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# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

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The Government (of India) has some monolithic aspects that have caused a degree of concern. Some of the powers of detention voted to the Executive (in peacetime), for example, have exceeded even the most drastic of British (war-time) public order decrees.—The "New York Times," 29th May.

We must take care that in the name of the preservation of the State and stopping of subversive activities we may not stifle democracy.—D. Kailas Nath Katju, Governor of West Bengal, in a broadcast talk on 18th May.

A victory of communism would put an end to liberty but a victory over communism at the expense of liberty would be hollow indeed.—The "New York Times," 22nd June, in its comments on the Australian and South African bills for the outlawry of communism.

To stand between the individual and arbitrary action by the Government is the highest function of this court (the United States Supreme Court).—Mr. Justice Jackson in the case of Ellen Knauff.

## ARTICLES

### PREVENTIVE DETENTION ACT DECLARED VALID

On 19th May, in the closing days of the term, the Supreme Court of India, in considering the habeas corpus petition of Mr. A. K. Gopalan, a communist detenu of Madras, declared the Preventive Detention Act valid by a majority of 4 to 2, holding, however, by a unanimous decision, that sec. 14 of the Act, forbidding disclosure of grounds of detention to a court of law, to be invalid (though severable from the Act).

The main ground of attack taken by the petitioner against the constitutionality of the statute was that it infringed articles 19 and 21 of the constitution. It was contended on behalf of the petitioner that since freedom of movement was guaranteed by art. 19 (1) (d), subject only to "reasonable restrictions" being imposed on this freedom under art. 19 (5), no law authorizing preventive detention in the manner of the statute could be consti-

tutional. It was on this ground that a special bench of the Calcutta High Court had held that the statute was ultra vires of the constitution. But the Supreme Court rejected this interpretation of art. 19 (1) (d), only one judge, Mr. Justice Fazl Ali, supporting it. The majority of five ruled that preventive detention was outside the purview of art. 19, the rights enumerated therein being the rights of persons who have not been deprived of their personal liberty by being detained. In respect to art. 21, the argument urged was that the term "law" in the article which prohibited deprivation of personal liberty "except in accordance with the procedure established by law" must be interpreted to mean immutable principles of natural justice. But the majority of the Court did not accept this interpretation. It ruled that "law" in that context only meant a State-made law, the Chief Justice adding: "One may like that right (the right to Freedom of Person) to cover a larger area. But to give such a right is not the function of the Court; it is the function of the constitution."

In showing how the phrase "in accordance with the procedure established by law" had a very restricted meaning, the Chief Justice drew pointed attention to the fact that the constituent assembly, having in its earlier draft adopted the phraseology of the United States constitution, viz., "due process of law," later omitted it, just because (as explained by the Law Minister, Dr. Ambedkar,) its retention would impart to the courts the jurisdiction to decide whether any particular law passed by the legislature to restrict personal freedom fell within the term "due," i. e., was reasonable, or not. This previous history in connection with art. 21 puts it absolutely beyond doubt that the article was not intended by the constitution-makers to confer a justiciable right of personal liberty. And we for our part are not at all surprised at the Supreme Court's decision of this issue, however much we would like to have the right made justiciable as in the United States. But what does the decision import? In the words of the Chief Justice, "the constitution gives the legislature the final word to determine law." The courts of law are not competent to inquire into or pass on the question as to whether in the circumstances prevailing at the moment there was any justification for the enactment or enforcement of a law of preventive detention. All that they could do in deciding about the validity of such a law was to see whe-

ther it was in conformity with the procedure for preventive detention laid down in clauses 4 to 7 of art. 22.

So much of the Court's finding was, we believe, inevitable, but one might have expected that the question whether the actual provisions of the Preventive Detention Act, and particularly sec. 12 thereof, were in consonance with the above-mentioned clauses of the article would receive a more searching scrutiny than it did at the hands of the majority. Consideration of this question led the minority to the conclusion that sec. 12 of the Act was unconstitutional and therefore void. As a safeguard against abuse of the power of preventive detention, sub-clause (a) of clause 7 of art. 22 provides for a definition in a preventive detention law of "the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months . . . without obtaining the opinion of an Advisory Board." One would think that the class of persons here contemplated was somewhat like the class of persons "of hostile origin or associations" and the circumstances were like those in which a person to be detained has "been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation of or instigation of such acts," as was provided for in Regulation 18 B in England, so that at all events no one who did not belong to such a class and did not act in such circumstances would not be liable to detention on mere suspicion. Surely art. 22 (7) (a) must have been inserted in the constitution with the object of affording protection to the generality of persons, limiting as far as possible the kind of cases in which preventive detention could be ordered. But in fact the Preventive Detention Act does not seek to limit executive action by "classes" and "circumstances" at all.

Although the constitution intended the limitation to be both by "classes" and "circumstances" (and Mr. Justice Fazl Ali draw pointed attention to the word "and," saying that it was not to be "either of them"), the Chief Justice ruled on the point otherwise. He says: "It would be enough if either 'classes' of cases or 'circumstances' in which a person can be detained for a period longer than three months without the advice of the Advisory Board was specified." But the fact is that the Act specifies *neither* in sufficient particularity to be of any use as a safeguard. It is wholly silent about the "circumstances." Then what about the "class or classes" of cases? Is that at least specified? An answer to this question also must be a decisive NO. What the Act does is to take schedule 7 of the constitution demacrating the legislative powers of the Union and the States and to insert in sec. 3 (a) entry 9 of the Union List and entry 3 of the Concurrent List relating to preventive detention. These are the only classes of cases in which either the Union Parliament or the States legislatures can enact a law of preventive detention. They represent, as Mr. Justice Mahajan says in his dissenting judgment, "the ambit of legislative power" on

the subject of detention, and the law actually passed just reproduces all of them, without any kind of attempt at limitation such as art. 22 (7) (a) obviously intended.

But the mischief does not stop here. The law, in grouping all possible classes of cases of detention, denies an inquiry by the Advisory Board provided in art. 22 (4) to all these classes except one. Preventive detention is allowed by the constitution in six classes of cases altogether: detention ordered for reasons connected with (1) the defence of India, (2) the relations of India with foreign powers, (3) the security of India, (4) the security of a State, (5) the maintenance of public order in a State, and (6) the maintenance of supplies and services essential to the community. And the Advisory Board procedure laid down in art. 22 (4) has been dispensed with in the first five of them and retained only in the last sixth. As Mr. Justice Mahajan observes, "This construction (of the phrase "classes and circumstances" in clause 7, making it "co-extensive and co-terminous with the subjects of legislation") is in contravention of art. 22 and makes clause 4 of art. 22 to all intents and purposes nugatory. Such a construction of the clause would amount to the constitution saying in one breath that a law of preventive detention cannot provide for detention for a longer period than three months without reference to an Advisory Board and at the same breath and moment saying that Parliament, if it so chooses, can do so in respect of all or any of the subjects mentioned in the legislative field." "Such a classification," he concludes, depriving an exceedingly large proportion of the detenus, and in fact ALL the detenus of the Public Safety Acts régime, of the protection afforded by clause 4 of art. 22, "could not have been in the thoughts of the constitution-makers when clause 7 was introduced in art. 22. The section (sec. 12, which makes this classification,) is void."

Mr. Justice Fazl Ali fully supported this argument and the conclusion to which it inevitably leads. To reinforce these, he compared the Preventive Detention Act with Regulation 18 B of England in war-time and pointed out that it had "provided for an elaborate Advisory Board in all cases *without exception*." But this reasoning, which appears to us to be irrefragable, did not appeal to the majority of the judges and they held the section valid. They seemed to do so reluctantly, for the Chief Justice said: "The Act must be held valid notwithstanding that the Court may not fully approve of the procedure prescribed by the law." And Mr. Justice Mookherjee remarked that he did not think that section 12 had been framed "with regard to the object which the constitution had in view." Even then he did not feel able to rule that the section was ultra vires of the constitution. The constitution having given "unfettered power" to Parliament to make classification, it was open to Parliament, he thought, to adopt any method or principle it liked. Mr. Justice Das was of the same opinion. The constitution "did not recognise the absolute supremacy of the Court over the legislature as in the United States." It accepted the Court's supre-

macy only in respect to matters which were specifically made justiciable, and this particular matter was not one of them. Therefore, the people "had to accept the vagaries of the legislature." The "Hindu," in commenting on the majority judgment, points up the conclusion which flows from this reasoning. It says:

Parliament may, at the instance of the majority party which is running the government, pass laws which seriously affect one or other of the civil rights of the citizen. Then the question arises as to where he will go for relief. The answer in the case of the U. S. A. is the Supreme Court. In India the answer is: NOWHERE."

