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FREEDOM OF ASSEMBLY AND PROTECTION OF THE PUBLIC PEACE

DECISION OF THE PUNJAB HIGH COURT ON SEC. 144, CR. P. C.

U. S. CONSTITUTIONAL LAW ON THE SUBJECT

The decision of the Punjab High Court in the case of Master Tara Singh, sustaining the validity of sec. 144 of the Criminal Procedure Code (vide p. ii:55 of the BULLETIN), in so far as the power it confers on a magistrate to prohibit the holding of meetings in a public place is concerned, if in his opinion such prohibition "is likely to prevent, or tend to prevent, obstruction, annoyance or injury, . . . or a disturbance of the public tranquillity, or a riot, or an affray," raises the vastly important question of the proper limits of free assembly and free speech. In discussing this question, the constitutional law of the United States would afford us the most valuable guidance, and, therefore, we give below the principles of that law as we have been able to deduce them from the opinions of the Supreme Court of that country in some of the leading cases.

It is obvious that some limits must be set to the right of free assembly and free speech in public places, for though unhampered exercise of the right is basic to democracy, it often comes into conflict with other social interests like protecting the public peace and good order, which are of no less importance to a civilized community. And the practical problem that is presented is how best to reconcile, as Mr. Justice Frankfurter has put it in his concurring opinion in the recent case of *Niemotko v. Maryland*, 340 U. S. 268, decided on 15th January 1951, "claims of the right to disseminate ideas in public places" with "claims of an effective power in government to keep the peace" and to protect such other interests.

OBSTRUCTION AND ANNOYANCE

Because sec. 144 speaks of control of public assemblages with a view to prevention of "obstruction" and "annoyance," which is a comparatively minor problem, we shall first set forth the manner in which gatherings on streets and thoroughfares and in public parks, is regulated in the United States. It is recognized in that country that streets and parks are proper places for holding public

meetings, whether for discussion or demonstration, and that local authorities must make them available for that purpose, though reasonable conditions may be prescribed for the use of them. In *Hague v. C. I. O.* (1939) 307 U. S. 496, the Supreme Court declared :

(Streets and parks) time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the . . . liberties of citizens.

And it added :

The privilege of a citizen . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all ; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order ; but it must not, in the guise of regulation, be abridged or denied.

Thus, towns and cities have the authority to regulate the use of public grounds and have thus the authority to a certain extent to regulate public assemblages. Their first duty would be to keep the streets open and available for movement of people and property, the primary purpose to which streets are dedicated. Then they might impose conditions as to the holding of meetings in regard to time and place and manner "so as to serve public convenience," but the conditions must be such that they will not unduly abridge the right of assembly guaranteed in the Constitution. Local authorities have generally developed a permit system for allowing the use of streets and parks for meetings, requiring a permit to be taken for the holding of any public gathering, but they have to take care that their ordinances do not give power to an official to grant or refuse a permit in his discretion. If such should be the case, i. e., if unlimited discretion be given to refuse permits, say, to unpopular

groups like Jehova's Witnesses, the courts would declare an ordinance giving such discretion void, holding that the licensing power has been made the instrument of arbitrary suppression of the right of free assembly and free speech. The ordinance must prescribe proper standards for the exercise of official discretion, must not contain any kind of prohibitions which will amount to censorship, suppression or previous restraints and must not be discriminatory, either in express terms or in effect and substance [*Lovell v. Griffin* (1938) 303 U. S. 444; *Schneider v. Irvington* (1939) 308 U.S. 147; *Cantwell v. Connecticut* (1940) 310 U. S. 296; *Saia v. New York* (1948) 334 U. S. 558]. This is enough to show that in the United States any statute which gives arbitrary power to an official to interfere with gatherings on the ground that they are likely to cause "obstruction" or "annoyance" will be held unconstitutional by the Supreme Court of that country.

MAINTENANCE OF PEACE AND ORDER

But the more important, and to us the more immediately pertinent, question is in what circumstances officials are permitted in the United States to deny or restrict the right of free assembly on the ground of disturbance of the public peace. The law on this subject will be best illustrated by citing the case of *Cantwell v. Connecticut* (1940) 310 U. S. 296. In it the Supreme Court declares that "the state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders" but "the alleged protection of the state's interest" must not be pressed "to a point where it has come into a fatal collision with the overriding interest protected by the federal compact," i. e., by the federal Constitution. And then the Court goes on to deal with incitement to breach of the peace of which Jesse Cantwell was convicted by the trial court. It says:

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 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.

This sets forth in very clear terms the conditions in which state or local authorities can step in and interfere with the exercise of the right of free assembly and free speech on the ground that such exercise provokes disorder. A law or an ordinance which provides for curbing the right would be valid, if "narrowly drawn to prevent the supposed evil;" only the courts would then apply the "clear and present danger" rule to the facts of the situation and decide

whether the law or the ordinance was properly administered. In this particular case, however, Jesse Cantwell was not charged with a statutory offence, but with the common law offence of inciting a breach of the peace. Thus, as the Court put it, "here was a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." A statute of such a character would have been held to be lacking in due process. But Cantwell's conduct was found by the Court to be not such as to create a clear and present danger, and the Court therefore reversed the conviction on this count. Its ruling was:

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.

The application of the clear and present danger rule enunciated in *Schenck v. United States* (1919) 249 U. S. 47 helps to limit interference with assemblages to occasions when disturbance of the public peace is of a grave character.

We shall here give a recent instance of a case in which the clear and present danger test was applied: it is the case of *Feiner v. New York* (1951) 340 U. S. 315. Here Irving Feiner, a young student, made a street-corner speech, of which the main purpose was to protest against cancellation by the city authorities of a permit which they had granted to a former attorney general to speak on the subject of racial discrimination and civil liberties and to ask the audience to attend a meeting which had been arranged for this purpose that evening. But in the course of his remarks Feiner used derogatory language with reference to the city authorities, President Truman and the American Legion and, what is more, he was alleged to have asked the negroes to rise up in arms and fight for equal rights. In view of the excitement aroused by his speech, the police requested him to stop speaking, but he ignored these requests, whereupon he was arrested and prosecuted for disorderly conduct under New York's Penal Law, which defines "disorderly conduct" as follows:

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offence of disorderly conduct:

1. uses offensive, disorderly, threatening, abusive or insulting language, conduct or behaviour;
2. acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others. . . .

The trial judge convicted him, holding that "the officers were fully justified in feeling that a situation was

developing which could very, very easily result in a serious disorder." His view was sustained by an intermediate appellate court and by a unanimous decision of the New York Court of Appeals, which said:

An imminent danger of a breach of the peace, of a disturbance of public order, perhaps even of riot was threatened. The defendant... so inflamed and agitated a mixed audience of sympathisers and opponents that, in the judgment of the police officers present, a clear danger of disorder and violence was threatened.

