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[A MONTHLY REVIEW]

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POWER TO DETAIN REVIVED

ALL NON-CONGRESS PARTIES UNITE IN OPPOSITION

The case against detention without trial could not be put more impressively than in the statement (quoted elsewhere in this issue) which was published over the signatures of jurists and statesmen of the highest eminence like Mr. P. R. Das, Dr. Nares Chandra Sen Gupta, Mr. Atul Chandra Gupta and Dr. Radha Binode Pal who in the statement have expressed their uncompromising opposition to the Preventive Detention Bill both on grounds of political morality and political expediency. One passage in the statement deserves particular mention. It is in reply to the Government's contention that where preservation of public order is concerned it cannot take any risks. These leaders say: "As to taking risks, any constitutional government involves taking risks. When a political party and its Ministers are put in power, a great risk is taken by the people." (The sarcasm in this, we hope, will not be lost upon the Government.) A Government of any civilized country impliedly pledges itself to adopt only civilized methods in quelling disorder and in dealing with fomentors of trouble. The method that our Government has adopted in this Bill when there is no grave crisis, viz., preventive detention, is a barbarous method not sanctioned by the criminal code of any democratic or civilized country in the world. That is the severest possible indictment against the Bill. To this indictment the Home Minister of the Government of India gave the bland reply that since the Constitution itself in art. 22 permits resort to detention without trial even when the situation in the country or any part thereof has not become so dangerous as to call forth the proclamation of emergency under art. 352 (1) the central and local Governments are entitled to use this weapon of preventive detention against all who are suspected of being engaged or of being likely to be engaged in disturbing the peace, and the weapon can be used not only against those who are subverting the country but also against those who indulge in minor offences like black-marketing. And to the prominent members of the Opposition who, like Dr. Syama Prasad Mookerjee, vowed their opposition to the very principle of detention without trial the Home Minister said: "The proper course for members opposing the Bill tooth and nail is to get the Constitution amended." Never was

an unpleasant truth stated in more forthright terms. We must thank the Home Minister for bluntly telling us that if the right to Freedom of Person is to be made really secure, the object will not be fully attained by merely amending the Bill in some particulars or even by repealing the existing Act, but only by taking out of art. 22 those provisions which provide for detention without trial. The Home Minister has made a challenge to all lovers of civil liberty.

What were the factors that in the Government's opinion established the necessity for the measure? Not merely have Communists "whose one aim is to produce chaotic conditions in the country" and communalists who encourage internal communal feuds to be controlled, but there are other troubles likely to arise against which proper precautions must be taken, e. g., agrarian trouble in states where zamindari has been abolished. The Home Minister said: "This requires that we should nip the trouble in the bud. It is no use waiting for things to ripen and then disperse unlawful assemblies and take coercive measures and send to prison a large number of people." Why imprison a large number of persons after they have committed an offence, if imprisoning a smaller number before any offence is committed will serve the purpose equally well? This is the principle underlying the Bill. In this sense the Home Minister was entitled to describe it as "a humane measure." In his opinion a number of people are saved from punishment because of inflicting it on a few, even though this requires imposition of penalties without the guilt being proved. When Dr. Syama Prasad Mookerjee pointed out, by reading extracts from speeches of the late Pandit Motilal Nehru and his distinguished son, that they used to denounce in violent terms such humane measures as acts of repression in days when the Congress had not yet come into power, the Home Minister did not feel embarrassed in the least. He had an answer pat to the case: "The circumstances having changed, the emphasis has shifted. One can understand (such precautionary measures being denounced) when there was conflict of allegiance. But there is no conflict now." "For the sake of mere platitudes and slogans we must not jeopardise the existence and unity of the country. Let us not lose our

sense of proportion." Which means plainly that what was worthy of condemnation as coercion in the days of British rule deserves now, after we ourselves have become the rulers of our country, to be praised and welcomed as a safeguard of civil liberty for the masses of people at the cost of the liberty of a few dangerous elements. Independence has given a new meaning to "civil liberties"! They are a mere slogan to be mouthed when convenient.

It is hardly surprising therefore that the root and branch opposition of men like Dr. Syama Prasad Mookerjee, Mr. Narendra Deva and Mr. N. C. Chatterjee to the principle of the Bill was not even intelligible to the Government and did not succeed in persuading it to scrap the Bill. In face of such a situation the Opposition was reduced to the position of making efforts to improve the Bill's provisions in some particulars with a view to minimizing the evil effects thereof. And the only good feature of the proceedings in Parliament in this respect was that all the Opposition elements—Communists, Socialists, National Democrats, Praja Party and Independents—joined in attacking both the principle and the detailed provisions of the Bill. The Home Minister was not prepared to see such a "a union of hearts" among the divergent elements which comprised the Opposition. The detailed suggestions which the Opposition made for improving the Bill while keeping the scheme of preventive detention intact were eminently reasonable, but they were all rejected by the Government. The purposes for which detention can now be resorted to are much too wide. It can be enforced not only for securing (i) the defence and (ii) security of India and (iii) the security of any State, which one can understand, but for many other things besides. It can be enforced for the sake of (iv) maintaining "public order," which, as Mr. N. C. Chatterjee and those who joined with him in presenting a minute of dissent rightly characterised as "a term of widest amplitude," enabling the executive to make short shrift of the personal liberty of people even in minor affrays where only some police action would be warranted. It can also be enforced in the interest of (v) "the relations of India with foreign powers," which, as Dr. Kunzru pointed out in his minute of dissent, would enable the executive "to detain a person because of his criticism of Indian foreign policy." It can likewise be enforced (vi) "for the maintenance of supplies and services essential to the community," i. e., it can be enforced against profiteers, hoarders, etc. "But," as the Socialist members said in their dissenting minute, "the ordinary law of the land should be enough to meet the menace of these classes. Nobody has ever heard of a preventive detention act being enacted to meet such a menace." All such attempts to restrict the scope of the Bill proved unavailing, and the Government was determined to equip itself with extraordinary powers to deal promptly with all kinds of "prejudicial acts."

An attempt was similarly made by the Opposition to limit the application of the law to areas which appear to the Government of India to be particularly dangerous.

Such a limitation was imposed in the Rowlatt Act in the period of British rule when it was thought that civil liberties were being unmercifully crushed. But even this suggestion did not find favour with the Government. The Home Minister said that every State had felt that it must be armed with detention power in order to be able to maintain law and order within its limits and to give that power to some States and refuse it to others would be a breach of faith with the latter. He also urged that there were constitutional objections to taking this course. He was similarly opposed to limiting the duration of the Bill to a year. All the Opposition members of the Select Committee had made this suggestion. They had said that if the Government saw the need for reviving the powers conferred by the Bill at the end of the twelve-monthly period it should bring up a fresh bill for the purpose, the object of limiting the period being, as Dr. Kunzru put it, that "as the law is of an exceptional character it is necessary that the position should be reviewed every year so that the Act may not remain in force for a day longer than is necessary." But the Home Minister would not agree to this; he insisted that the Act should remain in force till the end of 1954. He was convinced that the special law would be required "for a few years more" and contended that the purpose of an annual Parliamentary scrutiny would be served by the Government placing an official resolution before Parliament in November next year seeking the approval of the Houses for the Act continuing in operation for the following year also. The Opposition pointed out that in England Regulation 18 B required the Home Secretary to place before Parliament a monthly return of the number of persons detained and inform it of the manner in which the cases of detenus had been disposed of by the Advisory Committee, with the result that Parliament in Britain had many more opportunities of discussing the policy of the Government than Parliament in this country would have and that in any case a resolution on the continuation of the Act would not give as full an opportunity for reviewing the Act as a fresh Bill seeking for power to continue the Act would. But the Home Minister could not be persuaded to limit the life of the Act to one year. Nor would he agree that orders for detention should issue in every case from the Home Ministers of the Governments of the States or the Home Minister of the Government of India, which was regarded as a valuable safeguard in England. "A district magistrate," he said, "is a high officer of the Indian official hierarchy and wields large powers;" he could not therefore be refused the power of detaining suspects.

