

Regd. No. B. 5681

Editorial Committee:

N. M. JOSHI,
S. G. VAZE,

*Vice-President and
Secretary respectively of
the All-India Civil
Liberties Council*

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

*Edited by R. G. KAKADE, M. A., LL. B., PH. D.,
Assistant Secretary, All-India Civil Liberties Council
Office: Servants of India Society, Poona 4*

Annual
Subscription : Rs. 3
Per issue: annas 4
including postage

No. 22

July 1951

FREEDOM OF EXPRESSION WRITTEN OFF

"AMENDMENT ONLY AN ENABLING MEASURE": ITS REAL SIGNIFICANCE

It was freely admitted by the Government spokesmen (the Prime Minister, the Law Minister and the Home Minister) that all the additional reservations which the amendment to art. 19(2) introduces in the matter of exercise of the right to freedom of speech and expression, viz., "friendly relations with foreign States," "public order," and "incitement to an offence," were imprecise and inexact. Such an admission should really be fatal to a Charter of Freedom, which is not intended to be a mere declaration of pious wishes like the Directive Principles of State Policy embodied in Part IV but is intended to be a legally binding instrument as the whole of Part III relating to Fundamental Rights is. If the rights conferred by this latter Part are to be justiciable, it follows that there must not be any uncertainty about the binding legal obligations the rights impose on the State. This means that any exceptions that may be allowed in the case of any of the rights must be expressed in clear language so that the precise scope of the rights would not be left in any doubt. But if the exceptions are couched in words which are admittedly overbroad and elastic, they would result in such a whittling away of the rights as to amount even to their destruction.

In this particular case, however, the Government spokesmen maintained that since the amendment of art. 19(2) was only an enabling provision, the vagueness of the words used would not much matter. The amendment by itself, they argued, would not affect the right to freedom of expression at all. It is only when legislation is passed in pursuance thereof, that the change in the Constitution would begin to operate on individuals. The time, therefore, for scrutinizing the reservations was not when merely power was taken, by altering the Constitution, to make freedom of expression subject to these new reservations but when restrictions are embodied in a statute for the purpose of making them effective. When such legislation is introduced in Parliament or the local legislatures, let the restrictions be thoroughly scrutinized, they said, and a form of words adopted which will properly limit their scope. If at that time too wide a scope is left for the restrictions, there will be legitimate cause for

complaint, but there can be no ground for any such complaint when what is done is nothing more than to confer power upon the legislatures in necessarily general terms to impose restrictions.

This argument was again and again put forward by the Ministers in charge of the Constitution Amendment Bill. Mr. Nehru who only indulges in generalities without going to the root of any matter might perhaps be excused for adopting this kind of reasoning, though even he as the founder of the first Civil Liberties Union in India might have been expected to show a greater knowledge of the fundamentals of civil liberty. But that Dr. Ambedkar and Mr. Rajagopalachari who ought to be well acquainted with the governing principles of a Bill of Rights should use such an argument cannot but be a matter of profound grief. For the argument is really destructive of the basic idea underlying the setting apart of some rights as Fundamental Rights.

What is this basic idea? It is that certain rights selected as Fundamental Rights should enjoy the special protection given by the Constitution to such rights so that it would be beyond the power of even the legislatures to take them away or to diminish them. What would, however, be the situation if the restrictions that could be imposed on any fundamental right are expressed in very general and therefore necessarily too broad terms in the Constitution, as they admittedly are in this particular instance, and an attempt is made when passing legislation on the subject to give to the restrictions a limited scope. If this attempt to keep the restrictions within proper limits fails, obviously it would be useless to invoke the Constitution against the statute which the legislatures may pass. For, *ex hypothesi*, the Constitution permits of broader restrictions than are necessary, and the statute too does not choose sufficiently to restrict their scope. There can thus be no guarantee that freedom of expression will be protected from legislative infringement of the right. But to afford such protection is the very purpose of giving any right the sacred character of a Fundamental Right.

One can understand if the Constitution-makers want the people of India to enjoy the right to

freedom of expression in an extremely restricted sense, but one cannot understand the argument that any deficiencies in the Constitution, in that it permits restrictions of too wide a character, can be remedied by the legislature diminishing the width of the restrictions. In the first place Parliament might enact restrictions which are too broad, which is by no means improbable if one is to judge from its general attitude to civil liberty. But assuming that this Parliament enacts restrictions of just the right kind, there is certainly no guarantee that succeeding Parliaments will similarly restrain themselves as we have assumed that the present Parliament will. In any case the right to freedom of speech and freedom of the press will no longer be a constitutional right but will become merely a statutory right depending upon the whim of the political party returned in a majority in the elections. But is it not the only justification for treating any individual liberties as Fundamental Rights that they may thereby be removed from the domain of politics and rendered incapable of being destroyed by any party that may happen to command a majority in the legislature? Mr. Justice Jackson, delivering the opinion of the U. S. Supreme Court in *West Virginia State Board of Education v. Barnette* (1943) 319 U. S. 624, said :

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The main objection therefore to taking too large a power in the Constitution to interfere with freedom of expression and then asking us to trust to the good sense of the legislature that the power will not be abused is that this right is thereby deprived of all constitutional protection. This is nothing else, as Pandit Kunzru said in Parliament, than to score out this right from the list of Fundamental Rights altogether.

The right of free speech and the free press will then have the same status in our Constitution as it has in the British Constitution which knows of no constitutional limitations on the power of Parliament, the legislature in that Constitution being supreme in every matter. It is not suggested even remotely that in effect freedom of speech and the press is less secure on that account in England; it is in fact just as secure there as it is in the United States where the right enjoys complete constitutional protection. The age-long tradition of individual liberty gives in England the same guarantee that Parliament shall not invade freedom of speech and the press as specific inhibition on the power of Congress does in the United States. Mr. Nehru too asked us to trust our Parliament (and also the lesser legislatures in the states). Why should we,

members of Parliament, he asked, impose any limitations on our own power? His question only shows that he does not know what a radical difference there is between a statutory right which is capable of being withdrawn or curtailed at the unfettered discretion of the legislature and a constitutional right which is not so capable because it is permanently guaranteed in the Constitution. But surely he cannot claim that in India even a statutory right will give us the same freedom as it does in England. He ought to know that England is in a unique position in this respect—that without any formal prohibition Parliament is not tempted to lay any unnecessary restraints on individual liberty. For countries like India such prohibition is essential.

James Madison, who was the principal author of the First Amendment to the U. S. Constitution, stated, in presenting the proposals which were later embodied in the Bill of Rights, how by means of the Bill of Rights these freedoms were being made secure against encroachments by Congress as they were not in England. He said :

Although I know that whenever the great rights—the trial by jury, freedom of the press, or liberty of conscience—come in question in that body (Parliament), the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of these rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.

And Justice Black declared in *Bridges v. California* (1941) 314 U. S. 252 :

No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. (The First Amendment constitutes an "enlargement" of the concept of freedom of the press.)

During the 175 years that have elapsed since the U. S. Constitution was promulgated, this freedom has no doubt become in practice absolutely secure in England, but is there no reason now for the people of India to be alarmed, because of no constitutional guarantee of that right, as the people of America after they become politically free were, which prompted Madison to present the Bill of Rights?

However, if the British Constitution, on account of the very principles of its organization, does not restrict the sovereignty of Parliament, the British Government and the British people are now quite willing to undertake obligations not to enact laws interfering with the fundamental liberties of the individual. The English delegation in the Human Rights Commission and other bodies of the United Nations has expressed its determination to co-operate with other nations in having a legally binding Covenant of Human Rights. Indeed, it goes much

farther than many another nation in insisting on allowing as few restrictions as possible on the exercise of these rights. The delegation has never taken up the attitude in these bodies that Parliament must continue to have full freedom to pass whatever laws it likes; on the contrary, its position consistently has been that if the Covenant is to be an instrument legally enforceable, nationally and internationally, only such rights should be incorporated therein as are enforceable, and that all of the rights so incorporated should be enumerated in terms of the utmost precision. For instance, in the Third Committee of the fifth session of the General Assembly, Lord Macdonald said on 18th October 1950:

The Government of the United Kingdom considered the Covenant (in the sense of a legally binding document) inadequate in its present form. It was willing to accept obligations as extensive as those which any other member of the United Nations was prepared to accept, but it would find it most difficult to assume obligations as imprecisely defined as those in the existing draft of the Covenant.

He completely disagreed with the view that the Covenant should confine itself to defining general principles. A statement of general principles was not, technically, a proper method of imposing binding legal obligations on States; what was required was an instrument drawn up with the greatest possible degree of precision.

If the Covenant was to be no more than a second edition of the Universal Declaration of Human Rights, it was a waste of time to try to cast it in the form of a legal document. The United Kingdom Government, however, wished the Covenant to be an effective and enforceable instrument, drafted with the necessary precision. . . . It has been proposed that an international committee should be established to investigate alleged breaches of the Covenant. If that committee were to function effectively, it was absolutely indispensable that it should have an enforceable instrument which it could interpret precisely, a requirement that was not satisfied by the existing text of the first 18 articles of the Covenant.

Lord Macdonald then proceeded to point how the use of the vague word "arbitrary" in art. 6 (relating to the freedom of the person) would merely mean something that was not "in accordance with the law" and would make

this right of personal liberty subject to the untrammelled control of the legislature. He also pointed out how the introduction of so broad and vague a phrase as "public order" in art. 14 (relating to freedom of information) would make it liable to be construed as "permitting the imposition of almost any restriction" on the right. Similarly, in the Committee on the draft Convention on freedom of information the British delegate opposed a proposal for inserting in the Convention a reservation corresponding to what we have inserted in art. 19(2): "friendly relations with foreign States." Lord Macdonald said, in the Third Committee on 21st November 1950, of all such reservations in the Convention that they would merely give the appearance that the United Nations was "condoning excessive restrictions" upon the right of freedom of information, which, as Mrs. Roosevelt pointed out, covered "freedom of expression, opinion and speech."

