

# **Bombay Civil Liberties Conference**

**THIRD SESSION (3rd February 1952)**

## **Presidential Speech**

BY

**S. G. VAZE**

## **FREEDOM OF PERSON**

**Constitutional and Statutory Provision for Detention**

**Price : Annas Eight**

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# BOMBAY CIVIL LIBERTIES CONFERENCE

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S. G. VAZE'S

## Presidential Speech

(3rd February 1951)

Brother and Sister Delegates,

I feel greatly honoured by your generous invitation to preside over this third session of the Bombay Civil Liberties Conference. But when I look back over the two previous sessions and recall to my mind the names of the gentlemen of high eminence in public life (Mr. M. C. Setalvad, now Attorney General of India, and Professor P. A. Wadia) who presided over these sessions, I cannot but suspect that you have on this occasion descended so low in the choice of your President because you found it none too easy in the altered conditions of the country to persuade persons of any great calibre or influence to fill this office which was till only recently looked upon as a privilege to be deeply cherished. Many things have changed since the attainment of political freedom, and most of them have certainly changed for the better. But the cause of civil liberty has, in spite of this turn in our fortunes and almost (it would seem) because of it, fallen on evil days. Under the former régime our public men vied with one another in condemning the repression of popular liberties which we then thought could not be severer or more wide-spread than it was. Now the repression has become still more ruthless and still more general than at that time, and yet hardly any powerful voices are heard being raised against it. But if those who by virtue of their position should in this hour of trial come forward to protect fundamental freedom hang back for one reason or another, it is the duty of humbler men to do whatever little they can at least to keep alive a feeling for civil liberty in the minds of the general public. Their attitude to civil liberty need not change because the source from which danger to civil liberty arises has changed.

The change that has occurred in the general behaviour of men who till recently were often put on the rack but who have now come on top is one of the saddest phenomena it has been our lot to witness. In all their former controversies with the British rulers these men adopted a holier-than-thou attitude, and this attitude was never more pronounced than on questions relating to civil liberty. They condemned repression all round, even if it was repression of open and direct violence. If anyone showed the slightest inclination to look into the conditions in which repression was used, so that our condemnation might not be as indiscriminating as the Government's repression, he was dubbed a reactionary feeling no concern for civil liberty. They placed a higher value on Fundamental Human Freedoms than even on political freedom, and they spoke as if repeal of all repressive laws and restoration of civil liberties in their integrity would have the very highest priority in the programme they would adopt after the liberation of the country. But none of these things seem to be any nearer than when they assumed office three years ago. Even for some time before the independence of India was formally proclaimed they held the reins of office in their hands, but during all these years civil liberty has stood where it did under the foreign régime.

The Defence of India Regulations died a natural death after the termination of the war, but the worst of them have come to life again in peace time under the auspices of the Congress in the form of Public Safety Acts, only in a more drastic form. The Press Act of 1931 has dragged on its existence for two decades, without any thought being given by those in control of affairs to give up this engine of repression. Even the High Courts have recommended repeal of this measure as totally inappropriate to India's new political status, but the Congress leaders give no heed to the recommendation. Such is the demoralization that has come over us that not even the Press now dares to make a demand for freeing organs of public opinion from repressive regulations as it used to do vociferously under British rule. Co-operation with the rulers has now become the formula of the Press instead of independence of criticism. The Criminal Law Amendment Act, which the British Government enacted to nip in the bud a revolutionary movement which had arisen in Bengal and the existence of which had almost been forgotten, remains on the statute book and has to-day been employed, after the establishment of the Republic, for outlawing political parties in several States. The provisions in the Public Safety Acts relating to detention without trial have been

removed from these laws but only to be replaced by a more sweeping Preventive Detention Act passed by the central Parliament. The Rowlatt Act, which was supposed to be the acme of repression and which was passed to deal with violent crime the existence of which no one has ever doubted, is almost mildness itself compared to the Preventive Detention Act. And so the sad tale might be prolonged almost indefinitely. My friend, the editor of the "Indian Civil Liberties Bulletin," has very aptly said that the Congress administration so far has served to illustrate the truth of the adage that the old poacher makes a good gamekeeper. We are meeting in such conditions and, although we cannot produce any startling results, let us at all events do something to bring home to the masses the very serious contraction, if not utter destruction, of the fundamental liberties which we have to go through at present.

