

~~BOMBAY CIVIL LIBERTIES~~ CONFERENCE

(Organised by the Bombay Civil Liberties Union)

29th and 30th January, 1944

Presidential Address

by

Mr. M. C. SETALVAD

M. A., LL. B., ADVOCATE (O. S.)

V2:5
H4
044852

Printed at:
THE "ADVOCATE OF INDIA" PRESS, BOMBAY.

LADIES AND GENTLEMEN,

Perhaps at no time in recent Indian history has the freedom of the citizen, whether it be his right to personal freedom, or to freedom of speech or discussion, or the right of public meeting or the right of association, stood at so low an ebb as at the present moment. It is, therefore, in the fitness of things that those who are by reason of their professional and other activities, concerned with the protection and promotion of civil liberties in all their aspects, should meet together with a view to take stock of the situation and concert measures, to get the rigours which, at the moment, fetter these liberties, relaxed. That, Gentlemen, I understand, is the genesis and purpose of this Conference?

In a sense, all Government and even all Law means curtailment of individual liberty. And yet there can be no widespread liberty, or perhaps, no liberty at all except under the reign of law. In a properly constituted State, there is, therefore, no necessary antithesis between the interests of the citizens and those of the State. Indeed, harmony, if not identity of such interests, is the fundamental basis of the modern State.

It is essential to the ordered development of social life in all its aspects, that there should exist a powerful state that will regulate laws, so that under their protection, the individual may reach the highest stage of his cultural and economic progress. But it is equally true, that the individual will be unable to attain such development unless he is in the possession of certain liberties, which alone can leave him free as it were to breathe and expand. Indeed, good life, which according to Aristotle, is the very object for which a State shall exist, cannot be attained unless the Citizen is in the enjoyment of these liberties.

The ideal State would, therefore, seem to be one, which can achieve, by adjustment, that balance between the powers of the State and the liberties of the individual, which would leave to the individual the maximum liberty to plan, order and effect his growth in all fields and at the same time afford to him the protection from his fellow citizens and outside forces, which is essential to his growth and development. The central problem of the modern State is to achieve this balance by reconciling the claims of the individual with the claims of the State. The love of power is, however, inherent in man and there is always a tendency in those, who hold in their hands, the executive power in a State, to encroach upon the liberties of the citizens. It is

in order to guard against this encroachment, that modern democratic constitutions have evolved what are called "the fundamental rights", or "the inherent and inalienable rights" or "the natural or elementary rights" of the citizens. Whatever be the name, these rights are no other than the most important liberties known to Constitutional Law, viz., the right to personal freedom, the right of the freedom of speech and discussion which includes the freedom of the Press, the right of public meeting, the right of association and the right to the security of property. Recently, they have been epitomized in the famous "Four Freedoms" enumerated by President Roosevelt. The Constitutions of the United States, Ireland and Soviet Russia have expressly declared and guaranteed these individual liberties to the citizens and provided methods for their enforcement whenever there is an encroachment upon them by the executive or by other citizens. In Britain, apart from the general provisions ensuring the peaceful enjoyment of rights of property and the freedom of the subject from illegal detention, duress, punishment or taxation contained in the four great Charters or Statutes, which regulate the relations between the Crown and the people, the liberties of the subject are not expressly defined in any Law or Code; but they are well established and have been evolved as a result of a continuous struggle between the citizens aided by the Law Courts and represented in Parliament on the one hand and the Crown and the executive on the other.

So far as the right to personal liberty is concerned it owes its protection mainly to the prerogative writs, particularly to the writ of Habeas Corpus as reinforced by the Habeas Corpus Acts. That writ is, perhaps, the most important writ known to the Constitutional Law of England, affording, as it does, relief against all illegal restraint and confinement. This is a Writ of immemorial antiquity, an instance of its use having occurred in the thirty-third year of Edward I. It has, through the ages, been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of liege. There is in the Indian constitution no provision declaring or guaranteeing any fundamental rights. But our statute law has incorporated into it, with some modifications, the Writ of Habeas Corpus; and, following English precedents, Courts have endeavoured to maintain, in a certain measure, other liberties of the subject by judicial decisions.

