Regd. No. B. 5681

Editorial Committee:
Prof. P. M. LIMAYE,
S. G. VAZE,
Member and Secretary respectively of the All-India Civil Liberties Council

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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

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

No. 96
September 1957

CONTEMPT POWER OF LEGISLATIVE BODIES

THE CONSTITUTIONAL LAW OF BRITAIN AND THE U. S. A.

The exercise by the British Parliament of power to punish for contempt by its own process has caused great concern in England and remedies are sought to check this power particularly with a view to restraining its impact on the liberty of the Press. In the recent "Sunday Express" case, the editor of the paper, Mr. Junor, was adjudged guilty by the House of Commons of a breach of privilege on account of an article criticizing the allotment of petrol to M. P.'s and their constituencies. The statements he made in the article were, according to Mr. Richard Crossman, "false", and the article was wholly "objectionable;" Mr. Crossman had no doubt that a violation of privilege had occurred. And yet he felt compelled to express doubts as to the expediency of exerting the power of punishment in this case, because of its indirect effect in suppressing criticism. He pointed out that though the article in itself could not be defended, it served a useful purpose in calling the attention of the public to the "scandal" concerning petrol which it revealed. Expressing the opinion that the "Sunday Express" editorial was "outrageous," he went to say:

> I would remind hon. Members, with great respect, that outrageous attacks, suitably answered, are the essence of democracy.... There has to be an outrageous attack in order that we may get the truth. Why have we privilege here to say anything we like, however scandalous, about anybody in this country? Some of us abuse that privilege. I can think of a number of hon. Members here who have made a great many observations which they could not possibly have made outside, not all of them hon. Members on one side of the House. They could not possibly have defended those remarks outside. They have abused that privilege.
>
> That privilege of saying outrageous things is absolutely vital, because by the exercise of that privilege the truth comes out in the end, provided that we do not abuse the privilege too far. I happen to be not only a Member of the House but a practising journalist. Of course, I care primarily about the privileges of the House, but I care, secondly, very much about the freedom of the Press and about the relationship between the freedom of the Press and the privileges of this House, upon which democracy largely depends. If this relationship is not good and healthy democracy is undermined.
>
> Should not we, who have been granted this tremendous privilege of free speech without fear of accusation or of being brought into court, be the last people to give the impression that we are afraid of being criticised? I know perfectly well that hon. Gentlemen who are in favour of taking this action against Mr. Junor, are not really afraid of criticism; but one must not only be guiltless; one must seem guiltless. I cannot think that the House has made itself look guiltless by its action on this whole question of petrol, because if ever there was behaviour designed to arouse the suspicion of the general public that there is something in this charge it is the way in which this House reacted to these undoubted violations of privilege.

In this particular case there was no doubt about the guilt, but in a number of other cases the guilt itself is far from obvious; and any injustice caused cannot be redressed, because the aggrieved party has no access to courts of law. The prevailing practice in such cases is, according to Erskine May, as follows:

> Either House may adjudge that any act is a breach of privilege and contempt; and if the warrant recites that the person to be arrested has been guilty of a breach of privilege, the courts of law cannot inquire into the grounds of the judgment but must leave him to suffer the punishment awarded by the High Court of Parliament, by which he stands committed.

Such a procedure giving unrestricted judicial power to a body of politicians is bound to lead to many instances of grave injustice, and it was in order to obviate this that the "Times" of London was prompted to make the suggestion that Parliament should leave it to the courts of justice to determine whether a breach of privilege or contempt has in fact occurred.

CONTEMPT POWER OF LEGISLATIVE BODIES

In the United States of America the power of the Congress to punish for contempt is very limited. In that country contempt cases arise mostly out of disobedience of subpeona requiring a witness to testify in congressional inquiry. In such cases Congress has the power itself to punish for contempt, but it has also provided by law that a contumacious witness be indicted and punished in the courts for a misdemeanour. In any case even Congress's power to punish is subject to judicial review unlike the exercise of privilege in Britain. Latterly, in the United States, many persons cited for contempt in investigations of subversive activities could not be given relief even by courts when such relief was required. But recently, in Watkins' case (vide p. iv: 296 of the BULLETIN), the Supreme Court delivered a judgment which will dispel all apprehensions in this branch of the law of contempt. The judgment amounts to a clear and emphatic declaration that the assertion of congressional power in the investigative process must ever be subject to the rights and privileges of individuals such as those enumerated in the Fifth or First Amendment to the Constitution. The Court said:

> The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion or political belief and association be abridged.

I—The Constitutional Law of Britain

This judgment delivered by Chief Justice Earl Warren in this case is as momentous as that delivered by him outlawing segregation in public schools. But we have referred to it here because it brings into strong relief the striking contrast in the constitutional doctrines regarding the legislatures' power of contempt which are made applicable in Britain and the United States. In the course of the judgment he traces the origin of the lex parliamenti, developed as an independent body of law, not open to judicial review; what abuses it inevitably led to in England; how in the United States the principle of the separation of powers averted those abuses and how the legislature's power to punish for contempt was from the outset subjected to the jurisdiction of law courts. This part of the judgment we reproduce below in full as most helpful to a proper understanding of the question of parliamentary privilege. This will show better than anything else how necessary it is for us to be thinking about ways in which parliamentary privilege as understood and enforced in England ought to be dealt with in our country if it is not to infringe upon Freedom of Expression. C. J. Warren said:

The rudiments of the power to punish for "contempt of Congress" come to us from the pages of English history. The origin of privileges and contempts extends back into the period of the emergence of Parliament. The establishment of a legislative body which could challenge the absolute power of the monarch is a long and bitter story. In that struggle, Parliament made broad and varied use of the contempt power. Almost from the beginning, both the House of Commons and the House of Lords claimed absolute and plenary authority over their privileges. This was an independent body of law, described by Coke as lex parliamenti. * Only Parliament could declare what those privileges were or what new privileges were occasioned, and only Parliament could judge what conduct constituted a breach of privilege.

In particular, this exclusion of lex parliamenti from the lex terrae, or law of the land, precluded judicial review of the exercise of the contempt power or the assertion of privilege. Parliament declared that no court had jurisdiction to consider such questions.

JUDGE SENT TO PRISON BY COMMONS!

In the latter part of the seventeenth century, an action for false imprisonment was brought by one Jay, who had been held in contempt. The defendant, the Serjeant-at-arms of the House of Commons, demurred that he had taken the plaintiff into custody for breach of privilege. The Chief Justice, Pemberton, overruled the demurrer. Summoned to the bar of the House, the Chief Justice explained that be believed that the assertion of privilege went

* "Judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws, but *secundum legem et consuetudinem Parliamenti*." The power of Parliament "is so transcedent and absolute as it cannot be confined either for causes or persons within any bunds."—Sir Edward Coke.

Some other pronouncements to the effect that Parliament is the sole and exclusive judge of its own privileges are:

"The court of Parliament is a superior court, and though the King's Bench have a power to prevent excesses of jurisdiction in courts, yet they cannot prevent such excesses in Parliament, because that is a superior court, and a prohibition was never moved for to the Parliament."—Justice Powell in Reg. *v.* Paty (1704). In answer to the objection that no man should be imprisoned except by the law of the land, Justice Gould said that there were several laws in the Kingdom, one of which was the lex parliamenti, and that the House of Commons should be intrusted with the liberty of the subject. "Can the High Court of Parliament, or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts, which is acknowledged to belong, and is daily exercised as belonging, to every superior court of law, of less dignity undoubtedly than itself?"—Lord Ellenborough in Burdett *v.* Abbott (1811). "The House of Commons is a Supreme Court, and they are judges of their own privileges and contempts."—Blackstone J. in Brass Crosby's case (1771). "We must presume that what any court, much more what either House of Parliament, acting on great legal authority, takes upon it to pronounce a contempt, is so."—Lord Denman in the Sheriff of Middlesex's case (1840).

to the merits of the action and did not preclude jurisdiction. For his audacity, the Chief Justice was dispatched to Newgate prison. * [Jay *v.* Topham, 12 How. State Tr. 822.]

