

# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

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## Control of Movements in Kashmir State

### Law of 1953 and Its Administration

Miss Mridula Sarabhai, a prominent Congress worker who has kept herself in close touch with developments in Kashmir State and is never weary of protesting on grounds of civil liberty against the long-continued detention for 31 months of Sheikh Abdullah without charge or trial, has in an article exposed the vagaries of the Jammu and Kashmir Ingress (Control) Act 1953 and of the administration of its provisions.

Before the present law was enacted, there was a law in existence in the State which controlled by means of permits the entry into the State of foreigners, i. e., those who were neither permanent residents of the State nor of other parts of India. That permits should be required for temporary visits or repeated journeys to the State from foreigners Miss Sarabhai regards as but reasonable. "A foreigner's stay in the State," she says, "may be restricted, as is usually done in other countries, in view of the fact that if a foreigner misbehaves, the local authorities get involved in international law, and the question as to whether the local law can be applied to the person concerned creates complications. Therefore, periodical extensions of permit may be a healthy check on any complications against subversive activities."

But after the anti-Abdullah coup the present Act was adopted which puts an Indian citizen who is not a permanent resident of Kashmir on the same footing as a foreigner, though no complications of international law can arise in the case of an Indian citizen. Such a citizen too has to obtain a permit under the new law if he wishes to enter the State. To this extension of the requirement of a permit Miss Sarabhai naturally takes strong exception. Kashmir has in law acceded to India and is therefore a part of India; and the right to freedom of movement guaranteed by Art. 19 (1) (d) of the Indian Constitution should be available to all Indian citizens, whether they wish to go to Hyderabad or Kashmir. But Kashmir State has already been given power, which no other State enjoys, of restricting this freedom "in the interests of the security of the State." And under this modification of the Indian Constitution in its application to the State of Kashmir, the State has now the power to control

Indian citizens' entry within its borders just as it pleases the State authorities to exercise the power. The law provides that "no person shall enter into Jammu and Kashmir State from any place in India outside the State unless he is in possession of a permit." An Indian citizen who enters the State without a permit exposes himself to a penalty of one year in jail and Rs. 1,000 fine, besides being liable to be removed from the State.

It is not surprising that when the State Government has gone so far to curtail one of the fundamental rights of Indian citizens, it does not omit to give absolute discretionary power to the authorities concerned to grant or withhold a permit. The 1953 law was originally limited in duration to two years, but before its expiry it was re-enacted as an ordinance on 4th August 1955, which must since have been given the shape of a statute. The notification issued under the ordinance states that permit authorities "may refuse to issue any such permit without assigning any reason" and the ordinance itself gives complete protection to the authorities by providing that "no suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act." Such a complete denial of the due process of law, exempting all proceedings under the Act from a court test of any kind, and the fact that there are no safeguards against misuse of these extraordinary powers in restricting the movements of any citizens "on no grounds at all or on personal vindictiveness," irks Miss Sarabhai's soul terribly.

But, according to Miss Sarabhai, it is not only the entry of Indian citizens into Kashmir State that is regulated under the Act, but also the exit of Kashmiris out of the State for business or other purposes. The Act of course does not provide for the latter. It is a law for the control of the ingress of non-Kashmiris into Kashmir, but is also used as a means of controlling the egress of Kashmiris out of Kashmir. There is of course no authority in this or any other law for this kind of control. But she asserts that such control is in fact in operation. Under the law as it stands, Indian citizens are not allowed to enter the State "by water, land or air" except on a permit; but under the law as it is interpreted by the executive, residents of Kashmir are not allowed to leave

the State by water, land or air without a permit. Miss Sarabhai says:

Even though there is no provision in the Act itself whereunder it is necessary to secure a permit to leave the State territory, strangely enough, even the Indian Airlines Corporation does not issue a ticket unless a permit is produced. By road one would be arrested at the border if found to be without a permit. There are numerous cases where the Kashmiris were not sanctioned a permit to go to India even when they had specifically stated that their object was to meet the Prime Minister and the Home Minister of India. So this Act which was meant to safeguard the State from external dangers has been used for party politics and has thus prevented persons from seeking redress from Indian authorities for their trials and tribulations that have been their lot since the shocking events of 9th August 1953.

Miss Sarabhai further says that "inhuman treatment" is often meted out to persons who were on the other side of the cease fire line but who were very properly regarded as Indian citizens entrapped in the enemy territory and were allowed to return to Kashmir. Such a person, if found undesirable, can legitimately be sent back to Pakistan immediately after he crosses the cease fire line. But if a person in the Pakistan-occupied territory comes to Kashmir and is allowed to settle there, it would be wrong to send him back. What is now happening is, says Miss Sarabhai, that if a person across the border is allowed to settle in Kashmir and if later such a person becomes suspect in the eyes of the Kashmir Government, the latter "do not take the usual legal procedure against him by either detaining him or exiling him in a proper way, but instead they take him to the thana, illegally detain him, beat him up and throw him across the border." And she gives a recent instance that has come to her notice of such a happening. "It is stated that Shamsuddin of village Chougal Maidan, tehsil Hindwara, district Baramullah, was in 1947 entrapped on Muzaffarabad side of the State. In 1950, after satisfying the State authorities, he was allowed to return and stay at his home. About two months ago, the Kashmir special police staff arrested him with two other co-workers, viz., Mohiuddin and Ahmed Din. They were taken to the police thana" and

are alleged to have been subjected to third degree methods. "It is stated that the police took them to the cease fire line and threw them across to Pakistan-occupied Muzaffarabad forest area." "Shamsuddin is reported to have died of injuries. It is alleged that police wrath on Shamsuddin was due to his being the Vice-President of the Plebiscite Front of the Hindwara tehsil." She has given the incident as was related to her and says that the matter "calls for thorough investigation." Whether this particular incident is true or not, we would say that if such practice prevails, it ought to be stopped immediately. Kashmir State has amply provided itself with powers to deal with persons who threaten the security of the State: it can detain such persons in jail, and the State is none too squeamish in detaining people without bringing them to trial. But the policy of "pushing back," as Miss Sarabhai calls it, has no justification.

The point that Miss Sarabhai makes about the operation of the Act is that the Union Government cannot wash its hands of the injustices that result therefrom. It is true that Kashmir is unlike other States that have acceded to India in many respects. It enjoys many privileges and immunities which no other State enjoys. Evidently it was thought that unless an exceptionally advantageous position was carved out for Kashmir, there was no possibility of retaining her in India at all. One advantage she has is that she has acceded to India only in respect of defence and external affairs and communications. In every other respect she is recognized to be independent, and the Kashmir Government, both under Sheikh Abdullah and his successor in office, has never ceased to flaunt this independence to Kashmiris. In spite of all this independence, however, unusual as it is in an acceding State, "security of the State," to preserve which the Ingress Act was passed, is a subject closely connected with matters in regard to which the Union Government has still retained power. Miss Sarabhai's conclusion therefore is that if injustices are perpetrated in the operation of the Act, the Union Government cannot plead that it is constitutionally incompetent for it to afford redress, and that if in spite of the existence of constitutional power, it fails to redress legitimate grievances, it is no less responsible for the continuation of the injustices than the Kashmir Government which causes them.

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## THE INSTITUTION OF SECRET INFORMERS

### BROAD ATTACK BY THE COURT OF APPEALS ON THE SYSTEM

In the case of Dr. John P. Peters (vide p. : iii : 249) the constitutional issue of a person in Government employment having the right to know and face his accusers was squarely raised before the Supreme Court. Dr. Peters had been removed from a Government job on the recommendation of the Loyalty Review Board made on the basis of derogatory information supplied by informants

whose identity could not be disclosed. The Justice Department in that case took up the extreme position that the President had the sole authority to appoint and dismiss Government employees, which could not therefore be subject to the control of the judiciary; that the Executive had a right to keep the sources of information confidential in loyalty cases; and that consequently

judicial standards of due process were not applicable to procedures followed in removing a Government employee from his job. On the other hand, Dr. Peters maintained that he was denied due process inasmuch as he was not afforded, in the hearing of his case by the Loyalty Review Board, an opportunity to confront and cross-examine his accusers. He in fact requested the Court to decide his case on constitutional grounds alone. The Court decided in favour of Dr. Peters, but without pronouncing on the constitutional questions raised by both parties to the suit. It is the custom of the Supreme Court to avoid passing on constitutional issues except where such an opinion is strictly necessary. Thus the question whether an accused security risk has the constitutional right to face his accusers has yet remained undecided by the highest tribunal. In the earlier case of *Dorothy v. Richardson* (vide p. iii: 231) the Supreme Court was evenly divided and the opinion of the Court of Appeals in favour of the Government was left undisturbed.

