Regd. No. B. 5681

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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

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

No 115

April 1959

Tibetans' Revolt Against China

As in the case of the Hungarian revolt against Soviet Russia, the revolt of the Tibetans against Red China has shown that Mr. Nehru cannot bring himself to denounce aggression, however brutal, committed by a Communist power. China is in law supposed to be entitled to exercise the rights of suzerainty over Tibet. In any other context Mr. Nehru would have said that this old-world concept of one country's suzerainty over another cannot be accepted in modern times which demand that the right of self-determination must be conceded to all nations and that China's status is really that of an occupation force by a colonial power, and that it is in fact aggression though in strict legal language it cannot be so described. In any case, Mr. Nehru would certainly have said that if a breach of the regional autonomy which the Chinese overlords have solemnly promised to Tibet takes place, such a breach would be an act of aggression, and it is the duty of all who would like the world to live in peace to strive to undo the wrong and at least to protest against it.

That Tibet's internal autonomy has been grossly broken admits of no doubt. China saw that Tibet was a feudal country still living in the middle ages and that she must be modernised. She accordingly sought to introduce "democratic reforms" there; she started communizing Tibet. Hundreds of young Tibetans were sent to China for indoctrination. Hordes of Chinese came to Tibet for the uplift of the Tibetans. But very little came of this: Tibetans would not give up their way of life, and under the Sino-Tibetan agreement China was required to let them go their way. The agreement lays down that the Chinese Government would not interfere with Tibet's political institutions and internal administration, and as for the contemplated reforms it was specifically provided that the Tibetan Government was to carry them out voluntarily "without interference from the Chinese Central Government." Yet the reforms were forced on the Tibetans when all forms of pressure proved to have failed. For some time the pace of reforms was slowed down and it was declared that the process of socialization of Tibet would be halted till 1963. But the apprehension of the Tibetans that their country is being absorbed by China has not abated. China was busy planting Chinese colonies in the area and it was felt that the mass migration of Chinese settlers was on such a scale that these would soon outnumber the indigenous population.

It is true that India is not in a position to do much to redress poor Tibetans' wrongs. If she were to deal with countries which have respect for world opinion, her intercession might have a chance of success. But, if nothing else, the Indian Government could at least condemn the outrage that is being perpetrated upon Tibet. It is its moral duty. The thoughts expressed by the "Indian Express" are uppermost in the minds of all Indians:

> If New Delhi could rightly condemn the Anglo-French aggression on Egypt, thereby castigating a fellow-member of the Commonwealth, what prevents it from raising its voice in protest against Peking's effort to dragoon the Tibetans into submission?
>
> If New Delhi can protest — and rightly protest — against South Africa's policy of apartheid against the African who enjoys no autonomy but is subject to the authority of Cape Town, and whose cause Indian spokesmen plead annually at the United Nations, how can it withhold protest against the naked and brutal aggression practised by the Chinese against the admittedly autonomous Tibetans? There can be only one explanation for this attitude. Mr. Nehru has one yardstick for some people and a different one for others.

The impact of China's action in Tibet on other Asian countries which, like India, have shaped their foreign policy on the basis of neutrality may be guaged from the comment of a Rangoon newspaper, "The Nation," which declared, after the rape of Tibet, in an article under the heading "No Time for Neutrality," that all Asians should condemn this "typically imperialist" suppression of autonomy.

———

PATTERN OF POLITICAL EVOLUTION IN A MIXED SOCIETY

AS DEVISED IN THE TERRITORIES OF CENTRAL AFRICA

As we have taken interest in the past in the independence of countries like Algeria and Cyprus as involving the most fundamental of human rights, self-determination, so we feel we should take interest in the question of independence as it is shaping up for the British Government to solve in Rhodesia and Nyasaland. The bloody clashes that took place last month in the possession of Nyasaland between black mobs and troops of the territory are going to be judicially inquired into as to the existence of a movement of violence and particularly a plot for the assassination of higher white officials there, but we may here deal with the larger problem of how best to meet the African nationalists' demand for freedom in these territories.

It is but natural that seeing that Ghana won sovereign independence in 1957 and Nigeria is about to attain the status of full adulthood among nations very soon, the peoples of the other African countries, Northern Rhodesia and Nyasaland, which are yet exceedingly backward in their progress towards self-government should feel that they too should advance quickly along that path, and in dealing with this movement in the right way British statesmanship will be tested in a way in which it has never been tested before. For here the problem is that of freeing a mixed society from control and not that of giving freedom to a homogeneous society as in Ghana and Nigeria. The transfer of power to multi-racial communities is far more difficult than such transfer to a country inhabited predominantly by one race. In Central Africa, however, in addition to the Africans who are indigenous to the land, a large European community has settled there, and it is to this immigrant community that the territories owe their economic development and also social advancement. It therefore considers itself to have a rightful claim to regard the country as its home, equally with the indigenous people. Such a plural society requires a different pattern of political structure, and it is because of this that Lord Home, Secretary of State for Commonwealth Relations, said recently that "the pattern of evolution in Central Africa is entirely different from anywhere else in the Commonwealth" and that "it is the greatest and most difficult adventure which we have yet undertaken in imperial history."