Instances of "Inevitable Abuses"

It seems inevitable that the power claimed by Parliament would have been abused. Unquestionably it was. A few examples illustrate the way in which individual rights were infringed. During the seventeenth century, there was a violent upheaval, both religious and political. This was the time of the Reformation and the establishment of the Church in England. It was also the period when the Stuarts proclaimed that the royal prerogative was absolute. Ultimately there were two revolutions, one protracted and bloody, the second without bloodshed. Critical commentary of all kinds was treated as contempt of Parliament in these troubled days. Even clergymen were imprisoned for remarks made in their sermons. [Proceedings against Richard Thompson, 8 How. State Tr. 2.] Perhaps the outstanding case arose from the private conversation of one Floyd, a Catholic, in which he expressed pleasure over the misfortune of the King's Protestant son-in-law and his wife. Floyd was not a member of Parliament. None of the persons concerned was in any way connected with the House of Commons. Nevertheless, that body imposed an humiliating and cruel sentence upon Floyd for contempt. The House of Lords intervened, rebuking the Commons for their extension of the privilege. The Commons acceded and transferred the record of the case to the Lords, who imposed substantially the same penalty. †

Case of Titus Oates

Later in that century, during the reign of Charles II, there was great unrest over the fact that the heir apparent, James, had embraced Catholicism. Anti-Catholic feeling ran high, spilling over a few years later when the infamous rogue, Titus Oates, inflamed the country with rumors of a "Popish Plot" to murder the King. A committee of Parliament was appointed to learn the sources of certain pamphlets that had been appearing. One was entitled: "The Grand Question Concerning the Prorogation of this Parliament for a Year and Three Months Stated and Discussed." A Doctor Carey admitted to the committee that he knew that author, but refused to divulge his name. Brought to the bar of the House of Lords, he persisted in this stand. The House imposed a fine £1,000 and committed the witness to the Tower.

Case of John Wilkes

A hundred years later, George III had managed to gain control of Parliament through his ministers. The King could not silence the opposition, however, and one of the most vocal was Wilkes. This precipitated a struggle that lasted for several years until Wilkes finally prevailed. One writer sums up the case thus :

> He had won a victory for freedom of the Press. He had directed popular attention to the royally-controlled House of Commons, and pointed out its unrepresentative character, and had shown how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned. It is one of life's little ironies that work of such magnitude had been reserved for one of the worst libertines and demagogues of all time. §

II.—The Constitutional Law of the U. S. A.

Chief Justice Warren then went on to show how very different the constitutional law of the United States is on the contempt power of the Congress. He said :

> The history of contempt of the legislature in this country is notably different from that of England. In the early days of the United States, there lingered the

* "In 1689, after a dissolution of Parliament, an action was brought against Topham, the Sergeant-at-arms attending the Commons, for executing the orders of the House in arresting certain persons. Topham pleaded to the jurisdiction of the court, but his plea was overruled, and judgment was given against him. The House declared this to be a breach of privilege, and committed Sir F. Pemberton and Sir T. Jones, who had been the judges in this case, to the custody of the Serjeant-at-arms."—May, "Law and Usage of Parliament."

† "In Floyde's case, in 1621, the Commons clearly exceeded their jurisdiction. [Acting as a court of record the Commons imposed fines and imprisoned offenders.] That person had spoken offensive words concerning the daughter of James I and her husband, the Elector Palatine. In this he may have been guilty of a libel, but cartainly of no breach of parliamentary privilege. Yet the Commons took cognizance of the offence and sentenced Floyde to pay a fine of £1000, to stand twice in the pillory and to ride backwards on a horse with the horse's tail in his hand. Upon this judgment being given, first the King and then the Lords interfered, because the offence was beyond the jurisdiction of the Commons. The Commons perceived their error and left the offender to be dealt with by the Lords. [The House of Lords in its judicial capacity is a court of record, but according to Lord Kenyon, "when exercising a legislative capacity, it is not a court of record."] If the Commons exceeded their jurisdiction in this case, the Lords equally disregarded the limits of their own and proceeded to still more disgraceful severities. Floyde was sentenced that he should be incapable of bearing arms as a gentlemen; that he should ride twice to the pillory with his face to the horse's tail, holding the tail in his hand; that he should be branded with the letter K on his forehead, be whipped at the cart's tail, be fined £5000 to the King and be imprisoned in Newgate for life."—May, "Law and Usage of Parliament."

§ "Wilkes was a worthless profligate, but he had a remarkable faculty of enlisting popular sympathy on his side, and by a singular irony of fortune he became the chief instrument in bringing about three of the greatest advances which our Constitution has ever made. He woke the nation to a conviction of the need for Parliamentary reform by his defence of the rights of constituencies against the despotism of the House of Commons. He took the lead in the struggle which put an end to the secrecy of Parliamentary proceedings. He was the first to establish the right of the Press to discuss public affairs."—J. R. Green in "Short History of England."

direct knowledge of the evil effects of absolute power. Most of the instances of use of compulsory process by the first Congresses concerned matters affecting the qualification or integrity of their members or came about in inquiries dealing with suspected corruption or mismanagement of government officials. **Unlike the English practice, from the very outset the use of contempt power by the legislature was deemed subject to judicial review.**

ANDERSON *v.* DUNN, 1821

The first case involving the exercise of contempt power by Congress by its own process came to the Supreme Court in 1821 in the case of Anderson *v.* Dunn, 6 Wheat. (U. S.) In this case John Anderson brought an action for assault and battery and false imprisonment against the Sergeant-at-arms of the House of Representatives, who had taken the plaintiff in custody pursuant to a warrant issued by the Speaker of the House in accordance with a resolution of the House adjudging him "guilty of a breach of privilege and a high contempt of its dignity and authority." The charge on which Anderson was brought to the bar of the House for trial was that he offered a bribe to a member of the House, since "attempts to bribe a member are the equivalent of attempts to secure a particular cause of action by the legislature through duress."

The question for determination by the Court was "whether the House of Representatives can take cognizance of contempts committed against themselves," and the Court answered it in the affirmative. It was contended on behalf of the plaintiff that there was no constitutional provision giving to either House of Congress the power to punish for contempt except when committed by its own members and that the warrant issued in this case was illegal. The Court admitted that there was in the Constitution no express grant of power to Congress to issue such a warrant and to punish a non-member for contempt, but such a power it held must be implied to exist by reason of its necessity for self-preservation and self-defence. Justice Johnson, who delivered the opinion of the Court, said:

> There is not in the whole of that admirable instrument (the Constitution) a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.
>
> If there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of powers indispensable to the attainment of the end of their creation. . . . That "the safety of the people is the supreme law" not only comports with, but is indispensable to, the exercise of those powers in the public functionaries without which that safety cannot be guarded.
>
> But it is contended that if this power in the House of Representatives is to be asserted on the plea of necessity, the ground is too broad and the result is too indefinite. . . . But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts and leaves it exposed to every indignity and interruption that rudeness, caprice or even conspiracy may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived.
>
> In reply to the suggestion that, on this same foundation of necessity might be raised a superstructure of implied powers in the executive, and every other department, and even ministerial officers of the government, it would be sufficient to observe that neither analogy nor precedent would support the assertion of such powers in any other than a legislative body. . . . In the retirement of the cabinet it is not expected that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive or any other department to hold a public deliberative assembly.

Thus predicating the existence of power to punish for contempt in either House of Congress on the necessity for the attainment of the end for which those bodies are created, Justice Johnson defined the power as "the least possible power adequate to the end proposed."

KILBOURN *v.* THOMPSON, 1881

While the holding in this case may at first glance seem to confer on Congress the exclusive jurisdiction to determine what constitutes contempts and to punish for such contempts, implying that the courts have no power to inquire into this jurisdiction, it is now well settled that congressional assertion of the power to punish one who is not a member for contempt of the authority of Congress is subject to judicial review. Later cases have established this beyond challenge. The most important case in this respect is Kilbourn *v.* Thomson, 103 U. S. 168 (1881). The case arose out of the question of the power of Congress to punish recalcitrant witnesses for contempt as an auxiliary aid to investigation, but the larger question was fully considered in this case and the reasoning of Anderson *v.* Dunn was overruled or rejected. The Court rested its decision in this case on the ground that while Congress had power to punish for contempt in adjudicating election

contests and in impeachment proceedings, it had no power to punish a private person, not a member, for contempt. Justice Miller, delivering the opinion of the Court, said;

> There is no express power in that instrument (the Constitution) conferred on either House of Congress to punish for contempts.
>
> The advocates of this power have therefore resorted to an implication of its existence, founded on two principal arguments. These are: (1) its exercise by the House of Commons of England, from which we, it is said, have derived our system of parliamentary law; and (2) the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them [the argument relied on in the Court's opinion on the earlier case of 1821].