It appeared that in the recent case of *Parker v. Lester* the Supreme Court would have an occasion to decide whether, as the Government contends, informants' names could be kept secret in the interest of national security and yet the accused could be condemned on the strength of information given by the secret informers. The Appeals Court decided the case against the Government and an appeal preferred by the Government against the decision would, it was expected, elicit the opinion of the highest judicial authority on the issue. The Government had in fact made a request to the Supreme Court to extend the time in which to make the appeal, and the request had been granted. Yet it now turns out that the Government has decided not to appeal in this case and the Supreme Court's opinion will therefore not be available.

At this point it would be best to give the details of this *Parker* case. Under the port security programme seamen are employed only if the Coast Guard issues security cards to them. If the local Coast Guard office has doubts about any maritime worker, it holds a hearing, at which information may be obtained from informants whose identity is not disclosed to the worker concerned and whose testimony obviously he is not in position to rebut by cross-examination. If the Coast Guard's doubts persist, the worker is treated as a bad risk and cannot work. This kind of security programme covers about 500,000 seamen and longshoremen. Some of these workers, whose security cards had been lifted by the Coast Guard, i. e., were declared ineligible for employment as seamen, went to court and asked that the Coast Guard be enjoined from administering its security programme as set forth in its regulations. These regulations provide that particulars of the charge need not be given if that would result in the source of the derogatory information being given. The seamen complained that the regulations prevented them from knowing whether all the particulars of the charge

had been given to them and that they were deprived of the protection afforded by the Due Process Clause of the Fifth Amendment when they were denied the right to learn the identity of their accusers and to confront and cross-examine them.

District Judge Edward P. Murphy ordered the Coast Guard to give the seamen a general summary of the charges and testimony against them. But he specifically excluded any guarantee of confrontation, saying:

The Federal Bureau of Investigation has uniformly insisted that practically none of [its] sources will continue to be available to it if proper secrecy and confidence cannot at all times be maintained with respect to the original source of the information.

The seamen, not satisfied with this decision, went to the Court of Appeals in San Francisco. This Court in October last in a 2 to 1 opinion agreed with the seamen's contentions and roundly condemned the use of secret informers. It did not declare that the existence of the maritime security programme was unconstitutional in itself, but it declared that the regulations under which the programme was worked did not satisfy the test of constitutionality. It said that unless some kind of confrontation was required, the seamen might not really know the charges against them sufficiently to make a defense. The court said it might be possible to draft new Coast Guard security regulations qualifying "in some degree" the right of confrontation, but the present regulations were unconstitutional.

The dissenting judge (Judge William Healy) said that the confrontation issue should be left for the Supreme Court to decide.

The majority opinion, written by Judge Walter L. Pope, made a very strong attack upon the whole system of secret informers. Stating that the issue in this case was "whether the danger or possible danger to national security is of such character and dimensions that the ancient and generally accepted rights of notice and hearing may be denied to these seamen citizens," the Judge answered the question in the negative. He said:

It may be assumed that this determination will remove from the investigative agencies to some degree a certain kind of information and that, in the future, some persons will be deterred from carrying some of these tales to the investigating authorities.

It is unbelievable that the result will prevent able officials from procuring proof any more than those officials are now helpless to procure proof for criminal prosecutions. But surely it is better that these agencies suffer from handicap than that the citizens of a freedom-loving country shall be denied that which has always been considered their birthright.

Indeed it may well be that in the long run nothing but beneficial results will come from a lessening of

such tale-bearing. It is a matter of public record that the somewhat comparable security risk programme directed at Government employees has been used to victimize perfectly innocent men.

The objective of perpetuating a doubtful system of secret informers likely to bear upon the innocent as well as upon the guilty and carrying so high a degree of unfairness to the merchant seamen involved cannot justify an abandonment here of the ancient standards of due process.

Furthermore, in considering the public interest in the preservation of a system under which unidentified informers are encouraged to make unchallengeable statements about their neighbours, it is not amiss to bear in mind whether or not we must look forward to a day when substantially everyone will have to contemplate the possibility that his neighbours are being encouraged to make reports to the F. B. I. about what he says, what he reads and what meetings he attends.

The time has not come when we have to abandon a system of liberty for one modelled on that of the Communists.

In the event of war we may have to anticipate Black Tom explosions on every water front, poison in our water systems, and sand in all important industrial machines.

This Parker case is of course not on all fours with the Peters case before the Supreme Court, the difference

being that the former was concerned with the right to private employment whereas the latter was concerned with the right to a Government job, and it is perhaps just this difference between civilian employment and public service that led the Government to drop an appeal from the decision in the instant case. The Government has always argued, and it so argued in the Peters case, that working in a public office is a privilege and not a right, and that since this is so, a Government worker is not entitled to the constitutional guarantee of "due process"—including confrontation of his accusers. But merchant seamen being privately employed, the Government probably considers that their case falls in a different category. For the courts have often held that private employment is a right protected by the due process guarantee. The Court of Appeals in the Parker case itself recognized this distinction. It said:

The (seamen's) liberty to follow their chosen employment is no doubt a right more clearly entitled to constitutional protection than the right of a Government employee to obtain or retain his job.

Yet, as the Solicitor General himself said, the ruling will have "obvious far-reaching implications for the various governmental security programmes." It is left to the future to unfold these implications, but in the meantime the Coast Guard is drafting new port security regulations, so that they may not be voided in future as they were in the Parker case.

## POWERS OF RUSSIAN SECRET POLICE CURTAILED

### REFORM OF THE CRIMINAL CODE

Professor Harold J. Berman of the Harvard Law School has collected much reliable information in Moscow which goes to show that since the death of Stalin and the execution of Beria sweeping police and judicial changes have been introduced in the Soviet Union pointing in the direction of curtailment of the powers of the secret police and reform of the criminal code. The principal changes made as regards the police force are outlined as under:

The special M. V. D. (Ministry of Interior) troops that constituted a private army at the disposal of the police force have been abolished as such. Control of these units was shifted to the Soviet Army in September, 1953.

Three special three-man boards (troikas) of the M. V. D., which could sentence Soviet citizens to forced residence or forced labour terms on secret charges and without hearing the accused, have been abolished.

Conditions in the forced labour camps have been ameliorated and some camps are reported being liquidated. Soviet Army authorities have replaced M. V. D. officials in the direction of some camps.

Military tribunals are reviewing the cases of hundreds of thousands of citizens who were arbitrarily sent to exile or forced labour by the M. V. D. troikas. Many of these citizens have been released.

The abolition of the special three-man M. V. D. boards is a notable change which it is believed will be of the most consequence to the ordinary Soviet citizen.

These boards had existed since the purge days of the middle Nineteen Thirties. In practice, any three M. V. D. officers could sit as a tribunal and impose sentences for "counter-revolutionary" crimes. The accused did not need to be present, and in fact seldom was. Often he was not even told what he was accused of or the duration of his sentence until he arrived at the labour camp in Siberia or the Far North.

Such cases normally fall under Art. 58 of the Soviet Criminal Code, which defines various "counter-revolutionary" crimes in terms so vague that almost any kind of conduct can come within its scope.

By placing such cases in the hands of the conventional Soviet military and civil courts the rights of Soviet citizens are considerably improved.

The powers of the Soviet police remain much greater than would be tolerated in any Western state and such traditional Anglo-Saxon concepts as the right of habeas corpus are still unknown.

### Changes in the Criminal Code

A new Soviet criminal code and code of procedure is, it is stated, nearing completion and is expected to be put into force this winter. The precise effect of many of these changes of procedure is still difficult to evaluate, but it is believed that, though the revision of the code does not contemplate any substantial change in Art. 58 and though this fact will reduce the significance of other legal reforms designed to protect the rights of the Soviet citizen, still some substantial improvement in those rights may be expected.

The changes to be made in the criminal code are summarized under the following heads:

Peasants will no longer be held criminally liable for failure to fulfil their labour requirements for work on collective farms.

Managers of factory enterprises will be permitted to sell surplus equipment and will be relieved of criminal responsibility for minor acts of negligence.

