

# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

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## CHURCHILL ON DETENTION WITHOUT TRIAL

### URGES THAT "18B SHOULD BE COMPLETELY ABOLISHED"

#### EVEN WHILE ENGLAND WAS HALF-WAY THROUGH THE EUROPEAN WAR

### DR. KATJU CONFUTED

The Home Minister of the Government of India, Dr. Kailas Nath Katju, made the wholly unwarranted remark, when speaking in the House of the People on the Preventive Detention Bill, that in England detention without trial was resorted to not only in war time but also in peace time. This remark was based on Mr. Herbert Morrison's speech in the House of Commons, in which he had said how he would have dealt with Hitler in Germany. We have shown ( see p. ii:160 ) how entirely unfounded Dr. Katju's inference, based on Mr. Morrison's speech, was.

But there is something more to be said about the remark of the Home Minister. Not only was recourse to detention never taken in England in peace time, but even while the war was still on, the British Government was continually reviewing the cases of persons already detained and releasing a large number of detenus as the danger to national security became less on account of an improvement in the war situation. "The greatest number of persons detained at any time under 18B was 1428, in 1940, surely a trifling number considering the state of England's defences at the time. By mid-1944 this number had been reduced to about 200" ( Clinton L. Rossiter in "Constitutional Dictatorship" at p. 197 ). The principle on which the Home Secretary worked was, as explained by him, "As regards every person who is detained under Defence Regulation 18B, it is my duty to consider from time to time whether detention is still necessary in the interests of national security, and for this purpose to take account of all relevant considerations, including considerations which arise from change in the international situation" ( Hansard, vol. 392, col. 444 ). The number of detenus went on being reduced as a result of the application of this principle, until "all remaining persons held under 18B were released immediately after V-E Day," i. e., without waiting for the close of the war in the Pacific.

Mr. Winston Churchill's War Memoirs have now brought to light the further fact that the Prime Minister

was urging his Cabinet, not only to set at liberty as many detenus as it was possible to do because of the victories the Allies were winning and the consequent diminution of the danger to national security arising from the activities of the fifth-columnists, but to withdraw altogether Regulation 18B under which people were being held in detention even before the European war had come to a conclusion. The fifth volume of the Memoirs entitled "Closing the Ring" which has just been published contains an appendix of minutes and memoranda which shows how Mr. Churchill was continually exerting pressure for a total withdrawal of the Regulation as early as 1943. Because of the very great importance of this subject and because of the complete rebuttal of Dr. Katju's unjustifiable attack on British policy which this appendix F contains, we quote it below in full.

The immediate occasion for Mr. Churchill's goading the Cabinet to discontinue detention was the release of Sir Oswald Mosley, leader of the British Union of Fascists ( which on the outbreak of war discreetly called itself simply the British Union ), from detention on grounds of health. Sir Oswald had been detained in May 1940, some three and half years earlier, on the ground that his British Union's activities were prejudicial to national security. Medical advice was received by the Home Office that his continued detention might cause permanent damage to his health and might possibly be a danger to his life. On receipt of this advice the Home Secretary decided to release Sir Oswald (with Lady Mosley), because he was satisfied that "no undue risk to national security would be incurred" by the release at a time when, although war had not come to a close, considerable improvement had taken place in the "national fortunes." He was violently attacked in Parliament and outside for the release of the Fascist leader, but he met these attacks valiantly. He said in the House of Commons on 23rd November 1943 :

If I were to allow myself, in the exercise of the drastic power of detention without trial entrusted to me by Parliament as an exceptional war-time measure (Dr. Katju might notice the underlined words), to depart from the judicial frame of mind and to be in-

fluenced—not by considerations of the public safety—but by personal dislike or political opposition, I should no doubt be able to give entire satisfaction to many of my present critics, but I should be abusing the powers afforded by Regulation 18B and betraying the trust reposed in me by Parliament that those powers would be exercised in a judicial spirit and solely for the purpose of national security. Any departure from these principles of administration would involve great danger to the maintenance of constitutional democratic government and might set a precedent which in other circumstances no one would regret more than many of my critics of to-day.

Mr. Churchill supported Mr. Morrison in this humane measure but further pressed him to consider the desirability of a "complete abolition" of detention, "as the national emergency no longer justifies abrogation of individual rights of habeas corpus and trial by jury on definite charges," because "the power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him judgment by his peers for an indefinite period, is in the highest degree odious," and detention without trial is "contrary to the whole spirit of British public life and British history." Mr. Churchill adjured Mr. Morrison "NOT TO QUIT THE HEIGHTS."

There could not be a more complete refutation of Dr. Katju's assertion that in England recourse could be had to detention without trial in peace time as in India. On the contrary, the above shows:

(i) that Regulation 18B was a purely war-time measure to be applied only in cases of "the dire peril of the State;"

(ii) that it was in fact applied with evident circumspection;

(iii) that as the danger to national security became less, persons detained were steadily released;

(iv) that the Regulation was withdrawn the moment the war in the European theatre came to a close even though that in the Pacific was still continuing; and

(v) that the Prime Minister exerted pressure for the total withdrawal of the Regulation even while the war in Europe was only half-way through. We have never ceased to wonder how our Home Minister could make himself responsible for the grossly erroneous and misleading statement he made in Parliament.

## MR. CHURCHILL'S MEMORANDA

*While we were in Conference at Cairo and Teheran a domestic issue of constitutional importance which had been before us since the beginning of October came to a head. It is recounted here (in an Appendix) in order not to break the general narrative.*

Prime Minister to Home Secretary (6 Oct. 43):

Let me know what is the report of the Medical Commissioners upon Sir Oswald Mosley's state of

health. I have received privately some rather serious medical reports about him, but they are of course unofficial.

*Mr. Morrison's reports confirmed this information, and he decided to release Sir Oswald and his wife. I was sure this would raise controversy.*

Prime Minister to Home Secretary (21 Nov. 43):

I expect you will be questioned about the release of the Mosleys. No doubt the pith of your case is health and humanity. You might however consider whether you should not unfold as a background the great principle of habeas corpus and trial by jury, which are the supreme protection invented by the British people for ordinary individuals against the State. The power of the Executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him judgment by his peers for an indefinite period, is in the highest degree odious, and is the foundation of all totalitarian Governments, whether Nazi or Communist. It is only when extreme danger to the State can be pleaded that this power may be temporarily assumed by the Executive, and even so its working must be interpreted with the utmost vigilance by a Free Parliament. As the danger passes, persons so imprisoned, against whom there is no charge which courts and juries would accept, should be released, as you have been steadily doing, until hardly any are left. Extraordinary powers assumed by the Executive with the consent of Parliament in emergencies should be yielded up when and as the emergency declines. Nothing can be more abhorrent to democracy than to imprison a person or keep him in prison because he is unpopular. This is really the test of civilization.

