

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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As in previous years there will be no issue of the Bulletin in June this year, the present one being intended to be a joint May-June number. The next number will be issued in July.

Kashmir's Constitution

"Reasonable Restrictions" Thereunder

How light-heartedly and callously persons are sometimes placed under detention in Kashmir State will be apparent from the detailed account we have given elsewhere in this issue of two cases of detention for reasons which the High Court found to be not only vague and indeterminate but, in one of these cases, wholly extraneous to the purposes of the Preventive Detention Act.

But another case that came before the Court reminds one of how our Bill of Rights, as applied to the Kashmir State, has been so whittled down as to make the legislature the final authority to determine the extent and character of the fundamental rights of citizens instead of the judiciary—a point on which we have already commented at p. iii: 102.

In *Galodhu v Nanak Chand*, A. I. R. 1955 J. and K. 25, involving a pre-emption suit under the Kashmir State's Right of Prior Purchase Act the defendant vendee contended that the statute imposed on the right to acquire, hold and dispose of property guaranteed by cl. (1) (f) of Art. 19 of the Constitution restrictions which are not in the nature of reasonable restrictions as required by cl. 5 of the Article, and that the Act was therefore ultra vires.

What restraints the Act lays on the power to buy and sell land we do not know; they may be quite reasonable. But the point is that if they are unreasonable, there is no possibility of obtaining redress.

The defendant very hopefully cited a decision of the full bench of the Hyderabad High Court—*Moti Bai v. Kand Kari*, A. I. R., 1952 Hyderabad 161—in which a plea was put forward that the customary law of pre-emption as enforced in the Hyderabad State was a clog on the right to dispose of property and had become void and unenforceable since the commencement of the Constitution under Art. 19 (1) (f) read with Art. 19 (5), and the Court allowed the plea and declared the law ultra vires. The argument in the present case was that the Kashmir statute imposed similar restrictions and should

therefore be similarly held invalid, as that State too had in its Constitution adhered to the Bill of Rights.

The Kashmir High Court, however, decided—and this also was a full bench decision—that it was beyond its competence to pass on the reasonableness or otherwise of the restrictions imposed by the statute. It pointed out that though Kashmir State had adopted Art. 19 of the Indian Constitution, it had, in doing so, specially added to the six clauses of that Article a seventh clause which runs as under:

The words "reasonable restrictions" occurring in clis. (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate legislature deems reasonable.

How the added clause effaces the fundamental rights enunciated in Art. 19 can be easily seen. For it makes the reasonableness of restrictions which the legislature can legitimately impose on the exercise of those rights a non-justiciable issue. The value of Art. 19 for what was formerly British India and Indian States like Hyderabad consists in the fact that though the legislatures of these areas will no doubt subject the enjoyment of the rights mentioned therein to restrictions which they consider to be "reasonable," whether the restrictions so imposed are in fact reasonable or unreasonable will be finally decided by the courts, and if the courts come to the conclusion that the restrictions are not reasonable, they have the power and indeed the duty to declare the laws imposing those particular restrictions void under Art. 13 (1) of the Constitution. In other words, reasonableness of the restrictions is a justiciable issue. A fundamental right deserves to be called by that name only if it is placed by means of judicial review above the vagaries of legislative action and if the judiciary can protect citizens from any possible legislative infringements of the rights by pronouncing the laws themselves to be void. Where however, as in Kashmir State though it is claimed as an Indian State, the legislature itself is authorized to decide in the last resort the scope of the rights which citizens may enjoy and the power of reviewing its decrees is denied to the courts, there obviously the so-called fundamental rights cease to exist.

Accordingly, in this case the Court was helpless to give relief to the applicant if he was entitled to any. In sheer desperation it had to say:

The (Hyderabad) ruling would not be of much assistance to the applicant.

The powers of the courts are limited by the Constitution itself according to the provisions of cl. 7 of Art. 19, which lays down that the words "reasonable restrictions" occurring in cl. 5 will be deemed to be reasonable if laid down by the appropriate legislature.

It is not open to the courts to examine these restrictions in order to find out whether they are reasonable or not.

The Constitution under cl. (7) mentioned above has itself ousted the jurisdiction of the courts to examine the reasonableness of restrictions which have been imposed by the appropriate legislature.

In the State of Madras *v. V. G. Row*, A. I. R., 1952 S. C. 190, Chief Justice Patanjali Sastri said from the Supreme Court bench :

(In respect to Fundamental Rights) this Court has been assigned the role of a sentinel on the "qui vive." While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.

In Kashmir State, however, the legislative judgment is supreme; the High Court and even the Supreme Court would be trespassers if these were to pass on the validity of laws regarding the freedoms enumerated in Art. 19.

The position in Kashmir State in regard to the freedoms specified in Art. 19 closely resembles that in India as a whole in regard to the right to Freedom of Person. The legislature can restrict this freedom at will, subject only to some minimal constitutional limitations, such as furnishing to the person held in detention without charge or trial the grounds on which the detention has been ordered. The grounds must be full and clear but only in the sense that they will enable the detainee to make a representation against his detention to the Advisory Board. Even upon this right of the detainee to be furnished in full with the grounds on which the detention order is made, the Constitution has made, in the words of Chagla C. J. of the Bombay High Court in *re. L. J. J. D'Souza*, "a rather serious inroad," inasmuch as it permits the detaining authority in public interest to withhold materials from the detained person "even though such action may seriously prejudice the detainee" and prevent him from making a proper representation. Whether the grounds given are adequate to justify detention or even whether the allegations made against him are true or not is not a matter for the courts. If the allegations are such that they lead the detaining authority to satisfy himself that detention in that case is justified, that is enough to keep him in jail. It is a subjective satisfaction on the authority's part, not open to judicial review in any shape or form. It is not for the courts to determine objectively the reasonableness of the satisfaction of Government as to

the necessity of passing an order of detention against any individual. The courts have power only to see that the technicalities of the law are complied with and they can give relief only in cases where the detaining authority is so foolish as not to comply with these simple technicalities. They can also give relief when it can be proved by the detainee that the decision to detain him was not an honest one, and it is of course next to impossible that it can be so proved. But the subjective decision of the executive authority as to the sufficiency of grounds for detention cannot be subjected to an objective judicial test. A person may be suspected of having committed a crime and criminal proceedings may actually be started against him, and yet later these proceedings may be suspended, perhaps for the reason that sufficient evidence is not forthcoming, and he may be locked up in jail under the Preventive Detention Act, in which case no evidence need be adduced and mere suspicion can prevail against normal legal safeguards. Mr. Justice S. R. Das, speaking from the Supreme Court bench, asked, and answered the question himself, thus :

What is the protection which our Constitution gives to any person against the legislature in the matter of deprivation even of life or personal liberty? None, except the requirement of Art. 21, namely, a procedure to be established by the legislature itself, and a skeleton procedure prescribed in Art. 22

If in India at large the Constitution gives no protection to citizens against the legislature in the matter of deprivation of Freedom of Person, in Kashmir State it gives no protection even in the matter of infringement of the freedoms mentioned in Art. 19. [And we saw in the last issue (p. iv:56) how the extremely tenuous right to Personal Liberty which we enjoy has been further whittled away in Kashmir State.]

The executive of the Praja-Socialist Party, which met at Gaya at Christmas passed a resolution on Kashmir asking that the authority of the Supreme Court be extended to Kashmir State. It appears to think that the State has not made itself amenable—for it was open to it to make its own High Court the highest judicial tribunal within its territory though it calls itself a State of India—to the control of the Supreme Court, and that it is this which has enabled the State Government "to deprive the people of their fundamental rights and civil liberties with impunity." Here, however, the P.-S. P. has got hold of the wrong end of the stick. The Supreme Court operates in Kashmir—much credit was given to the State for making this "large-hearted" concession; but the trouble is that the Supreme Court has to determine issues concerning civil liberties in Kashmir in accordance with the Constitution that the State has chosen to adopt, and it is well known that it has adopted it subject to several stringent "exceptions and modifications."

SEGREGATION ON BUSES

HELD UNCONSTITUTIONAL BY THE SUPREME COURT

On 23rd April the U. S. Supreme Court ruled against the last vestige of racial segregation in public transportation. Ten years ago it held that segregation of passengers by race on buses crossing state lines was an unconstitutional burden on interstate commerce. Now it held that segregation on buses operating within the boundaries of a state violated the Fourteenth Amendment to the Constitution.