Justice Miller rejected both the arguments as unsound. He denied the analogy of the British Parliament as inapplicable on the ground that that Parliament derived such power from the fact that it was a judicial as well as a legislative body before its separation into two Houses. He said:

> (The origin of the British Parliament) goes back to the period when the bishops, the lords and the knights and burgesses met in one body and were, when so assembled, called the High Court of Parliament.
>
> They were not only called so, but the assembled Parliament exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the King in his Court of Parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the King, were recognized as valid. Upon the separation of the Lords and Commons into two separate bodies, holding their session in two different chambers and hence called the House of Lords and the House of Commons, the judicial function of reviewing by appeal the decisions of the Courts of Westminster Hall passed to the House of Lords, where it has been exercised without dispute ever since. To the Commons was left the power of impeachment and perhaps others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament of the Kingdom of England.
>
> It is upon this idea, that the two Houses of Parliament were each courts of judicature originally, which, though divested by usage and by statute, probably, of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority, that the power rests.

Justice Miller also pointed out that the opinions of English courts were not unanimous as to the extent of the power to punish for contempt supposed to inhere in the British Parliament and "the liability of its exercise to be inquired into by the courts." For instance, he showed that in the celebrated case of Stockdale *v.* Hansard, 9 Ad. & E. 1 (1839) "this doctrine of the ommipotence of the House of Commons in the assertion of its privileges received its first serious shock in a court of law." In this case Lord Denman "holds with an incontrovertible logic that when the rights of the citizen are at stake in a court of justice, it must, if these privileges are set up to his prejudice, examine for itself into the nature and the character of those laws and decide upon their extent and effect upon the rights of the parties before the court." Justice Coleridge said in this case: "I have yet to learn that this court is to be restrained by the dignity or power of anybody, however exalted, from fearlessly, though respectfully, examining the reasonablenes or justice (of the acts of the House of Commons), where the rights of third persons, in litigation before us, depend upon their validity."

The constitutional separation of judicial from legislative power in the United States made the principles underlying the powers and privileges of the English House of Commons on the subject of punishment for contempts inapplicable (Justice Miller remarked) "to the House of Representatives of the United States—a body which is in no sense a court, which exercises no functions derived from its once having been a part of the highest court of the realm, and whose functions, as far as they partake in any degree of that character, are limited to punishing its own members and determining their election." The conclusion was:

> We are of the opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given to the doctrine that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation.

Adopting the language of the Supreme Court of Massechusetts in a case that came before it, Justice Miller said:

> **The House of Representatives is not the final judge of its own power and privileges in cases in which the rights and**

CONTEMPT POWER OF LEGISLATIVE BODIES

> liberties of the subject are concerned, but the legality of its action may be examined and determined by this Court. . . . Especially is it competent and proper for this Court to consider whether its (the legislature's) proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme, and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.

The Justice concluded:

> We must therefore hold, notwithstanding what is said in the case of Anderson *v.* Dunn, that the resolution of the House of Representatives finding Kilbourn guilty of contempt and the warrant of its Speaker for his commitment to prison are not conclusive in this case and in fact are no justification, because, as the whole plea shows, the House was without authority in the matter.

Anderson *v.* Dunn, he declared, " was decided as a case of the first impression in this Court and undoubtedly under pressure of the strong rulings of the English courts (this case was decided before the case of Stockdale *v.* Hansard) in favour of the privileges of the two Houses of Parliament, " the reasoning of which however was not applicable to the United States.

MARSHALL *v.* GORDON, 1917

In Marshall *v.* Gordon, 243 U. S. 521 (1917), a congressional sub-committee was appointed to investigate certain offences committed by a district attorney in New York. While this investigation was pending, the district attorney wrote and published a defamatory letter reflecting upon the conduct of the sub-committee. Under the authority of the House of Representatives a formal warrant for his arrest was issued and executed. In habeas corps instituted by the district attorney, the Supreme Court directed his discharge from custody. The decision was rested on the ground that the power of Congress under the Constitution as to contempts is limited to punishing its own members therefor, and no such power may be found by inference, since that would violate the express constitutional provisions as to separation of powers; nor is such power incidental to other express powers granted to the Congress, although the power of Congress to punish for contempt is implied in so far as it may be necessary to preserve and carry out the legislative authority given to it by the Constitution. The Court said;

> Without undertaking to inclusively mention the subjects embraced in the implied powers, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty, or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed.

JURNEY *v.* MACCRACKEN, 1935

In Jurney *v.* MacCracken, 294 U. S. 125 (1935), Justice Brandeis, speaking for the Supreme Court, referred to " the limitations upon the power of the Houses of Congress to punish for contempt " and said:

> The scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature.

Because in this case the privilege which was in question was " the established and essential privilege of requiring the production of evidence, " Justice Brandeis said:

> The apprehensions expressed from time to time in congressional debates, in opposition to particular exercises of the contempt power, concerned, not the power to punish as such, but the broad undefined privileges which it was believed might find sanction in that power. The ground for such fears has since been effectively removed by the decisions of this Court which hold that **assertions of congressional privilege are subject to judicial review** (Kilbourn *v.* Thompson); and that the power to punish for contempt may not be extended to slanderous attacks which present no immediate obstruction to legislative processes (Marshall *v.* Gordon).

The United States' constitutional law on the congressional power to punish for contempt may therefore be summed up thus: Congress can undoubtedly punish any disorderly behaviour of its members. Art. I, sec. 5, provides that " each House may punish its members for disorderly behaviour and, with the concurrence of two-thirds, expel a member. " There is no express grant of power to Congress to punish for contempt persons other than its members. The existence of such power has sometimes been based on the necessity for self-preservation. But the exercise of the power has been limited by considerations as to the nature of the action in connection with which the contemptuous conduct has occurred. Conduct is contemptuous if it has the effect of obstructing legislative proceedings; and notwithstanding Anderson *v.* Dunn, it is now recognized that congressional assertion of the power to punish

non-members for contempts is subject to judicial review, it being for the courts to determine whether an offensive act is of such a nature as to obstruct legislative functions. Where the act is determined to be of that nature, it is left to the Congress to deal with it without judicial interference, unless there is manifest an absolute disregard of discretion and a mere exertion of arbitrary power amounting to a violation of constitutional limitations.

PROTECTION OF NEGROES' VOTING RIGHTS

THE FIRST MEASURE IN THREE GENERATIONS

After the U. S. Senate passed on 7th August a basically altered version of the Administration's *Civil Rights Bill* designed mainly to give to the Negroes equal rights with the whites both in regard to the civil rights generally and the voting right specifically, the first reaction produced among the most ardent supporters of the bill was to drop the whole business for the present and to enact a strong measure in the next session, putting back into it the teeth which the Senate had taken out.

The part of the Bill (Part III) which sought to implement the Fourteenth Amendment to the Constitution was struck out by the Senate altogether. Under it the Attorney General could have brought the power of the Federal Government to bear against any infringement of any civil right. This part being eliminated by the Senate, a frontal attack on civil rights violations by means of Federal injunctive sanctions to protect all civil rights including the right to attend an integrated school is no longer possible. Similarly Part IV which dealt particularly with the protection of the Negro's right to vote conferred by the Fifteenth Amendment was greatly weakened by the Senate. The bill originally proposed to give the Attorney General power to go to a Federal court for an injuction against actual or threatened interference with any citizen's right to vote. Violators could be fined or imprisoned for contempt of court. Such cases could be tried by the judge sitting without a jury, as all injunctive cases are. But the Senate interposed a jury in some of the cases, and it was feared that such interposition would greatly impair the effectiveness of this provision. In the version of the bill as adopted by the Senate, an election official refusing to obey courts' injunctions could be imprisoned for civil contempt by a Federal judge, sitting without a jury, until he agreed to comply. In criminal contempt actions, however, where the purpose of the judge was to punish a man for defiance of a court order, and not simply to force the carrying out of the order, a jury trial would be mandatory. Because few juries in the South could be expected to convict in civil rights cases, it was apprehended that this Part as now rewritten by the Senate would be almost wholly ineffective.