An encroachment upon the liberties of the citizens may take the form of a direct usurpation of power by the Executive or it may be attempted by enacting laws which confer uncontrolled power on the Executive. The protection of the citizen against the first method of encroachment lies in the Courts of Law of the State, whose traditions have always made them jealous in

guarding the liberties of the subject. But it has to be remembered that Courts of Law can only afford protection to the citizen to the extent permitted by the law and the utmost that they can do is to put on laws restricting the liberty of the subject a construction most favourable to the subject. If the Law is clear, the Courts are powerless, because their function is only to administer the law as it stands. Attempts to enact laws subversive of these liberties can only be met by the bulwark of a popular and representative legislature which will refuse to pass such legislation except to the extent needed for the protection and advancement of the citizens. Liberty of the subject in England has been progressively enlarged and effectively preserved by the use of these two powerful weapons. As observed by Lord Wright, "In the constitution of this country (i.e. England), there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible Government which has been evolved." Unfortunately, India has not yet attained full representative and responsible Government and this potent weapon for the protection of the liberty of the citizen does not in any substantial measure exist in this country.

On the coming into force of the Government of India Act 1935 the Provinces attained a certain degree of autonomy, which undoubtedly made for the protection of the liberty of the citizen against encroachment by legislation in certain fields. As a result of the Act the Provincial Governments became responsible to the Legislature and therefore to the people. But soon after the declaration of the War, a large number of the popular Legislatures in the Provinces ceased to function. A major part of the popular element in the Central Legislature also kept aloof from that Legislature. In the result, such checks as could have been exercised by the popular legislatures in the Provinces and the popular element in the Central Legislature against the attempts of the Executive to obtain extraordinary powers were completely removed and I think it will be correct to say, that the most effective cause which has made possible the assumption of arbitrary powers by the Executive in the form of Laws giving them the widest and most far-reaching authority and the relentless exercise of these powers by the Executive unaffected by the voice of public opinion, is the absence of a popular and representative form of Government in this country. The Government, that is functioning today in the majority of the Provinces and at the Centre is a Government by the Executive uncontrolled and uninfluenced by a popular Legislature or public opinion. It is the Executive who promulgate the Laws; in the Six provinces in the shape of Acts enacted by the Governors, and, at the Centre, largely in the shape of Ordinances promulgated by the Governor General.

At the outbreak of the War, the Governor General declared under Section 102 of the Government of India Act that a grave emergency existed threatening the security of India and as a result the power to make laws in the Provincial field became vested in the Centre. Having thus obtained power over the whole legislative field, the Governor General has utilised it to the utmost by the exercise of the authority to issue Ordinances in case of emergency preserved to him under Section 72 in the Ninth Schedule of the Government of India Act 1935. Though the Central Legislature, attenuated and unrepresentative as it is, is still functioning, the Governor General has chosen to ignore it in enacting the bulk of the Legislation at the Centre. In the result we have this curious spectacle that though from and after the 1st of January 1940, the Acts enacted by the Central Legislature number one hundred and twenty-five, as many as 132 Ordinances have been issued by the Governor General under his emergency powers after that date. This phenomenon of two legislative authorities functioning in the same field at the same time is anomalous and perhaps unknown to constitutional law. In these circumstances, it is not surprising to find legislative measures giving the widest powers to the Executive without any safeguards for the effective protection of the citizen and the liberty of the citizen gravely threatened and in some spheres altogether destroyed.