I propose in my speech this evening to confine my attention to Freedom of Person, and I hope I shall have your leave to do so. I confine myself to this subject for two reasons. One is that the limits of the fundamental rights guaranteed in the constitution are yet in an early stage of being defined. The constitutional provisions themselves we have already considered in the past two sessions of the Indian Civil Liberties Conference. That body has passed resolutions analysing these provisions and pointing out defects therein. But the practical value of the provisions will be determined in the last resort by the interpretations of these provisions by our courts. The process of interpretation has barely started, and it will take some time before we can evaluate the fundamental rights in the light of judicial interpretations. The right of freedom of speech and press appears even now to be firmly established, but the right of freedom of association is not yet so established. One High Court has declared the law governing this right to be void, though on somewhat narrow grounds, and this decision is yet to be confirmed on appeal by the Supreme Court. Thus I thought it might be a little premature to embark on a general discussion of civil liberties just yet. My second reason for limiting my remarks to Personal Liberty is that detention without trial is the most urgent problem facing us at the moment. The Preventive Detention Act will expire at the end of March next, and in its February session Parliament will be considering an amending bill. I thought it would serve a useful purpose if at such a time I brought to your minds some considerations bearing on this subject. It is not as if I have anything new to say on detention. But it might be of some little help if your memory was refreshed with things to which I daresay you

4

have listened often enough before. I shall examine first the constitutional provisions for detention and then the statutory provisions.

## 1

### EMERGENCY PROVISIONS

Our constitution in Part XVIII adopts the expedient of France and other civil law (as distinguished from common law) countries of Continental Europe to make permanent statutory provision for emergency powers. France institutionalized such powers in a "state of siege" law of 1849 amended in 1878, and since our country has chosen to follow the example of France (rejecting the example of common law countries like the United Kingdom), we may here compare the provisions of the French "state of siege" law with the "Emergency Provisions" of Part XVIII of our constitution. Such a comparison is certainly not to the advantage of India.

The circumstances which can give rise to a state of siege in France and justify use of the exceptional power it gives are the actual presence of "a foreign invasion or an armed insurrection" or an imminent danger thereof. These circumstances may be said to be nearly the same as those contemplated by our constitution. Art. 352 (1) authorises declaration of an emergency in the event of a situation "whereby the security of India is threatened, whether by war or external aggression or internal disturbance," and art. 352 (3) makes it clear that an emergency can be declared not only when in fact such an occurrence has taken place, but also when there is "imminent danger" of its taking place. But if the occasions prescribed for invoking emergency powers are about the same in the French law and the Indian constitution (though we would have liked a stronger formula than "internal disturbance" in our constitution), there are several differences in other respects which establish the superiority of the French law.

The establishment of a state of siege is always effected by a legislative enactment, and only if the Chambers are not in session, can the President declare a state of siege on the advice of the Council of Ministers, but in the latter case the Chambers will have to meet automatically two days thereafter and confirm the declara-

tion in order that it may have validity. In India the only authority invested with the power of declaring an emergency is the President, and although he will normally exercise the power on the advice of his Cabinet, Parliament is rigorously kept out of this business. Even if it is in session, it has nothing to do with the declaration, and will have nothing to do with it for a minimum period of two months by virtue of art. 352 (2) (c). For this period of two months all the extraordinary powers which Part XVIII of the constitution confers will remain in force, the usual Parliamentary surveillance being dispensed with for the time being. Positive refusal by Parliament to ratify voids the declaration, but only after the lapse of two months; and if Parliament takes no notice of it, the declaration will continue to be in operation with the tacit and negative Parliamentary approval. This has only to be compared with the positive approval by the Chambers that the French law requires, both for initiation and continuance of the state of siege, in order to realize how much greater discretion is left to the executive in our constitution.

#### PARLIAMENTARY CONTROL

The constitution of India does not require the summoning of Parliament, if it has been adjourned or prorogued, when an emergency is declared by the President, immediately after the declaration or within any specified period. This emergency, however grave it may be, will not operate as an emergent situation calling for a meeting of Parliament to be held forthwith, as it should; a meeting may be convened by the President at his own discretion. And if the House of the People happens to have been dissolved at the time of a declaration of emergency or during two months after that event, then the declaration will remain in force till the House is reconstituted and for thirty days thereafter. This may well involve a delay of about a year. Now compare the French law's provision in this respect. It says: "In the event the Chamber of Deputies is dissolved, and until elections shall have been entirely completed, the state of siege cannot, even provisionally, be declared by the President of the Republic." The only exception to this is when the emergency is of the type of war with a hostile power, and the exception is made in the following proviso: "Nevertheless, in the event of a foreign war, the President, on the advice of the Council of Ministers, can declare the state of siege in the territories menaced by the enemy, on condition that he convoke the electoral colleges and reassemble the Chambers in the

shortest possible delay." Thus it is provided that the establishment of a state of siege will always be an expression of the will of the people's chosen representatives, and this provision acts as a strong deterrent to arbitrary executive action. On this point the Italian Republic's constitution of 1947 may be adverted to. Art. 77 in that constitution runs:

The Government may not, without delegation of power by the Chambers, issue decrees which have the force of ordinary law.

When, in extraordinary cases of necessity and urgency, the Government on its own responsibility adopts provisional measures having the force of law, it must on the same day present them for conversion into law by the Chambers, which, even if dissolved, are convoked for the purpose and assemble within five days.

The decrees lose effect as of the date of issue if not converted into law within sixty days of their publication.