The notorious "doctrine of analogy" will be abolished. This allowed a court to convict a Soviet citizen for committing an act which was not prohibited by law but which the court held was "analogous" to a prohibited act.

The severity of punishments is being reduced in many instances. For example, the sentence for "counter-revolutionary propaganda" is being cut from a maximum of ten years to five years. The real meaning of such reductions, however, is obscure so long as the sweeping provisions of Art. 58 remain in force.

One of the most important pending reforms places protective safeguards around the "investigatory" phase of Soviet detention. At present a Soviet citizen has no right to counsel until the trial stage of his case is reached. He may be held by the police up to six months and then for an indefinite period by a so-called judicial investigator.

It is now proposed to permit the intervention of counsel when the judicial investigator presents the first draft of an indictment to the accused.

## COMPULSORY TESTIMONY ACT

### CONSTITUTIONALITY UPHOLD BY THE U. S. SUPREME COURT

In the first test case under the Compulsory Testimony Act passed by Congress in 1954 that came before the Supreme Court, the high court on 26th March upheld in a majority decision by 7 to 2 the constitutionality of the Act which provides that the Government may obtain a court order, on an application of the Attorney General, to compel a witness to testify in national security cases, provided he is granted immunity from any criminal prosecution in connection with his testimony. If the witness refuses to answer questions put to him, he can under the law be cited for contempt and sentenced to imprisonment for two years and a half.

Mr. William Ludwig Ullmann, who till 1947 was an official in the Treasury Department, was suspected to be a member of a war-time espionage ring headed by one Mr. Silvermaster in partnership with whom Mr. Ullmann was working after his retirement and in whose house, it was alleged, he had photographed secret documents intended for transmission to Moscow. Being relieved in advance from liability for prosecution if he were to make any incriminating statements, he was asked to answer questions about these activities. He refused to answer them before a federal grand jury, claiming the protection of the Fifth Amendment to the Constitution against being compelled to give testimony that might incriminate him. A federal Judge in New York then held him guilty of contempt and

sentenced him to six months in prison for defying his order to give testimony (vide p. iii. 286). The case thereafter came to the Supreme Court on a writ of certiorari. The Court affirmed Mr. Ullmann's conviction for contempt.

The constitutional question involved in the statute is not quite as simple as it looks at first sight; indeed, it presents a veritable dilemma. The dilemma was thus defined over a hundred years ago by the first Chief Justice of the Supreme Court, John Marshall:

The principle which entitles the United States to the testimony of every citizen and the principle by which every witness is privileged [by the Fifth Amendment] not to accuse himself can neither of them be disregarded.

Justice Frankfurter, who wrote the majority opinion, answered the question here raised by affirming an earlier decision in which the Court held:

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself — in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply.

The case cited here is that of *Brown v. Walker*, 161 U. S. 591 (1896), in which Brown, auditor of a railroad company, was held in contempt for refusing to testify before a grand jury investigating charges that officials of the company had violated the Interstate Commerce Act. The case established the principle that under an immunity statute, exempting the witness from prosecution arising out of his testimony, he may be compelled to testify, provided that the statute gives him absolute immunity. In an earlier case arising out of the same Act, *Counselman v. Hitchcock*, 142 U. S. 547 (1892), the Court held the Act unconstitutional because, while the immunity provision therein prevented the use of the evidence against the witness, it did not preclude his prosecution as a result of information gained from his testimony. The Court in this case ruled that because the Act as it then stood did not give adequate protection against future prosecution, a witness appearing before a grand jury was entitled, under the Fifth Amendment which gave absolute immunity, to refuse to answer questions. Subsequently, the Act was amended, giving absolute protection to a person testifying in proceedings under the Act, and because of this change in the law, the Court in the *Brown* case held the new Act constitutional and ruled that the Fifth Amendment would not apply in the case, the statute giving as much protection to a witness as the constitutional guarantee against self-incrimination. It said: "If his testimony operate as a complete pardon for the offence to which it relates, a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the [ self-incrimination ] clause." Here a reference may be made to a case similar to the *Brown* case. It is that of *United States v. Monia* 317 U. S. 424 (1943), involving an alleged conspiracy to cut down prices in violation of the Sherman (Anti-Trust) Act. The Anti-Trust Immunity Act provides that one who in obedience to a subpoena appears before a grand jury inquiring into an alleged violation of the Sherman Act and gives testimony under oath touching the alleged offence shall obtain immunity from prosecution for that offence. The question in this case was whether in order to obtain immunity he need claim the privilege against self-incrimination, and the Court ruled that he need not, since the statute did not make such a claim necessary.

Justice Frankfurter stated that four questions were raised by Mr. Ullmann's appeal:

Is the immunity provided by the Act sufficiently broad to displace the protection afforded by the privilege against self-incrimination? Assuming that the statutory requirements are met, does the Act give the district judge discretion to deny an application for an order requiring the witness to answer relevant questions put by the grand jury, and if so, is the court thereby required to exercise a function that is not an exercise of "judicial power"? Did Congress

provide immunity from state prosecution for crime, and if so, is it empowered to do so? Does the Fifth Amendment prohibit compulsion of what would otherwise be self-incriminating testimony, no matter what the scope of the immunity statute?

On the question of the district judge's power, Mr. Frankfurter ruled that the language of the Immunity Act makes it clear that the district judge does not have discretion to deny an application from the Attorney General for an order to compel a witness to testify. As to the power of Congress to provide immunity from state prosecution, he said that "it cannot be contested that Congress has power to provide for national defense" and to make all laws necessary for the exercise of that power. Mr. Ullmann had argued that though he had been freed from the fear of federal prosecution, there was still a real possibility that he might be accused in state courts. He further argued that even if he were given immunity from state as well as federal prosecution, Congress had no power to pass a law that immunized a witness from state prosecutions. Justice Frankfurter held that the Act gave such immunity and that Congress had power to give it in the interest of national security. He said:

The Immunity Act is concerned with national security. It reflects Congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution. We cannot say that Congress' paramount authority in safeguarding national security does not justify the restriction it has placed on the exercise of the state power for the more effective exercise of conceded federal power.

On the interpretation of the Fifth Amendment Justice Frankfurter said that the constitutional protection afforded by the Amendment "must not be interpreted in a hostile or niggardly spirit." "Nothing new," he added, "can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process." A "strict not lax observance" of the constitutional protection of the rights of the individual impelled the conclusion; he observed, that the interdiction of the Fifth Amendment operated only where self-incriminatory testimony was involved. When "immunity displaces the danger," he said, constitutional rights are preserved.

Justice Douglas dissented and Justice Black joined in the dissent. If the Immunity Act protected a witness from prosecution, it did not protect him, Justice Douglas pointed out, from other penalties incurred by a person who is a Communist such as ineligibility for federal employment in defense facilities, adding:

Any forfeiture of rights as a result of compelled testimony is at war with the Fifth Amendment. The

guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against a conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well. My view is that the framers [of the Constitution] put it beyond the power of Congress to compel anyone to confess his crimes. [The Fifth Amendment] was designed to protect the accused against infamy as well as against prosecution. . . . There is great infamy involved in the present case. The disclosure that a person is a Communist practically excommunicates him from society. . . . The critical point is that the Constitution places the right of silence beyond the reach of the Government. The Fifth Amendment stands between the citizen and his Government.

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## COMMENTS

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### Complete Segregation of S. African Natives

#### A Commission's Recommendation

A Government-appointed Commission, which has been working on the problem of apartheid or racial separation for the last five years has published a report in which the Commission recommends establishment of seven areas in which eventually all the Natives excepting those who would be used as migrant labour in white areas will be brought together. It postulates its recommendation on the belief that since Natives outnumber Europeans by 3 to 1 (the Natives are nine million while white persons are only three million), a policy of anything like gradual integration — political, economic and social — of the two races is impracticable. The Commission is convinced that "there is no midway between the two poles of ultimate total integration and ultimate separate development of the two groups," and it feels that the acute friction that would be generated some fifty years hence if whites and Natives lived in a common society and the possible domination of the former by the latter could be avoided only if total separation of the two races was planned.

The Commission states that such separation could not, however, be brought about except at much expense. It calculates that 290 million dollars would have to be spent in the first ten years of the programme for the industrialization of the Native areas if the Natives residing in those areas are to be enabled to obtain a livelihood. When this economic development takes place, African farmers would be reduced from four to two millions. Mining, manufacturing and other businesses in 100 towns in the segregated Native areas would, according to the Commission's plan, be owned and operated by the Africans.

