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PROTECTION OF FREE SPEECH IN THE VIEW OF MR. D. D. BASU

We tried to show last month how Mr. Durga Das Basu's treatment of Freedom of Person in the Journal of the International Commission of Jurists was faulty, tending to produce the utterly false impression that the protection of personal security as provided in the Indian Constitution was perfect. Our attempt this month will be to show that his treatment of the right to Freedom of Expression is equally faulty and that he presents much too favourable a picture of Art. 19 (2) which sets forth the limitations which can be imposed on the right of free speech and free press.

As the Constituent Assembly set about the right way in dealing with personal freedom but later had second thoughts about it and, eventually, completely devitalised Art. 21 by removing from it the most essential "due process" clause, so the Assembly started well in specifying in Art. 19 (2) only such restrictions on freedom of expression as are clearly necessary but later, in its capacity as Provisional Parliament, inserted three more restrictions, every one of which can be, as frankly admitted by the Prime Minister himself, excessive and the cumulative effect of which would be, as Dr. H. N. Kunzru asserted in Parliament (see p. v : 29 of the BULLETIN), to render the guarantee of free expression provided in Art. 19 (1) (1) altogether valueless. Mr. Basu himself declared in his "Commentary on the Constitution of India" that, in respect of this guarantee, the Constitution, even when the scope of restrictions had not been immeasurably expanded by amendment of Art. 19 (2), "does not hold out any substantial advance over the existing state of affairs." But, curiously enough, he appears to see nothing wrong with the constitutional provisions in this respect although the amended Art. 19 (2) adds restrictions all of which are capable of stifling a free discussion of public affairs.

Similarly, in his "Commentary," Mr. Basu is critical even of Art. 19 (2), as it originally stood, which permitted restrictions to be imposed only when the security of the State but not public order in its wider sense was imperilled, on the ground that, even so, it

would still make valid prior restraints on the the press, even in time of peace, if the restraints are required for reasons of security, though "censorship of the press in time of peace is something unimaginable either in England or in the United States in modern times;" he, therefore, finds fault with the unamended Article and suggests that it should have prohibited imposition of censorship in time of peace. But this critical spirit seems to have taken leave of him when he wrote the article for the Journal of the International Commission of Jurists, for though he had occasion to refer in this article to the Punjab Press Act of 1956, mainly for the purpose of vindicating the Government and the Supreme Court, he failed to mention that the Act provides for censorship of the press. It is true that Mr. Basu was led to the conclusion that the constitutional protection afforded to the right of free speech and free press, even before the scope of permissible restrictions had been enormously enlarged, was no better than before, when the Constitution provided no fundamental rights at all, because Art. 19 (2), as it then stood, practically barred judicial review of the propriety of the restrictions actually imposed, in the absence of the words "reasonable restrictions" later introduced in the Article. The insertion of these words is no doubt a great improvement, but it is more than counterbalanced by the addition of several other grounds of restriction expressed in loose and over-broad language — a fact which he does not take into consideration. For our part we would have preferred the earlier form of the Article, even without the improvement subsequently made, to the later form subjecting the right to freedom of expression to a dragnet of all kinds of restrictions. For there was hope that our Supreme Court would have given a preferred status to freedom of expression, as the United States Supreme Court has done under the doctrine laid down in *Thomas v. Collins*, 323 U. S. 516 (1944), that in cases involving interference with freedom of speech or press, the burden of proof that a law restricting such freedom was justified by some "clear and present danger" to the public security rests upon the Government and that until this burden is adequately discharged the presumption

will be against the validity of the law. Justice Rutledge, speaking for the Court, said in this case :

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.

For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to give the widest room for discussion, the narrowest range for its restriction.

* * * *

Mr. Basu makes light of the additional restrictions which are permitted to be imposed by the amendment in 1951 of Art. 19 (2). It is no doubt true that one of them, viz., "public order," finds a place in the permissible grounds of restriction in the International Covenant on Human Rights. But it must be remembered that, in framing the Covenant, which can become international law only if the member-states voluntarily accept it, the United Nations had to find a common denominator of fundamental human freedoms, and, as in the case of personal freedom, so in the case of freedom of expression it had constantly to water down its earlier version of the draft and be content with one that even the least progressive countries would agree to. Thus in the case of many civil rights the final outcome is not at all satisfactory. The earlier version of the Article dealing with the right to free expression was better; it authorized restrictions to be imposed on this right "only with regard to :

- (a) Matter which must remain secret in the vital interests of the State ;
- (b) Expressions which directly incite persons to alter by violence the system of government ;
- (c) Expressions which directly incite persons to commit criminal acts ;
- (d) Expressions which are obscene ;
- (e) Expressions injurious to the fair conduct of legal proceedings ;
- (f) Expressions about other persons which defame their reputations or are otherwise injurious to them without benefitting the public.

It will be seen that this omits "public order ;" and even the final version omits "friendly relations with foreign States," though India and several other Asian-African countries fought hard to insert it.

* * * *

But we regard the insertion of "public order" as a new head of restriction to be the most objectionable feature of the 1951 constitutional amendment. For the scope of the restriction is so comprehensive that it is fittingly described as a catch-all restriction. The Constituent Assembly had decided wisely that no restrictions in the interest of public order can be imposed on the right of free expression, which lies at the basis of a free society, unless they are required to prevent what can be described as undermining the State or its overthrow. In the United States it is left to the courts to determine, by a close examination of the circumstances in each particular case, what would fall within the proper field of freedom of expression and what would fall outside it. Mr. Justice Stone said in *Harrison v. Schaffner*, 312 U. S. 579 (1941) :

Drawing the line is a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind. . . . We leave it to further judicial decisions to determine precisely where the line shall be drawn.

But the Constituent Assembly drew the line between "public order" and "security of the State" — the differentiation in these two categories has been recognized in the Schedule enumerating legislative subjects — most admirably ; and, probably having Justice Stone's words in mind, our Supreme Court, in *Ramesh Thappar v. the State of Madras*, S. C. R. 594 (1950), said :

The Constitution thus requires a line to be drawn in the field of public order or tranquillity, marking off — maybe roughly — the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind.

