

THE INDIAN LAW INSTITUTE, NEW DELHI

Seminar

on

Constitutional Developments Since Independence

April 1973

Discrimination by Private Persons: Its Constitutionality

By

Joseph Minattur\*

In P.D. Shendrasani v. Central Bank of India Ltd. the Supreme Court laid down that the right to acquire, hold and dispose of property as well as the safeguard against deprivation of property save by authority of law is directed against the State and not against private individuals. The case related to the application of articles 19 and 31, but the position is considered to be the same under Article 14. 2

On the face of it the prohibition under article 14 is directed against the State. The provision in our Constitution begins with the words "The State shall not deny to any person". This is unlike the language used in the Universal Declaration of Human Rights. The latter reads:

All are equal before the law and are entitled without discrimination to equal protection of the law. 2a

---

\* The Indian Law Institute, New Delhi.

1. (1952) S.C.R. 391.

2. H.M. Seervai, Constitutional Law of India, (1967) 189 fn. 4.

2a. Article 7 of the Declaration.

The difference in the forms of expression of the existence of the right may not mean any difference in its content or applicability. It may be in the form of a declaration in which case all human beings are supposed to be bound by it. If it is in the form of a prohibition directed against the State, all members of the State are bound by the prohibition. The definition of state in article 12 may not be regarded as exhaustive. The very use of the word, 'includes' in the definition proves that many persons and institutions other than those mentioned in the article are covered by the expression 'State'. Any elementary text book on Political Science will tell us that people (population) are included in the definition of 'State'. There is no good reason to assume that the founding fathers were unaware of the usual definition of the term. It is because rights likely to be impinged upon by legislative provisions are the main theme of Part III that governments and legislatures, the main bodies engaged in legislation, are specially mentioned. The judiciary, for instance, does not find mention there, but cannot possibly be excluded from the definition, especially in their role of judicial law-making. There is, therefore, every reason to suppose people are not excluded from the definition of State. When people are included in the definition, the prohibition may be taken to be directed against all persons, not exclusive of private individuals.

We may, however, consider the expression 'State' in the context as embracing only "authorities" within the territory of India or under the control of the Government of India. As our interpreters of law are inclined to take their cue not from Aristotle, Kantilva, or Purva mimansa, but from Maxwell, Odgers, Craies and persons of their ilk, it is possible that they will apply to the definition in article 12 a worn-out Latin maxim<sup>3</sup> which may be irrelevant in the context, and say that only authorities are meant in spite of the comprehensive connota-

---

### 3. eiusdem generis

tion of the word, "includes". In many of the new constitutions in the Commonwealth<sup>4</sup> the prohibition of discriminatory treatment is expressly mentioned as directed against persons acting by virtue of any written law or in the performance of the functions of any public office or any public authority. Even assuming that people are not contemplated in the definition in article 12, the prohibition in article 14 will however, appear to apply to the "people" as it does to all persons in authority.

While the expression 'equal protection of the law' may envisage state action in making and administering laws, the provisions regarding 'equality before the law' would seem to involve private persons if law is understood in the sense of a body of rules regulating human conduct. In enunciating a principle of equality, all individuals in the society are expected to accept and be guided by this rule of equality. Any contravention of the rule may be prohibited by the provision concerning equal protection.

When the principle of equality is laid down in a Constitution which the people have given to themselves the people should be assumed to have agreed to be bound by their own declaration of the principle. Further, when the constitution lays down that there would be equal protection of the law, the people do give express authorization to the coercive powers of the state to implement the principle that they have enunciated as applicable to themselves. State action in the restricted sense of the expression as connoting action by the authorities of the State, is relevant and necessary in regard to protection of the law. And what is to be protected is equality before the law which the people have laid down for themselves as a guiding principle in their lives, as though they declared to one

---

4. Article 29(2) of the Constitution of Uganda is an instance in point. It provides among other things: "... no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."

another, "Whatever be the differences between us in the matter of complexion, creed, ethnic origins or place of birth, you are my equal in the eye of the law and I desire that you should be so treated". The people are indubitably bound by the covenant they have made.

