

EQUALITY OF TRADING RIGHTS

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What is described as the claim for equality of trading rights between Indian and British interests in India is only the latest phase of the demand for statutory safeguards against discriminatory legislation of which we heard so much when the Statutory Commission was here. It is necessary, therefore, to trace the origin and history of this agitation in order to comprehend adequately its full implications. The protest of the British commercial community against economic discrimination and their demand for safeguards against such legislation had their origin in what is known as the Indian Coastal Traffic Bill. It will be remembered that in 1928 the Associated Chambers of Commerce of India and Ceylon issued a memorandum in which they expressed great concern at the tendency shown by Indian politicians to introduce legislation discriminating against British commercial interests in India and urged that the Indian Legislature should not be in a position to discriminate legislatively or financially on racial grounds. Later, the All-Parties Report on the constitutional question, commonly known as the Nehru Report, considered this matter and declared that:

As regards European commerce, we cannot see why men who have put great sums of money into India should at all be nervous. It is inconceivable that there can be any discriminating legislation against any community doing business lawfully in India.

The question was soon after debated in the Legislative Assembly when the motion to refer the Indian Coastal Traffic Bill to a select committee came up in September 1928, and the representatives of the Associated Chambers, Pandit Motilal Nehru and other speakers dealt exhaustively with this subject.

The question was again discussed in the annual meeting of the Associated Chambers in December 1928. But it was in July 1929 that the Associated Chambers addressed a communication which was meant for the Statutory Commission and was widely circulated among members of Parliament and commercial bodies in England. The Associated Chambers reiterated therein the demand for constitutional safeguards against discriminatory legislation which they had urged before the Statutory Commission and instanced the Coastal Reservation Bill as an illustration of such legislation. Within about two months, in October 1929, the Federation of Indian Chambers of Commerce and Industry issued a rejoinder in reply to the statement

of the Associated Chambers in which the Federation made it clear that "there can be no self-government in India if she is to be denied the power to devise and follow a national economic policy, including the right, if her interests required it, of making economic discrimination against non-national interests." Thereafter the agitation for statutory safeguards persisted and in July 1930 the Associated Chambers again came forward with a circular on the subject of discriminatory legislation. The Statutory Commission definitely ruled out the proposal to prevent discriminatory legislation by attempting to define it in a constitutional instrument. (*Vide* pp. 129-130, Vol. II).

Last year when the Round Table Conference was convened, the European commercial bodies modified the form of their demand and suggested that there should be an understanding or trade convention ensuring equality of status between European and Indian commercial communities trading in India. This was insisted on as a condition precedent to the grant of responsibility in the Central Government by the non-official European representatives and the Conservative and Liberal delegates to the Round Table Conference. The Government of India's Despatch on the Statutory Commission's Report also deals with this aspect of the matter and supports the claim for statutory safeguards against discriminating legislation.

In January last, the Minorities Sub-Committee of the Round Table Conference adopted Clause 14 by which it was agreed that there should be no discrimination between the rights of the British mercantile community and the rights of Indian-born subjects and a convention to this effect should be drawn up. The controversy that arose in the press and on platform as a result of this agreement is too recent to need any detailed reference.

Now what is exactly the nature of this demand? The European commercial community demands that certain statutory safeguards or guarantees should be provided in the new constitution against discriminatory legislation. It is rather curious that except for citing the instance of the Coastal Reservation Bill, there is no attempt to define precisely the term "discriminatory legislation" or "economic discrimination" nor is there any clear enunciation of the nature of the safeguards required. Obviously much will depend upon how these safeguards are defined and what their scope and implications are. Even the Statutory Commission, composed as it was entirely of Englishmen and naturally sympathetic to the demands of the European mercantile interests, was unable to devise a formula that could be embodied in the statute for safeguarding non-Indian interests. They carefully considered the drafts of clauses submitted by the European commercial bodies providing for constitutional safe-

guards against legislation which discriminates against certain communities in matters of taxation, trade or commerce. But they ruled out the possibility of securing protection by these means because such statutory protection could not be limited to particular minorities or to discrimination in matters of trade and commerce only. "The statutory provision would therefore," the Commission concluded, "have to be drawn so widely as to be little more than a statement of abstract principle affording no precise guidance to courts."

