

Regd. No. B. 5681

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

Edited by R. G. KAKADE, M. A., LL. B., PH. D.,
Assistant Secretary, All-India Civil Liberties Council
Office: Servants of India Society, Poona

Editorial Committee:

Prof. P. M. LIMAYE,
S. G. VAZE,

Member and Joint
Secretary respectively of
the All-India Civil
Liberties Council

Annual
Subscription : Rs 5
Per issue : annas 8
including postage

No. 125

February 1960

THE SOVIET LEGAL SYSTEM

BY N. C. CHATTERJEE

The Chief Justice of the U. S. S. R., and a number of distinguished jurists from Soviet Russia visited India this month. They were present at the hearing of some cases in the Supreme Court of India and were present at the sittings of some of the courts in South India.

Mr. T. P. Sokolov, Chairman of the Presidium of the Leningrad City Collegium of Advocates, was an important member of the U. S. S. R. delegation. Another important member was Mr. B. S. Nikiforov, Head of the Department of Criminal Law of the All-Union Institute of Juridical Science. Both these gentlemen, Mr. Sokolov and Mr. Nikiforov, delivered interesting lectures at the Supreme Court Bar Association meeting over which I had the privilege to preside. Mr. Sokolov spoke on the "Organisation of the Soviet Bar," which deserves careful study. Mr. Nikiforov spoke on the "Modern Trends of Development in Criminal Laws in the U. S. S. R."

Another interesting lecture was delivered by Mr. V. V. Kulikov, who is the Deputy Public Prosecutor of the U. S. S. R. This lecture was delivered under the auspices of the All-India Civil Liberties Council with which I am associated as President for some time. The Chief Justice of U. S. S. R., Mr. Gorkin, was also present and made a passionate appeal to the men of law in India not to be misled by propaganda which suggests that there is no Rule of Law in a Communist State. He also pointed out that a Civil Liberties Organization was essential for the maintenance of basic human rights and that there was risk of dictatorship even under a facade of parliamentary democracy.

The Indian delegation of lawyers had been invited last year by the Supreme Soviet judiciary. The delegation consisted of a number of lawyers and was led by Mr. A. K. Sen, the Law Minister of India. Some members of Calcutta, Bombay and Madras Bars had joined the delegation. As the Vice-President of the Supreme Court Bar Association I was also a member. After the Law Minister was compelled to return to India from Moscow, I was requested to lead the delegation to Leningrad and had an opportunity of visiting the interesting city which is really the cultural capital of U. S. S. R.

The distinctive feature of the Russian legal and judicial system which impressed us was that the People's Courts dispensed speedy and non-expensive justice. As a matter of fact the trial of an industrial case which we witnessed in the People's Court was filed on the 19th November and it was heard and judgment was delivered on the 22nd November.

The entire contour of economic life in Soviet Russia is different from ours and therefore big commercial or agrarian litigations are unknown in that country. Socialist economy is generally organized and thoroughly planned. The economic life of the U. S. S. R. is directed by the State plan of national economy for the purpose of increasing public wealth and raising the material and cultural levels of the toilers. All factories and business houses are State properties and are run by State employees. In our discussion with the Supreme Soviet judiciary and the leaders of the legal profession we wanted to know how black-marketeers were dealt with. They could not appreciate our question and ultimately they pointed out that there was no incentive to or scope for black-market as business enterprises were all owned, managed and worked by the State.

In Moscow we attended one People's Court and witnessed one trial. There all the judges were women. It was a criminal case and the charge was one of hooliganism and causing bodily harm. The trial was postponed because two witnesses failed to appear and defence counsel wanted time and the procurator, i. e., the Prosecutor, said that they were important witnesses for the defence. This showed that the prosecutor also wanted a fair trial and did not act merely as a court inspector trying to get a conviction. The presiding judge was a trained lawyer but the other two were women assessors. One of them was a teacher in a local school. Of course, all of them were elected. We ascertained that there were People's Courts for each of the 20 districts in Moscow and some of the People's Courts had three to four benches. On each bench would sit one judge and two assessors. There were about 90 judges and 1100 assessors for the People's Courts in the city of Moscow alone. Most of these judges, although

elected, were professional judges and some of the assessors also had training in law. In the Moscow People's Court the defence counsel wanted time and gave his reasons for postponement. The judge and the assessors, after hearing him and the Prosecutor, retired and came back in a few minutes with a written judgment or order granting adjournment for 10 days.

The preponderance of women on the Bench is a feature of the Soviet system that needs special mention. There are about 90 judges and 1100 assessors in the People's Courts in Moscow. Mostly they are women. I found three judges on the Bench in one People's Court and all of them were women. I must say that the greatest civil lawyers in Moscow assured me that women judges were more satisfactory than men. Almost in all the trials we were impressed with the manner in which some judges handled the cases in court.

The legal profession in the U. S. S. R. is organized in collectives. There have been some recent changes in order to make the legal profession a better instrument for justifying their function of securing impartial administration of justice.

In the Soviet system all legal assistance rendered to individuals must be paid for. Only the conduct of suits for alimony and the drawing up of applications for pensions or other social benefits and of legal documents for soldiers and sailors in the Soviet Armed Forces are free of charge. So is oral advice of an informative nature when no special legislation had to be looked up or documents brought by the client consulted. When a client wants to get compensation for an injury received at work, the consultation office also does not charge for such a suit, but if the court allows compensation it must order the defendant to pay a specified sum for the counsel for the plaintiff.

When a lawyer is authorized by a private individual to conduct a case in court he is paid on a piece-work basis.

Every person who applies to a consultation office for a lawyer may have his personal choice, whether it is a civil or a criminal case. Fees according to the case and personal confidence act as stimulus to each advocate to do his best. That is the only way for him to acquire a reputation and prestige.

For legal services rendered to private individuals anywhere in the Soviet Union specific fees are charged according to a uniform list approved by the Ministry of Justice.

A fee may be charged for drawing up a legal document, the amount payable depending on how long and complicated it is.

For the purpose of fixing fees, criminal cases are divided into simple and complex. A case is considered complex when for instance expert testimony is required necessitating the study and elaboration of special problems.

A fee not exceeding 500 roubles may be fixed by the office manager himself. But provision must also be made

to cover cases where the record of the preliminary investigation is very bulky or difficult to study or where the hearing in court is protracted. No limit is fixed for fees in such cases. It is established by the presidium of the lawyer's collegium at its next regular meeting and depends on the amount of work done and the skill of the lawyer employed.