For the rest, the efforts of the Opposition members were concentrated on placing the Advisory Boards on the same level of authority as that of the Advisory Committee in England, which was master of its own procedure, so that it could obtain from the Government all the information in its possession and pass it on to the detenu, allow the detenu in suitable cases to be represented by counsel in preparing and presenting his case and allow him where necessary to call witnesses in his defence. The Opposition

asked that Advisory Boards in India be given the same powers. In order to secure that no relevant information be withheld from the detenu, Mr. N. C. Chatterjee explicitly suggested deletion of sec. 7(2) which permits the detaining authority not "to disclose facts which it considers to be against the public interest to disclose." Not only would the Home Minister not adopt this suggestion but he refused to allow the detenu to be represented by a lawyer before the Advisory Board. He said that the detenus' interests would be best served if the lawyers did not intervene in their cases! He was also adamant against giving power to the Advisory Boards to allow detenus to call witnesses. All that he agreed to do was to give authority to the Advisory Boards to gather information "from any person called for the purpose through the appropriate Government." It is obvious that this is very far from summoning a legal witness. The power to call witnesses which the Advisory Committee in England possessed, our Advisory Boards would continue to lack. The only real concession the Home Minister made was that a person would not remain in detention longer than twelve months unless on the ground of what he did subsequently he came to be detained again.

The House of the People passed the third reading of the Bill on 6th August and the Council of States on 12th.

FREEDOM OF PERSON

in Non-Emergency Situations

We cannot repeat too often that under our Constitution Freedom of Person, like every other freedom, can be abrogated not only when what the Central Government considers to be a grave national crisis faces the country or any part thereof and gets the President to proclaim an emergency, but it can be similarly suspended even when the situation is not so critically dangerous as to warrant, in the eyes of the Government itself, the bringing of the Emergency Provisions of the Constitution into operation. In this respect the Indian Constitution is indeed unique. Germany's Weimar Constitution, framed after the first World War no doubt empowered the President temporarily to suspend any or all individual rights, but it did so, like our own Republican Constitution, only in an emergency, i. e., if public safety and order were seriously disturbed or endangered. Even so, this provision proved fatal. "(It) proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President von Hindenburg to suspend all such rights and they were never restored." In France by a "state of siege" and in Great Britain by laws like the Defence of the Realm Act an emergency government can be set up in time of war or other similar emergency, but care is always taken in these countries even under such conditions to make exercise of emergency powers as far as possible compatible with freedom, the essence of which is "leave to live by no man's leave, underneath the law." In these countries use of extraordinary powers in an emer-

gency has never resulted, as in Weimar Germany, in a suspension or abrogation of law. But India is the only country in the world where personal freedom, the most basic of all fundamental rights, can suffer deprivation in conditions which even the Government do not claim to constitute an emergency. And because of this provision we are now reduced to demanding from the Government that they shall not make greater inroads upon personal liberty in peace time than the British Government did in war time and shall provide at least those safeguards which Regulation 18 B did in Great Britain.

In the United States no part of the Bill of Rights can be suspended even in an emergency, for the Constitution of that country does not recognise an emergency as justifying use of special powers in any kind of situation and does not provide for any emergency regime. Here a quotation may usefully be made from the judgment of Justice Jackson in the recent steel seizure case in rebuttal of the Solicitor General's claim that unlimited executive power can be exercised whenever an emergency is on. Mr Jackson says about this claim:

The appeal that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it [art. 1 (9) (2) of the Constitution], they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognised that war and economic crises may upset the normal balance between Liberty and Authority.

This extract serves to bring to our mind certain facts which all civil liberties organizations should take note of very carefully:

(1) That the U. S. Constitution requires due process of law to be enforced in times of emergency as well as in normal times; that individual liberty is not suppressed even in an emergency, however real and grave;

(2) That the only liberty that is capable of suspension in an emergency is liberty of the person (under the safeguard that the judiciary is to judge whether the emergency is such as to warrant suspension of habeas corpus: this is what we add; it is not contained in the judgment quoted);

(3) That no other extraordinary powers are provided for in the U. S. Constitution for use in an emergency because of "the pressures they engender for

authoritative action" and because of the apprehension that "emergency powers would tend to kindle emergencies."

This is the background in which we should judge of the merits of the Nehru Government's Detention Bill.

Constitutional withdrawal of the power to suspend habeas corpus except in certain narrowly defined conditions from the competence of the legislature is a peculiarly American doctrine. In England and her Dominions, there being no scope for a formal system of constitutional guarantees on account of the theory of the sovereignty of Parliament, the American doctrine finds no place in the Constitutions of these countries, but in practice the doctrine is still adhered to, i.e., habeas corpus is not suspended except in a period of grave emergency, this being due, however, more to inherited traditions of British liberalism than to any constitutional guarantees of the right of personal freedom. And neither the United States nor the United Kingdom and her Dominions have been known to have suffered any harm to their national interests because of either such a constitutional limitation or such a rule of national policy.

In speaking of the United States of America, we should like to add that, in addition to the guarantee in the federal Constitutions about the maintenance of the privilege of habeas corpus in all times except in those of external aggression or internal rebellion, there is a similar guarantee provided in the Constitution of almost every state of the Union. And neither the federal Government nor the Government of any constituent unit has wearied of such a constitutional limitation on its power and has desired to to abolish it after a practical experience of more than a century and a half. For in state Constitutions revised some five or six decades after the framing of the federal Constitution in 1789, e. g., in the Constitutions of Indiana and Iowa, the same provision forbidding suspension of habeas corpus is repeated. In the former Constitution the provision runs: "The privilege of the writ of habeas corpus shall not be suspended, except in case of rebellion or invasion; and then, only, if the public safety demand it," using much the same language as in art. 1(9) (2) of the federal Constitution. Some states revised their Con-

stitutions a century after the U. S. Constitution came into force, e.g., Illinois, Tennessee, California, Florida, Idaho and Delaware; and yet these Constitutions too provide against suspension of the writ. Revision of the Constitution of the state of New York took place in 1937, and that of the Constitution of the state of New Jersey took place as recently as 1947, i. e., after the second World War; in both the prohibition of the suspension of habeas corpus is reproduced. In the Bill of Rights of Puerto Rico, which is not yet fully self-governing, provision is made for non-suspension of the writ, the only difference being that the power of suspending it "only in case of rebellion, insurrection, or invasion" is vested in the President or the Governor in contradistinction to the power vesting in the legislatures in the states. The influence of the United States in this matter is so pervasive that the now independent country of the Philippines has also repeated the U. S. Constitution's provision about habeas corpus in its Constitution of 1947.

This shows that the framers of the United States Constitution and those of the state Constitutions did not impose this severe limitation on legislative power in a fit of idealism divorced from practical considerations of the necessities of government, but only because they were convinced that it was essential as a safeguard against arbitrary invasion of personal freedom. And it should be remembered that the U. S. Constitution was framed, not in perfectly normal times as in India, but in a time of great turmoil, when naturally they were expected to give first place in their thoughts to the demands of national security. Yet most drastic limitations were put upon the powers of the legislatures in the interest of the security of the person. Nor has any evil result flowed from what many might think an excessive regard for individual liberty, and the people of the United States have had no cause for regret, in their long career of independence, about the incorporation of these limitations in their Constitutions.

In face of this experience should we not at least, as in Great Britain, France and other democratic countries, stoutly refuse to subject an individual to an arbitrary deprivation of his personal freedom in peace time, even if we cannot muster enough strength of mind to include an express prohibition of it in the body of our Constitution?

THOUGHTS ON DETENTION BILL

Subversion — Then and Now

Among those who have appended a minute of dissent to the Select Committee's report on the Detention Bill is a Congress member, Diwan Chaman Lall. This might appear strange as the Congress party discipline is so strict; but he will not come into disfavour with the Congress President on that account. For this so-called "minute of dissent" is really like a concurring judgment giving further reasons for concurrence with the governing

judgment of the court. And the further reasons he gives for supporting the Bill are valuable as they throw a flood of light on the mentality of the Congress in matters of civil liberty. Answering, apparently, the very telling criticism made by Dr. Syama Prasad Mookerjee that the present Congress leaders are going back on the principles laid down by former leaders like Pandit Motilal Nehru who had consistently denounced such coercive measures, Mr. Chaman Lall writes in his minute:

Under British rule, during the leadership of Pandit Motilal Nehru, similar legislation was opposed by the Swarajya Party on the basis, firstly, that the foreign Government ruling our country had no sanction of the people behind it, and, secondly, it was, keeping the principles of non-violence as enunciated by Mahatma Gandhi in view, the bounden duty of all of us to do whatever lay in our power by legitimate means to subvert the alien government ruling over us.

Now it cannot be said to-day that the Government of the day or the various State Governments have no sanction behind them. These Governments are the creation of the people's will, and therefore any attempt to subvert such Governments is no longer a patriotic duty as in the days before the achievement of independence, but on the contrary an act of treason and disloyalty to the nation.

