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The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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CONGRESS AND CIVIL LIBERTIES

"No Need in a Free India"!

Mr. Prynns Hopkins, who was sent by the International League for the Rights of Man to visit India (among other countries) in 1949-50 with the object of finding out whether Indian leaders could be persuaded to revive Mr. Nehru's Civil Liberties Union which had by that time become defunct and to form active local-bodies devoted to the preservation of civil liberties, narrates the talks he had with Congress leaders in his book called "A Westerner Looks East" (Warren F. Lewis, Los Angeles). These talks throw a flood of light on the Congress mentality which prevailed then and which prevails now.

Mr. Hopkins found that a great deal of interest was professed in civil liberties in Congress circles and the interest generally took the form of righteous indignation against the suppression of these liberties under the British. But when a suggestion was made to them that the former good work of protecting civil liberties might be continued after British rule had ended, the cry everywhere was: "But now the British are out, there is no need for it!"

Mr. Kunzru had already entered a caveat about this. He had said: "After Mr. Nehru's assumption of office in 1947 only non-Congressmen continued to do some civil liberties work. Now that Congress is in power, he felt it was doubtful whether (Mr. Nehru's) Civil Liberties Union would stand up for human rights against the Government. Party discipline exists; and if a member stands up against party decisions, he will be in disfavour."

But the search for workers was still continued, and Mr. Hopkins naturally felt that Congress leaders who had suffered the most from repression would be the most zealous champions of civil liberty even in the new regime of political freedom. However, this quest for leadership of the civil liberty movement among the prominent men of the Congress proved vain.

Mr. Hopkins later met Dr. Pattabhi Sitaramayya who is described as one "who tells people courteously but without mincing matters exactly what he thinks," and when the subject of starting or rather re-starting a civil liberties union with branches in provinces was broached to him, he did not mince matters. "Dr. Pattabhi said," the author tells us, "he himself could not possibly take part in organizing

a local civil liberties union, because he conceives it as a check on the Government which he is engaged in strengthening"! Instead of viewing it as a check on the Government, why not look upon it (Mr. Hopkins tried to argue) as a check on "corrupt persons or powerful corporations who would pervert the very constitutional provisions and laws he was trying to create," in which case the union would be a body "not paralyzing but rather upholding the hands of an honest government." But the argument did not go down.

We now know that after Dr. Pattabhi became President of the Congress, he gave up this passive attitude in favour of one of active hostility to civil liberties unions. He issued an order prohibiting Congressmen from joining such organizations. There were still a few innocent men in the Congress who felt that protection of civil liberties was just as good work in the post-British period as in the British. But he disabused them of this entirely wrong idea. Civil liberties unions were "a check on the Government." Did they dare to put this check on Congress Governments?

Among the other Congress leaders Mr. Hopkins met was Dr. Rajendra Prasad. He was more diplomatic and merely said the formation of a civil liberties union would at that time be premature. He said: "In India anything like the revival or establishment of civil liberties unions should wait until more urgent matters had been attended to. A movement for civil liberties at this time would play into the hands of Communists, who would take advantage (of the clauses of the Constitution) to agitate against the present benevolent, mild and liberal regime in favour of a dictatorship under which there would be no civil rights whatever."

In short, a movement for civil liberties would be premature as long as the Congress was in control!

Pre-emption Act Invalid

In a suit brought by Uttam Singh for possession of certain areas of land, Kapur and Soni JJ. of the Punjab High Court on 5th December declared that the Punjab Pre-emption Act, 1913, was ultra vires of the Constitution. Their Lordships observed that the law affected both sale and acquisition of property. It abridged the right of many to acquire agricultural land if the rules of pre-emption were to be applied. It was fundamentally opposed to the preamble of the Constitution and was also inconsistent with several of its Articles. But because this opinion of theirs differed from that of another division bench, Their Lordships said they would refer the matter to a full bench for final decision.

SOUTH AFRICA'S HIGH COURT OF PARLIAMENT APPEAL COURT DECLARES THE ACT INVALID

The Appellate Division of the Supreme Court consisting of Chief Justice Centlivres and Justices Greenberg, Schreiner, Van Den Heever and Hoexter on 13th November upheld in a unanimous judgment the finding of the Cape Provincial Division of the Supreme Court (vide p. ii:163 of the BULLETIN), that the Act which set up a High Court of Parliament consisting of Parliament's entire membership and gave it power to sit as a High Court to decide whether legislation was constitutional or not, was illegal, thus rejecting the Government's appeal against the decision of the Cape Provincial Division.

Mr. A. B. Beyers, Q. C., argued on behalf of the Government that sec. 59 of the Constitution Act gave Parliament full power to make laws for the peace, order and good government of the Union, and that this had been consistently interpreted by the courts as covering "the entire conceivable area of political action." And the clauses in the Constitution Act dealing with the judicial system were not entrenched, as were those dealing with the voting rights of non-Europeans (sec. 35) or the equality of the two official languages—English and Afrikaans—(sec. 137), which, sec. 152 lays down, cannot be amended except by a two-thirds majority of a joint sitting of both Houses of Parliament. The judicial system not having the protection of sec. 152, it was argued that there was nothing to prevent Parliament even abolishing the Appeal Court altogether and that "the power of the South African Parliament is similar and equal to that of the British Parliament."

In his judgment, the Chief Justice A. van de Sandt Centlivres said the entrenched clauses of the South Africa Act—the Constitution—made it clear that certain rights were conferred on individuals, and these rights could not be restricted unless the procedure of a two-thirds majority vote at a joint sitting of both Houses of Parliament was followed.

The sections contained constitutional guarantees, and it was the duty of the courts to ensure that protection of the guarantees was made effective, unless it was modified by constitutionally valid legislation.

The contention by the counsel for the Government, Mr. A. B. Beyers, that no court should have jurisdiction to decide whether any Act that had been passed by Parliament was in conformity with the entrenched clauses, was "a startling proposition." This would reduce the safeguards in the entrenched clauses to nothing.

"There can, to my mind, be no doubt that the authors of the Constitution intended that those rights should be enforceable."

The High Court of Parliament was not a court of law but simply Parliament functioning under another name.

If the High Court of Parliament could be described as a court of law it was one which differed materially

from the court envisaged in the entrenched clauses of the Constitution. Individuals who complained that their rights were affected had access to all courts of law, but not to the High Court of Parliament. The only person who had access to that Court was a Cabinet Minister.

If the High Court of parliament declared that the Statute of Westminster had repealed the entrenched clauses, the practical effect would be the same as legislation repealing the safeguards contained in the Constitution.

This was sufficient to justify the view that the High Court of Parliament Act had been passed in contravention of section 152 of the Constitution.

All that the High Court of Parliament Act provided was that Parliament, sitting unicamerally, might by a bare majority confirm, vary or set aside any judgment of the Appeal Court.

