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# The Indian Civil Liberties Bulletin

[ A MONTHLY REVIEW ]

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Office : Servants of India Society, Poona 4*

Annual  
Subscription : Rs. 3  
Per issue : annas 4  
*including postage*

No. 11

August, 1950

In exercise of the powers under the "lawless laws," they (the Congress leaders) have suppressed political parties; they have taken away the freedom of the press; they are issuing orders under section 144 to forbid processions and meetings; they are not hesitating to shoot down even women when those orders are disobeyed; and they have deprived over three thousand persons of their liberty without bringing them up for trial.—P. R. Das, in July 1949.

There was no greater advocate of civil liberty and the rule of law than the present Prime Minister of India; yet, strange to relate, he is do-day the upholder of the exercise of coercive powers by the State.—*Ibid.*

## ARTICLES

### OUR APPEAL TRIBUNALS

#### Their Purpose Completely Nullified

We had thought that India was unique in providing in art. 22 (4) of her constitution the kind of machinery that it has provided for the purpose of inquiring into cases of preventive detention of which the duration is longer than three months—an Advisory Board which, though by an excess of humility rare in constitution-makers, is called "advisory", is in reality vested with compulsory jurisdiction in the sense that if, in any particular case, it recorded an opinion that there was no sufficient cause for the detention, the Government was under an obligation to revoke the detention order and restore the person concerned to liberty. We had all the time concentrated our attention on what happened in England during the last war in this respect. There Regulation 18B had similarly provided for an Advisory Committee to review cases of detention, but this Committee, as the name implied, was in fact advisory, the Government being at liberty to set aside the Committee's opinion in any case and continue to hold a man in detention in spite of the fact that the Committee might have recommended his release. It is true that in England the Government considered itself to be morally bound to pay, and in actuality did pay, the greatest deference to the advice of the Committee; but in any case in the eye of law it was open to it to decline

to follow the Committee's advice if it thought that such a course was unavoidable in the interest of national defence. To endow the inquiring body with legal power to make a binding decision (as was suggested by Mr. M. C. Setalvad in his "War and Civil Liberties") was something which we had thought was not attempted anywhere else in the world except in India.

There was on this account a glow of pride in our heart to which no adequate expression could be given. A constituent assembly in which, in matters of civil liberty, the founder of the All-India Civil Liberties Union, Pandit Jawaharlal Nehru, had a controlling hand could not but, we felt certain, make the guarantees of personal freedom stronger than those in every other country. We thought it was a great blot on our constitution that it had provided for three months' detention without any kind of remedy. That was a matter on which, we said to ourselves, we would have to pick a bone with Mr. Nehru. Perhaps we could persuade him to see that Parliament does not use the power which the constitution gives it to pass a law authorising detention for three months without having to refer the matter to an Advisory Board, and though such forbearance could not be depended upon after Mr. Nehru had ceased to be at the helm of affairs, so long at any rate as he was in control personal liberty would be secure against arbitrary infringement even when such infringement was constitutionally possible. But leaving aside this matter of detention of three months' duration, over which perhaps a hard struggle would be necessary in the future, we were satisfied that, mainly owing to Mr. Nehru's influence, everything had been done in the constitution in regard to Freedom of Person which, short of an open trial (which too Mr. Setalvad recommended for persons who were in detention "for a certain length of time"), could be done to mitigate the injustices inherent in preventive detention.

An Advisory Board consisting of independent persons was to be constituted which would be enabled to review and finally decide whether an order for detention against a person should be confirmed or withdrawn. We were conscious of the fact that under the constitution every order for detention would not go to the Advisory Board for review as in England every order without exception could

go to the Advisory Committee, and that under art. 22 (7) (a) in certain circumstances and in certain classes of cases such orders could be withheld from the Board's scrutiny, leaving the executive in an unchallengeable position in such cases. But here again we had hoped that what was constitutionally permissible would not be allowed to be legally possible, and that Parliament would in fact refrain from exercising the power which the constitution had given it of enacting a law exempting any cases of detention, or at all events any but a very small number of such cases, from the Advisory Board's mandatory jurisdiction. In any case we thought that to bestow on a sort of judicial body the power of deciding which detention orders should stand and which should not was a novel proceeding, the like of which had not been adopted in Britain or any other country, in matters in which, from the very nature of the case, the final power of decision must rest in the hands of the executive, though some safeguards would have to be provided.

While we were thus contemplating with pride the fact that India had the honour of showing the way to the world in the matter of protecting Freedom of Person, what was our dismay and consternation to see the legislation that Parliament actually enacted in the law of preventive detention. It just killed the Advisory Board. It withdraws from the scope of the Board's quasi-judicial functions, not a large portion of possible detention cases, but EVERY POSSIBLE CASE. No detention order that any government could possibly have issued under the Public Safety Acts could by any chance be placed before the Board. Instead of congratulating ourselves therefore that for an Advisory Council endowed with purely advisory functions which was all that was available before would now be substituted an Advisory Board endowed with power to give decisions which would be binding on the executive, we were left to mourn not only that there would be no Advisory Board IN ANY CASE, but that there would not be an Advisory Council either IN ANY CASE. In order possibly to give some work to the Advisory Board provided for in the constitution, Parliament, very obligingly, created a new class of detention unknown to the Public Safety Acts and rigidly restricted the Board's jurisdiction to this class. As though it said to itself: "The Advisory Board is to give binding decisions? Very well, then let it concern itself only with the cases of persons who previously could not be detained at all. We are, for the benefit of the Advisory Board, giving a new power to the local governments to detain an additional class of persons. Let the Board, if it must be doing something, sit and spend its energies upon such cases. But we cannot, oh, we just cannot, let this Board get itself mixed up with the cases of those persons whom these governments were in the habit of detaining before. They must be wholly out of reach of any of its impudent incursions."

It is sheer dishonesty first to create a body which, if it were genuine, would have reflected the greatest credit

on India and in fact credit which (as we thought at the time) no other country could claim, and then coolly to turn round and say that NO CASE SHALL GO TO THAT BODY.

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#### Eire's Offences against the State Act

The point we wish to make on the present occasion, however, is different: it is that the provision of an independent tribunal to investigate *and decide* cases of preventive detention is not, as we had thought, peculiar to India, showing her willingness to go to the utmost length in maintaining the fundamental liberties of the citizen. Before India, Eire had exhibited equal progressiveness in this respect. Just about the time when, on the eve of the break-out of World War II, the British government took power to itself, in the interest of national security, to detain fifth-columnists, de Valera's government too took similar power in the Offences against the State Act, 1939. This was a comprehensive code of criminal law. The first four Parts thereof embodied normal rules of procedure, but the next two Parts consisted of temporary emergency legislation enacted in view of the threat of the I. R. A. Part VI of this Act related to powers of internment; it authorised the government by proclamation to bring it into force when and where it thought that the employment of the powers conferred by it was necessary. Under the operation of this Part the Minister for Justice was empowered to arrest and detain, without charge or trial, any person about whom the Minister was satisfied that he was "engaged in activities calculated to prejudice the preservation of the peace, order, or security of the State." The Minister was invested with discretionary powers, but this was counterbalanced to some extent by setting up a Commission for inquiring into detentions, and by providing that if the Commission was not satisfied about the necessity of detaining any particular person he shall either be released or put on his trial. The Minister's satisfaction in regard to any case was made subject in the ultimate resort to the Commission's decision after a searching inquiry or to the judgment of a court. Only one sub-section of sec. 59 relating to this matter need be quoted here *in extenso*:

(3) 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, 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.

Paragraph (d) in the above-quoted sub-section makes it clear that, unlike the Advisory Committee of Regulation 18B of England, but like the provision of art. 22(4) in the constitution of India, followed in sec. 11 of the Preventive Detention Act, the Commission of inquiry set up in Ireland under the Offences against the State Act was given what Mr. Justice Mahajan has in the Gopalan case called compulsory jurisdiction. Thus the bold new departure that we thought India had taken for the first time was in fact due to Ireland's initiative.