The Chambers may nevertheless regulate by law juridical relationships arising from decrees not converted into law.

Here it will be seen that legislative control of the executive is maintained intact allowing no greater interruption than may be absolutely necessary, and that executive action already taken is even subject to retrospective annulment.

Another feature of the French law merits attention. It is specifically declared in the state of siege law that the enactment which is to institute a state of siege shall fix a limit on its duration. The general experience is that when once emergency powers are assumed, maybe for good and sufficient reasons, they tend to outlast their real necessity. The provision in the French law that "the enactment will fix the period of its duration," and that "at the expiration of this period, the state of siege ceases automatically, unless a new enactment shall prolong its effects," ensures that Parliamentary control over emergency measures is continually maintained and that by lifting the state of siege they are terminated when the need for making use of them has passed. It must be borne in mind that it is far more difficult to end an emergency than to declare one. The provision in the French law has been found to be very efficacious in practice in shortening the duration of the state of siege régime; for "it has always been the consensus of French juristic opinion that this duration (to be laid down in the



declarative statute) is to be expressed in terms of weeks or months, not in a general phrase such as 'for the duration of the present emergency.'" If the French law contemplates a severe national emergency to be usually a matter of weeks or months, our constitution provides negatively that the emergency shall not be brought to an end (unless the President himself wills it so) at least for two months after it is declared, even if Parliament would have it terminated sooner!

### SUSPENSION OF CIVIL RIGHTS

The effect of the institution of a state of siege in France is, besides the grant of police power to the military, which is permissive, a possible infringement of certain specified rights of French citizens: homes can be searched; arms can be taken from citizens, and publications and meetings can be prevented if of such a nature as to excite disorder. No other rights could be abridged. What are the corresponding provisions in the Indian constitution? By virtue of art. 358, the constitutional guarantees for all the rights mentioned in art. 19 lapse when an emergency is declared, and they remain suspended during the continuance in force of the declaration. These rights are: freedom of speech and expression; freedom of peaceable assembly; freedom of association; freedom of movement, etc. And it is not as if the executive is permitted by art. 358 to disregard these fundamental rights if in the actual circumstances prevailing it is found necessary to do so. There is nothing permissive about this provision: the rights automatically cease to exist. A permissive provision is made in art. 359 about other rights. It denies to citizens the right to move any court for the enforcement of any of the Fundamental Rights enumerated in Part III of the constitution if the President issues an order to this effect. That is to say, the whole gamut of our Bill of Rights will be capable of being wiped out during the period of an emergency. All civil rights will be in danger of being suspended. It is hardly necessary to emphasize the great contrast in respect of encroachment on civil liberty between the French law of the state of siege and the Emergency Provisions of our constitution.

The safeguards inserted in the state of siege law both in respect of its initiation and administration have, in the opinion of competent judges, generally served to restrict the use of emergency powers to bare necessities. During World War I France had to be placed in a state of siege, but for forty years earlier there was no occasion to bring it into operation. It is realised by French

statesmen that it is permissible to invoke a state of siege only in the event of an ominous crisis and that it is not to be directed to minor disturbances such as those that plagued France for forty years before the outbreak of the global war. And even during the World War, again in the opinion of those who are competent to judge, the emergency powers to which the state of siege gave rise were on the whole wisely and discriminatingly used. Is there anything in our Emergency Provisions which will guarantee such a result?

#### JUDICIAL REVIEW BARRED

The great defect in the state of siege is that neither its initiation nor its administration is passed upon by the judiciary. The civil law courts provide absolutely no check upon the declaration of the state of siege or upon the acts of the authorities even after disturbances have been quelled and normal conditions have been restored. "The declaration is clearly an *acte de gouvernement* or *acte politique* and in no way subject to judicial review. Even if the executive declares the state of siege without any possible reason, it is not up to the courts but to the legislature to protect its prerogative in this respect." But if this is a defect inherent in the French procedure, it is also common to the Indian, the only difference being that, while the courts are kept at arm's length in India as in France, there is not even Parliamentary supervision in India to the extent that is provided in the French law (for two months after the declaration Parliament being rendered incompetent to interfere).

#### THE CRISIS WEAPON OF ENGLAND

The defect referred to above does not subsist in the procedures that common law countries follow in meeting an emergency. In the constitutional jurisprudence of common law countries like Britain there is no legally anticipated and codified state of siege, giving power to the authorities to take any irregular action in emergencies, and that is the reason why in the constitutions of countries modelled on the British (e. g., the Australian Commonwealth) there is no chapter corresponding to the Emergency Provisions Part in our constitution. The ultimate weapon which is employed in Britain in times of grave national danger is the weapon of martial law, its employment being based, in the words of Sir James Stephen, on the common law right and duty of the Crown and its subjects to "repel force by force in the case of inva-