And it ruled that "unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under cl. (2) of Art. 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order." It can easily be imagined how wide the scope of interference with free speech has become by authorizing restrictions to be imposed for the maintenance of public order.

Mr. Basu gives high praise to the Constitution-makers that, in providing for fundamental rights, they have formulated "definite limitations instead of leaving the courts to devise vague doctrines such as that of 'police

power' or that of 'due process' to combat the 'police power' itself" — an unnecessary and unmerited jibe at the American judiciary. But there is no "definiteness" or "precision" in the restrictions added to Art. 19 (2) in 1951. The Prime Minister and the Law Minister unreservedly admitted that the restrictions were extremely vague and imprecise, but they pleaded that the Article contained only what might be called enabling provisions stating the heads of restrictions, and though the language about the restrictions was too wide, the laws to be made under the Article would be couched in precise language, so that no excesses would result in applying the laws. It was at that time pointed out by critics like Dr. Kunzru and Dr. Syama Prasad Mookerjee that if the legislatures adopted legislation imposing restrictions far in excess of requirements the Constitution could afford no protection, since the words used therein empowering restrictions to be imposed were themselves too general. Nor could the courts give any relief since, because of the supposedly precise definition of limitations in the Constitution (as claimed by Mr. Basu), an elastic construction of the limitations such as the facts of the case might demand would also become impossible. Moreover, our subsequent experience is that legislatures in fact have, in devising restrictive measures, employed language just as broad and loose as the Constitution authorizes them to do. The result is that all the authorities concerned have helped to stultify the right to freedom of expression.

* * * *

One consequence of adding "public order" in general terms to the "security of the State" as a ground of restriction in Art. 19 (2) may here be considered, because it is particularly adverted to by Mr. Basu. The Constituent Assembly had deliberately deleted "sedition" as a basis for restricting freedom of expression from Art. 19 (2) as it had framed it, and consequently in cases like that of *Master Tara Singh v. the State*, 6 D.L.R. 82 (Simla) courts had decided that sec. 124, I. P. C., was not covered by Art. 19 (2). But since then "public order" in its wider connotation has been added to the Article and because of it, as Mr. Basu himself says, the law of sedition as defined in sec. 124-A may now be held valid. The exact words of Mr. Basu are: "The fact that the (Supreme) Court approves of the view taken in the Patna case [*Devi Soren v. State of Bihar*, A. I. R. 1954 Pat. 254, to the effect that "a law might, after the amendment (of 1951), validly impose restrictions on utterances which have a tendency to cause public disorder but which may not actually lead to a breach of public order"] suggest that the Supreme Court might uphold the validity of sec. 124-A, because the Patna High Court had held that provision to be covered by the expression 'in the interest of public order.'"

The supreme immediate advantage that has been claimed for the First Amendment to the United States Constitution is that it invalidated the English common

law rule that in cases of seditious libel "there was no need to prove any intention on the part of the defendant to produce disaffection or excite an insurrection." As Mr. Chafee says in "Free Speech in the United States":

The First Amendment was written by men to whom Wilkes and Junius were household words, who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, *without any incitement to law-breaking*, forever impossible in the United States of America.

We may here note the observations of Mr. Leo Kohn, that the Article in the Constitution of the Irish Free State relating to free speech and free press implies a restriction of the scope of seditious libel such as that in secs. 124-A and 153-A, I. P. C. He says:

In the light of its emphatic assertion of the freedom of expression of opinion an attempt "to bring into hatred or contempt or to excite disaffection" against the Government or "to promote feelings of ill-will and hostility between different classes of citizens," can hardly be held to be unlawful — as long as, in the opinion of a jury, it was not designed to produce actual violence.

One can hardly count the blessings which the amended Art. 19 (2) of our Constitution may bring us!

* * * *

There cannot possibly be a more effective refutation of the claim that India's Republican Constitution affords to free speech and press a protection even remotely resembling that which any democratic country's Constitution should afford than that a press law of the severest imaginable nature has been enacted in a State in India and that the highest judicial authority in the land has upheld its constitutional validity.

The law in question is the Punjab Special Powers (Press) Act. It is not a temporary piece of legislation designed to meet an emergency, but a permanent statute. This fact is particularly mentioned here because it has been found that the Supreme Court often takes a lenient view of a measure in considering its constitutionality if it is intended to last for a brief period of a year or two. The Act empowers the Executive (1) to impose pre-censorship on a newspaper, (2) to prohibit publication altogether, (3) to ban an outside newspaper's entry into the State, and to require a newspaper to publish matter of Government's choice. Can one conceive of a more barbarous press law than this? Of the four special powers it confers the least oppressive is probably the first concerning censorship; but the possibility of even this most inoffensive of these powers being exercised without a check from the judiciary moved Mr. Basu to exclaim — maybe in his unregenerate days — that, after all, post-Constitution freedom of the press is not any better than pre-Constitution freedom. Evidently he could not conceive that any democratic Government would prohibit

in advance publication of any matter. But under the Press Act the Punjab Government can do it and has done it, without the Supreme Court giving any relief to the newspaperers affected, in spite of the fact that the Court has been given authority to judge of the reasonableness of the restrictions that may be imposed on the press. And yet apparently to Mr. Basu the decision of the Court does not seem to be in any way exceptionable.

The Supreme Court in the case involving the Press Act — *Virendra v. State of Punjab* — in effect disclaimed the power that it had been given to look into the facts and see whether outright prohibition of publication was justified in the circumstances surrounding the prohibition. The Court seems to say: the Government was given power to prohibit publication with a view to preventing disturbance of communal harmony; the authorities on the spot alone can determine whether acute communal tension would arise because of the publication; who are we to judge of the propriety of the preventive action taken? The actual words used by the Court are:

Quick decision and swift action must be of the essence of those powers [conferred by the Act upon the Executive], and their exercise must, therefore, be left to the subjective satisfaction of the Government

charged with the duty of maintaining law and order. To make the exercise of these powers subject to judicial scrutiny will defeat the very purpose of the enactment.

If the State Government, or its delegate is satisfied that for the purpose of achieving the specified objects it is necessary to prohibit the publication of any matter relating to the "Save Hindi" agitation, then for the Court to say that so much restriction is not necessary to achieve these objects is only to substitute its satisfaction for that of the State Government or its delegate.