The instant case arose out of a suit for damages brought against the South Carolina Electric and Gas Company, which runs buses in Columbia, by Sarah Mae Flemming, a Negro. She asked for damages of 25,000 dollars because a driver had forced her, as happened in December last in Montgomery, Alabama, to leave a bus when she refused to move to the section reserved for Negroes. She contended in the federal District Court and the Circuit Court of Appeals in Richmond that enforcement of the South Carolina statute requiring segregation on buses abridged civil rights as guaranteed by the Fourteenth Amendment which provides that every person shall have equal protection of the laws. This position of the plaintiff was upheld by the Court of Appeals on 1st July 1955. It said that, in the light of the Supreme Court's school decision of 1954, "we do not think the 'separate but equal doctrine' can any longer be regarded as a correct statement of law." This doctrine was first affirmed by the Supreme Court just sixty years ago in the famous case of *Plessy v. Ferguson* involving segregation in intrastate railway coaches. It said in that case that separation of races did "not necessarily imply the inferiority of either race to the other" and was generally recognized "as within the competency of the state legislatures in the exercise of their police power." And it held that segregation of railroad passengers was not unconstitutional if "separate but equal" facilities were provided on the trains. This "separate but equal" doctrine was expressly overruled by the Supreme Court in cases involving segregation in public schools. Basing itself on this decision and applying it to transport, the Court of Appeals struck down in the instant case the South Carolina law requiring segregation of passengers on motor vehicles.

The bus company then appealed to the Supreme Court, which summarily rejected the appeal in its per curiam opinion (one issued by the whole court); it simply said: "The appeal is dismissed" and cited *Slaker v. O'Connor*, in which the Court dismissed an appeal as "without any authority of law" and as one that "needlessly consumed our time." By citing this case the Supreme Court in effect chided the bus company for bringing the appeal. The dismissal of the appeal means that racial segregation in the matter of public transport is as violative of the Constitution as that in the matter of publicly supported education.

Last November the Interstate Commerce Commission put an end to segregation on interstate trains and buses and in waiting-rooms used by interstate travellers. There has been no segregation on air-planes. And, by the decision of the Supreme Court, segregation has been outlawed in schools, public works, recreation areas and golf courses supported by public funds as well as in theatres, hotels and restaurants.

In view of the Supreme Court's ruling of 23rd April bus lines ended segregation on buses the next day in at least thirteen cities, including Montgomery, where Negroes have boycotted the buses for twenty-one weeks. But this boycott still continues, for the city officials have taken the stand that the Supreme Court's decision is binding only on the parties to the suit that originated in Columbia and that the Montgomery segregation law was still in force. The officials therefore notified that if bus drivers refused to enforce the law, they would be arrested and prosecuted. The bus line however announced that the company would stand behind any of the bus operators who might be arrested for not giving effect to segregation. Such disputes may go on for some time, but it is clear that the Supreme Court's ruling will eventually remove colour restrictions on interstate transit lines in all the thirteen states in the South where such restrictions are enforced.

This case brings to the reader's mind a very similar case decided nearly ten years ago, that of *Morgan v. Virginia*, 328 U. S. 373 (1946). It involved the constitutionality of a Virginia statute which, like the South Carolina statute in the instant case, required segregation of passengers in motor buses. Under the statute separate seats had to be assigned to white and coloured persons and drivers were given power to require passengers to change their seats to comply with the allocation. Those who failed to obey the directions of drivers were to be deemed guilty of a misdemeanour and upon conviction made themselves liable to a fine of 25 dollars. The statute applied both to intrastate and interstate passengers.

Irene Morgan, a Negro interstate passenger travelling on a bus from Virginia through the District of Columbia to Baltimore, Maryland, refused to obey the request of the driver to move to a back seat in order to make room for a white passenger. She was arrested and convicted of violating the Virginia segregation statute. The high court of Virginia affirmed the conviction. The U. S. Supreme Court invalidated the statute, but it should be remembered that in doing so it did not pronounce on the question of segregation but considered the statute in its relation to the Commerce Clause, holding that the state legislation imposed an "undue burden" on interstate commerce. It noted that 18 states prohibited racial segregation on motor

carriers while ten required racial segregation. Justice Frankfurter said :

The imposition upon national systems of transportation of a crazy-quilt of state laws would operate to burden commerce unreasonably, whether such contradictory and confusing state laws concern racial mingling or racial segregation.

This ruling was based upon the decision in the case of *Hall v. Du Cuir*, 95 U. S. 485 (1878), which concerned a Louisiana statute banning racial segregation on public carriers. The statute required owners of public conveyances to give all persons travelling in the state "equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or colour." A Negro passenger on a steamboat that traversed the Mississippi from New Orleans to Vicksburg was excluded, while the boat was in Louisiana, from a cabin reserved for whites. Hall, the operator of the boat, was held liable in the state courts for damages for violating the Louisiana statute. The Federal Supreme Court reversed, holding that the statute was an unconstitutional burden on interstate commerce. Chief Justice Waite said :

If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardships. . . . Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if, on one side of a state line, his passengers, both white and coloured, must be permitted to occupy the same cabin, and on the other be kept separate.

While the opinion in this case is held to be controlling, a different conclusion was reached in *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28 (1948), the special circumstances in which distinguished it from the case of seventy years earlier. The company carried its patrons to what is popularly known as Detroit's Coney Island for

recreational facilities; the passengers used to go to the Island in the company's boats and return the same day. The Island, though located in Canada, is practically inaccessible from the Canadian shore. In June 1945 thirteen girls wanted to go on the outing. They purchased the tickets, went to the upper decks and took chairs. But subsequently the company discovered that one of the girls, Miss Sarah Elizabeth Ray, was a Negress, and the company excluded coloured persons from its excursions.

Miss Ray thereupon brought suit against the company for violation of Michigan's Civil Rights Act. After the Federal Civil Rights Act was invalidated by the Supreme Court in the Civil Rights cases, 109 U. S. 3, in 1883, several states adopted similar legislation in their own jurisdiction, and the Michigan statute was enacted in 1885. It was a comprehensive legislation guaranteeing "full and equal accommodations . . . to all citizens alike" and making a proprietor or agent of any such place who directly or indirectly withheld any accommodation on account of race, creed or colour liable to punishment.

The company was prosecuted for violation of the statute, and the state court found it guilty and sentenced it to pay a fine of 25 dollars. On appeal the state's supreme court affirmed the judgment; and so did the U. S. Supreme Court. The latter said :

It is difficult to imagine what national interest or policy, whether of securing uniformity in regulating commerce affecting relations with foreign nations or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so. Certainly there is no national interest which overrides the interest of Michigan to forbid the type of discrimination practised here.

In all these cases the governing factor was the effect of a state law, either compelling or prohibiting racial segregation on public carriers, on interstate or foreign commerce, whereas in the instant case the Supreme Court outlawed racial segregation on buses travelling within a state and indeed within a state.

INVOCATION OF THE FIFTH AMENDMENT " CONVERTED INTO A CONCLUSIVE PRESUMPTION OF GUILT "

Dr. Harry Slochower, who served for twenty-seven years as a teacher of German at Brooklyn College under the control of New York City and thus had acquired tenure rights in the college, was asked in September 1952 at a hearing of the Senate Judiciary sub-committee, which was investigating subversive influences in the public schools throughout the country, whether he had been a member of the Communist Party in 1940 and 1941. (It had been alleged in testimony before a committee of the New York

legislature that he had been a Communist in 1941.) Dr. Slochower refused to answer the questions, invoking the privilege of the Fifth Amendment, which provides that no person shall be required to give self-incriminating testimony. Thereupon, in October 1952, he was dismissed under sec. 903 of the charter of New York City.

This section provides that if a city employee refuses to answer official questions about official duties on grounds of possible incrimination, "his term or tenure of office or

employment shall be terminated." Employees so discharged become ineligible to future election or appointment to municipal positions. The law does not provide for notice, hearings, or opportunity to explain the refusal to answer the questions.

