A Kerala model for an anti-discrimination law

If enacted this law will be the largest expansion of civil rights in the State, and can be emulated by the rest of India

SHASHI THAROOR &
ARVIND KURIAN ABRAHAM

A couple turned down for a home they wish to rent, because they are Muslim. A qualified professional rejected for a job because he uses a wheelchair. A pair of students denied facilities on campus because of their caste or ethnicity. An air hostess dismissed for being above the weight deemed desirable, even though male stewards/pursers of that weight continue in their jobs.

Forms of discrimination

Such incidents are all too common in our society."Silent segregation" on the grounds of marital status, gender, sexual orientation or eating preferences are followed in several housing societies and residents' associations. The Housing Discrimination Project (https://bit.ly/3wvGQFC) at Jindal Global Law School has shown how extensive housing discrimination is across the country. The recent Pew Research Center Report (https://pewrsr.ch/2TOZF9v) has confirmed that a substantial number of Indians prefer not to have a person from a different religious community as their neighbour. The absence of a proper legal recourse for those who suffer from housing discrimination only makes matters worse.

Even though Section 377 of the Indian Penal Code was read down by the Supreme Court of India to exclude consensual relations between adults of the same sex, social prejudice against members of the LGBTQIA+ community in the country remains strong. Article 15 (1) of the Constitution of India prohibits the state from discriminating against individuals on basis of certain protected characteristics such as religion, race, caste, sex and place of birth. But it does not bar private individuals or institutions from doing what the state is not permitted to. Nor does it expressly list ethnicity, linguistic identity, nationality, marital status, sexual orientation, disability, physical appearance and other personal characteristics as prohibited grounds of discrimination.

The understanding of discrimination has also evolved over the years. It does not operate along a single axis; it can take the form of combined discrimination which is a combination of discrimination on two or more grounds. Last April, the Supreme Court, in *Patan Jamal Vali vs State of Andhra Pradesh*, recognised intersectional discrimination – discrimination on the basis of the intersection of personal characteristics, such as that faced by Dalit women as Dalits, as women and in the unique category of Dalit women. Discriminatory practices may also be indirect in nature, whereby policies that seem neutral and not expressly targeted at a particular group, still cause a disproportional adverse impact on disadvantaged sections of society.

Legal remedies are needed

Since discrimination thus operates on a wide variety of grounds, legal remedies are needed for its victims, whether direct, indirect or intersectional. A comprehensive anti-discrimination legal framework is required to fill the existing legal lacunae. India is one of the few liberal democracies without such a framework. The Sachar Committee, in 2006, recognised the need for an anti-discrimination law. This was further reiterated by the Expert Group on Equal Opportunity Commission headed by Prof. N.R. Madhava Menon.

GETTY IMAGES/ISTOCKPHOTO

Though the proposal for an anti-discrimination law was approved by the United Progressive Alliance Cabinet, it was put on the backburner after the government changed in 2014.

When a Bill lapsed

One of us (Tharoor) tried to revive the idea by introducing the Anti-Discrimination and Equality Bill, 2016 (https://bit.ly/3k5KoMf) in the Lok Sabha. Perhaps predictably, the Treasury Benches were not interested to take it forward and the Bill lapsed in 2019 with the dissolution of the Lok Sabha. It seems clear to us that the only way progressive legislation of this nature can be passed in the present climate would be if the States lead the way, by enacting anti-discrimination laws in their respective jurisdictions. States have a vital role in strengthening our right to equality. A central Bill cannot, at any rate, cover subjects that are under the exclusive jurisdiction of State governments. And if States take the initiative, the demand for a national anti-discrimination law to cover services and institutions under the domain of the Union government will be reignited.

Kerala is one the best placed States to take this proposal forward, especially since both the major political fronts in the State have previously committed themselves to such legislation. The CPI (M) in its 2019 manifesto (https://bit.ly/3hVjEet) and the United Democratic Front (UDF) in its 2021 State Assembly manifesto (https://bit.ly/2UGXFjn) have both promised to enact an anti-discrimination law which covers the private and the public sectors. The State legislature can use its powers under Entry 8 of List III in the Seventh Schedule to the Constitution to enact an anti-discrimination law that attracts civil penalties for those who engage in discriminatory practices.

Crafted for Kerala

With the invaluable assistance of Professor Tarunabh Khaitan of Oxford University, we have drafted an anti-discrimination Bill for the Kerala government to consider introducing in the State Legislative Assembly. The Bill prohibits employers, landlords, traders, service providers, private persons performing public functions, and public authorities, from discriminating on grounds of caste, race, ethnicity, descent, sex, gender identity, gender expression, pregnancy, sexual orientation, religious identity, tribe, disability, linguistic identity, HIV-status, nationality, marital status, dietary preference, skin tone, physical appearance, place of residence, place of birth, age or analogous characteristics which are beyond the control of an individual or those that constitute a fundamental choice.

At the same time, the Bill balances the anti-discrimination mandate with other rights guaranteed by the Constitution. The anti-discrimination mandate can be restricted in pursuance of a legitimate objective:for instance, a drama company putting up a production of the Ramayana can insist on only male applicants for the role of Ram. That would not be discrimination in the terms covered by the law.

The Bill also introduces affirmative-action provisions whereby public authorities are obliged to progressively realise diversification of their workforces by recruiting members of disadvantaged sections excluded from society, such as transgender persons or persons with disabilities. Given the backlogs in our judicial system, the Bill establishes a 'Kerala Equality Commission' to adjudicate complaints and to provide policy recommendations to the State government. Given that the proliferation of post-retirement public offices for judges does not augur well for judicial independence, the proposed commission does not follow the tried and tested model of former judges presiding over statutory bodies. Rather, appointments to the Commission are left to the political process, with substantial weightage given to the largest parties in the State, both in the Treasury and Opposition benches, to ensure bipartisan buy-in to the process.

The Bill has been forwarded both to the Law Minister of Kerala and the Leader of the Opposition with the suggestion that it should be subjected to a pre-legislative consultation process, so that democratic participation in enacting this historic law is encouraged (https://bit.ly/3reY74Z). If this Bill is enacted, it will be the largest expansion of civil rights in the State since the commencement of the Constitution, and it can be a model for other States to follow. We recognise that an anti-discrimination law is not a panacea for the problems of inequality and social prejudice that are deeply rooted in our society. Nevertheless, it is a necessary step – an idea whose time has come.

Shashi Tharoor is Member of Parliament for Thiruvananthapuram and an author. Arvind Kurian Abraham is a fellow at the University of Oxford