The Court hints that it would not have adopted a policy of self-abnegation that it has but would have exercised its supervisory authority if the Act, though itself permanent, had not set a limit of time—two months in this case—to the operation of the prohibitory order, or had allowed publication of all news or comment to be prohibited instead of some, or had not permitted the newspapers concerned to request the Government to reconsider—in its own discretion—the prohibitory order. Mr. Basu seems to think that these circumstances are sufficiently mitigating to wipe out the taint of unlimited executive control over newspapers and to render a press put in fetters and manacles by the Act a genuinely free press!

TIBET TO APPEAL TO THE UNITED NATIONS

After a week's deliberation with his Ministers and after prolonged consultations with international lawyers, the Dalai Lama has finally decided to appeal to the United Nations against the Rape of Tibet. He was impelled to take the decision by the thickening reports of the horrors that the Chinese are committing against Tibetans. He said at a press interview on 23rd August that 20,000 people were killed in Lhasa and its surrounding areas, while in other areas more than 60,000 Tibetans lost their lives fighting against the Chinese. A monk from the Sera Monastery who came to him recently told him that the Chinese captured the monastery and put out a large number of pamphlets bearing the forged seal of the monastery and the names of the heads of the monastery. These pamphlets urged the lamas and monks who had left in thousands (only 50 inmates had remained behind) to return to the monastery without fear and saying that the Chinese would treat them kindly and that everything would be normal. This misled some to return and they were subjected to ruthless torture.

Other reports received by him suggested that monks and lamas were made to work as road labourers. Monks were also forced to study Marx doctrine. Instead of religious and devotional songs they were made to sing Chinese patriotic songs and take part in community dances. Historic manuscripts were being removed to China.

With more Chinese than Tibetans now in his country complete extermination of the Tibetan race in its own home-land was in progress.

The Chinese appear to be out to crush the Tibetan people and, if necessary, to eliminate the Tibetan race altogether. Already deportations in thousands have taken place, followed by the arrival of Chinese soldiery and colonizers in even greater number.

Some idea of the change which has taken place in Tibet can be seen from the population transformation in Lhasa. Until a few months ago the Tibetans there totalled 50,000 and the Chinese were only 4,000. The ratio has been completely reversed.

Simultaneously the Chinese are routing out the established orders and have even sent back the Panchen Lama under surveillance to Shigatse having decided that they can no longer rely on the Tibetans for the attainment of their objectives.

Speaking to the Indian Council of World Affairs on 13th September, the Dalai Lama said:

Today, practically the whole of Tibet is under the complete domination of the Chinese forces. Dire consequences have followed. A reign of tyranny and oppression prevails over the whole country. Innocent men, women, and children have been massacred en masse and are being daily massacred to enable the Chinese authorities to achieve their objective of total extermination of

the Tibetan race. Crimes against humanity are being daily committed.

Equally rampant are crimes against religion. Thousands of monasteries have been razed to the ground and sacred images and articles have been ruthlessly destroyed.

Despite these atrocities, I and my Government are prepared to accept a just and peaceful settlement.

The Dalai Lama came over to Delhi to persuade Mr. Nehru that India should raise the Tibetan issue at the U. N., though in replying to a resolution in the Lok Sabha Mr. Nehru had categorically expressed the Government's opposition to such a move. He advanced two reasons for his opposition to the invoking of U. N. aid : one was constitutional and the other was practical. The constitutional reason was that since internationally Tibet was not recognized as an independent country, the charge of aggression in Tibet could not be maintained against China. But the past history of Tibet shows that, except for short periods in which China exercised some attenuated control, that country was a recognizably free country. It is true that India, after independence, inheriting "more or less the position that existed in the British days," recognized China's suzerainty over Tibet, but, as Mr. Kripalani said, it was India's first big blunder that she accepted China's overlordship. The International Commission of Jurists has, in its memorandum, pointed out clearly that, in spite of the fact that first Britain and then India had taken up the position that Tibet had no control over its external affairs, Tibet was a sovereign nation with all the rights which accrue from such sovereignty. But, apart from these contentions, the Dalai Lama showed the kind of dilemma in which India would place herself by denying sovereign authority to India. He pointed out with irrefragable logic that if Tibet was to be regarded as a vassal of China, India could not maintain that the McMahon Line was an internationally recognized boundary between India and Tibet. The Line was agreed to by Tibet at the Simla Convention of 1914, but if Tibet had no sovereign status, by virtue of which it could either agree or refuse to agree to the boundary, the Line cannot be an internationally recognized boundary. China, which alone on this reasoning could sign such an agreement either on behalf of herself or on behalf of Tibet had not signed it. This would mean that the McMahon Line was a unilateral affair on the part of India and that there was no agreement on the other side. Mr. Nehru said that accepting the British position in regard to Tibet's status carried "some advantages and disadvantages". Whatever the advantages, the disadvantage is that India cannot now describe China's crossing the McMahon Line as an act of aggression against herself. If, however, the Line is to be claimed as one agreed to as their boundary by India and Tibet, "it follows as a logical corollary," said the Dalai Lama, "that

Tibet *did* possess sovereign and international status at the time she concluded the agreement." And it would be for Mr. Nehru to elect on which horn of the dilemma he would like to be impaled ! He is caught in a vice.

Mr. Nehru laid equal emphasis on the practical reason. He objected that invoking the aid of the U. N. would not only be futile but harmful to the interests of the Tibetans themselves. The United Nations was not going to send an army in Tibet to drive back the Chinese, as it did not send any forces to Hungary to expel the invader. All that would happen would be that promoters of the idea of U. N. intervention would feel a glow of satisfaction in their hearts that they had done their duty and after making brave speeches against China would go home leaving Tibetans to face the consequences of Chinese reaction to the cold war it would give rise to, and this reaction would only be harmful to Tibet and Tibetans. So the ultimate result would be that there would be no relief to the Tibetan people but something reverse of that. This was not showing sympathy for Tibet in a mature way. (What the mature way was he did not explain.)

