

Indian Civil Liberties Conference, Madras.
15-17 July 1949
Presidential address

By

P. R. Das.

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The ^{one-party} ~~one-party~~ Civil Liberties' Conference, Madras

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P. R. DAS

(Retired High Court Judge and Barrister, Patna)

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Constant reiteration of civil liberty essential

My first duty is to thank you for inviting me to preside over your deliberations. The importance of a conference of this nature cannot be over-estimated, because it is necessary to state and restate the case for civil liberty over and over again, and as often as it may be necessary. Mankind has suffered much from the delusion that a guarantee of civil liberty, however important under a monarchical government or a foreign government, is of no moment in a constitution framed by the people for themselves and under which public affairs are managed by an executive chosen by the people themselves. So it was argued by the framers of the American Constitution; and in the Constitution originally framed, there was no guarantee of civil liberty at all. But experience showed that such a guarantee was absolutely necessary; and a Bill of Rights was incorporated into the American Constitution by a series of amendments. Those who suffer from this delusion forget that the aggressive tendency of power is such that it seeks constantly to enlarge the boundary of its authority. It seeks to be authoritarian and aims at dictatorship. It is, therefore, necessary to restate the case for civil liberty from time to time. This is the meaning of the famous maxim that eternal vigilance is the price of liberty.

One party-state in India

We have to remember in this connection that we have in India to-day a one-party state just as Hitler's Germany was a one-party state, just as Mussolini's Italy was a one-party state. Such is the prestige of the Indian National Congress that, when it decided to fight the elections as a party, it was impossible for any other party to make any impression on the electorate. I deplored the decision of the Congress to fight the election as a party. The Indian National Congress,

as its name implies, is a national organ and not a party organization in any sense. It won independence for India, not as a party but as representing the people of India. The object of the Indian National Congress, according to its written constitution, was the attainment of independence by the people of India. That object has been attained; and the constitution of the Indian National Congress does not provide for its existence after the attainment of independence. That, at any rate, was the view of the present Prime Minister of India at one time. He relates an interesting conversation between himself and Mahatmaji in his autobiography. He says that in the days of the Delhi Pact he used to accompany Mahatmaji in his early morning walks in New Delhi and used to talk of many matters, of the past, of the present, and especially of the future. He then says as follows:—

"I remember how he surprised me with one of his ideas about the future of the Congress. I had imagined that the Congress, as such, would automatically cease to exist with the coming of freedom. He thought that the Congress should continue, but on one condition: that it passed a self-denying ordinance, laying it down that none of its members could accept a paid job under the State, and if any one wanted such a post of authority in the State, he would have to leave the Congress. I do not at present remember how he worked this out, but the whole idea underlying it was that the Congress by its detachment and having no axe to grind, could exercise tremendous moral pressure on the Executive as well as other departments of the Government, and thus keep them on the right track."

The National Government has passed many ordinances; in fact, one ordinance follows another with bewildering rapidity; but it has not passed a self-denying ordinance such as that which was in the contemplation of Mahatmaji. Instead of doing that, the Congress has constituted itself the state; and like any other one-party state, it must ultimately aim at dictatorship.

One-party state irreconcilable with a democratic state

The one-party state is wholly irreconcilable with a democratic state. It must be remembered that Hitler enjoyed the confidence of the German people in a remarkable degree. He was a stern legalist in one sense; he sought the verdict of the German people on every occasion, and on every occasion the German people gave him overwhelming support. But no one will suggest that Hitler's Germany was a democratic state. Prof. Laski in his "Liberty in the Modern

State", dealing with the evils of one-party states, says as follows :—

"The one-party state means, literally, what it is called. For all effective purposes, the state-power becomes the apparatus of the party, so that it can use the supreme coercive power to make its will into law.....The one-party state is under the constant temptation to over-pass the boundaries beyond which liberty degenerates into dictatorship."

He concludes as follows :—

"My thesis involves the view that if in any state there is a body of men who possess unlimited political power, those over whom they rule can never be free."

Draft Constitution suppresses civil liberty

What is the position in India to-day? We have at the head of the Government a man whose life history constitutes an epic poem; a prince by birth, who deliberately chose the path of suffering and austerity; a man of imagination, foresight, courage and determination; an idealist tempered by prudence; an uncompromising hater of tyranny and oppression in every form; and, if that priceless book which he has given to this world, his autobiography, is speaking the truth, an upholder of the Rule of Law. We have also Sardar Vallabhbhai Patel, the second in command; a stern and unbending realist who carries his heart in his head; and who in the course of days rather than of months gave a death blow to feudalism in this country by methods, which, for want of a better expression, I should like to describe as "non-violent violence".

With these two men at the helm of affairs, I should have thought that the future of India as a democratic republic was safe: but actually the Draft Constitution, so far accepted by the Constituent Assembly leaves it open to the executive government to suppress political parties, to interfere with the freedom of the press, freedom of speech and association, to put people behind the prison-bars without bringing them up before courts of law and thus to pave the way for dictatorship.

