

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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PRE-CENSORSHIP OF THE PRESS CUTS AT THE VERY HEART OF A FREE STATE

How little understanding of basic human rights there is in high quarters in India is shown by the adoption by the Punjab Government of a Press Act, one of the features of which is (though others are no less objectionable) imposition of a naked form of pre-censorship of the press. This makes it desirable for us to set out briefly the philosophy on the basis of which this system was condemned by all thoughtful persons ages ago. As early as 1769 Blackstone wrote in his "Commentaries" :

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. [This complacent rationalization limiting the freedom of the press to immunity from censorship is now discarded everywhere, and it is now recognized as an axiom that the liberty of the press means far more than mere absence of previous restraint.—Editor.] Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press. . . . To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.

The censorship provided for in the Punjab Press Act is just what Blackstone has here denounced; viz., a requirement enforced by law to obtain the official imprimatur before any newspaper or periodical could be lawfully printed. Blackstone speaks of this practice of requiring publications to be licensed as having already ceased in England. The Crown at first used to prohibit, as a matter of royal prerogative, any publication unless previously approved by licensers. Parliament then continued this policy after the Restoration of Charles the Second under a licensing Act, and the Act was renewed after the Revolution of 1688. But the last licensing Act expired in 1694 and it has never since been revived. From that time everyone in England is free, as Blackstone says, "to lay

what sentiments he pleases before the public." If censorship expired in England in 1694, in the colonies of England it took thirty years more for censorship to expire. No one has in recent times ever thought of enacting a censorship or licensing Act like that of the Punjab.

When the First Amendment to the United States Constitution forbidding the legislature to adopt any kind of legislation abridging freedom of speech or of the press was passed, the framers were not thinking of censorship at all: as Professor Chafee has said, that issue "had been dead for decades." They were thinking of "rigorous and repeated prosecutions for seditious libel" or such other things. "The mere exemption from previous restraints [which was Blackstone's definition of liberty of the press] cannot be all that is secured by constitutional provisions," said Cooley in "Constitutional Limitations;" "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." Post-publication penalties must also be strictly limited.

It is our misfortune that in India we have at this day to struggle against censorship of the press, when the British Parliament had finally renounced the power of licensing and censoring periodicals more than 250 years ago.

The leading case in the United States on this subject is *Near v. Minnesota*, 283 U. S. 697 (1931). The statute held unconstitutional therein did not provide for direct pre-censorship, as does the Punjab Act (it is impossible to imagine any state in the U. S. A. passing a law of direct censorship), but operated to bring about the same result indirectly. It declared that publication or circulation of "a malicious, scandalous, and defamatory newspaper, magazine or other periodical" constituted a public nuisance and provided for proceedings to be taken against a person guilty of such a nuisance, which might end in putting the publisher under an effective censorship. This remedy could be enforced, not by virtue of the

subjective judgment of the censor, as in the Punjab Act ; but by a suit in equity being brought against the publisher in a court of law. It was for the court to decide whether the newspaper or periodical proceeded against was or was not "malicious, scandalous and defamatory" and if the court decided that the periodical was a nuisance within the meaning of the statute, it was authorized, in order to abate the nuisance, to prevent the publisher from further publishing such a periodical. The statute permitted the publisher to show in defence that the impugned statements in his periodical were true and were published "with good motives and for justifiable ends." Under the statute nine issues of the "Saturday Press" of the city of Minneapolis charging the chief of police with illicit relations with gangsters and participation in graft were produced before the district-court, which, holding that the matter complained of was a nuisance, granted a permanent injunction against further committing the nuisance. The state supreme court sustained the injunction, but the federal Supreme Court reversed the judgment.

The framers of the statute had apparently thought, as indeed was said by the state supreme court, that existing libel laws were inadequate effectively to suppress evils resulting from "malicious, scandalous or defamatory" publications and that the best way to deal with protracted, false and malicious assaults by publishers intending to put into effect a scheme for blackmail or extortion was to restrain by injunction the publication or circulation of such periodicals among the people. And since, the framers must have thought, the statute did not authorize administrative control of periodicals in advance, as was formerly exercised in England by censors, but purported only to prohibit publications adjudged by an independent authority to be a public nuisance, the statute would not be held to operate as censorship so universally denounced. The provision in the statute for a judicial procedure to determine the character of publications against which proceedings might be started under the statute would be held, the framers of the statute no doubt thought, to be free from the constitutional vice which attached to the system of censorship as such.

The validity of this reasoning was decisively negatived by Chief Justice Hughes, who wrote the opinion of the Supreme Court in this case. Mr. Hughes said on this point:

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court... and required to produce proof of the truth of his publica-

tion, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its jurisdiction what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected.

Mr. Hughes thereafter addressed himself to the question: Are the states to be left powerless "to prevent the circulation of scandal which tends to disturb the public peace"? His answer was:

Charges of reprehensible conduct, and in particular of official malfeasance [which was involved in the case], unquestionably create a public scandal, but the theory of the constitutional guarantee is that even a more serious public evil would be caused by authority to prevent publication. . . . There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination [of the founding fathers] to protect the press against censorship and restraint upon publication. . . . The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

What then is the remedy against abuses which the press may perpetrate? On this point Mr. Hughes quoted with approval the following observations of Madison on the guarantees of liberty of the press in the state constitutions:

In every state probably in the Union, the press has extorted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press had stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been

gained by reason and humanity over error and oppression, who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness?

The remedy against abuses on the part of the press, Mr. Hughes indicated, was not imposition of censorship prior to publication but imposition of sanction after the event. He said:

The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

The point made is this famous judgment, viz, that the interposition of a judicial procedure in first suppressing an offending newspaper and then preventing the publisher from subsequently printing or circulating similar matter does not relieve the impugned statute from constitutional objection, deserves special notice.

The same point was made in another famous judgment involving freedom of speech and the press and freedom of religion. This case was that of *Cantwell v. Connecticut*, 310 U. S. 296 (1940). Mr. Justice Roberts spoke for a unanimous Court in this case. Here Newton Cantwell and his two sons, all of them Jehovah's Witnesses engaged in the solicitation of money for the Witness movement and of orders for its books, were convicted (the conviction being affirmed by the supreme court of the state) of violation of a Connecticut statute forbidding any person to do such things without securing the prior approval of a certain administrative official in the form of a certificate that the cause for which aid was sought from the public was a bona fide religious one. The official concerned was empowered to withhold his approval if he thought that the cause was not religious. The Court found that such a requirement constituted a censorship of religion and held the statute unconstitutional.

It was argued on behalf of the state that if the licensing officer were to act arbitrarily or capriciously in any case, his action would be subject to a judicial correction under a rule prevailing in the state to the effect that the decision of an administrative official could be reviewed if "it works material damage of individual or corporate rights, or invades or threatens such rights." This argument was, however, rejected by the Court. It said: "The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the state court to impose a mere ministerial duty" on the official concerned. For, "upon his decision as to the nature of the cause, the right to solicit depends."

But the further point made by the Supreme Court in rejecting the above argument is of the greatest importance,

and it is to this point that we wish to draw the reader's special attention here. Mr. Roberts said:

Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint, which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action [*Near v. Minnesota, supra*].

Advisory Committee in Punjab Press Act

"There Can Be No Substitute for a Judicial Inquiry"

When the Punjab Press Act conferring most drastic powers of interference with the liberty of the press on executive authority was about to be passed, the Chief Minister offered, as a sop to critics among whom we would repeat were Congressmen of the eminence of Principal Ralla Ram, to appoint an advisory committee whose advice he declared would be normally respected when clamping restrictions on the press. No provision, however, is made for such a committee in the Act itself and, so far as law is concerned, the committee does not exist and no aggrieved journalist can plead in a court that because an advisory committee was not consulted the restrictive order passed against him has no validity. But it is felt in some quarters that if an advisory committee had been embodied in the law and if its advice, when favourable to the press, had been made binding on the State, as in the case of the advisory board under the Preventive Detention Act, the Act would no longer be open to constitutional objection, as in its present form they think it is, however objectionable it might still remain from the point of view of a liberal policy necessary to be adopted towards the press.

This argument is, however, fallacious, for it can be shown that, even under the rulings of our Supreme Court, not to speak of the criteria applied by the United States Supreme Court in such cases, the provision of an advisory committee, even if statutorily recognised and endowed with the power to arrive at a decision by which the Government is required to abide, would not relieve the law of the constitutional infirmity inherent in a measure infringing upon the freedom of the press. In corroboration of this statement we can cite the Supreme Court's unanimous judgment in *The State of Madras v. V. G. Row, A. I. R. 1952 S. C. 196*, involving the right to freedom of association enshrined in the Constitution in Art. 19 (1) (c). This was one of the great judgments delivered by Chief Justice Patanjali Sastri, another equally momentous one being *Thapar v. State* involving the right to freedom of the press, though this latter judgment, great as its importance was, was soon afterwards nullified by an amendment to Art. 19 (2), which allowed Governments to impose additional sweeping restrictions on the freedom of expression.

