

COEXISTENCE OR SEGREGATION?

EXAMINING CONSTITUTIONAL PUBLIC POLICY AND THE DISTURBED AREAS ACT 1991 IN GUJARAT

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I. Introduction

How should law and policy respond to institutionalizing social change in democratic societies ridden by years of violent ethnic segregation? A fundamental problem before engaging with the challenge is of defining what constitutes ‘public policy’ in a democratic society, faced with structural challenges of accumulated group inequality. In an urban setting, spatially carved divisions, including those socially constructed through informal boundaries, can fundamentally affect the impact a policy may have. In democratic societies ridden by protracted conflicts between communities, mutual distrust and social cohesion remain enormous challenges. These challenges become more multifaceted when the patterns of residence also reflect spatial segregation based on divisions of caste, religion, sect, and/or race.

It is often due to mutual distrust between communities that communities choose to self-segregate. There are two important points to take note of. One, (ethnically) mixed areas can offer liberatory potential by creating more and more shared spaces. One the other hand, they can also become sites of insecurity for social groups either giving rise to cluster-based living (gated communities) or intra-city migration, while severely constraining mobility choices.¹ Segregation can then be contextualized in Ellen & Steil’s conception as constrained choices due to fear and insecurity.² This sense of collective choice as reflected in “communal living”, as Sanderien Verstappen calls it,³ reflects deeper patterns of spatial segregation.

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¹ Rubina Jasani mentions the intracity migration in Ahmedabad post 2002 mass violence. See Rubina Jasani, ‘A Potted History of Neighbours and Neighbourliness in Ahmedabad’ in Edward Simpson and Aparna Kapadia (eds), *The Idea of Gujarat: History, Ethnography and Text* (Orient Blackswan Private Limited 2010).

² Ingrid Gould Ellen and Justin Peter Steil, ‘Introduction’ in Ingrid Gould Ellen and Justin Peter Steil (eds), *The Dream Revisited: Contemporary Debates About Housing, Segregation, and Opportunity in the Twenty-First Century* (Columbia University Press 2019).

³ Sanderien Verstappen, ‘Communal living: Religion, class, and the politics of dwelling in small-town Gujarat’ (2018) 52(1) *Contributions to Indian Sociology* 53–78.

The formation of informal settlements and surrounding areas could very well be attributes of fear and mistrust between communities. Needless to say, welfare governance in a highly divided society also resorts to “voluntary bystanderism”,⁴ at a distance away from bringing significant structural changes in the delivery of public utilities. It then becomes imperative for policy-makers to bridge the gap between constitutional guarantees, the context in which they operate, and redistributive governance through the state’s institutions aimed at public welfare.

In Ronald Dworkin’s view, the interpretive role of courts should be limited to examine whether public policies are violative of citizens’ rights.⁵ Moreover, Pellissery et al.⁶ direct our attention to two conditions which trigger policies; first, when the executive does not perform positive action to generate public good and second, when the courts judge the constitutional validity of such policies decreeing them as *ultra vires*. Thus, one of the foremost challenges before the policy-makers is to determine what constitutes the public good in a fragmented society. One way to address this is to determine the redistribution of public services in areas which resemble deeper patterns of spatial segregation in a historical sense.

Historically, communities in societies ravaged by years of armed and sectarian conflict, say the overlapping nationalist (Irish/British) and religious (Catholics/Protestants)⁷ conflict in Belfast (Northern Ireland),⁸ have resorted to spatially carved divisions engendering definitive ethnic (spatial) segregation. Ascriptive identities⁹ in such contexts are thus, hard to let go off. The state desiring policy changes in such cases, needs to be wary of the wicked problems posed due to ethnic conflict;¹⁰ for a policy aimed at reducing inequalities between conflicting groups may end up perpetuating the same in conduct.

⁴ Professor Upendra Baxi uses the metaphor to explain the withdrawal of state’s presence in the context of 2002 mass violence. See Upendra Baxi, ‘The Twilight of Human Rights’, (2003) 30(2) *India International Centre Quarterly* 19-28.

⁵ Sony Pellissery, Babu Matthew, Avinash Govindjee and Arvind Narrain, ‘Why is law central to public policy process in the Global South?’ in Sony Pellissery, Babu Matthew, Avinash Govindjee and Arvind Narrain (eds.) *Transformative Law and Public Policy* (Routledge 2020).

⁶ Pellissery et al., *Supra* Note 5.

⁷ Scott A. Bollens, *On Narrow Ground: Urban Policy and Ethnic Conflict in Jerusalem and Belfast* (State University of New York Press 2000) 189.

⁸ Separation barriers called “peacelines” in order to segregate Catholic neighbourhoods from Protestant neighbourhoods are the most visible example. See Paul Doherty and Michael A. Poole, ‘Ethnic Residential Segregation in Belfast, Northern Ireland, 1971-1991’, (1997) 87(4) *The Geographical Review* 528.

