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The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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There is a very great difference between disagreeing with a thing (like Communism) and feeling that you must persecute it. Hon. Senators on the other side sometimes speak as if they think that anyone averse to persecuting a group of people agrees with their views. I should be very sorry to find myself agreeing with the atheists, but I should fight to the death any attempt to impose a religious test which would persecute atheists. . . . Little as most of us like Communism, the price which the Hon. Minister is asking us to pay is too heavy a price, if we weigh up the dangers—not the theoretical but the actual, practical dangers—of Communism to our South African system, they will weigh light in the scale compared with the threat to our liberties, our whole way of life and our whole set of legal conceptions. —Dr. Brooks, speaking in the Senate of South Africa on the Suppression of Communism Bill on 21st June.

ARTICLE

A CREVICE IN THE RAMPART OF HABEAS CORPUS WRIT

When in India the people are being robbed promiscuously of the right of access to the courts for a writ of habeas corpus, it would be of interest to our readers that they should be told of the story how in England intelligent public opinion was stirred to its depths by the passing of an Act in 1933 denying the remedy of habeas corpus to aggrieved members of the Dominion troops who happen to be temporarily on English soil and how earnest efforts are still being made to repair the small breach that was then made in this ancient bulwark of freedom. The persistence of these efforts shows the very great value that Englishmen set upon habeas corpus, because in this case the persons who might suffer are non-Englishmen and the withdrawal from them of the traditional protection afforded by the system of English law was the consequence of an agreement, not merely desired, but insisted upon, by the governments of the very persons who are liable to suffer. The story is well worth relating.

In 1933, an exception (though of very limited scope) was made in England to the universal applicability of the rule of habeas corpus. The exception was not made by the British statesmen of their own choice : it was demand-

ed by the self-governing Dominions, and the British statesmen considered it a matter of prudence to agree to it.

The exception consists in this : that a section of the Visiting Forces (British Commonwealth) Act, 1933, provides that if any member of the Dominion forces that happen to be stationed in England is tried by court-martial and sentenced to imprisonment, the sentence shall not be subject to review by the civil courts in England. Even if the sentenced person feels that he has been wrongfully imprisoned, he cannot sue for a writ of habeas corpus and seek his release from imprisonment. This is of course contrary to the normal English law. For the law is that every person, within the jurisdiction of the English courts, who believes himself to be unlawfully confined, has the right to challenge the cause of his confinement by means of habeas corpus and regain his freedom if the challenge succeeds. The right to a writ of habeas corpus is not confined to British citizens but extends to aliens as well ; nor is it confined to civilians but extends to members of the armed forces as well. The writ runs wherever the English courts have jurisdiction.

That soldiers are subject to law as much as civilians might be stressed here a little because the belief widely held in India is different. According to the British constitution a soldier is still a citizen. He has all the obligations and all the immunities of the civil law. The civil law is supreme over the military, and the military have the right of recourse to the civil law and to any protection that it can give, just like civilians. If a soldier sentenced by a court-martial has reason to believe that the military court has overstepped its jurisdiction or acted wrongly, he can appeal through habeas corpus to the civil court, and the civil court can intervene in proper cases. A British soldier can yet in these circumstances seek his freedom by invoking the writ of habeas corpus. A Dominion soldier also could do so till 1933, but the Act of that year referred to above took away the right of a Dominion soldier who is in custody in England to sue for the writ. For the Act provides that no decision of a court-martial established by a visiting force in England shall be open to review in the civil courts of England even under a writ of habeas corpus : the decision of the court-martial is unchallengeable in any court. A section of the Act says :

For the purposes of any legal proceedings within the United Kingdom the court (i. e., a military court)

shall be deemed to have been properly constituted, and its proceedings shall be deemed to have been regularly conducted, and the sentence shall be deemed to be within the jurisdiction of the court and in accordance with the law of that part of the Commonwealth and, if executed according to the tenor thereof, shall be deemed to have been lawfully executed, and any member of a visiting force who is detained in custody in pursuance of any such sentence shall be deemed to be in legal custody.

Anything that the military court does is to be deemed to have been rightly done and no one is enabled to challenge it under a writ of habeas corpus. Thus the writ does not avail a Dominion soldier who is under a sentence of a court-martial of the Dominion to which he belongs, even though he resides in England during the period of the sentence.