sion or insurrection and to act against rebels as it might against invaders." The term "martial law" sounds terrifying; properly understood, however, a declaration of martial law only means that "the military forces, or a part of them, have been called upon by the civil authorities to aid them in the maintenance of order and the enforcement of law. But no new laws have been brought into operation, no civil authorities are superseded, and no constitutional rights are thereby suspended or subject to suspension" (Willoughby and Rogers, "Problem of Government," p. 101). "Those who wield this extraordinary authority must stand ready to prove to the courts, when normal government has returned, that general conditions were likewise extraordinary and thus justified martial rule. They must further be prepared to prove that the particular measures adopted were warranted by the exigencies of the situation, for these measures may be proceeded against both civilly and criminally. This fact sets martial law off sharply from the state of siege. Under the latter the legislature is the sole limit upon arbitrary use of the extraordinary competence of the officials, and the regular courts offer scant refuge to the individual injured during the condition of emergency. Under martial law the courts are the chief obstruction to wanton acts of an official nature." The introduction of martial law is usually followed by an Indemnity Act to condone irregular action taken in good faith, but the passage of such an Act by Parliament is not an automatic affair and the possibility that officials wielding exceptional power will have to stand trial for its misuse exercises a salutary check on the officials. Further, the English system, under which the civil courts are invested by the common law rules, with the power to decide as to the existence of an alleged state of war or internal disturbance also provides an initial check to the natural tendency of the executive bodies in times of difficulty to assume whatever powers may be at their disposal. In addition to judicial review which this system provides (but the continental system does not), there is a further advantage in it. "The permanent existence in Continental States of a comprehensive code of regulations designed to govern a state of emergency may act as a ready temptation to an executive to bring it into operation even though the actual situation may not yet justify it." Thus, all in all, we have no cause for gratification that our constitution-makers have chosen the Continental, in preference to the English and American, method of dealing with emergency situations and much less that, having adopted the Continental method, they have made our state of siege law very much looser than the French law, approximating it very nearly to art.

48 in the Weimar constitution which contributed so much to the eventual break-up of the German Republic by the forces of Fascism.

### ENGLAND'S EMERGENCY POWERS ACT

The English people have always shown a marked distaste for a set of regulations worked out in advance to be brought into effect in sudden emergencies. They prefer to rely in the last resort on a declaration of martial law, which, however, they have not found it necessary to invoke for 150 years. Anything like a state of siege, they think, is contrary to the Rule of Law; but in 1920, faced with direct action by labour, they adopted the Emergency Powers Act which gave a death-blow to that principle. The Act is called by Professors Willoughby and Rogers "the first Coercion Law since the days of Castlereagh." It is a permanent law to be set in motion by a proclamation in the event of a crisis of a particular type. When the proclamation is made, regulations may be issued for "securing the essentials of life to the community." These are designed to give to the officials all anti-sabotage powers necessary for achieving the purpose of the law. This is the English version of a minor state of siege law based on the Continental pattern, and as such it makes all the provisions that a law of this kind ought to make. First, it limits the duration of the proclamation to one month; second, it requires Parliament, if not in session, to be summoned within five days after the proclamation; and, third, it provides for the necessity for positive Parliamentary approval within seven days for the continued validity of the regulations. This shows us what principles we should incorporate in our state of siege law if we choose to follow that method.

## 2

### DETENTION WITHOUT TRIAL

The question to which this discussion leads is: When the Emergency Provisions Part of our constitution confers ample powers, indeed ampler powers than any corresponding state of siege law gives, to take exceptional action made unavoidable by the sudden precipitation of a national danger, to the point of suspending all civil rights, is it necessary to have in the constitution another article (art. 22) which permits of detention without trial?

I wish to ask this question in all seriousness. We all recognise (and the civil liberty movement recognises it to the full) that the law of national self-preservation which must override every other law may occasionally require suspension of the most fundamental of all human rights, viz., the right to Freedom of Person. But such suspension can be allowed only in the gravest of circumstances. The classical example of the permissible limits of such action is provided by the United States' constitution, which says: "The privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it." Whether in fact there is the state of rebellion or invasion, and whether, supposing there is one, the public safety requires suspension, are matters which in that country are determined in the last resort by the judiciary. To meet the requirement of this provision, "actual and not, simply constructive necessity by a declaration of the legislature (in the United States the Congress alone is supposed to have authority to suspend habeas corpus) is necessary, and the courts will be the judge" (Willoughby and Rogers, "Problem of Government," p. 104). And it is not to be supposed that, if the constitution expressly provides for suspension of habeas corpus, it also impliedly provides for suspension of other rights in times of difficulty. It is not so. In the United States no civil rights are capable of being suspended if the courts are not, on account of disturbances, rendered incapable of exercising their jurisdiction. In the famous *ex parte* Milligan case of the time of the Civil War, the Supreme Court through Justice Davis said:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great emergencies of government.

Our fathers knew that... unlimited power, wherever lodged at such a time (i. e. time of war), was especially hazardous to free men. For this and other equally weighty reasons, they secured the inheritance they had sought to maintain by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning habeas corpus.

