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CIVIL LIBERTY: THE "TEST OF CIVILIZATION" *

BY P. R. DAS, PRESIDENT, ALL-INDIA CIVIL LIBERTIES COUNCIL

The term "civil liberty" has, of course, a wider connotation than the term "personal liberty," though personal liberty is the most important aspect of civil liberty. The term also includes (1) the right to freedom of speech and expression, (2) the right to assemble peaceably and without arms and (3) the right to form associations or unions.

What is "personal liberty"? The subject is so connected with the conception of the "Rule of Law," an expression made memorable by Prof. Dicey in his "Law of the Constitution," that it is impossible to deal with the one without referring to the other.

"Rule of Law"

The "Rule of Law" 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, as Prof. Dicey explains, 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." It means the absolute supremacy or predominance of regular law—*lex terrae* of Magna Carta—as opposed to the influence of the arbitrary power and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of Government.

There is no particular statute in England which embodies the principle of the "Rule of Law," because the British Constitution is not a written Constitution. It was not created at one stroke. It has grown from precedent to precedent. It is the result of long struggles carried on in the courts of law on behalf of the rights of individuals. "Personal liberty," therefore, means a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of complete justification in a court of law under the ordinary law of the land. This security is provided in England by the celebrated writs of Habeas Corpus and the Habeas Corpus Acts. The writ is an order issued by the court calling upon the person by whom a prisoner is alleged to be kept in confinement to bring such prisoner before the court, to let the court know on what ground the prisoner is confined, and thus to give the court an opportunity of dealing with a prisoner according to law.

The right to the writ of Habeas Corpus, of course, existed at Common Law; but not only the Crown officers but also the judges, at a time when the independence of the judges had not been secured by law, could have recourse to devices to frustrate the writ. Every student of English history knows that there was an intense struggle involving the liberty of the subject and its vindication against arbitrary and unlawful power in the seventeenth century which culminated in the famous constitutional Charters, the Petition of Right, the Bill of Rights and the Act of Settlement, which together with Magna Carta form the four great charters of British liberty.

In 1679 the celebrated Habeas Corpus Act was passed in order to make evasion impossible either for the Crown or for the judges. The Act of 1679 applies to persons imprisoned on a charge of crime. A subsequent Habeas Corpus Act passed in the reign of George III applies to persons deprived of liberty otherwise than on a criminal accusation. These two acts were passed to meet all the devices by which the effect of the Common Law writ could be evaded or invaded.

Habeas Corpus

The whole history of the writ of Habeas Corpus shows what attention was paid by Parliament to modes of procedure by which to secure respect for a legal right. It has been pointed out that the Habeas Corpus Acts are essentially procedure Acts. Their object was to improve the legal mechanism by means of which the acknowledged right to personal freedom may be enforced. The Rule of Law is a rule of Common Law; the Magna Carta did not bring this law into existence; it merely affirmed that it existed from time immemorial. But the great problem for constitutional lawyers was to see how this right could be successfully asserted, and to invent a procedure which

* This article appeared in the Republic Day number of the "Statesman."

would make it impossible for any persons to be detained in prison except in accordance with the law of the land. The Habeas Corpus Acts achieved this end.

The most important point to remember in this connexion is that civil liberty in Great Britain is not based on any fundamental laws which are, like the Constitution of the United States of America, specially entrenched against the normal process of repeal and amendment. There are certainly great constitutional documents like Magna Carta (1295), the Petition of Right (1627), the Bill of Rights (1688) and the Act of Settlement (1700), with which Parliament would hesitate to tamper, because their historical value entitles them to peculiar reverence. There is nothing, however, to prevent Parliament from passing a preventive detention act, though one may assert with confidence that Parliament will not pass such an act except in time of war or rebellion within the realm.

Two Instances

I will quote two striking instances in support of my assertion. It will be remembered that during the last Great War Parliament gave power to the Executive Government to detain persons without trial. Before the war formally came to an end, but after it became quite clear that all danger had passed, Mr. Herbert Morrison, the Home Secretary, decided to release Sir Oswald Mosley and his wife. There was opposition to his proposal, and the Prime Minister had to intervene in the matter. His letters to the Home Secretary published as Appendix F in Volume V of his great work, "The Second Great World War", make interesting reading. These letters ought to be read by everyone interested in civil liberty. (They were published in the BULLETIN at pp. ii: 172–3.)

In his letter dated Nov. 21, 1943, he pointed out that "the power of the Executive to cast a man into prison without formulating any charge known to the law.... .... is in the highest degree odious, and is the foundation of all totalitarian Governments, whether Nazi or Communist. It is only when extreme danger to the State can be pleaded that this power may be temporarily assumed by the Executive, and even so its working must be interpreted with the utmost vigilance by a Free Parliament. .... Extraordinary powers assumed by the Executive with the consent of Parliament in emergencies should be yielded up when and as the emergency declines. Nothing can be more abhorrent to democracy than to imprison a person or keep him in prison because he is unpopular." And he added, "This is really the test of civilization."

In his letter dated Nov. 25, 1943, he says as follows:

> "These powers were conferred on us by Parliament because of the dire peril of the State, and we have to administer them in accordance with the principles of humanity.... On no account should we lend any countenance to the totalitarian idea of the right of the Executive to lock up its political opponents or unpopular people."

Attlee's Reply

The next instance I have in mind is that which is furnished by Mr. Attlee's reply to a question put by Sir Waldron Smithers in Parliament at a time when there were labour disputes of a serious kind in England and there were acts of sabotage on a wide scale. Mr. Attlee was asked to introduce anti-Communist legislation on the lines of that in India and France. He refused to do so; and 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."

It is obvious that the democratic conscience of England will not permit preventive detention in times of peace. "In the Constitution of this country," observed Lord Wright in Liversidge *v.* Anderson, "there are no guaranteed or absolute rights; the safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved."

Liberty of Press

So much for personal liberty in Great Britain.

So far as the right to freedom of speech and expression is concerned—and the liberty of the Press falls within this category—it may be said at once that in England and America, this right is subject only to the law of Libel. "The liberty of the Press," says Lord Mansfield in Rex *v.* Dean of St. Asaph, "consists in printing without any previous licence subject to the consequences of law." "The Law of England," says Lord Ellenborough, in Rex *v.* Cobett, "is a law of liberty and consistently with this liberty we have not what is called an imprimatur; there is no such preliminary licence necessary; but if a man publishes a paper, he is exposed to the penal consequences, as he is in every other act, if it is illegal."

These dicta show that the liberty of the Press is a mere application of the Rule of Law—of the general principle that no man is punishable except for a distinct breach of the law established in the ordinary manner in the ordinary courts of law. This principle is wholly inconsistent with any right on the part of the Government to require the Press to take out a licence or of the right to impose censorship and with the further right to demand a preliminary deposit of a certain sum of money as a security for good behaviour and with the right to forfeit the security in certain circumstances. As it has been pointed out, such checks and preventive measures are inconsistent with the pervading principle of English Law, that men are to be interfered with and punished, not because they may break the law, but only when they have committed some definite assignable legal offence.

The right to assemble peaceably and without arms—that is to say the right to hold public meetings—stands on the same footing. The subject enjoys no statutory or gua-

ranteed right in this respect and the problem has to be solved by the application of the Rule of Law. The right of assembling is nothing more than a result of the view taken by the court as to individual liberty of person and individual liberty of speech. If A, B, C, D and hundreds of others have the liberty to say whatever he or she likes so long as he or she does not say anything which brings them, or any of them, within the mischief of the general law, they must have the right to assemble and say whatever they like, subject to the law of the land. Interference, therefore, with a lawful meeting is not an invasion of a public right, but an attack upon the individual right of A or B and must generally resolve itself into a number of assaults upon definite persons, members of the meeting. This principle was established in the case of Beatty *v.* Gillbanks (L. R. 9 Q. B. D. 308).

So far as the right to form association or union is concerned, the position is exactly the same. The test is whether association or union has been formed for a lawful or unlawful purpose.

