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**Editorial Committee:**  
N. M. JOSHI,  
S. G. VAZE.  
*Vice-President and  
Secretary respectively of  
the All-India Civil  
Liberties Council*

# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

Edited by R. G. KAKADE, M. A., LL. B., PH. D.,  
Assistant Secretary, All-India Civil Liberties Council  
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## TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION FOURTH AMENDMENT OF THE CONSTITUTION

By S. G. VAZE

The Constitution (Fourth Amendment) Bill which the Prime Minister introduced in Parliament on 21st December carries out a recommendation which a sub-committee of the Congress Working Committee made to that body six months ago, viz., that in order to give effect to the schemes of social welfare the Congress had in mind, the Government should be relieved of the obligation which the Constitution now lays upon it to pay compensation for any deprivation of private property that may result in the course of implementing the schemes, and that if compensation was to be paid it should be non-justiciable. The Bill will be circulated for eliciting public opinion and further proceedings in that matter will be taken in the next session of Parliament.

The Constitution of every country recognizes the right of the State to take private property if that be required for the purpose of promoting general welfare, but the Constitution of every democratic country attaches to such expropriation the essential condition that the State should be enabled to exercise this right only upon paying due compensation to the expropriated owner. Protection of property from an invasion by the State is as much a mark of democracy as protection of such basic rights as freedom of the person, freedom of expression, and freedom of association, whether the dominant economic policy which the State pursues be one of private enterprise as in the United States or one of private enterprise largely tempered with socialism as in the United Kingdom. Our Constitution too guaranteed the right to property along with other rights and provided in Art. 31 (2) that there shall be no deprivation of property, moveable or immoveable, except by the authority of law, and that if the State has occasion to take possession of or acquire such property for public benefit it shall pay compensation for the property so taken possession of or acquired. The Government later assumed power, by inserting Art. 31-A, to enact laws for abolishing large landed estates, and this objective having now been achieved, it wishes to go further and amend the Constitution still further in order

to give effect to its other programme of social welfare, and the amendment it now proposes to make is to the effect that the compensation for the property of which a person may happen to be deprived shall be purely discretionary.

With this object in view the Bill extends the scope of Art. 31-A by adding to it seven other categories, in respect to which the Bill declares that no law providing for them shall be deemed to be void in virtue of Art. 13 on the ground that it is inconsistent with or takes away or abridges any of the fundamental rights guaranteed in the Constitution. All the objectives mentioned in these categories are highly commendable, and if the matter rested here no one would seriously quarrel with the enlargement of the ambit of Art. 31-A. But the Bill proceeds to empower the Governments of the Union and the States to undertake expropriatory legislation in respect to these categories without being required to pay compensation for the property compulsorily taken. This it proposes to do by adding to clause (2) of Art. 31, which provides for compensation, a new clause, which runs:

Where a law does not provide for the transfer of the ownership or right to possession of any property to the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property by the State, notwithstanding that it deprives any person of his property.

This new clause thus provides that the latter kind of any extinguishment or curtailment of a right to property shall not entail payment of compensation, and as all the exceptions now proposed to be added are of this description, it means that in carrying out any of the items of social welfare it has in view the Government will be freed from the obligation to pay compensation for the property taken.

The position that the Government takes in the new clause is that a distinction must be made between a curtailment of a property right which a purely regulatory law may incidentally involve and the direct deprivation of property which laws authorizing acquisition of property

by the State will necessarily involve, and that while it is right that the State should be under an obligation to pay compensation for the latter kind of interference with property, it should be under no such obligation in cases of the former kind of interference. The distinction here made is very reasonable, but the excuse that the Government puts forward for enacting the clause based on such a distinction is altogether vain, viz., that the Supreme Court in some of its decisions has ignored this distinction and nullified regulatory legislation because the statute did not provide for compensation even in cases of minor infringement of property rights. Mr. Patanjali Sastri, late Chief Justice of the Supreme Court, has in his presidential address to the ninth session of the Madras State Lawyers Conference proved conclusively, by quoting from judgments in two recent cases, that, far from ignoring the distinction referred to by the Government, the Supreme Court has emphasized it and has unreservedly recognized that different methods would be justified in cases involving real deprivation of private property on the one hand and those involving merely an incidental abridgment of the right to such property on the other. In *State of West Bengal v. Subodh Gopal Bose* [ A. I. R. 1954 S. C. 92 ], the Supreme Court said :

The expression " taken possession of or acquired " in clause ( 2 ) [ of Art. 31 ] implies such an appropriation of the properties or abridgment of the incidents of its ownership as would amount to a deprivation of the owner. Any other interference with the enjoyment of private property short of such appropriation or abridgment would not be compensable under Art. 31 ( 2 ).

The expression " taken possession of or acquired " must be read along with the word " deprived " in clause ( 1 ) [ of Art. 31 ] and understood as having reference to such substantial abridgment of the rights of ownership as would amount to deprivation of the owner of his property. No cut and dried test can be formulated as to whether, in a given case, the owner is deprived of his property within the meaning of Art. 31. Each case must be decided as it arises on its facts. Broadly speaking, it may be said that an abridgment would be so substantial as to amount to a deprivation within the meaning of Art. 31, if in effect it withheld the property from the possession and enjoyment of the owner or seriously impaired its use and enjoyment by him or materially reduced its value.

Similarly, in *Dwarkadas v. Sholapur Spinning and Weaving Co. Ltd.* [ A.I. R. 1954 S. C. 119 ], Mr. Justice Vivian Bose said for the Court :

If there is substantial deprivation, then clause ( 2 ) is, in my judgment, attracted. By substantial deprivation, I mean the sort of deprivation that substantially robs a man of those attributes of enjoyment which normally accompany rights to, or interest in, property.

The form is unessential. It is the substance that we must seek.

In fact, in *Subodh Gopal Bose's* case the legislation which extinguished a property right without providing for compensation was upheld as valid, because it was an incidental consequence of a regulatory law; " that is to say, the case was regarded as falling within the legitimate exercise of the State's regulatory power."

Mr. Sastri drew the obvious moral from this. He said: " The passages extracted above indicate the scope of regulatory and prohibitory powers which the State can exercise without having to pay compensation. It is only when regulation of private property goes further and amounts to a substantial abridgment of the incidents of ownership that it would amount to deprivation for which compensation could be claimed." And he added :

There is thus reasonable scope left under these decisions for the exercise of the State power of regulation and control in relation to private property. The cases represent an earnest attempt to reconcile the rival demands of State control and regulation of private property and the constitutional protection thereof and lay down a principle which is fair to the Government and just to the citizen, and accords with the American view that " the general view at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking," in which case compensation would be payable.

This shows that there is no substance in the Government's contention that because the Supreme Court failed to distinguish between deprivation on the one hand and mere abridgment of the right to enjoy property on the other that it was being compelled to make the amendment in the Constitution that it sought to make.

Nor does it follow, as the Government contends, that because the State does not appropriate to itself any private property of which it happens to deprive the owner in exercise of its regulatory power, the owner should receive no compensation. Mr. Sastri put the point cogently when he said :

Cases are readily conceivable where it would obviously be unjust to deny the right to compensation to a person who is made to lose the benefit of his ownership or his right to possession without the right being transferred to the State. Take, for instance, the case of an owner, whose lands have been submerged by water impounded in execution of a project authorised by law. There would be no transfer of the ownership of the submerged lands or of the right to possession to the State in such a case and the owner will have no constitutional right under the new clause [ clause ( 2-A of Art. 31 ] to compensation. Another instance, perhaps, would be the

cutting off of the usual supply of water for what are called mamool wet lands under statutory authority in order to ensure adequate supply of water to an expanding city served by the same tank.

Instances can be multiplied. In such cases, according to the construction placed on Art. 31, clauses (1) and (2), it would probably be held that the abridgment of the incidents of ownership is so substantial as to amount to deprivation of rights of property and entitle the owner to compensation. Is it the intention of the Government that the constitutional protection should be withdrawn in such cases?