When the hearing of a criminal case in which the fee is fixed by the manager alone lasts more than three days, an additional amount of not more than 75 roubles for each additional day must be added to the fee.

If a lawyer represents two defendants in a case, he may charge each 75 per cent. of the full fee listed, and if three defendants, 60 per cent.

Special payment is provided for handling criminal cases on appeal to a Court of Cassation. Counsel for defence who first enters a case on Cassation is of course allowed a higher fee than one who conducts it in the lower court.

The lawyer's fee in a civil case depends on the amount involved in the suit. As a rule it should not exceed 600 roubles. If the consultation office manager considers the case too complex to be paid for by the usual fee he may apply to the presidium to fix a higher amount.

A special fee is charged in those categories of civil cases in which no definite sum is involved, as for instance in labour disputes, ejection cases and the like.

If in a civil case a lawyer's fee was fixed by the office manager and the trial lasts more than three days, an additional fee may be charged for each additional day the same as in criminal cases.

In 1957, 12.5 per cent. of the over-all annual income of the Leningrad Regional Collegium went for the maintenance of its presidium and legal consultation offices. But here it must be taken into account that the staffs of the consultation offices and the presidium rendered considerable assistance to the lawyers in their practice of the law and relieved them of much incidental work.

The amount deducted was also used for many other purposes. Thus 1.9 per cent. was spent in providing advanced training for the collegium members; 2.6 per cent. to pay lawyers appointed by court; 1.1 per cent. to procure office paraphernalia and furniture and to make repairs, i.e., in the long run to improve the working conditions of the lawyers themselves; 0.15 per cent. to amplify the law library and 0.2 per cent. to hold general meetings. An additional six per cent. was deducted for the holiday fund, out of which each jurist was annually paid an average month's salary. Lastly, 4.6 per cent. was contributed to the social security agencies who paid each lawyer his average salary during illness, and one per cent. was taken for the mutual aid fund out of which lawyers receive loans and grants. Deductions made for the benefit of the mutual aid fund are credited to the particular lawyer and in the event of his death or withdrawal from the collegium are returned to him or his heirs.

The Chief Justice of U. S. S. R. pointed out that two outstanding changes in the U. S. S. R. legal system were the shifting of the onus of proof to the prosecution, even in political cases, and the annulment of the law under which a person could be convicted merely on the basis of a confession unsupported by objective evidence.

Explaining the new provisions of the law, Mr. B. S. Nikiforov, Head of the Department of Criminal Law of the All-Union Institute of Juridical Science, said that the Soviet lawyers used to give too much weight to the accused's confession, particularly in crimes directed against the State. It had now been laid down that every confession must be corroborated by objective evidence before a person could be convicted.

In his lecture delivered under the auspices of the All-India Civil Liberties Council, Mr. Kulikov pointed out that all shortcomings or violations of legal obligations were not treated as crimes. Mr. Kulikov said that the functions of the Procurator General were defined by an Act of the Supreme Soviet. He was an important legal authority who can intervene in any case and move for the redress of injustice in both civil and criminal cases. He repudiated the suggestion sometimes made that the Procurator General only acted in the interest of the State under the orders of the totalitarian authorities in order to curb the liberties of the people.

When I was in Moscow I along with my colleagues had long discussions with Mr. Rodenko, the Procurator General. I was assured by him that in about 50 per cent. of the cases he demanded a review or rehearing of adjudications made by the Courts at the instance of the

citizens who had convinced him that prima-facie injustice had been done. The rules for rehearing or review are not complicated as in India and during the course of discussions we were satisfied that such review or rehearing applications were successful in at least five per cent. of the cases.

Mr. Kulikov also pointed out that they were making a change in the legal system and that at present the onus of proof was on the organs of investigation and not on the accused. It was the duty of the police organs to place all the materials against the accused person before the Procurator within 10 days. No person can be arrested without the assent of the Procurator or an order of a Court and the Procurator must first familiarise himself with all the materials before he orders the arrest of any accused person.

In Soviet Russia under the present regime, the Russian jurists assured us, great stress was laid upon the guarantee against unlawful arrest and every effort was made not to allow any case of illegal arrest or unjustified victimization.

The number of lawyers both in Moscow and Leningrad is limited. But under the collegiate system no lawyer is allowed to starve and although no great fees are paid to the lawyers, even the juniormost counsel is assured freedom from starvation. In case of illness or retirement he is paid pension or allowance. The Chief Justice of U. S. S. R. assured us that one of the most important things which struck Russian delegates or lawyers during their visit to India was the system of study and evaluation of evidence in our courts.

CHARTER OF BASIC HUMAN RIGHTS

PROPOSED FOR KENYA TO ELIMINATE RACIAL DISCRIMINATION

After a satisfactory settlement of the problem of constitutional advance in Tanganyika, the next country with a multi-racial population in respect of which a similar problem falls to be tackled by the British Government is Kenya. Assuming that Britain is not more reluctant to a transfer of power to the Africans of Kenya than to those of Tanganyika, such transfer should be even more rapid here, for Kenya is economically and educationally much more advanced than Tanganyika. But in actual fact Kenyan independence is a far more difficult nut to crack, because of the greater strength of the immigrant communities, and particularly European settlers, in Kenya than in Tanganyika. Whereas there are but 25,000 Europeans to 9,000,000 Africans in Tanganyika, there are 65,000 Europeans (besides 170,000 Asians and 37,000 Arabs) to 6,170,000 Africans in Kenya. Thus, the European settler community plays a far more dominating role in Kenya than in Tanganyika. Moreover, Tanganyika's African leadership is far more liberal and responsible than Kenya's counterpart has

yet shown itself to be. In the very first speech Mr. Julius Nyerere made in the Legislative Council after obtaining a grant of near-self-government for Tanganyika, the future Prime Minister of the country made an appeal to his followers to get away completely from racial politics and to build up a plural society in which minority communities will not labour under any disadvantages. He said :

From now on, the duty of protecting human rights—those human rights for which we have been struggling—that duty from now on is our duty. Let it not be said by posterity that we were a bunch of hypocrites. Let not the world point a finger at us and say that we gained our freedom on a moral argument—the argument of the brotherhood of man—and then threw that argument overboard, and began ourselves to discriminate against our brothers on the ground of colour.