Congress President proposes dictatorship over the Press

As regards the position which the press occupies to-day, I cannot do better than read to you what Dr. Pattabhi Sitaramayya, the present Congress President, said at a recent press conference. He admitted that liberty of the newspapers

is "definitely less under the National Government than what it was under the bureaucratic regime." He gave an explanation which is as extraordinary as it is dangerous. He said: "During the days of the foreign Government the press was as much patriotic unit as any political party or agitator, but under the National Government, it is a unit of the Government." The press, a unit of Government! I rubbed my eyes when I read this, and thought of Hitler's Germany and Mussolini's Italy. He continued as follows: "Therefore, it was true that the so-called freedom of the press had been curtailed considerably since the advent of the National Government." To a question whether this was not autocracy, the Congress President said that democracy was only the autocracy of the chosen persons. "The dictator in a democracy", he said, "is given wide powers by the people. The moment the democratic autocrat exceeds the limits, he is pulled down from his exalted place. This is what happens in the annual elections to the leadership of the party." I regret to say that I am quite at a loss to follow the reasoning of the Congress President except this, that he is clearly aiming at Congress dictatorship in which the press will occupy a position subservient to the Government. He has little conception of the modern meaning of democracy.

Pre-Censorship in West Bengal

I may draw your attention to a recent order passed by the Government of West Bengal imposing a precensorship ban on "Saturday Mail" demanding that all matters intended for publication shall be submitted for scrutiny to the Government of West Bengal, Home (Press), and that no issue of this journal shall be published except with his written permission. This is the position of the press to-day, perfectly consistent with the view expressed by the Congress President but wholly at variance with the requirements of democracy.

Refusal of Mr. Atlee to follow India

As regards the civil liberty of the subject in India, I may refer you to what Mr. Atlee said in Parliament very recently. He was asked to introduce anti-communist legislation on the lines of that in India and France. He refused to do so; and in answer to a question put by Sir Waldron Smithers, he said: "I do not know whether Sir Waldron has studied the somewhat drastic measures that are being taken by provincial Governments in India and whether he and his party generally support the power to

detain without trial on suspicion of subversive activities, and a number of other things which are generally regarded as rather dangerous here." I confess that when I read this, I thought that every Indian ought to bow down his head in shame and humiliation. I cannot conceive of a greater condemnation of what is happening in India to-day. I would add that according to a recent statement made by Sardar Vallabhbhai Patel, 1611 Communists and 1400 Communalists are under detention without trial up to the 15th of February.

Contrary to the preamble, the constitution provides for dictatorship

As against this background, let us consider the claim made in the preamble to the Draft Constitution that "we, the people of India, have solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens, justice, social, economic and political and liberty of thought, expression and belief." These are brave words; but is the claim made in the preamble well-founded or has it been introduced deliberately to deceive the people of India? I contend that the Draft Constitution already accepted by the Constituent Assembly wholly denies the claim made in the preamble that there is anything like democracy in the proposed Constitution of India; but that, on the other hand, care has been taken to provide for dictatorship, if, in the opinion of the Executive Government, the situation in the country so demands. I also contend that there is no security either for political justice or for liberty of thought, expression and belief in the Constitution as already accepted.

Democracy and rule of law

First, then, what is democracy? The old-fashioned definition of a democracy as the form of government in which the ruling power of a state is legally vested in the party which is returned to power at an election is correct so far as it goes; but it does not go far enough. This modern definition of a democracy is given by H. G. Wells in his "Outlook for Homo Sapiens". Democracy, according to him, means "the sub-ordination of the state to the ends and welfare of the common individual". According to him, "From the point of view of democracy all absolutisms are illegal, and resistance to their commands is as justifiable as resistance to any less general hold-up or act of violence." According to

the old conception, democracy is the democracy of the ballot box. You may make whatever promises you like to the electorate, and if you are returned to power, you are perfectly safe for the period for which you have been returned to power. According to the view of H. G. Wells, there must be "a continuing consent" of the electorate. In ordinary matters of policy it is difficult for the electorate to keep an eye on the government from day to day; but it is quite clear that democracy and absolutism are two different things altogether. A constitution which provides for absolutism cannot be a democratic constitution. Now, consider the statement of the Congress President that democracy is the autocracy of the chosen persons. This view is certainly not in accord with the view of H. G. Wells as to what democracy means. I shall presently discuss the question whether the constitution proposed for India does or does not provide for absolutism. Prof. Laski in his "Liberty in the Modern State" has discussed the question as to what democracy implies. He says, first, it involves a frame of government in which men are given the chance of making the government under which they live at stated intervals. Secondly, he says, it involves the securing to the citizens certain fundamental human rights and the maintenance of those rights by the separation of the judicial from the executive powers. Thirdly, he says, it involves the bringing into existence of a Bill of Rights for safeguarding the fundamental human rights, such as freedom of speech, protection from arbitrary arrest and the like. According to Prof. Laski, the supermacy of the "rule of law" is absolutely essential for the working of a democracy. Now, what is "Rule of Law"? Prof. Dicey who has made this expression memorable in his "Law of the Constitution" says that this expression means that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land." "In this sense", Prof. Dicey says, "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint." You will notice that this conception of democracy differs widely from that of the Congress President. It has been said that before flood, fire, pestilence, earthquake, and state of emergency like war, or threat of war men have had to relinquish their liberty of individual action to a higher command of some sort with unqualified immediate powers. Prof. Laski has given a reply to this argument. He says "I do not trust the

executive power to act wisely in the presence of any threat, or assumed threat, to public order". He continues as follows :—

" Anyone who studies the treason trials of 1794, or, even more striking, the cases under the Espionage Act in America during 1917-20, will be convinced of the unwisdom of allowing the executive an undue latitude. Every State contains innumerable and stupid men who see in unconventional thought the imminent destruction of social peace. They become Ministers ; and they are quite capable of thinking that a society of Tolstoyan anarchists is about to attempt a new gunpowder plot. If you think of men like Lord Eldon, like Sir William Joynson-Hicks, like Attorney-General Palmer, you will realize how natural it is for them to believe that the proper place for Thoreau or Tolstoy, for William Morris or Mr. Bernard Shaw, is a prison."