⁹ In the context of the paper, it implies the magnification of religious, caste, racial or any other identity over the citizen’s identity in policy formulation.

¹⁰ Donald L. Horowitz, *Ethnic Groups in Conflict* (University of California Press 1985) 563–568.

In the context of post mass violence Indian cities, ethnic segregation and informal boundaries have often emerged as visible markers of everyday life. This essay looks one such unique case. It examines a restrictive zoning policy related to ethnic conflict and spatial segregation in the state of Gujarat. From the lens of constitutional fundamental guarantee under Article 15(2), the paper examines the validity of the Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act, 1991 (also known as the Disturbed Areas Act 1991) (hereinafter, the Act). The background to the Act must begin with a fundamental question – Do ethnically mixed areas cause more violence in times of distress or witness more social cohesion? This question has acquired a key position among policymakers contemplating ethnically mixed nature of areas in sensitive areas.

In scholarly work, this question has been addressed with contrasting views. Ashutosh Varshney's significant work titled "Ethnic Conflict and Civic Life" advocates routine engagement between communities and "pre-existing local networks of civic engagement" as decisive in defusing tensions between ethnically divided communities. Varshney's argues that presence of intercommunal engagement can lead to communal peace, thus advocating a version of coexistence rather than its contrasting policy option of segregation. It leads policy makers to emphasize on the modes of governance which can address the diluting character of mixed areas and mushrooming segregating public spaces in the guise of private land-use. This leads us to view housing as a primary site, borrowing from Solange Muñoz's study on housing in Buenos Aires (Argentina),¹¹ from which residents' access to urban resources and services such as education, health care, jobs and transportation gets mediated.

II. The origin of the Act and case laws

The city of Ahmedabad has been grappling with the problem of mass violence since 1969, and communal violence has been endemic, post-independence. Howard Spodek demonstrates that violence in the city has not been simply sporadic but endemic with breaks in 1941, 1942, 1946, 1956, 1958, 1964, 1969, 1974, 1981, 1985 and 1986 (including the pogrom in 2002).¹² During rising ethnic tensions in the 1980s, 'distress sales' led to exodus and evictions of minorities

¹¹ Solange Muñoz. 'A look inside the struggle for housing in Buenos Aires, Argentina', (2017) 38(8) *Urban Geography* 1252–1269.

¹² Howard Spodek, 'From Gandhi to Violence: Ahmedabad's 1985 Riots in Historical Perspective', (1989) 23(4) *Modern Asian Studies* 765.

from communally sensitive areas. It also led to consolidation of informal boundaries between Hindu and Muslim areas.

The Disturbed Areas Act was initially passed as an ordinance in 1986 to stem the bootlegging activities and ‘distress sales’.¹³ Ornit Shani explains that the purpose of the law was to prevent the dilution of mixed localities and it was enacted first in eastern Ahmedabad (with reference to Bapunagar area) where Muslims were evicted from Hindu-dominated localities and had to sell their properties at distressed rates. Shani critiques the Act by arguing that it had little possibilities of success as the Act “sought to reverse the situation that existed on the ground after the riots” where patterns of spatial segregation had reified.¹⁴ Over the years, the policy has been extended to various areas in Ahmedabad and cities across Gujarat. Its extension criticised by scholars for perpetuating social segregation, an objective against which the Act was brought in.¹⁵

The prohibition on transferring of property includes prohibition of transfers by gift, exchange, sale, lease or otherwise. Though the Act does not mention religion as the basis of such a prohibition, in practice it becomes more complex when one wants to move out of a disturbed area and relocate. It is so because the religious ascription to areas and religious identities in the social context are intertwined in the practice of segregated living. The extension of the Act to a new area would mandate that residents apply for permission to the authorities for selling their respective properties. In ethnically mixed areas, the probability of selling the property to buyer of another community is unlikely, leaving the option to sell it at lower price to a co-ethnic/co-religionist. It may also impact the market price of properties in that area.¹⁶ This appears as a compromise of the Act’s initial intent which had originally focussed on preventing forced transactions/evictions.

¹³ Howard Spodek, *Ahmedabad: Shock City of Twentieth-Century India* (Orient Blackswan Private Limited 2012) 235–236.

¹⁴ Ornit Shani, *Communalism, Caste and Hindu Nationalism: The Violence in Gujarat* (Cambridge University Press 2007) 127–128.

¹⁵ For instance, Fahad Zuberi calls it “Apartheid by law” to signify the deep ethnic divisions perpetuated by the existence of the law. See Fahad Zuberi, ‘Apartheid by Law: Sustaining Conflict, Producing Divided Cities, The Case of Disturbed Areas Act, 1991’ in A. Srivathsan, Seema Khanwalkar and Kaiwan Mehta (eds), *CEPT Essay Prize 2019* (CEPT University Press 2020).