The separation of Natives is also to be accompanied by a separation of the Coloureds or people of mixed blood, who number 1,100,000. All Natives living in the western

part of Cape Province would be removed, and the area would be restricted to Coloured persons.

Since the proposed separation scheme is meant to preserve and perpetuate white supremacy, it follows that the scheme contemplates that Natives (and Coloureds) would continue to be under the political control of whites for the foreseeable future, and that they would have no hand in the country's government. Self-government might gradually be provided for non-whites at and up to the provincial level.

It is expected that the Strydom Government will bring down legislation in the Union Parliament to give effect to the Commission's recommendations.

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### New Security Arrangements in Britain

#### MEASURES AGAINST SUBVERSION AND DISLOYALTY

When after the Burgess-Maclean disclosures the British Government, in answer to public criticism for slackness in taking proper precautions against espionage, promised to tighten up its security arrangements, there must have been not a few who feared lest in the process civil liberty would badly suffer. From the recommendations in the report of the conference of Privy Councillors set up by the Government to examine these arrangements — and these recommendations published in a White Paper have been accepted by the Government in toto — it would appear, however, that the new security system is not quite as severe as it might have been. Believing that "the Communist faith overrides a man's normal loyalties to his country and induces the belief that it is justifiable to hand over secret information to the Communist Party or to the Communist foreign power," the conference was of the view that the State should take reasonable precautions against Communist infiltration into the public services.

The Privy Councillors themselves recognize that "some of the measures which the State is driven to take to protect its security are in some respects alien to our traditional practices," but say that, national security being paramount, the measures recommended by them were essential, however distasteful they might be to the English public. The main changes may be grouped under two heads. It is proposed to discard the principle followed hitherto that a civil servant's character is his own business. Hereafter defects of character and conduct that show themselves in the private sphere will be taken into account. The report says:

To-day great importance must be paid to character defects as factors tending to make a man unreliable or expose him to blackmail or influence by foreign agents. There is a duty on departments to inform themselves of serious failings such as drunkenness, addiction to drugs, homosexuality or any loose living that may seriously affect a man's reliability.

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A civil servant's associations will also be taken into consideration, and the Privy Councillors go so far as to

recommend that a civil servant entrusted with *secret* work might be removed from that job if married to a Communist or Communist sympathiser. And generally they have come to the conclusion that it would be justifiable "to tilt the balance in favour of offering greater protection to the security of the State rather than in the direction of safeguarding the rights of the individual," with the result that due process will necessarily be abridged. The White Paper says that decisions may have to be taken in some security cases without revealing full details of supporting evidence in order to safeguard official sources of information. In addition the White Paper says that there may be cases in which a job would be barred to a man because of lingering doubt about his reliability, "although nothing may have been proved against him on standards which would be accepted in a court of law."

In proposing these measures for dealing with potential subversion or disloyalty by government employees, the White Paper, however, makes a distinction between the most sensitive sectors of government—the Foreign Office, the defense services, and the atomic energy establishment—and other less sensitive departments, setting higher standards for the former than for the latter. It also contemplates outright dismissal of unreliable public servants only in the case of those civil servants who are employed on sensitive jobs, thinking that in other cases it would ordinarily be enough to transfer a suspected civil servant to another job or to hold up his promotion.

We reproduce below the comments of the "Statesman" on the White Paper, from which it would be seen that this journal does not think that in England the new security arrangements will in practice result in as serious an interference with civil liberty as it would in other countries lacking her democratic traditions. The journal says:

In this respect few conscientious readers will accuse the White Paper of neglect for the citizen's legitimate rights. Though many countries, including India, permit some form of preventive detention for reasons of security, Britain has so far avoided any peace-time equivalent of Regulation 18 B; the conference again firmly rejects the notion. A man may, indeed, be arrested upon suspicion that he is about to convey information to a foreign Power, but he must be brought before the courts on a charge without delay. Equally firmly it refuses to restrict the right to travel abroad, as suggested in some quarters after the Burgess-Maclean affair; as it points out, there is considerable reason to doubt whether withdrawal of passports from suspects would in fact prevent them from leaving the country if they had foreign connivance.

On the other side of the ledger, the main innovation seems explicit recognition that others besides known Communists or sympathizers may for one,

reason or another be bad risks. Officials with intemperate habits or of irregular life may be susceptible to blackmail; an unreliable wife or husband may exert emotional pressure on an otherwise worthy-seeming person. At this point, in some countries, there might indeed be reason to fear that, if too much weight were given to such considerations inquisitions and purges would result. The likelihood in Britain seems singularly remote. Certainly there has so far appeared no sign of a desire to persecute opinion as such; the emphasis is purely on undesirable connexions. If public servants are transferred from secret work or in extreme cases dismissed, they have the right of appeal to a tribunal; the conference indeed recommends that the latter's powers should be widened to permit a fuller report to the Minister, and that no fresh regulations should be promulgated without an opportunity for representations by staff associations. The value of such safeguards, again, depends upon the spirit of their interpretation, but in Britain few doubt that they have worked reasonably well.

#### Right to be Free from Detention

The United States Government, dissatisfied with the extremely unsatisfactory character of the Covenant of Human Rights and unwilling to be a signatory to it on that account, has taken the position that, instead of such a treaty, a more constructive approach to the problem of human rights would be for the Human Rights Commission to make an inquiry into the state of human rights in various countries and report to the United Nations as to where these rights are preserved and where they are violated, so that suitable action may be suggested in order to bring about an improvement where it is required. The Commission is willing to make such an investigation, but the question then arose which of these rights should be studied first. At the New York meeting of the Commission the United States suggested that Freedom of Person should have priority. The formula it proposed for personal liberty was: "the right of everyone to be free from arbitrary arrest, detention and exile." But the suggestion was not acceptable to all countries. Soviet Russia, Poland and the Ukraine opposed it.

In this connection it may be noted that Soviet Russia, though showing signs of relaxing its totalitarian control of citizens' activities, is yet far from conceding individual freedom. The "New York Times," writing on what transpired at the 20th Congress of the Communist Party in Moscow, says:

The Soviet Union is a dictatorship and whether it be a one-man dictatorship or an oligarchical dictatorship of some small "collective leadership" is relatively unimportant. Free speech, free press and similar free institutions are still non-existent in that country, and its rulers still monopolize all formal



internal channels of information and education. The vast majority of the Soviet population has no voice in deciding the key questions of national life, how the national income shall be divided, what foreign policy shall be, and the like. The secret police continues to exist and Mr. Khrushchev even praised it publicly last month. Serious dissent on vital issues, serious criticism of the highest leaders by ordinary citizens, all these are still conspicuously absent.

### Separation of the Judiciary from the Executive

#### WRONG VIEW PUT FORWARD BY U. P. MINISTERS

Recently there has been a discussion on the merits of separating judicial from executive functions in high quarters in the Uttar Pradesh. On this the "Leader" has this comment to offer :

The ball was set rolling by Mr. Justice Mulla's forthright attack in his presidential address to the fourth annual Conference of Judicial Officers' Association, on the system whereby judicial magistrates, who have in most cases a temporary tenure, have been placed under the administrative control of the Government. The Chief Minister who inaugurated the Conference, however, differed from Mr. Mulla and thought that was the proper thing to do "in a period of transition" and even went further and said that in a free country different officers and departments could not work in separate water-tight compartments. In the U. P. Legislative Assembly on the question being raised on the discussion on the demand for the administration of justice, the Minister for Justice expressed the opinion that the question of the separation of the judicial and executive functions was one of priorities and could only be taken up after the economic condition of the people had been improved. He questioned the correctness of the view that only judicial officers separated from the executive could do justice and went to the length of doubting the propriety of Mr. Justice Mulla's action in criticising the Government in a speech to Government servants.

We think it is too late in the day to question the principle of separation. In the directive principles of state policy, that principle, without its being made dependent upon economic progress, has been accepted in the clearest terms possible. In the United States, . . . which is undoubtedly a democratic country, there is the completest separation of powers and administrative functions in what the Chief Minister would call "water-tight compartments" without loss of efficiency or a breakdown of the law and order machinery. Arguments, therefore, such as were put forward by the Chief Minister or the Law Minister have no validity and one may be pardoned for doubting whether they brought to the question a detached mind steeped in democratic traditions. Obviously, a system under which a judicial officer's

chances of promotion depend upon his capacity to take a law and order view in the criminal cases with which he has to deal is not sound.