Dr. Slochower took the matter to the Supreme Court and contended that the application of the charter's provision to his case deprived him of due process of law, because he was dismissed without a hearing. New York City asserted that Dr. Slochower's refusal to answer would tend to prove him guilty of a crime or that he had falsely invoked the Fifth Amendment privilege to avoid answering and therefore committed perjury.

The Supreme Court on 9th April ruled by a majority of 5 to 4 that the "summary dismissal" of Dr. Slochower "violates due process of law," thus rejecting the contention of New York City and agreeing to that of the petitioner. Justice Clark, delivering the opinion of the majority, said:

At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.

In practical effect the questions asked are taken as confessed and made the basis for the discharge. No consideration is given to such factors as the subject matter of the questions, the remoteness of the period to which they are directed, or justification for exercise of the privilege.

It matters not whether the plea results from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive.

Referring to the New York Court of Appeal's ruling that Dr. Slochower's assertion of the Fifth Amendment privilege was "equivalent to a resignation," he said that under this interpretation, every employee who sought the shelter of the Amendment could be discharged. This denied "full enjoyment" of the constitutional privilege.

Dr. Slochower testified that he had answered questions of the New York legislature's committee and of a faculty board regarding his Communist affiliations in 1940 and 1941. Referring to this, Justice Clark said that the New York Board of Education had "possessed the pertinent information for twelve years" to determine whether Dr. Slochower was qualified to continue in city employment. The questions asked by the Federal committee, he asserted, were propounded "for a purpose wholly unrelated to his college functions." But the Board had seized upon his invocation of the Fifth Amendment to "convert the use of

sec. 903 into a conclusive presumption of guilt." He said:

Since no inference of guilt was possible from the claim before the Federal committee the discharge falls of its own weight as wholly without support. There has not been the "protection of the individual from arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process.

Chief Justice Warren and Justices Black, Douglas and Frankfurter concurred in Justice Clark's opinion, and the Court ordered Dr. Slochower's reinstatement.

The dissenters were Justices Reed, Burton, Minton and Harlan: they contended that refusal to testify was adequate ground for dismissal. Justice Reed disagreed with the assumption of the majority that "sec. 903 as a practical matter takes the questions asked as confessed." He said:

The city does have reasonable ground to require its employees either to give evidence regarding the facts of official conduct within their knowledge or give up the positions they hold.

The fact that the witness has a right to plead the privilege against self-incrimination protects him against prosecution but not against the loss of his job.

Justice Harlan, in his separate dissent, asserted that the state did not violate due process when it made assertion of a claim of privilege ground for discharge. He said:

I think that a state may justifiably consider that teachers who refuse to answer questions concerning their official conduct are no longer qualified for public school teaching, on the ground that their refusal to answer jeopardizes the confidence that the public should have in its school system.

Presumption of Guilt

PRIMA FACIE OR CONCLUSIVE?

The decision of the Supreme Court means that when the Fifth Amendment is validly invoked, it cannot be used for imposition of sanctions by methods that violate due process of law. In this case the Court ruled that dismissal was automatic, without notice or hearing, that sec. 903 had been interpreted by the New York courts as a "conclusive presumption of guilt," and that this denied due process guaranteed by the Fourteenth Amendment.

On the question of the presumption of guilt two recent cases may be adverted to. In *Adler v. Board of Education*, 342 U. S. 485 (1952) — vide p. ii: 97—the Court upheld New York's Fainburg Law, which authorizes public school authorities to dismiss employees who are found, after notice and hearing, to belong to organizations which advocate overthrow of the Government by unlawful means. The Law directed the authorities to make a list after notice and hearing, of such organizations, and

the authorities enacted a regulation to the effect that membership in a listed organization "shall constitute prima facie evidence of disqualification for appointment to, or retention in, any office or position in the school system". This provision about prima facie evidence was challenged on the ground that it denied due process, "because the fact found bears no relation to the fact presumed". The Court of Appeals in this case said:

"The presumption growing out of a prima facie case remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." (Quoted from a New York court decision.) Thus the phrase "prima facie evidence of disqualification," as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the prima facie evidence. Once such contrary evidence has been received, the official who has made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence.

Accepting this reasoning Justice Clark, speaking for the Supreme Court, said:

Where, as here, the relation between the fact found (viz., that the employee was a member of a subversive organization) and the presumption (that such member is ineligible for employment) is clear and direct and is not conclusive, the requirements of due process are satisfied.

In *Weimen v. Updegraff*, 344 U. S. 183 (1952)—vide p. ii: 210—the Supreme Court struck down a "loyalty oath" Act of the state of Oklahoma as arbitrary because it based disqualification for employment solely on the fact of membership in certain organizations regardless of the knowledge on the part of the employees that the organizations were within the proscribed class. It held that scienter should be a necessary factor, because membership in itself might be innocent, and that classification of innocent and guilty together was "arbitrary." Again Justice Clark, delivering the opinion of the Court, said:

Under the statute before us, the fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one.

STATES' SEDITION LAWS

HELD TO BE SUPERSEDED BY FEDERAL LEGISLATION

Mr. Steve Nelson, a Communist Party leader of Pennsylvania, was charged with conduct designed to encourage the seditious overthrow of "the Government of Pennsylvania and the United States" under Pennsylvania's Sedition Act of 1919 and convicted in 1952. But the supreme court of Pennsylvania reversed the conviction on the ground that the federal Smith Act of 1940, which makes it a crime to advocate or plot forcible overthrow of "any government in the United States," superseded state legislation in the field of sedition and nullified the Pennsylvania statute. The court held that sedition was "a crime against the nation" and that it was vital that prosecutions for the crime "be exclusively within the control of the Federal Government." Pennsylvania appealed from this ruling to the U. S. Supreme Court, and thirty states and the Justice Department of the Federal Government joined Pennsylvania in the appeal urging the Supreme Court not to nullify state sedition laws. The states maintained that Congress did not have power to annul these laws. The Justice Department pleaded that the sedition laws of states (and all but six states have such laws) caused no impediment or embarrassment to federal action in the field in the fifteen years since the Smith Act was passed by Congress.

On 2nd April last the Federal Supreme Court upheld the reversal of conviction of Nelson in a 6 to 3 decision,

ruling that the Smith Act pre-empted the field of sedition for the Federal Government. Chief Justice Earl Warren wrote the majority opinion and he was joined by Justices Frankfurter, Black, Douglas, Clark and Harlan. The Chief Justice observed that since Nelson was not charged with ever having assailed the Government of Pennsylvania, the act of which he was accused was sedition against the United States. That was a matter for the federal courts only, Congress not having specifically included the state tribunals.

Referring to the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954, the Chief Justice remarked that the conclusion was "inescapable" that Congress "intended to occupy the whole field of sedition." He said:

Taken as a whole, they evince a Congressional plan which makes it reasonable to determine that no room has been left for the states to supplement it. Therefore a state sedition statute is superseded regardless of whether it purports to supplement the Federal law.

The scheme of federal regulation [of Communists] is so pervasive . . . that Congress left no room for the states to supplement it. Federal interest is so dominant [in the field of sedition] as to preclude enforcement of state laws on the same subject.

Congress has devised an all-embracing programme for resistance to various forms of totalitarian aggression. Our external defenses have been strengthened, and a plan to protect against internal subversion has been made by it.

Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem.

Further, it was pointed out that enforcement of state sedition laws "presents a serious danger of conflict" with the federal programme. The Chief Justice said:

Since 1939, in order to avoid a hampering of uniform enforcement of its programme by sporadic local prosecutions, the Federal Government has urged local authorities not to intervene in such matters, but to turn over to the Federal authorities immediately and unevaluated all information concerning subversive activities.

To support its interpretation of what Congress meant the majority cited the Volstead Act, the enforcement arm of the prohibition amendment. In this law the concurrent jurisdiction of the states over violations was definitely assigned. So, concluded the majority, by not making a similar assignment in the Smith Act, Congress was reserving the whole field for Federal action. When there is no such total Federal occupancy, said the Court, the states may try and punish.

Dissenting Judgment

Justice Reed wrote a dissenting judgment in which Justices Burton and Minton concurred. He pointed out that Congress was aware, at the time it passed the Smith Act, of the existence of similar state laws and that in the fifteen intervening years Congress knew of the spread of such laws among the states, but Congress never amended the Smith Act to exclude the state courts.