"Parliament cannot, by giving itself the name of a court of law, come to any decision which will have the effect of destroying the entrenched provisions of the Constitution. The so-called High Court of Parliament is not a court of law but simply Parliament functioning under another name."

Mr. Justice C. P. Van Den Heever said that neither the people nor any other constituent authority had conferred upon Parliament, as ordinarily constituted, power to alter the franchise in Cape Province. "No legislative organ can perform an act of levitation and lift itself above its own powers by the bootstrap methods." Dismissing the Nationalist standpoint that the imperial abdication of Britain in South Africa had weakened the checks in the Constitution, the judge said: "That contention assumes that as soon as a policeman is round a corner there is no law." He said that altering the coloured franchise without the requisite two-thirds majority had "no greater validity than if the City Council of Bloemfontein had presumed to do so."

Mr. Justice O. H. Hoexter said that the provisions of the High Court of Parliament Act "are so lax that they permit those very persons who have passed a statute to declare that it is valid again."

Reaction of the Judgment on the Union Government

This verdict given unanimously by all the five judges of South Africa's highest tribunal confronted the Union Prime Minister with a grave choice—whether to abide by the Constitution or defy the law and create what the Opposition Leader, Mr. Strauss, said would be anarchy. And it was felt that Dr. Malan would adopt the latter course since he had said that the Government could not afford to lose. But, owing perhaps to the influence of the Finance Minister, Mr. Havenga, he has chosen the path of discre-

tion. He has declared that he would accept the ruling of the Appeal Court and keep the mixed race electors in Cape Province, or the Coloured as they are called in that country, on the common electoral roll and fight the Parliamentary elections next April without disfranchising the Coloured voters, as he had given himself authority to do by the Separate Representation Act which has given rise to all this trouble. With the Coloured voters off the register, his victory would have been easy, for though these electors number only 47,000, they have exercised a sort of "swing vote" because the balance between the parties is narrow, and the bulk of them have traditionally voted for the United Party, which too favours segregation but is more moderate in its application. With the Coloured voters on the register again, the results of the ensuing election is doubtful.

But what is more to the point is that because Dr. Malan has agreed to carry the Coloureds on the common electoral roll, the impending constitutional crisis has not been completely averted. All that has happened is that the showdown has been postponed till after the elections. For Dr. Malan has announced that he would appeal to the electorate against the Appeal Court's invalidation of the High Court of Parliament Act and ask the electorate in this "higher appeal" to give the Government a mandate to place beyond doubt the sovereignty of Parliament—that is to say, not to leave its laws open to quashing by the law courts. He said he would announce later the precise nature of the steps to give effect to the mandate. That he will not obtain a two-thirds majority of membership in both Houses that is required to scrap the entrenched clauses of the Constitution is certain. Will he then proceed to amend the Constitution as he wishes, even if he is returned to power on a bare majority? It is not altogether impossible. For he can do this by passing a bill through Parliament with a simple majority giving him power to pack the Senate with Government-nominated members to assure the required two-thirds majority of both Houses meeting together. There is no limit imposed by law on the Senators Government may nominate and if Dr. Malan appoints some 40 or even 80 persons that may be found to be required to give the Government the necessary majority for the passing of a measure making the Union Parliament "sovereign," there will be no legal impediment in his way. Indeed, the Nationalist Party's Whip has publicly stated that this is what the Government intends to do. Even if Dr. Malan were to go this extreme length, it is very doubtful whether this would serve his purposes, for the likelihood is that the Appellate Division will rule that the passing by a two-thirds majority of a bill to take away the power of the courts on constitutional questions was but a camouflage and that the procedure required for constitutional amendment was not genuinely followed.

The Opposition United Party, however, is trying to prevent such side-tracking of the Coloured vote taking place. At an annual meeting of the Party, a resolution

was adopted that, if elected with a majority of seats at the next election, the Party would introduce legislation to make it possible for the written Constitution to be entrenched by means of a referendum on which there should be compulsory voting by all registered voters. But the attitude of the Party to racial segregation is very nebulous. For Mr. Strauss, its leader, declared that his Party felt that Indians had no rightful place in South Africa, that they should be repatriated to India, and that residential segregation of Indians envisaged by the Group Areas Act should be retained. It may be, as has been suggested, that this repatriation cry has been adopted from the nationalist platform "in order to win the white votes." But it may well be genuine too, for the United Party's liberalism is so thin. For the present at any rate, the party has given up the position which General Smuts took up in 1946 that Indians in South Africa must be recognised now as an integral part of the population of the country. What can be expected of a party whose hold on fundamentals is so shaky?

Discrimination on Railways

The South African Supreme Court on 19th November rejected a Crown appeal against the acquittal by a Cape Town Magistrate of an African charged with having used a European waiting room at Capetown Railway Station.

The Crown has given notice of an appeal to the Appellate Division.

The Magistrate had found the African not guilty on the ground that there was inequality of treatment between Europeans and non-Europeans in the facilities at the station. The Magistrate based this view on an Appeal Court decision that regulations which provided for unequal treatment of the races were ultra vires.

The Supreme Court's decision was by a majority of three judges who gave separate judgments.

The Judge-President (Mr. Justice de Villiers) said, "The Appellate Division agreed that the principle of discrimination was expressly authorised, but that it could not be coupled with inequality and partiality of treatment to a substantial degree."

Mr. Justice Herbststein said that he agreed with the Appellate Division's decision and added: "I find it impossible to assume that the legislature intended that one section of the community should be treated unfairly as compared with another section."

Mr. Justice Hall (dissenting) said: "I am of the opinion that in conferring powers of this kind (the powers given to the Railways to reserve facilities for different races) Parliament is paramount, and that no court has the power to apply a test of reasonableness based on partiality or inequality to any statute enacted by it."

Resolution of Port Elizabeth Council

The Port Elizabeth City Council in Cape Province decided on 18th November to ask the railway authorities to abolish apartheid (racial segregation) at the New Brighton railway station, the scene of a riot the preceding month in which four Europeans and seven Africans were killed.

SOME POINTS OF CONSTITUTIONAL LAW

Scope of Prerogative Writs

MEANING OF "ANY OTHER PURPOSE" IN ART. 226

Art. 226 of the Constitution lays down that High Courts have power to issue writs in the nature of habeas corpus, certiorari, mandamus, etc., for the enforcement of any of the rights conferred by Part III, i. e., fundamental rights, and "for any other purpose."

What does the expression "any other purpose" mean in this Article? Does it mean merely "any other purpose ancillary to the enforcement of fundamental rights," or does it mean "any legal right whatever"? Are the prerogative writs to be issued to enforce rights enumerated in Part III of the Constitution and none else, or are they to be issued also to enforce a merely legal right?

