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# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

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## OUTLAWING THE COMMUNISTS

"The primary reason not to outlaw the party springs from the most fundamental principle of the American political system. The freedom of assembly, of speech and of press guaranteed by the Constitution obviously is not merely freedom for those with whom we agree. It is freedom for those with whom we disagree; for the dissenter, the unorthodox, the unpopular. It is freedom to denounce the existing Government and to advocate a peaceful change in the political or economic structure.

"On the other hand, it is not freedom to commit or promote sabotage or sedition or to attempt to overthrow the Government by violence. Nor is it freedom to assist our enemies in time of war. But a good argument can be made that if any of those things is done, there are ample laws (perhaps with a few minor additions) to protect the integrity of the United States. Any action of treason, or espionage, or sabotage, or violence, is punishable under existing law. In this way we are protected against Communist action. But to outlaw the Communists as such comes perilously close to outlawing an idea and there is no law in the world strong enough to do that. No matter how wicked or objectionable the idea may be, it can be overcome only by other ideas. The Founding Fathers realized this and their descendants should never forget it.

"By attempting to legislate against the party as a whole it would appear that we negate the principles of a liberal democracy; we deceive ourselves into thinking that we have added to our own armour; we take a long step toward the very totalitarian danger from which we are trying to protect our country; and we do not actually eliminate a single Communist—we merely drive him underground, where he is harder to find and to watch."—The "New York Times" (13th August) on Freedom House's proposal for legislation to outlaw the Communist party.

You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous.—Lord Justice Scrutton in O'Brien case (1923) 2 K. B. 361;

## ARTICLES

### SALUTATION !

With this issue the BULLETIN completes the first year of its existence, and we take this occasion to salute our readers in all sincerity, trusting that they have found this little organ of civil liberty deserving of their patronage and hoping that it will continue to receive this patronage for the second year upon which it is now about to enter.

When started, the BULLETIN was intended chiefly as a chronicle of events connected with matters relating to civil liberty in our country. But from the very first number the emphasis has shifted from a record of events in India to a comment on such events not only in India but outside. We believe that the readers do not disapprove of this change.

For our part we think the change was well worth making. We are all new to Fundamental Rights—the makers and administrators of law as well as their critics. The full implications of the enthronement of these rights in our constitution will become apparent only as days go by, and we shall arrive at a just appraisal of our constitutional guarantees of all the ingredients of human freedom principally by casting a glance at the U. S. A., which is the country that has blazed the trail in providing for this freedom in its constitution and which, in spite of any occasional aberrations, still stands before the world as an exemplar in this respect.

We therefore always try to invite the readers' particular attention to important events concerning civil liberty in the U. S. A. and bring to their notice how such problems are handled in that country by its Supreme Court and bodies which champion civil liberty in general. Mr. John Haynes Holmes, who is most widely known in India perhaps as a devoted follower of the Gandhian philosophy of absolute non-violence but who in the U. S. A. is just as well known for his sturdy and intrepid advocacy of civil liberties in the capacity of Chairman of the Board of Directors of the American Civil Liberties Union (which position he has recently relinquished), wrote to us in a private letter asking us to "match all proposals (about preventive detention and such-like matters) to the standards set up and main-

tained in this country for a century and a half gone by." For, he adds, "Our Bill of Rights is a precious document, still a flawless guide to the preservation of true freedom."

This is very true, and we have been instinctively judging (as the readers must have found) of the executive and legislative acts of our governments by the yardstick of the U. S. A.'s Bill of Rights, which is the lodestar for all in every country intent upon safeguarding civil liberty, and we shall continue to do so. Similarly, we make an attempt to examine in detail the solution offered in other countries for tackling problems similar to those that face us at present, as to how, e. g., to meet the threat of subversive activities, and we try to give to our readers a digest of progressive opinion as may at the time be expressed on these subjects.

Indeed, our columns are a sort of student's note book on such questions which it is our hope will give some small help to our readers in understanding the basic principles of civil liberty and the manner in which they should be applied in practice. Because we are all new to this task we feel that the help we may succeed in rendering in this way will be appreciated by those who do us the honour of going through these pages.

One particular misconception, which is all but too common, about our general attitude will, we trust, have been cleared away by now. Government has been taking strong coercive action against communists and Hindu communalists, and it falls to our lot constantly to criticise such action. But our criticism is often supposed to be inspired by the sympathy we feel for these sections. Nothing, however, can be farther from the truth. In the first place, no one can possibly sympathise with both these sections at the same time, their respective ideologies being poles asunder. In the second place, as we have declared often enough before, the BULLETIN is above all politics; its one approach to every problem that arises for consideration in these columns is the approach of one who is interested in civil liberty *simpliciter*, without regard to whom the problem primarily affects, and in performing this function we may at times appear to be espousing causes which politically might be the most remote from our sympathies.

This is a position into which one often finds oneself landed. The Australian Labour Party, for example, is the bitterest opponent of the bill for suppressing communism which the right-wing Government of the Commonwealth has sponsored, and yet that party has done more in the past to oppose communism by deeds as well as words than either of the two parties now in power could or perhaps even would have done. Why does the Labour Party oppose the bill then and make it appear as if it stood by the communists who are merely carrying out the dictates of a foreign country? Because it feels that even an evil must be eradicated by right means. We do ourselves serious harm by following evil ways in counteracting evil. If communism is really suppressed by the new

measure, which is more than doubtful, we shall do so (the Labour Party argues, and rightly,) by turning ourselves into fascists, which is no less an evil. Our attitude is just the same. The measures we take must be just in themselves.

It should also be repeated here that we have always put in the forefront of the principles on the basis of which the BULLETIN is being conducted that we feel a profound concern for national security, and are always prepared to make due allowance for its just claims. In assessing the weight to be attached to these claims, however, we would always urge the Government not to underrate the weight of the just claims of civil liberty. What we often find in practice is that when it appears to the Government that the claims arising from these two paramount duties which it owes to the people clash with one another it is prone in a panic to give precedence to the former over the latter, thinking that the infant democracy of our country must first be saved from its foes before affording itself the luxury of a punctilious observance of the commands of the constitution. Believing however that a democracy can never be reared on the grave of civil liberty and that an erosion of individual liberty is really unnecessary for ensuring the public safety, we have found ourselves compelled to oppose the campaign of relentless coercion on which the Government seems to have embarked.

When we see the light-hearted and callous manner in which repression is enforced with the object (as it appears) of preserving the young Republic, we are often tempted to use the language which the U. S. A.'s Supreme Court once used on a memorable occasion. In the Milligan case of the time of the Civil War to which we have referred below the Supreme Court pointed out that there was one fundamental right—the right to a writ of habeas corpus—which alone the constitution allowed to be suspended, and that every other right must be maintained intact—in war as well as in peace. It declared:

The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and in all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great emergencies of government.