The British Government, notwithstanding the fact that it functions under a different constitutional system from that in which restrictions are imposed upon the powers of the legislature in the interest of individual liberty, is now in favour of the International Covenant of Human Rights which would impose such restrictions. But it lays the greatest possible insistence upon two things: 1. that the qualifications of the rights to be safeguarded should be as few, and 2. that they should be as precise as possible so that the safeguarding of the rights would be not of the window-dressing variety but be real and effective. At the time when India was under British rule, this Government, following its own constitutional system, opposed the demand of Indian nationalists like Mr. Nehru for inserting a Bill of Rights in our Constitution. Now it is the turn of Mr. Nehru and his National Government to make a mockery of this Bill of Rights by inserting therein such elastic terms as "public order," which in the international field the British Government opposes! The whirligig of time has brought its revenge! Art. 22 of our Constitution, conferring the power of detention without trial to be used even in a time of non-emergency, already brings to nought the most precious of all rights, Personal Liberty. But Mr. Nehru is not content with it. He now brings to nought Freedom of Speech and Expression, the next most precious right, and, what is even worse, he fobs us off with the empty promise that the legislation that he will enact will be better than the Constitution!

"REASONABLE" RESTRICTIONS

EROSION OF THE IMPRESCRIPTIBLE RIGHT NOT PREVENTED

In defence of the new reservations inserted in art. 19(2) it is pleaded that the restrictions that will eventually be imposed by virtue of them, whatever form they may take and however broad they may be, have to be "reasonable," the final decision as to their being reasonable or otherwise resting in the hands of the judiciary. It

is said by the Government's spokesmen: "Freedom of speech and of the press is not and cannot be an absolute right. It must necessarily be subject to certain restrictions, and although the restrictions that in the Constitution we have permitted the legislatures to impose may appear to be too extensive, this can have no evil

effect since we have also provided for court review in respect of the restrictions that the legislatures can actually impose. These restrictions being subject to adjudication by the courts, it is clear that none of them will be allowed to pass as valid unless they are in fact reasonable. What objection can there be then to the reservations embodied in the Constitution, inexact and imprecise as they are, if they enable the legislatures to impose only such restrictions as the courts will hold to be reasonable?" This defence, though plausible, is not sound. If it were, it would be justifiable even to omit in the Constitution all mention of categories of matters (like contempt of court) relating to which exceptions could be made in allowing free discussion. Art. 19(2) might then simply be: "Notwithstanding art. 19(1), laws can be made imposing reasonable restrictions on the exercise of the right of free speech and expression." But it will be admitted that this would involve too large an extension of the exceptions. Expressing the exceptions in the Constitution by such vague terms as "public order" will have a similar result. The courts will in most cases be unable to give relief on account of the looseness of the terms in which the exceptions are expressed.

Suppose a case goes before a court of law; the contention of a person charged with breach of the press law, e. g., is that the restriction imposed on free speech is unreasonable. The court can no doubt invalidate any order passed against a person if the order violates the right of free speech as defined in the statute. If, for instance, the statute says (with reference to the reservation of "friendly relations with foreign States") that all criticism of foreign States shall be punished which tends to bring about war with India, the court will be able to say in any particular case that the criticism in question, let us say, of the Pakistan Government, does not answer to this description and must be permitted. But if the statute itself curtails the right of free speech in an unreasonable way, in that it restricts the right as it should not and as no Constitution of the right sort allows anywhere, the court will naturally be powerless. The man concerned cannot invoke the Constitution in his defence because, on the showing of the Ministers themselves, the Constitution makes provision for broader restrictions than the statute. The conclusion therefore is that the word "reasonable" in the Constitution will not afford any significant help; it will give us no protection against unjust or oppressive statutes, which is the *raison d'être* for the provision of any fundamental right at all. The courts will have power to set aside a law if it be unreasonably applied, but the possibility of an appeal from the law to the Constitution being barred on account of the vagueness of the latter, the law will be exempt from scrutiny as to its inherent constitutionality and the courts will in the very nature of things have no power to declare any law unreasonable in the sense that it imposes restrictions not sanctioned by the Constitution and therefore void on its face.

To illustrate this point, we will give an instance of a statute which was declared invalid on its face by the United States Supreme Court. The state of Alabama had enacted a law which was so broadly drawn as to forbid loitering about the premises of any industrial concern and picketing there, even if the picketing was to be of a wholly peaceful character. A person of the name of Byron Thornhill was convicted in a circuit court of the state for the two offences mentioned in the law, but the U. S. Supreme Court held, in *Thornhill v. Alabama* (1940) 310 U. S. 88, that the law itself was void in that it created offences in such "sweeping regulations" as to violate the freedom of speech guaranteed by the Fourteenth Amendment against invasion by the states. The Court said:

It is apparent that one or the other of the offences comprehends every practicable method whereby the facts of a labour dispute may be publicized in the vicinity of the place of business of an employer. . . . The courses of action, listed under the first offence (loitering for the purpose of inducing other persons not to have business dealings with anyone), which an accused may not urge others to take, comprehends those which in many instances would normally result from merely publicizing, without annoyance or threat of any kind, the facts of a labour dispute. An intention to hinder, delay or interfere with a lawful business, which is an element of the second offence (picketing), likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute. The vague contours of the term "picket" are nowhere delineated. Employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offence. In sum, whatever the means used to publicize the facts of a labour dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute.

Is it at all possible for the courts in India to declare such a law void on its face? It is not, because here the courts will have to say that if the range of even innocuous activities which the law proscribes is extremely wide, the range of such activities which the Constitution itself proscribes, by using vague terms like "public order," is even wider. They will have to say that "all activity without exception is within the inclusive prohibition of the Constitution." They will therefore be unable to rule that the law, which it is assumed will in any case impose fewer and narrower restrictions than the Constitution, is violative of the right of free speech as defined in the Constitution, as the U. S. Supreme Court did in the above-mentioned case.

In this case the issue of public order also arose in a definite form. The Court's finding on that issue was as follows :

The state urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the state to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a dispute involving the latter.

The courts in India would obviously be unable to give such a ruling in face of a constitutional provision which permits a state to restrict freedom of speech if it can point to any possible threat to public order. While the courts can give relief if in their opinion a law is unreasonable in its application, they can never do so on the ground that the law by reason of the restrictions it imposes contravenes the Constitution, for the restrictions allowed in art. 19 (2) are assumed to be larger than the statutory ones. The topsy-turvy procedure we have adopted of permitting wider restrictions in the Constitution than those in enactments passed thereunder necessarily deprives the courts of all power to hold unconstitutional any enactment unduly restricting the right to freedom of expression even though the right is now made justiciable.

An American friend who is competent to deal with the subject of human freedoms as few others are writes to us : " If you have judicial review of a restrictive statute and (also) of the constitutional provision, and the courts have some latitude to interpret ' reasonable-ness, ' ' then it would be all right. It would be, but our friend loses sight of the fact that the Constitution was amended just for the purpose of depriving the courts of the power which the Constitution had given them of invalidating a statute which abridged freedom of speech in a situation which was not so grave as to imperil the security of the State. Besides, how can we even ask that the courts whose business is to interpret the Constitution as they find it be empowered to decide cases as if the Constitution was better than it actually is ? In any case, our correspondent agrees with us that if the courts are not given the latitude he suggests, they will be powerless, in spite of the word " reasonable " in art. 19 (2) which applies to restrictions that a statute may impose, to prevent legislative abridgment of this right as a proper Constitution would enable them to do.

But let us suppose that the legislatures in their wisdom pass laws in this respect which impose only the right kind of restrictions (and also that the executive applies them properly), giving the courts no occasion to exercise their supervisory jurisdiction. Will even then the right to freedom of expression be fully assured ? Emphatically not. Because the threat will still be there of the legislatures becoming unwise some day and ourselves finding the Constitution unable to restrain them. And the Constitution must provide not only against arbitrary interference with the right in the present but also against any threat of such interference in the future. If exercise of the right is made subject to the taking of a licence for making a public speech though one can have a licence for the asking, even then the right is thought to be unduly restricted, the objection being to the scheme of licensing itself. Thus the U. S. Supreme Court ruled in *Lovell v. Griffin* (1938) 303 U. S. 444. In the case of *Thornhill v. State of Alabama* from which we have quoted above, the Court said of the system of licensing :

The power of the licensor against which John Milton directed his assault by his " Appeal for the Liberty of Unlicensed Printing " is pernicious not only by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the licensor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.

And, speaking of the anti-picketing law of Alabama, the Court said :

A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

Adapting these words, we say that, by reason of art. 19(2) as it now stands, allowing the legislatures to impose overbroad and censorial restrictions, restrictions which are broader than, it is said, the legislatures themselves in fact intend to impose at the present moment, we shall be living under a continuous and pervasive threat of arbitrary restraints on our inalienable right of Freedom of Speech and Expression.

THE "POLICE POWER" DOCTRINE

1

WHAT IT IS AND WHAT IT IS NOT

The Law Minister of the Government of India, Dr. Ambedkar, based the Government's case for the necessity of restricting the fundamental right to Freedom of Speech and Expression in the way in which it has been restricted on the non-application in India of the doctrine of the police power of the states which is freely applied in the United States of America. He said that if this doctrine could be resorted to by the courts in this country, there would have been no High Court decisions which had forced this restriction on the Government. And he went on to say:

Under the doctrine of the police power of the states the U. S. Supreme Court has evolved certain limitations upon the fundamental rights of the citizen.

Similarly, Sir B. N. Rau, who had a large part in shaping the Indian Constitution and who now represents India at the United Nations, delivered himself of the same opinion in New York while the Constitution was still in the process of being amended. He said:

Even in the U. S. A., the freedom of the press has been interpreted by the Supreme Court as being subject to the police power of the states.

It is necessary to examine this view. If it merely implies that, in interpreting the right to freedom of speech and the press, e. g., the courts of the United States do not regard the right as absolute but recognise certain limitations thereof and that, in determining the scope of the right, they make in every case that comes before them due allowance for the legitimate exercise of the police power which undoubtedly belongs to the states, no one need have any quarrel with it. In the determination of a case preservation by the states of the interests of which they are trustees is certainly a relevant factor which the courts must take into account. But the final determination depends upon whether, in the judgment of the courts, the states' exercise of the power was valid or not, and if the courts found in any particular instance that in performing their duty of maintaining good order the states had made unreasonable use of their police power so as unnecessarily to interfere with freedom of speech, they would declare invalid that exercise of the police power. And even if such unreasonable use was permitted by any legislation passed by the states, the legislation itself would be voided, the judgment of the legislature being always liable to be overruled by the courts. Thus, although the states' police power has an important place in the constitutional system of the United States, as it must have in every system even if it is not known elsewhere by that name, the exercise of this power is always subject to the Constitution. It is the latter which obviously has superior authority. Police power will go down if, in the opinion of the courts, it exceeded its proper limits.