When the matter went up on a writ of certiorari to the U. S. Supreme Court, the Court, seeing that "the estimate of a particular local situation thus comes here with the momentum of the weightiest judicial authority of New York," affirmed the conviction by a majority decision of 5 to 3. It said:

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving over-zealous police officials complete discretion to break up otherwise lawful public meetings. ... But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and *undertakes incitement to riot*, they are powerless to prevent a breach of the peace. Nor in this case can we condemn the considered judgment of three New York courts approving the means which the police, *faced with a crisis*, used in the exercise of the power and duty to preserve peace and order. (Emphasis supplied.)

Justices Black, Douglas and Minton dissented on the ground that the situation did not constitute "any imminent threat of riot or uncontrollable disorder," Mr. Justice Black particularly making the point that the policeman, instead of protecting the speaker, proceeded to stop him. He said:

The police of course have the power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. Here the policemen did not even pretend to try to protect petitioner. ... Their duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.

The majority judgment is widely regretted as a setback to the right of free assembly and free speech, but it is still of great importance as showing that the principle to be applied in such cases is the principle, laid down by the late Justice Holmes, of "a clear and present danger."

ANTICIPATED DISORDERS

But the above case deals with a limitation upon free assembly and free speech by a sanction imposed after the event, i. e., after disorders have broken out or are alleged to have broken out. However, we are more concerned, in discussing sec. 144, Cr. P. C., with prohibition of public meetings on the ground that, but for such prohibition, the public peace will be or is likely to be disturbed.

On this point also there are decisions of the U. S. Supreme Court to guide us. The most important of such decisions is that of *Hague v. C. I. O.* (1939) 307 U. S. 496, to which we have referred above in another connection. In this case the Court had to pass on a municipal ordinance prohibiting public assemblies without a permit which the Director of Public Safety was authorized to refuse if upon investigation he should believe it proper to do so for the purpose of preventing riots, disturbances or disorderly assemblage. The district court of New Jersey had held the ordinance unconstitutional in that it imposed a previous restraint. The Supreme Court sustained this finding, saying:

We think the Court below was right in holding the ordinance... void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent "riots, disturbances or disorderly assemblage." It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly "prevent" such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right. (Emphasis supplied.)

Here the facts were that certain civic and veterans' organizations had condemned the C. I. O. and on at least one occasion had accompanied such condemnation with threats. This was however merely an excuse for barring C. I. O. meetings, because, as Mr. Alison Reppy, Dean, New York Law School, says in "Civil Rights in the United States," at p. 70, "actually in this case the city officials had been instrumental in stirring up the opposition."

This points up the great danger that lurks in a blanket authority to prohibit meetings such as sec. 144 of our criminal code confers on all magistrates in the country. In the presence of a law giving uncontrolled power to officials to interfere with the right of free assembly, a situation is almost inevitable in which the officials themselves produce conditions affording a plausible justification for the banning of meetings which, under the Constitution properly interpreted, must be allowed.

A very similar case (*Sellers v. Johnson*) happened in 1947; only in this case the officials had acted in good faith while in the Hague case they had not. In September 1946

(the "Harvard Law Review" for February 1948 reports), Jehova's Witnesses congregated from all the surrounding country for meetings in the public park of a small Iowa town. Substantial opposition arose, which was "not based on what the Witnesses might say ... but upon the fact that certain citizens of the town and surrounding country disliked the organization on account of its attitude in opposing the draft (compulsory service) and refusing to take any part in the 2nd World War." During the second meeting fights developed, both sides sustaining bloody noses. Thereafter, protection was requested of the sheriff, who asked that the Witnesses hire a hall so that he might better protect them. This they refused to do and announced their intention of holding another meeting in the park. Word came to the sheriff that "hundreds of G. I.'s" would attempt to prevent the meeting and that trouble and bloodshed were likely. A hundred citizens were deputized, the roads blockaded, and the Witnesses prevented from entering the town. When the Witnesses sought to enjoin such action by officials, the district court found that, although the Witnesses had a constitutional right to assemble for this peaceful purpose, the "clear and present danger" of mob violence justified denial of the injunction, 69/F. Supp. 778 (S. D. Iowa).

This case is better known for the judgment of the Circuit Court of Appeals reversing the judgment of the trial court [*Sellers v. Johnson* (8th cir. 1947) 163 F. Supp. 877]. The appellate court's decision meant that the alleged clear and present danger of mob violence did not justify curtailment of the right of free assembly in this case and that there was a violation of the right. The decision is of such vast importance that we think we should deal with it separately in a later issue, but for the moment we wish to bring prominently to the notice of the reader the fact that even the district court dismissed the petition of Jehova's Witnesses for an injunction only be-

cause of the existence, in its opinion, of a clear and present danger.

The present status of the law in regard to prohibition of meetings on the ground of apprehension of disorder if they were allowed is a recent development in the United States. There are instances in which the state courts have supported the action of local officials in preventing public gatherings because of a likelihood of disturbances arising. [*People v. Burman*, 154 Mich. 150, 117 N. W. 589 (1908); *West v. Commonwealth*, 208 Ky. 735, 271 S. W. 1079 (1925).] Because of such decisions Professor Zechariah Chafee could not express a positive opinion in the article on the Right of Assembly which he contributed to the "Encyclopaedia of Social Sciences" in 1930. Still he went so far as to say that "it is exceedingly doubtful, however, if the meeting may be forbidden in advance on this ground," viz., that the peace might be broken by the opponents. Decisions in subsequent cases like *Hague v. C. I. O.* and *Sellers v. Johnson* should now dispel any lingering doubts that Professor Chafee had in mind when he wrote the above article. And now the right of assembly has acquired the sure status which the distinguished jurist whom we quoted in our last issue assigned to the right in the opinion which he gave us. The opinion is worth citing once again:

I am convinced that our Supreme Court would not uphold any statute which permitted the banning of meetings in advance merely because disorders were anticipated.

After studying the trend of decisions referred to above, there will, we believe, be little doubt left in the mind of the reader that the High Court of the United States will give short shrift to sec. 144 of the Indian Criminal Code the validity of which the Punjab High Court has sustained, which gives wholly arbitrary power to a magistrate, should "a speedy remedy" appear "desirable" to him, to prohibit a meeting even if in his opinion it only "tends to prevent a disturbance of the public tranquillity."

CONTROL OF PROCESSIONS AND MEETINGS

PROVISIONS IN PUBLIC SAFETY ACTS

Apart from the uncontrolled authority given by sec. 144 of the Criminal Procedure Code to magistrates to prohibit any meetings or demonstrations when as a "speedy remedy" they think it desirable so to prohibit, there are provisions in the Public Safety Acts of all the states to control processions and meetings. The following are typical provisions in this respect:

(1) The Provincial Government may, for the purpose of securing public safety or the maintenance of public order or . . . prohibit, restrict or impose conditions on the holding of processions, meetings or assemblies.

(2) For the purposes of sub-section (1) any procession, meeting or assembly which is open to the public or to any class or portion of the public, whether held in a public or private place and whether admission thereto is restricted by the issue of tickets or otherwise, shall be deemed to be a public procession, meeting or assembly as the case may be.

It will be observed that the Acts give power to the executive to deny or abridge the right to freedom of assembly in its sole discretion.