Apparently, it is the intention of the Government either to pay no compensation at all or to pay what would be regarded as less than fair compensation to the dispossessed owner merely because the property would not come into its own possession. If this is its intention under the Bill, surely a wrong would be done which must be rectified. As Mr. Sastri put it:

The point is if the State provides for no compensation or for only a nominal compensation, the affected owner will have no constitutional remedy. The constitutional protection of private property consists not in any prohibition of appropriation of private property but in the insistence on the payment of adequate compensation. If the quantum of compensation is to be left to the discretion of the State and made non-justiciable, there will be little left of the guaranteed protection of private property which will then be exposed to all sorts of experimental economic legislation according to the notions of social welfare of the politicians who may come into power from time to time. Such a situation must tend to spread a sense of insecurity in the minds of the people and give rise to conditions of economic instability with harmful consequences to investment of domestic and foreign capital.

The change in the constitution which the Bill proposes to make in respect to a State monopoly in any trade or business is a much simpler matter. The amendment made by the Constitution (First Amendment) Act of 1951 in Art. 19 (6) has already taken such monopolies out of the purview of Art. 19 (1) (g). "The result of the amendment," says the Supreme Court in *Saghir Ahmed v. State of U. P.* (reported by us on a later page in this issue), "is that the State would not have to justify such action (i. e., prohibition of any business by private individuals because of the creation of a State monopoly) as reasonable at all in a Court of law, and no objection could be taken on the ground that it is an infringement of the right guaranteed under Art. 19 (1) (g) of the Constitution." But the amendment does not dispense with the obligation resting on the State to provide for compensation in cases

of "deprivation" of property in virtue of Art. 31 (2), and in *Saghir Ahmed's* case the Supreme Court voided the U. P. Act under which bus-owners were deprived of the business of running buses on hire on public roads without paying them compensation. Now the Constitution Amendment Bill places this and all other analogous matters beyond challenge in courts of law by making an additional provision to that effect in Art. 305 and including in the rubric of that Article "saving of laws providing for State monopolies."

The Bill is founded on the belief that large-scale plans of social welfare will not be practicable if rights of private property are to be scrupulously respected. But the belief is not justified. Taking the instance of nationalization of industries, we see that in the United Kingdom the Labour Government, which adheres to the policy of socialism, took over private industries on paying to the owners the market value of their property. In no country is social welfare in a more developed condition than there, and we may well be content to walk in the footsteps of that country in the matter of promoting social welfare. In any case democratic countries always inhibit themselves from following policies which involve expropriation of private property; they limit their welfare plans to what they can achieve in other ways, the levying of graduated income-tax being one of the most effective means of rectifying social inequalities, which is such an urgent need in this country. We feel that we should follow democratic practice in this respect as in others. While it is true that there is no substance in the Government's plea that it is the Supreme Court's judgments which have driven them to other modes of bringing about social welfare (we recognise, however, the need, in spite of the Supreme Court's decision to the contrary, of the Government being empowered to take over and manage for a temporary period big undertakings which are being mismanaged by incompetent persons without having to pay compensation), the truth is that the Government does not feel that regard for private property which every democratic Government should feel. Mr. Nehru said frankly at a Congress meeting that if he did not resort to outright expropriation in the public interest, as some other sections of opinion would, it is only because short-cuts of this kind would in the long run put the country backwards. It is good that considerations of expediency deter the Government from such adventures; but we wish it would also be deterred by what adherence to democratic principles and practices requires. At all events, having agreed at the time of framing the Constitution to afford constitutional protection to rights of property, the Government might well refrain now from scoring out this protection, as the Bill in effect seeks to do, by giving to itself discretion to deal with these rights as it deems fit.

## 'COMPULSORY REGISTRATION OF THE COMMUNIST PARTY FEDERAL COURT OF APPEALS DECLARES THE LAW TO BE VALID

In the first judicial decision on the constitutionality of the Internal Security Act of 1950, popularly called the McCarran Act after its sponsor in Congress (the late Senator Pat McCarran), the Court of Appeals in Washington upheld on 23rd December, by a two-to-one majority, the validity of the law requiring any organization proved to be engaged in subversive activities and dominated by Soviet Russia to register itself with the Justice Department.

Under this law proceedings were started as early as April 1951 against the Communist Party in the United States, and hearings were begun before the Subversive Activities Control Board to determine whether the party was a Moscow-dominated subversive organization. The Board held in April 1953 that the party was such an organization and directed it to register with the Attorney-General. The party refused to register and took its case directly to the Federal Court of Appeals.

Registration would impose rigid controls on the party. It would be required, on pain of a maximum fine of \$10,000 for wilful failure to register, to furnish names and addresses of its members and submit a full statement of its income and expenditure to the Justice Department. The law also provides that if the organization itself does not register, individual members thereof shall register, those who failed to do so being subject to a maximum penalty of five years' imprisonment in addition to a fine. Among the privileges registered members would forfeit were the right to Government jobs, to passports and to certain tax deductions.

The Court's decision affirmed the Subversive Activities Control Board's order that the Communist Party was a subversive organization controlled by the Soviet Union and sustained the constitutionality of the 1950 Act. The majority opinion was written by Judge Prettyman and concurred in by Judge Danaher. Judge Bazelon dissented.

The Communist Party first assailed the Control Board's order as not supported by a preponderance of evidence adduced at the hearings. The Court reviewed the evidence in detail and concluded that out of the testimony had come a picture of a world movement dedicated to the overthrow of the American Government. It said it believed that the evidence supported the finding of the Control Board that the Communist Party "is substantially directed, dominated and controlled by the Soviet Union, which controls the world Communist movement . . . and that the Party operates primarily to advance the objectives of such world Communist movement."

Then the Communist Party challenged the Act on several constitutional grounds. It argued that the Act infringed on the First Amendment's guarantees of freedom of speech and belief. The Court rejected this argument, holding that "the right to free expression ceases at the

point where it leads to harm to the Government." Judge Prettyman said:

The right to unimpeded expression of views does not apply to unimpeded conduct. Clearly the aim of the statute before us is at action and conduct rather than at mere speech and assembly. A purpose to establish a totalitarian dictatorship is a programme of action rather than of mere discussion. It is a programme of action; it involves the Government. It can be met with action by the Government.

Dealing with the contention that the Act violated the due process of laws clause and was a bill of attainder, the Court held that the penalties provided in the Act imposed no restrictions on the constitutional provision that no person "shall be deprived of life, liberty or property without due process of law." They were a reasonable exercise by Congress of its power to protect the nation against the world-wide Communist conspiracy.

The Party also put forward the argument that the Act was an "outlawry statute" designed to outlaw the party by legislative fiat. On this subject the Court said:

If an organization is actually operating primarily to achieve the objective of a foreign organization . . . by other than constitutional means, we perceive no constitutional obstacle to its outlawry.

The Court observed that the fact that no organization could survive registration under the Act "is no detriment to the validity of the statute." A statutory requirement was not invalid, the opinion asserted, "merely because of results which may flow from the unpopularity of the cause affected."

Lastly, the Court dealt with the party's contention that the Act, by requiring the registration of party members, violated the Fifth Amendment's guarantee that "no person shall be compelled in any criminal case to be a witness against himself." Judges Prettyman and Danaher held that the constitutional privilege against self-incrimination was a "realistic barrier between the obligation of a citizen to give evidence and the injustice of inquisition by force." They added that it was "designed to achieve a precious protection."

The mere fact of being required to register, however, did not in their opinion deprive Communists of this protection. Revealed membership in the Communist party was not of itself a violation of any criminal statute. They said, "The membership records of an organization are not protected by the privilege against self-incrimination."

The dissenting member of the Court, Judge Bazelon, based his dissent entirely on this last point. He said:

Suppose an Act of Congress required bands of bank robbers to file with the Attorney-General statements of their membership and activities, and

imposed criminal penalties upon their leaders and members for failure to do so. Such an act would compel individuals to disclose their connection with a criminal conspiracy.

The registration provisions of the Internal Security Act . . . compel individuals, under criminal penalties, to disclose intimate associations with the Communist Party, a disclosure which the Supreme Court has held to be incriminatory.

No argument could reconcile such an Act with the Fifth Amendment's command.

The Communist Party is going to file an appeal against this decision to the Supreme Court.

### Teacher's Freedom

The "Times of India" carried the following editorial in its issue of 31st December.

