

The Bombay Provincial
Civil Liberties Conference, 1949.
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Five years ago when the last Civil Liberties Conference was held in Bombay, Mr. Motilal Setalvad, who presided on the occasion, observed : "Perhaps at no time in recent Indian history has the freedom of the citizen, whether it be his right to personal freedom, or to freedom of speech or discussion, or the right of public meeting or the right of association, stood at so low an ebb as at the present moment." He thought it right, therefore, that those who were concerned with the protection of civil liberties should come together to take stock of the situation, and devise measures for getting the rigours that fettered civil liberties relaxed. In the five years that have elapsed since these words were uttered, many things have happened. Our country has attained its immediate objective of freedom from the foreign domination. The rulers of the Indian States with their traditions of medieval methods of ruling have been converted overnight into constitutional heads of States, that have voluntarily formed unions and that have become organic members of a greater India. The new holders of political power in India in the very first year of their occupation of office have found themselves faced with grave problems. They have been faced with the task of defending with all their resources a State whose ruler has appealed to them for help against the aggressive invasion of hostile frontier tribes. They have been faced with the equally serious problem of inflation which has acquired wider proportions in the post-war period than during the war years. Their energies have also been absorbed in the responsible work of framing a new constitution for a country distracted by separatist movements and torn by communal hatred.

Above all they have to deal with the question of rehabilitation of about six million people, whose displacement from their original home has followed the partition of the country. If distracted by these sudden and unforeseen occurrences, our rulers have grown impatient of criticism, intolerant of opposition, short-sighted and opportunist in their ways of dealing with men and happenings, we may sympathetically endeavour to understand the blunders they have committed, and of the lack of statesmanship which is manifest in many of their ill-conceived measures. But we would be disloyal to ourselves, and to the country to which we are proud to belong, if we observed silence where duty compels us to speak, or to approve of measures which affect unfavourably the very roots of our new born life as citizens of a free state.

There has been too often a tendency in human history to confuse the moral rights of the individual with his legal rights. Such confusion helps the advent of the totalitarian state. The moral rights of the individual are some times called natural rights. When the American Declaration of Independence referred to the government as an institution established to secure the right to life and liberty, it assumed the pre-existence of these rights. In the last resort there is only one right which is natural, the right of the individual to realise his "nature", to become what he is capable of becoming—the Dharma of the individual. The State exists for making possible the full development and blossoming of personality. To be free is to develop one's personality. Freedom involves negatively the absence of control or restraint from without; but it also implies positively the enjoyment or possession of the means, the opportunities to be free. Without such means, the absence of restraint may be a mockery of freedom. A man in the desert of Sind is free to eat, drink, bathe and read, in the sense that there is no one who can prevent him from doing all this. A prisoner in Bombay is far better off, as he enjoys the means

which are denied to the man in the desert. If the millions in Italy and Germany bartered away the negative element of freedom,—the absence of control from without—they did so in the hope of securing the positive element of security of work and daily bread, which are the means to a life of freedom. They must have felt that freedom to work is a mockery, if society does not provide for them a job to work at. Freedom for men who are free to do what they should do, but cannot do, has driven them into willing subordination and slavery, and made them rejoice in their chains. It is such and similar situations that prepare the way for the acceptance of fascist or communist teachings by baffled humanity.

The normal development of human personality is based upon the enjoyment by the individual of certain fundamental rights—shall we call them opportunities?—which a free society secures or ought to secure. Those rights are referred to when we speak of civil liberties. They include freedom of conscience, freedom of thought, freedom of speech, freedom of person, freedom of assembly. The authors of the famous Declaration of Independence of 1776 spoke in more comprehensive terms of the inalienable rights of man, "that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it". This famous document of 1776 with its enunciation of the claim of the individual to realise his nature marked a decisive moment in human history; it was the expression in terse but clear terms of the ideals of democracy as a way of life. All men ought to be equal in respect of life, freedom and the pursuit of happiness. We who live in the twentieth century find it difficult to under-

stand that the enunciation of these principles was an intellectual mutation, that was to lift up the generations that followed to a higher level of the sense of human dignity and of reverence for human life. For the generation in which this declaration was made was one that had through centuries inherited the belief that the early civilisations of Egypt and Babylon, India and China and Greece were based upon inequalities, upon the distinction between the free and the unfree, between the wealthy and the poor; that even the glories of medieval Europe rested upon a society that included serfs and the lower classes. It was assumed as an unquestionable truth that the happiness that was appropriate to the upper classes should for ever be beyond the reach of the other. A devout woman like Hannah More could write in 1801 that the poor in general should receive what was done for them "as a matter of favour—not of right, so that the same kindness would always be extended to them, whenever it shall please God to inflict the land." Even down to our days the belief that earthly happiness is unimportant, while bliss awaits the poor beyond the grave, has been characteristic of Christian divines. In a country like India it gets unnecessary prominence amongst a school of writers who are apt to enlarge upon the spiritual heritage of India.