Nowhere is relief to be found in cases of deprivation of personal liberty. As if to mitigate the dire effect of such a reaction on the public mind, Mr. Justice Das went out of his proper sphere to remark: "Our protection against legislative tyranny, if any, lies, in the ultimate analysis, in a free and intelligent public opinion which must eventually assert itself." This has the look of a very soothing observation, but it is entirely out of place in a discussion of fundamental rights. In matters of policy, social, economic, or political, the majority opinion must prevail in a democracy. If the policy is wrong, the people must still allow it to go forward till they are able by democratic process to replace the rulers by those who will follow a sound policy. But is this also to apply to fundamental human rights, which by definition must be above the caprices of a fleeting majority? Why are these rights set apart in the constitution if not for the reason that they should be beyond the reach of a tyrannical majority, however overwhelmingly great it may happen to be? The fact of the matter is, and that is obviously the import of Mr. Das's remark, that PERSONAL LIBERTY IS NOT A FUNDAMENTAL RIGHT IN OUR CONSTITUTION in spite of the fact that it is included in the Fundamental Rights Part of the constitution. One of the judges asked the Attorney-General, in the course of the preliminary hearing of Mr. Gopalan's habeas corpus petition, why, if art. 21 places personal liberty at the mercy of the legislatures, it has found a place in the constitution among fundamental rights. Mr. Setalvad's answer was revealing: it has come to be there, he said, quite incidentally. The truth is that it has no right at all to be where it is. The Preventive Detention Act passed by the present Parliament is thoroughly vicious, more vicious than one might have imagined. A differently constituted Parliament might possibly redeem it of many of its vices. But whether personal liberty is wholly insecure as at present or becomes a little more secure or even completely secure, that will depend on the complexion of Parliament at the time. The constitution itself does nothing to assure personal liberty. This only brings home to us the truth of what the All-India Civil Liberties Council said in a resolution on articles 21 and 22 of the constitution: the resolution says that in our constitution personal liberty is only a statutory right; it is *not* a constitutional right.

And if Personal Liberty is not a fundamental right as properly understood, what is the practical good of the constitution seeking to guarantee any other fundamental rights which depend for their exercise upon personal liberty being first rendered secure against all unnecessary and unjust infringements?

#### DR. KUNZRU ON PREVENTIVE DETENTION

Pandit Hirday Nath Kunzru who, on account of his mission to South Africa, had no opportunity of taking part in the discussion in Parliament when the Preventive Detention Act was passed on 24th February, devoted a large part of the address which as President of the Servants of India Society he delivered on 12th June on the occasion of the Society's anniversary to a severe condemnation of the Act.

In a masterly analysis of the provisions of the Act, he showed how they were even more retrogressive than the corresponding provisions of the earlier provincial Public Safety Acts which the central Act has now superseded. He pointed out that under the new Act no person detained only for a period of three months would have his case considered by a tribunal, though under the former Acts cases of persons detained even for such a limited period had to be referred to an Advisory Council.

Persons detained for a longer period would also, Dr. Kunzru stated, be now labouring under disadvantages from which they did not suffer under the provincial laws. The central Act no doubt provides for Advisory Boards with "compulsory jurisdiction," to use the words of Mr. Justice Mahajan in the Gopalan case, but these can only inquire into the cases of persons who are detained with a view to preventing them from acting in any manner prejudicial to the maintenance of essential supplies and services. The provincial Acts had dealt with this matter in quite a different way. Persons engaged in activities of this kind could be ordered to act in a certain way or to refrain from doing certain things, and violations of the orders were punishable only after trial in a court. The persons concerned could not be detained without trial. The Preventive Detention Act, however, confers on the States governments a power of detaining such persons which they did not possess before. Thus the Act creates a new class of detenus and, what is more, confines the benefit of an inquiry by the Boards only to this class of detenus consisting of persons who formerly were not liable to detention at all.

Those who were so liable under the old Public Safety Acts could demand a reference of their cases to an independent investigating body which was variously called the Advisory Council, Advisory Tribunal, etc. But under the Preventive Detention Act the cases of such persons are now to be reviewed by the governments themselves in consultation with a judge or a retired judge or a person qualified to be appointed as a judge of a High Court. It is obvious that a review by government cannot have the same effectiveness as a review by an independent body of

inquiry. Dr. Kunzru declared that this provision for a governmental scrutiny was highly unsatisfactory, and stated that the least that should have been provided for in such cases was an independent review, the government being given the power to act contrary to the opinion of the reviewing authority and an obligation being laid upon the Home Ministry to inform Parliament periodically of the number of cases in which government had so acted.

Thus Mr. Kunzru's conclusion was that the Preventive Detention Act was even more reactionary than the Public Safety Acts which themselves were extremely unsatisfactory. The public had expected, he said, that the power given to Parliament by the constitution to pass central legislation was intended to be used and would be used for the purpose of restraining the powers of the States governments to detain persons without trial, but it is found that in fact the legislation passed by Parliament gives more power to the States governments than they previously possessed, and thus it comes about that the Preventive Detention Act is even more restrictive of the liberty of the citizen than the former Public Safety Acts.

Mr. Kunzru put the coping stone on this analysis by a final clinching observation. At the very least, we ought to be able to claim, he said, "that the safeguards inserted in a war-time regulation for detenus without trial in England (Defence Regulation 18 B of 1939) should be provided in a law to be used in India in peace-time."

The reader will have noticed that Mr. Kunzru has endorsed in every detail the criticism of the Preventive Detention Act made by the BULLETIN in its pages, and the whole civil liberty movement will feel greatly encouraged that one who occupies a position of such high eminence in public life as Mr. Kunzru, although he is not directly connected with the movement, takes on this important matter a stand which is the same as that taken by civil liberty organizations in the country.

### SUPPRESSING COMMUNISM

Because in India the executive Governments, taking advantage of an age-old law of the British régime, have been declaring the Communist Party as an unlawful association in province after province and State after State (and to their number has recently been added the province of Assam), it behooves us to pay close attention to the discussions that are taking place in two sister Commonwealth countries—Australia and South Africa—on bills which would have the effect of outlawing the Communist Party in their territory.

All liberal elements in both these countries are united in opposing these bills. The fire of attack is naturally concentrated on the main provision of the bills which takes power from the law courts and vests it in the executive to take action against any organization. Up-to-date freedom of association has been a recognised right in all Commonwealth communities to be forfeited only after

public judicial determination in the courts of law. But it would no longer be so when the bills are passed.

The Australian bill, e. g., defines an "unlawful association" as "the Australian Communist Party or a body of persons declared (by the Governor-General) to be an unlawful association under the Act." The very definition enables a majority party, without a judicial decision to support it, to impose a ban on another political party and deny it the traditional remedy of contesting the matter in the courts. It thus constitutes a grave departure from the practice so far followed. The Australian Government had previously passed legislation for curbing the activities of subversive and seditious organizations, but this legislation did not avoid legal processes as the present bill of the Menzies Government does. Under the Crimes Act no organization could be penalised until the High Court had in effect found it guilty of treasonable conspiracy. And the legislation enacted last year by the Chifley Government during the coal miners' strike, applicable to all offenders whether communists or not, also provided for the imposition of penalties only after due process of law.

The Communist Party is now to be denied all access to law courts; but other bodies with Communist Party affiliation, which the Governor-General is to be given power to declare as unlawful associations, is to have some semblance of access. If such a non-communist body is gazetted by executive act as a communist body, it may within 28 days apply to a single judge of the High Court to set aside the declaration. But the burden of proving that it is neither communist nor communist-influenced was, under the earlier version of the bill, to lie on the body concerned, if it was to satisfy the judge that the declaration in its case must be revoked. The Government was prepared later, in order to meet the Opposition half way to amend this provision; it was agreeable that the onus of proof would fall on the Crown if a "declared" body appealed against the declaration and gave evidence on oath that it was innocent of the charge.

But the Labour Party is not willing to accept this compromise. It insists that the onus of proving that an organization (or its member) is communist shall be on the Government in all circumstances; or, in other words, the communist nature of a "declared" body (or a person) shall be proved, *before* any action is taken, according to the normal process of law. It also insists on the provision for a jury. An amendment to this effect was moved in the Senate in which the Labour Party is still in a majority, and it was carried notwithstanding that the Government coalition resisted it. Thus a stalemate has been reached, and it is the intention of the Government, when Parliament meets again after three months, to refer the bill once again to the Senate and if the Senate is found to be as insistent as before on the ordinary legal procedure being made applicable in the matter of the onus of proof clause, the Government would have both houses of Parlia-

ment dissolved in order to make an appeal to the electorate.

The anti-communist bill of South Africa is equally wide in scope and violative of the fundamental principles of civil liberty. It specifically outlaws the Communist Party and empowers the Governor-General to outlaw by proclamation any other organization which professed to propagate, or was otherwise an organization for propagating, the principles of communism. It provides for a maximum penalty of ten years, and the only concession the Government was prepared to offer was that a committee of investigation consisting of three persons would be set up to examine all matters relating to individuals or organizations and that the powers conferred by the bill would be exercised only after consideration of a report by the committee, one of whose members must be a law adviser of the Justice Department and one a senior magistrate. The Opposition moved an amendment rejecting the measure, saying that it fails "to provide for full and effective access to the courts" and "makes intolerable inroads upon the freedom of the citizen," and "in seeking to combat Communist totalitarianism it creates Fascist despotism" (the very same objection which the International League of Human Rights and Mr. Fenner Brockway have taken to our Preventive Detention Act). The bill has passed both houses. It was adopted by the Senate at its third reading on 23rd June on the casting vote of the President. The Communist Party in its turn has dissolved itself and gone underground.

