

BREAKING THE BRICK WALL: USING ANTI-DISCRIMINATION LEGISLATION AS A TOOL FOR TRANS-JUSTICE





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INTRODUCTION

In India, there is a constitutional safeguard against discrimination but no statutory protection against different kinds of discrimination. In 2017, Dr Shashi Tharoor introduced the Anti-discrimination and Equality Bill in Parliament. However, the Bill lapsed. No other law has been introduced in its place since. In this paper, I argue the need for anti-discrimination legislation in India. I also argue that such legislation will be a great tool to enhance LGBTQ+ rights movements and trans-justice in India.

In Section I, I explain the present structural framework of non-discrimination guarantees in India. In Section II, I discuss the need for legislation that focuses on non-discrimination and equality in addition to the existing laws. In Section III, I discuss the components of appropriate anti-discrimination legislation. In Section IV, I discuss how comprehensive anti-discrimination legislation can strengthen the LGBTQ+ rights movement in India.

I. The framework of non-discrimination guarantee in India

The important sources of equality and anti-discrimination law in India are the Constitution, Statutes and International Laws.

The Indian Constitution recognises the Right to Equality under Article 14 and further elaborates the equality scheme through specific Articles 15, 16, 17 and 18. In addition to explicitly prohibiting discrimination on various grounds under Articles 15(1) and 16(1), the Indian Constitution also provides for affirmative action for disadvantaged groups.[1] Under the Directive Principles of State Policy (DPSP), there are specific provisions to do away with discrimination.[2] These provisions also encourage equal treatment of different groups. Some guarantees under DPSP include equal rights to adequate means of livelihood, equal pay for equal work for men and women and equal opportunities for securing justice.[3]

The non-discrimination and equality guarantee under the Constitution are, however, of limited application. Firstly, except Article 17 and Article 15(2)(a), there is a limited mandate on non-state entities against discriminatory practices. Article 17 of the Constitution abolishes the practice of untouchability and makes it an offence punishable by law. The operative provisions are found in the Protection of Civil Rights Act, 1955. Article 15(2)(a) also possesses a unique tool to address the problem of horizontal discrimination.[4] Article 15(2)(a) states as follows - *“No citizen*

[1] INDIA CONST art.15(3); art. 15(4); art.16(4).

[2] INDIA CONST part IV.

[3] INDIA CONST art. 39(a); INDIA CONST art. 39(d); and INDIA CONST art. 39A respectively.

[4] Gautham Bhatia, Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach Asian Journal of Comparative Law, 11 (2016), pp. 87-109 doi:10.1017/asjcl.2016.5.

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...access to shops, public restaurants, hotels and places of public entertainment". Over the years, the term 'shop' has been interpreted widely in light of the debates in the Constitutional Assembly. In *IMA v. Union of India*, an educational institution was brought within the ambit of 'shop' mentioned in Article 15 (2)(a).[5] However, the application of 15(2)(a) is limited to economic transactions of some nature and the prohibition is only binding on the State.[6] Non-state entities are largely left outside the purview of this mandate.

These articles are of limited application because the protection under Articles 15 and 16 can only be afforded by 'citizens' and 'non-citizens' are left outside the scope of such guarantees. Thirdly, with respect to the provisions of DPSP, although the State is required to take into consideration principles laid down under Part IV, the provisions are not per se enforceable in any court.[7]

Despite these limitations, Articles 14 to 18 of the Indian constitution are widely applied in many cases and lay down a strong foundation for anti-discrimination jurisprudence in India. The scope of Part III provisions on the State is viewed expansively. The State's failure to ensure equal treatment of individuals in the private realm has been brought under the

[5] *Indian Medical Association v Union of India*, (2011) 7 SCC 179.

[6] *Supra* note 6, at p.101.

[7] INDIA CONST art.37.

purview of the law and there are innumerable cases where the courts accepted this horizontal effect of Articles 14 and 15, at least indirectly. In *Vishaka v. the State of Rajasthan*, employers in both public and private sectors were mandated to take appropriate steps to prevent sexual harassment as it was seen as a violation of Articles 14, 19(1)(g) and 21 and this rule was reiterated in cases like *Renuka Mukherjee v. Vodafone Essar Ltd.*[8]

The second source of equality and anti-discrimination law in India are the statutes. There are innumerable statutes in India that specifically prevent discrimination on various grounds. These legislations form the operative part of the rights protected under the Constitution. Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989, the Rights of Persons with Disabilities Act, 2016, the Transgender Persons (Protection of Rights) Act, 2019, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 are some examples of such legislation. In addition to identifying specific concerns of protected groups, some of these legislations penalise discriminatory behaviour towards protected groups and even provide compensation (as seen in Section 15 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013). In the past, Section 153B of the Indian Penal Code was also invoked in India in cases of private discrimination although it is a provision intended to counter hate speech.[9]

[8] *Vishaka & Ors. v. State of Rajasthan*, AIR 1997 SC 3011 and *Renuka Mukherjee v. Vodafone Essar Ltd*, 2017 SCCOnline Bom 8898.

