

Protective Discrimination and the Rule of Law

Joseph Minattur*

Anatole France has said,

The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.¹

IN INDIA THE FIRST two items of luxury are not forbidden. If a bridge is no obstruction to his celestial vision, Dicey from his heavenly abode, may look at the people sleeping under bridges and observe: They sleep the sleep of the peaceful, of the men of goodwill unworried by devaluation, bank nationalisation or even green revolution. They are equal with everyone else before the law and can get their legal wrongs righted, their grievances redressed by the ordinary courts of law.

Most of the framers of the Indian Constitution were born in or about the year in which Dicey's *Introduction to the Study of the Constitution* was published. In their undergraduate days or at their law schools, they imbibed Dicey's ideas of the rule of law. During their public life they came in contact with Fabian socialism which was something of a rage during the interwar years. When they set about drafting a Constitution for India they applied their minds to the Diceyan concept of the rule of law, but gave it a veneer with their own notions of Fabian socialism.² So they put down in the Constitution a general rule that 'The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India', taking their cue from constitutions of countries where certain sections of citizens are not, in fact, considerably less equal than other sections.

*. Ph.D. (London), LL.D. (Nimeguen), D.C.L. (Strasbourg), of Lincoln's Inn, Barrister-at-Law, Associate Research Professor, Indian Law Institute, New Delhi.

1. Quoted in S.M. Huang-Thio, 'Constitutional Discrimination under the Malaysian Constitution', 6 *Malaya Law Review*, 1 at 4 (1964)
2. See Ivor Jennings, *Some Characteristics of the Indian Constitution*, 31 (1953).

But they were aware of the situation in the country where in ancient glorious days according to tradition, even a cow enjoyed the protection of the rule of law.³ Bearing this factor of life in mind, they set down a fundamental principle, born, one presumes, of Fabian socialism. Under what are called 'Directive Principles of State Policy', was created a signpost for the state which read

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.⁴

Though this principle along with many others and particularly the one enshrined in article 38 are considered fundamental in the governance of the country and though it is declared that it is the duty of the state to apply these principles in making laws a breach of this *dharma* may not be visited by any earthly sanction; it may be that when the present state withers away, and when it is resurrected from its ashes, it will be born as a communist state or a military one *a la* Pakistan. To avoid a rebirth in this *asura* or *chandala* state, it is necessary to follow this principle. Otherwise there appears to be no compelling reason, according to our pundits, to follow it. But the principle that every citizen is equal before the law and is entitled to equal protection of the law, was regarded as more fundamental than his right to protection from social injustice. In other words, a citizen has a fundamental right to have access to ordinary courts of law irrespective of whether he is able to pay court fees, advocate's fees, and advocates' clerk's fees, along with the privilege he enjoys to be ill-fed, ill-clad and ill-sheltered from the ravages of inclement weather.

In the heyday of our fundamental rights when we considered them as changeable as our summer shirts, the Supreme Court in *State of Madras v. Champakam Dorairajan*⁵ struck

3. According to tradition the Chola King, Manuniti Cholan ordered his son to be run over by a chariot when a cow complained to the King by ringing the palace bell that her calf had been run over by the Prince's chariot.

4. Constitution of India, article 46.

5. A.I.R. 1951 S.C. 226.

down a government order which sought to give better facilities to candidates from less fortunate communities in the matter of admission to medical and engineering colleges.⁶ Equal protection decisions such as this hastened the adoption of clause 4 of article 15 of the Constitution which enabled the state to make special provision for the advancement of any socially and educationally backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes. It is not clear how far the duty imposed by article 46 has been fortified by the addition of this permissive clause in article 15, except to the extent that protective discrimination is now turned into a permissible right from a fundamental principle. With a little vision, the communal order impugned in the *Dorairajan* case could have been dealt with not under a Diceyan concept of the rule of law, but under the notion of a socialistic pattern of society. But then our judges had studied their Dicey very thoroughly. Further, the Avadi era which ushered in a lot of glib talk about socialistic pattern had not swum into our ken.

Perhaps even more than the Avadi resolution there was another influence on the social conscience of jurists, including judges. In 1959 the International Commission of Jurists envisaged a wider concept of the rule of law and gave the new concept a local habitation in the hearts of jurists all over the world. The Declaration of Delhi states

...[T]he Rule of law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised.

It was realised that not to provide special safeguards for the weak was to prefer the strong.