#### SEGREGATION BARRED IN U. S.

In three momentous decisions, which were all unanimous, the Supreme Court of the United States, on the last day of its term (5th June), struck down the barriers separating Negroes from whites in railway dining cars and educational institutions.

The Fourteenth Amendment, adopted in 1868 after the Civil War, conferred on the Negroes the full rights of citizenship and further specifically provided that no State shall "deny to any person within its jurisdiction the equal protection of the laws." But this "equal protection" clause was so interpreted by the Supreme Court as to sanction racial segregation with respect to the enjoyment of accommodation in common carriers like railways, buses and tramcars, in inns and restaurants, and in places of amusement and public schools. The equality granted by the clause, it was ruled, was political and not social equality, and in consequence it was held that equality was not denied by State statutes requiring, e. g., separate railway carriages for the white and coloured races [ *Plessy v. Ferguson* (1896) 163 U. S. 537 ] or prohibiting the teaching of white and Negro pupils in the same school [ *Berea College v. Kentucky* (1908) 211 U. S. 45 ]. In upholding such statutes the Court has, however, emphasized the matter of equality of accommodation if

they were to be regarded as reasonable and not as a subterfuge for the annoyance or oppression of the coloured race.

This "separate but equal" doctrine was not very rigidly observed either, with the result that the coloured people of the United States, like the depressed classes of India, were subjected, in social matters, not only to a brand of inferiority but to many substantial injustices. The recent decisions have at least made it clear that the "equal protection" mandate of the Fourteenth Amendment will not be satisfied unless the treatment given to the Negroes is in fact equal to that given to the whites in every respect, measured by objective tests to be rigorously applied. This itself will lead, it is widely believed, to a virtual end of segregation of the coloured race in the southern states.

In one case, Elmer W. Henderson, a Negro, was refused a seat in a Southern Railway dining car, except at a table reserved for his race and curtained from other passengers. "The denial of dining service to any passenger," said Mr. Justice Burton who delivered the judgment, "subjects him to a prohibited disadvantage," and is unconstitutional.

The two other cases related to segregation of Negroes in educational institutions, and the Chief Justice Mr. Vinson, who wrote the judgments, ruled that such segregation could not be practised. In one case a Negro of the name of Heman Marion Sweatt was refused admission to the law school of the all-white University of Texas and compelled to attend a Negro law school. The Chief Justice wrote: "We cannot find substantial equality offered white and Negro law students by the State... (Mr. Sweatt) may claim his full constitutional right—legal education equivalent to that offered by the State to students of other races... We hold that the equal protection clause of the Fourteenth Amendment requires that (Mr. Sweatt) be admitted to the University of Texas Law School."

The other case was similar. In it a Negro graduate student of the University of Oklahoma, G. W. McLaurin, had to sit in a separate class room for coloured students, was assigned to a table on the main library floor and allowed to use the cafeteria at the same time as other students, though at a designated table. Such restrictions, Mr. Vinson said, "set McLaurin apart" from other students, and thus he is "handicapped in his pursuit of effective graduate instruction (because these restrictions) impair and inhibit his ability to study, to engage in discussions and exchange views with other students... State-imposed restrictions which produce such inequalities cannot be sustained."

What if the State removed the restrictions and the white fellow-students imposed them, by refusing to mix with Negro students? The Chief Justice said: "This we think is irrelevant. There is a vast difference—a constitutional difference—between restrictions imposed by the

State which prohibit the intellectual commingling of students and the refusal of individuals to commingle where the State presents no such bar."

In the realm of strict judicial theory the Supreme Court decisions have perhaps made no great change. The 54-year old doctrine of "separate but equal" facilities current since the Plessy case still stands. In all these cases the Justice Department of the Federal Government had as *amicus curiae* filed strong anti-segregation briefs, inviting the Court to overrule this doctrine and to say in express terms that separate but equal facilities are repugnant to the constitution because the very fact of segregating coloured from white is a denial of coloured equality under the laws. But the Court did not feel it necessary to "re-examine" the doctrine. Although the doctrine has not been technically reversed, the effect of the decisions will, it is expected, give it in practice at not too long an interval of time the *coup de grâce* which it must receive eventually. In the meanwhile at any rate so much has been established, that "a community must be able to prove beyond all question that a segregated complainant receives educational (and other) services equivalent to those rendered the racial majority."

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## COMMENTS

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### An Anomaly Removed

We have referred before ( vide p. 90 of the BULLETIN ) to the anomaly created in provinces like Madras, Assam and East Punjab by substituting the provisions of the newly enacted Preventive Detention Act for the detention provisions in these provinces' Public Safety Acts. This substitution has removed in respect to all those who could be detained under these Acts the only safeguard the detenus had before of a review of their cases by an independent tribunal, viz., an Advisory Council, and replaced such a review by a reconsideration of the cases by government itself "in consultation with" a person possessing certain judicial qualifications.

But while persons in detention can no longer claim investigation of their cases by an independent body, those who are subjected to orders of minor restrictions on movements like internment can still claim investigation by an Advisory Council. For, in the provinces referred to above, the Public Safety Acts provide that even those against whom such orders are made shall be supplied with grounds for the orders, that the persons concerned shall be given an opportunity of making a representation, and that the grounds and the representation shall be referred to an Advisory Council. Thus in those provinces deprivation of personal liberty now goes without an inquiry by an outside body, while minor restrictions are subjected to it!

This ludicrous situation arises because the Preventive Detention Act is even more reactionary than the Public Safety Acts, and the only way to remove such a glaring

anomaly is for the latter Acts also to be brought down to the same low level as the former Act.

This Assam has now done. When by Act 12 of 1949 the province made provision for an Advisory Council, a review by the Council was made applicable as well to cases of internment, externment, etc., as to those of detention. Because now such a review will not be available in cases of detention under the Preventive Detention Act, the Assam Government thought, naturally enough, that it must not be made available in cases of restrictions of a much less grave nature, and has now passed an amending Act ( Act 21 of 1950 ) which deprives persons subjected to minor restrictions on movements of the advantage of having their cases considered by an Advisory Council which they enjoyed before.

We sympathise with the Assam government. By imposing on it a drastic law of preventive detention, the Union Government has indirectly compelled it to make the remaining provisions in its Public Safety Act equally retrograde. There is now no provision in this Act for an Advisory Council at all. Why should there be one, when even orders for detention are to be examined by the government itself?

We have no doubt that the Madras and East Punjab governments will also follow suit as soon as the anomaly resulting from the passing of the Preventive Detention Act comes to their notice. Supposing they fail to notice it, we are sure that the Nehru government, which is well aware of the anomaly, will order them to delete the provisions about the Advisory Council altogether, so that it may not itself appear in an unfavourable light in comparison with the provincial governments if they retained the provisions about the Advisory Council for the benefit of those who were subjected to restrictions on movements instead of detention. Even if these provisions were allowed to stand, however, there can be little doubt that there will hereafter be no cases to be referred to an Advisory Council. Which government which has its head on its shoulders will choose to issue an order for internment or externment and thereby put itself in the position of having to justify its action before an impartial body when it can take far stronger action of detaining the persons concerned and yet escape such an independent scrutiny? One may depend upon it, detention will hereafter be ordered even where minor restrictions would in the Government's own judgment have sufficed.

### Communalists' Political Activities

#### PROPOSAL FOR PROHIBITION ABANDONED

There was a sudden on-rush of anti-communal feeling in the Government of India after it was compelled to accept the partition of the country on communal lines, and in April, 1948, it got the following resolution passed through the constituent assembly:

Whereas it is essential for the proper functioning of democracy and the growth of national unity and

solidarity that communalism should be eliminated from Indian life, this Assembly is of opinion that no communal organisation which, by its constitution or by the exercise of discretionary power vested in any of its officers or organs, admits to or excludes from its membership persons on grounds of religion, race and caste, or any of them, should be permitted to engage in any activities other than those essential for the *bona fide* religious, cultural, social and educational needs of the community, and that all steps, legislative and administrative, necessary to prevent such activities should be taken.

Administrative action is of course being taken, and the ban imposed on the R. S. S. some time ago was in pursuance of it. But prohibition of the political activities of communal bodies by law which the resolution contemplated is now found by the Government to be impossible, and it has already circulated to the States governments that such legislative prohibition should no longer be attempted. This withdrawal of the mandate is due to the Government of India becoming aware that a law prohibiting political activities may come into conflict with the Fundamental Rights of the constitution, which in art. 19 (1) (c) has guaranteed the right "to form associations and unions," subject only to the saving in art. 19 (4) that the right can be subjected to "reasonable restrictions" imposed in the interests of public order and morality. What the Government of India fears is that a law restrictive of the right to freedom of association, if passed by the legislature, may be declared null and void by the High Courts and the Supreme Court on the ground that it does not fall within the ambit of art. 19 (4). Political activities conducted on narrow communal lines no right-minded person can approve. But the Government of India must remember that whatever is undesirable cannot be legally suppressed, and we congratulate it on its becoming alive at long last to this simple truth and deciding to refrain from action which, besides being illegal under the new constitution, would have been highly inexpedient and unjust too.