[9] "Mumbai: Builder, staff booked for refusing home to Maharashtrian." *Hindustan Times* 3 Jun 2015, Available at <https://www.hindustantimes.com/mumbai/mumbai-builder-staff-booked-for-refusing-home-to-maharashtrian/story-Cq4XF9a9RC10xb4fxYgUcN.html>.

The problem with having numerous statutes is that they are not comprehensive. Separate statutes give rise to separate procedures for enforcement and that makes the entire process scattered. It also completely overlooks the issue of intersectionality. In this regard, the Bill introduced by Tharoor was all-comprehensive in terms of coverage as it identified a wide range of protections and also highlighted direct and indirect discrimination. It also focused on other forms of discriminatory practices including harassment, boycott and segregation. The Bill attempted to account for intersectionality. Unfortunately, the statute was not adopted by the legislature.

The third source of equality and anti-discrimination law in India is international law. India is a party to numerous international conventions condemning discriminatory acts including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

Under the Indian Constitution, it is important to 'foster respect for international law and treaty obligations in the dealings of organised peoples with one another'.^[10] However, international law also has limited application in India as they are not directly enforceable within the country.

[10] INDIA CONST art.51(c).

II. The need for anti-discrimination law in India

The existing legal framework has limited horizontal application. The framework is not all-inclusive as it does not cover all grounds of discrimination and does not indicate the scope of 'discrimination'. The framework completely ignores the issue of intersectionality.

Limited Horizontal Application

Although the constitutional protection is often enabled in cases of discrimination by way of progressive interpretation of Articles 14 and 15, the Indian Supreme Court has also refused to entertain cases of horizontal application on multiple occasions.

In *Zoroastrian Co-operative* case, the Supreme Court refused to hold an exclusionary covenant in a housing society by-law as violative of Part III. [11] The by-laws noted that only Parsis were eligible to become members of the society and housing shares cannot be sold to non-Parsis. In this landmark decision, the court carved an exception to Part III scrutiny by noting that the housing by-laws are similar to a contract binding only between the parties affected by them and that "Part III of the Constitution has not interfered with the right of a citizen to enter into a contract for his own benefit." [12]



[11] *Zoroastrian Co-operative Housing Society Ltd. v. District Registrar, Co-operative Societies (Urban)*, (2005) 5 SCC 632.

[12] *Id.* at para 16.

Part III of the Constitution is normally only enforced against the State or other authorities who may come within the purview of Article 12 of the Constitution. The constitutional case of discrimination would be found against other entities only where they would fit the description of an instrumentality of the State or in cases where it can be shown that such an entity is discharging a public function or there is some public law element involved therein.[13]

In other cases, there is no direct horizontal effect given to provisions under Articles 14 and 15 (1) and a remedy is available only in cases where there is a specific law prohibiting such discriminatory behaviour. For instance, if an individual A discriminates against another individual B, based on their sexual orientation, there would be no remedy to it under the current law as there is no specific legislation dealing with this issue of 'discrimination on grounds of sexual orientation'. At the same time if a Company A discriminates against individual B because B is disabled it would fall within the ambit of the Rights of Persons with Disabilities Act, 2016 and appropriate punishment as prescribed under the Act under Section 90 would be applicable. The application of anti-discrimination law is uneven and restricted.

Limited Grounds of Discrimination

Article 15 (1) states that *"The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any*

[13] The Praga Tools Corporation v. C. A. Imanual & Ord, AIR 1969 SC 1360.

of them.” Article 16(1) states *“There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.”* The Article also prohibits discrimination based on ‘descent’ and ‘residence’ in addition to those grounds mentioned in Article 15 in matters of employment under the State.[14] The protected grounds mentioned under Articles 15 and 16 are very limited and these provisions have excluded grounds such as disability, marital status, pregnancy, age and sexual orientation.