\* \* \*

*Difference arose between Ministers on the step the Home Secretary proposed to take. I assured him of my full support, though I should have preferred to deal with the question as a whole, rather than in a particular case.*

Prime Minister (Cairo) to Home Secretary (25 Nov. 43):

I am convinced 18B should be completely abolished, as the national emergency no longer justifies abrogation of individual rights of habeas corpus and trial by jury on definite charges. I doubt very much whether any serious resistance would be made to this. There are of course a number of totalitarian-minded people who like to keep their political opponents in prison on *lettres de cachet*, but I do not think they constitute a majority. I have already on more than one occasion expressed in Parliament my distaste for these exceptional powers, and my hope that success and security would enable us to dispense with them. However, as these views conflict with the line you have adopted I shall not press them at this stage.

Any unpopularity you have incurred through correct and humane exercise of your functions will be repaid in a few months by public respect.

Prime Minister (Cairo) to Deputy Prime Minister and Home Secretary (25 Nov. 43):

In case there is a debate on an amendment to the Address to terminate 18B, I would strongly counsel the line that we very much regret having to be responsible for such powers, which we fully admit are contrary to the whole spirit of British public life and British history. These powers were conferred on us by Parliament because of the dire peril of the State, and we have to administer them in accordance with the principles of humanity, but all the time we desire to give back these powers from the Executive to Parliament. The fact that we have gained great victories and are in a much safer position makes the Government the more desirous of parting with exceptional powers. The time has not yet come when these can be fully dispensed with, but we can look forward to that day.

2. On no account should we lend any countenance to the totalitarian idea of the right of the Executive to lock up its political opponents or unpopular people. The door should be kept open for the full restoration of the fundamental British rights of habeas corpus and trial by jury on charges known to the law. I must warn you that departure from these broad principles because the Home Office have a few people they like to keep under control by exceptional means may become a source of very grave difference between us and the totalitarian-minded folk. In such a quarrel I am sure I could carry the majority in the House of Commons and the mass of the nation. Anyhow, I would try. It seems to me you have a perfectly good line in deploring the fact that such powers are thrust on you and in proclaiming your resolve to use them with the utmost circumspection and humanity. Do not quit the heights.

\* \* \*

*Mr. Attlee now reported to me that the Cabinet had decided to support the Home Secretary in releasing the Mosleys from prison. There was, I learned, considerable Parliamentary agitation against this step.*

Prime Minister (Teheran) to Home Secretary (29 Nov. 43):

Considering you are supported by the Cabinet, and by me as Prime Minister, you have no choice whatever but to fight the matter through, and you will no doubt be supported in any direct issue by a very large majority.

2. There is no hurry about the general question of 18B. I certainly recommend however that you express your distaste for such powers and your regret that dangers of the country have forced you to assume them, and your earnest desire to return to normal. This is a becoming attitude in a democratic Minister.

\* \* \*

*Mr. Morrison showed firmness and courage in resisting the storm that threatened him, and, as is often the case, it dispersed. People who are not prepared to do unpopular things and to defy clamour are not fit to be Ministers in times of stress.*

Prime Minister (Teheran) to Home Secretary (2 Dec. 43):

I congratulate you on the strong support given to you by the House of Commons. Your courageous and humane discharge of your most difficult and disagreeable functions will gain its reward in the respect of the British nation.

#### FOURTH YEAR OF THE BULLETIN

The BULLETIN enters the fourth year of its existence with the present number.

At the close of every year the promoters have to decide whether the BULLETIN should be kept alive or should be discontinued.

Financial difficulties are always present. The yearly deficit is heavy; however, arrangements have been made to meet the deficit that will be incurred in this year.

But the question still arises whether, in view of the fewness of the readers whom the BULLETIN reaches, it is worth while for the Editor who has other public activities of his own to carry on, and for those who render him help in writing in the paper at the cost of much of their time, to be engaged in a piece of work which, though of the highest importance in itself, seems to make so little impression on the public for whom it is intended.

The promoters have resolved this question by deciding to continue the publication at least for the present. This decision was influenced to a large extent by two or three factors:

(i) that the memorandum prepared by the All-India Civil Liberties Council on the Preventive Detention Bill (which preparation was itself possible only because the BULLETIN was continually dealing with the problem in its columns and all the material was thus ready to hand) was extensively used by Opposition members of Parliament in putting the case against resort to detention in time of peace;

(ii) that some of the more important articles appearing in the BULLETIN were being published by some daily newspapers of great repute and large circulation, thus giving much wider publicity to some of its material than the BULLETIN itself is able to command; and

(iii) that the BULLETIN is highly appreciated in countries abroad like the United States and is thus serving a useful function in the international civil liberties movement.

Feeling therefore that the BULLETIN has still a measure of utility in spite of the smallness of its reading public, its promoters have decided that the BULLETIN should continue its existence at least for the year 1952-3. Its future beyond this period will only be assured if those of its readers who value the service it renders bring it to the notice of others interested in the movement, so that if the large excess of expenditure (which does not include any editorial charge) over income is not entirely met, an increase in the income will at least give a feeling to those who have made it their job to conduct it that they are not engaged in an utterly fruitless task.

## CONSULT INTERNATIONAL OPINION

Mr. V. V. Giri, Labour Minister of the Government of India, announced recently that the two Bills on industrial relations which his predecessor had introduced in Parliament and which had indeed been referred to a select committee would be withdrawn as they had provoked a great deal of controversy and a new Bill would be framed so as to meet the wishes as far as possible of both employers and employees. He further announced that in this attempt to have an agreed measure he would take the assistance of the International Labour Office, which has been requested to depute two or three experts to India for the purpose of formulating principles that should be followed in settling trade disputes. This is a very wise move on the part of the new Minister of Labour. Mr. Giri has been an active labour leader all his life, and it would have been very strange if he had allowed the present Bills which are so highly unpopular with large sections of the people to be put on the statute book in the form in which they stand at present and had not set before himself the objective of having an improved measure. In this effort at improvement he has shown himself to be a man of vision in consulting the I. L. O., which has at its back experience accumulated for three decades.

Why should not the Prime Minister be equally open-minded and consult international opinion on matters affecting civil liberties problems? We made such a suggestion (see p. 228) when the Constitution Amendment Bill was on the anvil, but the suggestion was not heeded. We are perfectly certain that if at that time effect had been given to the suggestion, neither the Constitution Amendment Act, nor the Press Act, nor the Detention Act, would have been so gravely defective as we find them to-day. Although all these Acts have been passed, it would not yet be too late to consult experts serving on international bodies with a view to introducing improvements in them in order that the serious discontent that exists in regard to these matters may be substantially allayed. Indeed, we urge with the utmost emphasis at our command that such consultation do take place and improvements be effected, in conformity with competent international opinion on the subject, in the constitutional and statutory provisions concerning chiefly Freedom of Person and Freedom of Expression. These provisions, besides being widely considered in the country itself as falling far short of the requisite safeguards, have created in the minds of experts abroad a very unfavourable impression of India's democratic structure.