We think that the stand taken by Mr. Justice Mulla is correct and, in the interests of the purity of the judicial administration, we strongly support the view that judicial officers should be brought under the administrative control of the High Court.

The "Leader" continued its criticism of the Government's policy after the working committee of the U. P. Lawyers' Conference urged in a resolution the separation of judicial and executive functions.

Some States have gone ahead with schemes for separation. But here in our State a system has been evolved whereby young magistrates, called judicial magistrates, are employed on a temporary basis to administer justice under the ultimate control of district magistrates. The system is one which is liable to abuse and it does no credit to us that it continues to flourish and that the State Government has almost come to love it. It should be ended without avoidable delay. We have no doubt that schemes can be devised which can make the separation workable without adding any appreciable burden to State expenditure. The fact is that, despite the express directive in this matter of the Constitution, the will to make a real advance in this direction is, as is clear from recent discussion in the Legislative Assembly, lacking. This is an unsatisfactory state of things and it is high time public opinion asserted itself.

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## HABEAS CORPUS PETITIONS

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### Kashmir's Detention Law

#### "MUCH MORE STRINGENT" THAN ELSEWHERE

Mohammad Subhan and nine others were arrested in May 1955 and held in detention under sec. 3 of the Preventive Detention Act of the Kashmir State on the ground that their activities were prejudicial to the security of the State. They presented habeas corpus applications in the State's High Court, and a full bench consisting of Wazir C. J. and Kilam and Shahmiri JJ. disposed of these applications on 2nd August 1955.

The Act in a proviso to sec. 8 (1) empowers the Kashmir Government to withhold from a detenu the grounds of detention by making an order declaring that it would be against the public interest to communicate the grounds of detention to him. The petitioners maintained that this proviso was ultra vires of Art. 22 (5) of the Constitution, under which the authority making an order of detention is required to communicate to the detenu the grounds on which the order has been made. In this connection it is to be noted that Art. 370 (1) (d) empowers the President of the Union to apply to the State the provisions of the Constitution (except those of

Art. 1 and of Art. 370 (itself) "subject to such exceptions and modifications as he by order may specify." By virtue of this Article, the President added cl. (c) to Art. 35, which says: "no law with respect to preventive detention ... shall be void (for five years) on the ground that it is inconsistent with any of the provisions of this Part" of the Constitution, viz., Part III relating to Fundamental Rights. The contention of the petitioners was that Art. 35 (c) which purports to save the preventive detention law was itself ultra vires of the powers of the President as envisaged in Art. 370 (1) (d). Under this Article it was argued that while the President could apply certain Articles or parts thereof to the State, he could not make a provision which ran counter to Art. 22 and Art. 13, and that the legislature could not enact a law abridging the rights conferred by Part III of the Constitution. It was urged that by virtually eliminating Art. 22 (5), under which grounds are to be furnished to the detenu, the sheet-anchor of Art. 22 is removed, and that when this safeguard is taken away Art. 22, which affords protection against arbitrary arrest and detention by the executive, becomes "a dead inert mass" and loses all its value.

The Court unanimously rejected the contention about Art. 35 (c), holding that the Article was not in excess of the powers conferred on the President by Art. 370 (1) (d) and that the Preventive Detention Act was within the competence of the State legislature. However, Mr. Justice Shahmiri thought it necessary to say :

Nevertheless, I wish to add that I should not be understood to repel the contention of the learned counsel for the petitioners that refusal to furnish grounds of his detention to the detenu takes away from him the only effective safeguard against deprivation of his personal liberty and that thus he is placed entirely at the mercy of the executive. This may be so, but we have to interpret the law as it is. We have not to decide what is desirable in the interest of personal freedom and civil liberty. All that we have to determine is whether a particular provision of law, however distasteful it may be, is within the competence of the appropriate legislature.

On the constitutional point of the validity of Art. 35 (c) there was unanimity among the members of the Court; but as to the irregularity in the execution of the order of arrest and detention, the Court was divided, the Chief Justice on one side and the other Judges on the other. On the facts they were not divided, but on the question whether the irregularity made the detention orders bad law, their opinions were different.

The arrests, which sec. 4 of the Act requires to be carried out in accordance with sec. 79, Cr. P. C., were actually carried out by Station House Officers of different stations (the detenues belonged to different parts of the city of Srinagar). Apart from the fact that these officers are "unknown to the Cr. P. C.," they were not mentioned by name, as sec. 79 requires. That the detenues were arrested

not in conformity with the procedure laid down was admitted by the Chief Justice, but he did not think that this violation would "per se render the detention illegal." The other Judges were not of this view. Mr. Justice Kilam insisted that in a matter of deprivation of personal liberty the law must be followed by the executive "in every detail." He cited the authority of Dale's case (1881) 6 Q. B. D. 376. Lord Justice Bratt said in this case :

It is a general rule which has always been acted upon by the Courts of England that if any person procures the imprisonment of another, he must take care to do so by steps all of which are entirely regular and that if he fails to follow every step in the process with extreme regularity, the Court will not allow the imprisonment to continue.

Agreeing with this, Lord Justice Cotton added :

A person imprisoned might be discharged, although the particulars in which the authorities had failed to follow the powers under which they acted might be matters of mere form.

Mr. Justice Kilam ruled that the arrests were illegal. He pointed out that "unlike the Indian Preventive Detention Act, the Government here is not bound to furnish grounds of detention in case a person is detained for reasons of the security of the State." As to the effect of this, His Lordship said :

His (a detenu's) knowledge is limited to the fact that he is under detention on a vague charge of acting against the security of State. In the absence of grounds, no representation is possible for him to make. All that he can do is to simply file a denial. Under these circumstances what is he to do? He certainly has a right to seek a writ of habeas corpus from this Court. But, in the absence of any grounds having been supplied to him, what is he going to urge on his behalf except a bare denial? How can he establish his innocence if he honestly believes himself to have been wronged?

Mr. Justice Shahmiri also pointed to the fact that Kashmir's detention law "is much more stringent than any such law in any other Indian State."

There was also an irregularity in enforcing the orders of detention. The detenues were arrested in Srinagar "in the small hours of the morning" of 27th May and taken to Jammu, where at 9-30 p. m. on that day the detention orders were shown to them and copies thereof were given to them. The detenues in their affidavits affirmed that at Srinagar the detention orders were neither read to them nor even shown to them though there was a specific direction in the order itself to this effect. They made further allegations in their affidavits which were met by counter-affidavits. With regard to the latter, Mr. Justice Kilam observed that there were further circumstances which lent support to the position taken by the detenues and that "the detention at least up to 9-30 p. m. was illegal."

Mr. Justice Shahmiri was of the same opinion. The Chief Justice, however, said on this point :

There were valid (detention) orders. Up till 9-30 p.m. on the 27th May they did not operate, but it cannot be said that because some irregularities were committed in enforcing the orders, the orders themselves had lost all their force. . . . The fact that orders which had to be put into force were attempted to be executed wrongly did not exhaust their force. They remained valid orders and could still be put into force effectively [after 9-30 p. m.]. Where no defect exists in the order, its *wrong execution* does not make the order bad. It is still capable of being rightly executed. . . . The orders were rightly executed when they were served on the detenus at 9-30 p. m. on 27-5-1955. As I have not been able to find any defect in the orders of detention under which the detenus are being detained in Central Jail, Jammu, I find there is no ground to order their release.

This was the line which Mr. Dephtary, Solicitor-General of India, who appeared in the case for the Union of India, had taken in his arguments. In regard to this, Mr. Justice Kilam said :

Nor has he (Mr. Daphtary) contested with any amount of seriousness that the detention of the petitioners was illegal up to at least 9-30 p. m. on the day of their arrest. To meet this position he adopted a different line. Mr. Dephtary's argument, which has found favour with the learned Chief Justice, is that when once the detenus were relegated to jail custody, their arrest and detention, though illegal initially, became legal just the moment when the detention orders were shown to them at Jammu. In his view the previous irregularity in execution of the orders was simply automatically washed off with the showing of the warrants.