But within a few days after the passage of the bill in a greatly altered form in the Senate, reflection produced second thoughts even among the strongest supporters of the bill. It was felt that even this whittled-down measure represented a significant advance for the Negro, because it would be a permanent new weapon in the hands of the Justice Department for the protection of the Negro's voting rights, though the protection it could afford would be limited.

Heretofore the voting rights were enforceable by two methods: criminal prosecutions by the Federal Government of those who interfered with Negro voting, and civil suits by Negroes themselves. As early as 1884, in ex parte Yarborough, the Supreme Court upheld a criminal conviction for excluding Negroes from the polls. But such prosecutions are no longer regarded as an effective enforcement method, first, because prosecutions will be successful only if juries are willing to convict, which is more than doubtful in the South, and, secondly, because, even where they are successful, punishment comes only after the fact. Civil suits for damages by Negroes, though they have in the past effected some advances in Negro voting rights, such as the opening of the Texas primaries to Negroes (Nixon *v.* Condon, 286 U. S. 73 [1932]), are also an unsatisfactory method, first, because a jury trial is constitutionally required in any suit for damages, and, secondly, because the resources of individual Negroes and even their organizations to bring such suits are limited.

The Administration therefore thought of this new weapon by which the United States Government, with all its resources, would be plaintiff instead of a private individual, and the proceedings that would be instituted on behalf of would-be Negro voters would be civil rather than criminal, so as to eliminate jury trial, as American law does for all injuctions; and, moreover, the suits would be brought before elections, and not after. But the bill, as passed by the Senate, requires a jury trial in cases of criminal contempt, though not in those of civil contempt. The critics of the Senate version of the bill still ragard such a requirement as a serious defect in the measure, but they have now come to feel that it might not be a fatal defect, and that in any case even the weakened bill might be given a trial, for it is only after a trial that one can find out what impediments it would in practice throw in the way of Negroes' access to the polls.

In this desire to give a trial to the bill they were fortified by some leading lawyers known to hold liberal views, among them Mr. Dean Acheson, former Secretary of State, who pointed out that the line between civil and

criminal contempt had been drawn extremely vaguely by the courts and that it would probably be found that in a large majority of cases things would go no farther than the issuance of an injunction and obedience to it. But what weighed most with supporters of Negro rights was the fact that the National Association for the Advancement of Coloured People, the most militant Negro organization, and several other liberal organizations like the Americans for Democratic Action, though dissatisfied with the measure as it stood, expressed a desire to have some kind of bill in the current session, when the choice was between an imperfect civil rights bill and no bill at all.

Thus, when the bill went back to the House of Representatives for a decision on what to do about the Senate changes, the "all or nothing" position was given up and a compromise solution was reached on the jury trial provision. Under the compromise that was worked out, the principle of the jury trial was retained, as insisted upon by the Senate, but its operation was so restricted as to permit non-jury trial for minor criminal contempt cases. An amendment was thus made, which provides that —

> A Federal judge shall determine whether a jury trial is to be granted in criminal contempt prosecutions arising from violation of Federal voting-right injunctions.
>
> If he elects, however, to proceed without a jury, convicts the defendant and fines him more than $300 or sends him to jail for more than forty-five days, the defendant can demand a jury and have the case tried all over before that jury.

The House of Representatives passed the bill on 27th August by a vote of 279 to 97 and the Senate passed it on 30th August by a vote of 60 to 15. The bill cannot possibly meet the requirements of the all-out supporters of the provisions contained in the measure originally proposed by the Administration. Nevertheless, it is thought that the power which the Government would obtain under the bill was potentially great and that if the law be conscientiously executed it would advance the right of Negroes to a free ballot. Negroes have had to wait long for this advance —for over eight decades—since the Fourteenth and Fifteenth Amendments were passed in 1868 and 1870.

The first two parts of the bill were uncontroversial and they form part of the measure now adopted. Part I creates a presidential bi-partisan Commission on Civil Rights, with subpoena powers to summon witnesses. Its task is to survey the civil rights field, spotlight shortcomings and suggest to Congress what laws might be adopted to overcome the shortcomings. The Commission would help to focus public attention on the civil rights situation and, if it produced evidence of widespread or flagrant infringement of rights, could generate considerable public sentiment for stronger laws in the field. Part II authorizes the President to appoint an additional Assistant Attorney General. His duty would be to supervise the work of the Justice Department in the field of civil liberties. This would result in stepping up the prestige and probably the impact of the Department's existing civil rights division.

The World Court and Britain

The British Government has notified the United Nations that Britain's acceptance of the jurisdiction of the International Court of Justice at the Hague as compulsory under the optional clause of the Court will hereafter be subject to two additional reservations. One of these exempts the British Government from accepting the Court's jurisdiction where the other party recognizes the Court only for the dispute in question or has acknowledged the Court system for less than a year. This reservation, though new, is intended, the British Government claims, only to give complete effect to the principle of reciprocity, subject to which alone all acceding nations (and they are less than 40 per cent. of the nations of the world) have accepted the Court's jurisdiction. Such a clarification, the British Government maintains, was necessary to eliminate "the gross anomaly that exists now between those countries accepting the Court's jurisdiction and those that do not." The latter countries which do not accept the jurisdiction as a matter of general policy can accept it on specific disputes they might wish to bring before the Court. The accepting countries, on the other hand, are not equally empowered to take before the Court an issue with a non-accepting country, which, it is said, results in those that have agreed to give up a great part of their national sovereignty being placed at a disadvantage in the matter of international disputes. This reservation will thus, it is contended, only help to make the condition of reciprocity meaningful—a condition which every accepting country has insisted upon.

But it is the second reservation now announced that has aroused strong criticism in liberal quarters. It excepts from the World Court's jurisdiction disputes "relating to any question which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or any of its dependent territories." The addition of this reservation, the British Foreign Office explains, "only spells out in detail one of the intentions of the previous reservation," which excluded "disputes arising out of, or having reference to, any hostilities, war, state of war, or belligerent or military occupation in which the Government of the Kingdom are or have been involved." Critics of this expanded reservation on national security point out that under it the British Government itself defines "national security" and takes the matter out of the province of the Court and say that if other countries refuse the Court's jurisdiction on the same grounds, which the principle of reciprocity will enable them to do, the Court will be greatly weakened. Thus they charge that this is a step backward.

Only 32 out of the 81 members of the United Nations have accepted the compulsory jurisdiction of the Court, together with three non-member countries, and many of these have made sweeping reservations. Norway, Denmark, Sweden and the Netherlands are the only countries that make no reservations, except for the principle of reciprocity. The United States retains the right to accept or reject jurisdiction in each individual dispute. The basis for such a position is that the Senate probably would not accept blanket jurisdiction, even if the Executive should propose it. The Soviet bloc does not accept the Court's compulsory jurisdiction at all.

THE RIGHT OF ASYLUM

HUMAN RIGHTS COMMISSION TO CONSIDER THE PROBLEM

Having failed in its previous attempts to give concrete expression to the Right of Asylum as a fundamental human right, the U. N. Commission on Human Rights has now decided to give further consideration to the matter. *This is heartening news for those groups of people* who have the misfortune of being nationals of countries whose Governments so mistreat them as to compel them to flee from their countries of origin and seek shelter elsewhere. If these people cannot find a place of refuge somewhere else as a matter of right and have to remain in their own countries, subject all the time to governmental persecution from which they wish to escape, they would to all intents and purposes be denied the right to life, which everybody recognizes is the basic human right which must be jealously safeguarded for peoples all over.

The right of asylum has found a place in the Universal Declaration of Human Rights, but when the Human Rights Commission *took up the subject for further* elaboration so that it could be included in the International Covenant on Human Rights, thus giving it the character of a right recognized by the world community of nations, it could not arrive at a formula acceptable to all or even a large majority of countries. The matter was thus left at that, but the Commission has now decided to place the topic on its agenda once again as a separate item, and one can only hope that as a result of its deliberations an effective right of asylum will be worked out, which will mean so much to those persons who suffer from terrific repression in their own countries.

The Universal Declaration of Human Rights, as said above, contains an *Article — Art. 14 — relating to this* subject, but the criticism is general that it is extremely unsatisfactory. It reads as follows :

> Everyone has the right to seek and to enjoy, in other countries, asylum from persecution.

