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The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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"The foundation of the struggle against communism is the maintenance of sound economy and fundamental political freedom."—Dr. Philip C. Jessup, U. S. A.'s Ambassador at Large on 18th January at Seoul (Korea), referring to Korea's unchecked deficit spending mainly on the hunting down of communists and the impairment of civil liberties by its National Security Law.

ARTICLES

AVAILABILITY OF INFORMATION TO DETENUS IN ENGLAND

One of the points on which a close watch will have to be kept, when Parliament will pass legislation under article 22 (7) of the constitution in regard to the procedure to be followed in cases of preventive detention, is whether provision is or is not being made for supplying full information to the detained persons about the charges that are brought against them. It is obviously of the utmost importance that where a person has to undergo imprisonment not for any crime he has committed but because it is feared by the authorities that he may commit a crime which will endanger the public peace, and where the authorities have exclusive discretion as to the circumstances in which they may take such precautionary action, but where in the way of a safeguard a kind of tribunal is set up in order that the authorities may have an outside opinion on the case dealt with, the person concerned must have the fullest opportunity of knowing what charges he has to meet. If because any relevant facts are withheld from him he is unable to make his defence, it is clear that this vaunted safeguard of a tribunal will become wholly illusory and the action of the authorities will become purely arbitrary.

Pre-War Legislation

In England express provision was made, under Defence Regulation 18 B (1939) which gave power to the Home Secretary to hold suspects of some specified categories in detention, for the supply of all necessary information to the persons so held in detention. This procedure was evolved when, some three months prior to the framing of Defence Regulations, the Prevention of Violence Act was passed for the purpose of checking the outrages that were then being committed by the so-called Irish Republican Army. It was represented to the then Home Secretary, Sir Samuel Hoare, that although his ultimate responsibility for deportation or detention of suspected persons might be preserved, he should consult with others of an independent mind as to whether the action he had taken against any person was in the circumstances justified or required. Sir Samuel agreed to do so, and as a necessary step towards the creation of such a tribunal for the purpose of giving him advice, he promised to make all necessary arrangements to enable the tribunal to give a searching examination to every case. Such examination involved putting the tribunal in possession of all facts and giving the person concerned fullest opportunity of meeting them. This promise was carried out. It is not suggested that all official papers on which an order for deportation or detention had been based were placed without reserve before the person concerned. That was considered to be a dangerous course in view of the grave risk it involved to the lives of those from whom information in regard to any deportee or detainee was derived. What was guaranteed was that the tribunal would be put in possession of all information excluding nothing whatever, leaving it to the judgment of the tribunal to communicate to the deportee or detainee such of that information as it might think necessary or desirable in order that the person concerned might know all the facts in regard to which he had to clear himself. Sir Samuel said: "I would give these gentlemen (comprising the tribunal) all the information that we had at the Home Office or the police might have about these cases" (House of Commons Debates, vol. 350, col. 1512).

The assurance was given in order to meet the objection of the Opposition which among others was voiced by Lord (then Mr.) Pethick-Lawrence, who urged that it must be provided "that the substance of the charge against the man will at some point that is not too late be given to him who is the sufferer in the case. Otherwise the whole procedure will be fruitless. If the man is not to know the substance of the case against him there is no point in having the referee (the man of judicial experience appointed for examining the cases). The man might say 'I am guiltless', but that is all he can say." The force of the objection was fully admitted by the Government, and the Solicitor-General himself said: "If the examiner were a retired judicial officer with experience, it is quite clear that he

would be unable to discharge his functions unless he notified in sufficient outline to the objector what was the case against him" (*ibid.*, col. 1567). And the assurance given by the Home Secretary was several times repeated. Thus the Solicitor-General declared: "It is proposed that the examiner or referee should be put in possession of all the relevant facts, and he will, no doubt, at an early stage of his interview with the objector make known, with discretion no doubt, to the objector the case that is going against him" (col. 1566). Again: "It is his (the Home Secretary's) intention in every case to give to the referee all the material that is relevant to the making up of his mind on the issue that is before him" (col. 1576). It might happen in any particular case that although the referee had got all the particulars which the Home Office had, they might not all reach the person concerned. But if any of them did not come down to him, it was only because that particular piece of information was not considered to be essential or relevant for the purpose of enabling him to defend himself. And the decision in this matter was not that of the Home Office, but of the referee alone. He was expected to pass on to the deportee or detainee all the material that was regarded as sufficient, and in any case the referee was completely at liberty, without reference to the Home Office, to pass on to the deportee or detainee whatever material he thought proper. The referee was also given the power to interview the informants so that the allegations against a man could be thoroughly probed, and in fact the referee was given full latitude to evolve the procedure on which his inquiry would be conducted.

Post-War Legislation

When Regulation 18 B was made to cope with the war situation, it was modelled on these lines, and the requirement as to the supply of full information was embodied in the Regulation itself. Sub-section 5 of the Regulation laid down: "It shall be the duty of the Chairman (of the Advisory Committee) to inform the objector of the grounds on which the order (for detention) has been made against him and to furnish him with such particulars as are in the opinion of the Chairman sufficient to enable him to present his case." Like Sir Samuel Hoare before, Sir John Anderson who succeeded him in the office of Home Secretary gave the assurance that nothing that was on the records of the Home Office would be kept back from the Advisory Committee. He said: "The Advisory Committee have before them all the evidence which is in the possession of the Secretary of State," (vol. 352, col. 1854). Every bit of it that was necessary for his defence was communicated to the detenu, the Committee itself (and not the Home Office) deciding what was necessary for the purpose. "It is invariably the practice of the Advisory Committee," said the Under-Secretary of State for the Home Department, "to put before these persons, as explicitly as they can, all the facts which are known against them" (vol. 373, col. 947).

Procedure in Detail

The detenu is first served with an order. "The order itself is a short form of the grounds of the man's detention. He is told that he is being detained under Defence Regulation 18 B and under which specific part of the Regulation he is being detained. Before he goes before the Advisory Committee he is given a further statement of the grounds of his detention. When he gets to the Advisory Committee every fact which can possibly be put to him is put to him by the Chairman of the Committee at the hearing. He is given at least three days' notice, and usually longer [a week], before he goes before the Committee, after the statement of the grounds for his detention. Detailed evidence upon which he is being detained is, of course only put to him at the actual hearing before the Committee." If at this hearing some new facts not disclosed to him before come up, the detenu naturally requires time to consider the matter. In such a case he is not pressed to offer an explanation then and there, but the Committee gives him an adjournment, so that he may further consult with his legal adviser as to what defence to make. The general attitude of the Committee was thus described by Mr. Morrison, who was next in succession to Sir John Anderson as Home Secretary: "The Committee that hears the applicant is not a prosecuting committee, not a committee which sits to cross-examine the detained person with a view to finding him guilty. It is not in the prosecuting frame of mind at all.... The Chairman and the Committee regard it as a large part of their duty to be helpful to the detained person, to help him to bring out his case if they think he has not presented it as well as he might have done.... If these committees have any bias at all—and I am not accusing them of bias—it is rather in favour of the detained person than against him" (vol. 367, col. 860).