Take, first, the question of Inviolability of the Person, in regard to which the guarantee must be absolutely water-tight if any other rights conferred on citizens are to be meaningful. Security of the person is a primary right on which exercise of every other right is contingent, and that right must be protected in India as effectively as it is protected in every other democracy. What is the status of this right in other countries whose example

one would like to follow? Broadly, it is this: personal liberty cannot be interfered with except in cases of grave emergency threatening the life of the nation; in every other case the right to a writ of habeas corpus which insures immunity from arbitrary arrest and imprisonment must be maintained intact. The U. S. Constitution and the constitution of every component state of the Union contain express provisions for prohibiting deprivation of the right, except in time of war or in time of internal rebellion. In France, the law of the state of siege guarantees the right. In England, where no constitutional limitations can be imposed on the sovereignty of Parliament, constitutional conventions protect the right as jealously as if that country's Constitution had contained a specific prohibition, as in the U. S. Constitution, of suspension of habeas corpus. India is the only country in the world—leaving aside avowedly totalitarian countries—which permits by its very Constitution infringement of personal liberty in time of peace when no public emergency has arisen. Mr. Nehru will certainly do well to consult the best minds in other democracies as to whether any great harm would come to India if here also, as in every other country, the power to detain persons without charge or trial was restricted to cases where protection of the public safety required exercise of such power. There is evidence to show that on account of provisions in the Constitution which permit detention in time of peace our country is being looked upon as a pariah nation in the world outside. Mr. Nehru who is so keen on conciliating enlightened world opinion ought to be anxious to wipe out this indignity.

The same need for consulting international opinion arises in the case of that clause in the Constitution Amendment Act which permits additional restrictions to be imposed by law upon exercise of the right of Free Expression. In the matter of these restrictions the Prime Minister has admitted unreservedly that they are couched in too broad terms. But surely the Prime Minister knows that to subject any right to such vague and flexible qualifications is to give a right with one hand and to take it back with the other. These particular qualifications have been frequently discussed at great length in the Human Rights Commission and committees of the United Nations. While of course in these bodies representatives of a number of countries were found to defend such qualifications, the representatives of all progressive nations have condemned them as making the right almost wholly meaningless. These latter representatives have said unanimously that very little of substance would be left in the right to Freedom of Expression after full effect is given to the qualifications drawn in unduly wide terms. The newly passed Press Act also requires to be thoroughly scrutinised by overseas experts. The Act is of a wholly unique character inasmuch as it provides for special punishment for press offences by a system of securities, such as is to be found nowhere else. Whether the Act is at all consistent with the principles of democracy is a question which Mr. Nehru should refer to persons qualified to speak with authority

on the subject. In this particular matter the best non-official organization to consult is undoubtedly the newly founded International Press Institute of Zurich. But in other matters men eminent in the cause of civil liberties like Dr. Charles Malik who is Rapporteur of the Commission on Human Rights and experts of the American Civil Liberties Union who have been putting up a big fight for civil liberties for the last thirty years and more should be invited to tell us in what manner Liberty and Authority can best be harmonized. Both liberty and authority must be subject to certain qualifications, and the question that should be referred to them is whether in their opinion the latter does not trespass too far on the domain of the former in the Constitution and laws of our country and, if that be so, in what respects changes require to be introduced so that a proper balance would be maintained between the two.

## FREEDOM OF THE PRESS

The tenth session of the All-India Newspaper Editors' Conference held in New Delhi on 16th and 17th September and the announcement almost immediately thereafter of the appointment of a Press Commission to inquire into the state of the press in India have focussed the attention of the public on the question of the right to Freedom of the Press which is at the basis of all democratic freedom. The Indian press had already registered its unanimous opinion that the Constitution Amendment Act which by its amended Art. 19(2) has enormously enlarged the restrictions on freedom of the press and correspondingly circumscribed the constitutional limits of free expression has deprived the right conferred by Art. 19(1)(a) of all substance. It had also recorded its opinion that the Press Act to which the way was paved by the constitutional amendment leads to a policing of the press such as is not to be found in any other democratic country of the world. This verdict was reaffirmed by the A. I. N. E. C. at its recent session without a dissentient voice, and the demand was made that Art. 19(2) be restored to its old form and that the Press Act be repealed.

To both the measures curbing the liberty of the press the opposition of the A. I. N. E. C. was fundamental. Amendment of Art. 19(2) has made it possible for the legislatures to impose three additional restrictions on publications, which the original article had declared to be unconstitutional. And the restrictions are of a far-reaching character. All the three were discussed at one stage or the other in the U. N. Commission on Human Rights and all of them were violently opposed by the delegates of those countries like the U. K. and the U. S. A., where freedom of the press is highly appreciated and jealously guarded. That the delegate of the United Kingdom in which constitutional limitations on legislative power are unknown should declare that the guarantee of freedom of the press would be robbed of all effectiveness if Governments were allowed to interfere with the right for

the sake of the maintenance of "public order" (or for the prevention of "incitement to an offence") is the strongest condemnation of these particular restrictions that the amended Art. 19(2) allows. It has also now been proved that there was no justification whatever for introducing these new restrictions. The Patna High Court's judgment in the Bharati Press case led the Government to think that even open incitement to murder and similar violent offences was protected by Art. 19(2) as it originally stood, and it was on the basis of this judgment that the Government of India proposed the present amendment to the article. But that judgment being since overruled by the Supreme Court judgment, it is clear that there was no justification whatever for the amendment that has been made. Why should not the Government of India now undo what it did under a mistaken belief and remove the restriction which has been found to be unnecessary? Similarly, the restriction in the interests of "friendly relations with foreign states" is a restriction, the like of which is not to be found in the constitution or statute of any country which professes to be a democracy. Since Mr. Nehru himself has admitted that the restrictions have an unreasonably wide sweep, it would be but proper for him to remove these restrictions altogether. For, as long as they have a constitutional sanction, freedom of the press would ever remain exposed to the threat of being virtually extinguished by legislative bodies in the country.