The Court naturally anticipated the alarm that the enunciation of such a principle based on a strict interpretation of the constitution would create in the minds of those who wielded executive authority. How is the State to be preserved consistently with the observance of the constitution if the latter ordains that whatever be the emergency the essential rights of civil liberty must be maintained? The Court answered the question in this way:

*A country preserved at the sacrifice of all the cardinal principles of liberty is not worth the cost of preservation.*

September, 1950

### EMERGENCY PROVISIONS in Our Constitution

In an address delivered during the Patna University's Convocation Week, Mr. S. Varadachariar, retired Judge of the Federal Court of India, said about articles 358 and 359 of the constitution which provide for suspension of fundamental rights and of remedies in respect thereof during national emergencies :

This provision rests on the principle that the safety of the State when that is threatened is more important than the liberty of the individual, the former being the *sine qua non* of the latter.

The principle here laid down is undoubtedly sound and unexceptionable. But mere reference to it is not enough to defend the kind of emergency provisions which we have in the constitution.

The only country which has provided for fundamental rights worth speaking of is the United States of America. There are no doubt a number of European countries which in their post-World War I constitutions have enumerated what are described therein as fundamental rights (and in some cases the lists of such rights are quite long too), but the rights being subject in every case to laws taking away or reducing those rights, these constitutions do not really provide for any fundamental rights which, to be entitled to that description, must be beyond the reach of possible encroachments as much by the legislatures as by the executive. Mr. Justice S. R. Das of the Supreme Court, in his opinion on the Gopalan case, refers to the qualifying clause "according to law" inserted in the guarantees of fundamental rights in several constitutions like the Weimar constitution of Germany, of Czechoslovakia, of the Irish Free State, of the Free City of Danzig, etc. (as we have a clause of like effect in art. 21 of our constitution relating to personal liberty) and points out that these constitutions "have been content with leaving the life and liberty of their citizens to the care of the laws made by their legislatures," and that "it is no novelty if our constitution has done the same." For a judge who is concerned only with the text of the law, this reasoning is good enough. But no political scientist, apart from a jurist, will ever accept any right, which the constitution itself makes liable to curtailment by the legislatures or invasion by the executive as a fundamental right, even if dignified by such a name in the constitution. It is of the essence of a fundamental right that it should not be capable of being restricted by the process of ordinary law or by any process save that for constitutional amendment.

Fundamental rights then in the strict sense of the term, are guaranteed only in the U. S. A. constitution and in no other, and the problem of suspending them in times of grave national emergency must be viewed, in order to have a proper perspective in the matter, in the light of provisions made to this effect in that constitution. The architects of the U. S. A. constitution cannot be char-

ged with concentrating so far on the needs of "the liberty of the individual" as to neglect the legitimate claims of "the safety of the State." No one has ever made such a charge. And if anyone were to make it, the history of the U. S. A. extending over a century and three quarters has already given the lie to it. That country has lived under the constitution for this long stretch of time without coming to any apparent grief. If then we follow the U. S. A. constitution in providing for fundamental rights (personal liberty is of course not one of them), we might as well follow that constitution in providing for their suspension. There is no justification whatever for departing from that constitution in this respect. But our constitution departs from it *in toto*. For the U. S. A. constitution does not provide for suspension of fundamental rights at all. No one can possibly point his finger to any article in that constitution which authorises suspension of any right included in the Bill of Rights in any circumstances whatever.

The only right in respect to the deprivation of which the constitutional remedy can be suspended in the U. S. A. is the right to the liberty of the person—freedom from arbitrary arrest and detention. In India, however, personal liberty is not a constitutional right at all, according to the decision of the Supreme Court, and the remedy for its preservation can be suspended in circumstances which may have no relation to a national emergency, such as is provided against in art. 352 of the constitution. In this kind of emergency declared by the President ALL fundamental rights and the remedies that the constitution provides for their enforcement are liable to be suspended by a Presidential order. What then is the range of difference in this respect between the U. S. A. and India? In the former country only one right can be suspended in emergencies, and it is a right which in the latter country is not recognised as a right which requires an emergency for its suspension; it can be suspended even in non-emergency situations. So far as the other rights are concerned, they cannot be suspended even in emergencies in the former country; in the latter all of them (like freedom of speech and peaceable assembly) are liable to be suspended for as long a time as the emergency lasts. The difference amounts virtually to NO SUSPENSION in the former country, and EVERY KIND OF SUSPENSION in the latter.

The right to a writ of habeas corpus is the only right which in the U. S. A. is capable of being suspended in any circumstances, and suspension of this right too is surrounded there with exceedingly stringent conditions. Art. I §9 (2) provides that "the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it." It is the Congress which can authorise suspension, but even that body is not endowed with final authority to take decisions on this matter. These decisions are subject to what view the courts may take as to whether a state of rebellion or invasion exists and

whether, even if such a state does exist, the public safety requires suspension. Even in Ireland, as we have pointed out before, the provision in the constitution relating to this matter limits suspension of habeas corpus to similar conditions ("during the existence of a state of war or armed rebellion") and the courts are again the judge of whether such conditions prevail or not. The same law obtains in effect in Great Britain, where, though martial law may be declared at any time by the executive, "the courts have, at any rate in time of peace (i. e., when ordinary civil courts are open), jurisdiction in respect of acts which have been done by military authorities and others during a state of war" (Dicey, in "Law of the Constitution," p. 542).

In our country, however, not only would habeas corpus be suspended in a situation which the constitution does not recognise as an emergency, but other rights which can never be suspended in the U. S. A. will also be capable of being suspended when an emergency arises, and an emergency will be legally understood to have arisen when the President declares it, the circumstances in which the proclamation of emergency is issued not being subject to judicial review. That in the U. S. A. constitution there is no provision under which any right other than that of habeas corpus can be suspended in any contingency whatever will be apparent to anyone who studies that constitution, but if any positive proof of this is needed we may point to the pronouncement of the Supreme Court in the famous Milligan case (*ex parte Milligan*, 1863, 4 Wall. 2), which arose during the Civil War.

Our fathers knew that . . . unlimited power, wherever lodged at such a time (i. e., time of war), was especially hazardous to free men. For this and other equally weighty reasons, they secured the inheritance they had fought to maintain by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the judiciary disturb, *except the one concerning the habeas corpus*.

Again,

The illustrious men who formed that instrument (the constitution) were guarding the foundations of civil liberty against the abuses of unlimited power. Knowing this, *they limited the suspension* (even in war) *to one great right* and left the rest to remain forever inviolable.

This means that as long as civil authority lasts and courts are open and able to exercise their jurisdiction, civil liberty must receive protection. In India an executive decree will put an end to all elements of civil liberty.

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## SPECIAL ARTICLES

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### "CLEAR AND PRESENT DANGER" TEST

#### Interpretation by the U. S. Court of Appeals

[The theory of clear and present danger depends upon] whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

Thus did the United States Court of Appeals interpret the Holmesian doctrine of "clear and present danger of a "substantive evil" in its unanimous decision (handed down on 1st August) affirming conviction of eleven Communist leaders and upholding the constitutionality of the Smith Act which was challenged on the ground that the defendants were entitled to the protection of the freedom of speech guarantees of the First Amendment. The Court, in its opinion which was written by Chief Judge Learned Hand, particularly draws attention to the fact that in the interpretation quoted above the word "improbability" has been substituted for the word "remoteness," which appears to give a somewhat different meaning to "present danger." It does not quite mean "immediate" or "imminent" in every case; it may, in some cases, mean "highly probable." Mr. Hand says:

In application of such a standard courts may strike a wrong balance; they may tolerate "incitements" which they should forbid; they may repress utterances they should allow; but that is a responsibility that they cannot avoid. Abdication is as much a failure of duty, as indifference is a failure to protect primal rights.