It sometimes happened that the Home Office itself got some further information about the detenu after the Committee had finished its examination of him. But the Home Secretary did not arrive at his final decision on the basis of that information, but he promptly remitted it to the Committee asking it to reconsider the case. The Committee in its turn put to the detenu these facts newly come to light, seeking his explanation of them. The Home Office could not keep anything up its sleeve, adding to what the detenu had seen something he had not seen so that it might afford the Home Secretary justification for not revoking the order for detention. All the facts had to be made known to the Committee, and the Committee made them known to the detenu. In the end the Home Secretary might find himself unable to act upon the advice given by the Committee, but that was because of a different appreciation of the facts. The main point is that the Committee itself had all the facts. [It could also "call in any person who, in their opinion, may be able to assist in elucidating the matter with which the Committee have to deal" (vol. 352, col. 1854).] Through the Committee the

detained person got all the facts and was given every opportunity to defend himself with the help of legal advisers of his choice.

THE STORY IN INDIA

Our Public Safety Acts too provide this kind of appeal to the Advisory Councils. But what is the law about it, and how does it work in practice? The law says that the Government shall communicate (in some provinces the form is "may communicate") to the detained person the grounds on which the order for detention is made and such other particulars as are in their opinion sufficient to enable him to make a representation against the order. The decision about the amount of information to be furnished rests with the Government. In England, as we have seen, it rests with the Advisory Committee. The Government there is bound to take the Committee into its fullest confidence and can hold nothing back. When the Committee has the information it makes it available to the detenu. Our law, however, leaves it to the discretion of our Governments to tell the detained person (or the Councils) only as much as they think expedient. Is it a merely verbal and unintentional departure from Regulation 18 B of England? And do our Governments in practice work our law just as the Regulation is worked and has to be worked in England? Does the detenu here too get all the information upon which the detention order is based and which he has to answer? Let us see.

An Orissa Case

We shall give but two recent instances. The first is from Orissa. In the High Court of that province two persons held in detention by order of the Government filed applications for a writ of habeas corpus for securing their release. The grounds supplied to one of them, Mr. A. Narain Murty, were:

1. That as a member of the Sambalpur District Colliery Workers' Union, he engaged himself in various lawless activities which created dislocation of work in the industrial area of Brajarajnagar and as a result there had been apprehension of a breach of the peace in the said area on several occasions in the past.

2. That he has been advocating commission of violence by workmen in the said area on the manager and other authorities of the Orient Paper Mills and the manager of the Ib River Colliery and as the result of such instigation the workers, specially the miners of the Ib River Colliery used violence on the manager of the colliery in November 1947.

3. That in December 1947 he tried to foment a strike by the workmen and, failing in his attempt, fomented communal feeling between Oriya and Bilaspuri labourers in the colliery.

4. That in January 1948 as a result of his unlawful activities and instigations there was rioting in the area of Rampur Colliery and a case under sections 148, 447 and 323 of the Indian Penal Code is pending trial.

5. There is credible information to show that he was going to renew his above-mentioned unlawful and objectionable activities not only in Brajarajnagar Orient Paper Mills and Rampur Colliery but also in the Hirakud Dam area.

The remarks of the High Court on these grounds are given below:

> These grounds are not accompanied with any illuminating particulars; nor is it stated on behalf of the Government that the particulars are such as could not be disclosed in the public interest. In this background, all these grounds are as vague and indefinite as they could be.
>
> In reference to ground No. 1, the lawless activities have neither been specified nor the character thereof has been indicated. There is no reference to any time in which, the persons in relation to whom and the localities where the said activities were committed.... To a ground like this could any detenu say anything except that he did not commit any unlawful activities and would this his mere say satisfy the authorities to recall the order?
>
> The second ground appears to be more specific but still without necessary particulars. The violence used on the manager must have taken place on a particular date in November 1947. The date has not been mentioned nor the place. Who are the workmen who caused the violence, has not been disclosed. When and where and on how many occasions instigation of the workmen to use violence was made, is not stated. Here too the detenu in order to make a representation will not find sufficient data for challenge....
>
> As to the third ground, fomenting a strike, without anything more, cannot, as a matter of rule, be said to be a lawless activity. It is one of the rights of a free citizen to advocate causes of the aggrieved and to form associations to achieve the amelioration of their working and living conditions by lawful and constitutional means. Strike has nowhere been held unlawful provided it is conducted in a peaceful and lawful manner. It is only when it is a conspiracy to injure that it is unlawful, but not every conspiracy even if its peaceful activities cause loss or injury to rival traders or to capital vis-a-vis labour.
>
> With regard to fomenting communal feeling between Oriya and Bilaspuri labourers in the colliery the petitioner brings to our notice that in the rioting case, in which he has been impleaded as an accused, his co-accused are some of the Bilaspuri labourers.
>
> As to ground No. 5 (credible information as to renewal of the above-mentioned unlawful and objectionable activities), it is a vague one too. In

order to afford a ground of apprehension to public safety or danger there must have been some preparations which should be mentioned amongst the particulars if not claimed to be particulars which should not be disclosed in the public interest.

The Court's finding thus was that the grounds and particulars supplied to the petitioners were so "vague, indefinite and meagre" as to constitute non-compliance with sec. 4 of the Orissa Safety Act providing for an inquiry by an Advisory Council, which was "the only safeguard against arbitrary detention." The Court therefore held the petitioners' detention illegal and ordered them to be set free.

There were other incidents in connection with these detentions which provoked adverse comment from the Court. It says about these features:

> (They) are downright and gross negligence on the part of the officers who constitute an essential part of the Government machinery by which the executive discretion vested under the Act is to be exercised. The officers concerned have taken the subject of the matter too lightly, or else there should have been no circumstances such as suppression of the petitioners' petition to the Court for a long period of about three months, omission to supply the grounds and particulars till long after detention and absolutely no efforts to explain the doubtful circumstances by proper affidavits and other material available. Besides from time to time the detenus' effort to get justice has been obstructed by the conduct of the officers concerned.

The case [A. Narain Murty *v.* The King] was heard by Ray, C. J., and Panigrahi, J., the judgment being delivered by the former on 11th March, 1949.

A Bihar Case

The other case which we wish to cite as a specimen in this connection is Nek Mohammad *v.* Bihar [1949 Patna 1], which resulted in the habeas corpus petitions of twelve detenus being allowed and the petitioners being released on the same ground, viz., failure of Government to supply particulars of detention to the detenus with sufficient distinctness. It would be tedious to give the grounds in the case of each individual petitioner; the description given by the Court of all of them will be sufficient.

> Except in the case of one,* no other particulars have been given against any of the petitioners except the bare statement that he has been a worker, organizer or member of the R. S.S. or the Muslim League National Guard, as the case may be. In the case of some it has been stated that he is carrying underground training of volunteers or working as a secret courier or is an officer of the secret branch of the Muslim League National Guard or has been giving training to members of the R. S. S. or is an important man in the inner circle of the R. S. S.
>
> All these are vague and general assertions which mean nothing except membership of the organization known as the R. S. S. or the Muslim League National Guard. There is no reference to the nature of the activity indulged in by any of the petitioners, apart from membership of the R. S. S. or the Muslim League National Guard. . . . It is to be remembered in this connection that some of the petitioners were arrested on the day following the declaration of the organizations as unlawful organizations, and some were arrested within a few days. There is nothing in the grounds to show that any of these persons were engaged in activities prejudicial to public safety and the maintenance of public order, after the organizations of which they were members had been declared unlawful. . . . Even where activities have been referred to, no particulars have been given and the nature of the activities is not indicated.

