

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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THE RIGHT OF FREE ASSEMBLY THE AMERICAN CASE OF SELLERS V. JOHNSON

We view with such concern sec. 144 of the Criminal Procedure Code declared by the Punjab High Court to be good law, although it gives uncontrolled discretion to police officers to forbid public meetings with a view to preventing any anticipated disorders, that we have thought it desirable in successive issues to contrast this provision of the Indian law with the state of law as it exists in the United States and the United Kingdom on the subject of free assembly.

In the January issue, at pp. ii:51-3, we gave the full text of the decision (just then delivered) of the supreme court of Westchester County (U. S. A.) declaring unconstitutional most of the provisions of what have come to be called "Peep-skill Laws." These ordinances were passed by the Town Council of Cortlandt which was the scene of the Peep-skill riots that marked the appearance of singer Paul Robeson in August 1949.

In the February number we tried to state the United States constitutional law on the subject by citing in particular the leading case of *Hague v. C. I. O.* (1939) and the most recent case of *Feiner v. New York* (1951), the decision in which latter case, though unfavourable to civil liberty, was still based on the application of the "clear and present danger" test. In the same number we also discussed the provisions of the Public Order Act, 1936, of England and compared them with restrictions on demonstrations and meetings allowed by the Public Safety Acts which are in force in all the States of this country.

In the March issue we attempted to give a distillation of the law applicable both in the United Kingdom and the United States based mainly on the classical statements of law by Dicey and Professor Chafee, supported by decisions in important cases.

In the present issue we give a full account of the most important case in the U. S. A. after the Hague decision, viz., *Sellers v. Johnson*, which

deals both with actual and threatened disorder. This completes—for the present—our discussion of this most important subject.

Facts of the Sellers Case

A congregation of Jehova's Witnesses, an order "the members of which believe themselves to be under a covenant with Almighty God to preach the gospel from door to door and from house to house and in public places," planned to hold religious meetings on the Sundays of September, 1946, in the public park of a small Iowa town, Lacona. Accordingly they held the first meeting on September 1, which was a Sunday. The speaker on that occasion was harassed and interfered with, but he succeeded in delivering his Bible lecture. There seemed to be organized opposition to the meeting—opposition 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 military service) and refusing to take any part in the second World War."

Because of this opposition, the Town Council on the day following the first meeting adopted a resolution requiring its permission for the holding of any meeting in the park in future. But the resolution was not communicated in time to the Witnesses, and consequently they proceeded to hold a second meeting on the appointed day. But they did not succeed in actually holding it. "The bandstand in the park, which had been used as a speaker's platform at the meeting on September 1, was occupied (by those opposed to the Witnesses). Benches in the park were turned over, so that old ladies who had come to attend the lecture to be given by the Jehova's Witnesses could not sit down. Children were encouraged to play baseball, thus to interfere with the meeting. The Jehova's Witnesses did not attempt to use the bandstand, but endeavoured to set up their sound equipment in another part of the park. . . . They were attacked. There were numerous fist fights, with the usual results—bloody faces, black

eyes, broken glasses and teeth, and torn clothing." The meeting thus could not be held on September 8.

Two days thereafter the Town Council, being informed that "hundreds of G. I.'s' would attempt to prevent the meeting (due to be held next Sunday) and that trouble and bloodshed were likely," met and resolved to serve notice on the Witnesses that "they will have to have permission from the Council before holding meetings in the park, or this will be deemed an unlawful act and be punished as such." The notice was accordingly given, but the Witnesses decided to hold a meeting on the third Sunday, September 15, as originally intended, without a permit, and wrote to the Council to that effect. In this letter they also complained of the violation of their civil rights on September 8 and of the failure of the local authorities to furnish police protection. The local authorities on the other hand decided, on the advice of two deputies of the Attorney General of the Iowa state, not to permit a meeting of any kind on September 15 and to blockade the town. In accordance with this advice, the Sheriff blockaded all the highways leading to the town, and the Witnesses, when they came as far as the blockade, were turned back after being told by the Sheriff of the county and the Mayor of the town that they could not hold their scheduled meeting. Naturally the meeting did not take place.

Thereupon the Witnesses wrote to the Mayor and to the Town Council and asked for permission to use the park for a Bible lecture on September 29, the last Sunday, stating however that "the Constitution of the United States precludes the city from requiring a permit as a condition precedent to using the park," and that they would hold the meeting whether they received a permit or not. The Town Council promptly met and decided not to give them the permission sought.

District Court's Findings

Finding that their "constitutional rights of freedom of speech, assembly and worship had been infringed" in this way, the Witnesses instituted an action in the federal district court, "for themselves and as a class action for others of the Jehova's Witnesses similarly situated in the state of Iowa," against the officials concerned and against the municipality, seeking, under the Civil Rights Act of 1871 (which provides for redress against anyone who, acting under colour of state law, subjects a person to the deprivation of any rights, privileges, or immunities secured by the federal Constitution), to restrain the officials from enforcing the municipality's resolutions purporting to require a permit for the use of the park. In the action they also asked for a declaratory judgment declaring that they "have a constitutional right to use the park for public preaching purposes . . . that the resolutions of the Town Council requiring a permit are void, and that the (officials) are without right to eject or deport (them) and others of Jehova's Witnesses from the town or to interfere with their preaching activities."

After a trial of the case upon the merits, the district court dismissed the complaint (69 F. Supp. 778, S.D. Iowa), refusing the injunctive relief prayed for. The Court's findings were:

(1) That the Jehovah's Witnesses had a constitutional right to hold their meetings in the public park at Lacona on the dates they attempted to meet;

(2) That they had the right to assemble on those dates for peaceful purposes, and that the purposes of their meeting and proposed meetings were peaceful;

(3) That the resolutions of the Town Council, passed to prevent the use of the park by Jehovah's Witnesses, were unconstitutional and void as against the plaintiffs, but that the resolutions and actions of the Town Council were too inconsequential to warrant injunctive relief; (4) and (5) . . . ;

(6) That the Sheriff acted to prevent the Jehovah's Witnesses from entering the Town of Lacona on September 15, in the belief that that course was necessary in order to prevent riot and bloodshed, and that in so doing he acted "within the scope of his authority and properly under the situation as it then existed";

(7) That "on September 15, 1946, the threat of mob violence in Lacona was apparent and real, substantial and grave, and a clear and present danger to the peace and quiet of the town and the situation warranted the Sheriff in barring the plaintiffs from the town, even though it interfered with their right of assembly and free speech"; and

(8) "That plaintiffs' petition (complaint) should be and the same is hereby dismissed upon its merits with judgment against the plaintiffs for costs."

Court of Appeals Reverses Judgment

Against this judgment of the trial court to the effect that there was such "a clear and present danger" of mob violence against the Jehova's Witnesses on the day of the meeting as to justify the municipality in abridging their right of assembly, speech and worship, an appeal was preferred to the Circuit Court of Appeals for the 8th Circuit, and this Court reversed the lower Court's judgment (*Sellers v. Johnson* [1947] 163 F. 2d 877) and ordered that a declaratory judgment be entered as prayed. The Court said:

The theory that a group of individuals may be deprived of their constitutional rights of assembly, speech and worship if they have become so unpopular with, or offensive to, the people of a community that their presence in a public park to deliver a Bible lecture is likely to result in riot and bloodshed, is interesting, but somewhat difficult to accept. Under such a doctrine, unpopular political, racial, and religious groups might find themselves virtually inarticulate. Certainly the fundamental rights to assemble, to speak, and to worship cannot be abridged

merely because persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised.