To sum up : the right to civil liberty in Great Britain is in no sense a guaranteed right, but rests on the good sense of the people. It is a Common Law right ; but as British Parliament is a sovereing body and is subject to no constitutional limitation, it may legislate to take away those rights. But one may assert with confidence that the democratic conscience of England will rise in revolt if any attempt is made by Parliament to deprive the subject of his civil liberty except when the country is at war or is in dire peril. As Sir Winston Churchill pointed out, " this is really the test of civilization. "

U. S. A. Constitution

PROPOSED CURB ON THE PRESIDENT'S TREATY POWER

AS AFFECTING HUMAN RIGHTS AND OTHER TREATIES

I.—ORIGINS OF THE BRICKER AMENDMENT

The proposal, introduced in the Senate by Senator John W. Bricker of Ohio, for amending the Constitution so as to impose crippling limitations on the President's (and the Senate's) treaty-making power is a proposal in which all persons of whatever country, who are interested in civil liberties, should take a profound interest. For the proposal, though it is in the name of Mr. Bricker who is himself one of the most prominent of the remaining isolationists in the United States, has really been initiated by the reactionary lawyers in the American Bar Association, who, alarmed by the probability that the United States would sign the Human Rights Treaties of the U. N. and other international agreements, put up Mr. Bricker to propose a bill which, if carried, would in effect make all treaties subject to the same constitutional restraints that limit the application of statutory law. Mr. Bricker wrote, in defending his bill :

> So long as the treaty-making power was confined to its traditional function, the dangers attached to that power might have been regarded as remote. But after the United Nations was formed, the treaty power was put to a revolutionary use. Instead of using treaties to regulate external relationships between sovereign nations, the U. N. and many of its specialised agencies seized the treaty power as an instrument of legislation on matters of purely domestic concern.

He and the American Bar Association are so sovereignty-conscious that they would not tolerate any outside body like the U. N. to interfere in the least with the policies of the United States by means of treaties although there would be no compulsion on the United States to adhere to any of these treaties and accept any of the obligations imposed by them. Mr. Bricker wrote scathingly of the United Nations that " reactionary one-worlders were trying to vest legislative powers in . . . non-elected representatives of the U. N. Socialist-Communist majority." Acting on this hypothesis, the Bar Association formally opposed ratification by the U. S. of the Genocide Convention adopted by the U. N. in 1949 on the ground that it represented an intrusion into the domestic jurisdiction, because under the convention " an International Criminal Court would permit American citizens to be tried abroad for crimes committed in the United States. " The U. N. Declaration of Human Rights of 1948 and the two Covenants based thereon, which are yet in the making, are the chief causes of the Bricker amendment. The sponsors of this amendment were particularly exercised when Mr. John P. Humphrey, Director of the Division of Human Rights of the U. N., wrote :

> What is now being proposed (in the Covenants) is, in effect, the creation of some kind of supra-national supervision of . . . relationships between the state and its citizens.

How could Mr. Bricker and men of his ilk bear with this kind of outside supervision? They therefore decided to press for this prohibition, among others, that " no treaty shall authorize or permit any international organization to supervise, control or adjudicate rights of citizens of the United States enumerated in the Constitution or any other matter essentially within the domestic jurisdiction of the United States. " (This prohibition is now embodied in sec. 3 of the revised version of the Bricker bill.) They also insisted on an amendment of the treaty clause of Art. VI of the U. S. Constitution which states that a treaty is the "supreme law of the land, . . . anything in

the constitution or laws of any state to the contrary notwithstanding." (This is now being given effect to in sec. 2 in the Bricker bill in a most drastic manner by virtually giving to the states the power of nullifying treaties impinging on their local jurisdiction.)

The bill has thus extremely far-reaching results. It would indeed paralyse the conduct of all foreign relations and is thus a grave matter for politicians. But because it would slam the door on Human Rights Treaties and similar other international agreements, civil liberties organizations must feel special concern about it.

II.—SUPREMACY OF TREATIES

Having stated the importance of the provisions of the Bricker amendment to students of civil liberties problems, we shall now analyse the salient features of the amendment. Sec. 1 reads :

> A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

This section is really declaratory of the present state of constitutional law; it would effect no substantial change in the Constitution. But its inclusion in the amendment has the effect of producing a wholly wrong impression on the public mind as if in the United States the provisions of any treaty made with foreign nations override the Constitution itself. However, this is not true at all; the Constitution stands above all treaties and any provisions of the latter which are inconsistent with the Constitution will automatically have to give way. But because of Art. VI, sec. 2, some people have formed the impression that a treaty is superior even to the Constitution itself; for the Article says :

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

This "supremacy" clause have led many people to believe (and we find that in India this belief is very widespread) that a treaty has an even higher standing than the Constitution. But that is an interpretation which is not supported by any writer on the Constitution or by any judge. The true interpretation is that though the scope of the treaty-making power is very extensive, a treaty is still subject to the provisions of the Constitution. For instance, Burdick says in "The Law of the American Constitution":

> It also seems clear that the national Government cannot do by means of a treaty what it is expressly forbidden in the Constitution to do at all. Thus it would seem that it could not by treaty abolish the writ of habeas corpus, or institute bills of attainder, or levy a capitation tax except in proportion to the census, or tax exports from a state, or give preference to the ports of one state over those of another, or provide for titles of nobility. Nor could it by treaty establish a state church, or provide for promiscuous searches, or do away with indictments or jury-trials in criminal cases, or do any of the things forbidden in the first amendments.

This view has found expression in a number of Supreme Court judgments. For example, in Doe *v.* Braden, 16 How. 635 (1853), the Court declared :

> The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States.

In the Cherokee Tobacco case, Boudinot *v.* United States, 11 Wall. 616 (1871), the Court observed :

> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument.

In De Geofroy *v.* Riggs, 133 U. S. 258 (1890), the Court said :

> It would not be contended that it (the treaty power) extends so far as to authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter without its consent.

No treaty has yet, in its history of 165 years, been held void by the Supreme Court; but that is only because the President would never think of negotiating and the Senate would never ratify a treaty any provision of which contravenes the fundamental principles of the Constitution. There is however no reason to believe that the Supreme Court would hesitate for a moment in declaring such a provision unconstitutional, as was indeed indicated in Thomas *v.* Gay, 169 U. S. 264 (1898).

If then a treaty is as subservient as ordinary legislation to the guarantees of the Constitution, what does the "supremacy" clause mean? It only means that treaties are on the same level (in respect to internal law) as an act of legislation. Both are declared by the clause to be the supreme law of the land, but both are equally liable to be upset by the Supreme Court if repugnant to the provisions of the Constitution. In The Head Money Cases, Edye *v.* Robertson, 112 U. S. 580 (1884), the Court plainly declared that "a treaty with a foreign nation can become the subject of judicial cognizance in the courts of this country." From the equality of a treaty with a statute follows the consequence that a treaty can change a prior act Congress, and an act of Congress can change a prior treaty. It was said in Hijo *v.* United States, 194 U. S. 315 (1904) : "It is well settled that in case of a conflict between an act of Congress and a treaty—each being equally the supreme law of the land—the one last in date must prevail."

III.—THE " WHICH CLAUSE "

Sec. 2 of the Bricker bill reads as follows :

> A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty.

The Constitution at present vests in the President the power to make treaties " with the advice and consent of the Senate, " which means that a treaty can only be ratified by a vote of two-thirds of the Senators present. In the case of treaties that are self-executing nothing further need be done to give them effect. But in the case of other treaties supplementary legislation is required in order to implement them. Mr. Bricker's proposal means that no treaty would be automatically operative and that all treaties would have to be followed by the necessary enabling legislation. A treaty would be nullified as internal law unless it is re-enacted as a statute by both Houses of Congress. This would be an exceedingly cumbersome process even in normal times, unnecessarily delaying the making of treaties, and must be utterly impracticable in an emergency requiring prompt action to be taken. But this is not the most formidable objection to it. The fatal defect of the scheme is that it would allow a treaty to be re-enacted as a statute only if the subject fell within the legislative jurisdiction of Congress. That is to say, if a treaty affects any of the subjects which are within the jurisdiction of states, Congress would be constitutionally incompetent to pass the statute which under the proposal would be required to make the treaty effective, unless the treaty had the approval of the states' legislatures.