It was argued by the Government Advocate that the fact of the petitioners' membership of bodies which Government had to declare unlawful could be taken as enough evidence to prove the dangerous character of the activities of the petitioners themselves, giving Government the right to keep them under lock and key. But the Court refused to accept this principle of guilt by association (cf. Shripad Ramchandra Jog *v.* Emperor, 1931 Bom. 129). It said:

> The crucial point is the nature of the activity in which the persons detained have been engaged [either before or after the two organizations were declared unlawful], and in order to enable the detained persons to make an effective representation the provincial Government must indicate the nature of that activity and give particulars thereof.

The Court adds a revealing statement:

> In several of the cases the District Magistrate concerned has sent us a copy of the report of the Superintendent of Police addressed to the Government of Bihar for the detention of the particular person mentioned in the report. These reports are very enlightening and show that nothing was known of the antecedents of the persons reported against, except that they were members of R. S. S. or the Muslim League National Guard, the activities of which were considered to be prejudicial to public safety and the maintenance of public order. Nothing is stated about the nature of the activities in which the persons reported against were engaged. This would show that, except mere membership of a particular organization which has been declared unlawful, there was nothing against those persons.

The Court summed up its conclusion as follows:

> In the absence of any indication of the nature of the activity and particulars thereof, the grounds must be held to be no grounds at all under sec. 4 of the [Public Safety] Act.

This was a decision of the Full Bench of the Patna High

* In this case also the Court found that the necessary particulars were wanting.

Court consisting of Meredith, Sinha and Das JJ., and Mr. Justice Das delivered it.

Such Relief No Longer Possible

There are numerous instances like this in which the High Court has held further detention of persons illegal if the grounds communicated to them were vague or indefinite; e. g., In re: Krishnaji Gopal Brahme and In re Rajdhar Kalu Patil in Bombay; Emperor *v.* Inder Prakash in the United Provinces; Shri Ramchandra Bapat *v.* C. P. and Berar and Govind Laxman Bedekar *v.* C. P. and Berar in the C. P.; and Murat Patwa *v.* Bihar in Bihar—all cited in this Nek Mohammad case. The reader will perhaps ask after this: "If, however bad the law and its administration may be, the courts give relief in suitable cases, then what is the trouble?" The trouble is that the Governments, seeing that the persons whom they want to see confined in gaol were being let out by the High Courts, have now made it impossible for the Courts to do what they used to do before. The Governments have for a long time been engaged in paring down in one way or another the jurisdiction of the High Courts, and now by amendments in their Public Safety Acts all provincial Governments have deprived the High Courts of their competence to declare detentions illegal on this ground, viz., that the information supplied to the detenus was insufficient. For example, the Orissa Public Safety Act has been amended by Act VI of 1949, introducing the following proviso:

> Provided that neither the said order of detention nor the detention of the said person thereunder shall be deemed to be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the communication made to such person under this section.

The two cases from Orissa and Bihar to which we have referred above were decided before the Public Safety Acts in these provinces were amended in this sense. Before the amendments were made the High Courts were to some extent in a position to rectify injustice, but now after the amendments they are not in that position. If these cases had come up now, the Courts would have been compelled to proclaim their helplessness in restoring personal freedom to those who have been unjustly robbed of it, as some High Courts have in fact so proclaimed.

If the High Courts have been rendered powerless to do justice, so have been the Advisory Councils. The latter will not even find it possible to give that close and full examination to detention cases which they are expected to give, if the material supplied to them is inadequate. And, because the Governments have expressly reserved to themselves the power of withholding any material which they deem fit, the Advisory Councils will have no cause for grievance either. If, however, in sheer desperation they were to recommend the release of detenus, the Governments would summarily turn down their recommendation, which too they have power to do. The Governments would say to themselves: "On the basis of the material we have made available, the detentions may well seem unjustifiable to these very estimable people, but there can be no doubt that if they had access to all the material we have built up in our files, they would come to the same conclusion as ourselves. And therefore as we have the legal power to set aside their advice, so we have the moral authority as well."

Our apprehension is that what has happened to the present Advisory Councils may happen to the future Advisory Boards also and the apprehension becomes the more lively because the amendments to the Public Safety Acts referred to abovs which have practically muzzled the High Courts were enacted on the advice and by the directive of the Central Government. There is thus every reason for fear that the legislation which Parliament is to pass under article 22 (7) may follow the same direction. Let's therefore look narrowly into this business!

LEGAL ADVISERS AND WITNESSES IN CASES OF DETENTION

Because the review of cases of detention that takes place before Advisory Councils under the Public Safety Acts is not in the nature of a regular trial in a court of law, Pandit Jawaharlal Nehru thinks, to judge from the reply given by him to the editor of the BULLETIN and quoted in the last issue, that the appearance of legal advisers and witnesses on behalf of detenus is quite out of place in the proceedings of the Advisory Councils. This, it seems to us, is a wholly unwarranted assumption. In the case of the detenus the ordinary legal procedure is reversed. The principle of law is that a man should not have to prove that he is innocent, but that the accuser should have to prove that he is guilty. The detenus, however, are in a different case. They are detained on suspicion. They are not charged with an offence, and they are not presumed to be innocent until they have been proved guilty. The Government does not undertake to prove their guilt. On the contrary, their guilt is presumed, and their only hope is to establish their innocence before the Advisory Councils, though even if they do so to the satisfaction of the Councils their release is still problematical. When such a topsy-turvy procedure is adopted, it is but fair that the wretched detenus should be given all the facilities which can be given them consistently with the main lines of the policy of preventive detention, and there is no reason at all why, in the quasi-judicial procedure adopted for the Advisory Councils, legal aid should not be provided for them or why they should not be permitted to call witnesses in their defence.

In commenting on Mr. Nehru's reply we have already stated that these facilities were in fact afforded to the detenus in England in the working of Defence Regulation 18 B during the last war. But we would like to give a little more information about this, quoting, because we are

in controversy with such a high personage as the Premier, the *ipsissima verba* where necessary. We are so anxious that in the legislation which Parliament is to pass under article 22 (7) of our constitution these facilities at any rate should not be denied to those persons who will have the misfortune of being subjected to preventive detention that we feel we must deal with this topic at some length. In the matter of legal representatives, what should be done in a particular case was determined by the Advisory Committee in England, and the Government gave full power to the Committee to allow legal representatives where in the opinion of the Committee such a course would help the detenus in stating their case against detention and pressing their objections to it. The Home Secretary, Mr. Morrison said in the House of Commons on 10th December, 1940, that his predecessor had provided in the rules "that if the Advisory Committee came to the conclusion that in the circumstances of any case there would be advantage to the proceedings by the bringing out of facts and that this would result from legal assistance being available, that tribunal or Committee had the right to say that such legal assistance could be provided. . . . It is still so. It is not the Home Secretary who settles whether legal assistance shall be available or not, but the Committee outside" (vol. 367, col. 859). On 23rd July, 1941, he said 'A legal advocate can come before the Committee if the Committee so permits. It is entirely within the discretion of the Advisory Committee whether a person should be assisted by a solicitor" (vol. 373, col. 1009). On 10th December, 1940, he had said the same thing: "They (the detenus) are allowed consultations with their legal advisers in preparation of their case, but cannot have legal representation in the ordinary sense before the tribunal without the special consent of the latter" (vol. 367, col. 861). Not in all cases were the detenus in a position to instruct legal representatives; but where a legal representative had been instructed the Advisory Committee often asked such a representative "to appear before them to give evidence on behalf of the appellant when he was able to do so, or to assist the Committee on the appellant's behalf in the investigation of the facts of the case" (vol. 367, col. 1245). It is not contended that advantage was always taken of this facility, but the important point is that advantage could be taken by all who wanted to do so and that in any case it was not within the power of Government to deny it to anyone.