Only, Ireland intended the safeguard of the Commission to be effective and provided it in the case of every detained person who would desire to avail himself of it. For the Act says that "any person who is detained" may apply for his case being referred to the Commission, and upon such application being received, "the Government shall forthwith refer the matter of such person's detention to the Commission." This obligation on the part of the Government was not hedged round with any qualification; it was complete. The Advisory Committee in England differed from the Irish Commission in one particular, viz., that its functions were only advisory. But in regard to the extent of its jurisdiction, the British Committee corresponded exactly with the Irish Commission. No case of detention could be withheld from it. It was not a matter of picking and choosing either for Parliament or for Government. Regulation 18B provided: "It shall be the duty of the Secretary of State to secure that any person against whom an order (for detention) has been made under this Regulation shall be afforded the earliest practicable opportunity of making to the Secretary of State representations in writing with respect thereto, and that he shall be informed of his *right*, whether or not such representations are made, to make his objections to such an Advisory Committee as aforesaid." No exceptions were allowed, whether in England or Ireland.

But what happened in India? An Advisory Board was provided for in the constitution with compulsory jurisdiction — undoubtedly a great step forward. But the constitution also provided for exceptions to be made by Parliament. The framers of the constitution perhaps expected (and we for our part did so) that the exceptions would be few and far between and, such as they are, would be very narrowly defined. But Parliament used this power to include everything in the exceptions and thus reduced the Advisory Board to an absolute nullity. The difference in this respect between the practice followed in England and Ireland on the one hand and that followed in India on the other is the difference between NO EXCEPTION and EVERY EXCEPTION between ALL-IN and ALL-

OUT. The uniqueness of India thus consists not in having a body with compulsory jurisdiction to dispose of cases of detention, but in so framing the law as virtually to put this body out of existence altogether. We have characterized the Preventive Detention Act before as an outrage and a fraud. Both descriptions are literally true, but what causes greater resentment, we must confess, is the fraud of it even more than the outrage made on the feelings of the Indian people.

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#### Emergency to be Terminated by Parliament

While we are on the subject of the Offences against the State Act of Eire, we might draw attention to two of its aspects which are of particular interest to India. It will be seen that sec. 59 (3) (c) of the Act throws on the Government an obligation to supply to the Commission which is to inquire into detention cases all the material asked for by the Commission, which is in the possession of Government or which Government can procure ("The Minister of Justice shall furnish to the Commission," etc.). A similar undertaking was given in England, to which we have made reference before. But in India the Government has accepted no such water-tight obligation. Sec. 10 (1) of the Preventive Detention Act says that "the Advisory Board shall, after considering the materials placed before it and, if necessary, after calling for such further information . . . as it may deem necessary, submit its report." The Board has the power to call for information, but why should it not be specifically laid down that it will be the duty of the Government to respond to the Board's demand in as full a measure as possible? This is perhaps a small point, for when the Advisory Board is itself made lifeless it does not matter much how it proceeds to carry on its work. Still the point may be noted.

The other point to which we wish to refer is of greater consequence. The Offences against the State Act is no longer in force. It was avowedly an emergency legislation which ceased to be operative after the war period, and now the Minister for Justice has no power to detain any person without trial, and there are no statutory bars on the rights of habeas corpus. It should be remembered that art. 40 (2) of Eire's constitution of 1937 provides detailed means for obtaining relief in the nature of habeas corpus in case of unlawful detention. We would again bring to the attention of our readers what we stated at p. 95 of the BULLETIN, viz., that the Irish constitution provides for suspension of the writ of habeas corpus only "during the existence of a state of war or armed rebellion," and the courts are the final judge of whether "a state of war or armed rebellion" justifying suspension exists or not. This is a point the importance of which cannot be overrated.

Moreover, in the Offences against the State Act, an additional safeguard against the power of preventive detention was provided. The power was taken by the Act in order to cope with a national emergency, in the form of the violent activities of the I. R. A., and in order to

ensure that the power would not overlast the emergency it was provided that Parliament should be in a position to put an end to the proclamation by which Part VI of the Act authorising detention would be brought into operation. Sec. 54 (4) reads :

Whenever the Government has made and published a proclamation under the second sub-section of this section, it shall be lawful for Dail Eireann, at any time while this Part of this Act is in force by virtue of such proclamation, to pass a resolution annulling such proclamation, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.

Our Preventive Detention Act is not claimed by the government to be a piece of emergency legislation, and the Home Minister, Sardar Patel, made it clear in Parliament, that he was thinking of it in terms of a permanent law. But compare the above section of the Offences against the State Act of Ireland enabling Parliament to make it impossible for government to suspend habeas corpus thereunder with the provisions in our constitution relating to emergencies. The President declares a state of emergency by a proclamation when in his opinion public security is threatened, either actually or potentially. The proclamation has no doubt to be laid before Parliament, but no provision is made for the summoning of Parliament within a specified period if, at the time the proclamation is issued, it is not in session, and further even if it is in session or is summoned and votes against the proclamation, even then it is provided that the proclamation shall remain in operation for the space of two months unless the President himself chooses to revoke it earlier; and if Parliament happens to be dissolved within these two months, the proclamation will get a further lease of life for thirty days after the election of a new Parliament. It is unnecessary to remind our readers that one of the consequences of the issue of a proclamation of emergency may be suspension of habeas corpus by an order of the President. These restrictions on the powers of the legislature exceed in severity any such restrictions imposed in any other constitution. We have pointed this out before, but we would still repeat it because some matters in connection with the constitution are of such importance that they should not only be known to the reader but should sink into his mind.

#### POACHER AND GAMEKEEPER

The old poacher makes a very good gamekeeper. The truth of this homely saying was well illustrated in the appeal which the Bombay Government preferred against the award of damages by a district court for illegal imprisonment of a man who was suspected by the executive of

the time to be likely to take part in the Quit India movement of 1942.

This is a very interesting case from the political point of view. One Mr. Kalidas Kalyanbhai Patel, a prominent citizen of Nadiad, was, on the eve of the passing of the Quit India resolution by the Congress eight years ago, arrested and held in detention for over two years. He recently complained to the district court that his detention was malicious inasmuch as it was known at the time he was detained that he had ceased to take part in Congress activities since November, 1939, when "owing to certain differences with the Congress executive", he ceased to be a Congress member (his name having actually been removed from the membership roll by the Gujarat Prantik Samiti), and for this reason he claimed damages from the government. The district court held that the district magistrate had not applied his mind in making the order of detention against Mr. Patel as the latter had remained aloof from the Congress movement and awarded damages to Mr. Patel. Against this decision of the district court the Bombay government appealed to the High Court, which overruled the trial court's decision and set aside the award for damages.

We do not know if there was any provision in the Defence of India Act, under which Mr. Patel's detention was ordered, which made it obligatory on the detaining authority to apply his mind to an order for detention which he might issue. But presumably even the hated British régime, in the midst of its orgy of repression, had inserted some such provision in the Act since the district court based its judgment thereon. The High Court, in upsetting the decision, did not take the ground that there was no such requirement in the Defence of India Act and that the executive was left completely free under it to detain whomsoever it thought necessary. Mr. Justice Bavadekar and Mr. Justice Vyas, who heard the appeal, denied that it could be inferred from the circumstances in which the district magistrate had passed the order for detention that he had not applied his mind in making the order.

Their Lordships were not prepared to agree with this view. They said that immediately circumstances were made out that on the previous day the "Quit India" resolution had been passed and that it was thought desirable to take action against persons who were likely to enter into subversive activities, the good faith of the district magistrate in passing the detention order had been made out. Their Lordships, therefore, held that Government were protected under the provisions of the Defence of India Act.