¹⁶ For instance, a resident in Shahpur (East Ahmedabad) wanted to migrate to Navrangpura (an area known for upward residential mobility) by selling his existing property. Due to the imposition of the Act, he could not do so. Since his ascriptive identity happens to be Hindu, he could only sell it to Hindu or Jain buyers. He frustration with the imposition of the Act can be summarized in his statement “at the rate being offered by Hindu or Jain buyers, we can’t even afford to buy even a bathroom there. There were Muslim buyers who were willing to offer the market price, but getting the collector’s permission to make the sale to them is a hindrance.” See Nileena MS, ‘The Gujarat government is enforcing communal segregation and criminalising property transfers’ *The Caravan* (21 August 2019) <<https://caravanmagazine.in/policy/the-gujarat-state-is-enforcing-communal-segregation-and-criminalising-property-transfers>> accessed 12 August 2021.

The disputes arising under the Act in front of the Gujarat High Court are disputes about personal property on various grounds, that include individual parties, cooperative societies, builders and so on. The cases are about the vagueness of the language of Act with regard to the state's extension of the Act to applicants' area,¹⁷ the illegal possession of one's property after a riot situation,¹⁸ or challenging the involvement of a third party between two consenting parties.¹⁹

A major contestation with regard to the Act's application has appeared in transactions involving inter-faith property transfers particularly in ethnically mixed as well as homogenous areas. It has been contested on assessments of potential future law and order problems. The SNA case offers a significant direction in this regard.²⁰ It represents the tussle between the community sentiment of maintaining exclusive membership and preventing members of other communities from acquiring property in their vicinity. In this case, Justice Waghela held that the applicants' contention²¹ was "suffering from communal prejudice" and they had "misconception about the law".²² Moreover, in his reading of the Act, Justice Waghela observed that the original intent of the Act was not to divide "residents or citizens on communal lines". He also held that no law in India could be interpreted in a manner to "exclude the members of one or the other community from carrying on legitimate business activities and entering into communal transactions".²³ This reinforces our attention to the original intent of the Act which is free consent between parties and not inter-community property sale.

¹⁷State of Gujarat v. Nareshbhai P. Parmar, 2012 SCC OnLine Guj 2688.

¹⁸Abdul Azziz Mohammad Shafi Rangwala v. State of Gujarat, 2016 SCC OnLine Guj 4753.

¹⁹ Bharatkumar Shankarlal Somani v. State of Gujarat Special Civil Application No. 11362 of 2017, Para 11.

²⁰ SNA Infraprojects Private Limited v. Sub Registrar, 2011 SCC OnLine Guj 2504. (hereinafter 'SNA')

²¹ Supra Note 20, SNA at Para 5. The case mentions appeal of ten Mevawala flat residents through multiple civil applications who had requested the Speaker of the Gujarat Legislative Assembly to intervene as there were attempts to sell properties to Muslims. Moreover, they refer to a letter drafted by the then Deputy Collector to the Chief Minister in 2006 indicating that such property transfers would force more than a thousand Hindus to leave the area in question. It is for preventing the defeating of the purpose of the Act that these applicants had argued that such a sale deed by the petitioners be held illegal. In this case, the involvement of a non-state actor called as "Shree Kochrab Ellisbridge Hitrakshak Samiti" which had insisted the Speaker to take note of the transactions happening in the sensitive area. However, the petitioners had contended that the applicants suffered a misconception about the Disturbed Areas Act that its primary objective was to prevent entry of persons of a community into another.

²² Supra Note 20, SNA at Para 9.1.

²³ Supra Note 20, SNA at Para 10.

The Act was amended in 2019 (hereinafter, the Amended Act) to plug in the loopholes in the previous iteration of the Act.²⁴ In the Amended Act's language, "harmonious demographic equilibrium" was prescribed as the most essential parameter helping in maintaining public order in disturbed areas. In as many as three cases,²⁵ the Gujarat High Court has interpreted that free consent and fair value between parties is the objective of the Act, and the matter should not be unnecessarily complicated by emphasizing upon the religious demography angle. Though the Gujarat High Court judgments have been important in their own sense, the constitutionality of the Act has not been tested by the Court. In light of the Amended Act, the constitutionality of the Act needs to be analysed from the aspect of public policy.