Authority grossly abused in the absence of rule of law

He makes an emphatic assertion that he knows of no case where the state has exercised extraordinary power outside the normal process of law, in which that authority has not been grossly abused. He says "it was abused in the Civil War even under a mind so humane and generous as that of Lincoln; it was emphatically and dangerously abused in the Amritsar rebellion of 1919." He concludes as follows:—

" Whether you study repression in Ireland or Russia, Bavaria or Hungary or India, its history is always the same. The fact always emerges that once the operation of justice is transferred from the ordinary courts to some branch of the executive, abuses always occur. The proper protection of the individual is deliberately neglected in the belief that a reign of terror will minimize disaffection. There is no evidence that it does. If it could, there would have been no Russian Revolution ; and there would have been no movement for Indian self-government. The error inherent in any invasion of individuality, such as a system of special courts implies, is that it blinds the eye of Government to the facts not only by suppressing illegitimate expression of opinion, but by persuading it that most opinion which finds expression is illegitimate if it is not in the nature of eulogy. Even Lincoln supported his general in completely indefensible attacks on civilian rights. Executive justice, in fact, is simply a euphemism for the denial of justice ; and the restoration of order at this cost involves dangers of which the price is costly indeed."

Fundamental rights subject to existing lawless laws

Now, let us see whether the constitution proposed for India promises a democratic republic or political justice or liberty of thought, expression or belief. It is true that

Article 13 provides that " (1) Subject to the other provisions of this article, all citizens shall have the right :—

- (a) to freedom of speech and expression ;
- (b) to assemble peaceably and without arms ;
- (c) to form associations or unions."

But clauses (2), (3) and (4) provide that the guarantee given in sub-clauses (a), (b) and (c) of clause (1) are all subject " to the operation of any existing law ". Now, we all know that the press acts, the police acts, the criminal law amendment acts, the infamous Bengal Regulation 3 of 1818, Madras Regulation 2 of 1819, Bombay Regulation 25 of 1827 and various other acts which were enacted by the British for the consolidation of its powers, and which used to be denounced by the Congress leaders as " lawless law " are all " existing laws ". What is the value then of the guarantee given in Article 13 (1) (a), (b) and (c), when all these are subject to the operation of the existing press acts, police acts, criminal law amendment acts and other acts which have taken away the freedom of speech and expression, the right to assemble peaceably and without arms and to form associations or unions? I suggest, therefore, that so long as those acts are in existence which give the persons in authority wide, arbitrary or discretionary powers of constraint, and substitute executive justice for the rule of law, it is ridiculous to talk of democracy in India or of political justice, or of liberty of thought, expression and belief.

Article 15, Gravest menace to democracy

But Article 15 of the Draft Constitution constitutes the gravest menace to democracy and, therefore, to civil liberty. It runs as follows :—

" No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India."

The original suggestion of the Constituent Assembly was that this Article should provide that no person shall be deprived of his life and liberty without "due process of law"; but the framers of the Draft Constitution substituted the expression "except according to procedure established by law" for the words "due process of law", as in their opinion, the words which they have taken from the Japanese Constitution of 1946 are more specific than the words "without due process of law", which occur in the American

Constitution. Section 1 of the Fourteenth Amendment of the American Constitution runs as follows :—

“ All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

What is Due Process of Law ?

The expression “ due process of law ” has a proud ancestry and goes back to the Magna Carta. Chapter Thirty-nine of the Magna Carta provides that “ No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and *by the law of the land* ”. It appears that the words “ by the law of the land ” were abandoned, and the words “ by due process of law ” were substituted in the series of statutes passed in the reigns of Edward III and Richard II. These statutes show that the words “ by the law of the land ” were read in the fourteenth century as equivalent to the wider expression “ by due process of law ”;

It is clear, therefore, that the expression “ by due process of law ” is equivalent to the expression “ by the law of the land ”.

It is then necessary for us to see whether these expressions are sufficiently specific to afford complete constitutional protection to the subject against the coercive powers of the State.

Viscount Bryce in his preface to the Magna Carta Commemoration Essays says :—

“ Rather perhaps may we find the chief contribution of England to political progress, *in the doctrine of the supremacy of law over arbitrary power*, in the steady assertion of the principle that every exercise of executive authority may be tested in a court of law to ascertain whether or not it infringes the rights of the subject. Does the ‘ law of the land ’ warrant and cover the act done of which the subject complains? Though it is now generally held that the famous phrase ‘ nisi per legem iudicium parium suorum vel per legem terrae ’ (‘ unless by the lawful judgment of his peers and by the law of the land ’), does not, as used to be supposed, constitute the basis of what

we call 'trial by jury'; still it remains true that these words, and especially the declaration of the supremacy of the 'lex terrae' ('law of the land'), are the critical words on which the fabric of British freedom was solidly set before a representative Parliament had come into existence. It was this guarantee of personal civil rights that most excited the admiration of continental observers in the eighteenth century, and caused the British Constitution to be taken as the pattern which less fortunate countries should try to imitate."

In examining the sense in which the phrases "due process of law" and "law of the land" are employed, Cooley in his "Constitutional Limitations", Vol. II, page 736, says that "Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: 'By the law of the land' is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society." Mr. Cooley proceeds to say as follows:—

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and render judgment only after trial."

