

Regd. No. B 5681

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The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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Office: Servants of India Society, Poona 4

Annual
Subscription : Rs. 3
Per issue : annas 4
including postage

No. 7

April 1950

Democratic government must be able to protect itself, and yet in doing so it must not destroy those very values that give democracy its unique distinction. — The "New York Times," 7th March.

ARTICLES

AN APPEAL TO MRS. ROOSEVELT

While there is yet time for Article 9 of the International Covenant on Human Rights, which relates to the protection of the most fundamental of all rights—the right to Freedom of Person, to be finalised in the U. N. Commission on Human Rights, it might be useful to make an appeal to the Commission through its Chairman, Mrs. Franklin D. Roosevelt, so to shape the Article as to make it impossible for a Member state to enforce a statute like the Preventive Detention Act passed by the Indian Parliament. This Article was provisionally approved by the Commission by taking separate votes on the six paragraphs it contains, but a confirmatory vote on the Article as a whole is yet to be taken, and it will be taken only after Article 4, which is concerned with application of the Covenant in times of national emergency, has been adopted.

This was a wise decision. For until one knows what provision is to be made in the Covenant for dealing with personal freedom when a grave emergency arises, one cannot very well make any commitment as to the protection which can be afforded to individuals in regard to their personal liberty. The connection between the two Articles is so obvious that the delegation of the United States notified to the Commission that if Article 4 was not satisfactory it would insist upon moving an amendment to Article 9 inserting in that Article itself a provision setting out the conditions in which alone personal freedom would be capable of being interfered with. The reservation made by the United States was very necessary. For Article 9, as it has been adopted, gives full discretion to the Member states to curtail personal freedom by national legislation. Paragraph 2 in the Article provides that—

No person shall be deprived of his liberty except on such grounds and in accordance with such procedure as is established by law.

This means that if a national "law" permits of detention without charge or trial, the Covenant will not stand in the way of such a deprivation of personal liberty, whatever be the conditions in which such deprivation takes place. Paragraph 5, which makes special mention of detention, says that—

Every one who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

This paragraph has in view remedies in the nature of habeas corpus, and it would appear at first sight as if every detained person will have such remedies available at least in normal times. But such is not the case. If a state's law chooses to provide for preventive detention even in normal times access to law courts will be cut off and then the aggrieved person will not be able to go to a court and have his case adjudicated upon, or if he goes to a court he will be told that his detention is "lawful" inasmuch as the law itself provides for it. There is obviously no guarantee in this Article against what Dr. Max Soerensen called at a meeting of the Commission "abuse of legislative power" by a Member state (vide December, 1949, number of the BULLETIN, p. 30).

Such a situation in which any state could deprive a person of his liberty at will by merely passing legislation authorizing such deprivation was naturally not acceptable to the United States, where constitutional limitations are imposed upon the legislative branch of government in this respect, and therefore it proposed the addition of a sentence to paragraph 5 which would make it impossible for any state to detain any one without sufficient cause. If Article 4, which mentions limitations on the enforcement of the Covenant, read with Article 9, gives special power to the Governments to detain persons without trial only in crises of grave danger, then such an addition need not be made to Article 9; but otherwise there must be a provision in Article 9 itself which would limit the Governments' power of detention to cases where such detention becomes inevitable. The right to Personal Freedom can never be absolute. While in normal times the rule can and must be rigidly adhered to, that no one should be imprisoned except as a result of a conviction on

a charge of crime by a court of justice, it cannot be followed in times of national emergency, when for reasons of public security the writ of habeas corpus, which is the means by which the right is secured, may have, when occasion calls for it, to be put temporarily in abeyance. In such times the Governments must have the power to shut up a person on mere suspicion without being compelled to bring him to trial or to release him. This is the only fundamental right which is ever capable of being suspended in the United States (vide the Supreme Court's opinion in the Milligan case, 1863), but the United States constitution has made due provision for suspending this right in paragraph 2, section 9 of article I. In the Human Rights Commission the United States delegation proposes, if necessary, to make an addition to Article 9 of the Covenant in the same words, viz.,

This remedy (i. e., a writ of habeas corpus) may not be suspended unless when in cases of rebellion or invasion the public safety may require it.

If this sentence is added to paragraph 5, it will govern that paragraph and paragraph 2, so that the power of national legislatures to curtail Freedom of Person by legislation, which in the above paragraphs is now absolute, will be properly restricted.

With this addition Article 9 would forbid preventive detention in all save certain specified conditions, and whether such conditions did in fact exist or not would no doubt be immediately decided by the Government concerned, but ultimately it would be decided in any particular case by a competent court of law. It is in this way that Freedom of Person is guaranteed in the United States, and it is only in this way that it can be effectively guaranteed in an international charter. But let it not be supposed that the United States is alone in making such a proposal. We are glad to find that France also makes a similar proposal. Only instead of proposing an addition to Article 9, it seeks to bring about the same result by a suitable change in Article 4. Its proposal in this behalf is that Article 4 should contain a provision as follows:

The right defined in Article 9, paragraph 5, may only be suspended in the event of invasion or disturbance.

It does not matter whether such a limitation is introduced in Article 9 or Article 4, but it must find a place in either of the two articles in order to protect personal freedom as evidently the Covenant is intended to do. And it may be said in passing that of the two amendments that proposed by the United States, as being more precise and as having stood the test of a century and a half's experience, is to be preferred to that proposed by France. But whatever be the form that is eventually adopted, such a limitation must be imposed upon the power of Governments to restrict personal liberty. In its absence the national Parliaments would be invested with a general competence to abrogate the most elementary safeguards of individual freedom and create arbitrary forms of "lawful detention."