The right " to seek asylum " is of course no right ; even without such a *solemn declaration, one would have* that right if it were a right at all : no one could possibly be forbidden to ask for admission to another country. The right " to enjoy asylum, " once an asylum has been granted, is also without much solid content; it merely means that the country of asylum in such a case owes a duty to protect the person to whom it has voluntarily given asylum and the person concerned acquires the right to receive protection. But the main question is whether a persecuted individual or group of individuals has the right as a matter of international law to obtain the kind of protection which an asylum connotes. And on this point the Article is silent. In its original form the *Article had specifically provided for the right. It had* stated :

> Everyone has the right to seek and to be granted, in other countries, asylum from persecution.

The Article was intended to declare that every country has not only the right to grant asylum, but also the duty in suitable cases to grant it ; i. e., no country could withhold asylum except in certain conditions which it was hoped would be formulated in the International Covenant on Human Rights. But the omission at a later stage of the words " to be granted " has emasculated the Article to such an extent as to rob the right of all its meaning : a right is not a right in the proper sense if it can be enjoyed only on sufferance of others.

The current notion is that every State has the right, as an attribute of its sovereignty, to grant asylum, and, as a corollary to it, every State has also the right, in virtue of its sovereignty, to deny asylum. This notion, that the right of asylum is a right of the State, not of the individual, was most clearly expressed by the United *States Court of Appeals on 3rd December 1948 in* Chandler *v.* United States in the following words :

> The right of asylum is that of the State voluntarily to offer asylum, not that of the fugitive to insist upon it.

It was under the influence of this prevailing opinion that the General Assembly in its third session amended the draft of Art. 14 of the Universal Declaration of Human Rights deleting the crucial words " to be granted asylum " and thereby making the Article of no practical value. What is now required is to make the idea underlying the Article in its original form prevail. The right of asylum should no longer be regarded merely as the right of a State to grant asylum, but also the right of an individual to be granted it. It can only then be regarded as a fundamental human right. Those who favour this idea do not of course mean that under it States would have an obligation to admit every person who seeks such admission, without regard either to the type of individual seeking admission or to the circumstances of the State to which admission *is sought. Some conditions* will have to be laid down as regards both these matters, and they.

will have to be very carefully thought out. But, subject to these conditions, everyone must have the right, as Art. 14 had originally stated, "to be granted asylum."

In Art. 33 of the Convention Relating to the Status of Refugees of 1951 some of these necessary conditions have been stated. The Article says:

> (1) No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The first paragraph states the grounds on which alone a person would be entitled to an asylum; and the second paragraph deals with exceptional cases, which reasonably can be regarded as special security risks. For no one denies that the security of States must be taken into account when throwing upon them the obligation to grant asylum. Countries of asylum must therefore be granted the right to screen persons who ask for asylum. A fair balance must be struck between the claim of a persecuted individual for the right of asylum and the claim of a State for safeguarding its security. Another factor that will have to be considered is the economic capacity of the State whose asylum is sought. Professor Sir Hersch Lauterpacht has provided for it in his draft of this right in his book on Human Rights, which is as follows:

> Within the limits of public security and economic capacity of the State, there shall be full and effective recognition of the right of asylum for political offenders and fugitives from persecution.

The Co-ordinating Board of Jewish Organizations, in a Memorandum submitted to the Human Rights Commission (from which material for this article is derived), recognizes the importance of this factor and says: "A small host country might otherwise be swamped with refugees which it could not absorb or maintain for any length of time without its economic basis being disrupted, and even the resources of a large country which has adopted a generous attitude might be severely taxed unless the international community through the United Nations provided the necessary alleviation." And it makes a very useful suggestion in this regard, viz., that "at the request of a State which has granted asylum to a considerable number of persons the Economic and Social Council should devise ways and means to assist such a State in a suitable manner." It also suggests that "a special convention on asylum would be preferable to a single, probably incomplete and unsatisfactory, Article in the Covenant." "A convention," it says, "could more easily strike a true balance between the interests of individuals and States; it could more easily define exceptions to the rule; it could provide for the necessary screening processes." *It is to be* hoped that first the Human Rights Commission and subsequently the General Assembly will successully tackle the problem.

COMMENTS

The "Prabhat" Case

In the Light of the U. S. Constitutional Law

In the case of the "Prabhat" of Poona, whose editor was adjudged guilty of contempt of the Bombay Legislative Assembly, the impugned article was not found to contain any reflections on the conduct of members or the Speaker of the Assembly. It appears that the editor was censured because the policy of undiluted opposition which he advocated would tend, in the words of the Committee of Privileges, to "lower the authority and dignity of the House in the estimation of the people" (vide p. iv: 313). One may speculate as to what the opinion of the courts in the United States would have been (and in that country contempt of the legislature would be subject to judicial review) *in this case according to the precepts of the U. S.* constitutional law. Particularly one passage in the judgment of the Supreme Court of that country in Marshall *v.* Gordon (referred to in the opening article in this issue) is very apposite. In this case the defendant was acknowledged to have written a defamatory letter reflecting upon the conduct of a committee appointed by the Congress, and yet he was held not guilty. The Supreme Court's conclusion was:

> There is room only for the conclusion that the contempt was deemed to result from the writing of a letter, not because of any obstruction to the performance of legislative duty resulting from the letter, or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind, or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally.

The ruling in the case is that though contemptuous conduct may be punished if it has the effect of obstructing legislative proceedings, Congress may not exercise the power to punish for contempt anyone who makes slanderous attacks which present no immediate obstruction to such proceedings.

Sheikh Abdullah's Continued Detention

Reports were spread when Kashmir's Constitution was about to be finalized that after this work was over the

Bakshi Government would condescend to set at liberty the former Premier, Sheikh Abdullah, long held in detention. It was felt that the Government probably thought that, Kashmir's accession to India being finally decided upon so far at least as that Government was concerned, Abdullah's alleged subversive activities would offer no threat to Kashmir's security. But the expectations aroused by these reports have not been realized so far, and Abdullah continues to be in detention. This naturally disturbs lovers of civil liberty.

The Prime Minister of India shoves off responsibility for this continued detention of Abdullah. He avers that the detention is very distasteful to him and that he would be happy indeed if Abdullah were released. Mr. A. D. Gorwala, who has rendered such distinguished service to India as a former civilian, makes the pertinent query:

> What then prevents the release? If no charge can be made against him in a proper court, why is he not released? The responsibility for his detention rests squarely on the Government of India and it cannot be got out of by pretending that it is the Government of Kashmir that is detaining the Sheikh.

Mr. Gorwala points out that the contention so often advanced by the Government of India that a plebiscite demanded by Pakistan for the disposition of Kashmir's political future is no longer necessary because the will of the Kashmiris has been exhibited by the recent elections to Kashmir's legislature is vitiated by the continued detention of Sheikh Abdullah, in face of which the elections cannot be regarded as free. Says Mr. Gorwala:

> To say that there have already been elections in the valley and the result of these elections demonstrated the willingness of the valley people to remain with India is to argue fallaciously. The issue in the elections was not choice of adherence (to India or Pakistan) nor, in view of the detentions, can it be urged that the elections were truly free.

By the way he also urges the Government of India, if only to avoid an arms race with Pakistan by having to place on the border a force in relation to the army which Pakistan may plant on the other side, to have a plebiscite in the disputed territory rather than incur huge military expenditure which India can ill afford to do. He admits that Pakistan committed aggression and that she still holds illegally a part of Kashmir. In spite of this he feels that India's real interests do not lie in insisting on the enforcement of the legalistic position. He asks:

> Would they (India's interests) be advanced by holding on to the valley of Kashmir even if its inhabitants, more than 80 per cent. of whom are Muslims, wished to go to Pakistan? Obviously not. Only if the valley Kashmiris were undisputedly willing to stay with India, would it be worth this country's while to try and keep them. Whatever the legalistic arguments then and the strength of the Indian legal position, is it not desirable to have a plebiscite in the valley alone and settle the issue of its adherence once and for all on the result?