The Press (Objectionable Matter) Act passed by Rajaji is to be condemned not so much because of the wide definition of "objectionable matter" that it contains as because it subjects the press to special legislation, creating special press offences and imposing special penalties on the offending section of the press. It is the demand of the A. I. N. E. C. that only the ordinary law should apply to the press in India. It does not want the press to occupy any special position: it does not desire any special privileges for the press, nor would it have the press subjected to any special liabilities. And the worst of the measure is that it continues in force the system of levying security bonds on the press and then confiscating them which the emergency press legislation of the British regime first introduced in the country. The Press Laws Committee had denounced this system in a unanimous report. It was unworthy of the Government of India to have reintroduced the system in the teeth of the recommendation of this expert body of high authority to abolish it, and it would be still more unworthy of the Government to maintain it in the teeth of the violent opposition of the entire Indian press. It should also be remembered that the Government has not yet taken any steps, nor does it appear to be within its contemplation to take any steps, to relax the rigours of the present seditious law which, being pronounced to be unconstitutional by High Courts, has been reactivated by the Constitution Amendment Act with retrospective effect.

While the Government of India seems to be thus unwilling to repair the damage which it has itself inflicted

on the press, it seems to be anxious to rid the press from the domination of the Press Lords. In this country, as in many others, freedom of the press is in danger from two different quarters. The Government makes inroads upon it by enacting restrictive laws and so amending the Constitution itself as to give such laws the constitutionality which they had previously lacked. When one speaks of freedom of the press, it is this aspect of the freedom that comes first to mind. This freedom our Government has managed to take away in almost full measure. Having done so, it considers it prudent to divert the country's attention to the other aspect of freedom of the press, viz., the inroads that come upon it from the more powerful sections of the press. That this too is an evil must be admitted. The press is subjected even now to a great deal of regimentation of public opinion at the hands of the wealthy. The running of a daily newspaper is a costly affair which is within the means of but a few. This fact alone tends to stifle much of honest opinion which, however worthy of being placed before the people, often has no organ through which it can express itself. But when a few individuals own a large number of the big prints, this monopoly of the wealthy makes it virtually impossible for the public to have access to any opinion which the monopoly press does not espouse. This is true in large measure even of news, for the monopoly press gives publicity only to certain types of news and withholds it from certain other types. This monopoly, if broken, will certainly lead to a greater freedom of information and opinion, but we have our own doubts as to whether the Government would be able to break the monopoly and whether it would even pursue the matter with vigour. For the concentration of the power of the press in a few hands favours the Government at present. The owners of this commercial press, purely from self-interest, backs up the Government in everything that the latter does, because it pays them to do so, and the Government will hardly show much keenness in weakening their power. Anyway, rescuing freedom of the press from governmental onslaughts is a far more important matter, from which public attention must not be allowed to be diverted.

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## NOTES

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### California's Alien Land Law;

When the supreme court of California in the *Sei Fujii* case invalidated the state's Alien Land Law which prohibits aliens ineligible for citizenship from taking title to real property (see p. ii:116 of the BULLETIN), fear was expressed that the state might appeal against the decision in the U. S. Supreme Court, and the latter, refusing to go farther than it did in *Oyama v. California* (1948) 332 U. S. 633, in which the constitutional question was bypassed, might similarly avoid a forthright ruling to the effect that the law was in violation of the Fourteenth Amendment and was therefore unconstitutional.

One would be glad to know, therefore, that the state authorities accept the decision of the state's supreme court and do not intend to appeal against it. For California's Attorney General has declared:

Now that our state supreme court has given this law its death-blow, I can see no justifiable nor supportable legal reason which, in good conscience, would cause me to adopt a course of action seeking to reanimate this law in California (which he described as the state's last legal remnant of racial discrimination). My office is in full accord with the legal conclusion reached in that decision by the court.

Every citizen of California, I believe, by the decision in the *Fujii* case can take pride that California will legally no longer persist in an adherence to a philosophy of a "super race," nor insist upon being a vindictive outpost of racial discrimination; that everyone of our residents here has an equal opportunity to share in the building of a greater destiny for our state; and that our guide now, more than ever before, is the U. S. Constitution which guarantees equal rights and equal protection for all.

It may be stated that the California Legislature had already adopted in 1951 legislation to pay those Japanese whose land holdings were confiscated to the state during and following the second World War for their escheated property.

Like California, Oregon too in 1951 had its Alien Land Law declared unconstitutional by its supreme court. In the decision the court said: "Our country cannot afford to create by legislation a ghetto of our ineligible aliens" and Oregon too did not seek to appeal to the national Supreme Court.

### Distribution of Leaflets on Streets

#### PART OF FIRST AMENDMENT RIGHTS

"The state can prohibit the use of the streets for the distribution of purely commercial leaflets," declared the U. S. Supreme Court in *Jamison v. Texas* (1943) 318 U. S. 413, but the states "may not prohibit the distribution of handbills in the pursuit of a clearly religious activity" by subjecting it to a license tax, declared the Court in *Murdock v. Pennsylvania* (1943) 319 U. S. 105, a case affecting the order of Jehova's Witnesses.

But what if the leaflets distributed are not of a religious character, but contain controversial political matter? This question arose in a California court in the case of *Irwin Edelman* who had distributed political leaflets in the Pershing Square of Los Angeles, and the trying court decided that the *Murdock* decision did not apply as it related only to literature having the spread of religious ideas for its object. Another question that arose in this case was whether, if a person offered his pamphlets for sale as a means of raising money for himself, he was not guilty of the offence of "begging." This question arose because *Edelman* sold his leaflets with the object of finding

the wherewithal to pay court costs and lawyers' fees in the several prosecutions to which he was subjected in his fight to assert the rights of the First Amendment. The court found him guilty of "solicitation of funds for personal ends."

The Appellate Department of the Superior Court, however, reversed the conviction on appeal on the basis of the Murdock decision and the decision in *Follett v. McCormick* (1944) 321 U. S. 573, in which immunity from a license tax of one who sells religious literature and earns his livelihood thereby was in question. In this case the Supreme Court said: "Freedom of religion is not merely reserved for those with a long purse. . . . Whether needy or affluent, (people may) avail themselves of the constitutional privilege of a free exercise of their religion," thus striking down the notion that dissemination of ideas might become the monopoly of the wealthy. The Appellate Department in the present case took its stand on this decision and observed:

We are of the opinion that the principle is established that one may make a living by the distribution of political or religious leaflets, for which he receives "contributions," without a license and without running afoul of a provision against soliciting alms or of carrying on a commercial business. When we have a case where the distribution of the leaflets is a mere subterfuge for begging, we shall deal with it. The case before us is not such a case.

#### Freedom of Information in Russia

The recently established International Press Institute of Zurich has published a survey called "The News from Russia." The survey says that the tightening of censorship and other restrictions since 1946 had reduced a correspondent in Moscow to handling a very limited range of topics selected for him by Russian officials "who consider him a potential or actual spy."