After referring to those passages in the brief filed by the Bill of Rights Committee of the Bar Association, as amici curiae, in the case of *Hague v. C. I. O.* (1939) 307 U. S. 496 which treat of the subject of anticipated disorder as a basis for the abridgment of constitutional rights (we ourselves drew largely on this brief in our last issue), and after quoting a passage from the Hague opinion itself that "uncontrolled official suppression of the privilege of free speech cannot be made a substitute for the duty to maintain order in connection with the exercise of the right," and after quoting a passage from the concurring opinion of Mr. Justice Brandeis in *Whitney v. California* (1927) 274 U. S. 357 (viz. "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State"), the Court said:

It is, in our opinion, not necessary in this case to determine whether state action which deprives a group of persons of the fundamental constitutional rights of assembly, speech and worship can ever be justified upon the ground that the group is so offensive to the community in which it proposes to meet that the only way to maintain order and to prevent bloodshed is to bar the group from the community. We find no substantial evidence in the record to support the conclusion that the proposed religious meetings of the Jehovah's Witnesses in the Town of Lacona were actually fraught with any substantial danger to the peace and welfare of the state of Iowa. The fact that there was disorder in the park on September 8 is fully as consistent with the hypothesis that the disorder was due to the failure of the local and state authorities to police the park as it is with the hypothesis that the unpopularity of the Jehovah's Witnesses was so great that the only means of maintaining order in the future was to deny them access to the Town.

The Court examined the testimony given by the Mayor and the Sheriff and then said:

While we do not question the good faith of the Mayor or the Sheriff in concluding that the best and easiest way to maintain peace and order in Lacona on September 15 was to blockade the roads leading up to the Town, we are convinced that evidence of unconfirmed rumours, talk, and fears cannot form the basis of a finding of the existence of such "a clear and present danger" to the state as to justify a deprivation of fundamental and essential constitutional rights. We think that is particularly true in a situation where no effort whatever was made to protect those who were attempting lawfully to exercise those rights. There is no evidence that it

was beyond the competency of the Sheriff and the Mayor to secure enough peace officers to police the park on September 15. . . .

The only sound way to enforce the law is to arrest and prosecute those who violate the law. The Jehovah's Witnesses were at all times acting lawfully and those who attacked them, for the purpose of preventing them from holding their religious meeting on September 8, were acting unlawfully and without any legal justification for their conduct.

We think that the plaintiffs (in the judgment the appellants are referred to as plaintiffs and the appellees as defendants) were entitled to equitable relief. . . .

We do not agree with the district court that the resolutions of the Town Council, adopted to prevent the Jehovah's Witnesses from using the park without a permit, were inconsequential. The resolutions obviously were passed to establish a basis for treating the Jehovah's Witnesses as law violators and to justify barring them from the park.

ITS CONCLUSION

Then the Court recorded its finding as follows:

Our conclusion is that the plaintiffs are entitled to a decree declaring:

(1) that they and others of Jehovah's Witnesses have the right to hold religious meetings in the public park in the Town of Lacona, Iowa, without molestation and without securing the permission of the Town Council;

(2) that the resolutions of the Town Council purporting to require the plaintiffs and others of Jehovah's Witnesses to obtain a permit to use the park for religious meetings, and purporting to deny them such a permit, are unconstitutional, void and unenforceable;

(3) that the Jehovah's Witnesses are entitled to be protected in the exercise of their constitutional rights of freedom of assembly, speech and worship;

(4) that the action of the Sheriff, sponsored by the Mayor, in blockading public highways leading into the Town of Lacona, for the purpose of preventing the Jehovah's Witnesses from holding a meeting in the public park on September 15, 1946, constituted an unlawful deprivation of the constitutional rights of the Jehovah's Witnesses.

The decree should contain a clause retaining jurisdiction of the case for the purpose of issuing injunctive orders in the event such orders shall become necessary to secure the plaintiffs against possible future attempts by the defendants, or any of them, to deprive the plaintiffs of their rights.

The Town Council and the officials concerned applied to the U. S. Supreme Court for a writ of certiorari, but certiorari was denied (1948) 332 U. S. 851.

NEHRU ON DETENTIONS

The Congress party executive met for a number of days last month to finalize its policy on all manner of questions, but throughout its discussions it put to one side the question of the coercive policy the Congress Governments have been pursuing as apparently something which required no re-thinking. However, just when the executive was about to disperse, Mr. Nehru, as both the President of the Congress and the Prime Minister of India, was constrained to defend this policy in public, because a deputation headed by no less a person than Dr. Meghnad Saha, the distinguished scientist, came to meet him and urge on the Government repeal of the Preventive Detention Act and release of political prisoners.

Mr. Nehru maintained that there was need to keep the Detention Act on the statute book and to enforce it as long as the security of the country was put in jeopardy by Communists and other subversives. All that he could promise was to soften the rigours of detention, in view of the fact that the situation in regard to law and order had improved during the last few months, by an executive re-consideration of the detention cases which might result in the release of some of the persons now held in detention. But he held out no hope that the Detention Act itself would be repealed. He admitted that detention without trial was a loathsome business, and that he did not like it himself. But, the security of the nascent Republic being in danger, the Government was forced to detain a few subversives in order that thereby the generality of the law-abiding people might be protected. "Only when we are convinced that there is difficulty or risk involved," he said, "we keep somebody detained." And in support of this action he claimed that every country did that sort of thing in time of crisis.

We shall be the first to admit that when national security, which is the greatest of all public interests, is threatened by a really serious and imminent danger, even personal liberty, the most basic of individual freedoms, must give way. But the menace to national security must be of that order of gravity which is defined in the United States Constitution in an article justifying suspension of habeas corpus. Our Constitution in its emergency provisions permits detention in situations of much less gravity, but now people are thrown into prison without charge and trial in a situation in which even these emergency provisions have not been, and cannot be, invoked. We are no doubt faced with difficulties at present, but when can we expect to be wholly free from difficulties of this minor kind? They do not become grave so as to warrant suspension of habeas corpus in the United Kingdom or enforcement of a state of siege in continental countries merely because Mr. Nehru chooses to say that they constitute a crisis.

Mr. Nehru appears to believe that personal freedom is but a fair-weather doctrine, which ceases to have any application as soon as some threat of disorder begins to

appear on the scene. In truth, in the absence of invasion or rebellion, immunity from arrest or detention except as a result of judicial sanction, should be an inexorable safeguard against any arbitrary action on the part of the executive. Mr. Nehru urged in defence of the Preventive Detention Act that the law had been adopted by the elected representatives of the people by large majorities. This no doubt proves that it has popular support, but such support cannot be the last word in countries like India in which certain matters are withdrawn from the legislative as well as the executive branch of government for the express purpose of guaranteeing essential human freedoms to the people at large. And the heart of the matter is that democracy, understood in the true sense, implies respect for these elementary rights of men, however suspect or unworthy the men themselves may be. When we deny even the most degraded person the rudiments of these freedoms, we do not secure the State against subversives; we endanger the liberties of everyone. As was said by Mr. Justice Douglas of the United States Supreme Court in a recent case, "We set (by such actions) a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension." Mr. Nehru fails to recognize that the protection of what are regarded in all freedom-loving countries as the basic liberties of the individual is itself a factor in the national security for which he shows such deep concern as he ought to.

The number of detenus may perhaps be reduced somewhat in the near future, but that is about all that one may expect to happen. The Detention Act itself will be kept alive for some excuse or other, the feudal chiefs' conspiracy in Saurashtra being the latest of these excuses. The Congress party being in almost as unchallengeable a position in the new legislatures as in the old, those who do not own allegiance to the Congress can immediately do nothing effective to protect our basic rights and freedoms from legislative infringement, but we must at any rate continue to protest against the invasion of these rights and freedoms under colour of law and at the least guard against such invasion resulting as it must, if the theory of somewhat critical times lending justification to detention without trial so contrary to basic principles be acquiesced in without protest, in the desensitization of the common man to the ignoring of these principles by the administration and the legislature.

