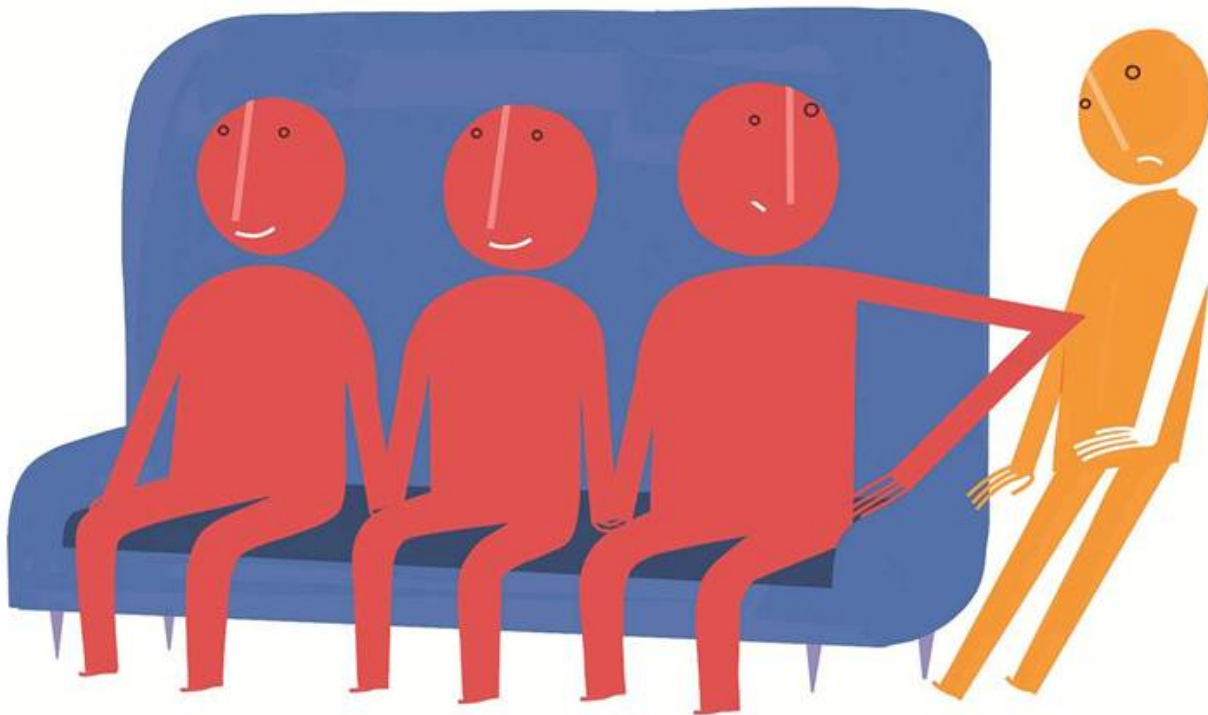


Protection whose time has come

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Women, Dalits, religious and sexual minorities, people from the North East, hijras, disabled persons and the elderly are especially at the receiving end. (Illustration by C R Sasikumar) On March 10, Shashi Tharoor, MP, introduced the Anti-Discrimination and Equality Bill 2016 (ADE Bill) in the Lok Sabha. I advised him on the contents of the Bill, having spent the last three years revising numerous drafts, in discussion with activists, academics, lawyers and politicians. As a Private Member's Bill, however, this will not be enacted unless the government takes ownership of this Bill. There are at least three reasons why it should do so: The Bill's symmetric protection, its experiential understanding of discrimination as a lived reality, and its proportionate regulation of the private sector.

Let us start with the Bill's symmetry. That discrimination is rife in India is not in doubt. Women, Dalits, religious and sexual minorities, people from the North East, hijras, disabled persons and the elderly are especially at the receiving end. Almost everyone in our country has faced, or is likely to face, some form of discrimination. On the other hand, we have all also been perpetrators, sometimes consciously, but often unconsciously — by benefitting from unearned privileges that tend to accompany our dominant group status, sincerely believing in our merit, and in our innocence. Recognising this universality in the experience and perpetration of discrimination, the ADE Bill seeks to symmetrically protect majorities as well as minorities (with exceptions for affirmative action and aggravated discrimination), and does so comprehensively, along multiple grounds of discrimination. It is true that members of

minority groups primarily suffer from discrimination. But, given our multiple identities, no one person is a member of the dominant group in all respects. Also, patriarchy will not end unless women as well as men are liberated from gender roles.

Furthermore, asymmetric laws are hard to pass and harder to enforce. In fact, the BJP's chief reason for frustrating the UPA government's efforts to pass the Communal Violence Bill was that it only protected minority groups; the perpetrators were assumed to belong to majority groups. Under the symmetric ADE Bill, anyone could potentially be a victim, and anyone, whether from a majority or minority group, could be a discriminator. The right wing has long complained that the left wing is selective about the victims it seeks to protect; whatever may be the truth of that allegation, here is one Bill that is genuinely universalist in its aspiration.

Secondly, the ADE Bill understands discrimination as it is experienced by its victims, and is sensitive both to the evolving nature of this social phenomenon and its particular character in the Indian context. Of course, the Bill prohibits overt prejudice or stereotyping as direct discrimination. But it also recognises that sometimes, one can discriminate indirectly by doing something that disproportionately impacts a group (say, a minimum height requirement that is unnecessary for satisfactorily performing a given job, and disproportionately excludes women since they tend to be shorter than men). It treats harassment, bullying, segregation, boycott, violence and victimisation as the various guises that discrimination can take. By focussing on the experience of the victim, rather than the intention of the discriminator, the Bill understands that power is self-aggrandising and dynamic, with the ability to adopt ever subtler forms, and even deny its own existence in order to perpetuate itself.

Finally, in prohibiting discrimination in public as well as private sectors (especially employers, landlords, retailers and service-providers), the ADE Bill recognises that decades of affirmative action in the public sector, while necessary, is insufficient to tackle discrimination. It also imposes diversification duties, while ensuring that private businesses can discharge their social obligations with minimal regulatory burdens. Marking a break from past laws that criminalised discrimination, the focus of the ADE Bill is to create a civil liability to protect and compensate the victim, rather than to punish the discriminator. Criminalisation — which requires a very high burden of proof — probably contributed to the under-enforcement of existing laws. The “lighter touch” approach of the ADE Bill is complemented by a dedicated, efficient and independent enforcement mechanism. It therefore strikes a proportionate balance between competing demands.

As it seeks to realise B.R. Ambedkar's vision of an India free from discrimination, the ADE Bill also honours a less-celebrated (and increasingly rare) dimension of his democratic politics: A principled pragmatism that preferred an imperfect solution accepted (albeit grudgingly) by many, to a perfect one championed by the few.

For all these reasons, the central government should have the Bill sent to a parliamentary standing committee for wider public consultation and scrutiny and prepare for its enactment. If it fails, a pioneering state government or two should take the lead in championing the idea instead.