We in Tanganyika believe that only a wicked man can make colour the criterion for human rights. Here

we intend to build a country in which the colour of a person's skin or the texture of his hair will be as irrelevant to his rights and duties as a citizen as it is irrelevant to his value in the eyes of God.

Unfortunately it cannot yet be said with confidence that African nationalism in Kenya is altogether free from the dangers of "racialism in reverse" against which Mr. Nyerere issued a warning in this speech and that at any rate it is such that it will place equal emphasis on winning the confidence of the racial minorities in that country. And the fate of the round-table conference now being held in London to determine the constitutional future of Kenya depends upon how statesmanlike and prudent its African leadership is than upon any other single factor.

So far as the British Government is concerned, it appears that it is prepared to go a long way towards meeting African aspirations and that it is willing to put Africans into effective power, provided minority communities are assured of fair play. In his opening speech to the conference, the new Colonial Secretary, Mr. Ian Macleod, made it clear that it was Britain's intention to lead Kenya to independence, and that the task of the conference was to see at what pace constitutional progress could be made culminating eventually in the people of Kenya having full control over their own destiny. He said: "Africans are easily the majority of people of Kenya, but there are also those who have made their homes in Kenya, who are entitled to make a full contribution to the work of the government of the colony." Their claims have to be recognized. Then he put forward an outline plan giving in some detail the Government's proposals for immediate advance. This plan has not been published, but it is believed that it provides for a decisive transfer of power on condition that a fair amount of agreement is arrived at among the leaders of all the communities living in the country. He is believed to have said that he hoped to see the Westminster model of parliamentary institutions flourish in Kenya and that a move could be made towards a common roll for many of the seats on a "very wide" franchise. It is said that he contemplates a fully elected Legislative Council, with at least half the seats being open to a common roll. His policy also embodies a Government in which the majority of Ministers are elected members answerable to their own constituents and to the nation at large, with African Ministers taking a greater share in the government of the territory.

The Africans' demand is for "responsible government in 1960, with one-member geographical constituencies, based on a common roll with universal adult suffrage," this responsible government being a stepping-stone to complete independence for Kenya within two or three years. Their proposals make no mention of any safeguards for the immigrant communities which have thrown in their lot, for good and all, with Kenya which they look upon as their home and to whose material development they have contributed a major share. Obviously, these

communities will need some kind of safeguards to avoid being swamped by the African numerical majority. For, as the "Guardian" says, without any such safeguards, universal suffrage on a common roll would mean "that every unofficial member of Kenya's Legislature would be an African and that the European and Asian communities would be removed from effective say in public affairs." Further, the Government would be not only a fully African Government, but "an inexperienced and incompetent Government." For, "none of the African elected members have yet had any experience of administration or government." Mr. T. J. Mboya, the most influential of the African leaders, was reported to have said after his visit to Tanganyika and his talks with Mr. Nyerere, that he would agree to some reserved seats for the European and Asian communities on the lines proposed for Tanganyika, where 21 out of 71 seats in the Legislative Council would be filled by the minority communities—10 by Europeans and 11 by Asians. But subsequently Mr. Mboya denied that he had made any such commitment.

Now, however, he is prepared to meet the wishes of the minorities in another way. He offers to them a Bill of Rights to be incorporated in the Constitution which will prevent racial discrimination being practised by the powers that be. If this is accompanied by a reasonable compromise on franchise, the franchise being wide and yet qualitative, it will go far to satisfy all but die-hard extremists among the minority communities. (The news has now come that most of the delegates have accepted the principle of franchise based on a common roll, with reservation of a number of seats.) The Bill of Rights that Mr. Mboya promises will not be just a pious declaration of rights with no machinery to ensure that the rights will be respected. He proposes that there would be a Supreme Court to interpret the rights and secure them against any possible violation. He wants, he says, "to eliminate—at least from political life—all those who at present have one foot in Kenya and one in London, and those who have one in Kenya and one in Bombay." He is opposed to safeguards which specifically mention any particular racial group. But he is in favour of a general safeguard applicable to all communal groups; it would provide that "any individual should have recourse to the courts if it appeared at any future date that the Parliament in Nairobi had passed legislation limiting individual rights and freedom." This implies, he explains, a form of supreme court which would be the ultimate guardian of the Constitution. "Parliament could not, as in Britain, be supreme in interpreting the Constitution. People would know that there was a sovereign court of appeal beyond that, protecting their civil rights." This idea of restricting the competence of the Legislature in order to protect the fundamental human freedoms from legislative interference owes its inspiration apparently to Mr. Thurgood Marshall, the

renowned counsel for the National Association for the Advancement of Coloured People in the U. S. A., whom the African leaders have wisely appointed their constitutional adviser. And the idea has found so much favour at the Kenya conference that a committee has been appointed to examine the utility of such a guarantee and to spell it out.

It is remarkable how the concept of a fundamental right superior to any right conferred by the Legislature is gaining acceptance among British people with whom supremacy of the Parliament is almost a creed. We have seen (p. vi, 36) how in Nigeria the recommendation of Sir Henry Willink's Minorities Commission for the insertion of a Bill of Rights in the Nigerian Constitution for the protection of minority interests has been accepted. It is provided in this Constitution that "individuals shall not be subject to any disabilities or privileges;" and further it is provided that this Bill of Rights applicable to all Regions shall not be altered except by a two-thirds vote of all the members of the Federal Legislature. For Kenya itself the Bow Group of Young Conservatives suggested that the rights of minorities should be secured by a Bill of Rights guaranteeing

- (a) no expropriation without compensation,
- (b) subject to the law of riot, no restriction of the right of assembly,
- (c) within the context of a common franchise, no arbitrary deprivation of the right to vote, and
- (d) no imprisonment without fair trial.

The Group also suggested that, in respect of matters affecting personal rights, there should be an appeal to the Judicial Committee of the Privy Council.