This question arose in the Bhopal High Court in the case of *Jeevanlal v. Government of Bhopal* (A. I. R. 1952 Bhopal 35), and *Sathaye J. C.* in his judgment interpreted the words "for any other purpose" as meaning that these writs could be issued where enforcement of fundamental rights alone was in question and not for the purpose of enforcing a mere legal right acquired under a statute.

A large number of decisions of different High Courts were cited before him to prove that "the expression 'any other purpose' means and includes 'enforcement of a legal right.'" For Example, *Kanhaiyalal Mulchand v. State of Madhya Pradesh* (A. I. R. 1951 Nag. 47), *Laxmibai v. State of Madhya Pradesh* (A. I. R. 1951 Nag. 94), *Gopal Jairam v. State of Madhya Pradesh* (A. I. R. 1951 Nag. 181), *Ram Govind Singh v. Chief Commissioner, Vinidya Pradesh* (A. I. R. 1951 Vinidh. Pra. 3), *Raghunath Patnaik v. State Transport Authority, Orissa* (A. I. R. 1951 Orissa 81), *In re Dr. John Matlbai* (A. I. R. 1952 Trav.-C. 1), *Carlsbad Mineral Water Mfg. Co. Ltd. v. H. M. Jagtiani* (A. I. R. 1952 Cal. 315), *Mangal Sain v. State of Punjab* (A. I. R. 1952 Punj. 58), *Raj Krishan v. Chief Commissioner, Delhi* (A. I. R. 1952 Punj. 176), and *Wazir Chand v. State of Himachal Pradesh* (A. I. R. 1952 Him. Pr. 35).

But *Sathaye J. C.* did not accept the reasoning founded on these rulings, but stuck to his own interpretation which he had also given in another case, and declared that the petition before him for the issue of writs of certiorari and prohibition, "which makes a grievance not against the infringement of any right under chapter III of the Constitution, but against infringement of a mere legal right said to have obtained or acquired under a local statute, is not tenable under Art. 226 of the Constitution, and no writs available under that Article can be issued."

Quo Warranto

WHO CAN APPLY FOR THE WRIT?

In the Calcutta High Court *Mr. Biman Chandra, M. Sc., M. A., B. L.*, made a petition for the issue of a writ of mandamus directing the Governor of Bengal to recall the nominations he had made to the State Legislative Council on the ground that the nominations were arbitrarily made and were in contravention of the Constitution. The petitioner also prayed that the persons nominated be directed not to exercise the rights under the nominations.

As to the Governor, *Bose J.* held that Art. 361 created an absolute bar against interference by the courts with his official acts. "Even though the act done is outside or in contravention of the Constitution, it comes within the protection of Art. 361 if the act is professed to be done in pursuance of the Constitution. If the act is ostensibly done in exercise of the power given under the Constitution and it is not established that the act is not done dishonestly or in bad faith or, in other words, out of any improper motive, immunity attaches to the exercise of the power. . . . (Therefore,) this application, in so far as it seeks any relief against the Governor, is wholly incompetent."

As for the persons nominated, *Mr. Justice Bose* said, "The Governor not being answerable to Courts by reason of Art. 361, it follows that the validity or invalidity of the nominations cannot be inquired into by this court in the present case," and observed that the only suitable writ which could be asked for against the persons named for nomination was the quo warranto writ. Even the case for such a writ would, *His Lordship* said, fail in this particular case, but he proceeded to consider the objection raised by the Advocate-General that "the petitioner has no locus standi to maintain (an application for a writ of quo warranto), as no right or interest of his had been infringed by the impugned nominations."

Support for such an objection was sought in two decisions of the Madras High Court in cases in which the validity of the nomination of *Mr. C. Rajagopalachari* made by the Governor of Madras was questioned. In one of these cases *Chandra Reddi J.* held that a petition asking for a writ of quo warranto was not maintainable "as the petitioner had not sufficient interest to present the petition." On this point *Bose J.* said:

I find myself unable to agree with the reasoning and conclusion of *Chandra Reddi J.* to the effect that unless a person's personal right is infringed or unless he has suffered a legal injury, he cannot maintain an application for quo warranto. . . . An application for a writ of quo warranto challenging the validity of appointment to an office of a public or substantive nature is maintainable at the instance of any private person even though he is not seeking enforcement of any fundamental right or any legal right of his or of any legal duty towards him. [A. I. R. 1952 Cal. 804.]

Indeed, we have reported at p. 195 a case that was admitted in the Nagpur High Court in which Mr. Karkare challenged the appointment of the Advocate General by a petition for the quo warranto writ on public grounds.

Legal Status of Portuguese Nationals

The Madras Government's order of 2nd February 1951 regulating the issue of liquor permits distinguishes between Indian and foreign nationals, saying that to the former permits should be granted "only in exceptional cases on the production of medical certificates" while to the latter permits on a more generous scale can be granted. And the order lumps "citizens of the French and Portuguese settlements in India" with Indian nationals. Mr. Louis C. Menezes, a Portuguese subject born of parents both of whom were born at Goa, applied for a permit, which was refused. He thereupon challenged the Government order as discriminatory under Art. 14 of the Constitution in the Madras High Court, and Rajamannar C. J. and Venkatarama Ayyar J. on 4th March last upheld the petitioner's contention, ruling that the Madras Government was wrong in refusing to grant a permit to him. The Chief Justice said in the Court's judgment:

The petitioner is a Portuguese national. He would therefore fall prima facie within the category of foreign nationals If so, what then is the justification for excluding him from this category because he happens to be a citizen of a Portuguese settlement in India? Portuguese settlements in India, though geographically situated in India, must be treated as part of the territory of Portugal.

The learned Advocate-General was not able to convince us as to how this exclusion can be justified as not being discriminatory. . . . We find (from the Government file that we were enabled to see) that the view that we are inclined to take, viz., that the only classification which will not offend Art. 14 of the Constitution would be the classification between Indian citizens on the one hand and foreign nationals on the other, was also taken by the departments concerned; but evidently the Government came to a different conclusion and decided to exclude the citizens of the French and Portuguese settlements in India on the ground that the grant of permits to them might lead to abuse. It is not clear how it would; but even assuming it would, we do not think that that would be sufficient in law to warrant an arbitrary classification excluding particular foreign nationals from the general category of foreign nationals.

A Licence Fee and A Tax

The Madras Government enhanced, by order dated 29th December 1950, a licence fee levied on oil mills from a flat rate of Rs. 10 for every licence to Rs. 100 for each expeller used for crushing groundnut and producing

groundnut oil and groundnut cake. Mr. K. C. Varadachari of Madras Oil Mills and Products challenged the enhancement of fee in the Madras High Court on the ground that the new rate was disproportionately high and virtually amounted to levy of a tax. Rajamannar C. J. and Venkatarama Ayyar J. on 22nd February last sustained this contention and held that the enhanced fee was unconstitutional and invalid because the fee would amount to an unreasonable restriction on the exercise of the right to carry on business guaranteed by Art. 19(1)(g) of the Constitution.