The position then in every country would be what it was in the Irish Free State after its constitution was enacted in 1922. Article 6 of that constitution first made an abstract declaration that "the liberty of the person is inviolable," and then proceeded to state that "no person shall be deprived of his liberty except in accordance with law." This general authorization to Parliament to restrict the scope of the constitutional protection of Freedom of Person by ordinary legislation amounted virtually to the removal of this protection altogether, and this is exactly what would happen if Article 9 of the Covenant is left as it is and no limitation is provided for in Article 4. The aim of Article 9 is to prohibit all arbitrary interference with the right to Freedom of Person, and unless such prohibition becomes operative on the legislative as on the executive organs of Member states, a mere enunciation of the right would be just empty verbiage. If the enunciation is intended only to have an educative effect, then that has already been secured by embodying it in the Declaration of Human Rights. A Covenant, which is to implement the pious aspirations of the Declaration, must be armed with teeth. It must prohibit legislative sanction for any arbitrary interference with personal freedom. It must clearly define the conditions in which alone national Parliaments will be competent to deprive individuals of their liberty.

The futility of the provisions of Article 9 (as they stand at present) strikes us in India more powerfully than perhaps it strikes people in other countries because the articles in our constitution bearing on Freedom of Person are very similar to the provisions of Article 9 of the Covenant and, what is more, the Indian Parliament has, in accordance with these articles of the constitution, passed a Preventive Detention Act which is as bad as human ingenuity could make it. First, the Act deals with non-emergency situations, there being separate provisions in the constitution itself to deal with emergencies. (The drastic nature of these emergency provisions has been pointed out at p. 64 of the BULLETIN.) Secondly, the safeguards that were afforded to detained persons in England by Defence Regulation 18 B are all absent from the Indian Act, although the Regulation of England was a war time measure and our Act has no relation to any of the difficult peace time problems which our Government has to deal with. Thirdly, the Act is meant, on the Government's own admission, to be a permanent law. All these features of the Act have been dealt with in the BULLETIN at pp. 65 to 70. If such legislation can be allowed to remain on the statute book of India and can be enforced by the Indian governments, central and local, then it would mean that in India Freedom of Person has ceased to be a fundamental human right. And when that right becomes insecure, all the others become insecure with it. Freedom of speech, freedom of the press and freedom of assembly are valuable rights, without which democracy cannot function. But it is no use for the United Nations Assembly trying to

provide international guarantees for these rights when no such guarantee is provided for that right on which the exercise of these rights depends. As the Calcutta High Court said in a hearing of habeas corpus petitions of certain detenus recently, when it was argued that these detenus have been unreasonably deprived of certain rights, the latter rights are meant to be exercised by free men, and those who are lawfully detained must automatically lose these rights along with the right to personal liberty. Next to the right to live, which the Covenant guarantees in Article 5, this right to Freedom of Person is the most elemental of all. And if the Covenant cannot guarantee that right, it does not really guarantee any other, and all the well-meant labour of the United Nations in protecting human rights would in such case be sheer waste.

That the United Nations seeks to guarantee any rights at all means that these rights must be confided to the protection of a body which can control the caprices of a national legislature. First, the national judiciary must be competent to apply a check, and then, some international sanctions must be provided. If the national judiciary is rendered incompetent by national law to prevent arbitrary interference with personal liberty and if no international body can come to the rescue of aggrieved persons, then obviously personal liberty becomes a precarious right and because of this every other right becomes precarious. National legislatures cannot therefore be left in an unchallengeable position, in which it would be impossible for any person subjected to detention without trial to impugn any law which they may choose to pass. But here it may be argued that if the Indian legislatures become supreme in this way in the matter of preventive detention, they will be in no worse case than the British Parliament which too by ordinary legislation such as a Habeas Corpus Suspension Act can at a blow abrogate the safeguard of personal liberty. This is true; but by a long tradition of democracy and love of individual liberty the British people have learnt to do without any constitutional limitations on the all-pervasive competence of their legislature. Parliament has the legal right to abolish all safeguards of personal freedom, but the people can be trusted not to allow it to do so except when it becomes imperatively necessary. As Mr. Justice Felix Frankfurter says in "Mr. Justice Holmes and the Supreme Court" (p. 63): "The liberties that are defined by our Bill of Rights are, on the whole, more living realities in the daily lives of Englishmen without any formal constitution because they are part of the national habit, they are in the marrow of the bones of the people." Perhaps constitutional limitations are not required for the people of the United States either. But they are essential for Indians, in whom the spirit of nationalism is strong but in whom the spirit of true democracy is yet woefully lacking. And if no constitutional limitations are to be imposed on national legislatures, what anyway is the United Nations trying to do by forging an International Bill of Human Rights in the Covenant?

We therefore appeal to Mrs. Roosevelt both as delegate of the United States (where the importance of constitutional limitations on the powers of the legislature are better understood than anywhere else) and as Chairman of the Commission on Human Rights to use her best efforts to get inserted into Article 9 the proposed provision about limitations on suspension of habeas corpus. If with the desire of securing the adherence of as large a number of states as possible to the Covenant any weakness is shown in insisting upon strengthening the Article, it would mean that just those people who stand sorely in need of international guarantees for fundamental rights will have to go without them. They will then have no practical use for the Covenant, however good a showing it may outwardly make.

TAKE IT FROM THE ATTORNEY-GENERAL!