The solution which the British Government has devised for Central Africa is a federation of Southern Rhodesia as a self-governing colony with Northern Rhodesia and Nyasaland as protectorates still under the tutelage of the Colonial Office. This Central African Federation was formed in 1953 by way of an experiment, and it was intended that the political association of the three territories would develop ultimately into full membership of the Commonwealth, on condition that "the inhabitants of the territories so desire." In the meanwhile the British Government would encourage partnership between the two main races, so as to lead finally to the creation of a democratic society over the whole area which would be called upon to manage its own affairs without outside interference. Of this novel constitutional structure created in 1953 Professor Wheare, who was the British Government's constitutional adviser when the Federation was devised, has said that "it is an attempt to use federalism in order to provide a system of government for Europeans and Africans," and that "it will have been justified if it gives to Africans a sense of political justice, and if it makes them feel that they will not suffer by being associated with other territories in a federal government. Time alone will show whether a feeling of justice and security and prosperity does develop in the Federation. What is clear, however, is that those who framed the constitution took great care that safeguards for the interests of Africans were provided in the constitution. If, as the constitution is worked, Africans and Europeans can come to feel that they share in a common loyalty to Rhodesia and Nyasaland, while retaining, like the French and British in Canada, all those national or racial characteristics and common loyalties and sentiments and ways of life which they value tremendously, the Federation will have achieved not merely a success, but a unique success."

What led to the Federation being formed was recognition of the fact that the economies of all the three territories were complementary and inter-dependent, and there is no question that the territories have made a remarkable progress economically because of this closer association in economic matters. The closer political association was suggested by the likelihood that the most advanced of these territories, Southern Rhodesia, which had already attained the status of a self-governing colony in 1923, would link itself with the Union of South Africa and follow a policy of the colour bar which was the policy of the Union unless it was encouraged to look to Britain for its inspiration and to maintain British traditions of equal justice for all races. It is very important to bear in mind this overriding objective of British policy in bringing about a federation of territories which were at different stages of internal political development. The idea of a Federation was first conceived by the Labour Government for the purpose of extricating Southern Rhodesia from a union with its southern neighbour whose apartheid policy was so abhorrent to it. But the Labour Party insisted at the same time upon making arrangements in the constitution intended to prevent Africans of Northern Rhodesia and Nyasaland from coming under

the domination of the white settlers in Southern Rhodesia. The constitution of the Federation that was finally adopted, it must be conceded, did introduce adequate safeguards for the protection of African interests. First, it was provided that the Protectorate status of Northern Rhodesia and Nyasaland would be preserved, a status to which Africans of these territories attached much importance as entitling them to look to the Colonial Office as a means of saving themselves from the oppression of the European settlers. Secondly, in the division of functions between the Federal Government and the territorial Governments all those matters which most intimately affect the daily life of Africans would be within the authority of the territorial Governments, and the Federal Government would have no right to interfere with the management of such matters. Thirdly, security of land was specifically underwritten in the constitution in order to remove the fear of the indigenous population lest they might lose lands to the immigrant community. And, fourthly, limitations were imposed upon the power which the Federal Government could exercise even within its own demarcated sphere. This was done by adopting two novel constitutional devices: (1) by setting up an African Affairs Board which would examine all legislation proposed by the Federal Government from the standpoint of its possible effect upon the interests of the Africans so that if it found the legislation to be discriminatory it could recommend that the Imperial Government should veto it; and (2) by providing for a Minister for African interests in the Federal Government, a Minister who would be appointed and dismissed, not by the Federal Government, but by the Imperial Government and would thus owe allegiance to the latter.

The greatest safeguard of all was that the federal structure would be maintained provided the majority of the inhabitants of all the three territories desired that it should be continued, the underlying idea being that Africans would consent to Federation only when they were convinced that as a result of having more educational facilities, more experience of local government, greater representation in the territorial assemblies and the Federal Parliament, they were sufficiently equipped to hold their own alongside the Europeans, who at the present time are the dominant partners since they are more advanced than the Africans in every way, politically, economically and socially. But, however iron-clad may be the safeguards which the constitution provides, the Africans fear that they will remain but paper safeguards and that the Federal Government would become so powerful that the Imperial Government would in practice abdicate its obligations towards them and part with all real power to their oppressors. Indeed, the primary objective of the movement of the Nyasaland African leader, Dr. Hastings Banda, is secession from the Federation in order to get away from the clutches of the European settler community.

If any signs are forthcoming that the excesses of the white settlers could be checked, either by the Imperial Government exhibiting its firm determination to check them or by liberal Europeans and moderate African nationalists making common cause to hold the racially-minded Europeans in tight rein by means of creating at any rate a strong opposition in the territorial and Federal Legislatures, it is possible that a genuine racial partnership will have a chance of working itself out. And it is because the Northern Rhodesian elections held last month show that progress along this path is quite practicable that we now propose to deal with these elections. One can only wish that the success obtained by the liberal forces on this occasion would be the harbinger of greater successes to follow so that a partnership of Africans and Europeans in the government of this tract will build a bridge which will transcend race and colour.

Northern Rhodesian Election

For the first time in the protectorate's history, the constitution of Northern Rhodesia permits the direct election of Africans to the legislative council. Prior to 1948 non-whites were not represented by members of their own race. In 1948 two Africans were allowed to be elected through representative institutions, and in 1954 the number of African members so elected by indirect means was increased to four, as against 12 directly elected European members in a house of 27.

