**Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context.**

**Submission- Access to Justice for Housing Discrimination and Spatial Segregation**

* *What institutional mechanisms exist to report, redress and monitor cases of discrimination or segregation in relation to the right to adequate housing in your country and how effective have they been to addressing discrimination and segregation?*
* *What are the principal barriers to seek justice for discrimination/segregation in relation to the right to adequate housing?*
* *What policies and measures do you consider important to strengthen access to justice and remedies for households and communities facing housing discrimination and spatial segregation?*

**India- A Map of Spatially Segregated Communities, their locational disadvantage and structural barriers to justice.**

Dr. B.R Ambedkar, regarded as the architect of the Indian Constitution said, *“Every Hindu village has a ghetto. The Hindus live in the village and the untouchables live in the ghetto”*.[[1]](#footnote-1)The Hindu caste system premised on notions of purity and pollution continues to perpetuate discrimination and exclusion in all spheres of life.

Seven decades after independence, urban and rural areas are marked by spatial segregation, with caste, religion, ethnicity, class and gender identity determining the contours. Urban cities and towns are marked by residential clusters occupied by migrant regional working-class communities, ethnic minorities from the North-Eastern states, Kashmiris, transgender persons, refugees, manual scavengers and the poor.

The growth of a free-market economy and rapid urbanization and migration has not reversed this trend. Far from being a melting pot and harbingers of social mobility Indian cities perpetuate exclusion adding newer categories of discriminated communities.

A 2018 study on the basis of block level census data from 2011, in five of the largest metropolitan cities, confirms that Dalits and members of Scheduled Castes and Scheduled Tribes largely reside in community clusters isolated from the rest of the city, which has a direct bearing on the levels of access to municipal services, such as drinking water, sanitation, education and healthcare that these residents are able to access.[[2]](#footnote-2) These studies etch a pattern that has been described as ‘locational disadvantage’.

The rise of right-wing Hindutva politics, over the last few decades has further polarized social relations through targeted communal violence, the 1984 anti-Sikh massacre, 1992-93 Bombay riots, the anti-Muslim pogroms of 2002 in Gujarat and Muzaffarnagar in Western Uttar Pradesh, has accelerated the cementing of spatially segregated housing. As caste equations and religious identity continue to play a pivotal role in Indian electoral politics, spatial segregation gets further entrenched. Consequent to the riots in a part of Delhi last year in 2020, a large number of Muslims have resorted to distress sales and driven by concerns of safety and security shifted to Muslim dominated localities.[[3]](#footnote-3) “These *divided populations represent the triumph of communal politics, successfully undoing histories of shared living between Hindus and Muslims over centuries.*”[[4]](#footnote-4)

A 2015 study[[5]](#footnote-5) on the urban rental housing market in the NCR, documents that compared to 99.80% upper caste Hindus, only 58.62% Dalits and 33.47% Muslims received positive responses. The politics of ‘othering’ and demonising the Muslims has further exacerbated the situation.

The demonisation of Kashmiri Muslims as anti-nationals has further shrunk their access to rental accommodation, pushing them into sub-ghettos in Muslim dominated localities.[[6]](#footnote-6) Any thinking on this issue will therefore have to factor in the trajectory of majoritarian right wing politics.

A 2019 Report of the International Commission of Jurists, “Living with Dignity”, documents the discrimination faced by LGBTQ persons in India in seeking access to rental accommodation, the increased risk of violence and harassment by property owners and landlords.[[7]](#footnote-7) The study noted that “A common reason for denial of rental accommodation is that property owners may tend to associate LGBTQ people with illegality.” During the COVID pandemic trans persons found it difficult to secure refuge for their safety, with natal homes not always being available for shelter, given their gender identity.