Free India's first Attorney-General, Mr. Motilal C. Setalvad, is a lawyer of great eminence, fully entitled, it need hardly be said, by reason of his legal knowledge, to occupy the high office which he is now occupying. But he is equally noted for that broad sense of statecraft which alone enables one to measure the needs of individual liberty against those of public security, when in times of grave national emergency these rival claims come into conflict with each other, and to strike a proper balance between them. As a lawyer he was put up by Sardar Patel in Parliament (in preference to the Law Minister, Dr. Ambedkar) to explain the law of the Preventive Detention Act, and of course he performed this job exceedingly well. But we have means of knowing what kind of law he would have proposed if he had been entrusted with the job, not merely of explaining the law, but of formulating it. The views which he expressed as President at the first Bombay Provincial Civil Liberties Conference and the views which later he elaborated in "War and Civil Liberties" (published by the Indian Council of World Affairs) give us a clear idea of what he would have put into the law, assuming that he was of the opinion (for which there is no warrant whatever) that a grave national emergency had now arisen such as he was dealing with in his carefully thought-out book.

Particularly in the case of infringements of personal liberty, Mr. Setalvad insists in his book that before such infringements actually take place the executive government should consult with some independent-minded persons as to the necessity of this kind of action. He says:

It has to be remembered that in a time of emergency the executive is naturally wholly prepossessed in favour of the need of taking immediate and drastic action, so that it is difficult for it to appreciate and appraise the citizen's point of view on many matters on which it thinks immediate action imperative and essential. It is therefore necessary that the legislature should make it obligatory on the executive to act in consultation with other persons who may not have that bias

so that action may be taken after careful and balanced consideration. The freedom of the person is a right which has naturally been the most valued right of the citizen; and restrictions on it ranging from detention to minor restrictions on his movements have rightly evoked bitter comment and criticism. The greatest care is therefore necessary in the enactment of legislation giving the executive powers restricting the liberty of the person.

The Madras Public Safety Act provided for such previous consultation with the Advisory Council. The Council's advice might or might not be acted upon, but in any case consultation with it had to take place before any person was detained. It need hardly be said that this safeguard is not provided by the central Act recently passed, and in the Madras Bill itself which seeks to amend the existing Act in order to "bring it into accord with the constitution" it is proposed to be removed.

But Mr. Setalvad is not a doctrinaire politician; and he recognizes that at times such previous consultation may not be possible. "In a time of emergency," he says, "it may be necessary forthwith to detain a person or impose restrictions on his movements. This necessity of immediate action itself makes it necessary that such power should be entrusted to the highest and most responsible officers," whereby he obviously means the Home Ministers. He has dwelt at great length on the tendency of the governments everywhere to delegate this power to subordinate officials and on the disastrous consequences flowing from it. And it is perfectly clear that he would never have agreed to delegate the power to district magistrates and sub-divisional magistrates and commissioners of police as sec. 3 (2) of the Preventive Detention Act does. England put up with Regulation 18 B in the last war only because under it, *inter alia*, the Home Secretary, and the Home Secretary alone, could make an order for detention on his satisfying himself personally that such an order was necessary in the interests of the security and defence of the country.

Mr. Setalvad then proceeds to deal with the safeguard of an appeal to a judicial tribunal, "which," he says, "should be entitled" to have full information which would in due course be passed on to the detenu who should be given "an opportunity of being heard" in respect of the charges brought against him. It must be noted that both these safeguards are lacking in the Act. There is no provision in it, as there was in Regulation 18 B, about full information being supplied to the tribunal, and as for a hearing being given to the detenu the provision in sec. 10 (3) actually negatives it. For this section says that a detenu shall *not* be entitled "to attend in person or to appear by any legal representative" before the tribunal. But these are comparatively minor defects. A far more serious defect is that while Mr. Setalvad pleads for every case of detention to go before the tribunal, if the detenu so desires it, in the Act all cases of detention are excluded

from the purview of the tribunal, if the order for detention is for three months or less. Three months' detention does not seem to matter at all to our governments!

But this is not all. Mr. Setalvad would have the tribunal to perform not merely advisory functions, but he insists that "its decision should be made binding on the executive." To the unwary it would seem that this recommendation of Mr. Setalvad has been carried out in the Act inasmuch as the detention of persons can continue for longer than three months only if the tribunal records an opinion to that effect. But here comes the great fraud of which the Government is guilty in enacting this legislation. Cases of detention for reasons of "the security of a state or the maintenance of public order," which are the real cases of detention, are put altogether beyond the competence of the tribunal. Thus not only cases of detention for three months but even those for a longer period, i. e., practically all cases of detention, will be decided by the executive without reference to any independent tribunal. Cases of security prisoners detained for longer than three months for reasons of security will be heard by the executive itself with the help of a person of judicial experience, but such an inquiry will not be regarded by anyone as an inquiry by an independent tribunal for which Mr. Setalvad has pleaded. He wants all cases of detention to be investigated by an impartial judicial body: the Act provides that virtually no cases will be heard by it! There is a further recommendation which Mr. Setalvad has made. It is that "the legislature should also provide that persons detained for a certain length of time should be brought up for trial before the ordinary courts, except in cases when a judicial tribunal considers this course undesirable in the public interest." This recommendation should not be confounded with the provision in the Act which requires, in the case of a minor class of detenus, i. e., those who have suffered detention for reasons of the maintenance of essential supplies and services, an endorsement by the tribunal for an order for detention for more than three months. Under this provision a person belonging to this class of detenus, and this class alone, can be held in detention (for an indefinite period it should be noted) if before three months have expired the tribunal records its opinion that there is sufficient cause for continuing his detention. But this is not Mr. Setalvad's recommendation. He would practically put a maximum limitation on the period of detention, which the Act fails to do, though the constitution contemplated a statutory provision to that effect. After this period has elapsed, every detenu must, according to him, be put on his trial before an ordinary court or released, unless the tribunal says in any particular case that such a course is not advisable. Barring these exceptional cases, no one, urges Mr. Setalvad, should be detained without trial for more than a certain period to be specified in law.