The Government of India's spokesmen may, however, be thinking of police power in different terms. In any case the expressions used by them are of dubious import. Dr. Ambedkar in particular is always contemptuous of the United States' Constitution. In the Constituent Assembly he declared on 4th November, 1948, that the Supreme Court of that country "invented the doctrine of police power" in order somehow to be able to limit the scope of fundamental rights! In course of the debate on the Constitution Amendment Bill, on being invited by Pandit Hriday Nath Kunzru and Dr. Syama Prasad Mukerjee to follow the "clear and present danger" rule which constitutes the palladium of free speech and the free press in the United States, he poured wholly unmerited ridicule on the rule. It was also suggested by him that when exceptions to fundamental rights are enumerated in the Constitution itself, they must necessarily be in broad terms like "public order" and that the breadth of the exceptions might be cut down only in specific legislation, so that the Constitution would have the advantage which the U. S. Constitution derives from the states' police power and which, on the other hand, is not available in India. From these indications it does not seem altogether impossible that he in fact propounded the absurd proposition in Parliament that in the United States the states' police power is sovereign and that they can in effect set aside the obligation imposed upon them by the Fourteenth Amendment to respect liberty of speech and that of the press. In order not to do him injustice we asked for a transcript of the text of his speech, but not being favoured with it, we have to depend upon the summary that has appeared in the press. And as this summary lends itself to an interpretation which from his general attitude to the U. S. Constitution cannot be entirely ruled out, we have to say most emphatically that the proposition if so meant is fantastically untrue. It may be however that so very knowledgeable a person as Dr. Ambedkar did not in fact commit himself to such a proposition, in which case our criticism would naturally not apply. But, be that as it may, it would be useful in any case if we stated here what place the states' police power occupies in the U. S. Constitution in relation to the Fourteenth Amendment.

2

POLICE POWER AND DUE PROCESS

"One of the classic definitions of the police power is that of Chief Justice Shaw, given in his opinion in *Commonwealth v. Alger*." (Willoughby.) There he defines the police power as "the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and

welfare of the Commonwealth, and for the subjects of the same." In *Barbier v. Connolly* (1885) 113 U. S. 27, it was described as the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people." Even matters of public convenience come within its scope. The Supreme Court said in *Lake Shore and M. S. Ry. Co. v. Ohio* (1899) 173 U. S. 285: "The power of the state, by appropriate legislation, to provide for the public convenience, stands upon the same ground precisely as its power by appropriate legislation to provide the public health, the public morals, or the public safety." Police power is indeed a very elastic term, the precise scope of which the Court has persistently refused to define and is perhaps impossible to define in a comprehensive manner. And the power it confers is vast, if vague; but whatever be the extent of the power, it must always be understood as subject to the authority the General Government can exercise under the Constitution. In the last mentioned case the Court said: "Whether legislation of either kind is inconsistent with any power granted to the General Government is to be determined by the same rules." The exercise of the police power must not be repugnant to the Constitution. There are certain powers which are prohibited to the states, and the states cannot of course enact any police measures in respect of such matters. But, more particularly, the Fourteenth Amendment lays upon the states a very stringent prohibition: "nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." And as the Supreme Court has not given a complete and rigid definition of the police power, so it has not given and cannot possibly give a complete and rigid definition of the prohibition contained in the Fourteenth Amendment either. Both are, in the words of Beard, "within the keeping of the judicial conscience," and in each case the Court decides whether or not any particular exercise of the police power falls within the inhibition of the Fourteenth Amendment. As Willoughby says, the police power, though vast, "is not however without limits, or otherwise the prohibition as to taking of life, liberty or property without due process of law would be wholly shorn of its restraining force." But the prohibition has in fact a great restraining force: it prevents what in the opinion of the Supreme Court is undue interference with the personal liberty and property rights of the individual. And the Supreme Court arrives at its opinion by its own independent judgment. The judgment of a state, expressed in any legislation it may have passed, will not prevail if it is found to encroach upon rights guaranteed by the Constitution. Thus the rule is: "A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

Here a word may be added about the invalidation by the Supreme Court of statutes passed by states in virtue of their police power. The Court may find a statute void on its face or void as applied. A statute is ordinarily presumed to be constitutional, but this presumption is countered, in free speech cases, by the categorical imperative of the First Amendment made applicable to the states by the Fourteenth Amendment. In *West Virginia State Board of Education v. Barnette* (1943) 319 U. S. 624, the Court, speaking through Mr. Justice Jackson, declared:

The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship, may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

A restrictive law, in order to escape being declared void on its face, must be proved by those who made it to have been required and to "be justified by clear public interest" (*Thomas v. Collins* [1945] 323 U. S. 516), which means that laws which on their face invade such rights are presumptively invalid, thus reversing the normal presumption which is in favour of the constitutionality of laws duly passed by the legislature. Besides, a law may be void as applied, and here the decision will depend upon the specific facts of the particular case. And the Court will make its own assessment of the facts involved. The legislative determination "creates merely a rebuttable presumption that (the necessary) conditions have been satisfied" (*Whitney v. California* [1927] 274 U. S. 357), and this legislative determination is in the final result subject to the judicial determination arrived at independently.

3

LOCAL STATUTES VOIDED

This being the state of the law, one naturally comes across numerous instances in which some of the legislation passed by the states in virtue of their police power was declared null and void by the Supreme Court as contravening the provisions of the Fourteenth Amendment and constituting legislative infringements of fundamental rights like those of the freedom of speech and freedom of the press. In order to bring home this point, we give below, by way of illustration, some of the well-known cases in which statutes and ordinances passed by the states were invalidated by the Court.

The "Minnesota gag law" was struck down as violative of the freedom of the press (*Near v. Minnesota* [1931] 283 U. S. 697). A California statute forbidding display of a red flag "as a symbol of opposition to organized

government" was held inconsistent with the "liberty" of the Fourteenth Amendment inasmuch as it denied opportunity for free discussion. The statute was thus voided (*Stromberg v. California* [1931] 283 U. S. 359). Oregon's Criminal Syndicalism Act which made it unlawful to assist in conducting a meeting of any group or organization which advocates so-called criminal syndicalism was held to be unconstitutional, the Court ruling that "consistently with the federal Constitution (i. e., the due process clause of the Fourteenth Amendment), peaceable assembly for lawful discussion cannot be made a crime" (*De Jonge v. Oregon* [1937] 299 U. S. 353). A law of Georgia which permitted a conviction for utterances advocating the overthrow of organized government if the jury thought that the accused intended to have influence in bringing about an insurrection at some future time was declared void on the ground that the law set such "vague and indeterminate" boundaries to the freedom of speech and assembly as to offend the Fourteenth Amendment's guarantee of liberty (*Herndon v. Lowry* [1937] 301 U. S. 242). The state of Georgia urged the Court to adopt "the dangerous tendency" rather than the "clear and present danger" test of the state's power, but the Court refused to do so.

Ordinances requiring permission of some officer to hold meetings or distribute pamphlets, thus treating the fundamental rights of free assembly and free speech and press as concessions, were held void on their face as a denial of due process of law (*Hague v. C. I. O.* [1939] 307 U. S. 496; *Lovell v. Griffin* [1938] 303 U. S. 444 and *Schneider v. New Jersey* [1939] 308 U. S. 147).

Two state statutes relating to picketing went down before the Fourteenth Amendment in 1940. One of these was so broadly drawn as to forbid picketing even if unaccompanied by violence or intimidation (*Thornhill v. Alabama* [1940] 310 U. S. 88), and the other forbade the public display of banners and placards in aid of picketing (*Carlson v. California* [1940] 310 U. S. 106). A Texas statute which required labour organizers, before soliciting members for their unions, to secure organizers' cards from a state official was held unconstitutional though the official had no authority to refuse cards to anyone who could establish his credentials, the Court holding that no such restraint could be imposed on "the most basic right of all," viz., freedom of speech, which has a "preferred place" in the U. S. constitutional system (*Thomas v. Collins* [1945] 323 U. S. 516).

A state statute which made it a crime for any person to solicit funds for any religious or charitable cause without securing the prior approval of an official vested with authority to determine whether the cause was bona fide was held void, the Court ruling that such a requirement constituted a censorship (*Cantwell v. Connecticut* [1940] 310 U. S. 296). The requirement that school children be compelled to salute the national flag was declared un-

constitutional (*West Virginia State Board v. Barnette* [1943] 319 U. S. 624).

The equal protection clause of the Constitution was held to be denied by state laws permitting exclusion or discrimination against Negroes in respect of jury service (*Norris v. Alabama* [1935] 294 U. S. 587, *Smith v. Texas* [1940] 311 U. S. 128, *Hill v. Texas* [1942] 316 U. S. 400 and *Patton v. Mississippi* [1947] 332 U. S. 463); deprivation of a right to equal educational opportunities (*Missouri ex rel. Gaines v. Canada* [1938] 305 U. S. 337, *Sweatt v. Painter* [1950] 339 U. S. 629 and *McLaurin v. Oklahoma State Regents* [1950] 339 U. S. 637); exclusion of Negroes from certain residential areas (*Buchanan v. Warley* [1917] 245 U. S. 60); restriction of Negroes' use of property by private agreements (*Shelley v. Kraemer* [1948] 334 U. S. 1); denial of a gainful occupation to Negroes (*Takahashi v. Fish and Game Commission* [1948] 334 U. S. 410).

4

THE GROUNDS OF INVALIDATION

The above is a mere list of invalidations. We may now state, by considering a few of these cases in some detail, how the Court deals with the states' plea of the police power.

Distribution of Pamphlets

In *Schneider v. Irvington* (1939) 308 U. S. 147, a group of four ordinances were held invalid. The ordinance of Irvington prohibited distribution of pamphlets soliciting funds without the prior permission of the Chief of Police who could refuse permission unless he was satisfied that the canvasser was "of good character" and his project was "not free from fraud." It was argued on behalf of the municipality that the ordinance "is a reasonable and proper exercise of the police power in furtherance of the public welfare, and the constitutional rights of freedom of speech and the press are properly subject to the same." The Court of Errors and Appeals of the state upheld this contention, saying that the ordinance was evidently designed to protect citizens against fraudulent solicitation. But the U. S. Supreme Court held that the ordinance imposed censorship and said: "To require a censorship through licence which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."

The other three ordinances in this case prohibited distribution of handbills on the public streets, and they were defended on the ground that they are "a reasonable exercise of the police power of the state," being formulated "to serve the public interest and to prevent abuse in the manner of the exercise of the right" of freedom of the press, and that "by reason of the nature of the contents of the handbill, freedom of the press is not involved." The courts below sustained the validity of the ordinances on the ground that "experience shows littering of the streets

results from the indiscriminate distribution of handbills." The U. S. Supreme Court held the ordinances void. It said: "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."