The existing Constitution of Kenya provides for a Council of State whose avowed object is to watch over minority interests, though this body is not clothed with power such as a court would have of invalidating any discriminatory legislation. This Council of State provision was modelled on that of the constitution of the Central African Federation, under which an African Affairs Board was instituted to see that no discrimination was practised to the detriment of the Africans. This Board has not proved very effective in safeguarding the interests of the majority, but leaders of the European community are now trying to have it replaced by a body which would protect the interests of all races, including the minority communities. And it is not only the upholders of vested interests like the Premier of the Federal Government but also liberal-minded Europeans belonging to the Opposition who have expressed this view. For instance, Sir John Moffat, leader of the Central Africa Party and champion of the legitimate rights of the Africans, introduced a motion for a Constitutional Court in the Federal Parliament in 1958. This Court, according to the motion, was intended as a safeguard against discriminatory legislation being passed involving any racial group in injustice. In moving the motion, he said: "The African people can obtain a majority in this Federation on the voters' roll far

sooner than they could be trusted with the power that goes with that majority." To prevent the "African extremists" from abusing the powers which it was mathematically certain would soon be theirs," he suggested that a Constitutional Court should be set up which could veto differentiating legislation. The motion was not carried, but it was felt then that if extremists among the Europeans have to be held in check by some constitutional safeguards, so will extremists among the Africans also need to be held in check lest, when they become dominant, they should unjustly treat their former oppressors. And a writer in the "Guardian" says: "Ultimately racial goodwill is the only safeguard for minorities; but a Bill of Rights written into the Federal Constitution and a Human Rights Board with genuine teeth [i.e., a Court with power to void unequal laws] can help to restore goodwill in a way in which the discredited African Affairs Board never now can." Thus, the idea of enshrining certain basic rights in the Constitution so that it will be beyond the power of temporary majorities in the Legislature to tamper with them is making steady headway among the British people.

"State Trading in Justice"

In a suit brought by some members of the Allahabad Parsi Zoroastrian Anjuman against some other members the defendants raised the issue that the court fee paid by the plaintiffs was insufficient and pleaded that the suit should on that account be dismissed. The trial court held that the court fee paid was insufficient. In a revision against the order of the civil judge, Allahabad, Mr. Justice S. S. Dhavan of the Allahabad High Court on 5th January ruled that the defendants had no right to join issue with the plaintiffs on the question of court fee, and in the course of his judgment made the following general observation on the system of levying court fees in general:

"In modern India due to the Court Fees Act, if a citizen's suit is dismissed by the trial court and the lower appellate court on an erroneous view of the law but decreed by the High Court in second appeal, the plaintiff will have paid a substantial fee for the privilege of obtaining two wrong decisions. There is no refund of court fee even after the highest court has held that the decisions of all the lower courts are erroneous. If the High Court awards him costs, the burden of paying for the mistakes of the two courts is transferred to the defendant through no fault of his. The idea that the sovereign should make the subject pay for the errors of its courts before giving him a correct verdict would have been regarded as scandalous under the Roman Law, or in the regime of Asoka whose royal emblem is the emblem of our Republic and this court.

"Justice is an essential attribute of sovereignty. Under the Court Fees Act, the sovereign demands payment for doing justice between subject and subject — that is to say, for fulfilling its essential attribute of

sovereignty. In England there is no court fee on suits, and even the crippling burden of two world wars did not tempt the British Parliament to levy a tax on dispensation of justice. In 1938, Dr. K. N. Katju, then Minister of Justice of the United Provinces, in his Statement of Objects and Reasons justifying the substantial increase in the rate of court fee in the United Provinces under the U. P. Court Fees Amendment Act, 1938, stated :

The conception that a litigant should pay for services rendered by courts of justice seems to have been familiar to every system of law, ancient or modern. In ancient times, the Roman Law, according to the Code of Justinian, penalised the plaintiff or the defendant who put forward a false plea by a tenth part of the value claimed, while Hindu Courts of Justice imposed upon the party at fault a fine, as ordained in the Smritis of Yagnavalkya and Manu, equal to the claim itself, which went to the coffers of the State.

"With respect, there is a fundamental difference between a fine or penalty imposed upon a litigant held to be at fault by the court after a proper hearing, and a fee enacted in advance by the sovereign as the price of the hearing irrespective of the result. Whether the present system of taxing justice is consistent with the spirit of the Preamble to the Constitution which announced that the people of India had given to themselves the Constitution to secure, inter alia, to all its citizens justice, social, economic, and political, is a matter which may be considered by Parliament one day. This court can only interpret and give effect to laws, as long as they do not violate the Constitution.

"Today the tariff imposed by the State under the Court Fees Act is high and, in many cases, prevents the citizen from obtaining redress for any wrong done to him unless he proclaims himself to be a pauper. Moreover, considering that this court is at present hearing second appeals and revisions arising out of suits filed in 1950 or even earlier, it is arguable that the citizen who has to wait for more than 10 years before obtaining redress for the wrong done to him, does not get value for the fee paid by him. If this were a transaction between private parties, the citizen would probably be entitled to a refund of his fee on the ground that in giving him delayed justice, the sovereign had not fulfilled its part of the bargain. The courts will, therefore, be justified in giving the Act a strict interpretation though ensuring that its provisions are not evaded."

Making these observations the text of its leading article, the "Sunday Express" of 31st January wrote under the caption of "Trading in Justice":

If justice delayed is justice denied, so also legal redress which is beyond the means of an average citizen is a travesty of justice. The Preamble to our Constitution promises to secure to all the people of India "justice, social, economic and political." In

practice, however, our courts of justice, like the Ritz, are open only to the rich.

This anomaly has been criticised by a number of High Court judges in recent months, the latest and most outspoken being Mr. Justice S. S. Dhavan of the Allahabad High Court. He held not only that the States have no justification for converting the court fee into a device for raising revenue but also that the present system offended against the Constitution.

Similar opinions were expressed earlier by Mr. Rajagopala Iyengar, a retired Judge of the Madras High Court, and Mr. N. H. Bhagwati, retired Judge of the Supreme Court. Both observed that the high quantum of court fees now prescribed amounted practically to a denial of justice. Perhaps worse, it has put justice on sale.

The Law Commission in its Fourteenth Report had pointed out that "India is the only country under a modern system of government which deters a person who has been deprived of his property or whose legal rights have been infringed from seeking redress by imposing a tax on the remedy he seeks." This pertinent observation, however, has been disregarded by the powers that be.

According to the Indian tradition, a citizen has the right to seek justice from the sovereign. The ruler regarded it as his primary duty to dispense justice without levying a fee for this service. Both the Hindu and Muslim rulers made themselves easily accessible to aggrieved persons.