An important judgment on the constitutionality of segregated housing (or rather housing membership on exclusive criteria) from the aspect of public policy is the Supreme Court's ruling in *Zoroastrian Cooperative v. District Registrar*.²⁶ The context of the Zoroastrian case has larger implications on rapidly urbanizing spaces where de-facto practices of social segregation and restrictive covenants (private bye-laws) based on exclusive membership (say religious, caste or sect identity) meet de-jure restrictive zoning law such as the Disturbed Areas Act 1991. This critical comparison of the judgment can thus provide an important lens to judge other legislations, including the Act, that relate to housing based on ethnic identities. Accordingly, the following section will analyse the Zoroastrian Cooperative judgment to identify its core principles and apply them to the Act.

III. Zoroastrian Cooperative judgement and the Disturbed Areas Act

²⁴ The Statement of Objects and Reasons states, "In place of the existing provision in section 3 of the aforesaid Act, a new provision is sought to be substituted whereby, while enlarging the instances for declaration of any area to be a disturbed area illegal transfers of immovable property disturbing the proper clustering of the persons of one community and to have harmonious demographic equilibrium by introducing the concept of identification of proper clustering of the persons of one community on the basis of the traits of the residents of a particular geographical area having common norms, religion, values or identity and sharing a sense of place in the said area." See 'The Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in the Disturbed Areas (Amendment) Bill, 2019'. *National eVidhan Application – Ministry of Parliamentary Affairs (NeVA)* <http://cms.neva.gov.in/FileStructure_GJ/Notices/4d0680e4-0ff4-4038-90bc-ae75232223d2.pdf> accessed 12 August 2021. (hereinafter 'Amended Act')

²⁵ *Bharatkumar Shankarlal Somani v. State of Gujarat* Special Civil Application No. 11362 of 2017. *Sudhakar Chudaman Borse vs State of Gujarat* Special Civil Application. No. 10628 of 2016 and *Onali Ezazuddin Dholkawala vs State of Gujarat* Special Civil Application No. 13041 of 2019.

²⁶ *Zoroastrian Cooperative Housing Society Limited v. District Registrar Cooperative Societies (Urban)*, (2005) 5 SCC 632. (hereinafter 'Zoroastrian')

The Zoroastrian Co-operative Housing Society was a society registered under the Gujarat Co-operative Societies Act, 1961, with its own set of by-laws. The Housing Society contended that Respondent no. 2 (a Parsi) as a member of the Co-operative Society violated clause 7 of its bye-laws by entering into negotiations for selling the property to Respondent no. 3 (a non-Parsi). It led to the violation of Fundamental Right to Freedom of Association under Article 19(1)(c) of the Co-operative Society. The right of Parsis, a religious minority, to preserve their culture under Article 29 was also invoked. The Respondents contended that Section 4 of the Gujarat Co-operative Societies Act, 1961 under which the Cooperative was now registered, “clearly indicated that no bye-law could be recognized which was opposed to public policy or which was in contravention of public policy in the context of the relevant provisions in the Constitution of India and the rights of an individual under the laws of the Country. A bye-law restricting membership in a co-operative society, to a particular denomination, community, caste or creed was opposed to public policy”.²⁷

According to Gautam Bhatia,²⁸ the judgment defined “public policy”²⁹ within the confines of the statute in question and did not see the bye-law violating the Constitution on the aspect of religious based discrimination. Our purpose here is to contribute to the critique to the judgment in the Zoroastrian Cooperative judgment case, and also to import some parallels which inform the Act tangentially. The proposal is not to disagree with what Bhatia argues, rather it is to reiterate the blatant unconstitutionality of the Disturbed Areas Act.

First, in the Zoroastrian Cooperative judgment, the Supreme Court was clear about the need of a legislative intervention to formulate non-discriminatory law. A law under which the bye-laws made on discrimination based on religion or sex would be held invalid. Only then the bye-law can be said to be violative of public policy. The Court held that it is not for it to give a theory of what is consistent with public policy as envisioned by Part III of the Constitution.

²⁷ Supra Note 26, *Zoroastrian* at Para 6.

²⁸ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts*. (Harper Collins India 2019) 114-140.

²⁹ Supra Note 26, *Zoroastrian* at Para 32. The SC refused to delve into the question of what constitutes public policy according to it. The Court felt that while “theoretically it could devise a new head of public policy under exceptional circumstances, such a course would be inadvisable in the interest of stability of society”. Also, the SC felt observed that it was left best to the legislature to decide what is appropriate public policy.

When it comes to the Amended Act, the discriminatory provisions based on religion and caste are inscribed in the legislation itself.³⁰ The most important aspect here is that it is being enforced by the State that falls under the purview of Article 12 of the Constitution. The question whether Cooperatives fall under the purview of State, as was the question in Zoroastrian Cooperative judgment, is not for consideration here. The Court pointed out in the Zoroastrian Cooperative judgment that had such a discrimination based on class and religion been purported by State, it would have been forced to intervene. Hence, the Act should be held unconstitutional on this very basis.