As regards the calling of witnesses, that again was left in Regulation 18 B wholly to the discretion of the Advisory Committee. The Under-Secretary to the Home Department remarked on 13th February, 1941: "In some cases witnesses may be available, in others not; and where witnesses are available it is for the Committee to decide whether the attendance of witnesses is necessary. It is the practice of the Committee to send a notice to the applicant giving particulars of the grounds for his detention at least three days before the case is heard. [Ordinarily he gets seven days' notice, as Mr. Morrison told the Commons on 10th December, 1940 (vol. 367, col. 861).] The Committee takes all the care to ensure that an applicant has every opportunity to deal with any matter that is raised" (vol. 368, col. 1499). It appears that far more advantage was taken by the detenus of this facility in regard to the calling of witnesses than that of being represented by lawyers. Mr. Morrison said on 23rd July, 1941: "Witnesses can be called, and are called in many of these cases" (vol. 373, col. 1009). These are among the precautions—that the suspect should be allowed to state his case with the assistance of a solicitor and counsel and that he should be allowed to call witnesses—which it is quite practicable to take, even within the scope of a policy of preventive detention, so that injustice might not be done and mistakes might not be made, and these precautions were in fact taken in England to minimise the risk to innocent persons of an unwarranted deprivation of personal liberty.

COMMENTS

Extension of Detentions

Clause 4 of article 22 of the constitution provides that no person shall be subjected to preventive detention for a period longer than three months unless an Advisory Board, to be constituted under the clause, "has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention." But such Advisory Boards have not yet been constituted, though in some provinces (and only in some) Advisory Councils have been working under the present Public Safety Acts. And since the constitution has come into force from 26th January, the effect of art. 22 would have been, as Dr. Ambedkar explained in the Constituent Assembly on 15th November, 1949, that all detenus would have had to be released if by the time of the inauguration of the constitution they had undergone three months' detention, merely because Parliament had not yet passed a law under clause 7 of article 22 permitting detention for more than three months.

This would have, according to Dr. Ambedkar, "disastrous consequences," and in order to prevent such a "breakdown of law" article 373 was inserted in the constitution empowering the President to make an order, which would have the force of the Parliamentary enactment contemplated by clause 7 of article 22 and which is to remain in operation for the maximum period of one year since the commencement of the constitution. The power so given to the President was used by Babu Rajendra Prasad on the very day of the commencement of the constitution by issuing the Preventive Detention (Extension of Duration) Order, 1950. This Order provides that whoever is in detention will continue to be in detention for the full period for which he may have been detained although his case has not been referred to an Advisory Board, subject, however, to the condition that

he shall not be detained for more than three months after 26th January.

In the case of persons against whom an order for detention will be passed after 26th January, the President's Order provides that the maximum period of their detention will be three months from the date of the detention order. This limit becomes necessary since Parliament has not yet passed any law permitting detention longer than three months without reference to Advisory Boards under article 22 (7) (a). It was expected that under article 373 the President would enact a law making a temporary provision in regard to this matter, which would remain effective till Parliament itself passed a law under article 22 (7). But this has not been done, and therefore those who will be detained hereafter cannot be held in detention for a period exceeding three months. But it should be understood that the limit is only temporary. Further, perhaps before this period of three months is over Parliament will pass the required law, and then even those who come now to be detained for a period of three months after 26th January will be liable to have their cases referred to Advisory Boards and their period of detention will be liable to be extended if the Boards so record their opinion.

Bengal Regulation III Still Alive

The Home Minister of the Government of India, Sardar Patel, was reported to have stated in Parliament on 19th December last, in answer to a question by Mr. Kamath, that Bengal Regulation III of 1818 would be automatically repealed at the commencement of the new constitution. But from the Adaptation of Laws Order, 1950, made by the President on 26th January, when the constitution came into force, it is clear that this Regulation, as well as Madras Regulation II of 1819 and Bombay Regulation XXV of 1827, and the State Prisoners Acts of 1850 and 1858, all of which give power of detention without trial and under which no petitions for a writ of habeas corpus can be made, will still be alive, the only modification made in the Bengal, Madras and Bombay Regulations being that provisions relating to communication of grounds of detention, etc., which correspond to secs. 5 and 6 of article 22 of the new constitution are inserted therein.

Civil Liberties in Parliament

The Indian Parliament under the new constitution opened on 31st January with an address of the President outlining the Government's policy—a novel feature in India. For a Speech from the Throne, the President's address was unusually long, and though it covered much ground in internal and external affairs and was quite comprehensive, it was conspicuous by the absence of any reference in it to civil liberties. The Premier's closing speech, too, which extended to over an hour, cold-shouldered this topic as if it was of no consequence, although criticisms had been offered in earlier speeches concerning it. Mr. Sarangdhar Das, a Socialist member, had, for instance, roundly declared that "civil liberty was the first casualty after the attainment of independence"—a sentiment to which repeated expression is given outside Parliament and which corresponds to true facts. Mr. Das also moved an amendment to the President's address protesting against the Government's continual "encroachment on the personal, political and economic liberties of the citizen." But the amendment was defeated. The cavalier treatment meted out to this subject not only by the Government but also by the private members will give one an idea of the climate in which this Parliament will carry out its policy-making function.

Firing Without Inquiry

BOMBAY C. L. U. PRESIDENT'S DISTRESS

The dynamic personality and sagacious leadership of Mr. N. M. Joshi, its President, have given the Bombay Civil Liberties Union a premier position amongst such organizations in India. In the midst of most discouraging circumstances in which it has become the fashion for politicians to give a carte blanche to Government, so far as restrictions on fundamental liberties like personal freedom, freedom of speech, etc., are concerned, because forsooth the country is passing continually through a series of grave crises when all criticism of the rulers must be hushed, the B. C. L. U. goes on pegging away at its work, in raising its voice of powerful but reasoned protest against the drastic encroachments that are being made by the executive and the legislature from a feeling of panic.

The Union held its annual meeting on 10th February, to which was submitted a report of highly important work done in the year. Mr. Joshi in his presidential address referred to over 2,500 detenus rotting in gaol, the press being put under severe restraints, and various other aspects of repression that is being practised without limit. But he drew pointed attention to stories of firing that are almost heard every other day without any steps being taken to conduct an inquiry as to the necessity for such action. He said:

> One matter which must cause us greatest concern is the frequency of firing by the police on workers and kisans engaged in strikes or other demonstrations. The value of human life was at a discount with the British rulers of India. Unfortunately it seems to be at an equal discount with our present rulers. Mahatma Gandhi used to insist upon a public judicial inquiry being held in every case of firing especially when it had resulted in deaths. Our present rulers pay lip service to Mahatma Gandhi's ideals of truth and non-violence. But they seem to be afraid of facing truth in cases of firing by the police by accepting Mahatma Gandhi's directive about the holding of public judicial inquiry. Non-violence also appears similarly to be at a discount with the present

Governments. In England and in America strikes have been taking place on a much larger scale, but the police there have been able to maintain law and order without resorting to firing. If our Governments were to teach our police to maintain law and order without resorting to firing, they would find that Indian workers and kisans are not more prone to violence than British or American workers.