The sentiment was also enshrined in the Magna Carta in which King John promised his Barons "to none shall we delay, to none shall we deny, to none shall we sell justice." The British system of justice remains on the whole faithful to this assurance.

In India, however, which has more or less followed the Anglo-Saxon model, court fees were introduced as a device to check frivolous litigation. Lord Macaulay, who has left a deep impress on our legal system, criticised them in no uncertain terms. The real way to prevent unjust or frivolous suits, he said, is to take care that there will be just decisions.

Nor does the levy of a court fee prevent the abuse it is meant to remedy. To quote Lord Macaulay again, even a stiff fee did not make "the pleadings clearer, nor the law plainer, nor the corrupt judge purer, nor the stupid wiser." Its only effect is to deny a poor plaintiff justice.

Disregarding all these considerations, however, our State Governments are cynically increasing court fees on one specious ground or another. Fees for legal redress are really a scandal in a Welfare State. Justice Bhagwati rightly condemned them as "State trading in justice." Justice Dhavan considers it a fundamental principle that the purpose of litigation is justice and not revenue. Administration of law defeats its purpose when it leads to a denial of justice.

Communist Regime in Kerala

Breach of the Rule of Law

The committee appointed last September by the Indian Commission of Jurists, the Indian wing of the International Commission of Jurists, to inquire into the allegations of subversion of the rule of law in Kerala under the former Communist Government, has submitted its report, which is wholly adverse to the Communist regime. The committee consisted of Mr. N. H. Bhagwati, a former judge of the Supreme Court, Mr. M. P. Amin, a former Advocate-General of Bombay, and Mr. M. K. Nambiar, a senior advocate of the Supreme Court. It held public sittings at various towns in Kerala and examined 78 witnesses.

Findings.—The committee's finding is that under the communist regime in Kerala there was "a gross and systematic violation of the rule of law undermining both equality before law and equal protection of law." "The Communist rule was a rule for the benefit of the members of the Communist Party and not for the benefit of the people at large and had for its main objective the securing of Communist hegemony over the whole of Kerala." The report said that the non-Communist citizens of the State were denied fundamental rights to form associations or unions, to hold property or to carry on trade or business. There was deprivation of life and personal liberty otherwise than in accordance with procedure established by law.

The functioning of cell courts, the report said, subjected the non-Communist citizens to the jurisdiction of extra-judicial courts which had not the sanction of any law and which enforced their decisions by illegal methods. "There was a complete subversion of law and order and a flagrant breach of the rule of law as envisaged by the Constitution."

The police policy enunciated by the Communist Chief Minister in July 1957 was a "flagrant violation of the law of the land." "The duty of the police is regulated by the relevant statutes and the police policy laid down a code of conduct in violation of the provisions of the relevant legislative enactments in force, and amounted to the abrogation of the relevant provisions in conflict with or dispensation of such laws, which the Communist Government had no legal authority or jurisdiction to ordain." The report further states that neither the police nor the Ministers can be above the law, and Ministers who promulgate orders in contravention of the law or instigate acts or omissions by the police or the statutory authorities contrary to law are themselves privy to a breach of the law and must be liable to be proceeded against civilly or criminally for their tortuous acts or criminal offences.

Recommendations.—In view of these findings the committee has recommended that there should be a provision in the Constitution for impeachment of

Ministers and civil servants as in the U. K. and the U. S. A. It has also recommended appointment of a Director of Public Prosecutions of the status of a High Court judge, with powers of supervision over all criminal investigations and prosecutions to ensure the administration of impartial criminal justice.

The committee has suggested to Parliament to consider whether the administration of justice, of public order and enforcement of criminal law should not be transferred to the Concurrent List. The committee is also of the view that it is the duty of a State Governor to act as a guardian of the Constitution and to dismiss a Ministry pursuing a course of action in violation of the law of the land and, if necessary to dissolve the legislature and order fresh elections. If on the dismissal of a Ministry or at the end of the term of the Presidential rule no Ministry could be found to form a stable Government for any reason whatsoever or if the Ministry so formed should pursue policies in violation of the law of the land, the Presidential rule should again be imposed and continued for the full term of five years after making constitutional amendment to the effect. The committee thinks that it is the duty of the Union Government to hold an inquiry into the allegations of misrule whenever made and to take appropriate action by the issuance of directions and if necessary to impose Presidential rule.

Firing by Police

Kerala Committee's Recommendations

The Police Reorganization Committee which was appointed by the former Communist Government of Kerala and which was composed of Mr. N. C. Chatterjee as chairman and Mr. S. M. Kumarmangalam, Mr. S. Guruswami (President of the All-India Railwaymen's Federation) and Mr. P. N. Krishna Pillai (a former Labour Commissioner of Kerala) as members, has presented its report, which is unanimous. The committee had been asked, among other things, to report as to whether the use of firearms by the police should be totally excluded, and, if not, to indicate the circumstances under which it should be allowed.

The committee has suggested that firearms should not be used for dispersing an unlawful assembly unless its action causes serious damage to public or private property or the crowd is armed with deadly weapons and there is clear and imminent danger of those weapons being used.

The use of firearms, in the view of the committee, cannot also be avoided if there are two contending groups who adopt such an aggressive attitude to each other that a riot is inevitable if they are not immediately dispersed.

At the same time, the committee has recommended that the police detailed for duties in connexion with the prevention of public disorder should be armed only with 400 muskets as these are less deadly than 303 rifles.

Where the use of firearms results in loss of life, the committee has recommended that a judicial inquiry, if possible by a High Court judge, should be instituted.

On the control of large assemblies by the police, the committee has expressed the view that greater use should be made of mounted police. In its view it is not necessary to make special provision for the banning of the carrying of sticks or other weapons in processions as the existing provisions in law are adequate to enable preventive action to be taken where feelings run high and clashes are likely to occur.

Picketing by lying down should be handled firmly by arrests and removal; kid-glove handling of such situations is looked upon as weakness and induces repetition of violations of law, the committee says.

The committee is not in favour of the use of coloured water or water under pressure for dispersal of unlawful assemblies. But, it says, use of tear-gas is a well-known and effective method of mob dispersal.

It would be possible to disperse most unlawful assemblies by a cane-charge if tear-gas is not effective, the committee says. It adds that the lathi is a powerful weapon and should be resorted to only if a cane charge proves ineffective and the use of greater force is indicated.