The illustrious men who framed that instrument (the Constitution) were guarding the foundations of civil liberty against the abuses of unlimited power. Knowing this, they limited the suspension to one great right and left the rest to remain forever inviolable.

This judicial pronouncement may appear to be extreme, but it represents the fundamental law of the United States. For ultimately the constitution is what the judicial authorities interpret it to mean. And this is not an outdated interpretation either. As late as 1946 Justice Murphy, in his concurring judgment in the Hawaiian martial law case of *Duncan v. Kahanamoku*, referred to the Milligan opinion and reaffirmed it. Justice Jackson, in 1948 (though at an informal journalists' function), said the same thing: contrasting the Bill of Rights in the United States constitution with that in the Weimar constitution, he said: "Our constitution makes no such provision for crisis suspensions of freedoms of speech or the press." There can be no dispute about the truth of the statement that the U. S. Bill of Rights "presents an unconditional guarantee against legislative encroachment on the freedoms therein asserted."

I revert to my question: When the Emergency Provisions of our constitution provide for suspension of all civil rights, is it at all necessary in reason to provide separately for suspension of the right to Personal Freedom which is contemplated in art. 22? The insertion of this article in the constitution, when the Government has the whole apparatus of a state of siege at hand, can only mean that the constitution-makers deliberately intended to empower the authorities to deprive individuals of their personal liberty without a proper judicial trial even when there is no emergency of war or rebellion which offers a threat to the security of the country. It is in these circumstances alone that the constitution authorises the President to declare an emergency, but if, in conditions which do not amount to an emergency within the terms of the constitution, the Cabinet from a feeling of panic advises the President to take this extreme step, in which event the President must declare an emergency and place the country in a state of siege, then the people have no remedy: there will be neither a judicial finding of facts, nor will it be competent to Parliament to revise the decision for two months at the least. The President or the Government has absolute discretion in the matter. But even if the President or the Government does not think that any disorders or disturbed conditions that may have arisen in the country or any part thereof

are not of the gravity deserving of being called an emergency and therefore does not bring emergency powers into use is the executive still to be allowed to apprehend and detain persons without sufficient cause being shown? Must we not expect the Government to desist from such a serious measure as suspension of habeas corpus except in a most exacting crisis involving grave danger to the life of the community? In all democratic countries it is found that, in times of lesser danger than invasion by a foreign power or an organized revolt on the part of the citizenry, ordinary methods of government are sufficient to put down disturbances and re-establish order. Why should India alone, which at any rate aspires to be a democracy, allow the most fundamental of all human rights to be crushed by the executive even when conditions become mildly abnormal? Freedom of Person is manifestly the most fundamental right. All other rights like the right to free speech and free assembly are rights to be enjoyed by individuals who are personally free. If Freedom of Person disappears, all other rights disappear with it, for they are but subsidiary to that basic right. Our constitution however places this most important of all rights at the mercy of the executive even in conditions which on its own showing are not of such a magnitude of seriousness as to call for the exercise of emergency powers. This attack which the constitution itself makes on Personal Liberty must be resisted.

#### ARTICLE 22

It is said in defence of art. 22 that this article imposes some checks on the power to detain without trial and that for this reason it is marginally called in the text of the constitution an article for "Protection against Arrest and Detention in certain cases"! This claim that but for this article the power to invade Freedom of Person would have been wholly uncontrolled may be conceded. But what are the checks that the article applies to this power? They are: that the detained person should be informed of the grounds of his detention and should have an opportunity of making a representation against the detention order. These are at best very slight palliatives, but look at the way in which the constitution reduces their possible effectiveness. Clause (6) of the article says that the detaining authority shall not be required to disclose facts which in its opinion it may be against the public interest to disclose. If the representation is for the purpose of enabling a detenu to dispel if possible the suspicions entertained against him, it is obvious that the most serious of these suspicions must not be kept by the Government to itself. Even if the Government refers deten-

tion cases to an independent body for a quasi-judicial inquiry, that body cannot arrive at any considered opinion unless it is in possession of all that could be said against the detained person. And if the detaining authority itself is to decide which of the information against the detenu should be withheld, the investigating body will naturally be led to make large allowances in favour of the Government, presumed to have much in its possession which in its judgment is too dangerous to be placed either before the detenu or the investigating body. The investigating body's opinion, if it at all deems fit to offer any, will necessarily incline to the support of the action taken by the Government.