The Court then surveys the policy of the U. S. S. R., one article of the creed of whose faith is "the violent capture of all existing governments," and the deeds it has done in pursuance of that policy and comes to the conclusion that the government of the U. S. A. cannot treat with good-humoured toleration a conspiracy for forcible overthrow of the government carried on, as the evidence proves, by the American Communist Party owning allegiance to the faith and acting under the orders of the U. S. S. R., but must, even if the conspiracy may not seem to be likely to have immediate success, be allowed to have authority to take all legitimate steps to defeat the conspiracy even before it became ripe for its final stages. The reasoning of the Court may be given in its own words:

#### SPARK IN THE TINDER-BOX

Any border fray, any diplomatic incident, any difference in construction of the *modus vivendi*—such as the Berlin blockade we have just mentioned—might prove a spark in the tinder-box, and lead to war. We do not understand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities.

The only justification which can be suggested is that in spite of their efforts to mask their purposes, so

far as they can, consistently with the spread of the gospel, discussion and publicity may so weaken their power that it will have ceased to be dangerous when the moment may come.

That may be a proper enough antidote in ordinary times and less redoubtable combinations; but certainly it does not apply to this one. *Corruptio optimi pessima.* [The worst of all is the corruption of the best.]

True, we must not forget our own faith; we must be sensitive to the dangers that lurk in any choice; but choose we must, and we shall be silly dupes if we forget that again and again in the past thirty years, just such preparations in other countries have aided to supplant existing governments, when the time was ripe.

#### DANGER "CLEAR AND PRESENT"

Nothing short of a revived doctrine of *laissez-faire*, which would have amazed even the Manchester school at its apogee, can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression.

We hold that it is a danger "clear and present."

The question before us, and the only one, is how long a government, having discovered such a conspiracy, must wait. When does the conspiracy become a "present danger"? The jury has found that the conspirators will strike as soon as success seems possible, and obviously no one in his senses would strike sooner.

#### CONSTITUTIONAL PRIVILEGE

Meanwhile they claim the constitutional privilege of going on indoctrinating their pupils, preparing increasing numbers to pledge themselves to the crusade, and awaiting the moment when we may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that the chance seems worth trying. That position presupposes that the Amendment assures them freedom for all preparatory steps and in the end the choice of initiative, dependent upon that moment when they believe us, who must await the blow, to be worst prepared to receive it.

We need not say that even so thoroughly planned and so extensive a confederation would be a "present danger" at all times and in all circumstances; the question is how imminent, that is, how probable of execution—it was in the summer of 1948, when the indictment was found.

... ..

The Court held that there was no constitutional right of revolt, referring to utterances like those of Jefferson: "I hold a little rebellion now and then a good thing," and of Lincoln: "Whenever they (the people) shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary

right to dismember or overthrow it." On this point the Court observed:

The advocacy of violence [as in the present case] may, or may not, fail; but in neither case can there be any "right" to use it. Revolutions are often "right," but a "right of revolutions" is a contradiction in terms, for a society which acknowledged it could not stop at tolerating conspiracies to overthrow it, but must include their execution.

It is a right which the revolution itself creates; it is not a right which the constitution acknowledges.

In the U. S. A.'s federal judicial system the Court of Appeals is second only to the Supreme Court, to which the defendants will now make a last appeal on the constitutionality of the Smith Act.

#### ONUS OF PROOF.—II

Further to the remarks made at pp. 129-131 in the last issue of the BULLETIN on the onus of proof question arising out of the anti-Communist bill of the Australian Government, we wish to make some more observations here in order fully to elucidate the question. Only in doing so, we shall deal with the clause affecting declared persons instead of that affecting declared organizations, as we did in the last issue, for the principle of placing the burden of proof where it belongs is even more important in the case of private individuals than of public bodies.

It will be remembered that the first version of the clause required the declared person himself to establish his innocence in a court of law if he would have the declaration set aside. In the second version the Government accepted the responsibility of proving that the person had not been declared without cause, but subject to the condition that the declaration would itself be treated as *prima facie* evidence that the person concerned was properly declared. This second version was as follows:

Upon the hearing of the application, the declaration made by the Governor-General under sub-section (2) of this section shall, in so far as it declares that the applicant is a person to whom this section applies, be *prima facie* evidence that the applicant is such a person.

If, upon the hearing, the court finds that the applicant is not a person to whom this section applies, the court shall set aside the declaration.

If the court does not so find, the court shall dismiss the application, and the declaration shall remain in force.

In the Senate the Government produced a third version of the clause which went a little farther in meeting the demand of the Labour Party that no person should suffer in body, property or reputation unless he is convicted of an offence, the burden of proving the commission of the offence lying solely upon the Government. This last version was in the following terms:

At the hearing of the application, the applicant, shall begin; if he gives evidence in person, the burden shall be upon the Commonwealth to prove that he is a person to whom this section applies, but, if he does not give evidence in person, the burden shall be upon him to prove that he is not a person to whom this section applies.

Upon the hearing of the application, the declaration made by the Governor-General under sub-section (2) of this section shall, in so far as it declares that the applicant is a person to whom this section applies, be prima facie evidence that the applicant is such a person.

The Attorney-General explained it thus :

The amendment is proposed by the Government to ensure that a person who is to have the advantage of the burden of proof resting on the Commonwealth shall himself go into the witness-box to give evidence. If he is prepared to do that, then the burden of proof will shift to the Commonwealth, and it will have the advantage of being able to cross-examine the applicant on his Communist affiliations.

This was a slight improvement upon the earlier version, but it failed to satisfy the Opposition, inasmuch as the procedure laid down therein, by putting the accused person in the witness-box to answer an allegation, was still the very reverse of the ordinary principle of law that an offence must be established by the accusers. The Opposition insisted that there should be no departure from full application of due process of law. This would require, they said, that it would be for the Government to present its case for declaration. After this was done the declared person would be left to exercise his right either to go into the witness-box and give evidence or to sit back and hear the case presented against him, and the tribunal should finally decide on the evidence adduced. The amendment was therefore opposed by the Labour Party and because the latter is in a majority in the Senate it was defeated by 29 votes to 21. The Opposition thereafter moved its own amendment which was carried, again, by 29 votes to 21. It ran as follows :

If, upon the hearing, the Commonwealth satisfies the court—

(a) that the applicant is a person to whom this section applies; and

(b) that the applicant is engaged, or is likely to engage, in activities prejudicial to the security and defence of the Commonwealth or to the execution or maintenance of the constitution or of the laws of the Commonwealth, the court shall dismiss the application and the declaration shall, subject to this section, remain in force.

If the Commonwealth does not so satisfy the court, the court shall set aside the declaration.