The invocation to the doctrine of non-violence in this quotation is a mere eye-wash; no responsible person will now contend that Congressmen as a body adhered to the doctrine in deeds. In fact, in speaking on the Bill in Parliament, one Congress member, appealing to the Communists to abjure violence, said that violence was quite in order for the subject people under British rule, but one must abstain from it now in free India.

The really important point in Mr. Chaman Lall's statement is that while it was highly useful to pay lip service to the principles of civil liberty while we were under the domination of foreigners, these principles might well be put into the discard after we have attained independence. With men like Mr. Chaman Lall, who do not understand that civil liberties can be infringed upon in self-governing countries and require to be protected against such infringements, there cannot be any argument, and he is a prominent leader in the Congress and really represents the prevalent Congress mentality.

Rowlatt Act and Detention Bill

One of the suggestions made by Mr. N. C. Chatterjee and those who joined with him on the Select Committee was that the Detention Act should not be made applicable to the whole of India but that it should be restricted in its application to those areas "which in the opinion of the Central Government require, having regard to the special conditions prevailing therein, the application of such an extraordinary measure." The Communist members also made the same suggestion in their minute of dissent.

In this connection it would be useful to recall that the Rowlatt Act of 1919 had provided for such a restriction of the area in which the measure was to operate. The power of arrest without warrant and confinement in gaol which the Bill provided for could be used only in those areas which were declared by the Government of India to be areas in which the public safety was endangered by anarchical and revolutionary movements. It might further be noted that detention could not be enforced under the measure merely because public order

was disturbed, as our Detention Act does, but only when "the public safety"—a much bigger thing—was in peril. Similarly, the Act contemplated reference of all cases in which use of the power of detention was contemplated to an investigating authority before the power was actually brought into use and not after. Furthermore, the Act required the Government, in the case of every person proposed to be detained, "to place *all* the materials in its possession relating to his case" before the investigating authority, and did not allow the Government to withhold such material as in its opinion it would be dangerous to disclose.

In all these respects the Rowlatt Act was superior to the Detention Act, and yet it was not allowed by the pressure of public opinion to come into active operation as far too restrictive of civil liberty. Among those who opposed the 1919 Act were Congress leaders of the time, Mahatma Gandhi being at their head, but the present-day Congress leaders think nothing of such a measure. Civil liberties in their opinion are to be striven for only under an alien government: a swadeshi government may however be permitted to crush these liberties at will.

"Recently concerned in Prejudicial Acts"

Pandit H. N. Kunzru in his minute of dissent brought the fact prominently to the attention of the Government that the power of detention without trial which Regulation 18 B permitted in Britain in war time could be employed only in the case of "certain categories of persons" like persons of hostile origin and associations. The dissenting minute of Mr. N. C. Chatterjee also pointed to another restriction on the scope of the Regulation, viz., that it could be applied only to persons "recently concerned in, or in the instigation of, acts prejudicial to the public safety." And he suggested that detention should be ordered only when the detaining authority, which should be none but the Minister, "has reasonable cause to believe that the person against whom the said order is going to be passed *has been recently concerned*" in prejudicial acts. All such efforts to limit the scope of the Bill, however, proved unavailing.

"Progressive Improvement" of Detention Law

Mr. B. Shiva Rao defended the Bill in a particularly aggressive speech on the ground that the provisions of the detention law had been progressively improved. He contended, which is far from the fact, that the allegations made by critics of the Bill that in too many cases of detention the grounds on which orders for detention were based were frivolous and that the investigation of the cases by the Advisory Boards was much too superficial dated from the time when the power of detention was exercised under the Local Governments' Public Safety Acts. But this power was taken over, Mr. Shiva Rao argued, by the Central Government in the late Mr. Patel's 1950 Act just because of the misuse of power that had disclosed itself.

Even so, it is true (Mr. Shiva Rao admitted) that the cases that could go to the Advisory Boards were only 2 or 3 per cent. of the total number of cases, thus agreeing to the indictment made by Mr. Vaze in his presidential speech at the Bombay Civil Liberties Conference that "exceptions made in the statute to the Advisory Boards' scope of jurisdiction are so wide as to leave in nothing but exceptions." But this gap, Mr. Shiva Rao continued, was closed by Rajaji's Act which provided that every case of detention should be referred to an Advisory Board without exception and further making the opinion of this body binding on the Government. That Act is being further liberalised by the Bill. What more could Parliament want?

No one denies that the law is now in a much better condition than before. But is that any reason for ceasing our efforts to bring it into still greater conformity with the demands of justice? Mr. Shiva Rao himself did not raise his voice at the time of passing Mr. Patel's Act, even when he knew that the Act was exceedingly defective, keeping most of the detention cases away from the Advisory Boards; however, he did not then plead for liberalizing it: he kept the counsel to himself, perhaps because of party discipline. Why should not others, not so mandate-bound, make now an attempt to introduce maximum improvements in the Bill? Mr. Chatterjee and others, opposed to the very principle of detention without trial, sought as the second best to co-operate with the Government by suggesting improvements which were within the scheme of preventive detention, and each of the suggestions they made is supported by the practice of Great Britain. And what is the reward they get at the hands of Mr. Shiva Rao? They are dubbed as people bent on wrecking the Bill by making it totally ineffective for the purposes for which it is intended. Yet, Mr. Shiva Rao is thought to be a person of very progressive ideas, due perhaps to the brave speeches he makes at the Trusteeship Council of the United Nations, which costs nothing.

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"Detention Necessitated by Political Backwardness"

One often comes up against the argument whenever basic rights are proposed to be limited, whether it be the right to Freedom of Person or Freedom of Expression or Freedom of Association that is under discussion at the moment, that the people not being used to democracy yet, these democratic rights cannot be granted in their fulness. The Home Minister himself used it in defence of the Detention Bill and of course many other smaller fry. The argument is best summed up by the "Hindustan Times" in its editorial on the Bill. Says this paper:

Preventive detention is, no doubt, a violation of the valuable right of freedom of person and when it is resorted to by Government in peaceful times, the action, it is not surprising, causes serious concern to all those interested in the future of democratic freedom. But we cannot ignore the fact that ours is still an infant

democracy and there are forces, political, social, and economic, which have not clearly understood the real implications of government by the people. The existence of undemocratic laws is a reflection of the political immaturity of our people. A great responsibility rests on the Government [for restricting democratic freedom] and the interests of the millions cannot be imperilled for the sake of theoretic principles enunciated in complete disregard of local conditions. This was the refrain of most of the supporters of the Bill: maxims of political government must be boldly put aside when they come in the way of smooth government.

Who ever heard that fundamental human rights to be protected against governmental encroachments have also to be graded, like other political rights, according to the capacity of the masses of people in whose behalf the rights are enshrined in the Constitution? The fundamental idea underlying such a Bill of Rights is that these minimal basic rights must be made available to all irrespective of their conditions. If this were not the case no Universal Declaration of Human Rights such as was proclaimed by the United Nations on 10th December 1948 could ever be possible. It is called "universal" just because it is applicable in all varying conditions of the peoples of different countries. And how can an International Covenant on Human Rights applicable everywhere be at all framed such as the United Nations is now for several years engaged in preparing? If it is the opinion of Premier Nehru that these civil rights also are such that they can be conferred in a larger quantity on an advanced people and in a smaller quantity on a backward people, why does he allow India to be a participant in these discussions, the object of which is to secure these rights in an equal measure to peoples of all conditions? India should withdraw from the enterprise altogether. It is not as if a people have to grow and deserve these rights; they are the inalienable, indefeasible, irrevocable rights of all. No government, if civilized, can take them away. If anybody's political capacity is in question here, it is not that of the people for whose benefit they are being incorporated in national and international codes, but that of the rulers themselves. The existence of a law like the Detention Act on the Indian statute book is not a reflection of the political immaturity of the Indian people. Such immaturity would justify a restricted franchise, for instance, and a gradual widening of the right as the generality of the people become fit for its exercise. But where it is a question of fundamental rights which inherently belong to every individual, whether a people enjoy these rights or not depends upon the character of the Government, whether it is willing to conform to democratic or civilized standards or not. The argument put forward by the Government of India for restricting any of these basic civil rights is entirely fallacious.

Detention Provision in the McCarran Act

The Socialist members of the Select Committee on the Bill, viz., Acharya Narendra Deva and Messrs. Sarangadhar Das and K. A. Damodara Menon, in their minute have opposed the very principle of detention without trial in peace time as "repugnant to the right of freedom and inviolability of the individual" and say that in Britain such detention was only a war-time measure. Then they refer to what they call the American Emergency Detention Act and show how infinitely superior it is to the Indian Act. The Act they have in mind can only be the notorious McCarran Act passed just about two years ago with a view to controlling the activities of the Communists.