The Court drew a distinction between a licence fee and a tax. The former could be demanded, as stated in *Ingles v. Morf* (1937) 300 U. S. 290, as reimbursement for the added expense of providing facilities and regulating the business concerned. As such it must bear a reasonable relation to the total cost of regulation. Their Lordships said: "The licence fee is not intended to raise revenues for the general purpose of the authority levying the fee. For such purposes the levy should be in the form of a tax. The licence fee must be reasonable whereas a tax need not be."

Discussing the merits of the Government's contention that the fee was enhanced in order that good quality in manure would be ensured, Their Lordships said: "The supervision and regulation contemplated by the order are confined to the stocking and sale of manure and do not relate to the maintenance of any quality." "The total fees at the enhanced rate which can be collected from the oil millers (who are included in the term "dealers") alone, completely leaving out of account the other classes of dealers, would far exceed the cost of establishment." The Court on these grounds held that enhancement of the fee imposed upon the exercise of a fundamental right restrictions which could not be held to be "reasonable" as contemplated by Art. 19(6).

On another ground also the enhanced fee exacted from oil mills was held unconstitutional. The Government order further discriminated between oil mills and mere dealers in manure. While it fixed the licence fee for the former at Rs. 100 for each expeller, it fixed it for the latter at a flat rate of Rs. 20. The Court found this discrimination unconstitutional. Their Lordships said:

It is impossible to discover any rational basis for adopting the expeller as a unit for charging licence fee. If it is said that the more the number of expellers it would mean more manure produced and sold, then it can be very properly asked: What about the other dealers who may actually stock and sell much more than what any oil miller may be able to produce and sell? Such dealers have to pay only at a flat rate of Rs. 20. The enhancement in the case of oil millers only would in that event be clearly discriminatory and would offend the provisions of Art. 14 of the Constitution.

Delegation of Legislative Power

VALIDITY OF ESSENTIAL SUPPLIES ACT

In the case of *Bhushan Lal v. State*, decided on 14th May last, secs. 3, 4 and 6 of the Essential Supplies (Temporary Powers) Act, 1946, were challenged in the Allahabad High Court on the ground that they purport to delegate essential powers of legislation. A full bench of the High Court consisting of Agarwala, V. Bhargava and Brij Mohan Lall JJ. heard the case and Agarwala J. announced the Court's opinion.

Sec. 3 confers on the Central Government power to make rules for regulating or prohibiting the production, supply and distribution in certain specified articles. Their Lordships held that the section was valid on the analogy of *Opp Cotton Mills Inc. v. Administrator* (1941) 312 U. S. 126. In this case before the U. S. Supreme Court it was decided that the Fair Labour Standards Act was not "an unconstitutional delegation of the legislative power of Congress," as the basis and factors prescribed by the Act for the fixing by administrative agencies of minimum wages for employees engaged in the production of goods for interstate commerce (including the determination whether employees so engaged in any particular industry shall be classified and be subjected to wage differentials) were not too vague and indefinite. It was competent to Congress to resort to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of Congress policy, had been made pre-requisites to the operation of the statutory command. Their Lordships remarked :

Applying this principle to the case in hand, it may be said that the legislature in sec. 3 has specified the basic conclusions of fact, viz., maintenance and increase in supplies of essential commodities, securing of equitable distribution, and availability at fair prices of essential commodities. The Act prescribes an administrative agency which is to find these facts and the legislature ordains that its statutory command is to be effective.

The Court also upheld the validity of sec. 4 which empowers the Central Government to delegate the power conferred on it by the preceding section to officers of the Central or Provincial Governments. The section was attacked on the ground that this involved sub-delegation. On the authority of *Shanon's case* (1938) A. C. 708, Their Lordships held that sub-delegation was permissible and said that the section has not permitted the sub-delegation to be made "to a vague or indefinite or undefined class."

On the other hand the Court held that sec. 6 was invalid. This section is similar to the last portion of sec. 2 of the Part C States (Laws) Act, 1950, which gives power to the Central Government, while extending an Act of a Part A State to a Part C State, to provide for the repeal or amendment of any corresponding law which is

in force in that Part C State. The majority of the Judges of the Supreme Court held this section to be ultra vires the powers of Parliament in the Delhi Laws Act case (A. I. R. 1951 S. C. 332). Mr. Justice Mukherjee for instance said in this case: "To repeal or abrogate an existing law is the exercise of an essential legislative power, and the policy behind such acts must be the policy of the legislature itself," and observed that to give to the executive government the authority to alter, repeal or amend any laws, was to vest almost unrestricted legislative powers in the executive government, and was thus an unwarrantable delegation of legislative duties and could not be permitted. Following the Supreme Court's decision, Their Lordships in the present case declared sec. 6 of the Essential Supplies Act to be invalid.

NOTES

Segregation on Trains Banned

Mr. William C. Chance, a Negro, was travelling in a white coach. When the conductor of the train discovered this, he asked the Negro to change to a Negro coach. The Negro refused, and the conductor put him off the train and the local police arrested him for disorderly conduct. Thereupon the Negro sued the railroad for \$25,000 damages. But a federal jury held that segregation on trains was valid and reasonable. It only awarded \$ 50 for wrongful arrest. All this happened in 1948. Thereupon Mr. Chance preferred an appeal to the Fourth Circuit Court of Appeals, which early in 1951 reversed the decision, holding that the segregation of white and Negro passengers was unjustifiable. Then the railroad concerned, viz., the Atlantic Coast Line Railroad, appealed to the Supreme Court, and this highest tribunal, hearing the case on 10th November this year, rejected the appeal, refusing to review the Appeal Court's ruling.

"Separate but Equal" Doctrine Struck down

The reader is well aware of the "separate but equal" formula enunciated by the U. S. Supreme Court in *Plessy v. Ferguson* (1896) 163 U. S. 537, in which it held that a Louisiana statute requiring railroads to "provide equal but separate accommodations for the white and coloured races" did not constitute a denial of the equal protection of the laws in violation of the Fourteenth Amendment.

The trouble with this doctrine was that the Court till recently did not inquire whether the Negroes enjoyed any facilities at all or whether the facilities were in fact equal. Only two years ago in *Sweatt v. Painter* (1950) 339 U. S. 629 the Court did inquire into this matter and finding that the facilities available in the law school for Negroes in the state of Texas were inferior to those in the University law school, which was till then an all-white school, ordered the admission of *Sweatt*, a Negro, to the latter. We had referred to this decision in our columns when it was deli-

vered. This decision and that of *McLaurin v. Oklahoma State* (1950) 339 U. S. 637 have, by breaking down racial barriers in education, have gone a long way towards establishing the proposition that segregation of races is a denial of the Fourteenth Amendment.