The principles underlying the ruling are thus stated by the Court:

Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

Picketing and Freedom of Speech

In *Thornhill v. State of Alabama* (1939) 310 U. S. 88 the anti-picketing statute of the state (statute 3448) was declared void on its face. The statute made it an offence, "without just cause or legal excuse," to go near to or loiter about the premises of anyone engaged in a lawful business for the purpose or with the intent of influencing or inducing other persons not to have business dealings with him.

It was contended by the Attorney General of the state that the statute "is a valid exercise of the police power of the legislature of the state." The Court said:

The range of activities proscribed by statute 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labour dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition in the market of public opinion. [Cf. *Mr. Justice Holmes* in *Schenck v. United States* (1919) 249 U. S. 47 and *Abrams v. United States* (1919) 250 U. S. 616.] We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify

the sweeping proscriptions of freedom of discussion embodied in statute 3448.

Solicitation of Funds

In *Cantwell v. Connecticut* (1940) 310 U. S. 296, a state statute was held void which made it a crime for any person to solicit funds for a religious or philanthropic cause without securing the prior approval of an official who was authorized to determine whether the cause was bona fide and conformed to reasonable standards of integrity.

The Attorney General of the state pleaded that the state, in legislating the statute, "enacted a valid law within the proper exercise of the police power of the state." "In passing upon the constitutionality of a statute it must be borne in mind that a large discretion is necessarily vested in the state legislature to determine not only what the interests of public convenience and welfare require, but what measures are necessary to secure such interests." "It is the duty of a court in the exercise of great care and caution to make every presumption and intendment in favour of the validity of a statute and sustain a legislative enactment unless its invalidity is demonstrated beyond a reasonable doubt." The Supreme Court of the state "declared the legislation constitutional as an effort to protect the public against fraud and imposition in the solicitation of funds" under the cloak of religion.

The U. S. Supreme Court found that the requirement of previous approval constitutes censorship and denies due process of law. It said:

(It is clear that) a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. . . . To condition the solicitation of aid for the perpetuation of religious views or systems upon a licence, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Breach of the Peace

The Court also set aside in this case the conviction of Jesse Cantwell for a breach of the peace for playing phonograph records on the streets, even though, by attacking the Roman Catholic religion, they were offensive to those who heard them. (The court below had held that Cantwell was guilty of incitement to breach of the peace.) On this point the Supreme Court said:

Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that freedom to communicate informa-

tion and opinion be not abridged. The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the state's interest, means to which end would, in the absence of limitation by the federal Constitution, lie wholly within the state's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact [i.e., by the federal Constitution].

The offence known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views under the guise of conserving desirable conditions. . . .

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. . . .

Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offence in question (i. e., breach of the peace).

However, on this breach of the peace issue the Court came to an opposite opinion in *Chaplinsky v. United States* (1942) 315 U. S. 568. In this case the conviction was affirmed of Chaplinsky for calling a policeman to his face "a damned racketeer" and "a damned Fascist" under a statute which prohibited persons from using offensive words to others. The state's Supreme Court on the authority of its earlier decisions had declared that "the statute does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee," and the U. S. Supreme Court, agreeing with this, said: "We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. . . . The challenged statute, on its face and as applied, does not

contravene the Fourteenth Amendment." The difference in the *Cantwell* and *Chaplinsky* cases, as observed by Mr. Osmond K. Frankael, "was that in the latter case the statement was made to the person maligned and was likely to cause reprisals, whereas in the former case the circumstances did not justify an inference that a breach of the peace might result."

As in the *Chaplinsky* case, the decision in *Feiner v. New York*, rendered on 15th January, 1951, was favourable to the state. The decision amounts to this: that the local police have a wide discretion in arresting a street-corner speaker whose remarks stir up excitement among the listeners, especially if a charge of breach of the peace is subsequently made in the state courts. There were however dissents from this decision on the part of three judges: Justices Douglas, Minton and Black. Justice Black declared that this conviction "makes a mockery of free speech guarantees" and that it was "a long step towards totalitarian society."

5

CONCLUSION

The conclusion that emerges from this discussion is that the states undoubtedly possess police power which they are competent to exercise in the interest of the welfare of their residents, but the obligation rests on them to exercise it in such a way as not to come into conflict with the Bill of Rights incorporated in the Constitution. Where a conflict arises, it becomes the duty of the Supreme Court in the last resort to resolve it. The Court decides whether any particular legislation, be it a state statute or a municipal ordinance or a decree of any other body like an education board, under which a conviction has been obtained, is invalid either on its face or as construed and applied, in that it infringes any of the constitutional guarantees of fundamental freedoms and liberties. This the Court does by weighing competing social interests. How this weighing is done is shown in the *Cantwell* case supra. There the Court said: "The state has an obvious interest in the protection of good order. We must determine whether the alleged protection of the state's interest has in this instance come into fatal collision with the overriding interest (of freedom of speech) protected by the Constitution." In this particular case, as we have seen, the statute was held unconstitutional. On the other hand, in the *Chaplinsky* case, which was somewhat similar, the assailed statute was sustained. The decision in any particular case will depend upon where the balance between differing social interests is struck. But this much is clear that if the police power is thought by the Court to trench upon fundamental liberties, it must give way; the exercise of the power will be illegal. Thus in every case the Constitution as interpreted by the Court has overriding authority. It would be nonsense therefore if anyone were to imply that constitutional limitations in behalf of civil liberty have to yield before exercise of police power; the truth is just the contrary.

We shall conclude this discussion by quoting an extract from the decision in *Schneider v. Irvington* (1939) 308 U. S. 153, in which the Supreme Court of the United States found, after weighing the social interests that were involved in the case, that the balance lay heavily in favour of the maintenance of freedom of speech and freedom of the press. The Court said:

This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties.

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

NOTES ON FREE SPEECH AND A FREE PRESS

Significance of "Reasonable"

It would appear from the statements made in Parliament by some non-Congress members of the select committee on the Constitution Amendment Bill that among the Government's spokesmen for the Bill the Home Minister was the most insistent that the additional restrictions permitted to be imposed on freedom of expression by art. 19 (2) should be as wide as possible. Because of the strenuous opposition offered by non-Congress members he was forced to agree in the select committee to make some of the new reservations somewhat less elastic than they were in the Bill. For instance, he agreed, obviously very reluctantly, that the blanket reservation of "public order" might be changed into "prevention of public disorder," as was proposed by the Opposition members for the purpose of reducing occasions on the part of the Government to limit the right.

Later, when these members proposed the introduction of the word "reasonable" before the word "restrictions" so that the restrictions imposed might be a matter for judicial review, then, too, the Home Minister had to

agree. For as many as 73 members of the Congress itself had written to the Government that in their opinion it was necessary to provide that the courts should decide whether in any particular case the restrictions imposed were reasonable or otherwise. When he found that there was no help but to agree to this amendment, he blandly went back on his agreement to the previous amendment which sought to make the reservations a little less vague. Evidently he thought that if the reservations were to be specific, it would be highly unsafe to provide for court review!

The Opposition members could not understand this. They pointed out that narrowing the scope of reservations and making the restrictions imposed by virtue of the reservations subject to the verdict of the judiciary as to the reasonableness of the latter were two separate issues. Would it be justifiable, they asked, to place the restrictions beyond the pale of judicial inquiry because the reservations were not as wide as the Government would have them? The reservations must in any case be expressed in precise language, but it would not follow from this that the actual restrictions to be imposed should for that reason be left in the untrammelled discretion of the executive. It was equally necessary, they said, to provide that these restrictions be subject to a judicial test in order to ensure that they were not arbitrary.

But the Home Minister thought otherwise. In his opinion both these safeguards could not be allowed, and between the two safeguards he would rather have judicial review than the narrowing of reservations. His choice is very significant. It means that the Home Minister is quite certain in his mind that judicial review would have little value if the reservations were broad. The courts would no doubt have nominal power to exercise their supervisory jurisdiction if "restrictions" were qualified by "reasonable," but in effect the all-inclusive reservations would make it impossible for the courts to exercise their jurisdiction in so far as the inherent constitutionality of the laws that the legislatures might pass was concerned. We agree with this implied reasoning of the Home Minister in toto.

"Safeguard" of the Concurrent List

In the course of the debate in Parliament a suggestion was thrown out by a Congress member, Mrs. Durgabai, that any legislation restrictive of the right of free expression that it may be possible to enact under the amended Constitution should be enacted by the central, instead of any local legislature. This suggestion was also supported by several members of the Opposition. These members evidently felt that while the evils inherent in the amendment could not be wholly cured if exceptions to the exercise of the right to free speech and the press were widened in the generous way in which the amendment has widened them, these evils would be somewhat mitigated if the law permitting of such exceptions were to be passed

by Parliament and not by the Assemblies of the various States, the idea underlying the suggested procedure being that Parliament which is expected to consist of men of wider vision and having a greater concern for civil liberty than those who would fill the local Assemblies would adopt legislation which would not invade freedom of expression to the same extent as legislation passed by the latter bodies would do.

Mr. Nehru gave his blessing to the suggestion and promised to incorporate it in the Constitution Amendment Bill if technically it was possible to do so. But the Law Minister declared that it would be unconstitutional to prohibit in this way the State Assemblies from passing legislation in a sphere in which they were competent to do so. Eventually, therefore, the suggestion failed to materialise, and the Amendment Act, as adopted, leaves the State legislatures as well as the Union legislature to impose, within the bounds of the amendment, such restrictions upon free expression as they may consider necessary in the prevailing circumstances. Mr. Nehru could thereafter only say that since "public order" and "incitement to an offence" were within the Concurrent Legislative List, the Union Government would see to it that the State Governments did not in fact impose any undue restrictions.

Those members, whether of the Congress party or Opposition parties, who had favoured Mrs. Durgabai's suggestion that Parliament and Parliament alone should have it within its power to enact restrictions which the Amendment Act allows, were naturally dissatisfied with this watered-down assurance given by Mr. Nehru; they insisted that the power be confined to Parliament alone. The plea which has now been put forward by the Minister for Information, viz., that since it has been secured (the subjects of legislation being in the concurrent list) that central legislation would predominate over State legislation, it ought to be a guarantee that no unduly harsh restrictions will be imposed in the States, satisfies nobody. All that will be gained by the fact that "public order" and "incitement to an offence" are in the concurrent list is that where State legislation is inconsistent with Parliamentary legislation, the latter will prevail; but it does not obviate the possibility of the States validly imposing restrictions in a field not yet covered by Parliament. The latter, for instance, might refrain from passing legislation permitting pre-censorship of the press, but any State Assembly may yet go ahead with such legislation in its own area, without any fear of the legislation being declared void.