Without further explanation this reference to the law is likely to give a misleading impression as if the United States armed itself with power to detain a person without accusation and trial in 1950, and in order to dispel such a wrong idea arising we wish to say something about that provision in the law which authorizes the President to apprehend and detain persons suspected to be spies and saboteurs during an emergency. The law no doubt provides for detention, but it is not preventive detention such as our Act allows, for it preserves the privilege of the writ of habeas corpus intact. Originally, it is true habeas corpus was intended to be suspended, but in the law as it finally emerged from Congress judicial review of all cases arising

under the law was restored and the "writ of liberty" made applicable.

The procedure that the law lays down in carrying out its "concentration camp" programme was described by us at p. 160 as follows:

The Attorney General, himself or through deputies assigned, could issue warrants for a round up of suspects. Such persons would be given preliminary hearings within forty-eight hours. Trial examiners would decide whether they would be interned or freed. A Detention Review Board of nine members would be established to go into the merits of each case. But even the Board's decisions are not final; they could be appealed against, and *the need for detention would have to be proved in a court of law in every case under the rule of habeas corpus.*

This anti-Red legislation is undoubtedly of the harshest kind ever adopted in the United States, but it should be remembered that it was passed over the President's veto and was denounced by all liberals in the country. The "New York Times" said about it at the time that it aimed "a blunderbus straight at the precious liberties of all American people." But the point for us to take note of is that even this most repressive measure ever passed by Congress did not dare to provide for—detention without trial.

PUBLIC SAFETY ACTS

CONFER CONTROL POWERS "AS WIDE AS CONCEIVABLE"

MADHYA BHARAT ACT DECLARED UNCONSTITUTIONAL

The width and the harassing nature of the Public Safety Acts, enacted by the Congress Governments as soon as they came into office after the termination of the second World War and vigorously exercised to control the movements and activities of citizens, have been prominently brought to the notice of the public by the decision of the Madhya Bharat High Court (38 A. I. R. Madhya Bharat 114), in which the Maintenance of Public Order Act, 1949, of the state was declared void. This Act, similar in all respects to those in other states, under sec. 3, empowers the Government, when in its opinion it, is necessary to regulate any person's actions or movements "with a view to preventing him from doing any act prejudicial to the public safety or maintenance of public order," to make an order—

externing the person from an area or requiring him to reside in an area and (if he is not already there) to proceed to that area and reside there;

requiring him to notify his movements and to report himself at such times as the order may specify;

imposing upon him restrictions in respect of his employment or business, and in respect of his association or communication with other persons, and in respect of his activities in relation

to the dissemination of news or propagation of opinions; and

prohibiting or restricting the possession or use by him of any such articles as the order may specify.

These provisions are broad enough in all conscience, but there is "a catch-all provision" at the end, which says that the order

may regulate the conduct of the person in any manner otherwise than is covered by the above specific provisions.

Kaul C. J. in his judgment said about this section (and the other Judge concurred):

It will be readily conceded that the powers conferred upon the Government under this section are as wide as conceivable. It authorizes the Government not only to interfere with the personal liberty of an individual* but makes legal an interference by the Government with practically every sphere of activity of the citizen if it is satisfied that he is likely to do any act prejudicial to public safety or maintenance of public order. . . . The powers given by sec. 3 include

*This is no longer applicable, for the power of detention which the section conferred has since been taken over by the Central Government's Preventive Detention Act.

the power to control almost any activity of the individual in any sphere of life whatsoever.

The "extraordinarily wide and heavy restrictions" which the section authorizes the Government to impose are not in the opinion of the Court commensurate with the requirements of the interests sought to be protected thereby and are not "reasonable" within the meaning of the Constitution.

There is a further point noticed by His Lordship as to how disobedience of an order issued under sec. 3 is dealt with in the Act. On this point the Chief Justice said:

The manner in and the means by which obedience to the order passed under sec. 3 may be enforced are drastic and of a character so as to make the restrictions imposed on the right conferred by art. 19 (1) (d) and (e) unreasonable.

A person against whom an order under sec. 3 is made may be required to execute a bond with or without sureties for due performance of the instructions or conditions specified in the order, and disobedience of the order is made a penal offence punishable with a sentence of one year or with fine or with both. Furthermore, the Chief Justice says:

The unreasonableness of the the restrictions imposed by the statute under consideration does not result merely from the unusually wide character of the restrictions that may be imposed upon the right of the citizens but also flows from the manner in which the power conferred may be exercised.

For under sec. 11 the Government is empowered to delegate the powers conferred on it "to any officer or authority," and "the powers may be delegated to a naib tahsildar or to a sub-inspector of police or maybe even to a head constable." The conclusion of the Chief Justice is:

From the onerous character of the restrictions imposed, the penalties attached to the disobedience of any order passed under this law, and in the absence of any safeguard against the delegation of the powers to the subordinate officials, howsoever low in rank, I am clear that the restrictions which the law permits to be imposed cannot be called reasonable.

The Chief Justice says further:

This is not all. The unreasonableness of the restrictions becomes evident when we find that... the person affected (by the order) is not given any right of representation. The authority making the order may have acted on wrong information or under a mistaken belief as to the existence of a set of circumstances which really do not exist. Yet the person against whom an order is made... is without remedy.

The Act was challenged on the ground that it is repugnant to art. 19 (1) (d) and (e), but is open in the view of the High Court to attack on an even wider ground. Says the Chief Justice:

There cannot be the slightest doubt that such restrictions as are permitted to be imposed on two of the Fundamental Rights of the citizen under the impugned statute cannot be said to be reasonable restrictions as contemplated by art. 19 (5) of the Constitution. The result, therefore, is that secs. 3 and 11, read with sec. 5 of the Act (which denies representation), render the Fundamental Rights conferred by art. 19 (1) (d) and (e) of the Constitution practically valueless. The provisions of sec. 3 are of such a far-reaching character that they may restrict and abridge even Fundamental Rights other than those to which reference has just been made, but in the view that I take of the matter it is unnecessary to go into that question. I hold accordingly that the cumulative effect of secs. 3, 5 and 11 of Act 7 of 1949 is to impose restrictions on the Fundamental Rights conferred by art. 19 (1) (d) and (e) which cannot be called reasonable. The restrictions which it is permissible to impose under those sections must, therefore, be held to be ultra vires of the powers of the state legislature.

As every single province and state is blessed with a Public Safety Act of equally wide scope, this decision of the Madhya Bharat High Court should as a matter of decency be regarded by every local Government as an order for nullifying its own law, and all these laws should automatically cease to come into operation throughout the country. The Government of India should really have issued such an instruction to all the local Governments or, in the alternative, obtained a judgment from the Supreme Court reversing the Madhya Bharat High Court's unanimous decision. In the absence of such a judgment of the highest court in the land, no Government has any moral authority to enforce a Public Safety Act anywhere. But these moral considerations never weigh with our Governments. The Madras High Court voided the Criminal Law Amendment Act in so far as it empowered the Madras Government to ban the Communist Party. But this decision had no influence with the West Bengal and Travancore-Cochin Governments, who went on merrily enforcing the Act within their jurisdictions. A judgment of the Supreme Court affirming the decision of the Madras High Court was needed to stay their hands. This reflects little credit on the local Governments or on the Government of India.

Public Safety Acts do not stir as much feeling or create as much noise as the Detention Act does, under which people are locked up in gaol on mere suspicion. But they are no less galling; persons against whom they are enforced are not subjected to imprisonment, but the restraints on liberty laid under them can be as severe as to amount imprisonment. Civil Liberties Unions cannot look upon them with equanimity. These bodies must seek by every legitimate means to put an end to the widest imaginable powers of discretion which these laws confer on the executive.

SPECIAL COURTS CASES

Within a space of four months three cases concerning the validity of provisions in law concerning reference of criminal cases to special courts were decided by the Supreme Court (*West Bengal v. Anwar Ali*, *Kathi Raning v. Saurashtra* and *Lachmandas v. Bombay* reported in A. I. R., 1952, respectively at pp. 75, 123 and 285). The provision of law in question in all the three cases permits a special court to try such (i) offences, or (ii) classes of offences, or (iii) cases, or (iv) classes of cases as the State Government might direct. The Court was divided in its opinion in each of these three cases, but even the majority opinion of the Court was not similar in all of them. It would, therefore, be interesting to see how the majority judgment distinguished the cases.