Issue of Intersectionality

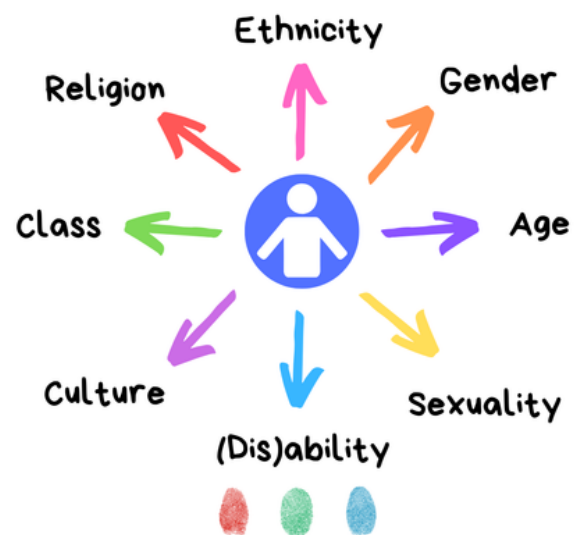
The term intersectionality was coined by Kimberlé Crenshaw in the year 1989. Intersectionality is a theory that suggests that overlap of multiple social identities such as gender, race, caste, etc. would have specific effects of discrimination on individuals. For example, while a woman may face sexism, a Dalit woman may be subjected to both casteism and sexism. A lesbian Dalit woman may be subjected to homophobia, casteism and sexism. As Sandra Fredman explains, *“Multiple identities can intensify disadvantage for those who belong to more than one disadvantaged group.”*[15]

Imagine a hypothetical situation where a lodge refuses accommodation to a transgender person with HIV. A situation involving a transgender person with HIV could be different from the case of refusal of service to any other person. It could be the case that the lodge does not refuse

[14] INDIA CONST art.16(2)

[15] Sandra Fredman, Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India, European commission Directorate General for Justice, February 2012 at p.40.

service to others. They may even not discriminate against all transgender persons or all HIV patients but only against transgender persons with HIV. In such a scenario, unless there is a specific prohibition of discrimination on multiple grounds (gender identity and health status in this case), there will be no legal case.



III. Components of an appropriate anti-discrimination law in India

Comprehensive Anti-discrimination and Equality legislation is seen in different jurisdictions like the US, UK and South Africa. According to Khaitan prohibition of discrimination, reasonable accommodation, affirmative action, the requirement of fault and possibility of justification are different tools employed in anti-discrimination law.[16] Learning from different jurisdictions and the limitations in the present law as observed above I suggest the following components be part of anti-discrimination law in India:

- the new law must define grounds of discrimination and define the scope of discrimination;
- it must explain which competing priorities can displace a finding of discrimination and;
- it must also provide for reasonable accommodation for affirmative action and impose a duty on different actors to foster ideas of diversity and inclusiveness.

[16] Tarunabh Khaitan, A Theory of Discrimination Law 10 (2015).

Grounds of Discrimination

Recently the Centre for Law and Policy Research published a draft Equality Bill 2020 which covered many grounds of discrimination. The draft suggests prohibition of *“all forms of discrimination against persons on the grounds of caste, race, ethnicity, descent, colour, sex, sexual orientation, gender identity, gender expression, tribe, nationality, disability, marital status, pregnancy, health (including HIV / AIDS status), occupation, political opinion and belief, linguistic identity, place of birth, age, migration, religion, refugee status, socioeconomic disadvantage, food preference or any combination of these characteristics”*[17] This needs to be incorporated in comprehensive anti-discrimination legislation.

The Scope

One significant point of contention is the meaning of the term discrimination. There is a gap between the meaning of discrimination in a legal sense and discrimination as understood by a layperson. An act that appears prima facie discriminatory in law may not be discriminatory at all to a layperson. Khaitan explains this problem: *“in law, discrimination may be unintended, indirect, or non-comparative”* and *“it treats a much wider range of conduct as discriminatory than does ordinary language, although its regulation of such conduct is restricted to a limited range of contexts.”*[18] In most cases, the disagreement as to what amounts to discrimination comes in cases of indirect discrimination.

[17] 'Equality Bill 2020: Takes a New Step in Addressing Discrimination, Recognising Intersectionality & Promoting Equality.' (17 Jan 2020) <<https://clpr.org.in/wp-content/uploads/2020/01/Equality-Bill-2020-17-Jan-2020-1.pdf>> accessed on 10 Feb 2020.

[18] Tarunabh Khaitan A Theory of Discrimination Law 2 (2015).