Spiritual enlightenment may have dawned upon the Buddha while meditating under a *bodhi* tree; but his material enlightenment came to him when he witnessed the miseries of the world,

6. The Bombay High Court, inspired by a similar spirit of the rule of law had struck down an order requisitioning land for the construction of a *harijan* colony, as discriminatory. See *Jaqwant Kaur v. State of Bombay*, A.I.R. 1952 Bom. 461.

the sufferings of the poor and the sick who lived only a stone's throw from his palace. Our parliamentarians who went about meeting people and mixing with them during a few weeks before the polling day, if at no other time, were roused to compassion by the squalor of the slums in our big cities and the brazen poverty in our rural areas. Their compassion did not inspire in them a desire to follow in the footsteps of the Buddha; but it induced in them a willingness to render verbal service to the depressed classes. This inclination to render service found its way into their speeches, full of platitudes and verbiage and also, significantly, into a few articles of the Constitution and particularly in the amendment we have quoted above. If now nothing happened, the blame could be laid and laid bare at the door of the Supreme Court. After all, the judges are supposed to live in ivory towers, while Ministers and other parliamentarians live with the people and move, in their limousines, among them.

There are a number of articles adopted by our Constituent Assembly to ameliorate the condition of the less fortunate among the people of India and lift them to a position of equality with others. Untouchability is abolished and its practice in any form is forbidden.⁷ There should be no discrimination among citizens, on a number of specified grounds, in the exercise of their right to access to shops, public restaurants, hotels and places of public entertainment and to the use of wells, bathing ghats and other places of public resort.⁸

II

There are provisions which permit reservation of posts for any backward class of citizens.⁹ Not only can there be reservation of seats for the Scheduled Castes and the Scheduled Tribes in the Lok Sabha and the Legislative Assemblies of states,¹⁰ there can also be nomination of Anglo-Indians to the Lok Sabha and the Legislative Assemblies of States, if the community is not adequately represented in them.¹¹ This reservation of seats and the special representation of the Anglo-Indian community are to cease at the expiry of thirty years from the commence-

7. Article 17.

8. Article 15(2).

9. Article 16(4).

10. Articles 330, 332.

11. Articles 331, 333.

ment of the Constitution.¹² The special provisions made for the Anglo-Indian community for appointment to certain services were to cease in 1970.¹³ It was also provided that for a period of ten years after the commencement of the Constitution Anglo-Indian educational institutions established prior to 31 March 1948 could receive grants-in-aid from the government.¹⁴

III

It may not be easy to determine which are the socially and educationally backward classes contemplated under article 15(4). An educationally backward class can be determined on the basis of statistics, seeing what percentage of the class is literate or educated. A socially backward class may defy such facile pigeon-holing. While income may be a factor to be taken into account in deciding whether a section of people is socially backward or not, it cannot be the only criterion. Caste will certainly come into the picture, as social backwardness may, to some extent at least, depend upon the social recognition given to a community by other sections of the people. It is possible that while a section of the society may, from a statistical point of view, be regarded as educated and economically not too badly placed, it may not be accorded social recognition because of its ethnic origins. Caste, unfortunately, is too much with us. The Constitution has not abolished it; what the Constitution has done is to remove certain incidents of the caste system in certain spheres of public life. By making references to the Scheduled Castes, the Constitution actually recognises differences in caste in our social structure.

Though the system may have originated among the Hindus, it appears to be prevalent in almost all religious groups. Among Muslims and Christians, the term is taboo, but the practice prevails. If a non-Sayyid makes overtures of marriage to a Sayyida, he will be regarded as impertinent, and if a non-Sayyida expresses her desire for such a union with a Sayyid, she will be considered to entertain 'the desire of the moth for the star.'¹⁵

12. Article 334.

13. Article 336.

14. Article 337.

15. The Shaikhs also appear to observe such distinctions. See Ghaus Ansari, *Muslim Caste in Uttar Pradesh* 71, 73 (1960) where he gives details of caste among Muslims.