For migrants from the North Eastern states of India, racism characterises their experiences of ‘mainland’ India as their choice of food, attire and features lends to their ostracization. A 2020 Netflix film, Axone, typifies this, a poignant scene shows a North Indian landlady shouting at a group of tenants who are from the North East, “When you rented this apartment, I had told you can’t make that stinky food here, didn’t I?” demanding an explanation from the group who are making pork with ‘*axone*’ (akhuni), a fermented soya bean used in Naga cuisine, known for its distinctive flavour and smell. Not only are their cultural rights supressed but they are also forced to pay higher rents.

Patriarchal control over women is exercised through landlords policing their social interactions and by imposing curfews to return to home in the evening. Thus social control regulating the sexual autonomy of adult women severely demarcates access and availability for working women.

The above mapping is not descriptive, it underlines the structural barriers to justice, in addition to the impediments and infirmities of the legal framework.

**Analysis of the gaps and infirmities in the Indian legal framework leading to a lack of effective legal remedies**.

**Constitutional Framework**- Part III of the Indian Constitution guarantees Fundamental Rights to citizens and persons. Article 14 establishes the right to equality, Article 15 prohibits discrimination on various grounds, Article 17 abolishes untouchability and makes its practice an offence, Article 19 guarantees certain freedoms to citizens, including the freedom of association and freedom to reside anywhere in the country, Article 21- the right to life, Article 25 to 28 protects the freedom of religion, and Article 29 and 30 protect the interests of minorities. Most of these fundamental rights apply vertically and are enforceable only against state action by invoking the writ jurisdiction of Constitutional Courts.[[8]](#footnote-8) It is that at this juncture, that the most significant gap lies.

Indian jurisprudence has recognized the right to shelter as an essential facet of the Right to Life under Article 21 in landmark judgements- Olga Tellis (1985),[[9]](#footnote-9) Chameli Singh (1996)[[10]](#footnote-10), Ahmedabad Municipal Corporation (1997)[[11]](#footnote-11), etc. In 2015, the Delhi High Court in Ajay Maken vs. Union of India, held that the right housing is *“a bundle of rights, not limited to a bare shelter over one’s head. It includes the right to livelihood, right to health, right to education and the right to food, including the right to clean drinking water, sewerage and transport facilities.”[[12]](#footnote-12)* The Court considered the right to housing in the context of the Right to the City and India’s welfare obligations flowing from international law.

Housing is provided in India either through State run schemes and programmes, or by direct purchase of property in the private sector. Since the remedy of writ lies only against the State and its agents, the private sector of housing falls largely outside the purview of the writ jurisdiction, thereby impeding access to justice for discrimination in private sector housing.

It is striking that there is very little case law on this issue and few have approached the courts, given the pervasive nature of the segregation and discrimination. Cooperative housing societies are governed by statute and interestingly this has led to some litigation on the question of discrimination and exclusion in the membership of these cooperatives.

The questions that came up before the court, centred around permitting sale to a member of a different religious denomination or sect, where the cooperative society was formed by members of a particular faith. One of the cardinal principles developed under the Cooperative Society laws is the principle of ‘Open Membership’.

The Bombay High Court, in 2006, in St. Anthony’s Co-operative Society vs. Secretary[[13]](#footnote-13) highlighted the need for open membership and held:

*"Thus, having regard to the uniform position in law which has been accepted by a Judgment of this Court and by Judgments of the High Courts of Madhya Pradesh and Gujarat, it is* *abundantly clearly that a restriction in the By-laws of a Co-operative Society imposing a condition or qualification restricting membership, to a particular religious group would violate the principle of open membership. That principle of open membership is recognised by Section 23 of the Maharashtra Co-operative Societies Act, 1960. Indeed, it must be recognised that it would not be open to the State Legislature to permit a discrimination only on the ground of religion, race, caste, sex. place of birth or any of them by virtue of the provisions of* [*Article 15(1)*](https://indiankanoon.org/doc/1942013/) *of the Constitution. Regard must also be had to the position that cooperative housing societies provide an essential amenity to the citizens, namely the amenity of housing. The right to housing is now itself recognised as a fundamental right under* [*Article 21*](https://indiankanoon.org/doc/1199182/) *of the Constitution in* [*M/s. Shantistar Builders v. Narayan Khimalal Jotame,*](https://indiankanoon.org/doc/1813295/)*...A faint attempt was made to rely upon the freedom to profess, practice and propagate religion under* [*Article 25*](https://indiankanoon.org/doc/631708/) *of the Constitution.* [*Article 25*](https://indiankanoon.org/doc/631708/)*, however, expressly makes a distinction between religion and the secular aspects. The latter can be regulated by the State."* (Para 20)