As in the case of every other Government in the world, it became necessary for the Indian Government as soon as War was declared to arm itself with powers unthought of and unknown in times of peace. No citizen can question the necessity and expediency of the assumption of such wide powers in a time of crisis like the war. As has been said "In the eternal dispute between Government and Liberty, a crisis means more Government and less Liberty". Yet, it is interesting to examine the nature of the powers assumed in this country in the emergency of war as compared with those assumed in the United Kingdom. At the outbreak of War, the crisis in India was at any rate of no greater magnitude than that in England and yet one finds that important powers assumed in this country on the ground of emergency were much wider and without the safeguards contained in corresponding legislation in England. One may illustrate this by reference to the provisions in regard to the power of Government to make rules under the Defence of India Act and the corresponding provisions in the Emergency Powers Act in England. The English Act enabled His Majesty to make such regulations as may appear to him to be necessary or expedient for the purposes mentioned in the Act by an Order in Council. The Act provided that every Order in Council containing Defence Regulations was to be laid before Parlia-

ment as soon as it may be after it was made and it was open to either House of Parliament to resolve that the Order be annulled within a certain number of days, after the Order had been laid before it. The promulgation of an Order in Council is itself a form of legislation, so that, in effect, the English Act enabled regulations to be made under the Act by a form of legislation and the regulations when made were open to consideration and rejection by either House of Parliament. We know, in point of fact, that Parliament did, from time to time, consider the regulations laid before it and on occasions expressed its disapproval of them. In the Indian Act, the power of making rules was vested in the Central Government, who were entitled to make such rules as appeared to them necessary or expedient by notification in the Official Gazette.

The rules under the Defence of India Act, confer upon the Executive the most sweeping powers in matters covering almost every sphere of a citizen's activity; and, it will be realised how essential it was that these rules should be subject to scrutiny by representatives of the people. The English Act provided for this scrutiny and control in a full measure; the Indian Act did not.

Invested with these uncontrolled powers in regard to making rules, the Central Government, while keeping the regulations made under the English Act as a model, widely departed in many important respects from the terms of those regulations. Many of these departures, though known to the practising lawyer, have not yet come up for examination before Courts of Law. But one of them, a very vital one, dealing with the most important liberty of the subject, viz., the liberty of his person, has been the subject of a close and critical scrutiny by Courts of Law for a period of about two years. I am referring, Gentlemen, to the famous Rule 26 of the Defence of India Rules. The corresponding English Regulation 18 (B) gave a power of detention to the Secretary of State in respect of a person, whom he had reasonable cause to believe, to be of hostile origin or associations or to have been recently concerned in acts prejudicial to public safety. It constituted Advisory Committees consisting of persons appointed by the Secretary of State, to whom objections could be made by the persons detained in respect of the action taken against him by the Secretary of State. On an objection being made by the person detained, it would be the duty of the Chairman of the Advisory Committee to inform the objector of the grounds on which the Order had been made against him and furnish him with particulars sufficient to enable him to present his case. The Secretary of State was not bound to accept the advice of the Advisory Committee in respect of the objections made, but he was to

make a report to Parliament at least once every month as to the action taken by him under the Regulation including the number of persons detained under orders made thereunder and the number of cases, if any, in which he had declined to follow the advice of the Advisory Committee. This Regulation empowers action only when a high official such as the Secretary of State has reasonable cause to believe the detention of a person necessary and even then provides a number of safeguards, giving in particular, the right to the person detained to know the reasons for his detention and meet them before a Tribunal, though an advisory one.

In contrast we may turn to our Rule 26, which conferred the power of detention on the Central Government or the Provincial Government, if it was satisfied that it was necessary to detain a person for any of the purposes mentioned in the Rule. There was no provision whatever in this Rule requiring the person detained to be informed of the reasons of his detention or giving him an opportunity to present his case. Could anybody suggest that when these rules were promulgated at the commencement of the war, the crisis in India was greater than in England? The Indian Rule was framed as it was by the Executive, clearly with a view to arm themselves with unfettered powers of detention, leaving no remedy or redress whatever to be person detained.