The High Court's judgment is demonstrably correct and we have no disposition at all to criticise it. But the action of the government in making an appeal against the trial court's judgment for the award of damages stands on a different footing. To it the Quit India movement is a glorious revolution, and every one who suffered in

the movement is a martyr to the cause of independence. This government and the governments of other provinces have rewarded those who took part in it. Those whose lands were forfeited to government on account of their participation in this national revolt got them back. And similarly whatever was done by the satanic British government was deliberately undone to the extent it was possible to do so. The British government coerced the people in order to put down the revolt, and the Congress leaders who have by a tide in the turn of events succeeded to the power of that government made it their first business to compensate those who had fallen a prey to the coercion of the former régime. In this posture of things one would have expected the Bombay government to congratulate itself that the district court of Nadiad had found some method by which it could hold the detention order passed by the district magistrate against one of the heroes of the revolution to be illegal and award damages to him. Even if the order had been perfectly bonafide and therefore legal, the government should have rejoiced at the error of the district court. But, no, it felt aggrieved by the decision. Perhaps because the martyr to the British government's repression in this case had, on account of "differences with the Congress executive", fallen from grace, and the revolutionary therefore became just an ordinary breaker of law! Such a man had to be punished. The Defence of India Act was a blessing in disguise!

All the coercive laws of the British régime are to the party now in power blessings in disguise. These laws come very handy to it, and they are all being rigorously enforced. None of them has been repealed, nor does there seem to be an early prospect of any one of them being softened to any extent, not to speak of repeal. They were all denounced by the Congress as harsh and barbarous when they were passed and they were continuously being denounced later while the Congress was in opposition, but since it has come into power it has found them very serviceable. The whole of India regarded the Rowlatt Act as the acme of repressive legislation of the former government. It might be said to have laid the foundation of the freedom movement of recent days. Mahatma Gandhi made the most substantial contribution in opposing the Act, and because the opposition was so fierce the British government had to let it fall into desuetude. But some of the worst features of it have been revived—by the Congress government. We have compared (on page 16) the provisions in the Rowlatt Act relating to detention with similar provisions in the Public Safety Acts and pointed out that the latter were very much worse than the former. But these detention provisions in Public Safety Acts have now yielded place even to severer provisions in the Preventive Detention Act! Time has had its revenge!

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. Apparently, severer legislation is required to maintain the public safety of a country in peace time than what is required to secure its defence in war. No one would have believed it in India but for the fact that those who opposed war-time legislation are the very persons from whom this peace-time legislation has emanated. The Press Emergency Powers Act has dragged on its existence for nearly two decades although one felt sure that the Congress would put an end to this Act, if it was unable to put an end to others, as soon as it came into power. Even the High Courts in the land have gone out of their way to recommend to the authorities repeal of this legislation as destructive of the very basic principles of democracy (e. g., see p. 22 of the BULLETIN), but the authorities are not in a hurry to do so. And, strange as it may seem, even the press does not make any longer a flaming demand for its repeal, as it used to do before; our press seems to have accommodated itself to the new surroundings! A committee sat on this Act; it has made some very mild suggestions, but even these the government does not consider it urgently necessary to effectuate. Evidently the government thinks that whatever powers an autocratic régime required are also required under a régime which claims to be popular and democratic. In fact it seems to think that it needs greater powers, and therefore it has supplemented the Press Act with additional provisions in the Public Safety Acts which go to restrict the freedom of the press. The Criminal Law Amendment Act, which the British government utilised to nip in the bud a revolutionary movement that had arisen in Bengal and the existence of which the people had almost forgotten, has now been used in several States to outlaw political parties, and but for the attempt now being made in Madras to introduce some safeguards into the measure, one would have thought that suppression of public bodies without having to offer any justification for it was entirely consistent with democracy. In addition to this law there is in force in Bengal another legislation which the British government passed twenty years ago in order to meet what it regarded as an emergency. Whatever the emergency was at the time has certainly passed away, and that the law still remained on the statute book was a matter of the sheerest accident. But this long-forgotten law the Congress government has revitalised and put into force. When the matter came up before the Calcutta High Court, the government maintained that it was not an emergency measure, but just normal legislation (vide p. 82 of the BULLETIN)! And the Public Safety Acts are worse than even this legislation, only the Preventive Detention Act being still worse. Such is the record of the Congress government in the matter of civil liberty. It has not given up any powers conferred by any of the laws adopted by the British government, but it has taken new powers of a sweeping nature under other special legislation of its own.

This would not have struck anyone as a heart-rending tragedy if the Congress leaders had not been mouthing slogans of civil liberty before their advent to power and making it appear as if there would prevail the rule of law in India as soon as freedom had been achieved for the country and they were placed in power. No one was more insistent on civil liberty in a Free India than Pandit Nehru, and if one were to quote from his previous speeches and writings on this subject that would fill a volume. No one can charge him with insincerity when he either made severe attacks on the British régime or made large claims for the Congress when it became a controlling power. Nor are we inclined to think that at heart Mr. Nehru has weakened on this issue. Maybe, he is overwhelmed by other reactionary forces in the government, which are known never to have placed too much value on individual liberty. But the ultimate result is the same: the country has to put up with even more draconic laws than those to which it was accustomed under the former régime. One is told that Pandit Nehru becomes very much upset (as he may well become) if one confronts him with his previous sayings on civil liberty. We do not wish to cause him any pain by making such quotations, but the situation with which he is now faced is very similar to the situation which faced de Valera when he assumed control of Ireland. When the Cosgrave government proposed legislation conferring extraordinary powers on the executive in order to put down the forces of disorder and violence, there was no one more vociferous in his opposition to it than de Valera. He denounced the Cosgrave government as even worse than the former frankly alien government. He said:

There have been Coercion Acts in the past and brutal Coercion Acts in the past. They have been put forward mainly, except for the last four or five years, by men who did not understand this country or the aspirations of the people. Now they are proposed by an executive that calls itself Irish and by a House that pretends to call itself Irish and which is composed of Irish representatives who in the past have been fighting for liberty but who are now going to give away those rights and hand them to the keeping of an executive of whom the Minister for Justice is typical.

Again:

There should be some attempt to lead to the right the beautiful sentiments and honourable sentiments of these young men [who were shooting and intimidating]. These are the men who are being hounded without the slightest attempt to understand their motives, which are in themselves noble and good — the desire to have the complete independence of their country. Instead of giving them a chance to orientate themselves in the direction which is necessary, these people are to be condemned.

But the first act of de Valera after he took charge of the government was to clamp on the country even more drastic legislation than what had prevailed under the

Cosgrave administration. It would be easy to match these quotations from de Valera's speeches with similar quotations from Pandit Nehru's of what is now a by-gone age and, what is worse, to match de Valera's later deeds with Pandit Nehru's deeds now. The truth of the adage that an old poacher makes a very good gamekeeper is fully borne out.

## BANNING OF ORGANIZATIONS

### Madras Bill to Liberalise the Law

At last there are some signs of an awakening on the part of at least one government of the utterly arbitrary nature of a forty-year old law (the Criminal Law Amendment Act, 1908), giving exclusive power to the executive to declare any association to be unlawful and to bring everyone connected therewith under its penal sanctions. The Madras State, which had already banned some Communist Party organizations under the operation of this Act, has now brought forward an amending bill to soften the rigours of this legislation for its territory and to provide a kind of safeguard to aggrieved persons. The bill, as we show below, does not go far enough to prevent injustice; but we still welcome it because it shows at any rate that the State is alive to the oppressive and undemocratic character of this Act which was adopted by the British government particularly in Bengal at the time revolutionary crime had struck root.

The bill empowers the government to declare illegal such an association as, in its opinion,

- (i) constitutes a danger to the public peace; or
- (ii) has interfered or interferes with the maintenance of public order, or has such interference for its object; or
- (iii) has interfered or interferes with the administration of the law, or has such interference for its object.

It will be seen that the clause, as drafted, does not require proof of any overt act done by an organization to bring it within the scope of the law. It is enough if only the government suspects that its object is to interfere with the maintenance of public order or the administration of the law. To the extremely wide power which even the amending bill would give to the executive Mr. V. Raghavayya rightly objected in the Legislative Assembly. He suggested that the clause be limited to overt acts only. "A small group of four or five persons, he said, even if there were no tie to connect them one with another in any way, would be liable to be declared as members of an unlawful association because, according to the government, they "thought alike" and held common beliefs in the matter of interference with law and public order.