Defence Regulation of England

In England such power was thought necessary in war time when the very existence of the State was in danger because of the propaganda carried on by fifth-columnists, but as soon as the war was over the Regulation conferring this power, viz., Defence Regulation 39E of 1939, was withdrawn. The relevant portions of the Regulation are given below :

(1) The Secretary of State, if satisfied with respect to any area in the United Kingdom that the holding of public processions or of any class of such processions in that area would be likely to cause serious public disorder or to promote disaffection, may by order prohibit, for such period as may be specified in the order, the holding in that area of processions or processions of that class, as the case may be.

(2) The Secretary of State may give directions prohibiting the holding in the United Kingdom of any meeting as to which he is satisfied that the holding thereof would be likely to cause serious public disorder or to promote disaffection.

The Regulation no doubt gave to the Government during the continuance of the war wholly arbitrary authority to prohibit or otherwise regulate processions or assemblages, but even so it would be well to note that the Government had imposed upon itself the obligation not to invoke this authority except when it believed that the holding of the processions or assemblages "would be likely to cause serious public disorder or to promote disaffection." It is true that the Government was itself to be the judge of the circumstances in which the authority accorded to it could be employed, without the judiciary being allowed to pass upon the situation. But the limitations to which the Government had voluntarily subjected itself was, in the tradition of England, a valuable safeguard that the discretion given to the executive would not be abused. Our state Governments both lack such a tradition and are immune from the pressure of public opinion which restrains the executive in using any arbitrary powers given to them. The result is that for four years in which no critical situation at all comparable to the situation that existed in England when such powers were assumed the state Governments have been employing these powers in an unrestrained manner and there is yet no sign of their willingness to give them up, whereas in England the Regulation in question giving such powers was repealed immediately after the war came to an end.

USE MADE OF THE REGULATION

If these were the powers which the British Government assumed to itself during the pendency of war and which it renounced immediately after the war, what was the actual use it made of them while they lasted? On this point the testimony of an American observer, Mr. Clinton L. Rossiter, may be treated as conclusive. He says in "Constitutional Dictatorship" (1948) at pp. 196-9 :

One of the most impressive features of the British government of the recent war was the scrupulous and consistent regard for the civil liberties of the people maintained throughout the conflict by the government itself and the myriad of authorities carrying out its will. Although the freedom of the subject was placed squarely in the hands of the government to respect or invade according to its own appraisal of the necessities of the moment, the encroachments upon this freedom were in fact rather trifling, even in the darkest days of the Nazi threat to the island.

(Freedom of the press) suffered scant abridgment in wartime Britain. . . . The freedoms of speech and assembly underwent even less invasion, although they too were at the mercy of the government, under such regulations as 39A, 39B, 39BA, and 39E. Regulation 39A provided for the prosecution of persons inciting Britons to disaffection or seducing them from their duties under the Crown; 39B did the same for false and malicious propaganda; 39BA authorized a penalty of one month's imprisonment and a fine of £50 for any person summarily convicted of publishing "any report or statement . . . likely to cause alarm or despondency;" and 39E gave the Home Secretary—poor Mr. Herbert Morrison—an absolute veto on any "processions" or meetings "likely to cause serious public disorder or to promote disaffection," another provision which the American people would have regarded as a shocking violation of their liberties, but which the British people (a few thousand miles nearer the sound of the guns) could hardly have spared their hard-pressed leaders. The spectacle of soap-box orators demanding a second front (since they didn't have to open it) before crowds in Trafalgar Square provided conclusive proof that British democracy was still very much of a going concern. Speaking of the general position of civil liberties during the war, the author says :

The men who ruled England in 1940 possessed arbitrary power such as the Tudors themselves did not enjoy, and the men who rule it in 1948 are equally able to claim such power should the nation again come to the crisis of war. And yet this power has had and will continue to have but one reason for its existence : the maintenance of democracy and freedom within the realm of England.

Public Order Act, 1936, in England

In fairness it must be mentioned that the British Government in 1936 abridged the right of assembly which till then was wholly unrestricted by equipping itself with the Public Order Act, sec. 3 of which gave the executive power to regulate processions. We shall first set forth the provisions of this section and then consider the safeguards they contain. The section is as follows :

(1) If the chief officer of police, having regard to the time or place at which and the circumstances in

which any public procession is taking place or is intended to take place and to the route taken or proposed to be taken by the procession, has reasonable ground for apprehending that the procession may occasion serious public disorder, he may give directions imposing upon the person organizing or taking part in the procession such conditions as appear to him necessary for the preservation of public order including conditions prescribing the route to be taken by the procession and conditions prohibiting the procession from entering any public place specified in the directions :

Provided that no conditions restricting the display of flags, banners, or emblems shall be imposed under this subsection except such as are reasonably necessary to prevent risk of a breach of the peace.

(2) If at any time the chief officer of police is of opinion that by reason of particular circumstances existing in any borough or urban district or in any part thereof the powers conferred on him by the last foregoing sub-section will not be sufficient to enable him to prevent serious public disorder being occasioned by the holding of public processions in that borough, district or part, he shall apply to the council of the borough or district for an order prohibiting for such period not exceeding three months as may be specified in the application the holding of all public processions or of any class of public processions so specified either in the borough or urban district or in that part thereof, as the case may be, and upon receipt of the application the council may, with the consent of the Secretary of State, make an order either in terms of the application or with such modifications as may be approved by the Secretary of State.

This subsection shall not apply within the City of London as defined for the purposes of the Act relating to the City Police or within the Metropolitan police district.

(3) If at any time the Commissioner of the City of London police or the Commissioner of police of the Metropolis is of opinion that, by reason of particular circumstances existing in his police area or in any part thereof, the powers conferred on him by subsection (1) of this section will not be sufficient to enable him to prevent serious public disorder being occasioned by the holding of public processions in that area or part, he may, with the consent of the Secretary of State, make an order prohibiting for such period not exceeding three months as may be specified in the order the holding of all public processions or of any class of public processions so specified either in the police area or in that part thereof, as the case may be.

(4) Any person who knowingly fails to comply with any directions given or conditions imposed under this section, or organizes or assists in organiz-

ing any public procession held or intended to be held in contravention of an order made under this section or incites any person to take part in such a procession, shall be guilty of an offence.

ANALYSIS OF THE PROVISIONS

Under sub-sec. (1) the head of the police is empowered, not to prohibit a procession, but only to control it by imposing certain conditions on the manner of taking it out. The main condition that the section contemplates is that of prescribing the route by which it must go. At the time the Act was passed it was feared that a fascist and a communist procession would take the same route and collide against each other causing a breach of the peace. In order to avoid such a contingency, power was given to the police to direct that one procession should go one way and the other another way. Even such a restriction could be imposed only when the police officer "has a reasonable ground for apprehending that the procession may occasion serious public disorder." The words in the section originally proposed were that a police officer could route a procession when he "is of the opinion" that serious public disorder would be caused. But because these words would give uncontrolled power to the officer they were changed into those that stand now in the section so that the direction given would be "open to challenge in the courts," as Mr. Dingle Foot put it, which ensures that unless there is in fact reasonable ground to fear that a breach of the peace would occur there would be no interference with the procession.

