where everyone has 'equal wealth'. The end goal is the same as that of a libertarian: ensuring each person's freedom and ability to pursue the good life (I will call this '*the liberal consensus*'). Market based transfer of property which are 'procedurally and historically just' thus uphold that core idea of liberty (***the liberal consensus***). In fact, in his book 'Political Liberalism', Rawls seems to present a great defence of pluralism, i.e., allowing religious faiths to 'flourish in their own way' and develop their own conception of good.[137] A strict boundary between public discourse based on public reason, evidence, logic, etc., (the domain of the political)[138] and comprehensive views (religious views) which 'are different' have been drawn in Rawls' liberalism. The religiously diverse people consent to this thin 'political realm' of democratic liberalism because they consider it reasonable.[139] The constitutional values of liberalism should be such that

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135 Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 283-84 (1981).
136 Simmonds, *supra* note 134 at 58.
137 Rawls Liberalism, *supra* note 133 at 435.
138 *Id.* at 217.
139 *Id.* at 439.

religious communities should be able to consent to it, in addition to their beliefs in religious precepts.[140] Most people will not consider an encroachment into religious views as tenable. Now, if the property holding mechanism of an affluent religious community (say Hinduism) is exclusionary to some members (say on caste lines), Rawlsian liberalism may, in fact, allow it. We see that Rawls is not prepared to tread into contentious issues of the private realm in order to effect 'equality' in the society. Sadly, it is exactly in these private transactions that the worst of discrimination still permeates.

Now, we must examine why Rawls stopped there. Can Rawls' 'concession' or 'acknowledgement' be challenged, while still being consistent with the 'liberal consensus'? **[Q1]** If yes, is Rawls' application of his principles only to 'basic structure of society' more liberty securing than application to private law transactions? **[Q2]**. We must turn to A.T Kronman for answers.

D. ANTHONY KRONMAN AND DISTRIBUTIVE JUSTICE IN PRIVATE LAW

In an influential article, Professor Anthony Townsend Kronman [hereinafter "**Kronman**"] provocatively argues that consistency forces libertarians to accept equality in private transactions.[141] Kronman in making his argument relies on two crucial premises of Rawls' theory. First, he agrees with the 'liberal consensus' of individuality/distinctiveness of

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[140] Rawls Liberalism, *supra* note 133, at 199-200.

[141] Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 472-97 (1980) [*hereinafter* "Kronman"].

persons and their freedom to pursue their conception of the good life. Secondly, he agrees with Rawls' 'difference principle', as a tool to offset the 'inability of several people' in the status quo to pursue their good life. He seeks to modify Rawls' 'difference principle' and apply it to private transactions by the 'doctrine of paretianism'.

Q1: Applying Rawlsian principles in private transactions does not violate the 'liberal consensus'

Liberals accept 'freedom to contract' as the central tenet of their principles of liberty in a private transaction. For this private transaction to be 'just', it should not be coerced. Coercion may take many forms like fraud, undue influence, huge imbalance in technical know-how between the parties, etc. Thus, illegitimate 'advantage-taking' by the dominant party (say seller who knows the defects of the land and a buyer who doesn't) is impermissible if it proves detrimental to the other person. Let us recall that Rawls' challenges the 'moral dessert' of advantages that are conferred on people by the 'lottery of births'. This makes natural and inherited advantages in the society contestable. Similarly, to justify this inequality of arbitrary advantage-taking between parties, something similar to the 'difference principle' must be introduced into private transactions.

Rawls uses the veil of ignorance to arrive at distributive principles which would justify the existing inequalities.[142] Similarly, Kronman argues that we will have to come to a conclusion about principles which would 'justify' the 'morally arbitrary advantages' available to parties in private

[142] Rawls, *supra* note 128 at 15-19.

transactions.[143] Given the liberal consensus on personal autonomy, 'utilitarianism', i.e., the principle of maximising overall happiness, at the cost of individual freedom cannot be justified.[144] Which principle would then offset inequality yet preserve freedom in private transactions? The principle which Kronman proposes is 'paretianism'. It states that 'advantage taking' in private transaction will only be tolerated if those who are disadvantaged at present will benefit in the long run.[145] But if every transaction was to be subjectively interfered with by the state or the courts to see if both parties are on an equal pedestal, a huge inconsistency would be created.[146] Not to mention it would do violence to precedents and established law.[147] Therefore, Kronman's version of interference allows a particular form of 'advantage-taking' when doing so will increase the long-run welfare of most people who are in a disadvantaged position [Group Paretianism (hereinafter "**GP**")].[148] This way each transaction will not have to be interfered with. A broad baseline principle of distribution may be laid down which would regulate most transactions. Kronman argues, in case of private transactions, the baseline condition is that the advantage must either be shared with everyone or everyone must be uniformly denied the use of the advantage [hereinafter "**baseline condition**"].[149] That is to say the possessor of an advantage may only use it if those not

[143] Kronman, *supra* note 141.
[144] *Id.* at 485-86.
[145] *Id.* at 486.
[146] *Id.* at 497.
[147] *Id.* at 489.
[148] *Id.*
[149] *Id.* at 491-92.