In Row's case the Madras Government had by executive order declared the People's Education Society an unlawful association under sec. 15 (2) (b) of the Indian Criminal Law Amendment Act 1908, as amended by a Madras Act of 1950, and the Supreme Court, agreeing with the Madras High Court, held that the section was ultra vires. The main question before the Court was whether the constitution of an Advisory Board, which was provided for by the new sec. 16—A introduced by the amending Act of Madras and whose opinion to the effect that there was no sufficient cause for the issue of a notification declaring an association to be unlawful the Government was required to accept, would render proceedings under sec. 15 (2) (b) valid as falling within the limits of constitutionally permissible legislative abridgment of the right to form associations.

The Attorney-General, who appeared in the case on behalf of the Union Government, argued, on the analogy of the Supreme Court's decision in *Dr. N. B. Khare v. State of Delhi*, A. I. R. 1950 S. C. 211 (1950), that the interposition of an Advisory Board had the effect of making any restrictions imposed on freedom of association "reasonable" restrictions permitted by Art. 19 (4). Mr. M. C. Setalvad contended that the East Punjab Public Safety Act, under which Dr. Khare was externed from Delhi, provided for a reference to an Advisory Board, which was truly advisory in the sense that its opinion, though favourable to the externee, had no binding force. The Madras amending Act, on the other hand, provided for an Advisory Board whose report was binding on the Government. And if, in Dr. Khare's case, the Supreme Court decided, though not by a unanimous decision, that the subjective satisfaction of the Government regarding the necessity for externment was a reasonable procedure, the procedure adopted by the Madras Government in taking action under the Criminal Law Amendment Act must be held to be a fortiori reasonable.

The Court rejected the argument for many reasons. One was that the Punjab Act was a temporary measure intended to be in force only for a year, while the Criminal Law Amendment Act was a permanent measure, and what might be regarded as a reasonable restriction imposed under a temporary Act would not necessarily be considered reasonable under a permanent Act. [And it should be remembered that the Punjab Press Act is not a temporary measure.] Another reason was that externment, like preventive detention, was based on suspicion, whereas the grounds on which associations could be declared unlawful under sec. 15 (2) had to be "factual and not anticipatory or based on suspicion."

An association is allowed to be declared unlawful because it "constitutes" a danger or "has interfered or interferes" with the maintenance of public order or "has such interference for its object," etc. The factual existence of these grounds is amenable to objective determination by the Court. . . . We are

unable to discover any reasonableness in the claim of the Government in seeking, by its mere declaration, to shut out judicial inquiry into the underlying facts under cl. (b) [sec. 15 (2) (b)].

But these may seem technical considerations; the underlying principle was thus laid down by Mr. Patanjali Sastri :

The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious, political and economic fields, that the vesting of authority in the executive government to impose restrictions on such right, without allowing the grounds of such imposition, both in their factual and legal aspects, to be duly tested in a judicial inquiry, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed by sec. 15(2)(b) on the exercise of the fundamental right under Art. 19 (1) (c); for no summary and what is bound to be a largely one-sided review by an Advisory Board, even when its verdict is binding on the executive government, can be a substitute for a judicial enquiry. The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights. In the case of preventive detention, no doubt, this Court upheld, in *A. K. Gopalan v. State of Madras*, 1950 S. C. R. 88, deprivation of personal liberty by such means, but that was because the Constitution itself sanctions laws providing for preventive detention, as to which no question of reasonableness could arise in view of the language of Art. 22.

The Court thus held that sec. 15 (2) (b) of the Criminal Law Amendment Act, even as amended for the State of Madras, "falls outside the scope of authorized restrictions under cl. (4) of Art. 19 and is, therefore, unconstitutional and void." The Court thought it necessary to say that if the legislative judgment was by this decision set aside, it was not because, as was "suggested in some quarters that the courts in the new set-up are out to seek clashes with the legislatures in the country," but because "our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution." Mr. Patanjali Sastri said :

If the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the fundamental rights, as to which this court has been assigned the role of a sentinel on the *qui vive*,

COMMENTS

Kashmir's Accession to India

DETENTION OF A FORMER MINISTER WHO OPPOSES

Mirza Afzal Beg, a colleague of Sheikh Abdullah in the latter's cabinet before the coup of 1953, had been detained by the Bakshi Ghulam Mohammad Government under the Preventive Detention Act along with several other followers of Sheikh Abdullah, but the new Government subsequently released him from detention in order to enable him to participate in the Constituent Assembly discussions on Kashmir's Constitution. However, when Mirza Beg opposed the accession of Kashmir State to India in the Constituent Assembly on 24th October, he found himself the following day again in jail under the Preventive Detention Act!

Mr. Beg said in the Constituent Assembly that the Instrument of Accession, signed by the Maharaja of Kashmir on October 26, 1947, was accepted by the Government of India as the provisional accession of the State to the Union of India and the condition imposed then was that the wishes of the people would be ascertained through an impartial plebiscite. Sheikh Abdullah, he asserted, had agreed to the "conditional accession" in 1947. Besides, he said that the Sheikh was still under detention and there were restrictions on public meetings, and that in these circumstances a final decision on accession such as is contemplated in the Constitution should not be made.

Whatever the merits of the issue of accession, whether it should be decided by a Constituent Assembly while many of the opponents of the proposal are under detention or whether it should be decided by a plebiscite according to India's commitment to the United Nations, it speaks ill of the Ghulam Mohammad Government's love of civil liberties that it should throw into prison the President of the Plebiscite Front because, instead of toeing the line of the Government as perhaps it expected, he stuck to his former opinion and opposed the Government on the accession issue. It looks very much like Imre Nagy being allowed to be Hungary's Prime Minister but promptly jailed when it was discovered that he would make Hungary more independent than the Russian rulers would like.

Loyalty to the Land of Domicile

DECLARATION BY MR. CHOU, CHINESE PREMIER

It is well known that Governments in South-East Asia have to face serious difficulties in countries in which Chinese communities are settled in large numbers. The difficulties arise because of their claim to dual nationality in the countries where they reside and the consequent impossibility of their political assimilation with those countries and the fear it arouses of internal subversion,

In Vietnam President Diem, as a result of such fear, banned Chinese nationals from a number of categories in the country's economic life, with the consequence that several Chinese are reported to be fleeing the country. But he has mitigated the harshness of this action by a provision to the effect that henceforth every child born in Vietnam, regardless of national or ethnic origin, will be a Vietnamese, which means that large numbers of Chinese who are already in Vietnam by virtue of birth there can claim citizenship on the strength of this provision and escape the disabilities imposed upon those Chinese who are not citizens.

The presence of twelve million Chinese in South-East Asia does present a problem. They form an overwhelming majority (78 per cent.) in Singapore. The Chinese community in Indonesia too is enormous. In the Philippines it is economically powerful. In Malaya the Chinese are equal in number to the Malays, but the fact that in this country the leaders on both sides have thrashed out a working agreement shows that, given good-will, the problem need not be insoluble. In the Crown Colony of Hong Kong, whose population has risen from 600,000 to 2,500,000 since World War II, and whose principal city, Victoria, has become a refugee centre both for pro-Nationalists and pro-Communists, clashes between the two elements of the population have increased. In this respect a very encouraging gesture was made by Mr. Chou En-lai, the Chinese Prime Minister, to Singapore's former Chief Minister, Mr. David Marshall, when the latter was in China on a visit. Mr. Chou expressed himself definitely against dual nationality for overseas Chinese, and said he would like these to give exclusive loyalty to the land of their domicile. The New China agency reports that Mr. Chou made the following points in his talks with Mr. Marshall:

(1) The Chinese Government wishes to see Chinese in Singapore acquire Singapore citizenship if they themselves so wish and give exclusive loyalty to the land where they live. The Chinese Government believes that this is conducive to the welfare of those Chinese themselves, to the peace and stability of Singapore and to the development of friendly relations between China and Singapore.

(2) Any Chinese residing in Singapore who voluntarily adopts Singapore citizenship immediately ceases to have Chinese citizenship, though of course his inherent racial and cultural affinity remains.

(3) Any Chinese who has acquired Singapore citizenship may if he wishes adopt Chinese citizenship after relinquishing Singapore citizenship in accordance with the laws of Singapore.

