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[A MONTHLY REVIEW]

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SWEEPING RESTRICTIONS ON FREEDOM OF EXPRESSION

ENLARGEMENT OF THE SCOPE OF ART. 19(2)

AMENDMENT PROVED TO HAVE BEEN UTTERLY UNNECESSARY

The Supreme Court's decision in the Bharati Press case, delivered on 26th May and reported on a later page, cuts the ground from under the feet of the Nehru Government in widening in a sweeping manner the restrictions on the fundamental right to Freedom of Expression by amending art. 19(2) of the Constitution. This amendment sanctions the imposition of three additional restrictions, viz., those in the interest of maintaining (i) "friendly relations with foreign States" and (ii) "public order," and preventing (iii) "incitement to an offence." With the first category of restrictions we are not here concerned, but the above decision proves beyond a shadow of doubt that there was not even a colourable excuse for incorporating the other two categories of restrictions in the Constitution.

It was said on behalf of the Government when the Constitution (First Amendment) Act was passed, on the strength of the Patna High Court's majority decision in this very case (i. e., in re Bharati Press, A.I.R. 38 Patna 12) that even direct incitements to political assassination were not capable of being punished under the Constitution

MR. P. R. DAS

ON THE ADVISORY COMMITTEE OF THE INTER'L LEAGUE

The International League for the Rights of Man has appointed Mr. P. R. Das, President, All-India Civil Liberties Council, to be a member of its Advisory Committee.

This is an office of high honour, as will be seen from the fact that among members of the Advisory Committee are such renowned persons as Mr. James T. Shotwell of the Carnegie Endowment for International Peace, Mr. Manly O. Hudson, a noted jurist on international law, and Dr. Michael Scott who has been so valiantly fighting the battle of the negroes of South Africa in the United Nations.

The All-India Civil Liberties Council takes pride in the appointment of its President to the Advisory Committee of the International League.

since it was held by the High Court that even such incitements were saved by art. 19(2) in the form in which the article stood, and that therefore it had become necessary to enlarge the scope of this article by adding to the exceptions specified therein.

Let us first have a look at the High Court's decision. All the judges held that the pamphlet in question, which was published at the Bharati Press and on account of which a deposit of Rs. 2,000 was demanded from the keeper of the press, came within the scope of sec. 4(1)(a) of the Press (Emergency Powers) Act of 1931, which enables a security to be demanded on account of the publication of a document containing words "which incite to or encourage the commission of any offence of murder or any cognizable offence involving violence." Mr. Justice Sarjoo Prasad said (and the other judges agreed):

The central theme which runs through the whole gamut of the offending pamphlet is that the author is anxious to bring about a bloody revolution and challenge completely the present order of things by causing a total annihilation of the persons and policies of those who, according to him, are in the opposite camp. Such a pamphlet, therefore, does come within the mischief of [sec. 4(1)(a)].

Even so, two of the three judges of the special bench held that sec. 4(1)(a) of the Press Act was unconstitutional and void and that the order of the Government demanding security be set aside.

The reasoning on which these judges founded their judgment was as follows. Art. 19(2) allows imposition of restrictions on the freedom of speech and expression only in cases where danger to public security is to be apprehended. But sec. 4(1)(a) of the Press Act is capable of being applied to cases where no such danger could arise, for the section is worded in general terms and may apply both to grave forms of offences like political assassination and to other offences against a private person

which involve violence. As Mr. Justice Ramaswami said, the section "cannot without strain upon the language be restricted in its scope and connotation to such aggravated forms of murder, insurrection or violence which tend to overthrow or undermine the security of the State," as required by art. 19(2). But unless it is so restricted, the section cannot be saved as permissible legislation under that article. It is the command of the Supreme Court to strike down laws which are not *solely* directed to the purpose of safeguarding the security of the State. In Ramesh Thappar's case (A.I.R., 37 S.C. 124) the Court, speaking through Mr. Justice Patanjali Sastri, said:

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

The principle underlying this was enunciated in the following words:

Where a law purports to authorize the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. As this judgment controls the case, it cannot be held, said the Patna High Court judges, that sec. 4 (1) (a) of the Press Act falls outside the scope of the saving clause of the Constitution in respect of freedom of expression and the section must in consequence be held void.

It should be remarked that these judges ruled as they did in the Bharati case with the utmost hesitation. Mr. Sarjoo Prasad said:

I am compelled to observe that from the above discussions of the Supreme Court judgments (in Ramesh Thappar's case and in Brij Bhushan's case [A.I.R. 37 S.C. 129]), it follows logically that if a person were to go on inciting murder or other cognizable offences either through the press or by word of mouth, he would be free to do so with impunity inasmuch as he would claim the privilege of exercising his fundamental right of freedom of speech and expression... I cannot with equanimity contemplate such an anomalous situation, but the conclusion appears to be unavoidable on the authority of the Supreme Court judgments by which we are bound.

I therefore wish that my decision on the point would sooner than ever come to be tested by the Supreme Court itself and the position re-examined in the light of the anomalous situation pointed out above.

This decision was handed down as early as 13th October 1950, and although the High Court itself requested that an authoritative opinion of the Supreme Court be obtained on this most important point by means of an appeal, no such action was taken for about a year and half. An appeal was filed when it had become wholly unimportant, on account of the amendment of art. 19 (2) in June 1951, to ascertain from the Supreme Court whether the scope of the article was as restricted as the Patna High Court by a majority decision (Mr. Justice Shearer holding a different opinion on the constitutional issue) made it out to be. The Government of India was slow in consulting the Supreme Court on the point raised by the Bharati case, but was quick to amend the Constitution by so extending the scope of art. 19 (2) as to save laws directed not only against the undermining of the security of the State or overthrow of it but also laws directed at the maintenance of "public order" and against "incitement to an offence." And an appeal was preferred subsequently, when the issue dealt with in the Bharati case had become dead by the constitutional amendment.

Now what is the decision of the Supreme Court in the belated appeal from the Patna High Court's judgment? It is to the effect that the majority judges of the High Court were in error in interpreting art. 19 (2), even as it stood at the time the case was decided by the lower court; that they misunderstood the principles enunciated in the Thappar and Brij Bhushan cases and applied them wrongly; and that art. 19 (2), even in its unamended form, did not give immunity to those who would incite to murder or violence. It was mainly on the basis of the Patna High Court's judgment that the Nehru Government widened the ambit of restrictions permitted by art. 19 (2). Mr. Nehru himself said in Parliament, in justifying the amendment:

Why is this amendment brought? It is because some doubts were cast on it (the scope of cl. 2 of art. 19)... I think it was the Bihar High Court which said something to the effect that preaching of murder is allowed under this clause.

It is clear that the original clause, as interpreted by the superior courts in this country, has put this Government, or would put any Government, into a very difficult position. The House knows—and it is mentioned in the Statement of Objects and Reasons—that one of the High Courts held that even murder or like offences can be preached. Now it is an extraordinary state of affairs if that can be done.

The Home Minister said:

Eminent judges have held that the language (of cl. 2 of art. 19) as it stands permits, and Parliament cannot pass any law and Government cannot deal with any man who makes speeches, writes pamphlets and distributes literature, inciting people to murder... If it has to be admitted even by the worst opponents of this Bill (the Constitution Amendment

Bill) that attempts to incitement to murder and violence would be included in the protective clause of art. 19 as it stands, the argument that no amendment is necessary falls completely to the ground, because eminent courts have raised it as a bar even to interfere with incitement to violence.

The Law Minister said, referring particularly to sec. 4 (1) (a) of the Press Act :

It means that under the decisions of the Provincial High Courts to which I have referred it is now open to anybody to incite or encourage, tend to incite or encourage, the commission of any offence of murder or any cognizable offence involving violence. . . . Is it a satisfactory position that any person should now be free to incite. . . ? Is it a desirable state of affairs that our Constitution should leave us in this desperate position that we could not control the right of free speech which has been granted by cl. 1 of art. 19 and it should be so unlimited that any person should be free to preach murder or the commission of any cognizable offence ?