Paragraph (b) in the above amendment requires a little explanation. The declaration made by the Governor-General is on two counts: first, that the man is a Communist and, secondly, that he is believed to be prejudicial or likely to be prejudicial to the security or the defence of the country. But the bill permits the individual who is declared to approach a court only on the allegation that he is a Communist, and denies to him access to a court on the more serious allegation that he is prejudicial to the security of the country. The amendment seeks to give declared persons full access to a court of justice on both the counts and places the burden of proof on the Crown in either case. The Government of course refused to let the courts have any jurisdiction on the second count. They, however, moved an amendment for setting up a committee, which they thought would provide a sufficient safeguard against arbitrary action. The amendment was as follows :

The Executive Council shall not advise the Governor-General to make a declaration under the last preceding sub-section unless the material upon which the advice is founded has first been considered by a committee consisting of the Solicitor-General, the Secretary to the Department of Defence, the Director-General of Security, and two other persons appointed by the Governor-General.

The Opposition supported this amendment as it would greatly improve the position of declared persons. It meant that this screening committee would first consider a case; the Attorney-General would then make his recommendation; and then that will be considered by the full Cabinet. The Opposition agreed that the undertaking given by Government that no person would be declared until he had first been screened by this departmental committee provided some real safeguards, but, not being content with this improvement, they still insisted that the remedy of a law court should be available to all such persons on both kinds of allegations, the burden of proof resting on the Government in the fullest measure in both types of cases. The Labour Party's amendment also provided for an appeal from a single judge to a full bench (consisting of no less than three judges) of a State's Supreme Court or the federal High Court. Similarly, it provided that a person wrongfully declared shall be entitled to his costs and, in appropriate cases, to compensation. But as on the present occasion we are concerned only with the question of the burden of proof, we do not propose to refer any further to these parts of the amendment. There being a difference of opinion between the House of Representatives and the Senate, this bill has been deadlocked, and though it will be submitted to the legislature once again this month, probably the deadlock will continue, and a general election will become necessary to break it.

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## COMMENTS

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### Prohibition Law of Bombay

The validity of the Bombay Prohibition Act, 1949 was challenged in the Bombay High Court on the ground that some of its provisions were outside the competence of the legislature and that some others violated the fundamental rights guaranteed by the constitution. The High Court held (22nd August) that the Act was valid, but that the provision therein preventing possession and legitimate use of non-beverages and medicinal and toilet preparations containing alcohol was ultra vires, though severable from Act. On the policy of prohibition the Court naturally expressed no opinions. "However repugnant a legislation may be," it said, "to the conception which the Court has of what is right or wrong and however drastic the provisions of the legislation may be, if it does not in fact contravene any of the articles of the constitution which lay down fundamental rights, then it would be the duty of the Court to uphold such legislation."

However, some of the provisions of the law were, in the opinion of the Court, in contravention of the fundamental rights. For instance, it held that the provision in sec. 136 (1) of the Act which gave power to a police officer to arrest without warrant and detain a person for 15 days without being produced before a magistrate was void because it went beyond the power of preventive detention which the constitution allowed. The Court also held that the portions of sec. 23 (a) and (b) and sec. 24 (1) which prohibited publications commending the use of intoxicating liquor were invalid because they contravened the right to freedom of speech and expression. Similarly, the Court held void sec. 52 and sec. 139 (c) and sec. 53 to the extent to which it empowered the Government to vary or substitute any of the conditions provided by the Act for licences or permits as they constituted a delegation of legislative powers to the executive. The Court further held void sec. 136 (2) (b) and (c) providing for restriction of movement and for externment as offending against art. 19 conferring the right to move freely and settle in any part within the territory of India. Their Lordships also held sec. 136 (2) (e) void as offending against the right to practise any profession or trade. The Court also found that some of the rules under the Act contravened art. 14 relating to the right to equality before the law as they were based on classifications which could not be held to be reasonable.

The Bombay Government, while intending to make an appeal to the Supreme Court, is implementing the ruling of the High Court, and some other provincial governments, which have adopted prohibition law, are examining them in the light of this judgment.

### Bill to Amend Safety Act

#### NEW PROVISIONS FOR RESTRICTIONS ON FREEDOM OF PRESS

The Home Minister of the Government of India having in the central Preventive Detention Act given spacious powers of preventive detention to all State administrations, it has become unnecessary for the latter to retain detention provisions in their Public Safety Acts, and all States are now deleting these provisions from their local Acts. Accordingly, the Madras State is bringing forward an amending bill, the main purpose of which is to remove such provisions. The local Governments must be very glad to do so, for central legislation confers on them wider powers than they enjoyed before.

The Madras Government is also taking this opportunity of an amending bill (and the Orissa Government has already done so) "to bring the Act into accord with the provisions of the constitution as interpreted in some recent judgments of the Supreme Court." This refers to the judgments nullifying the order of pre-censorship served on the "Organiser" and the order banning the entry of the "Cross Roads" into the State of Madras. It was easy enough for the Supreme Court to declare these orders void because they were on the face of them issued for the purpose of maintaining public order, while the constitution permits restrictions on the freedom of the press only in the interest of the security of the State, which is a much narrower ground requiring circumstances of a far more serious character to justify orders of restriction.

The amending bill of Madras now seeks to satisfy the requirements of the constitution by substituting for the words "the State Government may, for the purpose of securing the public safety or the maintenance of public order," (impose restrictions) the words used in the constitution, viz., "if the State Government are satisfied that the passing of an order under any of the clauses of this subsection is necessary either to prevent the security of the State from being undermined or to prevent any action which tends to overthrow the State, they may," (impose any of these restrictions). The Bombay Government has already adopted this phraseology, and those that have not yet done so will no doubt take similar action in due course of time. But we fear that what the governments think is required in order to bring the restrictive provisions in their Security Acts into consonance with the constitution as interpreted by the Supreme Court is to use the phraseology of the constitution and nothing more. We wonder whether they realise that a different attitude to the freedom of the press is required on their part; that the constitution bids them not to lay their hands on the press almost at random as they used to do before; that it is not a matter of just using suitable phrases, but of being suitably tolerant of opinions which they may heartily dislike.

We shall follow with very great interest what line the Supreme Court will take in deciding cases which come

before it of restrictions imposed under the amended Acts. Let us suppose that the Madras Government again bans the "Cross Roads" from its territory or the Delhi Government again clamps a pre-censorship order on the "Organiser" in accordance with the revised provisions, pleading that these restrictions were necessary, not for the maintenance of public order but for the security of the States. How will the Supreme Court deal with these cases then? Will it take the recital of the respective governments at its face value, or will it examine for itself whether the conditions were in fact such that, but for the restrictions, the security of the States (apart merely from public order therein) would have been imperilled?

In the case of the externment order against Dr. Khare, we have seen (p. 116) that the Court adopted the former course, the Chief Justice who delivered the majority judgment arguing that the power of externment given to the Delhi Government by the East Punjab Public Safety Act was "final," and therefore unchallengeable in a court of law. In the cases we are imagining the governments would also plead that their Public Safety Acts give them "final" power to abridge the freedom of the press, as the words in the Acts are: "If the State Government are satisfied" that the imposition of restrictions is necessary to prevent the security of the State from being undermined they may impose restrictions; and the power being final, it is not within the competence of the courts to go into the necessity of issuing restrictive orders.