There is only one other point made by Mr. Setalvad which we would like to bring to the reader's attention. But this point is of the utmost importance as throwing light on the general principles which should guide us when it becomes necessary to take preventive action. These principles are such as would win the approval of all persons who have a feeling for civil liberty. He says :

It is essential even in emergency legislation to affect as little as possible the ordinary jurisdiction of the Civil Courts, particularly in matters relating to the freedom of the person of the citizen. Judicial decisions in times of emergency have shown that the courts of law have been fully alive to the needs of the emergency, and have construed emergency legislation in its true setting endeavouring in all cases to gather in it an intention and a meaning which would best serve the purpose of emergency. If therefore the citizen is not debarred from access to the court, the consciousness in him that his right to have access to the ordinary courts of the land has not been taken away will inspire confidence in him in the acts of the executive. At the same time the possibility of the acts of the executive being examined by the courts with a view to see that they are within the terms of their charter and authority would act as a salutary check on the exercise of its powers by the executive. The citizen's right to have recourse to the courts could therefore well be left to operate without affecting or defeating the true object of emergency legislation.

The spirit of this wholesome recommendation is violated in every section or in every line of the Act, but nowhere is it more flagrantly violated than in sec. 14 (1); which lays down that—

No court shall . . . allow any statement to be made, or any evidence to be given, before it of the substance of any communication made under sec. 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order . . .

Disclosure of the grounds of detention is made an offence punishable with a year's imprisonment. This led the counsel for the detenus to declare, in a recent hearing before a full bench of the Calcutta High Court, that "there is a steel curtain all around the Preventive Detention Act," and one of the judges is reported to have facetiously exclaimed, in seeming approval of this remark, that the Act is "court-proof."

It will be seen that every single safeguard with which (Mr. Setalvad pleaded) deprivation of personal liberty should be surrounded even in the gravest of national emergencies like war has been disregarded in the peace-time legislation which the Indian Parliament has enacted. What Mr. Setalvad himself should have done as Attorney-General in face of such a piece of legislation

is a personal question which we do not think it worth while to consider. Mr. Nehru has clearly gone back, in the matter of civil liberty, on many of his high-sounding statements of principle. We would not so accuse Mr. Setalvad. Although an Attorney-General, like every Cabinet minister, is expected to be in full sympathy with governmental measures, the Attorney-General's position has not yet come to be so recognised in this country. Probably Mr. Setalvad looks upon himself as a mere expounder, on behalf of the Government, of the legislative projects which the Government initiates, without having anything to do with the policy behind them. But with this aspect of the question we are not concerned. Our immediate concern is to point out that the Preventive Detention Act jumps over all the barriers which he, with every lover of democracy and civil liberty, would raise against arbitrary deprivation of Freedom of Person.

HOW DETENTIONS ARE ORDERED

A special bench of the Calcutta High Court consisting of Sen, Chunder and Lahiri JJ., in considering habeas corpus petitions of over 200 persons detained under the Bengal Criminal Law Amendment Act, 1930, unanimously declared the Act itself to be invalid. It did so on the ground that the Act which provides for detention in sec. 2 (1) violated the fundamental right conferred by art. 19 (1) (d) "to move freely throughout the territory of India," and that it was not saved by the qualification in art. 19 (5) allowing imposition of "reasonable restrictions on the exercise" of the right "in the interests of the general public." But another special bench constituted to consider some other habeas corpus petitions, consisting of C. J., and Sen and Banerjee JJ., later expressed by a majority a different opinion on this legal point, holding that to cases of detention art. 19 (1) (d) did not apply at all, and that the right mentioned in this article was a right to be exercised by persons who were physically free and were not held in detention. On account of this difference of opinion, the legal point involved in these cases was referred to a full bench, which has now decided by a majority that the power of detention does not conflict with art. 19 (1) (d). The same point has now been raised in another case in the Supreme Court. Whatever the decision of the Supreme Court may be, the hearing of the petitions before the first special bench of the Calcutta High Court made revelations about the manner in which the power of detention is actually exercised under the B. C. L. A. Act, and with these revelations the reader deserves to be acquainted.

The first point to note in this connection is that the Act is a twenty-year old Act. When it was first passed, it was no doubt meant to meet a special emergency, but the Government never bothered to consider whether the emergency that brought it into being continued or had passed away. It just remains on the statute book and continues to be brought into use as if it was ordinary

legislation destined to be permanent. One would have thought the Government would at any rate plead that there was an emergency justifying the use of such drastic powers as the power of detention without trial. But the Government does not even consider it necessary to put forward such a plea. In defending the detention orders, it was admitted by the counsel for Government that "the legislation was not for any emergency, but it was a normal law having regard to the conditions prevalent in the country." What were the conditions in the country which made the Government consider such very special legislation as "normal law"? The counsel explained: "It appeared that the general public was not such as would co-operate with the Government in putting down these types of crimes." This brought forth a remark from the bench: Might it not be "that those who wanted the support of the people did not get it because they had lost touch with them"? Anyway, the fact remains that this Act which is a kind of Suspension of Habeas Corpus Act remains in force continually for two decades and, what is worse, is intended to go on being enforced perhaps for another four or five decades. It is not surprising in view of this that the central Government also treats the newly passed Preventive Detention Act as a permanent piece of legislation.