Nor is there any ground for hope that the central Government will behave better than the State Governments in this matter. For, as the President of the All-India Newspaper Editors' Conference pointed out in commenting upon the communique of the Minister for Information, "even before art. 19 (2) was amended, a pre-censorship order was served in April 1951 (even after such an order issued by the Commissioner of Delhi on the 'Organizer' was declared invalid by the Supreme

Court!) on a daily newspaper in Ajmer, which is a centrally-administered area, requiring that all matter, whether relating to law and order or displaced persons, shall be submitted, duly translated into English, on the previous day, for censorship." The whole of this idea, therefore, that a central agency would be more solicitous of the freedom of expression than a local one, has no foundation in fact. Even if Parliament alone were competent to pass restrictive legislation, little would have been gained in practice. As it is however, even those who have greater faith in Parliament than in the State Assemblies remain thoroughly dissatisfied.

Freedom of the Press in the Swedish Constitution

When one speaks of the Freedom of the Press one usually has in mind the examples of the United Kingdom or the United States and not of any other country where interference with this right, either in practice or constitutional law, is more frequent and far-reaching. But, in speaking on the Constitution Amendment Bill, the Home Minister chose to cite the example of Sweden. In the Constitution of that country there is an article, viz., art. 86, which defines freedom of the press in general terms. The definition runs as follows:

By freedom of the press is understood the right of every Swede to publish his writings without any interference on the part of the public officials. The individual may afterwards be prosecuted before a regular court because of the contents of his publication but shall not be punished unless such publication is plainly in conflict with a law enacted to preserve the public peace, without interfering with public instruction.

It will be noticed that this definition closely follows the famous definition associated with Blackstone, viz.: "The liberty of the press . . . consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published." But it is now universally recognised that this definition is much too conservative and wholly inadequate. While previous restraints ought of course to be completely barred, this by itself is not enough. For freedom of the press also requires that post-publication penalties must be considerably limited and that the crimes which are to entail penalties "must be," as Professor Chafee says, "carefully restricted (e. g., by the clear and present danger test)." This is secured in the United States by the Constitution of that country protecting the press from previous restraints and also from subsequent punishment on certain fixed principles evolved by the Supreme Court. If the legislature is to decide finally what shall be regarded as crimes in respect of publications, the liberty of the press will not be constitutionally guaranteed as it is in the United States. And if no such constitutional guarantees are possible under the British system, there is still the practical guarantee there that Parliament will not

pass a law unduly curtailing the liberty of the press. The Swedish Constitution forbids previous restraints, but for the rest leaves it to the legislature to impose what post-publication restrictions it may choose to enact. Which means that the freedom of the press in its wider connotation does not exist in Sweden.

Nor can one say that the law passed on 23rd March, 1949, in Sweden on the subject conforms to the standard which is generally observed in this matter in freedom-loving countries. For art. 4 of chap. 7 of this law makes punishable the following "utterances in print" among others:

(8) incitement to criminal acts, neglect of civil duties or disobedience to authority;

(9) dissemination of false rumours or other false statements with the intention of endangering the security of the Kingdom, public welfare or public order and security, or of undermining respect for authority. . . .

It will be agreed that these clauses are too widely drawn. In the Reserve and Auxiliary Forces Act recently passed in England special power was taken to penalise incitement of persons called up under the scheme of rearmament to non-performance of their duties, and such legislation may be said to be justified in the circumstances. But the broad powers which clause (8) of the Swedish law gives are clearly liable to be abused. But we are surprised to find the Hon'ble Mr. Chakravarti Rajagopalachari invoking the law and practice, not of the United States or United Kingdom, but of other lesser countries in saying how the freedom of the press can best be assured. Is that the way in which our fundamental rights are to be implemented?

Preferred Status of Free Speech

We have often enough referred to the preferred status which the First Amendment freedoms enjoy in the United States Constitution, by reason of the rule which the Supreme Court has been following latterly, viz., that when a law appears to encroach on any of these freedoms, "the presumption is that the law is invalid, unless its advocates can show that the interference is justified because of the existence of a 'clear and present danger' to the public security." In *Thomas v. Collins* (1944) 323 U. S. 516, the Court affirmed this preferred position and said:

That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice (between the individual's freedom and the State's power of control).

A judge of an Indian High Court—Mr. Justice Panchapagesa Sastri of the Madras High Court—cited this passage recently in his judgment in the *Avanti Press* case and noted, with obvious regret, that in the Indian

Constitution, such a "preferred position has not been formally recognised" for Freedom of Speech and Expression. But he says that as compared to other fundamental rights guaranteed in art. 19. (1), this fundamental right does enjoy a "preferred position." He says (*A. I. R.*, 1951, Madras 78):

The difference in the importance of these various fundamental rights is, however, expressed in the Constitution by the difference in the character of the restrictions permitted by the subsequent clauses of art. 19. It will be noted that cl. (2) allows a narrower field for legislative interference (with the right to freedom of speech and expression) than what cls. (3) to (6) allow (in respect of other "rights of freedom"). It is unnecessary, therefore, to build any argument upon the superiority of one kind of freedom over the rest, except to the extent especially recognised and regulated by the Constitution itself.

The "narrower field" of the possibility of invading freedom of speech and the press arises from the fact that while restrictions on this right can be imposed only when the "security of the State" is endangered, they can be imposed on other rights like the right to peaceable assembly even when "public order" is imperilled, and a threat to "public order" naturally covers a much wider range of situations than a threat to the "security of the State."

The constitutional provision in respect to Freedom of Speech and Expression was regarded in the country as satisfactory (Mr. Vaze said in his presidential speech at the Bombay Civil Liberties Conference: "The right of freedom of speech and the press appears even now to be firmly established, but the right of freedom of association is not yet so established") just because of this "narrower field" within which restrictions can validly and constitutionally be imposed upon this right. This was reflected in the words used by Mr. Patanjali Sastri who delivered the judgment of the Supreme Court in the "Cross Roads" case, viz.:

Unless a law restricting freedom of speech and expression is directed SOLELY against the undermining of the security of the State or the overthrow of it such law cannot fall within the reservation of cl. (2) of art. 19, although restrictions which it seeks to impose may have been conceived generally in the interests of public order.

But the superiority of the position of free speech of which Mr. Panchapagesa Sastri speaks over that of other rights has ceased to exist after the recent amendment of the Constitution, for this amendment now adds "public order" as a basis for permissible legislative restriction of the right of free speech, and the general satisfaction about the constitutional limitations concerning this right has now given place to serious dissatisfaction amongst all lovers of democratic freedom.

Freedom of News and Opinion

U. S. A. REJECTS THE CONVENTION

The United States, in reply to a request from the U. N. Secretary-General to all member States to give their views about the Convention on Freedom of Information (and opinion) drawn up by the U. N. Committee appointed for the purpose, informed the United Nations on 20th June that it was unable to adhere to the Convention because, in the judgment of the United States, the proposed text would not help to correct but could even be used to sanction such abuses. The United States reply stated:

In the opinion of the U. S. Government, the text of the proposed Convention would not aid in correcting certain existing abuses of the three Freedoms, and could easily be utilised to sanction and legitimise these and other abuses.

The Government cannot agree with the assumption which seems to underlie much of the present text, namely, that the pressing task of the moment is to define ways and means by which Governments may curb the reporting of news which they consider undesirable.

Any proposal which might in any way restrict the availability of news and information to the peoples of the world would, in the view of the U. S. Government, be singularly inappropriate at a time when Government restrictions on the flow of news threaten increasingly to deprive the public of the information which it needs to form conclusions on the many vital problems affecting world peace.

We are so glad that the U. S. A. has given the right lead to all freedom-loving countries. India of course will have no difficulty in adhering to the Convention. Its difficulty will only be that the Convention does not curb Freedom of the Press to the extent it considers necessary. For it should be remembered that the draft Convention, unsatisfactory as it is to us in many respects, is satisfactory in that it rejected the proposal sponsored by India among other countries which is based on the reservation newly introduced in the Indian Constitution, viz., "friendly relations with foreign States." Nevertheless, India will in all probability support the Convention because it must be hoping that though the reservation does not find place in the Convention, yet it will be introduced therein through Resolution "A" (vide p. 264 of the BULLETIN).

The International League for the Rights of Man has also no use for the Convention in its present form. Its Bulletin for April says:

The fifteen nations committee set up by the General Assembly (of the United Nations) to continue work on a Convention for freedom of information (and expression) to set standards of practices within the nations, ended its work in February with the same

division which has marked the debates for two years. The majority favoured including limitations by governmental controls in a long list of exceptions to freedom of press and publication.

On the recommendation of Dr. Max Beer (League's representative at the U. N.), who closely followed the debates, the League has taken the position that, in view of the sharp division of opinion in the Freedom of Information Committee, further work on the Convention should be deferred until after the Human Rights Covenant is drafted. It is felt that a good article on freedom of information in the Covenant of Human Rights might make a special Convention unnecessary at this time.

It may be added that the Commonwealth Press Union formed for the protection of the freedom of all newspapers in the Commonwealth has expressed in its annual report its opposition to the U. N. Convention on the ground that though its intentions are good the wording of the Convention makes it "a danger to Press freedom."

"INCITEMENT TO AN OFFENCE" AND "PUBLIC ORDER"

There was in fact no occasion or justification for Mr. Nehru to propose and Parliament to adopt new restrictions on freedom of speech and the press in the interest of the maintenance of public order or the prevention of incitement to an offence. Decisions of three High Courts in cases involving the Press Act of 1931 were made an excuse for making and passing these atrocious proposals. None of these decisions was unanimous and in none of them was the matter taken by either of the Governments concerned to the Supreme Court for an authoritative and final interpretation of the scope of the constitutional provision concerning freedom of expression. Instead of seeking such a definitive opinion from the highest judicial authority, the Nehru Government thought it best to take advantage of the High Court decisions (though divided) to impose most sweeping limitations on this vital freedom — limitations which would not have been justified even if the Supreme Court had affirmed the majority decisions of the High Courts (and in fact, as will be seen later, a minority decision of one High Court).