The responsibilities of government have evidently made Mr. Nehru himself insensitive to civil liberty, but for the benefit of those who, while recognizing the claims of national security, are willing to consider the claims of the competing interest of civil liberty, we may here quote what Professor Edward C. Lindeman said in his Abraham Lincoln lecture on 12th February in New York City. What he said on that occasion is indirectly a reply to Mr. Nehru's thesis that the present "critical times" justify suspension of habeas corpus. Mr. Lindeman was asked:

Is it not sound policy to curtail certain liberties at a time of crisis and then restore these as soon as the danger is past? Isn't this precisely what President Lincoln did when he suspended the writ of habeas corpus during the Civil War?

The question was put by those who, on the basis of what Lincoln did in the years between 1861 and 1864, sought to justify measures like the McCarran Act, which, though contrary to the American tradition of liberty, would be helpful in countering the violent activities of the Communists bent on overthrowing the State. Mr. Lindeman said:

The implication of this question is that those of us who care about civil liberties need not be more squeamish in emergencies than was the Great Emancipator, whose devotion to the Bill of Rights was beyond question. The secondary implication is that there is no danger in suspending liberties so long as there exists a determination to restore these rights the moment it is safe to do so.

It occurs to me that those who resort to this analogy in order to justify contemporary defection regarding civil rights make a poor use of history.

He pointed out that what Lincoln actually did when he suspended habeas corpus was "to declare martial law in those regions where civil law and the courts had disintegrated." "Altogether the suspensions did not last more than three years and in most instances much less. And it is probably correct to assert that in terms of fact American devotion to this particular right intensified after its return." Mr. Lindeman went on:

Is it reasonable to argue from this fact that it is now perfectly safe to sacrifice the Bill of Rights in order to combat domestic Communism? I think not.

Lincoln's suspension of habeas corpus was a military act performed in the light of open rebellion. It was not an attempt to alter the basic nature of our liberties.

Mr. Nehru here is destroying the liberties not of Communists alone but of all of us (for freedom is indivisible) under the excuse of a crisis which does not exist in the form which alone would justify detention without trial.

SEPARATE ROLL FOR COLOURED VOTERS SOUTH AFRICAN ACT DECLARED VOID

A case concerning merely the interpretation of the Constitution of South Africa has attracted much notice in this country because the decision in the case stalls—for the present—the Union Government's policy of racial segregation; and because of the interest felt here, and also because the case involves what has been described as the most important constitutional issue ever to come before the Supreme Court, we deal with it in these pages at some length.

Four coloured persons of Capetown challenged the constitutionality of the Separate Representation of Voters Act of 1951 putting coloured (i. e., non-European) voters on a separate roll, on the ground that the Act was passed in the ordinary way, i. e., by a simple majority in both Houses of Parliament, instead of by two-thirds of the total membership of the two Houses sitting unicamerally, as required by sec. 152 of the South Africa Act. They first applied to the Cape Provincial Division of the Supreme Court, seeking an order enjoining the Minister of the Interior from removing their names from the common voters' roll under the Act, but the Court dismissed the application. Thereupon they appealed to the Appellate Division of the Supreme Court, the highest court in South Africa, and this Court, upholding the arguments of the appellants, declared the Act invalid on 20th March.

The question for decision by the Court was whether the special procedure laid down in sec. 152 for passing a valid law which made any change in the so-called entrenched sections of the Constitution Act was still

binding on the Government after the passing of the Statute of Westminster. One of the two entrenched sections, sec. 35, lays down that no law may disqualify anyone (save a native) in the Cape from being registered as a voter by reason of race or colour alone, unless the procedure set out in sec. 152 is followed. (The other entrenched section, sec. 137, provides for equality of the official languages—English and Dutch.) In regard to both these sections, sec. 152 provides that no Bill making a change in them shall be valid unless "passed by both Houses of Parliament sitting together and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses."

The Malan Government did not follow this procedure in passing the 1951 Act, which has removed the Cape coloured voter from the previous common roll and placed him on a separate roll. That was because, apart from the fact that the Government could not have mustered a two-thirds majority of the whole membership, it was believed that sec. 152 prescribing a special procedure rested entirely on the Colonial Laws Validity Act, 1865, and that as, under sec. 2 of the Statute of Westminster, this Act would cease to be operative in the Dominions, the South African Parliament was no longer bound to observe the terms of sec. 152. Whether this would be the legal effect of the Statute of Westminster was discussed at the time of passing the Status of the Union Act giving effect to the Statute. General Smuts, the then Premier, had expressed

the view that the entrenched clauses would disappear. In spite of this, Government members had acknowledged that whatever the legal position might be, it was a matter of good faith and honour to respect the entrenched sections, and the Statute of Westminster was approved "on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act," which is the Constitution Act of that Dominion.

The Smuts Government itself followed the procedure of sec. 152 when it passed in 1936 the Representation of the People Act removing the native voter from the common roll. Curiously enough, the validity of the Act was questioned in a test case (*Ndlwana v. Hofmeyr, N. O. [1937] A. D. 229*) by a disfranchised person on the ground that the special procedure of sec. 152 had been adopted instead of the ordinary procedure in passing the Act! The full bench of the Cape Provincial Division held that the removal of the native voters on to a separate communal roll did fall within the ambit of sec. 35, and that the Statute of Westminster did not affect the entrenched sections, which remained of full force. The Appellate Division affirmed; and Chief Justice Stratford, going further, declared:

Parliament's will, as expressed in an Act of Parliament, cannot now in this country, as it cannot in England, be questioned by a court of law, whose function it is to enforce that will, not to question it. . . . Parliament can adopt any procedure it thinks fit; the procedure, express or implied in the South Africa Act, is, so far as courts of law are concerned, at the mercy of Parliament like anything else.

In the instant case the Provincial Division Court, in dismissing the application of the coloured men, had refused to decide on the constitutional points raised, basing itself on the decision in this earlier case, and in the appeal to the Appellate Division the Government took its stand on the above-quoted passage in Chief Justice Stratford's judgment, which might perhaps be taken as an obiter statement. Before passing last year's Act, the Government had consulted its seven law advisers and they were unanimously of the opinion that there was no need now to follow the procedure of sec. 152 in removing coloured voters from the common roll. "This conclusion," they wrote, "is in accord with the concept of the supreme legislative authority within the State"—a conclusion which finds strong support in the former Chief Justice's statement. The Government's view is also supported by such writers as Keith, Jennings and Young, Wheare, May, Phillips, Kennedy and Schlosberg (see "The Journal of Comparative Legislation and International Law," vol. 33, p. 90).

The Government in the present case also put forward the argument that the Act did not deprive coloured voters of rights because it gave them more generous representation in Parliament. In a sense this is true, for though

the Act removes the names of the non-European voters from the hitherto common roll, it also gives them, by way of compensation, the right to elect four members of the lower House of Parliament in addition to existing members. (These non-European representatives, however, must themselves be Europeans, though the two additional members which the Act allows the non-European voters of the Cape to elect to the Provincial Council may be non-Europeans.) But the Court did not accept this argument of generous treatment. The Chief Justice, Mr. Centlivres, who announced the Court's unanimous decision, said:

This argument is illusory. The South Africa Act contained guarantees of defined rights, not of their equivalent. The argument suggests that a spoliator may deprive me of my property with impunity if he is prepared to give something of equal or greater value in return.

On the interpretation of sec. 152, the Court reversed the ruling given in the earlier case on the unqualified supremacy of Parliament, saying that that ruling was arrived at without adequate argument and after the briefest consideration. The Chief Justice observed that the British Parliament could not be said to have gone out of its way in enacting the Statute of Westminster to change the Constitution of a Dominion without a request from that Dominion to do so. The records did not show that such a request had been made; on the contrary, they showed that the Union "had emphasized that the proposed Statute would in no way derogate from the entrenched provisions of the South Africa Act." He remarked:

The Statute did not modify the entrenched clauses. If the Government contention was correct it would mean that the Statute of Westminster had, by mere implication, effected a radical alteration of South Africa's Constitution, that Parliament could ignore constitutional safeguards solemnly enacted in the South Africa Act and could also ignore that section of the Act which provided for a joint sitting of the two Houses when there was a disagreement between the two Houses.