The final draft that was agreed to by the Sub-Committee No. III (Minorities) and adopted by the Committee of the whole Conference, with the notable exception of Mr. Jinnah, was as follows :

"At the instance of the British commercial community, the principle was generally agreed that there should be no discrimination between the rights of the British mercantile community, firms and companies trading in India and the rights of Indian-born subjects, and that an appropriate convention based on reciprocity should be entered into for the purpose of regulating these rights."

"It was agreed that the existing rights of the European community in India in regard to criminal trials should be maintained."

Now let us examine the implications of the agreement. In the first place, not unfair or unwarranted but any sort of discrimination *in the matter of trading rights alone* is ruled out. Racial discrimination *against* Indians in the matter of jury-trial or other privileges or preferential treatment in jails or railways is to continue. Such a safeguard cannot be limited to commerce or trade only and applied solely in the interests of Europeans. Secondly, no sort of discrimination is to be permitted in the sphere of trade even if such discrimination is a means to establishing the paramountcy of Indian interests and is required in national interests. If a State Railway insists on purchase of coal from Indian collieries, would it be discrimination? If the Stores Department gives preference to Swadeshi goods even at a sacrifice, will that constitute discrimination? Supposing a Provincial Government wants to buy over a European-owned public utility company but has no objection to a similar Indian company existing, will that be classed as discrimination? Would the Government under the proposed agreement be able to impose restrictions on non-Indian exchange banks and insurance companies, if it considered them necessary in national interests or cancel and refuse renewal of licenses for mines, plantations and forests given to non-Indians wherever the conditions of such licenses are detrimental to Indian interests? It is conceivable that such restrictions might conflict with the existing rights of non-Indians residing in India and might affect their future rights,

but if they are desirable in India's interests, there is no reason for not imposing them. For the definition of what constitutes discrimination will depend on what interpretation we give to the term 'right.' Have Britishers, for example, the undisputed "right" to monopolise and dominate certain spheres of trade and industry or the "right" to eliminate and annihilate Indian industries in their own country? If these rights are themselves privileges based on discrimination against Indians in the past and at present, they have no moral justification; and if those rights are claimed on a basis of equality with Indian fellow-subjects, what is the *raison d'être* of demanding special prerogatives in criminal trials? You cannot be fellow-citizens in one case and a superior race in the other. Moreover, it is not merely the existing rights of the British community nor the rights of the existing British community that are to be guaranteed but the future rights of the British community for all time to come. This point was strongly insisted upon by Lord Reading and Sir Hubert Carr, the former of whom emphasised that their agreement about responsibility at the centre was conditional upon this clause being adopted and the latter of whom frankly stated that their commercial rights were not open to negotiation. Nevertheless the Indian delegates agreed to barter away essential conditions of economic freedom for comparatively less important constitutional concessions. Even the demand of some of the Indian delegates that in the case of certain basic and key-industries, the Government must be left the right to discriminate was ignored and has nowhere been provided for in the clause as finally adopted. However, it is doubtful if even such a circumscribed right would be useful in the absence of any accepted definition of a key-industry. It is not a question of protecting this or that industry or enterprise. What is fundamentally objectionable is the constitutional restriction on the inherent right of an Indian legislature to pursue whatever policy it considers desirable and essential.

In the second place, it is noteworthy that the agreement is not restricted to companies or firms registered in India. Whether the company is registered in India or not, and even if it is registered in England or South Africa or if it is a British firm established outside the British Empire but is only trading in India, no discrimination is possible against it. There are about 821 companies with paid-up capital aggregating £ 568,068,672 which are registered elsewhere than in India but are working in British India. But the Government of India have already acknowledged and acted upon the principle of discrimination in giving State-aid to industries, such as bounties or similar definite pecuniary assistance where specific restrictions are imposed to

safeguard Indian interests. For instance, Section 5 of the Steel Industry Protection Act of 1924 laid down that in the case of incorporated companies, such companies should be registered under the Indian Companies Act of 1913 with rupee capital, that a reasonable proportion of the directorate should be Indian and that facilities for the technical training of apprentices should be provided. Similarly, when the Indian Radio Telegraph Company had to obtain a licence from the Government, the Government laid down in their agreement with the Company that sixty per cent of the new capital should be reserved for Indians. In the matter of subsidizing civil aviation also, the Government have approved and adopted the principle of reserving a majority of the share capital and directorate for Indians. The External Capital Committee, in fact, approved of the imposition of similar stipulations to safeguard Indian interests. It is conceivable that all such stipulations and safeguards would be rendered impossible under the terms of the Round Table agreement as they might be construed as racial discrimination. This agreement, therefore, constitutes a distinct step backward.