But a specific proposition that segregation itself, even apart from the practical effects that flow from it, is violative of the Constitution, has not yet been formulated by the United States Supreme Court. A lower court has however dared to do that. In deciding the case of *Belton v. Gebhart* in the Delaware Court of Chancery, Chancellor Collins J. Seitz ordered the doors of two "white" public schools to be opened to Negroes, hoping that in similar cases the Supreme Court of the nation would attack segregation as such. He said:

I believe the "separate but equal" doctrine in education should be rejected, but I also believe its rejection must come from that Court.

His decision has been hailed by the American Jewish Committee, which stated in a memorandum:

As far as we are aware, this is the first time a court has made a finding to the effect that segregation is discriminatory *in itself*, regardless of whether the facilities of the separate schools for whites and Negroes are equal.

The McCarran Act

A SECTION DECLARED INVALID

A point of great constitutional importance arose in *United States v. Spector* (1952) 348 U. S. 169, decided on 7th April last, about the validity of a section in the McCarran Act (the Internal Security Act 1950) which makes it a crime for an alien who is under an order of deportation not to effectuate his own deportation. Justice Jackson, with whom Justice Frankfurter joined, held the section invalid. It is true that he did so in a dissenting judgment in the case, and it is just because of this that the point at issue is likely to be overlooked. Though the opinion that the section in the McCarran Act "to punish an alien's unlawful presence in the United States is unconstitutional for reasons apparent on its face" is expressed in a dissenting judgment, it has, for all practical purposes, the quality of being the Court's decision inasmuch as the Court thought "it might be compelled to agree with this constitutional objection to the statute were the reasoning advanced by counsel," as it was not.

The section involved says, wilful failure of an alien under deportation to leave the country or take specified steps towards departure is a crime. Said Justice Jackson, "The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted."

Justice Jackson cited in support of his finding the decision in the case of *Wong Wing v. United States* (1896) 163 U. S. 228 which struck down an Act permitting any Chinese person not lawfully entitled to remain in the United States to be first imprisoned and then removed from the country. The decision in this case established the law, that Congress has the power to expel aliens through executive officers without judicial intervention, but if it chooses to subject persons whom it would exclude to infamous punishment at hard labour or confiscate their property such legislation must provide for a judicial trial in order to be constitutional. The Court said:

It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.

Justice Jackson held the relevant section of the McCarran Act invalid for the same reason, viz., that "the administrative adjudication that one is liable to deportation" is used as "conclusive adjudication of his unlawful presence for the purpose of his criminal prosecution."

If vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom.

In his judgment Justice Jackson takes occasion to point out the essential weakness of the deportation programme which Congress was trying to overcome by means of the McCarran Act. He says:

A deportation policy can be successful only to the extent that some other State is willing to receive those we expel. But, except selected individuals who can do us more harm abroad than here, what Communist power will co-operate with our deportation policy by receiving our expelled Communist aliens? And what non-Communist power feels such confidence in its own domestic security that it can risk taking in persons this stable and powerful Republic finds dangerous to its security? World conditions seem to frustrate the policy of deportation of subversives. Once they gain admission here, they are our problem and one that cannot be shipped off to some other part of the world.

HABEAS CORPUS PETITION

Detention Illegally Extended

TWENTY-SEVEN HYDERABAD DETENUS RELEASED

Mr. Bopanna Venkateswaraloo and four others filed in the Supreme Court a petition for writs of habeas corpus challenging the order of the Hyderabad Government for extension of their period of detention. Mr. Bopanna was served with an order of detention in October, 1951. The grounds of detention were furnished to him on Novem-

ber 1, 1951. The Advisory Board submitted its report on December 30, 1951, and Government confirmed the detention on January 21, 1952, in which the period of detention was specified to be till March 31, 1952, when the Detention Act was to expire. But when the life of the Act was extended for another six months by an Amendment Act (No. 34 of 1952), the petitioner's detention was extended on March 29, 1952 up to September 30, 1952, and on September 22, 1952 his detention was again extended till December 31, 1952. It was this last order which was challenged in the petition, and the question was raised as to the proper construction of section 11-A inserted in the original Act of 1950 by the Preventive Detention (Second Amendment) Act of 1952.

It was contended on behalf of the detenus that on September 22, 1952, the State Government had no jurisdiction to make an order of extension so as to continue detention beyond October 1, 1952, as the order of detention was made under an Act which was to expire on October 1, 1952. The detention was ordered under this Act to continue for a period beyond the life of the Act and was thus illegal. It was contended that that was the position in spite of the Preventive Detention (Second Amendment) Act of 1952, which sought to continue the Act from October 1, 1952 to December 31, 1954. Counsel had argued that any extension of detention beyond October 1, 1952, could only be by a fresh order of detention passed under the Act as amended by the Second Amendment.

A division bench of the Supreme Court heard the petition and held on 26th November that the contentions were well-founded and that the order of extension of the period of detention on September 22 to December 31, 1952, was illegal because the Government concerned had no jurisdiction to pass the order under the detention law as it existed on the former date, the amended Act coming into force only on September 30, as specified in the notification issued on September 15.

The judgment of the Court was delivered by Mr. Justice Mahajan. His Lordship said :

An order for the extension of detention made under the purported exercise of the power conferred by any of the provisions of the new Act is not an order with respect to the time when or the manner in which anything is to be done under the Act. Such an order could only be made under the Act and after the Act had come into force and not in anticipation of its coming into force. The Act having no retrospective operation, it cannot validate an order made before it came into force. It seems to us that the expression "order" in the section means order laying down directions about the manner in which things are to be done under the Act and it is order of that nature that can be issued before the Act came into force, but it does not mean that a substantive order against a particular person can be made before the Act comes into force. In our opinion, therefore, the contention raised on behalf of

the State Government has no force and the order extending the detention of the detenus on September 22, 1952, up to December 31, 1952, is illegal.

On that date (September 22, 1952) the state Government had no jurisdiction to make that order (of extension) under the law in force as it stood on that date. September 30, 1952, had been specified as the date up to which their detention was to last by a subsisting and perfectly valid order and the detention beyond that date is illegal and cannot be justified on the provisions of section 11-A (2) or on the provisions of section 11-(1) of the original Act.

The Solicitor-General contended that the detention was legal, because, no period of detention having been specified in the initial orders of detention, the detention would stand automatically extended till the end of March 1953 under section 11-A (2) of the Act of 1952, which says: "Every detention order which has been confirmed under section 11 before the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall, unless a shorter period has been specified in the order, continue to remain in force until the 1st day of April 1953." It was contended that the confirmation orders, which specified the period for which the detenus were to be detained, could not be considered as "detention orders" for the purposes of section 11-A (2) and that, therefore, the exclusion contained in that section would not apply in these cases. Mr. Justice Mahajan observed :

The Supreme Court had held that the fixing of the period of detention in the initial order of detention was contrary to the scheme of the Act and could not be supported as it tended to prejudice a fair consideration of the case when it was placed before the Advisory Board.