As you are aware, so greatly is the liberty of the person prized in England that the English Regulation even framed as it was, received severe comment as conferring too wide a power of detention. It was held by the House of Lords that a person detained could, notwithstanding the regulation, satisfy the Court that his detention was not bonafide. One of the learned Judges went much further and held that it was for the Court to investigate and decide whether there was, in fact, reasonable cause for the detention of a person. Indeed, some jurists have taken the view that the decision of the majority in the case of *Liversidge vs. Anderson* "has put back the clock to the day when Englishmen found it necessary to declare that the power of the Executive had increased, was increased and ought to be diminished."

Wide and arbitrary as was the power of detention contained in Rule 26, the manner of its exercise by the Central and Provincial Governments was still more arbitrary and afforded a glaring instance of a total disregard of the liberty of the subject. Though it was the Central or the Provincial Government who were invested with the power of detention these powers could under those rules, be delegated. In the result the actual power of detention was exercised by the subordinate officials so that the liberty of a citizen may well be at the mercy

of an Inspector or Sub-Inspector of Police. As stated by the Federal Court in Talpade's case, "There is, in the Indian Act, no trace of an intention that any particular person or authority should exercise the power of detention. On the contrary, the selection of those, who are to exercise this most important and exceptional power, is left to be decided by the Rules themselves, i. e., by the Executive which makes the Rules. The vast area of the Indian sub-continent, the wholly different problems of Government which are to be found there and the existence of 11 Provinces in addition to the Central Government, besides other subordinate Government authorities, no doubt, made it a difficult task to select in advance an individual or individuals in whom these powers might be vested as was done in the United Kingdom. So far as we can see, there is nothing in the Act to prevent these powers being vested in any person or body, however insignificant or subordinate. It is one thing to confer a power to make a regulation empowering the Home Secretary to detain any person if he thinks it expedient to do so for a number of specified reasons. It is another thing altogether to confer a similar power on any person whom the Central Government may, by Rule, choose to select or to whom the Central Government may by Rule give powers for the purpose."

Towards the close of the year 1942 and thereafter, we witnessed what may be legitimately termed, a reckless exercise of this wide and uncontrolled power. Thousands of persons were detained; and there was a general feeling of helplessness throughout the country. After these initial feelings had passed, people in their extremity turned to the Courts of Justice where alone lay a hope of amelioration and redress. Attempts were made to test the validity of these detention orders by Habeas Corpus proceedings. Here again, the attitude of the Executive was one determined effort to resist every attempt by the Courts to interfere with the arbitrary exercise of their wide powers. It was seriously urged on behalf of the Executive that Section 491 of the Criminal Procedure Code, which gives a right to apply to the High Court for the release of a person unlawfully detained, had been impliedly repealed by the Defence of India Act and the Rules made under it and that the persons detained had, therefore, no right to apply to the Courts under that Section. But Lord Atkin had laid down in the Liversidge case that even "amid the clash of arms, the laws are not silent. They may be changed but they spoke the same language in war as in peace". The House of Lords had held that notwithstanding the Act and the Regulations, the right to apply for a Writ of Habeas Corpus was not abrogated. The Courts in India following that decision, entertained these applications. The Executive went to the length of even denying the persons detained the benefit of legal advice and it required the judgment of a High Court to establish that right.

Then arose the now historic fight about the validity of Rule 26 itself. This question was, so far I know, first raised in this Province and ultimately resulted in a popular victory in the judgment of the Federal Court declaring the Rule invalid. That judgment is a landmark in the assertion of civil liberties in this country. That decision and the weighty observations made in it achieved for the cause of civil liberty in India what had been achieved in England by the observations of Lord Atkin in the *Liversidge* case. It proclaimed to the world how these orders of detention contained merely mechanical recitals of the language of Rule 26, clearly indicating that in many cases, persons in whom was vested the grave power of detention without trial, had no opportunity of applying their minds to the facts of the cases which came before them. It was a clear and emphatic condemnation by the highest Court in the land, both of the terms in which Rule 26 had been enacted and the manner in which the powers given by it had been exercised by the Executive.