It is very rarely that Mr. Nehru sets political expediency in such stark opposition to moral right and gives clear precedence to expediency. If immediate utility was the sole criterion, one may well ask him why India year after year was raising the question of the Indian residents of South Africa in the United Nations? Did he ever expect the U. N. to compel the Nationalist Government of S. Africa to treat Indians as equals of the whites? Would not this on the contrary incense the Government and prompt it to treat Indians even more cruelly than it was doing? The Algerian parallel was even more apt. Why does India take the initiative in moving the U. N. for Algeria's independence? A resolution for independence was passed last year in the General Assembly and may be passed again this year by even a larger majority. But the U. N. did not send last year and is not going to send this a year a force to Algeria to join with Mr. Ferhat Abbas's army to wrest independence from France. Was it not more likely that the result of India's intervention would be to expose the rebel Government of Algeria, whose destiny ever was (in the words of its Information Member, Mr. Mahomed Yazid) "war, war and still war," to an even more furious attack by the well-organized French army, though this would give Mr. Nehru a sense of self-satisfaction that he has bravely supported the cause of independence? It is true that President de Gaulle seems now to favour negotiations with the rebel leaders and is prepared to go beyond mere cease-fire talks and to seek a political instead of a military path to the pacification of Algeria. It is said that de Gaulle's new formula proposes to give Algeria "the place of choice" in the French community for which the President said it was destined when he took office last January, conferring autonomy on Algeria for a fixed period to be followed by

self-determination. It may as well be that if such an offer is forthcoming, Mr. Abbas may be inclined view it with favour, though the militarists in the rebel Government like Mr. Karim Bilkasim would oppose it. But if such a compromise solution is proposed, Mr. Nehru has no reason to think that it would be because of the pressure his Government exerted on France at the U. N. And if it really be so, it would only mean that totalitarian States like Russia and China are immune to the world opinion which the U. N. mobilizes through its resolutions but democratic countries like Britain and France are heedful of it. If this is a fact — and by and large it is — what becomes of India's vaunted non-alignment policy ?

The simple fact of the matter appears to be, as Mr. Kripalani put it, that India's weak-kneed policy in regard to Tibet is inspired by fear of China, which goes a long way to explain Mr. Nehru's insistence every now and then that India's policy must be guided, primarily and above everything else, by considerations of her own security as if that was really in danger, whatever expansionist aims China might be cherishing. "Fear," Mr. Kripalani said, is the greatest enemy of mankind, which makes the whole nation coward. "If this policy continues India's independence will be in danger," and if the policy does not endanger India's independence, it will at least encourage the aggressor nation to continue its aggression.

Chinese Incursions into India

The Chinese Government has started taking provocative action against India, which clearly shows that its attitude towards its neighbour has changed, though the material damage caused by the action might be limited. The Chinese official organs carried on propaganda describing the Government and the people of India as imperialists. The Chinese Government insisted upon treating Ladakhi Muslims and Ladakhi Buddhists as Chinese nationals for the reason that they had been in Tibet for a long time, though the Indian Government claims them as Indian nationals. One consequence of this was that these people were unable to return to their original homes in India. The action involved some 400 lama students from Ladakh who are receiving religious education in monasteries in Tibet, and some 2,000 Indian traders in the Yatung, Phari and Gyantse regions travelling to western Tibet for seasonal trade. Various other curbs have been imposed upon traders; for instance, the Chinese Government issued an order declaring both Indian and Tibetan currency illegal, and work had been stopped on the reconstruction of the Indian trade agency buildings in Gyantse. The result is that trade between India and Tibet has been brought virtually to a standstill. The value of imports from western Tibet alone dropped from \$315,000 last February to \$42,000 in May. Exports for the same period declined

from \$210,000 to \$63,000. This trade was never very large, but what is important from India's point of view is that it provides the sole means of livelihood for persons living along the Indian side of the Tibetan border.

The purpose of these actions seems to be to snap gradually the ancient cultural and trade contacts between India and Tibet and the most important thing to note about them is that they are clearly in violation of the spirit of the agreement concluded between the two countries in 1954 (the agreement is to expire in 1962 unless renewed), with the object of promoting cultural relations, commerce and pilgrimage traffic, and this agreement was supposed to guarantee freedom of access to Tibet for Indians. Indians remember this pact as one in which Pancha Shila first made its appearance. And they cannot possibly forget either that in the accord Tibet was described as the "Tibetan region of China" and recognized by India as such !

But what is more serious is Chinese incursions into India. Last month Chinese forces set on and captured two border posts in the Kameng and Subansari divisions of the North East Frontier Agency and are within four or five miles of Indian territory. Similar infiltrations on a much larger scale have already taken place in Ladakh in Kashmir State. The Chinese Government built two years ago a motor road linking Gartok in western Tibet with Yarkand in Chinese Turkestan, and the road passes through a corner of north-eastern Ladakh. The Chinese have entered eastern Ladakh in the Khurnak-Spanggur region and have been in occupation of the area for a year. It is said that a considerable portion of Indian territory in Ladakh has been appropriated by the Chinese, but these activities did not attract much attention, because it is difficult to know definitely what is happening in these remote parts. Violations of the NEFA border are easily detectable and have naturally very much exercised Indian opinion. Mr. Nehru has roundly condemned them as naked aggression on the part of the Chinese. The Government has placed the whole border area under the direct control of the army, whereas formerly it was being guarded by a civilian force.

China has never recognized the McMahon Line, which defines the border between NEFA and Tibet. It was the result of the Simla Convention of 1913, which the then Chinese Government refused to ratify. The Chinese Communist officials and journals have since been describing it as an "imperialist intrigue to expand British aggression into Tibet," and recently the Mao Government has officially stated "that it does not recognize the McMahon Line as the international frontier, and that therefore the so-called Chinese border intrusions do not constitute violation of India's territorial integrity but on the other hand these Indian incursions violate the territorial integrity of China. When the Chinese began consolidating themselves in Tibet, India for the security

of her frontiers opened more outposts along the McMahon Line. The Chinese asked India to withdraw from these new posts until both countries had come to an agreement on the determination of the frontier, but India refused. After this followed the Chinese conquest of Tibet, and then China asked India, it is reported, to withdraw to a depth of five miles from its recently established border posts and said that after India had done this, they would be prepared to undertake a joint survey of the frontier region and demarcate the boundary between the two countries. Apparently the Chinese Government considers itself absolved from the obligation of negotiating the matter which is imposed upon it by its adherence to Panch Shila enjoining non-interference and peaceful co-existence.