If this plea is accepted by the Supreme Court, it would mean that only a proper recital was required in order to bring every restrictive order within the ambit of the constitution, and the safeguard provided in the constitution would in the result be reduced to nothingness. One can only wait and see how the Court interprets the amended Acts.

#### Freedom of Expression

At a meeting held in Edinburgh on 24th August, the PEN International Congress passed a resolution which called on the Congress to affirm that PEN stood for "the principle of the unhampered transmission of thought within each nation and between all nations" and that members "pledged themselves to oppose any form of suppression of freedom of expression in the country and community to which they belong." It also called on men to declare for a free Press and opposition to arbitrary censorship in times of peace, and said that "free criticism of governments" was imperative.

The resolution was moved by Sir C. P. Ramaswamy Aiyar, and in speaking to it he pointed out how in the Indian constitution freedom of expression was more closely guarded than rights of assembly and formation of associations. The latter rights, he observed, might be restricted in the interests of public order in the strict sense, but the right to freedom of speech and expression stood on a different footing, and nothing less than endangering the

foundations of the State or threatening its overthrow could justify the abridgment of such a right.

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## HABEAS CORPUS PETITIONS

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### Detention of Laik Ali Illegal

A case which politically made a great sensation was that in which a full bench of the Hyderabad High Court declared by a unanimous finding that the detention order passed against Mir Laik Ali, former Prime Minister, could not be held to be legal. This decision arose out of a revision petition filed by some of the accused who were prosecuted for abetting the escape of Laik Ali from custody in March last and were convicted by a special Judge on 22nd June. The High Court held that even if the petitioners did help Laik Ali in escaping (which they denied), they incurred no criminal liability in so doing inasmuch as the Public Safety Regulation of Hyderabad under which Laik Ali had been detained became void after the commencement of the new constitution and therefore the detention of Laik Ali himself had become illegal since 26th January. It was the intention at first of the Hyderabad Government to prefer an appeal against the High Court's decision to the Supreme Court, and it therefore served the undertrials with detention orders under the Preventive Detention Act and held them in custody. But it appears that the Government has now abandoned the idea of making an appeal, and those under trial have been released, the orders for detention served on them being cancelled.

During the hearing of the case it was argued by the Advocate-General that though the Hyderabad Regulation under which Laik Ali was confined had become void, still his detention could be regarded as legal at least for three months thereafter in view of the fact that art. 22 of the constitution expressly permitted detention for three months. This contention was rejected by the Court. The Chief Justice said on this point:

I do not agree with him. Just because the constitution permits under certain circumstances and with sufficient safeguards detention for three months it does not mean that preventive detention in all circumstances and without those safeguards is in consonance with the constitution or that the repugnancy is removed. The constitution tolerates preventive detention as a necessary evil and insists that it can be ordered only under law duly passed specifying the circumstances and enumerating all the safeguards mentioned in art. 22 of the constitution. Without law, special circumstances and safeguards, detention would be repugnant to the constitution.

The State law was no more enforceable after 26th January, and a fresh order should have been served on Laik Ali under the Preventive Detention Act; but this was not done. Nor could the President's Preventive Detention (Extension of Duration) Order be invoked, as was decided



by the Calcutta and Patna High Courts, to validate an invalid detention. His Lordship observed :

If the President's order was really a provision necessary for the security and safety of a State to keep undesirable and dangerous persons in detention till their cases were examined and appropriate laws were passed as has been argued by the Advocate-General, then it really amounts to suspension of the constitution in this regard for three months from its commencement, and such a provision should have been made in the constitution itself. Under the constitution, as it stands, even Parliament cannot extend indefinitely autocratic detentions for three months.

And then the Judge went on to attribute to the Congress leaders who shaped the constitution deep concern for civil liberty which, though it reinforces his interpretation of act. 22 of the constitution, can hardly be said to be in accord with facts. In any case his hope that preventive detention would be totally abolished from the constitution at an early date is no more than wishful thinking. He remarked:

The framers of the constitution, who sacrificed so much and struggled so long for freedom and to whom detention without trial has been an anathema, could not have thought of permitting it for a single day. They wanted to give full freedom for all. They seem to tolerate preventive detention as a necessary evil under certain circumstances and permitted it only with safeguards. If possible, they would have liked to do away with preventive detention altogether. I hope the day is not far off when this will become possible for the people of this ancient land.

His Lordship realised that the Court's judgment would be highly inconvenient to the executive as it would mean not only that when Laik Ali escaped from house arrest he was not really under valid restrictions but that others who might have helped in his escape would also go scot free. However, to the judiciary such unpleasant consequences do not count if, for the sake of preserving the liberty of the people in general, they interpret the constitution strictly as they have to. The Chief Justice said in this connection :

The spirit and the letter of the constitution has to be guarded more zealously than the detention of a few persons, however necessary the detention may be and however inconvenient their escape. When momentous changes take place in the country some undeserving persons are bound to escape from their liabilities because of the lacunae due to the changes. It is far better that a few persons take unmerited advantage of the law guaranteeing freedom rather than that the liberty of the people be in any way endangered and the sublimity of the constitution be affected.

#### Mention of Term of Detention Obligatory

That it is necessary for the detaining authority to mention, in the order for detention made either under sub-clause (i) or sub-clause (ii) of clause (a) of sec. 3 (1) of the Preventive Detention Act, the period for which a person has been detained and that failure to do so would render the detention illegal was laid down as a principle by the Pepsu High Court in a recent case. It will be remembered that Mr. Justice V. Bhargava of the Allahabad High Court ordered in June last the release of M. M. Bashir on account of the mention of the term of detention being omitted in the detention order passed against him (vide p. 121 of the BULLETIN).

The same ground was taken by Mr. Justice Kesho Ram Passey in disposing of the habeas corpus application of Dr. Teja Singh of Banur, who was detained by order of the Deputy Commissioner of Patiala for alleged incitement of tenants against bishwedars in a speech made at a conference. The detenu denied having made a speech on that day at all. Another allegation against the detenu was that he was a regular subscriber to Communist literature and that he used to circulate this among Communist sympathisers and that he was in constant communication with certain underground Communists. The detenu, on this score also, denied that he was either a Communist or had sympathies with Communists. It was also urged by him that the grounds advanced were vague and indefinite.

What the Court thought of the petitioner's contention that the grounds were vague does not appear from the published report of the case, but it is clear from the grounds given that action was not taken against the detenu under sec. 3 (1) (a) (iii) of the Act, i. e., for reasons of "the maintenance of supplies and services essential to the community," which, though it would have made it necessary to place him before the Advisory Board, would have enabled the Government to hold him in detention for an indefinite period. The detention order was obviously made under sec. 3 (1) (a) (i) or (ii), i. e., for reasons of the security of India or the security of the State. In the case of such detenus the Advisory Board procedure is dispensed with, which from the executive's point of view is a great convenience, but which at the same time limits the possible period of detention to one year. The governments have so far proceeded generally on the supposition that it would be in accordance with the requirement of the Act if the detention did not in fact exceed one year in duration, even if the precise duration within the allowable maximum was not mentioned in the detention order.