The survey lists the following among restrictions on foreign correspondents in Moscow:

1. There are no uncensored telephone calls abroad.
2. Foreign broadcasts, by Western correspondents, are not allowed.
3. The Soviet State Secrets Law classes as "espionage" the passing of information on a wide range of topics—economic, agricultural and scientific as well as purely military.
4. Soviet citizens are forbidden to have any dealings with foreigners unless officially authorised to do so. A correspondent now requires a special permit to visit a public library.
5. Correspondents are excluded from more than one-third of Moscow, and from many parts of Moscow province, and may not travel more than 40-kilometres from the centre of the city.

## PRESS ACT, 1931

### Incitements Not Protected by Art. 19 (2)

The full text of the Supreme Court's judgment in the appeal filed by the Government of Bihar against the decision of the Patna High Court in the *Bharati Press* case is now available, and as this decision formed the chief justification for amending Art. 19 (2) and so extending the qualifications to the right to Freedom of Expression as in effect to extinguish the right altogether (vide pp. ii:127 to 130) the Supreme Court's judgment on the constitutional issue involved is given below in full.

The Government of India thought it necessary to widen the scope of Art. 19 (2) because Sarjoo Prasad J. had said, on the basis of the Supreme Court's remarks in the cases of *Romesh Thappar v. Madras* and *Brij Bhushan v. Delhi*: "If a person were to go on inciting to 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. Any legislation which seeks or would seek to curb this right of the person concerned would not be saved under Art. 19 (2) of the Constitution (which defines the qualifications to which the right is subject) and would have to be declared void."

Mr. Justice Mahajan of the Supreme Court remarked in his judgment on the appeal that these observations "disclose a complete lack of understanding of the precise scope of the two decisions of this Court" relied on by Sarjoo Prasad J. and said:

Clause (a) of sec. 4 (1) (of the Press Act of 1931) deals with "words or signs or visible representations which incite to or encourage, or tend to incite to or encourage, the commission of an offence of murder or any cognizable offence involving violence." It is plain that speeches or expressions on the part of an individual which incite to or encourage the commission of violent crimes such as murder, cannot but be matters which would undermine the security of the State and come within the ambit of a law sanctioned by Art. 19(2) of the Constitution. I cannot help observing that the decisions of this Court in *Romesh Thappar's* case and in *Brij Bhushan's* case have been more than once misapplied and misunderstood and have been construed as laying down the wide proposition that restrictions of the nature imposed by sec. 4(1) (a) of the Indian Press (Emergency Powers) Act or of similar character are outside the scope of Art. 19(2) of the Constitution inasmuch as they are conceived generally in the interests of public order. Sarjoo Prasad J. also seems to have fallen into the same error.

The question that arose in *Romesh Thappar's* case was whether the impugned Act (*Madras Maintenance*

of Public Order Act, No. 23 of 1949) in so far as it purported by sec. 9(1-A) to authorize the Provincial Government, "for the purpose of securing the public safety and the maintenance of public order, to prohibit or regulate the entry into or the circulation, sale or distribution in the Province of Madras or any part thereof of any document or class of documents," was a law relating to any matter which undermined the security of, or tended to overthrow, the State, and it was observed that whatever ends the impugned Act may have been intended to subserve and whatever aims its framers may have had in view, its application and scope could not, in the absence of delimiting words in the statute itself, be restricted "to those aggravated forms of prejudicial activity which are calculated to endanger the security of the State," nor was there any guarantee that those authorized to exercise the powers under the Act would in using them discriminate between those who act prejudicially to the security of the State and those who do not.

Sec. 4(1)(a) of the impugned Act (Press Act), however, is restricted to aggravated forms of prejudicial activity. It deals specifically with incitement to violent crimes and does not deal with acts that generally concern themselves with the maintenance of public order. That being so, the decision in Romesh Thappar's case given on the constitutionality of sec. 9(1-A) of the Madras Maintenance of Public Order Act has no relevancy for deciding the constitutionality of the provisions of sec. 4(1)(a) of the Indian Press (Emergency Powers) Act. Towards the concluding portion in Romesh Thappar's judgment, it was observed as follows: "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 clause (2) of Art. 19."

The restrictions imposed by sec. 4(1)(a) of the Indian Press (Emergency Powers) Act on freedom of speech and expression are solely directed against the undermining of the security of the State or the overthrow of it and are within the ambit of Art. 19(2) of the Constitution. The deduction that a person would be free to incite to murder or other cognizable offences through the press with impunity drawn from our decision in Romesh Thappar's case could easily have been avoided as it was avoided by Shearer J. (of the Patna High Court).

Here it may be useful to point out that in the Special Courts case of Anwar Ali v. West Bengal Harries C. J. of the Calcutta High Court had invoked the case of Romesh Thappar in declaring sec. 5(1) of the West Bengal Special Courts Act, 1950, invalid on the ground that the provision was discriminatory between persons and offended against

Art. 14 of the Constitution guaranteeing equality before the law. He had said:

The powers under the sub-section could be so exercised as not to involve discrimination, but they also could in my view be exercised in a manner involving discrimination. When an Act gives powers which may and can offend against a provision or provisions of the Constitution such an Act is ultra vires though it could be administered so as not to offend against the Constitution.

And in support of this proposition he cited two decisions of the Supreme Court, one of which was the decision in Thappar's case.

On this point Patanjali Sastri C. J. observed as follows when the West Bengal Government appealed to the Supreme Court against the local High Court's judgment:

With respect, those decisions have, I think, no application here. In Romesh Thappar's case, the constitutionality of a provincial enactment purporting to authorize the Provincial Government to regulate the circulation of a news-sheet in the province of Madras for the purpose of "securing the public safety or the maintenance of public order" was challenged as being inconsistent with the petitioner's fundamental right to freedom of speech and expression conferred by Art. 19(1)(a) of the Constitution. But the only constitutional limitation on freedom of speech was that the State could make a law directed against the undermining of the security of the State or the overthrow of it, and as the impugned enactment covered a wider ground by authorizing curtailment of that freedom for the purpose of securing the public safety or the maintenance of public order, this Court held it to be wholly unconstitutional and void.

Quoting a passage from the judgment (which was also invoked by Sarjoo Prasad J. in the Bharati Press case in the Patna High Court), Mr. Patanjali Sastri said:

This passage, which was relied on by the learned Chief Justice (of the Calcutta High Court), lends no support to the view that the mere possibility of an Act being used in a manner not contemplated by the legislature, though such use may not be subject to judicial review on that ground, or, in other words, the mere possibility of its abuse in practice, would justify its condemnation as unconstitutional.

The important distinction is that in Romesh Thappar's case the impugned enactment, having been passed before the commencement of the Constitution, did contemplate the use to which it was actually put, but such use was outside the permissible constitutional restrictions on the freedom of speech, that is to say, the Act was not condemned on the ground of the possibility of its being abused but on the ground that even the contemplated and authorized use was outside the limits of constitutionally permissible restrictions.