For our own part we had answered this rhetorical question even before it was put in Parliament. We said in the May 1951 issue of the BULLETIN (p. 258) :

We are free to admit, as we have already said before, that Governments must be in a position to punish direct incitements to violence, and if our Constitution is found by the highest judicial authority to contain any lacuna in this respect, we have no doubt that it must be filled. But to make the right to freedom of speech and expression also subject to qualifications required for the maintenance of "public order," as are the rights to peaceable assembly and freedom of association, is to deprive freedom of speech or the press of a very valuable safeguard. When a threat to public order on account of words used rises to the magnitude of a threat to the security of the State, the words should certainly be liable to punishment. This criterion which the Constitution as it stands at present prescribes must be maintained; only the form in which it finds expression may be changed. But to go beyond this and deliberately to lower the standard of protection of this essential right is to take a reactionary step which would rob the right of a necessary part of its protection. If in India, as in the United States, were applied the "clear and present" danger rule, along with the "preferred status" rule, there would be no possibility of a minor breach of the peace being allowed to interfere with freedom of speech and expression, as the substitution of the words "public order" for "security of the State" would.

The Nehru Government which so precipitately amended the Constitution and in effect wiped out the fundamental right to freedom of expression must look foolish in the eyes of all in the light of the Supreme Court's decision

now announced which shows that even the unamended clause 2 of art. 19 does not give immunity to incitement to murder or other offences involving violence, which was the only basis on which the amendment was or could be justified. But the question arises why the Bharati case was not referred to the Supreme Court as Mr. Justice Sarjoo Prasad went out of his way to suggest. There was all the greater need for doing so, because in the case of *W. N. Srinivasa Bhat v. The State of Madras* (A.I.R., 38 Mad. 70) the same question of the validity of sec. 4(1)(a) of the Press Act had arisen and the majority of the judges of the special bench which considered the case had ruled that the section was constitutional, saying that "even the incitement or encouragement of a single case of murder or a single cognizable offence involving violence might have a tendency to overthrow the State." It is not as if the Government of India was unaware of this decision, for the Law Minister, in justifying amendment of art. 19(2), referred to this case by name, as if that case also supported him ! This decision at least should have raised a doubt in the mind of the Government about the soundness of the majority judgment in the Bharati case and should have prompted them to obtain the Supreme Court's finding on the subject before amending the Constitution. Would it be wholly unreasonable to assume that the Government, feeling convinced that a reference of the matter to the Supreme Court would only deprive them of an opportunity to whittle away the right to free speech and free press, proceeded to alter the Constitution, exploiting the Patna High Court's decision to the full ?

And what is the amendment which was pushed through in a provisional Parliament by means of tactics so utterly unfair, to say the least of them ? It just leaves freedom of expression at the mercy of the legislature and thus scores out the right from our Bill of Rights. To make this so-called fundamental right subject to such a "broad and vague" limitation as "public order" was in fact to "completely nullify" it, as Lord Macdonald, representative of the United Kingdom, told a committee of the United Nations. Pandit H. N. Kunzru said in Parliament :

If the amendments proposed are accepted then it is not merely that art. 19 will be amended, but that, for all practical purposes, part (a) of cl. 1 of art. 19 will be deleted. The provision relating to freedom of speech and expression will be reduced to the position that Fundamental Rights occupy in the continental constitutions. In those constitutions Fundamental Rights are no more than pious wishes. At the best, they are indications of the policy of the authorities; nothing more than that. I, therefore, think that if Government really feel that the clause to which I have referred must be hedged round with such serious limitations as to make it valueless for all practical purposes, then they should courageously come forward and ask for the deletion of that clause.

Prime Minister Nehru in fact went very near saying that freedom of expression need not be guaranteed in the Constitution. He remarked :

I have never heard of anyone saying that in the United Kingdom there is no freedom of the press or freedom of anything because Parliament is all-powerful. It is only here that we seem not to rely on ourselves, have no faith in ourselves, in our Parliament or our Assemblies.

His point was that in India too everything might be left to the legislatures, thus virtually scrapping the whole of the Bill of Rights! And this came from one who, before assuming office, had put the greatest emphasis on constitutional limitations being imposed on legislative power in the interest of securing individual freedom and founded the Indian Civil Liberties Union to propagate that doctrine!

PREVENTIVE DETENTION BILL

We give below a Note prepared by the Secretariat of the All-India Civil Liberties Council on the existing Preventive Detention Act in order that Members of Parliament may have before them the Council's views on the subject while considering the Bill then expected to be moved in Parliament for extending the life of the Act due to expire on 30th September this year.

The Bill has now been moved in the House of the People and it is now necessary for us to deal only with the changes which the Bill seeks to make in the Act. If the Bill is passed, and there is no reason to doubt that it will be passed by an overwhelming majority in a Parliament which still remains a single-party body, detention without trial would continue to be in force—for the present—up to the end of 1954, i. e., for a year and half more.

For the first time in the history of this measure effect is to be given by the present Bill to art. 22(7)(b) of the Constitution which contemplated fixing a maximum period of detention. The Bill fixes the maximum period to be twelve months. This may not amount to much in practice, for it only means that on a particular detention order a person cannot be detained for more than a year, but there will be nothing to prevent the Government from issuing another order at the end of this period detaining him for another year. All the advantage that this procedure will give the detenu is that his case will receive fresh examination at the hands of the Advisory Board after his first detention order has expired.

Under the present Act district magistrates and other officers authorized to exercise the power of detention were merely required to "report the fact" of any detention made by them to the State Governments. Now the Bill provides that the detention orders passed by these officers "shall be subject to the approval of the State Governments within a period of 15 days" and that the State Governments will report the matter to the Central Government immediately

thereafter. It is obvious that the requirement of the approval of the State Governments after an order is made will not be half as effective as the Home Minister himself making the order on his individual responsibility after personally looking into the facts of each case recommended by the police officers for detention.

The provision in the existing Act for personal attendance before the Advisory Board of the person on whom an order for detention has been served is being somewhat liberalised in the Bill. Sec. 10(1) of the Act spoke of such personal attendance as if it was to be an exception; now it is proposed to be made the normal rule. A detenu will be heard in person by an Advisory Board if he so desires. But the prohibition on being represented by counsel will continue as heretofore.

It will be seen that the changes which are proposed to be made by the Bill are of a very petty nature. The fundamental defects in the procedure of the Advisory Boards, which have been pointed out in the Note of the A.I.C.L.C., remain as before, and all the criticisms made therein will apply with equal force to the new enactment as to the old.

It is not usual for any member of Parliament to oppose a measure when leave for introducing it is asked, but Dr. Syama Prasad Mookerjee, Vice-President of the A.I.C.L.C., took this extraordinary course in respect of the present Bill. He had every right to do so, because, as he said, "detention without trial, except in the special circumstances of an emergency, was inconsistent with and repugnant to every principle of democracy. In normal times, such as the present, a country must be governed by the rule of law under the ordinary law of the land." The objection taken to the Bill on this high ground was simply unintelligible to the Home Minister, Dr. Kailas Nath Katju. It is "very astonishing," he said, that opposition should be offered to the very underlying principles of the Bill.

But really it should not be so surprising to him at all. For he himself had written just about ten years ago in his Foreword to "Recent Judgments in India" published by the "Hindustan Times" about detention without trial which was enforced in war time under Rule 26 of the Defence of India Rules :

Detention on mere undisclosed and often groundless suspicion, without charge or trial, is opposed to all notions of natural justice and all canons of civilized administration.

What is really surprising is that the good man who uttered this sentiment in 1942 should be surprised when it is just repeated by another man who stands even in a better position in condemning detention because it is being enforced in peace time. It is true that Dr. Katju was not then burdened with responsibility as he now is when he is "clothed with brief authority." But should that make all this difference?

The Home Minister made matters worse by expressing a doubt that Dr. Mookerjee was opposing the motion for introduction of the Bill "for party considerations." The patent truth is that if party considerations were to weigh with Dr. Mookerjee, he would be glad to support the Bill and keep in detention Communists against whom chiefly the Bill is directed. For he personally and the party of which he is the leader are ideologically poles asunder from Communists. In fact he showed by his opposition to the Bill aimed at his political opponents a generosity which is somewhat rare in politics. He was influenced in his action solely by his devotion to civil liberty in the abstract. He is the leader of the civil liberty movement in India and the whole movement would rejoice at this additional evidence afforded by him that workers in that cause do rise and ought to rise above politics and are guided in all their actions by principle alone.