Civil liberties in the larger sense are those opportunities which every citizen should enjoy, if he is to live the fullness and abundance of life, to live a happy life in terms of the American declaration.

The first among these opportunities or rights, on which stress has been uniformly laid by all schools of political thought, is the right to the full formation of opinion and to the full expression of such opinions. The freedom to which we refer is freedom of speech and freedom of the Press. Freedom of speech extends beyond freedom of private conversation to the right to address groups and assemblies, to spread

one's views through the printing press—the newspaper and the book—to a more extended audience in space and time. To-day radio makes it possible for the individual to address an audience scattered over all parts of the globe far more rapidly and effectively than the written word. The first amendment to the American Constitution guarantees this right of the citizen by providing that Congress shall make no law abridging the freedom of speech or of the press. It is a commonplace that any attempt at a suppression of speech involves the mental sterilisation of a community, that restraining the expression of ideas through the fear of penalty tends to bringing about an atrophy of thought both for the individual and the group. The social value of freedom of expression can well be realised when we remember that any attempt to control the spontaneity of intellectual gestation is equivalent to the sapping of social vitality. Civilised society as a working organisation of ideas presupposes free expression; significant ideas are just those which are calculated to shake men out of the apathy and sense of security associated with static conditions. They arouse resistance in proportion to their significance. Freedom of expression lifts the level of social conflict from the plane of violence to the plane of discussion.

This moral right of freedom of expression is not, however, unconditional. The reasons for claiming this right are the conditions on which the right can be vindicated. This condition is that an utterance or publication does not invade in an *overt* and *demonstrable* manner recognised private rights or vital social interests. We are not concerned here with a consideration of attacks on private interests; we are concerned with the expression of opinions which affect public order and security. Where an expression of opinion affects public order or security, the moral right of the speaker may remain intact; it has, however, to be overridden by consideration of the common good. The duty of the State

to suppress the speaker may be as unquestionable as the duty of the speaker to resist being suppressed. Let us apply this principle to our Indian conditions in connection with communal tensions or Communist propaganda. When the expression of opinion is equivalent to aggressive action, the author of such action incurs the legal responsibilities of such action—the liability to be tried by a proper judicial tribunal and convicted. We are assuming that such expression of opinion takes place at a time when the prevalence of normal conditions does not create a state of emergency. At the end of the last war the state of emergency disappeared for India as for other countries. If after having seen the end of the war, and having shaken off the foreign domination and gained freedom, our present rulers allow the state of emergency to continue, the implication is that our rulers do not feel assured that they command popular support for continuing in office, or that the stage of our political evolution today suggests and justifies the denial of constitutional methods of Government and necessitates totalitarian rule.

The legal restraints on the expression of opinion through the press differ from country to country. Sedition in England has been defined as a word, deed, or writing calculated to disturb the tranquillity of the State, and to lead ignorant persons to overthrow the government and laws. It is curious, however, that in 1936 the Daily Worker, a Communist paper, was the only one that suggested that Edward VIII should be free to follow his own wishes regarding his marriage; whilst the unquestionably seditious pronouncements of the Conservative Party and the Church of England which led to that monarch's abdication were not interfered with. Similarly English civil law makes any statement affecting the financial interests of a rich man very dangerous. J. B. S. Haldane gives us a characteristic incident in his life. A firm advertised that he had habitually used a medicine which he had never seen. When he attem-

pted to deny this statement in the Press, and to state that the firm had departed from the strictest canons of morality in using his name, the suggestion was held to be libellous and no journal would publish it for fear of an action. At present in commercial matters one can only praise and not blame. On the other hand in the U. S. S. R. criticism of this kind is not only allowed, but highly developed.

It has also to be remembered that modern technological advances help the success of a daily paper with a big capital behind it; and distributive organisations can be used to boycott a paper that criticises the government too severely. In capitalist countries the odds are against the success of a socialist paper, even if it is not banned.

The radio which is a powerful instrument for the expression of opinion is generally a state monopoly. Discussions on social, religious and political questions are usually censored. Even where it is not a government monopoly, as in the U. S. A., it is controlled by advertisers. It has not been wrongly suggested that an intelligent but reactionary government might allow discontented people to blow off steam without causing any serious disturbance.