The constitution was amended in 1958, so as to enfranchise the Africans for the first time (formerly the franchise was restricted to British subjects, and now it is extended to British "protected persons," as most Africans are), and also to increase their representation in the council. The franchise is extremely complicated: it is organised on a two-tier system, ordinary and special, the property qualification for both franchises being the same. The ordinary franchise will mainly elect whites and the special mainly Africans. If it were provided that the special voters should elect only African members and the ordinary voters should elect only European members, it would have meant the introduction of a communal franchise, which the British Government was keen on avoiding; and if ordinary voters were allowed to take part in the election of Africans without any restriction, it would have meant that the Africans returned would mainly be the choice of white men rather than black, since the ordinary voters would far outnumber the special voters. For this reason, a limitation which operates both ways has been imposed. The "Economist" has thus described the limitation: "Just as the number of special votes will be restricted to one-third of the voting for 'ordinary' members, so the number of ordinary votes is to be restricted to one-third the votes for 'special' members." The effect of this common roll will be that

both whites and blacks will be able to exert a limited influence on the election of members in general and thus all candidates will, in course of time as the value of the vote comes to be appreciated, have to seek the votes of both races.

The franchise works out in this way: out of the 22 elective seats (8 will be appointive, the total strength of the council being 30), 14 will be ordinary or white members and eight non-whites. The total number of voters registered for the present election was 30,234, of whom 7,617 were Africans, the rest being Europeans. That in a territory whose African population is two millions and non-African some 60,000 the white voters should outnumber the black by 3 to 1 is hardly just, but it should be remembered that the number of black voters might easily have been four times as much as it was. They did not register partly because of a sufficient lack of civic consciousness and partly because of the boycott of the elections advocated by a break-away group of the territory's African National Congress.

That the council should as a result of the election be manned predominantly by Europeans was of course inevitable, but the most encouraging aspect of the election is that the extremists among the Europeans, whose domination Africans had good ground to fear, will not be able to have their own way; on the contrary there is good reason to believe that the moderate elements among the whites and blacks will keep them in check. The party of Sir Roy Welensky, Prime Minister of the Federation, the United Federal Party, which already controls Southern Rhodesia as well as the Federation, had set itself on winning at least 16 seats, so that it could dominate the government of Northen Rhodesia and make good its claim to achieve dominion status for the Federation at the constitutional discussions about the future of the Federation which are to take place next year. In the predominantly white urban constituencies the party had a tremendous success. It won all but one of the twelve urban seats for whites and it also won two urban seats that may be said to have been reserved for Africans. But the result of the election showed conclusively that it had no support of Africans, and this want of confidence on the part of the blacks must have convinced the British Government that the party cannot be trusted with the management of the Federation, whose very foundation is racial partnership between blacks and whites.

The most heartening thing in the election is the amount of support which the newly formed Central African Party has been able to secure. This party was founded by Mr. Garfield Todd, formerly Prime Minister of Southern Rhodesia. It stands for the principle that future policy must remove from each race the fear that any single race may dominate the others and that every citizen must have the right to progress politically, economically and socially, according to his abilities without distinction of colour, and Mr. Todd, a "Kaffir lover" as he is called, has shown by active work that he wishes to advance the interests of Africans to the utmost extent possible. He lost his premiership last year only because of his liberal racial views. He had opened the franchise to some 10,000 Africans. Only recently in a speech he called for a "massive and immediate" ending of the colour bar in the government sphere and for the implementation of partnership without delay. The North Rhodesian leader of this Central African party is Sir John Moffat, who resigned his seat as the Chairman of the African Affairs Board to join the party so that it may put forth its best effort to apply the brake of liberalism to the racial policies of Sir Roy. He successfully fought a key constituency himself and his party has won three more seats. And, what is more, it is estimated that he "should be able to gather a voting block of nine or more," of which Mr. Nkumbula, President of the African National Congress, will of course be one. The party will of course be in a minority, but it will be a strong opposition, strong enough at least to remove the fear that, whatever be the safeguards that the federal constitution provides for Africans, the pressure of the ruling European party will be such that the British Government will be unable to enforce them.

The United Federal Party had intended, by winning an absolute majority of seats in the election to demonstrate that it had attained a power to which the Imperial Government must yield. Sir Roy had personally campaigned for the return of at least 16 candidates of his party so that the party could take over the government of the territory. He had in fact held out an open threat that if his party was not allowed to have its own way it would embark on a policy of non-co-operation with a view to making the constitution unworkable. Of the eight appointive seats in the legislative council, six are to be filled by officials and two by non-officials nominated by the Governor, and he said at Lusaka: "It would be a very brave Governor who would overrule (the recommendation of the members of his party who have been elected). He would soon be looking for another job," meaning that he will have to nominate men of his choice. He had also hoped that by the success of his party in the election he would be able to dominate the executive council. The new constitution of Northern Rhodesia provides that the executive council shall consist of four ex-officio ministers, five un-official ministers and two assistant ministers, and that from the outset the Africans will be given two portfolios. Sir Roy had hoped that the two Africans to be appointed to the executive council would be those whom his party would recommend. But Mr. Lennox Boyd Secretary of State for the Colonies, had already made it clear that there shall at present be no chief minister in Northern Rhodesia, and that the Governor shall individually choose the ministers. And when it was known that Sir Roy's party was winning most of the European seats, he sent a dispatch emphasi-

zing that no matter which party won, Northern Rhodesia would continue to be subject to Colonial Office rule and executive power would continue to rest with the Governor, which means that the protectorate status of Northern Rhodesia would be preserved giving to the Africans the protection which that status implies and that the European settler population must not expect to secure control over African policies. This is the best portent now available that the Central African Party's counsels of reason will have due weight in the government of Northern Rhodesia and that the principle of racial partnership will survive the attacks of whites in that multi-racial society.