Congress has not, in any of its statutes relating to sedition, specifically barred the exercise of state power to punish the same acts under state law.

(A conflict between Federal and state laws) should be clear and direct before this court reads a Congressional intent to void state legislation into the Federal Sedition Acts.

We look upon the Smith Act as a provision for controlling incitements to overthrow by force and violence the nation, or any state or any political subdivision of either.

Such an exercise of Federal police power carries, we think, no such dominancy over similar state powers as might be attributed to continuing Federal regulations concerning foreign affairs or coinage, for example. In the responsibility of national and local governments to protect themselves against sedition, there is no "dominant interest".

The dissenting Justices said that, since Americans are citizens of both the states and the nation, and the

Communist conspiracy is the greatest threat to our institutions in history, "we are dependant on both the states and the Federal Government to preserve our rights and liberties". They argued that the conclusion that Congress intended to reserve to the Federal courts all jurisdiction over trials for sedition, was not justified, especially in a state's attempt to put down subversion within its boundaries, save by a clear mandate from Congress excluding the state courts from concurrent jurisdiction.

"A Legislative Trial and Conviction"

Investigation of Perjury by a Congress Sub-Committee

An officer serving in Italy in World War II in the Office of Strategic Services, Major Holohan by name, met a mysterious death in 1944. Two of his subordinates, Lieut. Aldo L. Icardi and another, were suspected of plotting and carrying out the murder, but neither of them could be brought to trial. They were no longer in the army and could not be tried in a military court. The murder had taken place in a foreign country while they were soldiers fighting a war, and so they could not be tried for murder in the home country. Both men were tried in their absence by the Italian Government and were convicted.

In 1953 a sub-committee appointed by the House of Representatives' Armed Services Committee took charge of the matter. This sub-committee was established for the purpose of determining, by relevant testimony, the adequacy of existing law to deal with crimes committed by the armed forces overseas and the efficiency with which the Defence Department functioned with respect to that law. It received information from Italy which fixed the blame on Mr. Icardi. The sub-committee called Mr. Icardi as a witness. He denied the charges. Thereupon he was indicted for prejury. The Defence Department prepared an elaborate case—with many witnesses from Italy—to prove that he was guilty of murder and therefore of prejury.

On 19th April last Mr. Keech, a Judge of the District of Columbia, acquitted Mr. Icardi of the charge, ruling that he had been subjected to an illegal "legislative trial." That the sub-committee had prejudged Mr. Icardi was shown by the fact that when, fourteen months after it had been in full possession of his statements, it had summoned him to testify a second time and spoken of allegations against him as "facts" and of Mr. Icardi as the "accused." This prejudgment, it was pointed out by some writers, was against the primary presumption that a man is innocent until he is proved guilty—a presumption which even a sub-committee of Congress that conceived itself to be a court could not ignore. Mr. Fay, for instance, wrote in the "Notre Dame Lawyer" as follows before Mr. Keech's decision.

When individuals are not called (by a Congressional committee) in good faith to furnish information but

because they are the wrong-doers, when an individual is called not as a witness but because he is an object of scorn and a sacrifice to public titillation, when he is called and addressed directly as the defendant, then he ought to enjoy some of the substantial rights of the defendant.

Judge Keech affirmed that Congress and its committees had full investigatory powers, but he ruled that it was not proper for a congressional committee to call a witness for the purpose of "extracting testimony with a view to a perjury prosecution." In this case, the Judge said the sub-committee that called Mr. Icardi went beyond the proper bounds of "valid legislative purpose" and was "functioning as a committing magistrate." Whether Mr. Icardi denied or confessed guilt, his testimony "could not have influenced the sub-committee's conclusion on subjects which might be legitimately under (its) investigation." The Judge found that the questioning of Mr. Icardi was not "material" to the sub-committee's authorized objectives, and that its "authority cannot be extended to sanction a legislative trial and conviction of the individual towards whom the finger of suspicion points."

The decision means in effect that legislative committees must stick closely to some legitimate goal of legislation in both the general approach of any inquiry and the questions put to individual witnesses. It emphasizes the line of demarcation between Congress as a legislator and Congress as a committing magistrate. The basis of the decision is, as one commentator has put it, that "under the Constitution, neither Congress nor any of its divisions can function as a court or as an officer of law enforcement." The decision sets out sharply the limits beyond which Congressional committees may not properly go in questioning witnesses. It is felt by lawyers that the decision would tend to make these committees more careful in calling and questioning witnesses in future trials of persons charged with contempt or perjury before the committees.

Civil Rights Commission in the U. S.

to Protect Constitutional Rights of Negroes

It would be recalled that President Eisenhower in his State of the Union Message (vide p. iv:67) suggested that an investigatory commission be appointed by Congress to inquire into infringements of the constitutional rights of American citizens because of their race or colour, with particular reference to denial of the ballot and to the exercise of "unwarranted economic or other pressures" against Negroes. He has now sent a message to Congress through the Attorney General asking for the establishment of a six-man bi-partisan commission on civil rights to be appointed by the President subject to the Senate's confirma-

tion. The commission would have subpoena power to investigate denial of constitutional rights because of colour, race, religion or national origin.

The President proposes that a special civil rights division be set up within the Department of Justice in the charge of an Assistant Attorney General devoting his full time to the task of protecting civil rights. There is already a civil rights section within the Criminal Division, but the President's Committee on Civil Rights (appointed by President Truman) found that this was inadequate and urged that the present civil rights section be raised to full divisional status. The Committee said: "We believe this step would give the federal civil rights enforcement programme prestige, power, and efficiency that it now lacks."

Another proposal contained in the message is extension of federal law to enforce the constitutionally guaranteed right of voting through civil—as distinct from criminal—proceedings. The Attorney General states that "the only method of enforcing existing laws protecting this right is through criminal proceedings," and suggests that civil proceedings "may often be far more effective in the long run." To this end he proposes legislation forbidding anyone—not just state or local officials—from intimidating would-be voters in any election, including primaries. He also asks for authority for the Justice Department to seek injunctions or initiate other civil actions on behalf of citizens denied their civil rights. It will be remembered that the President's Committee on Civil Rights made similar recommendations in 1947. It said:

The difficulty of winning convictions in many types of criminal civil rights cases is often very great. The Committee believes that the civil rights section should be granted increased authority, by Congress if necessary, to make appropriate use of civil sanctions, such as suits for damages or injunctive relief, suits under the Declaratory Judgment Act, and the right of intervention by means of briefs amicus curiae in private litigation where important issues of civil rights are being determined.

In the same way a proposal is included in the present civil rights programme for legislation to permit the Department of Justice to bring civil suits against civil rights conspiracies such as attempted intimidation of federal grand jury or trial jury witnesses or the wearing of hoods or masks to deprive any person of his rights. Similarly, the legislation would permit any private citizen to go directly to a federal court (as is possible in India) with a complaint of the denial of his rights rather than requiring him first to proceed through state courts.

COMMENTS

The Press Act to Lapse

The Press Act adopted by the Nehru Government in 1951, after the Government had first obtained by constitutional amendment a sweeping enlargement of restrictions which could be validly imposed on the freedom of the press, will, it is now announced, be allowed to lapse this year. It was first intimated semi-officially that the Act would receive a third extension for two years. That the proposed extension will not materialize is a welcome change in the Government's policy. But it is obvious that the change of policy that the announcement implies is not very material. For the Government feels that it can dispense with the power it now has under the Press Act to require a deposit from the printer or publisher of a newspaper and then to seize the press, only because, in its opinion, there will now be an adequate substitute for this power given by the Act.

The substitute is the Press Council which is proposed to be constituted. This Press Council which is to come into existence will not be like the Press Council of the United Kingdom; it will in fact be as different from the latter as chalk from cheese. Our Press Council will not be a voluntary body of newspaper proprietors and editors like the English Council which is intended to maintain high standards of journalism by private effort. The Press Council in England examines complaints against newspapers that may be made to it, but even in cases in which it finds the complaints just, it does not and cannot impose sanctions on the offending papers. All it does is to give wide publicity to its views on the complaints, thus trying indirectly to raise the tone of the press.