One of the three decisions on which the Government of India's proposals purports to have been based was already referred to by us at p. 258 of the BULLETIN. It is the decision of the Patna High Court in the Bharati Press case in which it was held by Sarjoo Prasad and Ramaswami J.J. that clauses (a) and (b) of sec. 4(1) of the Press Act were not saved by art. 19(2), while Shearer J. held that they were. We might again bring it to the notice of our readers that in this case Mr. Justice Sarjoo Prasad expressly suggested that his decision which he thought would create an "anomalous situation" might "sooner than ever come to be tested by the Supreme Court." But

the Government of India evidently thought that the Bihar Government should rather not have the decision tested in this way lest it should be overruled and Mr. Nehru robbed of the excellent opportunity it gave him of gagging the press.

The other two decisions which were similarly made the basis of the additional restrictions clamped on speech and publication are decisions by the Madras and the Punjab High Courts in *Srinivasa v. State of Madras* and *Amar Nath v. the State* respectively. In the latter case the special bench of the High Court was divided, two of the judges holding that sec. 4(1)(h) of the Press Act fell outside the scope of restrictions authorized under art. 19(2) and one judge dissenting from this opinion. In the former case, too, the special bench was divided, but in this case two of the judges held that sec. 4(1)(a) of the Press Act was not repugnant to the Constitution, it being saved by art. 19(2), while one judge delivered a contrary opinion. Since the majority decision of the Madras High Court in this case was in flat contradiction to the majority decision of the Patna High Court in the case referred to above, it should have occurred to the Government of India to make a reference to the Supreme Court on this issue before it came forward with its extremely retrograde proposals for altering the Constitution, but evidently it suited its purposes better to have the Constitution altered anyway.

In the Madras case the Court was unanimously of the opinion that some of the poems in a Telugu book called "Vajrayutham" were such as to incite to commission of the offence of murder and encourage commission of cognisable offences involving violence, and the only question was whether the Constitution gave immunity for publication of even such matter. Mr. Justice Panchapagesa Sastri held that it did. He said:

It is apparent that the language of sec. 4(1)(a) [of the Press Act] (viz., "inciting to or encouraging commission of an offence of murder or any cognisable offence involving violence") is much wider than what is described in art. 19(2) as "matter which undermines the security of or tends to overthrow the State."... It may be that in some cases publication which falls under sec. 4(1)(a) may amount to publication of matter undermining the security of or tending to overthrow the State; but the two expressions are not, however, identical. As sec. 4(1)(a) stands at present, it cannot be regarded as constitutionally valid, as it conflicts with art. 19(1)(a)... It is not open to us [in view of the Supreme Court's opinion in the "Cross Roads" case] to uphold the constitutionality of sec. 4(1)(a) even to a limited extent [i. e., to the extent of its inconsistency]. It follows, in my opinion, that both secs. 4(1)(a) and 4(1)(d) fall outside the scope of permitted legislation and would be unconstitutional as operating to abridge the freedom of expression guaranteed by art. 19(1)(a).

Govinda Menon and Basheer Ahmed Sayeed JJ. did not accept this view. The former judge said:

My learned brother Panchapagesa Sastri J. seems to think that even if a newspaper, book or document contains words which incite or encourage, or tend to incite or encourage, the commission of an offence of murder or of any cognisable offence involving violence, and even if such incitement and encouragement might undermine the security of the State or tend to overthrow the same, still sec. 4(1)(a) would be ultra vires because, as the section now stands, incitements which do not undermine the security of the State or tend to overthrow the same come within its ambit, and since it is impossible to separate the two different categories of the incitements the entire section should be held to be invalid and ultra vires....

I do not think that in such a case sec. 4(1)(a) can be held to be ultra vires. Even the incitement or encouragement to a single case of murder, or a single cognisable offence involving violence, might have a tendency to overthrow the State.... It is very difficult to postulate with any definiteness that the classes of offences mentioned in sec. 4(1)(a) will not undermine the security of the State or may not tend to overthrow it.

In the Punjab case the question was of forfeiture of copies of a book entitled "Now It Can Be Told," narrating some of the events following partition of India and describing riots which took place in West Punjab in which Muslims attacked Sikhs and Hindus. The order of forfeiture was made on the ground that the book contained passages which tended to promote feelings of hatred between different classes of citizens within the meaning of sec. 4(1)(h) of the Press Act. All the three judges of the special bench were agreed that the book did not come within the mischief of the section, but two of the judges, Mr. Justice Khosla and Mr. Justice Harnam Singh, went further and held that the section of the Press Act under which forfeiture was ordered was void. Mr. Justice Harnam Singh said in this connection:

It is conceded that publications which tend, directly or indirectly, to promote feelings of enmity or hatred between different classes of the citizens of India may undermine the security of India or tend to overthrow the State. Clause (h) of sub-sec. (1) of sec. 4 of the Act, however, covers publications which do not undermine the security of or tend to overthrow the State. That being so, the possibility of the application of clause (h) of sub-sec. (1) of sec. 4 of the Act for purposes not sanctioned by the Constitution is not ruled out. Clause (h) of sub-sec. (1) of sec. 4 of the Act, therefore, falls outside the scope of authorized restrictions under clause (2) [of art. 19] and is, therefore, void and unconstitutional.

Mr. Justice Kapur, on the other hand, felt unable to agree with this reasoning though he agreed with the conclusion.

[In this connection reference may be made to the opinion of Mr. Leo Kohn quoted at p. 268 of the BULLETIN that an attempt to promote feelings of ill-will and hostility between different classes of citizens "can hardly be held to be unlawful" under the article in the Irish Free State's Constitution relating to freedom of expression.]

SPECIAL ARTICLE

THE "CLEAR AND PRESENT DANGER" DOCTRINE

The Supreme Court's Opinion

IN THE CASE OF THE ELEVEN COMMUNIST LEADERS

The United States Supreme Court on 4th June upheld the conviction of the members of the Politbureau of the American Communist Party who had been indicted for violation of the conspiracy provisions of the Smith Act. The judgments of the trial Judge (October 1949) and the Court of Appeals (August 1950) were summarised in the BULLETIN at p. 17 and 142. The decision of the Supreme Court, which was rendered by a 6 to 2 vote, concerned itself with only one issue in the Communists' appeal, viz., whether the Smith Act, which makes it a crime to advocate the overthrow of the Government by force or to organize any group for such a purpose, is constitutional, and the Court held that the Act was constitutional and within the power of Congress to enact.

The charge that was brought against the Communists was that they advocated the overthrow of the Government by force and violence, and as this charge "contains an element of free speech," the Supreme Court said, "we must pay special heed to the demands of the First Amendment marking out the boundaries of speech;" and after reviewing cases since the Schenck case in which the classic dictum of Justice Holmes "placed a unique emphasis" on the right of free speech, the Court observed:

The rule we deduce from these cases is that where an offence is specified by a statute in non-speech or non-press terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created "a clear and present danger" of attempting or accomplishing the prohibited crime.

In the Gitlow and Whitney cases the Court refused to apply the "clear and present danger" test, though Justices Holmes and Brandeis dissented from the majority opinion. But in later cases the Holmes-Brandeis philosophy was accepted. About them the Supreme Court said:

Although no case subsequent to Whitney and Gitlow has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale,

and pointed out that in *American Communications Association v. Douds* (1950) 339 U. S. 382 the Court stated:

(The First) Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom.

Thus, application of the "clear and present danger" test is now insisted upon in all free speech cases by the Supreme Court as a whole; it is no longer the doctrine of a minority of the Court as in the Gitlow-Whitney cases.

* * *

The decision of the Supreme Court in the instant case therefore turned upon the interpretation of the "clear and present danger" doctrine and the precise scope to be allowed to it, in view of "the development of an apparatus designed and dedicated to the overthrow of the Government in the context of world crisis after crisis" such as had not happened when the doctrine was enunciated. And on this point the Court said:

Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If a Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.

After these observations the Court proceeded to state that it adopted the interpretation which the Court of Appeals put on the "clear and present danger" doctrine in the present case, viz., that "in each case they (the courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger," and expressed itself in accord with the opinion of that court that "such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression" and that "it is a danger 'clear and present.'" As to the contention that "a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation," the Supreme Court observed: "It is the existence of the conspiracy

which creates the danger. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added" and the conspiracy actually ripens into revolution.

In conclusion, the Court said:

We hold that secs. 2 (A)(1), 2(A)(3) and 3 of the Smith Act do not inherently, or as construed and applied in the instant case, violate the First Amendment and other provisions of the Bill of Rights. . . . Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a "clear and present danger" of an attempt to overthrow the Government by force and violence. They were properly and constitutionally convicted for violation of the Smith Act.

The meaning of the decision is that the present world threat of Communism constitutes a "clear and present danger" to the safety of the State in which the act of teaching and propagating Communist doctrines amounts to overt act aimed at overthrowing the Government by force and that a subversive ambition does not have to be achieved before it can be branded as a conspiracy.

Justices Black and Douglas dissented from this majority opinion because they could find no basis for any sufficiently imminent danger. Justice Douglas remarked that the First Amendment, barring any abridgment of free speech, did not mean that the Government need "hold its hand" until it was too late to save itself from a revolution. Nevertheless, he said, "the command of the First Amendment is so clear that we should not allow Congress to call a halt to free speech except in the extreme case of peril from the speech itself." He then went on to say: "All known facts of Communist activities in the United States have a bearing on the likelihood that their advocacy of the Soviet theory of revolution will endanger the Republic. But the record (in this case) is silent on the facts. If we are to proceed on the basis of judicial notice, it is impossible for me to say that the Communists in this country are so potent or so strategically deployed that they must be suppressed for their speech." He said, they "are miserable merchants of unwanted ideas; their wares remain unsold." And he declared: "How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery." Justice Black, agreeing with this view, expressed the hope that "in calmer times, when the present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society" (Cf. the opinion in *Thomas v. Collins* cited on an earlier page of this issue of the BULLETIN). Justice Frankfurter too, who concurred

in the majority opinion, made a remark that is worth pondering. He said:

No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the conviction before us we can hardly escape restriction on the interchange of ideas.

Civil Liberties Unions in the United States are dissatisfied with the majority opinion, because though it applies the "clear and present danger" rule, it virtually reduces that rule to one of a "clear and probable danger."

* * *

The practical effects of the decision are not expected to be large. The Government recognises, as Attorney General McGrath has said, that the decision does not of itself outlaw the Communist Party. In fact, one of the majority Justices, Mr. Jackson, himself said in his concurring judgment: "I have little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement. Communism will not go to gaol with these Communists." As the "New York Times" observes in commenting on the decision, "If the eleven convicted leaders are replaced by eleven others, and if the eleven others hold forth as their predecessors did, seemingly they, too, could be indicted and convicted. It may be, also, that other Communists lower down in the party hierarchy are subject to prosecution under the law." The Government is already proceeding against 17 second-rank leaders of the Communist Party and may probably be preparing actions against many other avowed Communists under the Smith Act now finally declared valid. But each one will have to be prosecuted and in each case the guilt will have to be separately proved; the vicious doctrine of guilt by association will not apply.