Parliamentary Privilege in Australia

The High Court's Decision

In the January issue, at p. v : 185, we referred to the Australian House of Representatives on 10th June 1955 adjudging two men connected with a provincial newspaper guilty of a serious breach of privilege and committing them to gaol for three months. That the men were indulging in a most vicious propaganda against a member of Parliament was admitted in all quarters of the House, but the exercise of a judicial power by a legislative body led to criticism, and Dr. Evatt, Leader of the Opposition, suggested on that occasion that while the power of commitment for contempt should be retained, as provided for in sec. 49 of the Commonwealth Constitution, procedures "in consonance with the essential principles of justice" under sec. 50, which authorizes Parliament to make rules "with respect to the mode in which its powers, privileges, and immunities may be exercised and upheld." Broadly, his suggestion was that the procedure in regard to contempt of Parliament (which, as the Bulletin of the International Commission of Jurists in its December 1958 number says, makes Parliament "at the same time both the prosecution and the *judex in sua causa*, whose verdict is not reviewable by a court of law") should be assimilated to that in regard to contempt of court by providing for an application for a preliminary order, a hearing by counsel and a right of appeal, so that if Parliament is to exercise a judicial function its approach should at least be judicial and that it should not be a judge in its own cause.

The case of these two men came up on habeas corpus petitions before the High Court of Australia, and because it has been cited by our Supreme Court in the "Searchlight" case (vide p. v : 191 of the BULLETIN), we propose to give here a summary of the High Court's judgment in the case (The Queen *v.* Richards 92 C. L. R. 157) delivered by Chief Justice Sir Owen Dixon (who, it may be remembered, was formerly Mediator between India and Pakistan in the Kashmir dispute) on 24th June 1955. (A petition for special leave of appeal from the High Court's judgment was made to the Privy Council, which dismissed the petition on 14th July 1955 on the ground that the High Court's judgment was "unimpeachable.") On the passing of a resolution by the House of Representatives to that effect the Speaker issued warrants to Chief Commissioner of Police (Richards) for committing the newsmen to custody in gaol for three months. The warrants were in a general form, stating the cause of commitment in general terms, viz., that the newsmen were "guilty of a serious breach of privilege;" they did not state any particular facts as a cause of commitment. The Chief Justice at the outset stated the law, about parliamentary privilege in England, as "finally established" by the Case of the Sheriff of Middlesex, 11 Ad. & E. 273 (1840), to be as follows:

> It is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.

The Court then went on to show that the same law was applicable in Australia by virtue of sec. 49 of the Commonwealth Constitution Act, which says that until Parliament declares its privileges, the privileges shall be those of the Commons House of Parliament of the United Kingdom, citing in support the Privy Council's opinion in Speaker of the Legislative Assembly of Victoria *v.* Glass, L. R. 3 P. C. App. 560 (1871). In that case the privileges of Victoria were decided to be "in effect" the same as those of the House of Commons, about which Lord Cairns said:

> Beyond all doubt, one of the privileges — and one of the most important privileges of House of Commons — is the privilege of committing for contempt; and incidental to that privilege, it has been well established in this country (that is, in the United Kingdom) that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant, stating that the commitment is for the House generally, without specifying what the character of that contempt is.

The Court held that that state of the English law applied under sec. 49 of the Constitution to the House of Representatives, to which were transferred the full powers and privileges of the House of Commons, and that an essential ingredient in those powers was "the protection from the examination of the conclusion of the House expressed by the warrant."

Thereafter the Court proceeded to consider one of the main contentions urged on behalf of the newspapermen, viz., that the Constitution of Australia provides for a separation of judicial and legislative powers, and that, that being the case, the exercise by Parliament of a judicial function in finding anyone guilty and punishing him was contrary to Chap. III of the Constitution which deals with the judiciary. The Court rejected the contention. It said:

> The general structure of this Constitution, meaning by that the fact that it is an instrument creating a constitution of a kind commonly described rigid, in which an excess of power means invalidity does not provide a sufficient ground for placing upon the express words of sec. 49 an artificial limitation. ...
>
> It is correct that the Constitution is based in its structure upon the separation of powers. It is true that the judicial power of the Commonwealth is reposed exclusively in the courts contemplated by Chap. III. It is further correct that it is a general

principle of construction that the legislative powers should not be interpreted as allowing of the creation of judicial powers or authorities in any body except the courts which are described by Chap. III of the Constitution. . . .

Throughout the course of English history there has been a tendency to regard these powers [the powers referred to in sec. 49, interpreted to include the power to commit for contempt] as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection. . . . They were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically — perhaps one might even say, scientifically — they belong to the judicial sphere.

But our decision is based upon the ground that a general view of the Constitution and the separation of powers is not a sufficient reason for giving to these words [the words of sec. 49], which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear.

The applications for the writs of habeas corpus were refused.