The difference between a statutory Council such as ours, endowed with disciplinary powers, and a voluntary organization without these powers, as the U. K. Council was intended to be and is, must be stressed. Even when the Royal Commission on the Press recommended the formation of a Press Council for England, it set its face against a Council possessed of power to punish. It was of the opinion, and quite rightly, that a body which will not merely exercise a restraining and corrective influence on the erring sections of the press by the standards of behaviour it sets before it, but has legal power to impose penalties on them, cannot be an instrument of the right sort to preserve freedom of the press. What is more, the Press Council itself, in its second annual report published towards the end of last year, mentioned that proposals were made to it that its powers be widened to correspond with those of the Law Society and the British Medical Association so that it be converted into a statutory body with disciplinary powers. But the Council firmly rejected such proposals on the ground that it does not deal like the other two bodies with merely professional matters, in respect to which an internal control by members of the

profession would be justified, but it deals with a matter touching the liberty of the press and that exercise of disciplinary powers in that sphere would not be consonant with the British traditions of a free press. For the reasons for which the British Press Council refused to be clothed with power to impose sanctions we think that the Indian Press Council should not have such powers, and that the vesting of these powers in our Council would result in curbing press freedom.

Publication of Legislative Proceedings

A private member's bill proposed that the privilege of immunity from civil and criminal liability which attaches by a constitutional provision to the proceedings of legislatures should be extended by statute to the publication of these proceedings, that is to say, that the media of publication—the press and broadcasting stations—should not be hauled up for contempt if they report the proceedings faithfully. The Government of India favoured the bill, only suggesting that its scope be limited to the publication of Parliamentary proceedings and that the State legislatures be left free to adopt similar legislation if they desired to do so. As the matter with which the bill deals is a concurrent subject, this attitude of the Government of India was widely criticised and it was urged that the bill should embrace within its purview proceedings of both the Central and State legislatures. The select committee which sat on the bill has, however, supported restriction of its scope to Parliamentary proceedings and in this form it has been passed. It will therefore take some time for the press to obtain the necessary protection for publication of proceedings in all jurisdictions.

Measures to Enforce Anti-Untouchability

In response to appeals by Scheduled Caste members, the Minister in the Home Affairs Ministry made an encouraging statement in Parliament on this subject on 11th April. Mr. Datar frankly admitted that the evil of untouchability still stalked the rural areas. The Government's approach, he said, was to try first to wean away evil-doers by persuasion. About a crore of rupees had been spent during the first Plan to "rouse the conscience" of Caste Hindus through propaganda. The Minister also indicated the Government's willingness to offer legal aid to indigent members of the Scheduled Castes for redressing "untouchability grievances." Regarding the general demand for better representation in the services, he said, the Government was doing its best, consistent with the demands of administrative efficiency.

Popular Election of Judges

"A BLIGHT ON THE AMERICAN SYSTEM"

In the United States judges, like high executive officials, are elected to office—a system which to us bred up in British traditions appears to be highly objectionable,

particularly in regard to the appointment of judges by popular election. In the state of New York there was a proposal to add 21 new judges to the Supreme Court of the state by means of election. The proposal being vetoed by the Governor, nothing will be heard about it for some time.

A judge of the Court of Appeals, Mr. Medina, who was a trial judge in the prosecution of eleven top-ranking Communist leaders under the Smith Act, has taken this opportunity to condemn roundly the system of election of judges by popular vote. He characterizes it as a "farce" in which the people have little or nothing to say. Politicians, he says, are having a "field-day" through control of the selection of judges and court personnel. The tie-up between politics and the court is, according to him, a "menace to the administration of justice" and a "blight on the American system." Republican-Democratic deals "on judgeships, he says, are "brazen effrontery" and an "insult to the electorate".

The judge has suggested getting the politicians "out of the driver's seat" and breaking their "strangle-hold" on court personnel and appointing judges by the Governor from a list named by a non-partisan panel of judges, lawyers and laymen. He has advocated putting the entire system under the Chief Judge of the Court of Appeals and establishing a uniform state-wide method of selecting court personnel. He has also proposed certain reforms designed to secure inexpensive and speedy justice.

"Nothing to Criticize"

IN THE CENTRAL ASIAN EMPIRE OF RUSSIA

Mr. Robert F. Kennedy who, with U. S. Supreme Court Justice William Douglas, recently visited Bokhara which is now a part of a great Soviet colonial empire in Central Asia consisting of Turkmenistan, Uzbekistan, Tadzhikistan, Kirgizia and Kazakhstan and covering an area larger than that of all Western Europe put together describes how those areas which were for less than a century proud and autonomous territories were deprived of their freedom, local autonomy and rights of minorities. The people living in these areas, of Turkish and Persian stock, are, he says, as different from their European Russian masters as the Moroccan is from the Frenchman or the Malayan from the Englishman. About freedom of speech in these territories, he says:

The right of a citizen to criticize the Government does not exist in Soviet Central Asia. The Chancellor of the University of Tashkent explained this to us by saying that the Government is always right and the people of the Soviet Union realize this, so there is nothing to criticize. Similarly, the head of the University of Frunze explained that the students had no political debates because there was only one correct position on political matters and that was the position taken by the Government, so there was no purpose in discussion.

The pattern of intimidation—monitored conversations, purge trials, slave labour and all the rest—has not disappeared.

HABEAS CORPUS PETITIONS

Detentions in Kashmir

Grounds "Vague" and "Irrelevant"

A full bench of the High Court of Jammu and Kashmir State consisting of Wazir C. J. and Kilam and Shahrin J. on 17th June last allowed a habeas corpus petition of Mr. Ghulam Qadir Hawabaz who was ordered to be detained by the district magistrate of Baramulla "with a view to preventing him from acting in a manner prejudicial to the maintenance of public order."

The order of detention was challenged on the ground that the grounds for detention communicated to the detenu were so vague as to vitiate the detention order. The Court in its judgment said:

We have gone through the grounds. It is a huge document. But a mere perusal of this document would show that some of the grounds are very vague, in framing which the detaining authority does not seem to have applied his mind properly. For instance, in most of the grounds reference has been made to the "nefarious designs of the detenu."

But it appears that the phrase "nefarious designs" has been used merely in a Pickwickian sense. No details nor any description of the detenu's "nefarious designs" have been given. It is possible that what may be "nefarious designs" in the eyes of the detaining authority may be quite innocent in the opinion of others. What was needed was that the specific activities of the detenu should have been detailed so as to provide a clue to understand as to what really was meant by the detaining authority by this phrase. Besides that, in most of the grounds supplied, no date or time has been mentioned as to when those "nefarious designs" were being carried out by him.

In *Prem Datta v. Superintendent, Central Prison, A. I. R., 1954 All. 315*, in none of the grounds had any date or time been mentioned. In one of the grounds in which it was alleged that the petitioner organized two illegal strikes, there was no mention of the dates and no particulars were given as to the place or places where the alleged strikes were said to have been caused by the detenu. On these facts it was held "that these grounds were in terms which were too vague to enable the petitioner to make an adequate representation." The detention order was set aside.

In ground 3 (c) the detenu [in the instant case] has been accused of having met some "Mr. Beg and Mr. Kara respectively, to get instructions from them." Now everybody knows that there are many Beks in the city of Srinagar and also many Karas. The detenu can very easily say that as long as it is not

specifically given as to which Beg or Kara is meant, he cannot make any effective representation to the Government. In the same ground it is said that "the detenu continued to receive instructions and messages from the War Council, Srinagar, through persons whom it is not expedient to name." Further on, it is stated "you (detenu) sought the collaboration of the P. S. P. or any other anti-Government elements of Baramulla in your nefarious designs." Now, no date or time of the reception of these instructions and messages from the War Council has been given. And then the mind of the person who has given the grounds is so hazy that he is not sure as to whether the detenu sought the collaboration of the P. S. P. or any other anti-Government elements. The word "or" which is used in this sentence is significant, and is suggestive of the inference.

One of the grounds is that the detenu had imported "Sach," a paper issued from Jammu, which contained the speeches of Mr. Beg delivered in the Assembly at Jammu. The height of absurdity is reached in ground No. 3 (c) in which the detenu is accused of trying to hamper (perhaps the word is "tamper") with the loyalty of certain National Conference workers. We wonder if it is a "nefarious design" to convert certain National workers to some other political view. Here also no time or date is given as to when and where this "tampering" started.