This is a grave warning which our Governments will ignore at their own peril. Whatever they do, we hope that they will not refuse to pay heed to Mahatma Gandhi's precept on the ground that, being a pacifist, he was opposed to the use of force in any circumstances and that, from that standpoint, he had asked all Congress ministries to resign office if they could not maintain peace without the use of the police and the military. Our Governments are not pacifist in that absolute sense, of course; nor are civil liberty organizations. They do not rule out firing where the need for it is imperative. But a judicial inquiry into cases of firing that Mahatma Gandhi enjoined on the Congress Governments was not something peculiar to him; nor did it proceed from his doctrine of pacifism. Many others have laid down the same principle. For instance, the late Sir Ibrahim Rahimtoola used to say this, and he said it as a member of Government too. He was prepared to undertake the responsibility of instituting a judicial inquiry into every case of firing in order to find out whether, in the first instance, firing was at all necessary, and, in the second instance, whether the amount of force used did not exceed the requirements of the situation. Why? Only lately the Congress President, Dr. Pattabhi Sitaramayya, repeated that whenever firing was resorted to the circumstances in which it took place should be judicially investigated. But this directive of the head of the Congress is ignored. His ban on civil liberties organizations is, however, strictly adhered to. Congressmen just pick and choose. But this is a matter concerning the lives of people, and there they should not be so eclectic. They must follow a well-established rule, from which they should not be allowed to deviate even by a hair's-breadth.

Personal Freedom: A Statutory Right

Mr. S. N. Mukherjee, Joint Secretary of the Constituent Assembly, on whom as on Sir B. N. Rau, Constitutional Adviser, the Assembly leaned heavily in shaping our constitution, freely admits in an article contributed by him on the occasion of the inauguration of the Republic that personal liberty as guaranteed in the constitution is but a statutory right. Of article 21 he says that it corresponds to the well-known "due process" clause in the American constitution, but he has the candour to acknowledge that while the American constitution secures both procedural and substantive due process, our article 21 secures procedural due process only. He observes: "The view that the judiciary should be endowed with power to question the law, not merely on the ground that it was in excess of the authority of the legislature, but also on the ground that the law violates some fundamental principles as regards the protection of the life and liberty of an individual, did not find favour with the authors of the constitution [it should be noted that he does not express his personal approval of this view], and they considered that it would be preferable to place the ultimate authority for the conferment of this fundamental right in Parliament, rather than to give the judiciary the authority to sit in judgment over the will of the legislature." There could not be a more frank admission than this that article 21 confers only a statutory as contradistinguished from a constitutional right.

Mr. Mukherjee might with equal candour have made a similar statement about article 22 also. He says that this article "gives further protection to the subject against the coercive power of the State" and that it "provides safeguards against arbitrary arrests." To the extent that it does so (and about this probably Mr. Mukherjee has an exaggerated notion), it will be the result of statutes passed either by the provincial legislatures or by the central legislature, and these statutes are always capable of being changed for the worse, even if originally they be satisfactory. The provincial legislatures will have uncontrolled authority as regards preventive detention if the period of such detention does not exceed three months. In so far therefore as detention up to three months is concerned, there is no guarantee of personal freedom whatsoever if the legislatures choose to exercise their will in an oppressive way. When they will pass laws authorising detention of a longer duration, such laws will be subject to certain restrictions; but these restrictions will be imposed by the central legislature. Thus, whatever be the period of preventive detention, the right to personal freedom (such as it is) will be only a statutory right governed by statutes enacted either locally or centrally. If legislative power is abused in regard to personal freedom, there is no article in our Bill of Rights which can be invoked to prevent such abuse. This is only another way of saying that neither article 21 nor article 22 imposes any constitutional limitations upon the power of either Parliament or the provincial legislatures with a view to the protection of personal freedom from their inroads. And such inroads are possible even in normal times, there being separate provisions to deal with emergencies.

"Clear and Present Danger" Rule Applied in India!

It is, we believe, rare to find the Indian High Courts relying even on the well-established principles of the constitutional law of the U. S. A. in deciding cases that come up before them. But for once at any rate a High Court, is found to place reliance on these principles. The Orissa High Court, while considering the case of Mr. A. Narain Murthy referred to in a previous column in this issue of the BULLETIN, invoked the "clear and present

danger" rule first enunciated by the late Mr. Justice Holmes of the United States Supreme Court in the famous Schenck case. There was for a time a struggle in this court between this rule after it had been laid down and "the bad tendency" rule which prevailed before, but after quite a brief struggle the rule formulated by Holmes gained complete mastery. It has now acquired the position of an unchallengeable doctrine and has invariably been applied in the United States for over a quarter of a century.

It is well if it comes to be applied by our Supreme Court in this country also, and the citation of it by the Orissa High Court is therefore to be warmly welcomed as a beginning in this process. The Orissa High Court used the "clear and present danger" test in deciding a very simple issue. Two persons detained by the Orissa Government on the ground that there was apprehension that they might endanger public peace if left at large applied for a writ of habeas corpus, and the High Court decided that there was no "present danger" in this respect. The Chief Justice Mr. Ray, speaking for the Court, said: "On examination of the grounds it appears that none of the activities of the petitioners referred to therein indicate any present danger. These activities were mainly in the year 1947. They were not considered sufficient to detain them under the Public Safety Ordinance which was replaced by the present Act," that came into force in April, 1948.

But the Holmesian "clear and present danger" rule is capable of a very large extension, and it is our firm conviction that individuals will not be protected from legislative aggression, which risk is always present in a democracy, unless the rule is as uniformly applied in India as it is being applied in the United States. Indeed, our judiciary will hereafter have to equip itself with a profound knowledge of the U. S. case law in deciding cases affecting fundamental rights as heretofore it used to equip itself with the case law of the English Privy Council in deciding cases affecting every kind of law. Fundamental rights are unknown to the English constitution. But they are jealously protected in the American constitution. We can therefore only turn to the case law of the United States if we are to evolve a sound code of law in respect of civil liberty.

Nor, if such a bent is given, can it be regarded as a distortion of our constitution. The authors of the constitution themselves expect that we shall follow the usages of the United States constitution in this respect. If it were not so, why would they have insisted so much upon elimination of the words "due process" from article 21, as the Constituent Assembly had adopted it at first? They knew that the inevitable result of leaving in these words would be, by importing into our constitution all the ideas associated with the American "due process," to subject laws affecting personal freedom to judicial control. They wanted to free the legislatures from this control and make them supreme in the legislative field as in England. They therefore scored out the all-important words in the final form which they gave to the article. They will thus have no reason to complain if our judiciary hereafter applied the canons of the U. S. constitution in interpreting the scope of fundamental rights.

Preferred Status of Civil Liberty

In a critique of the constitution contributed to the "Hindu," Professor M. Ruthnaswamy points out how rights of freedom are guaranteed in the U. S. A. by the first eight amendments to the constitution and how the 9th amendment assures all other natural rights by providing that "the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." He wishes that the Indian constitution too, limiting itself to a few really basic rights, had safeguarded others by following this method. He says: "The advantage of this method of framing the clauses that have to do with these rights is that the burden of proof for the necessity of violation of any of these rights by any legislature or executive is thrown on these bodies."