## HABEAS CORPUS PETITIONS

### Sufficiency of Grounds of Detention

#### OUTSIDE THE SCOPE OF THE COURT'S INQUIRY

The A. I. R. for September has reported two cases of detention in which it was urged in habeas corpus applications that the grounds of detention, besides being vague, were insufficient, and the decision in both cases was that if the grounds furnished were not so convincingly irrelevant and incapable of bringing about satisfaction in any rational person the question whether the grounds could give rise to the satisfaction required for making the detention order was outside the scope of the inquiry of the Court.

Mr. Samalia Bhujan, a prominent member of the Communist Party, was detained by the Bihar Government on 8th April 1950. He contended in an application for habeas corpus that the grounds were vague and such as could not satisfy any rational person about necessity for the order of detention. Shearer and Khaleel Ahmed JJ. of the Patna High Court ruled (7th December 1951) that "though it was desirable that better and further particulars should have been given in order that it may have been more definite and intelligible to the detenu, it cannot however be said that the grounds supplied to the detenu in this case, as they are, are so vague as not to convey any idea as to the charge framed against him." As to the argument that the grounds were insufficient, the Court relied upon the following statement of Kania C. J. of the Supreme Court in the case of *Bombay v. Atmaram Shridhar* (A. I. R. 1951 S. C. 157) :

There may be a divergence of opinion as to whether certain grounds are sufficient to bring about the satisfaction required by the section. One person may think one way, another the other way. If therefore the grounds on which it is stated that the Central Government or the State Government was satisfied are such as a rational human being can consider connected in some manner with the objects which were to be prevented from being attained, the question of satisfaction except on the ground of mala fides cannot be challenged in a court. Whether in a particular case the grounds are sufficient or not, according to the opinion of any person or body other than the Central Government or the State Government, is ruled out by the wording of the section. It is not for the court to sit in the place of the Central Government or the State Government and try to determine if it would have come to the same conclusion as the Central or the State Government. As has been generally observed, this is a matter for the subjective decision of the Government and that cannot be substituted by an objective test in a court of law.

On the basis of this pronouncement Their Lordships ruled that the question of sufficiency was not open to the Court to go into and dismissed the application.

The same conclusion was reached by the Mysore High Court (10th September 1951) in the habeas corpus petition filed by Mr. D. M. Revanasiddiah, who in a criminal case, was acquitted by the Sessions Judge on 8th March and was served the same day with an order for detention dated 5th March. The grounds of detention were that he was a habitual dacoit and that, being associated with a number of well-known criminals who had gone underground, he

was suspected to have a hand in two recent dacoity cases, etc. The Court ruled that the grounds did not suffer from vagueness and that though the order could be set aside "if the grounds were very vague and indefinite so as to render the object of furnishing the grounds illusory," "it is not for this Court to assess whether those grounds were sufficient for the detaining authority to make up its mind." For support of this statement the Court referred to the Supreme Court's judgment in *Atmaram Shridhar's* case and *Tarapada De's* case (A. I. R. 1951 S. C. 174), saying :

Sufficiency of the grounds for the purpose of satisfaction of the Government is not a matter for examination by the court; their sufficiency to give the detained person the earliest opportunity to make a representation can be examined by the court, but only from the point of view of seeing if it is relevant, i. e., it can have some connection with the satisfaction of the Government. The law has now been very clearly laid down that the satisfaction contemplated in sec. 3 of the (Preventive Detention) Act is that of the detaining authority.

The petition was accordingly dismissed.

### Confirmation Order Required

#### FOR CONTINUING DETENTION AFTER THREE MONTHS

The Pepsu High Court on 20th July 1951 allowed the habeas corpus petition of Kaur Singh who was ordered by the district magistrate of Sangrur to be detained on 19th March 1951 for a period of one year under sec. 3(2) of the Preventive Detention Act, 1951. The detenu's case was referred to the Advisory Board which reported that the detention was justified, but up to the time of the petition being heard by the Court, i. e., within four months, the Government had not passed any order on the report of the Board under sec. 11 of the Act, which in sub-sec. (1) says: "In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit."

The petition was heard by Chopra and Passey JJ., and Mr. Justice Chopra, who delivered the judgment of the Court, said :

The intention of the legislature in enacting secs. 9, 10 and 11 is that no detention is to be regarded to be lawful beyond three months unless within that period the Government, on a report from the Advisory Board justifying detention, decides to confirm the detention order and to continue the detention for a period that in its view may appear to be necessary. It is mandatory that within three months of the detention, the initial detention order be reviewed in the light of the recommendation of the Advisory Board by the Government and that appropriate orders be passed within that period.

I cannot agree with the learned Advocate-General that the absence of an order terminating the detention would by itself mean that the Government had decided to continue the detention for the period originally fixed by the district magistrate. My own view is that unless the Government makes a clear order to that effect, it cannot be taken to have considered the advisability of confirming the detention order and continuing the detention of the person concerned.

What sec. 11 provides is that the Government "may confirm" and "continue detention." (These words?)

have their own significance and they obviously mean that if the Government decided to continue the detention it must confirm the order of detention and that non-confirmation of the order would result in its revocation and termination of the detention. The verb "may" only indicates that it is not obligatory on the Government to confirm the detention order even though the Advisory Board has reported in favour of the necessity of continuing the detention. The phrase, read in its context, undoubtedly signifies that the Government, if it decides to continue the detention, must confirm the detention order.

The Preventive Detention Act confers powers upon the Government and officers mentioned in sec. 3, subject to specified conditions and circumstances, to detain a person by an executive order without sending him up for a regular trial and thus deprive him of his liberty which under the Constitution of India is his birth-right to enjoy. As these powers are so dangerous to the freedom of the subject, the provisions of the Act relating to the safeguards placed by the legislature for the proper consideration of every case must be strictly construed. The necessity of strict compliance of every one of these provisions cannot be over-estimated, and non-observance of any one of them would render further detention illegal and without authority.

Accordingly the petitioner was ordered by the Court to be released from custody forthwith.

### Missing Detenu

#### DIRECTIONS TO TWO STATES

Writs of habeas corpus on the State Governments of Hyderabad and Madras to produce in court T. Janardhanachari, a Communist detenu reported to be missing since August 1950, were issued by the Constitution Bench of the Supreme Court on 22nd September.

The petitioner, who belongs to Krishna district in Madras, was arrested and then subsequently released by a magistrate in Madras in June 1950. It was alleged that, in spite of his release in Madras, the respondents were illegally detaining the petitioner in Warangal jail. The affidavits filed on behalf of the State Governments of Madras and Hyderabad could throw no light on the whereabouts of the detenu, who is disowned by both State Governments and is not to be traced.