I shall refer to another restriction which militates against a proper consideration of the representation: it forbids a detenu from appearing in person or by a legal representative before the investigating body. This restriction finds place in sec. 10 (3) of the Preventive Detention Act, and not in art. 22, it is true, but it finds place there because it is not contrary to the constitution. It can easily be imagined what a great handicap it will put upon the ability of the detenu to answer charges made against him. No searching investigation will be possible unless (i) full information is made available; (ii) the person concerned has the right to appear in person or by a legal representative; and (iii) he is enabled to call evidence and cross-examine witnesses. None of these essentials of a full inquiry is provided for either in the constitution or the statute; if anything, they are prohibited by law and practice. And in the absence of them the inquiry can be purely nominal. It should be remembered that the procedure followed in England under Defence Regulation 18B which was in force in that country during the last war provided for all these essentials.\*

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\* Government pronouncements on this subject in the House of Commons bear out this statement.

- (i) "I would give (the Advisory Committee) all the information that we have at the Home Office or the police might have about these cases." —Home Secretary (July 26, 1939). "The Advisory Committee have before them all the evidence which is in the possession of the Secretary of State."—Home Secretary (October 31, 1939). "It is the invariable practice of the Advisory Committee to put before these persons, as explicitly as they can, all the facts which are known against them." "Detailed evidence upon which he is being detained is put to him at the actual hearing of the Committee."—Under Secretary (July 23, 1941).

(Continued on next page)



There is one provision in art. 22 which, granting that detention without trial is to be permitted, is of a progressive nature. That provision is to the effect that if, in cases referred to it, the Advisory Board appointed for considering detention cases comes to the conclusion that there is no sufficient cause for detention, the detention order shall be cancelled. It should be premised that the wholesome effect of this provision is almost entirely nullified by the restrictions imposed on the procedure for the conduct of the inquiry to which I have referred just now. These restrictions cannot but reduce any inquiry to a futility. But even a more serious defect in the provision is that all cases are not referable to an Advisory Board. In the first place, no orders for detention for less than three months will be placed before it. Those persons who are detained for three months will have no remedy whatsoever; for this period the executive will have an exclusive discretion to shut up any person in gaol. In the second place, not even all persons who have the good fortune of being detained for a longer period will have their cases passed upon by an Advisory Board. Parliament has been given power to determine which class of cases of detention, though longer in duration than three months, need not be referred to such a body. How this power of exclusion Parliament has in fact employed so as to make

*(Continued from last page)*

- (ii) "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 has the right to say that such legal assistance could be provided. . . . It is not the Home Secretary who settles whether legal assistance shall be available or not, but the Committee outside." The Advisory Committee asks a legal representative, if the detainee has given him instructions, "to appear before them to give evidence on behalf of the appellant or to assist the Committee on the appellant's behalf in the investigation of the facts of the case."—Home Secretary (December 10, 1940).
- (iii) The Advisory Committee can "call in any person who, in their opinion, may be able to assist in elucidating the matter with which the Committee have to deal."—Home Secretary (October 31, 1939). "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."—Under Secretary (February 13, 1941). "Witnesses can be called, and are called in many of these cases."—Home Secretary (July 23, 1941).

exclusions all-pervasive and in effect to kill the Advisory Board I shall explain presently. But, confining our attention to the constitution for the moment, we have to note that the framers of the constitution have not only excepted all cases of detention for three months from the Advisory Board's jurisdiction, but have also made provision for extending the scope of these exceptions at the discretion of Parliament.

### THE ADVISORY BOARD

The method here followed, of giving the right of access to an appeal tribunal to some persons and withholding it from others, is a novel one which is not followed anywhere. In England every detainee could approach the Advisory Committee; none was shut out. It is true that the Advisory Committee under Regulation 18B was not endowed with what our Supreme Court has called "compulsory jurisdiction" in speaking of our Advisory Board. But that was more or less a mere matter of form. The Home Secretary considered himself morally bound to respect the Advisory Committee's opinion wherever he could do so, though in law he was free to depart from that opinion. But the important point is that every detainee could appear before the Committee, and this machinery of detention without trial was set up, it should be remembered, when Britain was engaged in fighting for survival as a nation, and the power of detention was assumed for use against suspected traitors. Even so, no suspected person was debarred from going to the Advisory Committee to have his case investigated. Eire took some extraordinary powers in order to meet the threat of the Irish Republican Army when it adopted the Offences against the State Act in 1939, one of these powers being that of what our Government calls "preventive detention." Under the Act a body was set up to investigate into cases of persons detained, and this body was also given power to take final decisions on the cases referred to it like our Advisory Board. And yet no case was excepted from its purview. Sec. 59 (3) of the Act says:

Any person who is detained under this Part of this Act may apply in writing to the Government to have his said detention considered by the Commission (set up under clause (1) of the section for inquiring into detentions), and upon such application being so made the following provisions shall have effect, that is to say:

(a) the Government shall forthwith refer the matter of such person's detention to the Commission;

(b) the Commission shall inquire into the grounds of such person's detention and shall, with all convenient speed, report thereon to the Government;

(c) the Minister for Justice shall furnish to the Commission such information and documents (relevant to the subject-matter of such inquiry) in the possession or procurement of the Government or of any Minister of State as shall be called for by the Commission;

(d) If the Commission reports that no reasonable grounds exist for the detention of such person, such person shall within one week either be released or be charged according to law with an offence.