A DECLARATORY JUDGMENT TO OVERTURN A STATE LAW

"CLASS ACTION" BY A NEGRO AGAINST A DISCRIMINATORY STATUTE

A Tennessee statute provides for segregation on buses and other transportation facilities by requiring coloured passengers to seat themselves in the back portion of the vehicles. Mr. C. Z. Evers, a Negro resident of Memphis in that state, boarded a Memphis bus and took a seat at the front of the bus, just to test the constitutionality of the state law. The driver of the bus told him he must move to the rear, "stating that the law required it because of (his) colour." On Mr. Evers refusing to comply, two police officers boarded the bus and ordered him to go to the back of the bus. At that Mr. Evers got off. Subsequently, he brought an action in a federal district court seeking a declaration that the Tennessee statute was invalid and asking for an injunction against enforcement of the statute or any other method of state-enforced segregation on account of race on himself or others similarly situated on transportation facilities. After a hearing the three-judge district court dismissed the complaint, but did so without reaching the merits. It refused to enter a declaratory judgment, on the ground that no "actual controversy" within the intendment of the Declaratory Judgment Act had been shown in that Mr. Evers had ridden a bus in Memphis on only one occasion and had "boarded the bus for the purpose of instituting this litigation," and was thus not "representative of a class of coloured citizens who do use the buses in Memphis as a means of transportation." The Supreme Court on 15th December 1958 allowed the appeal, holding that the district court had erred in not proceeding to the merits, and remanded the case for further proceedings consistent with its opinion.

Under Art. 3 (2) of the Constitution, the jurisdiction of the United States Court is limited to "cases" and "controversies." "Controversies" are civil actions or suits; "cases" may be either civil or criminal. An essential requirement of a "case" or "controversy" is that there must be adverse litigants presenting an antagonistic assertion of rights. Justice Field, as a judge of a circuit court, said in a case [In re Pacific Railway Commission, 32 Fed. 241] in 1887 :

> The judicial Article of the Constitution mentions cases and controversies. The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter and includes only suits of a civil nature. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a "case." The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.

If a proceeding before a court is not a "case" or a "controversy" it is not judicial in character, and the court considers that it is without power to consider the matter. Thus, in Muskrat *v.* United States, 219 U. S. 346 (1911), the Supreme Court considered the question of its jurisdiction. In 1907, certain federal statutes, having been passed which affected the rights of the Charokee Indians in land allotted to them, Congress had passed an Act permitting suits to be brought in the Court of Claims to test the validity of those statutes, with a right of appeal to the Supreme Court. When an appeal was made to the Supreme Court, the tribunal held that it was not a case or controversy, because there were no adverse parties whose rights were to be settled, "but the proceedings were planned merely to get a determination as to the constitutionality of certain legislation" ("The Law of the American Constitution" by Charles K. Burdisk, p. 133).

The federal courts do not undertake an abstract determination of the validity of a statute on a hypothetical state of facts, and it is only those whose interests are directly affected by the enforcement of the statute who are considered to have a standing in the matter of questioning its constitutionality. Cooley says in his "Constitutional Limitations": "Nor will court listen to an objection made to the constitutionality of an Act by a party whose rights it does not affect and who has therefore no interest in defeating it" The statute is assumed to be valid until someone complains whose rights it invades. In the absence of an adverse proceeding, the Act is not void, but voidable only, and it follows, as a necessary legal inference from this position that this ground of voidance can be taken advantage of by those only who have a right to question the validity of the Act, and not by strangers. To this extent only is it necessary to go in order to secure the rights of all persons against an unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interfere.

Again the interests involved must be real and substantial in order that the controversy presented may be real and substantial. For instance, the interest of taxpayers in the general funds of the federal Treasury is insufficient to give them a standing in court to contest

the expenditure of public funds. It was said in Massachussetts *v.* Mellon, 262 U. S. 447 (1923):

> The party who invokes the (judicial) power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

It is only where the clash of interests is real and strong that the courts consider that the matter deserves a decision on the merits.

In the instant case of Evers *v.* Dwyer, the Supreme Court said in a per curiam opinion:

> Of course, the federal courts will not grant declaratory relief in instances where the record does not disclose an "actual controversy." ... The record [here] shows that the appellants intend to enforce this [Tennessee] statute until its unconstitutionality has been finally adjudicated. We do not believe that appellant, in order to demonstrate the existence of an "actual controversy" over the validity of the statute here challenged, was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to coloured passengers. A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability. That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant.

RIGHTS OF GOVERNMENT SERVANTS

The State's Right to Punish its Servants
FOR MISCONDUCT COMMITTED IN THEIR PRIVATE LIVES

One Mr. L. N. Pande, a qanungo of district Ballia, was suspended by the district magistrate on a report by the sub-divisional officer that he had entered the office of another qanungo at midnight in July 1957 and had molested the latter's wife. Pande filed a writ petition in the Allahabad High Court for quashing the order of suspension passed against him, on the ground that the State had no jurisdiction to punish him for acts concerning his private life and unconnected with his official duties.

Mr. Justice Dhawan dismissed the petition on 2nd April. He said:

> If the contention of the petitioner, that a Government servant is not answerable for misconduct committed in his private life is correct, the result would be that however reprehensible or abominable a Government servant's conduct in his private life may be, Government would be powerless to dispense with his services unless and until he commits a criminal offence or commits an act which is specifically prohibited by Government Servants' Conduct Rules. This would clothe Government servants with an immunity which would place the Government in a position worse than that of an ordinary employer.

The Court observed that Art. 311 of the Constitution did not restrict the power of the State to dispense with the services of any Government servant for conduct which it considered to be unbecoming or unworthy of an official of the State nor did it fetter the discretion of the State as to what type of conduct it shall consider sufficiently blameworthy to merit dismissal or removal. The State had been vested with absolute discretion in this respect. It could demand a certain standard of conduct from Government servants not only when performing their official duties but in their private life as well. For example, the State had the power to demand that no Government servant shall remarry during the lifetime of his first wife. It might also require its officials not to drink alcoholic liquors at official functions. The very fact that Government Servants' Conduct Rules contained injunction against lending and borrowing and restrictions on the acquisition and disposal of immovable property was proof of very wide powers of the Government in requiring a proper standard of conduct from Government servants even in their private life.