The reason the Home Minister adduced for re-enacting the detention law was that attempts were still being made "to subvert the Constitution and the maintenance of law and order" and that that situation was expected to continue "for a considerable time." If the weapon of detention without trial was to be given up, why did the Constitution, he asked, confer on Parliament the power to enforce detention—even outside what could be called a situation of emergency in the legal sense? This argument is of course quite unanswerable. The motion was passed in the end by 279 votes against 84, which means that all non-Congress groups united in the opposition. Equally vigorous opposition will be offered to the Bill at its later stages, but it will all be unavailing as the Government has an assured majority of large size in both Houses.

PREVENTIVE DETENTION :

A NOTE CONTAINING THE VIEWS OF THE ALL-INDIA CIVIL LIBERTIES COUNCIL

In view of the proposed extension of the life of the Preventive Detention Act, this Note which embodies the views held by the All-India Civil Liberties Council on the subject was submitted for the consideration of M.P.s.

Constitution Itself Defective

Apart from the defects in the provisions of the existing legislation which are set forth below, it should first be noted that India is the only country in the world which professes to be democratic where detention without trial in peace time is possible. In the United States it is constitutionally incompetent to Congress to suspend habeas corpus except in cases of external invasion or internal rebellion. In the United Kingdom Parliament can never contemplate detention except in war time. In civil law countries like France also the so-called state of siege conferring any extraordinary power cannot be enforced unless there is actually present "a foreign invasion or an armed insurrection" or an imminent danger thereof. India is unique in this respect, in that its Constitution, besides providing for the use of exceptional powers in an emergency, also provides for legislation like the present Detention Act being adopted in a situation which does not partake of the character of an emergency. This uniqueness is not to the credit of the republican India and must come to an end. But this wider consideration is not of much relevance in considering a specific peace-time law of detention except in confirming one in opposition to all such laws.

So Also Legislation

The number of persons held in detention, it must be admitted, has been very much reduced of late, but time has certainly arrived when all those still in detention should be let out if only for the purpose of instituting

legal proceedings against them in the courts of justice and of repealing the law giving power of detention. The Defence of India Act provided for detention during the last war, but the Congress Governments as soon as they assumed office after the termination of the war took power by Public Security Acts to detain persons on suspicion and used it extensively. Now a separate law gives the power. Thus, for an unbroken period of twelve years detention without trial is in vogue in this country. Isn't time we broke with this long-continued arbitrary regime and gave up the power altogether? Even if larger considerations of principle were to be disregarded, mere expediency would seem to dictate this course.

But if a law of detention is to remain on the statute book and is to be brought into operation, even if on a very limited scale, the law needs to be improved. That every case of detention is now referred to a tribunal whose recommendations, if favourable to the detenu, have to be carried out is no doubt a very great advance on the former state of things. But the tribunal is not placed in a position where it can inform itself thoroughly of the facts of each case and determine whether the particular detention order was warranted or not. What is required to be done in order that the investigating body be enabled to get at the truth and give relief to those kept in custody without good cause is to assimilate the practices and procedures of our Advisory Boards in this respect to those which were followed by the Advisory Committee in England under Regulation 18 B, which was in force while World War II lasted and which was repealed as soon as the war came to a close. And it surely it is not too much to ask that India should pay at least as much respect to personal liberty in peace time as England did in war time.

The three essentials for a proper functioning of any investigating body are: (1) that full information con-

cerning the circumstances in which detention has been ordered be made available; (2) that the detenu be allowed to appear in person or by a legal representative to put forward his case; and (3) that he be enabled to call evidence and cross-examine witnesses.

None of these pre-requisites of a proper inquiry are satisfied by our law, while all of them were satisfied to the maximum extent by Regulation 18 B and the procedure adopted under it by the Advisory Committee.

These will now be considered seriatim.

* * *

1. — FULL INFORMATION

Our Constitution itself in art. 22 (6) authorizes the withholding of information considered by the detaining authority "to be against the public interest to disclose," and this constitutional provision is reproduced in sec. 7 (2) of the Preventive Detention Act. Such a provision, either in constitution or statute, is unknown in any country. That the information which is supplied in India to the detenu about the grounds of his detention is not as full as it could be, even after making allowance for this extraordinary reservation, was graphically described by the Chief Justice of the Bombay High Court in *Atmaram Shridhar Vaidya's case* (A. I. R., 33 Bombay 266) as follows :

In all the matters which have come up before us, we have been distressed to find how vague and unsatisfactory the grounds are which the detaining authority furnishes to the detenu; and we are compelled to say that in almost every case we have felt that the grounds could have been ampler and fuller without any detriment to public interest.

Nor is necessary information withheld from the detenu alone; it is capable of being similarly withheld from the investigating body itself. For though sec. 10 (1) of the Act allows the Advisory Board to call for further information than has been supplied to the detenu by the Government, no obligation has been placed on the Government to supply to the Advisory Board the information the latter may call for, even subject to the reservation about the withholding of information, non-disclosure of which is in the opinion of the detaining authority warranted by "the public interest." The result is that there is no guarantee that the detenu or even the tribunal itself will be in full possession of facts which it is obviously necessary to know if justice is to be done.

In this respect, Regulation 18 B presents a complete contrast. In the first place, it did not contain the limiting language appearing in sec. 7 (2) which warrants keeping back any information on the ground of the public interest. In the second place, the duty was in express terms cast on the Advisory Committee to obtain from the Government and to furnish the detenu "with such particulars as are in the opinion of the Chairman sufficient to enable (the detenu) to present his case." If this was the law what was the practice? "The Advisory Committee have before

them all the evidence which is in the possession of the Secretary of State" (Home Secretary in the House of Commons, Oct. 31, 1939). "It is the invariable practice of the Advisory Committee to put before (the detenus), as explicitly as they can, all the facts which are known against them" (Under Secretary, July 23, 1941). All that is in the record of the Home Office had to be and was made available to the Committee, and through the Committee to the detenu, without permission being given to keep back anything even in the supposed interest of the public security.

It may be added that in *Eire's Offences* against the State Act, passed in 1939 to combat widespread disorders, detention without trial was permitted, but the law placed upon the Government an explicit obligation to make every kind of information without exception available to the Commission appointed to investigate detention cases. The section in the Act providing for this is quoted below :

The Minister for Justice shall furnish to the Commission such information and documents (relevant to the subject-matter of such inquiry) in the possession or procurement of the Government or of any Minister of State as shall be called for by the Commission.

Our Home Minister, Mr. C. Rajagopalachari, put forward, when piloting the Preventive Detention Act last year, a very ingenuous argument in defence of withholding certain information even from the tribunal. He said: "If the tribunal was not in possession of all the facts, will it not be the worse for the Government? Will not the tribunal give a verdict for the detenu, in which case he will have to be released? Why should anybody worry about insufficiency of information?" The argument looks very plausible, but the provision is almost bound to react on the Advisory Board in just the opposite way. It will say to itself: "No doubt, on the facts as they have come to us, there does not appear to be any good reason for detaining this person. But all the facts need not come to us. We can be denied, under the Constitution and under the statute which govern our proceedings, knowledge of facts disclosure of which is thought by those whose duty it is to safeguard the security of the country to be detrimental to the public interest. Can we in the face of such a reservation expressly made report that there is no sufficient cause for the detention and cause by our report the release of a man possibly engaged in activities tending to subvert the State? We are not a judicial body whose business is to interpret laws. We are expected to take a common sense view of matters coming before us with a view to ensuring that no flagrant injustice is done to any one, and in taking such a common sense view we cannot ignore the fact that the circumstances which have not come to light probably are such as would prove the detenu's guilt to the hilt if only they could be disclosed without endangering the supreme interest of the security of the State. We cannot lend ourselves to becoming the instruments of the release of a person who is very likely dangerous, only on the ground that the papers which we were allowed to see

do not compel such a conclusion." No one knows how the Advisory Boards work, complete secrecy being maintained even about the details of their reports; but there is no reason to think that such influences are not at work. To say so is not to question the impartiality of the members of the Boards, but to point out a natural consequence of a defective provision of the law. In any case there is no justification for maintaining the provision.