#### Wind up Press Advisory Committees

Sec. 7 (1) (c) of the East Punjab Public Safety Act, 1949, which gives power to the executive to clamp an order of pre-censorship on any newspaper if it is "satisfied that such action is necessary for the purpose of preventing or combating any activity prejudicial to the public safety or the maintenance of public order," was, in the judgment of Supreme Court in the case of the "Organizer" of Delhi, violative of the right to freedom of the press conferred by the constitution in art. 19 (1)(a) and therefore void in law. It appears that before serving the publisher of the "Organizer" with an order of pre-censorship the Delhi Administration had consulted the Central Press Advisory Committee and obtained its approval of the order. Mr. Justice Fazl Ali, in his dissenting judgment, laid great

stress on this fact to reinforce his general arguments supporting the conclusion that both the relevant section of the Punjab Act and the order made thereunder were valid. He said :

The order in question was passed by the Chief Commissioner (of Delhi) in consultation with the Central Press Advisory Committee, which is an independent body elected by the All-India Newspaper Editors' Conference and is composed of representatives of some of the leading papers such as the "Hindustan Times," the "Statesman," etc. I therefore hold that it is beyond the power of the Court to grant the relief claimed by the journal.

Mark the word "therefore" in this. The Judge might as well have added a Q. E. D. at the end!

This will explain why the All-India Civil Liberties Conference at its last session in April demanded not only repeal of the Press Emergency Powers Act, 1930, and the provisions relating to the press in all the various Public Safety Acts, but also total abolition of the Press Advisory Committees in all the States. One would think that such committees consisting of pressmen themselves would be more keen on preserving the freedom of the press than anyone else. But the experience unfortunately does not support such a pre-conception in their favour. And the action, in this case, of the central committee, which should be more enlightened than the provincial committees, proves that the committees often lend themselves to the destruction of a free press. Pre-censorship should ordinarily strike those connected with the press as an odious measure, but what surprises us is that these aristocrats of the press are wholly oblivious even of the elementary fact that under the new constitution pre-censorship is not permissible. Even if the committees were better constituted than they are, we would still not like them to stand even as protectors between the press and the judiciary. Let the press boldly face the consequences of what it conveys to its readers. If it misbehaves, it ought to suffer; and, certainly, if the governments misbehave, let not these committees be used as an instrument of suppression. We may say that the "Bombay Chronicle" recently supported our view.

The part of the resolution of the Civil Liberties Conference which relates to this subject is given below :

The executive action taken (by governments against the press) is sometimes defended on the ground that it is taken only after the Press Advisory Committee is consulted on the subject and its concurrence obtained as to the necessity of the action. But the machinery of the Press Advisory Committee, established under totally different conditions, has now become outmoded and should be discontinued. While such a body might be useful in persuading members who belong to it to exercise voluntary self-restraint in delicate situations, it is wholly unfit to sanction penal action

and no government should be enabled to shield itself behind it.

### Covenant Goes to UNESCO

The United Nations Human Rights Commission finished consideration of the draft Covenant on Human Rights on 18th May and passed it on to the Economic and Social Council for review and action. But when it sent the draft to the Council, it did not do so with a recommendation that it be adopted. The Commission conveyed the draft to the Council simply "for its consideration." No recommendation for adoption was made because the Commission was conscious of the fact that the draft gave complete satisfaction to nobody, and that a great many countries were desirous of revising several of its articles.

It was expected, when the draft left the Commission in such shape, that the Council, instead of taking any action on it, would refer it back to the Commission, perhaps with instructions to produce something more satisfactory. This expectation has, however, not been realised. For, on 5th July, the Council decided to "reconsider in its broad aspects" the controversial provisions in the draft and, after making any changes in these provisions, to submit it to the General Assembly in the September Session.

### France: A Semi-Police State

Criticism is being levelled at the Fourth Republic of France by newspapers like the "Manchester Guardian" that the Government is at present so violating the fundamental principles of French constitutional and penal law that it can no longer be called "un état de droit" or a government of law but has become a semi police State. One of the reasons on which this criticism is based is that innumerable arrests are made and "terms of preventive imprisonment inflicted on people who have been forced to wait months and years in gaol." Such preventive detention is obviously in gross violation of an essential principle of French criminal procedure, viz., habeas corpus, according to which "nobody can be arbitrarily arrested, detained, or exiled" (articles 9 and 10 of the "Déclaration des Droits" or the famous Déclaration of the Rights of Man of 1789).

## NOTES

### Organising Secretary's Tour

Mr. K. G. Sivaswamy, Organising Secretary of the All-India Civil Liberties Council, has submitted to the Council a report of the work done by him in May and June, which shows that he was very active in the cause of civil liberty. In May he visited the district of Tinnevely in Madras State to investigate the complaints he had received from certain villages that sec. 144 of the Cr. P. C. was widely enforced there. On inquiry he found that the section was invariably being applied against

tenants and in favour of landholders. He drew up a report on the subject and presented it to the officers concerned, asking them to remedy the tenants' grievances.

In the middle of June he paid a visit to Nagpur and had preliminary meetings with a number of friends with a view to forming a Civil Liberties Union for the State of Madhya Pradesh.

He then proceeded to Hyderabad, where he addressed a meeting of the newly formed Civil Liberties Union for that State, explaining to the meeting the lines on which A.-I. C. L. C. carries on its work. The Union has adopted the constitution of the Bombay Civil Liberties Union for itself with a few minor modifications. A drive for the enlistment of members is now on in Hyderabad, and when it goes some way new office-bearers will be elected in place of those that were provisionally elected when the Union was formed.

At Hyderabad Mr. Sivaswamy brought to the notice of the Home Secretary of the State Government several cases of persons against whom detention orders or other restrictive orders were issued without, so far as Mr. Sivaswamy could find on inquiry, there being any justification for the orders. Among these cases were the following:

Mahomed Kasim and Gopal Reddy of Karimnagar Gopal and three other peasants of Kaknur (Mahboobnagar district); Pulipaka Rajam of Kothagudium, detained under the Preventive Detention Act;

Sidiramappa Herur of Tandur and Bajirao Patel of Gangapur interned in their towns;

Bejjanki Rajam and Besta Rajam of Kothagudium externed from the coal mines area;

Veeranna, a trade union worker, arrested at Warangal. ("Here the Congress workers used lathis and swords, and two fingers of a Hind Mazdoor Sabha worker were cut.")

The authorities have kindly agreed to institute an inquiry into all these cases.

### C. L. U. Activities

At a meeting of the executive of the Bombay Civil Liberties Union held on 29th June the following resolution was passed:

Resolved that the Government of Bombay be urged to release forthwith all persons detained without trial and to cancel without delay all orders restricting the personal liberty of citizens including externment and internment orders, especially in view of the fact that the general elections to the Parliament and to the State Legislatures are going to be held in the near future, so that these persons may be enabled to participate therein as free citizens.

The meeting also decided to hold a session of the provincial Civil Liberties Conference on 4th and 5th November next.

A meeting of the Provincial Organising Committee of the Punjab Civil Liberties Council was held at Jullundur



on 14th May, at which, besides adopting the constitution of the Council, it was decided to hold a provincial Civil Liberties Conference in winter at Ambala, with Mr. N. M. Joshi as President. The meeting has elected Pandit Haradatta Sharma of the Servants of India Society as Organising Secretary of the Punjab Civil Liberties Council.

There are complaints of a great deal of harassment by the police, the province having long earned a notoriety for illegal tyranny and corruption. The meeting above referred to brought these facts to the attention of Government and urged upon it the imperative necessity of appointing a strong representative committee for the purpose of making concrete suggestions for reform and reorganization of the administration of the police department, so that the police in the province "may become as efficient, useful and popular as the police in the advanced democracies of the world."

The "Tribune," the most widely circulated and highly respected newspaper of the province, has lent its weighty support to this demand for reform and also emphasized the need for taking early steps to remove all executive functions from those officials who administer justice.

At a conference held on 25th June in Madras under the auspices of the so-called People's Civil Liberties Union, which body has been formed by seceders from the Madras Civil Liberties Union affiliated to the All-India Civil Liberties Council, resolutions were passed urging repeal of the Preventive Detention Act and release of prisoners detained thereunder; cancellation of the ban on trade union organizations; cancellation of the Press Emergency Powers Act and orders prohibiting meetings and processions, etc.