There is one other observation that one feels tempted to make. The degree of security which any government feels in its own stability marks the extent to which it tolerates the free expression of opinions. Bertrand Russell gives us a typical illustration in this connection. In Queen Victoria's days Gilbert and Sullivan made fun of the army and navy; the only consequence was the Queen's refusal to bestow a knighthood on Gilbert. In our days they would be shot in Russia, sent to a concentration camp in Germany, accused of violating the Official Secrets Act in England, and investigated by a Senatorial Committee of the U. S. A. on suspicion that they were receiving their finance from Moscow. Can we see the same feeling of insecurity at work in the present Government of India ?

What are the day to day features of the trend of Government under which we live and perform our daily tasks? Our Provincial and Central Governments are the sole judges of emergency conditions due to communal tensions; in the name of such emergency they have carried out searches of private houses without warrants, detained persons for indefinite periods without trial; issued censorship orders about what newspapers should publish and what they should not publish. Nay—what is more—articles in newspapers were to obtain the previous approval of censors; and orders of this kind served on the Press were not to be printed in their columns. No government can be the sole judge of the rightness or wrongness of its own action. One is reminded of the absolute character of the ruler of Hobbes' Leviathan. Every government has a moral duty to submit its action to a judicial tribunal. The judgment of members of a Provincial Government or of the Central Government is as liable to be mistaken as the judgment of any body of thoughtful citizens. The test should be the ability of the executive to prove the danger of unlawful acts flowing from the expression of opinions.

The Bombay Public Security Measures Act of 1947 gives the Government the power of detaining or restricting the movement of persons who in the opinion of the Government are acting in a manner prejudicial to the public safety. The grounds or reasons of such an order may be disclosed to the persons so detained without disclosing the facts on which such reasons are based. Exercises or drills which Government consider to be of a military nature may be banned; the use of uniforms resembling police or military uniforms may be prohibited; special courts and judges can be instituted, and special procedures can be laid down for trials. The powers of the Provincial Government under the Act can be delegated to a District Magistrate and to the Commissioner of Police; and such officers are to be

indemnified against legal proceedings if they have acted in good faith. Associations can be declared unlawful, if such associations arouse reasonable apprehension that the members may use physical force in furtherance of the Association's object. We shall only make one comment. The power of arbitrary imprisonment is a terrible weapon in the hands of even the best administration. It involves a perpetual temptation to use it not for the purpose for which it was intended, but to silence opposition, and to put politically and even personally undesirable people out of the way. It is only too easy for a zealous administrator to persuade himself that he is acting for the good of the country in having undesirable people removed. It is the same power of self-deception that led the British industrialist to argue that the workers on strike were damaging British prosperity by damaging his own; the same power that makes a dominant group of powers raise slogans about collective security and resistance to aggression; the same that made Mr. Churchill declare that the fortunes of the British Empire and its glory are inseparably interwoven with the fortunes of the world.

Article 13 of the Draft Constitution of India which has already met with the approval of the Constituent Assembly will be the subject of a resolution before the Conference. It protects some of the fundamental rights of the citizen, but is hedged in by provisos which reflect the anxiety and fears of a newly established government in a country where public opinion does not exist, or can be swayed by the emotional changes of a rapidly moving world.

Freedom of speech even in a time of emergency—and the Indian Government during its period of rule has shown a tendency to proclaim and continue the prevalence of emergency not only in times when "police action" is being undertaken in some part of the vast territory under its control—freedom of speech in such times of supposed emergency is as necessary and desirable as in times of peace.

To give the executive a free hand is to invite it to commit, to lay it open to the temptation of committing, all the follies of which dictatorship is capable. It is human, but disastrous to the larger interests of the country, for the executive thus freed from responsibility to keep away from the people all the information on which its conduct can be assessed. It is human, but equally disastrous for the executive to use all the instruments of propaganda at its disposal to deceive its friends without deceiving its enemies. The holders of power "will be obtuse to suggestion", will regard even friendly criticism as unwise and calculated to undermine their prestige. An executive that penalises those who criticise is poisoning the moral foundations of the State.

The state of emergency declared by the Government of India on the occasion when "police action" was being undertaken in Hyderabad has evidently not yet ended. For Ordinance No. XXIV of 1948 to provide for measures to prevent any grave menace to the security of India has not yet been repealed. Human ingenuity has yet to discover a document which vests in the executive powers of detention and search and control that excel those created by the Emergency Powers of this Ordinance. And these powers can be delegated to any officers or authorities designated by Government. The traditions of Government to which we were habituated for more than a century cannot be outgrown in a year or two, any more than the traditions of French centralisation of powers under the Bourbons could have been outgrown under the Jacobins or the Napoleonic Empire.