These border raids were perhaps calculated to cause, and have at any rate caused, a feeling of insecurity among Himalayan States bordering on Tibet. China seems to say to them: India is unable to defend her own frontiers; you cannot depend upon her to protect you from our expansionist pressures. Just about this time China hinted that Bhutan and Sikkim were part of Tibet and therefore Chinese. Tibet, it was said, is the palm of China's hand, and Bhutan, NEFA, Sikkim, Nepal and Ladakh are the fingers. Now that the hand is restored to China, the fingers should go with it. This campaign of a Himalayan federation has caused much alarm and to allay it Mr. Nehru made it plain that any violation of the territory of Bhutan and Sikkim would be regarded as a violation of India's own borders. Sikkim's status is that of an Indian protectorate; India recognizes the State's autonomy in regard to internal affairs and makes itself responsible for the defence of Sikkim. Bhutan has a treaty of friendship with India, by which it "agrees to be guided by the advice of the Indian Government in regard to its external affairs." However, to carry out these pledges is not an easy matter for India in that terrain. Bhutan is more vulnerable to Chinese infiltration than Nepal and Sikkim, and it is more accessible from the north than from India. In order to overcome this difficulty the Indian Government is planning to build motor roads to link Bhutan with near-by Indian areas. The Government is also, in co-operation with the United States, making arrangements to strengthen Nepal against possible Chinese aggression. "India is giving Nepal \$20,000,000 in economic technical aid. She is equipping and training the Nepalese army of ten thousand men and helping Nepal man about twenty guard posts along the Nepalese-Tibetan border." The U. S. A. is working closely with India. "Technical assistance projects under the \$2,000,000-a-year United States aid programme are decided in consultation with Indian officials. In such enterprises as road building, the development of air travel and health and education services there is joint Indian-American participation."

It cannot be that China is really planning a direct attack on Nepal, Sikkim or Bhutan, but an indirect

attack cannot be ruled out. As the "Statesman" says of such indirect aggression.

Laos is a pattern (with modifications) that leaps to mind. The process is now almost classical: the seeking out and schooling abroad of a hard core of malcontents, their training in arms and sabotage, their return and the recruitment of "freedom fighters," the first clashes with loyal troops, then a full-fledged revolt against a "feudal system" — a purely "internal affair" in which assistance for the established Government would be condemned as aggression against "the people" and counteracted by the surreptitious supply of arms to the rebels across an unclosable frontier. None in authority in the loosely administered, underdeveloped kingdoms in question would deny that possibilities for such mischief exist.

But, even so, the question arises: what does the probing of India's own borders signify? The border offensive of course does not mean anything like a Chinese invasion of India. The Chinese Communists are much too shrewd and realistic to contemplate any such foolish and futile endeavour. Then, what have they in mind? The only answer that stands to reason that one can give to such a question is the one which Mr. C. D. Deshmukh recently gave at a press conference in Manila that the border clashes "were the result of Communists' irritation at India's policy regarding the Dalai Lama." Mr. Nehru has adopted a policy of the utmost moderation, indeed of abject weakness, in regard to the Chinese conquest of Tibet. He has refrained even from condemning the horrors attending the conquest. All that has been done is that he has given asylum to the Dalai Lama — this he could not possibly have refused; the poor ruler had nowhere else to go to — but even in doing so he has refused to acknowledge him as the head of an emigre government and has banned him from carrying on from the host country what may even remotely savour of political activities in behalf of Tibet, so much so that the Dalai Lama is not sure that if he himself went abroad to plead Tibet's case in the U. N., the Government of India would not prevent him from returning to India on the ground that he engaged in political work. Mr. Nehru indeed seems to be thinking now of nothing else than keeping the peace with the Chinese Communists and maintaining friendly relations with them. And yet the fact that he gave refuge to the fleeing Dalai Lama seems to have given such a deep affront to the Chinese Government that it is impelled, by way of pin-pricks, to make small assaults on India's frontier. No other interpretation seems to fit the case.

Repression in South Africa

1. — Mass Treason Trial

The mass treason trial has entered on its last stage, though one cannot say how long it will be before it ends. The proceedings began in 1956 with the arrest of 156 persons, but after a preliminary inquiry, lasting a year charges were dropped against the majority of the accused and the number of the accused was reduced to 91. Of these 61 had their indictments quashed last year. After a similar move in behalf of the last thirty failed, the case against these re-opened in Pretoria last month. They are charged with high treason. The prosecution made a statement, alleging that these persons as members of the African National Congress and other subversive organizations were engaged in a "liberatory movement" as part of an international Communist-inspired and Communist-supported movement pledged to overthrow by violence all governments in non-Communist countries, where sections of the population did not have equal political and economic rights. This "liberatory movement," the prosecution asserted, had its counterpart in South Africa, and its objective was the establishment of a "people's democracy," which would necessarily entail the destruction of the existing State in South Africa. The prosecution proposes to present to the court more than 5,000 documents to support the indictment, and it is said that "at this rate it will take more than six months for these documents to be read" ! This will give an idea of the likely duration of the trial.

"The Times" writes editorially of this trial as follows :

An unbridgeable gap cuts this trial off from what in Britain and the United States of America, to name only two countries out of many, is meant by the rule of law. It is incredible to the average British and American man or woman that such mass prosecution is prompted by anything higher than political motives. It bears the stamp of being in origin less than judicial. If all or any of the thirty still on trial are guilty of any specific offence, then their fate should have been settled more promptly, more simply, and in a manner that showed that justice was being done. So long as citizens are proceeded against in droves and left indefinitely to suffer the penalties of being neither convicted nor acquitted, those responsible for their prosecution must expect to be condemned at the bar of world opinion. State trials on this scale and of this character are a common feature of dictatorial and tyrannical regimes. They should have no place in a nation that draws its main white elements from two such homelands of respect for law as Holland and Britain.