The Act itself as a whole was of course very necessary. It was necessitated by the Statute of Westminster, which in effect recognised that the Dominions had full sovereign rights within the Commonwealth. If the legislation were not put on the statute book, there would be no military law and no discipline for any forces visiting England from the Dominions which had adopted the Statute of Westminster. The Act was intended to make provision with respect to the discipline and internal administration of such forces. But while doing this, the above-quoted section therein also denied to a Dominion soldier under sentence of a Dominion court-martial the right which he possessed before of going to a civil court in England where for the time being he was stationed and filing an application for habeas corpus. This part of the Act was bitterly opposed when it was passed. Sir Stafford Cripps moved an amendment, which was supported among others by Sir Herbert (now Viscount) Samuel, which sought to restore to Commonwealth soldiers coming to England the right to a writ of habeas corpus. The amendment failed to pass, whereupon members of the Labour and Liberal parties voted against the third reading of the bill, such was the importance which they attached to preservation of the right. The defence put up by the government was very weak and even half-hearted. Denial of habeas corpus will not in fact result in injustice, it was said; during the last 50 years and more no single application for a writ of habeas corpus has been made by any British soldier although he has the right, and therefore there is no reason to suppose that a Dominion soldier will be deprived of any substantial right which he will have occasion to exercise. This argument that the matter in any case is not serious was countered by Sir Stafford by saying: "It is, indeed, the restraining power of some overriding prerogative writ of this sort that renders people very careful in the procedure of court-martial, and the value of it is very largely the fact that it exists, rather than the fact that it has constantly to be used." As Lord Buckmaster, an ex-Lord Chancellor, put it, "It is of the utmost importance that courts entrusted with these

solemn powers — powers of life or death in some cases — over the liberty and lives of the people whom they have to judge should know that beyond them there is a power that can restrain any excessive use of the jurisdiction or any overstepping of the powers conferred on them." From the point of view of principle it was a serious matter. Lord Atkin wrote to the "Times," saying that the matter was of great constitutional importance to the liberty of the subject, and in fact every legal authority outside the ranks of the government expressed strong objections to the bill on the ground of principle.

It was further said by the government in defence of the obnoxious section: If anyone does suffer because he loses the right of habeas corpus, it will be the Commonwealth soldier, and not the British soldier. Why should we, the British people, bother about it? It will be "the funeral" (this very word was used) of the Dominions to look after their liberty. If they not merely acquiesce in but positively ask for something which entails loss of a precious right, it is not for us to concern ourselves with the matter. But opponents of the bill were not willing to be complacent about this cutting down of the age-long right of habeas corpus because it would affect, not Englishmen, but some others. A breach, however small in extent, in the universality of the writ was, according to them, a matter of serious concern to all Englishmen. Sir Stafford said, a Dominion soldier will, on account of the bill, "be left in a position in which no other person in this country can possibly be left, be he foreign or British. Every person in this country has a right to go to the courts and demand a writ of habeas corpus and to challenge the reason why he remains under restraint." And if anyone on English soil is put in a position in which he cannot demand the writ, it is a matter of disgrace to Englishmen which they cannot possibly tolerate. The real reason for this change was that the elevation in constitutional status which the self-governing Dominions achieved by the Statute of Westminster had made them ask for the change and Britain had thought fit, rather weakly, to accede to their request. But even this argument did not succeed in inducing men like Sir Stafford Cripps and Sir Herbert Samuel to withdraw their opposition. They urged that while the Dominions' visiting forces should be allowed to have full control over their internal discipline, they should not be given any exemption from the rule of habeas corpus, the universality of which ought to be maintained intact on any account.

British statesmen have not slept over the matter. Lord Reading in 1947 moved a comprehensive bill entitled the "Preservation of the Rights of the Subject Bill" which contained a provision in the same words as the amendment of Sir Stafford, to the effect that habeas corpus proceedings could be taken in respect of Dominion troops while residing in England. This bill was given a second reading in the House of Lords, but its further passage was stopped for want of Parliamentary time. The question was again recently taken up by Viscount Samuel

who moved on 27th June this year a bill similar to Lord Reading's. It is called the "Liberties of the Subject Bill." The second reading of the bill was passed in the House of Lords by 66 votes to 24, though the clause in it providing for restoration of habeas corpus to Dominion forces was opposed by the Government. The only reason that was adduced by the First Lord of the Admiralty, Viscount Hall, who spoke on behalf of the Government, for retaining the provision about denial of habeas corpus in the 1933 Act was that the Act "was entered into as a result of complete understanding between the Commonwealth countries and our own Government and our Allies during the last war," and that it had worked well. When in actual fact no injustice had occurred, he could not understand why the agreement should be disturbed from a purely doctrinaire insistence on habeas corpus. This last point was pitifully answered by Viscount Simon. He said:

There are one or two doctrines of which I am not in the least ashamed. I have a horrid prejudice in favour of liberty.