In maintaining its lead in encroaching upon the rights of teachers, the Madhya Pradesh Government continues to exhibit its scant respect for their freedom as citizens. Having earlier placed a ban on political activities by school-teachers, it extended the rule some time ago to include teachers in aided colleges. Its latest directive to private colleges seems to be intended to bring all professors, lecturers and tutors under this ban. It has naturally put college managements in a mortal fear of losing the State grant. In order to ensure its continuance, they have since been busy, it is reported, taking written pledges from the members of their staff that they will not take part in politics. In condemnation of the M. P. ukase, a mention was appropriately made at the All-India Educational Conference of a similar order—the notorious Risley circular of forty years ago—against which leaders of all walks of life then united in protest. While Madhya Pradesh paves the way, official attempts to take away from the teachers the ordinary rights of citizenship are also in evidence elsewhere. On the eve of last month's municipal election in Delhi, Government prohibited teachers in State or aided schools from participation in elections or politics. A similar ban obtains in PEPSU and the latest to be warned are the school-teachers of Andhra.

Undoubtedly, teachers devoted to their job and vocation will have little time or aptitude for active politics. They should also do nothing that would hamper their professional work or lead to the indoctrination of young minds. Yet the fundamental question remains whether any curtailment by the State of their rights as individuals and as an organised body is justified. This is particularly so when they are not in State employment. Here is a matter which is best left to their good sense and devotion to duty as wards who mould the life of the younger generation. In stifling the free atmosphere in which teachers should function, State Governments have also forgotten the provisions in the Constitution which

explicitly gave them a political role to play when they act as the electorate for electing a twelfth of the membership of State Legislative Councils. It is possible to imagine that the teacher's expression of views on current problems like the medium of instruction or on the adequacy and success of the Five-Year Plan would be looked upon as an incursion into politics. This is a dangerously anti-intellectual and restrictive climate of existence for any individual and especially for the teacher, who must arouse the pupil's curiosity and meet his doubts and questions. Even the teacher's struggle for better salaries and conditions of work can be pounced upon as political agitation. The answer to the restrictive orders in Madhya Pradesh and elsewhere would be for teachers to unite in protest and request the Judiciary to decide if they are good in law. Administrations with a greater respect for the citizen's freedom will, in the meantime, be eager to rescind all measures which put them out of accord with democratic principles and the temper of the Constitution.

### COMMENTS

#### Censorship by Opening Citizens' Letters

#### DOES IT NOT VIOLATE ART. 19 (1) (a)?

Recently it was alleged that the mail of a member of the Madras Legislative Assembly was interfered with by the police and a demand was made that the matter be referred to the committee of privileges of the legislature. The Speaker of the Assembly found no *prima facie* case for acceding to the suggestion. Commenting on this incident, the "Statesman" has raised the wider question of the constitutionality of the practice of opening citizens' letters. The paper says:

Indian practice derives from sec. 26 of the Post Office Act, 1898, or sec. 5 of the Telegraph Act, 1885. Censorship can be, and is, exercised in peace-time, the criterion being public emergency or "the interest of public peace and tranquillity." Of such interest the official concerned is sole judge, since a certificate signed by a Secretary to Government, State or Central, "shall be conclusive proof on the point."

There is no known responsible body of censors such as the Australian committee of privileges presumably had in mind (this precedent was examined by the Madras Speaker); anyone can be deputed to act, from the postal authorities to the police. Nor has action under these measures a particularly reputable history. During the civil disobedience movements, for instance, the authorities might have conceivably made out a case for open censorship; instead they proclaimed abroad that there was none, while in fact proceeding quietly to interfere both with private correspondence and with Press messages, under the P. and T. Acts. There have been not infrequent allegations that, from time to time, the same sort of thing goes on today.

There seems, on the face of it, some doubt whether this is constitutional. Article 19 (1)(a) gives all citizens the right to freedom of speech and expression. Case law has since indicated that interference with the circulation of a newspaper infringes this right; a fortiori, it seems, so also should interference with private mail. Article 19 (2), indeed, permits the legislature to place restrictions on the right for certain purposes; but, under the Constitution (First Amendment) Act, 1951, they must be reasonable restrictions—which is justiciable. The constitutional position may some day be clarified in the courts. The difficulty is that the authorities are not obliged to inform a citizen when they propose to confiscate or open his mail, nor do they; on the other hand, mail can and does quietly disappear or linger in transit for reasons other than official censorship.

#### Control of Dramas in Madras

The bill for the regulation of dramatic performances in the State of Madras, to which reference was made in the last issue (see p. iii:165), underwent some changes in the select committee, which are calculated to soften the provisions of the bill. First, the clause relating to incitement to interference with supplies of essential articles, which had no relation to the purposes of the bill in present conditions, was dropped. Secondly, the clause relating to "fomentation of class hatred between various sections of the people" has been made applicable only to cases involving "incitement to violence." This was obviously necessary because the Press Commission has recommended that sec. 153 A, I. P. C., to which this clause corresponds, should, in order that it be above challenge in courts of law on the ground of constitutionality, be restricted in its operation "to those cases where there is intention to cause disturbance of public peace or knowledge or likelihood of violence ensuing." In fact, "incitement to violence" has now been made the criterion of the objectionableness of dramatic performances in the whole bill: a performance could be banned if it was "objectionable" and was also likely to lead to a breach of the peace. Thirdly, "deliberate intention" to cause violence must be proved if an "objectionable performance" is to be banned. This is in contrast to what the Press Act provides, which expressly says that the motive of the writer is immaterial; it is only the result that flows from the writing with which the Act is concerned.

An "objectionable performance" is now defined as any drama or pantomime:

Which incites any section of the citizens of India to acts of violence against any other section of the citizens of India or which is deliberately intended to outrage the religious feelings of the citizens of India by insulting or blaspheming or profaning the religion

or the religious beliefs of that class or which is grossly indecent or is scurrilous or obscene or intended for blackmail."

It is now provided that action under the measure could be taken by officers of the rank of district collectors in the districts or the Commissioner of Police in Madras City. An order to prohibit a performance temporarily, i. e., for less than two months, can be passed only "after giving a reasonable opportunity" to the parties concerned "to show cause why the performance should not be prohibited." Appeals against other prohibitory orders will be heard by a Bench of the High Court of not less than two judges. The penalty provided in the original bill for disobedience has been reduced.

#### Judiciary-Executive Separation

##### SCHEME INTRODUCED IN FIVE DISTRICTS OF THE PUNJAB

The Punjab Government has brought into force a scheme for separation of the Judiciary from the Executive in five districts of the State, namely, Jullundur, Ambala, Hoshiarpur, Gurgaon and Simla. The judicial work in these districts will be entrusted to judicial magistrates, the Deputy Commissioners being confined to executive functions and to development work, which is heavy. Five judicial magistrates have been posted at Jullundur headquarters, three at district headquarters and one at I. N. A. in Hoshiarpur; one each at Ambala City, Ambala Cantonment, Rupal, Kharar and Jagadhari in Ambala district and two at the headquarters, and one at Palwal in Gurgaon district. In Simla a senior sub-judge will work as judicial magistrate.

The scheme has been introduced for the present on an experimental basis, the Government's opinion being that the people are not very keen on it. Extension of the scheme to other districts would depend, it is stated, on its success or failure in the five districts in which it has been introduced, and particularly on the reaction of the general public to it:

#### The Judicial System in New China

Mr. Saila Kumar Mukerji, Speaker of the West Bengal Legislative Assembly, who has returned after a study of conditions in new China, has in an account of his impressions confirmed Mr. Attlee's statement (vide p. iii:131 of the BULLETIN) that the judiciary in that country is not independent of the executive machinery, but is a part of it. Noting that there is no special class of lawyers in China, Mr. Mukerji says:

In every case, whether civil or criminal, a judge is assisted by two assessors. A judge may or may not have any legal training. There is no system of cross-examination or any evidence act or code of civil or criminal procedure, but from the discussions I had with the Chinese Law Association at Peking I

gathered that new China had not yet developed fully its system of law and law courts.

In delivering a judgment, the judge apparently gives expression to the fact that, in awarding the punishment, he is guided by the view that the accused should be punished with a view to effecting the Socialistic construction of the State. Thus, a judge is also a part of the Executive and administrative machinery. Brought up in the traditions of judicial training and administration of law courts in India, and the system of jurisprudence to which we are accustomed, I was amazed at the nature of the trial where no independent lawyers can be obtained, where the truth of a statement cannot be tested by independent cross-examination, or where there is no law of evidence to sift relevant and irrelevant matters.