2.—Bannings Under Suppression of Communism Act

The Nationalist Government of South Africa has prohibited Mr. Ronald Segal, editor of "Africa South,"

under the suppression of Communism Act from attending any gathering in South Africa for the next five years. Though the notice served upon Mr. Segal is not explicitly based upon his conduct of "Africa South," there can be no doubt that the action is directed against the paper, because, as Mr. Clement Davis and some other members of the British Parliament have in a protest pointed out, the journal "has played a very real part in building up a united and thoughtful opposition to the disastrous policy of apartheid."

The antecedent moves make clear what could be the objective of the banning order. The journal's outspoken anti-apartheid policy made it extremely difficult for Mr. Segal to run the magazine at all. Advertisers in South Africa boycotted it for fear of political repercussions, and soon after its foundation it was banned by the Government from sale on railway book-stalls. Still it grew in influence and popularity. An unofficial white group threatened Mr. Segal with violence, and he was refused police protection or a licence to possess a fire-arm. He was later charged with carrying a fire-arm illegally and entering a Native location without a permit and his passport was seized.

On top of all this comes the order forbidding him to attend any gatherings, which are defined in the Act as any meeting, social, political or religious, consisting of two or more persons. Such prohibition is, as the M. P.s' protest says, "extremely hampering to an editor—only slightly less damaging than a ban on the publication itself." The Government's action is taken everywhere as an attack on the freedom of the press, constituting an invasion of the liberty of Mr. Segal's readers to have access to uncensored news and comment, and accordingly the chairman of the Commonwealth Press Union has protested strongly against it.

All that Mr. Segal was told about the charge against him was that the Minister "has reason to believe" that Mr. Segal was furthering the purposes of Communism, and the pernicious Suppression of Communism Act requires no more. Mr. Segal has no legal means under the Act of disputing the charge unless he assumes the impossible onus of proving that the Minister has acted in bad faith. The fact that "Africa South" has been sponsored by three Bishops and the leader of the British Liberal Party is guarantee that the magazine was not being conducted in the interests of Communism. On the other hand it was, as the members of Parliament state, "an enlightened courageous forum for the discussion of African affairs," in a country "where opportunities for the frank exchange of views across racial and political barriers are few." And such an organ of public opinion has been virtually ordered to cease publication. Mr. Morris Broughton, editor of the "Cape Argus," truly said at a gathering that freedom of the press in South Africa was like the freedom of a fly in a spider's web.

Similarly ex-Chief Albert Lutuli, president of the African National Congress, was first banished to his home on the borders of Zululand and then prohibited from attending any meetings, on the ground that the Minister was "satisfied" that he was "promoting feelings of hostility in the Union of South Africa between the European inhabitants of the Union on the one hand and the non-European inhabitants of the Union on the other hand." The order served on him postulates that the Minister is bona fide of the opinion that "the achievement of any of the objects of Communism would be furthered" if the ex-Chief were permitted to attend meetings. As the President of the Institute of Race Relations has said, "Chief Lutuli's whole record as a moderate democrat, a Christian gentleman and an earnest advocate of inter-racial peace and goodwill belies the imputation. The Minister's action, therefore, by reason of the palpable injustice, can only have the greatest detrimental effect on the relation between the races in South Africa." As the "Cape Times" puts it, "Without a trial, without a charge being preferred, a cultivated and highly intelligent South African is being deprived of his liberty because he has indulged in political activity which has not been shown to be illegal."

That Chief Lutuli could not be justly accused of promoting feelings of hostility will become manifest from his comments on the Union Government's bill to create Bantustans. He wrote in the "Cape Times":

The Government's plans for the African people are completely unacceptable because they give us neither freedom in the "white man's areas" nor independence in "our own areas." The road the Government points out to us leads nowhere.

We in the African National Congress have a different vision of the future of South Africa. We believe it is possible for all South Africans to live together in peace, without barriers, without frontiers and without hatred. All that is necessary is that we should give up fear and practise tolerance and goodwill. We Africans have no desire to get rid of the white man, to destroy his civilization. We only want an end to the rule of "Europeans only," which is slowly choking our country to death. Let us not frighten one another with horrible tales of what will happen in the year 2000. Let us do the best we can for one another now, and leave the future to the good sense of our children.

The moral that the Cape Town "Civil Rights" draws from these bannings is that banning never works. It says:

What has the Suppression of Communism Act done but to drive Communists underground, to make martyrs of them, to win for them sympathy that they would not otherwise have had? The way to defeat

the "objects of Communism" is to do justice so that it may be seen to be done, to remove injustices and causes of friction, to give man and woman opportunities and security—not to deprive them of their rights by the stroke of a politician's pen.

The policy of banning, says Mr. Moltens, a member of the South African Parliament, "will most certainly defeat its own ends, but, in the process, is calculated to destroy all prospects of international peace and harmony for generations to come."

COMMENTS

The Press of Pakistan

Press Commission's Report

The Pakistani Government has decided, in accordance with a recommendation of the Press Commission, to introduce one improvement in the provisions of the Press (Emergency Powers) Act of 1931, viz., that a security can henceforth be demanded from a publisher or keeper of a printing press after the Government has obtained the judicial findings of a sessions judge instead of its being demanded at the time of filing a declaration; correspondingly, the penalty of forfeiting the security can be enforced only after obtaining a sessions judge's judicial findings. It will be remembered that in India a similar improvement was made in the matter of security deposits when the 1931 Act was replaced by Rajaji's Press (Objectionable Matter) Act in 1951.

To the list of offences provided for in the earlier Act, a new offence is to be added, viz., writings which are indecent, obscene, scurrilous, or which endanger alarm or propagate provincialism. Similarly, receipt of a subsidy from foreign sources by newspapers is to be an offence if the subsidy is found to influence the newspapers to propagate views "which are not in the interest of Pakistan." And, in order to enforce the provision, newspapers are to be required to maintain a separate register in which all payments from any foreign source shall be entered and be open to inspection by an officer nominated by the Government in this behalf.

Another offence added is "defamatory attacks against foreign Heads of States and their accredited representatives in Pakistan." It will be recalled that in 1951, when the Indian Constitution was amended, it was suggested by critics of the proposed amendment as a matter of compromise that, instead of permitting restrictions to be imposed on the press by inserting in Art. 19 (2) the loosely worded ground of restriction, viz., "friendly relations with foreign States," a more restricted provision like that now made in Pakistan should be introduced, but the suggestion was rejected. This means that in this particular respect our Press Laws could be more stringent than the present Press Law of Pakistan.