But there might be cases in which prescribing different routes for rival processions would not be possible. In such cases nothing short of prohibition of the proposed processions would become necessary. Such prohibition was provided for in sub-sec. (2). But even in these "perfectly exceptional cases," as the then Home Secretary, Sir John Simon, explained, the power of prohibition was accorded not to the head of the police, but to a county or borough council on an application from the latter. The council being an elected body, the requirement of its approval provided a democratic safeguard. But even the council's approval was not enough; a prohibitory order must receive the consent of the Home Secretary. Thus a triple check was provided. First, the head of the police must propose; secondly, an elected council must approve; and, thirdly, the Secretary of State must consent. Then only can a prohibitory order come into effect, and even so it can remain in operation only for three months at the outside. A similar provision was made in respect of the City of London in sub-sec. (3). The word "knowingly" in sub-sec. (4) may also be noted. It was introduced in order to avoid punishing a person who did not wilfully commit an offence.

We think it will be recognized by all dispassionate observers that although the Act provides in sec. 3(2) and (3) for a total prohibition of processions (for a

maximum period of three months), it also affords all such safeguards as it is practicable to devise in order that this drastic prohibition will not be abused. In spite of the checks thus incorporated, the Government was reluctant to propose, and Parliament was reluctant to adopt, a measure interfering with the right to freedom of assembly, it being contrary to British traditions. But the circumstances which caused such a proposal to be brought forward were exceptional. Those were the times when Sir Oswald Mosley's "British Union of Fascists," by its vile propaganda designed to stir up racial animosity and bring about breaches of the peace, had actually led to grave disturbances in the East End of London, in Leeds and in Manchester. On account of such abnormal circumstances the measure was welcomed by all sections of public opinion; and it was in fact introduced at the request of very influential deputations of a number of public bodies. That it received the hearty support of the Labour Party which was in opposition is a guarantee of the fact that some such law was necessary and that the particular law was not unreasonable. The leader of the Labour Party, Mr. Herbert Morrison, thus defended sub-sec. (2) of sec. 3 providing for the prohibition of processions, when the Act was under debate in Parliament:

The problem, which must not be under-estimated, was that a certain organization, not only in London, but in Leeds and to some extent in Manchester, deliberately marched in and about a certain quarter of the district for the deliberate and conscious purpose of

provoking disorder and trouble, and I know they did it because they were consciously and deliberately following the technique of the Nazis in Germany. . . . If that goes on and if there are not adequate powers to limit it, a terrible situation will develop in such districts. . . . The problem arises not only in the East End, but in Leeds, where people deliberately marched in and about the Jewish area in the city, and in Manchester. . . .

(Sub-sec. 2 of sec. 3) could not provide more checks and more democratic guarantees for its reasonable use. First of all, the police . . . must have ground for apprehension. Secondly, they must obtain the support of the district council or the borough council. . . . It can be an effective embargo on the police. There must be an affirmative consent by the district or borough council, and, finally, the consent of the Secretary of State, which can be challenged in this House. I venture to think that, in the circumstances, it is not an unreasonable sub-section.

It will be seen that this Act is mildness itself in comparison to the provisions in our Public Safety Acts which give absolute powers to the executive to interfere with the citizens' right of assembly. We do not know on how many occasions prohibition of public processions had actually to be invoked in England, but we believe that Sir Oswald Mosley and his fascist organization having faded out of politics, the Act has fallen into complete desuetude.

PRINCIPLES GOVERNING ADMISSION TO BAIL

Bail was fixed by the District Court for the Southern District of California (U. S. A.) in the uniform amount of \$50,000 for each of twelve members of the Communist Party charged with conspiring to advocate the overthrow of the government by force or violence. In a unanimous judgment delivered on 5th November 1951 in the case of *Stack v. Boyle* the Supreme Court of the United States held that "the fixing of bail before trial in these cases cannot be squared with the statutory and constitutional standards for admission to bail." The principles governing allowance of bail were laid down in the opinion written by the Chief Justice as follows:

1. Federal law has unequivocally provided that a person arrested for a non-capital offence *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defence and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

2. The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found

guilty. . . . Bail set at a figure higher than an amount reasonably calculated to fulfil this purpose (of insuring the presence of the accused for trial) is "excessive" under the Eighth Amendment (which says that "excessive bail shall not be required").

The Court remarked that the amount of bail as prescribed by Rule 46(c) of the Federal Rules of Criminal Procedure must be fixed with reference to each defendant separately, whereas in this case a uniform amount was fixed without individual inquiry, the only evidence the Government had offered being that other persons previously convicted under like charges had forfeited bail. On this point the Court said:

The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute (*viz.* the Smith Act) under which petitioners have been indicted.

" Bail Must Not Be Sky-High "

The principles enunciated above are so important that we give below extracts from a separate opinion written by Justice Jackson and concurred in by Justice Frankfurter, which elaborates these principles somewhat in greater detail. Justice Jackson says:

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses and preparing a defence. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offence not punishable by death, Federal Rules of Criminal Procedure, Rule 46 (a) (i) providing: " a person arrested for an offence not punishable by death shall be admitted to bail . . . " before conviction.

Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them. Rule 46 (f).

In allowance of bail, the duty of the judge is to reduce the risk by fixing an amount reasonably calculated to hold the accused available for trial and its consequence. Rule 46 (c). But the judge is not free to make the sky the limit, because the Eighth Amendment to the Constitution says: " Excessive bail shall not be required . . . "

Congress has reduced this generality by providing more precise standards, stating that "... the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offence charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." Rule 46(c).

These statutory standards are not challenged as unconstitutional, rather the amounts of bail established for these petitioners are alleged to exceed these standards. We submitted no constitutional questions to argument by the parties, and it is our duty to avoid constitutional issues if possible. For me, the record is inadequate to say what amounts would be reasonable in any particular one of these cases and I regard it as not the function of this Court to do so. Furthermore, the whole Court agrees that the remedy pursued in the circumstances of this case is inappropriate to

test the question and bring it here. [The remedy sought was that of a writ of habeas corpus.] But I do think there is a fair showing that these congressionally enacted standards have not been correctly applied.

It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46 (c). Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants do not lose their separateness or identity. While it might be possible that these defendants are identical in financial ability, character and relation to the charge—elements Congress has directed to be regarded in fixing bail—I think it violates the law of probabilities. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.

Thus, the amount is said to have been fixed not as a reasonable assurance of their presence at the trial, but also as an assurance they would remain in jail. There seems reason to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail.