Any executive, alive to constitutional law and its implications, would have felt compelled to bow to this decision and carry out its spirit and substance. The decision and the reasons given for it were entirely ignored and the view taken by the Executive was that the judges had discovered a minor legal and technical defect in the Rule, which they were entitled to set right, and, immediately, a validating ordinance was enacted setting right, what the Executive had called, a technical flaw. This ordinance was enacted by the Governor-General, in whom is vested the executive authority at the centre, on the plea that an emergency had arisen. Were it not for the fact that this rule and the various measures taken from time to time to maintain its arbitrariness have deprived thousands of citizens of their personal liberty, one may confess to a sense of amazement at this so-called emergency. The Executive enacts a rule, not justified by its rule-making power. The highest Court in the land declares it invalid and the detention of a person under it illegal. Far from respecting this decision and realising its implications, the Executive considers that the decision itself has created an emergency; and again firmly wielding its ordinance making power it enacts an ordinance which ignoring the decision keeps the illegally detained persons still in detention. Such a course of action could be possible only in a regime, where the voice of the people is not heard and the ideas of constitutional propriety are ignored.

Apart from the effect of the validating ordinance on the persons detained, its effect on the Executive in general and on the inferior Courts was very grave indeed. The subordinate officers, already armed with arbitrary powers had a feeling that whatever happened and whatever the Courts decided, every thing done by them would stand ratified and validated and that nothing need

retard them in the exercise of their powers. The cursory treatment accorded to the decision of the highest Tribunal in the land had also a very undesirable effect on the subordinate judiciary. Indeed, we had the clearly unconstitutional and somewhat undignified spectacle of the Chief Justice of a High Court admonishing the Federal Court and trying to convince it that its decision in regard to Rule 26 was incorrect.

But notwithstanding the validating ordinance, the battle for the assertion of civil liberty is still raged in the only forum which remained open to the people, the Courts of Law. The Calcutta High Court in a memorable judgment declared the validating ordinance invalid. Some other High Courts, however, decided the ordinance to be valid and the matter eventually again came before the Federal Court. Though that Court held that Section 3 of the Validating Ordinance was not invalid or *ultra vires*, it held that it was a condition precedent to the valid exercise of the power of detention conferred by Rule 26 that the Provincial Government should have applied its mind and have become satisfied that such detention was necessary for preventing the person proceeded against from acting in a manner prejudicial to the matters mentioned therein and that orders of detention made in pursuance of a general order that if the Police recommended the detention of a person under Rule 26, such person should be detained, were invalid. In the result by that decision, the detention of a considerable number of persons was declared to be illegal. This was another victory for the cause of civil liberty.

Notwithstanding these verdicts of the Federal Court, the executive in India has remained unmoved. The new Ordinance, called "the Restriction and Detention Ordinance" has been published a few days ago. A perusal of this Ordinance, though one has not the time to carefully look into the terms of this Ordinance, will make it clear that it retains unaltered, most of the objectionable features of Rule 26 and, indeed, in some respects alters the situation for the worst. It appears that by this Ordinance, the executive has deliberately attempted to shut out the wide and salutary effect of the Court under Section 491 of the Criminal Procedure Code, in the result, notwithstanding the struggle waged for over a year in the Courts of Law, the executive has, in substance, refused to part with its arbitrary powers restricting the freedom of the persons.

I have, so far, traced broadly the history of the inroads made by the Executive on the right of personal freedom, the attempts made to rescue it and the very partial success which these efforts have achieved.