Repression in Kashmir

A New Drastic Measure Passed

Under the existing Defence Rules (now designated Security Rules) the Government of Kashmir already wields vast powers to curtail civil liberties of individuals. One of these Rules makes the publication or distribution of a document containing "prejudicial reports" an offence. Recently the Government has taken power by legislation to enlarge the scope of the offence. Now mere possession of such a document would be an offence. The extension of the scope of the offence was sought to be justified on the ground that threats to security were held out from across the cease-fire line and that Mr. Akbar Khan plans to create disorder in the State. The new law met with serious opposition on the part of several members. Mr. Premnath Dogra, Leader of the Praja Parishad group, denounced the whole body of Security Rules as a relic of World War II and said it was not suitable in present conditions. Another member, Mr. Kishendev Sethi, opposed the measure from the National Conference benches, saying that there were already on the statute book drastic laws like the Preventive Detention Act and that the new measure would further cripple civil liberties and would greatly harass the people. A supporter of Government defended the measure on the ground that the bill was aimed against "the enemies of Government" and thus the question of harassment of citizens and curtailment of civil liberties did not arise!

Police Firings

The "Times of India" in its issue of 28th August writes as follows on police firings: "Is there to be no end to police firings? And have State Governments despaired of finding a more civilised way of dealing with angry crowds? As it is, the occasions on which the police open fire on crowds are so many that it makes one wonder if rowdy demonstrations are peculiar to this country. According to statistics collected by the Socialist party the police had opened fire on over a thousand occasions in the first nine-and-a-half years of independence. To all appearance there has been no marked fall in the incidence of firings in the last six months. Occasionally there is a judicial inquiry into a particularly flagrant case of firing and the authorities are put on the defensive. But then for every inquiry there are a score of firings where there is no inquiry. Now and then spokesmen of the ruling party seem to feel penitent, but for the most part they remain entirely self-righteous. It is time they asked themselves whether it is proper for a party, which has never tired of declaring its faith in the sanctity of means, to resort to violence on the least provocation.

"This week's Raipur incident in which the police opened fire on students killing one and wounding thirty

again points tragically to the need for a new approach to the question of dealing with violent crowds. The widespread indiscipline among students and young men is no doubt a matter of deep concern. But this can only be fought off by reforms which seek to remove the causes of the prevailing unrest among them. The use of force by the police will incense them further. As for the wider problem of dealing with angry public demonstrations of all kinds, there is need to limit the use of firearms to the gravest emergencies. As in other countries, the use of police batons, tear gas and water hoses should suffice to disperse rowdy crowds in ninety-nine cases out of a hundred. Most Congress Governments still fight shy of establishing a convention under which there will be a judicial inquiry into every case of police firing. Is it because they know that the fear of a judicial inquiry will make the trigger-happy officials more reluctant to use *firearms against demonstrating crowds ?* "

THE PUNJAB PRESS ACT

One Section Valid, Another Invalid

SUPREME COURT'S JUDGMENT

The Home Secretary of the Punjab Government on 13th July 1957 issued an order, in exercise of the powers conferred on him by sec. 2 (1) of the Punjab Special Powers (Press) Act, 1956, prohibiting Mr. Virendra, editor, printer and publisher of the Jullunder edition of the "Daily Pratap" and "Vir Arjun," from printing and publishing in these newspapers any article, report, news item, letter or any other material relating to or connected with the "Save Hindi" agitation in the Punjab for a period of two months from the date of the order. A day later he served another order under sec. 3 (1) of the Act on Mr. K. Narendra, editor, printer and publisher of the Delhi edition of the same papers, prohibiting the entry of the issues of the papers into the Punjab.

Messrs. Virendra and K. Narendra filed separate petitions in the Supreme Court under Art. 32 of the Constitution challenging the validity of the prohibitory orders and the sections of the Act under which action had been taken against them. Their main contention was that secs. 2 and 3 of the impugned Act, were unconstitutional inasmuch as they infringed the fundamental rights guaranteed by Art. 19 (1) (a) [freedom of speech] and Art. 19 (1) (g) [freedom to carry on business].

The Press Act is designed to control the activities of that section of the Press which the Government thinks indulges in fostering communal disharmony. Sec. 2 of the Act enables the Government to prohibit for a period of two months the publication of any material relating to matters specified by the Government, provided it is satisfied that "such action is necessary for the purpose of preventing or combating any activity prejudicial to the maintenance of communal harmony affecting or likely to affect public order." The section also entitles the newspaper to make a representation against such orders and ask for its reconsideration.

A similar prohibition could be placed by the Government on the entry of publications from outside the State under the provisions of sec. 3 of the Act, but this section does not provide that an order made under it shall be limited in duration to a maximum of two months nor does it give the aggrieved person a right to obtain reconsideration of the order.

According to the petitioners, after the appointment of the States Reorganization Commission in 1953, the Akali Party in the Punjab had started a campaign for the partition of the State of the Punjab on a communal and linguistic basis. The ruling Congress Party had surrendered to the communal pressure of the Akalis and had accepted what had since come to be known as the regional formula. To change the objectionable features of the regional formula, a movement known as "Save Hindi" agitation was started in the month of May 1957 by the Hindi Raksha Samiti with the support of the Arya Samaj. The "Daily Pratap" and "Vir Arjun" considered that the clauses of the regional formula were not only unjust and unfair to the cause of propagating the national language in the country but were also calculated to secure the political domination of the minority community over the majority. Therefore, the "Daily Pratap" and "Vir Arjun" supported the "Save Hindi" agitation. Their stand was that there should be no compulsion as to the use of Punjabi or Hindi and that the official work below the district level should be carried on in the language of the district.

It was argued on behalf of the petitioners that the impugned statute offended the Constitution because the restrictions imposed by secs. 2 and 3 were not reasonable in that they amounted to a total prohibition.

Mr. C. K. Daphtary, Solicitor-General of India, who appeared on behalf of the State of the Punjab, argued that from a practical point of view it was not possible for the executive to decide beforehand as to which issue of the Delhi edition of the papers contained objectionable matter unless it had entered the boundaries of the State. Therefore the total prohibition of the entry of the paper into the State was the only way to ensure public order in the State. It was a question of choice between two evils, between restriction of some fundamental rights and preservation of public order. The nature or extent of the evil to be met would determine the reasonableness of the restrictions imposed and, in certain cases, even a total prohibition might have to be construed as reasonable.

As regards the "reasonableness" of the restrictions, Mr. Daphtary said that this had to be left to the person who was authorized to exercise powers under the impugned sections. Whether something published in a newspaper was "objectionable" or not could not be left to be determined by the editor of the paper. It was for the authorities to decide what was detrimental to public order.

Mr. Daphtary said it was also not practicable to put a ban on publication of only objectionable matter relating to the agitation and allow other matter to be published which was not objectionable. This, he said, would create a problem as to who would decide what was objectionable and what was not.

Concluding, Mr. Daphtary said that only because there were certain apprehensions that the executive could make improper use of powers under the impugned sections the Act could not be held invalid.

The Constitution Bench of the Supreme Court disposed of the petitions on 6th September. It held that sec. 2 of the Act which authorized the State Government to issue an order prohibiting the publication of any matter relating to a subject or a class of subjects, for the purpose of preventing any activity prejudicial to the maintenance of communal harmony, was constitutional and valid, because of the "safeguards" the section provided for, and it held that sec. 3 authorizing the State Government to prohibit the entry of outside newspapers into the State was unconstitutional and ultra vires, because of the lack of these "safeguards" in this section. The ruling of the Court was unanimous.

Dealing with the arguments advanced on behalf of the petitioners, the Chief Justice, who delivered the judgment of the Court, said it could not be overlooked that the Press was a mighty institution wielding enormous powers which were expected to be exercised for the protection and the good of the people, but which might conceivably be abused and exercised for anti-social purposes by exciting the passions and prejudices of a section of the people and thereby disturbing the public order and tranquillity, or in support of a policy which might be of a subversive character.

The powerful influence of the newspapers for good or evil on the minds of the readers, the wide sweep of their reach, the modern facilities for their swift circulation to territories, distant and near, all entered into the judicial verdict, and the reasonableness of the restrictions imposed upon the Press had to be tested against this background. "The crucial question is: Are the restrictions reasonably necessary in the interests of public order under Art. 19 (2) or in the interests of the general public under Art. 19 (6)?"

His Lordship added that quite conceivably the linguistic agitation in the Punjab might at any time assume a nasty communal turn and flare up into a communal frenzy and faction fight disturbing the public order of the State which was on the border of a foreign State and where consequently public order and tranquillity were essential in the interest of the safety of the State.