In *Dr. Ramkrishna Bhardwaj v. State of Delhi*, A. I. R. 1953 S. C. 318, it has been held: "A petitioner has the right, under Art. 22 (5) to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give relief to him. This constitutional requirement must be satisfied with respect to each of the grounds communicated to the persons detained, subject of course to a claim of privilege under cl. (6) of Art. 22. "Where it has not been done in regard to one of the grounds mentioned in the statement of grounds, the petitioner's detention cannot be held to be in accordance with procedure established by law within the meaning of Art. 21 and he is, therefore, entitled to be released."

Again, in A. I. R. 1954 All. 315 it has been laid down: "Where good grounds for detention have been mixed up with vague, indefinite and bad grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 as the constitutional requirement with respect to each of the grounds communicated to the person detained, subject to a claim of a privilege under cl. (6) of Art. 22, is not satisfied."

It would serve no useful purpose by discussing all the grounds that have been supplied to the detenu. The grounds referred to above are sufficient to establish their vague and indefinite character, an following the dictum laid down in *A. I. R. 1953 S. C. 318* the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21, and the petitioner is therefore, entitled to be released.

Now, some of the grounds discussed above do not show any relevancy to the object which the Legislature had in view, namely, the prevention of objects prejudicial to the maintenance of law and order. We find that an attempt to tamper with the loyalty of certain National Conference workers is totally irrelevant to the object before the detaining authority. In a democracy it is the inherent right of a citizen to try to convert the public or a portion thereof to his own viewpoint by peaceful persuasion, preaching and propaganda. Similarly, the mere sending for a paper which contains the speeches of a member delivered in the Assembly and harsarded there, would certainly be irrelevant to the object in view. As long as the paper "Sach" is not banned, everybody has a right to read it.

According to *Shibban Lal Saksena v. State of Uttar Pradesh*, A. I. R. 1954 S. C. 179, in such cases introduction of irrelevant matters would vitiate the detention order as a whole, though there may be only a few grounds that were irrelevant or illusory. [In this case the U.P. Government itself "plainly admitted" that one of the two grounds on which the detention order was passed was "unsubstantial or non-existent," but contended that the other ground still remained. With respect to this contention, the Court said: "In such cases, we think, the position would be the same as if one of these two grounds was irrelevant for the purpose of the Act or was wholly illusory, and this would vitiate the detention order as a whole," citing *Keshav Talpade v. Emperor*, A. I. R. 1943, F. C. 32.] The seeking of collaboration of the P. S. P. also would be quite irrelevant. The P. S. P. has a recognized position in the Union Parliament and as long as the P. S. P. is not declared as an illegal body in the State, mere collaboration with it would not lead to a presumption that the collaboration is for disturbance of public order. The view of law enunciated above has been taken by the Full Bench of this Court in a number of judgments. Even the Ag. Advocate General did not support the present detention order.

For these reasons the Court found that the detention of Mr. Ghulam Qadir was "both illegal and improper," and ordered the petitioner to be released forthwith.

"Grounds Far Too Vague"

The same full bench some time earlier allowed the habeas corpus petition of Mr. Abdul Ghani Goni, a member of the Constituent Assembly of Kashmir State, who attended, on an invitation by the Chief Secretary, a meeting of the Advisory Standing Committee at Srinagar and who, when he was about to return to his district, was served on 6th August 1954 with a detention order passed by the additional district magistrate of Srinagar and detained in the Central Jail. The Court ruled (A.I.R., 1955 J. and K. 38) that the grounds supplied to the detenu were vague, indefinite and not sufficient to enable him to make an effective representation and that for this reason his further detention "is bad in law." The Court directed that the petitioner be set at liberty. In its judgment the Court said :

The grounds which have been served on the detenu are far too vague to enable the detenu to meet them satisfactorily. They are merely allegations made against the detenu and the bases of these allegations have not been disclosed and it is not possible for the detenu to make any effective representation to the Government in regard to the grounds served on him, and that being so, the detention in our opinion is not justified.

As many as seven charges were made against the detenu, but there was no particularization in any one of them.

Ground No. 1—Organized subversive activities : what were the objectionable activities; where and when and with what effect—not mentioned.

Ground No. 2—Disturbed communal harmony by spreading false rumours; what rumours were spread not mentioned. This ground "is also as vague as it can be," says the Court.

Ground No. 3—Made a programme for the observance of the Martyrs' Day : no particulars.

Ground No. 4—Contacted with persons of subversive character : no details.

Ground No. 5—Same as Ground No. 4.

Ground No. 6—Established contacts with the enemy across the border : no particulars.

Ground No. 7—Visited Mattan on 4th August for exploiting the situation arising from a communal dispute over a piece of land : how the detenu exploited the situation not mentioned ; according to the detenu, he did not go to Mattan on that date.

Pointing out how general the allegations are, the Court said :

Nothing is said as to what the detenu was doing to form an organization on communal lines ; how he was creating communal hatred in the town ; and how he was organizing subversive activities.

The detenu could say nothing in regard to these grounds except deny them.

If in the grounds details had been given as to the particular place and the particular day he had made a

speech or he had advised some people to take part in subversive activities, the detenu would have been in a position to give adequate proof of the fact that he was not present on that particular day or at a particular place where it is alleged that he made such speeches or took part in subversive activities.

A Detenu ordered to be Released

"A LEGAL MALA FIDE"

One Mr. Mahadeo Sakharam was ordered to be detained by the Commissioner of Police, Bombay, on 29th July 1953, the allegation against him being that he in association with several others committed during a period of some seven months previously petty acts of theft and extortion. While his associates too were detained and released after one year in detention, Mahadeo Sakharam could not then be traced. He was found and arrested on 24th July 1955 and was then put up before a Presidency Magistrate because he did not submit to the detention order that had been passed against him. A charge-sheet was filed against him and the bail he had been granted was cancelled. On that very day the detention order passed in 1953 was executed. The validity of the execution of this detention order was challenged in a habeas corpus petition at the Bombay High Court, and on 11th October 1955 Chagla C. J. and Tendulkar J. allowed the petition and directed the detenu to be set at liberty.

On behalf of the detenu it was urged that sec. 11-A which was introduced in the Preventive Detention Act in 1952 limiting the duration of detention to one year (under which section the associates of Mahadeo Sakharam had already been set free) made it illegal for a detention order to be executed after the lapse of two years unless a fresh order was issued (and a fresh order was not issued in this case). Their Lordships accepted this contention. They said in regard to sec. 11-A :

The reason underlying this amendment (of the Preventive Detention Act) is that Parliament wanted to give an opportunity to a person who was suspected of prejudicial activities after a lapse of certain time to turn over a new leaf. The Parliament also thought that the danger to the State by the activities of a particular person could not extend beyond a period of one year and that a safe risk could be taken by the State in releasing the detenu after a lapse of a year. It is always open to the State Government to issue another order if the person detained and who was released under sec. 11-A continued in his prejudicial activities. . . . There is no suggestion that after 28th July 1953 the detenu has committed any prejudicial act or has indulged in any prejudicial activities.

It was contended on behalf of the State Government that Mahadeo Sakharam's detention commenced from 19th August 1955 and the order passed on 29th July 1953 was still a good and valid order under which action could

be taken by the State of Bombay. On this point Their Lordships said :

It is necessary to bear in mind that an order under the Preventive Detention Act is not in the nature of a punishment. The Preventive Detention Act is not a penal statute. It is an Act passed to arm the State with powers in order to prevent danger to public security and public order. Therefore, it is not right for the State of Bombay to think that because an order was passed on 29th July 1953, therefore necessarily the detenu must be detained for a period of one year.

If a person is convicted of an offence, whenever he may be found and arrested he can be compelled to serve out his sentence, but that principle cannot apply to the Preventive Detention Act, and what we have to consider is whether in detaining (Mr. Mahadeo Sakharan) on 19th August 1955 the State of Bombay was acting bona fide. If their action was not bona fide, was not dictated by considerations relevant to the Preventive Detention Act, then the act of detaining him on 19th August 1955 cannot be supported.

From the materials placed before us we are satisfied that the view taken by the authorities is that inasmuch as the order was passed in July 1953 and inasmuch as that order is still a valid order and inasmuch as the detenu has not submitted to that order and has not undergone a period of detention, therefore it is necessary to enforce the order against him.