(4) People with Chinese citizenship should respect the laws and decrees of the local Government and refrain from taking part in local political activities.

Rioting in Singapore

Whether this wise declaration having in it the potentiality of doing immense good to overseas Chinese and conducing to international peace in South-East Asia is genuinely meant or not, the advice to Chinese communities settled outside China which accompanies it does not appear to be taken to heart by these communities. And it is a great pity that it should have been disregarded in Singapore, to which Mr. Chou's declaration had special reference. Referring to the riots in the Colony which have resulted in a number of casualties, the "Times of India" wrote:

Many in South-East Asia will note that, despite Mr. Chou En-lai's advice that the Chinese in Singapore should surrender their Chinese nationality if and when they assume Singapore citizenship, local Communist elements have not hesitated to exploit the Chinese fear that their culture is being "destroyed." Evidently pious assurances from Peking need not necessarily be taken very seriously by leftist trade unions and agitators in South-East Asia.

The above quotation speaks of Chinese culture being supposed by the local Chinese to be under a threat because the riots in Singapore stemmed from students protesting against the banning of a middle school students' union as a Communist front and the closing of certain middle schools with the object of stopping Red infiltration in the schools. This is not a recent menace. The White Paper issued in 1951 called the schools "fortresses of communism" and described in detail "the formation of cells and indoctrination of study groups, the intimidation of teachers and students and the appointment of student examiners." It should be remembered, however, that when the Minister for Education in the Singapore Ministry ordered on 12th October two out of the nine privately managed middle schools to be closed, he declared that the Government recognized that Chinese education was an integral part of Singapore's educational system and promised that the two schools which have an enrolment of about 8,000 students would be reopened when order was restored. The Legislative Council and several unofficial organizations, among which is the Malayan Indian Congress, have supported the action Government has taken with a view to combating subversion. How one wishes that the Chinese everywhere would heed Mr. Chou's advice.

Apartheid in Universities

IMPENDING LEGISLATION IN S. AFRICA

When the Union Parliament opens in next January, the Strydom Government will probably enact legislation to enforce apartheid in the three open universities of South Africa—the Natal University, the University of Cape Town and the Witwatersrand University.

There are nine universities in the country with approximately 20,000 students, of whom only 1,000 are

non-white. Considering that the white population is about 2½ million and the non-white population about 10½ million, the disproportion between the two elements of the population in respect of facilities for higher education becomes obvious: the whites, being a little over a quarter of non-whites in the population, have nineteen times the number of non-white students at universities. But the Government, instead of planning to give increased facilities for higher education to the Africans, Coloureds and Indians, is planning to force on universities, which at all open their doors to non-European students by virtue of their autonomous status, a segregation policy in higher education.

Such schemes were entertained ever since the Nationalists came into power, but steps looking to the effectuation of them were taken in 1953, when the Government set up the Holloway Commission to consider, not whether apartheid in universities was desirable, but only whether it would be financially practicable, and the Commission reported last year that such apartheid was unfeasible in view of the financial burden which would be cast on the Government if they were to provide separate training facilities for non-Europeans. But in November of last year an inter-departmental committee was appointed to inquire into the same matter, and specifically to consider the establishment of segregated tribal colleges for non-white groups. This proposal had been made to the Holloway Commission and had been rejected by it on the ground that it would constitute a "material retrogression in regard to the university training of non-Europeans."

The committee's report has not yet been published, but it seems certain that the universities which do not bar admission to non-whites will have to face legislation early next year forbidding the holding of mixed classes. The Minister of Native Affairs stated in September last that "where there is no segregation, as is the position at certain universities, it must be established or enforced." The open universities repeatedly requested the Minister of Education to receive a deputation to discuss university apartheid, but he replied that "the provision of separate facilities is the declared policy of the Government" and that therefore he was not prepared to receive a deputation.

The Witwatersrand University has been following the non-segregation policy ever since its foundation in 1909 and the University of Cape Town at least since the early years of this century. Both the staff and the students of these universities are resisting the proposal for enforced apartheid on the ground, first, that such compulsion would be a violation of their independence, and, secondly, that past experience proves that non-segregation is not only workable but is the best educational policy for the South African universities. It is, however, too much to expect that the Government will have such regard for universities' autonomy as to desist from interference with them.

EXTERNMENT ORDERS

Bombay Police Act, 1951

Validity of Sec. 57 Upheld by Supreme Court

The constitutionality of sec. 57 of the Bombay Police Act 1951 authorizing externment of persons in certain circumstances was challenged in the Supreme Court in the case of Hari Khemū Gawali v. Deputy Commissioner of Police, decided on 8th May 1956 and reported in the September number of A. I. R.

Gawali, a bullock cart owner of Bombay was convicted in 1938 of certain offences under chap. 16, I. P. C. Thereafter the police tried several times to get at him on one charge or another. The first attempt to involve him took place apparently in 1948, ten years after his conviction. On that occasion and on a later occasion in the same year and on a subsequent occasion in 1949 he was discharged for want of sufficient evidence. In August 1950 an externment order was passed against him, but the order was set aside on appeal. In December 1953 an order of detention was passed against him under the Preventive Detention Act; he then moved the Bombay High Court against the order, but before the High Court could hear his habeas corpus petition he was released from detention. Thereafter he was charged with possession of liquor. The case went on for two years and ultimately he was discharged by the Presidency Magistrate in February 1955. In the meanwhile in October 1954 he, along with some others, was arrested on a charge under the Prohibition Act. It was stated that he was found smelling of alcohol. In this case he was not merely discharged for want of evidence, but was acquitted.

Thus a regular tug-of-war went on between him and the custodians of peace for some six years. Foiled in all these attempts to bring home a criminal charge against Gawali, the authorities in October 1954 served him with notice with a view to his externment under sec. 57 of the Bombay Police Act, which authorizes the Police Commissioner to direct a person to remove himself outside Bombay if the person has previously been convicted of an offence under chap. 12, 16, or 17, I. P. C., and if the Commissioner "has reason to believe" that he "is likely again to engage himself in the commission of an offence similar to that for which he was convicted." The notice served on Gawali recited his conviction of 1938 and the later charges brought against him. Gawali admitted his previous conviction, but said that he was a mere youth then and had lived a clean life ever since. As to the subsequent allegations against him he pleaded that he was discharged and even acquitted after a court trial and that these allegations were based on "old prejudices and suspicion."

Sec. 57 of the Bombay Police Act under which an order of externment was contemplated in this case was assailed

in the Supreme Court on the ground that it vests unlimited power of removal in the police and that thus it infringes the fundamental rights of free movement and residence guaranteed by cls. (d) and (e) of Art. 19 (1) of the Constitution. It was contended that in judging of the necessity of externment the Act does not even provide for an advisory board such as the Preventive Detention Act provides in cases of detention; that proceedings are initiated by the police which is the judge in the case, thus militating against the accepted principle of natural justice that the prosecutor should not also be the judge; that the right of appeal granted by sec. 60 is illusory; and that the restrictions imposed on the fundamental rights in question are therefore unreasonable restrictions. The Court negatived these contentions. On the absence of a provision for an advisory board it held that "the existence of an advisory board (was not) a sine qua non of the constitutionality" of legislation allowing preventive action to be taken against suspects. On the argument that prosecutor and judge are rolled in one, the Court remarked that though a case might be started by the Criminal Investigation Department, the facts and circumstances of each case were examined by police officers or magistrates of higher ranks, and the order of externment was passed by a Commissioner of Police, or a District Magistrate or a Sub-Divisional Magistrate; the right of appeal to the State Government was not illusory because the State Government was expected "to discharge its functions with due care and caution;" a further safeguard consisted in sec. 61, which, though it provides that the order of externment shall not be called in question in any court, allows a person against whom such an order was passed to challenge the order in a court on the ground "(1) that the authority making the order had not followed the procedure laid down in sec. 57, or (2) that there was no material before the authority concerned upon which it could have based its order, or (3) that the said authority was not of opinion that witnesses were unwilling to come forward to give evidence in public against the person proceeded against."

As to the legality of the impugned order in the circumstances of this case, the Court said:

These are all matters which cannot be examined by this Court in an objective way, when the legislature has provided for the subjective satisfaction of the authorities or officers who have been entrusted with the duty of enforcing those special provisions of the Act.