Further His Lordship said that the exercise of powers for preventing activities likely to affect public order cannot in view of the surrounding circumstances and tension brought about or aided by the agitation in the press, be regarded as anything but the imposition of permissible reasonable restrictions on the two fundamental rights. Quick decision and swift and effective action must be of the essence of those powers and the exercise of them must, therefore, be left to the subjective satisfaction of the Government charged with the duty of maintaining law and order. To make the exercise of these powers justiciable and subject to judicial scrutiny would defeat the very purpose of the enactment.

Dealing with the contention of the petitioners that the restrictions amounted to a total prohibition, His Lordship said whether the restrictions imposed under the two sections of the Act amounted to a total prohibition of the exercise of the fundamental rights might be judged by reference to the ambit of the rights and, so judged, there could be no question that the entire rights under Articles 19 (1) (a) and 19 (1) (g) had not been completely taken away but restrictions had been imposed upon the exercise of those rights with reference to the publication of only articles, etc., relating to the particular topic and with reference to the circulation of the papers only in a particular territory and, therefore, it was not right to say that these sections had imposed a total prohibition upon the exercise of these fundamental rights.

His Lordship added that apart from the limitations and conditions for the exercise of the powers contained in the body of the two sections, there were two provisos to sec. 2 (1) (a) which were important. Under the first proviso the order made under sec. 2 (1) could only remain in force for two months from the making thereof. Further, there was another proviso permitting the aggrieved person to make a representation to the State Government, which might, on a consideration thereof, modify, confirm or rescind the order.

A consideration of these safeguards should, in their opinion, the Chief Justice said, have an important bearing in determining the reasonableness of the restrictions imposed by sec. 2. Judging it in the proper context, His Lordship said, sec. 2 should be held to have imposed reasonable restrictions on the exercise of the rights guaranteed by Art. 19 (1) (a) and Art. 19 (1) (g) in the interest of public order and of the general public and was protected by Art. 19 (2) and Art. 19 (6) of the Constitution.

The Chief Justice said that the observations made as to the safeguards set forth in the provisions of sec. 2 (1) (a) of the Act could not however apply to the provisions of sec. 3 (1). Although the exercise of the powers under sec. 3 (1) was subject to the same condition as to the satisfaction of the State Government or its delegate, as was mentioned in sec. 2 (1) (a), there was no time-limit for the operation of an order made under this section nor was there any provision made for any representation being made to the State Government. The absence of these safeguards in sec. 3 clearly made its provisions unreason-

able and the Solicitor-General obviously felt some difficulty in supporting the validity of this section. It was surprising, His Lordship said, how in the same statute the two sections came to be worded differently.

In the result, the petition filed by Mr. K. Narendra was allowed and that of Mr. Virendra was dismissed.

CITIZENSHIP ACT

Rule 3 of Sec. 9 Declared Invalid

"PASSPORT NO EVIDENCE OF CITIZENSHIP"

A division bench of the Andhra Pradesh High Court on 5th September declared rule 3 under sec. 9 of the Citizenship Act, 1955, of the Central Government void as it "infringed the fundamental rights guaranteed by Art. 19 of the Constitution."

The division bench consisting of the Chief Justice Mr. K. Subba Rao and Mr. Justice P. Jaganmohan Reddy, ordered the issue of a writ of mandamus against the Government of Andhra Pradesh forbidding it to enforce orders directing the writ petitioners to leave the country, and also ruled that a passport was not the basis of legal evidence to establish the fact of citizenship. It only embodied a request to a foreign Government to allow the bearer free passage and to afford him every assistance and protection. Their Lordships said :

> A passport issued by Government to a citizen does not make it a document of title or a piece of evidence in a court of law to establish that fact. It is only a convenient link in the chain of international intercourse.

The petitioners, Peer Mahomed Khan and 21 others, were born in Quetta district of Baluchistan which now forms part of Pakistan. Before the division of the country in 1947, they had come to the south and settled in Kovvur, in Andhra Pradesh and started business. It was alleged that after the partition, under pressure from local police and without proper guidance and appreciation of their citizenship rights, they applied for passports and obtained the same under the seal of the High Commissioner for Pakistan in India, which were valid up to 6th March 1958. On 7th April 1955 the Andhra Government directed them to quit the State by 30th April 1955.

The writ petitions against this order first came up before Mr. Justice Bhimasankaram. It was contended before him that the petitioners were citizens of India within the meaning of Arts. 5 and 6 of the Constitution, that the mere obtaining of a passport from Pakistan, which was not a foreign State within the meaning of the Constitution, did not have the effect of depriving them of their citizenship and that they had applied for passports under the mistaken impression that persons born in the area, now forming part of Pakistan, were not citizens of India.

Mr. Justice Bhimasankaram found that the appellants were citizens of India and that they did not voluntarily acquire the citizenship of Pakistan by the time of the commencement of the Constitution of India. But he held that there was an automatic statutory "cesser" of citizenship by virtue of sec. 9 of the Citizenship Act, 1955, which came into force on 30th December 1955, and on that basis he dismissed the writ petitions. Sec. 9 of the Citizenship Act provides for the termination of the citizenship of anyone if he has voluntarily acquired the citizenship of another country. Rule 3 says that the fact that a citizen of India has obtained on any date a passport from the Government of any country shall be conclusive proof of his having voluntarily acquired the citizenship of the country before that date.

Against this judgment the petitioners preferred an appeal to the Division Bench.

It was contended on behalf of the appellants that the provisions of sec. 9 of the Act gave arbitrary and unregulated powers to the Government of India and hence were violative of the equality clause enshrined in Art. 14 of the Constitution. It was also contended that the rules made by the Government of India were in excess of the power conferred on them under the said section.

After examining the judgments of the Supreme Court of America and the Madras High Court, Their Lordships held that a passport was not the basis of legal evidence to establish the fact of citizenship. A passport was merely a request to a foreign Government to allow the bearer free pasage through the country and to give the bearer assistance and protection. It could not be accepted as a piece of legal evidence in any court.

Their Lordships further observed that under the provisions of the Citizenship Act and the rules made thereunder, the Central Government acted as a special tribunal for deciding questions raised by States before expelling any citizen, and in ignoring this provision of the Act the orders were not valid.

Their Lordships, however, said that the view expressed by them in the appeals would not preclude the Central Government from determining the question whether the appellants had voluntarily acquired citizenship of another country within the meaning of sec. 9 (1) of the Citizenship Act in the manner prescribed under rules, ignoring rule 3 of Schedule III which, they said, they had already held was beyond its rule-making power.

In the result, Their Lordships issued the writ of mandamus as prayed by the appellants and allowed their writ appeals with cost.

IMMUNITY FROM SELF-INCRIMINATION

Not Applicable to Public Documents

ORISSA HIGH COURT'S JUDGMENT

Mr. Madanlal, Jajodia, the Managing Director of Sri Biswanath Rice Mills Ltd., Jatni, was both a purchasing agent and the miller agent for the Orissa Government in

Puri district and a licensee under the Orissa Food-grains Control Order. The Civil Supplies Officer of Puri, after an inspection of Mr. Jajodia's premises, filed a complaint before the Sub-divisional Magistrate of Khurda for his prosecution under sec. 409 I. P. C. on the ground that he had committed criminal breach of trust of a large quantity of rice and paddy stored by him as the purchasing agent of the Government. After the Magistrate took cognizance of the case, the prosecution wanted the petitioner to produce from his custody the food grains procurement stock register, " presumably for the purpose of proving from the entires in the register the actual stock that was in his possession and for which he was not able to give a satisfactory account later on." Mr. Jajodia filed a petition claiming protection under cl. 3 of Art. 20 of the Constitution from producing the register.