In the third place, it is evident that all measures of protection are in a sense discriminatory because they seek to safeguard on a basis of differentiation—whether the discrimination is practised through the manipulation of tariffs and bounties or through special legislative measures. It is, however, contended that while such protective measures as tariffs are unobjectionable in principle, economic discrimination against non-Indian industries established in this country is obnoxious. But in considering this question, there are several relevant issues which must be emphasised. In the first place, we must investigate the process and methods by which such industries came to be established and to flourish in this country. If it is found that in certain spheres of economic activity the non-Indian interests have been established through discrimination against Indian interests, then to that extent the claim for perpetuation of such vested rights is weakened. Now there is no doubt that the political domination of India has been the principal cause of the establishment of industries controlled and managed by non-Indians. In oil, jute, coal, shipping, banking, insurance and several other spheres, the non-Indian interests have been able to succeed and dominate with the active sympathy and support of the Government of the land. We all know the saying that trade follows the flag and it is the political power of which the flag is the symbol that so often builds up economic control just as it is the peaceful penetration of traders which paves the way for political domination. It is therefore only an accident that these industries happen to

be geographically located in India, because otherwise they are alien in every sense of the term as evinced by the case of the oil industry. After all, in this matter, we must also examine the aim of protective measures. Tariffs are imposed for the promotion of national industries but if it is found that foreign interests taking advantage of a tariff wall come to a country and seek to exterminate national enterprises, is it not the duty of the State to safeguard them? On this question it is interesting to consider the opinion of Sir William Clark, a Commerce Member of the Government of India, who, speaking in 1916 on the resolution which led to the appointment of the Industrial Commission observed that "the building up of industries where the *capital, control and management should be in the hands of Indians* is the special object we all have in view." He further deprecated the taking of any steps which might "merely mean that the manufacturer who now competes with you from a distance would transfer his activities to India and compete with you within your boundaries." The mere constitutional right to impose tariffs does not connote fiscal autonomy of which it is but an element. The power to legislate and tax so as to promote national industries and to regulate trade and industry, tariff and transport in national interests constitutes fiscal autonomy. This would, of course, include the right to levy differential duties on the industries owned and managed by Indians and non-Indians and to devise and enforce such measures as reservation of coastal or inland waterways to Indians or the right to exclude non-Indians from certain spheres of economic operation like banking and insurance. India is deprived of such autonomy by the Round Table agreement. Now this is no imaginary danger. Recent experience in India shows that high tariffs by themselves are not an adequate protection: foreign capital by establishing itself within the country competes with Indian-owned concerns by unfair means. The match industry is an instance in point while it is rumoured that Lancashire contemplates the establishment of cotton mills in India; hence the Government of the country must have power to safeguard national concerns in such cases. There is no possibility of developing national industries in India if India lies prostrate under the shackles of foreign economic control.

Two replies to this line of argument which have been urged by some of the Indian delegates might be briefly considered here. To begin with, emphasis is laid on the term "generally" and it is claimed that the formula is designed to prevent only wholesale discrimination. But the question is not one of the *extent* of discrimination but of the *right* of discrimination. It is possible that, in certain spheres, discrimination may be unnecessary or harmful but that is no ground for fettering the right of the

Indian legislature from its very inception. Secondly, it is contended that the formula arrived at lays down only the general principle while the details are to be worked out on a basis of reciprocity through a trade convention. But it is of little use to seek to regulate commercial relations between England and India, after having sacrificed the fundamental principle and after agreeing to limit the powers of the future Indian Government for the sake of British interests. Nor can the proposal of reciprocity bear scrutiny. Reciprocity as a basis between England and India is proposterous, because we cannot balance the interests of half-a-dozen Indians residing in Great Britain with the enormous interests of the British people in India and because England being in a much more advanced stage of economic and industrial development, the privilege of Indians to start industrial enterprises in England is a joke for which its perpetrators deserve some recognition but not to the extent of the unhampered right to exploit Indian resources for an unlimited period of time which they demand.