Second, the essay agrees with the Court holding that a Cooperative is a voluntary organisation. The Parsi Respondent who was willing to sell to a non-Parsi Respondent became the part of the society on his own volition. With this, he not only acquired the rights but also the obligations that came along with being member of the Cooperative.³¹ Under the Act, the people unable to sell property to a person of different identity was not due to being part of a restrictive covenant, being part of a voluntary cooperative, etc. It was due to an action of the State preventing a private contract from being enforced on the basis of caste and religion, thus violating the Fundamental Right under Article 15(2).

Third, the Indian Medical Association (henceforth IMA) v. Union of India³² judgment could be referred to in order to further strengthen the argument. The IMA judgment held that no private service can be restricted due to any legislation based on ascriptive identities, as it was a violation of Fundamental Right under Article 15(2). Similar argument can be made with reference to the Act too, as it is restricting a private contract based on ascriptive identities. The Court, citing the speeches of Babasaheb Ambedkar in the Constituent Assembly, ruled in the IMA case that the word “shop” used in Article 15(2) is used in a generic manner and hence entails “educational institutions” too.³³ Since the word “shop” is used in a generic manner,

³⁰ *Amended Act*, Supra Note 24.

³¹ Supra Note 26, *Zoroastrian* at Para 29.

³² Indian Medical Association v. Union of India (2011) 7 SCC 179. (hereinafter ‘*IMA*’)

³³ Supra Note 32, *IMA* at Para 112 of the judgment indicates how social justice is a pressing concern under Article 15(2). Para 113 reads an egalitarian jurisprudence when read with other provisions of the Constitution. The beginning of the Para 113 would indicate how the judgment is using words of Babasaheb Ambedkar in the Constituent Assembly to interpret an expanded meaning of “shops” in Article 15(2). Para 113: “The purport of Article 15 (2) can be gathered from the Constituent Assembly debates. Babasaheb Ambedkar elucidated on the same saying that “To define the word ‘shop’ in the most generic term one can think of is to state that ‘shop’ is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. Certainly it will include anybody who offers his services. I am using it in a generic sense. I should like to point

hence obviously its reach is not restricted by “educational institutions” but encompasses “housing” or “property transactions” too, which is of concern in this discussion. Gautam Bhatia takes the argument further and strongly contends that the Court in the IMA case brought horizontal discrimination based on grounds of sex, race, religion, etc. under the purview of Article 15(2).³⁴

From the above arguments, it would be reasonable to comment on the unconstitutionality of the Act. This essay contends that any legislation stepping on the right of the economic transaction (in its conduct or as a ‘disparate impact’) between consenting private parties based on exclusivity of religion and caste, is a clear violation of the Fundamental Right under Article 15(2). More importantly, the Gujarat High Court while dealing with cases with respect to the Act, has also reiterated that free consent and fair value are the objectives underlying the Act, irrespective of the ascriptive identities of the parties entering the transaction.

Fourth, the Zoroastrian Cooperative judgment had also held that prevention of formation of a “ghetto” is an important aspect that the legislation must focus on.³⁵ The Act with its arbitrary formulation (discussed in detail later), which may be deliberate too, may escape the scrutiny of the judiciary for being discriminatory and perpetuating inequality.³⁶ It needs to be emphasised here that the State can deliberately draft a law in a particular manner in order to keep itself away from the scrutiny of the Courts. It is not hard to see that the Act with its drafting formulation falls under this. Unlike the Amended Act, the 1991 version of the Act does not have explicit mention of identity markers. The Amended Act helps us understand that residence based on identity markers (either caste, religious or otherwise that have not been endorsed by the Gujarat High Court as the Court has upheld fair value and free consent principles as the

out therefore that the word ‘shop’ used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to.”

³⁴ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins India 2019) 129. In Chapter 4 Bhatia contends that the Constituent Assembly Debates, the IMA judgment, and the uniquely transformative nature of the Indian Constitution “justifies the use of horizontal constitutional rights against discriminatory economic transactions in the private sphere”. He interprets the use of the word “shop” in Article 15(2) is “merely the concrete expression of the idea of the impersonal, abstract market of the modern liberal-capitalist economy”.

³⁵ *Supra* Note 26, *Zoroastrian* at Para 28. It further needs to be taken into account that the term ghetto in understanding spatial segregation is problematic. In the case of Ahmedabad, before evoking the term, one needs to make a critical assessment as to why certain communities choose to cluster around certain areas and what are the structural barriers to their residential mobility.

³⁶ *Re Drummond Wren* (1945) O.R. 778 (Ont. HC). A restrictive covenant that prohibited land to be sold to a ‘Jew or person of objectionable nationality’ in a Canadian case called *Re Drummond Wren* in 1945 was held unconstitutional for violating international law and being racist in character.

original objectives of the Act) have been sought to be imposed through the amendment as the original objectives of the Act.