He points out that "the words 'by the law of the land', as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere non-sense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'" He quotes Mr. Justice Johnson of the Supreme Court of the United States as saying,

"As to the words from Magna Carta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of Government, unrestrained by the established principles of private rights and distributive justice."

Draft constitution places personal liberty at the mercy of the Executive

I suggest, therefore, that the expression 'due process of law' is sufficiently specific to import complete constitutional protection to the subject against the coercive powers of the executive government, and that the view of the framers of the Draft Constitution, with all respect, is not correct. Had Article 15 provided that "no person shall be deprived of his life or personal liberty except according to due process of Law", the supremacy of law over arbitrary power would have been established, and it would have been impossible for any legislature in India to make any law in India which would place the life and liberty of the subject at the mercy of the executive government. Every exercise of executive authority could then be tested in a court of law, and civil liberty would have been guaranteed to the subject. But the Constituent Assembly, on the insistence of the Congress leaders, has deliberately substituted the words "except according to procedure established by law", for the words "without due process of law", and in doing so, has placed the life and liberty of the subject at the mercy of the executive government, and has made it impossible for the subject to test the exercise of executive authority in a court of law.

I should like to point out that though the framers of the Constitution have proceeded on Article XXXI of the Japanese Constitution 1946 they have altogether ignored the other provisions of the Japanese Constitution which give complete protection to the subject against the arbitrary conduct of the Executive Government. Article XXXI provides :

"No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

If Article XXXI stood alone, there would be no protection to life or liberty at all; for a procedure could be invented without difficulty which would place the life or liberty of the subject at the mercy of the Executive Government. Article XXXI, however, is followed by three Articles which completely protect the subject against the coercive powers of the State.

Article XXXII provides that

"No person shall be denied the right of access to the Courts."

Article XXXI provides that

"No person shall be arrested or detained without being at once informed of the charge against him or without the immediate privilege of Counsel; nor shall he be detained without adequate cause and upon demand of any such person such cause must be immediately shown in open Court in his presence and the presence of his Counsel."

Article XXXV provides that

"The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures, shall not be impaired except upon warrant issued only for probable cause, and particularly describing the place to be searched and things to be seized or except as provided by Article XXXIII. Each search or seizure shall be made upon separate warrant issued for the purpose by a competent judicial officer."

It is truly remarkable that while the framers of the Draft Constitution proceeded on Article XXXI of Japanese Constitution of 1946, it completely ignored Articles XXXII, XXXIV and XXXV. It is clear, therefore, that the framers of the Draft Constitution deliberately decided to give the persons in authority wide, arbitrary or discretionary powers of constraint, and to refuse to the subject the right to test exercise of executive authority in a court of law. Sir Brojendra Mitter, the well-known Indian jurist, has in two short sentences summed up the effect of Article 15 of the Draft Constitution. He says "Article 15 secures procedural due process only. It affords no protection against tyrannical laws".

No protection against tyrannical laws

This, then, is the position in India to-day. We have no protection against tyrannical laws; we have no protection against the arbitrariness of the Executive Government. The Constitution has deliberately provided for "executive justice" and not for "rule of law". I ask myself, is this the independence for which the people of India, and particularly the Indian National Congress, fought the British power from 1885 and particularly from the date when Mahatma Gandhi took up the leadership of the Congress? The Indian National Congress in the second year of its existence passed a real resolution for the separation of the judicial from the executive. I find no evidence that the Congress Governments are at all anxious for such separation to-day. The Indian National Congress has passed numerous resolutions protesting against "the lawless laws" passed during the British regime for the suppression of civil liberty

and for the consolidation of its power ; to day the leaders of the Congress have completely forgotten those resolutions and they have deliberately given power to the executive governments to suppress civil liberty and to substitute executive justice for the " rule of law ". There is a well-known saying that the Romans made world-wide roads and that down the same roads came their conquerors. The British made many laws for suppression of liberty and for consolidation of its power. The Congress Governments have found it convenient, not only to retain all those laws, but also to make new laws for the suppression of civil liberty. There was no greater advocate of civil liberty and for the rule of law than the present Prime Minister of India. His autobiography, which should be read and re-read by every student of politics, is full of human sympathy and hatred of government by coercion ; yet strange to relate he is to-day the upholder of the exercise of coercive powers by the State. I do not find any change in the administrative methods to-day. We have the same Police Raj ; orders under section 144, Code of Criminal Procedure, continue to be made ; and lathi charges have not been stopped. Calcutta especially occupies a proud position so far as orders under section 144, Code of Criminal Procedure, and lathi charges are concerned. We still continue to be governed by ordinances. I will read to you a passage from Pandit Nehru's autobiography :—

" Brazen-faced hypocrisy could hardly go further. Here was India being governed forcibly under an absolute dictatorship with Ordinance laws and suppression of every kind of civil liberty, and yet our rulers talked unctuously of democracy. Even normally, where was the shadow of democracy in India ? It was no doubt natural for the British Government to defend its power and vested interests in India and to suppress those who sought to challenge its authority. But its assertion that all this was the democratic method was worthy of record for future generations to admire and ponder over."

I respectfully submit that this exactly is the position in India to-day.

West Bengal Security Act

This brings me to the security acts which have been passed by the different Provincial Governments, no doubt under the direction of the Central Government. I propose to discuss the West Bengal Act.