All countries have the right to discriminate or differentiate between nationals and non-nationals and to reserve certain domestic spheres of trade for nationals. It is the policy of nations generally to reserve for their own citizens certain rights and privileges which for one reason or another are not extended to aliens. For example, it has been the policy of the United States for over a century to reserve the coasting trade exclusively for vessels of its own citizens. When, therefore, national treatment is pledged in their commercial treaties in terms sufficiently broad to cover this trade, a provision is introduced expressly excepting coast-wise shipping. In addition to coasting trade and national fisheries, discriminatory treatment in favour of a country's own nationals is provided for in commercial treaties with reference to acquisition and possession of the soil, particularly in agricultural districts, and to the practice of certain professions and trades. France, Germany, Italy, Denmark, Chile, Roumania, Portugal have all got definite restrictions on the activities of foreign concerns and lay down specific rules for the purpose. In Roumania, it has been provided that "companies operating in Roumania must have two-thirds of the capital in Roumanian hands, and three-quarters of the directors must be Roumanian nationals." This is in accordance with the general trend of Roumanian legislation which aims at "Roumanianizing" industry. In China, Greece, Chile, etc., there are laws against granting mineral concessions to foreigners. In 1923 France forbade the acquisition of property by a foreigner. Even in the British Empire, free trade England does not permit a foreigner to be a proprietor, in part or whole, of a British ship under the Merchant Shipping Act of 1894

which reserves certain rights in regard to British ships for natural-born and naturalized British subjects only. British Columbia forbids registration of a non-national company for the construction and working of railways or for carrying on the business of banking or insurance of any trust within the meaning of the Trust Companies Act. Section 8 of the War Precautions Repeal Act (1921) of Australia provides that no company in which more than one-third of shares are held by foreigners shall acquire any mine or interest or metallurgical business. Section 2 of the same Act prohibits any foreigner from acquiring shares without the permission of the Treasurer. The fact is that the British Commonwealth itself provides numerous instances of a discriminatory policy and British Dominions exercise discrimination not only against foreigners but also against other members of the Empire. In the matter of immigration, franchise, trading licence and the right to hold property, British subjects can be and are treated differentially in a Dominion. But this is not all. Section 26 (1) of the British Nationality and Status of Aliens Act 1914-22 commonly known as the Imperial Nationality Act specifically lays down that nothing in that Act shall prevent the Legislature or the Government of a British possession "from treating differently different classes of British subjects." Hence while in India safeguards are being demanded against discrimination, the very right of legislative discrimination has been carefully safeguarded by an imperial statute. It is therefore not true that all British subjects enjoy any social or political rights simply by virtue of their nationality as is claimed by the British commercial community in India.

The imposition of such restrictions on those who have had the unfettered right to exploit hitherto and have taken advantage of the open door policy might involve inconvenience and loss to existing interests. But that is inevitable. For instance, the Kuomintang or the Nationalist Party of China declared that "no foreigners will be permitted to own property, open banks or issue bank-notes unless in accordance with Chinese law, custom and usage"; and the Nationalist Government has excluded foreign shipping from coastal and inland water-routes within a year of the passage of the measure. Last year, the Chinese Minister of Foreign Affairs appreciated the efforts for the rendition of Chinese shipping rights and said that the Nationalist Government "would exert every effort to take back these rights from foreign merchants."