The second noteworthy point in the B. C. L. A. Act is about the authority who in actual fact exercises the power of detaining persons and of restricting their movements in other ways. In outward form the Act makes not too bad a showing. It says in sec. 2 (1):

Where, in the opinion of the provincial Government, there are reasonable grounds for believing that any person is, or was at any time, a member of an association of which the objects and methods include the commission [of certain offences]... the provincial Government may [direct] that such person... shall be committed to custody in jail.

That the condition that the grounds for the Government's belief should be reasonable affords no kind of safeguard was admitted by the High Court in these cases. The opinion of the provincial Government on this matter, it said, "is subjective and not justiciable," that the Government "is constituted the sole and absolute arbiter of the decision whether there are reasonable grounds for believing, etc." But who represents the Government in this connection? Who actually makes a decision which is judicially incapable of being impugned? The Governor? The Home Minister? The Chief Secretary? No; according to the rules of governmental business in force, this grave decision relating to deprivation of the personal liberty of the subject is left, on the Government's own admission, to be taken by a deputy secretary in the Special Branch Section. This subordinate official makes orders for detention, and only certain specified matters are placed by him before the ministers. When this was divulged in the hearing, a judge was led to ask, Did the Government con-

sider the question of the liberty of the citizen so unimportant as to leave the decision to an official as low down in the official hierarchy as a deputy secretary? From this the reader would gain a very good idea of how the Preventive Detention Act would work which expressly authorizes a district magistrate and a sub-divisional magistrate to lock up a person in jail on his own independent authority.

A third point that is worthy of note is that while the B. C. L. A. Act mentions several categories of persons who could be detained on suspicion, offering to the Government a number of alternatives, the orders for detention passed against all the detenus whose cases came up for hearing before the High Court just repeated the words of sec. 2(1) without deciding which of the alternatives was relevant in any particular case and what was the category to which in its opinion the detenu belonged. The section gives power to the Government to detain in prison a person who (i) "is or was at any time" a member of a certain type of association, or (iii) "is doing or did at any time" an act to assist the operations of any such association. In making the order of detention, the Government not only did not name any association, but did not even state whether according to its belief the person to be detained was a member of an impugned association at the time of making the order or had in the past been a member of it, or was doing any prejudicial act at the time of making the order or had in the past been doing such an act. The order mentioned both the alternatives as equally applicable in all cases, as much as to say "we do not quite know, but one of the alternatives, whichever it is, must apply." Imagine in England the Home Secretary, in making an order for detention under Regulation 18 B. merely copied the sections of the Regulation without making it clear to which of the categories mentioned in the Regulation the person against whom action was to be taken belonged. Would there be the slightest chance of the Advisory Committee endorsing the order, and would there be the slightest chance of the Home Secretary later confirming it? But this is precisely what happened in every one of these cases showing clearly and indubitably that the detaining authority had not applied its mind to even one out of the mass of these cases. No wonder that the High Court held that even if the B. C. L. A. Act were valid, which in its opinion it was not, its provisions had not been followed and that therefore the detention orders were bad.

These cases demonstrate that when vast powers are lodged in petty officials to detain persons on mere suspicion, and persons so detained are deprived of the normal judicial remedies, the powers are certain to be used in an utterly irresponsible way. The vagaries of the detaining authority came to be exposed in these particular cases only because the High Court thought that the new constitution gave it a certain amount of authority to

question the validity of the detention orders. Whether it has this authority or not is still under adjudication in the Supreme Court. But the recklessness of the Bengal Government in misusing its powers would not otherwise have been authoritatively known to the outside world at all.

COMMENTS

Civil Liberties Protection Society, Ambala

A general meeting of the newly formed Civil Liberties Protection Society, Ambala, was held on 14th March, at which the office-bearers of the Society were elected. They are: Mr. Braham Dutt Sud (President); Sardar Kartar Singh Chhahi and Mr. Rajeshwar (Vice-Presidents); Mr. Haradatta Sharma of the Servants of India Society (General Secretary); Professor N. C. Kanwar and Professor Manohar Lal Divesar (Joint Secretaries); and Mr. Gyan Chand (Treasurer). Besides these, six persons were elected as members of the Executive Committee. At the meeting instances were given of excesses committed by certain officials of the police department and of attacks made by the executive on the civil rights of the citizens after the commencement of the new constitution.

At a meeting of the Executive Committee of the Bombay Civil Liberties Union held on 4th April under the presidency of Mr. N. M. Joshi, the Union passed a comprehensive resolution condemning the Preventive Detention Act in strong terms. It also passed a resolution protesting against the orders of restraint and detention passed against prominent leaders like Dr. N. B. Khare and Mr. V. D. Savarkar. Finally, it expressed its disapproval of the persistent refusal of the Bombay Government to institute an independent inquiry into cases of firing, the latest instance of which happened at Rajapur in Ahmednagar district.

"A Glimmering of the Obvious"

The "Hindu" says editorially in its issue of 23rd March: "Democracies cannot rule by blanket bans; and the tendency to invoke special powers, rather than put themselves to the extra trouble and effort involved in maintaining law and order without infringing on popular liberties, is only too marked in the conduct of some of the state governments." The "Hindu" is probably thinking of governments of Madras, Travancore-Cochin, etc., which are near to it. But we wonder whether it can name any state in which the tendency of which it complains is not plainly observable.