Another phase of the usurpation of arbitrary powers under the form of law by the Executive in India, was its attempt to encroach upon the jurisdiction and powers of the lawfully constituted Courts in this country. The Defence of India Act, enacted immediately at the commencement of the War, gave power to constitute Special Tribunals for the purpose of trying offences under the Act and certain other offences. A special procedure modifying the usual procedure of the Courts was laid down for these Special Tribunals. These provisions of the act were however at no time put into force, probably because the Executive thought that the Tribunals constituted and the procedure prescribed for these Tribunals were not suitable. Instead, there was enacted early in 1942 an Ordinance called "The Special Criminal Courts Ordinance." Curiously enough, the application of this Ordinance to any particular Province was left to the Provincial Government, who were to decide to put it into force on being satisfied of the existence of an emergency. As we all know power was given by this Ordinance to the Provincial Government to direct what cases or classes of cases were to be tried by the Special Courts. The procedure provided by these Courts was a special procedure and the rights of revision and appeal contained in the ordinary law were rigorously cut down. The Courts of Justice alone had so far been able to afford protection to the citizen against the rising tide of restriction and abrogation of Civil liberties. The publicity of trial in a Court of Law, the right to be tried by assessors or a jury in certain cases, the right of appeal and the right of revision, the right to have the charges tried by Courts of a particular status were all valuable rights of the citizen which enabled him to resist through the machinery of the Courts the encroachments of the Executive. The enactment of this Ordinance deprived the citizen of the protection afforded by these valuable rights.

Here again the people adopted the only method that remained in their hands of combating the encroachments of the Executive. They resorted to Courts of Law and challenged the validity of the Special Courts Ordinance; and they succeeded. A full bench of the Calcutta High Court declared the Special Courts Ordinance invalid and the decision of the Calcutta High Court was affirmed by the Federal Court. On that occasion again the Federal Court indicated its views on emergency Legislation in no uncertain words. The Acting Chief Justice of the Federal Court stated as follows:-

"It has no doubt been always recognized that some authority in the State should be in a position to enact necessary measures to meet extraordinary contingencies. Section 72 of Schedule 9 makes ample provision for it; the question

is, about the manner of exercising that power. Before applying the analogy based on the English practice as to emergency legislation, certain differentiating circumstances must be borne in mind. In England even emergency legislation is Parliamentary Legislation or Order in Council passed under the authority of Parliamentary Statute and it is always subject to Parliamentary control, including in the last resort the right to insist on the annulment or modification of the Order in Council or even the repeal or modification of the statute itself. In the Indian Constitution, the Legislature has no share in or control over the making of an ordinance by the exercise of the powers thereunder nor has it any voice in asking for its repeal or modification. Again anything like a serious excess in the use of special emergency power will, under the English practise, be a matter, which Parliament can take a note of, when the time comes for passing usual Indemnity Act on determination of the emergency. That is not the position here, as the Indemnity can be provided by an Ordinance. As against all this, the only safeguard provided in the Indian constitution is that the matter rests entirely upon the responsibility of the Governor General.....In the present case it is impossible to deny that the ordinance making authority has wholly evaded the responsibility of laying down any rules or conditions or even enunciating the policy with reference to the cases that are to be assigned to the Ordinary Criminal Courts respectively and left the whole matter to the unguided and uncontrolled actions of the Executive authorities."

As a result of that decision, the Special Courts Ordinance was repealed and provision was made for the review in appeal of the sentences passed by the Special Courts. Persons, whose sentences still remained unexpired, or persons who still remained to be tried by the Special Courts, obtained the benefit of an appeal to or a trial by the Ordinary Courts.

It has not been possible to obtain statistics to enable one to form a judgment as a whole of the way in which the Special Courts under the repealed Ordinance functioned, but some of the cases tried by these Courts which have come in appeal before the Ordinary Courts leave no room for doubt that a large number of persons tried by these Courts did not receive a proper judicial trial. In a number of cases, the convictions made by these Special Courts have been set aside, it being found that the convictions were arrived at on material which was not legal evidence. It is not possible to form any idea as to the number of persons tried and convicted by these Special Courts. The sentences passed in a large number of cases tried by these Courts

did not come up for examination or investigation by the Ordinary Tribunals. But it can, I think, be safely stated that on the whole the persons tried by these Special Tribunals under their special procedure and convicted by them were denied the right of a satisfactory judicial investigation of the charges against them.