#### Affiliation with International League

The May 1950 Bulletin of the International League for the Rights of Man has the following about the All-India Civil Liberties Council:

The All-India Civil Liberties Council, with headquarters at the Servants of India Society, Poona, was formally affiliated with the League in February. The All-India Council was formed at a national conference last summer and represents the revival of the Indian Civil Liberties Union, founded by Jawaharlal Nehru in the 1930's. The Council publishes a printed monthly BULLETIN, recent issues of which are mainly concerned with what the Council regards as a wholesale violation of civil rights in preventive detention of persons not charged with crimes, and held without the right to habeas corpus.

#### Publicity about Detention Cases

The All-India Civil Liberties Council requested the Home Ministry of the Government of India, in view of

the safeguard which wide publicity about detention cases affords, to publish a monthly return giving the number of detenus in all the States, with a break down of these figures according to para. (i), (ii) and (iii) of sec. 3 (1) (a) of the Preventive Detention Act under which the detenus were detained, and stating how many of the cases were reviewed by the Advisory Board and in how many of them the detention came to an end because the Advisory Board expressed an opinion to this effect. These suggestions, it will be recalled, were reproduced in the BULLETIN at p. 96. Although it is nearly two months since the A.-I. C. L. C. made such a request, the Home Ministry, we understand, has not yet informed the Council as to which of the suggestions it is prepared to adopt. The suggestions made will be acknowledged by all to be quite reasonable. They are in fact no other than those which were statutorily provided for in England in Regulation 18 B and carried out by the Government of that country throughout the period in which preventive detention was permissible in war-time. We may add that a provision has been inserted in the Suppression of Communism Act passed recently in South Africa throwing upon the Minister of Justice the obligation to report to Parliament, 14 days after the start of each session, on action taken under the Act, and to state in particular whether the Minister of Justice departed in any case from the recommendation of the Advisory Committee set up to advise the Minister in these matters. Our Home Minister will do well to accept the suggestions of A.-I. C. L. C., which has again written to the Minister requesting him to inform it of the action he proposes to take.

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## EXTERMENT PROVISIONS HELD VALID

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#### Dr. N. B. Khare's Extermment

On 26th May a full bench of the Supreme Court, by a majority of 3 to 2 (one judge being absent), held valid the order of externment passed against Dr. N. B. Khare, President of the All-India Hindu Mahasabha, and dismissed the plea made on his behalf that the section of the East Punjab Public Safety Act, 1949, under which the order was made was unconstitutional.

Dr. Khare went to Delhi on 1st April (when the Nehru-Liaqat Ali Khan negotiations for a pact on East and West Bengal were about to commence) to attend a meeting of the Working Committee of the Mahasabha, but he was served with an order by the District Magistrate of Delhi to leave the capital and to stay out of it for a period of three months under the Public Safety Act of East Punjab, which is in force in Delhi.

It will be remembered that a similar order passed against Modi under Bombay's Public Safety Act was on 14th April set aside by the Bombay High Court as *contrary*

to the constitutional rights conferred by the constitution. But this case is distinguished from Dr. Khare's case in that, while the Bombay Act does not provide for supplying the grounds for an order of externment or a representation being received from the person against whom the order is made and its being reviewed by an independent body, the East Punjab Act provides for such safeguards in some measure (vide p. 102 of the BULLETIN). The latter Act requires the authority making an order for externment to communicate the grounds of the order to the externed person and also provides, if the order is to remain in force for more than three months, that the externee "shall have a right of making a representation which shall be referred to the Advisory Tribunal." The question under adjudication therefore was whether, if the externment provisions of the Bombay Act are to be held invalid because they lacked any safeguards, the safeguards afforded in the East Punjab Act were sufficient to bring the externment provisions of the latter within the savings of clause 5 of art. 19 which allows "reasonable restrictions" to be imposed on the exercise of the right conferred by sub-clause (d) of clause 1 of the article "to move freely throughout the territory of India." The Chief Justice, and Mr. Justice Fazl Ali and Mr. Justice Patanjali Sastri expressed the opinion that they were, and Mr. Justice Mookherjee and Mr. Justice Mahajan said that they were not.

It was argued on behalf of Dr. Khare that, though under the Act an externee had to be given reasons for his being externed (the word "may" in the relevant section of the Act being interpreted to mean "shall"), he had no effective remedy if the externment was only for three months, a review by the Advisory Tribunal not being open to him in such cases, and such a state of things could not be said to be a reasonable restriction on his right to free movement. The Chief Justice, who delivered the majority judgment, rejected the argument. He referred to the analogy of article 22 in the constitution relating to preventive detention, and said that if the constitution provided no remedy to a man detained for three months, externment for three months without a remedy must be held to be but a reasonable restriction. But one may wonder whether the Supreme Court, which is bound to administer the detention provisions as they are, must follow that line in matters in which it is not so bound by the constitution. And if the analogy of preventive detention is to be followed, why should not the Court take into account the fact that, while art. 22 (7) (b) contemplates a maximum limit to the period of detention, sec. 4 (3) of the East Punjab Act provides no such limit to the duration of an externment order if made by the provincial government? Mr. Justice Mookherjee, Mr. Justice Mahajan concurring, made pointed mention in his dissenting judgment to this discrepancy; which according to him puts the East Punjab law outside the saving clause of art. 19, viz., clause 5.

A further question still remained, viz., whether, even if sec. 4 of the Act was constitutional, the particular order for externment made under it was valid in the sense that the restrictions imposed thereby were reasonable in the circumstances. The Chief Justice disposed of this question in a very summary way. In the grounds supplied to Dr. Khare it had been stated by the District Magistrate that Dr. Khare's activities, "since the recent disturbance between the two communities in East and West Bengal, have been particularly of a communal nature which excite hatred between the communities." What exactly these activities were and what effect they would have had upon "the public safety and the maintenance of public order" of Delhi was not so much as inquired into. It was enough for the Chief Justice that some grounds had been given. He felt that it was not within his competence to examine their sufficiency, because the section in question gave power to the authorities to take action when they were satisfied that such action was necessary. No doubt, as the Chief Justice says, the power given by the Act "was final," and "the decision was not open to review by the Court." But if this was true in the pre-constitution days when the law was enacted, must it be held to be true even after the constitution came into operation which provides for a fundamental right of free movement?

The subjective satisfaction of the detaining authority must be accepted even by the Supreme Court in cases in which the constitution itself has provided for it. But the constitution provides for subjective satisfaction nowhere in so far as externment orders are concerned. On the contrary, by enabling the Court to examine the reasonableness or otherwise of the restrictions imposed, the constitution has given it power to override the subjective satisfaction of the provincial authority in suitable cases. Why then should it not exercise it? We should have had no reason to quarrel with the Court if, after going into the grounds, it had found them to be adequate. But it just refused to go into them, relying upon their unimpugnability under the law, as it stands. The Supreme Court appears here to be strangely oblivious of the new power which the constitution has given it and the High Courts. A great deal of what was unimpugnable before the constitution came into effect has become definitely impugnable now.

If it were not so, why should the Bombay High Court have invalidated the externment order in the Mody case? Following the cue of the Supreme Court it should have said: "The Bombay Public Safety Act provides no kind of safeguards as some other Provincial Acts do in the matter of externment orders. The government wields uncontrolled power in this respect. This is very regrettable. But what can we do about it? It is not our function to make laws; that function belongs to the legislature. Our only function is to administer the laws as we find them. We cannot therefore deny validity to the order passed." But the High Court bethought itself of the new constitution and the power that it has

newly received from that organic law to throw a shield over citizens who are being unduly deprived of their liberty. We must confess to an uneasy feeling that in this particular case the Chief Justice temporarily forgot that the Supreme Court had acquired the power and had been entrusted with the duty of standing between the oppressor and the oppressed in a new field. There can be no meaning in a right being made justiciable if the legislature can curtail it at its will and the courts say that the legislature has the last word on the subject.

Mr. Justice Mookherjee, on the other hand, was aware of the new power. He denied that, "in deciding the reasonableness or otherwise of the restrictions," it is beyond our province to look into the circumstances under which or the manner in which the restrictions have been imposed. And his conclusion was (Mr. Justice Mahajan concurring) that "under sec. 13 (1) of the Indian constitution these provisions of the (East Punjab) Act became void and inoperative after the constitution came into force and, consequently, the order made by the District Magistrate in the present case could not stand."

## RESTRICTIONS ON PRESS IN SAFETY ACTS

### Declared Void by Supreme Court

#### "CROSS ROADS" AND "ORGANIZER" CASES

On the eve of recessing on 26th May the Supreme Court, by a majority of 5 to 1, declared the provisions in the Public Safety Acts of two States restricting the freedom of the press to be ultra vires of the constitution and quashed the orders issued by the States governments under these provisions.

The Madras Government had banned the entry of the "Cross Roads" (a communist weekly from Bombay) into the State of Madras under sec. 9 (1-A) of its Public Safety Act, and the Delhi Administration had imposed an order of pre-censorship on the "Organizer" (an R. S. S. weekly of Delhi) under sec. 7 (1) of the East Punjab Public Safety Act which applies to the State of Delhi as well as to that of East Punjab. The aggrieved newspapers obtained relief at the hands of the Supreme Court, Mr. Justice Patanjali Sastri being the spokesman of the majority in both cases.