This would be a revolutionary change ; it would render the making of treaties not only difficult but well-nigh impossible. For there is hardly any treaty which does not affect any part of the legislative area which the Constitution has reserved to the states. And it is in view of this fact that the Constitution has vested the whole treay-making power in the national Government and has provided in the " supremacy " clause of Art. VI that " the judges in every state shall be bound (by the treaties ratified by the Senate), anything in the constitution or laws of any state to the contrary notwithstanding. " The states can exercise their influence on treaties only through their representatives in the Senate, but as states they have no locus standi in the making of treaties. The necessary consequence of this supremacy is that a treaty may invade the field of reserved powers of the states even though an act of Congress passed in the ordinary way cannot have that effect. Mr. Elihu Root has thus described the constitutional position :

> The treaty-making power is not distributed ; it is all vested in the national government ; no part of it is vested in or reserved to the states. In international affairs there are no states ; there is but one nation, acting in direct relation to and representative of every citizen in every state. Every treaty made under the authority of the United States is made by the national government as the direct and sole representative of every citizen of the United States. (There can of course be a colourable exercise of the treaty-making power.) But so far as the real exercise of the power goes, there can be no question of state rights, because the Constitution itself, in the most explicit terms, has precluded the existence of any such question.

It follows that state constitutions and state laws must give way to the stipulations contained in a treaty entered into by the President and Senate, and the Supreme Court has so decided in a number of cases, the first in the series being Ware *v.* Hylton, 3 Dall. 199 (1797), in which Justice Chase said in most unambiguous terms :

> A treaty can totally annihilate any part of the constitution of any of the individual states that is contrary to the treaty. . . . A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate ?

That a treaty can trench upon the states' legislative field whereas ordinary legislation passed by Congress cannot do so was strikingly demonstrated by the decision given by Justice Holmes in Missouri *v.* Holland, 252 U. S 416 (1920). In 1913 Congress passed a law regulating the shooting of migratory birds. Two federal courts in 1914-15 held the law unconstitutional on the ground that inasmuch as the statute provided for federal instead of state control, it exceeded the powers of Congress as listed in the Constitution. The statute exceeded the constitutional power of the federal Government, because the states retain the police power over their internal affairs which as sovereign nations they possessed prior to the adoption of the Constitution. The Executive then entered into a treaty with Canada and Great Britain which depended for enforcement on this federal control. Congress thereafter re-passed the earlier measure and the Supreme Court sustained it in a unanimous decision. " The nub of this finding was that a ratified treaty which is given the status of a ' supreme law of the land ' by the Constitution, can enlarge the legislative powers of Congress beyond those specified in that document. In other words, the Court concluded that conflicts between the section that limits these powers and the section that makes treaties the supreme law of the land can be resolved in favour of the latter if legislative expansion is required for a ' proper and necessary ' law to put a treaty in operation. ". Thus Congress was deemed to have acquired a new power when the treaty became the " supreme law of the land. "

It has been pointed out by the Administration that twelve out of the twenty-three treaties approved last year by the Senate involved subjects which might trespass on the domain of states' rights and would have been impossible to negotiate under the Bricker amendment " unless

each of the forty-eight states separately agreed to the treaty," and that such a multiple agreement "would be impossible of accomplishment." It would result in the substitution, in contravention of the clear intent of the Constitution, of the discordant voices of forty-eight separate state governments for the single voice of the national government.

Even under the confederation which was in force before the present Constitution was adopted the Articles of Confederation provided that "the United States in Congress assembled (had)... the sole and exclusive right and power... of entering into treaties and alliances." But the trouble with this Article was that the national government formed at the time had no power to make state governments enforce the treaty obligations which had been undertaken. The Bricker amendment would be a reversion to the state of things which existed then and to remedy which the Constitution of 1787 was adopted.

IV.—U. N. TREATIES

In section 3 of the Bricker amendment it is provided that:

> Congress shall have power to regulate all Executive agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this Article.

This means that Executive agreements shall become effective as internal law only through positive action by Congress, and that again subject to the "which clause" giving the individuals states a veto over the agreements. This section is mainly directed against the United States acceding to U. N. Treaties like the Human Rights Covenants and the Genocide Convention. But even in regard to Executive agreements which it is within the power of the President to bring about by himself, it is clear that that power must reside in the President in cases where speed and flexibility are of the utmost importanc e As a committee of eminent lawyers has well put it:

> Under such confinements (of sec. 3) the President would be demoted from the spearhead of our foreign policy to only a figurehead. Our country would find itself in a position where there would be no one who could act in foreign affairs on matters of urgency and dispatch.

And the American President, it should be remembered is not merely the head of the State but also Premier and Commander of the military forces.

NOTES

Censorship of Motion Pictures

OBJECTIONS OF CENSORS TOO VAGUE

Following the memorable decision in the "Miracle" case, Burstyn *v.* Wilson, 343 U. S. 495 (1952) (vide p. ii: 136 of the BULLETIN), in which the Supreme Court of the United States, overruling the earlier decisions to the contrary, declared that motion pictures were within the ambit of the constitutional protection of free speech and press, even though their production be a business conducted for profit, the Court on 18th January reversed the decisions of the supreme courts of New York and Ohio and held that the ban imposed by censors on a French film "La Ronde" and on "M" respectively was unconstitutional. The objection to "La Ronde" was that it depicted amorous adventures in old Vienna and was immoral and the objection to "M" was that it was based on murder and gangsterism and that it tended to incite to crime.

The "Miracle" had been barred by the censors from public exhibition on the ground that the picture was "sacrilegious," and the Supreme Court ruled that the term "sacrilegious," as used in the New York statute, was unconstitutionally vague. Similarly, in the instant cases, the Court held that the laws under which New York and Ohio had refused licenses to show the films did not provide definite standards of what constituted an "immoral" picture or one that "incited" to crime and they therefore violated the constitutional guarantees of free speech and press.

In the 1952 case the question was left open whether a state might establish a system for the licensing of motion pictures and refuse a license on account of the contents of a picture under a clearly drawn statute. In the same way the present decisions have also left the question open. In these cases the Court was invited to rule that all censorship of motion pictures prior to public exhibition was unconstitutional; but the Court did not go so far, obviously because it is averse to laying down absolute rules where it is unnecessary to decide any particular case, and presumably because it would uphold a ban on patently obscene pictures. Nevertheless, Justice Douglas indicated in a concurring opinion (and Justice Black joined him in this) that he would outlaw all prior censorship of movies. He wrote:

> The argument of Ohio and New York that the Government may establish censorship over moving pictures is one that I cannot accept. The First and the Fourteenth Amendments say that Congress and the states shall make "no law" that abridges freedom of speech or of the press.
>
> In order to sanction a system of censorship I would have to say that "no law" does not mean what it says, that "no law" has to be qualified to mean "some" laws. I cannot take that step.
>
> In this nation every writer, actor, producer, no matter what medium of expression he may use, should be freed from the censor.

In the "Miracle" case too Justice Reed, while concurring in the Court's decision that the film was not of a character that the First Amendment permitted a state to refuse a licence for its exhibition, had intimated that the issue of a state establishing a system of the licensing

of motion pictures was "not foreclosed" by the Court's decision in that particular case.

Although the issue of pre-censorship as a matter of principle has thus been left undecided, it is felt that the present ruling meant the "death knell" of state censorship on such grounds as immorality and criminal incitement and that state censors would hereafter be extremely wary of refusing licenses on these grounds. Moreover, it is felt that since pictures that could be declared obscene would hardly be submitted to the censors, there would now remain very few grounds upon which boards of censorship might exclude movies from public view and that therefore practically all restraints on the showing of pictures would be removed.

Aliens cannot be Denied Exit

Without a Full and Fair Hearing

An important decision defining the rights of aliens has been handed down by the U. S. Court of Appeals in the District of Columbia. It holds that under the Passport Act an alien is entitled to a full and fair hearing before permission to leave the country can be denied him.