Reliance for this view was placed on *Naranjan Singh v. State of Punjab* (A. I. R., 1952 S. C. 106), but Mr. Justice Shahmiri showed that in that case "there was a fresh order of detention which was free from all the defects on the basis of which the previous order was *impugned*," but that in the instant case no fresh orders were served to cure the defects of the old ones. His conclusion therefore was :

In such cases the only thing that this Court can do is to see that the procedure laid down by law is strictly observed, and where deviation from legal procedure is established the detenu is entitled to be set free.

In the result the Court found the detention of the petitioners "improper and invalid" and ordered them to be set at liberty.

#### Detentions in Connection with Maharashtra Agitation

The Chief Justice and Mr. Justice Desai at the Bombay High Court on 2nd April disposed of seven petitions for a writ of habeas corpus challenging the detentions of

persons who were being detained in connection with the movement for the establishment of United Maharashtra. Six of these petitions failed and only one succeeded.

The one that succeeded was made on behalf of Mr. Appa Pendse, a member of the Action Committee formed to carry on the United Maharashtra agitation. He was arrested on 13th February on an order issued by the Commissioner of Police, Bombay, on 13th January. He was ordered by the Court to be released for a reason similar to that for the release of Mr. Thakarey (vide p. iv:85). Among the particulars that were supplied to Mr. Pendse was one which stated that he addressed a meeting at Shivaji Park on 14th November last. Later by a corrigendum of the order of detention this particular was deleted. Their Lordships said that the detention order could be challenged on the ground that it was based on facts which admittedly did not exist. Their Lordships held the *detention order* bad.

The other detenus whose petitions were dismissed were Mr. P. K. Atre, editor of "Navayug;" Mr. S. S. Mirajkar, a member of the Central Committee of the Communist Party of India; Mr. Nana Patil of Satara; Mr. A. M. Mandekar; and Mr. D. W. Randive and Mr. A. D. Padbidri, editors of "Samyukta Maharashtra." The detenus were stated to be carrying on propaganda for the achievement of *Samyukta Maharashtra with Bombay* and in the grounds of detention furnished to them it was stated that they addressed meetings exhorting people to observe *hartal* and to organize "morchas" and processions in defiance of the orders of the Commissioner of Police banning processions and assemblies. This resulted, it was stated, in acts of violence.

Mr. Atre had stated that the passages from his speeches which were before the Court were torn out of the context and were not correctly reported. Their Lordships said they failed to see how they could decide this point, which was for the Advisory Board to consider. The grounds furnished to the petitioner fell within the ambit of the *Preventive Detention Act*. Their Lordships held that on merits the order of the Commissioner was valid and dismissed Mr. Atre's petition.

In dismissing the petition filed on behalf of Mr. Mirajkar, Their Lordships said that taking the grounds of detention as a whole, they thought that the Commissioner was justified in issuing the detention order. It was stated that from 10th to 31st January 1956, Mr. Mirajkar was in hospital for the treatment of ulcer and, therefore, there should be no likely apprehension of his future activities. Their Lordships said that the question of future apprehension must be judged by the detaining authority from the past activities of the detenus. The past activities of Mr. Mirajkar had been set out in the order and it was for the detaining authority to satisfy itself that there was a possibility of the detenu's activities being continued. Their Lordships said that the fact that the detenu was in hospital for some time did not rule out the possibility that he would continue in his prejudicial activities. The petition, therefore, failed.

The petitions of the other four detenus also failed.

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## INCOME-TAX ACT

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### Validity of Sec. 5 (7-A) Challenged

#### ORDER THEREUNDER QUASHED BY SUPREME COURT

The Bidi Supply Company of Calcutta, which has its head office in Calcutta and factories near Chakradharpur in Bihar, was since its inception in 1948 assessed to income-tax by the income-tax officer at Calcutta till 1954, but the company's case was subsequently transferred to the income-tax officer at Ranchi, under sec. 5 (7-A) of the Indian Income-Tax Act which empowers the Central Board of Revenue to make such transfers. The company filed a petition with the Supreme Court challenging the section of the Act and the order made thereunder as in contravention of Arts. 14 (equality before the law), and 19 (1) (g) and 31 (rights to trade and property) of the Constitution.

The Constitution Bench of the Supreme Court on 20th March quashed the order transferring assessment proceedings. Mr. S. R. Das, Chief Justice, who delivered the judgment, said: "The order which was expressed in general terms without any reference to any particular case and without any limitation as to time was beyond the competence of the Central Board of Revenue." His Lordship observed:

It is implicit in the sub-sec. (7-A) that the Commissioner of Income-Tax or the Central Board of Revenue, as the case may be, should before making an order of transfer of any case apply his or its mind to the necessity or desirability of the transfer of that particular case. The fact that it is necessary or desirable to transfer a case of assessment of a particular assessee for any particular year does not necessarily indicate that it is equally necessary or desirable to transfer another assessment case of that assessee for any other assessment year.

The income-tax authorities have by an executive order, unsupported by law, picked out this petitioner and transferred all his cases by an omnibus order unlimited in point of time. This order is calculated to inflict considerable inconvenience and harassment on the petitioner.

The Chief Justice did not consider it necessary for the purpose of the present petition to go into the constitutionality of sec. 5 (7-A) of the Income-Tax Act.

#### Mr. Justice Bose's Separate Judgment

##### VOIDING THE SECTION ITSELF

Mr. Justice Vivian Bose in a separate judgment agreed with the main judgment and further declared sec. 5 (7-A) of the Act to be ultra vires of Art. 14 of the Constitution. He said:

Under the Act there is no need to give reasons with the order transferring the case from one place to another without any warning; and the power given by the Act is to transfer from one end of India

to the other; nor is that power unused. We have before us in this Court a case pending in which a transfer has been ordered from Calcutta in West Bengal to Ambala in the Punjab.

After all, for whose benefit was the Constitution enacted? What was the point of making all this potter about fundamental rights? I am clear that the Constitution is not for the exclusive benefit of Governments and States; it is not just for lawyers and politicians and officials and those highly placed. It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker." It lays down for this land "a rule of law" as understood in the free democracies of the world. It constitutes India into a sovereign democratic republic and guarantees in every page rights and freedom to the individual side by side and consistent with the overriding power of the State to act for the common good of all.

If an executive authority or a quasi-judicial body, or even Parliament itself, were to be given the right to determine these matters to their subjective satisfaction, there would be no point in these fundamental rights, for the courts would then be powerless to interfere and determine whether those rights had been infringed. The whole point of the chapter is to place a limitation on the powers of all these bodies, including Parliament, save in its constituent capacity. Therefore, no power resting on the subjective satisfaction of any of these bodies can ever be conferred: the satisfaction must always be objective so that its exercise is open to judicial review.

The power of transfer can only be conferred if it is hedged round with reasonable restrictions, the absence or existence of which can in the last instance be determined by the courts; and the exercise of the power must be in conformity with the rules of natural justice, that is to say, the parties affected must be heard when that is reasonably possible and the reasons for the order must be reduced, however briefly, to writing so that men may know that the powers conferred on these quasi-judicial bodies are being justly and properly exercised.

In a democracy functioning under the rule of law it is not enough to do justice or to do the right thing; justice must be seen to be done and satisfaction and sense of security engendered in the minds of the people at large in place of a vague uneasiness that star chambers are arising in this land. We have received a rich heritage from a very variegated past. But it is a treasure which can only be kept at the cost of ceaseless and watchful guarding. There is no room for complacency, for in the absence of constant vigilance we run the risk of losing it. It can happen here.

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## CRIMINAL JUSTICE

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### Illegal Detention for 20 Days

#### CONFESSION DUE TO POLICE TUTORING

A strange case involving theft and murder was heard last month in the Allahabad High Court. In 1947 the theft occurred in a house in Kanpur City. Neither the thieves nor the murderer could be traced. Four years later, however, one Autar Singh presented himself to the sessions judge at Ajmer. He was brought to Kanpur on 25th October 1951 and remained in police custody till 14th November 1951, on which date he was sent to jail. Two days thereafter he was placed before a magistrate for the recording of his confession. The confession covered 99 pages and took ten days in recording. He was so eager to make the confession that he was the murderer that he threatened to commit suicide unless justice was done to him by hanging. The confession was, however, retracted at the earliest opportunity thereafter in the court of the committing magistrate. At the trial the sessions judge accepted the confessions as voluntary and convicted and sentenced Autar Singh and two others for murder and other offences.

An appeal was then filed in the Allahabad High Court and on 20th March Mr. Justice Mukarji and Mr. Justice Chowdhary, allowing the appeal, set aside the convictions and sentences passed on the appellants.