In Pakistan a General Council of the Press is to be established to improve journalistic ethics and to further the efficiency of the profession, as was the object of the Press Council of India. But it is provided that this Council should be constituted by journalists themselves and that "in the interest of its complete independence Government should neither have any hand in its formation nor have any of its representatives on it." To such a Council no objection could be taken, but the projected Indian Press Council trenched on the freedom of the press at many points and the proposed legislation on the subject was wisely dropped by the Government of India.

One curious innovation to be made in Pakistan is that the Provincial Government may withhold a declaration from a newspaper if the publisher has not the financial resources for starting it or if the editor does not possess the requisite qualifications. Whether the financial resources and educational qualifications are to be defined by statute we cannot find out, but it is provided that "no appeal shall lie against the orders of the Provincial Government" in this respect.

INDIAN EVIDENCE ACT

Sec. 27 Held Void

AS DENYING EQUALITY BEFORE LAW

A division bench of the Allahabad High Court made a reference to a full bench of the Court asking for its opinion on the following two questions :

(1) Whether sec. 27 of the Indian Evidence Act is void because it offends against the provisions of Art. 14 of the Constitution [guaranteeing equality before law] ; and

(2) Whether sub-sec. (2) of sec. 162, Cr. P. C., in so far as it relates to sec. 27 of the Indian Evidence Act is void.

While the Evidence Act in sec. 26 lays down that a confession by accused while in the custody of the police shall not be proved against him, it adds a proviso in sec. 27, which is as follows :

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Sec. 162 (1), Cr. P. C., provides that "No statement made by any person to a police-officer in the course of an investigation under this Chapter [Chap. XIV] shall, if reduced into writing, be signed by the person making it, nor shall any such statement . . . be used for any purpose . . . at any inquiry or trial in respect of any offence under investigation at the time when such statement was made." And sub-sec. (2) goes on to say :

Nothing in this section shall be deemed to . . . affect the provisions of sec. 27 of that Act [the Indian Evidence Act] .

A full bench of the Allahabad High Court consisting of Desai, Mukerji and Srivastava JJ., on 24th August, answered the reference as follows :

The answer to both the questions referred to this Bench is that inasmuch as sec. 27 of the Indian Evidence Act creates an unjustifiable discrimination between "persons in custody" and "persons out of custody" and in that way offends Art. 14 of the Constitution, it and sub-section (2) of sec. 162, Cr. P. C., in so far as it relates to sec. 27 of the Indian Evidence Act, are void to the extent of that inconsistency. In the present form they are and must remain ineffective as long as that discrimination is there.

Mr. Justice Desai dissented from the view expressed in the prevailing opinion given by Mr. Justice Mukerji and Mr. Justice Srivastava.

NOTES

Compulsory Registration of Communists

The Communist Party of U. S. A. is continuing its fight against the provision of the Internal Security Act of 1950 which requires Communist-action organizations (on the grounds that they are under the control of "the world Communist movement" and advance its aims) to register with the Attorney General, naming its members and accounting for its finances. The Subversive Activities Control Board established under the Act for the purpose of determining whether any organization is a Communist-action organization decided in 1953 that the Communist Party answers to the description of such an organization and must register. The Communist Party has been challenging this ruling of the board. Last month, by a 2 to 1 vote, the U. S. Court of Appeals upheld the ruling and directed the party to register. It was the contention of the party that the 1950 Act was unconstitutional and that, anyway, the United States Communist Party was not under "foreign domination." The court rejected this contention, saying that "the facts are beyond dispute" and held that the party was pursuing the methods and objectives of the international Communist movement. The party has announced it would appeal to the Supreme Court.

This is the third order of the Subversive Activities Control Board that is the subject of contention in the courts. Its first order, upheld by the Court of Appeals, was voided on appeal by the Supreme Court in 1957 on the ground that the board's ruling was "tainted" by testimony of three witnesses whose veracity Government itself challenged. When the board on the basis of the remaining record again ordered the party to register, the

Court of Appeals in 1958 quashed this second order on the ground that the Government had failed to make available for cross-examination the records of a federal agent who infiltrated the party. Then came the third order in February last, in which the Board again expunged testimony objected to and reaffirmed its finding that the party must register. This, as said above, was upheld by the Court of Appeals.

State Seditious Law

PRINCIPLE OF FEDERAL PRE-EMPTION REAFFIRMED

The Supreme Court of Louisiana recently affirmed a lower court verdict that Junesh Jenkins cannot be tried under the state's Subversive Activities Law which prescribes membership in any organization advocating the illegal overthrow of any federal state or local government. Jenkins was convicted under the law because of his membership in the Communist Party.

In an opinion by Justice McCaleb, the state's highest court held that Jenkins' appeal must be upheld because of the ruling of the United States Supreme Court in the 1956 Steve Nelson case. Nelson had declared that a state statute concerning subversion was preempted by the presence of anti-subversive legislation drawn up by the Federal Government. The Smith Act, according to the U. S. Supreme Court in a six-to-three decision favouring Nelson, touches a field in which the federal interest is so dominant that the system must be assumed to preclude state laws on the same subject. The Supreme Court also stated that "the scheme of federal legislation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."

In the Louisiana case, Jenkins had established the similarity between his case and the Nelson case. The district attorney, however, directed the court's attention to the Tenth Amendment of the federal Constitution which reserves to the states those powers not delegated by the Constitution to the United States. The district attorney argued that Congress was without right to restrict the states in cases where persons had violated the states' seditious laws, even though the offence might also be against federal law.

Justice McCaleb criticized the district attorney's contention by saying that "it assumes without discussion that the State police power cannot be bridled in areas of dual interest, Federal and State." Affirming Jenkins' motion to quash the indictment, the court held, "Suffice it to repeat that any claim of reserved state power in prosecutions for Communist activity has been foreclosed by the Nelson case."

A Federal Judge Sets Aside the Ban

A week after the Chatterley decision (vide p. v : 267) was rendered by the Supreme Court, a federal district judge invalidated the ban on a picture that had been judged obscene because of reference to rape or contraceptives. The

censorship board of Chicago banned the showing of a film "Anatomy of a Murder" based on Robert Traver's book of that name. It deals with the trial of an army lieutenant accused of killing a man who allegedly had raped the lieutenant's wife. Thereupon the city prohibited the showing of the film. A suit for injunction was brought by Columbia Pictures.