A Chinese student, Han-Lea Mae by name, went to the U. S. A. in 1947 as a temporary visitor under the sponsorship of the then Nationalist Government of China. He studied at the University of California for four years and thereafter he wished to return to his native land.

He was then called in to talk to an Immigration Inspector, subsequent to which he was denied permission to leave the country because he had "scientific knowledge and training" which "might be utilized by Communist China." During his interrogation he was not advised of his right to have counsel.

The refusal was made under the McCarran-Walter Immigration Act, which continues the emergency powers of the Passport Act to deny exits of aliens during a declared state of emergency. A U. S. District Court Judge sustained the action.

In reversing this decision, the Court of Appeals affirmed Mae's right to seek the fair hearing guaranteed under the Fifth Amendment. The court referred to a past Supreme Court decision that an alien is so entitled if he is a "lawful permanent resident" of the U. S. Said the Court of Appeals :

> We do not think that the Court intended, by using the word "permanent"... to hold or imply that a resident alien, in order to be entitled to Fifth Amendment protection, must intend to spend his life here. The statement was carefully worded to fit the case in hand and was not intended, we think, to limit constitutional protection to an alien whose residence is permanent in the strictest sense of the word.

Un-American Activities Committee

And the First Amendment

A surprise move was taken by two members of the staff of the Harvard University, Professors Wendell H. Furry and Leon J. Kamin, when they appeared on 15th January before Senator McCarthy, sitting as a one-man sub-committee of the House Un-American Activities Committee engaged in questioning people about Communist affiliations.

Heretofore most of the persons summoned by the committee took refuge behind the Fifth Amendment's privilege against self-incrimination and just refused to answer the questions put to them. They did so mainly because it was thought that the Supreme Court, in refusing to review the lower court's ruling in the "Hollywood Ten" case of 1948 that the questions put to the screen-writers were proper, was of the view that refusal to answer such questions could not be covered by the First Amendment invoked by the screen-writers.

Professors Furry and Kamin too had previously taken their stand, when they appeared before the larger committee, on the Fifth Amendment, and, like others who did so, they were not cited for contempt. But now they waived the Fifth Amendment and declared they were now willing to discuss their party activities. Both admitted that they were at one time members of the Communist Party which they had since left, but refused to answer when asked if there were any other Communists on the staff of the University. Professor Furry went further and said about half a dozen Communists were associated with him but refused to name them when ordered to do so by Senator McCarthy. He said :

> I do not think that my duty to my country requires me to become a political informer. I am not seeking to protect the guilty from prosecution; I wish merely to secure the innocent from persecution.

Both Professors said that they would disclose names only if convinced that the person involved was guilty of a substantive crime—such as espionage, treason or sabotage —but that they would not do so in "political cases."

Senator McCarthy threatened to send them to jail for contempt, but they dared him to do his worst.

Individual Liberty and National Security

"Reds' Strongest Foe is Discussion, Not Taboos"

In connection with the bi-centennial of the Columbia University a conference of scholars of many countries was held, at which the problem of "the right to knowledge" in the light of the security requirements of the community was discussed for three days last month, and at this conference Sir Hartley Shawcross, former Attorney General of the United Kingdom, made a notable contribution in which he related how his country dealt with the menace of communism which faces most of the countries. He referred in his paper to the "evils and fallacies of communism. and

stated that Englishmen felt that the best way of demonstrating such weaknesses was not by taboos that drove communism underground but by objective examination and discussion.

Summing up the general attitude in Britain, Sir Hartley said that in the face of the Communist conspiracy " we have refused to allow ourselves to be stampeded by fear," that all parties agree that repressive measures would make "the danger to our way of life the greater," and that, " on the whole, the community accepts the fact that if we claim freedom to propagate the ideas with which we agree, we must grant others freedom to propagate ideas which we detest."

" Broadly, we would say," he observed, " that indirect propaganda can best be dealt with by an informed and enlightened public opinion; espionage and sabotage only by Government agencies—and by no others—in accordance with the rule of law."

The best way to combat the insidious attack of the cold war, he said, " is to have " a people " with light of knowledge in their eyes," undivided by fears or suspicions of each other, but united in their love of liberty. " He added: " Courage, truth, dignity and tolerance: these are the weapons with which we fight. "

As to the employment of Communists in the civil service, he said:

> We do not deny a man's right to adhere to the Communist Party if he chooses. But we claim the right to choose whom to employ in positions involving national security.

And the thing that is generally done to civil servants with either Communist or Fascist ties is to transfer such men who are proved after screening to have such ties to jobs which do not involve much security risk. He stated that out of a total of more than a million civil servants only 148 were suspended after special investigation: of those suspended 23 were reinstated after inquiry showed them to be " perfectly loyal and reliable;" 69 were transferred to non-secret work; 22 were dismissed; and 19 resigned. He thus emphasized that while the number of employees inovlved was " comparatively small " in relation to the entire body of civil servants, " nonetheless, in the cases where security risks is involved, there is a thorough probe and if at the end there is doubt the man is transferred or dismissed."

Father J. Connell of the Catholic University of America said " a just and reasonable mean must be observed" between individual liberty and national security, both important in themselves. " If the first is overemphasized, liberty degenerates into license. If the second is stressed too much, authority becomes tyranny, and the way is opened to totalitarianism."

Fair Hearing Denied because of Vague Charges

VIOLATION OF DUE PROCESS OF LAW

A point somewhat like that which often arises in connexion with habeas corpus petitions, viz., that the grounds of detention are vague and not sufficiently specific, arose in the Appeal Court in San Fransisco (U. S. A.) in a case in which three merchant seamen were denied clearance under the Coast Guard security programme. This programme repuires merchant seamen to be advised of the charges against them, but the rule is not observed in spirit, because in practice the men are told only that the charge against them is affiliation with or sympathy with a subversive or disloyal organization, and nothing more. The three men concerned in this case asked for further information at the hearings as to when and where they were found to be associated with Communistic activities, but such information was refused. The Federal District Court thereupon dismised the indictment on the ground that the seamen concerned had not been given a fair hearing.

From this decision an appeal was made to the Court of Appeals, and this Court in a unanimous opinion affirmed the decision below, holding that the Coast Guard procedure resulting in failure adequately to inform the seamen of the charges against them violated due process of law. The Court said;

> No good reason appears why the Commandant cannot apprize the seamen of the basis for the initiate determination with such specificity as to afford him notice and an opportunity to marshall evidence in his behalf; and the same is true of the conduct of the examination before the appeal board.
>
> It is not impracticable, and we are unable to believe that it would be hurtful to the security programme, to inform the seamen of the *contents* of the showing against them. True, the doing of this is time-consuming and requires effort and the taking of pains. The regulations provide that every effort be made to protect the interests of the U. S. and the appellant.

Another " Anti-Subversive " Bill

" CATCHING SUBVERSION IN ACTION "

The legislature of the state of Ohio (U. S. A.) recently passed an " anti-subversive " bill, making it a crime for a person knowingly to assist in the formation of, contribute to, or become a member of an organization whose object is to " advocate, advise, or teach by any means " the overthrow of the government, and which is *subsequently* found to be subversive.

The Governor vetoed the bill, pointing out in his veto message that the Ohio Un-American Activities Commission had been functioning over two years and had not brought a single person, guilty of sedition to justice, and also pointing out that this situation obtained in some 32 states with similar laws. The veto of the Governor was however overridden by the state legislature.

The Governor must have vetoed the bill because it takes the position, as the Cleveland Civil Liberties Union said in protesting against it, that "mere advocacy or teaching, unaccompanied by any 'clear and present danger' of a resulting illegal act is criminal." The Union charged that "what appears on its face to be an innocent weapon with which to catch subversion in action has dangerous potential as a whip to lash criticism into silence and dissent into conformity." The Union attacked the bill on the ground that it clashed with the traditional conception of the First Amendment.

THE PRESS ACT, 1951

A Calcutta Paper Ordered to Deposit Security

In the first case in Calcutta under the Press Act Mr. S. Geelany, editor, printer and publisher of "Spotlights," an English weekly, was ordered on 30th January by the Chief Presidency Magistrate of Calcutta, sitting as a Sessions Judge, to deposit Rs. 5,000 as security in connection with the publication of three articles objected to as containing grossly indecent and scurrilous words and statements concerning incidents in Iran and Iraq.