This is a very important point, and we would like to state in this connection that, even in regard to the rights like freedom of speech and press which are specifically provided for in the United States constitution, the burden of proof that any laws restricting them in any way are necessary is by interpretation of the Supreme Court cast on the Government. This ensures that no rights for the enjoyment of which the constitution has given a guarantee will be unduly infringed either by the executive or the legislature. The student who wishes to know a little more about this may usefully turn to pp. 32-34 of Mr. Vaze's booklet, "Civil Liberty under the new Constitution."

Formerly in the United States legislative acts of states were presumed, in virtue of the police power inherent in them, to be valid in all doubtful cases, the burden of proof to show that they are invalid lying on those who deny their constitutionality. But in 1937 in the Herndon *v.* Lowry case the Supreme Court took a different line. By saying that "the power of a state to abridge freedom of speech and of assembly is the exception rather than the rule," it implied that where fundamental liberties were concerned, presumption would lie against legislation restricting such liberties and that a case for the necessity of restriction would have to be made out by Government. What was implied in this decision was expressly stated for the first time by the Supreme Court in the Thomas *v.* Collins case in 1945, and since then it has become the established rule of interpretation.

In the Thomas *v.* Collins case the Court said that the rights secured by the First Amendment had a preferred place in the scheme of the U. S. constitution, and added: "That priority gives these liberties a sanctity and a sanc-

tion not permitting dubious intrusions." Because of the preferred status of fundamental liberties in the constitution, writes a commentator, Professor R. E. Cushman, it is now agreed that "no presumption of validity attaches to any legislation which on its face appears to infringe any of its (the First Amendment's) guarantees.".

The "clear and present danger" rule and this new doctrine (that when a law appears to encroach upon a civil right, the presumption is that the law is invalid) have together given almost a steel frame to the U. S. Bill of Rights, and it is our hope that the Indian judiciary too would begin enforcing these principles in interpreting our fundamental rights so that they may become equally effective in this country from the very beginning.

HABEAS CORPUS APPLICATIONS

Ordinary Criminal Law By-passed

IN ORDER TO RESORT TO THE SAFETY ACT

A Muslim refugee from Pakistan, Mr. Saifi Kashmiri by name, came down to Delhi after partition and settled there. He was arrested in October, 1948, and detained in prison for three months. The main ground for his detention was that "since his arrival in Delhi he had started a malicious propaganda against the Jamiat-ul-Ulema and (Ahrar) Muslims,... and had issued three posters which were objectionable from the communal point of view," and that "his effort was to deepen the differences between the population of displaced persons and the Muslim residents of Delhi." Into the truth or falsity of these allegations the Judge of the East Punjab High Court, Mr. Jeevan Lal Kapur, naturally felt it to be beyond his competence to inquire when disposing of the habeas corpus petition made on behalf of the detenu, and he said on this point:

> It is not open to me to adjudicate upon the fact whether these posters do or do not suffer from the defect which is ascribed to them. The sole judge of this is the District Magistrate.

But the question still remained, viz., Assuming that the posters were objectionable, why should not Mr. Saifi Kashmiri have been prosecuted under the ordinary criminal law rather than recourse being taken to the Public Safety Act? On this point the Advocate-General argued that the executive had power to proceed under this Act against a person even though he could have been prosecuted under the ordinary criminal law or, for that matter, was so prosecuted and found not guilty (!) and that if the executive chose to resort to detention under the Public Safety Act, the Court could not go behind the detention order. The Judge rejected this contention and upheld that of the petitioner's counsel to the effect that the Public Safety Act could be used only for preventive purposes and not for punitive purposes as had been done in this case. Mr. Justice Kapur's remarks on this point were:

> In this case, if the District Magistrate was of the opinion that the detenu had started malicious propaganda and had issued posters which, according to him, were objectionable from the communal point of view, then it was open to him to take action against Mr. Saifi Kashmiri under sec. 153 A of the I. P. C. or under sec. 108 of the Cr. P. C.
>
> The (Public Safety) Act is not intended to suspend the ordinary criminal tribunals of the land or prevent them from exercising their ordinary jurisdiction.
>
> The reason given seems to me to show that in the opinion of the District Magistrate the detenu had already done acts which would come within the purview of sec. 153, I. P. C. (promoting or attempting to promote feelings of enmity or hatred between different classes of Indian Union's subjects).
>
> In this respect the action of the executive certainly is *dehors* the objects of sec. 3 of the Act and it could not be legally used for the purpose for which it has been used. In my opinion, therefore, the detention of Mr. Saifi Kashmiri is illegal, and I must allow the petition, make the rule absolute and order that he be released forthwith.

Cases like this in which, as the "Tribune" remarks, Governments "prefer the detention provisions to the hazards of a public trial to punish those whom they consider undesirable" are by no means uncommon.

Trying to Have Two Strings to the Bow

A case of a somewhat similar nature came up in the Bombay High Court. Twenty-eight persons stated to be communists were arrested by the police on 8th May, 1949, for organising and participating in a procession in the City of Bombay in contravention of a ban order. The arrests were made by the Superintendent of Police under the Public Safety Act, which in sec. 2 (A 1) allows such an officer, if he is satisfied that any one is acting or is likely to act in a manner prejudicial to the public safety, to arrest him without warrant and keep him in custody for 15 days. Before this period of 15 days was over, i. e. on 20th May, the Commissioner of Police issued an order for the detention of these 28 persons, on the ground that he was satisfied that they had acted in a manner prejudicial to the public safety. The arrested persons thus remained in detention in virtue of this order. Subsequently they petitioned the High Court for a writ of habeas corpus, challenging the order for detention passed against them on the ground that under the guise of orders under the Safety Act they were being detained on the identical grounds on which they were being prosecuted.

For, though detained without charge and without trial, they were at the same time being proceeded against under the ordinary criminal law—they were charged with the offence of being members of an unlawful assembly and of breach of the order banning processions. Only in these proceedings the provisions of the Criminal Procedure Code were not observed. Investigations were started on the day of the arrest, but the arrested persons were not put

up before a magistrate till some six months thereafter, and no periodic remand orders had been obtained from the magistrate, though the law provides that an arrested person should be produced before a magistrate within twenty-four hours and the necessary investigation must be conducted under the supervision of a criminal court. The police authorities obviously thought that since the persons had been detained under the Safety Act it was not incumbent upon them to comply with the provisions of the Criminal Procedure Code in this respect.

The full bench of the High Court who dealt with the habeas corpus petitions of the detenus said, in their judgment (8th February) delivered by the Chief Justice Mr. Chagla :

> In our opinion, it is not permissible to the authorities under the cloak and disguise of the Public Security Measures Act, to override the ordinary law and to deprive the subject of the safeguards provided under the law.
>
> If this was permissible, indeed, a very serious situation will arise in this province because it will mean that it will be open to the police to investigate into every conceivable case without the safeguards provided by the law, merely detaining the accused and then carrying on investigations secretly without providing the accused the protection which the law gives.

Referring to the detention order, their Lordships observed that on 20th May, when the order was passed, police investigations were still going on and in a manner not warranted by the law. From this they concluded that the Commissioner of Police must have had a collateral purpose in passing the order and that was to deprive the detenus of the rights which they had as persons arrested under the Criminal Procedure Code.