Judge Milner on 8th July granted the injunction. He upheld the censorship board's power to censor films, but ruled that in this case "the censorship exceeded constitutional bounds." He wrote:

The court finds that while the city of Chicago has the power to censor films and to deny a permit to those which are obscene and immoral, the film in question does not fall within the restrictive provisions of the city ordinance. Taken as a whole, the film cannot be placed in the category of the obscene or the immoral because its dominant effect does not tend to excite sexual passion or undermine public morals.

In fact the criminal assault on the murderer's wife has an effect of arousing pity and revulsion, rather than desire or sexual impure thoughts. Furthermore, under present-day standards, neither of these two words [rape and contraceptive] offends the common conscience of the general public.

Ban on Travel to Communist Countries

UPHELD BY A COURT OF APPEALS

The decision in the Worthy case (vide p. v : 256) was in effect reaffirmed by the Court of Appeals at Washington in an appeal preferred by Mr. Waldo Frank from a federal district court's dismissal of his suit against the Secretary of State for refusing his application for a passport to Red China where he intended to go as a correspondent for Latin American newspapers.

Mr. Frank's contention was that as the State Department had authorized about forty newsmen to go to China it had discriminated against him by denying him permission to do so, and that this was violative of the due process clause of the Fifth Amendment to the Constitution.

The Court unanimously rejected this contention on 6th July. Its decision was brief, but one of the three judges, Mr. Burger, gave a lengthy explanation of the grounds of rejection. Mr. Burger pointed out that the department had given passports for travel to China to a limited number of newsmen on an experimental and temporary basis. He said:

In such an experiment the political branch of the Government must be allowed wide latitude in carrying out its policy. Simply as a matter of numbers, a line must be drawn somewhere. The foreign policy considerations give the Secretary of State wide latitude in drawing a line and defining criteria. It is not the court's duty to decide whether the Secretary of State had developed the best criteria.

In carrying out the experiment, Judge Burger said, the State Department had undertaken "a calculated risk" on the presumption that it would help the ultimate objectives of world peace and stability and reduce tensions. The experiment "is political in the highest sense and is not reviewable on any basis in any circumstances by any court." The conclusion was that the limited programme was "not discriminatory" against Mr. Frank.

Contempt of Legislature

Mr. David H. Scull, a printer, was subpoenaed in 1957 by the Virginia Committee on Law Reform and Racial Activities. He was asked by this legislative committee about his beliefs and associations. Among the questions put to him were whether he belonged to the National Association for the Advancement of Coloured Peoples fighting racial segregation in the courts, had paid lawyers' fees in segregation cases, or was associated with the American Civil Liberties Union. He refused to answer in all 31 questions on grounds of conscience. He refused again when a judge ordered him to answer them. Consequently he was held in contempt of the state legislature and sentenced to ten days in jail and fined \$50. His conviction was upheld by the Virginia supreme court.

On 4th May last, however, the U. S. Supreme Court freed him from the conviction in a unanimous decision.

The New Indian Township of Lenasia

The "Graphic" reports a deplorable lack of necessary facilities in the new Indian group area of Lenasia, some miles from Johannesburg. It has :

- No train services in the mornings and afternoons,
- No recreational facilities for the households now settled.
- No health services, and not even a small clinic.
- Not even a medical doctor to attend the sick.
- No public or private telephones in the area.
- No shopping facilities (the only grocer is three miles away).
- No street lighting (hence increasing crime).

It is said that the Union Government is proposing a compromise to Indian businessmen that, provided they accepted residential segregation, their business sites would be left intact or blocks would be set aside in cities for "vertical development" of Indian trading instead of their being removed entirely to new sites on the fringes of cities and villages.

Reservation of Jobs for Whites

One of the basic elements of the Nationalist Government's apartheid policy is the principle of "protecting" white workers against non-white competition. Under the Industrial Conciliation Act of 1956 the Government

has already the power to say what labour fields were open to various race groups. But the Government is now taking additional power of reserving jobs for the whites. On 22nd April Parliament gave second reading to an amendment of the Act which would give the Minister of Labour power to lay down further what percentage of workers of any race could be employed by any one employer and to prohibit replacement of a worker of one race by one of another and force an employer to maintain a specified percentage of workers of one race, either generally or within one or more separate categories of jobs.

The passing of the bill has caused grave concern among the large population of coloureds in the Cape area where the question of non-white competition with white workers has become a sensitive issue, particularly after the Government's defeat in two Provincial Supreme Court tests of the law of 1956. In these decisions the Court ruled that the original law could not be applied to the garment industry, which was the subject-matter of that litigation.

University Apartheid Act

After two years of heated discussion the House of Assembly of the Union Parliament passed on 11th April by a vote of 100 to 55 a bill banning the attendance of non-white students at open universities like those of Witwatersrand, Capetown and Natal and providing for four new "Bantu" universities exclusively for non-whites. The provisions of the bill are :

Students are, in future, to be divided not only according to race, but further according to language. Thus the 300 sub-standard matriculants which Bantu education is to produce annually are to be split amongst four new university colleges, to be instructed strictly in their pastoral tribal vernacular. Unfettered control of students, staff and syllabuses will be given to a white Cabinet minister who may, however, condescend to accept advice from an all-white council and senate appointed by himself. These bodies may, in turn, accept advice from non-white 'advisory councils' and 'advisory senates', likewise appointed by the minister. The new colleges will, of course, be paid for by the Africans themselves, who are already meeting the cost of the social services they receive.

One provision denounced as "shameful" by several professors, provides for a fine of £100 or six months in jail for any one registering in a university across racial lines. Only medical students are excepted from segregation because they are so few in number and because of the impracticability of establishing separate schools for non-whites.

Another bitterly contested provision of the bill is its omission of the so-called conscience clause, under which no member of a university faculty could be questioned about his religious beliefs. The Anglican Bishop of Johannesburg, R. Ambrose Reeves, and Jewish leaders specifically condemned the dropping of the conscience clause, besides opposing the whole concept of the bill from the start.