The political aspect of this demand is not less important. The position of the British commercial community on this question is not quite consistent. Sometimes the Britishers claim their rights as a minority community of India—a weak, unprotected, powerless

minority as it is. On other occasions, they demand their rights owing to their race and their stake in the land they live in. Still on other occasions, they claim that they are fellow-subjects of the same Empire and must have the same rights. Now it is evident that it is not the rights of a minority that they demand but the continuance of the privileges of a ruling race. No communal minority in India has yet demanded the right to be tried by members of its own race ; no minority has attempted to fetter the constitution by safeguards against discrimination. The British demand their rights as nationals of England, not as nationals of India. Indeed, they are so conscious of their non-national character that when demanding protection for oil industry, they could not characterize it as anything more than an indigenous industry. It is obvious that the special rights enjoyed by Britishers in this country are due not to their being a minority community at all but to their racial affinity with the governing caste who regard this economic garrison as a counterpart of military occupation. To demand equality in the face of the fundamental inequalities that exist between Indians and Europeans is hence simply preposterous. But it is something to the good that Britishers in this country who have thrived on racial inequalities are constrained to protest vehemently even against the faintest hint of preferential treatment for the children of the soil when they perceive the possible effects of such a policy on their own interests.

To ask for the continuance of this privileged position and favoured treatment in the shape of statutory guarantee or trade convention is simply to demand capitulations from a self-governing India. It is not necessary to dilate at length on the odious history of these capitulations, which were so offensive and humiliating, that all countries such as Egypt, Persia, China and Turkey, where they existed, revolted against them with all their strength and the European countries have had to forego them. Such judicial, economic and commercial privileges granted to foreigners, often at the point of the bayonet, are similar to the safeguards and "equality of status" demanded in this country. In China, for instance, foreign interests were protected by "unequal treaties" whose abolition was demanded to restore equality of conditions : here unequal rights are sought to be perpetuated by a commercial treaty or trade convention. The Koumintang's first demand therefore was that "all present treaties not based on the principle of equality between China and any foreign power should be abrogated including those providing for extra-territorial rights of foreign nationals" and promised most-favoured nation treatment to any nation which

voluntarily relinquished its special privileges. Similarly, in Turkey, the National Pact of 1920 observes :

"It is a fundamental condition of our life and continued existence that we, like every country, should enjoy complete independence and liberty in the matter of assuring the means of our development in order that our national and economic development should be rendered possible and that it should be possible to conduct affairs in the form of a more up-to-date regular administration. For this reason, we are opposed to restrictions inimical to our development in political, judicial financial and other matters."

Safeguards and guarantees such as are demanded by the British commercial community would, like extra-territoriality or capitulations, be derogatory to national dignity. Whatever the differences in form between them and capitulations strictly so-called, they would in practice operate as a restriction on the territorial and administrative sovereignty of India and would in some cases throw the economic machinery out of gear ; further they might be utilized by foreigners to erect barriers against India's economic independence and development. We want not the substitution of economic bondage for constitutional irresponsibility but the simple and unconditional abolition of all economic and political restrictions in the life of the nation while giving adequate protection to legitimate foreign interests.

What the Europeans in this country are entitled to obtain and will obtain under the new constitution are their legitimate rights like any other non-nationals. If, however, they desire to obtain more, they should be prepared to become the nationals and citizens on terms and conditions to be laid down by the future parliament of India. Now we are told by *Statesman*, for instance, that "the root of the matter was really whether all subjects of the Empire were to receive the same treatment in India." The reply is two-fold. Were such statutory guarantees made a preliminary condition before conceding Dominion status or full responsible government to any of the component parts of the British Empire ? In no Dominion have such safe-guards been specifically provided against discriminatory measures. It is therefore objectionable in principle and detrimental in practice to national interests to fetter the constitution of India and limit the sovereignty of the Swaraj Government. But this is not all. As General Smuts pointed out at the Imperial Conference of 1913, "there is no common equal British citizenship in the Empire." Further, he stated that "the composition and character and rights of its people will be the concern of each free and equal State of the Empire." This constitutional position has been authoritatively accepted by the representatives