The bill gives the right to "any office-bearer or member of the association" declared unlawful "or any other person interested" to make a representation to the government against the notification declaring the body

illegal, and this right is to be extended to associations which have already been banned. The representation will be placed before an Advisory Board consisting of three persons who are either sitting or retired High Court judges or who are qualified to hold such a post, and the notification will have to be revoked if the Board records its opinion that its issue was unnecessary.

In any case in which the Advisory Board or a majority of its members has reported that there is no sufficient cause for the issue of the notification in respect of the association concerned, the State government shall cancel the notification in respect of such association.

The compulsory jurisdiction bestowed on the Advisory Board is no doubt a great step forward, but, as Begum Amiruddin pointed out, this can never take the place of the ordinary courts of law which should be allowed to deal with the matter.

Besides, some provisions in regard to the procedure of the Advisory Board detract very much from its utility. From the Board all information in the possession of the government will be withheld which, in the government's opinion, it is against the public interest to disclose. The Home Minister, Mr. Madhava Menon, made an attempt to show that it would not militate against the Advisory Board looking into the question and arriving at right conclusions. The Board would call for whatever material it might think necessary, and the government *could* place such material before it. "The saving was only in respect of those facts whose disclosure might not be in public interest." But Mr. K. Bhashyam and Mr. V. Raghayyya saw no justification for the withholding of any facts "which might be vital to the consideration of the case." Nor could they agree to the provision in the bill that the person aggrieved shall not be entitled to appear in person or through his legal representative in any matter connected with the reference to the Advisory Board. All that the Minister could plead in defence was that the Preventive Detention Act of the central legislature contained similar provisions.

But assuming that these provisions enabled the Advisory Board to examine the necessity of a notification with full knowledge (and this is a very large assumption to make), even so the vicious principle of guilt by association would apply to members of associations in respect to which the declaration of illegality has been confirmed, although these members individually may be free from guilt. Thus, in the best of circumstances, the right to Freedom of Association would be liable to be violated. In spite of this the willingness of the Madras government to apply some checks to its uncontrolled power in this respect is undoubtedly a welcome sign. The bill was passed in the Assembly without any important amendments on 5th August.

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## SPECIAL ARTICLES

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### ONUS OF PROOF

The charge (against a suspected person) shall be particularized; the individual concerned shall have the right to appeal to a court of justice in which those who charge him shall have placed upon them the ordinary onus of establishing their charge; and the defendant shall have the right to answer the allegations in open court. This is a basic principle of British justice, and if the Government departs from it the danger is that those most eager in the struggle against Communism will forget proper equitable principles and will adopt methods which can only be described as those of Fascism.—Dr. Evatt.

Our Criminal Law Amendment Act, under which the Communist Party stands banned in several States and the R. S. S. was banned for two years, gives no access to the courts of justice at all, and therefore the question as to the proper rules of evidence that should be applied in such cases never arises here when public bodies are suppressed. But in countries in which a body that is declared an unlawful association can approach the law courts the question assumes great importance, and it would be useful to our readers to be acquainted with the merits of this question as it was debated in the Parliament of Australia in connection with the bill for outlawing the Communist Party of that country.

So far as the Communist Party itself is concerned, the Australian bill brands it as an illegal body and dispossesses it of all its property, without any redress at the hands of the law courts. But what are called "affiliated bodies," which the Governor-General may declare to be illegal, have been given an opportunity of seeking redress from the courts of law, and it is only in respect to these that the question of onus of proof arises, on which the debate in the Commonwealth Parliament mainly turned. The so-called affiliated bodies are divided in the bill into four groups. Of these only the first is directly affiliated with and remains subject to the control of the Communist Party. But as one goes from the first to the fourth group, the connection with CP becomes more and more tenuous, so that the fourth group consists of bodies, against which the charge is no more than that their policy is substantially influenced by persons who have been members of CP during the past two years or by persons who have been "Communists," which term extends to persons who advocate certain policies which CP also may have advocated. Thus, as Dr. Evatt said, the threat of illegality and consequent forfeiture of their property hangs on organizations of which 90 or 95 per cent. of the members may have nothing whatever to do personally with CP.

Affiliated organizations which fall within any of these four categories can, if declared, make an appeal to

the High Court, but instead of the Crown having to satisfy the court that a declaration was properly made, the applicant body is required to satisfy the court that the declaration should not have been made, the burden of proof being transferred to the organization that has been declared. The relevant section in this connection, as it stood originally in the bill, is :

If, upon the hearing, the applicant satisfies the High Court that it is not a body to which this section applies, the High Court shall set aside the declaration. In order to meet the objection that it should be for the government to prove that a body that has been declared is of the requisite description, the government later substituted the following section for that given above :

Upon the hearing of the application, the declaration made by the Governor-General under sub-section (2) of this section shall, in so far as it declares that the applicant is a body of persons to which this section applies, be prima facie evidence that the applicant is such a body.

If, upon the hearing, the court finds that the applicant is not a body to which this section applies, the court shall set aside the declaration.

If the court does not so find, the court shall dismiss the application, and the declaration shall remain in force.

The Prime Minister, Mr. Menzies, contended that, under the section thus worded, the Crown would have the carriage of the matter and that the burden of proof would have to be discharged by the Crown, as desired by the Opposition. He explained that the procedure would be as follows: "The declaration is to be prima facie evidence of its truth. The declaration, having been put in before the investigating court, will raise to that extent a presumption, and the applicant body would then be required to deal with that prima facie case and [by giving evidence and after submitting itself to cross-examination], if possible, in the long run to overthrow it." Mr. Menzies drew attention to the fact that this was not a matter of criminal proceedings in which the charge must be established by the Crown beyond reasonable doubt. So high a degree of proof was not required in civil litigation in which a court makes its finding on the balance of probabilities. The provision was substantially the same as the averment provisions that are to be found in certain Commonwealth statutes.

The altered proposal which was offered as a compromise was, however, not acceptable to the Opposition. The latter's point of view was that even under the altered proposal things were left very much in the same position as under the original proposal; for the altered proposal also, observed Dr. Evatt, "leaves the burden of proof squarely on the applicant body." He said: "In one respect it makes it a little worse," for "the charge itself is put in as evidence before the court." He agreed with

Mr. Menzies that the proceedings would not be criminal in character, but there was no reason, he contended, why there should be a departure from the general rule followed in civil cases. He pointed out what the departure was. The Governor-General declares an organization and the latter then goes before the High Court with an application for revoking the declaration. It may call a lot of evidence to show, e.g., that it is not under the influence of the Communist Party or of any Communist, even according to the broad definition of the term in the bill. If, after hearing the evidence, the court is left in doubt as to whether some Communists influenced the policy of the declared body, the court must, under the bill, resolve that doubt against the applicant. This involves a reversal of the normal practice followed in cases of this kind. If there is no affirmative satisfaction on the part of the court that the declared body comes within the scope of the description and the court has a doubt in the matter, the benefit of the doubt must go to the applicant organization and the Crown must be under an obligation to prove to the satisfaction of the court that the facts in the case warrant the declaration. Such subversion of the laws of evidence is not fair as a general principle, but it becomes particularly onerous on the members of the organization, because under sec. 9 of the bill every member of a declared body becomes liable to be individually declared with the consequences of losing his employment.

In order to place the onus of proof on the Crown, Dr. Evatt moved the following amendment :

If, upon the hearing, the Commonwealth satisfies the court that the applicant is a body to which this section applies . . . , the court shall dismiss the application, and the declaration shall, subject to this section, remain in force.

But the amendment was rejected in the House of Representatives and the government's later proposal passed.