The Indian Supreme Court however in 2005, in the case of Zoroastrian Cooperative Housing Society vs. District Registrar[[14]](#footnote-14), upheld the Bye-Laws of a Parsi Housing Society prohibiting the sale of  apartments to non-Parsis. In my view this is a flawed judgment as it erroneously conflates the freedom of contract and freedom of association of the Parsi community. Further while relying upon the Parsis fundamental right of association under Article 19 (1) (c) and their rights as a minority to preserve their culture, this judgment fails to evaluate the "constitutional morality" check on the freedom of association under Article 19(4) which governs Art 19(1)(c). It also ignores Section 23 of The Indian Contract Act[[15]](#footnote-15), which bars contracts contrary to public policy.

The Delhi High Court in 2012, in the case Delhi Dayalbagh Coop. House Building Society Ltd vs. Registrar[[16]](#footnote-16) noted that amended provisions of the Delhi Cooperative Societies Act, 2003, statutorily enforced the principles of open membership and non-discrimination and further held that restrictive covenants on membership were in violation of the Indian Contract Act as it is opposed to public policy. The Delhi HC observed

*“...our country has the benefit of diversity in cultures, religious and social beliefs. It is always said that there is unity in this diversity. However, recently pernicious tendencies have raised their heads raising disputes based on caste, creed, religion, etc. This has resulted at times in tenets of particular religion, caste, sect, affecting intermingling with different sections of the society, which is required for an overall growth of the country. If this kind of reservation for particular sects in matters of residence is permitted, we will be left with cities divided into areas depending on the religion, caste and cultural belief(s) – a wholly undesirable situation.”*(Para 58)

This judgement was affirmed by the Supreme Court in 2019.[[17]](#footnote-17)

In this context it would be pertinent to note that any assessment of the Constitution which suggests that private transaction qua housing is beyond the scope of the anti-discrimination principle of the Constitution, ignores the constitutional scheme as outlined in Article 15(2), which provides

*15 (2): No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to*

[*(a)*](https://indiankanoon.org/doc/1732536/)*access to shops, public restaurants, hotels and places of public entertainment*

This provides an illustrative clue that the Constitution aimed at eliminating all forms of discrimination that perpetuated structural impediments in the daily life of people and communities, and housing is very much a facet of the same.

The judicial history of tenancy litigation suggests that Section 23 of the Indian Contract Act has not been invoked to challenge discriminatory or restrictive covenants. The lack of litigation is intrinsically connected to the structural and cultural impediments faced by discriminated groups and communities, which lack the resources to access courts in order to pursue such litigation. The imbalance of power between the propertied class and those seeking rental accommodation is a large factor denying access to justice in such circumstances.

The argument that the freedom of contract inhibits state interference in a facetious one. The State exercises complete control over the domain of housing or and allied activities that are carried out. The home builder cannot, for example, build the house to a specification that is not permitted by municipal laws even though that may be the contractual obligation. Further, municipal laws ban commercial activity in areas designated as residential areas, even though the home buyer and the builder may contractually agree to using the house for commercial purposes. Thus, private contracts remain subject to overarching State laws and public policy, so nothing prevents the State from enforcing a policy of non-discrimination and prohibiting restrictive covenants on membership or ownership.