But the Pepsu Government has found in this case, as the U. P. Government did in the Bashir case, that the period for which a person has been detained must be mentioned in the order for detention if the detention is to be valid in law. In the order passed against Dr. Teja Singh the period was not mentioned, and for that reason the

order was held illegal by His Lordship, who said in his judgment :

It cannot be doubted that the intention of the legislature is that the period of detention should be proportionate to the extent of the apprehension that the activities of the detenu warrant and that it should be as short as necessary or as short as possible and if this intention is to be given effect to it would follow as a corollary that the period of detention must essentially be prescribed in the detention order itself.

He added:

The specification ( of the term ) of detention under the Preventive Detention Act is one of the indispensable essentials that would go to make the order of detention legal and valid in the eye of law. It is, therefore, imperative for the detaining authority to prescribe the term of detention, and failure to do so and leaving it to the complying authority and the person detained to infer that the maximum period permissible under the law is intended would make the order of detention doubtlessly vague.

The detenu was ordered to be released ( 25th August ).

The Judge notes that no Advisory Board has yet been constituted in the Pepsu State. This is hardly surprising, for this State, as every other, has had to deal with cases of detention ordered mainly for reasons of "the security of the State or the maintenance of public order" under sec. 3 (1) (a) (ii), and it has no use for an Advisory Board for this purpose. What is really surprising is that although in most of the detention orders passed under this section no period of detention is ( according to our belief ) prescribed, there have not been many more cases in which the detention order was held illegal for failure to satisfy what has been declared to be an essential requirement of the provisions of law.

#### Supplementing of Grounds

In the Supreme Court, the vacation Judge, Mr. Justice Mahajan, refused to consider the additional grounds given by the Government at the last moment for the detention of Mr. Bipul Choudhary, an Assam detenu, and, allowing the habeas corpus petition presented by him, ordered his release ( 12th August ). When Mr. Choudhary was first detained in November 1948, the ground given by the detaining authority was that he was a member of the Communist Party's volunteer organization, viz., the Red Guards, which was an illegal body. But after the Preventive Detention Act was passed in February 1950, a fresh order of detention was passed against him in March. In this new order the old charge was not made. What grounds were supplied to the detenu is not given in the P. T. I. report of the case, but the grounds that were supplied were found by His Lordship to be vague.

This made the detention order obviously invalid, but when the judgment was about to be delivered, the Advocate-General made a strenuous effort to save the order

from illegality. He filed an affidavit in the court stating that "Mr. Choudhary had gone to Burma with maps of Assam showing roads, rivers and essential installations." But His Lordship declined to take into consideration the affidavit filed "at the last moment" and insisted upon deciding the case on the basis of grounds given to the detenu in March, which alone were relevant. The Advocate-General pleaded that the grounds be taken with the history of the detenu's past actions. To this the judge's reply was: "It is a matter of personal liberty. I can't in these matters show leniency to Government" by going beyond the grounds furnished to the detenu. Thereupon the Advocate-General pressed the Court to consider "the difficult period" through which Assam was passing, saying that Mr. Choudhary's detention was "a great blow" to the Communist Party in the State and on this ground urging the Court in effect to co-operate with the Government in suppressing the subversive activities of the Communists. Mr. Justice Mahajan's reply was that the Advocate-General was a part of the State machinery which maintained law in the country. "But I am here to uphold the constitution also."

The final request made by the Advocate-General was the strangest of all; he urged that what had so far passed in the court should be regarded as but a preliminary hearing of the case and that no ruling should be given. The Court naturally refused to listen to such a plea. Our readers know how a similar plea was put forward on behalf of the East Punjab Government in the case of Professor Om Prakash Kahol before Mr. Justice Falshaw, and how the latter dealt with it ( vide p. 120 of the BULLETIN ). It is becoming very common for governments not to mention all the grounds to the detenus but to keep something up their sleeves, hoping to influence the decisions of the courts in this way. But it is heartening to contemplate that the courts insist upon a strict interpretation of the requirements of law when deciding cases affecting freedom of the person. In the cases reported by us in the last issue at p. 136, fresh grounds for detention were advanced by the West Bengal Government, but these grounds were communicated to the detenus though only a few days previous to the hearing of their habeas corpus applications, and the High Court had to take them into account. But such was not the case with the application of Mr. Choudhary or of Mr. Kahol.

Mr. Justice Das and Mr. Justice C. P. Sinha of the Patna High Court allowed on 24th August the habeas corpus petition of Mr. Chandrashekhar Prasad Singh and directed that the detenu should be released forthwith. The reason given was, according to a U. P. I. message, that "all the grounds of detention had not been communicated to the detenu." Mr. Chandrashekhar has been in detention for over a year on a charge of being General Secretary of the Bihar branch of the O. T. Railwaymen's Union and an important Communist leader.

Following the decision in the above case, Mr. Justice C. P. Sinha ( Mr. Justice Das concurring ) allowed ( 31st August ) the habeas corpus petition of Mr. Jagannath Sarkar, son of Dr. Akhil Chandra Sarkar, and for the same reason. In the statement of grounds supplied to the detenu, it was expressly stated that some grounds were withheld as being against the public interest. His Lordship said that all the grounds must be disclosed, and as in the present case the detaining authority had himself said that all the grounds could not be disclosed, the order of detention must be held bad in law. Mr. Sarkar was ordered to be released.

#### Vagueness in Grounds of Detention

On account of want of sufficient compliance with the mandatory provisions of art. 22 (5) of the constitution (reproduced in sec. 7 (1) of the Preventive Detention Act) relating to the communication of grounds to detained persons, Das J. and C. P. Sinha J. of the Patna High Court allowed the habeas corpus petition of Mr. Asoka Ranjan Chakravarty detained on 7th March and directed that he be set at liberty (3rd August). Their Lordships ruled that the grounds supplied to the detenu were vague. They analysed these grounds as follows in their judgment:

We have examined the grounds in this case. The first ground given is that the petitioner is the organiser of a workers' union. That ground by itself has no relation to the maintenance of public order. The second ground mentioned is that, as a result of search of his house, some communist literature was found including a circular advocating a railway strike on the 9th of March 1950 and inciting the railwaymen to take recourse to violence. No details of the said incitement are given nor is it stated that the petitioner was directly connected with that circular. The third ground mentioned is not quite intelligible to us. It states that the petitioner collected subscriptions for the East Bengal relief fund by distributing unconfirmed report which in the present condition of the country is likely to embitter communal feeling. It is obvious that collecting subscriptions for East Bengal relief is not a ground which is connected with the maintenance of public order. Except, therefore, the recovery of a circular from the house of the petitioner no definite ground is given for the detention.

Mr. N. N. Satta obtained release from detention for the same reason at the hands of the Chief Justice and Mr. Justice Gajendragadkar of the Bombay High Court (10th August). He was first detained in April, 1948, under the Public Safety Act but was released by order of the High Court on a habeas corpus application. He was subsequently detained under the Preventive Detention Act. In his present application to the High Court he complained that the district magistrate of Ahmednagar, chafing under the High Court's order for release, was actuated by per-

sonal motives in ordering his detention afresh. The district magistrate denied in an affidavit that he was influenced by the detenu's former release.