SPECIAL ARTICLES

SUPPRESSION OF COMMUNISM

Australian Law

The Australian bill outlawing the Communist Party became law on 19th October. It will be remembered that the bill had been blocked by the Senate in which the Labour Party has a majority. But when the Premier, Mr. Menzies, threatened to call new elections, the Labour Party's extra-parliamentary executive committee, fearing that popular anti-Red feelings would hurt the Party in elections, ordered Labour Senators to withdraw its opposition to the bill, much as many progressive members of the U. S. Congress became instrumental in passing the anti-Communist bill over the President's veto with their eye on the elections.

This direction to the Australian Labour Party was a severe blow to Mr. Chifley and Dr. Evatt, who wanted the Party to stand firm on its amendments placing on the Crown the onus of proving the guilt of persons declared under the bill and giving them the right of appeal before a jury. With the mandate not to insist upon these amendments, the executive committee issued another mandate to the Parliamentary Labour Party to insert amendments of this nature in the legislation immediately upon resumption of governmental office by Labour, in order to prove its loyalty to the stand taken earlier by Messrs. Chifley and Evatt. But in the meanwhile the Menzies bill was allowed to pass.

The Government started enforcing the law at once and raided the Communist Party's headquarters in Sydney and other towns, seizing a number of documents and papers. Even so, the Government was late. For the Communists had time to remove important documents, to distribute their assets, to

reorganize their underground movement, to prepare clandestine publications and to disperse 'unknown' Communists in new disguised organizations, and thus to defeat the law in advance. Moreover, they are taking legal steps with a view to nullifying the Act. Immediately after the passage of the measure the Communist Party lodged an application in the High Court for an injunction against the Government on the ground that the Act was beyond the legislative powers of Parliament. The High Court granted an interim injunction restraining the Government from declaring Communist organizations and persons and disposing of anything seized in raids on Communist premises, till a ruling on the constitutionality of the Act was given. It is only after this court test is gone through that the enforcement of the more important of the law's provisions will be possible.

South African Law

If the Australian law gives to declared persons or organizations access to the courts of law on the footing that the declaration would remain in force unless such persons or organizations gave evidence on oath to disprove the allegations made against them by government, the South African law passed in June does not provide for resort to law courts at all, even subject to the condition of placing the onus on the aggrieved persons or organizations. The Minister of Justice refused to follow the Australian example in this respect, on the ground that even if the onus were placed on the other party in the beginning it could easily be shifted back on the first party. "Assuming," he said, "the accused person gets 20 or 30 people to swear that he is not a Communist, then there is a prima facie case, and the government will have to come with evidence and information (which in any case cannot be disclosed) to prove that the man is a Communist," and "I do not know how Mr. Menzies is going to get out of this difficulty" created by his desire to meet the Labour Opposition half way. In this connection it should be noted that, in the People's Education Society case which arose in the Madras High Court under the Criminal Law Amendment Act (vide p. 154) of the BULLETIN the Chief Justice, in declaring the Act unconstitutional on the ground that it imposed unreasonable restrictions on the fundamental right of every citizen to free movement, delivered himself of the following obiter dictum:

I can understand, in the case of a declaration by Government, the onus shifting on to the accused, who may be called upon to establish that the declaration of the Government is unwarranted and illegal.