COMMENTS

Protest against Detention

The April 1951 Bulletin of the International League for the Rights of Man has the following:

The All-India Council for Civil Liberties, affiliate of the League, protested vigorously against the continuation of the orders of the government which have permitted for the last year the detention without trial of persons deemed dangerous to the public safety. Under the orders some two thousand Communists have been held in gaol. In a few cases the courts have intervened, but in effect the writ of habeas corpus has been suspended.

The new law passed by Parliament, effective April 1st, establishes the system on a permanent basis. The

League has expressed its support of the position taken by the All-India Council against such a sweeping denial of rights presumably guaranteed under all democratic practice.

Personal Liberty

The general objection which the United Kingdom raises to the draft Covenant of Human Rights is that the exceptions allowed therein to the exercise of several of those rights are too broad and vague, and its objection to art. 6 purporting to safeguard Personal Liberty in its present form is that it is "wholly inadequate." The article reads:

No one shall be subjected to arbitrary arrest or imprisonment.

No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.

The New Zealand delegate, Mr. Davin, in the Third Committee of the fifth session of the General Assembly, supported the United Kingdom on 29th October, 1950, in the latter's general objection to art. 6 as it stood at present. He said:

As regards art. 6, the term "arbitrary arrest or detention" was too vague and uncertain in meaning to be used in defining the fundamental right (Personal Liberty) which was the subject of the article. The limitation "except on such grounds and in accordance with such procedure as are established by law" might be open to abuse. It would seem necessary, in order to make the article effective, that the various cases in which an individual might be deprived of his liberty should be specified.

The Chilean delegate voiced the same sentiment. He said at the above meeting:

The word "arbitrary" used in art. 6 seemed to be inexact; as the adjective merely meant "contrary to the law," an act would cease to be arbitrary solely because the State promulgated a law justifying it. (Again,) as it was worded, art. 4 seemed to imply that "preventive detention" was in fact the rule.

Similarly, the Secretary-General of the United Nations in his Note on the draft Covenant (A/C. 3/534 dated 25th September 1950) raised the point as to whether provision should not be inserted "for the protection of persons whose detention is of a merely preventive character and is not based on criminal charges," unless such detention takes place under art. 2, i. e., in the event of a national emergency which is now defined as "public disaster," and "public disaster" is of course something quite exceptional.

No Need to Outlaw Communists

In a statement supplied to the Press about the law and order position in the Madras State on 7th June it was said:

Law and order in the State are being well maintained. The subversive activities of the Communists in the Circar districts are kept well under control. . . . It is in Kurnool district that we have been having attacks by Communists of late, but it is gratifying to see that village resistance is stiffening. It may be stated in this connection that there have been instances of dacoity, etc., wrongly attributed to Communists. Since the beginning of this year the Government have not had occasion to extend any order passed under sec. 144, Cr. P. C. (prohibiting meetings and processions), and this is an indication that the situation is, generally speaking, satisfactory.

This statement seems to prove that the Madras Government is none the worse for its discarding the weapon to which it was resorting before of outlawing Communists under the provisions of the Criminal Law Amendment Act which was declared unconstitutional by the Madras High Court in September last (vide p. 154). A Government is naturally prone to make use of whatever instrument comes handy to it in maintaining the public peace, irrespective of whether there is or is not an overriding necessity to employ such a barbarous instrument as that of the Criminal Law Amendment Act based on the vicious principle of guilt by association.

And if the judicial decision had not set aside the legislative judgment, there is no reason to suppose that the Government would have tried to do without this weapon in the hope that its normal powers would be enough to bring subversive activities under control. It is a matter of gratification to see that because the High Court struck this weapon off its hands, the Government has not been rendered powerless to get on top of its temporary difficulties, and that it has found by experience that it is unnecessary to have recourse to barbarous methods for the purpose. We are certain that the West Bengal Government too has not become impotent to meet the challenge of the subversive forces in that State on account of a similar decision of the Calcutta High Court in December (vide p. 202).

It is a matter of surprise that though two High Courts have declared the Criminal Law Amendment Act invalid, there are still some States who go on merrily enforcing it. It is true that these States are not constitutionally required to give up its use till their own High Courts have delivered themselves of the same opinion, but we think propriety required that they should also cease making use of a power which is known to be contrary to the provisions of the Constitution. Several laws nullified by the judicial authority have been validated by the Constitution Amendment Bill and we wonder whether the Criminal Law

Amendment Act is one of them. We cannot be sure that it is not, because, in spite of the demand made by members of the Select Committee on the Bill, the Nehru Government declined to supply the list of laws so brought back to life.

It has been stated that that Union Government has issued a directive to the State Governments asking them not to use the power of detaining without trial which the Preventive Detention Act gives them against profiteers and blackmarketers but to bring them under the operation of a special statute provided for the purpose. This will have the result of putting offenders on their trial in the courts of law. Pandit Kunzru had urged this course on the Government when the Preventive Detention Act was being passed, but the Government paid no heed to the suggestion at the time. In any case it is a good sign that the Government now sees the light.

Referendum in Australia

ON THE QUESTION OF OUTLAWING COMMUNISM

It was stated by the Prime Minister of Western Australia while in Bombay on his way back from London that Mr. Menzies, the Australian Prime Minister, asked the State Premiers at a recent conference to cede to the Commonwealth Government those powers for want of which the law passed by the last Parliament to outlaw the Communist Party was declared null and void by the High Court. But it was doubtful whether the States, so zealous of their autonomy, would agree to do so. In the event of their consent not forthcoming, it was expected that a referendum would be taken on the question and if a majority of people in the country as well as in the component States was found to be agreeable, the Commonwealth Government would proceed to alter the Constitution so as to make it possible for such a law to be validly enforced.

Racial Segregation Barred in U. S.

The United States Supreme Court on 23rd May upheld decisions of the lower courts, which has the effect of striking down racial segregation in two cases. In one case an ordinance of the city of Birmingham in Alabama state forbade Negroes to "use or occupy" property in certain areas even if the owners were willing to sell or lease it to them, and although it is within the state's police powers to enact and enforce such an ordinance on the ground that it is necessary for the purpose of preserving property values, the lower court held that it involved employment of public power to deprive citizens of their equal rights to acquire property and therefore was unconstitutional. The Supreme Court refused to review this decision. In fact the Supreme Court, in *Shelley v. Kraemer* (1948) 334 U. S. 1, had laid down the principle that judicial process could not be employed to enforce private agreements restricting use of property to persons of a particular race.

It may be noted here that in the discussion of the Constitution amendment Bill in our Parliament it was said on behalf of the Government that in the U.S. the "the states' police powers" doctrine was used to abridge the fundamental freedoms guaranteed by the Bill of Rights. But it will be seen that in this case the police powers which the state of Alabama undoubtedly possesses were held to be unavailable to the state because they contravened the Bill of Rights. This will show what the relative authority of the police powers on the one hand and the fundamental law of the Bill of Rights on the other is.

In the other case, a private corporation, viz., the Atlantic Coast Line, like other Southern railroads, segregated the whites and Negroes in its cars, presumably in the interest of order, and a Negro charged that this deprived him of his constitutional rights. His charge was sustained by the lower court, and the Supreme Court let the decision stand, once again applying tacitly the principle that the courts cannot tolerate public discriminatory regulations repugnant to the Constitution.

A third case was decided by the Supreme Court on the same day. Virginia, a Southern state, prescribes payment of a certain fee for three years as a condition of eligibility for voting. This poll tax was attacked on the ground that it was primarily designed to keep Negroes from voting. The defence of the state was that, since the tax applied to all citizens, the charge did not lie. That was sustained by the lower courts, and the Supreme Court, by declining to intervene, upheld the decision. The states have undoubtedly the right to fix voting qualifications subject to the over-all equal rights pledges of the National Charter. "If only the white citizens of Virginia were able to pay (this) poll tax, previous opinions of the Supreme Court indicate that the statute would have been held violative of the equal rights guarantees of the Constitution." But the Supreme Court presumably did not so regard it.

HABEAS CORPUS PETITIONS

Fifty Detenus' Detention Upheld

Habeas corpus petitions were filed in the Calcutta High Court on behalf of about 50 detenus challenging the validity of their detention. Their cases had been previously considered by the Advisory Board which reported that their detention was justified while recommending the release of thirty others. Those whose detention was confirmed by the Advisory Board contended before the Court that while they were detained in February 1950 what were called supplementary grounds were served upon them only in July 1950, and thus they were not told for what they were detained for a considerably long time which was contrary to the provisions of the Constitution.

The Chief Justice and Mr. Justice Das dismissed all these petitions on 18th June, and the Chief Justice who delivered the judgment of the Court observed in regard to this contention of the petitioners :

The so-called supplementary grounds or the particulars did not state any new grounds for the orders of detention. They were in the nature of particulars of the general grounds given earlier. They merely amplified these grounds giving specific instances to support the general statements made earlier. Again it was contended on behalf of the detenus that the original grounds were too vague and the particulars delivered in July could not be taken into consideration as they were not delivered in time and, therefore, it could not be said that the earliest opportunity had been given to the detenus to make their representations. The Supreme Court had held that the requirements of art. 22 (5) of the Constitution had been substantially met (in the cases before that Court) by serving a copy of the grounds for the orders in the middle of March and by service of the further particulars in or about July 22. In the light of the observations made by the Supreme Court this court was clearly of opinion that the detenus had been given the earliest opportunity to make their representations though the particulars were not delivered until nearly four months after the orders had been made and until after the detenus had filed their habeas corpus applications.

One of the grounds for detention given in these cases was that the persons detained were members of the Communist Party which had as its objects the commission of violent crime and the overthrow of the State by violence and which had for that reason been declared illegal. On this point the Chief Justice said :

It appears to me immaterial whether the Communist Party has or has not been declared to be an illegal organization. The gravamen of the allegation made in this ground is that the detenu belongs to an organization which is committed to violent and subversive acts and which has as its main object overthrow of the State by violence. Such being the case it appears to me to be of little importance whether such an organization has or has not been declared to be illegal. Assuming the party has the objects stated in this ground, a member of it would be equally dangerous, whether the organization had or had not been declared to be illegal. On a fair reading of the ground it would appear that the detenu is regarded as dangerous not because he is a member of an illegal organization but because he is a member, and assists in the activities, of an organization whose objects are said to be dangerous and a menace to the maintenance of public order and security of the State. For this reason I must hold that the orders of detention are not invalid because of the statements in the grounds that

the organization to which the detenus belong has been declared an illegal organization and therefore is an illegal organization.