It was contended on behalf of the petitioner that the range of offences in cl. (a) of sec. 57 (offences under ch. 12, 16 or 17, I. P. C.), conviction of any of which offences would qualify a person for externment, was very wide and that it was difficult to point out any rational basis for clubbing minor and major offences together. The Court granted the force of this argument. It said:

A person convicted under ch. 12, I. P. C., of counterfeiting Indian coin or Government stamps may

rightly be called the enemy of public finance and revenue, but is far removed from a person who may be convicted of murder or other offences against human body or against private property. But the legislature in its wisdom has clubbed all these offences together, and it is not for this Court to question that wisdom provided the provisions of the Act do not impose unreasonable restrictions on the right to freedom.

This defect of the legislation did not, in the opinion of the Court, was not in the nature of a constitutional infirmity.

Dissenting Judgment

From this judgment of the Supreme Court sustaining the constitutionality of sec. 57 Mr. Justice Jagannadhas dissented. In his judgment declaring the section invalid, His Lordship remarks that the section "prima facie infringes the fundamental right of a citizen under Art. 19 (1) (d) and (e) of the Constitution" and then proceeds to establish the unreasonableness of the restrictions which the section imposes upon this right. At the beginning he shows how our familiarity with the Preventive Detention Act makes us apt to believe that if any restrictive legislation provides the minimal safeguards that are afforded in the case of preventive detention, such legislation is proper in spite of the patent fact that these safeguards are inadequate when a person is not punished for a crime proved to have been committed by him in a judicial trial but preventive action is taken against him so that he may not commit a crime, thus by-passing the judicial process. He said:

The fact that our Constitution which declares fundamental rights also permits a law of preventive detention under very limited safeguards and that such laws have taken the pattern of the exercise of power by the Government or by its officers for specified purposes on the basis of their subjective satisfaction, has made us prone to reconcile ourselves to other kinds of restrictive laws affecting personal liberty though based on the subjective satisfaction of executive officers, if only they provide for certain minimum safeguards such as (i) supply of grounds, (ii) right of representation, and (iii) the scope for review by a superior authority or by an advisory body.

If one is to adopt this standard as furnishing the sine qua non of what is a reasonable law of preventive restriction of personal liberty, it may be possible to say that the provision under question [sec. 57 of the Bombay Police Act] satisfies the test. But the law of preventive detention stands on a very exceptional footing in our Constitution inasmuch as it is specifically provided for in the Constitution. The same Constitution has left the imposition of other restrictions on personal liberty to be judged by the courts with reference to the standards of reasonableness in the interests of the public. While undoubtedly the

above three safeguards may be taken as the minimum required to satisfy the standard of reasonableness, I am not prepared to assume that they are sufficient.

It appears to me that the constitutional validity of laws of preventive restriction, as opposed to the laws of preventive detention, has to be judged with reference to standards which this Court has generally accepted as regards the validity of restrictions on the other fundamental rights under Art. 19 (1) of the Constitution. As repeatedly held by the Court, a proper balance must be struck between the fundamental right of the citizen and the social control by the State in order to evolve a permissible restriction of the fundamental right under the Constitution.

After an examination of the provisions of sec. 57 Mr. Justice Jagannadhas came to the conclusion that these provisions fail to strike a proper balance between individual liberty and social control. A particular point was made in the judgment that the by-passing of the normal judicial procedure, which the section permits, when taking preventive action by an executive order was not necessarily due to witnesses not being available because of intimidation. In this connection His Lordship referred to *Gurbachan Singh v. State of Bombay*, A. I. R. 1952 S. C. 221, a case to which the majority judgment also referred. In this case the Supreme Court held sec. 27 (1) of the City of Bombay Police Act 1902 valid. This section in its relevant provisions is word for word the same as sec. 56 of the Bombay Police Act 1951. The latter section relates to removal of persons about to commit offences, while sec. 57, here impugned, relates to removal of persons previously convicted of certain offences. The Supreme Court in *Gurbachan Singh's* case held the section in the 1902 Act corresponding to sec. 56 of the 1951 Act reasonable because it was enacted, in the words of the court, "only to meet those exceptional cases where no witnesses, for fear of violence to their person or property, are willing to depose publicly against certain bad characters whose presence in certain areas constitutes a menace to the safety of the public residing therein." But this justification is lacking in the instant case. Mr. Justice Jagannadhas said:

The provisions of sec. 57 of the Act are totally different. This section can be invoked without the requirement of non-availability of witnesses or of any opinion in that behalf being arrived at by the officer concerned. All that is sufficient for the use of this section is that the person concerned should have been previously convicted of certain specified offences and that the officer concerned has reason to believe that such person is likely again to engage himself in the commission of a similar offence.

The powers under this section can, therefore, be invoked in every case where there is likelihood of repetition of offence by a person who has been previ-

ously convicted of a similar offence if the offence is of the specific categories, even though witnesses may be willing to come forward. I am not prepared to accept the idea that in such a situation it would be right or reasonable to clothe executive officers with the power to take preventive action restraining the liberty of the citizen instead of taking the chance of the offence being committed and leaving the deprivation of his liberty to the ordinary channels of criminal prosecution and punishment.

His Lordship then proceeds to say that if preventive action is to be resorted to instead of a prosecution, it should be clear at least that prosecution will not be feasible because of non-availability of witnesses on account of their terrorization; that the apprehended offence is of a major character; and that the conviction on which future preventive action is based is of a recent date (in the present case conviction took place sixteen years before preventive action was contemplated). His Lordship said:

It is true that in some matters anticipatory prevention is better than ex-post facto punishment. But in a State where personal liberty is a guaranteed fundamental right, the range of such preventive action must be limited to a narrow compass. What may be called the police power of the State in this behalf must be limited by the consideration that the offence likely to be committed is of a serious nature; that the likelihood of its commission is very probable, if not imminent; and that the perpetrator of the crime, if left to commit it, may go unpunished under the normal machinery on account of witnesses not being willing to come forward.

Sec. 151, Cr. P. C., authorizes a police officer to arrest any person when he knows of his design to commit any cognizable offence and to send him to the nearest magistrate for such action which he considers fit or as may be feasible under secs. 107 to 110, Cr. P. C. Sec. 57 of the Act constitutes a very wide departure from such a provision and there must be clear justification for so serious an encroachment on personal liberty as is contemplated therein. A provision of the kind might not only be justified but may be called for, if confined to serious offences — serious either because of their nature or of the attendant circumstances — and if witnesses are likely to be terrorised.

I am unable to see why a person who may have previously committed an offence of a minor character and in ordinary circumstances, under chaps. 12, 16, or 17, Penal Code, should not be left alone to the ordinary channels of prosecution. It appears to me that the proper balance between the fundamental right and social control is not achieved by vesting the power in executive officers in such wide terms as in sec. 57 of the Act. Such a provision

would lead to serious encroachment on the personal liberty of a citizen. While, of course, abuse of power is not to be assumed to test its reasonableness, neither is a power given in wide terms and prima facie unreasonable to be considered reasonable on an assumption of its proper use.

I am also unable to see that the fact of previous commission of any such offence without any limitation as to the period of time that may have elapsed or the circumstances with reference to which such an offence may have been committed, is any relevant consideration to justify restriction on personal liberty by way of preventive action. I am not aware that there is any accepted theory of criminology which justifies the view that a person who has committed an offence has any inherent tendency to repeat a similar offence — apart from environment, heredity or the like.

In a trial for the commission of an offence prior conviction is ruled out as inadmissible. On an evaluation of the tendency to repeat a crime, I do not see how it is permissible material except in cases where repeated previous commission of offences indicates a habit. It has been said that the power under sec. 57 of the Act will be exercised only when the officer concerned has before him not merely the fact of previous conviction but other material on the basis of which he has reason to believe that the person concerned is likely to engage himself in the commission of the offence. But this ultimately is a question of subjective satisfaction. It is not open to review by a court. It would be difficult to postulate how far such a factor as previous conviction might have prejudiced a fair consideration of the other material before the officer.

His Lordship's conclusion was:

To my mind the law which permits subjective satisfaction to prevail on such material must be considered unreasonable. In my view, therefore, though the procedural portion of the law as provided in secs. 59 and 61 of the Act may not be open to serious criticism, the substantive portion of the law relating to the content of the power as provided under sec. 57 of the Act cannot be held to be in the nature of reasonable restriction of the fundamental right, for three reasons:

1. Cl. (a) of sec. 57 of the Act not being confined to offences serious in their nature or with reference to the attendant circumstances within the chapters specified therein [chaps. 12, 16, 17], prevention of the repetition thereof cannot be considered a reasonable restriction. It is in excess of what may be considered justifiable.

2. The previous commission of an offence of the category specified, without any reference to the time,

environment and other factors has no rational relation to the criterion" of "reasonableness in the interest of the public."

3. The exercise of the power not being limited by the consideration of non-availability of witnesses is also not rationally related to the criterion of "reasonableness in the interest of the public."