The Constitution provides that the National People's Congress will appoint the Supreme Procurator-General and the organization of People's Procuratorates at different places is subject only to the Supreme People's Procurator-General. This official is responsible for controlling political crimes and offences and to see particularly that criminals are procured, brought to trial and convicted and to see that there is no counter-revolutionary sabotaging of the Socialistic policy of the State, whether in cities or in rural areas.

While the Judiciary is absolutely independent of the Legislature in India and has the power even to set aside a law framed by the Legislature, in China the Judiciary is an adjunct of the Executive and has no power to interpret the laws.

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## STATE MONOPOLY IN ROAD TRANSPORT

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### Right to Carry on Business Infringed

#### GUARANTEE FOR FREEDOM OF TRADE

In *Saghir Ahmed v. State of U. P.*, decided on 13th October last, the Supreme Court raised a number of points and the observations made in the course of its judgment in this case as to whether an Act providing for a State monopoly in a particular trade or business conflicts with the freedom of trade and commerce guaranteed by Art. 301 of the Constitution have been made a reason by the Union Government for proposing an amendment of Art. 305 in the Constitution Amendment Bill, which was introduced in Parliament on 20th December. For this reason the judgment has been summarised here at some length.

#### FACTS OF THE CASE

The U. P. Government, "having conceived the idea of establishing a State monopoly in respect to the road transport business in the State," began, through Transport Authorities, cancelling the permits to private operators of stage carriages and "refusing permits to people who

would otherwise have been entitled to them" under the Motor Vehicles Act of 1939, by virtue of sec. 43 (3) of which the Government could run any number of buses without taking out permits for them. Aggrieved by this "illegal use" of the Act, several bus-owners lodged complaints, in the Allahabad High Court. The petitions were heard by a Full Bench and "a majority of the judges expressed the opinion that the State, purporting to act under sec. 42 (3) of the Motor Vehicles Act, could not discriminate against other persons in their own favour and that the sub-section, in so far as it purports to exempt State buses from the obligation to obtain permits for their use, conflicts with Art. 14 of the Constitution. All the judges concurred in holding that "nationalisation of an industry was not possible by a mere executive order without appropriate legislation," giving a warning, however, that such legislation might conflict with Art. 19 (6).

Accordingly, the State Government passed the U. P. Road Transport Act in 1951 as a means of securing the exclusive right to operate road transport services within its territory. Under sec. 3 of this Act the Government was empowered, by promulgating a scheme in that behalf, to declare that the road transport services in general or any portion thereof shall be run and operated by the State Government exclusively or in conjunction with other agencies. In accordance with the provisions of this section the U. P. Government published on 7th April 1953 a scheme providing that the state carriage services, among others, on the Bulandshahr-Delhi route, shall be run and operated exclusively by the State Government. Thereupon, several persons plying buses on this route presented petitions before the High Court at Allahabad challenging the constitutionality of the 1951 Act and praying for writs, in the nature of mandamus, directing the Government not to interfere with the operation of their buses. A Division Bench of the High Court consisting of Mukharji and Chaturvedi JJ., on 17th November 1953, dismissed the writ petitions, repelling in their judgment all the constitutional objections urged by the petitioners. Against this judgment Saghir Ahmed and another filed an appeal in the Supreme Court. The appeal was heard by a Bench consisting of the Chief Justice and B. K. Mukherjee, S. R. Das, Bose and Ghulam Hasan JJ. The Court by a unanimous judgment allowed the appeal and issued a writ of mandamus restraining the U. P. Government from enforcing the provisions of the U. P. State Road Transport Act, 1951, against the appellants.

#### BEARING ON ART. 19 (1) (G)

It was contended on behalf of the appellants that inasmuch as the 1951 Act excluded all private bus-owners from the field of transport business, it was an infringement of the right, guaranteed in Art. 19 (1) (g) of the Constitution, to "carry on any occupation, trade or business." It was argued, on the other hand, by the Advocate-General appearing for the U. P. Government,

that "the citizen has no inherent right in this respect apart from any State sanction... The rights of the appellants are created entirely by State legislation, and by State legislation they could be deprived of the same." The Advocate-General cited in support of this argument two U. S. Supreme Court judgments [ *Packard v. Banton* (1923) 68 Law Ed. 596 and *Stephenson v. Binford* (1932) 77 Law Ed. 288], in which the doctrine of "exceptional user" or the doctrine of "franchise" or "privilege" was laid down. The Court ruled that this doctrine had no place in the Indian Constitution and referred with approval to the statement of law summed up thus by Mr. Justice Venkatarama Aiyar, Judge of the Madras High Court in *C. S. S. Motor Service v. State of Madras* [ A. I. R. 1953 Mad. 279 ] in regard to the right to use a public highway (such as the Bulandshahr-Delhi route, a part of the Grand Trunk Road, is ] :

The true position, then is that all public streets and roads vest in the State, but that the State holds them as trustees on behalf of the public. The members of the public are entitled as beneficiaries to use them as a matter of right, and this right is limited only by the similar rights possessed by every other citizen to use the pathways. The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally; ... but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied to him on the ground that the State owns the highways.

Expressing "entire agreement" with this, Mr. Justice Mukherjea, who delivered the opinion of the Court, said :

Within the limits imposed by State regulations any member of the public can ply motor vehicles on a public road. To that extent he can also carry on the business of transporting passengers with the aid of the vehicles. It is to this carrying on of the trade or business that the guarantee in Art. 19 (1) (g) (relating to the right "to practise any profession, or to carry on any occupation, trade or business") is attracted, and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under cl. (6) of that Article.

#### RESTRICTION AND EXTINCTION

The Court thereafter considered the question whether prohibition of the right of all private citizens to carry on the business of motor transport on public roads within the State of Uttar Pradesh, as laid down by the Act, was a mere "restriction," reasonable, or unreasonable on the right guaranteed in Art. 19 (1) (g); i.e., whether the expression "restriction," as used in that Article, "includes total deprivation" as well." The Court pointed out that "the normal use of the word 'restriction' seems to be in the sense of 'limitation' and not 'extinction,' and referred in this connection to the following observation of Lord Davey

in *Municipal Corporation of the City of Toronto v. Virgo* [ 1896 A. C. 88 ], while discussing a statutory power conferred on a Municipal Council to make bye-laws for regulating and governing trade :

But Their Lordships think that there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

The Court also referred to the detention case of *A. K. Gopalan v. the State* [ A. I. R. 1950. S.C. 27 ], in which a majority of the Justices drew a distinction between negation or deprivation of a right and a restriction upon it, *Kania C. J.*, e. g., saying :

I am unable to accept the contention that the word "deprivation" includes within its scope "restriction" when interpreting Art. 21.

The Court, however, preferred not to express any final opinion on the matter. If this opinion were that "restriction" does not include "total deprivation," the question whether the restrictions imposed by the Act were "reasonable" within the meaning of Art. 19 (6), would not have arisen at all. But because no "final opinion" was announced on this point, Their Lordships proceeded to consider whether the restrictions imposed on the exercise of the right mentioned in cl. (1) (g) of Art. 19 were such as legislatures were authorized to impose by cl. (6) of that Article.

#### IS THE RESTRICTION "REASONABLE" UNDER UNAMENDED Art. 19 (6) ?

This question, viz., whether the statute is saved by Art. 19 (6), had to be considered on the basis of the Article before it was amended by the Constitution (First Amendment) Act of 1951 because the statute was passed before the amendment came into force. This Act said : "Nothing in Art. 19 (1) (g) shall affect the operation of any existing law in so far as it relates to ... the carrying on by the State ... of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise." The Court observed that "the result of the amendment is that the State would not have to justify such action (prohibition of transport business by private citizens) as reasonable at all in a court of law, and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Art. 19 (1) (g) of the Constitution." But, it said :

The amendment of the Constitution, which came later, cannot be invoked to validate an earlier legislation which must be regarded as unconstitutional when it was passed. As Professor Cooley has stated in his work on Constitutional Limitations (vide vol. 1, p. 384, note); "A statute void for constitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution



removing the constitutional objection but must be re-enacted."