possessing it are made better off by its use.[150] This paretian prohibition applies to all talents and assets, including strength, intelligence, wealth, and information in which no one, not even the person who possesses the advantage has any prior claim. An example which Kronman gives to drive home the point is this: if 'A' comes up with an intellectual property right by using his social capital and the access to resources (which he does not morally deserve), he can make use of it only if he agrees to share it with the rest of the world and benefit them.[151] Thus, he can retain possession of it as long as 'disadvantaged people benefit in the long run'. Notice that this example translates in the Indian context to the weakening of copyright laws for access to literature in public universities[152] and thus, embodies Kronman's paretianism. Education is an essential social good whose access is restricted by excessive pricing which is a consequence of copyright. This is a form of unfair advantage to the privileged. Thus, copyright laws will remain as long as the exception allows for access to education.

This means that all property or skills which are the subject of private transactions belong actually to a common pool of resources.[153] The only way in which the present custodians of this property or skill will be allowed to retain them is through the aforesaid principle. Another crucial observation is the role of the state under Kronman's idea: it must, therefore, interfere in favour of the disadvantaged sections, even in the

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[150] Kronman, *supra* note 141 at 487.
[151] *Id.* at 492.
[152] University of Oxford v. Rameshwari Photocopy Services, 2016 (68) PTC 386 (Del) (India).
[153] Kronman, *supra* note 141.

private sphere so that they do not suffer disadvantage.[154] The doctrine of paretianism is a test of when the state is to interfere in private transactions, to ensure that 'illegitimate advantage' does not vitiate private transactions and make the disadvantaged sections worse off in the long run. Thus, we see that this line of argumentation opens up the scope of the extension of Rawlsian principles into private transactions.[155]

Q2: Applying Rawlsian Principles to property rights does not curtail more liberty than its application to the basic structure of society

The second argument of Kronman is perhaps less convincing. He makes the case that the scheme he mentions is not more liberty-curtailing than Rawls' application of fair equality to the basic structure of the society. He begins by acknowledging that Rawls stopped short of intervening in private law because he thought it would infringe liberty. Kronman tries to show that even taxation (which Rawls proposed) has the capacity to substantially limit my pursuit of happiness in materialist ways and equally discriminate.[156] Secondly, Kronman counters the objection that extending Rawlsian idea in private law will continuously infringe liberty. He does this by saying that these principles are to be made applicable to 'contract rules' and not individual cases, and therefore, will not require constant interference. In any case, continuous infringement,

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[154] Matthew H. Kramer & Nigel E. Simmonds, *Getting the Rabbit out of the Hat: A Critique of Anthony Kronman's Theory of Contract*, 55 CAMBRIDGE LJ. 358, 365-66 (1996) [*hereinafter* "Kramer"].
[155] Kronman, *supra* note 141.
[156] *Id.* at 498-501.

he argues equally happens in sales tax where tax is levied on each transaction.[157]

In summary, beginning with the premise that a libertarian endorses voluntary exchanges and prohibits involuntary ones, Kronman arrives at the conclusion that a libertarian must use paretian principles to restrain the use of talent and wealth in exchanges and must favour using contract rules to redistribute wealth from rich to poor.

E. SOME CONCERNS ABOUT KRONMAN'S THEORY: INCONSISTENCY AND INANITIES

Scholars have expressed concern about this theory and its excessive sacrifice of liberty in the dissemination of private wealth. Kramer and Simmonds call it a 'communitarian' theory which claims to be 'egalitarian' to highlight such a Faustian bargain.[158] The dubbing of all advantages of wealth, etc. as part of a 'common pool of resources'[159] which need to be regulated by the paretian principle, perhaps highlight some truth in this criticism. This criticism does not sufficiently appreciate contexts like India, where private transactions are the worst sites for perpetuation of discrimination. Ambedkar's notion of 'fraternity' was fashioned exactly to collapse such virulent personal discrimination which limits life chances of the weaker sections.[160] Appreciation of these contexts, in my opinion, calls for redefining equality as a crucial facet of

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[157] Kronman, *supra* note 141 at 501-05.
[158] Kramer, *supra* note 154.
[159] Kronman, *supra* note 141.
[160] Aravind Narain, *What Would An Ambedkarite Jurisprudence Look Like?*, 29 NLSIR 1, 17 (2017).

freedom and not in opposition to it, just as Ambedkar did. He opined that *"Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity."*[161]

Other concerns presented by scholars point out the unworkability of such a baseline condition and the inanities it might lead to if it were applied by judges or applied for making public policy.[162] Some of these concerns include difficult questions: deciding what exactly qualifies as 'advantage-taking' and which group is to be considered in judging, or calculating whether 'long term benefit' accrues to them. While these concerns are important for academic discourse, they don't take away from the thrust of Kronman's argument, they merely speculate on the difficulty of doing distributive justice in private law. Above all, Kronman's argument provides us with a lens not just to change contract law and make it more equitable, but also to understand the philosophical foundation of existing regimes of distributive justice. The point of this article is not so much to provide a framework for anti-discrimination laws. It is to tease out from a Kronmanian lens, the Indian Constitution's perspective on distributive justice and to critique the inadequacy of Indian laws. Therefore, this nuanced criticism of Kronman's theory need not detain us.