Thus the Suppression of Communism Act of South Africa denies all access to the courts of justice. So far as organizations that have been declared unlawful are concerned, they cannot go to court at all to ventilate their grievance that they have been wrongfully declared, except that they can exercise their common law right to prove

that the authorities have exercised their discretion in an improper way, or that they have acted mala fide. It means that the organization concerned must prove that that there was an element of fraud or something of that nature in the Minister's decision. But it is of course in the nature of things quite impossible to prove mala fides against the Minister. In regard to declared persons, they can go to court in certain circumstances. If a member of a body declared unlawful "proves that he neither knew nor could reasonably have been expected to know that the purpose or any of the purposes of the organization were of such a nature or that it was engaging in such activities as might render it liable to be declared an unlawful organization," then he can have the declaration against himself set aside. The Minister took great credit to himself for providing in the Act that, although the Government will have discretion to remove a person from a declared organization or prohibit him from entering certain areas or impose other restrictions of this kind on him, it will not have power to fine or imprison any such person except on conviction by a court of law. Such punishment can be awarded for what is called "acts of Communism," i. e., propagation and advancement of Communism. A person will have to be convicted by a court of the offence, and the onus in these cases will rest on the Crown to prove that the person concerned has committed acts of Communism.

There is only one provision in the law which may act as a safeguard, and that is that the Minister will not exercise the discretionary power which the law gives him of declaring an organization to be unlawful or taking action against any of its members before the matter has been investigated by a fact-finding committee. The committee makes "a factual report to the Government about the activities of the organization concerned (or of its members) and the Government acts on that." Whether this safeguard will be a real one will depend chiefly upon whether the committee (whose desire to discharge its duties impartially is not questioned) can make a searching investigation or not. In order to find this out, queries were addressed to the Minister of Justice as to whether (1) representations would be allowed to be made at such an inquiry; whether (2) the aggrieved organizations or persons would have an opportunity to be heard either in person or by legal representatives; and whether (3) they would be entitled to call evidence and to cross-examine witnesses. It was felt (and quite rightly) that if the Minister acted on a black list prepared by officials and the matter went subsequently before the screening committee, the latter would not be able to afford much protection unless it arranged to let the declared organizations or persons have detailed charges framed against them in order that they might make representations against the charges and unless also they were allowed to place evidence before the committee and cross-examine witnesses. To these queries the Minister made a very general reply, saying that the aggrieved parties would be given "a rea-

sonable opportunity" of putting their cases. When pressed to define what would be "a reasonable opportunity" in such cases, he answered: "That will be for the committee to decide." Though somewhat vague, this is not in itself a bad answer. If the committee is in fact in a position to lay down its own procedure, like the Advisory Committee in England which inquired into cases of detention in the last war, it may yet turn out to be an instrument of giving substantial protection to those whose cases would come before it. For the English Advisory Committee not only allowed detainees to appear before it in person or through legal representatives, but also allowed them to bring evidence and in suitable cases to cross-examine witnesses. If in the Union of South Africa too it is left to the investigating committee to decide these matters it will be enabled to exercise an effective check on the Minister's discretion.

COMPARISON WITH INDIA'S DETENTION LAW

We may here usefully compare the functions and procedure of the Advisory Board set up in India under the Preventive Detention Act with those of the South African committee which inquires into the cases of organizations declared unlawful and of their members. Our Advisory Board is endowed with what is called compulsory jurisdiction; it does not merely advise but decides. It may therefore be considered to have a great advantage over the Union (or the English) committee which performs only an advisory function. But this supposed advantage is a hollow pretence. Our Advisory Board is competent to inquire only into minor cases of detention; indeed only into cases of persons who before the Act was passed could not be subjected to detention at all. Even now the cases that can possibly go before the Advisory Board are so few in number that two judges of the Supreme Court in the leading case of Gopalan declared the Act itself to be unconstitutional because of the virtual failure of the Act to comply in spirit with art. 22 (4)(a) in the constitution requiring confirmation of detention orders by Advisory Boards. And, among the numerous cases that go to the High Courts or the Supreme Court on habeas corpus petitions, there does not seem to be even a single case which had been previously considered by an Advisory Board. Practically ALL detention cases have been removed by the Prevention Detention Act from the jurisdiction of Advisory Boards.

But even if the provision about the Advisory Board was not purely nominal as in fact it is but was really effective, the Board would not be able, because of the restrictions imposed upon its procedure, to give any worthwhile protection to detenus. First, the Board cannot call for full information about the detenus' activities. For sec. 7 (2) of the Act expressly states that the detaining authority shall not be required "to disclose facts which it considers to be against the public interest to disclose." Nor is this a merely statutory restriction; the constitution

itself has imposed it in art. 22 (6). In England nothing at all was withheld from the Advisory Board. Home Secretary Sir John Anderson said in the House of Commons :

The Advisory Committee have before them ALL the evidence which is in the possession of the Secretary of State (vide p. 48 of the BULLETIN).