For all the above reasons I consider that sec. 57 of the Act is constitutionally invalid.

Companion Case of Bhagubhai v. District Mag.

Jagannadhadas J.'s Reservations

On the same day, the Supreme Court upheld sec. 56 of the 1951 Bombay Police Act (the provisions of which are given in the above case) in the case *Bhagubhai v. District Magistrate*, in which the district magistrate had passed an order externing Bhagubhai Dullabhbai Bhandari, a trader in grass, from the Thana District. Mr. Justice Jagannadhadas felt constrained to concur in the Court's judgment because of the judgment in *Gurbachan Singh's* case of 1952, referred to above, which, he said, "is binding on me." His Lordship then proceeds:

But I think it right to add that if the matter were *res integra*, I should have felt difficulty in upholding the validity of sec. 56 (b), Bombay Police Act 1951, in so far as it did not demarcate the application thereof to the more serious classes of offences falling within the specified chapters (ch. 12, 16 or 17) . . . I should also have felt difficulty in holding a provision to be reasonable which clothes the executive officers with an authority to extern a person for so long a period as two years. . . The vesting of a power to extern a person out of his home for so long a period without the obligation to review the order at some stated periodical intervals, say once within three or six months, is *prima facie* unreasonable. Externment might appear on the surface not to be as serious an interference with personal liberty as detention. But in actual practice it may be productive of more serious injury to the person concerned—or the rest of his family if he is an earning member.

BOMBAY POLICE ACT

Externment under Sec. 57

"CONDITIONS NOT COMPLIED WITH"

In *Jivraj Joharmal v. the State* (decided on 13th December 1955 and reported in the November 1956 issue of *A. I. R.*), the validity of sec. 57 of the Bombay Police Act of 1951 was not called in question, but it was ruled by the Bombay High Court that "the conditions necessary for the application of sec. 57 have not been complied with."

The Additional District Magistrate of Poona passed an order for externment against Mr. Jivraj Joharmal, a

money-lender, against whom three prosecutions were launched under sec. 411, I. P. C. Two of these prosecutions failed in appeal and the petitioner was acquitted. The third was confirmed in appeal.

It was argued on behalf of the Bombay State that "once it is established that there is a conviction with regard to an offence which falls under ch. 12, 14 or 16, the District Magistrate would be justified in passing an order [for externment] under sec. 57." Chagla C. J., speaking for the Court, said:

This is a wrong reading of that section. Undoubtedly, there has got to be a conviction as required under that section, but over and above the conviction the authority concerned must have reason to believe that the person who has been convicted is likely again to engage himself in the commission of an offence similar to that for which he was convicted.

And, on the material before the Court, it could not be said that the Additional District Magistrate had reason to believe that the petitioner was likely to commit a similar offence.

The Magistrate had said in his order: "It is on record that the opponent was charge-sheeted for this offence on a number of occasions but subsequently acquitted, which clearly shows that he is in the habit of committing such offences." On this His Lordship observed:

So, according to the Additional District Magistrate, the habit is proved not from convictions but from the fact that he was prosecuted, even though the prosecution might fail and result in the acquittal of the accused.

We could have understood the attitude of the Additional District Magistrate if he had considered the materials in possession of the police himself (*sic*) and had come to the conclusion that notwithstanding the order of acquittal passed by the Criminal Court, in his opinion the petitioner was guilty. But he has not looked at the materials at all. He has merely been impressed by the number of prosecutions launched by the police and he has drawn the inference from that fact alone that the petitioner must have committed the offence in respect of which the prosecution was launched and therefore he is likely to commit that offence again.

The order for externment was set aside.

TRESPASS ON LAND

Collector Gives Protection to Trespassers

Landowner's Writ Petition Allowed

HIGH COURT'S STRICTURES ON THE COLLECTOR

The managing trustee of the Gopaldas Dwarkadas Family Trust leased part of the Trust lands in Thimmachipuram in the Kulitalai taluk to tenants for cultivation in the agricultural year ending 30th June 1955

and asked the cultivators to settle the terms of the annual lease for the next agricultural season, execute the lease deed and cultivate the land, offering to let out the land according to the customary practice. However, owing probably to the agitation of the Congress Vivasayee Sangam fighting for tenants' rights, the tenants of the Trust did nothing, and thus after the harvest of June 1955 the Trust remained in possession of all its lands.

Because there was great discontent among the kisans of the taluk, the Collector convened a conference at Kujitalai on 15th July 1955 with a view to allaying the discontent and effect a lasting settlement between the tenants and mirasidars. This attempt, however, failed. Convincing himself that the mirasidars' attitude at the conference was "defiant" and that they "were intent upon wholesale eviction of the tenants anticipating land reforms," he ordered

that the status quo should be maintained, i. e., those lessees and waramdars who cultivated the lands last year may start cultivation and that police protection would be there to prevent any obstruction.

This order was issued "in order to avert such a calamity [i. e., breach of the peace that would inevitably follow in the event of wholesale eviction of tenants] and in the interest of maintaining law and order in the villages." The order was implemented by the police who did not investigate whether trespass had taken place on the Trust lands and other lands and offered no protection against people who it was complained has committed trespass.

The legality of the Collector's order was challenged by the Trust in a writ petition. P. Rajagopalan and N. Rajagopala Iyengar J.J. of the Madras High Court on 24th October allowed the petition and set aside the order. Their Lordships said:

The position after 15th July 1955 was that the tenants and waramdars re-occupied the lands they had cultivated during the previous fasli. That clearly constituted trespass, whether or not it constituted criminal trespass. That trespass was a clear invasion of the legal rights of the petitioner as the owner in lawful possession of his land, and that resulted clearly from the executive orders of the Collector. It is a little difficult to believe that the Collector was not aware of how his orders were worked out in the fortnight that followed 15th July 1955. The police stood by and acquiesced in the trespass.

The Collector thought that it was his duty to maintain status quo. On this Their Lordships said:

Only, his concept of what was status quo did not accord with the reality, at any rate in relation to the petitioner and his lands. It was the petitioner who was in lawful possession of all his lands on 15th July 1955. That position was never maintained by the police. It was never intended to be maintained.

What in effect the Collector ordered was that persons who had cultivated lands in fasli 1364 (ending on 15th July 1955), whether as waramdars or as tenants, should be restored to the position they occupied in fasli 1364. The Collector had no legal authority to order any kind of restoration for which existing laws did not provide. The fiat of an executive authority, however high-placed, cannot take the place of law. Yet that is what the Collector attempted. He provided for restoration; he provided for reduction of rents. Both partook of legislative functions. He directed that

the tenants and waramdars should enter upon the lands they had cultivated the previous year. The Collector directed his subordinates to execute his direction to accord with his edict.

The unrepentant Collector's unwillingness or inability to realize that that constituted trespass in law cannot aid him to sustain his claim that he had maintained law and order. Only the trespassers were given the protection of the arm of law, the police.

Dealing with the Collector's statement that the mirasidars were defiant, Their Lordships said that the mirasidars did not defy authority, for authority was circumscribed by law. They did not defy law. True they did not accept the terms offered by the Collector, offered it might be with the best of intentions to promote the common good and to bring about peace and tranquillity. But the rejection of his terms did not amount to flouting of lawful authority or of law.

We are constrained to remark that it was the Collector that broke the law. He ignored existing legal rights and obligations and created new ones by his order dated July 15, 1955. His duty, as he claimed correctly, was not to abdicate his function of maintaining law and order. What he, however, achieved was abrogation of law by an executive edict in an effort to maintain what he thought was order. It was not maintenance of order either, because order itself is regulated by law. Instigation of or even acquiescence in trespass is not maintenance of order. Maintenance of law was a sacred trust entrusted to the charge of the Collector, the first respondent. We regret the necessity to record it: the first respondent [the Collector] betrayed that trust, at any rate in the case of the petitioner. The petitioner lost possession of 171 acres of his wet land in Thimmachipuram. That dispossession was unlawful in the sense that it was effected without the authority of law.

Their Lordships had no hesitation in declaring that the impugned order of the Collector, directed to the tenants and waramdars and to the police officers, was illegal, without the authority of law, and wholly without any jurisdiction, insofar as the petitioner and his legal rights were concerned. The justification attempted by the Collector had failed and there was not the least trace of contrition either.

It is for the Government to consider and to consider seriously whether an officer of such totalitarian views and disregard of law should continue to be entrusted with the duties of maintaining law and order in any locality in this State.