It is thus not inconsistent with the principle of allowing investigating bodies to deliver opinions of a binding character to admit all cases of detention to them without excluding any case from their scope, irrespective of the duration of detention or the nature of the suspicions which have caused detention. It may be added that under the laws adopted this year in Australia and South Africa for outlawing the Communist party, screening committees have been appointed, and these committees are also accessible to every person against whom action is taken by the Government. The idea to pick and choose which our constitution has adopted is indeed wholly unprecedented and devoid of justification.

Another restraint which art. 22 in our constitution seeks to impose upon the power of the executive to detain persons in custody is that Parliament has been given authority to prescribe the maximum period of detention. Parliament has not used this power in its Preventive Detention Act, but apart from this any limit that it may hereafter fix on the duration of detention can hardly be satisfactory in view of the fact to the framers of the constitution themselves three months' detention appears to be quite negligible inasmuch as they have left such detenus without any redress whatever. The imperfections of art. 22 that I have endeavoured to point out here are grave enough, but even if it were free from them, I would still urge its repeal, because the executive cannot be allowed to wield the weapon of habeas corpus suspension in any conditions but those of an acute crisis.

## PREVENTIVE DETENTION ACT

I need not spend much time on the Preventive Detention Act. All I will say is that Parliament by enacting it worked a miracle in entirely evacuating the statute of the only good feature of art. 22. A hope had been raised in the minds of some people (and I must count myself amongst these gullibles) that though art. 22 allows exceptions to be made to the scope of the Advisory Board's compulsory jurisdiction, Parliament would make very few such exceptions and that in actual practice most of those who had been detained for more than three months (the cases of persons detained for a shorter time having already been removed from the control of Parliament by the constitution) would have their cases inquired into and decided by the Advisory Board. If not a regular judicial trial, at least a verdict by a quasi-judicial tribunal (a verdict that would be as binding on the executive as a court's finding) would be available to them. If access to the courts is to be cut off, this is the best safeguard that can be devised to protect Personal Freedom from undue encroachments on the part of the executive, provided, however, that the tribunal is provided all the facilities, or is given power (as was done in England) to provide itself with all the facilities, that are necessary to probe every case to the bottom. The procedure prescribed for our tribunal makes this impossible, it is true; but putting that on one side for the moment, the Advisory Board might have been a real safeguard if all cases of detention of at least more than three months' duration were referred to it.

But exceptions made in the statute to the Advisory Board's scope of jurisdiction are so wide as to leave in nothing but exceptions. There is not a jot or tittle of exaggeration in this. All cases of detention ordered for reasons connected with the public security or public order have by a stroke been put out of the cognisance of the Advisory Board by sec. 9, which defines the competence of that body. Detention might become necessary only for the maintenance of the State's existence or for the maintenance of public order in the State. But our law says that if detention is for either of these purposes, the Advisory Board will have nothing to do with it. Such cases will be relegated, by sec. 12, to an inquiry by the Government, that is to say, by the detaining authority itself. The Advisory Board has been given, with a show of deep concern for

Personal Liberty, the power not only to advise but to decide. But virtually all cases of detention are taken away from the ambit of its authority, so that in the result it can neither advise nor decide. Is the Advisory Board then left without a job altogether? No, our Parliament is too considerate to leave anyone out of work. It has provided some work for the Advisory Board also. This body can look into cases of those persons who have been detained for reasons in connection with the maintenance of essential supplies and services. Under the old Public Safety Acts, which now have been superseded by this blessed Preventive Detention Act in so far as detention provisions go, no one suffered loss of personal liberty on account of any acts prejudicial to the achievement of this purpose. The State Governments used to put offenders of this category before the courts and, if convicted after a regular trial, to inflict punishment on them. No State authorities ever complained that this ordinary method of government was insufficient to deal, and deal drastically, with those who would interfere with essential supplies and services. But the Government of India, as it were with the object of giving some work to the Advisory Board which otherwise would have been left jobless, created this new ground for detention and put the Advisory Board in sole charge of such cases. It almost looks as if Parliament wreaked its vengeance on the framers of the constitution. It seemed to say to itself: "These worthy people ask us to do the impossible. They recognise the need for preventive detention. Preventive detention becomes necessary because cases cannot be taken to the courts. Those who shoulder the responsibility for peace and order must themselves determine who should suffer confinement. If it were not so, preventive detention would be entirely unnecessary. And yet the constitution calls upon the executive to refer such cases to others, not for an opinion, but for a final decision. Very well, we know how to get round the constitution. All detentions that could be ordered under the Public Safety Acts we shall keep out of reach of the profane hands of the Advisory Board. We shall create for its special benefit a new type of detention cases which are now decided in the regular law courts. The Board cannot do much harm if it deals with cases which are dealt with at present by judicial authorities in the ordinary way. If the body must be doing something, let it do this. No doubt this will have the effect of extending the field of detention, but the constitution-makers have forced such an extension on us. We know how to comply with such a constitution—and yet indirectly to subvert it."