One of the articles called General Zahedi, the present Prime Minister of Iran, an apostate and a heretic. The Judge considered that it was grossly indecent and abusive to call a Muslim an apostate or a heretic. He remarked that it was not the intention of the publisher which should be taken into consideration. The effect of the words used was alone to be judged. Purity of motive was no excuse for publication of grossly indecent or scurrilous matters.

Another article stated that King Feisal of Iraq was determined to marry Princess Shahnaz, daughter of the Shah of Iran. The Judge characterised the language used in this article as "grossly abusive and scurrilous" and observed: "It is baffling in the (extreme?) to find any context to which such things may in the remotest manner be referred to."

Press Advisory Committee Not Consulted

The Judge also referred to the contention of the respondent that there was a convention established between the Government of Bengal and the Bengal Press Advisory Committee some time in 1940 or so during the last world war that before launching any prosecution with regard to any writing that appeared in any newspaper in Bengal, the Press Advisory Committee would be consulted so that its opinion might be available. In the present case, the opinion of the Press Advisory Committee was not sought before launching the proceeding. It was contended on behalf of the respondent that the Government having committed a breach of the convention, the present complaint was not according to law. The Judge observed that he was not concerned in these proceedings with what the convention, if any, was, nor with its alleged breach, but only with the legality of the complaint as filed before him. The Press (Objectionable Matters) Act he pointed out did not impose any restrictions on the making of the complaint except those appearing in sections 7 and 16 of the Act. In the circumstances, the convention or the alleged breach of it had nothing to do with the legality of the present complaint made to him.

In conclusion, the Judge observed: "Looking to the fact that high personalities in foreign countries, with which India has friendly relations, have been attacked in grossly indecent and scurrilous language, it does not appear to me that the security deposit of Rs. 5,000 would be unreasonably heavy."

The paper reporting this case does not state what the opinion of the jury was as to the character of the articles, nor indeed that the matter was referred to a jury at all.

MADRAS POLICE ACT

Ban on Publication of Racing News

Declared Invalid as Infringing Freedom of Expression

The Madras High Court on 27th January held invalid sec. 49 A of the Madras City Police Act which makes it a crime to publish a book or leaflet, "containing news of acceptance for horse races or purporting to give tips, which is likely to aid or facilitate wagering or betting on horse races." From this prohibition is exempted publication of news relating to horse races outside the State of Madras and publication of similar news inside the State which is solely distributed within the precincts of a race club.

Holding that this Act was ultra vires of the fundamental rights guaranteed under Art. (19 (1) (a) of the Constitution, Mr. Justice Basheer Ahmed Sayeed, said that the Act contained several classifications which would be "a derogation of the rights secured to citizens under the Constitution."

His Lordship said that, in the first instance, a differentiation had been made between races within the State of Madras and areas outside. Again, a distinction had been drawn between news published within the race course premises and the news published outside it.

The Judge, accordingly, quashed the proceedings before the Third Presidency Magistrate, Madras, against one Venugopal, who was charged with keeping for sale a publication alleged to come under the purview of section 49 A and set aside the conviction and sentence imposed by the Chief Presidency Magistrate, Madras, on three individuals for an offence alleged under the same section.

It must be stated, the Judge observed, that the discrimination that was evident in section 49 A of the City Police Act was not based on any reasonable classification, much less could it be said that any classification, as was evidenced by that section, had any regard to the object underlying that section. "I must hold that Section 49 A of the City Police Act offends Article 14 of the Constitution."

Mr. Justice Basheer Ahmed Sayeed said it was not understandable how the publication of news about races outside Madras State, permissible under the law, did not facilitate wagering or betting so long as these newspapers were read by persons interested in horse races. It was not intelligible, he added, how the object underlying the section was sought to be achieved by merely prohibiting publication of information about horses and horse races outside the race club enclosure and permitting it within the club precincts.

A further distinction was sought to be made between news exclusively devoted to races and news which was not so exclusively devoted. It was not explicable how the object of discouraging betting on horse races was sought to be achieved by this process of differentiation.

It was also not intelligible, the Judge said, how the object of prevention of aids or facilities to betting or wagering by the publication of news or information was achieved by allowing newspapers evidently of much larger circulation which catered to such needs and by preventing the publication of the very same identical news in smaller circulation papers.

JURISDICTION FOR WRITS

Scope of Art. 226

PUNJAB HIGH COURT'S VIEW NOT SUSTAINED

The Constitution Bench of the Supreme Court on 22nd January rejected the appeals by K. S. Rashid and Son of U. P. (a partnership firm) against the judgment of the Punjab High Court refusing to quash the proceedings commenced against them by the Income-tax Investigation Commission for evasion.

The Bench, however, held that the view of the Punjab High Court, that it had no jurisdiction to issue a writ in the present case, could not be sustained.

The High Court had held that the petitioners being assessees belonging to U. P., their assessments were to be made by the Income-tax Commissioner of that State and the mere fact that the location of the Investigation Commission was in Delhi would not confer jurisdiction upon it to issue writs under Article 226 of the Constitution.

The appeals were a sequel to a reference by the Central Government on December 31, 1947, of the cases of the firm as well as individuals constituting it, to the Income-tax Investigation Commission for inquiry and report under section 5 of the Income-tax Investigation Act of 1947, on the ground that there had been substantial evasion.

Delivering judgment, Mr. Justice Mukherjea said the line of reasoning of the High Court on the question of jurisdiction did not appear to be proper, and added:

> It is to be noted, first, that prior to the commencement of the Constitution, power to issue prerogative writs could be exercised in India only by the High Courts of Calcutta, Madras and Bombay and that also within very rigid and defined limits. Writs could be issued only to the extent that the power in that respect was not taken away by Codes of Civil and Criminal Procedure and they should be directed only to persons and authorities within the original jurisdiction of these High Courts.
>
> The Constitution introduced a fundamental change in this respect. While Article 225 preserves to existing High Courts powers of jurisdiction which they had previously, Article 226 confers on all the High Courts new and very wide powers in the matter of issuing writs.
>
> There are only two limitations placed upon the exercise of these powers by the High Court under Article 226; one is that the power is to be exercised "throughout the teritories in relation to which it exercises jurisdiction," that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. The other limitation is that the person or authority to whom the High Court is empowered to issue writs "must be within those territories," and this implies that they must be amenable to its jurisdiction either by residence or location within those territories. It is with reference to these two conditions thus mentioned that the jurisdiction of the High Court to issue writs under Article 226 is to be determined. ... In our opinion, therefore, the first contention raised by Dr. Tek Chand must be accepted as sound and the view taken by the High Court on the jurisdiction cannot be sustained.

However, dismissing the appeals, Mr. Justice Mukherjea observed: "The appellants have already availed themselves of the remedy provided for under section 8 (5) of the Investigation Commission Act and reference has been made to the High Court of Allahabad in terms of that provision which is awaiting decision. In this situation we think it will not be proper to allow the appellants to invoke the discretionary jurisdiction under Article 226 at the present stage, and on this ground alone we would refuse to interfere with the orders made by the High Court."

COURT OF WARDS ACT

Clauses of Rajasthan Act Declared Void

SUBJECTIVE DETERMINATION OF JAGIRDARS' UNFITNESS

A full bench of the Rajasthan High Court, presided over by the Chief Justice Mr. K. N. Wanchoo, on 18th January held the provisions of section 8 (1) (i) (c), (ii), (iii) and (iv) of the Rajasthan Court of Wards Act, 1951, to be inconsistent with the provisions of the Article 19 (1) (f) and not saved by Article 19 (5) of Constitution.

The provisions of section 9 (3) of the said Act were held to be valid as they were reasonable restrictions within the meaning of Article 19 (5) of the Constitution.