" FACTUAL SITUATION MUST NOT BE IGNORED "

Agreeing with our criticism of the Supreme Court's decision in the case of Dr. Khare's externment (see p. ii:57), in which the Court omitted to consider facts in determining whether the Punjab Public Safety Act was constitutionally applied, an eminent lawyer of New York gives us the most recent pronouncement of the U. S. Supreme Court as to the respective roles which that Court and the state courts play in deciding what the facts actually were in any particular case involving the question of violation of fundamental rights guaranteed by the federal Constitution. In *Gallegos v. Nebraska* (1951) 342 U.S. 55, the Supreme Court announced the following rule:

As this Court has been entrusted with power to interpret and apply our Constitution to the protection of the right of an accused to federal due process in state criminal trials, the proper performance of that duty requires us to examine, in cases before us, such undisputed facts as form the basis of a state court's denial of that right. . . . A contrary rule would deny to the federal Government ultimate authority to redress a violation of constitutional rights. As state courts also are charged with applying constitutional standards of due process, in recognition of their superior opportunity to appreciate conflicting testimony, we give deference to their conclusions on disputed and essential issues of what actually happened.

WEST BENGAL SPECIAL COURTS ACT, 1950

Held Void by the Supreme Court

The Constitution Bench of the Supreme Court, consisting of the acting Chief Justice (Mr. Patanjali Sastri), Mr. Fazl Ali, Mr. Mehr Chand Mahajan, Mr. B. K. Mukherjee, Mr. S. R. Das, Mr. Chandrasekhara Aiyar and Mr. Vivian Bose, on 11th January, declared by a majority that the West Bengal Special Courts Act, 1950, which authorized the state Government to constitute special courts to try certain cases in accordance with a special procedure laid down in the Act, to be ultra vires of the Constitution since it infringed art. 14 which guarantees equality before law to all persons.

The acting Chief Justice, dissenting from all the other Judges, held that the Act was valid in its entirety, while Their Lordships Mr. Fazl Ali, Mehr Chand Mahajan, Mr. Chandrasekhara Aiyar and Mr. Vivian Bose held that the whole Act was ultra vires. Mr. Justice Mukherjee and Mr. Justice Das held that sec. 5 (1) of the impugned Act was ultra vires to the extent that it authorized the state Government to single out cases and refer them to a special court for trial; but while Mr. Justice Das expressed the positive opinion that the rest of the section was valid, Mr. Justice Mukherjee left the question open. Sec. 5(1) is as follows:

A special court shall try such offences or classes of offences or cases or classes of cases as the state Government may, by general or special order in writing, direct.

The judgment was given on an appeal preferred by the West Bengal Government under art. 132 (1) of the Constitution from the judgment and order of a full bench of the Calcutta High Court dated 28th August 1951, quashing the conviction of 50 persons passed by a special court constituted under the West Bengal Special Courts Act, 1950. The appeal was dismissed by the Supreme Court by a majority of six to one, the acting Chief Justice alone dissenting.

FACTS OF THE CASE

The respondent (Anwar Ali Sarkar) along with 49 others were tried before a special judge appointed under the West Bengal Special Courts Act, 1950, upon charges of murder, conspiracy to murder, commission of grievous hurt with deadly weapons, charges under the Explosive Substances Act and a charge under section 201 IPC for causing disappearance of evidence of murder. The case arose out of an incident at the factory of Messrs. Jesson and Company Ltd. at Dum Dum, on February 26, 1949, in the course of which the respondent and the co-accused were alleged to have attacked the officials of the company, battered them to death and threw their corpses into a blazing furnace.

On August 17, 1949, the West Bengal Special Courts Ordinance which provided for speedier trial of certain offences was promulgated under section 88 of the Government of India Act, and on October 28, 1949, the Government of West Bengal, under the provisions of the Ordinance, appointed Mr. S. N. Guha Roy, as special judge to try cases under the Ordinance.

The Government of West Bengal by a notification published on January 26, 1950, directed that the case of the respondent and the 49 co-accused be tried by Mr. S. N. Guha Roy as special judge under the terms of the Ordinance.

On March 15, 1950, the Ordinance was superseded by the West Bengal Special Courts Act 1950, which received the assent of the President of India on that day.

On April 2, 1950, the special judge, on a complaint filed by the additional Superintendent of Police, took cognizance of the cases against the respondent and his co-accused.

The special judge, by his judgment dated March 31, 1951, convicted the respondent and his co-accused and sentenced some of them to transportation for life and others to various terms of rigorous imprisonment. Rules were issued upon a number of them by the High Court to show cause why the sentence for transportation for life should not be enhanced to a sentence of death.

The respondent filed a petition before the Calcutta High Court under article 226 of the Constitution for a writ of certiorari for quashing his conviction and sentence on the ground that his trial before the special judge was not validly held. On May 1, 1951, Bose J. issued a rule upon the appellant, the state of West Bengal, to show cause.

On a report made by Bose J. to the Chief Justice that the petition raised points of great importance, the petition was referred for a decision of the full bench, consisting of Harries, C.J., Chakravarti, Das, Banerjee and S. R. Das Gupta, J.J.

On August 28, 1951, the full bench delivered judgment, Harries, C.J., by his judgment, with which Das and Banerjee, J.J., concurred, allowed the respondent's petition and quashed the proceedings, conviction and sentences in the case of the respondent and his co-accused and directed that they be tried in accordance with the law. Hence the appeal.

QUESTION BEFORE THE COURT

The questions for consideration in the appeal were whether section 5(1) of the West Bengal Special Courts Act, 1950, in so far as it empowers the state Government to direct "cases" to be tried by a special court under the Act, was void on the ground of its being in contravention of article 14 of the Constitution, and whether the notification issued by the Government directing the trial of the respondent under section 5(1) of the Act was ultra vires article 14 of the Constitution.

The Attorney-General of India had argued, inter alia, that even assuming that the special law provided for a procedure different from that in the Code of Criminal Procedure, that by itself would not vitiate that law as coming under the mischief of article 14. The Attorney-General had further contended that it was well settled that discrimination by legislation was permissible if the law made was on the basis of "reasonable classification."

On behalf of the respondents, it was argued by Mr. J. N. Ghosh that the impugned Act contravened the equality clause in the Constitution and was thus bad, because section 5(1) of the Act left complete discretion with the executive to decide the types of cases which were to go before a special court.

THE JUDGMENT

Mr. Justice Fazl Ali said :

The impugned Act has completely ignored the principle of classification followed in Cr. P. C. and it proceeds to lay down a new procedure without making any attempt to particularize or classify the offences to which it is to apply.

To say that the reference to speedier trial in the preamble of the Act is the basis of classification is to read into the Act something which it does not contain and to ascribe to its authors what they never intended.

The Act is a verbatim copy of the earlier Ordinance which was framed before the present Constitution came into force and article 14 could not have been before the minds of those who framed it because that article was not then in existence.

However well-intentioned the impugned Act may be, it will have to be suitably redrafted in order to conform to the requirements of the Constitution.

Mr. Justice Chandrasekhara Aiyar was of the opinion that the whole Act was ultra vires the Constitution and deletion of the word "cases" from sec. 5(1) would not save the rest of the Act from being invalid. He said :

The State Government may even arbitrarily determine the classes of cases to be tried by the special court and if it does so, its action will be within the powers conferred by the Act. The Act indicates no basis whatsoever on which such classification should be made.