Referring to Bauls, the group to which the mystic poet Lalan

Brahmin converts to Christianity appear to take pains to preserve the purity of their caste by arranging marriages within their own group. The definition given to 'Indian Christian' in statutes leaves them unperturbed as far as their social relations with other Indian Christians are concerned. Since these distinctions adopted in practice are based on birth or ethnic origins, they cannot be abolished, except by attacking the root of the cause. Perhaps the only way to remove them gradually is to promote inter-caste and inter-religious marriages and to prohibit endogamy. Endogamous marriages may be prohibited by extending the application of the impediments of consanguinity to cover a large number of kinship groups. If in certain tribal areas one cannot look for a spouse in one's own village, it is not preposterous to insist that a person's spouse should always be found outside one's own kinship group. This may seriously affect the prevalent customs of various communities and may be thought of as infringing the liberty of the individual in the choice of his or her mate. But some of the leaders of the D.M.K. party appeared to have envisaged a prohibition of endogamous marriages when they adopted a resolution to that effect some-time ago.

As long as the present social system prevails, there will be classes based on caste, among other things. If the members of a high caste are economically backward and illiterate, they may not be regarded as belonging to a socially and educationally backward class. Not to regard them as socially backward, and to deny them the protective discrimination contemplated in the Constitution may be against the spirit of the Constitution as may be gathered from article 46. The Supreme Court has held that caste may be one of the factors to be taken into account in determining the backwardness of a class of citizens.¹⁶ It is doubtful whether it is a factor which could be overlooked when attempting to render social justice to a community which belongs to a high caste, but quite low in other material aspects. In the hypothetical case given above, if the circumstances were a little altered, that is, if the members belonged to what is regarded as a low caste, there would be no difficulty in placing them among backward classes of citizens.

Shah of Bangla Desh belonged, Jnananjan Pal writes that they 'do not observe caste rules', presumably implying that other groups do. (J. Pal, 'Literary Renaissance in East Pakistan', *Young Indian* 9 (25 March 1971).

16. See also *P. Rajendran v. State of Madras*, A.I.R. 1968 S.C. 1012.

Article 340 of the Constitution provides for the appointment of a Commission charged with the duty, among other things, of investigating the conditions of socially and educationally backward classes. The Commission appointed in 1953 was authorised to determine 'the criteria to be adopted in considering whether any sections of the people... should be treated as socially and educationally backward classes'. The President may determine which castes, races or tribes are to be deemed 'Scheduled Castes' and Parliament may exclude any caste, tribe or race from this category or include any of them.¹⁷ There are similar provisions in regard to the Scheduled Tribes.¹⁸ When it comes to the question of deciding which are the backward classes contemplated under article 16(4), there seems to be no helpful guidance in the Constitution. Whether a backward class of citizens is adequately represented in the services under the state is a matter left to the opinion of the state, but the backwardness of a class of citizens does not appear to be so. Notwithstanding the *Trilokinath* decision,¹⁹ it may be submitted, with respect, that there is nothing in the Constitution to indicate that the backward classes contemplated under article 16(4) are to be deemed the same as the socially and educationally backward classes envisaged in article 15(4). It would appear that the words 'backward classes' have a wider connotation than the restrictive words used in article 15(4). It is not improbable that in certain states highly educated members of the Brahmin community which may have economically fallen on evil days and which is not adequately represented in the public services may invoke the provisions of article 16(4) as they regard themselves as 'backward' economically as well as in the matter of appointments in the public services and possibly also as being looked at in a special way, if not looked down upon, as a class. Traditionally this community belongs to the highest class and its members are, in general, well-educated. So it is difficult to regard the community as socially or educationally backward. But by force of circumstances in certain areas they may have become inadequately represented in the public services of the state and may have become economically backward. In the fulness of time the wheel, that is, the *chakra*, *ashoka* or otherwise, may turn full circle. In such circumstances, would the state be justified in denying

17. Article 341.

18. Article 342.

19. *Trilokinath v. State of Jammu and Kashmir*, A.I.R. 1967 S.C. 1283.

them the protection envisaged in article 16(4) on the ground that the community is not socially and educationally backward?

IV

The reservation of seats and special representation of certain classes of people in legislatures were contemplated for a short period only, though the period has been twice extended. The special provision made for the appointment of members of the Anglo-Indian community to certain public services was also envisaged to be for a short period. But the protective shields provided for under articles 15(4), 16(4) and 46, appear to be bright and emblazoned for all time.