The West Bengal case was the first to be heard by the Supreme Court. The opinion of the majority in this case was (Patanjali Sastri C. J. alone dissenting) that the provision of law [sec. 5 (1) of the Special Courts Act] in respect of the constitution of special courts, laying down a special procedure for the trial of cases which is much less advantageous to the accused than the ordinary procedure prescribed by the Criminal Procedure Code, was ultra vires as offending the equality provision of art. 14 of the Constitution, since no proper classification, and indeed no classification, was provided for in the section in the matter of selecting cases to be tried by the special courts. Sastri C. J. held that although the special procedure might operate to the disadvantage of the accused, it was still such as fulfilled "the essential requirements of a fair and impartial trial," and thus sec. 5 (1) was not discriminatory and therefore was not invalid. The majority Justices were themselves divided in opinion, Das J. holding that that part of sec. 5 (1) alone was invalid which conferred power on the State Government to direct "cases" as distinct from "classes of cases" to be tried by a special court and the other Justices holding that the whole section was invalid, Chandrasekhara Aiyar and Bose JJ. going further and holding that the entire Act was ultra vires the Constitution.

In the Saurashtra case, although sec. 11 of the State's Public Safety Measures Ordinance, 1949, is in identical terms with sec. 5(1) of the West Bengal Special Courts Act, the notification issued under the Ordinance which provides for establishment of special courts specifies the classes of offences which should be tried by such courts, and the deviations from normal procedure authorized by the Ordinance also are not as numerous and disadvantageous to the accused as under the West Bengal Act. The latter fact fortified the opinion of Sastri C. J. in the West Bengal case and he naturally held that the impugned Ordinance, read with the notification issued thereunder, was valid. Fazl Ali, Das and Mukherjea JJ. were not influenced to a great extent by this circumstance, viz., that the Ordinance is free from some of the most objectionable features of the West Bengal Act in respect of procedure,

but they held that the Ordinance contemplated classification of offences, and since the notification issued under it actually carried out the classification, the Ordinance or the notification could not be attacked on the ground of unconstitutionality.

Mahajan, Chandrasekhara Aiyar and Bose JJ. were not, however so easily satisfied, and they held that sec. 11 of the Ordinance was unconstitutional. Mahajan J. said:

Sec. 11 of the Ordinance, like sec. 5(1), West Bengal Act, suggests no reasonable basis of classification. . . . The State Government can choose a case of a person similarly situated and hand it over to the special tribunal and leave the case of another person in the same circumstances to be tried by the procedure laid down in the Criminal Procedure Code. It can direct that the offence of simple hurt be tried by the special tribunal, while a more serious offence be tried in the ordinary way. The notification in this case fully illustrates the point. The offence of simple hurt punishable with two years' rigorous imprisonment is included in the list of offences to be tried by the special Judge, while a more serious offence of the same kind punishable with heavier punishment under sec. 308 is excluded from the list. It is the mischief of sec. 11 of the Ordinance that makes such discrimination possible. To my mind, offences falling in the group of secs. 302 to 308, Penal Code, possess common characteristics and the appellant can reasonably complain of hostile discrimination.

Chandrasekhara Aiyar J. said in pointing out that "there is no rational classification" in the list of offences for which trial by a special court is provided:

Offences presenting the same characteristic features, and cognate in this sense, have been separately dealt with; some of them are to go before the special court, while others are left to be tried by the ordinary courts.

On this point it would be useful to see what Mukherjea J. said in the West Bengal case and in the Saurashtra case. In the former case he said:

It is not strictly correct to say that if certain specified offences throughout the State were directed to be tried by the special court, there could not be any infringement of the equality rule. It may be that in making the selection the authorities would exclude from the list of offences other offences of a cognate character in respect to which no difference in treatment is justifiable. In such circumstances also the law or order would be offending against the equality provision in the Constitution.

This very question arose in the Saurashtra case. Mukherjea J., speaking of such seeming discrepancies in the notification issued under the Ordinance, said:

It is true that the notification mentions sec. 183, Penal Code, though it omits sec. 184, but I am unable

to hold that the two are identically of the same nature. . . . Then again I am not sure that it was incumbent upon the State Government to include sec. 308, Penal Code, in the list simply because they included sec. 307.

And after saying that "a too rigid insistence on a thing like scientific classification is neither practicable nor desirable," he took the matter on to a different plane. He said:

Be that as it may, I do not think that a meticulous examination of the various offences specified in the list with regard to their nature and punishment is necessary for purposes of *this* case. . . . As (the appellant) is accused of murder and dacoity and no offences of a similar nature are excluded from the list, I do not think that it is open to him to complain of any violation of equal protection clause in the notification. There are quite a number of offences specified in the notification and they are capable of being grouped under various heads. Simply because certain offences which could have been mentioned along with similar others in a particular group but have been omitted therefrom, it cannot be said that the whole law is bad. The question of inequality on the ground of such omission can be raised only by the person who is directed to be tried under the special procedure for a certain offence, whereas for the commission of a similar offence not mentioned in the list another person has still the advantages of the ordinary procedure open to him.

Chandrasekhara Aiyar J., however, took a different view of the matter. He said:

The argument for the respondent that there has been no discrimination as against the appellant vis-a-vis other persons charged with the same offences is unacceptable. Cognate offences have been left over for trial by the ordinary courts. It is no answer to the charge by A of discriminatory legislation to say that B and C have also been placed in the same category as himself, when he finds that D, E and F, also liable for the same or kindred offences, have been left untouched and are to be tried by ordinary courts under the normal procedure.

The Bombay case again brought Das, Mukherjea, Mahajan and Chandrasekhara Aiyar JJ. together in setting aside the conviction of the appellants by the Special Judge and the sentences passed on them, Sastri C. J. alone dissenting.

DETENTION WITHOUT TRIAL

Leaders' Protest against Re-enactment of Law

We give below a statement issued by prominent persons as soon as the Bill for extending the life of the Preventive Detention Act was published, in which a plea was made to members of Parliament to throw out the Bill. Among signatories to the statement are Messrs. P. R. Das and Atul Chandra

Gupta, President and Vice-President respectively of the All-India Civil Liberties Council, and Dr. Radha Binode Pal and Dr. Nares Chandra Sen Gupta and Messrs. S. S. Mukherji, I. P. Mukherji, N. N. Yagnik, H. S. Bhatt and A. Gadgil. The statement runs:

The members of the first Parliament elected under the Constitution will have to take a serious decision at the beginning of their legislative term to extend or not to extend the Preventive Detention Act of 1950 for any further period. . . . When the full implications of this legislation and its dangerous possibilities are realised the members of Parliament should unhesitatingly refuse to keep it on as law in what we proudly call Free India. No amount of eloquence or Government's bona fides and goodwill and dark hints of possible disaster can suppress the fact that this law allows the Executive and its police to arrest and keep confined for an indefinite period any person who may be suspected by them of contemplating any act prejudicial to such a wide and elastic number of things that they really amount to anything not to the liking of the Government of the time. And this in time of peace when no emergency has been proclaimed, giving more or less a free hand to the Executive, and our Constitution provides for such proclamation not only in case of threatened external aggression but also in case of apprehended danger of internal disturbance even in a part of the territory of India. In face of such a constitutional provision legislation like the Preventive Detention Act is a confession that the Government in power cannot govern with rules of law binding themselves, but must have arbitrary powers to imprison people on suspicion. But executive Government bound by rules which do not allow them to exercise arbitrary powers in any field of activity is the very soul of democracy. Without this a claim of democracy is a fraudulent claim. The "satisfaction" which allows the police and the Executive to imprison people is not amenable to judicial review. This simply means that the evidence of this "satisfaction" cannot stand the scrutiny of a court of law and that if any violence or offence is committed or contemplated the police, and if necessary the military, are not efficient enough to apprehend or suppress.

When there is talk of risk of the present organization of society and Government being overturned by violence unless absolute and unrestricted power of keeping people imprisoned on suspicion were in the hands of the Executive, it is not realised that, if true, no greater condemnation of the present order of society or of Government could be conceived. Such overturning by violence is only possible when the great majority of the people are against the present social organization and are not with the Government, because they are convinced that the Government, as it is, would not only not help in bringing about a better state of society, but would try and prevent such

a change. If that be the case the Government are only ruling by suppressing the people by exercise of power for the time being in their hands. If the number of such people are small the ordinary law of the country should certainly be sufficient to meet the danger. As to taking risks, any constitutional Government involves taking risks. When a political party and its Ministers are put in power a great risk is taken by the people.