About the Government's part in this affair, Their Lordships said:

Appeals to the Government from the petitioner and other mirasidars apparently fell on deaf ears. Whether the Government approved of what the first respondent did and whether they approved of the defence he attempted in these proceedings might not arise for consideration. The Government has not been impleaded as a party to these proceedings and the Advocate-General very properly refrained from supporting the validity of the orders of the Collector, which were wholly indefensible in law.

INDUSTRIAL DISPUTES

Labour Appellate Tribunal's Decision SET ASIDE BY THE SUPREME COURT

The Pipraich Sugar Mills Ltd., which was carrying on business in crushing sugarcane at a place called Pipraich in Gorakhpur district (U. P.) made a contract with a Madras party in October 1950 to sell its machinery and plant, since it had been running at a loss. When the workmen came to know of it they threatened to strike. Thereupon the Mills in January 1951 offered to pay 25% of the profits on the sale transaction to the workmen on certain terms provided strike notice was withdrawn. When however it came to dismantling the machinery, the workers refused to help, and the management therefore discharged the workmen with effect from 1st March 1951.

The machinery was thereafter dismantled by the workers on a contract with the purchaser. The workers then, in April 1951, demanded from the Mills 25% of the profits. On the management rejecting the demand, the workmen moved the U. P. Government, who referred the dispute under sec. 3 of the U. P. Industrial Disputes Act to an industrial tribunal for a decision whether the services of the employees were terminated improperly and to what relief they were entitled. The Industrial Tribunal and the Labour Appellate Tribunal in appeal found the closure of the mills was bona fide. In their opinion, however, the offer of profits made by the management to the workmen had become a binding agreement and the employees were held entitled to this amount.

The Mills filed an appeal to the Supreme Court challenging this decision on two grounds: 1. that as the industry had closed, the reference to the Industrial Tribunal was invalid; and 2. that there was no concluded agreement between the parties for any payment to the workmen.

The Supreme Court on 23rd October rejected the first contention of the appellants and accepted the second. Mr. Justice Venkatarama Aiyar, speaking for the Court, expressed agreement with the view "that the industrial dispute to which the provisions of this Act apply is only one which arises out of an existing industry." But in this case the dispute relates to a claim which arose while the industry was in existence and hence it was clearly an industrial dispute. The Supreme Court held that as the claim for a share in the sale profits had accrued before the closure the reference by the Government was valid. It found, however, that there was no concluded agreement for payment of a portion of the profits to the workmen and the employees were not entitled to any such amount.

CR. P. CODE AMENDMENT

Examination of Witnesses RIGHT OF THE ACCUSED

Mr. Justice N. Somasundaram at the Madras High Court ruled on 26th October in a criminal revision case that prosecution witnesses not examined during investigation and not cited in the charge sheet could not be subsequently summoned.

A charge sheet for cheating was filed against Mr. V. S. Ramanathan by the police before a Presidency Magistrate on 1st December 1955. Four witnesses were cited in the charge sheet; the prosecution later filed an additional list of four witnesses; and afterwards another list of two witnesses, who had not been examined during investigation, was filed. Mr. Ramanathan objected to the

examination of the latter two witnesses, but the objection was overruled by the magistrate. A revision was therefore filed against the magistrate's order in the High Court.

His Lordship said that the first application filed for the examination of four additional witnesses was "the first assault on the right of the accused" not only to know the names of the witnesses before the commencement of the trial but also to have copies of the statements of these witnesses recorded under sec. 162, Cr. P. C. As regards the application to examine two witnesses who were not even examined during investigation, His Lordship said:

What the amendment to the Criminal Procedure Code provides is that the accused must know before the commencement of the inquiry what witnesses the prosecution proposes to examine and what documents it proposes to file so that the accused may know the full case against him as disclosed by the investigation. This right of the accused to know the case against him before the commencement of the inquiry cannot be denied or undermined, nor can it be watered down in any manner.

After stating that the prosecution must mention in the charge-sheet the names of the witnesses it proposes to examine in support of its case and furnish to the accused copies of the statements of those witnesses recorded under sec. 162 during the time of the investigation of the case, His Lordship observed:

If this is not done, the prosecution has no right to call any witness they like subsequently and spring a surprise on the accused. That is the restriction placed on the right of the prosecution to call any witness not cited in the charge-sheet or not even examined during the investigation.

In the result the order of the Presidency Magistrate permitting the examination of the two additional witnesses was set aside.

INDUSTRIAL DISPUTES ACT

Dismissed Employee's Right

TO CLAIM COMPENSATION AND REINSTATEMENT

On the C. P. Transport Services Ltd. dismissing one of their employees, Mr. Patwardhan, the latter applied for compensation and reinstatement under the C. P. and Berar Industrial Disputes Act. The management resisted the claim on the ground that a dismissed employee was not covered by the legislation, but when the case was taken to the Labour Appellate Tribunal in appeal, it rejected the objection of the management.

An appeal was thereupon filed by the management with the Supreme Court, which on 6th November dismissed the appeal, holding that a dismissed employee was entitled to raise an industrial dispute and obtain adjudication.

The management based its appeal on the principal ground that a dismissed person was not an "employee" as contemplated by the Act and hence he could not raise an industrial dispute. It was further argued that as the respondent alone had made the application this was an individual dispute and not an "industrial dispute," which required that more than one workman should be involved in the dispute.

The Supreme Court referred to a decision of the Federal Court and stated that "the question whether a dismissed employee is an employee as defined in the Industrial

Disputes Act must be held to be practically concluded by the decision of the Federal Court." It was held in that case that the definition was sufficiently wide to include the claim for reinstatement by a dismissed employee.

On the second question the Supreme Court observed that there was considerable conflict in the decisions of various courts and tribunals as to whether a dispute by an individual workman would be an "industrial dispute" as defined in the Industrial Disputes Act, 1947. Without giving any verdict on this issue the Court stated that it favoured the view that "a dispute between an employer and a single workman cannot per se be an industrial dispute, but it may become one if it is taken up by the Union or a number of workmen."

In the present case, however, the provisions of the C. P. and Berar Act were different from those of the Central legislation and they were meant to cover an industrial dispute raised by even one person. Hence it must be conceded that under the legislation applicable to the appeal an individual dismissed employee had been given a right to raise an industrial dispute.

GLEANINGS

The following resolutions were passed by the Deccan Sabha, Poona, at its meeting held on 25th October.

Punjab Press Act

With the professed object of checking communal propaganda the Punjab Government has adopted a measure of press control which, in the wide latitude it leaves for arbitrary official action and in the drastic nature of the powers conferred on executive officers, has no parallel in the long history of British rule or in the recent history after the achievement of independence.

This Special Powers (Press) Bill, which has passed both houses of the Punjab legislature, is not a temporary piece of legislation designed to meet an emergency and limited in duration to a year or two, but purports to be a permanent law to remain in operation until the local Government chooses to repeal it.

It empowers any official selected for the purpose, at his sole discretion, (i) to prohibit altogether the publication of news or comments; (ii) censor the contents of a periodical prior to publication; and (iii) to bar the entry of any periodical into the Punjab. While in the case of total prohibition mentioned in (i) the aggrieved party may make a representation to the Government which is given unfettered authority to deal with the representation in a manner which in its subjective judgment it deems proper, no opportunity is afforded of even making a representation in respect of other restrictive actions mentioned in (ii) and (iii), and thus there is no scope for review of these actions even by a higher official, not to speak of a judicial review. And further while a prohibitory order can remain in force (unless renewed) only for two months, the other restrictive orders may remain in force for an indefinite period without the necessity for such orders being scrutinized at any stage.

Moreover, though the measure is supposed to be directed against newspapers "fostering communal disharmony," it does not limit the power of suppression conferred on executive authorities to matter which even in their own opinion is likely to lead to communal tension. On the contrary it in terms permits them to prohibit the publication of "any" matter, to censor and order the omission of "any" matter, and to exclude "any" outside periodical from entering the Punjab. Thus, both in

initiating and enforcing suppression, the measure gives limitless power to the officials, and this power is not amenable to any kind of restraint either in the beginning or at the end. The net of press control cannot be cast more broadly under a non-totalitarian regime than is done in this measure.

It may be conceded that communal propaganda of an undesirable nature has made itself manifest in the Punjab recently, which no right-thinking person would desire to condone. But the remedy for this is to apply sanction after the event and not to take preventive action which, while suppressing evil newspapers, cannot but affect good ones. The deterrent effect of punishment should be sufficient to meet the requirements of the situation, especially because the Chief Minister, in moving the bill, said that there were only four or five newspapers indulging in pernicious communal propaganda and, what is more, that they had not succeeded in creating a spirit of communal hatred in the mind of the public. A sanction applied after the event should be preferred in the circumstances, for such sanction assures a fair appraisal in a court of law of the facts of a particular situation and leaves no room for high-handed arbitrariness on the part of executive authority. It is for this reason that Principal Ralla Ram, the distinguished educationist, like some other members of the legislature even belonging to the ruling party, and the All-India Newspaper Editors Conference urged upon the Government, while conceding the existence of unseemly communal propaganda, to withdraw the bill and rely upon use of the ample powers with which the criminal law endows the Government to curb the evil.