Turning to the argument of the Government that a Dominion could not be a sovereign State unless it had a sovereign Parliament capable of functioning like the British Parliament, the Chief Justice said:

There is nothing in the Statute of Westminster which in any way suggests that a Dominion Parliament should be regarded as if it were in the same position as the British Parliament. . . . A State can unquestionably be sovereign, although it has no legislature which is completely sovereign.

In the result the Court allowed the appeals, declaring that the Separate Representation of Voters Act was invalid, null and void and of no effect by virtue of the entrenched provisions, and set aside the order made by the Cape Court.

Promptly, Dr. Malan, the Prime Minister, announced that the Government would introduce, after the Easter recess, legislation to place the sovereignty of Parliament beyond doubt. The legislation would establish that the courts would not have the right to test the legality of Acts of Parliament and would be of retrospective effect from the date of coming into operation of the Statute of Westminster, i. e., from December 11, 1931. He said that the legislation would be based upon the decision (or the dictum?) of the Appellate Division in 1937 to the effect that the courts did not have the right of testing Acts of Parliament. Dr. Malan apparently argues that since South Africa, unlike Canada, e. g., enjoys the power of amending its Constitution Act, it can so amend the Act as to remove sec. 152 therefrom. But here too he will meet with a difficulty. For, as Chief Justice Centlivres said in the instant case, "Before the Statute (of Westminster) the Union Constitution included complete legal powers of

constitutional amendment, exercise of these powers being conditioned only by the provisions of sec. 152 of the entrenched clauses." If therefore the position is restored to that as it existed before the adoption of the Statute of Westminster, what is now at least a matter of doubt would be plainly established, viz., the incompetence of the Union to repeal or alter the provisions of either of the entrenched clauses except by the special procedure laid down in sec. 152. And the Supreme Court would checkmate him, in whatever manner he might seek to abolish the courts' revisionary jurisdiction. If Dr. Malan contemplates enactment of legislation declaring that courts have no power to test the validity of Acts of Parliament, the Leader of the Opposition, Mr. Strauss, on the other hand, announced that if returned to power in the next election the United Party would introduce a Bill of Rights and seek to entrench it in the Constitution!

GUILT BY ASSOCIATION

FEINBERG LAW SUSTAINED BY THE SUPREME COURT

The Supreme Court of the United States on 3rd March upheld in a 6 to 3 decision the constitutionality of New York's Feinberg Law enacted in 1949 chiefly to keep Communists and fellow-travellers out of the state's school system.

PROVISIONS OF THE LAW

The state of New York had already in 1939 taken, under its Civil Service Law, power to exclude or remove from employment any person who advocates the overthrow of the Government by force or violence or who joins a group which indulges in such a practice. But the power so given was to be exercised subject to some safeguards, viz., one declared ineligible for service or dismissed from service for these reasons was to be given a hearing "in open court with opportunity for cross-examination," "the burden of sustaining the validity of the order" of dismissal or ineligibility resting upon the person making the order, and, until the final judgment on the hearing is entered, the person concerned was entitled to a stay order.

But in 1949 a supplementary law, familiarly known as Feinberg Law was passed which changed the whole tenor of the above-mentioned provisions in the Civil Service Law. This law in its preamble makes a preliminary statement that "members of subversive groups, and particularly of the Communist party and certain of its affiliated organizations," who carry on a subtle propaganda for subversion have infiltrated into the educational system of the state and that it is necessary to meet this menace. It then exhorts the authorities to greater endeavour in ridding the schools of such subversive elements. The substantive provision of the law consists in empowering the Board of Regents, "after inquiry and after such notice and hearing as may be appropriate," to draw up a list of organizations which it may find to be "subversive"

in that they advocate the doctrine of the overthrow of the Government by force or violence. The law further requires the Board to frame rules providing that membership of an organization on this list "shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state." The law also provides that "evidence of membership in such an organization so listed . . . shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith." Accordingly, the Board of Regents adopted rules for, as Mr. Justice Frankfurter says, "ferreting out" violations of the law. The rules contemplated annual reports on each employee with a view to discovering evidence of such violations.

DECISION OF THE STATE'S SUPREME COURT

Soon after the passage of the Act, the Chairman and the Secretary of the Communist party in the state and certain employees of school districts sought in the state's supreme court a judgment declaratory of the unconstitutionality of the statute as a bill of attainder, a violation of procedural due process, and an infringement upon the right to free assembly and speech, and praying that action under the law be enjoined. The supreme court upheld all these pleas and, declaring the Act unconstitutional, issued an injunction as the petitioners had asked for (*Thompson v. Wallin, L. Honimdien v. Board of Regents of New York*, 93 N. Y. S. 2d. 274 [1949]). (The case was noticed by us in the December 1949 issue of the BULLETIN, vide pp. 32-3.) The case was subsequently carried on appeal to the Appellate Division, "where the order appealed from was reversed on the law and petition, on the ground that there existed no constitutional right to

be a school teacher nor to advocate overthrow of the Government by force, and that the disqualification to teach because of the advocacy of the overthrow of the Government by force is deemed constitutional" (Reppy, "Civil Rights in the United States," p. 53), and the Court of Appeals, the state's highest bench, affirmed the judgment of the Appellate Division.

U. S. SUPREME COURT'S DECISION

The majority judgment of the United States Supreme Court (written by Mr. Justice Minton, a new arrival on the bench,) found for the state on all the counts.

Freedom of Assembly and Speech

Denying that the statute constitutes an abridgment of speech and assembly of persons employed or seeking employment in the public schools of the state of New York, the Court said:

It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the state in the school system on their own terms.

They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.

Basing itself on an earlier decision of the Court in *Garner v. Los Angeles Board* (1951) 341 U. S. 716 (to the effect that past conduct and past loyalty may legitimately be inquired into as relevant factors for suitability for the public service), the Court said:

A teacher works in a sensitive area in a school-room. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools.

That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct may properly be considered in determining fitness and loyalty.

From time immemorial one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state when determining the fitness and loyalty of such persons from considering the organizations and persons with whom they associate.

If a person is disqualified from employment in schools because of membership in a listed organization, "in

order to protect the schools from pollution and thereby to defend the state's own existence," he is not thereby denied the right of free speech and assembly. All that happens is that "his freedom of choice between membership in the organization and employment in the school system might be limited."

Due Process of Law

The Court also rejected the contention that the provision in the law that membership in an organization listed as subversive shall constitute prima facie evidence of disqualification violated the due process clause of the Fifth Amendment. Here the Court relied upon the requirement that the listing be made "after inquiry and after (appropriate) notice and hearing." Mr. Justice Frankfurter, who dissented from the majority Justices in this case on the technical ground that none of the plaintiffs had actually been hurt yet by the Feinberg Law and therefore did not consider it necessary to pronounce on the merits of the case, has yet indicated in his dissent that the "hearing" contemplated in the law does not come up to the standard laid down by him in *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U. S. 123, and that it is not sufficient to fulfil the requirements of due process. The majority Justices, however, regarded it as "full hearing with the privilege of being represented by counsel and the right to judicial review." They sustained the finding of the Court of Appeals, that the presumption sanctioned by the prima facie evidence would remain only so long as there was no substantial evidence to the contrary, but "once such contrary evidence has been received, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of the order by 'a fair preponderance of the evidence'" and "should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review" prescribed by the Civil Service Law. "There was thus no question of procedural due process." The Court said:

Where, as here, the relation between the fact found (viz. that the person employed or to be employed was a member of an organization that advocated the overthrow of Government by unlawful means) and the presumption (that such member is ineligible for employment) is clear and direct and is not conclusive, the requirements of due process are satisfied.