Direct discrimination can be detected easily. For example, if a person is turned away from a restaurant for the reason that they belonged to a particular religion it is a clear case of direct discrimination. Indirect discrimination, also called as a disparate impact claim, is more complex. In cases of indirect discrimination, practice or policy would apply to all persons equally but it could have a particular disadvantage to a particular group. For example, if an employer insists that all workers must be 5'5" in height this could be indirectly discriminatory against women (assuming there is no nexus between the minimum height requirement and the work assigned) as more women are likely to be excluded by this criterion than men.

Another important aspect is to identify the range of its application. Anti-discrimination laws are mostly found in cases of employment, housing and the like. It is not found in certain other private matters like the choice of partner, marriage etc. One can decide not to be friends with a transgender person based on gender identity, although morally reprehensible, such a case would not fall within the scope of anti-discrimination law. It is therefore important to determine what cases of private discrimination would fall under the ambit of the law. Gautham Bhatia argues that within the existing framework, under Article 15(2)(a), private discrimination is prohibited within the private economic realm, insofar as it operates to exclude persons from access to core economic, social, and physical infrastructure.[19]

[19] Gautham Bhatia, Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach *Asian Journal of Comparative Law*, 11 (2016), pp. 87-109 doi:10.1017/asjcl.2016.5 at p.109.

The present law does not delineate the extent to which right to autonomy in the private realm can defer from principles of non-discrimination. For instance, would it be okay for a person to refuse rental housing to ‘non-vegetarians’ because eating non-vegetarian food is against their religious beliefs? Such a criterion is likely to have an exclusionary effect on non-Brahmins or non-Hindus but the question is whether it would fall within the ambit of anti-discrimination law. One may argue that these are personal ‘preferences’ that may be respected, which are not discriminatory. Another person may argue that it falls within the ambit of ‘private economic realm’ and therefore discriminatory. Another argument may find the aspect of ‘exclusion’ itself discriminatory. It would therefore be beneficial to address such concerns in the new law. A clause similar to ‘private economic realm’ or ‘public accommodation’ must be introduced to define the extent of the right to autonomy in the private realm.[20]

Reasonable Accommodation

A reasonable accommodation is also called reasonable adjustments or adaptations.[21] It is an expression of the concept of substantive equality and it is more often used in the context of disabilities law. Reasonable accommodation simply means making a change in any process or environment to accommodate persons at a disadvantage. For example, changing the physical infrastructure of a building by adding a ramp.

[20] A term used under Title III of Americans with Disabilities Act of 1990.

[21] The Concept of Reasonable Accommodation in Selected National Disability Legislation, Background conference document prepared by the Department of Economic and Social Affairs. Available at <https://www.un.org/esa/socdev/enable/rights/ahc7bkgrndra.htm>.

In certain national legislation (like the Americans with Disabilities Act of 1990) failure to make reasonable accommodation amounts to discrimination unless it is demonstrated that it would impose undue hardship or disproportionate burden on the entity required to facilitate such accommodation. Reasonable accommodation allows people to perform essential functions efficiently and facilitates equal participation.

Affirmative Action

In affirmative action, identities such as sex, gender, caste, religion and the like may be taken into account to extend opportunities from which those groups have been historically excluded. The Indian Constitution allows the State to make special provisions for women and children.[22]

Mandate to Foster the Idea of Diversity and Inclusiveness

An overarching anti-discrimination law could also help in fostering diversity and the idea of pluralism in Indian society. This would be possible if a component of such a law would be to impose a positive duty, on different actors, to be more inclusive in their affairs in the public sphere. This can be further encouraged by linking additional incentives to an institution's diversity metrics.

Incentives can include governmental aid, tax benefits and can be explored in the areas of education, employment and housing to increase diversity in terms of caste, gender, sex, religion, disability and other identities.

[22] INDIA CONST art.15(3).