**Weaponization of the law to entrench spatial segregation**

An illustration of barriers to equitable access to housing is the instrumental use of law by the state to perpetuate segregation. The Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act, 1991—commonly known as the Disturbed Areas Act, was enacted on the lines of a 1986 Act to address mass inter-area migration of communities, and check distress sale of properties in the aftermath of communal riots, particularly the 1985 Ahmedabad riots of Gujarat. Property transactions in ‘disturbed areas’ require the prior consent of the collector. However, the Act is now employed to disincentivize property transactions between Hindus and Muslims, for which permissions are kept pending and finally denied. No large-scale communal riots have occurred in Gujarat since 2002, however in July 2018, the BJP led state government brought 74 new locations under the Act, increasing the number of ‘disturbed areas’ to over 700. It has been argued that the Act is employed as a means to maintain demographic control over segregated constituencies. A 2020 Amendment, gives the State Government the power to declare an area to be a disturbed area on the grounds of (i) improper clustering of persons; (ii) polarization, and/or (iii) maintenance of demographic equilibrium; and even the mere likelihood of any of the same.[[18]](#footnote-18) The clustering of persons with common identity alone is considered proper under Sec. 2(d)[[19]](#footnote-19), whereas the opposite, a mixed populace, is considered improper. In effect, the Act effectively creates and effectuates enclaves or ghettos populated by a single religious community and prohibits any transfer of property that would disturb the said segregation. Recently on 20.01.2021, the Gujarat High Court restrained the State from issuing a notification under the amended provisions, staying the operation of the Amendment on a Public Interest Litigation challenging the constitutional vires of the Act.

**Strengthening the mandate of National Human Rights Institutions**

Due to non- compliance with the Paris principles, National Human Rights Institutions (NHRIs) like, The National Human Rights Commission (NHRC), The National Commission for Scheduled Castes and Scheduled Tribes, National Commission for Women and National Commission for Minorities, lack autonomy and teeth and have failed to provide effective forums to address and redress discrimination and exclusion in adequate housing. Further the powers of these NHRIs are only recommendatory, when approached by victims of discrimination and segregation, these recommendatory powers cannot provide effective remedy to victims. It is essential to strengthen these institutions which should conduct audits and inquire into specific complaints regarding housing discrimination.

**RERA: A Positive statutory development**

RERA can be cited as a positive statutory development where through State intervention spatial segregation is prohibited. State amendments to the RERA Rules have incorporated a declaration in the Rules, that the promoter shall not discriminate on the basis of caste, religion, language, region, sex, marital status, at the time of allotment.[[20]](#footnote-20) However, this only covers transactions between builders and home buyers, the obligation is not transferred upon the house owner both in term of rental and future sales.

**Recommendations- policies and measures to strengthen access to justice and remedies for households and communities facing housing discrimination and spatial segregation.**

* Ms. Leilani Farha, the former Special Rapporteur on adequate housing, in her Report to the Human Rights Council in 2017, after her mission to India in April 2016, emphasized that *“it is time for India to adopt national housing legislation based in both its national and international human rights commitments”*, her report noted that *“the existing schemes seem to emphasize and focus primarily on homeownership as the key housing model to respond to the current needs of India. However, even when well regulated, that model may be ill-suited to ensuring adequate housing for those most in need, including women, religious minorities, and scheduled castes and scheduled tribes*”.