They were satisfied that when section 11-A (2) referred to specification of the period of detention in the order, it intended to refer to the detention order as confirmed under section 11 (1) and not the initial order of detention.

In the opinion of Their Lordships section 11-A of the new Act made it very clear that only those detentions could be extended where a period was not specified. Where, however, the period was specified, the detention had to terminate with the expiry of the principal Act. The cases of twenty-two other persons raised the same question and all the twenty-seven detenus were ordered to be released.

"Missing Detenu"—No one Willing to Keep him

At last it is possible to make out what must have happened to Mr. Thaduri Janardhanachari, a communist detenu, whose whereabouts neither the Madras nor the Hyderabad Government was able to trace, though he could only be in custody of either of them. After the Supreme Court on 22nd September directed these Governments to

make another try (see p. ii:180), the Hyderabad Government stated in its return that it was handicapped in making further inquiry by reason of the repatriation of the principal police officers concerned to the Madras State police service. It could only state that Janardhanachari was sent to the Madras police at Munagala on August 3, 1950, and thereafter it ceased to have custody over the detenu. The Madras Government constituted an ad hoc committee to examine the matter. This committee came to the conclusion that Janardhanachari was kept in detention by the Deputy Superintendent of Police of Khammamet, apparently without legal authority, and when it came to be known that a habeas corpus petition had been filed in the High Court, the police officers at Khammamet became afraid of the consequences and they wanted to send Janardhanachari back to Madras territory so that it could be represented to the High Court that he was no longer in their custody or control.

Frantic attempts were made, the committee found, by the Deputy Superintendent of Police, Khammamet, to escort Janardhanachari across the border and leave him at some police station within the State of Madras. Finally he was sent to Munagala, in Madras State, on August 5, 1950, escorted by three policemen. What happened subsequently was not clear and the committee surmised that, in the circumstances, when nobody was willing to receive the detenu, "the escort party could well have connived at his escape and going underground."

The Supreme Court too was inclined to follow the Madras committee's conclusion and said: "In any case we are satisfied that Janardhanachari is no longer in the custody, control or power of either of the respondents and that is sufficient to dispose of this petition," which was accordingly dismissed (2nd December).

One already in Custody cannot be Detained

Mr. Haridas Deka was served with an order of detention by the district magistrate of Kamrup on 17th January last, but at that time he was already in custody in Gauhati Jail as an under-trial prisoner accused of an offence under the Assam Public Safety Act. (He was arrested in respect of this alleged offence some 52 days previously.) He made a habeas corpus petition against the detention order in the Assam High Court, and Thadani C. J. set aside the order and directed that the petitioner be set at liberty (22nd May). The Chief Justice said:

I cannot regard the present order of detention as having been passed in pursuance of the satisfaction of the learned district magistrate with respect to the petitioner that it was necessary to pass an order of detention with a view to prevent him from acting in any manner prejudicial to any of the purposes mentioned in sec. 3 of the (Preventive Detention) Act. It seems to me that when a person is not free to act at all, as when he is in jail custody, the question of satisfaction in terms of sec. 3 of the Act does not arise. . .

When a person is already prevented from (acting in a prejudicial manner) by reason of his detention in jail custody, it is I think futile to say that the detaining authority is satisfied with respect to the petitioner that it is necessary to pass an order of detention against him. The element of satisfaction must necessarily relate to a point of time when a person has freedom of action. If he has no freedom of action, as for instance when he is in jail custody, the question of satisfaction does not arise.

Having ruled that the district magistrate's satisfaction was not satisfaction as contemplated in sec. 3, Chief Justice Thadani went on to say that if and when the petitioner was released from jail custody and the Government was still satisfied, "by reason of (his) past or contemplated activities in the future," that his detention was necessary, it could if it thought fit pass a fresh order of detention. It would not be amiss to note here that in the grounds for detention supplied to the detenu the district magistrate mentioned a number of cases in connection with outrages committed in the tribal area as a result of the detenu's activities, and the magistrate further says: "On secret inquiry, it revealed that you were concerned in all these cases, but there was inadequate evidence against you to support a conviction." May it not be that the under-trial prisoner was detained just in order to avert the necessity of a trial which, the magistrate himself thought, would end in acquittal?

But it is doubtful whether the Chief Justice's suggestion that the Government might first release him from jail custody as an under-trial prisoner and then lock him up under the Preventive Detention Act will avail the Government now, for under Dr. Katju's amended Act a person once detained and released cannot be served with a fresh order of detention for his "past activities" or "activities contemplated in the future." This Act under sec. 13 (2) requires the detaining authority's satisfaction to be based upon "fresh facts." Or is the requirement applicable only in the case of those persons the detention order passed against whom has been voluntarily revoked by the Government, but not only applicable in the case of those whose detention has been set aside as illegal by the courts?

Routine Orders Passed

DETAINING AUTHORITY COULD NOT HAVE APPLIED ITS MIND

On 11th June last the Jaipur Bench of the Rajasthan High Court allowed habeas corpus petitions of Mr. Devi Sing of Mandawa and Mr. Gordhhan Singh of Chirana, holding that the orders of detention passed against them by the district magistrate of Jhunjhunu were mechanically passed without applying his mind to the orders and without being satisfied that the orders were necessary for the purposes mentioned therein.

The main ground for detaining the petitioners were that they were actively associated with the resistance move-

ment of Bhcmias of Udaipurwati over the issue of grain produce rents payable to them by the cultivators and were doing acts calculated to endanger the maintenance of public order in that place. But the orders of detention took a larger ground and recited the whole of sec. 3 (a) (ii) of the Preventive Detention Act, viz., that the petitioners were acting in a manner prejudicial to the "the security of the State" as well as "the maintenance of public order." (As a matter of fact, Mr. Gordhan Singh asserted that the order of detention in his case was not served on him at all, and the State neither contradicted this statement nor admitted it in its affidavit.)

It was conceded by the State that none of the grounds of detention furnished to both the petitioners had any bearing on the question of "the security of the State" or showed that they were acting in any manner prejudicial to the maintenance thereof. The grounds had certainly a relation to the "maintenance of public order," but into the "falsity or truth" of the grounds or their sufficiency it is not permissible for the courts to go, the matter being for the executive discretion of the detaining authority on a subjective satisfaction that detention was necessary.