The Court does not seem to have taken into account the finding of the state's supreme court that since the legislative judgment characterized the Communist party as subversive, it could be construed as an attainder, which is a legislative decree of guilt without benefit of trial. On the two grounds which the majority Justices considered, they came to the conclusion that they could find "no constitutional infirmity" in the Feinberg Law.

DISSENTING JUDGMENTS

Three Justices wrote dissenting judgments in the case. While Justice Frankfurter did not participate in the discussion of the constitutional issues involved, Justices Douglas and Black (who had also dissented sharply from the majority opinion in the case of the eleven top Communist leaders) showed that they were actuated by a different philosophy. If the basic tenet of the majority decision was that the state had a constitutional right to protect the immature minds of children in its public schools from subversive propaganda which a member of the Communist party or an affiliated organization presumably would try to disseminate, that of the minority decision was that exercise of the free intellect was a basic right which must be preserved according to the inexorable mandate of the First Amendment. Justice Douglas said:

The present law proceeds on a principle repugnant to our Constitution—GUILT BY ASSOCIATION. A teacher is disqualified because of her membership in an organization found to be "subversive."

Once a teacher's connection with a listed organization is shown, her views become subject to scrutiny to determine whether her membership in the organization is innocent or, if she was formerly a member, whether she has bona fide abandoned her membership.

The law inevitably turns the school system into a spying project. Regular loyalty reports on the teachers must be made out. The principals become detectives; the students, the parents, the community become informers. Ears are cocked for tell-tale signs of disloyalty.

The prejudices of the community come into play in searching out the disloyal. This is not the usual type of supervision which checks a teacher's competency; it is a system which searches for hidden meanings in a teacher's utterances. What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms.

This, I think, is what happens when a censor looks over a teacher's shoulder. This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth which the First Amendment was designed to protect.

Of course the school systems of the country need not become cells for Communist activities; and the classrooms need not become forums for propagandizing the Marxist creed. But the guilt of the teacher should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her

private life, her political philosophy, her social creed should not be the cause of reprisals against her.

"The New York Times" in its comment on the Supreme Court's judgment recalls what it had said when the Feinberg Law had not yet been adopted, viz., that the legislature was "enacting into law the untenable and illiberal theory of 'guilt by association,'" and says that while the state may well try to see that the teachers in its schools are not subservient to the Communist party doctrine and subservient besides to a specific foreign State, it would be more in keeping with the American spirit to judge teachers "on the basis of their conduct in the classroom, rather than on the basis of fringe organizations to which they may or may not have belonged in the past." True to its traditions of liberty, the paper supports the dissent of Mr. Justice Douglas.

NOTES

Police Entry into Private Meetings

If individuals have a right to hold meetings in public places free from interference by the police, one would naturally think that they must have the same right to privacy from police supervision at meetings held on private premises. But this question was raised in this form recently in the United States and judicially answered. Mr. Alison Reppy says in "Civil Rights in the United States" (1951) at p. 73:

In *Local 809, U. F. W. of America, C. I. O. v. Gates* (1948) 75 F. Supp. 620 (N. D. Ind.), a new issue arose as to the constitutionality of the conduct of certain policemen who persisted in attending the private membership meetings of the Union held during a violent strike. An application to enjoin such police surveillance was sustained as being in violation of the right of assembly and free speech.

This case "appears to have followed the public assembly cases in applying the 'clear and present danger' test." And the conclusion is that those safeguards which apply to public meetings are applicable *a fortiori* to private meetings, i. e., "there will be no restraint in the absence of a 'clear and present danger' of disorder, or a reasonable basis for apprehending a public disturbance."

In England the same theory holds good. The Home Secretary said in the House of Commons in connection with a Fascist meeting (vol. 290, col. 1968):

The law provides that, unless the promoters of a meeting ask the police to be present in the actual meeting, they cannot go in, unless they have reason to believe that an actual breach of the peace is being committed in the meeting.

The decision in *Thomas v. Sawkins* (1935) 2 K. B. 249 appears however to give the police a right of entry. But this decision can certainly not be treated as conclusive, and

besides it refers to a meeting open to the public but held on private premises.

Banning of Associations in Assam

HIGH COURT'S DECISION

We read some time ago a comment in a Bombay newspaper that while in Madras, West Bengal and Travancore-Cochin the High Courts of those states had invalidated the provision of the Cr. Law Amendment Act, 1908, empowering Provincial Governments to declare an association unlawful, the Assam High Court on the other hand had sustained the constitutionality of this section. Feeling somewhat doubtful of the accuracy of this latter statement concerning the Assam High Court's decision, we made inquiries in Assam, and our inquiries have elicited the following facts.

The newspaper apparently referred to the decision of the Assam High Court in the application for habeas corpus filed in the Court on behalf of Mr. Prabhatmalla Barua, who was arrested in course of the Nalbari police operations on a charge, under sec. 17 of the Cr. Law Amendment Act, of being a member of the Revolutionary Communist Party of India, which has been declared by the Assam Government under sec. 16 of the Act to be an unlawful association. Counsel for the applicant cited the decision of the Madras High Court in V. G. Row's case, and contended that the applicant should be set at liberty.

The Chief Justice, however, who heard the case, ruled that the declaration of the R. C. P. I. as an illegal association under sec. 16 was not final in the sense that it debarred the Court from inquiring into the validity of that declaration. In His Lordship's opinion, a declaration by the Assam Government that an association was illegal only authorized the police to take action in course of the prosecution of a member of that association under sec. 17, and that it would be open for the accused to challenge the declaration with a view to showing that the object of the association in question was in fact not unlawful.

In this sense the Assam High Court's decision appears to go against the decision of the Madras High Court in Row's case. For in this latter case the Court pointed out the "invidious distinction" made by the Act between associations, with objects falling within the purview of sub-cl. (a) and sub-cl. (b) of cl. (2) of sec. 15. Mr. Justice Satyanarayana Rao said :

So far as associations falling under sub-cl. (a) of cl. (2) of sec. 15 are concerned [i. e., associations which encourage commission of violence, etc.], there is an undoubted right of the members of the association to show that they are not within the mischief of that clause [in a prosecution under sec. 17, while the case is entirely different with associations falling under sec. 15 (2) (b), i. e., associations which are declared by the Provincial Government to be unlawful].

At the trial before a magistrate for the offence of being a member of an unlawful association, the declaration by the Government [that a certain association is unlawful under sub-cl. (b), as distinguished from sub-cl. (a) of sec. 15 (2)] is *conclusive*. In effect, it places sentence before trial and judgment. (Emphasis added.)

Similarly, the Chief Justice, Mr. Rajamannar, said :

When a person is charged under sec. 17 as being a member of an unlawful association within the meaning of sec. 15 (2) (a), the established procedure of the criminal courts of the land will apply. The onus will be on the prosecution to affirmatively establish that the association encourages or aids persons to commit acts of violence or intimidation or that the members of the association habitually commit such acts. The accused will be entitled to lead rebutting evidence and the court is entitled to adjudicate on the issue whether the association is unlawful within the meaning of the enactment.

[But in the case of a member of an association declared unlawful within the meaning of sec. 15(2)(b)] once a prosecution is launched, the criminal court is powerless to decide as to the validity of the declaration by the Government.

It would be interesting if members of unlawful associations of sec. 15(2)(b) variety could challenge the validity of the Government's declaration as much as members of unlawful associations of sec. 15(2)(a) variety, throwing the onus of proof on the Government concerned, as the Assam High Court's decision seems to imply, though this matter has now ceased to have any practical significance because of the Supreme Court's decision in Row's case.