Fifth, the Zoroastrian Cooperative judgment states that bonds of common usage and common habits are found in a community and caste that eventually becomes the basis of housing together. It contradicts its own statement later in the judgment that in secular India it is retrograde to form cooperatives based on identities of religion and caste.³⁷ The former statement seemingly justifies what the Amended Act aims to achieve, a “proper clustering of people of one community”.³⁸ The argument of “proper clustering” might stand for the preservation of culture under Article 29 for Parsi community, a minority, as it did in the Zoroastrian Cooperative case.³⁹ But it would fail to stand ground in case of the Act, as clustering of Hindus (or sub-clustering based on caste) would not stand the minority argument under Article 29.

Even if it is accepted that by means of Freedom of Association under Article 19(1)(c) the people of a similar community are allowed to self-segregate, as the judgment also observes, the active intervention of the State to enforce the proper clustering based on identity markers is questionable and opposed to constitutional public policy.⁴⁰

The next section points towards the problematic aspects in the Amended Act that have previously not been highlighted. As already stated, the amendment is important because it adds identity elements to the Act. The essay contends that the added aspects depict the essential objectives of the Act. On the basis of these, the Act would fail to stand the test of constitutionality. Most importantly, the subjectivity and the ambiguity of the provisions of the amendment to the Act would be brought to light. These ambiguities would point to the exacerbation of the problems with the Act, in relation to religious discrimination as examined above. It can rightly be inferred that the Act would not hold the test of constitutionality even when looked from the lens of an often-criticized judgment as in the Zoroastrian Cooperative case.

³⁷ Supra Note 26. *Zoroastrian* at Para 10 and Para 26.

³⁸ *Amended Act*, Supra Note 24.

³⁹ Supra Note 26, *Zoroastrian* at Para 6.

⁴⁰ Supra Note 26. *Zoroastrian* at Para 27 and Para 28.

IV. The 2019 Amendment and arbitrariness of the Act

First, it needs to be pointed out that the Amended Act emphasises that the religious demography is an important component of the Act. Apart from free consent and fair value, demographic equilibrium and proper clustering have become important criteria that need to be taken into consideration by the Collector in order to allow the sale of the property.⁴¹ The demographic equilibrium and proper clustering elements can be assumed to be added after the Gujarat High Court thrice reiterated that free consent and fair price was the only objective of the Act.⁴²

These added criteria related to ascriptive identity have already been criticised in the previous section, but what further needs to be understood is the ambiguity in the language of the legislation. It is up to the Collector to decide if the sale of the property will lead to a likelihood of polarisation or an improper clustering of people,⁴³ which leaves a lot of discretion at the hands of the bureaucracy, as there are no definite criteria to define what would lead to likelihood of polarisation or improper clustering of people. Any inter-identity sale would be curbed by the addition of the criteria. It would prevent any sale by free consent and fair price, because the additional new criteria would prevent it. Thus, it would hamper the original intent of the Act that was meant to prevent distress sale, but not to impose curb on sale by free consent and fair price.

Second, the Amended Act is largely ambiguous about its choice from the two opposite policy choice of segregation and coexistence. It states in its Statements of Objectives and Reasons that it aims to prevent “disturbing the proper clustering of the persons of one community”.⁴⁴ The Amendment goes on to emphasise what it means by “proper clustering” in section 2(d). It wants disturbed areas “to have harmonious demographic equilibrium by introducing the concept of identification of proper clustering of the persons of one community on the basis of the traits of the residents of a particular geographical area having common norms, religion,

⁴¹ *Amended Act*, Supra Note 24.

⁴² Supra Note 25.

⁴³ *Amended Act*, Supra Note 24, in section 5, sub-section (3), clause (b).

⁴⁴ *Amended Act*, Supra Note 24.

values or identity and sharing a sense of place in the said area”.⁴⁵ The bare reading of this portion of the Act seems to be tilting towards the policy option of keeping people ascribing to one identity in a segregated cluster.

The policy intention of the Act is further complicated by section 3(1)(ii) that describes the areas that can be held eligible for being declared as a disturbed area. According to section 3(1)(ii), the area that can be declared disturbed is “Where the State Government is of the opinion that polarization of persons belonging to one community has taken place or is likely to take place disturbing the demographic equilibrium of the persons of different communities residing in that area or that improper clustering of persons of one community has taken place or is likely to take place where the mutual and peaceful coherence amongst different communities may go haywire in that area”.⁴⁶ A bare reading of the section points to the need to maintain an equilibrium between people of different communities. On reading the section one can come to the conclusion that the policy option of keeping the demographic composition of the geographical area at status quo has been adopted.