The judgment was on a reference to the full bench by a division bench on the writ petition filed by Rao Bhagwatsingh, Jagirdar of Dooni, under Article 226 of the Con-

stitution against an inquiry being held by the Collector of Jaipur under section 92 of the Act on the allegations that the Rao was extravagant and was not giving maintenance allowance to the dependants of the Thikana (estate).

Section 8 (1) provided that landholders would be deemed to be disqualified to manage their estates when they were declared by the Government to be incapable of managing or unfit to manage their estates because of having been convicted of a non-bailable offence, or being of vicious habits or bad character, or having entered upon a course of extravagance, or failing without sufficient reason to discharge their debts and liabilities, or because their mismanagement had caused general discontent among the tenants. Their Lordships said:

> The three impugned clauses (ii), (iii) and (iv) of section 8 (1) provide the criteria on which the Government makes a declaration as to the unfitness of a landholder to manage his estate and deprives him of the possession of the property. The criteria which have been provided by these clauses for making a declaration are, in our opinion, so vague and elusive and liable to such different interpretation by different persons that it is merely left at the pleasure of the executive Government to decide in a particular case whether the criteria are satisfied.

The court referred in this connexion to the U. P. Court of Wards Act in which the same provision had been made, but in the Rajasthan Court of Wards Act, it said, everything had been left to the subjective determination of the Government.

Their Lordships were of the opinion that a law which made such vague provisions, the application of which depended entirely on the subjective determination of the Executive Government, could not possibly be called a reasonable restriction on the fundamental right of the applicant to hold property.

Referring to the contention that the object of the Act was to protect persons incapable of managing their own affairs, to prevent the dissipation of the property and to enable land-revenue to be more easily and more certainly collected, Their Lordships said that in Rajasthan State grants were inalienable and the revenue would in any case be collected and therefore there could be no dissipation or splitting up of the property. The only object therefore that remained was to protect persons incapable of managing their own affairs.

> In the present context of things when we find legislation in one State after another abolishing zamindari and when we also find that in this State too an Act has been passed for the resumption of jagir estates, the question may well arise whether it is in the interest of the general public that such jagirdars should be protected against whom the impugned clause will apply.
>
> As the Jagirdari Resumption Act is already on the statute book, it is hardly possible to say that the provisions contained in the impugned clauses are in the interest of the general public.
>
> These three clauses, therefore, in our opinion would fall also on the ground that the restrictions contained in them, besides being not reasonable, are not in the interests of the general public.

Section 8(2) provided that no declaration under clause (c) of sub-clause 1 would be made until a landholder had been furnished with a detailed statement of the grounds on which it was proposed to disqualify him, and he had an opportunity of showing cause why such declaration should not be made. It was urged on behalf of the Government that this provision sufficiently protected the interests of the landholder and therefore the provisions of the three impugned clauses must be held reasonable.

Their Lordships rejected this argument because the fact that the jagirdar was furnished with a detailed statement of the grounds and given an opportunity of showing cause did not lessen the subjective nature of the determination by the Executive Government of his fitness to possess property.

Their Lordships were of opinion that section 9 (3), which provided disabilities of section 37 pending inquiry by the Collector, as it stood, was a reasonable provision and was saved by Article 19 (5). There was no reason to hold that simply because a time-limit had not been provided within which an inquiry under section 9 (1) would be completed, section 9 (3) was also hit by Article 19 (1) (f) and was not saved by Article 19 (5). The judgment concluded:

> We may indicate, however, that it will not be possible to hold that the Act is discriminatory, for there is basis for reasonable classification therein.

ZAMINDARI ABOLITION ACTS

M. B. Abolition of Jagirs Act Held Valid

SUPREME COURT'S JUDGMENT

Raj Rajendra Maloji Rao Shitole and Raja Balabhadra Singh, who owned extensive jagirs in Madhya Bharat, applied to the Madhya Bharat High Court for a mandamus to restrain the State from issuing a notification for resumption of all jagir lands under the Madhya Bharat Abolition of Jagirs Act, 1951, which they claimed was illegal, but the High Court by a majority declared the Act valid except as regards three sections which were declared illegal and inoperative. From this decision an appeal was made to the Supreme Court, in which it was contended that since the Act was passed by an interim Legislative Assembly in which the twenty representatives of smaller States, i. e., other than Gwalior and Indore, were not elected by an electoral college according to the terms of the covenant in this behalf but consisted of members chosen by the M. B. Provincial Congress Committee and the Praja Mandal, the Act passed by a defectively formed body was wholly void and of no effect, and the State had no power to issue the notification it did.

The Constitution Bench of the Supreme Court on 2nd February dismissed the appeal. The Chief Justice, in his judgment, referred to Part XXI of the Constitution which deals with "Temporary and Transitional Provisions" and said:

About two dozen Articles in this Part concern themselves with the solution of the interval in between the repeal of the Government of India Act and the coming into being of bodies and authorities formed by the Constitution. Until the House or Houses of Legislature or bodies and authorities formed by the Constitution could be duly formed, it was necessary to say with certain definiteness as to what bodies or authorities would exercise and perform the duties conferred by the different provisions of the Constitution in the meantime.

When a silent revolution was taking place and princely kingdoms were fast disappearing and a new democratic Constitution was being set up and a provision had to be made for the interval between the switch-over from one Constitution to another, there was hardly any time to inquire and consider whether the bodies or authorities or House or Houses of Legislature formed under the old Constitutions, which were being scrapped, had been formed in strict compliance with the provisions of these Constitutions or whether there were any defect in their formation.

The Constitution-makers, therefore, took notice of their factual existence and gave them recognition under the Constitution and invested the bodies that were actually functioning as such, whether regularly or irregularly, with the authority to exercise the powers and perform the duties conferred by the provisions of the Constitution. That is clearly the scheme of all the Articles mentioned in Part XXI of the Constitution.

Even if that body was not formed in strict compliance with the provisions indicated in Schedule IV of the covenant, its defective formation does not affect the constitutionality of the impugned statute. The impugned statute was passed in the year 1951 after the Constitution of India had given recognition to, and conferred powers on, the Assembly under Article 385 of the Constitution. When it made this law it was exercising its powers under the covenant which brought it into existence. The result, therefore, is that the only contention of Mr. P. R. Das who argued before us cannot be sustained and it must be held that it is not well founded.

THE RIGHT TO TRADE

By-Law of a District Board Held Void

The Constitution Bench of the Supreme Court on 25th January held as "void" by-law No. 2 made by the district board of Muzaffarnagar in Uttar Pradesh, as infringing Article 19 (g) of the Constitution.

The by-law, made under section 174 (2) (a) of the U. P. District Board Act of 1922, lays down that no persons shall establish or maintain or run any cattle market in the district within the jurisdiction of the Board.

The decision was given on a petition filed by Tahir Hussain of village Banat in Muzaffarnagar district, following a notice served on him by the district board directing him not to hold any market for the sale of cattle.

The petitioner, who was owning a piece of land near his village, held a market for sale of cattle on this land once a week and charged some commission on sales, in consideration of which he looked after the comfort and convenience of the public who visited the market.

Delivering the judgment on behalf of the bench, Mr. Justice Ghulam Hassan said, section 174 (1) and sub-section 2(1) of the U. P. District Board Act "shows that power of the Board to make by-laws is to be exercised for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the area within the jurisdiction and that this power includes the power to regulate markets as mentioned in section 2 (1). The by-law passed by the District Board is not one passed for regulating the market but for prohibiting the petitioner from holding it. Such a by-law in the face of the provision of section 174 is obviously beyond jurisdiction. The by-law as well as the order made under it interferes with the fundamental right of the petitioner under Article 19(1)(g) and prevents him from carrying on the business of holding the market."

"We hold by-law No. 2 as being void and in conflict with the fundamental right of the petitioner under Article 19(1)(g) of the Constitution and the order passed thereunder cannot be allowed to stand."

COMMENTS

Fundamental Rights in Kashmir State

Although Kashmir is a part of India (according to the provisions of the Indian Constitution), it is going to have, unlike any other part, a constitution of its own. Because the State has acceded to India only for three subjects, its Assembly claims to possess, and is about to exercise, constituent powers in respect to all other subjects.