Section 16 of the West Bengal Security Act originally provided that,

" The Provincial Government, if satisfied on *reasonable grounds*, with respect to any particular person that with a view to preventing

him from doing any subversive act it is necessary so to do, may make an order—

(a) Directing that he be detained ;

(b) Directing that, except in so far as he may be permitted by the provisions of the order, or by such authority or person as may be specified therein, he shall not be in any such area or place in West Bengal as may be specified in the order ;

(c) Requiring him to reside or remain in such place or within such area in West Bengal as may be specified in the order ; and if he is not already there to proceed to that place or area within such time as may be specified in the order ;

(d) Requiring him to notify his movements or to report himself or both to notify his movements and report himself in such manner, at such times and to such authority or person as may be specified in the order ;

(e) Imposing upon him such restrictions as may be specified in the order in respect of his employment, business or movements, in respect of his association or communication with other persons, and in respect of his activities in relation to the dissemination of news or propagation of opinions."

I ask myself, can arbitrariness go further? What civil liberty can there be in a country where the executive Government possesses powers as wide as the powers which the Provincial Government of West Bengal has under section 16 of the West Bengal Security Act? We hear that in Soviet Russia the citizens have no personal liberty; but is there any difference between the powers exercised by the executive government in Soviet Russia and those which are exercised by the West Bengal Government under section 16?

We have been told the Provincial Government of West Bengal, which is the government freely chosen by the people of West Bengal, is not likely to exercise any powers under section 16 with respect to any particular person, unless it is satisfied beyond doubt that it is necessary to detain such person with a view to preventing him from doing any subversive act. My reply is that I prefer justice of the courts of law to executive justice. I may mention that a case came up before the Calcutta High Court, and the Calcutta High Court, took the view that it was competent to inquire into the question whether reasonable grounds existed in any particular case with respect to an order under section 16. Immediately an ordinance was passed removing the words "on reasonable grounds"; so that the Provincial Government may make an order of detention even if not satisfied on reasonable grounds. The

object of the ordinance was clearly to prevent the High Court from interfering in any case of detention under section 16.

It has been said that there is no reason to believe that these orders of detention have in fact been made without an anxious consideration of the circumstances leading to such orders. The suggestion is without any basis whatever. Section 17 of the Act provided that an order under section 16 should be in force for such period not exceeding three months provided

"That the Provincial Government may, if and so often as it thinks fit, before the date on which under this section any such order would otherwise have ceased to be in force, place before, a judge of the High Court in Calcutta, the grounds on which the order is made, the representation, if any, made under section 18 by the person affected thereby and such further materials as the Provincial Government may think fit and the Provincial Government shall, in accordance with the decision of the Judge thereon, issue an order of release or a fresh order of detention for a period not exceeding nine months as may be determined by the Judge".

There is another proviso to this section which provides,

"That the person affected by the order shall not be entitled to be defended or represented by any lawyer or other person before the Judge".

Lydford Justice.

The effect of sections 16 and 17 is that the person affected by the order is detained for three months; but before the expiry of three months his case is put up before a judge of the High Court; and the judge has to decide on the ex parte materials placed before him by the executive government and such representation as may be made by the detenu himself whether grounds existed for such detention. If the judge decides that there were grounds for such detention, a fresh order of detention may be made for such period not exceeding nine months as may be determined by the judge; but if he decides that there were no grounds whatever, the Provincial Government shall, in accordance with the decision of the judge, issue an order of release.

You will note that the person affected is detained for three months; and his case is put up before a judge on the expiry of three months. This is what is known as "Lydford Justice";

"I oft have heard of Lydford law,

"How in the morn they hang and draw

"And sit in judgment after."

In the next place, the judge has to form his opinion on the ex-parte statements put up before him, the statements which have not been tested by cross-examination.

In due course the case of 107 detenus was placed before a judge of the Calcutta High Court ; and the latter found that there was no case against 68 of the detenus out of 107 detenus. In other words, no grounds existed in respect of 63 per cent of the detenus, reasonable or otherwise or at all. After this it is absurd to say that the cases of these detenus are examined with any care.

Section 18 provides that where an order of detention is made in respect of any person, the authority making the order shall, within fifteen days after the order is made, communicate to the person affected thereby the grounds on which the order has been made against him and such other particulars as are in the opinion of such authority sufficient to enable him to make, if he wishes, a representation against the order and such person may at any time thereafter make a representation in writing to such authority against the order, and that it shall be the duty of such authority to inform such person of his right of making such representation and to afford him the earliest practical opportunity of doing so. I believe a provision of this nature is to be found in all the different security acts passed by the different provincial legislatures. The different High Courts have held that they are competent to decide whether the particulars supplied to the detenus are sufficient to enable them to make a representation in writing to the authority against the order of detention. Numerous cases have come up to the different High Courts ; and in numerous cases the High Court have held that the particulars supplied were not sufficient to enable the detenus to make representation to the authority against such detention and have ordered the release of the detenus. The High Court exercises its very limited power under the Habeas Corpus section of the Code of Criminal Procedure. It has no power to go behind the communication made to the detenu containing the grounds on which the order for detention was made. If the communication does not disclose even prima facie grounds for detention, the High Court has exercised its power to order the release of the detenus. If it does disclose prima facie grounds, the High Court has no power to interfere. The point which I am making is that the High Court has very limited power of interference. Even then the different High Courts have in numerous cases ordered the release of the detenus. In my own experience I have seen fantastic

grounds being put forward in support of an order for detention. I am firmly convinced that the orders for detention are made really by the District Magistrates on the reports of the Superintendents of Police, and that the cases are not examined by the higher officials at all. If this were not so, absurd and fantastic grounds could not have been put forward in support of orders of detention. It follows therefore that the civil liberty of the subject depends on the whim and caprice of the police officers. It must be remembered that the mentality of the police has not changed, nor the mentality of the permanent officials. Before independence, they served their British masters, not hesitating to make reports against the Congress leaders on false and frivolous grounds. Now, they serve the Congress with equal zeal, dishonesty, and callousness.