The case for the freedom of expression of opinion rests on the assumption that the normal human being is a rational animal; that we think with our minds and not with our blood; that the masses can be influenced by an appeal to their reason; that a silenced opinion may be true or may contain a portion of truth; that it is by the collision of conflicting

opinions that truth advances. The same methods of free inquiry which convert the heresies of yesterday into the universally accepted truths of tomorrow in the scientific world would be found to be fruitful in the practical fields of political and economic life. These assumptions have been challenged in our days by the anti-intellectualist trends of the last fifty years. The philosophy of William James and Bergson, the political theory of Treitschke in Germany and of Sorel in France, the recognition of the growing importance of subconscious elements in the explanation of human behaviour, have culminated in the Corporative State of the Fascists and the racial cult of the Nazis. And though the last war has ended in the defeat of these cults, their force has by no means been spent, and constitutes one of the most insidious attacks on freedom of speech and freedom of the press.

Among the fundamental rights, or civil liberties, is one that is necessitated by the rapidly changing economic environment of our own days, one that was apt to be overlooked in earlier days when the wage-earner was not completely dependent on his wages and when wages were largely influenced by the efficiency of the worker. We refer to the right to work. Freedom to work in the sense that the law does not prevent us from working is a mockery of the worker if he does not get an opportunity to work. Freedom to refuse a wage that is below a living wage is of no particular significance, if this is the only wage that he can accept. The right to work should have been listed among the fundamental rights in the draft of our constitution if we are to take legitimate pride in our country's destiny in the future of the world. We cannot enjoy any of our civil liberties or fundamental rights if we cannot have the right to live and to eat—and it is this that is implied in the right to work. The right to work implies more than obtaining the goods, the necessities which support life; it is the

right to participate actively in the economic life of the community. It gives the individual his significance, his place in society, his stake in the common enterprise of Government and in the economic order in which, so far as our country is concerned, it is only the industrialists and profit-earners who are interested. Concern for the maintenance of order can only be a by-product of a feeling on the part of millions of our workers that their work is a participation in the collective task of providing adequate food, clothing, shelter, education, health and culture for the nation as a whole.

So long as this objective is not achieved,—and there is a conflict of interests between the worker and his employer,—the right to make collective bargains is a fundamental right of the worker, and ultimately the right to strike. In a country like India where labour is just becoming conscious of the need of organisation, the right to strike should be jealously guarded, as its last line of defence. It has been said that Government cannot afford to sit by with folded hands, when a single occupational group can render millions idle and involve serious consequences for the nation as a whole. No one wants the Government to sit idle; but to legislate in favour of compulsory arbitration and to declare strikes as illegal by the enforcement of such legislation, is to deprive the worker of a right which only the emergency of war seems to justify. The principle of compulsory arbitration first adopted in New Zealand in 1894, and subsequently by Australia between 1901 and 1912 has not prevented strikes and has fostered wide-spread dissatisfaction among the working classes. In the U.S.A. Kansas was the only one of the States that embarked on such legislation in 1920, but had to abandon the experiment in 1923, as even the employers were not prepared to abide by the decisions of the arbitration tribunal. What is more, the Supreme Court of the U.S.A. by two successive decisions has declared the compulsory

Arbitration Law unconstitutional. Industrial disputes cannot be settled by compulsion, when both the sides to the dispute are not willing to accept arbitration. It involves a fundamental departure from the principles on which a capitalist organisation of society is based; and it tends to introduce political and other non-economic considerations in the settlement of industrial disputes. A Parliamentary Committee in the United Kingdom reported in 1918 "The experience of compulsory arbitration during the war period has shown that it is not a successful method of avoiding disputes; and in normal times it would undoubtedly prove even less successful." In 1938 the President's Commission on Industrial Relations in Great Britain found that both organised labour and employers were definitely opposed to compulsory arbitration of industrial disputes.