This view of the authorities is entirely inconsistent with the purpose and object of the Preventive Detention Act. As we pointed out before, it is erroneous on the part of the authorities to consider that detention is a punishment which it is obligatory upon a detenu to serve, and if that is the view on which the execution of this order has been based, then, in our opinion, there is a legal mala fide and the detention is not bona fide.

ZAMINDARI ABOLITION ACT OF ASSAM

Validity of Act upheld by Supreme Court

Raja Bhairabindra Narayan Bhup and Bedi Devi filed appeals and Sindhu Rani Choudhurani and others filed a petition in the Supreme Court challenging the validity of the Assam State Acquisition of Zamindari Act of 1951, which provides for the compulsory acquisition of the estates in Assam by the State Government. The Act was impugned on the ground that it violated the fundamental rights of the owners of estates by depriving them of their property and denying them equality before the law.

The Constitution Bench of the Supreme Court on 11th April dismissed the appeals and the petition. The

Chief Justice, who delivered the judgment of the Court, said that if the legislation was protected under Art. 31 (A) of the Constitution, then the question of infringement of fundamental rights of the plaintiffs under Arts. 31 (2) and 14 would not arise. What was protected under Art. 31 (A), the Chief Justice said, was a law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights. The only question then for consideration was whether the impugned Act was a law providing for the acquisition of any estate or any rights therein. The impugned Act, the Chief Justice said, was a law providing for the acquisition by the State of an "estate" within the meaning of Art. 31 (A) and that being so, its constitutionality or validity could not be questioned on the ground of any contravention of any of the provisions of Part III of the Constitution dealing with fundamental rights.

The constitutionality of the Act was also questioned on another ground. It was urged that the Act was void because it had been passed by the Assam State Legislature in contravention of the procedure under the Government of India Act and the Constitution of India.

The Zamindari Bill was introduced and passed by the State Legislature before the enforcement of the Constitution of India, but no assent was given to the Bill by the Governor-General. On the adoption of the Constitution of India the Bill was placed before the President of India who gave his assent in 1951 after certain amendments were made to the Bill by the State Legislature on his recommendations.

The procedure adopted by the Assam State Legislature in enacting the Zamindari Bill was examined by the Supreme Court with reference to the provisions of the Government of India Act and the Constitution of India. It was held that as this legislation was pending at the time when the Constitution of India was enforced the State Legislature had not violated any provision of law in passing the Bill in 1951 and enforcing it subsequently.

PROPOSED MERGER OF BENGAL AND BIHAR

Partial Union of States Not Authorized

A member of the West Bengal Legislative Assembly and three others filed an application in the Calcutta High Court for a prerogative writ against the Union of India, the Speaker of the State Assembly and the Chief Minister of West Bengal in regard to the latter's proposed resolution in the Assembly seeking approval for the merger of West Bengal and Bihar. The petitioners sought the assistance of the Court to stop the West Bengal Government from proceeding with the move for the merger. Their contention was that there was no provision in the Constitution for a "mixed" union of States, a union with a common cabinet but with different high

courts, etc., and that therefore the court should stop such a resolution, approving of a state of things not contemplated by law, from being passed.

The Advocate-General submitted that such a union could be made, but at the present moment the matter was only in the stage of discussion, and the Court could not interfere with the resolution which merely asked the Centre to take certain action. Moreover, under Art. 212, the Court was debarred from interfering with proceedings in the legislature. Besides, the Legislative Assembly had been adjourned and the resolution had lapsed. The moving of the resolution would not violate anybody's right. In reply to a question put by the Court, the counsel appearing for the Speaker, said that if the proposed resolution was first passed and later on the strength of it Parliament passed a Bill for merger, then it would be ultra vires. But the Court could not stop Parliament from passing such a Bill.

Mr. Justice Sinha on 17th April dismissed the petition. He said the court took no part in political controversies, however vital or pressing they might be. The petitioners had characterized the resolution as political extinction or racial suicide. If they were offences at all, they were offences yet not known to law and writs of the court did not reach there.

Mr. Justice Sinha said Art. 3 of the Constitution did apply to Part "A" States and Parliament could unite such States. But when the resolution was pending before the Assembly and as long as a Bill had not been passed into law, the Court could not and would not interfere, nor was it the duty of the Court to interfere unless a person affected by such legislation approached the court for redress.

The judge held that the Constitution, as it stood at present, did not contemplate a partial union of two States. The provisions of the Constitution would have to be strictly applied at the proper stage and could not be "conveniently enlarged." But the Constitution could be amended according to procedure laid down.

U. P. SUGARCANE ACT

Held Intra Vires by Supreme Court

The Constitution Bench of the Supreme Court on 24th April held the U. P. Sugarcane (Regulation of Supply and Purchase) Act of 1953 and the notifications issued thereunder intra vires the State Legislature and dismissed a number of petitions filed by sugarcane growers from the State challenging the validity of the Act.

One of the notifications dated 27th September 1954, issued under the U. P. Act ordered that where not less than three-fourths of the cane growers of the area of operation of a cane growers' co-operative society were members of the society, the occupier of the factory to whom the area was assigned should not purchase or enter into agreement to

purchase sugarcane grown by a cane grower except through such cane growers' co-operative society.

A subsequent notification issued under the Act assigned to the various sugarcane factories mentioned in the schedule the cane purchasing centres for the purpose of supply of sugarcane during the season 1955-56. In effect the Act specified the agency of supply of sugarcane to the factories by creating zones for particular factories.

The Act was challenged by about 4,700 petitioners who included the "Ganna Utpadak Sangh," said to be the rival body to the co-operative development unions established and recognized under the impugned Act.

The petitioners' contentions were that the Act was ultra vires the powers of the State Legislature, the subject matter of the Act being within the exclusive field of Parliament and that it was also repugnant to the Industries (Development and Regulation) Act of 1951 and the Essential Commodities Act of 1955.

The Act and the notifications issued thereunder, the petitioners claimed, were unconstitutional inasmuch as they infringed the fundamental rights guaranteed under Art. 14 (equality before law), Art. 19 (1) (c) (f) and (g) rights to form associations, to hold property and to carry on occupation—Art. 31 (deprivation of property) and Art. 301 (freedom of trade and commerce).

The unanimous judgment delivered by Mr. Justice N. H. Bhagwati held that the U. P. Act merely confined itself to the regulation of the supply and purchase of sugarcane required for use in factories without having anything to do with the further process of the manufacture or production of sugar, or with controlling or licensing of the sugar factories, or with the supply and distribution of sugar. He said: "If that was so, there was no question whatever of its trenching upon the jurisdiction of the Centre in regard to the sugar industry, which was a controlled industry within entry 52 of List I of the Constitution, and the U. P. Legislature had jurisdiction to enact the law with regard to sugarcane and had legislative competence to enact the impugned Act."

As regards the objections taken on the ground of the Act infringing their fundamental rights, the judgment held that the restrictions sought to be imposed by the notifications issued under the Act were "reasonable restrictions imposed on the petitioners in the public interest." If these impugned notifications are, therefore, intra vires the State Legislature, they cannot be challenged also under Art. 31 as none of the petitioners is being deprived of his property, if any, save by authority of law", the judgment added.

INDUSTRIAL DISPUTES ACT

Act Applicable to Hospital Service

BOMBAY HIGH COURT'S JUDGMENT

Two employees of the J. J. Hospital in Bombay, Vatsala Narayan and Ruth Isaac, were served with notices by the superintendent of the hospital, terminating their

services with effect from 1st November 1954 and 1st December 1954 respectively, stating that some of the staff had been retrenched because they had to be replaced by retrenched employees in the Civil Supplies Department. The two women and the Hospital Mazdoor Sabha filed a petition in the Bombay High Court challenging the retrenchment, but Mr. Justice Tendolkar dismissed the petition.

An appeal against this decision was then made. The contention of the petitioners was that they were workmen under the Industrial Disputes Act and that in retrenching them the hospital authorities had not complied with the provisions of sec. 25 (f) and (h) of the Act. It was argued on behalf of the Government that the maintenance of public health and medical relief, under which the management of hospitals came, was a duty of the Government and therefore a hospital could not be deemed an industry; and that every Government activity must be ruled out from the expression "industry" in the Act.