The question before the court was therefore whether, when detention was ordered for two objects, one of which was admittedly irrelevant in both the cases, the orders of detention could be held to be legal. And the Court held that the orders were bad, relying on the judgment of Sir Maurice Gwyer, Chief Justice of the Federal Court, in the case of *Keshav Talpade v. Emperor* (A. I. R. 1943 F. C. 1). In this case all the reasons for which a person could be detained under Rule 26 of the Defence of India Act were mentioned in the order of detention, though all the reasons could not be applicable. Sir Maurice Gwyer said in his judgment :

This reads like a mere mechanical recital of the language of Rule 26. . . . The order does nothing to remove the apprehension we have already expressed that in many cases the persons in whom the grave power is vested may have had no opportunity of applying their minds to the facts of every case which comes before them.

If a detaining authority give four reasons for detaining a man, without distinguishing between them, and any two or three of the reasons are held to be bad, it can never be certain to what extent the bad reasons operated on the minds of the authority or whether the detention order would have been made at all if only one or two good reasons had been before them.

Applying this test to the instant case, His Lordship Sharma J. said : The district magistrate

did not apply his mind to the grounds at all with a view to satisfy himself whether they had any bearing upon the security of the State or the maintenance of public order or any other object mentioned in sec. 3 of the Act. It appears as if he had some ready-made copies in his office with the words of sec. 3(a) (ii) of the Act, and without applying his mind whether the

material furnished to him bore any relation to the security of the State or the maintenance of public order or for the matter of that of any other object provided by sec. 3, he issued the order of detention against the petitioners.

Of course, as has been said above, it is not permissible for this Court to see whether the grounds given are true or sufficient. It is, however, certainly permissible for it to be satisfied whether the detaining authority was reasonably satisfied that the material supplied to him showed that an intended detenu was acting in any manner prejudicial to one or more of the objects given in sec. 3. It is not permissible to a detaining authority to issue an order of detention mechanically incorporating the words of sec. 3. It is necessary for it to issue such order after mental satisfaction. . . .

I am of opinion that the orders in the present case were not the result of mental satisfaction of the district magistrate on the consideration of the materials supplied to him, but the orders were made like a routine order. In grave cases of detention without trial, it would not do to pass routine orders, but the detaining authority should carefully consider the materials before it and then form its opinion whether it warrants orders of detention for the fulfilment of any of the objects given in sec. 3.

It is not permissible to recite all or more than one object given in sec. 3 in the order of detention, and when it is shown by the grounds that they have no bearing upon some of those objects, to fall back upon the argument that they have at least bearing upon one or more of those objects. This argument, I regret to say, is only an argument in despair. It does not take note of the fact that it is necessary for the detaining authority to apply its mind before making an order of detention to the question as to which of the acts alleged against the intended detenu have a bearing on a particular object for which he is going to be detained.

Patna High Court's Decision

A division bench of the Patna High Court consisting of Narayan and Ahmed JJ. ordered Mr. Samarendra Nath Roy, a communist from Manbhumi, to be released on 19th November for similar reasons. Mr. Roy had been detained, it was said, because he was inciting kisans to take forcible possession of zamindars' lands and organizing a Red force to aid the kisans in using violence. Many other things were alleged against Mr. Roy, but what earned him his release was the fact that it was found that the detention order passed against him had expired on 30th September, and without a fresh order being made for detaining him for a further period, he was left to rest in jail. A great point was made about this in the petition for habeas corpus, that no fresh order of detention had been issued, and the Judges, allowing the petition on this ground, directed the release of the petitioner forthwith.

WRIT OF MANDAMUS

Issued against the Bombay State

Miss Sudha Sumatilal Merchant of Amalner sought admission to the B. J. Medical College, Poona, a Government institution, on the ground that she was a member of a backward class, and in support of this claim she mentioned, in an application to the Surgeon-General, who regulates admission to the College, that she belonged to the Jain community and that her caste was Shrimali and sub-caste Dasa. To the application a certificate from the First Class Magistrate of Amalner was attached to show that she belonged to a backward class. The Surgeon General, accepting this claim, admitted her to the College. But subsequently the Government found, after making inquiries, that Miss Merchant did not belong to a community recognised as backward and therefore ordered, two months after her admission, that she be expelled from the College.

Thereupon Miss Merchant filed a petition in the Bombay High Court for the issue of a writ of mandamus against the State, the Surgeon-General and the Principal of the College directing them to forbear from enforcing the expulsion order and prayed that she be reinstated in the College. The Chief Justice and Mr. Justice Dixit on 13th November allowed the petition, rejecting the argument of the respondents that the petitioner had deliberately given false information with a view to getting admission into the College.

Their Lordships said: Once a student was admitted, he had a legal right to continue his studies, and hence he had a right to enforce that right in a court of law. The B. J. Medical College was a public institution and members of the public had a right to be admitted, and it was competent to the Court (by the issue of a writ) to prevent the head of such an institution from acting in a manner which was contrary to what his duty had imposed upon him or contrary to rules of the institution.

The right of Government to expel a student under rule 13 (the rule under which the expulsion order was made) was strictly confined to cases where the information that was supplied was incorrect. But in this case the information supplied by Miss Merchant was correct, and there was no basis for the suggestion made on behalf of the respondents that she had intentionally suppressed material facts.

In the notification issued by the Government there was an entry "caste Shrimali, sub-caste Dasa" under the heading of backward communities. This, it was contended by government's counsel, referred to a mendicant class in Karnatak and other places. But Government had not drawn the attention of the applicants to this in their note on the application form.

In expelling Miss Merchant, Government had not complied with the provisions of rule 13. No information supplied by the student had been found to be incorrect. The only thing which had been found to be incorrect was the claim made by her, on the materials before her, that she belonged to a backward class. If the conclusion arrived at by her (which was also the conclusion to which the Surgeon-General and the First Class Magistrate of Amalner had come) was not correct, she could not be expelled. The error made by the Surgeon-General should not be visited on an innocent girl who claimed the right to be educated in a Government institution.

Their Lordships set aside the expulsion order and directed Miss Merchant's name to be restored to the roll of the College

COMMENTS

Detention Law in Pakistan's Parliament

Last month a Bill was introduced and adopted in the Parliament of Pakistan to amend the Restriction and Detention Ordinance of 1944. The Bill was said to be necessitated by a certain Act passed this year, which required the words "the public safety and maintenance of public order" to be replaced by the words "the security of Pakistan or any part thereof." The Opposition, however, thought that this was but a camouflage by which the Government was seeking to strengthen its own hands against its opponents.

Among the Independents who offered stout opposition to the Bill were Sardar Shaukat Hyat Khan and Mian Iftikharuddin, but the credit for putting up the most valiant fight against the Bill went to the leading members of the Congress party in Pakistan such as Mr. Siris Chandra Chattopadhyaya, Leader of the Opposition, Mr. D. N. Dutta and Mr. B. K. Dutta. However, their criticism, albeit cogent and unassailable, cut very little ice with the Government, for no other reason than that the members belonged to a party which in India was ruthlessly crushing out personal freedom.