The ruling of the Court was that the State Government had the power, under Art. 310 of the Constitution, to dismiss or remove or otherwise punish a Government servant even for acts unconnected with his official duties if Government were of opinion that the act in question amounted to misconduct, was unbecoming or unworthy of a Government official or violated the written code of conduct, provided the Government complied with the provisions of Art. 311 and gave a reasonable opportunity to the official concerned to show cause against the action proposed to be taken against him.

CRIMINAL PROCEDURE CODE

Sec 479-A "Ill-Conceived, Ill-Drafted"

Mr. Justice Dhawan, of the Allahabad High Court on 1st April described sec. 479-A, Criminal Procedure Code, as an "ill-drafted and ill-conceived piece of draftsmanship ideally suited to cause the maximum headache to the courts who are under a duty to interpret and enforce it and thus give effect to the will of the legislature."

This section was inserted in the Cr. P. C. by an Act of 1955 with the object that cases of perjury should be dealt with promptly and without delay and that complaint should be filed by the judge who has the advantage of hearing the witness.

Mr. Justice Dhawan who had before him a case involving the legality of a complaint for perjury said that the section was calculated neither to expedite prosecutions for perjury nor to leave the last word as regards the decision to prosecute or not to prosecute with the trial court which heard the witnesses.

The provision for staying the prosecution of the perjurer if an appeal was filed against the judgment in the proceedings in which the offence was committed, had the effect of delaying the proceedings to such an extent as to make the law penalising perjury almost a farce. Instead of doing any good or effecting any reform in the law as it existed in 1955, it seemed to have made the position worse. One of the functions of the court would be to interpret this section in a manner which would prevent it from doing much harm and save it from being unconstitutional. Any attempt by the court to interpret this section so as to give effect to the purpose of the legislature was not likely to succeed in view of the mutually contradictory effects of the various parts of this section, Mr. Justice Dhawan said.

NOTES

Human Rights Court

With Supra-National Jurisdiction

On 5th May, during the tenth anniversary of the Council of Europe consisting of fifteen member states, the first international court for human rights will be installed to inquire into and dispose of any alleged violation of the European Convention for the Protection of Human Rights signed at Rome in 1950. If the court finds that any measure taken by a member state is in conflict with the obligations arising from the convention, it is to decide what is required in order to "afford just satisfaction to the injured party," and it is provided that "the judgment of the court shall be final" (vide p. iii: 260 of the BULLETIN). The court could not be set up until eight of the member states had accepted its jurisdiction, and since the required number is now forthcoming, the fifteen justices who constitute the court were elected last January by secret ballot by the Consultative Assembly of the Council of Europe. The justices elected include some of the greatest jurists, all of whom are specialists on the problems of human rights and fundamental liberties.

In the scheme of the European Convention for the Protection of Human Rights this court is the final appellate authority, the penultimate authority being the European Commission of Human Rights, whose jurisdiction has been accepted by all the member states of the Council of Europe except France. The commission itself marked a big step forward in the recognition of the international character of the problems of human rights, in that not only governments but individuals may go beyond their national courts to appeal to the commission. The chief goal of the commission is conciliation between interested parties, and if a friendly settlement cannot be made the commission sends the case either to the highest executive organ of the Council of Europe, its Committee of Ministers, made up of the foreign ministers of the member states or to the new court, according to the status of the case.

The court has competence to act for the eight states which have accepted its jurisdiction and each of these nations, under certain conditions, can have recourse to it against any of the others. The court can be approached directly by a state; an individual citizen can address it only through the European Commission of Human Rights, which first handles an individual case and then takes it to the court if in its opinion that appears necessary.

Court Bans Unidentified Informants

A Decision with Far-Reaching Effects

Recently the Supreme Court of California rendered a far-reaching decision in the San Francisco case of Priestly *v.* Superior Court, requiring the disclosure of undercover police informants in narcotics cases. It is confidently expected that the decision will result in greatly decreasing the number of illegal searches and seizures in that state.

Clyde M. Priestly was arrested in April 1957 without a warrant for possession of narcotics on information supplied by secret police informers. The only evidence offered to establish that the police had "probable cause" (within the meaning of the Fourth Amendment, which says that no warrants for searches "shall issue but upon probable cause") to arrest and search Priestly was the information received from two anonymous informants. By a 4 to 3 decision the supreme court of the state held that by denying Priestly the right to cross-examine the informants the search and seizure were illegal and the evidence seized inadmissible.

The court said it could not be determined if Priestly had been taken into custody with "probable cause" unless the tipster was identified, since the legality of the arrest depends upon the credibility of the information supplied to the police. Justice Traynor, who wrote the majority opinion, said:

> If the only evidence of guilt was illegally obtained, the defendant is held without reasonable or probable cause.
>
> If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search.
>
> Only by requiring the identity of the informer and giving the defendant a chance to present contrary evidence can the court fairly determine the issues.
>
> Such a requirement does not discourage the free flow of information to police officers or impede law enforcement.
>
> The effect of the requirement will be to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make a search.

Mr. A. L. Wirin, counsel of the American Civil Liberties Union, hailed the decision as "a long step in the right direction" and said it "gives meaning and reality to protection (afforded by the Fourth Amendment) against unreasonable searches and seizures."