The fact that not an inconsiderable number of persons, kept in jail without trial as persons dangerous to the State or society, have been elected by the people of India as their representatives in the Parliament and Assemblies, is a pointer to the danger of this legislation. It may easily be made into an instrument in the hands of political parties in a fight for political power, and different parties in different States may try to play the ugly political game, resulting in political vendetta, similar to what gave a death-blow to the Roman Republic.

A number of people who may be called political detenus have been recently set free. This should not relax the scrutiny of our legislators into the real nature of this panicky legislation. The question is not who are detained, but that any one should be detained in Free India without judicial trial. Let not the first Parliament of Free India go down in history as a body of panicky legislators who permitted to be reduced to mockery Justice, Liberty and Equality written in bold letters in the Preamble of our Constitution, and who dealt a staggering blow to the Indian Republic and all that it should stand for.

Resolutions of Protest

1.—THE DECCAN SABHA

The Council of the Deccan Sabha, Poona, at its meeting held on 25th July, passed the following resolution.

The Council of the Deccan Sabha is of the opinion that there is no justification whatever for the Bill, now referred to a Joint Select Committee, for extending the life of the present Preventive Detention Act till the end of 1954. It is true that the number of persons held in detention has been considerably reduced of late, and that if the law is continued it will probably be brought into operation to a much smaller extent than formerly. But it is the position of the Deccan Sabha that not a single person should be detained without trial except in the case of a grave national crisis, and the Sabha therefore opposes this Bill as it would oppose any other permitting the executive in times of peace to lock up people in jail on suspicion.

Nor does the present Bill make any improvements of consequence in the Act now in force except that the maximum period of detention on the basis of any particular order for detention is proposed to be fixed at twelve months. Though this is an improvement, it will only

mean that a person will have a fresh opportunity of having his case considered by an Advisory Board if a fresh order is served on him after expiry of the order in virtue of which he is in custody at present.

But there were several improvements that could have been made with advantage in the provisions of the existing law, even assuming that such a law was at all consistent with the basic principles of democracy. For instance, a legal obligation could have been imposed upon the Government to furnish to the detenu all the facts against him that are in its possession, and the detenu could have been allowed to put his case before the Advisory Board through a legal representative, and to call witnesses and cross-examine them. These are pre-requisites for any tribunal making a searching inquiry into matters before it and arriving at right conclusions thereon, and these pre-requisites were in fact provided for in the procedure of the Advisory Committees which were empowered to examine cases of detention in England in the last two World Wars.

However, the primary reason for the Deccan Sabha's resistance to the Bill now before Parliament is that it is firmly convinced that no person should suffer imprisonment unless he has been adjudged guilty of any offence by a competent judicial tribunal. The Sabha is fully conscious of the supreme need for maintaining national security, but it does not believe that national security cannot be maintained if a country limited itself in doing so scrupulously to procedures and practices strictly in conformity with the principles of civilised government.

The Council of the Sabha would like to add that it has no manner of sympathy with Communists, against whom mainly (apart from black-marketers, etc.) the Bill is directed. But it would insist that in protecting the country from Communism it is not open to the Government to follow just those methods which Communists employ in suppressing civil liberty. In the Council's opinion the Bill is born of a mania for fear, for which there is no warrant. The Council would therefore strongly suggest to the Government that it repeal the present Act and set at liberty all who are at present in detention if only to put them on trial on definite charges before the regular courts of law.

2.—THE HINDU MAHASABHA

The Working Committee of the All-India Hindu Mahasabha protested against the Bill in the following resolution at its meeting in Poona on 3rd August.

The Hindu Mahasabha is emphatically of opinion that any enactment like the Preventive Detention Act is unnecessary and inexpedient in the context of the present situation. Such an Act not only militates against the fundamental rights of citizens but is likely to prove an instrument of oppression in the hands of the ruling party as against the other political parties. The Constitution of India amply provides for emergencies; and the powers in the hands of the President and the other executive authorities to suppress unsocial elements and

subversive movements and to maintain peace and order in the country are quite sufficient. The Hindu Mahasabha calls upon the Government to drop the Bill.

3.—BOMBAY PRESIDENCY ASSOCIATION

The Council of the Bombay Presidency Association strongly condemns the introduction of the Preventive Detention (Second Amendment Bill) in the House of the People at Delhi which has aroused universal indignation all over the country and is of the opinion that it is against the entire spirit of the Indian Constitution. The Constitution allows suspension of civil liberties in times of war, invasion and of internal rebellion. It also allows certain suspensions during times of emergency less serious than war or invasion. But in the ordinary times of peace the civil liberties of the citizens are and ought to be inviolable. But ever since 1948 the Congress Party has been using the emergency powers of the Constitution in normal times and has systematically suppressed political opponents by passing the first Preventive Detention Act and imprisoning thousands of people. The more they have continued the use of these powers, the more they feel that they should continue to use them. The present measure, although intended to be in force for two years, retains all the loathsome and autocratic features of the old legislation and is equally unworthy of a democracy. The civil liberties of citizens can never be left to the tender mercies of the executive without stultifying civilized government. . . . In view of the above considerations, the proposed Bill should be dropped and the original Act be allowed to lapse or be repealed forthwith.

C. L. U. NEWS

Madras Union's Conference

TO PROTEST AGAINST THE DETENTION BILL

A conference was organized by the Madras Civil Liberties Union on 30th July to protest against the Preventive Detention Bill before Parliament. The conference met at Gokhale Hall in Madras, and all non-Congress parties participated in it.

Mr. P. Chenchiah, President of the Union, welcoming the delegates, declared that the Union was opposed to detention of any person without trial in peace time.

Mr. M. K. Nambiar, Senior Advocate of the Supreme Court, who presided over the conference, said in his speech that detention without trial had been throughout the ages the technique of tyrants, but had in modern times been done away with by all civilized countries. It was anomalous that India alone should be the country in the world which permitted, or justified by its Constitution, detention without trial in conditions which did not amount to a crisis. If it was national security that was threatened, it was absolutely important that those who were responsible for this should suffer for it. But ordinary contingencies which were now being met by application

of the Detention Act could easily be met by application of the preventive sections of the Criminal Procedure Code which provides for a warrant trial of persons who would try to disturb the public peace, securing to the accused the benefit of an ordinary trial. If necessary, a few minor changes could be made in these sections, which would be adequate to meet all contingencies contemplated by the Preventive Detention Act.

Mr. K. G. Sivaswamy, Secretary of the Union, then moved a resolution which condemned the principle of detention without trial except in cases of grave national emergency as "wholly repugnant to the conscience of civilized mankind" and suggested that the following provisions be made in the Act if the Government persisted in keeping it alive:

- (1) supply of full information to the detenu and the Advisory Board;
- (2) permission to the detenu to appear by legal counsel and call evidence and cross-examine witnesses;
- (3) periodical review of every detention case within the period of detention;
- (4) restriction of the provisions to maintenance of security of the State which should be clearly defined and not for maintaining public order or keeping smooth the relations of India with foreign powers;
- (5) exercise of the power of detention by the Home Minister himself on his being reasonably satisfied; and
- (6) the restriction of the operation of the Bill for a period of one year.

The resolution was supported by Messrs. C. V. Rajagopalachari, M. V. Ganapathi (Hindu Mahasabha), R. Ramathan (United Socialist), P. Ramamurthi (Communist), S. B. Adityan (United Democratic Front) and Sami Chindambaranar (editor of Dravida Kazagam's organ "Viduthalai"). Mr. Ramamurthi said he had requested the Madras Government to release him from his detention at least on the last day of the election but the Government had refused to do so and he had to fight the election from the gaol. He has been elected and is now the leader of his party in the Madras Assembly. The conference which was attended by about 1,500 persons was a great success.

PUNJAB PRE-EMPTION ACT

Sec. 15 Held Intra Vires

A division bench of the Punjab High Court consisting of Khosla and Harnam Singh JJ. on 19th July held sec. 15 of the Punjab Pre-emption Act intra vires of the Constitution when the validity of the section which prescribes the manner of disposal of agricultural land and village immovable property was challenged on the ground that it was contrary to art. 19(1)(f) of the Constitution. This article confers the right on citizens "to acquire, hold and dispose of property" and the right is subjected to the qualification in art. 19(5) that legislation can impose only

"reasonable restrictions" on its exercise "in the interests of the general public."