* * *

2. LEGAL ASSISTANCE

Sec. 10, sub-sec. (3), of the Act forbids the detenu to appear before the Advisory Board in person or by a legal representative. The prohibition as to personal attendance has been grudgingly relaxed in sub-sec. (1) of sec. 10, but the ban on legal assistance is maintained. It is wholly unsustainable and must be lifted. The practice in England in this respect is to be found in the following statement of the Home Secretary in the House of Commons on Dec. 10, 1940 :

If the Advisory Committee came to the conclusion that in the circumstances of any case there would be advantage to the proceedings by the bringing out of facts and that this would result from legal assistance being available, that tribunal or Committee has the right to say that such legal assistance could be provided. . . . It is not the Home Secretary who settles whether legal assistance shall be available or not, but the Committee outside. (The Advisory Committee asks a legal representative, if the detainee has given him instructions,) to appear before them to give evidence on behalf of the appellant or to assist the Committee on the appellant's behalf in the investigation of the facts of the case.

It is of course unthinkable that there could be any peace time legislation providing for detention in the United States, but assuming that such a law could validly exist, the mere provision in it for denying legal assistance would render the law unconstitutional on the ground that it deprived those who were affected by it of the due process of law. And this is not a legal quibble. The enforcement of such a provision necessarily vitiates the whole character of the inquiry. As Mr. C. K. Allen says in "Law and Orders" at p. 239 :

Speaking from considerable experience of the examination of conscientious objectors, the present writer can say without hesitation that legal aid may make all the difference to that large class of persons who are inarticulate or discursive and quite unable to present their own cases; and this must be so, however eminent, experienced or sympathetic the examining tribunal may be.

* * *

3.—CALLING IN WITNESSES

The former Home Minister, when the Act was amended in 1951, resisted the suggestion made to him that detenus be permitted to call evidence and cross-examine

witnesses. The practice that prevailed in England was in accord with the suggestion that was made to him, as will be seen from the following statements of ministers in the House of Commons.

(The Advisory Committee can) call in any person who, in their opinion, may be able to assist in elucidating the matter with which the Committee have to deal.—Home Secretary (Oct. 31, 1939). In some cases witnesses may be available, in others not; and where witnesses are available, it is for the Committee to decide whether the attendance of witnesses is necessary.—Under Secretary (Feb. 13, 1941). Witnesses can be called, and are called in many of these cases.—Home Secretary (July 23, 1941). Provision of such a facility, it need hardly be said, is absolutely essential even in a semi-judicial inquiry, if the inquiry is to bring out the true facts.

* * *

SOME OTHER POINTS

These criticisms are made with the object of showing how the Advisory Boards, though they may be properly manned, will be unable to fulfil their function unless they are provided with the means, described above, to sift the cases well and arrive at right conclusions. But some other points may be mentioned. They were raised in the debate last year in the form of suggestions by Opposition members of the provisional Parliament, but none of the suggestions made were acceptable to the Government.

It was pointed out, e. g., that the Supreme Court itself, going out of its way, had suggested that the Government should have a periodical review of every detention case made by the Advisory Board so that no one would remain in detention longer than necessary and it was urged that the suggestion should be given effect to. But this did not find favour with the Home Minister. The practice in England was in conformity with the suggestion. In that country the detenu often asked his case to be reconsidered by the Advisory Committee and the request was granted. Similarly, the Home Secretary of his own motion often submitted detention cases to the Committee for reconsideration. "It is principally in this manner," says Mr. Allen, "that the (detention) orders have been suspended (which term was used in England for 'revoked') and releases made".

It was also suggested that if the weapon of detention was to be kept in the armoury, its use might at least be reserved for really important occasions. It might be retained for the purpose of maintaining "the security of the State" but should be given up for minor objects like "the maintenance of public order" or keeping smooth "the relations of India with foreign powers." In that way the scope of sec. 3 (1) could be very much narrowed. This suggestion also deserves a better fate than it actually met with at the hands of Mr. C. Rajagopalachari.

Another small suggestion was also summarily rejected. The suggestion was that, instead of leaving it to all

district magistrates in the country to exercise "subjective" discretion and pass detention orders, this power should be confined to the Home Ministers of the States, requiring them to look personally into each individual case. In England personal investigation of each detention case by the Home Secretary himself was regarded as a great safeguard against too extensive and arbitrary exercise of this extraordinary power. Mr. Rajagopalachari, however, stoutly refused to provide the safeguard in India, pleading that it would cause inconvenience to the keepers of the peace. Perhaps his successor would now bring a more elastic mind to bear on the subject.

It need hardly be pointed out that the views put forward above in opposition to a peace-time legislation for the suspension of habeas corpus, aimed principally at the Communists, can be held by those who have no sympathy, overt or covert, with Communism and who have as deep a concern for national security as the Government itself. The opposition offered by the All-India Civil Liberties Council proceeds from its firm conviction that all subversive tendencies must be countered by a democratic people in ways conformable to democracy. The democratic doctrine itself imposes inhibitions against adopting totalitarian ways in combating totalitarian activities.

ENGLISH AND AMERICAN

"GROUP LIBEL" LEGISLATION

CORRESPONDING TO SEC. 153-A, INDIAN PENAL CODE

Our criminal law specifically provides, in sec. 153-A of the Penal Code, against promotion of communal ill-will and hatred, and Rajaji's revised version of the Press Act even makes this a special press offence to be visited with the special penalties of the taking and the forfeiting of a security.

In England too this is capable of being treated as the offence of seditious libel, a "seditious intention," which is a necessary ingredient of the offence, being defined to include an intention "to promote feelings of ill-will and hostility between different sections of His Majesty's subjects." This law was bodily adopted in India by the British Government, but the difference is this: that in England the law is still nominally retained as part of its criminal code, though it has become obsolete for over a hundred years; but it was actively used in India under the British regime and continues to be vigorously used in the present republican era also.

In the light of this we may consider what the latest developments in the English and American practice is in this matter.

1.—THE PRACTICE IN ENGLAND

In the Bill which Mr. Harold Lever recently introduced in Parliament to relax the provisions of the law of libel (which is recognised to be too rigid) in conformity with the recommendations of Lord Porter's Committee, an attempt was made in the Standing Committee to which the Bill was referred to make what is called "Group Libel" an effective part of the British code once again, thus making the law of seditious libel which corresponds to our sec. 153-A available for every-day use, instead of keeping it in reserve as an ultimate weapon to be brought into use in very exceptional cases (vide p. ii:118 of the BULLETIN). The Attorney-General resisted this proposal in the Committee on the ground that it would involve an unjustifiable restriction of free speech and free press. We

now know what the fate of the proposal was. The amendment—it was proposed by Sir Leslie Plummer—was rejected by 11 to 17 votes. It ran thus:

Notwithstanding the provision of sub-section (2) of section sixteen of this Act it shall be an offence punishable by imprisonment for a period not exceeding two years for any person to utter or cause to be uttered, or print or publish or cause to be printed or published, or distribute or cause to be distributed, any statement or publication directed, or reasonably understood to be directed, against any body of persons within the United Kingdom, distinguishable as such by race, creed or colour, which is calculated to bring the same into hatred, ridicule, or contempt.

A private person or organization shall have the right to initiate proceedings hereunder provided that the fiat of the Attorney-General or the consent of the Director of Public Prosecutions be obtained.

It is hardly surprising that the proposal did not meet with favour, for Lord Porter's Committee, on the basis of whose report Mr. Lever's Bill was moulded, had given full consideration to the matter and had arrived at the conclusion that no such change in the law of libel should be made. The Committee says:

We find ourselves unable to accept proposals which have been made to us that the law of defamation should be extended to embrace ("Group Defamation," that is to say,) false statements vilifying groups or classes of persons distinguishable by race, colour, creed or vocation.