The petitioner, who is the brother of the missing detenu, therefore sought the protection of the court against the "high-handed and unconstitutional action of the respondent Governments in having spirited away and concealed Janardhanachari."

The Chief Justice, Mr. Patanjali Sastri, observed :

The affidavits filed on behalf of the respondents reveal a deplorable state of affairs. The Hyderabad Government now admit, though they appear to have denied it at an earlier stage, that their police officers took over the custody of Janardhanachari from Madras police for purposes of interrogation in connexion with his alleged activities as a Communist but state that on the conclusion of such interrogation he was handed over to Madras police through Mr. Apparao whose services as inspector of police had been lent by the Madras Government to Hyderabad State.

We now find Appa Rao stating that while it is true that Janardhanachari was brought to Khammameth

in Hyderabad State, it was not correct to say that he was handed over to him ( Appa Rao ) to be taken back to Madras State. All that he was invited to do was to arrange for the escort of Janardhanachari on August 1, 1950 and August 3, 1950, and he ( Appa Rao ) had not taken charge of Janardhanachari at any time. Three men are said to have been sent to escort Janardhanachari over the border, and two of them have filed statements saying that they were frequently taking men in custody back and forth across the border and on August 3, 1950 they appear to have taken a person to Madras State from Hyderabad State in their custody, but they could not say what the name of that person was. They further state that when handing over any person in their custody to the Madras police, it was usual for them to take a voucher as evidence of such handing over. But no such voucher is produced.

The Madras Government, however, flatly contradict this statement and deny that Janardhanachari was ever sent to Hyderabad State or that he returned from there to Madras State. The liberty of an individual is far too important a matter to be disposed of on the unverified and conflicting statements of police officials.

We are not satisfied that it will be impossible for the respondents to trace the whereabouts of Janardhanachari and to produce him before this Court if further inquiries and efforts are made in that direction.

### Detention Without Authority

Mr. Dina Nath Gupta, National Conference leader of Chenani, who had been arrested in July last under sub-rule 1 of rule 24 ( Defence Rules ), filed a habeas corpus application in the Jammu and Kashmir High Court to have the detention order passed against him by the district magistrate of Udhampur set aside, on the ground that the district magistrate was without jurisdiction as "the order of detention had to take effect at a place beyond his jurisdiction, viz., Central Jail, Srinagar."

Justice Jia Lal Kilam, who heard the petition in the second week of September, ordered the petitioner to be set at liberty. He said :

I find that the order made by the district magistrate, Udhampur, for the detention of the detenu at a place beyond his jurisdiction makes his order obviously an illegal order. The Assistant Advocate-General has frankly conceded that the order of detention made by the district magistrate, Udhampur, is without jurisdiction. Taking all this into consideration, I find that the detention of Dina Nath is improper and invalid.

In support of this finding Justice Kilam cited a Bombay case of Baboorao Shripat Deshmukh decided by Chief Justice Chagala and Mr. Justice Gajendragadkar on 2nd December, 1947, in which Their Lordships had observed :

In all these three cases the detenus have been detained by an order of the district magistrate at the Nasik Jail. Nasik is not within the jurisdiction of the district magistrate, East Khandesh, and therefore, in ordering their detention outside his jurisdiction he has exercised a power which was not delegated to him under the notification of 26th April 1947. There is no doubt that the Provincial Government can detain a person anywhere in the Province, but when that power is exercised by an authority to whom that particular power is delegated, the delegation is circumscribed by

territorial considerations and the detention can only be within his own jurisdiction.

#### Discretion in Refusing to Disclose Facts

Four members of the Metal Workers' Union — P. J. John, Habib Ahmed Khan, S. N. Poojari and Mahomed Abdulla — were arrested and detained on 11th June, the grounds of detention being that with a view to bringing about total stoppage of work in the Metal Box Company of India on 6th June, they had threatened the workers and employees who were against their policy. It was also stated that they contemplated to commit acts of violence and of sabotage. They filed habeas corpus petitions in the Bombay High Court, stating that the grounds of detention were false and fantastic and lacked in material particulars.

Gajendragadkar and Chainani JJ. dismissed the petitions on 17th September, holding that the detaining authority had discretion to refuse to disclose facts, the communication of which would be against the public interest. Their Lordships held that the particulars supplied to the detenus were clear and specific and that the detention orders were not violative of Art. 22 (5) of the Constitution. They recommended to Government, however, to consider whether the detenus could not be released now.

#### Court Cannot Inquire into the Truth of Grounds of Detention

Mr. Inder Singh, a refugee of Ambala, who had been detained in the Nabha Central Jail, had a habeas corpus petition filed in the Pepsu High Court for setting aside the detention order made against him. It was stated in the grounds of detention that on 8th April he and three others held a secret meeting in the house of Karam Singh and decided to collect signatures to a memorandum to be submitted to the Government against the auction of the property of Sundar Singh of Deva Bassi, an alleged terrorist. On behalf of the detenus the contention was raised, among others, that there was no truth in the grounds supplied to him.

Mr. Justice Passey dismissed the petition on 2nd October, observing, in regard to this contention, that it had more than once been held that the Court could not inquire into the truth or otherwise of grounds on which the Government felt satisfied that it was necessary to make an order of detention. It was not a case where there were no grounds at all and where an order had been made arbitrarily or maliciously.

## EXTERNMENT ORDERS

### Held Valid by the Patna High Court

Orders passed by the Governor of Bihar under the local Public Safety Act against Messrs. Sadhan Gupta and Bodi Alam that they shall not be in the Dhanbad sub-division of the district of Manbhum were challenged in the Patna High Court, as violative of the right to move freely throughout the territory of India and to reside and settle in any part thereof guaranteed by Art. 19(1) (d) and (e). The question was whether the provisions of the Act were saved by Art. 19(5) which affirms the validity of laws imposing "reasonable restrictions" on the right. The Court decided on 21st December 1951 that the orders

could not be held to be bad and accordingly dismissed the applications.

#### SUBJECTIVE DECISION OF AN OFFICER

It was contended on behalf of the applicants, on the strength of the judgment of Meredith C. J. and Das J. in *Brijnandan Sharma v. State of Bihar* decided on 29th March 1950, that since the Act authorizes an order for externment to be made merely on the satisfaction of the State Government or of an officer under it, it imposed unreasonable restrictions and that the provision for externment in the Act did not therefore fall within the saving clause of Art. 19(5). In this case the Chief Justice had said :

The power of restriction contained in the provision (of the Act) is based, not on any reasonable grounds, but upon the satisfaction of some individual. . . . The provision is in such terms that it is not open to the Court to examine the reasonableness or otherwise of orders passed. Upon the terms of the Act, all that the Court can inquire into is the existence of the satisfaction. Quite clearly, such a provision might conceivably be used merely to exclude political opponents. . . . If the law enables orders to be passed which are unreasonable, and yet are consistent with its terms, then that cannot be called a law operating to impose only reasonable restrictions. . . . In my opinion, a law to satisfy the criterion imposed by Art. 19(5) must be so framed as to leave it open to the courts to apply the objective test of reasonableness to its operation.