Detention Sections Deleted

From the bill to extend the duration of the Bombay Public Safety Act, the Home Minister had already taken the precaution to delete sections relating to detention, in view of the passing of the Preventive Detention Act by

the Indian Parliament. But such sections were not deleted from the West Bengal Public Safety Act when the bill to renew that act was passed. Now, on the recommendation of the Governor, sections relating to detention have been removed. The result is that the local governments will now derive their power of detention from a central instead of a local statute. The local government is not worse off on account of this change. On the contrary it is better off. The judicial review which the local act provided for in cases of detention will not now be available to detenus if the period of their detention does not exceed three months. Thus it is quite clear that it was the assured object of the central government in having the Preventive Detention Act passed to deprive persons detained for this period of any safeguards which the existing Public Safety Acts provided.

Nothing to Beat Preventive Detention Act

At no time under the British regime was detention without trial enforced throughout the territory of India or continuously for years together as now after the attainment of freedom. This thought alone is sufficiently disquieting. But what is even more distressing is the evidence afforded that the government presided over by Pandit Nehru is actually going from bad to worse. This process in progressive circumscription of personal liberty has reached its culmination in the passing of the Preventive Detention Act, which for its extremely wide sweep and drastic nature is wholly unparalleled. To mention only one of its features, we may point out that all detentions for a period of three months are within the absolute discretion of the executive without any kind of inquiry by an outside body. Never did the British Government enforce in India power to detain persons without trial unless the exercise of such power was accompanied by an independent opinion being invited on it. The Rowlatt Act provided for such an inquiry; so did the Bengal Criminal Law Amendment Act which, adopted as an emergency measure by the British, is maintained by our free democratic Government as permanent law, in addition to the Provinces' own Public Safety Act.

But the B. C. L. A. Act, being passed under the British regime, was not without a provision for a scrutiny of detention cases. It provided in sec. 9 that—

(1) Within one month from the date of an order by the Local Government under sub-sec. (1) of sec. 2, the Local Government shall place before two persons, who shall be either Sessions Judges or Additional Sessions Judges having, in either case, exercised for at least five years the powers of a Sessions Judge or Additional Sessions Judge, the material facts and circumstances in its possession on which the order has been based or which are relevant to the inquiry, together with any such facts and circumstances relating to the case which may have subsequently come into its possession, and a statement of the

allegations against the person in respect of whom the order has been made and his answers to them, if furnished by him. The said Judges shall consider the said material facts and circumstances and the allegations and answers and shall report to the Local Government whether or not in their opinion there is lawful and sufficient cause for the order.

(2) On receipt of the said report, the Local Government shall consider the same and shall pass such order thereon as appears to the Local Government to be just or proper.

The judicial inquiry here provided may have lacked much in effectiveness as a safeguard, but it was some kind of safeguard. What our Government has done is to abolish it altogether formally, in respect of detentions for three months, and actually in respect of longer detentions, by the Preventive Detention Act. The foreign Government which was in power in 1930 had a consciousness that it lacked the support of public opinion and therefore went rather slow in the enactment of repressive measures. But the Government that has taken its place is without the necessity of exercising any kind of self-restraint. In its overweening pride that it represents public opinion cent. per cent., it goes forward impudently laying its hands on everybody whom it considers dangerous. Absolute lack of an inquiry in three months' detentions and implied lack in longer ones are about the worst features of the Preventive Detention Act, though there are others to match these.

U. P. Government's New Technique IN PROLONGING DETENTION

The United Provinces (or Uttar Pradesh) Government cannot but be admired for the great ingenuity displayed by it in evolving a technique for prolonging the period of detention of persons against whom it takes action under the Public Safety Act. This Act, like those of most other provinces, limits the duration of detention, in the first instance, to six months. (Bombay is unique in this respect as having the unenviable distinction of possessing a law which authorizes detention for an indefinite period. In this province altogether 10,422 persons were detained till 15th January last, of whom 400 were still in detention.) This limit of six months is by no means insurmountable. It can always be got over by making a new order when the previous one is about to expire. The duration can thus be prolonged indefinitely without any real limit.

But perhaps because a certain amount of opprobrium attaches to detention without trial, the U. P. Government has developed this new technique whereby detention can be prolonged by what outwardly looks as only due process of law. What happened to Mr. Ram Nagina Rai, a detenu from Ghazipur, whose habeas corpus petition was heard by the Allahabad High Court recently, is typical of all such cases. The provincial Government ordered

this man's detention on 18th May, 1949, under the Public Safety Act. This detention was for six months. But four days before the period of detention was to expire, the district magistrate of Ghazipur passed an order against him requiring him to act in a certain manner, there being provision for issuing such orders in all Public Safety Acts. The magistrate further ordered him to enter into a bond with two sureties for the due enforcement of the restrictions specified in the order. The bond was to be executed and sureties were to be furnished "immediately after the service of the order." It was also stated in the same order that if he failed to do so, he would be committed to prison or, if he was already in prison, he would be detained there till he did so. In this case the detenu refused to enter into a bond and furnish sureties, and therefore in virtue of the district magistrate's order he remained in detention after the period for which the provincial Government had detained him had expired.

When his habeas corpus petition came on for hearing, Dayal and Bhargava JJ. allowed the petition and ordered his release from custody forthwith (13th March). The petition was thus disposed of on a technical point. At the time the district magistrate of Ghazipur passed an order on 15th November, 1949, Mr. Ram Nagina Rai had been detained in the central prison outside the district of Ghazipur, and the High Court held that the magistrate had no authority to pass the order that he did against a person who was no longer within his jurisdiction, and that since the order requiring the performance of certain acts was itself illegal, Ram Nagina Rai could not be punished for failing to enter into a bond and give sureties for the performance of those acts.