Their Lordships said that the detention of Autar Singh in police custody from 25th October to 14th November, 1951, was without any order of remand. This conduct of the police was against the mandatory provisions of secs. 61 and 167, Cr. P. C. These mandatory provisions had obtained constitutional recognition in Art. 22 of the Constitution. If an arrested person was not produced before a magistrate within the time prescribed by Art. 22 (2) of the Constitution, which corresponded to sec. 167 (1), Cr. P. C., the arrest became void and the arrested person became entitled forthwith to obtain his release by a writ of habeas corpus. It was manifest that Autar Singh was deprived of the protection which Art. 22 of the Constitution, to say nothing of the provisions of sec. 167 Cr. P. C., conferred on every citizen of India in cases where such protection was imminently needed, that is, in cases of arrest without warrant. It was not that this illegal conduct emanated from an ordinary sub-inspector of police. The appellant was in the hands of high officers of the C. I. D. while he was in that illegal detention for 20 days. Highly reprehensible as such unlawful detention might ordinarily be, it was, therefore, all the more so in the present case. There were presumably strong reasons for the police to have had recourse to such an illegal and unconstitutional procedure. They were presumably actuated by motives which fought shy of the provisions prescribed by law for ensuring application of the judicial minds to the authority which they arrogated to themselves of seizing and detaining the appellant. In

these circumstances, the statement which he made while retracting the confession, that he was induced and intimidated by certain officers of the C. I. D. to make the confession by having been doped with Bhang and given promise of being made a rich man and given employment in the police, could not be brushed aside as devoid of all force. And if that be so, it must be held that the confession in question was made as a result of threats, inducement and tutoring.

Their Lordships said the reasons given by the sessions judge for accepting the confession as voluntary were wholly untenable and almost puerile. The retracted confession of Autar Singh could not be said to be voluntary. No question of its corroboration, therefore, arose. The various pieces of corroborative evidence on which reliance was placed were either inadmissible or non-existent. The conviction of Autar Singh for offences punishable under secs. 302, 307 and 120 B, I. P. C., for which he was tried with the help of assessors, based as it was merely on his retracted confession, was therefore wholly unsustainable.

Coming to the conviction of Autar Singh for offences under secs. 458, 459 and 460, I. P. C., in respect of which there was a jury trial, Their Lordships said it was regrettable that the sessions judge's charge to the jury was of a piece with his treatment of the confession of Autar Singh. The judge misdirected the jury, and the verdict of the jury that the appellants were guilty of the said offences was, therefore, manifestly erroneous and should be reversed.

The appeals were allowed and the appellants were acquitted.

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## U. P. ZAMINDARI ABOLITION ACT

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### Interpretation of Sec. 20

#### DEFINITION OF "OCCUPANT"

Mr. Justice Agarwala and Mr. Justice Chaturvedi of the Allahabad High Court on 5th March dismissed a writ petition by Jagdish Prasad of Rae Bareilly district against a majority judgment of the U. P. Board of Revenue and laid down important principles of law in interpreting the word "occupant" in sec. 20 of the U. P. Zamindari Abolition Act, which confers semi-proprietory rights on persons who were recorded in the revenue records of 1356 Fasli (1948) as "occupants." The respondents were the U. P. Board of Revenue, Sada Shiv and others.

These provisions had been the subject of considerable controversy and the question before the Revenue Board was whether even partners in cultivation, i. e., sajheedars, agents, servants and trustees, who were recorded as occupants, could also acquire these rights, superseding the rights of their masters in the land.

By a majority of two to one the Board of Revenue held that such persons could not acquire any right against

their masters even though their names were recorded in revenue papers as cultivating the land on behalf of the real owners of the land or as their sajheedars.

Their Lordships, delivering the judgment, said that in their opinion a partner or a mere agent of a person or a trustee could not acquire any rights under sec. 20 of the U. P. Zamindari Abolition Act if he was so recorded in 1356 Fasli. Having regard to the context in which the word "occupant" occurred in sec. 20, apparently it referred to a person who claimed cultivatory rights in the land to the exclusion of the others.

Their Lordships said it appeared that an occupant in cl. (g) of sec. 20 of the Act referred to a person in occupation of the land in his own right. A sajheedar and marfatdar (a person who is cultivating the land on behalf of another person) did not hold the land in his own right. Two elements of possession, as Roman lawyers had pointed out, were corpus and animus possidendi.

Their Lordships said in their opinion that a person recorded as an occupant under sec. 20 of the Act was a person recorded in column six of khasra or under sec. 20 of khatauni as kabiz (in possession) or kabiz dawedar (claiming possession) and not others whose names might have been recorded as sajheedars or marfatdars. Taking this view of the matter, they upheld the majority judgment of the Board of Revenue.

The applicant-defendant was recorded as marfatdar of the plaintiffs (who were his close blood relations) in the revenue records of 1356 Fasli. Failing in his other pleas against ejection by the plaintiff, he fell back on this entry and claimed immunity from ejection under sec. 20 (b) of the Zamindari Abolition Act as having acquired adhvasi rights under the section.—The "Statesman."

[Sec. 20 (c) (ii) runs as follows: "Every person who, on the date immediately preceding the date of vesting, was or has been deemed to be... a person recorded as "occupant" of any land (other than land to which sec. 16 applies) in the records of rights for the year 1356 Fasli... and who was on the aforesaid date in possession of the land, shall, unless he has become a bhumidhar of the land under sub-sec. (2) of sec. 18, be called adhvasi of the land and shall... be entitled to take or retain possession of the land." ]

## SEC. 144, CRIMINAL PROCEDURE CODE

### "Disturbing Public Peace" and "Causing Annoyance"

**One Restriction Constitutional; the other Unconstitutional  
ALLAHABAD HIGH COURT'S JUDGMENT**

On 25th April 1952 the police fired upon a crowd of workers in the district of Gorakhpur and in the firing two

workmen were killed. Since then every year on that day some persons go to the spot where the workmen were killed to place wreaths. And every year the district magistrate of Gorakhpur promulgates an order under sec. 144, Cr. P. C., prohibiting such an act and prosecutes persons disobeying the order. Last year too such an order was passed, but Mr. Raj Narain Singh, leader of the Opposition in the U. P. Legislative Assembly, and Messrs. Digay and Mahatam Singh, member of the Praja-Socialist Party, defied the order and proceeded to the spot. They were arrested by the police for disobedience of the order for being prosecuted under sec. 188 I. P. C. When they were detained in Gorakhpur jail, they presented a habeas corpus petition in the Allahabad High Court. Thereupon the applicants were released on bail and the case against them under sec. 188 was stayed. The petitioners challenged the validity of both sec. 144 and the actual order issued thereunder as infringing Art. 19 (1) relating to "freedom" rights.

Mr. Justice Desai and Mr. Justice Bhargava dismissed the petition on 24th January. As to sec. 144, Their Lordships considered only the question whether the section was in contravention of the rights guaranteed by Art. 19 (1) (a) relating to the right to freedom of expression and Art. 19 (1) (b) relating to the right to assemble peaceably and without arms, as the order issued by the district magistrate imposed restrictions only on these two rights mentioned in Art. 19 (1). They ruled that sec. 144 imposed on these rights restrictions which were permitted by Art. 19 (2) and (3). They had found, they said, nothing unreasonable in the substantive law or in the procedural law in respect of restrictions imposed by sec. 144 on the rights guaranteed in Art. 19 (1) (a) and (b).

Their Lordships then proceeded to consider the validity of the order issued by the district magistrate. In the preamble to the order the magistrate said that he had received information that certain persons intended to make demonstrations in connection with the incident of 25th April 1952 and that in his opinion such demonstrations were "likely to cause annoyance to the persons lawfully employed (on the railway grounds where the incident had taken place) and to disturb public peace and tranquillity, and speedy remedy is desirable." Their Lordships observed that while Art. 19 (2) and (3) permitted reasonable restrictions to be imposed in the interest of public order, sec. 144 permitted restrictions also in the interest of preventing obstruction, annoyance, etc. "It could not be doubted," Their Lordships said, "that at least to the extent that sec. 144 permitted restrictions in excess of those permitted by Art. 19 (2) and (3), it was void under Art. 13."