If may not be out of place to advert to the attitude which the Executive has maintained in regard even to the highest Courts in the land. Respect for Law and its administration are essential elements making for the stability of Government and the ordered progress of society. The dignity of Law and the Tribunals administering it have been insisted upon in all jurisprudence. Indeed, any conduct and words tending to affect the dignity of judicial Tribunals are punishable as contempts of the Court. It is in the light of this background that one must examine the conduct of the Executive in India in reference to the established Courts of the land. Every effort has been made to restrict and circumscribe the powers of these courts by emergency legislation, which, in this country, is mostly enacted merely by an executive fiat. In so far as these efforts have not succeeded and the Courts have pronounced upon the invalidity and the impropriety of the action of the Executive, the Executive has set at nought the pronouncements of the Courts and sought to obtain again, by the exercise of the power of legislation vested in them, the same or wider powers. What is more, the Courts have been subjected to the indignity of seeing persons acquitted by them after a laborious trial, pounced upon and seized by the Police, sometimes in the Court room itself and sometimes in the precincts of the Court house. The reports of the two Calcutta cases on contempt of Court, of which you are doubtless all aware, make interesting reading in this connection. These were cases in which persons ordered to be released were arrested in the Court room or the Court precincts, and one of the Police officers was bold enough to make an unwarranted suggestion in regard to the Chief Justice of that Court. And this has happened almost all over the country. Can a citizen have any respect for the law, when a law pronounced by the Courts to be invalid is validated in a few hours time at the will of the Executive? And what respect can the citizen have for the authority of Legal Tribunals, if persons pronounced by them after a laborious inquiry to be innocent are immediately after such pronouncement to be taken into detention again in the exercise of Executive powers? This action of the Executive had almost the appearance of playing with the Courts of Law. If they could secure a conviction the further detention of the person in jail could be attributed to the finding of the Court. But if the prosecution failed and the Judge pronounced the accused innocent, that

verdict was to be of no use to the Executive. I cannot conceive of a course of conduct which could have a greater tendency to undermine respect for law and the administration of justice in the minds of the ordinary citizens.

The fact that in many of these prosecutions the Executive have failed to secure a conviction at the hands of the ordinary Courts indubitably indicates that a large number of persons who have been under detention are incapable of being proved by a fair trial to be guilty of any offences against the law.

The conduct of the Executive in regard to Lawyers invites a reference. Laws and their administration and lawyers who helped in administration are all vital and essential elements in a well ordered State. It is axiomatic and has been frequently stated in weighty pronouncements by the highest Courts that lawyers are indispensable to the proper administration of justice. And yet how have lawyers been treated by the Executive? I remember that towards the end of 1942 a number of Associations of lawyers in this Province formed committees principally with a view to investigate the alleged excesses of the Police and other officials and to render legal aid to the victims of these excesses. Any Executive conscious of its responsibility would have welcomed this move which was designed to curb the alleged excesses of the lower officials. Not so the Executive in India. On the formation of these Committees a communique was issued and communications were addressed to the heads of some of these bodies making it difficult for them to carry on their self-imposed task. And we have known of instances of the Executive having gone so far as to arrest lawyers who were on their way to discharge their professional obligations towards persons detained by the Executive. Such action leads to an inference in the public mind that the Executive is attempting to shield subordinate officials who are in fact guilty of excesses.

This inference is strengthened by the attitude that the Executive has throughout maintained in regard to complaints made to them by responsible persons of the wanton exercise of arbitrary power by some of the officials. You will remember, Gentlemen, the case, in which a responsible member of the Bombay Legislative Assembly drew the attention of the Government to certain alleged action of the Police at Nandarbar and Poona. It was alleged that at Nandarbar, the Police had fired upon a procession of school children when four of the children had been killed and others injured and it was alleged that at Poona there was firing in which certain women, who were merely looking on, had the misfortune to be killed. Statements of eye

witnesses were sent to the Executive and they were asked to hold some inquiries into these matters. Repeated communications were sent to the Executive but they elicited no answer. Eventually the member published a pamphlet containing the letters addressed by him to the Executive. Not being content with having failed to reply and having shirked the inquiry, the Executive took proceedings against the Printer of the Pamphlet under the Press Act. The answer of the Bombay High Court to that application was that the pamphlet did not offend against the Press Act and the way in which the Executive had dealt with the matter in not answering the letters and not informing the writer that there was an inquiry in the matter and if so with what result was calculated to arouse criticism.