A much larger question was raised by the Labour Party in connection with affiliated bodies. Before any such body is declared by the Governor-General, he has to satisfy himself about two things: (i) that it belongs to one or other of the four categories mentioned above, and (ii) "that the continued existence of that body of persons would be prejudicial to the security and defence of the Commonwealth," etc. But only on the first finding was a limited right of appeal allowed to a body that might be declared; on the second finding, viz., that the body is of a subversive character or tendency, no such right is allowed in the bill. There would be a complete deprivation of access to any court either before or after declaration so far as the more serious part of the Governor-General's decision was concerned, that is to say, the charge of sedition or disloyalty. The position of a body would be considered behind its back; it would not be entitled to obtain particulars of the allegation against it; and it would have no right to be heard in the matter. Here was a question, not of reversal of any technical rule of law,



but of total denial of justice. Dr. Evatt proposed an amendment giving a right of appeal to a body declared on this score also and similarly placing the burden of proving the charge on the government. Mr. Menzies opposed the amendment, saying that this would mean "entering into the hidden recesses of information possessed by a government," and that "in time of war, cold or hot, that is a burden that should never be placed upon the responsible advisers of the Crown." The amendment was defeated by a large majority in the House of Representatives on 18th May.

### "RIGHT TO REVOLT"

#### Trial of U. S. Communist Leaders

It would be interesting and instructive to follow the colloquy that took place in the United States Court of Appeals between the Chief Judge, Mr. Learned Hand, and the government counsel when the appeal filed by eleven members of the Politbureau of the American Communist Party against the verdict of guilty by the jury after a nine-month trial in October last (vide "The Communist Trial in U. S." at pp. 17 to 19 in the BULLETIN) came up for hearing in the third week of June. The government's case in this matter is that the Communist leaders convicted in the trial are but fifth-column agents and were engaged in a conspiracy to seize power by force, destroy American freedom and set up a Soviet America in the interest of the Soviet Union, and that as such they cannot invoke the free speech guarantee of the First Amendment, which is the main constitutional plea that the Communist leaders have put forward. These leaders were prosecuted, under sec. 2 of the Smith Act of 1940, for teaching and advocating the duty and propriety of overthrowing and destroying the government of the United States by force or violence, and the case of the defendants is that this section which makes mere beliefs, and not overt acts, punishable violates the First Amendment and thus is unconstitutional.

#### *Not Beliefs but Actions*

The limits of free speech allowed by the constitution were therefore a matter of debate in the court. If, as contended by government, the Congress has power, under the First Amendment, to restrict freedom of speech in cases of advocacy to overthrow government, Judge Hand asked:

Would that go so far as to say that Congress would have the power to prevent the discussion of whether democratic government, as we understand it, had not proved a failure and ought not to be abolished?

The government counsel replied: No, I would suppose that the most fundamental changes can be advocated, so long as they are brought about by the process of constitutional amendment.

The Smith Act is concerned with language directly intended to bring about evil interference with the peaceful evolution of our state, teaching and advocating violent overthrow.

There must be evidence of purpose. The defendants had not been convicted for their "beliefs, academic teachings or predictions," but for "specific intent" to bring about violent revolution.

#### *Jefferson's Saying*

But then what about the saying of Jefferson that "I hold a little rebellion now and then is a good thing"? Are such sayings to be suppressed? The "liberals or democrats" of the 18th century were in favour of overthrowing a government if it "got oppressive enough," asked Judge Hand. He said:

That is what is troubling me. Certainly Thomas Jefferson again and again in his encyclicals advocated the propriety of overthrowing a government that had become utterly offensive. It is perhaps not impossible to suppose that if Alexander Hamilton had been elected in 1804 he [Jefferson] might have thought that a denial of all the essentials of honest or fair government, and would he not have come within that?

The reply of the government counsel was:

Jefferson was a man who had lived under an oppressive government, and his views on the right to revolt were conditioned by his experience. He was always talking in terms of the right to revolt against an oppressive government. It is hard for me to believe he could have been referring to a right to revolt against a government which provides, as does ours, opportunity to bring about under the constitution every conceivable kind of economic and social life.

Upon this Judge Hand said:

I should entirely agree that it is most unlikely he would have done it under those circumstances, but as to the correctness of the view that the government has become intolerable, is that the measure of it? What limit for it is given?

That would seem to introduce into the picture certain beliefs entertained by the conspirators. Anyone who undertakes to overthrow the government by force and violence undoubtedly falls within the condemnation of numberless statutes, but we are here concerned with whether the teaching and advocacy of the propriety of doing so shall be unlawful.

The counsel suggested that advocating or teaching the propriety of bringing about a violent revolution and moving ahead in terms of preparation to that ultimate objective "takes it out of the field of thought and belief."

#### *Clear AND Present Danger?*

"There must be then," remarked Judge Hand, "an intent to bring about overthrow, we will say, imminently or presently —". Interrupting him, the counsel observed:

No, I did not say that. I did not mean to read in it any intent to bring about overthrow tomorrow or next year or any particular date.

[If the government's view did not prevail,] the entire preparatory stage of recruitment by a modern totalitarian political organization (for violent revolution) will be brought under the protection of the First Amendment.

"It is certainly a very troublesome and difficult question," Judge Hand remarked.

This colloquy is given here, because it reveals the working of the Court's mind and helps in sizing up the First Amendment perhaps even better than the judgment would.

[At the time of going to the press, news has come that the Court of Appeals has unanimously upheld the conviction of the Communist leaders and the constitutionality of the Smith Act under which they were prosecuted.]

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## COMMENTS

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### Kunzru and Patel

The civil liberty movement in this country must be grateful to Pandit Kunzru for another service he has rendered to the cause: on 1st August he moved in Parliament an amendment to the motion on the Presidential address in which he raised the question of "severe curtailment" of the liberty of the citizen. He pointed out how the central Preventive Detention Act had still further enlarged the field of detention that was covered by the Public Safety Acts of the provinces. He also pointed out how the decisions of the Supreme Court and the various provincial High Courts had proved the utter recklessness with which the powers conferred by the central legislation were being administered. But for the Bombay High Court "putting fear into the mind of the Bombay government of its intervention," he said the people who were arrested by that government in 1947 and 1948 would still have been in detention without trial. He expressed the hope that the moral authority of the highest judiciary in the land would compel the executive not only to refrain from depriving people of their liberties simply because their freedom was of inconvenience to the authorities, but, additionally, so to amend the provisions of the Preventive Detention Act even before its term expired as to keep down the possibilities of arbitrary imprisonment to the very minimum that the circumstances in the country would allow. For, he declared, no freedom was more valuable than the personal freedom of individuals, and no interference with it without cause could be tolerated.

One would have expected the Home Minister to welcome this opportunity, presented by such a sober plea on the part of one who is known to weigh his words carefully before making any criticism, of defending his policy and if possible of modifying it in such a way as to bring it into consonance with responsible opinion in the

country. But Sardar Patel, who has justly earned the sobriquet of an "iron man," dealt out sledge-hammer blows to his critic. The speech which he made in reply was most irresponsible and mischievous and showed clearly not only that he felt no concern for civil liberty, but that he had no understanding either of the basic principles thereof or even of the main provisions of the law which was enacted at his own instance. He also indulged in the cheap jibe that when Congressmen were filling the gaols on account of their patriotic (but none too non-violent) activities during the British régime, Pandit Kunzru or others associated with him did not raise their voice of protest, implying that Mr. Kunzru's new-born solicitude for civil liberty was spurious.

No statement could be more unjust to Pandit Kunzru than this last one, for he was second to none at that time, as now, in doing what a non-official wielding no power could do to safeguard the personal liberty of the public workers. The Congress newspapers themselves have recognised the gross injustice of this attack. For example, the "Leader" says: "Sardar Patel is unfair to the large number of politicians like Sir Tej Bahadur Sapru and Mr. Sastri who, though non-Congressmen, were staunch advocates of civil liberties and denounced repression. Mr. Kunzru belongs to that school of thought. Denouncing the repressive policy of a former Governor of the U. P., Pandit Kunzru once said, 'The U. P. Government revels in repression.'" The "Statesman," from its position of detachment, said: "He (Sardar Patel) was perhaps harsh with Pandit Kunzru's humanitarian appeal. While Congressmen certainly had personal experience of life the other side of the bars, to the Opposition in the legislatures of those times, and especially to men still hearteningly pursuing their liberal function in changed circumstances, they largely owed much alleviation of their lot; without such continuing solicitude for the incarcerated, the country would, we think, be the poorer." Mr. Kunzru himself took an early opportunity later to make a reply to this attack which made Sardar Patel wince under it.