Whatever this constitutional position may be, one would have expected that, in so far as Fundamental Rights are concerned, the State might well have declared itself subject to the Articles relating to these rights enumerated in Part III. But it apparently thought that such subservience would amount to too great a derogation from "sovereignty" or at any rate internal autonomy which it has been asserting. Nor does it seek to save its constitutional status by bodily including Articles of Part III of the Indian Constitution in its own constitution. It proposes to vary these Articles.

It is easy to conceive of better guarantees of individual liberty than the Indian Constitution affords, and it would

have been comforting if the variations which Kashmir contemplates were intended to make the guarantees tighter than they are in the Indian Constitution. But it is not so; the Articles, in so far as they differ from the latter, are to give a wider latitude for arbitrary action than the Constitution of India does.

The Basic Principles Committee of Kashmir's Constituent Assembly states in its report that protection of personal liberty shall be guaranteed "on the lines of corresponding provisions in the Fundamental Rights of India." We know very well that personal liberty is not protected at all in the Indian Constitution, and there is not much merit in Kashmir adopting provisions like those in Art. 22 permitting preventive detention.

But a change for the worse is to be seen in what corresponds to Art. 19 guaranteeing "rights to freedom," i. e., freedom of expression, freedom of assembly, etc. All these rights are to be conferred on the citizens of Kashmir, but the committee says in its report :

> The State should, however, have powers to impose such restrictions as are *considered reasonable by the State legislature* on the exercise of these rights in the interests of general public security of the State, public order, communal harmony, ...

The State is going to reserve power to itself to curb freedom of speech, for instance, in the interests of communal harmony also, which does not find a place in India's Constitution as a ground for restraint.

But this is not all. The State will be competent to lay whatever restraints it likes on these rights, provided the restraints are deemed by the State legislature to be reasonable. We are familiar with the expression "reasonable restrictions," but in our Constitution the restrictions have to be reasonable in the opinion of the courts. A legislature will always impose restrictions that it thinks are reasonable ; no one need expect any legislature to impose any restrictions that even in its own judgment are unreasonable. But our Constitution says in effect that any restrictions a legislature may impose, however reasonable they may be in the opinion of that body, must be proved to be reasonable to the satisfaction of the courts ; otherwise the law authorizing their imposition will be declared invalid. In Kashmir State the final authority to decide about the reasonableness of the restrictions is the body itself that imposes them. It will not be a justiciable issue as with us.

It is thought to be a great concession on the part of the Kashmir State that it agrees to recognize the jurisdiction of the Supreme Court in the matter of fundamental rights. But how will this jurisdiction be of any avail to the citizens of Kashmir when fundamental rights are practically made non-justiciable ? Even Kashmir's High Court will be unable to give them any relief. When anyone brings a complaint to it that his right to free speech has been unduly curtailed, the Court will have to say, as our High Courts do in cases of preventive detention : "The Constitution has given full freedom to the legislature to impose any restrictions which to its own thinking are reasonable. There is no scope left to us to judge of their reasonableness. We cannot do anything for you." The Supreme Court will be equally bound to admit that it is powerless in the matter.

If in such matters of transcendental importance as Freedom of Person and Freedom of Expression, the legislature is to have the last word, can these rights be at all called fundamental ? They might as well be scrapped from the constitution ; at any rate, the people will then have no delusion about the real state of things.

Another variation from India's Constitution that is proposed is in respect to acquisition of private land. The State has been taking such land from land-owners without paying them any compensation whatever and wants to continue this process. It therefore claims that the Indian Constitution's provision which requires some compensation to be paid will not suit the conditions prevailing in Kashmir and insists upon having a provision in this respect which differs from that in the Indian Constitution. But Kashmir need not be so apprehensive. Our Constitution too is rapidly going the way Kashmir wishes to go. The provisional Parliament adopted an amendment which had the effect of validating the Land Acquisition Acts of the U. P. and Bihar ; and now the present Parliament is going to have another amendment which will enable Bengal to acquire on her own terms certain khas lands in the possession of ryots. We are not very much behind Kashmir after all.

If there are any people who think it is a matter of great rejoicing that Kashmir is to have Fundamental Rights somewhat like ours, we are not among them.

Accused's Right to Give Evidence

RECOGNISED IN THE CRIMINAL PROCEDURE CODE BILL

Clause 52 in the new Criminal Procedure Code Bill proposed to be moved in Parliament purports to give permission to an accused person to tender evidence on his behalf. On this subject the opinion of lawyers has veered round in favour of recognizing the right of the accused to give evidence for the defence.

A valued correspondent draws our attention to a passage in Sir Henry Hawkins' Reminiscences in which Sir Henry refers to the Criminal Evidence Act (61 and 62, Vic. c. 36) of 1893, which for the first time recognised the competence of the accused to give evidence on his behalf, and states how his misgivings that the law would operate to the prejudice of an accused who volunteered to give evidence were removed by the experience he had. A client of his offered to give evidence on his own behalf. Sir Hawkins nervously

followed the evidence he gave and the cross-examination he underwent. But in the end Sir Henry felt convinced that a man who was telling the whole truth in his evidence could not be broken by any cross-examination, and this experience converted him into a supporter of the law.

But, it is pointed out, the amendment introducing this reform is done in a very slipshod way in the present bill. The clause lacks the necessary safeguards which the English Act of 1898 embodies. This Act provides:

1. The failure of an accused to offer himself as a witness shall not be made the subject of any comment by the prosecution;

2. An accused called as a witness shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless:

(a) The proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(b) He has personally or by his advocates asked questions of the witness for the prosecution with a view to establishing his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for prosecution; or

(c) He has given evidence against any other person charged with the same offence;

3. The fact that the accused has been called as a witness shall not of itself confer on the prosecution the right of reply.

All these safeguards have been introduced in Burma, which in 1945 amended sec. 349 of its Criminal Procedure Code to give power to the accused to give evidence on oath.

Human Rights Covenants

"GRAVE DEFECTS": SAY BRITAIN AND THE UNITED STATES

The U. N. General Assembly adjourned in December without settling the form of the Human Rights Covenants, (1) political and civil and (2) economic and social; and this task it has remitted to the Human Rights Commission, which is due to begin its session from the 22nd of this month. In the meanwhile, Britain and the U. S. A. have stated their objections to the present draft. Britain has said, in its nine-page comment, that the draft suffers from "grave defects" and has pointed out how they can be removed. The United States, too, shares this opinion and has suggested five specific changes in the draft, with an intimation that further changes will be submitted later. While it would like the draft improved, it has taken the position that on the whole more useful work could be done by the U. N. by following "an action programme" which Mr. Dulles laid before the Human Rights Commission in April last. The announcement that Mr. Dulles made then, to the effect that the U. S. would not adhere to the Covenants, was perhaps due in some measure to the fact that supporters of the Bricker amendment had been attacking the Covenants on the ground that they would supersede the U. S. Constitution and hence infringe upon the United States' "sovereignty." The "action programme" sponsored by the U. S. calls for annual surveys by the United Nations of specific problems and also seeks to promote wider observance of human rights by efforts to enlighten world public opinion. The U. N. Assembly did not consider this proposal, and it will be now for the Human Rights Commission to decide whether such a programme should be taken in hand either as an addition or as an alternative to the Covenants. Anyway, the Covenants seem to have a bleak prospect.

Communists Here and Abroad

NEHRU'S INCONSISTENT POLICY

The contrast between the severity of coercive measures adopted by the Government of India in dealing with Communists in this country and the complacency with which it thinks other governments should deal with the threat of world communism in their countries has been marked by a number of observers before. The latest to join them is Mr. Chester Bowles, former Ambassador of the U. S. A., in his report on his experiences in India. This report is so friendly to Mr. Nehru and the Government over which he presides that it cannot by any stretch of imagination be treated as prejudiced. In describing the "ruthless action" taken by his Government against Indian Communists, Mr. Bowles says:

> His government then (i. e., after "police action" in Hyderabad) put through a Detention Act which permits it to imprison anyone charged with subversion for six months without trial. "We detest the need for such arbitrary power," the Congress party minister in charge said in presenting this bill in the House of the People. "But a young democracy can accomplish nothing unless it is competent to defend itself against the enemies within who would use the very cloak of democracy to destroy it."