About the plea of the Advocate-General that if recourse was had both to detention under the Public Safety Act and trial under the ordinary criminal law, it was only because of the desire of Government that the detention should not be indefinite, Their Lordships observed that this gave the detenus rather an illusory benefit, because it would be open to the detaining authority even after the criminal court had acquitted them to continue to detain them under the Safety Act. Their Lordships stated that the authorities could not have both the rights. A person should be either detained under the Security Act or be produced before a magistrate for remand, if investigations into the offence they had committed had to be conducted. They held that to carry on investigations secretly after detaining them was not warranted by law as it would deprive the detenus of the safeguards they were entitled to. In other words, a person could not be detained under the Security Act and at the same time secret investigations carried on for the purpose of prosecuting him under the ordinary law. In view of these circumstances, Their Lordships held that the detention order made by the Commissioner was not valid and so set aside the order.

High Courts Rendered Impotent

In an editorial "The Story in India" in another column we have referred to the Nek Mohammad case in which the Patna High Court ordered the detenus to be released on the ground that the Bihar Government did no supply them with information sufficient to enable the detained persons to make an effective representation against the order for detention issued against them. And we added that the High Court could intervene in this case only because it came up for hearing before an amendment had been made in the Public Safety Act to the effect that vagueness or insufficiency of the information supplied to detenus would be no bar against the validity of the detention order. We said further that after the amendment was made the Courts would be deprived of the power of such intervention and that some High Courts had actually confessed their impotence in the matter.

Now the Patna High Court itself has confessed its impotence, though the issue arose in a slightly different form. It was argued before the Court, in connection with 28 hebeas corpus petitions, that Bihar Ordinance No. 5 of 1949, which amended in the above sense an earlier Ordinance (No. 4 of 1949), should be declared ultra vires on the ground that because of the amendment the detenus would be prevented from making an effective representation against their detention. The Court, naturally enough, held that the Ordinance could not be declared ultra vires on that account. It said :

> No one can doubt that the preservation of the liberty of the subject is of the utmost importance to the State and to a court of law. The courts of law, however, at the same time have to administer the law as it exists, and if the particular legislation has been validly enacted it is not within the scope of the authority of a court of law to ignore that legislation because it interferes with the liberty of the subject.

The judgment was delivered by Mr. Justice Imam and Mr. Justice Jamuar on 23rd December, 1948.

Appeals from this judgment we re made to the Federal Court, who upheld the decision of the High Court. But another grievance was ventilated before this Court. It was complained that a letter written by one of the detenus, Mr. Jagannath Sarkar, to his lawyer asking the lawyer to represent him in the High Court had been detained by the gaol authorities for a long time and delivered one day after the appeal was dismissed, with the result that Mr. Sarkar went unrepresented by a legal adviser. Referring to the complaint, the Court observed :

> We feel constrained to state that, in our opinion, it is reprehensible that communications made by a prisoner to his legal adviser should be delayed and that he should be hampered in placing his grievances before the proper Court. We hope that the provincial

Government would look into the allegations and, if they were made out, take proper steps to see that in future communications by prisoners to their legal advisers are not unduly delayed.

" Reprehensible " is a very strong word, but none too strong for the occasion.

Preventive Detention for Punitive Purposes!

Two persons, Messrs. Purna Chandra Ghosh and Dulal Bose, were first detained under West Bengal's Public Safety Act, and after the expiry of the Act they were kept in detention under the Bengal Criminal Law Amendment Act, 1930, the order for this fresh detention being served on them while they were still in custody. They petitioned the High Court for a writ of habeas corpus against this order and Mr. Justice Chunder and Mr. Justice Guha allowed the petitions and directed the detenus to be released (23rd December, 1949).

The Bengal Criminal Law Amendment Act, in sec. 2, provides that " where, in the opinion of the Local Government, there are reasonable grounds for believing that any person is a member of an association of which the objects and methods include ... the doing of any act with a view to interfere by violence or threat of violence with the administration of justice, or ... has done or is doing any act to assist the operations of any such association, the Local Government may, by order in writing," direct that " such person ... shall be committed to custody in jail." The Advocate-General had to concede that since the order for detention had been passed against the detained persons while they were in jail it could not be said of them that they were at that time either members of an association or were doing an act which the Act regarded as objectionable. He relied upon the words " has done an act " in the section and pleaded that " advantage might be taken of acts done prior to the arrest."

Their Lordships held that in the present case there was absolutely no material to show that the past occurrences were connected with the present as continued up to the present, i. e., the moment of the order under sec. 2, or as having such results or consequences as to bear on the present moment. For what was done in the past and completed, an order under sec. 2 after such a long period of detention in jail was not justified. Moreover, Their Lordships said:

> This is a case of preventive detention which is provided for in the section and not punitive action. The object of the section is to prevent something which was likely to happen or what was still going on rather than to punish a man for what was done and was finished.

They found that the detention was illegal and ordered the petitioners to be released from custody.

Government's " Satisfaction " Purely Formal

Mr. Shiv Kumar Misra was detained by the United Provinces under its Public Safety Act on 27th July, 1948, and about a month afterwards he was convicted of certain offences and sentenced. The sentence was to expire on 30th October, 1941. But, five days before he was due to be released after serving out the sentence, the District Magistrate of Unnao, under the directions of the Government, passed a restrictive order against him, prohibiting him from doing certain things. This order was issued under the Public Safety Act. The District Magistrate also directed Mr. Misra to furnish a personal bond and two sureties for the enforcement of the restrictions specified in the order and, in case of his failure to do so, directed that he be committed to prison. Mr. Misra failed to furnish the bond and sureties, and he was therefore not released on the due date.

A habeas corpus petition in this matter came up before Mr. Justice Dayal, who allowed the application and ordered the applicant's release. Even restrictive orders, like the order for detention, can be passed against a person under the Public Safety Act only if the Government is satisfied that with a view to preventing him from acting in a manner prejudicial to the public safety it is necessary to do so. The Court held that it could not have been so satisfied and that the satisfaction that was expressed in the order was but a matter of form.

His Lordship said that the applicant had been in jail from July, 1948, and he could not have acted in any such manner during the period of his detention as should have led to the conclusion that he was likely to act in any manner prejudicial to the public safety or the maintenance of public order. No grounds for the order passed appear to have been furnished to the applicant. In the circumstances, the expression of the order that the District Magistrate was satisfied that it was necessary to prevent the applicant from acting in any manner prejudicial to the public safety or the maintenance of public order was a formal expression. His Lordship therefore held that the applicant was illegally detained and ordered that he should be released from custody forthwith.

Another application for a writ of habeas corpus was allowed at the same time by the same Judge and for identical reasons. Mr. Ishtiaque Abdi was convicted of theft and sentenced. He was due to be released on 12th November, 1949, but two days prior to this the District Magistrate of Fyzabad issued an order under the Public Safety Act detaining him for 15 days, and four days before the expiry of this order the Government of the United Provinces issued an order detaining him for six months. This order for detention was on 13th December replaced by the Government by a restrictive order, combining in the same order, as in the case of Mr. Misra, a demand for furnishing a personal bond and two sureties, and in case of failure to furnish them he was to be detained in prison

until the period of six months' detention expired or until the bond and sureties were executed. These not being executed, the detention continued.

The Judge's conclusion was the same as in the case of Mr. Misra and the grounds identical. His Lordship was of the opinion that the applicant's detention was illegal in view of the fact that he could not have done anything during the period of about 10 months of his detention which could have led to the conclusion that he was going to act in such a manner as to be prejudical to the public safety or the maintenance of public order, and that he could not have acted in such a manner for such a substantial period of time prior to the restrictive order passed against him. It was clear that there could not have been any satisfaction about his acting in such a manner and about the necessity of passing these orders in order to prevent him from following the alleged course of conduct. Nothing was shown to His Lordship to indicate that the provincial Government had reason to come to such a conclusion. It followed, therefore, that the order imposing restraints could not have been passed on that ground and, therefore, the order about putting the applicant in prison under sec. 123A of the Cr. P. Code for failure to furnish the bond and sureties was illegal. In the result, the application was allowed and the detenu was ordered to be released.