The inhuman side of the state apparatus

There is a moving chapter in Panditji's autobiography which deals with his jail life in Naini prison. It is full of pathos, human understanding and sympathy and is in marked contrast to a statement recently issued by the Director of Publicity, Bombay. He sees round him convicted prisoners who do not see a child or woman or even animals. They lose touch with the outside world completely, and have no human contacts left. He says that from time to time the prisoner's body is weighed and measured, and he asks, "how is one to weigh the mind and the spirit which wilt and stunt themselves and wither away in this terrible atmosphere of oppression?" He poses to himself the question, was this man guilty at all of any act or offence? He says, "police methods in India have long been suspect; in political matters they are doubly so". He adds,

"One sees in prison the inhuman side of the State apparatus of administrative repression at its worst. It is a machine which works away callously and unthinkingly, crushing all that come in its grips and the gaol rules have been purposely framed to keep this machine in evidence. Offered to sensitive men and women, this soulless regime is a torture and an anguish of the mind. I have seen long-term convicts sometimes breaking down at the dreariness of it all, and weeping like little children. And a word of sympathy and encouragement, so rare in this atmosphere, has suddenly made their faces light up with joy and gratitude".

The life of detenus

The detenus are not convicted prisoners at all; they have been put outside the pale of law as the result of the exercise of arbitrary power on the part of the executive

Government. They too are sensitive men, they too have wives, mothers and children with whom they have no contact at all. If the figures given by Sardar Vallabhbhai Patel can be relied on, 1611 Communists and 1400 Communalists are confined in jail to-day, and no opportunity has been given to them to establish their innocence in courts of law. Are they really Communists and Communalists? If so are they really engaged in subversive acts? Who can tell? True, the police have made reports against them; and the District Magistrates have acted on those reports. But, as Panditji has told us, "Police methods in India have long been suspect; in political matters they are doubly so". We also know that in numerous cases different High Courts have ordered the release of men put under lock and key under the Security Acts because the communications made by the authorities to those men containing grounds for detention did not even raise a prima facie case for detention. Who can say that these men are not the victims of police zid and zulum? Who can say that they have not been engaged in perfectly legitimate political warfare against the Congress Government, and have been put away to prevent them from causing embarrassment to those in power? They have been put outside the pale of law. They have no right to vindicate their honour in courts of law. Executive justice, which is no justice, has been meted out to them, and they must be satisfied with that.

The statement of the Bombay Director of Publicity.

In this connection I should like to draw your attention to a statement recently issued by the Director of Publicity, Bombay, with regard to a hunger-strike by the alleged Communists in Bombay. The statement runs as follows:—

"Men who have pledged themselves to subversive and disruptive activities and who are bent on using violence to bring about a change in the form of government, take care to circumvent the ordinary law of the land, hence the need for extra-ordinary powers to protect the State and society against the onslaught of anti-national elements. A repetition of the demand for trial by a court of law on the part of these persons cannot, therefore, be taken seriously."

Who has told the Bombay Government that these men confined in jail have pledged themselves to subversive and disruptive activities? They strenuously denied the allegations against them and asked that they should be put on trial so that they may have an opportunity of proving that the allegations against them are wholly false. It is true that the

police have decided for themselves that these men are dangerous elements in society and ought to be put outside the pale of law. It is also true that the Bombay Government has accepted the police reports. But I decline to accept the judgment of the Home Minister in preference to the judgment of the courts of law. The statement continues as follows :—

“The demand for trial by a court of law, coming as it does from the communists, can only be described as of academic importance. The Government have already appointed a retired judge of the High Court to review the cases of all the detenus.”

Note the taunt in the words, “coming as it does from the Communists”! The Communists are not worthy of serious consideration; they are outside the pale of law altogether!

A callous and heartless statement about detenu allowances

I should only like to say that if I were appointed a judge to review the cases of the detenus, I would, with all respect, decline the honour. It is quite impossible to decide a case on the ex-parte statements made by the police authorities when moreover those statements have not been tested by cross-examination and the detenus have had no opportunity to contradict those statements. Is it to be seriously suggested that a review of cases by a retired judge of the High Court on the ex parte statements of the police is the same thing as a trial by a court of law? The statement then deals with the demand of the detenus for family allowance. It says :

“These men have gone about their subversive activities in a deliberate and planned manner, knowing fully well the injury they were doing to the country and the consequences they should face. They wantonly exposed their families to certain risks. Now, that they have been detained for their activities, they cannot blame anyone but themselves for the hardships which they have brought on the heads of their families. The detenus' demands and the hunger-strike to enforce these demands can only be interpreted as a desperate attempt of the Communists to attract public opinion to themselves.”

So it used to be argued by the British Government when hunger-strike used to be resorted to by those confined in Jail without trial; and the communiques which used to be issued by the British Government were met by indignation and resentment throughout India. A more callous and heartless statement it is impossible to imagine; and I would respectfully draw the attention of Pandit Nehru to this statement.