The reasons given by the Committee in support of this conclusion are:

If such statements are made with intent to incite persons to commit any crime, to create a disturbance, to raise discontent or disaffection among His Majesty's subjects, or to promote ill-will and hostility between

different classes of such subjects, they may amount to the crime of seditious libel; but prosecutions for seditious libel, save in the most flagrant cases, may easily present the appearance of political prosecutions which the English tradition tends to view with disfavour. . . .

Much as we deplore all provocation to hatred or contempt for bodies or groups of persons (like the Jews) with its attendant incitement to violence, we cannot fail to be impressed by the danger of curtailing free and frank—albeit, hot and hasty—political discussion and criticism. No suggestion has been made to us for altering the existing law which would avoid the prohibition of perfectly proper criticisms of particular groups or classes of persons. The law of seditious libel still exists as an ultimate sanction and we consider that the law as it stands affords as much protection as can safely be given.

We do not, therefore, recommend any general change in the existing law to deal with Group Defamation. Thus English opinion may be held to be decidedly against any legislation for the purpose of preventing provocation of communal ill-will and hatred.

2.—THE PRACTICE IN THE UNITED STATES

In America some of the states, e. g., New Jersey, Massachusetts, Illinois, have what are known as "group" or "race libel laws." The New Jersey statute punishes advocacy of "hatred, abuse, violence or hostility" against racial or religious groups. But this statute was quickly held unconstitutional on its face by the supreme court of the state in *State v. Klaprott* (1941) 127 N. J. L. 395 (vide p. 299 of the BULLETIN). The Illinois statute was the next to come up for adjudication in the U. S. Supreme Court, which handed down its decision on 28th April last. We deal with this case below.

The statute makes it an offence to publish, disseminate or display any material that would expose citizens of any race, creed or colour "to contempt, derision or obloquy." The statute further prohibits publication or distribution of any such material if it be "productive of breach of the peace or riots." To this latter provision obviously no objection can be taken. But it is the former provision which punishes publication or exhibition of literature vilifying classes or groups even when a breach of the peace was not in question that causes concern.

It was the validity of this part of the law which punishes group libel minus disturbance that was challenged before the Supreme Court by Mr. Joseph Beauharnais, President of the White Circle League of America, who had distributed leaflets setting forth a petition to the Mayor and City Council of Chicago for the adoption of segregation measures. The leaflets appealed to the whites to take effective steps to "preserve and protect white neighbourhoods from the constant and continuous invasion, harassment and encroachment by the negroes," saying: "If persuasion and the need to prevent the white race from

being mongrelized by the negro will not unite us, then the aggressions, . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." Mr. Beauharnais was convicted under the statute and fined \$200, the maximum allowed by the statute. Against this conviction he appealed to the Supreme Court.

The Court in a 5 to 4 opinion affirmed the conviction, upholding the right of the state to pass and enforce a "group libel" law. Mr. Justice Frankfurter, delivering the judgment of the majority, said:

The precise question before us is whether the protection of "liberty" in the due process clause of the Fourteenth Amendment prevents a state from punishing (criminal) libels directed at designated collectives and flagrantly disseminated. . . . If an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a state power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the state.

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than rantings of modern Know-nothings. (It is, however, out of bounds for the judiciary to deny the legislature a choice of policy provided it is not forbidden by some explicit limitation on the state's power.) Speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups.

While the Court gave this opinion about the constitutionality of the statute, it took care to enter a caveat (which is most important) about the expediency of this kind of legislation. Mr. Frankfurter said:

We find no warrant in the Constitution for denying to Illinois the power to pass the law here under attack. But it bears repeating—although it should not—that our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others. It is not for us, however, to make the legislative judgment. We are not at liberty to erect those doubts into fundamental law.

"CLEAR AND PRESENT DANGER" DOCTRINE APPLICABLE

Mr. Justice Jackson, in a dissenting judgment, specifically dealt with the point made by the American Civil Liberties Union in its amicus curiae brief that there was nothing about the conduct of the defendant which created any danger that a breach of the peace would occur. "Fighting words," that is to say, words which are "likely to cause a fight" are punishable, according to *Chaplinsky v. New Hampshire* (1942) 315 U. S. 568, but the circumstances disclosed in that case were different, viz., that

there was an imminent danger of a disturbance, without which no statute tending to prohibit speech could be valid. Mr. Jackson said on this point:

(The safeguard imposed by the Supreme Court upon the states is) that where expression, oral or printed, is punished, although it has not actually caused injuries or disorders but is thought to have a tendency to do so the likelihood of such consequence must not be remote or speculative. That is the "clear and present danger" test which Mr. Justice Holmes and Mr. Justice Brandeis (formulated), eventually with support of the Court.

Punishment of printed words, based on their *tendency* either to cause breach of the peace or injuries to persons or groups, in my opinion, is justifiable only if the prosecution survives the "clear and present danger" test. It is the most just and workable standard yet evolved for determining criminality of words whose injurious or inciting tendencies are not demonstrated by the event but are ascribed to them on the basis of probabilities.

Its application is important in this case because . . . it will inquire whether this publication was obviously so foul and extreme as to defeat its own ends, whether its appeal for money—which has a cooling effect on many persons—would not negative its inflammatory effect, whether it would not impress the passer-by as the work of an irresponsible who needed mental examination.

One of the merits of the "clear and present danger" test is that the triers of fact would take into account the realities of race relations and any smouldering fires to be fanned into holocausts.

Mr. Justice Black held that the statute violated the right of free speech. He said in his dissent:

Unless I misread history the majority is giving "libel" a more expansive scope (making it applicable to groups as well as individuals) and more respectable status than it was ever accorded even in the Star Chamber. For here it is held to be punishable to give publicity to . . . any printed matter which a judge may find unduly offensive to any race, colour, creed or religion. In other words, in arguing for or against the enactment of laws that may differently affect huge groups, it is now very dangerous indeed to say something critical of one of the groups.

This Act sets up a system of state censorship which is at war with the kind of free government envisioned by those who forced adoption of our Bill of Rights. . . . I think the First Amendment, with the Fourteenth, "absolutely" forbids such laws without any "ifs" or "buts" or "whereases." Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech.

The American Civil Liberties Union, though it opposes Mr. Beauharnais' racist views, has now applied for a re-trial of the case.

FREE SPEECH GUARANTEE EXTENDED TO MOVIES

U. S. SUPREME COURT OVERTURNS ITS 37-YEAR OLD DECISION

On 26th May the Supreme Court of the United States unanimously decided in the "Miracle" case that motion pictures were entitled to the constitutional guarantees of free speech and a free press, specifically reversing its decision that had stood for thirty-seven years.

This earlier decision was rendered in an Ohio film case in 1915 (*Mutual Film Corporation v. Ohio Industrial Commission*, 236 U. S. 230) and was referred to by us at p. 180. In this case a distributor of motion pictures sought to enjoin the enforcement of an Ohio statute which required the prior approval of a board of censors before any motion pictures could be publicly exhibited in the state and which directed the board to approve only such films as in its discretion it adjudged to be "of a moral, educational or amusing and harmless character." The District Court denied injunctive relief and on appeal the Supreme Court affirmed the lower court's decree, thus sustaining state censorship of films. In doing so, it held that a state law providing for the censorship of motion pictures was constitutional on the ground that such pictures do not come within the free speech and free press guarantee. There are many media of thought, the Court noted, which

are outside the pale of this guarantee. Mr. Justice McKenna said:

It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion.

Because of possible harm from their presentation to mixed audiences and children the Court held it reasonable for the state to impose a censorship.

This *Mutual Film* case was decided, as has been said, "in the infancy of motion pictures when the potentialities of the medium as a means of communication and a form of art were necessarily as yet unrealized." To whatever extent it might have been true at that time, viz., that motion pictures are mere entertainment *sans* ideas, is not true any longer, and it is now widely recognized that while particular films might tend to corrupt morals as particular books and newspapers might, they might also be a source of enlightenment. But the Supreme Court had not till the other day given express recognition to this fact, though it came very near doing so. E. g., in

Winters *v.* New York (1946) 333 U. S. 507, the Court said :

The line between the informing and the entertaining is too elusive for the protection of that basic right (*viz.*, the right of a free press). Everyone is familiar with instances of propoganda through fiction. What is one man's amusement, teaches another's doctrine.