If a person who has been subjected to discriminatory treatment by a private person complains against it in a court of law, the court may dismiss the petition on the ground that the discrimination complained of is not unlawful discrimination. The court may express the view that the Constitution does not contemplate the prohibition of discrimination by private persons. It would then not be unreasonable to argue that by dismissing the petition, the court is lending its authority and thus indirectly aiding the private person in his discriminatory conduct. The court's answer could be that it would do the same thing with any person who files a similar petition and so every one is treated alike before the law. In Shelley v. Kraemer,<sup>5</sup> Chief Justice Vinson of the Supreme Court of the United States observed:

The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights... Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

In this case it was held that judicial enforcement of restrictive covenants as to ownership or occupancy of property based on race or colour was inhibited by the equal protection clause of the Fourteenth Amendment of the United States

-----

5. 334 U.S. 1 (1947)22. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides: "No State shall... deny to any person within its jurisdiction the equal protection of the laws."

Constitution, even though courts were ready to enforce restrictive covenants irrespective of the race of which exclusion was sought. Here actual enforcement of the covenant by the court was sought and when it refused to enforce, it, it was in effect rendering the covenant legally ineffective. When a court dismisses a petition complaining of a private person's discriminatory conduct in regard to the petitioner, it is indirectly permitting something which, under the law of the United States, it is inhibited from directly enforcing.

What our Constitution contemplates is equal protection of the laws, and not equal or identical indifference on the part of the law resulting in the undermining of one's personality through the agency of the law. Discriminatory treatment tends to destroy the welfare and possibly the personality of the individual while democracy postulates as one of its basic principles the development of the individual. If a court, on its intervention being invoked, were to adopt what is euphemistically called judicial self-restraint and declare that it is beyond its jurisdiction to adjudicate upon discriminatory acts of private persons which to its knowledge have been injurious to other persons may not appear to be doing its duty. The primary duty of a court of law is not to quote other courts'

-----

6. In Roman-Dutch law, actio iniuriarum is designed to protect those interests which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity and reputation. In a South African case decided in 1908 (Purshotam Dagee v. Durban Corporation, 29 N.L.R. 391) the defendants were held liable in damage to the plaintiff, an Indian, who had been forced to quit a tram car in which he was lawfully travelling by a conductor employed by Durban Corporation. Under Roman-Dutch Law it would not have made any difference to the decision even if the defendant were a private individual.

opinions, but to do justice to the parties who are before it to get their disputes settled or their grievances redressed. If the expression "equality before the law" is not interpreted to prohibit discriminatory conduct of private persons, except in certain purely personal and private matters like the selection of a friend or a spouse,<sup>7</sup> the constitutional provision laying down the principle of equality would be rendered impotent in various spheres of life where absence of discrimination will be important in maintaining the welfare and harmony of the community.

Perhaps private persons who are given administrative contracts need special mention. As they are not public servants, but private persons, their discriminatory behaviour in a number of matters connected with the work they have undertaken to do may not be questioned at all according to the traditional view adopted by courts and doctrinal writers about what constitutes the state. But the fact is that these contractors employ whosoever they choose, mostly from among their relatives and friends and pay them out of funds contributed by the taxpayer. These relatives, friends or favourites are put in positions of authority, the only necessary qualification for them being consanguinity or yesmanship, and they are permitted to live in conspicuous luxury, without doing any substantial work which will contribute to the welfare of the society, except that of pushing others round, which may have a significant impact on perpetuating a feudal or hierarchical social organisation to which most of these contractors are cordially dedicated while paying lip-service

-----

7. Here also one finds prohibitory usages like those of consanguinity, exogamy, monogamy etc.

to democratic ideals. Should all these persons, namely the contractors and their appointees who are all paid and paid handsomely out of state funds, be treated as private persons whose discriminatory conduct is beyond the jurisdiction of courts of law because they are not "State" as defined in article 12? Gotra kinship may have certain relevance in purely personal matters. The exhortation to love thy neighbour (or bandhava as we have interpreted 'neighbour' to mean) as thyself is not intended to inhibit fair treatment of yavanas, mlecchas, kaffirs or heathens. It is to prevent the exercise of this human frailty to prefer one's own relatives and yesmen, that democratic constitutions have chosen to enshrine in them the vital concept of equal protection of the law.

What has been said above about government contractors appears to be equally applicable to a number of autonomous bodies which are maintained out of state funds.

There is protective discrimination provided for in the constitution; there is judicial recognition of rational classification which may justify treating one person as a class by himself and passing a law in relation to him, reminiscent of a Bill of Attainder. If, along with these, the law closes its eyes to discriminatory behaviour by private individuals, government contractors, autonomous bodies etc. there will not be much left in content or utility in the equality provisions of the Constitution.

\*\*\*\*\*

\*Wadhwa\*