Detention held Illegal

A division bench of the Hyderabad High Court held on 16th July that the detention of a person under the Preventive Detention Act was illegal, if a case was pending against him before any criminal court on charges identical with those mentioned in the detention order.

This decision was a sequel to a habeas corpus application filed on behalf of Chikkati Mamilla Lulu, who contended that his detention was not proper as a criminal prosecution was pending against him before a criminal court on grounds similar to those in the detention order.

Their Lordships ordered: "If the detenu is now in jail custody, and if there is also an order for his remand by a criminal court, he will remain in such custody. Otherwise he should be released."

A division bench of the Hyderabad High Court on 1st July allowed the habeas corpus petition of Kokula Mallayya, a Communist detenu, and ordered his release as the grounds of detention were very "vague and indefinite." The bench rejected the habeas corpus petition submitted by Venampalli Somayya, another Red detenu.

TRIAL IN OPEN COURT ORDERED

"Publicity is Hallmark of Judicial Procedure"

The Additional District Magistrate, Nagpur, had ordered last year a trial inside the jail of Mr. B. N. Mukherjee and six others charged with a show of violence and rioting as they were being removed from one jail to another and had rejected an application for an open court trial on the ground of public safety and tranquillity as some of the accused "were under detention under the Public Safety Act." The detenus thereafter moved the Nagpur High Court for revision of the order, and Mr. Justice Kaushalendra Rao set aside the order of the Magistrate (19th June). In his judgment he said :

The mere fact the accused are detenus does not warrant the inference that public safety would suffer if the trial is held at the court house. There was nothing on record in the case to show that public safety was in danger by holding the trial at the court house.

Even if in any particular case a magistrate considers it necessary to hold the trial in jail it is incumbent upon him to create an atmosphere of the open court where every citizen has access by right. As observed by Lord Blanesburgh, "publicity is the

authentic hallmark of judicial as distinct from administrative procedure."

There should be nothing secret about dispensing of justice. This principle is enshrined in sec. 352 of the Criminal Procedure Code. Nothing prejudicial to public safety or tranquillity has happened during this trial or anything has been shown as likely to happen to justify the exclusion of the public in general from the court. The learned magistrate approached the question from an entirely wrong angle. The order cannot be supported.

EDITORS' CONFERENCE DECIDES ON SANCTIONS

A SPECIAL PLENARY SESSION

Mr. Deshbandhu Gupta, President of the All-India Newspaper Editors' Conference, convened a special plenary session of the Conference in Bombay on 23rd June in order to consider how to meet the grave threat which the Constitution in its amended form constitutes to freedom of the press in India. The Conference passed the following resolutions :

Resolutions

This special plenary session of the All-India Newspaper Editors' Conference convened to consider the situation arising out of the passing into law of the Constitution of India (Amendment) Bill, places on record its emphatic condemnation of the amendment to article 19(2) of the Constitution of India as a threat to the freedom of the press and a restraint on freedom of expression.

It endorses the representations made by the President of the All-India Newspaper Editors' Conference to the Prime Minister and also the resolution of the Standing Committee on the matter, and desires to make it clear to all concerned that the press, in the interest of the public, will not rest until the amendment so hastily and ill-advisedly placed on the statute book is repealed and freedom of expression restored without the qualifications now imported into article 19(2).

OUR BIRTHRIGHT

This special plenary session of the All-India Newspaper Editors' Conference is of the considered opinion that, in order to impress on the public the fact that what is at stake is not the question of any special privilege to the press but something of direct and immediate concern to them and that the amendment imperils the exercise of their right to freedom of expression, newspapers and periodicals published in the country should, in exercise of their responsibilities to the public, publish in every issue prominently on top of the leading article the following caption, namely,

Freedom of expression is our birthright and we shall not rest until it is fully guaranteed by the Constitution.

PROTEST

This special plenary session of the All-India Newspaper Editors' Conference calls upon the newspapers of the country to suspend publication for one day on July 12, 1951, as a mark of protest against the unwarranted and uncalled for encroachment on freedom of expression.

This special plenary session of the All-India Newspaper Editors' Conference urges on the electorate to demand from every candidate standing for election to Parliament and state legislatures a pledge to work for and to secure repeal of the amendment to article 19(2) of the Constitution and restoration of freedom of expression.

RESISTANCE

This special plenary session of the All-India Newspaper Editors' Conference appeals to all newspapers in India and to all organizations seeking to serve the interest of the press to continue to offer determined resistance to the grave threat to freedom of expression contained in the amendment to article 19(2).

This special plenary session of the All-India Newspaper Editors' Conference resolves :

1. To suspend the working of all its committees functioning in an advisory, consultative or associated capacity with Government both at the centre and in the States. The Conference authorises the Standing Committee to review the position in the light of the decisions of this plenary session if a situation calling for such a review arises.

2. The Conference remits to the Standing Committee for necessary consideration and action the proposal that the Conference should refuse its co-operation with all committees and inquiries instituted by the Government on matters relating to the press and the press laws in India.

The President of the A.-I. N. E. C. had, however, second thoughts later and asked the editors almost at the last moment to postpone to a later date the putting into execution of one of the resolutions, viz., that which urged suspension of publication on 12th July as a mark of protest against the placing of fetters on the press. The reasons that he gave for making this suggestion were the state of crisis caused by Kashmir and East Pakistan conditions and Mr. Nehru's expressed intention to repeal laws affecting the liberties of the press. In obedience to this suggestion several newspapers published their 12th July editions, but several other newspapers, some of them with very wide circulation, declined to carry out the suggestion on the ground that the reasons were unconvincing and untenable and that in any case, if valid, had as much operative force on the day the resolution was passed as on 9th July when contrary instructions were issued. These papers stopped publication as decided before. The Bombay Branch of the A.-I. N. E. C. went so far

as to denounce in a resolution passed at an extraordinary meeting the "retreat" ordered by the President, and even appointed a Council of Action in order to turn the A.-I. N. E. C. into an organization "geared to the defence of freedom of speech and expression."

CIVIL LIBERTIES UNION IN ASSAM

Mr. Sivaswamy's Address at the Conference

A Civil Liberties Union was formed for the State of Assam at a Conference held at Gauhati on 1st July under the presidentship of Mr. K. G. Sivaswamy, Organizing Secretary of the All-India Civil Liberties Council. The "Hindustan Standard" has published the following summary of his address at the Conference :

I was bewildered to learn of the manner in which the police are trampling upon civil liberties in Assam. Wrongful detentions, abuse of the search and seizure power, innumerable raids by cordoning areas, indiscriminate arrests of persons running into two thousand, use of third degree methods, inhuman treatment of undertrials and detenus in jails, and various police excesses in Sibsagar, Kamrup and Cachar districts are all expressions of the old bureaucratic traditions.

The vast gulf that exists between the fundamental rights as provided in the Constitution and the discriminatory laws that are being enacted today is glaring to any student of public administration. Article 14 guarantees equality before the law or equal protection of the law. But under the Rent Control Act or the Requisition Act, houses are commandeered for the use of Government servants and not others. The Government of India have fixed a low price for rationed foodgrains for industrial workers and not for others. Ration is specially provided for certain services and not for others. No one seems to question these discriminatory and unfair orders. To ensure the rule of law, the educational qualification of policemen should be raised, persons imbued with the spirit of service should be recruited, training schools should indoctrinate them with an awareness of civil rights and proper treatment of those in custody of the police should be stressed. In view of the civil rights guaranteed under the new Constitution to the people of India, any infringement of these rights by the police under colour of enforcing laws should be made a criminal offence as in section 52 of the Criminal Procedure Code of the United States of America.

As a corrective to the brutal police traditions we have inherited, the law should enumerate the rights of citizens as against the public officers, viz., the right to enjoy the civil rights under the Constitution, to be free from exploitation of property and free from forced labour, from infliction of personal injury and from discriminatory laws enforced by passive or active conduct of an official. The specific enumeration of these rights in the law has been recommended by the Civil Rights Committee in the U. S. A. Violation of these rights by officials should be punishable in law.

Another-urgently needed reform is the building up of an independent civil service, which will be free from the discriminatory interference of the Ministry by transfers of magistrates and police officers. The officers, too, mistake their loyalty to the State as personal service to the Ministers and they are bound to suffer in their prospects with changes in the Ministry. They consider themselves as servants of the party in power. By refusing to act on public representations of others than Congressmen, they misuse State power for a one-party rule. The people, too, not realising their equal rights to State services, consider Congressmen alone as proprietors of the State, and are afraid to approach officials for their needs and a solution of their grievances except through Congressmen. Conditions are, therefore, ripe for the perpetuation of a police raj and one-party rule, tending to dictatorship. Sound conventions to build up a civil service to serve all persons and groups, free from ministerial and one-party interference, have to be established.

That there could be no protection of civil rights nor healthy growth of democracy without the separation of the executive and the judiciary, which is one of the directive principles of the Constitution and a reform urged by the Congress since the nineties of the last century. Thus, with our lives at the mercy of the legislature, with preventive detention as a great right granted to us, with the conferment of executive power to stifle freedom of speech and expression in the name of preventing unfriendly foreign relations and incitement of offences and promoting public order, with police excesses and one-party rule, with the equal protection of law being denied in practice, with a magistracy subject to police influence, with freedom of association obstructed by many laws and orders, and with a backward democracy which complains not, we have today all the ingredients of an authoritarian rule slowly passing to a police State or near-dictatorship.

Mr. Sivaswamy urged the formation of a permanent commission on civil rights at the Union level, which will examine the working of the department of law and order, appraise the status of civil rights and issue regular reports. The formation of a civil rights section in each State as part of the department of justice, which should not be combined with the law and order department and should be under a separate Minister other than the Home Minister, was also necessary. Such a section, he added, exists in the United States and it maintains a number of prosecuting lawyers. This section receives complaints from the public about the infringement of civil rights by officials or non-officials and verifies the offences and prosecutes the offenders.

SUBVERSION FROM WITHIN

BY THE WHITTILING AWAY OF BASIC RIGHTS

We are keenly aware that equal to the danger of subversion from without by means of force and violence is the danger of subversion from within by the gradual whittling away and the resulting disintegration of the very pillars of our freedom.—California Court of Appeals in holding loyalty oath unconstitutional.