The Council of the Deccan Sabha too would beg the Punjab Government even at this late stage to drop the measure trusting that the good sense of the public combined with court action will provide an effective remedy against abuse of press freedom.

Failure to Inquire into Firings

The Council of the Deccan Sabha views with grave concern the obstinate refusal by the Bombay Government to institute a judicial inquiry into the recent firings in Bombay City and Ahmedabad, which have admittedly resulted in a heavy loss of life. After the specific charges made by the former Finance Minister in Parliament that firings in Bombay were to all appearances wholly uncontrolled on some occasions and especially after the verdict of the jury at the coroner's inquest that the firing at Flora Fountain in November of last year was uncalled for, the Government's refusal to hold a searching inquiry becomes entirely unjustified. If, as the Government contends, firing on every occasion was resorted to by the police either for self-defence or for quelling mob violence and was limited to the minimum, there can possibly be no harm in submitting the facts to a review by an independent authority. If on the other hand excesses come to be proved to have taken place on the part of police officials, as was the case in Patna, Hoshiarpur and Kalka, the Government will be enabled to take disciplinary action against erring officials whom it cannot be the object of Government to shield. The Council therefore supports the wide public demand to have these firings inquired into, since the risk of having to face such an inquiry, where ample prima facie evidence is forthcoming as in these cases to show that firing has been excessive, can alone restrain the custodians of law and order within due bounds and prevent an avoidable loss of life.

POLISH AND HUNGARIAN REVOLT AGAINST SOVIET EMPIRE

'NATIONAL INDEPENDENCE AND CIVIL LIBERTIES INVOLVED

The uprisings in Poland and Hungary have for their object the attainment not only of political independence from Soviet Russia but also the achievement of constitutional rights like personal freedom, free elections and freedom of speech and expression, and as such the BULLETIN may well take interest in these upheavals.

After the decanonization of Stalin by the present Russian rulers, which made it possible for the latter to bring about a reconciliation with Yugoslavia's Tito as a "free and equal" partner, the urge in all the satellites of Soviet Russia's empire was great to achieve a similar status for themselves, and in none was it greater than in Poland and Hungary, where the anti-Russian tradition of the people, with their history filled with the struggle against an overpowering neighbour in the East, is very strong. In all the satellites large Soviet garrisons were planted as occupation forces; the satellites' own armies were commanded by Russian officers; and their police were infiltrated by Russian security agents who created a reign of terror everywhere. There was terrible economic exploitation, the whole economic policy of the countries being shaped to Moscow's purposes. And the entire life of the peoples was dominated by Communist leaders, who controlled the satellite regimes according to the bidding of Russia's bureaucracy.

The easing of the Soviet's iron grip which de-Stalinization meant has of course its rigid limits. In Yugoslavia what had to be faced was a mere national Communism in place of Soviet Communism, though even this freedom from subservience to Russia in carrying out Communist policies was a great deal, and real democrats who would leave every people to choose its own way of life without any outside interference would be amply content if all the seven satellites of Russia in Eastern Europe chose the Communist way of life without its being forced into the mould of Soviet Communism. But where there is an upsurge of national enthusiasm, as was the case in Poland and Hungary, the demand is apt to be not merely for national Communism, free from Soviet tutelage, but for rejection of Communism altogether. In Yugoslavia the conflict was between the rulers of that country and those of Russia; it did not touch the masses nearly to the same extent as in Poland and Hungary. In these two countries the mass movement was characterized by "heretical" slogans like free voting and free speech, which "must jar on Tito's ears slightly less than on Khrushchev's." Will the liberalization policy of Soviet Russia indicated by de-Stalinization be prepared to make terms with such mass movements which may end in an independent Communist regime, but which may end even in a frankly anti-Communist regime? That was the question posed by Poland and Hungary.

Poland

In Poland, which from the time the Russians took over the country in 1944-45 had a Government dominated by Soviet Union agents imposed on it, it was the students and factory workers who organized demonstrations, in the recent crisis, in favour of Gomulka becoming the Premier. The young people—Communists and non-Communists alike—rallied round his leadership because he had dared to provoke Stalin's wrath. Only two months after Tito's open break with the Kremlin in 1948, he was removed from the leadership of the Communist Party in Poland for attempting to follow the Yugoslav pattern, and during most of the next six years he was in prison. It appeared that he was the best person to shake off the Soviet yoke and establish independent Communism or "democratic socialism," if not non-Communist democracy. Many groups ardently desired the latter, but since there was no early prospect of its arrival, they moderated their ambition for the time being and supported Gomulka, who would at least fight Soviet domination.

Their choice was a good one, but Soviet Russia was not inclined to let the Poles have their own way. Khrushchev and other leaders descended upon Warsaw to see if Marshal Rokossovsky, symbol of Soviet rule in Poland, could not be retained in control. Menacing movements of Russian troops towards Warsaw followed. However, the Russian leaders saw the futility of resisting popular wishes, but before they yielded they had assured themselves that Gomulka would not attempt to overpass the limits of Communist structure, although it would not be a structure to their liking, and it was his moderation and the moderation of the broad masses that supported him that saved Poland from the fate that overtook Hungary a few days later. In his policy statement as Premier Gomulka declared himself to be in favour of relations of friendship with the Soviet Union, but within the framework of these relations Poland, he said, must have full independence and sovereignty. Such sovereignty meant the withdrawal of Russia's occupation forces from Poland, but he did not press the demand too far. He thought it prudent to allow the Soviet forces, which were in Poland ostensibly to guard communication lines to East Germany, to continue to remain there till a more favourable moment arose for seeking their complete withdrawal. He also agreed for the time being to retain Rokossovsky, imposed upon Poland by Stalin, as Commander in Chief and Minister of Defence. Over 4,000 Russian officers are believed to have been imposed on Poland. But Gomulka had a commission appointed to establish responsibility for the security police measures enforced under Russia's orders during the worst years of police tyranny, from 1949 to 1953.

He thought these compromises were necessary in order that he might tackle successfully the grave economic

problems stemming from Soviet's domination that faced Poland. He rejected Khrushchev's thesis that heavy industry must have priority over the production of consumers' goods in a Socialist economy. Poland has developed one of the largest heavy industries in Eastern Europe based on rich coal resources, but much of the annual production of coal, which Poland herself needs and could have exported to other countries at much profit, has had to be sent to the Soviet Union at enormously low prices. The industrialization that is taking place serves Soviet's import requirements and construction of war industries more than the needs of Polish economy. Under Soviet pressure during the Korean war Poland developed under forced draft new industries to produce jet planes and other armaments. Labour and material resources allocated to farms and consumer goods production were diverted to war plants, and plans to increase the standard of living and raise agricultural production had to be abandoned. The collectivization of agriculture has brought about almost an investment strike. The peasants have done very little recently for the development of their farms out of fear that their farms would be taken over. Moreover, the collective farms are managed very inefficiently. Gomulka said in his speech after becoming Prime Minister that on peasant farms the production was 30 per cent. higher than on State-run collective farms. There is a prospect of a postponement of the collectivization campaign and dissolution of some particularly unprofitable kolkhozes. If this happens, it will be due not to Gomulka's lack of faith in Communism, for he is a convinced Communist, but to a realistic approach to the whole problem. Anyway, the Polish people are confident that in pursuing economic policies, Poland's interests will not be subordinated to those of Soviet Russia.

Elections to the Sejm have been promised next year. The system on which they will take place will presumably be the same as that under which the first election was held under the new Constitution four years ago—the Government presenting a single list of candidates (as in all East European countries under the thumb of Soviet Russia) approved by the Communist-dominated "National Front" and no Opposition candidates standing. In these elections the Government candidates obtained 99.7 per cent. of the total votes. This voting system is of course a farce, and though the intellectuals undoubtedly desire to have a free and secret ballot, it is too much to expect that that will be coming so soon. Professor Korowicz says: "It is almost impossible to believe that Gomulka would be ready to permit free elections, which would wipe out of the country all Communist domination and influences" (because only 5 per cent. of the workers belong to the Communist Party), but it is believed by some observers that under pressure of public opinion Gomulka will adopt a modified system of election in which the Opposition parties will have some chance. And economic development will probably dictate political development in the direction of democratization of Polish life. Mr. Sydney Gruson, a Warsaw correspondent, observes:

As of this moment, there is no thought whatsoever of making the people vote in order to roll up the type of preposterous majorities that used to be announced so gloatingly. The coming year may be decisive in determining whether the Poles can establish a kind of Communist parliamentary democracy to satisfy a people longing not only for freedom

from want but for freedom of expression and all other civil liberties as well.