Chagla C. J. and Desai J. on 21st April allowed the petition and reversed the decision of the trial Judge. Rejecting the Government's contention, they observed that if one were to judge any activity of the Government by the principle of duty, then practically every activity of the Government would satisfy the test and would keep that activity out of the purview of the Act. It was difficult for them to understand why different principles should govern an activity when it was carried on by private agency and by the Government. If any activity undertaken by a private agency fell within the Industrial Disputes Act, the same activity conducted by the Government would also fall within the Act.

RIGHTS OF GOVERNMENT SERVANTS

Mandate of Art. 311 (2) Not Satisfied PEPSU HIGH COURT'S JUDGMENT

Mr. Madhi Ram Bansi Lal, a forest guard, was dismissed from service by the divisional forest officer, Nabha, by an order on 12th October 1953. Aggrieved by the order, he filed a writ petition in the Pepsu High Court praying that the order of dismissal passed against him be quashed. On 20th December 1954 Chopra J. allowed the petition, holding that "the mandatory constitutional provision [of Art. 311(2)] safeguarding the rights of a public servant has been flouted."

A complaint was lodged against the petitioner that illicit grazing was going on in the Bir where he was posted. The divisional forest officer, on receiving the complaint, inspected the Bir and found that the forest had been heavily grazed; but the result of his inspection was not disclosed to the petitioner. An inquiry into the charge was made and statements of witnesses were taken. However, "the petitioner was not called to take part in the proceedings and was not present when statements were made." Later the statements were read out to him but no copies were given, and he was told that he could examine any of these witnesses he liked and produce his

own witnesses. His witnesses were examined, and then an order, or notice of an order, was passed that for the offence he had committed he would be dismissed, and he was told that he could produce any further evidence that he might desire. Reviewing the proceedings of the inquiry His Lordship observed:

The major part, if not the whole, of it was conducted behind the back of the petitioner. All the prosecution witnesses were examined in his absence; he had no occasion to hear them depose against him and to cross-examine them.

Referring to the fact that even copies of the prosecution witnesses' statements and reports against him were not supplied to the petitioner, His Lordship said:

There is nothing on the record to indicate that the petitioner was in any way apprised of everything that was stated or reported against him. Even if it be assumed that the entire evidence was actually read out to him, the petitioner could not have remembered and committed to memory the evidence thus read out.

Moreover, the principles of natural justice, and so also the rules of procedure for departmental inquiries, require that the evidence on the basis of which a public servant is proposed to be penalized must be given in his presence. The witnesses may probably not have dared to make the statements which they did in his absence. The petitioner could not be called upon to rebut the evidence unless the same was examined in his presence.

It was for the prosecution to make out a prima facie case before he was required to examine evidence in defence. The procedure to allow him to call any of the witnesses, who had deposed against him in his absence, and examine them in his defence was indeed a novel one.

In regard to the notice of dismissal that was allegedly given to him, it was contended on behalf of the petitioner that the notice was not in fact given but was interpolated in the record after the writ petition was presented in the High Court. About this His Lordship remarked that the matter was not totally free from doubt; on the other hand, "the alignment, the spacing and ink of the writing do, to a great extent, seem to support the inference that the order is an interpolation." But though the facts "make the genuineness of the order doubtful," His Lordship assumed in considering the case that the order was genuine. The petitioner in his defence had pleaded that the cattle were let in in the Bir by the contractor under the oral orders of the divisional forest officer himself and the contractor also made some such statement. The story might not be true, but "sense of propriety and justice demanded," said Mr. Justice Chapra, "that the divisional forest officer, on such plea having been taken, should have stayed his hands from proceeding with the inquiry or at least have stopped short of pronouncing his judgment on it." On the fact that the divisional forest officer's adverse impressions after his inspection visit to the forest were not communicated to the petitioner His Lordship remarked: "This makes the divisional forest officer himself the complainant or at least the principal witness, it is not desirable that he should also have been the judge and the final authority to decide the petitioner's fate."

His Lordship's conclusion on a consideration of the facts of the case, was:

I am inclined to think that the petitioner was not afforded reasonable opportunity to show cause against

the grounds on which the order of his dismissal was based, Art. 31 (2) requires that before a person holding a civil post under the Government is dismissed or removed or reduced in rank he should be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

This does not mean that he should be heard for what he has to say as regards the quantum of penalty that is proposed to be awarded. The purpose of notice is to afford him an opportunity to satisfy his employer that the action proposed to be taken against him is not justified because of the reasons to be given and substantiated by him.

The explanation that he may offer is not confined to the question of punishment that may be imposed on the facts alleged against him, but extends to his showing that the allegations are baseless and that no action whatsoever is called for. Any other interpretation of the Article will render the only safeguards against an unwarranted action of the Government with regard to the services of its employees ineffective and illusory.

In order to enable the public servant to show cause against the action the Government proposes to take in regard to him, he should be informed of the allegations against him and the grounds which have led the Government to take the particular action. It is only then that he may be in a position to show that the allegations are baseless and the grounds unjustified.

The above discussion makes it clear that the inquiry proceedings were anything but just and fair, and that the petitioner did not have a reasonable opportunity to explain his position and of showing cause against the proposed action.

In the result His Lordship held the order of dismissal passed against the petitioner "illegal and ineffective" and directed that the petitioner "shall be deemed to continue in service."

NOTES

Reform of Soviet Criminal Law

EXTRACTION OF CONFESSIONS NOW FORBIDDEN

As a part of the present campaign of undoing the evils of Stalinism, the Presidium of the Supreme Soviet has revoked certain laws which permitted the secret police to extract confessions from the accused in cases of treason and sabotage. The precise extent of this legal reform is still unknown, but one knew from Mr. Nikita Khrushchev's speech at the 20th congress of the Communist Party calling for an overhaul of the Soviet judicial system, that something like this was coming.

A glimpse of the approaching move was to be had from an article in the "Soviet State and Law," which denounced the late Mr. Andrei Vishinsky who was Chief Prosecutor in the infamous Moscow purge trials of the late Nineteen Thirties. In these so-called trials it was

astounding how some of the great figures of the Bolshevik Revolution were made to "confess" to the most heinous crimes, and in all democratic countries it was recognised at the time that on the basis of such frame-ups the Soviet authorities had done nothing short of arranging judicial murder. The Soviet magazine not only criticized Mr. Vishinsky, who subsequently became Soviet Foreign Minister and chief Soviet delegate to the United Nations, but struck at the entire Soviet prosecuting system. It assailed the prosecuting organs "for recognizing the guilt and responsibility for crimes on the sole basis of individual confessions of the accused themselves" and pleaded for "insuring legality in the protection of the rights and interests of citizens." It called for new definitions of court evidence and proof.

It is believed that the new criminal code will guarantee the accused the right of counsel at some stage of the pre-trial investigation and that the investigating officials will be made less subject to the prosecutor's direction. Minor negligence and other "administrative offences" will no longer be considered violations of the criminal code. Acts "analogous" to illegal acts will no longer be punishable under the code. Yet it is not expected that the revised code will even approach the standard which the democratic countries have set before themselves for ages. A competent observer says:

Whatever the effect these changes may have in humanizing Soviet jurisprudence, there is no thought of adopting Western concepts of legality. The courts and other facets of the Soviet judicial system are still administered as an arm of the State, entirely subservient to the party and obligated to carry out its political objectives.

Coast Guard's New Security Rules

The Coast Guard has framed new security rules for seamen which it thinks will conform to the decision of the Court of Appeals in the case of *Parker v. Lester* (reported in the last issue) to the effect that the Coast Guard's security programme failed to meet constitutional requirements of due process of law because the seamen were not told the source of the charges against them. On the confrontation issue the new regulations say:

Every effort should be made (in hearings) to produce material witnesses to testify in order that such witnesses may be confronted and cross-examined by (the seaman). If (the seaman) is or may be handicapped by the non-disclosure to him of confidential sources, or by the failure of witnesses to appear, the hearing board shall take the fact into consideration.

It will be observed that these regulations do not guarantee that an accused seaman will in all cases know the source of charges against him or have necessarily an opportunity to cross-examine, nor do they provide the right of subpoena for either him or the hearing boards. For this reason it is not clear that even the new regulations will meet a court test. But there is no doubt that the procedure has been liberalized.