One Mr. Qamrul Hoda was detained by the Bihar Government on the ground that he was fomenting communal trouble and rousing communal passions among Muslims against Hindus and the Government, and endeavouring to help the Pakistan Government. A habeas corpus petition filed by him was allowed by the Patna High Court and the order for detention set aside. It came out in the hearing that provisions in the Public Safety Ordinance relating to the reference of the cases of detenus to an Advisory Council and report by it were not complied with by the Government. Mr. Justice Das and Mr. Justice Sarjoo Prasad, who disposed of the petition, observed that these provisions were mandatory and non-compliance with them would render a detention illegal and fit to be set aside. In this view of the matter, Their Lordships directed that Qamrul Hoda be released forthwith.

RESTRAINTS ON THE PRESS

Pre-Censorship Order

The Government of West Bengal served on 18th January a pre-censorship order, under the West Bengal Security Ordinance 2 of 1949, on a daily newspaper in Bengali, the "Paschim Banga Patrika," directing its editor to suomit all news items, editorial comments, etc., for scrutiny before publication in the paper, and directing further that no issue of the paper shall be published except with the written permission of the Government. The "Patrika" has decided to suspend publication on account of this order. It was in existence for over two years. The same fate has overtaken a Bengali weekly, "Abhijan."

Security Demanded from "Shramik Mahila"

Under the West Bengal Ordinance no reasons need be given for the issue of such an order, and no reasons were in fact given in these cases. But even where reasons are required to be given they are often not given. This appears to have happened in the case of the "Shramik Mahila," a women's monthly magazine in Marathi, conducted by the Bombay Women's Association, an affiliate of the All-India Women's Association, in the interest of women employed in professions, fields and factories. The magazine was started over a year ago, and when a fresh declaration was being made occasion was taken under sec. 7 (1) of the Press Emergency Powers Act, 1931, to demand from the publisher the maximum security of Rs. 1,000 allowed by the section. The Act requires that when any such security is asked to be deposited the Magistrate who makes the demand shall record his reasons in writing. But we are told that in this case the demand was made "without assigning any particular cause." The magazine has no political party affiliations and carries on its work of "standing by the toiling woman in her difficulties" irrespective of party politics.

Under the West Bengal Ordinance no access to the High Court for relief is available, and although the Press Act provides for such relief by an application to the High Court the application can be made only against an order of forfeiture of the security deposited and not for the deposit of the security. It thus seems that the "Shramik Mahila" too will be unable to obtain any relief, unless some kind of judicial inquiry be possible because reasons for the demand of security from it were not given.

The number of casualties newspapers have suffered in West Bengal on account of the pre-censorship order to which the Government has subjected them is very large. The "Nation" in its issue of 7th December, 1949, gave a list of 26 dailies and weeklies which have had to stop publication on this account. And yet the list is growing. Now the "Paschim Banga Patrika" has succumbed, and it should be noted that when the Government forfeited a security of Rs. 2,000 taken from it the High Court on 24th November, 1949, set aside the forfeiture order and decreed that the security be returned with litigation costs. Now the Government has recourse to another device by means of which it can get round the High Court's order!

PRESS ACT, 1931

Forfeiture Order Set Aside

The Bombay Government forfeited a deposit of Rs. 2,000 furnished in August, 1949, by the printer and publisher of "Mashal," a daily newspaper published in Marathi and Gujarati in the Communist interest. It was thought by the Government that the article appearing

therein in the issue of 24th September, felicitating, the advent of the Communist regime in China was objectionable as it was likely to create hatred or contempt for the Government and to interfere with the maintenance of law and order. An application was filed against the order of forfeiture, and the Court set aside the order 6th February The impugned article, the Court held, was not much more than a strong piece of propaganda for the Communist Party. The party had not been banned by the Government, and there was nothing in law to prevent the Communists from carrying on propaganda about their ideology as against that of the Socialist or Congress Party. Their Lordships observed:

> The masses should be politically educated. They are entitled to know the pros and cons of every political system and ideology, and so long as it is legal for a particular party to put its views and its principles before the people, it would be improper for the Court to interfere with the right, not only of the party but also of the people of this country.

LATHI CHARGE AND FIRING IN JAIL

Plea for Use of Minimum Force Rejected

On the might of 13th August, 1949, a disturbance took place in the Sabarmati Jail, and 17 detenus kept in the jail were prosecuted by the Bombay Government for forming an unlawful assembly, rioting and causing hurt. The Special Judge who tried the case convicted the accused of the first charge as in his opinion they "acted illegally in forming deliberately an unlawful assembly and thereby unnecessarily occasioned disturbance." But he acquitted them of the other two more serious charges. The Judge observed:

> I am unable to accept the prosecution version that the parties of the policemen and jail servants were compelled to use force and make lathi charge on the detenus on account of stones thrown at them by the detenus.
>
> The attack by lathi charge must have been started by the combined party of the public servants, and after the situation became serious in the course of the hand-to-hand fight, which had continued for some 10 to 15 minutes resulting in injuries to persons engaged in the fight. The Deputy Police Superintendent seems to have given order for firing and thereafter the situation came under control.

Rejecting the prosecution plea that the policemen and jail authorities used minimum possible force in the discharge of their duty of quelling the disturbance, the Judge remarked:

> Necessary precautions prescribed in sections 127 and 128 of the Criminal Procedure Code do not seem to have been taken. There is nothing to show that the police officers commanded the unlawful assembly to disperse before having recourse to the use of force by lathi charge.
>
> The accused undoubtedly used force and violence against the policemen and jail servants and caused hurt to them. But they thereby committed no offence in law as they did so apprehending danger to their life and limb.
>
> They were acting within their right of private defence. They sustained in all 141 injuries including four gun shot wounds. It can be legitimately inferred that they were severely beaten by the jail sepoys and police constables in the course of the lathi charge. This gave rise to reasonable apprehension in their minds that grievous hurt or death was a likely result and they made a counter attack but they cannot in law be held criminally liable for their acts done in self-defence.

On the veracity of police officers who appeared in the case as witnesses the Judge had very strong adverse remarks to offer. He said:

> Responsible officers giving evidence on behalf of the prosecution do not seem to have due regard for truth and they seek to hide the truth from the Court by giving explanations which are improbable and unacceptable. Ordinarily evidence of witnesses holding high responsible posts should command respect, but unfortunately it cannot do so in this case.

The judgment was delivered on 6th January.

REVIEW

Freedom Under the Law

The Right Honourable Sir Alfred Denning, Lord Justice of Appeal, has written a book under the title "Freedom under the Law" (Stevens & Sons Ltd., 8/– net). In the book, the author has dealt with personal freedom, freedom of mind and conscience, justice between man and the State, and the powers of the executive. He suggests that the principles upon which to control the new powers of the executive have not yet been settled. Just as the pick and shovel are no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and uptodate machinery, by declarations, injuctions and actions for negligence and, in judicial matters, by compulsory powers to order a case stated. It is hoped that members of the legal profession in our country will prove themselves equal to this new and ever-growing challenge to the freedom of the citizen. N.H.P.

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