What the effect of certain provisions of sec. 144, if void, was (said Mr. Justice Desai, Mr. Justice Bhargava concurring) upon the rest of the provisions depended upon whether the two classes of the provisions were severable or not; if they were not severable, the provisions

must be held to be void. Naturally, when one could not sever a void part from the valid part, the whole must be rejected. If there were two distinct provisions or provisions which could be severed from each other and one of them was void and the other valid, the mere fact that they were combined together in one section or joined together in one sentence would not affect the validity of the valid provision. Art. 13 required that if a void provision could be separated from invalid provisions, it must be separated and the remaining provisions would remain in force.

His Lordship said sec. 144 contained several independent provisions. This itself meant that they were severable from one another. The provision that a magistrate might direct any person to abstain from a certain act if he considered that such direction was likely to prevent obstruction might be unconstitutional, but it would not affect the constitutionality of another provision to the effect that he might direct any person to abstain from a certain act if he considered that such direction was likely to prevent a disturbance of the public tranquillity.

His Lordship said that in the instant case the magistrate passed the order because he considered that the directions contained in it were likely to prevent annoyance and disturbance of the public tranquillity. The provision empowering him to pass an order if he considered that the direction in it was likely to prevent annoyance was unconstitutional and, therefore, he could not pass the order in order to prevent annoyance. If he had passed it just to prevent annoyance, it would have been knocked down as an invalid order passed under the authority of an unconstitutional provision. On the other hand, the provision empowering him to pass an order to prevent a disturbance of the public tranquillity was constitutional and had the order been passed just for that purpose, it would have been valid. Actually he passed an order for both the purposes; this meant that he exercised the powers conferred upon him by both the provisions. Since he could have passed a valid order by relying on the constitutional provision, the order actually passed must be held not rendered invalid merely by reason of his having relied upon the unconstitutional provision also.

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## BOMBAY POLICE ACT

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### Sec. 37 (3) Not Unconstitutional BOMBAY HIGH COURT'S RULING

A similar case was heard about the same time in the Bombay High Court. Mr. Baburao Jagtap, a trade union leader, was arrested in Bombay on 21st November on the charge of taking part in a procession in contravention of the order issued under sec. 37 (3) of the Bombay Police Act by the Commissioner of Police, Bombay, prohibiting processions of more than four persons in Greater Bombay. Mr. Jagtap challenged the validity of the section in the High Court on the ground that the provisions of the

section prevented him from exercising the right of movement guaranteed to every citizen under Art. 19 of the Constitution.

Chagla C. J. and Dixit J. dismissed the petition on 31st January. It had been argued that the section did not limit the duration of the prohibitory order and, with the sanction of the State Government, the order could continue indefinitely. Their Lordships dismissed the contention, pointing out that the continuation of the order depended on the satisfaction of the authority that it was necessary for the preservation of law and order. It could not continue any longer than required for the purpose. The validity of the law could not be tested on the basis that the powers would be used dishonestly.

Referring to the submission that the section was bad as it did not provide for hearing the affected party even after the order had been passed, Their Lordships said that it would be erroneous to suggest that in every case involving the deprivation of a fundamental right, the provision of law would be bad if no opportunity to make a representation was given to the citizen.

There was no allegation made by the Police Commissioner in the order and, therefore, no question arose of a representation being made by any in defence against the charge. Moreover, the entire city of Bombay was affected by the order. Their Lordships could not understand on what point representation should be permitted.

In Their Lordships' opinion it would be an impossible state of affairs to bring about if the question as to whether there was an emergency or whether public order was threatened or not could only be decided by a public debate between the Commissioner and the public. In an emergency, power must be given to some authority and it should be left to his judgment when and how it should be exercised. That was the procedure the Legislature had adopted, Their Lordships said.

Referring to the contention that the fundamental right was made dependent on the uncontrolled subjective opinion of an executive officer, Their Lordships said that it was futile to suggest that in an emergency the power to be exercised by the officer should be controlled by a higher authority. A safeguard had however been provided in that the Commissioner must satisfy himself from time to time that the conditions warranting the continuation of the order were present.

Their Lordships also said that the Legislature could not give any more details to indicate the nature of assembly or procession to be banned than stating "those whose prohibition was necessary for the maintenance of public order."

Their Lordships said that the restrictions imposed by the Legislature on the freedom of movement were in the interest of public order and were reasonable. The provision of the section, therefore, could not be said to contravene the Constitution.

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## NOTES

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### Mass Refusal to Use Buses

For organizing a boycott of Montgomery buses by Negroes in protest against a Negro woman being arrested for refusing to give up her seat in a bus to a white man (vide p. iv : 83), Dr. Martin Luther King, a Negro Baptist minister, was prosecuted in a circuit court under a 1921 statute, designed to be used in labour strife, which outlaws boycotts of legal businesses "without legal excuse or just cause." The circuit judge on 19th March convicted and sentenced the minister to a fine of 500 dollars. The possible penalty under the law is 1,000 dollars and the judge said that the fine had been halved because Dr. King continually urged his followers to observe a policy of non-violence. The conviction has only helped to spur the boycott movement. Dr. King said:

This conviction and all the convictions they can heap on me will not diminish my determination one iota. We will continue to protest in the same spirit of non-violence and passive resistance, using the weapon of love. God is using Montgomery as His proving ground, and maybe here in the cradle of the Confederacy the idea of freedom in the Southland will be born.

The boycott, begun on 5th December, is continuing with even greater vigour than formerly, none of Montgomery's 50,000 Negroes riding the city buses. An appeal will be lodged against Dr. King's conviction in the Alabama Court of Appeals, but it is estimated that it will take three years for the case to come up before the court.

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### Ban on Segregation in Colleges

#### PRINCIPLE OF 1954 DECISION EXTENDED

On 5th March the Supreme Court extended to colleges and universities the principle it laid down in its historical decision of 17th May 1954, outlawing racial segregation in elementary schools and high schools. The effect of the recent decision is that in all educational institutions, which are tax-supported and are not private, segregation of pupils is illegal, whether the institutions impart education in lower or higher classes.

LeRoy Benjamin Frasier and two other Negro students, after completing their high school course, applied for admission in the University of North Carolina, an all-white university. The authorities refused admission. Thereupon, the students sued to compel the university to admit them, contending that their constitutional rights and privileges were violated by the rejection on the part of the university of their applications. The university urged that equal educational facilities were available to Negroes in other institutions specially

maintained by the state for them, and that the Supreme Court ruling of 1954 did not apply to higher institutions.

A federal district court in its decision of 10th September 1955 agreed that the Supreme Court's decision of the previous year was limited to the facts before it; that is to say, that that opinion dealt only with cases involving elementary and high school pupils. But the court added that "the reasoning on which the (Supreme Court's) decision was based is as applicable to schools for higher education as to schools on the lower level." The Supreme Court in its 1954 ruling had held that segregation deprived Negroes of equal protection of the laws and that "in the field of public education the doctrine of separate but equal has no place." Applying that principle to colleges and universities, the federal district court decreed that applications of the three Negro students "and other Negroes similarly situated must be processed on the basis of their qualifications regardless of race or colour."

After this decision the university admitted the students, pending the outcome of the state's appeal to the Supreme Court. The Supreme Court affirmed the lower court's interpretation of its earlier decision.

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### Academic Freedom

Five colleges recently dismissed their faculty members who invoked the Fifth Amendment (which protects an individual from testifying against himself) when called before Congressional investigating committees and refused to answer questions put to them. These cases were referred to the American Association of University Professors, an influential body consisting of 38,000 members. A special committee of the Association on 22nd March asked for the censure of the colleges for what it said were violations of academic freedom. It held that pleading of the Fifth Amendment by a faculty member "cannot be in itself a sufficient ground for removing him." The committee also expressed itself against special opinion tests and "disclaimed oaths" and therefore opposed the Feinberg law of New York State and such other legislation that calls on supervisory officials to certify that members of their staffs are not subversives. It also suggested that membership in the Communist Party by itself was not sufficient ground for dismissal. The committee would rest its judgment in such cases on the character of the teacher and the quality of the teaching. If membership in the Communist Party would result in biased teaching, then, according to the committee, dismissal would be justifiable. The committee therefore urges that "the influence of the academic community should be directed against the proscription of membership in a movement which needs to be kept in view rather than driven underground" and generally rejects the idea of "an educational system subject to the irresponsible push and pull of contemporary controversies." The guiding principles which the committee laid down were approved by the Association's annual meeting on 7th April.