The Chief Justice Mr. R. L. Narasinhan and Mr. Justice G. C. Das of the Orissa High Court, on 30th August, rejected the petition. They referred to a recent decision of the Supreme Court, in which it was held that the guarantee in Art. 20 (3) of the Constitution, though against testimonial compulsion, would include protection against any process for production of evidentiary documents which were seized to support a prosecution of the accused. But they said that the distinction between public records and private records was not considered at all by that Court, " presumably because the records seized were admittedly private records." In the instant case Their Lordships held that public documents were not covered by the guarantee in Art. 20 (3). They based the holding on the U. S. Supreme Court's decisions on Amendments IV and V to the American Constitution. " in U. S. A., " they said, " it seems settled that the constitutional immunity of Amendment V is applicable to what are known as ' private documents ' in the possession of an accused and does not extend to ' public documents ' which may be in his custody. "

Their Lordships held that the petitioner " must comply with the order of the Magistrate and produce the register called for on pain of incurring the penalty prescribed by law for non-compliance with the order. "

RIGHTS OF GOVERNMENT SERVANTS

Application of Art. 320 (3) (c)

Requiring Reference to Public Service Commission

Dr. G. Valayya Pantulu, Health Officer at Guntur, filed a writ petition in the Andhra Pradesh High Court challenging the validity of a Government order dismissing him from service. The Tribunal for Disciplinary Proceedings, after considering several complaints against him, had framed seven charges and recommended his dismissal. After a consideration of his reply to the " show cause " notice, the Government dismissed Dr. Valayya, who thereafter preferred an appeal to the Governor, which was rejected.

Dr. Valayya contended that the constitutional safeguard provided by Art. 320 (3) (c) had been ignored. This Article requires consultation with the Public Service Commission " on all disciplinary matters . . . including memorials or petitions relating to such matters," provided that the Governor may make regulations specifying the matters in which it shall not be necessary for a Public Service Commission to be consulted. In terms of this proviso, a regulation dated 26th December 1950 was promulgated by the Governor providing that it shall not be necessary for the State Government to consult the Service Commission while passing orders on the advice of the Tribunal for Disciplinary Proceedings.

The Chief Justice, Mr. K. Subba Rao, and Mr. Justice P. Jaganmohan Reddy disposed of the petition on 3rd September. Their Lordships said the order of the Andhra Government dismissing the petitioner without consulting the Service Commission was saved by the regulation promulgated by the Governor. But the question was whether the disposal of the appeal filed by the petitioner to the Governor was vitiated by the fact that he disposed of it without consulting the Service Commission. Their Lordships ruled that the order of the Governor on the appeal filed by the petitioner amounted to the ignoring of the constitutional safeguard provided in Art. 320 (3) (c) and was "bad." " The Governor (they observed) was, however, not answerable to the Court in view of Art. 361 of the Constitution."

U. P. AGRICULTURAL INCOME TAX ACT

Estate Trustee's Appeal Dismissed

The Supreme Court dismissed the appeal by Messrs. W. O. Holdsworth against the State of U. P. by a judgement delivered on 4th September and held that the trustees of an estate in agricultural land and its income could not avail themselves of the benefit of section 11 (1) of the U. P. Agricultural Income Tax Act as they could not be treated as persons holding land on behalf of the beneficiaries.

The appellants were the trustees of the estate of one Mr. J. J. Holdsworth and were liable to pay the trust income to the beneficiaries in the form of annuities. The Collector of Income Tax, Gorakhpur, assessed the trustees to agricultural income tax on the aggregate income of the trust. He rejected their contention that they were liable to pay only the total amount which would have been payable by the beneficiaries if each one of them was assessed separately on his share of the trust income.

The trustees having failed to obtain relief from the Income Tax Appellate authorities and the High Court of Allahabad filed an appeal against their assessment to the Supreme Court. The trustees submitted that under section 11 (1) of the U. P. Agricultural Income Tax Act, where a person holds agricultural land on behalf of some persons who are jointly interested in such land and its income, the amount of tax which can be recovered is the same as if the joint owners were taxed individually on their respective shares. It was urged that a trustee was covered by this provision.

The Supreme Court rejected this contention. They said :

> The trustees do not hold land from which agricultural income is derived on behalf of the beneficiaries but they hold it in their own right though for the

benefit of the beneficiaries... and the beneficiaries are also not persons who are jointly interested in such land or the agricultural income derived therefrom.

The Supreme Court held that as the conditions prerequisite for the applicability or section 11 (1) of the Act were not fulfilled in the present case, the assessment was made correctly and the appeal was liable to dismissal.

NOTES

Segregation "Morally Wrong and Sinful"

THE CATHOLIC CHURCH'S OPINION

The Archbishop of New Orleans two years ago ended racial segregation in churches in his archdiocese, and when in protest the white parishioners in a small parish church refused to allow a Negro priest to say mass, he suspended services in the church, and the church has since remained closed. Disturbed by this, a newly formed association of Catholic laymen in New Orleans has appealed to Pope Pius XII to issue a decree stating that segregation was not morally wrong and sinful as the Archbishop said it was and to ask the latter to stop integration. The Pope is not expected to consider the appeal serious enough to need any intervention on his part in this matter, but the Holy See has made it known that the Roman Catholic Church is completely and unalterably opposed to all forms of racial discrimination—in New Orleans as much as in the Union of South Africa, because the church is "concerned with souls and all souls are equally dear to her." It is pointed out that as far back as Hitler's days the Catholic Church stood firmly against racial discrimination; and that its opposition has not weakened since. Nor does the Vatican attach any importance to the argument that segregation does not necessarily constitute discrimination; the Vatican thinks that it does. Indeed when the Archbishop of New Orleans started abolishing segregation, "Osservatore," reflecting the opinion of the Holy See, commended the stand he had taken and urged all Catholics to fight against racial prejudice involved in segregation, which it described as "inhuman rather than barbarous."

A New Wave of Terror in Hungary

Ten months after the rising there is no cessation of executions and deportations and brutalities in Hungary; on the contrary, there is a new wave of terror. It started in the middle of July. The Kadar Government had made its intentions quite clear. On 11th July the Minister of the Interior called for continuance of the fight to "annihilate" all "counter-revolutionary forces." The next day, the First Deputy Premier called for "constant and systematic persecution of the counter-revolutionaries," which term includes anyone considered to be a potential source of opposition. On 16th July the Kadar Government, in accordance with these declarations, issued a decree prolonging indefinitely its power to arrest and imprison without trial, and without any but the vaguest charge, and arrests began to be made on the night of 17th July. A correspondant of the "Daily Herald" says: "How many (arrests) there have been is unknown. But there is no doubt that the number runs into many thousands. Nor is the number of executions known. In July the official figure was 104. But the International Commission of Jurists had evidence suggesting that it was already in fact over 2,000." The former Premier, Imre Nagy is reported still interned in Rumania and the former Minister of Defence, Maleter, who was lured by the Russians to armistice talks and then kidnapped, is still in prison. "And the ominous charge is now made in the official Kadar press that he had been acting on instructions from the British Intelligence Service. His friends fear that pressure is being brought on him to 'confess,' and that this is why the 'trial' is being delayed."

PARLIAMENTARY PRIVILEGE

Deccan Sabha's Resolution

ENDORSES SUGGESTION OF THE "TIMES" TO TRANSFER JURISDICTION TO COURTS

The Deccan Sabha of Poona passed the following resolution on 23rd August an Parliamentary Privilege.

The Council of the Deccan Sabha endorses the suggestion made in the current number of the INDIAN CIVIL LIBERTIES BULLETIN that the Government of India take the question of Parliamentary Privilege into their consideration as a matter of urgent importance.

The BULLETIN has made the suggestion with reference to the recent exercise of parliamentary privilege by the Bombay Legislative Assembly against the editor of the "Prabhat." Without necessarily accepting the view of the BULLETIN as to the way in which the privilege was applied in this particular case, the need for defining privilege and for determining the mode in which it should be exercised is obvious, since without such definition of the scope of the privilege and determination of the manner in which it should be implemented the exercise of privilege is apt to be attended with grave abuses.

The framers of the Constitution were apparently alive to the possibility of such abuses and in any case they recognized the need for defining the privileges and immunities of the legislatures in India in matters like those of contempt of the houses of the legislatures inasmuch as they provided in Art. 105 (3) for applying privileges of the British House of Commons only until they have been defined in the Indian Constitution.

In view of the bitter discontent expressed in responsible quarters in the United Kingdom with some of the recent decisions of the House of Commons, the need for taking up the work which the Constitution-makers themselves envisaged in the above Article becomes urgent and in the opinion of the Deccan Sabha should no longer be postponed.

The Council would urge on the attention of the Government of India when they would take up this question to consider the suggestion made in the "Times" to transfer the exercise of parliamentary privilege after it has been suitably defined to the decision of the law courts.

If would perhaps be best, in order to reach a proper solution thereof, for the Government of India to remit this question to the Law Commission for the formulation of concrete proposals as to what should be the scope of parliamentary privilege and how it should be exercised.

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