But, contrary to this, in *Dr. Khare's case* (A. I. R. 1950 S. C. 211) the Supreme Court had ruled that the provision of the Act giving the power to make an order of externment to the Provincial Government or the district magistrate, whose satisfaction was final, did not by itself render the Act invalid. *Kania C. J.* had said in this case :

The desirability of passing an individual order against a citizen has to be left to an officer. In the Act such a provision cannot be made. The satisfaction of an officer thus does not impose an unreasonable restriction on the exercise of the citizen's right. Basing themselves on this decision of the highest judicial authority, *Das and Sinha JJ.*, who heard the instant case, overruled the contention of the applicants.

#### EXTERNMENT FROM THE PLACE OF RESIDENCE

It was next contended that the Bihar Act did not provide the necessary safeguards. Pointing to the Supreme Court's judgment in *Dr. Khare's case* referred to above, it was said that while the Bihar Act, like the East Punjab Public Safety Act under which *Dr. Khare* was externed from Delhi State, provided for communication of the grounds of the externment order to an externee and for consideration of his representation by an Advisory Board, it lacked the additional safeguard contained in the East Punjab Act, under which the State Government was not permitted to direct the exclusion or removal from the Province of a person ordinarily residing in the Province and similarly the district magistrate was not permitted to order the exclusion or removal of a person ordinarily resident in a district from that district. This provision the Supreme Court had described as "a great safeguard." The applicants therefore contended that since they were ordered to remove themselves from their usual place of residence, the absence of this "great safeguard" from the Bihar Act rendered the provision for externment in this Act unreasonable and therefore invalid.

The Court, however, did not see any force in this contention. Das J. said for the Court :

I am unable to accept the contention that the absence of a provision like the one in the East Punjab Public Safety Act, 1949, necessarily takes the Bihar Act out of the saving clause, viz., cl. 5 of Art. 19 of the Constitution. In other words, I do not accept as correct the argument that the existence of a provision which prevents externment of a person from his usual place of residence is an essential criterion for fulfilling the test of reasonableness. As was pointed out in the Calcutta decision (*Atar Ali v. Joint Secretary to Government*, A. I. R. 1951 Cal. 322) there may be good and valid reasons for keeping a person out from his usual place of residence as he may be doing greater mischief at that place than elsewhere.

In the result the applications were dismissed.

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## C. L. U. NEWS

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### Freedom of the Press

#### MR. VAZE'S SPEECH AT NAGPUR

Mr. S. G. Vaze, Secretary of the All-India Civil Liberties Council, had occasion towards the end of September to meet Mr. P. R. Das, President, at Patna and Mr. Atul Chandra Gupta, Vice-President, at Calcutta to discuss with them some matters concerning the civil liberties movement. On his way back Mr. Vaze halted at Nagpur for a couple of days and addressed a public meeting on 3rd October under the auspices of the Civil Liberties Union of the Madhya Pradesh on the subject of Freedom of the Press. The meeting was fairly well attended and was presided over by Mr. W. W. Puranik, a former judge of the Nagpur High Court.

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## COMMENTS

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### The Right to Counsel

#### AND DR. KATJU'S PREVENTIVE DETENTION ACT

"I believe that the right to counsel is indispensable and for that reason it is embodied in the Bill of Rights of the United States Constitution. . . . Judge Cuthbert Pound of the highest court in New York set forth a truth which should never be forgotten when he said that 'the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected.' Thus wrote Professor Zechariah Chafee recently. "Who but the lawyers are able to stop at the threshold any of the dangers that come from an invasion of individual rights?" asks Justice Black in his "The Lawyer and Individual Freedom."

Justice Sutherland declared in *Powell v. Alabama* (1932) 287 U. S. 45 that "a hearing (includes) the right to be heard by counsel," and that "a refusal (to hear a party by counsel) would be a denial of a hearing, and, therefore, of due process in the constitutional sense." This requirement, he pointed out, is based on the obvious necessities of the case.

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defence, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

But Dr. Katju, an eminent lawyer, believes otherwise. Convinced that detenus would only suffer if lawyers are allowed to intervene between themselves and the tribunal which hears their cases, he protects these wretched people against the temptation which they may have of engaging counsel by inserting an express ban on such intervention in his Preventive Detention Act. If the detenus do not thank him for this boon it is only due to their ignorance of the infinite mischief which Dr. Katju from his own professional experience knows the appearance of counsel will inevitably cause.

As for the theory, current in the United States, that the due process clause of the Fourteenth Amendment (as interpreted) requires a hearing by counsel, Dr. Katju cares a hang for it. He knows that in the United States due process of law requires, not only in criminal trials but in all quasi-judicial proceedings, the giving of a reasonable opportunity to defend, and that this includes the assistance of counsel. In *Ex parte Chin Loy You* (D. C.) 228 Fed. 833, for instance, in which a deportee was not allowed to have the aid of counsel in arguing his case in the trial court, when it was urged on behalf of the Government that the right to counsel conferred by the Constitution related only to criminal prosecutions, whereas that was a case of deportation, the district judge attached no importance to the argument. He said: "But it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner." The judge concluded that the principle that the prisoner shall be allowed a defence by counsel was of much wider application and was not limited to criminal trials. It is indeed a universal principle of constitutional law, as understood in the United States. But Dr. Katju has a wholesome contempt of all doctrinairism. If he were to formulate a theory, he would probably say: Due process of law requires the keeping out of lawyers.

### Suppression of the Communist Party

Under the Suppression of Communism Act the Government of the Union of South Africa has appointed a Liquidator of the Communist Party for the purpose of compiling a list of persons who are or have been members of the Communist Party. The question arose in the Supreme Court at Pretoria whether the list so compiled was conclusive and gave the Government undisputed authority to proceed against persons listed by the Liquidator as Communist. The Minister of Justice argued that the Liquidator's decision, though subject to review if improperly reached, was final and that the question of fact could not be challenged in any court of law. Mr. Stephen Tefu, an African trade union organizer, took exception to this plea. And the Supreme Court decided on 3rd October that the list of alleged Communists compiled by the Liquidator could be challenged in the court. Mr. Justice J. M. Murray, with another judge concurring, held that the power to include names in the list was dependent on the question of fact. They said:

There must be ground for the implication that Parliament intended the Liquidator alone to determine the question of membership or active support of the Communist Party. Parliament had not directed that the Liquidator was to settle the list but merely that he was to compile it. The jurisdiction of the Court had not been ousted.