Similarly, in *United States v. Paramount Pictures* (1948) 334 U. S. 136, the Court, speaking through Mr. Justice Douglas, said in a dictum :

We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.

The case decided on 26th May lays it down in so many words that motion pictures, like every other vehicle of idea, will be under the First Amendment's protecting wing.

This case concerns the "Miracle," a picture produced in Italy, which depicts the story of a simple-minded Italian peasant woman who is seduced by a stranger. She believes this stranger to be St. Joseph and imagines that her child is miraculously conceived. The picture was granted a license for public exhibition which is required under a New York statute, but it being found that the picture gave great offence to Roman Catholics, the license that was first issued was rescinded almost two years thereafter, on the ground that the film was "sacrilegious." The statute directs that a license be issued unless the picture "is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."

When Joseph Burstyn, Inc., the distributors of the film, brought an action against the banning order, the order was confirmed and thereafter an appeal was preferred to the Supreme Court. By a unanimous decision the Court held the New York statute permitting the banning of motion picture films unconstitutional, as imposing an inadmissible previous restraint upon speech and press. Mr. Justice Clark, speaking for the Court, said :

Since this series of decisions came after the *Mutual* decision (holding that the freedom-of-the-press guarantee was not applicable to motion pictures), the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press."

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behaviour in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.

It is urged that motion pictures do not fall within the First Amendment's aegis because their production,

distribution and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.

We fail to see why operation for profit should have any different effect in the case of motion pictures.

It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guarantee of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Comm'n* is out of harmony with the views here set forth, we no longer adhere to it.

The Court took care to add that to say that "liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments (is not to say) that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." Motion pictures presented their peculiar problems. "But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule."

In *Near v. Minnesota* (1931) 283 U. S. 697 it was recognized that "such a previous restraint (as was imposed by the New York statute) is a form of infringement upon freedom of expression to be especially condemned," though the decision carefully pointed out that "the protection even as to previous restraint is not absolutely unlimited; but the limitation has been recognized only in exceptional cases." In the light of this decision, the Court said: New York "has a heavy burden to demonstrate that the limitation challenged here (that the film is sacrilegious) presents such an exceptional case." In the opinion of the Court the state failed to discharge the burden. The Court said :

In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot

vest such unlimited restraining control over motion pictures in a censor.

Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favouring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority.

However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them, which is sufficient to justify prior restraints upon the expression of those views.

It is not the business of Government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

This means that the decision does not outlaw control of all kinds or even prior censorship of films in all cases. For, confining itself to the banning of a film on the basis of a censor's conclusion that it is "sacrilegious," the Court stated that it was not necessary on the present occasion "to decide, for example, whether a state may censor motion pictures under a statute clearly designed and applied to prevent the showing of obscene films."

Only a week after this New York case, the Supreme Court struck down a censorship ordinance of the City of Marshall in Texas in the case of a film called "Pinky," the showing of which was barred by the city's board of censors on the ground that the depicting of a white man kissing and embracing a Negro woman was objected to in the South. The film was, however, still exhibited in spite of the disapproval of the board, and the exhibitor was fined \$200 for breach of the banning order. He appealed to the Texas Court of Criminal Appeals, but the court upheld the order on 20th January, citing the Supreme Court's 1915 decision in the Ohio film censorship case to the effect that the constitutional guarantees of free speech and press did not extend to movies. On appeal from this decision, the Supreme Court on 2nd June reversed the lower court's decision. In doing so, the Court did not think it necessary to give any explanation other than citation of the "Miracle" decision.

The exhibitor's appeal in addition to attacking validity of the Marshall city ordinance as a restraint in medium of expression, contended that the ordinance, which authorized the board of censors to rule against a showing when the board felt that the film was "of such character as to be prejudicial to the best interests of the people of the city," was vague and indefinite, and set no proper standard for guidance of the censors. The Court as a whole did not pass on this contention. Mr. Justice Frankfurter, however, said that the ordinance in question offended the due process of law clause of the Constitution because of indefiniteness.

NOTES

C. P. Not to be Banned in France

CLANDESTINITY MAKES IT MORE DANGEROUS

There is no danger any longer, in view of the Supreme Court's decision in V. G. Row's case, of the Communist Party being banned in any State in India. But our Governments may well take note of the reasoning which has led the French Government not to suppress the Communist Party in France. A ban such as the Madras and West Bengal Governments had imposed would not be constitutionally objectionable in that country as it has been declared to be by our highest tribunal, but on grounds of pure expediency the French Government considers banning to be bad policy.

Following the demonstrations of Communist crowds against Gen. Ridgway, Supreme Allied Commander, on 28th May, the French Government caused the arrest of M. Duclos, Secretary General of the Communist Party, who was then in a car at the scene of the disturbance. Since then an alleged Red intelligence network is said to have been discovered at the ports. This had led to speculations about the Government's intentions in the matter of an outright suppression of the Party. (M. Duclos was ordered to be released by an Appeals Court on 1st July, holding that in arresting him the police had violated the immunity granted in the Constitution to Deputies, for, according to the Court, M. Duclos had not been taken in flagrante delicto, the only circumstance warranting the arrest of a Deputy.)

On this point the French Minister of the Interior declared on 18th June that while the Government would continue to prosecute individual violations of law by Communists it had no desire to ban the Party. He said:

The plan of action of this party has proved that it would place itself outside Republican legality. I do not think that it would be a solution to dissolve the Communist party. It is not sufficient to suppress a thing to make it in fact cease to exist, and, hidden in clandestinity, it would be still more dangerous than in the light of day.

The Government, however, intends to take steps against civil servants whose political sympathies are incompatible with the exercise of authority "over sectors of first importance or affecting the national defence."

Ban on Negroes Forbidden

A private arrangement arrived at between the St. Louis-San Francisco Railway and the Brotherhood of Railway Trainmen had the effect of depriving negro train porters of jobs by reason of the fact that negroes could not become members of the Brotherhood, its membership being confined to the whites. When this matter came on for hearing before the Supreme Court of the United States, the Court found on 9th June that the arrangement threatened negroes "with loss of their jobs

because they are not white and for no other reason" and that the Brotherhood had in fact long tried to supplant them with white men. The Court therefore by a 6 to 3 decision forbade labour unions to use the Railway Labour Act for the purpose of "using their position and power" to destroy "coloured workers' jobs in order to bestow them on white workers." Mr. Justice Black wrote the majority judgment. Mr. Justice Minton, who was the spokesman of the minority, took the position that State action was not responsible for the racial discrimination that had occurred but was due solely to the action of private parties, viz., the railroad and the brotherhood, and that therefore the Court had no jurisdiction over it.

International Press Convention

Lord Burnham, presiding over an annual meeting of the Commonwealth Press Union in London on 10th June, opposed the proposed U. N. Press Convention, saying:

There is a proposal (supported by India) to ban stories injurious to national prestige and dignity. It is to our job to record news impartially and, in fact, to tell the truth even if it hurts. I trust this Union will fight to the last to do that.

This is a very good example of where we get to when excellent intentions are interpreted by Governments who have no real conception of the essential requirements of freedom of news and comment.

Now the Convention would appear to be dead and, though there may be mourners at the funeral, I do not think the Commonwealth Press Union will be represented.

PRESS ACT OF 1931

Supreme Court Reverses Patna High Court

AND HOLDS THE PRESS ACT INTRA VIRES UNDER THE UNAMENDED ART. 19(2)

The Constitution Bench of the Supreme Court on 26th May partly allowed an appeal preferred by the Bihar State against the judgment of a special bench of the Patna High Court setting aside the order of the Bihar Government demanding security of Rs. 2,000 from Sheilabala Devi, keeper of the Bharati Press, under the Press (Emergency Powers) Act, 1931 (vide p. 258 of the BULLETIN). The judgment was unanimous.

The High Court had ruled (13th October 1950) in a majority opinion that the pamphlet, "Sangram" (Revolution) printed at the Bharati Press offended against the provisions of sec. 4(1)(a) of the Press Act inasmuch as in certain parts it encouraged violent revolution, but that this section was repugnant to the Constitution and therefore void as it imposed on the freedom of the press restrictions beyond the purview of those allowed under art. 19(2), which article at the time of the High Court's decision had not been amended. Thus the High Court had quashed the Bihar Government's security order.