Use of Illegally Obtained Evidence

EXCLUSIONARY RULE APPLIED IN A STATE TRIAL

The United States Court of Appeals in Washington recently decided that evidence seized illegally by state law enforcement officers might not be used in federal trials. This prohibition had formerly applied only to federal law enforcement officers. The exclusionary rule does not prevent the use of evidence unlawfully obtained by the state officers (Byars *v.* United States, 273 U. S. 28 [1927]).

The case in which the Court of Appeals so ruled involved a federal court conviction for larceny in the District of Columbia. One piece of evidence was some money found in a Maryland hotel where the defendant, Samuel J. Hanna, was arrested. The evidence was obtained by local police as a result of an illegal search and seizure.

In barring the use of the evidence in state trials, Judge Hastie quoted from the dissent of Supreme Court Justice Oliver Wendell Holmes, who said, in a 1928 wire-tapping case: "Government ought not to use evidence obtained ... by a criminal act." Judge Hastie went on to affirm that "the effectiveness of courts must always depend ... upon the respect which their processes command by reason of the integrity they reveal." Therefore, "the courts ... cannot ... play the ignoble

part by themselves permitting the use of unconstitutionally obtained evidence."

A Set-Back for Civil Rights

It will be recalled that the Justice Department of the U. S. Federal Government brought suits against the boards of registrars of two counties — the Terrell and Macon counties — in Alabama state, charging that the boards had for many years systematically denied voting rights to Negroes otherwise qualified to vote because of their race and asking permanent injunctions against the boards to prohibit alleged discrimination. The action was initiated under the Civil Rights Act of 1957 which states that "whenever any person has engaged . . . in any act or practice which may deprive any other person of [his right to vote] the Attorney General may institute for the United States . . . a civil action . . . for preventive relief, including an application for a permanent or temporary injunction."

The suit against the Macon county was dismissed by federal district judge Johnson on 6th March, the judge ruling that the Civil Rights Act did not give the Federal Government authority to sue states accused of violating the voting rights of Negroes. He said: "A reading of the legislative history of the Act impresses this court with the fact that if it had been mentioned that this Act authorized the United States to sue a state for preventive relief the Act would not have been passed." He declared that former Attorney General Brownell had told a Senate sub-committee studying the bill that the Justice Department's jurisdiction was limited to "commencing civil proceedings against individuals." Since there were no functioning members of the board of registrars (they had in the meanwhile resigned), no one was left, the judge said, who could be legally sued under the Act.

An appeal is going to be filed against the ruling.

ALL-INDIA CIVIL LIBERTIES COUNCIL

RESOLUTIONS OF WORKING COMMITTEE

REPORT OF THE LAW COMMISSION

The Working Committee of the All-India Civil Liberties Council passed the following Resolutions on the Report of the Law Commission at the Committee's meeting held in New Delhi on 14th March 1959 under the presidentship of Mr. N. C. Chatterji, Working President of the Council.

Writ Jurisdiction of High Courts

1. — The Working Committee of the All-India Civil Liberties Council notes with satisfaction that the Law Commission in its Fourteenth Report has recommended that the writ jurisdiction of the High Courts under Article 226 of the Constitution should not be restricted in any manner. In the opinion of the Working Committee, such jurisdiction is the only practical safeguard for the maintenance of fundamental rights and civil liberties. The unfortunate attitude on the part of the Executive to whittle down such jurisdiction would put civil liberties in great peril.

This Committee strongly endorses the recommendation of the Law Commission that steps should be immediately taken to remove the hardships imposed upon the citizens of India by reason of the unfortunate decision of the Supreme Court in the case of Election Commission v. Saka Venkata Rao (A. I. R. 1953 S. C. 210). That decision has tended to defeat to a large extent the very purpose of jurisdiction conferred by Article 226 of the Constitution, which is meant to enable any citizen to seek expeditious justice in respect of executive acts in violation of his rights within the State by an application to the High Court of his own State. It is extremely hard for a citizen, specially from distant States to come to the Punjab High Court in order to obtain relief against the Union of India or against the Election Commission or against the authorities functioning under the Central Government with their headquarters at Delhi.

2. — This Committee is definitely of the opinion that a target date should be fixed for the disposal of writ petitions under Article 226 and that the strength of the High Courts should be suitably increased wherever necessary to enable them deal with these writ cases.

3. — The Committee is of the opinion that the power or duty of the Supreme Court under Article 32 of the Constitution should not be fettered or restricted. No directives should be given to prevent the courts from granting interim orders or granting stay.

Administrative Tribunals

4.—The Committee is of the opinion that the French system of Droit Administratif or the constitution of a body like the Conseil d'Etat will not be suitable to Indian conditions. There is a growing feeling in the country that the citizens are not having the protection of law from the capricious exercise of arbitrary power by administrative or executive officers enjoying very wide authority. It is also felt that there are inadequate provisions of review of the decisions and failure to observe the rules of natural justice and that the time has come when fairness and justice should be observed in the administrative process as well as in the legal process. The Committee is of the opinion that this country should evolve a proper machinery suited to its needs in order to ensure the proper functioning of democracy and the maintenance of the Rule of Law as its basis. The adoption of a code like the U. S. A. Administrative Procedure Act of 1946 should be considered. The Law Commission has recommended the adoption of the suggestions made by Sir Patrick Spens' Committee in England. This Committee is of the opinion that having regard to the recent decisions which have greatly restricted the scope of judicial review in India, specially in service matters, Appellate Tribunals consisting of experienced civil servants and presided over by competent judges, should be established both at the Centre and in the States to deal with memorials and appeals of Government servants.