The fact that gross excesses have been committed by some officials is now a matter of judicial history. In Allahabad two men of the Special Armed Constabulary were sentenced to death and three to transportation for life on a charge of wantonly shooting a man and his wife during the disturbances of 1942. In Delhi four members of the U. P. Special Armed Constabulary were convicted of offence of the murder of three boys in October 1942 and were sentenced to death. These, Gentlemen, are instances of excesses amounting to the grave offence of murder. There have been other convictions of subordinate Officials on lesser charges and one must not forget the vast number of cases of alleged excesses which have never been investigated and have not come before the Courts.

I will be failing in my duty if I did not pay a tribute to our Judiciary for the way in which, as a whole, notwithstanding at times a most difficult situation, they have stood unshaken and rendered such relief to the subject against the aggression of the executive as the laws would permit them. The great traditions of the Courts in England who have endeavoured to safeguard the liberty of the subject, have throughout been the inspiration of our tribunals; and the success now and again achieved by those who were fighting for the cause of Civil liberty has been made possible by these tribunals.

And one must also call attention to the part played by the legal profession and some other bodies in vindicating the cause of the liberty of the subject. A number of them have formed committees which have done valuable work in aiding persons who were in need of help. This help was rendered on some occasions at considerable sacrifice and I know of the satisfactory result which were achieved. It was this aid which enabled many persons who might otherwise have been convicted to establish their innocence. And perhaps the greatest triumph

of these efforts has been the vindication on more than one occasion of the liberty of the subject by the highest Courts in the land.

I have so far, Gentlemen, mainly dealt with the most important of Civil Liberties, viz., the liberty of the person. The freedom of public meeting, of association and of the freedom of the Press, have been equally restricted. As to the last, there are others here, who can and will speak on the restrictions on the Press and its consequences with greater knowledge and authority than myself.

Let it not be said for a moment, that we are not conscious as citizens of the vital fact that in a time of stress and war, such as we are passing through at present, the liberty of the subject must needs be greatly restricted in all its varied spheres. The exigencies of War must needs involve constant interference by the Legislature and even by the Executive with our freedom. But what we have raised our voice against is, the assumption of powers not really needed for the emergency, the assumption of powers without safeguards for their due exercise, and, finally, the exercise of powers assumed to meet the emergency of War for a totally foreign purpose, viz., the suppression of the legitimate rights and activities of citizens. In Britain, as here, there has been a vast curtailment in the liberty of the citizen by reason of the emergency of war; and yet personal liberty, or the liberty of the press or liberty of association and public meeting, has not been restricted in anything like the measure in which it has been restricted in this country. In the words of Lord Macmillan "The fact that the nation is at war, is no justification for any relaxation of the vigilance of the Courts in seeing that the Law is duly observed, especially in a matter so fundamental as the liberty of the subject—rather the contrary".

Gentlemen, the picture I have drawn is a dismal one. Civil liberties continue to remain in this country in a precarious condition. A very large number of persons, the exact number is not known, are still under detention without inquiry and without trial, and others continue under the most galling restrictions. Freedom of speech, freedom of public meeting and freedom of association only subsist at the sufferance and at the will of the Executive. What then is the remedy for this grave situation? It is obvious that the Executive will remain unmoved whatever the facts we put forward and however cogent our reasoning. The real remedy lies in the attainment by this country of a Government representative of and responsible to the people. For achievement of that great end the noblest and best amongst us have striven and are yet striving, each according to the light

given to him. But these are matters outside the scope of our deliberations. All that we can do in our humble sphere is to keep an ever-watchful eye on encroachments on our liberties, keep a record in so far as it lies in our power of these encroachments, render help in so far as we can to those whose liberties have been encroached upon and who seek our aid and to endeavour in every way to preserve and enlarge our liberties.