Hungary

The Hungarian revolt was very much like the Polish revolt in origin but in its development it was entirely dissimilar. It started as a rebellion against Soviet control of Hungary but the Hungarian people soon turned it into a war against Communism itself.

Thousands of young people surged through the streets of Budapest to demand that Emre Nagy be installed as Premier. He was selected by the populace because in 1953, when as Premier he introduced the "new course" policy (under which the former policy of strengthening heavy industry and increasing the military potential of the country was relaxed in favour of production of consumer goods), he had been dethroned by Russia for "rightist deviation." (Nothing demonstrates the complete subordination of the satellites to their overlord so much as the dismissal of Nagy following closely upon the forced resignation of Malenkov in Soviet Russia for pursuing a similar policy.) Nagy had then declared that the former Government's policy of pursuing industrialization at the expense of agricultural development was a mistaken one and that his Government would try to ensure the revival of agriculture, which was the mainstay of the country. Collectivization of land had also been forced upon Hungary (one-third of the total agricultural land had been taken from the peasants) and a rigid system of crop quotas and forced collections of farm produce introduced. Because of this, Nagy felt (and he too is a convinced Communist like Gomulka) agriculture was in the doldrums, and his policy was that of slowing down the pace of collectivization, and permission being given to collective farmers to leave the collectives if they so wished. The rapid industrialization of the country could be effected only by cutting living standards, which had first to be improved. Nagy placed a similar programme before the Hungarian people, who had now called him to office.

The call for the "heretic" Nagy's return to leadership was the call for the removal of all vestiges of Russia's domination and for free political life. And the call came from all classes—workers in the factories, miners in the pits, peasants in the villages and in the co-operatives, the professional and middle classes, university professors, judges, poets, writers and students. All joined in the call for greater and speedier democratization. The students in particular shouted demands for free elections and freedom of the press. Free elections have not such an ominous sound in Hungary as in Poland; for though the single list system prevails, the list covers candidates from non-Communist parties also. In the last general elections to the National Assembly, for instance, held in 1953, which brought Nagy to power, the list was sponsored by the "People's Independence Front," which comprised, besides the Workers (Communist) Party, to which Nagy belonged, the Smallholders, National Peasants, Independent Democratic and Radical parties, and the Cabinet included a sprinkling of the representatives of all these parties. So Nagy, in this crisis, had little difficulty in meeting the demand for free elections and a coalition Government, though undoubtedly the demand for free elections meant elections in which all parties would be equal and thus a larger representation to non-Communist parties both in the Assembly and the Cabinet.

But the independence of Hungary meant above all withdrawal of Russian forces and disbandment of the

secret police under the control of the Russians, which had created such a political terror for the past ten years. The four divisions which Russia kept in Hungary were nominally lines of communication troops for the occupation of Austria, which she was to withdraw after conclusion of an Austrian peace treaty, but by delaying the treaty, Russia managed to keep her troops in Hungary for far too long. And now the justification for maintaining Russian forces comes from the so-called Warsaw Defence Pact imposed upon East German countries by Russia. Nagy promised to the demonstrators who had demanded withdrawal of Russian forces by the end of this year that he would start negotiations with Soviet Russia and do his best to have the troops withdrawn as soon as possible, but the demonstrators apprehending that Russia would take cover behind the Warsaw Pact, Nagy was perhaps compelled by the pressure of public opinion to declare that Hungary would renounce the Pact, which was the Soviet's answer to the Nato Pact, and that Hungary would henceforth be a neutral country like Austria, her policy being that of non-alignment with either the East or the West. This would leave Soviet Russia no excuse for stationing her troops on Hungarian territory. Nagy also promised the disbandment of the political police; constituted a coalition Government of all democratic parties; and released the Primate of Hungary, Cardinal Mindszenty, the living symbol of the Hungarian people's resistance to Communist enslavement.

If Moscow could have digested all this, Hungary's would have been a peaceful revolution like Poland's. But Hungary's declaration to withdraw from the Warsaw Pact and her proclamation of neutrality was something which the Soviet Government could not possibly tolerate. And taking advantage of the boisterous deeds of the young demonstrators, particularly the rounding up of the criminals of the secret police and the tearing off of Red stars from buildings, the Russians ordered their troops to march on Budapest. It was said that Nagy himself had asked for the aid of Russian forces to quell disorder. But he told the country in a broadcast speech that the decision to call in the Soviet Army had been taken without his knowledge by Erno Gero, deposed Secretary of the Communist Party, and Andras Hegedus, former Premier. "These two," he said, "will have to answer for this grave guilt before the nation." This declaration was made, it should be remembered, in the presence of Janos Kadar, whom the Russian leaders made Premier after ousting Nagy. Further, Kadar himself declared on this occasion that the Communist Party had approved of all the concessions made by the Nagy Government and urged the rank and file members to co-operate with the "fighters for freedom." One indication that though a number of concessions made by the Nagy Government were inspired by non-Communists, they were all acceptable to the Communists at large comes from a Communist head of a liberation committee in a small frontier town. He said to press correspondents: "If the Russians refuse to leave Hungary, we will fight to the last man." He considered that the Communists could not hope to win a free election. Yet he not only demanded a free election, but an election supervised by the United Nations. The Communists ought to be content, in his opinion, to play a minority role. He said: "There are only two great problems: the Russians must go and there must be democratic election." So, it is utterly ludicrous for the Soviet Government, and

particularly for Kadar, who had declared that the decisions of free elections and revival of other parties had been unanimously agreed to by the Communist Party and who had blessed the freedom fighters, to treat the revolution as a movement engineered by anti-revolutionary elements. This pretext was invented to crush the revolution by the massive strength of the Soviet forces.

Anyway, Budapest was blockaded, and the carnage that followed was something terrible. Mr. Noel Barber reported on 26th October: "At least a thousand were killed in one of the most ghastly massacres I have ever had to report. It happened yesterday morning when the Russians turned the guns of their tanks on to a crowd of unarmed demonstrators. They mowed them down for 20 minutes. . . . There are at least 50 (Soviet tanks) still in action, together with armoured cars and troop-carriers. They fire on anything almost at sight. At the moment I can hear, like thunder rolling in the distance, the sound of their 85 mm. guns." The city was ringed with steel for over a week and several thousand people died in the battle. On 4th November Soviet troops mounted a full-scale offensive throughout Hungary, and this was done while talks were proceeding between a Hungarian political-military committee and the Soviet authorities on the evacuation of the Soviet troops from the Hungarian territory. This perfidy reminds one of Japan's attack on Pearl Harbour in the last World War. The general offensive was preceded by the arrest of Nagy and his Ministers who were meeting inside the Parliament building and by the appointment of Janus Kadar as Premier, who obediently asked for the help of Soviet troops to crush the "counter-revolutionary terror." This is the man who in 1949 as Minister of the Interior and head of the secret political police, had Laszlo Rajk tried and executed on charges of Titoism and nationalism—Rajk who even the same Communist Party of Hungary recently felt it necessary to rehabilitate posthumously in order put itself right with the awakened public feeling. Kadar is still considered to be a pawn of the Kremlin and ever ready to do Moscow's bidding.

Since then a regular war is going on, not between two factions of the Hungarian people, but between Hungary and Soviet Russia; the latter's intervention can only be regarded as aggression on foreign soil. For, if the Warsaw Pact sanctioned the stationing of Soviet armies on Hungarian territory, it did not lend the least justification for their use for internal security in Hungary. The war is being fought most fiercely on both sides. The Hungarian people are fighting with the same valour as they displayed in the war of liberation that took place over a hundred years ago against Austria under the banner of Kossuth. It may be that they will suffer a defeat even as the armed intervention of Russia rendered all their valour unavailing a century ago. But Kossuth's memory will ever keep on inspiring in the hearts of Hungarians the ideal of freedom and independence till it is at last translated into a reality. For the moment however there seems to be no hope. The United Nations has condemned Soviet intervention and demanded the withdrawal of Soviet troops. All one need say about the debates is that Yugoslavia, considering its position, played a noble part in the affair by voting "yes" as India played, in Mr. Jayaprakash Narain's words, a "shameful" part by voting "no." Mr. Nehru has indeed dragged India's name into the mire.