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[161] Parliament of India, Constituent Assembly Debates (Proceedings), vol. XI (25 Nov. 1949), *available at* http:// parliamentofindia.nic.in/ls/debates/vol11p11.htm.

[162] William K.S. Wang, *Reflections on Contract Law and Distributive Justice: A Reply to Kronman*, 34 HASTINGS L.J. 513, 522-26 (1982).

III. INDIAN COURTS' APPROACH TOWARDS THE EQUALITY AND PUBLIC-PRIVATE DIVIDE

In this Part, I seek to analyse how the Indian Constitution's equality code, reconciles individualism, i.e., the 'liberal consensus' with equality and non-discrimination. In so doing, I will try to show how the horizontal application of the equality code to individuals over and above the state, reflects Kronman's doctrine of paretianism. I will pick up one concrete case of property law 'the Zoroastrian case' which has been criticized for not reflecting this transformative vision. Other precedents, however, will show that the Zoroastrian case is wrongly decided. The collapsing of the public-private divide in the Indian private laws will be shown to reflect Kronman's idea of paretianism.

A. THE INDIAN EQUALITY CODE: RECONCILING LIBERAL AND EGALITARIAN IDEAS

i. The equality code

Liberals, unlike radical egalitarians, agree on the 'liberal consensus' that everyone should be allowed to form their own conception of the good life. Underlying this idea is the respect for personal autonomy of each person to develop their own conceptions. Recollect that Rawls told us that in order to have that conception we need to possess certain 'social primary goods' which the most the 'disadvantaged sections' lack. Social goods include civil and political rights, liberties, income and wealth and

the social basis for self-respect.[163] Our ability to form a conception of the good life stands heavily impaired if access to these goods is curtailed. It is exactly that which Rawls sought to mitigate.[164]

The Indian Constitution similarly provides the right to personal liberty (Article 21), and also the right to equality and the right against discrimination (Article 14 and Article 15 respectively). Over the years, the Supreme Court has acknowledged that equality cannot be cabined into Article 14, it has to be read with Article 21.[165] This means that the discriminatory government actions necessarily hinder our ability to exercise our personal autonomy. A reading of the Constituent Assembly debates shows us that much like the US fourteenth amendment, our due process clause (embodied in Article 21) and equal protection clause (Article 14) existed as one unified article during the drafting phase.[166] Several judgments have acknowledged this interplay between equality and liberty in reading human rights not as silos, but as overlapping on each

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163 Rawls, *supra* note 128 at 92.

164 *Id.*

165 Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India) [P.N. Bhagwati, J., concurring; noting that "*It is indeed the pillar on which rests securely the foundation of our democratic republic. And therefore, it must not be subject to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for, to do so would be to violate its activistic magnitude.... Equality is a dynamic concept with many aspects and dimensions, and it cannot be imprisoned within traditional and doctrinaire limits.*"]

166 B. SHIVA RAO, INDIAN INST. OF PUB. ADMIN., THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS 118 (2015); *See*, Gautam Bhatia, *Equal moral membership: Naz Foundation and the refashioning of equality under a transformative constitution*, 1 INDIAN L. REV. (2017) (noting that Bhatia argues that we must understand Equality in the Indian Constitution not in the sense of formal equality but as a principle which allows each person irrespective of his ascribed status to realise his goals) [*hereinafter* "Bhatia"].

other.[167] This suggests that the Constitution recognises that inequality in access to basic goods from the state necessarily flows into the idea of not letting a person realise his full personal liberty to define his life.

Scholars have read *Naz Foundation* v. *Union of India* [hereinafter "**Naz Foundation**"] as the sanest and transformative explanation of the equality code.[168] The discrimination based on the five grounds of Article 15(1), i.e., of religion, race, caste, sex or place of birth was noted to be infringement on 'personal autonomy'. Thus, a law like Section 377 of the Indian Penal Code, 1860 which did not explicitly name the LGBT community but 'indirectly' discriminated against them fell afoul of the equality code because it violated autonomy to pursue 'conception of good life' by the following reasoning:

> "*The grounds that are not specified in Article 15 but are analogous to those specified therein will be those which have the potential to impair the personal autonomy of an individual. As held in Anuj Garg, if a law discriminates on any of the prohibited grounds, it needs to be tested not merely against "reasonableness" under Article 14 but be subject to "strict scrutiny"... Section 377 IPC in its application to sexual acts of consenting adults in privacy discriminates a section of people solely on the ground of their sexual orientation which is analogous to prohibited ground of sex.*"[169]

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[167] Maneka Gandhi v. Union of India, (1978) 1 SCC 248, 278 (India).
[168] Bhatia, *supra* note 166, at 37.
[169] Naz Foundation v. NCT of Delhi, 160 DLT 277 (2009) ¶ 112-113 (High Court of Delhi) (India); *see*, Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for the*

Notice that inequality according to Naz Foundation is wrong because it curbs personal autonomy. Citing the Planned Parenthood case,[170] the case explained the necessity of personal autonomy:

> *"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."*

Thus, the reading together of liberty as equality and equality as liberty likens the Indian regime of distributive justice to the key tenets of Rawls' and Kronman's theories.

ii. Horizontal application of rights: An equality code which created a civic duty

Article 15(2) in India extends the 'liberal consensus' to private transactions. Article 15(2) provides that no disability shall accrue to any person in their access to shops and other public places based on the aforementioned five grounds. The word 'shops' read in light of the Constituent Assembly Debates can be read liberally and interpreted to include private transactions of housing and services, i.e., items which have a resemblance to Rawlsian 'social primary goods' and are open to the

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Minorities, 2 NUJS L. REV. 419, 485 (2009) [noting that Khaitan shows how at the core of these 5 protected attributes is the idea that they are sites for curtailing individuals 'swaraj', i.e., personal autonomy].

[170] Planned Parenthood v. Casey, 505 U.S. 833 851 (1992).

public.[171] Article 15(5) provides that seats can be reserved for weaker sections even in private colleges with the goal of doing social justice. Notice that in making private institutions sites of distributive justice, this article collapses the public-private divide.

In *IMA* v. *Union of India,*[172] the Supreme Court relying on Ambedkar's statement in the Constituent Assembly extended Article 15(2): 'non-discrimination in access to public places and shops' to include all service providers, including providers of higher education in schools. In doing so, the Court took notice of the historical disadvantage several disadvantaged groups faced in the country for centuries, which marred their access to basic economic transactions and thus, limited access to basic goods.[173] In the case of *Pramati Educational Trust* v. *Union of India,*[174] there was a clash of rights between freedom of occupation vis-a-vis policy of reservation in private universities and the right to education. The petitioners were challenging the mandatory reservation in private colleges and mandatory reservation of seats in schools under RTE Act, 2005 as violative of their freedom of occupation as universities/schools. The Court reasoned that the freedom of occupation of private parties must yield to policies made to further visions of social justice given in the

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[171] Gautam Bhatia, *Exclusionary Covenants and the Constitution- IV: Article 15(2), IMA v. Union of India, and the Constitutional Case against Racially/Religiously Restrictive Covenants*, INDIAN CONST. L. & PHIL. BLOG (Jan. 14, 2014), *available at* https://indconlawphil.wordpress.com/2014/01/14/exclusionary-covenants-and-the-constitution-iv-article152-ima-v-uoi-and-the-constitutional-case-againstraciallyreligiously-restrictive-covenants/ [*hereinafter* "Bhatia blog"].

[172] Indian Medical Assn. v. Union of India, (2011) 7 SCC 179, 259 (India).

[173] *Id.* at 276; *see*, Bhatia blog, *supra* note 171.

[174] Pramati Educational & Cultural Trust v. Union of India, (2014) 8 SCC 1 (India).

Constitution.[175] Thus, we see that in matters of 'education', which is an essential social good, the Court read the Constitution as doing social justice, even at the expense of curtailing private freedoms of universities/schools. In *NALSA* v. *Union of India* [hereinafter "**NALSA**"],[176] the Court has drawn a more direct link between 'historic and systemic disadvantages' in access to privately owned places described in Article 15(2) and the State's duty to bring down its power to stop it. Holding that discrimination has continued against the transgender community, despite the mandate of Article 15(2), the Court said that this created a duty on the State to give them reservations and affirmative action.[177] Affirmative Action in India has been understood as a policy decision and not a matter of right. But this case recognizes that in an event of State failure to stop discrimination in civil society a 'right' to affirmative action arises. Thus, there is no public-private divide in India's social justice jurisprudence. The State has an active role to regulate discrimination everywhere.

We see that Kronman's idea of mitigating inequality in private transactions is reflected in the Indian court's reading of Article 15 in recognising that even the private sphere is a legitimate place for the state to do distributive justice. Phrasing this as a state's 'constitutional duty' and a 'constitutional promise' suggests that in the absence of this, the present civil society and its arbitrary distribution of wealth won't be justified. We

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[175] *Id.* at 51.
[176] National Legal Services Authority v. Union of India, (2014) 5 SCC 438, 489 (India).
[177] TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 215 (2015) [*hereinafter* "Khaitan"].

have seen in Part I(d) that liberals who think undue advantage-taking is against freedom of contract, will be forced to see much of the present benefits of the societal structure as 'illegitimate advantage'. Owners can remain custodians of property and transfer it only if they adhere to the principle of paretianism. Read this way, Article 15(2) and Article 17 seek to do distributive justice while still preserving the 'liberal consensus'.

We must now examine to what extent courts have adopted a similar reasoning in applying Rawls' egalitarianism to private law.

B. CASES FROM PROPERTY, TORTS AND OTHER PRIVATE LAWS

In *Bhau Ram* v. *Baijnath Singh*[178] [hereinafter "**Bhau Ram**"], the question before the Court was whether the right to pre-emption of a property can be provided on the ground of *inter alia* vicinage. The Court categorically held that given the existence of provisions to the contrary in the Constitution, it won't be permissible:

> *"But the Constitution now prohibits discrimination against any citizen on grounds only of religion, race, caste, sex and place of birth or any of them under Art. 15...the law of pre-emption based on vicinage was really meant to prevent strangers i.e. people belonging to different religion, race or caste, from acquiring property. Such division of society now into groups and exclusion of strangers from any locality cannot be considered*

[178] Bhau Ram v. Baij Nath Singh, AIR 1962 SC 1476 (India).