When I reached India, I was told that 8,500 Communist and fellow-travelling agitators had been imprisoned under this Act, a much harsher Communist control measure than any we have in the United States. Even though the Communist tactics

had changed for the moment to "peaceful co-operation," Nehru insisted that this Act be renewed in 1952 for use in future emergencies.

Actually, the suspension of habeas corpus is a measure so extreme that many Indian champions of civil liberties bitterly oppose it, but there can be no doubt about the Government's determination to take any steps necessary to defeat communism *in India*.

In September, 1953, a few months after Mr. Dulles's trip to New Delhi, the (U. S.) State Department issued a report entitled "India: a Pattern for Democracy in Asia," which stressed that until 1951 when the Communists abandoned violence "India had more Communists in prison than any other country, except perhaps the Soviet Union."

Curtailment of the Right to Free Speech

AMENDMENTS PROPOSED BY SOME STATES

A writer in the "Times of India" reports that the constitutional amendments proposed by some State Governments which affect the fundamental right of free speech and expression are alarming. He says:

> More State governments are agreed on the need to curb this right than on any other issue. They feel that the right is being abused and Central and State Governments are being criticised without their being able to retaliate. The Press Act has been roundly denounced by the press and the public, but one State government finds it mild and yearns for the days when it could demand securities, forfeit them and order the closure of a press without being questioned by third party.
>
> What is demanded in effect is the reinstatement of the law of sedition and powers to Government to gag the press and speakers arbitrarily. In asking for this the prospect of another government coming into power and wielding the law against the present ruling party is completely ignored. It may be that the curbs are demanded precisely to defeat this prospect. Whatever the intentions, with the return of the law of sedition, all clap-trap about democracy should cease.

Drift Towards Totalitarianism

MR. ANTHONY'S CRITICISM

Speaking at a public meeting organized by the Bombay Branch of the All-India Anglo-Indian Association on 10th February, Mr. Frank Anthony, M. P., head of the central organization, said: There were certain "undemocratic trends" in the country and the country was steadily, "[illegible]" sliding down the slope to authoritarian government" and the negation of civil liberties. The overwhelming majority of the members of Parliament presented the "pathetic and demoralising spectacle of a docile, subservient group of persons afraid to express their feelings with courage and independence." Criticism in Parliament was "resented by the Government" and the critics, however sincere, were marked down for official displeasure. There was less freedom of speech in Parliament today than in the Central Legislature during the British regime. Further invasions of the fundamental rights and civil liberties were to be feared and the proposed amendments to the Constitution, particularly Arts. 32 and 226, "had an ominous ring."

GLEANINGS

RENEWAL OF PRESS ACT

Criticisms in the Press

THE "STATESMAN"

An Ordinance has now been issued, which not merely extends by two years the life of the Press (Objectionable Matters) Act 1951, but substantially amends it on the lines of the Bill introduced, but not debated, during the last Parliamentary session. Dr. Katju had earlier announced that such would be the procedure, on the ground that there was not Parliamentary time for regular enactment; he even took to himself credit for warning the House about a step which he could have taken unannounced. Critics were not mollified. At least three issues of great importance to a working democracy appear involved: the propriety of using Ordinances as matters of Ministerial convenience; that of extending legislation on an issue closely affecting citizen rights, whose life had been deliberately limited by Parliament, without Parliamentary sanction; and above all that of further making, by mere official fiat, important changes in the law without any apparent evidence of urgency.

The original Bill of 1951 could almost certainly not have been validly passed before the first amendments to the Constitution. It was criticized by almost every section of the Indian Press. It was not circulated for opinion, and eight members of the Select Committee dissented from the majority's conclusions. When its life was, in the last stages before enactment, restricted to two years, this was claimed, and hailed, as an important concession. If ever there was an overwhelming case for democratic review before the end of that period, it was surely here. Such review might not have been entirely unfavourable, for even journalists are not by and large disposed to favour such offences as the Act deprecates. But Parliament and public would have expected, and were entitled, to know how the measure had been found to work, in general and

in detail, and to receive in equal detail cogent Ministerial reasons before it was either extended or modified.

No such details have been supplied. Instead, the extended measure has been modified to the advantage of Authority, by permitting official appeals from a sessions court decision in favour of the respondent. The professional juries, which the Press dislikes, have not been replaced by common juries but merely stripped of an important part of their powers. Ministers will no doubt argue that the Ordinance is in their opinion a good one, and that submission to a Parliamentary verdict is in any event bound shortly to occur. The public will find this plea familiar, but hardly reassuring. Ministers are not elected to behave as even benevolent autocrats, but to follow democratic procedure, in the spirit as well as the letter. When important legislation seems to brook no delay, it is in most cases no answer to say that time is insufficient. They should rearrange priorities and make time, if necessary by an extended session.

THE "HINDU"

Dr. Katju had led the country to expect the Ordinance extending the life of the Press Act by another two years. But it is not the less unwelcome on that account. The original Act was passed after very cogent and powerful objections by not merely the Press but every section of opinion in the country that cared for democracy and freedom. The main factor that was responsible for the Legislature acquiescing in this grievous imposition was the prospect held out of its being a temporary measure. But the Government's proposal, not merely to extend the life of the Act but to extend it for an identical period, shows that it has once again comfortably slid into the bureaucratic habit of treating as routine what was at the beginning, and can never cease to be, an abnormal and unwarranted infraction of a fundamental right. No attempt has been made to show whether the Press Act has justified its authors' expectation that it would, while acting as a deterrent to the operation of anti-social elements through the Press, interfere in no way with the legitimate function of the Press which is "to tell the people." Our own impression as well as that of others who are in a position to watch at close quarters is that, while a few prosecutions have been successfully launched, the gutter-press remains practically untouched by the thunders of the press law. On the other hand it is not to be denied that the Act has powerfully reinforced the natural timorousness of the weaker sections of the Press which, however anxious to expose evil wherever it might be found, have not the resources to face the terrors of a Government prosecution. In these circumstances there was no warrant whatever for an automatic doubling of the term of the Act. We are aware that Dr. Katju has suggested that the question of the precise period for which it should be extended could be looked into when Parliament discusses the Bill. But if the Government were only intent on keeping this legislation alive till the Press Commission reported, there was no reason whatever why either the bill or Ordinance should have proposed a two-year period. Six months should have sufficed, since the Commission expects to report before that. If it is unable to do so the period could then be extended for a further necessary period. If the Government had adopted this course they would have given the country greater assurance that they did really regard the Act as a purely passing affair.

Even more surprising than the proposed two-year extension is the attempt to make additions to the statute which are not at all insignificant though the Government call them minor amendments. One of the two objectonable proposals is to limit the jurisdiction of the special jury under the Act to pronouncing on whether a publication complained against is "objectionable matter." The right of saying whether, granting that the matter is "objectionable," there are sufficient grounds for demanding or forfeiting security is proposed to be vested solely in the Sessions Judge. Under the present Act no attemt is made to define the powers or authority of the jury. But, as it is provided that where the judge differs from it, he cannot overrule it but must refer the case to the High Court for disposal, it is clear that the jury has an equal voice with the judge in deciding whether there is a case for *action*. To deprive the jury of that power would be to reduce it to the position of a decorous dummy. And it would make a total mock of the pretensions that were made for this novel invention of an expert jury when it was introduced two years ago. The other retrograde proposal in the Ordinance is to give the Government as well as the prosecuted journal the right to appeal to the High Court against the Sessions Judge's judgment. The demand for security and the provision for forfeiture are restrictions on the freedom of the Press which have not only no precedent in democratic countries. The Act throws upon the Press an onus which is not thrown on the private individual in countries under the rule of law. If in these circumstances a judicial tribunal has held that the case for the prosecution has failed, the Government should not be allowed to have a second try at hitting the journal that has cleared itself at considerable expense and after undergoing a great deal of trouble. Parliament will, we hope, incontinently throw out these uncalled for and reactionary proposals.

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