Mr. Justice Mahajan said :

Democracy implies respect for the elementary rights of man, however suspect or unworthy. Equality of right is a principle of Republicanism and article 14 enunciates this equality principle in the administration of justice. In its application to legal proceedings the article assures to everyone the same rules of evidence and modes of procedure. In other words, the same rule must exist for all in similar circumstances. Not only does the special law deprive them of the safeguard of the committal proce-

dures and of trial with the help of jury or assessors, but it also deprives them of the right of a de novo trial in case of transfer and makes them liable for conviction and punishment for major offences other than those for which they may have been charged or tried.

Mr. Justice Vivian Bose said :

Judged by the question whether the Act gives equal terms of protection in the defence of liberties which is expected of a sovereign democratic republic of ours, the whole Act was void, for it offended article 14—equality before law.

Mr. Justice Das, who concurred in the majority judgment, held that the whole of section 5(1) of the impugned Act could not, in his opinion, be declared to be invalid. His Lordship held that that part of it which authorized the state Government to direct particular cases to be tried by a special court offended against the equality clause.

Stating that the object of the Act could not by itself be the basis of selection of cases, His Lordship observed it must be based "on differentials distinguishing the case from other cases." He said :

It is not a question of an unconstitutional administration of a statute otherwise valid on its face, but here the unconstitutionality is writ large on the face of the statute itself.

In the longest of the seven judgments running to 20 pages, Mr. Justice Mukherjee observed that the impugned Act vested "an unrestricted discretion in the state Government to direct any cases or classes of cases to be tried by the special court in accordance with the procedure laid down in the Act." He said :

Assuming that the preamble throws any light upon the interpretation of the section, the necessity of a speedier trial is too vague to form a rational basis for the discriminations made.

Dealing only with the competence of the notification issued by the state Government, he said the notification came within the definition of law given under article 13(3) of the Constitution and could be impeached apart from the Act if it violated article 14.

The acting Chief Justice said :

Wide latitude must be allowed to a legislature in classifying persons and things to be brought under the operation of a special law and such classification need not to be based on an exact or scientific exclusion or inclusion. I cannot share the view of Das Gupta J. (of the Calcutta High Court) that the expediency of speedier trial is too vague and indefinite to be the basis of a well-defined classification. Legislative judgment in such matters should not be canvassed by courts applying doctrinaire "definite objective tests." It seems to me the state Government exercised a sound discretion in referring these cases to the special court, for there are obviously special features which mark out this group of cases as

requiring speedier trial and the charge of discriminatory treatment must fail.

The other connected appeal in the Supreme Court related to the order of the High Court quashing the pending criminal trial of Gajan Mali and five other persons by a special court for offences of murder and conspiracy to murder. This appeal also was dismissed by a 6 to 1 majority.

KASHMIR'S ZAMINDARI ABOLITION ACT

High Court Holds the Act Intra Vires

At the Kashmir High Court Mr. Justice Jailal Kilam dismissed on 25th January a test suit filed by Mr. Maghar Singh, a landlord, for declaring the Kashmir Big Landed Estates Abolition Act as ultra vires of the Yuvaraj, who is the recognized authority to make laws for the State.

His Lordship observed that for matters not reserved for the Union Parliament the powers of the Kashmir legislature were unfettered. He said:

Our State has acceded to the Indian Union as a result of an instrument of accession executed by the Ruler of this State. In that he has made it clear that accession would be with respect to three main heads of Defence, Communications and Foreign Affairs. This would mean that sovereignty of the State, so far as these three main heads are concerned, has ended as a result of the voluntary surrender by the State itself.

But this does not and cannot exclude reservation to itself of internal sovereignty over other matters not included in the above three heads. This right of the State has been conceded by the Indian Constituent Assembly by enacting article 370 in its Constitution. According to this article, Parliament has reserved to itself the right of enacting laws with respect to only those matters which are declared by Parliament to correspond to main heads of Defence, Foreign Relations and Communications. If Shree Yuvaraj had enacted a law with respect to any such matter as is reserved by article 370, I would have without a moment's thought declared such law as ultra vires of the powers of Shree Yuvaraj. But such is not the case here. He has not intruded upon any such field as is reserved for Parliament. He has not made use of any such powers as are denied to him.

In his 17-page judgment Mr. Justice Kilam rejected the plea advanced by the plaintiff's counsel that article 385 of the Indian Constitution applied to this State and under that article only such laws could be passed by the State legislature as are allowed by the Indian Constitution and that the Yuvaraj had no more authority than a State legislature. Because a State legislature was not competent to pass any law in violation of the fundamental rights, so the Yuvaraj who functioned as a legislature here could not have any such powers, said the plaintiff's counsel. He also pleaded that under article 385, section 5 of the State Constitution giving Yuvaraj inherent powers also stood repealed.

His Lordship rejecting these pleas observed that what article 385 did was in fact to recognize and save the inherent powers of the Yuvaraj under section 5 of the State Constitution, because he was the legislature in this State, and article 385 gave recognition to the legislative authority functioning immediately before the commencement of the Constitution.

Justice Kilam observed further that article 370 preserved the internal administrative authority of the State intact.

For matters which are not reserved for Parliament the Jammu and Kashmir legislature has unfettered right of legislation in all other matters and as such the Act in dispute cannot be held as ultra vires of the powers of the Yuvaraj who has been recognized as the law-making authority by article 385.

FUNDAMENTAL RIGHTS NOT APPLICABLE

He also rejected the plea of application of article 31 to this State and observed: "Reference to the Jammu and Kashmir Constitution Application Order, 1950, would show that the chapter on fundamental rights has not been made applicable to Jammu and Kashmir. Therefore any reference to this article is irrelevant." He also described as irrelevant the plea of hardship for the people of the State if the chapter on fundamental rights was not made applicable and stated that he was only to administer law as it stood.

His Lordship, rejecting the plaintiff's plea for compensation, observed that article 254 referred only to those enactments which the Indian Parliament was competent to enact for this State and entry 42 of the Concurrent List was not one of those matters because, according to article 370, Parliament could legislate for this State only for such matters as were specified by the Union President.

The plaintiff's counsel had argued that so far as the existing law was concerned, Parliament might or might not be competent to enact it and the existing law would prevail if a State law were repugnant to it.

[Article 254 (1) lays down that if a State law is repugnant to "a law made by Parliament which Parliament is competent to enact" or to "an existing law with respect to one of the matters enumerated in the Concurrent List," then the law made by Parliament or the existing law shall prevail and the State law "shall, to the extent of the repugnancy, be void."]

His Lordship rejected this plea and observed: "If this interpretation were to prevail it will make article 254 contradictory to all those articles of the Constitution which are applicable to Jammu and Kashmir and particularly article 370 and the Constitution Application Order, 1950."

Rejecting another plea that according to some British judgments no enactment ought to be so construed as would enable confiscation of property without compensation, His Lordship said these judgments emphasized only that if an act was silent as to compensation it should not be construed to mean no compensation unless it expressly provided otherwise. But the absence of a provision for compensation would not make a law ultra vires of the legislature. Apart from this, the Act under dispute does not deny compensation. Provision for annuity has been made in section 26 and settlement of the question of compensation has been left to the Constituent Assembly whose decision must be binding upon all, concluded His Lordship, thus upholding defence counsel Mr. Jaswant Singh's plea that the Act contained provision for determining compensation.