The petitioners' case was simple: The constitution has guaranteed the right to freedom of the press in art. 19 (1) (a), and the exercise of the right can be made subject, under art. 19 (2), only to such laws restrictive of the right as relate to a matter "which undermines the security of, or tends to overthrow, the State." The relevant sections in the Public Safety Acts do not fall within art. 19 (2). They relate to "the securing of the public safety or the maintenance of public order." These terms are wider in scope than "the security of the State," and restrictions imposed in the interest of the

maintenance of public order, being naturally more comprehensive than those required by the security of the State, cannot be sustained as valid within the terms of art. 19 (2).

On this point it was argued on behalf of the governments concerned that "public order" was equivalent, or very nearly equivalent, to the "security of the State" and whatever restrictions could be allowed under the latter phrase would be allowable under the former also. But in reply it was pointed out by the petitioners that "public order" had, in the eye of the constitution, a much wider connotation than "security of the State," as was exemplified by the fact that while in defining the limits of the right to free assembly and the right to free association the constitution had used the words "public order" in clauses 3 and 4 of art. 19, it had used the words "security of the State" in defining the right to a free press, showing clearly that the exceptions allowed in the matter of the freedom of the press were much narrower and stricter than those allowed in the matter of freedom of assembly and freedom of association. On behalf of the Delhi Administration the Attorney-General advanced an ingenious argument (to which we have already referred at p. 99 in the last issue) purporting to show that "security of the State" had a much larger meaning than came into the minds of laymen. He said:

The word "State" used in art. 19 (2) included the Government and Parliament of India, the Government and legislature of each of the States and all other local authorities within the territory of India, and a small disturbance which might not have the effect of undermining the Government of India might conceivably lend to overthrow a local authority. Under such circumstances, the subject matter of legislation in the East Punjab Public Safety Act would fall within the description of "matter relating to the security of the State."

The majority of the Court rejected *in toto* the defence made by the governments and fully accepted the contentions of the petitioners. In the "Cross Roads" case, Mr. Patanjali Sastri said:

The constitution, in formulating the varying criteria for permissible legislation imposing restrictions on the fundamental rights enumerated in art. 19 (1) has placed in a distinct category those offences against public order which aim at undermining the security of the State or overthrowing it and made their prevention the sole justification for legislative abridgment of freedom of speech and expression; that is to say, nothing less than endangering the foundations of the State or threatening its overthrow could justify curtailment of the right to freedom of speech and expression, while the right of peaceable assembly and the right of association may be restricted under clauses 3 and 4 of art. 19 in the interests of public order which, in those clauses, includes the security of the State.

Mr. Sastri also referred to the deletion by the constituent assembly of the word "sedition" from clause 2 of what in the original draft of the constitution was art. 13 as another exception permitting restrictive laws and said :

This deletion shows that criticism of government exciting disaffection or bad faith towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of speech unless it is such as to undermine the security of the State.\*

His conclusion therefore was that :

Unless a law restricting freedom of speech and expression was directed solely against the undermining of the security of the State or the overthrow of it, such law could not fall within the reservation under clause 2 of article 19 although the restrictions which it sought to impose might have been conceived generally in the interest of public order. Hence section 9 (1—A) (of the Madras Public Safety Act) was void and unconstitutional and the order banning the "Cross Roads" was illegal.

The dissenting judge, Mr. Justice Fazl Ali, supported the governments' case. In his judgment in the "Organizer" case he observed :

That the prominence given to "public safety" in the title — East Punjab Public Safety Act — strongly suggested that the Act was intended to deal with serious cases of public disorder which affected public safety or the security of the State or cases in which owing to some kind of emergency or a grave situation having arisen even public disorders of comparatively small dimensions might have far-reaching effect on the security of the State. It was to be noted that the Act purported to provide special measures to ensure public safety and maintenance of public order.

His conclusion on this aspect of the case was:

Public disorders and disturbances of public tranquillity do undermine the security of the State and if the Act is a law aimed at preventing such disorders, it fulfils the requirement of the constitution.

A small point was sought to be made by the Advocate-General of Madras in the "Cross Roads" case that since the Madras Government had not restricted the publishers' freedom to publish what they liked but had only prohibited circulation of the paper in its territory, the prohibition did not restrict the freedom of the press at all. This argument was rejected by the majority of the Court. Mr Sastri said: "There can be no doubt that

\* In the preliminary hearing of the "Cross Roads" case the limited meaning attached to the expression "security of the State" drew from Mr. Justice Mahajan the remark: "That means sec. 99A of the Cr. P. C. will have to go." This section, which gives power to declare certain publications forfeited, runs as follows:

Where (a) any newspaper, or book as defined in the Press and Registration of Books Act, 1867, or (b) any document, wherever printed, appears to the Local Government to contain any seditious matter or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects, that is to say, any matter the publication of which is punishable under section 124A (or section 153A) of the Indian Penal Code, the Local Government may, by notification in the local official Gazette, stating the grounds of its opinion, declare every copy of issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to His Majesty....

freedom of speech and expression includes freedom of propagation of ideas, and that freedom is ensured by the freedom of circulation." In this connection he quoted the observation of a United States judge, viz., "Liberty of circulation is as essential to that freedom (freedom of the press) as the liberty of publication. Indeed, without circulation the publication would be of little value."

## HABEAS CORPUS PETITIONS

### Grounds for Detention

While upholding the constitutionality of the Preventive Detention Act, the Supreme Court declared invalid sec. 14 thereof, which forbade the courts to have placed before them the substance of the grounds of detention communicated to a detenu or the representation made by him, and which thus, in the words of Mr. Justice Mahajan, threw as it were "an iron curtain around the acts of the authority making the order of preventive detention." The iron curtain being removed, a number of petitions were filed in the High Courts and the Supreme Court, challenging no longer the constitutionality of the Act but challenging the sufficiency of the grounds supplied by the detaining authority so as to fulfil the requirements of sec. 7 thereof. It was complained that the grounds furnished were far too vague to give the detenu a real opportunity of making a representation against the detention order as required by the section, and many detenues obtained relief on this score.

But the scope of the jurisdiction which the Supreme Court's judgment (and now a formal excision of the section from the Act by a presidential ordinance) gives to the courts to examine the grounds of detention with a view to finding out whether the order for detention was justifiable or not must not be exaggerated. The Act, by sec. 3, gives power to the executive governments (and also to district magistrates, sub-divisional magistrates and commissioners of police) to order detention "if satisfied... that it is necessary so to do." The satisfaction, here contemplated, of the detaining authority remains subjective, no objective tests being capable of application by which justification for the order can be measured. All that the courts are competent to do under the Act is to look into the grounds with the object of seeing whether the detaining authority was or could have been satisfied in its own mind about the necessity of making the order, or whether its action could be regarded as bona fide, or whether the ancillary provisions in the Act about the detention order were observed. They can also see whether the grounds are specific enough to enable the detenu to make an effective representation against the order for detention.

This very nearly defines the scope of the jurisdiction which the courts have acquired by the Supreme Court's judgment. It is not within their competence to investigate and give a finding on the truth or otherwise of the allegations made against the detenu or sufficiency or insufficiency of the allegations if true. These they have to take on trust. Thus about the only cases in which they can now give relief are cases in which the detaining authority advances no grounds at all or mentions them in so loose and vague a manner as virtually to deprive the detenu of the right to make a representation conferred by clause 5 of art. 22.

It will be agreed that the authority left to the courts, even after the removal of the iron curtain, is exceedingly limited. In any case the Supreme Court has only restored to the courts the power which they had enjoyed before

under the Public Safety Acts and of which they were recently deprived by the Nehru government's Preventive Detention Act. And the courts can at best give only that kind of relief which they were able to give before February 1950. We have listened often enough in the past three years to confessions of utter helplessness from the courts to give substantial protection to persons unjustly deprived of their personal liberty, and we shall certainly have occasion to listen to such confessions again hereafter. Thus, while the deletion of sec. 14 is good in itself, let none of us expect too much from it.

#### MEHR SINGH ( Punjab )

The Supreme Court itself heard some habeas corpus applications in respect to the grounds communicated to the detenus. Among these was one from Mr. Mehr Singh of East Punjab. The grounds of detention given to him stated that he was an underground communist worker who carried on communist propaganda and distributed prejudicial leaflets. When the case came before the court for a preliminary hearing, Mr. Justice Mahajan, on hearing the grounds, said to the Advocate-General of East Punjab: "This is the same old formula. Why do you give vague grounds?" The Advocate-General tried to justify want of particularity in the grounds by an ingenious argument. He said that under sec. 7 of the Preventive Detention Act the government was not bound to give particulars. This is true enough. The section only requires the detaining authority to communicate to a detenu "the grounds on which the order has been made" and does not make specific mention, as for instance the East Punjab Public Safety Act did, of grounds and particulars. Fortunately the Supreme Court held that though "particulars" were not separately mentioned they were an integral part of the "grounds" and that the governments were bound to supply them to satisfy the requirements of the Act. "What sort of representation can the detenu make on the basis of these grounds?" asked Mr. Justice Patanjali Sastri. But the Advocate-General stuck to his guns. "I have already submitted to the Court," he said, "that no particulars are necessary." The result was that the Supreme Court ordered (26th May) Mr. Mehr Singh to be released for the reason that the grounds of detention supplied to him were "too vague and indefinite."