What Pandit Nehru says

Pandit Nehru is certainly a champion of democracy and liberty; and I would take the liberty of quoting a long passage from his autobiography in reply to the communique recently issued on behalf of the Bombay Government:—

“In Western countries”, Pandit Nehru says, “a strong public opinion has been built up in favour of civil liberties, and any limitation of them is resented and opposed. (Perhaps this is past history now). There are large numbers of people who, though not prepared to participate in strong and direct action themselves, care enough for the liberty of speech and writing, assembly and organisation, person and press, to agitate for them ceaselessly and thus help to check the tendency of the State to encroach upon them. The Indian Liberals claim to some extent to carry on traditions of British Liberalism (although they have nothing in common with them except the name), and might have been expected to put up some intellectual opposition to the suppression of these liberties, for they suffered from this also. But they played no such part. It was not for them to say with Voltaire: ‘I disagree absolutely with what you say, but I will defend to the death your right to say it.’”

It is not perhaps fair to blame them for this for they have never stood out as the champions of democracy of liberty, and they had to face a situation in which a loose word might have got them into trouble. It is more pertinent to observe the reactions of those ancient lovers of liberty, the British Liberals, and the new socialists of the British Labour Party to repression in India. They managed to contemplate the Indian scene with a certain measure of equanimity, painful as it was, and sometimes their satisfaction at the success of the ‘scientific application of repression’, as a correspondent of the *Manchester Guardian* put it, was evident. Recently the National Government of Great Britain has sought to pass a Sedition Bill, and a great deal of criticism has been directed to it, especially from Liberals and Labourites on the ground, *inter alia*, that it restricts free speech and gives magistrates the right of issuing warrants for searches. Whenever I read this criticism I sympathised with it, and I had at the same time the picture of India before me, where the actual laws in force to-day are approximately a hundred times worse than the British Sedition Bill seeks to enact. I wondered how it was that Britishers who strain at a gnat in England could swallow a camel in India without turning a hair. Indeed I have always wondered at and admired the astonishing knack of the British people of making their moral standards correspond with their material interests, and of seeing virtue in everything that advances their imperial designs. Mussolini and Hitler are condemned by them in perfect good faith and with righteous indignation for their attacks on liberty and democracy; and, in equal good faith, similar attacks and deprivation of liberty in India seem to them as necessary, and the highest moral reasons are advanced to show that true disinterested behaviour on their part demands them.”

The extract which I have quoted constitutes an attack on the Liberals, both Indian and British. The Indian Liberals pretend to carry on the tradition of the British Liberals; but they are too afraid to speak out when so much repression is going on all round. And what about the British Liberals? They have a knack of making their moral standards correspond with their material interests. Is it to be said that the leaders of the Indian National Congress have also a knack of making their moral standards correspond with their material interests? Only up to the other day, they were denouncing the "lawless laws" of the British on high moral grounds. In his autobiography, Pandit Nehru says, "Large numbers lie in prison and spend their young lives, year after year, eating their hearts out". In the footnote he draws our attention to the statement of Sir Harry Haig, the Home Member, in the Legislative Assembly on July 23, 1934, that the total number of detenus were 2,000 to 2,100.

Establishment of Congress dictatorship

I would respectfully ask the Prime Minister whether the position is not the same in India to-day. Over 3,000 persons are in confinement to-day though they have not been convicted of any offence. Pandit Nehru along with all the Congress leaders condemned the British Government for acting exactly as the provincial governments are acting to-day. It is quite true that "the highest moral reasons" are advanced by them to show that "true disinterested behaviour on their part" demands that over 3,000 persons in India should be confined in jail without trial. But history will record how the Congress leaders, champions of democracy and liberty, abandoned the principles of democracy and liberty as soon as they came to power, and will not hesitate to say that they did so, in order to establish Congress dictatorship in the country. In exercise of the powers under "the lawless laws", they have suppressed political parties, they have taken away the freedom of the press, they are issuing orders under section 144 to forbid processions and meetings; they are not hesitating to shoot down even women when those orders are disobeyed; and they have deprived over three thousand persons of their liberty without bringing them up for trial. This is how dictatorship was established in Hitler's Germany, in Mussolini's Italy, and in Stalin's Russia.

The Sankey declaration

India is an original member of the United Nations Organization. In my opinion, the so-called security acts are against the spirit and the letter of the Charter of the United Nations.

I think I am right in pointing out that the express recognition and the special protection of fundamental rights of man have become a general principle of Constitutional Law of civilised States and that International Law is increasingly taking note of this fact. Freedom from arbitrary arrests is surely a fundamental, unalienable, and natural right of man. The view is gaining ground that the rights of man, unless grounded in, and safeguarded by, effective recognition on the part of the International Society, are not sufficiently protected against violent encroachment by the State. Experience has shown that the denial of the fundamental rights of man to freedom tends to constitute a danger to international peace. Hitler's Germany and Mussolini's Italy are cases in point. The rise in the period following the first Great War, of various forms of authoritarian dictatorship gave a renewed impetus to the claim for an international recognition and protection of fundamental human rights. In 1929, the Institute of International Law adopted a Declaration of the International Rights of Man. After discussion organised by Mr. Ritchie Calder, in which all people of every creed and type participated, a Declaration of the Rights of Man was drawn up by a distinguished committee. This is known as the Sankey Declaration of Rights. This Declaration is set out at pages 242 to 248 of H. G. Wells' "The Outlook for Homo Sapiens". I will take the liberty of quoting Article 9 of the Declaration :—

"9.—*Personal Liberty.*

Unless a man is declared by a competent authority to be a danger to himself or to others through mental abnormality, a declaration which must be confirmed within seven days and thereafter reviewed at least annually, he shall not be restrained for more than twenty-four hours without being charged with a definite offence, nor shall he be remanded for a longer period than eight days without his consent, nor imprisoned for more than three months without a trial.