The Supreme Court now confirmed the High Court's decision, but on totally different grounds. It found that the pamphlet in question did not come within the mischief of sec. 4(1)(a), but it upheld the contention of the State Government that the section in itself was constitutional and intra vires even according to the unamended art. 19(2) of the Constitution. Thus it will be seen that while the Supreme Court's final judgment as regards the Government's order was the same as that of the High Court, its conclusions on the two points raised in the case were exactly contrary to those reached by the High Court.

CONTENTS OF THE PAMPHLET

As to the character of the pamphlet, the High Court had held, and on this point its opinion was unanimous unlike that on the constitutional point, that the document offended against the provisions of section 4(1)(a) inasmuch as certain parts of it contemplated a bloody and violent revolution and that the central theme that ran through the whole gamut of the offending pamphlet was that the author was anxious to bring about a bloody revolution and change completely the present order of things by causing a total annihilation of the persons and the policies of those who according to him were in the opposite camp.

But the Supreme Court's view was that the High Court had taken the pamphlet more seriously than it deserved. Mr. Justice Mahajan, speaking for the Court, said that he agreed with counsel in his opinion that the pamphlet contained merely empty slogans carrying no particular meaning except some amount of figurative expressions or language borrowed at random from various authors with a touch of poetic flourish about it. Writings of this character at the present moment and in the present background of our country neither excited, nor had the tendency to excite, any person from among the class which was likely to read a pamphlet of this nature. Any non-descript person who promised to change the order of things by bloody revolution and assumed the role of a new Messiah was merely the laughing stock of his reader and created an adverse impression against himself rather than succeeded in stirring up any excitement in the minds of the readers. Rhetoric of this kind might, in conceivable circumstances, inflame passions as, for example, if addressed to an excited mob. But if such exceptional circumstances existed, it was for the State Government to establish the fact. In the absence of any such proof, they should assume that the pamphlet would be read by educated persons in the quietness of their homes or in other places where the atmosphere was normal. The time was long past when writings of this kind could, in normal circumstances, excite people to commit crimes of violence or murder.

Mr. Justice Mukherjee in a separate judgment agreed with this conclusion. He said that the pamphlet, taken as a whole, was nothing but a tissue of high-sounding and meaningless words; that no rational person would take

the author seriously; and that he would look upon the composition as the vapourings of a deranged brain.

THE CONSTITUTIONAL QUESTION

But this was a minor point. The matter went to the Supreme Court at all because of the constitutional question it raised. On this question two of the three judges of the High Court (viz., Mr. Justice Sarjoo Prasad and Mr. Justice Ramaswami) had held that the decision of the Supreme Court in the "Cross Roads" (Ramesh Thappar v. Madras) and the "Organizer" (Brij Bhushan v. Delhi) cases as to the scope of art. 19 (2) controlled the issue and compelled the Court to rule that sec. 4 (1) (a) of the Press Act was ultra vires of the Constitution, inasmuch as art. 19 (2), as it then stood, did not cover the restrictions on freedom of the press which the section contemplated.

On this main question the Supreme Court unanimously rejected the majority judgment of the lower court. Speaking through Mr. Justice Mahajan, the Court held that Mr. Justice Shearer (of the Patna High Court) was right in the view that there was nothing in the two decisions of the Supreme Court which bore directly or indirectly on the point at issue in the present case and that both Sarjoo Prasad and Ramaswami JJ. were in error in holding that these decisions were conclusive on the question of the invalidity of clauses (a) and (b) of sec. 4 (1) of the Press Act. This section, His Lordship continued, dealt with words or signs or visible representations which incited or tended to incite the commission of any offence of murder or any cognizable offence involving violence and it was plain that speeches or expressions on the part of an individual which incited or encouraged the commission of violent crimes, such as murder, could not be matters which would undermine the security of the State coming within the ambit of a law sanctioned by article 19 (2) of the Constitution. He could not help observing, His Lordship said, that the decisions of the Supreme Court in the "Crossroads" and "Organizer" cases had been more than once misapplied and misunderstood, and had been construed as laying down the wide proposition that restrictions of the nature imposed by section 4 (1) (a) of the Press (Emergency Powers) Act or of a similar character were outside the scope of article 19 (2) of the Constitution inasmuch as they were conceived generally in the interests of public order.

His Lordship said the restrictions imposed by section 4 (1) (a) of the Press (Emergency Powers) Act on freedom of speech and expression were solely directed against the undermining of the security of the State or the overthrow of it and were within the ambit of article 19 (2) of the Constitution. The deduction that a person would be free to incite murder or other cognizable offence through the press with impunity drawn from the Supreme Court's decision in the "Crossroads" case could easily have been avoided as it was avoided by Mr. Justice Shearer. His Lordship concluded:

The State Government has succeeded in its contention that sec. 4 (1) (a) of the Act is constitutional, and

that was the real ground on which the case came to this Court.

The Court gave this authoritative interpretation of the scope of art. 19 (2) as it stood before the article was subsequently amended. After the enlargement of its scope by the Constitution Amendment Act, the validity of sec. 4 (1) (a) of the Press Act cannot conceivably be questioned. Formerly, the freedom of speech and expression could only be restricted in cases where that expression tended to undermine the security of the State. Amendment to article 19 (2), however, has further restricted that freedom by enacting that such expressions as tended even to undermine public peace could be taken exception to.

(For comment, see the article on the opening page.)

RECOVERY OF ABDUCTED PERSONS

Act Held to be "Inconsistent with the Constitution"

The full bench of the Punjab High Court consisting of Bhandari, Khosla and Harnam Singh JJ. held on 10th June that the Abducted Persons (Recovery and Restoration) Act of 1949 was inconsistent with the provisions of the Constitution.

The Act was passed in pursuance of an agreement between the Governments of India and Pakistan for restoration of abducted persons. An abducted person, according to sec. 2, is a Muslim female (or her child) who within a certain period had become separated from the family and is found to be living in any other family. A tribunal appointed for the purpose decides whether any person is an abducted person, and if the tribunal so finds, a person, arrested under sec. 4, is sent to a refugee camp for transfer to Pakistan with a view to handing her over to her relatives.

The validity of the Act was challenged in about 50 petitions praying for the release of persons detained in the abducted persons camp at Jullundar, and the Court held that certain provisions of the Act were ultra vires the Constitution. Their Lordships wrote separate judgments but came almost to identical conclusions, there being only minor differences of opinion on certain points.

Mr. Justice Bhandari held that the Act violated the abducted person's right to move about freely or to settle in any part of India which was conferred by art. 19 (1) (e) of the Constitution. He said:

If the Constitution has stated expressly, or by necessary implication, that a citizen shall not be expelled from India it would not in my opinion be open to Parliament to frame a statute so as entirely to defeat the objects of the Constitution by directing that he shall be expelled under escort of police. Nor is it, in my opinion, open to the Government to state that the taking of a citizen from India to Pakistan is no worse than taking a prisoner from one prison to another. It is a well-known legal maxim that what-

ever is prohibited by law to be done directly cannot legally be effective by an indirect and circuitous contrivance.

It is true that section 7 empowers a tribunal to convey abducted persons out of India and not to deport him, but the fact that the legislature has thought fit to use the word 'convey' in preference to the word 'deport' does not alter the fact that a person who is sent out of India is deprived of the right conferred upon him by article 19. If he is sent out of the country he cannot possibly practise any profession or carry on any occupation, trade or business. It would, in my opinion, be a mere quibble to say that expulsion is not permanent and that it is open to such persons to return to their own country. In the first place, it is extremely difficult for a woman who is conveyed out of India in these circumstances to return to her country, and, secondly, even if she does return to India, she is liable to be apprehended again and sent back to Pakistan on the ground that she is an abducted person and ought to be restored to her relations.