The grounds for detention were that Mr. Satta was instigating ryots and students of a *chatralaya* to commit acts of violence against the police and Government servants and was also instigating them against landlords.

Their Lordships held that the grounds furnished by the detaining authority were not such as to enable the detenu to make a proper representation to Government. They, therefore, set aside the detention order and ordered Mr. Satta to be released.

Non-compliance with the prescription in sec. 7(1) of the Preventive Detention Act that the detenu should be supplied with grounds of detention "as soon as may be" after he has been detained was the reason for which, on 22nd July, Chief Justice of the Pepsu High Court ordered the release of Sardar Indar Singh. His Lordship was satisfied that Indar Singh was in detention for 41 days without the grounds of detention being communicated to him.

#### No Inquiry by Advisory Board

One of the grounds on which Mr. N. Y. Gadekar, a communist, was detained by the Central Provinces Government in December, 1948, under the Public Safety Act appeared to be a ground on which detention would be allowed under sec. 3(1) (a) (iii) of the central Preventive Detention Act, viz., the doing of acts "prejudicial to the maintenance of supplies and services essential to the community," and yet the detenu's case was not referred to an Advisory Board, as required by sec. 9 of the Act, but was reviewed by the Government itself (presumably under sec. 12). The failure of the Government to give the detenu the advantage of a scrutiny by an Advisory Board was made a reason by Mr. Justice Mudholkar of the Nagpur High Court for allowing the habeas corpus petition of Mr. Gadekar and ordering his release (17th August).

The ground as communicated to the detenu read:

Government are reliably informed that in September, 1948, you were inciting a strike in the textile mills at Nagpur with intent to cause unrest among employees in services that are essential to the life of the community.

Under the Public Safety Act cases of detention were referred to an Advisory Council, but the Council performed only advisory functions. After the enactment of the Preventive Detention Act, however, the position underwent a change. A person detained for the above-mentioned ground was entitled to have his case reviewed by an Advisory Board, whose opinion, if it was against the detention order, would be binding upon the Government. In the case of Mr. Gadekar, however, there was no inquiry by an Advisory Board. On

the contrary, while his habeas corpus petition was pending before the High Court, the Government itself inquired into the case, apparently under sec. 12 (2) of the Preventive Detention Act, and set him free. Because he had been so released by Government, Mr. Justice Hidayatullah, who heard the habeas corpus petition with Mr. Justice Mudholkar, did not think it necessary to record his opinion on the petition at all. But Mr. Justice Mudholkar thought otherwise, and in his judgment he noted the Government's failure to apply the procedure of the Advisory Board "within six weeks from the date of detention," as provided by sec. 9 of the Act. His Lordship says in respect to this ground:

As regards ground No. 3, even if it be accepted as one falling under sub-clause (iii) of clause (a) of section 2 (1) of the Preventive Detention Act, I am afraid the applicant's detention must at this date be regarded as illegal. For, where a person has been detained under this provision, his case has got to be placed before an Advisory Board within six weeks from the date of the detention order. It is not denied by the learned Advocate-General that the applicant's case was never placed before the Advisory Board. His detention in jail, after the expiry of six weeks from the date of the order of detention and without submitting his case to the Advisory Board, is, therefore, not permissible.

#### GROUND "ILLUSORY"

The other three grounds communicated to the detenu were found by His Lordship to be "illusory". One was his "association" with the Communist Party. The Government did not give any particulars about "the manner or the extent" of his association. Another was that he arranged meetings of workers to condemn the report of the Pay Commission and staged a procession to demonstrate the workers' protest against the report. Freedom of assembly and freedom of speech being guaranteed by art. 19 of the constitution, this could be no valid ground for detention, says His Lordship, "even if all the facts stated therein are accepted implicitly." These activities might have tended to create a certain amount of disaffection against the Government, but, according to the ruling of the Supreme Court, "causing disaffection against the Government is not prohibited by the constitution."

Still another ground for detention was that in "Azadi," a paper which the detenu used to edit, certain articles appeared tending to cause unrest among workers and to create disaffection against the Government. One of these articles a special bench of the High Court had already had occasion to consider, and the bench had held that "neither the criticism contained in the article nor the statements objected to on behalf of the State even amounted to sedition." His Lordship's conclusion in regard to this ground was: "The particular article which the special bench had to deal with did not infringe that clause (clause 2 of art. 19 of the constitution) and as we are not told

that other articles did, it is impossible to sustain this ground."

In the result Mr. Justice Mudholkar directed that the detenu be set at liberty. Although Mr. Gadekar had already been set free by the Government as a result of its own inquiry, His Lordship's judgment is very valuable as elucidating certain important principles.

#### "A Spy of Pakistan"

A 17-year old boy, Sayyad Abdul Aziz, detained on 26th February for espionage by order of the Madhya Pradesh Government, was ordered to be set at liberty by Mudholkar and Hidayatullah JJ. of the Nagpur High Court on a habeas corpus application (17th August). Both the Judges analysed in great detail the two grounds given by the Government and ruled that neither of them was sustainable. The detenu was charged, first, with circulating false rumours calculated to create panic among the local Muslim population, but Mr. Justice Mudholkar notes in his judgment that "there are no particulars at all in the ground." It is true that in the return a statement was made purporting to show that the detenu was trying to obtain "objectionable information" for circulation amongst the Muslim population in the State with a view to create panic amongst them. After considering all the details in connection with this statement His Lordship arrived at the conclusion that "this is a far-fetched inference" which cannot reasonably be drawn from the material before the Government.

Secondly, it was alleged against the detenu that he was a spy of Pakistan and that his activities were likely "to endanger the peace of the State." A bare allegation that the detenu was a spy of Pakistan was not enough, according to Mr. Justice Mudholkar. It had to be further alleged that he was transmitting to a foreign country news which was prejudicial to the defence of India or to the security of India or of the State. Although in the return it was stated that the detenu had been transmitting "secret and objectionable intelligence" to Pakistan and Hyderabad, such activities were considered by the Government to be likely only "to jeopardise the public peace." On this point His Lordship says:

From this it is clear that the "secret and objectionable intelligence" which the detenu was transmitting was really not of a kind which was prejudicial to the defence of India or the security of India or the State but was regarded as likely to "jeopardise the public peace." It is difficult to understand how the public peace in the Madhya Pradesh State would be jeopardised by the transmission of "secret and objectionable intelligence" to Pakistan. In my opinion, therefore, the second ground given on behalf of the Government in support of the detenu's detention is not one which falls within the ambit of section 3 (1) (a) of the Preventive Detention Act.

For these reasons Mr. Justice Mudholkar held that the detention of Sayyad Abdul Aziz was illegal and ordered his release. Mr. Justice Hidayatullah in a concurring judgment said that the grounds advanced to justify the detention were insufficient, "since the main allegation that he is a spy is not established by any tangible clue in the grounds or the returns and the circulation of rumours is not particularised."