What we are concerned with here is not so much the legal point involved in the case (which is pretty obvious), but the mentality of the U. P. Government in devising a procedure by which what are really extensions of detention orders are disguised as imprisonment due to the normal process of law. This has been regularly happening in the United Provinces. The Government first makes an order for detention for six months, the maximum period allowed under the Act initially. When a man so detained has nearly served his term, instead of passing a fresh order for detention against him because it still considers him dangerous, as any straightforward government would do, it attains its object in a circuitous way. It lies in wait as it were, and just a few days before a man is due to be released it gets the district magistrate to issue an order directing him to do or refrain from doing certain things. In order to ensure that the things which are required to be done would be done or those which are required not to be done would not be done, immediate execution of a bond is insisted upon. The conditions imposed are perhaps so humiliating that almost invariably the man refuses to execute a bond, and for failure to do so he continues to remain in jail—not thereafter as a detenu but as one who defied a lawful order. The funniest part of the whole thing is that imposition of restrictions, demand for execution of a bond immediately, and notice that failure to do so would entail custody in jail—all these form part of the same order. The result is that the man drops out of the official list of detenues but still continues to be locked up.

In order that the Government may have power to keep a detained person imprisoned on this ground, it got the provincial legislature to pass a special law giving it this power. By Act 46 of 1948, the U. P. Legislature added a section (sec. 123 A) to the all-India Criminal Law Procedure Code, of which the first sub-section is as follows :

If any person, ordered to give security for any specified period under any enactment for the time being in force for the due performance or enforcement of any restriction or condition which may lawfully be imposed under such enactment, does not give such security on or before the date on which the security is required to be furnished, he shall, if the failure to perform or enforce the restriction or condition is punishable with imprisonment under such enactment, be committed to prison or, if he is already in prison, be detained in prison until such period expires or until within such period he gives security in accordance with the order :

Provided that the imprisonment shall be simple. The U. P. Government has the unique distinction among all the provincial Governments of having taken this power, in order we suppose to keep down the number of recognised "detenus" in its province, forsooth because detentions attract a great deal of public attention and evoke much criticism.

The validity of this 123 A section itself has been challenged in the Allahabad High Court. But what is of particular interest in this connection is that even if central legislation were to put a maximum limit on the duration of preventive detention, as article 22 (7) (b) of the constitution contemplates but as the Preventive Detention Act has not done, the provincial Governments are certain to devise other devious ways, as the U. P. Government has done, of circumventing a provision about such a limit.

Sec. 123 A, Cr. P. C., Declared Void.

Another case concerning detention under sec. 123 A, Criminal Procedure Code, came up for hearing on a habeas corpus petition before the same bench of judges of the Allahabad High Court a few days later. This was the case of Harpal Singh, who was prohibited under the Public Safety Act from doing certain things and ordered to execute a bond and offer sureties for ensuring that the restrictions imposed on him would be observed, and because of his failure to do so was detained in prison under sec. 123 A, Cr. P. C. This order of detention was not bad on account of want of jurisdiction of the detaining authority, as in the previous case of Ram Nagina Raj, and the larger question of the validity of the U. P. Government enacting sec. 123 A came up for decision by the High Court.

Dayal and Bhargava JJ. in separate judgments held (30th March) the section to be void. Both judges were of the opinion that the section was not a law of preventive detention, though enacted as an accompaniment of the U. P. Public Safety Act providing for such detention. The section merely provided for detention for failure to give security and not with a view to preventing the detenu from doing something. And as a law not intended primarily for preventive detention, the section was inconsistent with art. 22 (1) of the constitution as it did not provide for the arrested and detained person consulting with or being defended by a legal practitioner of his choice, and it was inconsistent with art. 22 (2) providing for such person being produced before a magistrate within 24 hours, for though the detaining authority was a magistrate of the first class it was not as a magistrate that he made the order for detention. On account of this inconsistency the section became void under art. 13 (1) of the constitution. Even if sec. 123 A were a law of preventive detention, it was inconsistent with art. 22 (4) and

22 (5), and the President's Preventive Detention (Extension of Duration) Order, which had special reference to art. 22 (4) (a) but no reference to art. 22 (5), could not save the provisions of sec. 123 A from being void. The section itself being illegal, the order made under it was illegal and the applicant was therefore entitled to be set at liberty.

The U. P. Government has thus been deprived of a powerful weapon, which it has been constantly using. But it should not be imagined that, thus foiled, it would be incapable of devising other ways of prolonging the detention of suspected persons without too frequent a resort to the Preventive Detention Act, application of which leaps to the eyes of the general public.

Anti-Communist Measures

A member of the United States Congress, Senator Joseph R. McCarthy, has made himself notorious for "looking for a red in every bed" and flinging charges of communist association and sympathies against all and sundry in a Senate investigation. He says that "the State Department... is thoroughly infested with communists" and that he knows of 57 individuals in the Department "who would appear to be either card-carrying members or certainly loyal to the Communist Party, but who nevertheless are still helping to shape our foreign policy." Even Dr. Jessup, who as Ambassador-at-Large is now on an exceedingly important job of formulating a policy for the Pacific and South Eastern Asia is not free from attack. The Senator charges him with "an unusual affinity for communist causes," which Dr. Jessup has of course indignantly repudiated.