If our law of preventive detention itself provides that certain facts and charges based thereon can be kept back from the tribunal established for the purpose of preventing any possible injustice, will it be at all possible for the tribunal to arrive at any just appraisal of the situation? The tribunal is bound to say in such cases : " We are not aware of all the facts. Some of them are apparently too dangerous to be made known even to us. It must therefore be presumed that they lend justification to the drastic action taken by the Government. We must endorse the action lest we should be instrumental in hurting the security of the State. " When the tribunal itself is driven to decide by presumption in favour of the Government, can it serve any useful purpose? How many sins of the Government cannot be covered up under this restriction which gives unfettered discretion to the detaining authority to keep certain things up its sleeves while supplying particulars, in order to produce the impression even on the tribunal that the detention should not be interfered with ?

In a recent case tried by a court-martial in England it came out that the trial was held in camera and that all the charges against the accused were not made public. Opinion was greatly stirred by this, because in England publicity is held to be essential to a proper administration of the law. Angry questions were asked in the House of Commons (vide Hansard for 19th September). The Minister in charge answered that the military authorities thought that that it was a fit case for adopting this particular procedure and accordingly they made that suggestion to the court; but the decision was not of the military authorities, but that of the court-martial. In this case it was not a question of suppressing any facts from the court; it was only a question of making known those facts to the public in order to maintain the purity of justice. But in India the tribunal itself is kept in the dark about certain facts and yet it is called upon, on the basis of the fragmentary information put before it, to arrive at a decision which will be possible only if all the facts are in for the tribunal to see. The worst of this restriction which is not merely allowed but enjoined by the constitution is that the detaining authority itself whose action is in question uses its discretion in holding vital information back from the tribunal.

One further restriction which cripples the Advisory Board in India is that which is contained in sec. 10 (3) of the Preventive Detention Act, viz. :

Nothing in this section shall entitle any person against whom a detention order has been made to

attend in person or to appear by any legal representative in any matter connected with the reference to the Advisory Board and the proceedings of the Advisory Board.

This restriction too is not only a statutory one, but is based on a provision in the constitution. For art. 22 in clause (1) first lays down this general rule: " No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. " But the article goes on to say in clause (3) : " Nothing in clauses (1) and (2) shall apply . . . to any person who is arrested or detained under any law providing for preventive detention. " Even the communication of the grounds of detention to the detained person might not have been required by a preventive detention law if clause (5) of the same article had not provided for it, but no provision being made in the remaining parts of this article about a person being allowed to attend in person or by a legal representative at an inquiry by the Advisory Board, the prohibition in sec. 10 (3) of the Act referred to above must be held to be one contemplated by the constitution itself. Now, what would be the value of a quasi-judicial inquiry in which the detenu has been put under a legal disability to argue his case either himself or through legal representatives? The Advisory Board can only look into the papers placed before it, but cannot try to ascertain whether the allegations made in them are true or untrue by questioning the detenu or his representative !

It is not specifically mentioned in the Act nor in the constitution that in the proceedings of the Advisory Board the detenu will not be entitled to call evidence or to cross-examine witnesses, but we have no doubt that the Advisory Board, not being expressly empowered to do so, will deny these facilities if demanded. In England, as we have shown in previous issues, the Advisory Committee was made master of its own procedure and did in fact allow all these facilities. It was authoritatively stated in the House of Commons (vide p. 52 of the BULLETIN) :

A legal advocate can come before the Committee if the Committee so permits. It is entirely within the discretion of the Committee whether a person should be assisted by a solicitor.

Witnesses can be called and are called in many of these cases (of detention).

These are facilities without which no Advisory Board will be in a position to appreciate the merits of cases placed before it and to pronounce justly on them.

The fundamental fact in India is that practically NO case of detention goes before an Advisory Board, but the point we are making here is that even if all cases went before it the Board would be powerless to discharge its function properly on account of the inhibitions to which it is subject. The Advisory Committee under Defence Regulation 18 B in England was free from all such

restrictions in respect of detention, and the investigating committee of South Africa will be equally free from them in respect of organizations to which illegality is attached by the new law or of members thereof. The Union Act is a thoroughly retrograde piece of legislation, but it is redeemed by this provision about the committee which far excels anything in India's Preventive Detention Act.