The Allahabad High Court agreed that the validity of the statute was not to be determined by applying the amended cl. (6) of Art. 19, but it held that "quite apart from the new provision, the creation of a State monopoly in regard to transport service could be justified as reasonable restrictions imposed in the interest of the general public." The Supreme Court held that this view was not correct.

The High Court upheld the validity of the legislation, even on the basis of Art. 19 (6) as it stood before the amendment, on two grounds: 1. that "prohibition (of the plying of private buses) with a view to State monopoly is not per se unreasonable" (one judge saying: "In my opinion, even this total stoppage of trade on public places and thoroughfares cannot *always* be said to be an unreasonable restriction"); and 2. that "legislation was passed in the interest of the general public who are undoubtedly interested in a suitable and efficient road transport service, and it was not proved by the petitioners that the monopoly which was contemplated in favour of the State in regard to this particular business, was not conducive to the common welfare."

The Supreme Court rejected both these arguments and therefore also the conclusion to which they led. Mr. Justice Mookherjee said on point 1:

It is not enough to say that as an efficient transport service is conducive to the interests of the people, a legislation which makes provision for such service must *always* be held valid irrespective of the fact as to what the effect of such legislation would be and irrespective of the particular conditions and circumstances under which the legislation was passed [in regard to which no materials were placed before the Court].

On point 2 he said:

There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Art. 19 (1) (g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in cl. (6) of the Article. If the respondents do not place any materials before the Court to establish that the legislation comes within the permissible limits of cl. (6), it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community.

While it is not known "what additional amenities or advantages the general public would enjoy" if the State takes over the road transport service, one immediate effect is plain, the Court said, viz., that hundreds of persons who are earning their livelihood by carrying on this business "will be deprived of the means of supporting themselves and their families and they will be left with

their buses which will be of no further use to them and which they may not be able to dispose of easily or at a reasonable price."

For these reasons the Court came to the conclusion that:

The legislation in question which violates the fundamental right of the appellants under Art. 19 (1) (g) of the Constitution and is not shown to be protected by cl. (6) of the Article, as it stood at the time of the enactment, must be held to be void under Art. 13 (2) of the Constitution.

#### IS THERE A VIOLATION OF ART. 301 ?

The Court finally considered the contention of the appellants that "the Act violated the guarantee of freedom of inter-State and intra-State trade embodied in Art. 301 of the Constitution." This contention was negated by the Allahabad High Court when urged there, on the ground that "this Article is concerned with the passage of commodities or persons either within or outside the State frontiers but not directly with individuals carrying on the commerce or trade," and that the right of individuals "is dealt with under Art. 19 (1) (g) of the Constitution, and the two Articles have been framed in order to secure two different objects."

The Supreme Court, having declared the Act unconstitutional on the two grounds mentioned above, did not consider it necessary to record its decision on this point, although it pointed out that in the Australian Bank case [1950 A. C. 235] the Judicial Committee held, in regard to sec. 92 of the Australian Constitution, "which so far as inter-State trade is concerned, adopts almost the same language as Art. 301 of our Constitution," that "the rights of individuals do come within the purview of the section." The Court, on this question, merely mentioned the contentions that could be raised in regard to it. Mr. Justice Mukarjee said:

The Constitution itself has provided in Arts. 302 and 304 (b) how reasonable restrictions could be imposed upon freedom of trade and commerce, and it would not be proper to hold that restrictions can be imposed *aliunde* these provisions in the Constitution, [Art. 304 (b) empowers a State legislature "to impose such reasonable restrictions ... as may be required in the public interest."] The question would also arise as to what interpretation should be put upon the expression "reasonable restrictions" and whether or not we would have to apply the same tests as we have applied in regard to Art. 19 (6) of the Constitution. One material thing to consider in this connection would be that although the Constitution was amended in 1951 by insertion of an additional clause in Art. 19 (6) by which State monopoly in regard to trade or business was taken out of the purview of Art. 19 (1) (g) of the Constitution, yet no such addition was made in Art. 301 or Art. 304 of the Constitution, and Art. 301, as it stands, guarantees

freedom of trade, commerce and intercourse subject only to part XIII of the Constitution (relating to trade, commerce and intercourse within the territory of India) and not the other parts of the Constitution including that dealing with fundamental rights.

## HABEAS CORPUS PETITIONS

### A Kashmir Detenu Released

#### ALLEGATIONS MADE BY GOVERNMENT "VAGUE"

Mr. Abdul Ghani Goni, a member of the Kashmir State's Constituent Assembly, who was arrested on 6th August last and detained under Sec. 3 of the Preventive Detention Act on an order by the Additional District Magistrate, Srinagar, filed a habeas corpus application in the State High Court, challenging his detention.

According to the grounds of detention given to the petitioner, Mr. Goni was being detained because he changed his nationalist outlook after the fall of Sheikh Abdullah's Government and became a communalist, organised "subversive" activities and raised "objectionable slogans." He was further charged with seeking to establish contacts with Pakistani agents. He also attempted to organise on August 9 a Martyr's Day (the day on which Sheikh Abdullah was dismissed and arrested) in obedience to the call given in a pamphlet published in Pakistan.

The Advocate-General, appearing for the State Government, said that the Executive was the final authority to decide the question of detention. The petitioner was engaged in subversive activities and this was enough for the executive authority to order his detention.

On 4th January the Full Bench of the Kashmir High Court allowed the application, holding that the grounds supplied to the detenu were vague and indefinite, and ordered the applicant's release. Their Lordships remarked they were satisfied that further detention of Mr. Goni was bad in law. They said:

It is the right of the petitioner under Article 22 (5) of the Indian Constitution to be furnished with particulars of the grounds of his detention to enable him to make a representation. The constitutional requirements must be satisfied with respect to each of the grounds communicated to the person detained subject, of course, to the claim of privilege under Clause 6 of Article 22 of the Constitution.

Where it has not been done in regard to even one of the grounds mentioned in Statement of the Grounds, the petitioner's detention cannot be held to be in accordance with the procedure established by law. He is, therefore, entitled to be released.

Their Lordships held that the allegations made against the detenu were "very sweeping and vague." The Judges referred to a Supreme Court judgment in which it had been held that preventive detention was a serious invasion of personal liberty. Such meagre safeguards as

the Constitution had provided against any improper exercise of the power to detain a person must be zealously enforced by law courts.

### Detention Order "Without Jurisdiction"

Mr. Mahabir Prosad Periwal was arrested on 20th August 1953 at Kalimpong and thereafter detained in Darjeeling jail under an order passed by Mr. S. Dutt Majumdar, who was both Deputy Commissioner and District Magistrate, Darjeeling. In passing the order, Mr. Majumdar purported to act under sec. 3 (2) of the Preventive Detention Act. The order was signed by him as Deputy Commissioner and also impressed with the seal of that officer. On this ground it was contended on behalf of Mr. Periwal, in his habeas corpus petition in the Calcutta High Court, that the order was illegal, since sec. 3 (2) of the Act authorized only District Magistrates, Additional District Magistrates, etc., to make an order directing a person to be detained, and that since Deputy Commissioners have no such power under the section, the order served on Mr. Periwal by Mr. Majumdar in his capacity of Deputy Commissioner was bad in law. It was further pointed out that Mr. Majumdar, in his affidavit in opposition to the petition, did not at all try to meet the argument in the petition that in making the order of detention he was acting as Deputy Commissioner and that as such he had no jurisdiction to make the order.

It was contended on behalf of the Government that as Mr. Majumdar had two capacities it should be presumed that he acted in a regular manner, i. e., in his capacity as District Magistrate. This contention was sought to be supported by a citation of *Dattatraya Moreshwar v. the State of Bombay* [A. I. R. 1952 S. C. 181] and *High Court Bar Association v. Emperor* (A. I. R. 1941 Lah. 324) and *Nadar Alam Khan v. Emperor* [A. I. R. 1935 Pesh. 108], which cases however S. R. Das Gupta and Lahiri JJ., hearing the present petition, ruled on 1st October 1953 had no application to the instant case. Reliance was placed by the petitioner's counsel on the observations of Page C. J. in the case of *Sein Tha U v. Maung Kyow Khine* [A. I. R. 1935 Rang. 135], viz. .