Their Lordships observed that the rights of the vendor to a certain extent and those of the vendee to a larger extent were no doubt restricted by the law of pre-emption. But they held that the restrictions imposed were "reasonable" and were "in the public interest." They said:

The right of pre-emption has been given in the first instance to the lineal descendants of the vendor in order of succession, then to the cosharers who are agnates in order of succession, next on the list are the persons in order of succession and fourthly to the cosharers. Failing these, rights vest in the inferior or superior proprietors when the land is sold to superior or inferior proprietors respectively, then in the owners of the "patti", the owners of the estate and the tenants and finally in the occupancy tenants. The sole object of the legislation is to preserve the homogeneity of the village community and to prevent fragmentation of holdings. The terms of section 15 do not go beyond the objects aimed at and the restrictions imposed are just sufficient to achieve the interest of the general public indicated above.

COMMENTS

Abdul Ghaffar Khan's Detention

Detentions in India cause little concern in Congress circles here, but those in Pakistan excite a tremendous lot of concern, particularly the detention of Khan Abdul Ghaffar Khan who was the one man who won the North-West Frontier Province to the Congress before Partition. But his devotion to India and opposition to Partition, though keenly appreciated in India, have made him the object of profound suspicion in Pakistan. And when a Government proceeds on the basis of mere suspicion, what is there to prevent it from imprisoning a person without charge or trial? Such is the lot that has befallen Khan Sahib.

It may be that the suspicion entertained about him by the Government of Pakistan is wholly unfounded, and that though he was all along for maintaining the integrity of India, after separation he has been loyal to Pakistan, as is averred by Congress leaders here. But the trouble in such a case is that when a man's actions do not determine what treatment he will receive but merely what a Government thinks of the harm he is capable of doing, there is no means of proving that the detention it orders is unjustified.

The Frontier Chief Minister could only say in defence of Khan Sahib's detention that he finds himself in gaol because "he has worked in league with the enemies of Pakistan (meaning India, we suppose) against national integrity and independence of Pakistan." We for our part are prepared to believe that Khan Sahib is not really disloyal to Pakistan, however attached he was to India before partition took place. But where loyalty to Pakistan is supposed to be necessarily inconsistent with love for India,

the suspicion entertained by the Pakistan Government about Khan Sahib appears only natural. And to add to the plausibility of his arguments, the Chief Minister of the Frontier Province said: "A number of detenus have been set free as they pledged loyalty to Pakistan and orderly behaviour in future. The Government would similarly release other detenus if they were satisfied that they had been reformed." This means that the Pakistan Government do not want to take any risk in so far as national security is concerned and would lock up a man if they thought he presented any threat. In this respect we must confess that they are closely following the example set by the Congress Government in India, however much the latter might feel distressed by Khan Sahib's detention.

We would also like to say that the Pakistan Government appears to have stronger ground for suspicion about Khan Abdul Ghaffar Khan than the Indian Government had about many of its detenus (though we are opposed in principle to detention of any person on mere suspicion). One who was consistently opposed to partition may with some show of reason be suspected to cherish a desire to plot against Pakistan which came to life as a result of partition, though in fact the suspicion may be quite unjust. But there was not even such shadow of reason for suspecting the intentions of some of those persons whom the Indian Government placed under detention.

Take for instance the case of detention of Mr. L. B. Bhopatkar, who was then President of the Hindu Mahasabha. The district magistrate of Poona issued an order for his detention on the ground that Mr. Bhopatkar was plotting the assassination of Ministers! To the ordinary mind the suspicion would appear to be most unreasonable. And when his case came up before the Bombay High Court on a habeas corpus petition, he was ordered to be released on the technical ground that the order for detention was vague as it did not specify which Minister or Ministers he wanted to assassinate. The district magistrate did not even care to mention in an affidavit which Ministers Mr. Bhopatkar was trying to kill and how. And the strangest part of the whole matter was that after Mr. Bhopatkar's release the district magistrate did not make another order for detention against him curing the defect of the first order and specifying by name the Ministers whom he was thus manoeuvring to dispose of. For the sake of a technical flaw the district magistrate was prepared to let a dangerous would-be assassin remain at large and thus endanger the security of India! What a grave dereliction of duty! Does not this at least lead to the presumption that the first order was issued without any scrutiny?

If Congress leaders wish to secure the release of Khan Abdul Ghaffar Khan from Pakistan gaol, they must first do away with detentions in India. Then alone will they have some moral authority to make an appeal to the Pakistan Government. No one who does not go to equity with clean hands has any chance of success.

"Satyagraha has no Place in a Democracy"!

How quickly and easily Congress leaders at the top turn their backs even on eternal truths! Pandit Gobind Ballabh Pant, Chief Minister of the U. P. State, delivered himself of the dictum the other day that satyagraha had no place in a democracy. If the Gandhi movement meant anything, it was a movement of satyagraha against unjust laws. Gandhiji preached that laws which were morally bad ought to be treated by all adherents to truth as if they had no binding force for them and ought to be thrust out of the statute book by a campaign of passive resistance. Those who acquiesced in such laws, he taught, were themselves participants in evil. Thus he came to advocate boycott of schools and law courts and non-payment of taxes with a view to bringing a satanic government to book. The foundation of his movement was moral—devotion to Truth; but his followers, even the biggest of them, forgetting this foundation, joined his movement just because of the possibilities in it of harassing a foreign government. Thus it happens that one of the foremost leaders of the movement, now in power, repudiates in express terms the very principle underlying it.

What he means to say is that passive resistance or civil disobedience was all right when we had to fight the domination of foreigners, but since we are now living under an indigenous government that weapon must be discarded in the new set-up. He said in fact that the technique of satyagraha involved coercion (!) whereas democracy was based on moral suasion and that satyagraha and democracy were therefore contradictions of each other; and that satyagraha encouraged disrespect for law and therefore could not be tolerated in a democracy. Gandhiji for his own part was never known to have told his followers that he was advocating use of this weapon only for driving the Britishers from India and that its use was meant to be strictly limited till we had attained independence. He spoke as if it was to be resorted to whenever that became necessary for the sake of adhering to truth. He was a pacifist and had no doubt always in mind the refusal of pacifists to submit to conscription in England and other self-governing countries. One could well imagine him saying, if he were alive to-day, about Pandit Pant, *Et tu, Brute!*

After delivering this attack on the life-principle of Gandhiji, the Chief Minister proceeded to defend the recent amendment of the Government Servant Conduct Rules which penalises not only the Government servants but their wives and dependants for directly or indirectly criticizing or bringing into contempt by public speech or printed words decisions of the Government. This, he said, was intended to ensure strict observance of the Secrecy Code. On this topic we need make no comment, as the All-India Civil Liberties Council in its session at Cuttack expressed its views on the similar Government Servant Conduct Rules of the Madras State in a resolution in December 1949 (reproduced at p. 43 of the BULLETIN).

Limited Fundamental Rights in Kashmir

As a result of the agreement that has been arrived at between the respective Governments in regard to the future constitutional relationship between India and Kashmir (accession of which State to India has now been declared to be "final and complete"), the Fundamental Rights embodied in the Indian Constitution will now become applicable in that State, but unlike other constituent States, these Fundamental Rights as applied in Kashmir would be limited.

First of all, certain exceptions are likely to be provided for (the details not yet being settled), giving larger power to the Kashmir Government than that which Governments of other States exercise in the matter of dealing with "subversive activities." The Fundamental Rights as they stand at present might hamper the State Government (so the Government thinks) in taking the precautionary measures that were necessary in its opinion.

Secondly, Kashmir's land legislation would not be subject to the Fundamental Rights of the Indian Constitution. By means of this legislation Kashmir has expropriated landowners without compensation (though probably Mr. Nehru would deny this on the ground that with expropriated landowners some land had been left); and this being repugnant to the provisions of the Indian Constitution, such legislation was in danger of being declared null and void and is therefore going to be saved by the reservation which Kashmir insists upon making in its favour. On this point the Indian Prime Minister declared: "We like Kashmir's land legislation. We do not want the Fundamental Rights to come in the way of this legislation as adopted now or any later development of it." In fact, it is quite impossible to upset a thing that has been done."

Thirdly, Kashmir would be allowed to retain its law preventing outsiders from acquiring immovable property in the State, irrespective of whether it conflicts or not with art. 19 (5) of the Constitution.

Fourthly, there will be a change in the "emergency provisions" of the Constitution as they apply to Kashmir. Instead of the President having power under art. 352 to proclaim an emergency on the advice of the Government of India and in view of it to assume extraordinary powers in the event of internal disturbances breaking out or being threatened, it is proposed to provide that in the case of Kashmir such action shall be taken only "at the request or concurrence" of the Kashmir Government.

The Supreme Court will have jurisdiction in regard to those Fundamental Rights which are agreed to by the State.