U. S. ANTI-RED ACT

As stated in the last issue, the anti-subversive law of the United States, officially called the Internal Security Act, passed by Congress over the veto of the President, is being set into motion. But the major part of the Act as yet remains a dead letter. The Act provides that organizations regarded by the Attorney General as Communist must register and disclose financial backing. This is the heart of the law, and it does not appear that these provisions will become operative at an early date. There are quite a number of hurdles to get over.

The initial responsibility for registration rests with the officials of organizations deemed subversive by the Attorney General, but the officials may not choose to register, and in fact all the black-listed groups refused to register within the time limit set by the law (25th October), saying: "We don't fit the bill. We're not foreign-controlled. We're not a conspiracy." And refusal to register is not a criminal offence, as was proposed in the first draft of the law.

When voluntary registration does not materialise, the act's provisions for enforced registration are to come into action. The procedure laid down in this behalf is as follows. The Attorney General first petitions the "Subversive Activities Control Board" to declare subversive those Communist organizations which did not register. The Board which consists of five members has been appointed; it is a bi-partisan body. The Board then holds public hearings. The Government must produce evidence from its files before this body to prove its charges. The case against known Communist organizations will necessarily have to be a comprehensive one, rather like a major prosecution in a court. For the accused organization has the right to be represented by counsel and to cross-examine Government witnesses, before the Board can make a finding of record as to whether or not it is subversive. [Compare the provisions in our Preventive Detention Act which deny these elementary facilities with the procedure prescribed in the U. S. law.]

But the Board is as it were only the court of first resort. If it finds in the way of facts against an organization, the finding can be contested in the regular courts on those facts as well as everything else. An appeal can be made first to the Federal Court of Appeals in Washington and from there to the Supreme Court. Thus, ultimately, the courts will decide whether any particular organization is subversive or not. If it is proved to be either "dominated or controlled" by the Communist movement

or one which gives "aid and support" to this movement, then it must register or suffer the criminal penalties provided in the law. Enforcement of the compulsory registration provisions thus involves almost endless litigation—litigation to be faced in the case of each and every organization placed by the Attorney General on his black-list. It may well take three to four years before these provisions become fully effective if at all that stage is ever reached, because the newly elected Congress might repeal or drastically amend the provisions before that time arrives.

In the meantime the Communists are trying to have the whole law, and particularly that part of it which concerns registration, nullified by the courts. A suit has been filed by 135 Communists in the Federal District Court against the Attorney General in which the plaintiffs attack the law as unconstitutional, saying that the law was intended to "put the Government in the thought-control business" (repeating the very words used by Mr. Truman in his veto message to the Congress!) by putting restraints on speech, press and assembly. The action seeks to get a temporary injunction against enforcement proceedings while the constitutional question is being reviewed.

COMMENTS

Human Rights Day

We trust that all Civil Liberty Unions in this country will celebrate 10th December next as a Human Rights Day. The day is the second anniversary of the adoption of the International Declaration of Human Rights by the General Assembly of the United Nations. The importance of this instrument cannot be exaggerated. As the Secretary-General says in his annual report:

The Declaration has sent its challenge into the far and dark corners of the earth, setting new standards for international and national action to redress inveterate wrongs, opening up new ways to freedom, and leaving its impact on the actions of groups and individuals. International agreements have incorporated its principles, new national constitutions and court decisions have embodied the very words of its text.

Yet the Declaration is only the first part of the International Bill of Human Rights. The other two parts that are to follow will consist of a Covenant which will give the force of law to the general principles enunciated in the Declaration and of measures for their implementation. The draft Covenant was considered by the General Assembly's Social, Humanitarian and Cultural Commission on 3rd November, and the Commission has been asked to put the draft into such form as to reconcile differences that were disclosed in its consideration by the Commission on Human Rights.

For the present the draft Covenant deals only with basic personal and civil rights, economic and social rights included in the Declaration being omitted therefrom on the ground that (in the view of some nations) no universal rule in regard to such rights could be framed which would be capable of equal enforcement in different parts of the world in varying stages of development. Nor are all provisions in the draft Covenant concerning personal and civil rights (e. g., freedom from arbitrary arrest or detention) such as can satisfy liberal minds. It is to be hoped that eventually a satisfactory instrument will be evolved.