But if it is so, it follows that it is of importance for the administration of justice that persons performing the dual role of Deputy Commissioner and District Magistrates should ever be mindful that their outlook and action in one capacity should not infringe upon their outlook and action in the other. I am fully alive to the difficulties inherent in the position in which such officials find themselves, but I make bold to say that officials who function both as Deputy Commissioner and District Magistrate ought to take meticulous care to differentiate between their exacting and to some extent almost incompatible duties as Deputy Commissioners and District Magistrates.

Their Lordships, accepting the arguments on behalf of the petitioner, concluded that the order of detention in

question was illegal and ordered that the petitioner be set at liberty forthwith. In this connection Their Lordships referred to the following observations made by Patanjali Sastri C. J. in *Ram Narayan Sing v. the State of Delhi* (A. I. R. 1953 S. C. 277) :

This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty must strictly and scrupulously observe the forms and rules of the law.

## PRESS ACT, 1951

### A Booklet Forfeited to Government

#### ORDER "QUITE ILLEGAL AND INCOMPETENT"

A Full Bench of the Assam High Court consisting of Sarjoo Prasad C. J. and Deka and Ram Labhaya JJ., on 15th June 1954, set aside the order of the Assam Government declaring copies of a booklet in Assamese entitled "Samaj Tantrabad Kiya Lagey" forfeited under sec. 11 of the Press Act. This section requires that in the order of forfeiture the grounds on which the order is based should be stated, but the order served on the writer of the pamphlet, Mr. Pannalal Das Gupta, a leader of the Revolutionary Communist Party of India, merely stated that forfeiture was on account of the booklet containing "objectionable matter" within the meaning of sec. 3 of the Act, and did not state what passages in the opinion of Government contained such matter. When an application for cancellation of the order was heard by the Court, the Government Advocate cited several passages as being objectionable and the Chief Justice went carefully through all of them in order to find out whether they were really objectionable. The booklet was a tirade against capitalism and an ardent plea for socialism, and after a detailed examination of the booklet the Chief Justice came to the conclusion that he could "find nothing in the booklet to lead us to hold that it is objectionable in the sense in which it is understood in law."

This was enough for the Court to allow the application and set aside the forfeiture order. But another flaw which the Court found in the order was that the order was issued on the certificate of the Legal Remembrancer of the State about the objectionable character of the booklet instead of on that of either the Advocate-General of the State or Attorney-General of India, as required by sec. 11 of the Act. Because of this also the Court ruled that the order was unsustainable. The Chief Justice said on this point:

The Legal Remembrancer, even though he may be a judicial officer in some States, acts merely as an executive officer, and the certificate given by such an officer would not inspire the same amount of confidence in its accuracy and disinterestedness as the certificate of the Advocate-General or the Attorney-General of India. These other officers by virtue of their constitutional position, their legal acumen and

integrity are expected to take a more impartial and independent view of things and are pre-eminently competent to certify as to whether the document complained of does contain objectionable matter. They are expected to give the correct advice to the Governor and the safeguard thus provided under sec. 11 is a legitimate safeguard.

The applicant, however, took a broader ground in assailing the order. He urged that sec. 11 of the Act was itself ultra vires as imposing an unreasonable restriction (not saved by cl. 2 of Art. 19) on the fundamental rights of freedom of speech and expression and the pursuit of any lawful avocation, guaranteed respectively by clauses (1) (a) and (g) of Art. 19 of the Constitution. This plea was based on the fact that under sec. 11 the Press Act does not provide that before passing a forfeiture order Government should give notice to the persons affected thereby to show cause against the action proposed to be taken. The declaration forfeiting the objectionable document can be made by Government without giving any hearing at all to the party concerned and without any inquiry by a Sessions Judge or a jury, as is to be found in relation to the proceedings under secs. 4 and 5 or 7 and 8 of the Act.

But the Court did not accept this argument. The Chief Justice pointed out that proceedings under these latter sections were very different from those under sec. 11. He said:

The object of those sections is to obtain security or additional security from the offending Press, whereas the object of sec. 11 is to prevent immediately the circulation of a book or paper which contains objectionable matter. It would be impossible to safeguard public order or to prevent the mischief of circulation of such objectionable matter if the State had to wait for a judicial decision in order to forfeit the offending document. The very essence of the power under sec. 11 is that it should be exercised promptly and expeditiously. There must be, however, ample and reasonable check upon this power of the Executive, and so long as there is some ultimate judicial corrective on the exercise of the power, it cannot be held to be unreasonable.

This corrective, the Court ruled, is provided in two ways; (1) sec. 11 provides that the Advocate-General or Attorney-General must certify that the document concerned contains objectionable matter (a provision which was disregarded in this case); and (2) sec. 24 provides that a person aggrieved by a forfeiture order can move the High Court against the order within sixty days of the date of such order. These two safeguards were in the opinion of the Court real, and therefore the restrictions imposed by virtue of sec. 11 were "reasonable" within the meaning of Art. 19 (2) of the Constitution.

It was argued on behalf of the applicant that the safeguard provided under sec. 24 of the Act was almost nugatory inasmuch as the section did not provide for individual notices upon the persons affected by the order [as seemed to be required by the spirit of judgments in *V. G. Row v. State of Madras* (A. I. R. 1951 Mad. 147), *State of Madras v. V. G. Row* (A. I. R. 1952 S. C. 196) and *George Chadayammury v. State* (A. I. R. 1952 Trav. C. 217)], and in the absence of such provision, it might happen to an aggrieved person that "the period of limitation (of sixty days) may run out without any knowledge of the order passed against him, and, as such, he may be deprived of his remedy to move the High Court against the order in question." The Chief Justice saw much force in the argument and said that "it would have been better" to provide in sec. 11 for an individual notice being served upon the author, the printer and the publisher of the offending document. "The above suggestion," he said, "is indeed a matter for the Legislature to take into consideration in order to make the provisions unexceptionable and to avoid any criticism on this score. But for the present, I would refrain from expressing any final opinion in the matter and from declaring on this ground that sec. 11 of the Act is ultra vires Art. 19 (1) (a) and (g) of the Constitution."

## PREVENTION OF CORRUPTION ACT

### Scope of Sec. 5 (4) Defined

#### SUPREME COURT REVERSES HIGH COURT'S DECISION

The Supreme Court on 14th December held that sec. 5 (4) of the Prevention of Corruption Act, 1947, which required that a police officer below the rank of a Deputy Superintendent of Police should not investigate any offence under sec. 5 (2) of the Act without the order of a First Class Magistrate, was mandatory.

It also held that the investigation conducted in violation of sec. 5 (4) of the Act bore the stamp of illegality, but where the court had taken cognisance of the case and the trial had concluded, the invalidity of the precedent investigation did not vitiate the result, unless miscarriage of justice had been caused thereby.

The Court further came to the conclusion that it did not follow, however, that the invalidity of the investigation was to be completely ignored by the court during trial. When the breach of such a mandatory provision was brought to the knowledge of the court at a sufficiently early stage, the court, while not declining cognisance, would have to take the necessary steps to get the illegality cured, and the defect rectified, by ordering such investigation as the circumstances of an individual case might call for.

The decision of the Court was given in the appeal preferred by H. N. Risbud and Indar Singh, Assistant Development Officer (Steel) and Assistant Project Section

Officer, respectively, in the office of the Directorate-General, Ministry of Industry and Supply, Government of India, against the judgment of the Punjab High Court.

The case against these two persons was that they, along with some others, entered into criminal conspiracies to obtain for themselves, or for others, iron and steel materials in the name of certain bogus firms and that they actually obtained quota certificates on the strength of which some of the members of the conspiracy took delivery of quantities of iron and steel from the stockholders of these articles.

The charges, therefore, under which the various accused were being prosecuted are under sec. 120-B, I. P. C., sec. 420, I. P. C. and sec. 7 of the Essential Supplies (Temporary) Powers Act, 1946. In respect of such of the accused as were public servants, there are also charges under sec. 5 (2) of the Prevention of Corruption Act, 1947.

A number of cases were started against the accused and the first information reports in these cases were made in April and June 1949, but permission of the magistrate, for investigation as against the public servants concerned, by a police officer of a rank lower than a Deputy Superintendent of Police, was given in March and April 1951.