The report contained the following recommendations, “*Enact legislation to curb all forms and practices of de facto housing discrimination against any individuals or groups, in particular religious and ethnic minorities, women, scheduled castes and scheduled tribes, internal migrants and manual scavengers in relation to their right to housing. Enhance monitoring and protection against discrimination in relation to rental accommodation, access to credit, inheritance and ownership.”*[[21]](#footnote-21)

* **Amend RERA**: It is essential that the state amends existing legislation on housing to introduce anti-discriminatory provisions. The Real Estate (Regulation and Development) Act, 2016, The Rent Control Act, 1948 must include provisions that would impose on landlords and private owners’ duties of non-discrimination towards home seekers, making it possible for individuals to access tribunals and courts on facing denial of housing.
* **Enact Anti-Discrimination and Equality Law**: In addition to strengthening existing legislation, it is crucial that India enacts a comprehensive law against private discrimination that tackles both direct and indirect discrimination in access to economic transactions and services of a public character, applicable to private individuals, housing societies and resident welfare associations. A private members bill, the Anti-Discrimination and Equality Bill was tabled in Parliament in 2016[[22]](#footnote-22) by Shashi Tharoor and the Centre for law and Policy Research drafted The Equality Bill in 2021[[23]](#footnote-23). These bills define ‘protected characteristics’, direct, indirect and intersectional discrimination. They also provide for the setting up of Equality Commissions to ensure diversification.

Such a law must also bar the inclusion of restrictions on lifestyle, dietary habits in rent agreements, which are indirect forms of discrimination against women, religious and regional minorities and Scheduled Castes and Tribes.

* **Sachar Committee Report: Incentives for Mixed residence**

A Prime Minster High Level Committee- the Justice R. Sachar Committee in its 2006 report on the social and economic status of Muslims in India recommended linking incentives to diversity indicators, presented to builders for promoting diverse resident populations, composite living spaces.[[24]](#footnote-24)Additionally, State sponsored incentives for mixed residence in co-operative housing, renting should be considered.

* **Smart Cities Mission**: state intervention to promote de-segregation

State intervention to provide housing and rental accommodation must be considered and organized in a manner that reduces spatial discrimination. These interventions are essential when implementing schemes to allot land to Dalit families to ensure that such schemes do not create Dalit only localities. The Smart Cities Mission was launched by the GOI in 2015 to create 100 ‘smart cities’. A study of 60 smart city proposals by HLRN reveals that only Mangalore (Karnataka) proposed to specifically encourage housing communities for mixed socio-economic groups.[[25]](#footnote-25) Divided cities cannot be smart cities. It is imperative for national and state housing policies like the Smart Cities Mission, to promotes de-segregation and mixed housing.

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   https://www.epw.in/journal/2019/30/notes/neighbourhood-scale-residential-segregation-indian.html [↑](#footnote-ref-2)
3. Falvia Lopes. “A Year After Delhi Riots, Muslim Families Are Selling Homes and Moving Out.” *The Wire,* April 7, 2021,

   https://thewire.in/communalism/a-year-after-delhi-riots-muslim-families-are-selling-homes-and-moving-out [↑](#footnote-ref-3)
4. Mander, Harsh, Akram Akhtar Chaudhary, Zafar Eqbal, and Rajanya Bose. "Wages of Communal Violence in Muzaffarnagar and Shamli." *Economic & Political Weekly* 51, no. 43 (2016): 39.

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5. Thorat, Sukhadeo, Anuradha Banerjee, Vinod K. Mishra, and Firdaus Rizvi. "Urban rental housing market: Caste and religion matters in access." *Economic and Political Weekly*(2015): 47-53

   [www.epw.in/journal/2015/26-27/housing-discrimination/urban-rental-housing-market.html](https://www.epw.in/journal/2015/26-27/housing-discrimination/urban-rental-housing-market.html) [↑](#footnote-ref-5)
6. Ahan Penkar. “No Kashmiris please: housing discrimination in Delhi’s Muslim majority areas.” *The Caravan,* November, 20, 2019