> *reasonable, and the main reason therefore which sustained the law of pre-emption based on vicinage in previous times can have no force now…"*[179]

Thus, the Court has in the past, read down a law allowing the transfer of property to members of the same caste and religion. However, we must notice that these laws had explicitly legitimised vicinage, thereby clearly making it a clear case of 'state-sponsored' discrimination, which could not pass muster. Under the next sub-heading we will see that when such an 'exclusion' is not explicitly legitimised by the statute but remains a probability under the ostensibly neutral wordings of the statute, the court has refused to read it down.

C. ZOROASTRIAN CASE AND THE PUBLIC-PRIVATE DIVIDE

In the Bhau Ram case, we saw that laws which explicitly allow discrimination will not pass muster. But what about laws, which are not per se discriminatory but under whose ambit discriminatory covenants can be enforced. It is here that the 2005 decision in the Zoroastrian case suggests that there are wholly limits to the impact of fundamental rights in this area of private law. In doing so it has deviated from the aforementioned cases. In this case, involving a private litigation concerning the buying and selling of land subject to a restrictive covenant, the Court upheld the enforceability of the Zoroastrian Cooperative Housing Society's by-law preventing the sale of the respondent's land to a non-member of the Parsi religion. The Court rejected the claim that the Gujarat Cooperative Societies Act 1961 and, in particular Section 4 which

[179] *Id.* at 7.

provided that a cooperative society shall not be registered if, in the opinion of the Registrar, its working is likely to be in contravention of 'public policy', must be interpreted in light of the constitutional values of equality contained in Article 14 and non-discrimination on the ground of religion contained in Article 15. Thus, we see that the Court steered away from interpreting into the Section a constitutional safeguard of non-discrimination:

> *"So long as there is no legislative intervention of that nature, it is not open to the court to coin a theory that a particular by-law is not desirable and would be opposed to public policy as indicated by the Constitution. The Constitution no doubt provides that in any State action there shall be no discrimination based either on religion or sex. But Part III of the Constitution has not interfered with the right of a citizen to enter into a contract for his own benefit and at the same time incurring a certain liability arising out of the contract.*[180]
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> *It is true that our Constitution has set goals for ourselves and one such goal is doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative action and not by the court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under Part III or Part IV thereof, could be declared to be opposed to public policy by the Court."*[181]

[180] Zoroastrian Case*, supra* note 122.
[181] *Id.* at 661-62.

Here we see that the Court shies away from applying the Constitution to the scheme of the Act. It is submitted that this is a clear violation of the precedent in Bhau Ram. It appears that courts have made a distinction between direct discrimination apparent on the face of the statute, like in the cases of Bhau Ram (discrimination legitimised by private law) and discrimination which the legislature did not explicitly provide against, such that a discriminatory private covenant can be made inside the ambit of the statute (discrimination tolerated by private law). I will try to take down this distinction below.

D. JUSTICE AS FAIRNESS: A CRITIQUE OF THE ZOROASTRIAN CASE

The Zoroastrian case, as has been highlighted elsewhere, is defensible under Rawls' theory.[182] This is because Rawls does not consider the private realm a good place to do distributive justice. In fact, his thin theory of good allows associations and religious beliefs to coexist, despite being antithetical to the values of a liberal state. Notice that Rawlsian liberalism would not support *discrimination legitimised by private law*. A concern for individual rights under the first Rawlsian principle of liberty would lead him to this conclusion. But he would be 'neutral' towards individual or group 'conceptions of good' which may be discriminatory, so long as the state does not legitimise and impose this conception of

[182] Gautam Bhatia, *Exclusionary Covenants and the Constitution – III: Zoroastrian Cooperative and Political Liberalism,* INDIAN CONST. L. & PHIL. BLOG (Jan. 13, 2014), *available at* https://indconlawphil.wordpress.com/2014/01/13/exclusionary-covenants-and-the-constitution-iii-zoroastrian-cooperative-and-political-liberalism/ [*hereinafter* "Bhatia covenants"].

good. In this Part, I shall show how the Indian Constitution and the Indian court's jurisprudence does not support Rawlsian plural liberalism. In fact, they go a step ahead and seeks to do distributive justice by going beyond the limits which Rawls sets for his theory and by adopting perhaps a Kronmanian version of Rawls' theory. Even *discrimination tolerated by private law,* will not pass muster under the Constitution.

i. Discriminating by enforcing the covenant

While falling foul of the constitutional safeguard, the Court in the Zoroastrian case seems to have taken the view that a contract law between private parties is not amenable to the application of a constitutional mandate. Even if it be conceded that courts are not 'State' for the purposes of Article 12, the statutory authority instructed to enforce the contract is definitely a State. Therefore, can it be said that even the state by bringing its power to enforce a discriminatory covenant is itself indulging in discrimination? The case of *Shelly* v. *Kraemer*[183] in the US has taken a similar line of reasoning. Arguing that enforcement *by the State* would violate the fourteenth amendment, it was noted that:

> *"These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, 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*

[183] Shelley v. Kramer, 334 U.S. 1 (1948).

enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell."