The charge-sheets in all these cases were filed in August and November 1951, but, admittedly, the investigation was entirely or mostly completed in between the dates when the first information was given and when the permission to investigate by an officer of lower rank was accorded.

Therefore, the question raised before the Special Judge, Delhi, who tried the accused, was that the proceedings by way of trial initiated on such charge-sheets were illegal and required to be quashed.

Accepting this contention, the Special Judge of Delhi quashed the proceedings pending before him. In revision the Punjab High Court reversed the orders of the Special Judge and, thereafter, the accused came in appeal to the Supreme Court, by way of special leave granted under Art. 136 of the Constitution.

In its judgment the Supreme Court interpreted the meaning and scope of Sec. 5 (4) of the Prevention of Corruption Act and directed the Special Judge to make appropriate orders in these cases in the light of it.

## TRAVANCORE-COCHIN RENT CONTROL ORDER

### Government Has No Revisional Jurisdiction

In *P. K. Gopalan v. Avaroni Sippora* (A. I. R. 1954 Trav.-C. 465) which was a rent control case, Govinda Pillai J. of the Travancore-Cochin High Court, on 22nd September 1953, ruled that the State Government had no revisional jurisdiction under Act 5 of 1950, by which Government took power, among other things, to regulate

the letting of houses for the purpose of controlling rents and preventing eviction of tenants. Under the provisions of the law a Rent Controller was appointed for carrying out the powers conferred by the Act, and it was provided that a party aggrieved by the decision of this officer can appeal to Government.

In the instant case the Rent Controller ordered eviction of the tenant, but the District Magistrate as the appellate authority reversed the order. Subsequently, the owner of the house put in a revision petition before the Government, who allowed the eviction. Thereupon the tenant filed a petition with the High Court to quash these revision proceedings on the ground that the Act did not confer revisional jurisdiction on the Government.

Under the Act the Rent Controller was vested with power to decide cases in regard to letting of houses, and sec. 22 provided for an appeal to Government against his decisions, the Government being authorized to delegate its power of hearing appeals to an officer subordinate to it, and the officer concerned in this case was the District Magistrate. While the Act itself thus contemplated two tribunals, the Rent Controller with original jurisdiction and the District Magistrate with appellate jurisdiction, Rule 16 framed under the Act provided for revisional jurisdiction to be exercised by Government "on the application of any aggrieved party or on their own motion at any time within six months of the decision of the appellate authority to correct a material irregularity in the procedure or if the decision of the appellate authority is vitiated by any mistake of fact or was due to any misrepresentation or fraud on the part of any of the parties or if the decision was otherwise unjust." The question was whether under this Rule Government could exercise such revisional jurisdiction while under the Act itself the decision of the District Magistrate as the appellate authority was final. It was argued on behalf of the respondent that, while delegating the appellate power to the District Magistrate, such delegation was made on the condition that the right to revise the decision of the appellate authority was retained by Government. His Lordship, in rejecting this argument, said :

An original decision and an appellate decision were alone contemplated in Chap. II of Act 5 of 1950. There was no justification to say that an appeal to Government is equivalent to an appeal to the District Magistrate plus a revision to Government. The Act contemplates only two tribunals, and I feel that the provision in Rule 16 is ultra vires and the Government had no such powers under the Act to make that provision. Being so, the order passed in revision by Government was without jurisdiction, and the said order has to be quashed.

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## EVACUEE PROPERTY ACT

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### Sec. 12 does not Violate Art. 31's Safeguards

#### A PUNJAB DECISION

Mr. Justice Bishan Narain of the Punjab High Court held on 3rd January that sec. 12 of the Administration of Evacuee Property Act was valid and intra vires of Parliament.

One Din Dayal, living in a portion of an evacuee property on Ludlow Castle Road, Delhi, was asked by the Custodian of Evacuee Property to surrender and vacate it. He first appealed against the order which was ultimately affirmed by Mr. Justice Kapur. Against this judgment, he unsuccessfully tried to appeal under the Letters Patent. Then he filed a suit for injunction against the Custodian in the Court of a Sub-Judge at Delhi alleging that sec. 12 of the Administration of Evacuee Property Act was ultra vires and violated the fundamental rights secured by the Constitution. On a revision filed in the High Court, the Chief Justice, Mr. A. N. Bhandari, transferred the original suit to the High Court for the decision of the constitutional point.

The issue came up for hearing before Mr. Justice Bishan Narain and it was contended that sec. 12 of the Administration of Evacuee Property Act violated the safeguards provided in Article 31 of the Constitution. The decision of the Supreme Court in the second Sholapur case was relied upon.

The Court, however, refuted this contention and relying on sub-clause 5 of Article 31 of the Constitution held that the Evacuee law was not hit by the restriction contained in sub-clauses (1) and (2) of Article 31 of the Constitution. The residuary entry conferring powers on Parliament to make laws was also relied upon in support of the validity of the impugned legislation.

After holding sec. 12 to be intra vires, the case was remitted to the trial court for decision on the merits.

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## SEARCH AND SEIZURE

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### "Very Drastic" Provisions

#### IN THE MADRAS PROHIBITION ACT, 1937

In a reference in re A. S. Krishna [A. I. R. 1954 Mad. 993] several provisions of the Madras Prohibition Act of 1937 were challenged before the Madras High Court on the ground that they were unconstitutional. Among such provisions were secs. 28 to 32 dealing with search and seizure, which were attacked as being illegal for the reason that while under these sections a Prohibition Officer can issue a search warrant under secs. 96 and 98, Cr. P. C., this power is vested in a Court or a Magistrate. Rajamannar C. J. and Umamaheswaram J. did not accept this argument. But while ruling that the impugned sections of the Act were not unconstitutional, Their Lordships added that some of the provisions contained in the

sections "are really very drastic in nature." They said: "We are free to confess that we would have been happy to have struck them down if there was good ground to do so. But (the counsel for the accused) was unable to convince us that any such ground is available. We shall therefore content ourselves with the following quotation from one of the leading text-books on constitutional law, viz, Cooley's Constitutional Limitations, 7th Edn., p. 429:

A statute which should permit the breaking and entering a man's house, and the examination of books and papers with a view to discover the evidence of crime might possibly not be void on constitutional grounds in some other cases; but the power of the legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken upon, his private books, letters, and papers exposed to prying curiosity and to the misconstructions of ignorant and suspicious persons and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases and who will select them often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the side of safety.

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## NOTES

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### Public School Segregation

Southern States are busy seeking ways to circumvent the Supreme Court's ruling of last May against segregation of Negro children in public schools. Georgia and South Carolina have already approved amendments in the state constitutions, which would in effect make public schools "private" and permit the States to subsidize such "private" schools. In December Mississippi followed suit, adopting by a two-to-one vote of the State voters a constitutional amendment similar to Georgia's and South Carolina's. Louisiana has taken a somewhat different route. That state has approved an amendment to its constitution, under which the State would attempt to continue segregation by putting its schools under the State's "police powers." All of these amendments are likely to come eventually for a federal court test.

### Price-Cutting in Intra-State Trade

#### U. S. SUPREME COURT'S JUDGMENT

The Mead Fine Bread Company, which operates in the states of Texas and New Mexico, was in competition

with Mr. L. L. Moore, a baker of Santa Rosa in New Mexico. When Mr. Moore, finding that he could not compete with the Meads because of the lower price of bread at which the latter sold, threatened to move his business to another town, local merchants who wanted to keep him in business at Santa Rosa, agreed to buy his products exclusively. The Meads labelled this action as boycott and cut the wholesale price of bread in Santa Rosa from 14 to 7 cents for a pound loaf and from 21 to 11 cents for a pound and a half loaf. They did not, however, cut prices in any other town. On account of this discrimination in price, Mr. Moore was forced to close his business. He sued the Mead concern for damages under the Clayton and Robinson-Patman Acts.

The Clayton Act makes it unlawful for any person engaged in interstate commerce to discriminate in price between different purchasers of like commodities where such discrimination would tend to create a monopoly. The Robinson-Patman Act forbids selling merchandise at unreasonably low prices to destroy a competitor.

A Federal Circuit Court of Appeals ruled that price-cutting that caused injury to a purely local competitor such as Mr. Moore was not related to interstate commerce and therefore not subject to the above Acts.