The committee had sittings at Delhi, Madras, Ernakulam and Trivandrum and examined 77 witnesses, among whom were jurists, members of Parliament, former judges, trade unionists, industrialists and police officials. It also received 44 memoranda in reply to a questionnaire issued by it.

The committee went into questions like the role of the police in a Welfare State, in employer-employee relations, in the exercise of civil liberties and in the control of large assemblies besides the use of regulatory and restrictive powers under the Police Act.

U. P. SPECIAL POWERS ACT

Sec. 3 Declared Unconstitutional

SEQUEL TO DR. LOHIA'S PROSECUTION

Sec. 3 of the U. P. Special Powers Act, 1932, which makes it an offence to instigate any class of persons not to pay dues in the nature of rates and taxes to the Government, was declared unconstitutional by a judgment of the Supreme Court delivered on 21st January by Mr. Justice Subba Rao.

Dr. Ram Manohar Lohia, the General Secretary of the Socialist Party of India, was arrested at Farrukhabad on 4th July 1959, on the ground that he was instigating people not to pay to the Government the enhanced rates for irrigation. He was charge-sheeted under sec. 3 of the U. P. Special Powers Act, 1932. Dr. Lohia, however, filed a petition for a writ of habeas corpus in the High Court at Allahabad praying that he should be restored to

liberty as sec. 3 of the Act violated his fundamental right to freedom of speech.

The learned judges of the High Court by whom the case was heard differed in their conclusions, and so the matter was referred to a third judge. On the basis of the majority view the Court held that sec. 3 was invalid and contravened the provisions of Art. 19 (1) (a) of the Constitution which guaranteed the freedom of speech and expression. The State preferred an appeal from the decision to the Supreme Court.

The Advocate-General of U. P. submitted that Art. 19 (2) permitted the imposition of reasonable restrictions on the right of freedom of speech and expression, provided such restrictions were in the interest of public order. The words "in the interest of public order," according to the appellant, were wider in connotation than the words "for the maintenance of public order." Sec. 3 aimed at preventing persons from instigating others to break laws which imposed a liability to pay taxes, and this being in the interest of public order, the section was within the limit of permissible restrictions.

The Supreme Court examined the provisions of the Act and the impugned section. It rejected the contention that the term "public order" had a very wide connotation and stated that as used in the Constitution the term was "synonymous with public peace, safety and tranquillity." Further the Court observed that in order to be reasonable and in the "interest" of public order, a restriction must have a close and intimate connexion with public order and not a far-fetched or problematical one.

With regard to sec. 3 the Court felt that it was extremely wide and there was no proximate or even foreseeable connexion between the instigation sought to be punished and the public order which had to be protected. In consequence the Court held that the restriction was neither reasonable nor in public interest and as such sec. 3 infringed Art. 19 (1) (a) of the Constitution and was invalid. The appeal was accordingly dismissed.

SALES TAX

Sale of Goods on High Seas

SUPREME COURT'S RULING

The construction of Art. 286 of the Constitution and the scope of exemption from taxation by a law of a State came up for consideration by the Supreme Court in a writ petition by Messrs. G. V. Gokal and Co. (Private) Ltd. of Bombay challenging the levy of sales tax by the assistant collector of sales tax on a sale of sugar to the Government of India.

The petitioners had entered into two contracts with the Government of India for selling to them two consignments of sugar. When the consignments were still on the high seas and had not yet arrived at the Bombay harbour, the Government of India had received

the documents of title, including bills of lading pertaining to the sugar purchased by them and had paid the price to the petitioner.

The sales tax officer, Bombay, accepting the petitioners' claim for exemption from payment of tax on these sales on the ground that they had been effected in the course of import trade, had deducted the price of the said two sales from the petitioners' turn-over for the year 1954-55. But the assistant collector of sales tax later held that sales tax was payable in respect of these transactions. The petitioners challenged this order on the ground that the sales in question were not liable to sales tax as they took place in the course of import.

The Constitution Bench of the Supreme Court on 25th January agreed with the petitioners and ruled that a sale of goods effected in respect of goods before they had crossed the Customs barrier into India was a sale "in the course of import of the goods" within the meaning of Art. 286 of the Constitution and hence was not liable to sales tax under a State law. Art. 286 (1) (b) provides :

No law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place in the course of the import of the goods into, or export of the goods out of, the territory of India.

The Supreme Court considered the meaning of the terms "in the course of the import of goods" in the context of a sale of such goods. Mr. Justice Subba Rao, who delivered the judgment, thus summarized the legal position in respect of import sale :

1. The course of import of goods starts at a point when the goods cross the Customs barrier of the foreign country and ends at a point in the importing country after the goods cross the Customs barrier ;
2. The sale which occasions the import is a sale in the course of import ;
3. A purchase by an importer of goods when they are on the high seas by payment against shipping documents is also a purchase in the course of import ; and,
4. A sale by an importer of goods, after the property in the goods passed to him either after the receipt of the documents of title against payment or otherwise, to a third party by a similar process is also a sale in the course of import.

The sales in question, His Lordship held, were under the fourth principle and, therefore, they were sales that took place in the course of import of the goods into India.

His Lordship said that the property in goods passed to the Government of India when the shipping documents were delivered to them against payment. It followed that the sale of the goods by the petitioner to the Government of India took place when the goods were on the high seas. That being so, His Lordship held, the sales in question must be held to have taken place in the course of the import into India and therefore they would

be exempted from sales tax under Art. 286 (1) (b) of the Constitution.

The Supreme Court accordingly allowed the appeal and set aside the order of the assistant collector of sales tax.

MAHOMEDAN LAW OF MARRIAGE

Restitution of First Wife

DENIED IN BIGAMY APPEAL

One Mr. Itwari was married to Ashgari about the year 1950 and lived with her for some time. Then things went wrong and the wife ultimately left him to live with her parents but he took no steps to bring her back and married another woman. The first wife filed an application for maintenance under sec. 488, Cr. P. C. Thereupon the husband filed a suit against her for restitution of conjugal rights. The wife contested the suit, alleging that she had been turned out by her husband who had formed an illicit union with another woman whom he subsequently married. She alleged that he had beaten her, deprived her of her ornaments and thus caused her physical and mental pain. The trial court decreed the husband's suit, holding that the wife had failed to prove that she was really ill-treated, and that the husband had not been guilty of such cruelty as would disentitle him to a decree for restitution of conjugal rights against her. On appeal, the district judge, Rampur, reversed the finding of the trial court and dismissed the husband's suit with costs. He was of opinion that Itwari had filed the suit only as a counterblast to the wife's application for maintenance and took the view that the wife, who had been deserted and not taken care of by the husband for so many years, would not find peace with him after another woman had already been installed as his wife. Accordingly he allowed the wife's appeal. Against this decision Itwari went to the Allahabad High Court in second appeal.