Parliament may at appropriate times, exclude from the list of the Scheduled Tribes and the Scheduled Castes certain specified tribes and castes so that after the efflux of a period of years, there may cease to be any Scheduled Tribe or Scheduled Caste. But socially and educationally backward classes are likely to continue in existence for a much longer period and relatively backward classes of people may remain for ever. Even if compulsory primary education is provided for in every state and even if a minimum standard of income is assured for all citizens—these are improbable possibilities for some time to come—it will be possible to find socially backward classes in society. In many countries Jews who are generally well-educated and well-to-do do not get the social recognition which their education and wealth should, in normal circumstances, bring to them. As long as ethnic origins are considered a criterion, as in caste, there will be backward classes of persons in the eyes of the society. If intermarriages between various sections and castes become very common, a day of sunshine may dawn when one may not know who is of which caste. One is reminded of a busy divorce court where every afternoon a notice was put up with the heading "who's whose". Until that day with its golden streaks brightens Bharat, there will be socially backward classes among us.

There is a further question and that is whether any section or sections of the society will be inclined to remain backward and claim the safeguards and privileges accorded to the backward classes. We have had instances where similar questions arose in relation to reserved seats in elections to legislatures.²⁰

20. *V. V. Giri v. D. S. Dora*, A.I.R. 1959 S.C. 1318.

Referring to a similar situation where permanent provisions for safeguarding the special privileges of the Malays in the Constitution of Malaya (now Malaysia) have been made, the Minister of Finance said

The Malays are a proud and sensitive race. They are also an intelligent race, and I know that they appreciate the significance and implications of this provision far better than most people realise. I have no doubt in my mind whatsoever that when the time comes, the Malays themselves will ask for its abolition but this is a matter which we must obviously leave to them to decide.²¹

An argument such as this may prove applicable and valid for some of the Scheduled Tribes who are so 'proud and sensitive' that one notices that they sometimes refuse to take advantage of the privileges granted to them. As for the others some other measures may have to be contemplated to induce them to adopt a sense of self-reliance and independence and to feel unhappy, if not ashamed, about being treated as a backward class.

The state is under a duty to promote the educational and economic interests of the weaker sections of the community, and to protect them from social injustice. This would involve providing better opportunities for them for self-development. As C. K. Allen puts it

The 'mystical' equality of men means that every citizen, of whatever capacity, is entitled to what a German jurist calls consideration (*Achten*) from all other members of society. Strong or weak, effective or non-effective, he is to be regarded as deserving such opportunities of self-development as he is capable of grasping, or even sheer protection and sustenance if he is incapable through natural defects or undeserved misfortunes, of maintaining any foothold for himself in society.²²

From what may be gathered from the Preamble and Part IV of our Constitution, it would seem that provisions like the following are implicit in our basic rights, though not spelt out in so many words

21. Quoted in S. M. Huang-Thio, *op. cit.* at 12.

22. C. K. Allen, *Democracy and the Individual*, 11.

The dignity of man is inviolable. To respect and protect it shall be the duty of all state authority.²³

Every one shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.²⁴

These provisions of the Basic Law of the Federal Republic of Germany, though expressed in the language of declaration rather than of legal provisions, have been accorded, as interpreted by the Constitutional Court, the full force of legal provisions.

In a society where the more fortunate tend to belittle and degrade, if not denigrate others who may happen to occupy a subordinate social or official status, it is unlikely that backward classes will be easily given a position where they will be encouraged to feel their importance as equal members of the society. It is here that the duty of the state as laid down in the Indian Constitution (and more clearly expressed in the German Basic Law) is of paramount importance. Whether this duty is expressed in clear terms or not is immaterial. It is implied in the concept of a democratic republic which Bharat is assumed to be.

When the state authority respects and protects the dignity of man and when he is given all opportunities of self-development, it is improbable that any member of the body politic would claim to be a person belonging to a backward class. No man, in his right senses, would barter away human dignity for paltry advantages. If any one in Bharat is inclined to do so, it is a clear indication that he has not attained self-development and, incidentally, that the state authorities have not given him adequate facilities for developing his personality and in general for imbibing the values of a democratic way of life. As Falstaff might say, "What is honour ... it is a mere 'scutcheon'," and he may be considered realistic. But a man who is considered to belong to a backward class in India is likely to be eager to rub the stains of backwardness off his forehead. He would prefer to be marked with the insignia of one reborn to a higher class where everyone is equal to everyone else.

When all Indians, of whatever class or caste they may be, are reborn into the realisation of their human dignity, through self-development, the Declaration of Delhi will have attained for us the plenitude of its significance.

23. Basic Law of the Federal Republic of Germany, article 1(1).

24. *Id.*, article 2(1).