The Supreme Court, however, by a unanimous decision, on the 6th December reversed this ruling, holding that price cutting by an interstate business to destroy a competitor whose business was entirely within a state was not permissible. Mr. Justice Douglas, who delivered the Court's opinion, declared that it was clear that the Clayton and Robinson-Patman Acts barred the price-cutting practices of which the Mead concern was accused. He said:

The Mead Company, a New Mexico corporation, sold bread both locally and interstate, and that it made price discriminations, maintaining the price in interstate transactions and cutting the price of intra-state sales.

The destruction of a competitor was plainly established. Profits made in interstate activities were used to underwrite intra-state price cutting.

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### Loyalty Oaths Now Required

#### IN RESERVE OFFICERS TRAINING CORPS

Formerly the Defence Department in the United States required from students of ROTC only a simple

affirmative oath in support of the Constitution, similar to the oath taken by public officials. But now, because of a rider to the last appropriations bill adopted by Congress, a loyalty certificate is insisted upon, which requires students to name all organizations on the Attorney-General's list of subversive organizations of which they were past or present members or whose meetings they had attended. Students are also asked whether they had sponsored any activities for such groups or had distributed any material for them, or had been "identified or associated (with the organization) in some manner."

This "loyalty" certificate is fully equipped with penalties for perjury. Any student who lists any item of exception is required to surrender his uniform and march in humiliation with his ROTC unit without uniform until a security check can be put through in Washington.

Two cases recently occurred, in which the loyalty certificate was enforced but in which fortunately the universities concerned granted relief on their own account. Harold Haak, a 19-year old student at the University of Wisconsin (where ROTC is compulsory), filled out the certificate conscientiously and was forbidden to wear the uniform "because he was once a friend of a person who later was investigated by the Federal Bureau of Investigation for alleged Communist activity." But the university restored Haak's uniform.

Another case concerned Ralph E. Ornelas, who refused to sign the loyalty oath. But since, in the University of California where he sought admission, every able-bodied male student must complete two years of ROTC training as a requirement of graduation, his refusal to sign the oath threatened to bar him from the university altogether. However, the university came to his rescue by deciding that students refusing to sign the oath could enrol in the university and satisfy the ROTC requirement by taking the military course "informally," without wearing uniforms. The university authorities said that not to make this kind of compromise would mean that "an external agency, rather than the Regents and administrative officers, would be determining which students should be admitted or denied admission to the university."

The American Civil Liberties Union has protested against this new loyalty certificate, saying :

If the Department of Defence is permitted to subject every male student in our Universities to this exhaustive test of his associations and the ideas he has heard expressed, irreparable damage will be done to one of our best bulwarks against Communist ideas — our system of free education for free citizens.

### Separate Negro Units Abolished

A U. S. Defense Department report said on 30th October that all Negro units had been abolished in the army and that the integration had been carried out ahead of schedule without any "untoward incidents". The report said that "the armed forces have continuously and vigorously implemented the principles of equality of opportunity and treatment for Negro personnel" with the result that the Negro serviceman "is now utilised on the basis of individual merit and proficiency in meeting the needs of the services." "There are no longer any all-Negro units in the services," the report said. One of the last "formal barriers" to integration was broken down last March when the Navy abandoned its practice of maintaining separate recruitment of Negroes as stewards. Now all Navy recruits, white and Negro, are put through basic training with an equal opportunity to qualify and apply for special training, the report said.

### End of Colour Bar in Railway Trains

ADVISED BY AN OFFICIAL OF INTERSTATE COMMERCE COMMISSION

Having secured end of racial segregation in public schools, the National Association for the Advancement of Coloured People is now engaged in having an end put to such segregation on all railways operating between states. It has filed complaints against twelve railway companies with the Interstate Commerce Commission, which has jurisdiction over such matters. The ending of the colour bar in transport would appear to be somewhat difficult in view of the fact that two months after the Commission was organized in 1887, the U. S. Supreme Court declared in a transport case that segregation would be constitutional if equal opportunities were provided for the white and the Negro races. The Eisenhower Administration is known to be enthusiastically in favour of abolishing the colour bar altogether in trains. The Attorney-General filed a brief for the Government in these cases, in which he said: "The time has come for this Commission, in administering the Interstate Commerce Act, to declare unequivocally that a Negro passenger is free to travel the length and breadth of this country in the same manner as any other passenger." An examiner of the Commission, Mr. Hosmer, has given the same advice. He says that when the "separate but equal" facilities principle was upheld, prevailing conditions including threats to peace and order were a factor in the ruling. But there has been since then "a change in public sentiment concerning passenger segregation," and in view of it the Commission should now "place greater emphasis on steps to preserve the self-respect and dignity of citizenship of a common country" which in 1887 it balanced against "peace and order." It is to be hoped that the Commission would

itself put an end to passenger segregation instead of having to go to the Supreme Court to reverse its former ruling in regard to such segregation.

### An Act to Outlaw Communists in Texas

The state of Texas, at its recently concluded legislative session, adopted legislation of a very drastic kind to outlaw the Communist Party. The law declares illegal the Communist Party of the U. S. and any other "related organization" which advocates or teaches "activities intended to overthrow the government by force or violence." It provides for dissolution of such organizations, and the forfeiture and seizure of all property, including their books and files, to the state of Texas. Proof of association with any organization which carries on the proscribed teaching "is prima facie evidence that the organization itself engages in these activities." The Act also makes it unlawful for any person to "knowingly or wilfully" do any act intended to overthrow the government by force, or to engage in the forbidden activities "under such circumstances as to constitute a clear and present danger." The punishment for violation of the latter two provisions may be as heavy as a fine of 20,000 dollars or imprisonment from one to twenty years. Search warrants may be used to seize any books or pamphlets showing that some one is violating or has violated the Act. The law disqualifies any person who comes within the mischief of the Act from ever being appointed to office in Texas. The American Civil Liberties Union has protested strongly against the measure.

### Censorship of Motion Pictures

Recently a Kansas district court judge ruled that the ban imposed on the showing of a motion picture named "the Moon is Blue" was unconstitutional. The court did not consider whether that particular film was indecent or whether the censorship board itself was constitutional. The decision was based on the finding that the censorship law of the Kansas state failed to provide definite standards for deciding what should be censored. Since the ruling was announced the Kansas censorship board has adopted new criteria in order to meet the court's objections. The decision has further led five of the seven states which have censorship provisions to undertake legislation to revise their censorship laws. It is expected that suitable amendments will be proposed in their legislatures next year so as to avoid further court tests.

### Protection from Self-Incrimination

We have referred in a recent issue, at p. iii: 148, to a law passed in the last session of the U. S. Congress requiring a person to disclose everything he knew about attempts at subversion if he were first promised immunity from criminal prosecution. This law intended to get round the Fifth Amendment which gives protection from compulsory self-incrimination in Communist-hunting is, as we said, not free from challenge on the ground of unconstitutionality. But there are some who would repeal the Fifth Amendment outright because it has been used by Communists to avoid answering questions about their activities. Such a move was denounced by Mr. Irving R. Kaufman, a judge of a federal district court, while speaking at a bar association meeting in New York. He said: "Some of our political conservatives unwittingly are leaning towards dangerous radicalism in their attitude towards the Constitution and in their search for quick cure-alls for Communism. The nation's founding fathers, he said, "would have been numbed with disbelief" had they been told such action ever would be contemplated. Observing that Communism feeds on "constitutional illiteracy," he urged lawyers to "speak out when fundamental rights are threatened" and instruct the community in constitutional principles.

### Film Censorship Law

#### ATTEMPT AT INVALIDATION DOES NOT SUCCEED

After the U. S. Supreme Court voided censorship of the film "M" by Ohio last year, three motion picture groups of the State brought a suit in Common Pleas Court, seeking to have Ohio's law of film censorship declared invalid; but the court dismissed the suit. In his decision, Judge Bartlett remarked that the Supreme Court's decision had not removed community control of films by censorship and his court would not do so under the claim of complete unconstitutionality of such censorship laws. He said:

Although liberty of expression by means of motion pictures is included within the freedom of speech and press guarantee of the U. S. Constitution as well as the state constitution, there still remains a limited field in which decency and morals may be protected from... an offending motion picture by prior restraint under proper criteria and standards... The judicial sense supporting the common sense... still sustains the exercise of police power by a sovereign state.