Ban on Communist Literature

It appears that the Government of India has banned Soviet literature from railway bookstalls, and twenty-two members of Parliament recently issued a statement demanding withdrawal of the ban. The statement says :

We are of the opinion that this ban on Soviet literature is only the thin end of the wedge. It is, we are constrained to say, the preface to further attacks on freedom of the intellect. It recalls the notorious Fascist fear of 'dangerous thoughts,' a fear that India, pre-eminently, must shed, if she is to develop a really democratic way of life. We call upon the Government to steer clear of such unworthy fears and to withdraw an insensate ban which all truly democratic opinion must unequivocally denounce.

It is to be noted that among the signatories are not only Communist members like Mr. A. K. Gopalan, Dr. N. M. Jaiscoorya, etc., but also others who own no allegiance to the Communist party and are indeed opposed to it, like Mrs. Sucheta Kripalani, Mr. K. A. Damodara Menon, Dr. Lanka Sundaram, Mr. B. H. Khardekar and Dr. A. Krishnaswami.

New Special Courts Act

After the invalidation of sec. 5 of the West Bengal Special Courts Act, 1950, by the Calcutta High Court and the Supreme Court, the Government of West Bengal took power to constitute special courts in the State by an ordinance in March last, and this ordinance having expired, it has obtained that power by means of a bill which passed its third reading in the Assembly on 26th July. The Bill was fiercely opposed by all non-Congress parties, but still the Government was able to obtain a handsome majority in its favour.

The new law empowers the Government to refer cases concerning certain specified offences (mainly of treason, murder, dacoity and rape), in areas to be notified by the Government as disturbed, to special courts for trial. In those disturbed areas in which the law is to be brought into operation, the scheduled offences will be tried exclusively by the special tribunals to be set up and not by the ordinary courts, thus avoiding the defect of discriminatory legislation pointed out by the High Court and the Supreme Court.

The Chief Justice of the Calcutta High Court had said in his judgment:

It appears to me that a notification directing that persons charged, for example, with murder or with offences against the person or with offences against the State, should be tried by a special court, could not possibly be regarded as discriminatory and contrary to the provisions of art. 14 of the Constitution (regarding equality before the law). . . . Further, it appears to me that there would be no discrimination even if Government directed that certain offences or classes of offences triable within certain areas should be triable by a special judge only.

The new law seems to be grounded on this opinion.

By the special procedure provided therein the accused will be deprived of his right to trial by jury and his right to a preliminary inquiry before a committing magistrate.

The High Court is empowered to transfer a case from one tribunal to another. Against the order of a tribunal the right of appeal to the High Court is provided on matters both of fact and law. The right to apply to the High Court for a writ of habeas corpus has been restored. The special judge will be either a High Court Judge or a Sessions Judge.

Seizure of Documents by Inquiry Commissions

Great concern is felt about the power proposed to be vested in Commissions of Inquiry which a Bill authorizes the Central and local Governments to set up for investigating "any definite matter of public importance." The Bill has been adopted by the House of the People and is now sent up to the Council of States. It provides that when Commissions of Inquiry are appointed, they will automatically have the powers of a civil court in trying civil suits in respect of compelling attendance of any person and examining him on oath, requiring the disclosure of any information and authorizing officials to enter private premises and to seize books and documents. It is feared that this latter provision in particular might result in the curtailment of the basic right of the inviolability of the home by arbitrary exercise of the power conferred by it. The Bill lacks the safeguards against misuse of such powers which are provided for by law in Britain, viz., such Commissions could be set up only in regard to matters of "urgent" public importance, and further they could be granted the powers which are provided for in the Bill only with the approval of Parliament in each individual case.

In view of the interest created by this measure in the general question of illegal searches and seizures, we shall take occasion to deal in our next issue with the Fourth Amendment to the United States Constitution, though our Constitution contains no article corresponding to the Amendment and though, even if it did, it is not suggested that the Bill would necessarily militate against it.

Restrictions on Freedom of Expression

ARTICLE IN THE DRAFT COVENANT

The Bulletin of the International League for the Rights of Man in its June number reports that Dr. Max Beer, League representative to the U. N., intervened in the Human Rights Commission's discussions to get into proper shape the article in the draft International Covenant on Human Rights relating to Freedom of Expression and Information, which is art. 14. The text of the article considered by the Commission was as follows:

The right to seek, receive and impart information and ideas carries with it special duties and responsibilities and may therefore be subject to certain penalties, liabilities and restrictions, but these shall be such only as are provided by law and are necessary for the protection of national security, public order, . . . Dr. Beer advocated use of such language in the article as would minimize restraints on the press based on "national security" and "public order." But his efforts were

unsuccessful, for though some verbal changes have been made in the first part of the article, the second part which is really objectionable remains unaltered. The Commission's work being still incomplete, the Ecosoc has recommended to the General Assembly that the work be continued next year and completed.

The Bulletin also makes mention of the election of Mr. P. R. Das to the League's Advisory Committee. It describes him as "a former judge of the Patna High Court and one of the organizers of the All-India Civil Liberties Council."

Policing of the Press in India

"SAFEGUARD" OF FREE EXPRESSION!

At the request of the U. N. Human Rights Commission the Associated Press compiled and presented to the Commission a factual survey of restrictions placed on freedom of information in the various countries of the world under the title of "Semi-Annual World Survey of Censorship." When the survey came up for discussion in the Commission's sub-committee on freedom of information on 17th March, two countries expressed their resentment at such a publication—U. S. S. R. and India. The former was resentful because the European countries in which information was blacked out were referred to in the Survey as "iron curtain countries." But the cause of the latter's resentment was more substantial: the Survey gave an account of India's Constitution (First Amendment) Act and characterized the change introduced in art. 19(2) of the Constitution relating to freedom of expression as tending to check the flow of information, apparently because of the insertion of the words "friendly relations with foreign States" in the article.

India's representative in the sub-committee, Mr. Moulik, complained that the account given in the Survey was a misrepresentation. He said:

The constitutional amendment mentioned had been adopted, not to curb freedom of speech, but rather to prevent abuse of it. It had been adopted because there were no provisions in the penal code to deal with irresponsible newspapers which vilified foreign countries, and it was aimed only against newspapers which had scurrilously attacked such countries, in particular the United States of America. The amendment was not a restriction on the right of free speech, but a SAFEGUARD (!).

Who in India ever thought that the Constitution was amended in this particular out of solicitude for U. S. A. ? And the amendment does not merely insert restrictions on freedom of expression in behalf of "friendly relations with foreign States" but also in behalf of "public order" and prevention of "incitement to an offence." Moreover, the Survey of the Associated Press was based only on the constitutional amendment and not on Rajaji's Press Act which followed later, permitting enforcement of security bonds

upon peccant journalists and forfeiture of the bonds and even confiscation of the press as punishment for the special press offences created by the Act. All this is apparently intended to safeguard the freedom of the press!

Contempt of Court in Pending Cases

REJECTION OF "CLEAR AND PRESENT DANGER" TEST

In the Allahabad High Court Dayal and Agarwala JJ. convicted the publisher and editor of an Urdu paper of Meerut called the "Hindustan Weekly" of contempt of court in respect of certain comments on a pending case and fined them Rs. 250 each on 30th April. On behalf of the defendants it was contended that inasmuch as under art. 19 (2) as amended by the Constitution (First Amendment) Act only such existing laws were saved as imposed "reasonable" restrictions on freedom of expression, the existing law relating to contempt of court must be held invalid because of the restrictions it imposes not being "reasonable." Their Lordships rejected this contention, holding that "the restrictions placed by the law of contempt, as it was understood in England and in this country, were 'reasonable'."

Their Lordships referred to some American cases and said: "It was clear that strong difference of opinion existed even in America about the application of the clear and present danger test. They were not bound to apply any such test." To which American cases reference was made here by the Court we do not know. But the three most prominent cases which come to mind, in which conviction for contempt of court was reversed by the United States Supreme Court, are given below. In *Bridges v. California* (1941) 314 U. S. 252 the Court said:

The "clear and present danger" language of the Schenck case has afforded practical guidance in a variety of cases in which the scope of constitutional protections of freedom of expression was in issue. . . . History affords no support for the contention that certain criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case. . . . For these reasons we are convinced that the judgments below result in curtailment of expression that cannot be dismissed as insignificant.

In *Craig v. Harney* (1947) 331 U. S. 367 the Court said:

The fires which (the language) kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. In these two cases the opinion of the Court was divided, but in the third case of *Pennekamp v. Florida* (1946) 328 U. S. 331 the Court was unanimous in setting aside the conviction as an invalid restriction on freedom of the press. The Court said:

We must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases. We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it.