Catlin on Fundamental Rights

Professor George Catlin, who when he arrived in Madras on his tour of South-East Asia was asked what he thought of the view to which Sir Ivor Jennings had given expression recently of the undesirability of setting up certain rights as fundamental rights and making them incapable of being tampered with by the legislature at its discretion, said he did not agree with that view. England's was an "extremely peculiar" case; there civil liberties were secure, although the sovereignty of Parliament could not be challenged even in regard to such fundamental liberties. That was due to the exceptional circumstances in which the British Constitution had grown. He said :

It is a very open question whether such personal freedom as is at the present time enjoyed in parts of the United States would in fact exist if the matter was left to public opinion and legal safeguards had not been provided in the U. S. Constitution. Indeed, the development of liberty in U. S. is to a significant

extent a matter of legal interpretation of the Constitution in the "Jeffersonian sense." This matter has much more than mere academic interest.

Referring to the flouting of sec. 152 of the South African Constitution by the Malan Government, Mr. Catlin remarked that protection of the interests of the coloured people which that section guaranteed was an instance of a fundamental right sought to be secured by a constitutional limitation, and the argument of Dr. Malan that a momentary majority in the legislature should have an unrestricted right of way was a perversion of the true meaning of democracy, which was the protection of the fundamental rights of one and all. "I certainly would not omit," he said, "a declaration of rights in the drafting of constitutions."

RIGHT OF ASSOCIATION

Section of Cr. Law Amendment Act Invalidated

The Constitution Bench of the Supreme Court on 31st March held by a unanimous decision that sec. 15(2)(b) of the Criminal Law Amendment Act, 1908, as amended by the Madras Act (No. 11 of 1950), which authorizes the Government to declare an association unlawful was unconstitutional as it infringed the right to freedom of association guaranteed by art. 19(1)(c) of the Constitution. This section defines an "unlawful association" as meaning an association "which has been declared by the State Government by notification in the official Gazette to be unlawful on the ground . . . that such association (i) constitutes a danger to the public peace, or (ii) has interfered or interferes with the maintenance of public order or has such interference for its object, or (iii) has interfered or interferes with the administration of the law or has such interference for its object." Sub-sec. (1) of sec. 16 A of the amended Act requires the State Government to place the case of an association declared unlawful under sec. 15(2)(b) before an Advisory Board and sub-sec. (6) of this section provides that if there is no sufficient cause in the opinion of the Advisory Board for the issue of a notification declaring an association unlawful, the State Government has to cancel the notification in respect of such association (following the procedure of the Preventive Detention Act).

This decision of the Supreme Court was delivered in an appeal preferred by the Madras Government (the Union Government and the Assam Government being interveners) from a unanimous decision of a full bench of the Madras High Court (vide the BULLETIN, p. 154) in the case of *V. G. Row v. State of Madras* quashing the Madras Government's orders which had declared the People's Education Society, of which Mr. Row is Secretary, an unlawful association. The Court, upholding the decision of the Madras High Court, dismissed the Madras Government's appeal. The Constitution Bench consisted of Chief Justice Patanjali

Sastri, and Associate Justices Mehr Chand Mahajan, B. K. Mukherjee, S. R. Das and Chandrasekhara Aiyar, and the Chief Justice announced the decision of the Court.

SUBJECTIVE SATISFACTION NOT ENOUGH

The Court stated at the outset that "the Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution," and, disclaiming any "desire to tilt at legislative authority in a crusader's spirit" and "to seek clashes with the legislatures in the country," it said that "while the Court naturally attaches great weight to the legislative judgment, it cannot desert its duty to determine finally the constitutionality of an impugned statute." It then proceeded to consider the validity of the section of the Madras Act in question, and starting from the premise "that that test under sec. 15 (2) (b) is, as it was under the old sec. 16, a subjective one and the factual existence or otherwise of the grounds (for declaring an association unlawful) is not a justiciable issue," it arrived at the conclusion that the restrictions imposed by sec. 15 (2) (b) on the right of association conferred by art. 19 (1) (c) were not "reasonable" as they were required to be under art. 19 (4). It agreed with the conclusion of the Madras High Court that sec. 15 (2) (b) was unconstitutional, but said that "the decision can be rested on a broader and more fundamental ground" than that assigned by the lower court. Then it went on:

The right to form associations or unions has such wide and varied scope for its exercise and its curtailment is fraught with such potential reactions, in the religious, political and economic fields, that the vesting of authority in the executive Government to impose restrictions on such right without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which in our opinion must be taken into account in judging the reasonableness of the restrictions imposed by section 15 (2) (b) on the exercise of the fundamental right under article 19 (1) (c); for no summary and what is bound to be largely one-sided review by an Advisory Board, even where its verdict is binding on the executive Government, can be a substitute for a judicial enquiry. The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights. In the case of preventive detention, no doubt, this Court upheld in Gopalan's case deprivation of personal liberty by such means, but that was because the Constitution itself sanctions laws providing for preventive detention, as to which no question of

reasonableness could arise in view of the language of article 21.

DR. KHARE'S CASE DISTINGUISHED

Because the Attorney-General "placed strong reliance" on the Court's decision in Dr. Khare's case (A. I. R. 37 [1950] S. C. 211) "where the subjective satisfaction of the Government regarding the necessity for the externment of a person, coupled with a reference of the matter to an Advisory Board whose opinion, however, had no binding force, was considered by a majority to be a 'reasonable' procedure for restricting the right to move freely conferred by art. 19 (1) (b)," claiming further "that the reasoning of that decision applied *a fortiori* to the present case, as the impugned Act provided that the Advisory Board's report was binding on the Government," the Court recorded its conclusion that "that case is distinguishable in several essential particulars" and "cannot rule the present case." It said: "Externment of individuals, like preventive detention, is largely precautionary and based on suspicion," while in the case of a declaration of an association as unlawful under sec. 15 (2) (b) the grounds on which such a declaration is made are "factual and not anticipatory or based on suspicion."

An association is allowed to be declared unlawful because it "constitutes a danger" or "has interfered or interferes" with the maintenance of public order or "has such interference for its object," etc. The factual existence of these grounds is amenable to objective determination by the Court quite as much as the grounds mentioned in clause (a) of sub-section (2) of section 15, as to which the Attorney-General conceded that it would be incumbent on the Government to establish, as a fact, that the association, which is alleged to be unlawful, "encouraged" or "aided" persons to commit acts of violence, etc. We are unable to discover any reasonableness in the claim of the Government in seeking, by its mere declaration, to shut out judicial inquiry into the underlying facts under clause (b).

Secondly, the East Punjab, Public Safety Act, under which an order of externment was served on Dr. Khare, was to be in force only for a year, the Madras Act being a permanent measure. Thirdly, while in the case of externment provision is made "for personal or other adequate mode of service" on the individual concerned, the impugned Act is marked by —

the absence of any provision for adequate communication of the Government's notification under section 15 (2) (b) to the association and its members or office-bearers. The Government has to fix a reasonable period in the notification for the aggrieved person to make a representation to the Government. But, as

stated already, no personal service on any office-bearer or member of the association concerned or service by affixture at the office, if any, of such association is prescribed. Nor is any other mode of proclamation of the notification at the place where such association carries on its activities provided for. Publication in the official Gazette, whose publicity value is by no means great, may not reach the members of the association declared unlawful and, if the time fixed expired before they knew of such declaration, their right of making a representation, which is the only opportunity of presenting their case, would be lost. Yet, the consequences to the members which the notification involves are most serious, for their very membership thereafter is made an offence under section 17,

with the result that they become liable to deprivation of liberty and property, which has not a deterrent but a "terrorising effect" in the words of Mr. Viswanatha Sastri, Judge of the Madras High Court. For these reasons, the Supreme Court, held that sec. 15 (2) (b) "falls outside the scope of authorized restrictions under cl. (4) of art. 19 and is, therefore, unconstitutional and void."