At a reasonable time before his trial, he shall be furnished with a copy of the evidence which it is proposed to use against him.

At the end of the three months period, if he has not been tried and sentenced by due process of the law, he shall be acquitted and released.

No man shall be charged more than once for the same offence.

Although he is open to the free criticism of his fellows, a man will have adequate protection from any misrepresentation that may distress or injure him. Secret evidence is not permissible. Statements recorded in administrative dossiers shall not be used to justify the slightest infringement of personal liberty.

A dossier is merely a memorandum for administrative use; it shall not be used as evidence without proper confirmation in open court".

It is pathetic to observe that while all civilised nations, including Japan, have realised that a recognition of the fundamental rights of man is essential to provide a defence to the citizen against the discretionary power of restraint on the part of the Government, for "power tends to corrupt and absolute power corrupts absolutely", India alone has struck a discordant note; India alone shows a tendency to go back to absolutism.

Declaration of human rights by United Nations

The outbreak of the Second World War strengthened the belief that the international recognition and protection of the rights of Man was an essential requirement of international peace. That conviction was repeatedly given expression in various Declarations on war aims, such as, the Atlantic Charter of August 14, 1941, and the Four Freedoms message of President Roosevelt to Congress on January 6, 1941. The Charter of the United Nations indicates in numerous provisions the recognition of human rights in the international field. I refer you to the Preamble: "We the peoples of the United Nations, determined,.....to reaffirm faith in fundamental human rights, in the dignity and worth of the human person....." The purposes of the United Nations are set out in Article 1, and one of the purposes as set out in sub-article 3 is "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." Article 13 provides that the General Assembly shall initiate studies and make recommendations for that purpose, inter alia, of promoting international co-operation in the economic, social, cultural, educational and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Article 55 provides that "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly

relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote, inter alia, universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Article 62 gives power to the Economic and Social Council "to make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedom for all." Article 68 gives power to the Economic and Social Council "to set up Commissions in economic and social fields for the promotion of human rights."

The Charter clearly contemplates the setting up of a Commission for human rights, one of the principal tasks of which would be the drafting of an International Bill of Rights.

India's sovereignty limited by its membership of United Nations.

India is an original member of the United Nations Organisation, and is clearly bound by the Charter of the United Nations. I submit that its membership involves a limitation on its absolute sovereignty in the legislative field. Having determined "to reaffirm faith in fundamental human rights" and having undertaken, in the most solemn manner, to promote and encourage respect for human rights and for fundamental freedoms for all, it is, I submit, contrary to international conception of human rights on her part to put the liberty of the subject at the mercy of the executive government.

The only question is whether the question of civil liberty is "essentially within the domestic jurisdiction of" India and so outside the jurisdiction of the United Nations. In two recent cases, the General Assembly of the United Nations has asserted its right to enforce respect for fundamental freedoms irrespective of domestic jurisdiction; in the case of priests, pastors and laymen of Hungary, and in the case of those who by origin were Indians in South Africa. These cases are known to you; and the moral importance of the decision of the General Assembly cannot be overestimated. In the case of South Africa, it was conceded that those for whom India fought were South African nationals, although Indians by origin. The leader of the South African delegation insisted that the United Nations Assembly was not competent to entertain India's complaint about the treatment of Indians in South Africa. In the great speech which he

made, Mr. Setalvad pointed out that the people in South Africa were subjected to all kinds of deprivation of human rights and fundamental freedoms; and, as I have already said the General Assembly decided that it was competent to inquire into the matter. If South Africa should like to take up the case of the Communists and Communalists in India and complain that they are being deprived of human rights and fundamental freedoms, it will not be open to India to take refuge in Article 7 of the Charter and contend that these are matters essentially within the domestic jurisdiction of India.

Separation of the judiciary from the executive

This, then, is the position in India to-day. I have already said that there is little inclination on the part of the provincial Governments to separate the judiciary from the executive. A recent debate in the Constituent Assembly has increased my fear in this respect. Prof. K.T. Shah's amendment by which he sought the inclusion of a new Article to separate the judiciary from the executive was defeated. Mr. K. M. Munshi, a leader of the Congress, opposed the amendment: and, if he has been correctly reported in the Hindustan Times (May 25, 1949, dsk edition), he said that "the doctrine of separation of powers was now an exploded doctrine." All that I can say is that this theory has been formed somewhat late in the day and only after the Congress has established its dictatorship in the country.

Need for an opposition

I am convinced that those who value freedom should come together without delay and organise a truly democratic party in India to-day. I have little hope that this party will make any impression on the electorate at the next General Election; for high is the prestige of the Congress, and Mahatma Gandhi's name, which the Congress leaders will exploit to the fullest extent, will without doubt carry them to power; but nevertheless an opposition is necessary; and I have no doubt that this party will constitute an effective opposition in the different legislatures. I have every confidence that this Conference will give a lead to the country as to the means to be adopted to fight this new menace in this country. We must never forget that "eternal vigilance is the price of liberty."

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