We do not wish to say anything more on this personal aspect of the controversy, for after all it is irrelevant to our main purpose. But the utter disregard that Sardar Patel showed for the principles governing the assurance of fundamental human rights to every citizen cannot be a matter of indifference to anyone. Mr. Patel's principal contention was that the country was faced with two groups of people whose activities could not be allowed to continue. One was the communists whose object was to disrupt society through violent means, and the other was Hindu reactionaries "who claim that there should be a Hindu communal government in this country — perhaps not only a Hindu but a sectional Brahminical government." And he declared: "If that is the aim and object of a set of people, then we are only performing the elemen-

tary function of a civilised government in detaining these people."

The answer to this kind of reasoning is obvious. There are many civilised countries which are plagued with similar problems, and certainly the problem of communist violence; but they have not armed themselves with the powers which Mr. Patel considers necessary. The "Times of India" asks:

Can the Deputy Prime Minister deny that in no other democratic country have so many people been detained without trial and without any valid grounds of detention as in India during the last three years and that in no other country have High Courts ordered the release of persons detained illegally in so many cases as in this country? . . . Political parties committed to a course of violent revolution are not a phenomenon peculiar to this country. Other democratic countries too have to deal with such parties. The pertinent question is whether these countries, in dealing with such parties, have recourse to the kind of undemocratic laws and abuse of powers sought to be justified by the Deputy Prime Minister.

To the rhetorical question addressed by Mr. Patel: "Do you want (such violence to be practised)? Is that the class of people for whose civil liberty you plead?" the "Leader," a Congress journal, gives the following reply:

Our answer is, no. We believe in free institutions, and we realise that free institutions impose certain responsibilities upon the citizens. . . . But the question which needs attention is whether the powers which the executive government has taken are not far in excess of the needs of the situation.

This is all elementary, that as soon as an evil arises the government should not start locking up in gaol people who are suspected to be the authors of it. But our Home Minister is not yet aware even of this elementary principle.

Among the troublesome movements which, according to Mr. Patel, have made Coercion Laws necessary, he even included the movement for bringing together people speaking the same language into one administrative unit. No one has ever associated this innocuous movement for arranging provinces on a linguistic basis with the least disorder or breach of the public peace, but Mr. Patel does not like the movement, and therefore he knows of only one way of dealing with its sponsors. About the detention of Mr. Bhopatkar, the Hindu Mahasabha leader, he says: "We were forced to take that action at a time when Bengal was disrupted by the aftermath of partition. . . . That was not the occasion for asking for the two Bengals to be reunited or asking India and Pakistan to reunite." The implication of this is whoever gives expression to sentiments which Mr. Patel does not approve, the way to dispose of him is to clap him into gaol. He also spoke of a plot

to murder Pandit Nehru. It is exceedingly doubtful whether any such plot ever existed and whether this bogey has not been raised in order to create the impression that the country has to face up to a grave situation necessitating stern repression, but the reasoning of Mr. Patel in regard to it should be noted. He says he was blamed for not taking sufficient precautions to prevent the assassination of Mahatma Gandhi. "If I am prepared to take precautions (now), then you say civil liberty is at stake." Obviously the only precaution the Home Minister knows of is to keep all suspected persons behind the bars for an indefinite period. One who is so callous in regard to the primal rights of individuals, we are inclined to think, will not be allowed to occupy the position of Home Minister for a couple of days in any country which sets any value on civil liberty.

In regard to the Bombay High Court's decision to release certain detenus, Sardar Patel said the government did not honestly know that they were under an obligation to communicate the grounds of detention to a detained person. The Public Safety Acts in the provinces provided for it; his own central Act provides for it, even the constitution is explicit on the point. And yet this Home Minister of ours knows nothing of it. His honesty need not be questioned, but his ignorance is to be pitied. The government "bowed to the High Court's decision," but with what evident regret! It is something that he does not honestly feel that the government would still be at liberty to keep a man in detention who has been ordered by a High Court to be released. Such is Mr. Patel's indifference to civil liberty and such is his ignorance of the laws permitting interference with it. He promised to amend the Preventive Detention Act which was hurriedly passed by Parliament in order to keep in continued detention people who had been detained under the Public Safety Acts and who would have had to be set at liberty because the High Courts had ordered their release. But it may well be, as the "Pioneer" has said, that the object of the amendment in the mind of the Home Minister may be to plug some of the loopholes discovered in the Act by the judiciary and to make it an absolutely water-tight law. And unless Pandit Nehru can deal firmly with his Home Minister this apprehension may prove true.

Mr. Patel's reference to a group of people who would set up a Brahmin raj was thoroughly mischievous as it was nothing short of an indirect incitement to the unruly elements in the non-Brahmin community, particularly in view of the atrocities committed on the Brahmins of Maharashtra after the murder of Mahatma Gandhi. Nothing could be more dangerous than this part of the speech. Fortunately, however, the people of Maharashtra have reacted to it in the most commendable manner. An all-party public meeting held in Poona on 6th August and attended by 30,000 people not only condemned in the severest possible terms the general

repressive policy of the government, as expounded by Sardar Patel, but also exhorted the people, Brahmins and non-Brahmins, to forget their internal feuds and make a united stand for the preservation of civil liberty. Out of evil cometh good, and it is a happy omen that Mr. Patel's speech is causing all sections of the people, irrespective of caste or creed or political opinion, to make a firm resolve to take up cudgels for fundamental liberties in spite of the fact that the all-powerful Congress seems to be ranged against them.

#### "Advisory Board Not Safe"

The constitution allows Parliament and the States' legislatures together to legislate in the matter of preventive detention for six types of cases in all (vide p. 108 of the BULLETIN), and Parliament in using this power enacted the Preventive Detention Act which in sec. 12 has put five of these six types of detention cases out of the purview of the Advisory Board altogether, retaining the jurisdiction of the latter only for the sixth type. And this type again consists solely of cases which under the Public Safety Acts in the States could not have been brought under detention at all. Such denial of the compulsory jurisdiction of the Advisory Board in most of the cases of preventive detention and in ALL cases that could have been dealt with previously under the Safety Acts, "could not have been in the thoughts of the constitution-makers," according to Mr. Justice Mahajan, and for this reason sec. 12 of the Preventive Detention Act is, in Mr. Mahajan's judgment, void.

On this point Mr. Justice S. R. Das, observes in the Gopalan case :

I am conscious that a law made by Parliament under art. 22 (7) will do away with the salutary safeguard of the opinion of an Advisory Board. But it must be remembered that our constitution itself contemplates that in certain circumstances or for certain class or classes of cases even the Advisory Board may not be safe and it has trusted Parliament to make a law for that purpose. Our preference for an Advisory Board should not blind us to this aspect of the matter.

It is true that circumstances ordinarily relate to extraneous things like riots, commotion, political or communal, or some sort of abnormal situation, and it is said that the framers of the constitution had in mind some such situation when the Advisory Board might be done away with. It is also urged that they had in mind that the more dangerous type of detenus should be denied the privilege of the Advisory Board. I am free to confess that prescription of specific circumstances or a more rigid and definite specification of classes would have been better and more desirable. But that is crying for the ideal.

The constitution has not in terms put any such limitation as regards the circumstances or the class or

classes of cases, and it is idle to speculate as to the intention of the constitution-makers, who by the way are the very persons who made this law. It is not for the Court to improve upon or add to the constitution. If the law duly made by Parliament is repugnant to good sense, public opinion will compel Parliament to alter it suitably.