   <https://caravanmagazine.in/communities/kashmiris-denied-housing-muslim-delhi> [↑](#footnote-ref-6)
7. International Commission of Jurists, “Living with Dignity- Sexual Orientation and Gender Identity Based Human Rights Violations in Housing, Work, and Public spaces in India”. (2019)

   https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf [↑](#footnote-ref-7)
8. Article 32, Article 226 of the Constitution of India, 1949. [↑](#footnote-ref-8)
9. Olga Tellis vs. Bombay Municipal Corporation (1985) 3 SCC 545- 5 Judge Bench [↑](#footnote-ref-9)
10. Chameli Singh vs. State of UP (1996) 2 SCC 549- 3 Judge Bench [↑](#footnote-ref-10)
11. Ahmedabad Municipal Corporation vs. Nawab Gulab Khan (1997) 11 SCC 121- Division Bench [↑](#footnote-ref-11)
12. Ajay Maken vs. Union of India (2019) 260 DLT 581 (DB) – Division Bench [↑](#footnote-ref-12)
13. St. Anthony’s Co-operative Society Ltd., Mumbai vs. Secretary (Co-operation & Textile Department), Mumbai and others (2000) 4 Mah LJ 642 [↑](#footnote-ref-13)
14. Zoroastrian Cooperative Housing Society Ltd. And Another vs. District Registrar, Cooperatoive Societies (Urban) and Others (2005) 5 SCC 632 [↑](#footnote-ref-14)
15. Section 23 provides "The consideration or object of an agreement is lawful, unless—" it is forbidden by law;or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy." [↑](#footnote-ref-15)
16. Delhi Dayalbagh Coop. House Building Society Ltd vs. Registrar Cooperative Societies & Ors. 2013 (133) DRJ 513 (DB) – Division Bench [↑](#footnote-ref-16)
17. Delhi Dayalbagh Cooperative House Building Society Limited vs. Registrar, Cooperative Societies and Others (2019) 3 SCC 745 [↑](#footnote-ref-17)
18. S. 3 Declaration of Disturbed area - (1) Where the State Government is of the opinion that, -

    (i) having regard to the intensity and duration of riot or violence of mob and such other factors in any area of the State, the public order in that area was disturbed for a substantial period by reason of riot or violence of mob; or

    (ii) 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; or

    (iii) for the reasons stated in this sub-section, that area of the State has become prone to disturbance of public order,

    it may, by notification in the *Official Gazette*,

    (a) declare such area to be a disturbed area;

    (b) specify the substantial period (hereinafter referred to as "the specified period"). [↑](#footnote-ref-18)
19. S. 2(d) *"proper clustering of persons of one community"* with all grammatical variations and cognate expressions shall mean, in relation to a geographical area, a small or large social unit or a group of living things who have something in common, such as norms, religion, values, or identity and often share a sense of place that is situated in a given geographical area [↑](#footnote-ref-19)
20. Rajasthan Real Estate (Regulation and Development) Rules, 2017. Available at: http://rera.rajasthan.gov.in/Content/pdf/RERA\_Rules\_2017.pdf [↑](#footnote-ref-20)
21. UN, HRC, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, on her mission to India, Leilani Farha, 10 January 2017, A/HRC/34/51/Add.1* [↑](#footnote-ref-21)
22. Anti-Discrimination and Equality Bill, 2016 available at [**http://164.100.47.4/billstexts/lsbilltexts/asintroduced/2991.pdf**](http://164.100.47.4/billstexts/lsbilltexts/asintroduced/2991.pdf) [↑](#footnote-ref-22)
23. The Equality (Prohibition of Discrimination) Bill, 2021 available at [**https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2021-8th-January-2021.pdf**](https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2021-8th-January-2021.pdf) [↑](#footnote-ref-23)
24. Sachar Committee report on Social, Economic and Educational Status of the Muslim Community of India , PM High Level Committee (2006) available at <http://www.minorityaffairs.gov.in/sites/default/files/sachar_comm.pdf> [↑](#footnote-ref-24)
25. Housing and Land Rights Network, “India’s Smart Cities Mission- Smart for Whom? Cities for Whom?”, (2017) available at https://www.hlrn.org.in/documents/Smart\_Cities\_Report\_2017.pdf [↑](#footnote-ref-25)