The political significance of universal preservation of human rights is clearly reflected in the concluding paragraph of the resolution on "Uniting for Peace" passed by the Assembly on 3rd November. Saying that "enduring peace will not be secured solely by collective security arrangements against breaches of international peace and acts of aggression," with which the resolution mainly deals, the Assembly in this paragraph

Urges member states to respect fully, and to intensify, joint action, in co-operation with the United Nations, to develop and stimulate universal respect for and observance of Human Rights and Fundamental Freedoms.

A "Permanent Law" of Detention

The New Delhi correspondent of the "Tribune" reports that the Government of India intends to introduce in the present session of Parliament a bill to amend the Preventive Detention Act passed in February last. The forecast about the bill is as follows. (1) This will be "perhaps a permanent measure." (2) It will ensure that the Advisory Board's verdict in respect of preventive detention will be binding on the Government. (3) "No person shall be detained at one time for more than three years."

In regard to (1), it may be said that the Government will no longer be able to claim that preventive detention is only a temporary device to be resorted to in an emergency. In regard to (2), the comment may be made that the Advisory Board's opinion is binding on the Government even under the present law, the fly in the ointment being that so few of the detention cases, if indeed any, are placed before an Advisory Board. If, under the amended law, every case of detention goes before an Advisory Board and its opinion has to be respected, the Act will be on all fours with Eire's Offences against the State Act of 1939 (vide p. 124 of the BULLETIN), under which every case of internment was subjected to review by an investigating Commission, with the obligation resting on the Government either to release the detenu or put him on his trial if the Commission saw no need for detention. If the Irish Act is followed in India, it will certainly be a great improvement. (3) will prescribe the maximum period of detention ("at one time"), as was contemplated by art. 22

(7) (b) of the constitution, this mandate of the constitution being ignored in the present Preventive Detention Act.

It appears that the Government of India is not in a mood to accept the suggestion made to it in a communication by the All-India Civil Liberties Council (reproduced at p. 171 of the BULLETIN), that the amending bill with a memorandum on the up-to-date working of the existing Act should be published sufficiently in advance to enable individuals, who are not members of Parliament, and public bodies interested in civil liberty to express their views on the provisions of the bill. If the Government had a mind to do so, it should have made this material available to the public before now. The least that it can now do is to adjourn later stages in the consideration of the bill to the budget session of Parliament early next year so that those who have any constructive suggestions to make about the bill will have an opportunity of doing so. As the existing Act will not expire before 1st April, 1951, the Government will lose nothing, and the cause of civil liberty will gain much, if the final stages of the bill are taken up, say early in March next year. The bill is certainly of importance enough to deserve its being referred to a select committee which would have power to hear views from interested witnesses. This procedure was followed with great advantage in the case of the Labour Relations Bill. A select committee was then appointed, and trade unions were allowed on that occasion to appear before it to ventilate their views. This enabled the Government to modify some of the bill's provisions in such a way as to bring them into conformity with labour opinion. The same procedure should be followed in the case of the Preventive Detention Act Amendment Bill also, and we have no doubt that if this is done the bill as finally passed will be more in keeping with enlightened opinion in the country than it otherwise would be.

"The Only Way to Combat Communism"

"The only way to combat Communism is to raise the standard of living of the people and to demonstrate to them practically and visibly the benefits of the free way of living," declared Dr. B. V. Keskar, Deputy Foreign Minister of India, at New York on 31st October. On the United Nations Day a week earlier, Sir B. N. Rau, India's chief delegate to the United Nations Assembly, gave expression to the same sentiment in almost identical words.

We suppose such statements are being made with a view to enlightening President Truman on the dangers of using coercive measures for the purpose of suppressing subversive elements. If this is the object (and we cannot conceive of any other), we must say that the India Government is doing nothing less absurd than teaching grandma to suck eggs. For President Truman has been tirelessly trying to impress these dangers upon the American people and to curb their anti-Communist hysteria.