4. Conclusion: Using anti-discrimination legislation to enhance LGBTQ+ rights movement in India

NHRC study on human rights of transgender persons based out of Delhi and Uttar Pradesh indicated that only 20% of transgender people in the area completed the primary level of school education.[23] The same study showed that only 6% of the transgender population in the area are employed, that too in the private or NGO sector, and the majority are engaged in informal engagements like begging or sex work.[24]

In 2017 the Kochi Metro Rail Limited (KRML) was widely applauded for its initiative to employ twenty-three transgender persons as ground staff. However, eleven out of the twenty-three people dropped out as they could not afford lodging in the city. Reports indicated that landlords refused to rent out apartments to people with transgender identities. Available lodging was as expensive as Rs.400-Rs.600 per day for a person whose salary is a little less than ten thousand rupees a month.[25] Yet another study exposed how transgender sex workers faced specific discrimination within the Indian health care system. From placing them in male patient wards to refusing reconstruction of the urethra in an eligible case, due to their HIV status, discrimination seems to be rampant due to their gender identity, sex worker status, HIV status or the combination.[26]

[23] Study of Human Rights of Transgender as a third gender, February 2017; Id. at p.23

[24] Id. at p.28

[25] T.K. Devasia "Kochi Metro's transgender employees are quitting: Social stigma remains the overarching problem." Firstpost 25 Jun, 2017, Available at <https://www.firstpost.com/india/kochi-metros-transgender-employees-are-quitting-social-stigma-remains-the-overarching-problem-3743119.html>.

[26] Chakrapani et al. "Hijras in sex work face discrimination in the Indian health-care system." (2004).

With respect to workspaces in India, members of the LGBTQ+ community are only protected by individual workplace policies. According to the Indian LGBT Workplace Climate Survey 2016, only 48% of workplaces had anti-discrimination policies in place. 40% of LGBT employees reported that they are often subject to harassment in the workplace.[27]

There are several significant judgements given by the Hon'ble Supreme Court of India over the past two decades that favoured the LGBTQ+ rights movement. *National Legal Services Authority v. Union of India & Ors* is a landmark decision that recognised the right to gender identity as a fundamental right. The judgement noted that “*Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.*”[28] In *KS Puttaswamy v. Union of India*, the Court determined one's sexual orientation as an element of privacy and dignity.[29] In *Navtej Singh Johar & Ors. v. Union of India & Ors.*, the draconian Section 377 of the IPC was struck down as unconstitutional to the extent it criminalised consensual homosexual acts.[30]

Courts have also dealt with the question of whether sex under Article 15 includes ‘sexual orientation’. *Navtej Singh Johar* answered the same in affirmative and even referred to the JS Verma Committee report on

[27] Indian LGBT Workplace Climate Survey 2016 conducted by MINGLE (Mission for Indian Gay and Lesbian Empowerment).

[28] *National Legal Services Authority v. Union of India & Ors*, AIR 2014 SC 1863; Id. at para 69.

[29] *KS Puttaswamy v. Union of India*, (2017) 10 SCC 1; Id. at para 128.

[30] *Navtej Singh Johar & Ors. v. Union of India & Ors*, AIR 2018 SC 4321.

amendments to Criminal Law, which also suggested that sex under Article 15 includes sexual orientation.[31] It noted that sexual orientation is a human right guaranteed by the fundamental principles of equality.[32] Through *Navtej Singh Johar*, discrimination based on sex stereotypes and sexual orientation was brought within the purview of Article 15.

The aforementioned judgements recognise various rights of minorities belonging to LGBTQ+ communities. However, the actualisation of these recognised rights would not happen in the absence of formal written law. Presently there is no statutory protection for discrimination against sexual minorities, except for transgender persons.



Photo Credit: Rajat Gupta, Shutterstock

[31] Report of the Committee on amendments to Criminal Law, January 2013, at para 65.

[32] *Id.* at para 75.

In the case of Transgender persons, the Parliament recently passed regressive legislation called the Transgender Persons (Protection of Rights) Act, 2019. The Act extends its application to individuals and non-state establishments and mandates prohibition against discrimination. Under the Act, there are specific provisions prohibiting discrimination in case of employment, occupation, education etc. But it does not clarify what amounts to discrimination. The Act is also widely criticised as violating the Supreme Court judgement in NALSA v. Union of India. The judgement had affirmed the right to self-determination of gender without a medical certificate or sex reassignment surgery. Provisions of the Act contradicts this right.

The terminology used in the Act is very vague. The Act seeks to prohibit 'unfair treatment' in educational institutions, employment and occupation, yet does not clarify what amounts to 'unfair treatment'. It is unclear if a failure to provide reasonable accommodation would amount to 'unfair treatment' of an employee. If an employer fails to provide a single-stall gender-neutral bathroom in the work-space it is a matter that would impede the functioning capacity of an employee who does not fit the gender-binary description.

A comprehensive anti-discrimination law would identify sexual minorities as protected groups, allow for wider horizontal application of the law against individuals and employees, identify situations of indirect discrimination and recognise multiple disadvantages- all of which are absent in the present legal framework.