Arbitrariness as a policy motive stands out from the language of the Act. It would further confuse the bureaucratic machinery, moving further away from worrying about distress sale. Rather the focus would shift on religious and caste demography that are subjective criteria at their best. The discretion handed in the hands of the bureaucracy can lead to dangers of bureaucracy tilting in favour of one identity that has previously also been seen in Gujarat.⁴⁷

Third, the Amended Act “includes an area of five hundred meters adjacent to the boundary of the disturbed area” in the disturbed area.⁴⁸ There have been cases of vagueness of the language of Act with regard to the government’s extension of the Act.⁴⁹ The addition of the extended feature would lead to further disputes. It is the responsibility of the citizen that they make their residential decision keeping the Act in mind. Most importantly, it would hand further discretion in the hands of the bureaucracy with yet another ambiguous feature in the Act.

V. Lessons from a foreign land: Importing ‘disparate impact’ to disturbed areas

⁴⁵ *Amended Act*, Supra Note 24.

⁴⁶ *Amended Act*, Supra Note 24.

⁴⁷ Nikita Sud, *Liberalization, Hindu Nationalism and the State: A Biography of Gujarat* (Oxford University Press 2012).

⁴⁸ *Amended Act*, Supra Note 24, addition under section 3 clause (a).

⁴⁹ *State of Gujarat v. Nareshbhai P. Parmar*, 2012 SCC OnLine Guj 2688.

India lacks a comprehensive national anti-discrimination housing policy. The case of disturbed areas in Gujarat can perhaps benefit from a desegregation legislation perspective. It can benefit by taking inspiration from its American counterpart, where the Fair Housing Act was enacted in 1968. Disparate impact, as a conceptual tool, helps us foreground discriminatory practices which perpetuate segregation between communities.⁵⁰ It helps us understand the fair market value of a property as well as the informal practices which prevent mobility as dictated by members of the dominant castes or ethnic communities in the respective areas.⁵¹

In the context of segregation in American cities, as Angotti and Morse inform, segregation was evident through exclusion in the form of exclusionary zoning as a “legally defensible means for communities to segregate under the guise of a public interest” through social indicators of wellbeing including the health, safety, and people’s welfare in the form of protection of property value or “neighborhood character”.⁵²

On defining housing discrimination in the context of the Fair Housing Act, Angotti and Morse make a distinction between ‘intent and disparate impact’.⁵³ The Fair Housing Act, which prohibits discrimination of protected classes on various grounds, does not require explicit intent to be proved to examine intentional discrimination.⁵⁴ Rather, the resulting impact of a housing policy on racial groups or protected classes determines its disparate impact.⁵⁵

The disparate impact approach has guided case laws pertaining to housing discrimination in the US for the past three decades.⁵⁶ Agnotti and Morse cite the US Supreme Court ruling on *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc., et al*, in which the Apex Court had ruled that to prove racial discrimination it is sufficient to establish “a disparate impact of public policy without necessarily proving discriminatory intent”⁵⁷.

It is important to revisit the scholarship of Richard Rothstein, who adds an interesting dimension to the institutionalization of segregation through nationwide legislation.⁵⁸ In the

⁵⁰ Tom Agnotti Tom and Sylvia Morse, ‘Racialized Land Use and Housing Policies’, in Tom Agnotti and Sylvia Morse (eds.) *Zoned Out!: Race, Displacement, and City Planning in New York City* (Terreform 2016) 46-71.

⁵¹ Agnotti and Morse, Supra Note 50.

⁵² Agnotti and Morse, Supra Note 50, Page 50–51.

⁵³ Agnotti and Morse, Supra Note 50, Page 65.

⁵⁴ Agnotti and Morse, Supra Note 50, Page 65.

⁵⁵ Agnotti and Morse, Supra Note 50, Page 65.

⁵⁶ Agnotti and Morse, Supra Note 50, Page 65.

⁵⁷ Agnotti and Morse, Supra Note 50, Page 65.

⁵⁸ Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright Publishing Corporation 2017) 8.

context of segregation in the United States, he takes into account the crucial role of state's restrictive legislation in institutionalizing segregation.⁵⁹ He argues that the patterns of residential segregation in the North, South, Midwest, and Western America is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation. Rather it is that of unhidden public policy that explicitly segregated every metropolitan area in the United States.⁶⁰ He informs us that the policy was so systematic and forceful that its effects continue to the contemporary times.⁶¹ He emphasizes that even without American Government's condoning of racial segregation, the menace of "private prejudice, white flight, real estate steering, bank redlining, income differences, and self-segregation" would still have persisted "but with far less opportunity for expression". Hence, Rothstein concludes, "segregation by intentional government action is not de facto. Rather, it is what courts call de jure: segregation by law and public policy".⁶²

The significance of 'disparate impact' as a tool in assessing the resulting intent of a public policy could also be useful in examining segregation in Gujarat. It implies that the Disturbed Areas Act could also be examined through the lens of 'disparate impact'. It is so since the Act has at multiple levels of enquiry by authorities in the course of its operation (as seen from the disputes), witnessed through perpetuation of structural inequalities in the areas where its original intent gets moulded or defeated all together.