#### ISHAR DAS ( Punjab )

The case of Mr. Ishar Das was very similar. The charges against him were that he was a communist and criticised the government, and that he preached armed insurrection. On this latter point Mr. Justice Mahajan exclaimed: "Armed revolution without arms? This is mere imagination. I could have understood if the man had possessed arms. Your grounds are wholly vague." Again the Advocate-General repeated his plea. He submitted that so long as Government supplied the detenu with the grounds of detention, the requirements of the law were fulfilled, and that it was not incumbent on the detaining authority to give facts on which the grounds of detention were based. This the Court did not accept. Mr. Justice Mookherjee said: "It is your duty to give him proper grounds of detention to enable him to make a representation. If you don't, it is a dereliction of duty."

Another point arose in this case. Mr. Ishar Das, who was already in detention under the old Public Safety Act, was served with an order of detention under the Preventive Detention Act, but the grounds of detention were not communicated to him for 28 days after the new order had

been served on him, though the Preventive Detention Act requires (and so does clause 5 of art. 22 of the constitution) that they should be communicated "as early as may be" after detention. The Advocate-General explained that the delay had been caused in printing forms on which grounds of detention had to be given to about 400 detenus in the East Punjab State. On this Mr. Justice Mookherjee observed: "I believe you had to give the same stereotyped grounds of detention to 400 detenus?" When the Advocate-General suggested that the authorities had to apply their minds to each of these cases, Mr. Justice Mookherjee remarked: "Don't talk seriously that you had applied your minds! This detenu has been under detention for about two years."

Whether this application was admitted like that of Mr. Mehr Singh has not been reported in the press, unless one Charn Das, who was released with Mr. Mehr Singh, and for the same reason, viz., that the grounds of detention communicated to him were "too vague and indefinite," was this Mr. Ishar Das.

#### BISHAN CHAND SETH ( U. P. )

This case was decided in the Allahabad High Court. It was stated on behalf of the applicant, Secretary of the U. P. Hindu Mahasabha, that the grounds of detention furnished to him were not sufficiently precise and that on those grounds it was not necessary to order his detention.

Mr. Justice Sapru who heard the application referred in his judgment to the full bench decision in 1948 A. L. J. 491 in which it was laid down that the executive government was the judge of the sufficiency or otherwise of the reasons for the detention of a person, and said it was, however, incumbent on the court to see that the grounds and the particulars supplied to the applicant were not vague, indefinite or incomplete. It was incumbent on the authorities of the government to supply to the applicant sufficient information to enable him to make an effective representation that would go to prove his case that the detaining authority was wrong in its belief that his detention was necessary in the interest of public safety.

He then proceeded to examine the allegations made against the detenu and found that at least three of them did not come up to the standard laid down by the full bench. One further charge against the detenu was that he made a speech on 16th March before 250 persons, in which he claimed credit for the Mahasabha for the communal disturbances that had previously broken out in the rural parts of Shahjahanpur district and predicted a repetition of such disturbances in the city of Shahjahanpur with the help of the rural population of the district. His Lordship said: "I assume that Mr. Seth did make the speech he is alleged to have made, and if he did make it, obviously the ground stated in this part of the statement of the case against him by the government is a good ground."

The detenu was further alleged to have made a speech on 22nd March to the effect that the bloodshed that had taken place in Shahjahanpur district was only a small affair and more was to come. The Judge naturally expressed horror at such a sentiment. The question would naturally arise here whether the applicant had in fact made the remark attributed to him. On this point Mr. Sapru observed: It might be that Mr. Seth did not utter the words attributed to him. Into that question it was not open to him to enter. All that he had got to see was whether the grounds were of a sufficiently precise nature to enable Mr. Seth to make a representation to the detaining authority. He was not prepared to say that the detaining authority was wrong in placing the interpret-

ation on the facts supplied to him that Mr. Seth approved of the bloodshed that had taken place in Shahjahanpur district and other neighbouring areas. For that reason His Lordship thought that this was a sufficiently good ground for bringing him within the orbit of sec. 3 of the Preventive Detention Act.

The relief prayed for was not granted (5th June).

**PROF. OM PRAKASH KAHOL (Punjab)**

The charge against this applicant was of a very serious nature, viz., that he had been stating that for every Hindu killed many more Muslims should be killed. Mr. Justice D. Falshaw, Judge of the Punjab High Court, who heard his habeas corpus application, accepted the plea of the applicant that the grounds supplied to him were too general and did not specify acts or particular speeches complained of, and that these grounds did not indicate when and where, whether privately or on public platform he had made the statement attributed to him. The Judge examined every ground in succession and found that all of them were vague and indefinite, adding in respect to one of them that, as remarked by the counsel for the petitioner, it was "a masterpiece of vagueness."

The Advocate-General did not seriously attempt to repel the contention that the grounds were rather vague and indefinite, but suggested that the Court, instead of directing release of the applicant, might direct the government to supply the detenu with fresh grounds containing fuller particulars which would enable him to submit an effective representation. His argument was that it was not for the Court to go into the correctness or otherwise of the allegations made against the detenu in any case, and that if all that was necessary was (as if as a matter of formality) that the detenu should possess detailed particulars the Court might as well arrange to have them supplied hereafter.

His Lordship refused to follow this "novel" procedure involving what he characterised as "a danger to the liberty of the subject." He said:

In fact it seems to me that to adopt this course might serve as an encouragement to the authorities to supply only vague grounds of detention in the first instance and then to go on gradually supplying further detailed particulars as required by the Court, with the result that the detenu would be kept in detention, whether lawfully or unlawfully for quite a long period before validity of the order for his detention would be decided, though obviously questions of this kind ought to be decided as speedily as possible. . . . Under the circumstances I do not see it fit to adopt the course suggested by the learned Advocate-General and, holding that the grounds supplied to the detenu in the present case are too vague and indefinite to enable him to make an effective representation to the State Government and therefore holding that the order for detention is invalid, I order his immediate release. The judgment was delivered on 16th June.

**MOTI LAL (U. P.)**

Mr. Justice V. Bhargava of the Allahabad High Court heard the habeas corpus application in this case. The plea raised on behalf of the petitioner by his counsel Mr. Hamid Beg was that there could not be any satisfaction of the detaining authority that detention of Mr. Moti Lal was necessary, and it was argued that where there was some doubt about the correctness of the grounds

of detention it was competent for the court to see whether the grounds were correct and based on evidence or not. His Lordship said:

This argument advanced by Mr. Beg was ruled out by the language of sec. 3 of the Preventive Detention Act. This section gave the detaining authority power to detain a person if that authority was satisfied that it was necessary to do so for one of the purposes mentioned in that section. The law just required the satisfaction of the detaining authority, and it did not require the existence of facts and circumstances proving that the person detained was likely to act in a manner prejudicial to the maintenance of public order or so on. The difference lay in the fact that the Preventive Detention Act merely required satisfaction of the detaining authority and did not require the establishment of the fact that prejudicial acts were likely to be committed. Since only satisfaction of the detaining authority was needed, His Lordship said that the court in dealing with habeas corpus applications could also merely see whether there was satisfaction of the detaining authority and, as had been held in the case of *Rex v. Durga Das*, 1948 A. L. J. 491 by a full bench of this court, could further see that that satisfaction must be based on the consideration of the materials available to the detaining authority and must have been bona fide. It is not permissible for this court to import its own views and to sit in judgment over the opinion of the detaining authority to see whether the detention was justified or unjustified. The satisfaction has to be that of the detaining authority and not of the court, and if it was a bona fide satisfaction the court cannot enquire even though, in the opinion of the court, the satisfaction may have been incorrect.

Holding that the grounds supplied to the detenu did not lack the requisite definiteness, His Lordship dismissed the application (2nd June).

**AHMAD ALI (U. P.)**

The same Judge disposed of the habeas corpus application of this detenu (31st May). The charges against him were that he indulged in fiery speeches and thereafter went underground; that he held a secret meeting and criticised the government; that he had been issuing objectionable leaflets off and on; and that he organised a procession in defiance of an order not to do so under sec. 144, Cr. P. C. Besides holding that some of the grounds were vague, His Lordship was of the view that none of them could be a sufficient reason for the order of detention.

On the charge of spreading disaffection against the government he observed:

Spread of disaffection against a party government cannot be said to be a ground for inferring that public order would not be maintained. It is the right of every citizen in a democratic government to spread disaffection against a particular party government. This right is of course subject to the condition that the disaffection should not be so spread as to result in violence and there should be really no incitement to the use of violence or other illegitimate courses.