2500 years ago Pericles was reported by the Greek historian Thucydides to have formulated in his famous funeral oration the ideals for which Athens stood, the ideals of an association of men in a society in which the free development of each is the condition for the full development of all. And these, by the way, were the very terms used in the Communist manifesto of 1848 by Marx and Engels. Let us quote from the funeral oration: "Our government is not copied from those of our neighbours; we are an example to them rather than they to us. Our constitution is named a democracy, because it is in the hands not of the few, but of the many. But our laws secure equal justice for all in their private disputes, and our public opinion welcomes and honours talent in every branch of achievement, on grounds of excellence alone. Open and friendly in our private intercourse, in our public acts we keep strictly within the control of law. We acknowledge the restraint of reverence; we are obedient to those in authority, and to the laws, more especially to those which offer protection to the oppressed, and to those unwritten ordinances whose

transgression brings admitted shame." Are we not reminded by these words of the claims made by our own rulers for what this country stands for, even as Pericles spoke of what Athens, the School of Hellas, the home of civic liberties, stood for? Only a short time after the funeral oration was delivered the Athenians decided that the small, independent state of Melos could not be allowed to remain neutral. Thucydides reproduces in his own words a dialogue between the Athenian envoy and the citizens of Melos. "We Athenians", the envoy observed, "will use no fine words; we will not get out of our way to prove that we have a right to rule, or that we attack you now because we are suffering any injury at your hands. We shall not convince you if we did. But you and we should say what we really think, and aim only at what is possible, for we both alike know that into the discussion of human affairs the question of justice enters only when there is equal power to enforce it, and that the powerful exact what they can, and the weak grant what they must."

Pericles may have grown eloquent over the ideals for which Athens stood. Perhaps he had not forgotten the numerous inhabitants of Africa who were not citizens, as well as the slaves. So do our public men not forget the millions whom they have a sincere desire to elevate to a status of equality with the rest. The incident of Melos reminds us that men who are proud and conscious of the great ideals for which they stand are easily tempted to accept the role of barbarians. The values of civilised life are exceedingly precarious: freedom, respect for truth, love of the beautiful and the noble. These are acquired with difficulty; they may be easily lost. We have only emerged from barbarism a little while ago, judged by geological time. The desire for power, the pride of dominance have not lost their attraction. We in India and elsewhere may have driven out the enemy who kept us in bondage; we may still

be under the domination of the enemy within us. Our freedom has to be achieved from day to day, if we are to keep it.

Though the war that was fought for democracy has been won, we need eternal vigilance if the traditions of democracy are to be preserved and its ideals cherished as directives. Our civil liberties demand a re-definition in meaning and scope. The need for survival and social security—the foundation of civil liberties—suggests the enlargement of executive authority within a framework of responsibility to the electorate. And yet, on the other hand, power vested in the executive to arrive at decisions and to overcome the law's delay paves the way to fascism and dictatorship, unless such power is checked by effective guarantees vested in the electorate. These problems cannot be solved by legislation, by the liberalism of the written code, bearing on separation of powers and judicial guardianship. Their solution demands something more. We have too often been familiarised with the dictum pronounced by our ministers and leaders that the new State which has been born in 1947 is to be a *secular* State. Those who say this forget that democracy itself, as a way of life, is a religion in the highest sense of the term. If Nazism or Communism have endeavoured to humiliate, if not to suppress, all religious communities, it is because they embodied in their claims the claim to be the bearers of a supra-temporal and a supra-national loyalty. If such loyalties are not expressed in the form of devotion to the universality of God and man, the historical churches and sects within the nation may become the instruments of power politics and hirelings of the state. Separation of state and church must undoubtedly be the basis of democratic society. But separation must not be confused with isolation or pretended aloofness. Such confusion can only end in mutual bribery and collusion between the state and the churches.

We have likewise been hearing about the need for a "planned economy." The planned economy which is

dangled before our eyes is a return to slavery, an economy of servitude and waste. If it is to be an economy planned in the spirit of democracy, bread and shelter must be made as freely available to all as water and a free use of roads. But if a feeling of security is to be brought within the reach of all, it must be a feeling of earned security ; it must not be allowed to degenerate into idleness of parasitical relief. A Bill of Rights must have as its counterpart a Bill of Duties, economic and political. Capitalism today cannot be wiped out with posters and slogans ; Socialism, on the other hand, has come to stay, whether we like it or not. We have to grope our way, in the light of past experience, to an economic organisation which will embody the ideals of justice and equal opportunities for which democracy stands.

The Jew and the Black man today are reminders to us of the inglorious failures of humanity in the past in organising a way of life that could be called democratic. The Harijan today in India is a warning to us against hypocritical claims to the establishment of democratic institutions. Nineteen centuries ago we were promised a City and a Kingdom where there was to be neither Greek nor Jew nor Barbarian nor Scythian. Shall we, along with others outside our country, keep in mind, when we are organising our economic and political life afresh, the need for laying the foundations of the path which will lead in a remote future to the construction of this City of God which is also to be a City of Man ?