#### Re-detention Under central Act

A number of persons who were held in detention under the Public Safety Acts were, in all provinces, served almost automatically with fresh detention orders under the Preventive Detention Act on or about 26th February after this central Act had taken the place of the local Safety Acts, and a question arose, when dealing with habeas corpus applications filed in respect of the new detention orders, whether the detaining authority which necessarily had to proceed on the old material when the original detention orders were passed could validly continue the detentions on the basis of this same material. It will be remembered that the Bombay High Court had to consider this question in dealing with the habeas corpus petition of Mr. Ghate who was first detained under the Safety Act in 1948 and re-detained under the Preventive Detention Act on 26th February 1950 (vide p. 121 of the BULLETIN).

The same question arose in a division bench of the Nagpur High Court in connection with an application for habeas corpus made by Mr. B. N. Mukerjee, a Communist, who was first detained on 8th March 1948 under the C. P. Safety Act and was re-detained on 26th February 1950 under the Preventive Detention Act. And Mr. Mukerjee's counsel in fact cited the Bombay High Court's judgment in support of the application, stating that the detention order passed against Mr. Ghate was set aside by the Bombay High Court. Because this important legal point was involved in a number of other applications, Mr. Mukerjee's case was referred to a full bench consisting of the Chief Justice and Hameon, Mudholkar and Hidayatulla JJ. The point was whether "the State Government can be said to be reasonably satisfied even where the materials for satisfaction are activities in which the detenu indulged a long time ago and when, during the interval, the detenu has been continually in detention." Their Lordships ruled in the affirmative, "provided that State Government have examined the material afresh before passing the new order."

The decision of the Nagpur High Court on this point (2nd September) was substantially the same as that of the Bombay High Court, which ruled that though no new material would be available, the old material would have to be examined afresh "in the context of the time" at which the new order was made. "The satisfaction which the law required was the satisfaction of the detaining authority when the order was made, and it was not open to the authority to fall back upon the satisfaction which was

valid in 1948." And Mr. Ghate owed his release to the fact that in his case the detaining authority so fell back on the satisfaction reached some two years ago for the new detention order was, in the words of the High Court, "put forward in support of" re-detention.

In the Nagpur High Court, Mr. Justice Mudholkar in his order on the law point, observed:

To say that besides old material, the detaining authority should consider something else, or to say that the detaining authority should consider old material in the context of the time when the fresh order was passed, would, in my judgment, amount to substituting a standard of satisfaction set up by the court for one set up by the detaining authority. Clearly, this is not permissible.

His Lordship however, agreed with the learned judges of the Bombay High Court that there must be fresh consideration of the entire material before passing an order of detention under the Preventive Detention Act. His Lordship said:

It is clear from the terms of section (3) of the Act itself that before the order is passed Government had to be satisfied about the necessity of detention. Such satisfaction cannot be mechanical but had to be arrived at conscientiously and intelligently. This cannot be done unless, before passing an order, the detaining authority applies its mind afresh to the material in its possession. Whether in a particular case there has been such fresh consideration of the material is a question of fact and it will have to be decided on the basis of the affidavits filed in the case.

His Lordship then gave the ruling with which the other two judges concurred

Mr. Justice Hidayatullah in his order said: "Before a fresh order of detention is passed the case must be considered *ae novo* and the satisfaction that the detention is necessary must be reached *bona fide* in the individual case."

Mr. Justice Hameon observed: "The fact that the Government of this State is from time to time releasing detenus demonstrates their awareness of the obligations in this respect; and I have no reason to suppose that the detention orders of 1950 are, if I may use the expression, rubber stamp."

There can be no doubt that the act of keeping old detention orders in force after the Public Safety Act has lapsed would in fact be a mechanical act on the part of the detaining authority in most of the cases. It would be difficult to believe that when the duration of detention orders had to be extended *en masse*, the detaining authority would apply its mind to each individual case of detention. If, however, the Government claims in its affidavit to have examined the matter afresh, there would be no option for the High Court but to allow the claim. Probably the Bombay High Court too would have dismissed Mr. Ghate's petition if the Bombay Government had put forward such

a claim. In the nature of the case there can be no means of testing whether the detaining authority had in reality satisfied itself after re-examining the whole matter that continued detention was necessary in any particular case.

#### Criticism of Land Allotments

Among the habeas corpus petitions of the eight Communist detenus which were considered by Falshaw and Soni JJ, in the Punjab High Court on 26th August, there was one from Mr. Dalip Singh, General Secretary of the Kisan Sabha. Dalip Singh was ordered to be released by Their Lordships as grounds of detention supplied to the detenu were held to be vague and indefinite. The main allegation against Dalip Singh was that he criticised land allotment policy of Government. Their Lordships observed that anybody was entitled to criticise the land allotment policy of Government.

### C. L. UNIONS NEWS

#### Bombay C. L. U's Protest

At a meeting of the Executive Committee held on 16th August, the Bombay Civil Liberties Union passed a resolution severely condemning "the tone and substance" of the speech made by Sardar Patel in reply to Pandit Kunzru's motion denouncing the Government's repressive policy. The resolution in particular protested against the allegation contained in the Home Minister's speech regarding Mr. L. B. Bhopatkar based upon evidence which was "not proved in a court of law and even the source of which was not named, especially as the statement was made in the privileged precincts of Parliament." Referring to a remark of Sardar Patel that a certain group desired to set up Brahmin raj, the resolution characterised the speech as "mischievous for its discrimination in singling out a particular section of the community for attack and thereby creating communal disharmony and ill-will which may result in the denial of civil liberties to this particular community."

The meeting passed another resolution asking for the appointment of a public judicial court of inquiry to report on the justifiability or otherwise of the firing by the police on an assembly of students in Gwalior.

On the trials in Hyderabad State, the meeting recorded the following resolution:

The Bombay Civil Liberties Union notes with satisfaction the fact that a Divisional Bench of the Hyderabad High Court has recently accepted the appeals of ten persons who were sentenced to death by a special tribunal and ordered a re-trial of their cases on the ground that the tribunal had failed to

give the accused any opportunity to appoint defence counsel and safeguard their rights.

The Bombay Civil Liberties Union has learnt with regret that the trials by the special tribunals in Hyderabad State were not satisfactory, especially in the matter of giving the accused all necessary facilities for their defence. The Union, therefore, urges upon the Hyderabad Government as well as the Central Government to order re-trials of all those who have been convicted by the special tribunals in the State.

### BOOKS ON CIVIL LIBERTY

**Civil Liberty under the New Constitution.** By S. G. Vaze. Pp. 53. Rs. 2.

**State vs. Liberty.** Pp. 35. Re. 1.

**Civil Liberties in India.** Pp. 221. Rs. 5.

**Report of the All-India Civil Liberties Conference.** (First Session, Madras, July 1949) containing Mr. R. R. Das's presidential address. Pp. 57. Re. 1.

**Report of the All-India Civil Liberties Conference** (Second Session, Patna, April 1950). Pp. 46. Re. 1. This contains extracts from Sri. Atul Chandra Gupta's presidential address and Sri. Jayaprakash Narayan's inaugural address and also a detailed analysis of and comment on the Preventive Detention Act, 1950. Besides the resolutions passed at the Conference, messages received from, among others, The International League for the Rights of Man, The American Civil Liberties Union and the National Council for Civil Liberties (Great Britain) are also included in it.

These publications will keep you au fait with the civil liberty movement in India.

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