## FRAUD AND DECEPTION

To remove all genuine cases of detention from the Advisory Board's purview and to confine its activities, as sec. 9 does, to cases of persons who should not be subject to detention at all but who have been newly made subject to it, is at best nominal compliance with the mandate of the constitution about the Advisory Board, which is the sole useful provision in art. 22. Supreme Court Judge Mahajan said as much in the A. K. Gopalan case. To hold that such a limited function alone could be allotted to the Advisory Board by statute is, he states, to make the provision about the Advisory Board "to all intents and purposes nugatory." He adds: "Such a construction of the clause (viz., cl. 4 of art. 22) would amount to the constitution saying in one breath that a law of preventive detention cannot provide for detention for a longer period than three months without reference to an Advisory Board and at the same breath and moment saying that Parliament, if it so chooses, can do so in respect of all or any of the subjects mentioned in the legislative field." He obviously meant that it was little short of trickery on the part of Parliament to have produced such a statute nullifying the whole purpose of the provision in the constitution relating to the Advisory Board. And when I think of the Preventive Detention Act, I think not so much of the utter indifference and callousness of our Parliament to civil liberty as of the fraud and deception which have given birth to this enactment.

Need I go any further with an analysis of the provisions of this atrocious law? Must I point out that power to detain without trial is enjoyed thereunder not only by the Home Minister, but by subordinate officials like a district magistrate, whose subjective satisfaction as to the necessity of detention must pass muster equally with that of the Home Minister, thus removing a check to which great value was attached in England, viz., that each case was considered by the Home Secretary personally before making an order for detention? Need I say that none of the safeguards carefully inserted in Regulation 18B of England (e. g., the limitation of detention to persons of defined categories like persons of "hostile origin or associations," the virtually final disposal of detention cases by the Advisory Committee which possessed full power to regulate its own procedure, maintenance of Parliamentary control through the medium of monthly reports by the Home Secretary) is provided in the Indian law to prevent excesses of executive action? And what about the extent of application of the measure? You know how widely and recklessly our Act is being enforced. Of

the English Regulation it has been said by an American writer that "the greatest number of persons detained at any one time under 18B was 1,428 (in August 1940); surely a trifling number considering the state of England's defences at that time. By mid-1944 this number had been reduced to about 200." In comparing numbers we must never let it be forgotten that England was at the time up to her neck in the biggest war known to humanity. Ours is a peace record! I shall stop here; I don't think it worth while to discuss the Preventive Detention Act any more.

### THE SHIELD OF THE JUDICIARY

Amid the most distressing conditions in which we are living in so far as civil liberties are concerned the one source of good cheer is the manner in which the judicial authorities are standing up to their rights and duties everywhere. It reflects very great credit on them. We must ever remember their services to the nation in profound gratitude. We can easily detect a tendency amongst the holders of the highest executive positions to cavil at the judiciary and resent what is looked upon as intrusion on their part into a sphere which properly belongs to the executive. A Minister of the Government of India is reported to have complained recently in public that "our courts do not show enough detachment in their ardent championship of civil rights." What he evidently meant was that they maintain too great a detachment from the executive and make themselves too much of champions of civil liberty to be anything but a cause of serious embarrassment to the Government. I have no doubt that our judges will look upon murmurings of this kind with the scorn which they deserve and will go on performing their duties without fear or favour. While we are grateful to the judiciary for what they have been able to do to safeguard our liberties, we had better listen attentively to the wail set up by almost every judge who has to handle detention cases, that the Court is powerless to go into the truth or the sufficiency of the grounds of detention alleged by the Government, in regard to which the executive is the sole judge. The fact that many detenus have been released on habeas corpus applications should not delude us into thinking that on the main question of detention a habeas corpus petition can be made. The essence of preventive detention is abolition of habeas corpus. The relief that has so far been obtained is on very minor points connected with the administration of the Act, which only shows utter ineptitude and lack of a sense of responsibility on the part of the executive. That the judges in all States sorrowfully proclaim their helplessness in considering

the causes of detention is not their fault; it is our misfortune. They are reduced to that unenviable position by the constitution and the statute. It is up to the people to broaden and liberalise these instruments so that our judiciary will be able to render full justice. We know we are too weak to bring about this result. But let us at least pledge ourselves to do what little we can to educate public opinion so that civil liberty will be freed one day from its trammels and real national security restored—and what is of infinitely greater value—NATIONAL HONOUR.

Mr. John Pearmain, Executive Secretary,  
International League for the Rights of Man,

writes to the Editor of the Indian Civil Liberties  
Bulletin as follows:

*The undersigned has read with the greatest of interest your first anniversary number, as also other earlier issues of your admirable Bulletin, and wishes to compliment you on the quality and range of your editorial and other material. We pass it along to others to read much of your material.*

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