VI. Conclusion

The case of disturbed areas in Gujarat presents a peculiar case of Robert Merton's "Unanticipated consequences of purposive social action". The Act, though extended in accordance with the government's view of law and order situation, impacts structural inequality in housing and property ownership individually as well as communally. The Act stands challenged in the Gujarat High Court by minority-rights activist Danish Qureshi.⁶³ More recently, the Court has restrained the state government from issuing further notifications in

⁵⁹ Rothstein, Supra Note 58, Page 8.

⁶⁰ Rothstein, Supra Note 58, Page 8.

⁶¹ Rothstein, Supra Note 58, Page 8.

⁶² Rothstein, Supra Note 58, Page 8.

⁶³ 'Disturbed Areas Act challenged in HC' *The Times of India* (Ahmedabad 03 May 2018) <<https://timesofindia.indiatimes.com/city/ahmedabad/disturbed-areas-act-challenged-in-hc/articleshow/64006616.cms>> accessed 08 January 2021.

accordance with the Amended Act against a special civil application moved by the Jamiat Ulama-e-Hind Gujarat challenging the recent amendments to the Act.⁶⁴

As the Gujarat High Court grapples with the question of the Act's constitutionality, it is imperative that the Act must be understood broadly in terms of its manifestations in the existing *de facto* segregation in Gujarat. While critiquing the rationale to the Act, a pertinent question is— can law become the torchbearer of change when the communities in conflict refuse to even break bread together, irrespective of the residential patterns of segregation? German Philosopher Walter Benjamin had evoked “law preserving violence” to signify when violence is used to pursue legal ends rather than natural ends.⁶⁵ He insisted that it operates via a constant threat and that it serves a means to keep the appearance of fate in place.⁶⁶ In the context of this essay, the constant threat of polarization between communities if residential mixing is not prohibited, resonates with Benjamin's view on the Act serving legal ends than the constitutional public policy mandate of upholding the citizen's identity (a natural end). This demands a critical examination of state's role in impacting the mandate of constitutional public policy against the background of communal conflict and mutual distrust between communities.

The fundamental problem which the Act evokes is not only of ‘distress sales’ and ‘forced evictions’ in the contemporary scenario for two reasons. First, a society cannot be projected in perpetual conflict by the state when the last episode of mass violence was in 2002. Second, a public policy aimed at welfare cannot prohibit individuals from different communities by simply citing the pretext of a sensitive area and upholding the religious identity of a citizen as its primary marker. It is for this reason that the Act has become a tool of fixing the residential mobility of communities to prevent mixing based on the religious identity of the citizen. As the Amended Act equates polarization with that of “improper clustering” of communities, the constitutionally flawed rationale to the Act itself serves as a reminder of state's withdrawal from becoming the central platform for facilitating mixed living as a core feature of public and private housing.

The Disturbed Areas Act is not only an opportunity to evoke the Constitutional mandate of public policy but also a broader window to deal with the broader problem of social segregation

⁶⁴ ‘Disturbed Areas Act: Gujarat HC stays fresh notifications on amended sections’ *The Indian Express* (Ahmedabad 20 January 2021) <<https://indianexpress.com/article/cities/ahmedabad/disturbed-areas-act-gujarat-hc-stays-fresh-notifications-on-amended-sections-7154739/>> accessed 09 August 2021.

⁶⁵ Andy McLaverty-Robinson, ‘Walter Benjamin: Critique of the State’ *Ceasefire* (31 December 2013) <<https://ceasefiremagazine.co.uk/walter-benjamin-critique-state/>> accessed 12 August 2021

⁶⁶ Robinson, *Supra* Note 65.

in the Indian cities beyond Gujarat. It can also serve as a critique to the ‘theory of area of operation’ (from the *Zoroastrian* judgement) and ‘caste-based residences’ which substantiate community associations and discourage mixed living. Our purpose is not to challenge one’s right to associate and form unions but to highlight its discriminatory aspect. Moreover, the intense involvement of bureaucracy ailing with objections from non-state actors such as cooperative society committees to raise objections between two consenting parties is a breach of citizens’ free will, right to privacy and autonomy. How can a public policy be solely defined by the state with the portrayal of law and order entirely dependent on the demography of the respective areas? There is an objective order of values grounded in Constitutional doctrines, and hence legislative action such as the Act need to be analysed in that light. It is for this reason that the judiciary is constantly relied upon to ensure that democratic and constitutional doctrinal values are adhered to in principle and conduct to prevent discrimination based on ascriptive identities.