His Lordship concluded his judgment thus:

All the grounds taken together indicated that during a period of about two years the applicant had been carrying on propaganda against the party government and had been suggesting to the people to

overthrow it, but there was no allegation at all that the applicant had at any stage incited the people to overthrow the government by the use of violence, or any other illegal means.

The facts alleged in the grounds merely constitute the exercise of the legitimate right of a citizen and detention on such grounds cannot in any way be justified. The grounds are either vague, or are such as cannot reasonably lead any one to the inference that it is necessary to detain the applicant for the purpose of maintaining public peace. Consequently the detention of the applicant is not in accordance with law.

#### M. M. BASHIR (U. P.)

Another application for habeas corpus which was heard by the same Judge was that of Mr. M. M. Bashir of Aligarh. Of the several grounds urged on behalf of the applicant, His Lordship felt it necessary to examine only one, for on that ground alone he came to the conclusion that the applicant must be released.

In the order for detention passed by the district magistrate the period for which detention had been ordered was not mentioned, and the Judge accepted the petitioner's contention that this was not in accordance with law. It was urged on behalf of the government that, in the absence of any period being mentioned in the order, the maximum period of one year allowed under the Preventive Detention Act might be taken as the period for which he was to be detained. This argument His Lordship refused to accept. In the Indian Penal Code maximum punishment was prescribed for every offence but the court had all the same to say in every case what was the sentence appropriate in any particular case. Similarly, the district magistrate of Aligarh ought to have stated in the order itself for how long detention was to continue. On account of default in this matter His Lordship held that detention of the applicant was not in accordance with the procedure prescribed by law (20th June).

#### COMMUNISTS (Bombay)

A division bench of the Bombay High Court (the Chief Justice and Mr. Justice Gajendragadkar) ordered the release of a large batch of communists on 11th and 12th July. Some of them owed their release to the fact that the detaining authority had in the opinion of the Court no jurisdiction to make a detention order against them. Mr. Ghate, e. g., had originally been detained in 1948 by order of the Commissioner of Police under the Public Safety Act because he belonged to Bombay, but he was actually detained in Yeravda gaol (near Poona), and when, after the detention provisions of the Public Safety Act were deleted and the provisions of the Preventive Detention Act took effect in February 1950, the new order for detention was still signed by the Commissioner of Police although the latter had no longer jurisdiction over the detenu.

It was contended on behalf of the Government that under the Preventive Detention Act commissioners of police were given jurisdiction co-extensive with that of the Union Government and States governments. But this interpretation was rejected by the Court. Although territorial limits of jurisdiction were not specifically mentioned in the statute, it would obviously be "opposed to the fundamental principles on which the constitution was passed" for the Bombay government to issue an order of detention against a person living in the State of Madras, and by the same token it would be beyond the power of the Commis-

sioner of Police of Bombay to issue an order of detention against a person now living in Poona.

But in the case of some of these detenus there was another ground for release. When Mr. Ghate was served with a fresh order of detention in 1950, the materials on which this new order was based were the same as those which were before the detaining authority when the first order was made. It was particularly necessary to re-examine the case on the basis of fresh materials, because under the Public Safety Act a person could be detained even if only he had acted in the past in a prejudicial manner, but the Preventive Detention Act under which the new order of detention was made did not refer to the past acts of a suspected person. On this point urged on behalf of Mr. Ghate, Their Lordships observed:

There could be no doubt that as the new detention order was made on February 26, and as that order was put forward in support of the detention, the satisfaction must be arrived at at the date when the order was made. It was not sufficient that some other authority in 1948 thought that the detention was necessary.

The detaining authority must examine the materials afresh, and although the past activities of the detenus might afford a ground for detention, it must review the past activities in the context of the time at which the present order was made. The satisfaction which the law required was the satisfaction of the detaining authority when the order was made, and it was not open to the authority to fall back upon the satisfaction which was valid in 1948. Therefore, on this ground also the petitioners were entitled to succeed.

#### L. B. BHOPATKAR (Bombay)

The same bench of judges on 12th July set at liberty Mr. L. B. Bhopatkar, Mr. S. R. Date and Mr. G. V. Ketkar, Hindu Mahasabha leaders, detained in April last. The ground on which Mr. Bhopatkar was kept under custody was that he was an active Hindu Mahasabha leader and was engaged in a conspiracy to commit acts of violence against Ministers of Government. The Court found that the grounds were too vague. Their Lordships said:

The ground mentioned by the District Magistrate of Poona in support of his detention order were vague and could not stand. The grounds given were that "you were engaged in a conspiracy to commit acts of violence against Ministers of Government." Neither the place nor the time when the detenu was supposed to have entered into the conspiracy nor the nature of the acts which went to constitute the conspiracy had been mentioned.

Further, it was vaguely stated that the conspiracy was against Ministers of Government. There were several governments in the country, namely, the State Governments and Union Government, and the detenu did not know against Ministers of which Government he was supposed to have conspired. In Their Lordships' opinion, therefore, the grounds were vague, inexplicit and did not enable Mr. Bhopatkar to make a proper representation to Government.

The Court set aside the order for detention also on the ground that the detaining authority had obviously let itself be influenced by a consideration which was extraneous to the Preventive Detention Act, viz., that Mr. Bhopatkar was an active Hindu Mahasabha leader. The Mahasabha was a lawful organization and any person was entitled to be its member and hold its views. The Court observed:

The detaining authority could only consider matters which were germane to the Act and which fell within the ambit of the Act. An active member of an organization was a ground foreign to the Act, and as that ground had operated upon the mind of the District Magistrate, the order could not stand.

Against Mr. Date the ground advanced was that he was an active Hindu Mahasabha leader and was inciting Hindus against Muslims. In ordering his release the Court observed that the detention order could not stand as the grounds furnished were not particularised as they should have been.

#### V. D. SAVARKAR ( Bombay )

Mr. V. D. Savarkar, thrice President of the All-India Hindu Mahasabha, was also arrested with Messrs. Bhopatkar and Date and detained in April. The ground for his detention, like that of Mr. Date, was that he was inciting the Hindus against the Muslims. Mr. Savarkar had in a representation to Government denied the allegation and asked for an unconditional release but offered to abide by certain conditions if the Government insisted on them. When his habeas corpus petition came up for hearing in the High Court, the Chief Justice and Mr. Justice Gajendragadkar ordered his release on those conditions. One can only infer that if Mr. Savarkar had not in his representation sought conditional release he would, like Mr. Date, have been set at liberty unconditionally by the High Court, which is concerned only with law, and for the same reason, viz., that the ground supplied to Mr. Savarkar by the detaining authority lacked particulars.

Mr. D. V. Zolekar of Akola in Ahmednagar district was also released. The ground for his detention that was furnished to him was that he was likely to instigate the ryots to use violence against the Sawakars and Marwaris and seize their lands and property by force. It was urged on behalf of the petitioner that this was a ground not contemplated by sec. 7 of the Act. In Their Lordships' opinion, this contention was correct.

### MESSAGE FROM FENNER BROCKWAY

*The following message for the second session of the All-India Civil Liberties Conference was received from Mr. Fenner Brockway, M. P. :*

Those of us who have worked for the independence of India are disappointed that its Government has felt it necessary severely to limit civil liberties and particularly the freedoms of speech, writing and association. I know that the excuse for this is the menace of Communism, but the worst feature of Communism is the denial of democratic and personal liberties, and it is a surrender of principle to attempt to overcome an evil by adopting features of that very evil. Communism can be defeated in India, just as it can be defeated here in Britain, only by establishing a society where social justice is combined with liberty.

## REPORT OF THE All-India Civil Liberties Conference

Second Session : Patna, April, 1950

Besides recording all the resolutions passed at the Conference, the Report contains extracts from speeches of

**Sri Atul Chandra Gupta**, *President*,

**Sri Nageshwar Prasad** ( retired High Court Judge ),  
*Chairman of the Reception Committee*, and

**Sri Jayaprakash Narayan**, who inaugurated the Conference.

A Detailed Analysis of and Comment on the  
**Preventive Detention Act**,

which the Report contains, will be found of much practical help.

Messages condemnatory of the Act from

**The International League for the Rights of Man,**  
**The American Civil Liberties Union,**  
**The National Council for Civil Liberties**  
( Great Britain ),

**Mr. Fenner Brockway, M. P., and**

**Mr. M. N. Roy**

deserve to be treasured.

#### An Account of the Work

done by the All-India Civil Liberties Council is given in the Secretary's Report.

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**T'NAGAR, MADRAS 17.**



## Number of Detenus

AS ON 15TH JULY

The Home Ministry has informed the All-India Civil Liberties Council, in response to the latter's request, that the number of detenus in the various provinces was as follows on 15th July :

West Bengal	...	878
Madras	...	475
Bombay	...	381
Punjab	...	225
Assam	...	197
Bihar	...	105
Madhya Pradesh	...	104
Orissa	...	71
Uttar Pradesh	...	57

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2,493

In the province of Delhi there was one detenu. Similar figures for States in Part B and Part C, which are under the administrative control of the Ministry of States, are, it is said, not available in respect of the period ending 15th July.