No one takes this witch-hunt seriously, and is not likely to do any harm, in the United States. On the contrary it is likely to do some good. As the "New York Times" says :

We are not always sufficiently grateful to people like McCarthy. We do not realise as we should what a benefit they confer on the nation when they make such principle as that of guilt by association repugnant and ridiculous. Possibly Senator McCarthy during the past few days has made people think on this subject as they have not thought before, and anybody who does much thinking on the principle of the right to join things is likely to find that it is pretty closely tied up with ancient American traditions and liberties.

And for this public service in bringing home to the American citizens the value of an unrestricted right to Freedom of Association, the paper suggests ironically that a plaque ought to be set up in honour of Senator McCarthy.

A dyed-in-the-wool Tory member of the House of Commons deserves to be similarly honoured in England—Sir Waldron Smithers. He plagues the Prime Minister at question time with suggestions for adopting repressive measures for putting down communism. The Prime Minister's answer is usually a curt "No," which often brings on the remark on the part of Sir Waldron: "Is the Prime Minister at all serious about his anti-communist campaign? I am forced to the conclusion that he is a fellow-traveller." These exchanges merely provoke laughter, but they also help to show how fast England holds to the due process of law, never deviating from it except in cases of great extremity.

Taking his cue from the Un-American Activities Committee of the United States Congress, Sir Waldron asked on 31st January last year whether a similar Commission would be appointed in England, and the reply he received was "No, Sir." At that time Public Safety Acts were being vigorously enforced in India throughout the country and Sir Waldron asked the Prime Minister a few days afterwards (on 24th February) whether he would introduce similar legislation in England to repress communist agitation. Again, Mr. Attlee's reply was "No, Sir," and being driven to indicate his opinion of India's Public Safety Laws, Mr. Attlee said:

I do not know whether the hon. Gentleman has studied the somewhat drastic measures that are being taken by provincial Governments in India, and whether he and his party generally support the power to detain without trial on suspicion of subversive activities, and a number of other things which are generally regarded as dangerous here.

Indeed, Sir Waldron's party does not support the suggestion. Just immediately before the General Election the leader of the Conservative Party, Mr. Churchill, was asked whether, in the event of his returning to power, he would outlaw the Communist Party. He replied in the negative. He said:

While I would not hesitate to take any measures necessary to prevent them gaining control, I am most anxious to preserve by every means we can a very full measure of political liberty. We are offering these liberties to people, who if they got in power, would take them from us. Yet I think we are strong enough, civilization is strong enough, to let them have a further measure of that tolerance which they do not hesitate to deny to others.

If this represents the policy of the Conservative Party one can well imagine what must be that of the Labour Party, and when, in the new Parliament, Sir Waldron Smithers suggested on 13th March introduction of legislation to outlaw the Communist Party in view of the result of the Fuchs trial, it is not surprising that Mr. Attlee summarily turned down the suggestion.

Men of the type of Senator McCarthy and Sir Waldron Smithers not only cover themselves with ridicule, but also bring into ridicule governments of countries like India to which they are able to point as exemplars in following a proper anti-communist policy. That India should be exposing herself to such a position cannot but be a matter of profound shame to all patriotic Indians. The bewildering inconsistency of the Nehru Government in refusing to line up with other democratic countries in the matter of fighting the depredations of world communism and in following at the same time a policy which Fascists would have followed in the matter of repressing local communists is widely noted in foreign countries. The "Newsweek" of New York said in its issue of 6th February: "Prime Minister Jawaharlal Nehru's Socialist-inclined government has refused to take a stand against international communism. It visualises itself as a

neutral moral force between two world-power blocs. Yet domestically it has clamped down hard on India's 70,000 communists, jailing 3,000 to 4,000 of them." These foreign observers know, however, that there cannot be much of a moral force behind a government which does not scruple to have resort to such anti-democratic measures as it is taking in dealing with its own internal foes.

MESSAGES ON PREVENTIVE DETENTION

SUPPORT FROM C. L. U's IN U. S. A.

(1) Int'l League for the Rights of Man

The following is the message, dated 24th March, which the Indian Civil Liberties Conference has received from the International League for the Rights of Man, signed by Mr. Roger N. Baldwin, Chairman, and Mr. John Pearmain, Executive Secretary:

We all share a common interest in protecting universally those civil and political liberties basic to freedom and progress. We rightly take alarm at any such threat to the whole structure as that presented by the arbitrary power of governments to arrest and detain persons not charged with crimes on the theory that thus they may be prevented from committing them. We note with concern that such a tyrannical system is in force in parts of India, sanctioned by your new Constitution, allegedly to combat the Communist menace.

But the system takes a leaf or two out of the very book of the Communists and the Fascists which all democrats condemn and abhor. The police-state Communists cannot be successfully fought by adopting their police-state methods.

It should be axiomatic in any democracy that all men and women without exception can be confined only upon order of a court, after open public trial on specific charges, save in time of war or armed rebellion when extraordinary measures to protect national security may be warranted.

We are urging such a principle on the United Nations Commission of Human Rights for universal application. We join you in urging it in India.

(2) American Civil Liberties Union

We cannot, under our by-laws, take action concerning foreign countries. We may say to you, however, that we have always opposed Preventive Detention in the United States even in time of war. We had it in the last war, both for alien enemies not charged with crime and even for citizens residing in coastal areas who were presumed dangerous to national security. The entire population of Japanese blood, over 100,000 people, were removed from their homes and kept in concentration camps for two years, one of the greatest racial tragedies in all our history.

We have never had any Preventive Detention in time of peace, nor has any such proposal ever been advanced seriously.