For all practical purposes, therefore, it seems to me that a person who is conveyed out of India under the provisions of section 7 is deprived of rights guaranteed to her by article 19(1)(g) of the Constitution of India. As the provisions of section 7 authorize deportation of a citizen from India these provisions must be deemed to be inconsistent with the provisions of article 19(1)(g) of the Constitution.

Their Lordships also held that the Act is repugnant to the provisions of clauses 1 and 2 of art. 22. Mr. Justice Khosla said :

The Act is inconsistent with the provisions of article 22 as it does not provide for production of an abducted person before a magistrate after he or she has been taken into custody. Indeed it appears to exclude such provision. It is also inconsistent with article 22 as it does not permit an abducted person to consult a legal practitioner of his choice.

The full bench to which the petitions were referred for a finding on the constitutional issues remitted the case to a division bench for disposal, and this bench allowed all the petitions and ordered the detenus concerned to be released forthwith.

C. L. U. NEWS

Bombay Union's Plea for Release of Detenus

A deputation of the Bombay Civil Liberties Union consisting of Mr. Dinkar Desai and Mr. N. H. Pandya, Secretaries, and Mr. R. A. Khedgikar, M. L. A., waited upon the Chief Minister, Mr. Morarji Desai, on 5th June to urge on the Bombay Government immediate release of all persons held in the gaols of the State under the Preventive Detention Act.

The deputation stated: "The Preventive Detention Act is an objectionable piece of legislation, inasmuch as it gives powers to the Government to deprive citizens of their fundamental right of personal liberty without bringing them for trial before a court."

It was generally argued by the Government that persons were detained for acts of violence and for similar objectionable activities, but the Government forgot that those alleged acts of violence were not proved in courts of law. The proper procedure to be adopted by the Government was to try the persons concerned in courts of law for alleged offences of instigating or committing violence.

An additional reason for release of detenus, the deputation stated, was that the general situation in the country today was absolutely normal. That had been admitted by Mr. Jawaharlal Nehru in a public statement at Calcutta on March 22nd last. The Prime Minister had also stated in the House of the People on 26th May that the policy of the Union Government was one of general release of detenus. The Bombay Government, therefore, must give effect to that policy immediately.

The deputation added: "We also feel that the newly-formed Governments should not continue the policy of the old Governments and should, therefore, release all political, trade union and 'kisan' detenus."

Mr. Morarji Desai is reported to have said that only such persons against whom there was proof of violence were being detained.

COMMENTS

Freedom of Person

ABOLITION OF DETENTION WITHOUT TRIAL URGED

Among the suggestions made by the International League for the Rights of Man, of which the All-India Civil Liberties Council is an affiliate, is one concerning art. 16 of the draft International Covenant on Human Rights which relates to Freedom of Person and which is as unsatisfactory as art. 21 of the Indian Constitution. The League's suggestion is, as summarised by the Secretary-General of the U. N., that "explicit provision should be made against preventive detention without trial in a court of law." The League also, in the Secretary-General's words, "emphasizes the danger of undue restrictions in the article on freedom of information" (art. 14).

Law of Sedition

While the Government of India was quick in validating, by the Constitution Amendment Act, the law of sedition (sec. 124-A of the Indian Penal Code) which has been declared invalid by the Punjab High Court and in clamping unheard of restrictions on the freedom of press by Rajaji's Press Act, it is inexplicably tardy in revising that law in accordance with the recommendations of the Press Laws Committee.

Such revision is still awaited, but in the meantime one comes upon what can only be regarded as a misrepresentation of the present state of the law of sedition by no less a person than the Minister for External Affairs in the reply which he sent to the U. N. questionnaire on forced labour on 14th April last. What Mr. Nehru says in this reply about the law of sedition does not change the position of India in respect of forced labour in any way, but the answer certainly is such as to produce a false impression on the U. N. in regard to our existing law in the matter of sedition.

Mr. Nehru says:

There is of course an offence of sedition which at the present time must be held to correspond closely to the offence of sedition or treason that all countries have. . . . But such an offence, since 26th January 1950, has nothing to do with the holding of any political opinion of any complexion, and only the acts that are directly subversive of the security of the State constitute that offence.

The impression one would gather from the above extract is that the law of sedition as it came down from the former regime to the Republic of India was suitably amended on the establishment of the Republic on 26th January 1950 so as not to make it applicable to any expressions, printed or oral, but only to "acts that are directly subversive of the security of the State." But such an impression would be totally inaccurate.

The law has not been amended; it remains just what it was during British rule. All that the Government has done is to give it a fresh lease of life after it was pronounced dead by the judiciary. The former harshnesses of the law remain intact. The public demand for a speedy revision has not so far been complied with. Nor would it be true to say (if Mr. Nehru meant it) that while there are no textual changes in the law, there has been improvement in the spirit in which the law is being administered. Such a claim is countered by the very case of Master Tara Singh, which was the occasion for a declaration by the Punjab High Court that the law is repugnant to the Constitution. No one would believe that if acts directly subversive of the security of the State were involved in that case the Court would have handed down the judgment it actually did. One cannot help regretting Mr. Nehru making such a bad blunder—and quite unnecessarily too.

The Right to Counsel

The right to be heard by counsel is regarded in the United States as a constitutional right conferred by the clause relating to due process of law (and this right is not confined to civil actions or criminal prosecutions but extends to all semi-judicial proceedings). As *Powell v. Alabama* (1932) 287 U. S. 45 puts it, denial of this right would amount to "a denial of hearing" itself (vide p. ii:110 of the BULLETIN).

But the implementation of this right requires that counsel should be available. It often happens in cases concerning Communists in particular that no counsel with reputation to lose is willing to defend so unpopular a cause, and in such a case naturally the defendant is put to a serious disadvantage, not because of any fault in law but because of a lack of sufficient appreciation of professional etiquette in the lawyers.

The New York Bar Association's Committee on Civil Rights thought it necessary to take up this question on account of the fact that Communists often found it impossible to persuade any competent lawyers to defend them, the lawyers apparently fearing lest if they did so they would be charged with being fellow-travellers. Therefore, the Committee recently passed a resolution saying that the right to counsel which is so essential to securing justice "requires correlative right of a lawyer to represent and defend, in accordance with the standards of the Bar, any client without having imputed to him his client's reputation, views or character;" and the Committee has undertaken to try to educate the profession and the public "on the rights and duties of a lawyer in representing any client, regardless of the unpopularity of either the client or his cause."

The principle underlying this is that "every accused person, even if he seems to be guilty, even though his apparent crime is atrocious, even though he is personally repellant, has rights under the law, including the right to counsel." Commenting on the above resolution, the "New York Times" says: "The counsel who sees that the rights of the accused are protected isn't helping Communists, corruptionists or thugs—he is upholding the sanctity of law and justice. The public should clearly understand that it is in the end the innocent who benefit."

If lawyers and the public require to be educated in the rights and duties of the legal profession, the workers in the cause of civil liberty and the general public also require to be educated, even to a greater extent, in the rights and duties of those who dedicate themselves to the protection of civil liberty. One often finds that Communists are unjustly treated because of the suspicion that surrounds their activities. When such injustice occurs, it is the business of all interested in civil liberty to lift their voice against it even if they may be personally opposed to the methods which Communists adopt in their dealings with others. But some workers often shy away from their duty, because the public is quick to impute to them sympathy with Communism from which they are totally free. The public must therefore be educated to take the view that if anyone takes up the cause of an aggrieved Communist it is not because he is a Communist-front man but because he is a man who is pledged to fight injustice against whomsoever it may be perpetrated. And the worker himself must realize that he is the watch-dog of civil liberty and must seek protection for even the most unpopular and hated men if they are subject to oppression.

A very good example of how civil liberty unions should go about their business is afforded by the American Civil Liberties Union taking up the case of Mr. Joseph Beauharnais (with which we have dealt in our article on Group Legislation in this issue). What was the Union's interest in this case? It was purely the interest in freedom of speech as it believed that the statute in question abridged this freedom. In its brief the Union said expressly "that we are in no way in favour of the utterances made by this petitioner and that we would oppose such utterances by combating them in the proper forum. Such utterances ought to be refuted. However, we stand foursquare on the issue of free speech: 'I may disagree with what you say, but I will give my life for your right to say it.'"