So Parliament in its wisdom has thought it unsafe to provide the safeguard of the Advisory Board in all major cases of detention, and it has thought fit to provide it only in what it regards as the less dangerous cases. But what are these less dangerous cases in which this safeguard will be available? They will be cases in which before the Preventive Detention law was enacted detention could not have been ordered at all. The cases in which detention orders could at that time have been passed are all of a dangerous sort which cannot be referred to an Advisory Board. Thus it comes to pass that all the cases that used to occur before under the régime of the Public Safety Acts are denied not only the compulsory jurisdiction of the newly constituted Advisory Boards, but also the advisory jurisdiction of the Advisory Councils that were then in existence! And, in face of such a grave situation, the highest court in the land from which protection might have been invoked is reduced to a position in which it can only refer us to public opinion which it hopes will compel Parliament to repeal a law repugnant to good sense! Such are our Fundamental Human Rights!

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## HABEAS CORPUS PETITIONS

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### Bombay Detenus Released

It will be recalled that the Bombay High Court ordered on 11th and 12th July (vide p. 121 of the BULLETIN) release of a number of Communist detenus on two grounds, viz., that (1) some of the detenus who had been detained under the Public Safety Act were held in detention after the Act had lapsed by a fresh order of detention under the Preventive Detention Act, but in their case the detaining authority had no jurisdiction to issue such an order; and that (2) this detention was based on the old material without examining the cases in the light of the circumstances existing at the time of issuing the order.

Acting upon this decision, the Bombay Government released not only those detenus whose habeas corpus petitions were considered by the High Court, but all other detenus as well whose detention it seemed to them suffered from the defects pointed out by the Court. "Government however have ordered the re-detention of certain persons as government are satisfied, on viewing their past conduct in the light of present circumstances, that their detention is absolutely necessary." The number of such re-detained persons is 60, none of those released by the High Court's order being among them. The Home Minister stated on 22nd July that there were still 75 Communists in gaol in the State of Bombay.

### Miss Sushila Madiman

Subsequent to the release of these Communists by the Bombay government, another batch of 13 Communist detenus were ordered to be released by the High Court on 27th July. In the hearing of the habeas corpus applications of Miss Sushila Madiman and four others out of these the same point arose as in the application of Mehr Sing heard by the Supreme Court ( vide p. 119 of the BULLETIN ), viz., whether under the Preventive Detention Act the detaining authority was under an obligation to supply to the person detained any "particulars" at all, apart from the "grounds of detention, and in the Bombay High Court the Chief Justice and Mr. Justice Gajendragadkar decided the point in the same way as the Supreme Court.

Miss Madiman, who is a member of the Communist Party and President of the All-India Students' Federation, was served, on 27th February, with an order for detention under para. (ii) of sec. 3 (1) (a) of the central Act which empowers detention of a person for reasons of "the security of the State or the maintenance of public order." The grounds as furnished to the detenu were that she along with her associates had been collecting arms and ammunition for illegal purposes and illegal activities. This allegation was denied by the detenu, but the correctness or otherwise of the allegation was not gone into by the Court, which however allowed the habeas corpus application on the ground also put forward by the detenu, viz., that the reasons or so-called "grounds" of her detention which were supplied to her were not mentioned with that particularity which the Preventive Detention Act requires.

On behalf of the government it was urged that neither the Act nor the constitution placed any such obligation on the government or the detaining authority. Art. 22 (5) of the constitution only requires that the grounds of detention be communicated to the detenu and that the latter be given an opportunity of making a representation against the detention order. This article makes no reference to "particulars" at all. The Preventive Detention Act no doubt makes mention of "particulars," but in a totally different context. Sec. 3 (3) of the Act requires the detaining authority, when that happens to be a commissioner of police (as was the case here), to report the fact of detention to the government, "together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the necessity for the order." Thus only the "grounds" need be supplied to the detenu so that he may, if he likes, make a representation against the detention order, and "particulars" have only to be submitted to the government. There is no requirement, whether under the constitution or under the Act, to furnish any particulars other than grounds to a detenu at all.

It must be admitted that this construction of the constitution and the statute is correct, if one is to go only by the words in the documents; but if the spirit of the provisions is to be taken into consideration, this interpre-

tation is obviously unsustainable, and the Court in this case gave a ruling to this effect.

Their Lordships held that the grounds must be such as to enable the detenu to make a representation with regard to his innocence. Therefore it was clear that under sub-clause 5 there was implicit the necessity for disclosing such facts as were necessary to give a proper opportunity to the detenu to make a representation against the detention order. Whether the facts disclosed were sufficient or not, it was not for the detaining authority to determine, but for the Court to decide.

Reference was then made in the judgment to the report together with grounds and particulars which the detaining authority had to submit to the government and which would be placed before the Advisory Board when the detention order was referred to it for review.

Their Lordships observed that the main function of the Advisory Board was to consider the justification of the detention, and it was impossible to hold that that justification could be arrived at by merely looking at the particulars furnished by the detaining authority without considering the representation made by the detenu. It was only when the detenu was told not only the ground on which he was detained, but also the material facts on which the ground was based that he would be in a position to make a representation to Government which could be usefully considered by the Board.

The Court held that in the present case the grounds supplied to the detenu did not contain facts or materials sufficient to enable her to make a proper representation, and that in the absence of such facts the allegation about the collection of arms must be regarded as vague. As the provisions of the Act had not been complied with, Their Lordships set aside the detention order. Four other applications were dealt with in the same way. Eight other Communist detenus were ordered to be released on the ground that the detention orders issued against them were vague.

The correctness of the Court's interpretation of the provisions in the constitution and the Act cannot be doubted, but we may be permitted to point out that the cases of Miss Madiman and others like her detained under paragraph (ii) of sec. 3 (1) (a) of the Preventive Detention Act are not to go to the Advisory Board for review at all, and therefore the question whether particulars in respect to detention orders which a commissioner of police has to submit to government along with his report have or have not to be placed before the Advisory Board does not in fact arise in such cases. Provision is made in sec. 12 (2) of the Preventive Detention Act for a review of such cases by the government itself "in consultation with" another person (the case of Muzaffar Ahmed, referred to below, who was detained

under the same section of the Preventive Detention Act was reviewed not by the Advisory Board but by the government), and this section does not refer to any materials as sec. 10 which relates to Advisory Boards does. Sec. 10, authorizes an Advisory Board to call for "such further information as it may deem necessary" from the government. Sec. 12 (2) does not give such authority to the appeal tribunal—and for a very good reason. For the appeal tribunal in such cases is no other than the government. Is the government to call for "further information" from itself? In fact, in these cases, no one will ever know whether the detenu was or was not supplied with material sufficient to enable him to make an effective representation answering the charges made against him, unless the detenu applies to the Court and it gives a ruling on the point. For we suppose even in these cases, though they are of a minor character, the courts will judge of the sufficiency or otherwise of the material in spite of the fact that the Act is silent on the matter.

#### "Additional Grounds"

In our last issue (p. 120), it will be recalled, we referred to the habeas corpus petition of Professor Om Prakash Kahol, in which Mr. Justice Falshaw refused to accept the suggestion made on behalf of the Punjab government that, instead of setting aside Mr. Kahol's detention on the ground that sufficient information had not been furnished to him, the Court might give the government an opportunity to supplement the information originally given with some more information so that the detention order could be held legal. Mr. Falshaw's words on this point are memorable and will bear repetition. He said:

It seems to me that to adopt this course might serve as an encouragement to the authorities to supply only vague grounds of detention in the first instance and then to go on gradually supplying further detailed particulars as required by the court, with the result that the detenu would be kept in detention, whether lawfully or unlawfully, for quite a long period before validity of the order for his detention would be decided, though obviously questions of this kind ought to be decided as speedily as possible.

Something of this kind has apparently been happening in West Bengal. Realising that the grounds and particulars supplied to detenus would not stand the test of sufficiency which the courts apply to such material, the government, almost on the eve of habeas corpus petitions coming up for a hearing round off the information supplied at first with additional information with a view to satisfying the requirements of law. And naturally the courts concerned have to take into account this additional information also in deciding whether the grounds and particulars are still too vague or have now become sufficiently precise (the correctness in fact of these being outside the competence of the courts to examine).