The High Court on 17th January concurred in the opinion of the district judge that it would be inequitable to compel the first wife to live with Itwari. Mr. Justice Dhavan, in giving this ruling, said that Muslim Law as enforced in India had considered polygamy as an institution to be tolerated but not encouraged. Describing the husband's desire to have the consortium of both wives simultaneously as "conjugal greed," His Lordship said that the provision in the Koran sanctioning polygamy was a restrictive injunction which reduced the number of wives to four at a time and thus imposed a ceiling on conjugal greed which prevailed among the males on an extensive scale. It had not conferred upon the husband any fundamental right to compel the first to share his consortium with another woman in all circumstances.

A Muslim husband had the legal right to take a second wife even while his first marriage subsisted, but if he did so and then sought the assistance of the civil court to compel the first wife to live with him against her wishes and on pain of imprisonment, she was entitled to raise the question whether the court, as a court of equity, ought to compel her to submit to cohabitation with such a husband.

In that case the circumstances in which his second marriage took place were relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first, which disentitled him to any assistance from the courts of law, which also functioned as courts of equity.

In the prevailing social conditions in India, His Lordship observed, the very act of a Muslim husband taking a second wife during the subsistence of the first marriage would raise a presumption of cruelty to the first wife. The onus, therefore, would be on the husband who took a second wife to explain his action and prove that his conduct involved no insult or cruelty to the first wife. His Lordship added :

In the absence of cogent explanation, the court will hold under the present social conditions that the action of the husband in taking a second wife involved cruelty to the first, and that it would be inequitable for the court to compel her against her wishes to live with such a husband.

Today Muslim women move in society and it is impossible for any Indian husband with several wives to carry all of them around. He must select one among them to share his social life, thus making impartial treatment in polygamy virtually impossible under modern conditions. Formerly, a Muslim husband could bring a second wife into the household without necessarily meaning any insult or cruelty to the wife. Occasionally a second marriage took place with the consent or even at the suggestion of the first wife.

But social conditions and habits among Indian Mussalmans have changed considerably, and with it the conscience of the Muslim community. Today the importing of a second wife into the household ordinarily means a stinging insult to the first.

MINES AND MINERALS ACT

Centre's Order Quashed SUPREME COURT JUDGMENT

Mr. Shivaji Nathubhai had applied in September 1950 for the grant of mining leases and in December 1952 the State of Orissa granted him leases in respect of five areas. Another applicant applied to the Central Government for a review of this decision of the State Government under Rule 54 of the Mineral Concession Rules, 1949, framed

under the Mines and Minerals (Regulation and Development) Act. The Central Government, without giving any notice to Mr. Shivaji Nathubhai, reviewed the decision and directed the State of Orissa to grant him a lease in respect of two of the above areas. Mr. Shivaji Nathubhai thereupon filed a petition in the Punjab High Court under Art. 226 of the Constitution for quashing the order of the Central Government, but the petition was dismissed. An appeal was then filed in the Supreme Court.

The principal argument in support of the appeal was that the power of the Central Government to review a decision granting a lease was a quasi-judicial power and hence it could not be exercised without giving the parties affected a hearing. Counsel for the other applicant, however, argued that the power was administrative and it was not incumbent on the Central Government to give notice to the parties or to give them a hearing. In consequence it was submitted that the order was passed lawfully.

On an examination of the provisions of the Rules and the Act, the Supreme Court held on 19th January that the power of review exercised by the Central Government under the Mineral Concession Rules was a quasi-judicial power. Mr. Justice Wanchoo, who delivered the judgment, said :

It must be held that on the Rules and the Act, as they stood, at the relevant time, the Central Government was acting in a quasi-judicial capacity while deciding an application under Rule 54. As such it was incumbent upon it, before coming to a decision, to give a reasonable opportunity to the appellant, who was the other party, in the review applications whose rights were being affected, to represent his case. Since this had not been done the Court ruled that the order of the Central Government must be quashed.

The appeal was allowed.

BOMBAY LAND REQUISITION ACT

Requisition Order Set Aside NOT "A PUBLIC PURPOSE"

The Government of Bombay in March last passed an order requisitioning a motor garage "for a public purpose, namely, for the use of a public servant." The owner of the garage, Mr. Amriksingh Sahny, challenged the order in the Bombay High Court, contending that it was not made for a "public purpose" within the meaning of sec. 6 of the Bombay Land Requisition Act.

Mr. Justice K. K. Desai on 20th January accepted the petitioner's contention and set aside the order of requisition. His Lordship said that the expression "public servant" had not been defined in any statute except the Penal Code, where the definition included

jurymen, assessors and also arbitrators appointed by the court in a judicial proceeding. His Lordship said that the phrase "public servant" was extremely vague and indefinite and difficult of precise definition. Counsel for the State had submitted that a public servant meant "a person who renders public service, that is, any service which would supply a want felt by the public or any service which the public may be desirous of having on its own behalf."

Accepting this definition as true, His Lordship was of the view that the matter remained as indefinite and vague as one could imagine. It was not as if it could be suggested that all persons included in the phrase "public servant" rendered such service as could be held to be service in the general interest of the community, or service in which the community was directly or vitally concerned.

His Lordship observed that a poet or a scientist or an industrialist might be referred to as a public servant because he was rendering service towards the literary or scientific or industrial progress of the nation. But to say that requisition could be made for the use of such a public servant of premises under sec. 6 of the Act would appear to be contrary to the true purpose of the phrase "public purpose" as mentioned in sec. 6.

His Lordship was of the view that the phrase "public servant" was so vague and was capable of including so many persons belonging to such different categories that it was impossible to say that requisition "for the use of a public servant" must be held to be requisition for a public purpose.

His Lordship therefore held that the order of requisition as being for the use of a public servant was bad in law.