That meant that the racially biased housing contract could continue to exist; only the state would refuse to enforce a racially restrictive covenant. Notice that this is contrary to the Indian state's approach to distributive justice as we saw in Part II (a). Under the Indian constitution, the rights apply horizontally against individuals and what is more, the State has an active responsibility to alleviate discriminatory practices. Whereas in *Shelly* v. *Kraemer*, the State remains a neutral observer, merely refusing to do anything which would perpetuate discrimination, but does not affirmatively seek to help the disadvantaged. The difference between the Indian and the US Constitution in this regard is clear. The US Fourteenth Amendment provides for 'equality before law and equal protection of law' by the State and does not consider the private realm a good place to do distributive justice. A slew of cases starting from Civil Rights cases[184] has held that private discrimination is not restricted by the US Constitution. But even the slightest State aid (even if to enforce a contract) to discriminatory practices is unconstitutional.[185]

Rawls would agree with the American standpoint and apply distributive principles only to the basic structure, i.e., the public law and the Constitution. Therefore, as *Shelly v. Kramer* shows us, the Zoroastrian

[184] *In re* Civil Rights Cases, 109 U.S. 3 (1883) [note that a group of five cases in which the Supreme Court of the United States held that the Thirteenth and Fourteenth Amendments did not empower Congress to outlaw racial discrimination by private individuals].

[185] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); *Griffin v. Maryland*, 378 U.S. 130 (1964).

case is not good law even by Rawlsian standards. Next, we shall see how application of Kronmanian standards shows the wrongness of the Zoroastrian case.

ii. Can associations and religions discriminate?

Another argument which found favour with the Court in the Zoroastrian case was the right to religion and association of members of the community to restrict membership in their fold.[186] To secure these rights, the Court held that the bye-law of exclusion should be allowed to stand.[187] Have seen closely, it appears to be creating an island of religious and associational rights, where conformity to the 'non-discrimination' clause is not necessary. Recall that Rawls had said that the application of the three principles should apply only to the basic structure of the society. Thus, Rawls allows for a penumbra inside the modern state where these principles do not apply. This is in consonance with his idea of 'political liberalism' and 'pluralism'.[188] A strict boundary between public discourse based on public reason, evidence, logic, etc. (the domain of the political) [189] and comprehensive views (religious views) which 'though not unreasonable are different' has been drawn in Rawls' liberalism. Religiously diverse people consent to this thin 'political realm' because they consider it reasonable. Most people will not consider encroachment into religious views as tenable. Thus, an idea of pluralism emerges which allows diverse groups and their belief systems to coexist. We can see that

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[186] Zoroastrian Case, *supra* note 122 at 9.
[187] Zoroastrian Case, *supra* note 122 at 10.
[188] Bhatia covenants, *supra* note 182.
[189] Rawls Liberalism, *supra* note 133 at 217.

Rawls' belief in the liberal consensus leads him to this idea of pluralism of allowing all conceptions of goods life to exist alongside thin 'thin theory of good', i.e., distributive justice.

This means that a politically liberal state which protects the 'liberal consensus' should not infringe the right of minorities or cultural groups to define their good life for themselves. For Parsis, therefore, living together as a cultural group should not be interfered with by the state. But can we rely on AT Kronman and the 'freedom of contract' to question this form of liberalism? We have seen in Part I that Kronman does this by showing how 'illegitimate-advantage' accrues to people based on their position in the society. The threshold condition of non-discrimination will have to be met. The Indian Constitution similarly is a transformative document which does not merely provide political rights but seeks to annihilate caste and change those social practices which limit access to political and legal equality.[190] On application of this principle through Articles 15(2) and 17, which as we saw in Part II(a) have been read as 'anti-exclusion' principles, associations and religious societies cannot discriminate on the basis of prohibited grounds.

iii. Public policy: backdoor entry of the Constitutional mandate

Under Section 23 of the Indian Contract Act, violation of 'public policy' makes the contract illegal. However, the Court ignored its obligation in the Zoroastrian case by saying that public policy has to be

[190] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION 114-141 (2019).

seen from within the four corners of the Act.[191] Such a characterization of 'public policy' by courts is again reflective of Rawlsian liberalism, where 'distributive justice' remains confined to the basic structure of the constitution and does not leak into private law. This becomes problematic because it stops the courts from taking into account basic constitutional morality while examining contracts. In India, as in Kronman's theory, the 'constitutional morality' of distributive justice permeates the public-private divide. In *DTC* v. *DTC Mazdoor*,[192] the Court has explicitly made constitutional principles applicable through the doctrine of public policy. The court reasoned that the Rule of law must govern parties under a contract and arbitrary bargains which violate Article 14 could not be sustained.[193]

The observation of the Court in the Zoroastrian case that the constitution does not form part of 'public policy' stands contrary to the established line of cases[194] which led to *DTC* v. *DTC Mazdoor*.