HABEAS CORPUS PETITIONS

Illegality Cured by a Fresh Order

The Constitution Bench of the Supreme Court on 25th January remitted the petition, Naranjan Singh Nathawan versus the State of Punjab, for further hearing before the division bench of the Court.

The Court had referred the matter to the former bench for consideration of the point whether an order of detention served upon a detenu after his petition for a writ of habeas corpus based on an earlier order was pending before a court of law was valid or otherwise.

The petitioner was arrested on July 5, 1950, under an order of the District Magistrate, Amritsar, in exercise of powers under section 3 of the Preventive Detention Act, 1950. The grounds of detention, under section 7 of the Act, were served on July 10, 1950. After the Preventive Detention Act was amended, a fresh order was served on the petitioner on May 17, 1951. The order was issued under sections 3 and 4 of the amended Act and was served on him on May 23, 1951.

The petitioner, thereupon, presented the present petition for his release, contending that the order was illegal, inasmuch as (1) the grounds of detention communicated to him on July 10, 1950, were "quite vague, false and imaginary," and (2) he was not furnished with the grounds on which the order dated May 17, 1951, was based. The petition was heard ex-parte on November 12, when the Supreme Court issued a rule nisi calling upon the respondent to show cause why the petitioner should not be released. It was posted for final hearing on November 23.

Meanwhile the State Government issued an order on November 18, revoking the order of detention of May 17, 1951, and on the same date the District Magistrate, Amritsar, issued yet another order for the detention of the petitioner under sections 3 and 4 of the amended Act. This last order along with the grounds on which it was based was served on the petitioner on November 19.

After the order of November 18, 1951, was served, the petitioner submitted a supplementary petition to the Supreme Court on November 28, challenging the validity of the last order on the ground that "it was only a device to defeat the habeas corpus petition of the petitioner in which a rule had already been issued." He also put forward an additional ground of attack on the legality of the order dated May 17, namely, that it fixed the term of detention till March 31, 1952, before obtaining the opinion of the advisory board as required by section 11 of the amended Act. This ground was evidently based on the view expressed by the Supreme Court that the specification of the period of detention in the initial order of detention under section 3 of the amended Act before obtaining the opinion of the advisory board rendered the order illegal.

In the return to the rule showing cause filed on behalf of the respondent, the Under-Secretary (Home) to the Government of the State explained the circumstances which led to the issue of the fresh order of detention dated November 18. He stated that the petitioner's case was referred to and considered by the advisory board constituted under section 8 of the amended Act, who reported on May 30, 1951, that there was sufficient cause for the detention of the petitioner. On the basis of this report the Government decided that the petitioner should be detained till March 31, 1952. But while a properly framed

order under sec. 11 should "confirm" the detention order and "continue" the detention for a specified period, the order of May 17, 1951, was issued under a misapprehension in the form of an initial order under sec. 13 of the amended Act on the same grounds as before without any fresh communication thereof to the petitioner. To avoid arguments based on possible defects of a technical and formal character, a fresh order of detention was issued under sec. 3 on November 18, 1951, and this was followed by a formal communication of the same grounds as before as there could be no fresh grounds, the petitioner having been throughout under detention.

Their Lordships' judgment recalled the recent case of Makhani Singh Tarsikka, in which the Supreme Court had observed (vide p. ii: 57):

It cannot be too often emphasized that before a person is deprived of his personal liberty, the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected.

The proposition applied with equal force, Their Lordships remarked, to cases of preventive detention before the commencement of the Constitution and it was difficult to see what difference the Constitution made in regard to the position. Indeed, the position was now made more clear by the express provisions of sec. 3 of the Act, which provided that a detention order might "at any time" be revoked or modified and that such revocation should not bar the making of a fresh detention order under sec. 3 against the same person. Their Lordships said:

Once it is conceded that in habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceedings, it is difficult to hold, in the absence of proof of bad faith, that the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf.

Detention Order Not Served

Harnam Das and Hari Ram, who had petitioned the court for writs of habeas corpus on the State of Punjab were ordered to be released by the Supreme Court on 28th January. Their Lordships held that, in fact, no order of detention as required by section 3 of the Preventive Detention Act, as amended, had been served upon the petitioners. What were served upon them were orders of arrest, which could not replace the order under section 3 of the Act, which provides that the Government may "make an order directing that such person be detained."

Membership of a Banned Party

A division bench of the Hyderabad High Court on 23rd January allowed the habeas corpus application of Armula Venkat Reddi, a detenu, and ordered his release.

Their Lordships held that even if a party like the Communist Party was banned, being a member of it could not be a ground for detaining a person unless acts prejudicial to the safety of the country were attributed to him.

Giving shelter to underground Communists and acting as a courier for them could not be regarded as indulging in activities prejudicial to the safety of the country and those grounds were outside the scope of the Preventive Detention Act.

Another detenu, Bakappa Bajanna Dhangar, was ordered to be released on 4th February. He was stated to have supplied rice and bread to Communists. But the Court held that "mere supply of rice and bread even to a criminal or an enemy is not an offence".

ELECTIONS AND THE JUDICIARY

High Courts have no Jurisdiction under art. 226

The Constitution Bench of the Supreme Court on 21st January by a unanimous judgment affirmed the decision of the Madras High Court dismissing the application made by Mr. N. P. Ponnuswami under art. 226 that the rejection of his nomination paper by the Returning Officer be set aside, the High Court's decision being that it had no jurisdiction to interfere with the order of the Returning Officer by reason of art. 329(b) providing that "no election (to a legislature) shall be called in question except by an election petition," etc.

The main controversy was about the meaning of the word "election" in the article. Mr. Justice Fazl Ali, who delivered the judgment of the Court, said that it appeared to him that the word had been used in Part XV of the Constitution to connote the entire procedure to be gone through to return a candidate to a legislature. After examining the scheme of this Part and the provisions in the Representation of the People Act, 1951, His Lordship summed up the conclusions arrived at by him as follows:

(1) Having regard to the important functions which the legislatures had to perform in democratic countries, it had always been recognized to be a matter of first importance that elections should be concluded as early as possible according to a time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections were over, so that the election proceedings might not be unduly retarded or protracted. (2) In conformity with this principle, the scheme of the election law in this country as well as in England was that no significance should be attached to anything which did not affect the "election," and, if any irregularities were committed while it was in progress and they belonged to the category or class which, under the law by which elections were governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition, and not be made the subject of a dispute before any court while the election was in progress.

The judgment meant that the High Courts in India had no jurisdiction to entertain petitions under art. 226 of the Constitution complaining of irregularity in election proceedings.

C. L. U. NEWS

Protest against Detention without Trial

The Executive Committee of the Bombay Civil Liberties Union passed at its meeting held on 4th February the following resolutions:

1.— DETENTION ACT'S RENEWAL

The Executive Committee of the Bombay Civil Liberties Union regrets to learn that the Government of India

proposes to introduce, in the next session of the present Parliament, legislation continuing for six months the present Preventive Detention Act which is to lapse from 1st April 1952. The Committee urges that the proper course for the present Government is to allow the present Act to lapse from 1st April 1952.