The Minister of the Interior, Mr. Gurmani, sought to make out that the measure was one of very limited application. He said:

Since the establishment of Pakistan we have not used the Restriction and Detention Ordinance against any person. There are only six persons who are detained throughout Pakistan under orders of the Central Government under the Pakistan Security Act. Their cases have been examined by an advisory committee comprised of judges and they have been satisfied that these persons have been detained for sufficient reasons and on valid grounds.

But the Congress wrath was not mollified by such an extenuating statement. Why should there be even a single detention in peace time? was the question that confronted the treasury benches. Mr. Chattopadhyaya said that the Ordinance was promulgated by the British in war time when an emergency was created by Subash Bose and his INA troops who were on the borders of India. But surely there was no emergency now. It was atrocious for a popular government to refurbish this rusted weapon of British armory to deprive the common man of his most basic right of personal liberty. Was any freedom-loving country in the wide world known to resort to detention without trial when there was no national emergency of a most exacting kind?

To this rhetorical question the answer was quietly returned by the Chief Minister of East Bengal, Mr. Nurul Amin: "Instances are known of such countries; the great country of India just across the border is one such." By this one sentence the Pakistani Congress members were told as it were to tend to their own back-yards first, before they indulged in that kind of high-falutin elsewhere. Mr. Amin said, the security of Pakistan was dear to their hearts, and when that was endangered extraordinary measures had to be resorted to. The activities of persons were so secret and underground that it was not possible to bring sufficient evidence against them before courts, and some of the information could not be disclosed in the public interest. It was as a last resort that the Government took action and detained people without trial. This merely re-echoed the sentiments of Mr. Nehru and Dr. Katju.

Mr. Dutta said, it was not as if the Opposition was not anxious for the security of Pakistan. In fact it was as anxious as the treasury benches; but it felt that indiscriminate detention without trial would endanger rather than ensure the security of the State. The Government was acting in panic and the Opposition wanted to save it from such a situation. Government members told the Congress party in effect that merely to cry damnation to repression on public platforms was not enough to prove one's genuine devotion to civil liberties: something more was required for that purpose than orations meant for foreign consumption. Mr. B. K. Dutta had won by his fiery speech in Parliament the applause of Dr. Syama Prasad Mookerjee, which only proved that most of the speeches made in Parliament there were for evoking admiration outside Pakistan. Was there an ounce of practice in India to match a ton of exuberant effusion in Pakistan, so far as the Congress was concerned?

In such a debate the detention of Khan Abdul Ghaffar Khan could not help being frequently raised by the Opposition. It was said that the Red Shirt leader had done more than anybody else in bringing freedom to India and thus indirectly to Pakistan, and yet the man who made an independent Pakistan possible was now rotting in jail under a free Government! The Minister of the Interior handsomely acknowledged the great contribution of Badshah Khan to the freedom of India, but his contribution to Pakistan's freedom was, according to him, none. As a matter of fact at every stage he and his group did their utmost to prevent Pakistan from coming into being. They resisted to the best of their capacity the establishment of Pakistan—and therefore the security of Pakistan required their being held in detention.

But had they not taken an oath of allegiance to Pakistan? Should that not remove all suspicions about their present intentions? The Government would not be so easily persuaded. Communist members of the legislatures had likewise taken an oath in India, but they were not on that account free from suspicion that they carried on subversive activities. In Pakistan the new Governments had not yet been so firmly established as in India, and there should be greater justification for acting on mere suspicion in the former country than in the latter.

Thus the debate went, and one who read it felt that it was a close repetition of what was said in India itself, only the Congress party exchanging the role it had played in India as a defender of coercion for the role that was forced upon it in Pakistan as an opponent of detention without trial both in principle and as a matter of policy.

Magistrates to be Stripped of Police Powers

ORISSA HIGH COURT'S SCHEME

The Orissa High Court has prepared a scheme for the separation of the judiciary from the executive and submitted it to the State Government. The Court first gently blames the Government for the latter's complete inaction in implementing the Article in the Constitution (Art. 50) directing all Governments to bring about separation, although "nearly two years and ten months have elapsed since the coming into force of the Constitution." The Court admits that the Article, appearing as it does in Part IV instead of Part III, is not justiciable, but says that its importance must not be belittled on that account, since Art. 37 declares that the "Directive Principles of State Policy" set out in Part IV, though unenforceable at law,

"are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." And the High Court states that "it is high time that steps are taken" for enforcing separation in some districts to start with so that it might be extended later to other parts of the State.

Like the Madras and Bihar schemes, this scheme contemplates permanent allotment to the judicial side of certain magistrates to be known as Judicial Magistrates and their complete absorption in the judicial service with prospect of promotion, like any other member of the judicial service, to the post of a district and sessions judge and where exceptional merit is shown, to the post a Judge of the High Court. The High Court, in putting forward the scheme, sees no reason for the Government to object to its acceptance either on administrative or financial grounds, if the scheme is made applicable in the first instance to the four old established districts of North Orissa, viz., Cuttack, Puri, Balasore and Sambalpur, excluding the merged areas of former Princely States which now form part of those districts. The High Court says:

In essence, the scheme aims at the permanent transfer to the judiciary of those posts of magistrates which have already been earmarked by the Government for exclusively judicial work. Hence, the remaining executive officers should be able to carry on their duties of maintaining law and order and other activities without any difficulty as at present. Their authority is not likely to be impaired, because they will retain their magisterial powers for the purposes of the preventive sections of the Criminal Procedure Code.

When time for extending the scheme to South Orissa arrives, it may be that additional administrative and financial commitments will become necessary, and it may also be that when the scheme is enforced in areas containing a large percentage of "highly excitable" aboriginal population, some special questions concerning the maintenance of law and order will arise. But necessary modifications based on the experience gained in North Orissa can later be introduced. The High Court, however, insists that the scheme be made effective in four districts at once.

The President-Elect

Dr. N. C. Sen Gupta, M.A., D.L., the President-Elect of the All-India Civil Liberties Conference to be held in Bombay on 20th and 21st December is a distinguished jurist and a great litterateur and publicist. After taking his M. A. degree in the first class, he served as Professor of Philosophy, Economics and Law for about two decades. He was Dean of the Faculty of Law in the Dacca University, which he helped in organizing as a teaching University. He has written several law books, of which the most widely known are "Evolution of Law" and "Evolution of Ancient Indian Law" (Tagore Law Lectures, 1950). He has written many works of fiction and drama and is recognised as a pioneer and leader of modern progressive literature in Bengali. He is a frequent contributor to journals on current topics. In his early years he was a prominent student worker in the agitation against the Partition of Bengal under Surendra Nath Banarji, and helped much to overcome the opposition to Gokhale's Elementary Education Bill in Bengal. He was a member of the Bengal Legislative Council from 1930 to 1936 and as such promoted many progressive measures. His interests are manifold and has done much for the development of co-operative societies in Bengal.