IV. RETHINKING PROPERTY LAW IN NAVIGATING THE PUBLIC-PRIVATE DIVIDE

Over the previous part of this paper, we have discussed 'advantage-taking' by morally arbitrary factors, especially those which determine how we exercise our personal autonomy (caste, gender,

[191] Zoroastrian Case, *supra* note 122 at 13.
[192] Delhi Transport Corporation v. Delhi Transport Corporation Mazdoor Congress, 1991 Supp (1) SCC 600, 705-706 (India).
[193] *Id.*
[194] Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly, (1986) 3 SCR 156 (India); O.P. Bhandari v. Indian Tourism Development Corporation Ltd., (1986) 4 SCC 337 (India); N.C. Dalwadi v. State of Gujarat, (1987) 3 SCC 611 (India).

position etc.). Kronman says that this is not justified. We have seen the Indian equality code, and how in imposing a duty on the civil society to not discriminate and the state to ensure non-discrimination, it asks the state to interfere into private transactions with the end goal to make the system 'fair'. The threshold condition of Kronman's 'paretianism' and the Indian equality code have a stark resemblance. But to concretise this theory and secure its praxis we must see: How the state must interfere? Is there precedent to think about a particular form of interference?

A. WHO BEARS THE DUTY TO NOT DISCRIMINATE?

How then do we identify, the players who exercise this 'illegitimate-advantage' in private transactions, so as to impose a non-discrimination duty on them? We do this by seeing how their position gives them more power to influence the transaction. It is important to keep in mind that the transactions often time like housing transactions, are about access to basic goods, and private transactions can exclude access to these basic goods. To ensure that the disadvantaged sections are happier in the long run (the equivalent of Rawls' difference principle in private law) non-discrimination duty must be imposed on those who control access to these basic goods.

Tarunabh Khaitan in his book the Theory of Discrimination[195] has discussed on whom an anti-discrimination duty should be imposed. He identifies similar goods whose access is threatened by discrimination: (a) a set of goods which will adequately satisfy one's biological needs; (b)

[195] Khaitan, *supra* note 177 at 115.

negative freedom, i.e., freedom from unjustified interference by others in one's person, projects, possessions, relationships, and affairs; (c) an adequate range of valuable opportunities to choose from; and (d) an appropriate level of self-respect.[196] Two factors should be taken into account while deciding who should bear the anti-discrimination duty: the publicness of the individual and the capacity of this individual to effect access to public goods.[197] Khaitan keeps the 'liberal consensus' in mind so as to make the least restrictive imposition of this duty. Therefore, 'publicness of a transaction' is an important determinant because in liberal societies the state should not normally infringe on a person's liberty.[198] At the same time, there is an immense check on the liberty of the state. This is because the state has immense power which should not be exercised arbitrarily.[199] Whereas the coercive power an intimate friend may exercise is miniscule. Therefore, private persons have negative liberty against state control of their actions, however, discriminatory.[200] These are two extremes of a private individual and the state, with most private agencies falling somewhere on the spectrum.[201] Some private players yield almost as much power as the state and therefore, fall on a spectrum closer to the state.[202] It is these players that must be checked. That is to say, if you refuse to invite lower caste friends to a party, that is not a subject that discrimination law should tackle, but if the same party is thrown by an

[196] Khaitan, *supra* note 177 at 95.
[197] *Id.* at 195.
[198] *Id.* at 201.
[199] *Id.* at 201.
[200] *Id.* at 203.
[201] *Id.* at 203.
[202] *Id.* at 213.

employer who doesn't invite lower caste colleagues then it becomes a subject of discrimination law.[203] The employer by virtue of his power has a responsibility to act fairly. Secondly, some positions like employers, landlords and service-providers affect our access to basic goods.[204] Employers determine our 'income and wealth', housing and access to other such resources which form the societal basis for the 'self-respect'. Thus, a duty is imposed on 'public gatekeepers of these basic goods'.[205] An examination of Article 15(2) as explained by *IMA v. Union of India* (See Part II(a)), has a similarly philosophical import and seeks to control transactions where access to these goods (education in that case) is under threat by a person acting in his public capacity.

V. CONCLUSION AND WAY FORWARD

A. THE ILLS OF CODIFICATION OF PRIVATE LAW

In India, caste and religion-based discrimination has a chequered history. Indicators suggest that caste and religion remain strong indicators of backwardness and exclusion from institution.[206] Most Indian laws on private transactions are colonial statutes and now perhaps it is time to disentangle Indian private law from the codificatory constraints of such Acts and allow courts to explore the diversity of ethical and constitutional

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[203] Jack & Mae Nathanson Centre on Transnational Human Rights, Crime and Security, *Tarunabh Khaitan on "The Public-Private Divide in Discrimination Law"*, YOUTUBE (Jan. 12, 2016), *available at* https://www.youtube.com/watch?v=tv6sCVCA8SY.
[204] Khaitan, *supra* note 177 at 209.
[205] Khaitan, *supra* note 177 at 209.
[206] All India Survey on Higher Education, Ministry of Human Resource Development (2018), *available at* https://mhrd.gov.in/sites/upload_files/mhrd/files/statistics-new/AISHE2015-16.pdf.

values and normative commitments that it may be capable of producing in true common law fashion.[207] I have tried to show that the conception of private law in India has stuck to the 'libertarian property owning tradition' without acknowledging the transformative vision of the Constitution. The codification of the Acts seems to be one reason why the courts are unwilling to go beyond the text or read the text in light of constitutional values. Courts, as we saw in Zoroastrian case, have been reluctant to upset the settled expectations of a contract by taking into account constitutional values.