Appointment of Judges

5.—The Law Commission has recorded its finding that unsatisfactory appointments have been made to the High Courts of Judges on political, communal, regional and other extraneous grounds. The Commission has definitely recorded its opinion that this has resulted in the diminution of the outturn of work and has led to law's delays. It is regrettable that in spite of constitutional provisions the Chief Justices have yielded to political or ministerial influence. In the opinion of this Committee, Article 217 of the Constitution should be amended so as to provide that judges of a High Court should be appointed only on

the recommendation of the Chief Justice of that High Court. The Chief Minister of the State, who may be knowing nothing about the comparative legal attainments of the members of the legal profession, should not come into the picture at all.

6.—With regard to the proposed All-India Judicial Service, this Committee apprehends that political influence may again create impediments in securing judges of the proper calibre.

7. — This Committee notes with concern the considered verdict of the Law Commission that the best talents among the Judges of the High Courts in India have not found their way to the Supreme Court and that even in the appointment of the Judges of the highest tribunal in the country, which is the protector and guarantor of basic human liberties, communal and regional considerations and " executive influence exerted from the highest quarter " have been responsible for this situation. The Law Commission has found that the Supreme Court is not looked upon by the subordinate courts and by the public with the respect or reverence it is entitled to by its status. In the opinion of this Committee the selection of Judges of the Supreme Court should not be confined only to the Judges of the High Courts or to retired Judges. The time has come when recruitment should be made to the Supreme Court directly from the members of the Bar as well as from academic lawyers and jurists. The experience of advanced democratic countries like U. K. and U. S. A. proves that the Judges of the greatest eminence were recruited directly from the Bar. The Committee feels that unless suitable safeguards are imposed to prevent appointments on political or communal or regional or other extraneous grounds, the convention of appointing the senior-most Judge of the Supreme Court as the Chief Justice of India should not be interfered with.

8. — This Committee endorses the recommendation of the Law Commission that the Judges of the High Court should be barred from accepting any employment under the Government other than as Judges of the Supreme Court and that a retired Judge of the Supreme Court should be debarred from accepting further employment from Government except as provided in Article 123 of the Constitution. It is a matter of regret that although these salutary principles have been recommended by the Law Commission, one of its members who is a signatory to this Report has been appointed to a post under the Executive Government in direct violation of its recommendation.

Benches and Circuit Courts

9.—This Committee expresses its disapproval of the sweeping recommendation of the Law Commission with regard to the abolition of all Benches and Circuit Courts. This will create great hardship on the litigant public specially by the abolition of Benches or Circuit Courts which are functioning at Lucknow, Delhi, Gwalior, Indore and Nagpur and the same will be strongly resented by the citizens of the States concerned. The abolition or suspension of Benches at Jaipur and Trivandrum has led to a good deal of dissatisfaction among the citizens affected thereby.

Appeals to the Supreme Court

10. — This Committee is of the opinion that the jurisdiction of the Supreme Court under Article 136 of the Constitution should not in any way be curtailed either in taxation matters or in criminal cases. The Law Commission has approved of the pronouncement of the Supreme Court in Dhakeshwar Cotton Mills *v.* C. I. T., West Bengal (A. I. R. 1955 S. C. 65). This Committee is of the opinion that it is improper to suggest that the present practice of granting special leave under Article 136 in criminal cases is affecting the prestige of the High Courts. The practice adopted by the Supreme Court up till now has not lowered the prestige of the judiciary and every citizen in India feels that if serious injustice is done to him by any Court or Tribunal the same shall not be perpetuated and that the Supreme Court will give him redress in spite of all legal technicalities.

Separation of Judicial Functions

11. — The Report of the Law Commission should be implemented immediately and there should be no further delay in the separation of the Executive and the Judiciary in all States.

Statement about ownership and other particulars about the " Indian Civil Liberties Bulletin " magazine, as required under rule No 8 of the Registration of Newspapers (Central) Rules, 1956.

FORM IV (Rule No. 8)

1. *Place of Publication*	:	Servants of India Society, Poona 4.
2. *Periodicity of its Publication*	:	Monthly.
3. *Printer's Name*	:	K. G. Sharangpani.
Nationality	:	Indian
Address	:	Aryabhushan Press, 915/1 Shivajinagar, Poona 4.
4. *Publisher's Name*	:	R. G. Kakade, Asstt. Secretary, All-India Civil Liberties Council.
Nationality	:	Indian.
Address	:	Servants of India Society, Poona 4.
5. *Editor's Name*	:	R. G. Kakade, Asstt. Secretary, All-India Civil Liberties Council.
Nationality	:	Indian.
Address	:	Servants of India Society, Poona 4.
6. *Names and addresses of individuals who own the newspaper and partners or shareholders holding more than one per cent. of the total capital*	:	Does not arise.

I, R. G. Kakade, hereby declare that the particulars given above are true to the best of my knowledge and belief.

(Sd.) R. G. Kakade
Signature of Publisher.

Date 10-3-59

Printed by Mr. K. G. Sharangpani at the Aryabhushan Press, 915/1 Shivajinagar, Poona 4, and Published by Mr. R. G. Kakade, M. A., LL. B., Ph. D., at the Servants of India Society, Poona 4.