2.— BANNING OF POLITICAL PARTIES

In view of the shortly impending formation of the new Parliament, the Executive Committee requests the present Government of India and the State Governments to take immediate steps to release all detenus detained without trial and immediately to cancel all orders of a repressive character imposing bans on political parties and also to cancel all outstanding restrictive orders and warrants issued for political reasons and thus create an atmosphere of freedom and civil liberty before the new Parliament comes into existence.

3.— CONTINUED DETENTION OF PERSONS ELECTED

The Committee is of the opinion that to continue any longer the detention of those persons who have been elected as members of State Assemblies or of Parliament is inconsistent with the verdict of the electorate and is an obstacle to the proper functioning of democracy. The Committee, therefore, urges that these persons should be released without any delay.

COMMENTS

Communist Gains in Elections

As the results of elections to the State Assemblies are being announced, the one feature that comes prominently to mind from the point of view of civil liberties is the Communist sweep in those States in which the Communist parties were or are banned. In Madras and West Bengal the ban had to be lifted only because of the High Court declarations of its unconstitutionality, and although these parties can now function as lawful bodies there, the public resentment against the ban that the executive had imposed is so bitter that the electorate returned an unusually large number of Communists to the legislatures. In the State of Madras the number of Communists elected to the Assembly is 38 out of 373, while the governing party, viz. the Congress, claims to have 152 among its adherents. In West Bengal the Communists number 27, the Congress representatives numbering 142 out of 238. Moreover, six of the Ministers in Madras and seven in West Bengal who sought the suffrages of the electorate were unseated in the election.

This trend is even more marked in Hyderabad and Travancore-Cochin, where the Communist parties are still outlawed. In the former state the Communists have captured 42 seats, the Congress having won 93 out of a total of 175. In the latter state, the total number of seats is 108, of which the Communists have bagged as many as 32 and the Congress 44. This favourable verdict of the electorate in favour of the Communist parties can only be attributed to the fact that the people at large are so disgusted with the Governments which imposed a ban on these parties that they would rather have the Governments deal with those whom they have been repressing face to face in the legislatures. This mode of showing resentment against the Governments has resulted in a serious dwindling of the influence of the middle-of-the-road parties, who are against all external or internal subversion but would deal with such movements in ways which are not opposed to democracy. This is a result which many would

regret, but the Governments concerned made it almost inevitable. For the rest, the Congress being still in an over-all majority, there does not appear to be much chance of the civil liberties position improving in any appreciable degree during the next five years.

Detention Act To be Renewed

The Government of India have announced their intention to have the Preventive Detention Act, which would otherwise come to an end on 31st March, renewed for six months. The term of a further six months to be attached to the Act is in recognition of the fact that a new Parliament elected on the basis of universal franchise would take the place of the present provisional Parliament within some two months from now, to which it would be proper to refer the question of equipping the Governments in the country with something like a permanent measure of detention. As the new Government that will come into power in Delhi will also be of the same complexion as the present, being drawn from the same party, viz., the Congress, we may be certain that we are faced with a continuance of the practice of detention without trial for quite a long time to come yet.

Detention without trial in peace time is a proceeding abhorrent to democracy all the world over, and yet our Republic under the sponsorship of such a convinced democrat as Mr. Nehru is not prepared to give up this despotic weapon even after a regime of four years of the so-called preventive detention! Nor is the electorate sufficiently awake yet to oust from positions of authority those who would continue the regime indefinitely! What remains then for lovers of civil liberty to submit to such despotism for the time being — under protest — and mobilise public opinion against a government that can only govern by *lettres de cachet*?

Detenus Elected to the Legislatures

The immediate question that awaits solution is in regard to those persons who, being held in detention, offered themselves as candidates for election and have been returned either to Parliament or to local legislatures. Will they be kept under detention or released so as to enable them to serve the constituencies which have chosen them as their representatives? Here we do not believe the Governments have any real choice. Some of the State Governments, though not all, followed the very wise policy of setting free temporarily such of the detenus as had expressed a desire to contest the elections. They released these detenus on parole lasting for two or three or four months. This conditional release of course meant that after the period of parole was over they should go back to jail, even if they were successful in winning the election. But if they were released expressly for the purpose of taking part in the elections, could they now with any show of decency be put back in custody after the electorate has given its verdict that they shall be members of the legislatures? If this is done, the concession shown by the Governments to the detenus will be of no advantage to the latter; it will only be a wanton affront to the electorate. We do not believe that even the present Nehru Government will indulge in such an utterly senseless proceeding, particularly when it is conscious of the power

it has to shut up these M. P.s and M. L. A.s again in its sole discretion at any time in future.

The New Chief Justice

On the death of Mr. Harilal Kania, Mr. Patanjali Sastri has succeeded him as the Chief Justice of India. This change brings prominently to mind once again the exceedingly important function which the Supreme Court performs. As the Constitution is as this highest court interprets it, in a sense the Supreme Court is the maker of constitutional law. It is true that the judges do not formally make the law; they only apply the law as they find it. But in construing the law, they have much latitude in indirectly moulding it by interpretation. While they must preserve the basic structure and the fundamental principles embodied in the Constitution, it is their task to adapt the constitutional system to the needs of the people, and in so doing they cannot but over a long space of time give it a trend in conformity with their own conceptions of social values. Where, as in the United States, the Constitution comes to be interpreted long after it was written, when it becomes difficult to discover the meaning which the words in the Constitution had in the minds of the Founding Fathers or when the Constitution has to be applied to problems which were not foreseen by them, the scope for interpretative development of the Constitution becomes vast and the social philosophy of individual judges plays a large part in this development. Thus we find that the Supreme Court of the United States is often divided into "liberal" and "conservative" groups. In India the scope for such groupings, because of the very recent adoption of the Constitution, is naturally very limited. Even so, however, our Supreme Court is already showing such lines of division, and one may easily place the new Chief Justice, from the work that he has done as an associate Justice and acting Chief Justice, among the more conservative part of the Supreme Court. His opinion on the Bengal Special Courts Act case, reported on an earlier page in this issue, is sufficient evidence of the correctness of this statement. Our Supreme Court has a great opportunity of introducing into our Constitution many valuable rules like that of clear and present danger test (to name only one of them) which have served to make the United States Constitution a bulwark of basic human rights. It is devoutly to be wished that judges of the Supreme Court of India will, by means of interpretation, which is their province, follow all such rules and thereby make civil liberty as secure as it is possible for them to make it, conformably to the essential features of our constitutional system.

Right of Assembly in Greece

The Greek Parliament approved on 22nd December last a new Constitution to replace the Constitution of 1911. The main feature of the Constitution now adopted is that it empowers the King in emergencies to proclaim that the country is in a state of siege and to set up special tribunals for dealing with emergency situations. It also enables the King when an emergency has arisen to suspend certain fundamental rights including the rights of assembly and association. All such royal actions are subject to ratification by Parliament within ten days.