B. THREE APPROACHES TO HORIZONTAL RIGHT AGAINST DISCRIMINATION

In India, three approaches to horizontal application of discrimination are possible to give the constitutional provisions real shape. Firstly, it can be done by creating a direct anti-discrimination duty on individuals who have a public character, alongside a direct remedy to approach constitutional courts in event of any discrimination.[208] Given India's public law torts jurisprudence, which allows individuals to move the courts for significant tortuous violations,[209] this does not seem a far-cry. In the absence of a proactive anti-discrimination legislation, Tarunabh

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[207] Shyamkrishna Balganesh, *Codifying the Common Law of Property in India: Crystallization and Standardization as Strategies of Constraint,* 63 AM. J. OF COMP. L. 33, 74 (2015).

[208] Stephen Gardbaum, *Horizontal Effect,* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 601-602 (Sujit Choudhry et al. eds., 2016) [*hereinafter* "Gardbaum"].

[209] *E.g.*, Indian courts have created torts of 'strict liability' and 'destruction of public property' etc; *See*, Association of Victims of Uphaar Tragedy v. Union of India, (2003) 2 ACC 114 (India); *see also*, *In re* Destruction of Public and Private Properties, (2009) 5 SCC 212 (India).

Khaitan has proposed this path. A tort against discrimination is a real possibility which the courts can explore.[210] Secondly, it can be done by imposing a duty on the state to ensure that discrimination does not take place.[211] This would mean legislation on this issue which provides an institutional mechanism to settle discrimination claims like an 'Anti-Discrimination Commission'. In the absence of such laws, guidelines can be framed by courts to fill the void. Thirdly, this can be achieved by reading private laws in light of the principles of non-discrimination.[212] This would mean that with successive cases, the courts strike down bargains which are discriminatory and read down laws which seem to allow discriminatory practices.

C. A NEGOTIATED CONCLUSION

Ideally, the state should follow the second path and legislate in such matters (like realisation of Article 21A by Right to Education Act, 2009) to secure the right against exclusion of its citizens. Limited remedy exists in the status quo for Scheduled Castes and Scheduled Tribes in the form of SC and ST (Prevention of Atrocities) Act, 1989. But even this Act is ill-equipped to handle indirect and systemic discrimination. In 2017, a private-member's bill introduced by Dr. Shashi Tharoor with assistance from Prof. Tarunabh Khaitan was much debated.[213] But lack of political

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[210] Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for the Minorities*, 2 NUJS L. REV. 419, 429 (2009).
[211] Gardbaum, *supra* note 208.
[212] Gardbaum, *supra* note 208.
[213] *Congress MP Shashi Tharoor introduces Anti-Discrimination Bill in Lok Sabha [Read the Bill]*, LIVELAW (March 15, 2017), *available at* https://www.livelaw.in/congress-mp-shashi-tharoor-introduces-anti-discrimination-equality-bill-lok-sabha/.

will has stalled the process of its adoption. In the absence of laws, it remains open to the courts to frame guidelines (like they did in *Vishakha* v. *State of Rajasthan*.)[214]

The other two routes namely constitutionalisation of discrimination claims or reading constitutional values into statutes are chaotic processes, which may create inconsistencies. Some normative objections like doctrinal manipulation of the text of the law and upsetting the settled expectation of the law remain.[215] Similarly, constant interference by courts to realise equality may obfuscate the corrective nature of private laws, which are considered to do restorative justice and not distributive justice.[216] Not to mention, it would create new constitutional remedies which could be exploited by busybodies.[217] The burgeoning PIL route and its over-expansion present a sorry example of importing foreign jurisprudence into Indian laws without doctrinal clarity.[218]

Thus, well thought out guidelines by constitutional courts seem to be the best-negotiated option when no legislative intervention is forthcoming. These guidelines must put constitutional duty of non-

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214 Vishaka v. State of Rajasthan, AIR 1997 SC 3011 (India).
215 Shyamkrishna Balganesh, *The Constitutionalisation of Indian Private Law,* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 699 (Sujit Choudhry et al. eds., 2016).
216 *Id.*
217 Shyam Diwan, *Public Interest Litigation,* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 935 (Sujit Choudhry et al. eds., 2016).
218 Arun K. Thiruvengadam, *In Pursuit of 'The Common Illumination of Our House': Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia,* 2 INDIAN J. OF CONST. L. 67 (2008).

discrimination on such 'duty-bearers' as identified in Part III. These guidelines will ensure clarity and consistency in application which will limit the harms like doctrinal manipulation of private law and upsetting of contractual expectations.