GRANT OF MOTOR PERMITS

Duty to Act Judicially

TRANSPORT TRIBUNAL'S ORDER QUASHED

Mr. Justice Tandon of the Allahabad High Court held on 20th January that since the act of the regional transport authority in granting or refusing to grant a stage carriage permit affected the right of an individual a duty was cast upon it to act judicially and its decision in granting or not granting a permit would thus be quasi-judicial.

His Lordship further held that the duty rested on the State transport tribunal to give notice to the petitioners to defend their appeal since the order which it also ultimately passed had the effect of affecting their rights. When a person whose permit was cancelled preferred an appeal as a consequence under clause (a) of sec. 64 of the Motor Vehicles Act and was not permitted to defend the appeal, the same being heard at his back

without notice to him, a fundamental error was committed by the State transport tribunal in hearing the appeal and its decision was contrary to the principles of natural justice.

Disposing of 16 writ petitions by Jagdish Chandra Jain, Rishikesh, and others. Mr. Justice Tandon found that an order of the State transport tribunal dated Oct. 27, 1958, setting aside the permits of the regional transport authority, Meerut, was illegal as it was passed at the back of the petitioners and without giving them an opportunity. It was accordingly quashed and the tribunal was directed to hear the appeal afresh and dispose of it in accordance with law after giving an opportunity to the petitioners.

NOTES

Denying Admission to the Bar

ON ACCOUNT OF COMMUNIST AFFILIATIONS

It will be recalled that the U. S. Supreme Court announced a momentous decision on this subject in the case of *Konigsberg v. State Bar of California* 353 U. S. 252 (1957). Mr. Raphael Konigsberg was denied admission to the bar in California in 1954 for refusing to answer questions concerning alleged membership in the Communist Party. He had denied, however, that he advocated violent overthrow of the government. He then preferred an appeal to the Supreme Court, which overruled the decision of the state court, holding that Mr. Konigsberg had presented ample evidence of good moral character. The Court said: "We recognize the importance of leaving states free to select their own bars, but it is equally important that states do not exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association." With the expression of this view, the Court remanded the case "for further proceedings not inconsistent with this opinion."

When the matter came back to the state, Mr. Konigsberg was again asked, at a rehearing before the Committee of Bar Examiners, questions concerning Communist affiliations, but this time was advised that refusal to answer would be regarded as relevant to his admissibility. Mr. Konigsberg refused to answer, and California's supreme court recently ruled, in a 4 to 2 decision, that refusal to answer questions on Communist Party membership was a valid basis for denying an applicant admission to the state bar. The court based its ruling on a section of the State Business and Professional Code which prohibits certification for admission to the bar of any person who advocates violent overthrow of the government. The majority opinion said:

To admit applicants who refuse to answer the committee's questions ... would nullify the

concededly valid legislative direction to the committee (i. e. the Committee of Bar Examiners).

Justices Roger Traynor and Raymond Peters took strong exception to the majority opinion in lengthy, separate dissents. The former said :

How many times does the issue of whether applicant possesses a good moral character and is a loyal citizen have to be tried? Those were the issues presented. Having sustained his burden as to those issues on what rational theory can it be held that the State Bar, at this late date, can offer a new and different excuse for denying certification?

When does this litigation come to an end? I had always thought that litigants were required to raise all relevant issues in one proceeding. I had assumed that parties cannot litigate their case piecemeal.

Inquiry on the issue of advocacy of the unlawful overthrow of the government is a greedy camel; it does not easily take its leave. It has a way of moving on into the domain of lawful economic and political belief, speech and activity.

The latter Judge said :

The only rules passed by the legislature provide that the applicant must be of good moral character and must not advocate forceful overthrow of the government. There is no rule about failing to answer. Here the so-called rule was adopted in the middle of a proceeding as an afterthought simply to justify the action of the Bar Committee in refusing to certify Konigsberg for admission. To sanction such a procedure is not only unfair but, in my opinion, a denial of due process and equal protection.

No Arraignment for Six Months

EUROPEAN POLICE INSPECTOR SENTENCED

A European police inspector, R. A. J. Pascoe, was sentenced on 6th January to six months' imprisonment at Nakuru in Kenya for wrongfully confining an African, Cheron Kiptere, at Eldama Ravine police station from May to November last year without bringing him before a court on a criminal charge. The prosecution case was that Pascoe, who was in charge of the station, arrested Kiptere on 5th May while investigating a murder and kept him in police custody for six months, until his release was ordered on 6th November, in contravention of the law which lays down that people arrested without a warrant should in normal circumstances be brought before a court within 24 hours or as soon as possible afterwards.

The inspector said he took Kiptere into custody after being shown the body of an African with stab wounds. Kiptere told him it was his brother and that he had stabbed him. Later Pascoe charged him with murder. Two days later Pascoe heard that his mother was dying from cancer in England and this caused him distress. He was in "rather a mess" mentally, and "things in the police station were not what they should have been."

Passing sentence, the magistrate said this was as grave a case of wrongful confinement as it was possible to imagine. He sympathised with Pascoe in his private grief. But he could not accept that this provided the slightest excuse for his failure to bring the prisoner before a court for five months after his mother's death.

Jury Panel Discriminatory

NEGRO'S CONVICTION SET ASIDE

On 6th January the Texas Court of Criminal Appeals quashed the conviction of one Mr. Isiah Stoer, a Negro, who had been found guilty of raping a white woman. The court took note of evidence produced by the defence that in spite of the fact that half the people of Harrison County, where the alleged offence took place, were Negroes, no member of that race had served on a grand jury in at least the last twenty years, and ruled that there had been racial discrimination in the selection of the jury that had indicted Mr. Stoer.

Protest against Apartheid

CHAPLAIN REFUSES TO PREACH

The first cricket Test match between England and South Africa will be played at Edgbaston (S. Africa) in June and the vicar of Edgbaston invited the Rev. Nicolas Stacey, Chaplain of Birmingham diocese and former Olympic runner, to preach at a sportsman's service to be held on the occasion. But Mr. Stacey has refused the invitation as a protest against the South African policy of apartheid. He has written to the vicar :

As a member of the national committee of the Campaign Against Racial Discrimination in Sport, I should feel bound to condemn the principles on which the selection of the South African cricket team is based as being neither Christian nor sporting.

I still hope that the tour will be cancelled (unless non-whites are considered for selection) or that it will be boycotted by spectators and players alike, as I believe that this would make sport-conscious South Africans realize how odious we consider their policies.