of India. Earl Crewe speaking at the Imperial Conference of 1911 observed that "Nobody can dispute the right of self-governing Dominions to decide for themselves whom, in each case, they will admit as citizens of their respective Dominions." This view has been subsequently confirmed at the succeeding Imperial Conferences where the right of the Dominions to discriminate against other British subjects of the Empire has been fully recognized and their policy of discrimination has been justified on economic grounds, that is, the same grounds on which discrimination is urged in India. Professor A. B. Keith, one of the greatest authorities on Imperial relationship, has acknowledged the power of the Dominions to regulate immigration and their right to treat differentially different classes of British subjects. It has already been shown that a British subject *qua* British subject is not entitled to any civic and political rights within the British Empire. Each component part of the Empire is entitled to pursue its own policy as regards the bestowal or refusal of rights to persons within its own jurisdiction. What is still more important, as Mr. Van Pittius, the author of "Nationality within the British Commonwealth of Nations," one of the latest theses on the subject, has pointed out, "the question of British subject-hood has hardly been taken into consideration at all in the process of discrimination." It is not necessary to dwell at length here on the serious disabilities imposed on Indians in the various Dominions and even Kenya, ranging from partial to complete prohibition and restrictions in exercising franchise or holding property, which induced Professor Keith to admit that "the exclusive policy (of the Dominions) is difficult to reconcile with the claims of common citizenship." Such discrimination against Indians includes, as is well-known, not only prohibition of immigration but the deprivation of the vested rights even of Indians lawfully resident in the Dominions for the sole crime of their colour. Repatriation which is the real aim of the South African Government is discrimination, confiscation and expropriation in the worst sense of all these three terms, but imperial fellow-feeling has not prevented it. Even if we admit therefore that there is one imperial nationality, there is a distinct and separate citizenship of the Dominions and the right and privileges derived from it are different in the various parts of the Empire. As a matter of fact, the Dominions are developing their own distinct nationalities. Canada was the first to do so in order to facilitate the operation of her immigration laws and later, to have an independent member of the Permanent Court of International Justice. This example was followed by the Union of South Africa in the Union Nationality and Flags Acts, of 1927. In both cases Dominion nationality can be lost on acquisition of

another Dominion nationality or the nationality of the United Kingdom. But the last instance is that of the Irish Free State which has constituted a distinct Irish citizenship. Article 3 of the constitution of the Irish Free State lays down the conditions of citizenship and concludes by stating that "the conditions governing the future acquisition and termination of citizenship in the Irish Free State shall be determined by law." The most striking feature about the provisions of Irish citizenship is that no distinction whatsoever is made between British subjects and aliens neither of which is ever mentioned. The British subjects of the United Kingdom are thus excluded from this citizenship but are eligible on application like other aliens. Political privileges are accorded only to citizens. But the most recent and authoritative exposition of the position is contained in the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation held in 1929. The Report dwells on the two-fold aspects of this problem because, while all members of the Commonwealth have a common nationality in virtue of their being subjects of the British Crown, they are also distinct juristic entities and may be said to have separate nationalities of their own. The Report points out that a common status operative throughout the Commonwealth can only be conferred in pursuance of legislation based upon common agreement and even such common status would not be in any way inconsistent with the recognition within or without the Commonwealth of the distinct nationality possessed by the nationals of the individual States of the British Commonwealth. This marks an important stage in the development of Dominion nation-hood. Now India, even on official admission, has achieved the status of a Dominion in international relations and she has been an original signatory of the Treaty of Versailles as well as an independent member of the League of Nations. There is, therefore, no reason why India should not constitute and establish a distinct nationality of her own. In no Dominion were the rights of citizenship guaranteed as they are sought to be mulcted from India. India must reserve the right to retaliate whenever necessary against those parts of the Empire where discrimination is made against Indians as in South Africa. This right cannot be sacrificed for the mirage of equality and can only be enforced if there is an independent Indian nationality. It was with that view that the All-Parties National Convention held at Calcutta in December 1928, adopted the following definition of an Indian citizen :

"The word 'Citizen' wherever it occurs in this constitution means every person :

(a) who was born or whose father was born or naturalized within the territorial limits of the Commonwealth and who has not been naturalized in any other country ;

(b) who being a subject of an Indian State ordinarily carries on business or resides in the territories of the Commonwealth ;

(c) or, who being a subject of the Crown carries on business or resides in the territories of the Commonwealth and fulfils the conditions prescribed by the Commonwealth ;

(d) or, who has been naturalized in the Commonwealth under the law in force for the time being.

Explanation. No person, who is a citizen of a foreign country, can be a citizen of the Commonwealth unless he renounces the citizenship of such foreign country in the manner prescribed by law."

It is not claimed that this definition is either complete or absolutely satisfactory, but it is on some such line as this that India must seek to develop and establish her own distinct nationality.