HABEAS CORPUS PETITIONS

Specification of Detention Period Not Necessary IN ORDERS OF CONFIRMATION UNDER SEC. 11(1)

In the consideration by the Constitution Bench of the Supreme Court of habeas corpus petitions filed by Mr. D. M. Pangarkar, a Bombay detenu, seven Assam detenues and one Punjab detenu, two contentions were made on behalf of the petitioners. The first contention was that an order under section 11(1) of the Preventive Detention Act had to specify the duration of detention. If it did not do so, it was bad in law. The second contention was that the order of confirmation referred to above had to be made in the name of the Governor, as provided in article 166(1) of the Constitution. Sec. 11(1) says: "In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit."

The Court held (27th March) by a majority of 4 to 1 that non-specification of the period for which the detention was to continue, in the order of confirmation made under section 11(1) after the Advisory Board had considered the case of detenus, would not make the detention illegal.

The Chief Justice held (Mr. Justice Das concurring) that if the words "to specify" had also been there after the words "as it thinks fit", the contention could be said to be sound. Even if no period was specified, detention for an indefinite period would not result because the Preventive Detention Act itself was for a limited duration.

Mr. Justice Mukherjea, with whom Mr. Justice Chandrasekhara Aiyar joined, said, sec. 11 of the Act — does contemplate that a period should be mentioned during which further detention of the detenu is to continue and the Government should see that no omission occurs in this respect. But I am unable to hold that this omission alone would make the order a nullity which will justify us in releasing the detenu.

Dissenting, Mr. Justice Mahajan said :

Any notion of an indefinite period of detention is wholly foreign to a democratic constitution like ours. The words "such period" implied that there was to be a beginning and an end of that period; in other words, it has to be for a certain duration, the extent depending on the pleasure of the Government.

The Government makes up its mind and decides in each individual case after the receipt of the report of the Advisory Board whether a particular detenu has to be kept in detention for the whole of the overall period, or for any period shorter than that.

The next question was whether failure to fix the period made the detention illegal. On this point Mr. Justice Mahajan said :

After considerable thought I have reached the conclusion that non-determination by Government of the period of the continuance of detention operates prejudicially against the detenu and makes the detention illegal.

The Court also held by a majority that the order of confirmation passed by Government after receiving the report of the Advisory Board would not be rendered void and inoperative if it was not expressed to be made in the name of the Governor as required under article 166 (1) of the Constitution.

Mr. Justice Das stated that article 166 of the Constitution directed all executive action to be expressed and authenticated in the manner therein laid down, but an omission to comply with those provisions does not render the executive action a nullity. Therefore, all that the procedure established by law required, he added, was that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under section 11 (1).

Thus the Court dismissed the petitions, Mr. Justice Mahajan holding in a dissenting judgment that the petitioners were not detained according to procedure established by law and were therefore entitled to their release.

Acting Editor of "Blitz" Released

The Constitution Bench of the Supreme Court on 18th March ordered the immediate release of Mr. H. D. Mistry, deputy editor of the Bombay weekly, "Blitz," who was then in custody in Lucknow on a warrant issued by the Speaker of the U. P. Legislative Assembly.

Mr. Mistry's detention had not been ordered under the Preventive Detention Act, but in virtue of the privileges of the U. P. legislature. In the issue of "Blitz" for 29th September, 1951, there appeared a paragraph which was regarded as casting reflection on the integrity of the Speaker of the Legislative Assembly, and the acting editor not appearing to explain the paragraph, a warrant of arrest was issued by the Speaker in exercise of his powers under the rules framed indicating the privileges of the House.

Mr. Mistry was arrested in Bombay on 11th March, and it was admitted on behalf of the Speaker that he had not been produced before a magistrate for a week. This was in contravention of art. 22 (2), which requires (in cases not covered by "preventive detention") that "every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest . . . and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

The Attorney-General argued that since Mr. Mistry had been arrested in virtue of the special powers of the Speaker, compliance with art. 22(2) was not necessary in this case.

Their Lordships negatived these arguments and ordered :

This is a clear breach of the provisions of article 22(2) of the Constitution of India which is quite peremptory in its terms. In view of the admitted facts it is perfectly clear that this provision of the Constitution has been contravened and the said Mr. Mistry is entitled to his release. The habeas corpus petition, therefore, succeeds and we direct that Mr. Mistry be released forthwith.

Permissible Vagueness

Mr. Justice Rajadhyaksha and Mr. Justice Vyas, at the Bombay High Court, dismissed on 4th April the petition filed by Mr. Samuel Augustine, President of the Indian Naval Dockyard Employees' Union, challenging his detention on an order issued by the Commissioner of Police, Greater Bombay, under the Preventive Detention Act. Their Lordships held that the detention order was valid.

The validity of the detention was challenged on behalf of the detenu on the ground of vagueness. Their Lordships rejected this contention as, according to a recent judgment of the Supreme Court, a detenu had no right to be released, on the ground of vagueness even if he could not make an effective representation to the Government.

Detention of Red Legislators

A special bench of the Calcutta High Court, the Chief Justice presiding, on 4th April dismissed the habeas corpus applications on behalf of the four Communist legislators of West Bengal, challenging Government's right to detain

them under the Preventive Detention Act, whilst their membership of the state legislature and the Council of States continued. The detenus are Dr. Ranen Sen, Mr. Benoy Chowdhry, Mr. Ganesh Ghosh, all elected to the state Assembly and Mr. Bhupesh Gupta, elected to the Council of States.

Insufficient Grounds

A division bench of the Hyderabad High Court on 10th April ordered the release of Mrs. Annapurna, a detenu in Warangal Jail, observing that her detention was based on insufficient and vague grounds.

ANTI-EXCOMMUNICATION ACT

Held Valid by the High Court

In the suit filed by Mr. Tyebhai M. Koicha against the Mullaaji Saheb, Sardar Sayedina Taher Saifuddin Saheb, head of the Dawoodi Bohra community, Mr. Justice Shah at the Bombay High Court on 17th March gave a ruling that the Bombay Prevention of Excommunication Act of 1949 was *intra vires* articles 25 and 26 of the Constitution.

Mr. Koicha, in his suit, had prayed for a declaration that the orders of excommunication passed by the Mullaaji Saheb against him first in 1934 and then in 1948 were illegal and void. He also claimed a sum of Rs. 50,000 from the defendant by way of damages.

It was contended on behalf of the defendant that the State legislature was not competent to pass the Prevention of Excommunication Act as the subject matter did not fall either within the provincial or concurrent legislative list of the Seventh Schedule of the Government of India Act, 1935.

His Lordship rejected this contention and held that the subject matter fell within entry 1, "Criminal Law," and also within entry 3, "Actionable Wrongs," of list 3 of the Seventh Schedule.

Referring to the contention that the Act contravened articles 25 and 26 of the Constitution, His Lordship said that practically every religious community in India claimed to exercise the right of severing the communion of its members not living according to the accepted code of behaviour, social or religious. The word "excommunication" had been adopted as a convenient expression of Indian social circumstances as meaning "exclusion from a caste or community," and thereby involving the deprivation of rights and privileges which a person so excommunicated was entitled to or accustomed to enjoy.

By enacting the Prevention of Excommunication Act, the legislature sought to restrict the consequences of excommunication which entailed deprivation of rights and privileges which were enforceable by a suit of a civil nature.

Even if it was assumed that excommunication was founded upon religious tenets so far as the Dawoodi Bohra community was concerned, what was guaranteed by article 25 were the religious beliefs and the right to profess, practise and propagate religion; but the right to religious practices was not guaranteed. Therefore the practice of excommunication, even if it were to be regarded as a religious practice, was not saved from legislative interference, because article 25 guaranteed the right to practise religion and not religious practices.

Article 26 conferred the right to a community or a section of the community to manage its affairs in matters of religion. His Lordship thought that the claim of a member of such a community to right of office or right of worship in any religious place of that community or other rights to which he was entitled did not affect the management by the community of its own affairs in matters of religion. In His Lordship's opinion, the exercise of the right of excommunication was not a matter of religious faith or belief. The guarantee under the Constitution was a guarantee of the right to manage its affairs in matters of religion, that is, matters of religious faith and beliefs.