The Chief Justice of the Calcutta High Court and Mr. Justice Mitter disposed of three habeas corpus applications on 19th July, in all of which such additional information was put forward by government. Their Lordships were of the opinion that the grounds first communicated to the detenus in all the three cases were far too vague, but held, in the case of one detenu, that even the supplementary information forthcoming at the time of the hearing failed to impart definiteness of the requisite standard to the grounds and therefore they allowed his petition, and in the case of the two other detenus, that the supplementary information made the grounds sufficiently precise and dismissed their applications.

#### MUZAFFAR AHMED and SHAMSUL HUDA

These two detenus, Janab Muzaffar Ahmed and Shamsul Huda, were detained under the Preventive Detention Act which Parliament passed towards the end of February. The grounds for detention were communicated to both in March, and supplementary grounds were handed in to both in July. The charge that was first made against them merely stated that they were members of the Communist Party which had been banned in the State of West Bengal and that they had been assisting its operations. How this assistance was rendered was not mentioned, nor anything else giving an indication of their activities, and the Court found, in the case of both of them, that the charge was too vague for the detenus to answer. In the case of Muzaffar Ahmed, it said, the grounds as given at first "were certainly vague and it might be that the Court would have been compelled to hold that they were not sufficient to justify the detention." In the other case it said that the grounds "were far too vague and indefinite to enable the detenu to make an effective representation. No details of any kind were given, and the grounds merely consisted of sweeping allegations in the very widest possible (sense?) of the term."

But "the vagueness of the grounds appears to have been realized by the government, possibly after the decision of the Supreme Court" which would have the consequence of invalidating a detention order on this ground, and just a few days before the petitions for release came up further grounds were served on the detenus. These said, in one case, that the detenu occupied various responsible positions in the Communist Party and was one of the persons responsible for the policy of the party, and, in the other case, details were given of the meetings of the party which the detenu attended mentioning also the place of the meetings and the subject matter discussed thereat. These additional grounds, the Court held, were "precise and definite" and gave the detenus an opportunity of making a representation against their detention, which was all that the Court could insist upon. The Court therefore ruled that it could not be said that the detention was illegal and dismissed the applications.

## SAFATULLAH KHAN

Four grounds for the detention of this detenu were advanced by government, but in the opinion of the Court all of them "were far too vague. They were merely allegations made against the detenu, and the basis of those allegations was not disclosed." Of one of these the Court said that it "was an extremely wide and sweeping allegation which it was practically impossible to refute. The only answer would be a total denial."

However, on 13th July, six days prior to the hearing of his application, the detenu was served with additional grounds, but they too were "far too vague." There was one amongst these supplementary grounds, however, which did not suffer from this defect. It was stated that at a particular date and at a particular place he addressed a meeting of the Jute Mill sirdars. Of this the Chief Justice said:

But the object of the meeting seemed to be innocuous. The object of the meeting was to bring, if possible, Muslim masses under a separate political organization. There was nothing subversive in that and surely it could not be said that a labour organizer was guilty of some subversive act if he endeavoured to form a political organization, even if it was composed of one community. His Lordship had never understood that the Hindu Mahasabha was an illegal body, but apparently this ground suggested that attempting to bring Muslims into a political organization, confined to Muslims, would amount to some form of illegality, and would be a ground of detention.

His Lordship observed that "this ground, though it complied with the necessity of preciseness, was no ground for detention at all and therefore could not be regarded as justifying the continued detention of this man." Thus, even the additional grounds were either vague and indefinite or, if they were precise, were in reality no grounds.

But the government took care to add, when serving these additional grounds that there were still other grounds which, however, could not be disclosed in public interest, taking refuge behind art. 22 (6) of the constitution, repeated in sec. 7 (2) of the Preventive Detention Act. It was pointed out, however, that what the article or the section allowed the government to withhold from the detenu were "facts" supporting the "grounds" and not the "grounds" themselves. On this point His Lordship remarked:

The authorities were bound to disclose the grounds and they could not suggest that it was against public interest not to disclose the grounds. It appeared to His Lordship that there was a clear difference between grounds and facts. The grounds were the basis of the allegations. The facts clearly were the evidence upon which the basis of the allegations was to be established. In any event, it seemed to His Lordship that the authorities could not refuse to disclose grounds in public interest. All they could refuse to disclose were facts which would be harmful to public interest if they were to be disclosed.

In the result the Court found the detention order to be invalid and ordered the detenu to be set at liberty.

## Cyclostyled Copies of Grounds!

## SARDAR HARI SINGH

This man was arrested and detained in December, 1949, under the Public Safety Act of the Patiala and East Punjab States Union on the ground that he was suspected of harbouring dacoits and facilitating the commission of dacoities. In his habeas corpus application against the order of detention he made several complaints, one of which being that he had not been informed of his right to make a representation. These complaints were being investigated and he was enlarged on 30th December on bail. While his habeas corpus petition was pending, however, he was served with another order for detention on 28th February, and the detenu made a fresh habeas corpus petition against the new order. In view of this order the previous application became infructuous, and the High Court disposed of the new application on 20th July. One of the grounds put forward in this application was that the government had not satisfied itself before ordering the detention.

It came out in the hearing that the order for detention was passed by the Chief Secretary of the Pepsu government but was issued by the Deputy Home Secretary, who submitted an affidavit, and that the government failed to put the Chief Secretary in the witness box who, the Court said in its judgment, should have been the proper witness to make a statement about the satisfaction of the government before passing the detention order. The Chief Justice, delivering the judgment further observed:

It was stated by the Deputy Home Secretary, in his statement, that while Hari Singh remained on bail for two months, nothing against him had been reported by the police. Government, therefore, arrested him under the Preventive Detention Act on the basis of the material which was in their possession when he was earlier arrested under section 3 of the Pepsu Public Safety Ordinance.

No less than 27 cyclostyled detention orders were issued with the same grounds of detention on one and the same day. His Lordship, therefore, came to the irresistible conclusion that government had not satisfied themselves before passing the detention order.

The Court ordered release of the detenu.

A law point arose in this case, which, because of the conflicting pronouncements thereon, was referred to a full bench. The point was whether it is open to a detaining authority to make an order for detention on the ground that the person sought to be detained had committed an offence. In the judgment many cases were referred to: *Kameshwar v. Rex* (1948 All. 440); *Gyanendra Kumar Jain v. The Crown* (1950 E. P. 162); *Devata Laxminarayan v. State* (1950 Madras 266); *Lalu Gope v. The King* (1949 Patna 299); and *S. S. Yusuf v. Rex* (1950 All. 69), and concurrence was expressed with the observation and interpretation of the law as expressed in *M. R. Venkataraman v. The Commissioner of Police, Madras* (1949 Madras 605), viz., that

it is not correct to say that while passing an order of detention under section 3, the antecedent conduct of the detenu cannot be taken note of by the detaining authority. The antecedent conduct will certainly afford data or furnish reasonable grounds in finding out the present attitude of the person concerned.

# **THE AMERICAN CIVIL LIBERTIES UNION**

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## **The All-India Civil Liberties Council,**

which would like to formulate a programme of work similar to that of A.C.L.U.

### **A. C. L. U.'s 1950 Programme**

includes a number of 27 important items like "opposition to  
racial discrimination and segregation in all forms," but  
**opposition to Preventive Detention does not figure in this Programme.**

The first plank in A. I. C. L. C.'s platform will be opposition to the  
**Preventive Detention Act.**

Why does not the American Programme include such an item ?

**Because the United States has not and  
never had this kind of legislation.**

**A. I. C. L. C. will make an attempt to have the Preventive  
Detention Act repealed.**

Its stand on Freedom of Person is the same as that of A. C. L. U. It is :

*"No person should be deprived of liberty except by the judgment of a court ;  
and the right to seek release from confinement by habeas corpus should never be  
denied, except in areas under martial law where the civil courts are closed."*

This being its stand, A. I. C. L. C. will seek not merely

**Repeal of the Preventive Detention Act, but also**

**Amendment of the Constitution**

**itself, which provides for Preventive Detention in peace time.**