"If with a view to achieve social welfare and to effect reform the legislature of the Province of Bombay declared excommunications invalid, it cannot be said that the legislation violated the freedom of conscience and the right freely to profess, practise and propagate religion guaranteed to persons under the Constitution of India," declared His Lordship.

His Lordship therefore held the Prevention of Excommunication Act *intra vires* of the Constitution.

SPECIAL COURTS ACT OF WEST BENGAL

Declared Invalid by the High Court

A special bench of the Calcutta High Court on 4th April held the provisions of section 12(1) of the West Bengal Black Marketing Act and section 4(1) of the Special Courts Act *ultra vires* the Constitution.

These provisions authorized the state Government to allot certain cases for trial by special courts.

The Chief Justice in his judgment observed *inter alia* that it was at the discretion of the local Government either to transfer or allot a case to be tried by a special tribunal or a special judge instead of a trial before ordinary courts. The powers to discriminate between cases and cases were against the provisions of equality in article 14 of the Constitution.

A NEW ORDINANCE

In view of sec. 5 (1) of the Special Courts Act, 1950, being declared void by the Supreme Court in the case of Anwar Ali Sarkar (see p. ii: 69 of the BULLETIN), the

Governor of West Bengal promulgated on 25th March an ordinance called the Tribunals of Criminal Jurisdiction Ordinance purporting to cure the defects of the 1950 Act which made it invalid. Sec. 5 (1) had empowered the Government to refer at its discretion any "offences or class of offences or cases or class of cases" to a special court. The new Ordinance specifies certain offences which will be triable by special tribunals and provides that every such offence shall be tried by such a tribunal.

GOVERNOR'S POWER OF NOMINATION

Writ Application Dismissed

The Madras High Court on 7th April dismissed an application for the issue of a writ of certiorari filed by Mr. P. Ramamurthi, Communist M. L. A., questioning the validity of the order of the Governor of Madras nominating Mr. C. Rajagopalachari as a member of the State Legislative Council.

Mr. Rajagopalachari was first nominated by the Governor to be a member of the Council and a few hours later on the same day he was elected leader of the Congress Party in the legislature. The earlier nomination by the Governor paved the way to Mr. Rajagopalachari becoming Chief Minister of the State, if the Congress party was to be called upon to assume the reins of office, and the Governor in fact asked Mr. Rajagopalachari to form the Government soon after his election by the Congress Party as its leader. It was in these circumstances that the application for certiorari was made, the applicant's contention being that Mr. Rajagopalachari's nomination to the Council was in contravention of the letter and spirit of art. 171 (5) of the Constitution, which prescribes that the members to be nominated by the Governor "shall consist of persons having special knowledge or practical experience" in respect of literature, science, art, etc.

The petitioner in his application stated :

This power of nomination of persons to the Legislative Council by the Governor, cannot be used to provide a seat in the Legislative Council for the political leader of any party in order to assist that party to overcome its own internal crisis and quarrels and to obviate for the leader the necessity of facing the democratic verdict of the people by means of an election. I, therefore, submit that the exercise by the Governor of his powers under article 171 (3) (e) and (5) for this purpose amounts to a fraud.

The petitioner also submitted that the Governor, who was himself a prominent leader of the Congress party, in nominating Mr. Rajagopalachari, "acted not as the Governor of the state but in such a manner as to further the interests of the Congress party in Madras."

The Court dismissed the application at admission stage, saying : "We are unable to see any personal right of the petitioner which can be said to have been infringed even in the most indirect manner by the nomination of Mr. Rajagopalachari. . . (He has no) such personal and direct interest in the matter as to enable him to invoke the provisions of art. 226 of the Constitution."

COMMENTS

Detenus in Hyderabad

It was reported on 31st March that the Hyderabad Government have decided to release about 400 detenus, 100 of them on parole, "in view of the improved situation in the State" and after a review of the cases of the detenus.

The Home Secretary said that Dr. Raj Bahadur Gowd, a Communist leader, who was recently elected to the Council of States, was not among those ordered to be released now.

In regard to the lifting of the ban on the Communist Party and on the Andhra Mahasabha, it is understood that the Chief Minister will consult the States Ministry of the Union Government.

Continued Detention of Elected Members

At a crowded meeting held under the auspices of the All-Parties Prisoners' Release Committee in Deshpriya Park in Calcutta on 22nd March, Dr. Meghnad Saha presiding, a resolution was adopted unanimously demanding immediate release of all political prisoners detained without trial, cancellation of warrants against such persons and repeal of the Preventive Detention Act. The meeting in particular expressed the view that it was "a serious crime against democracy" on the part of the West Bengal Government to keep in detention three members of the State Legislative Assembly and one member of the House of the People elected on the basis of adult franchise and generally by very large majorities. These members, who were previously detained, had been temporarily released on parole so that they might take their chance in the election and see if they could get the suffrages of the voters, but after winning the election were sent back to jail.

When Dr. Saha took up this latter question with the authorities, the Government said :

The reason why those persons who have stood for election were released on parole is that in the opinion of Government it was necessary for those persons to have an opportunity to canvass their respective electorates personally. This was a gesture on the part of Government and the recognition of a fact that in the case of the first general election under adult franchise such a procedure was justified. When a person is released on parole for a specific object he has to return to his place of detention as soon as that

object is achieved. And it was in pursuance of that principle that Government had taken action.

It did not follow, however, the Government argued, that they were bound, after the success of such persons in the elections, to release them permanently from detention so that they might participate in the business of the legislature also. Members of legislatures did not enjoy immunity from restraints on personal liberty in virtue of their membership. Was not Capt. Ramsay interned, though a member of the British House of Commons? The Government seems to be simply incapable of appreciating the simple reasoning that if a person be freed for the purpose of enabling him to participate in the elections, he must logically be freed, if successful in the election, for the purpose of enabling him to serve in the legislature unless by any fresh act he may commit he makes himself liable to detention.

In the circumstances, it appears to us that to subject these elected members to detention is very much like the expulsion, in the anti-Communist wave that arose in the U. S. A. on the outbreak of the first World War, of five members elected to the New York Assembly on the socialist ticket as disloyal. Against this expulsion Mr. Charles Evans Hughes, the great jurist who afterwards occupied the position of Chief Justice of the Supreme Court of the United States and rendered memorable judgments, wrote a memorial (which has become a classic on the subject) on behalf of the Association of the Bar of the City of New York; and as a result of the agitation thus carried on, the Lusk Anti-Sedition Statutes of New York were repealed in 1923.

Detenus in N. W. F. P.

The Chief Minister of the North-West Frontier Province gave the following information regarding the number of detenus in that province to the Assembly on 13th March: The number of detenus under the Public Safety Act and the Frontier Crimes Regulations was 41 and 30 respectively. Persons convicted by the courts under the Safety Act were 28, three had been acquitted, and the cases of 10 others were being heard. The number of detenus bound down under the Frontier Crimes Regulation was four: two were under trial. The remaining 26 had been released.

Pakistan's Safety Ordinance

In a debate on the budget of Pakistan, that country's Public Safety Ordinance came particularly under fire on 17th March. The Secretary of Pakistan's Congress party in Parliament, Prof. Rajkumar Chakravarty, for instance, said:

Public Safety ordinances were the orders of the day. Even persons like Mr. Suhrawardy were prevented

from addressing public meetings and leaders like Khan Abd'ul Gaffar Khan, who was ill, were incarcerated in jails for years together. The Government had learnt from the former British masters the use of the phrase "subversive elements;" these "subversive elements" were seen by the Government in power in every bush and at every corner. Civil liberties were often put in cold storage. How can democracy flourish if opponents are gagged like that? The Congress is eloquent about civil liberties in Pakistan but tongue-tied in the homeland!

BOOKS ON CIVIL LIBERTY

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

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

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

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

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

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

Apply to—

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