He has been honestly following the policy recommended by India. But can that be said of the India Government? In order to bring its deeds into conformity with its professions, drastic amendment will have to be made in these professions. They will have to be: "One way is to raise the general standard of living and the other is to outlaw the Communists and to put them in prison without trial, and the second is far more efficacious than the first." Is President Truman not aware of the Nehru way of combating Communism? Who is going to be deceived by Rau-Keskar declarations?

Australia's Communist Party Dissolution Act and America's Internal Security Act have filled all forward-looking people with alarm as to the effect such legislation will have on the liberties of the common man. The "New York Times" reflected this alarm when it wrote about the Commonwealth law:

It does seem as if Australia . . . is running the risk of destroying some traditional liberties at the same time that it destroys [or tries to destroy] the enemies of liberty. One does not want to repeat the last feat of that other strong man, Samson [he may well be Vallabhbhai Patel], and pull the temples of freedom down in order to kill the Communist Philistines.

Has Patel or, for the matter of that, Nehru ever shown any concern for the destruction of loyal Indian citizens' freedom while denying freedom to the Communists? The "Times," after making the above remarks, consoles itself with the thought that "Australia, like the United States, has freedom so strongly embedded in the hearts, the traditions and the institutions of the country, that one can feel confident no great harm will be done to democratic practices. The problem is whether any great harm will be done to Communism, and that is what remains to be seen." In India the traditions of freedom just not exist, and what harm then will not be done here to democracy? Do Nehru-Patel ever take that into account? Anyway, Keskar-Rau might well turn their attention to learning something from that land of freedom, the United States, rather than playing the rôle of mentor to President Truman and the American people.

Censorship of Films

Censorship of newspapers, pamphlets and books is wholly unthinkable as a practical proposition in this age in the United States. If any such restrictions involving control by a censor before publication were to be imposed upon freedom of the press, the courts would jump on those restrictions and declare them unconstitutional. But the guarantees of a free press contained in the First Amendment and the related "due process" clause of the Fourteenth Amendment are not always held to apply to other media of expression like the movies and the radio.

For instance, some thirty-five years ago, the Federal Supreme Court upheld motion picture censorship in the case of *Mutual Film Corporation v. Industrial Commission*

of Ohio (1915)-236 U. S. 230. The ground on which the courts make a distinction between the printing press and the moving picture exhibitions, denying to the latter the protection which they give to the former, is that while the press is concerned with communication of ideas in which the constitution is pledged to maintain a free market, motion pictures are concerned only with entertainment to which the guarantee of freedom of the press was not intended to apply.

Leaders of the civil liberty movement confidently expect that when a case of film censorship goes once again to the Supreme Court, it will reverse its 1915 decision and afford the protection of constitutional limitations to films as well as to the press. But in the meantime lower courts usually follow the previous decision of the Supreme Court. Recently a censor board of Atlanta banned the movie "Lost Boundaries" and the ban was challenged in the courts of law. The American Civil Liberties Union appeared in this case and pleaded that the constitutional guarantees of "free press" should now be accorded to films. The U. S. Circuit Court of Appeals, however, sustained the action of the censor board. In doing so, it said:

We particularly disagree with and dissent from the view they thus advance: Moving pictures have now emerged from the business of amusement into instruments for the propagation of ideas, and therefore, like newspapers, freedom of assembly, freedom of speech, must be regarded as within the protection of the Fourteenth Amendment.

While the civil liberty movement suffered a major reverse here, it scored a minor victory in another case. A board of review in the city of Portland had ordered one scene to be cut from "The Bicycle Thief," which is a highly applauded Italian motion picture. But Circuit Judge James W. Bain upset the ruling of the board of review and ordered that the film might be shown without deletions.

There is really no reason why film freedom should not be as complete as press freedom. The only ground advanced is that but for some supervisory control indecent films would be exhibited. But the ground is unsustainable. The criminal law is always at hand to check pornography. If the criminal law suffices in respect of unwholesome pictures in cheap illustrated magazines, it should also suffice in respect of similar pictures exhibited on the screen. "Yet," as Mr. Zechariah Chafee Jr. says, "we get along pretty well under a constitution which makes censorship of periodicals impossible, and one fails to see why censorship of moving picture exhibitions should be required." Those who are desirous of having a full treatment of the subject may consult a publication of the Commission on Freedom of the Press, "Freedom of the Movies" by Ruth A. Inglis brought out by the University of Chicago Press in 1947. It is the attempt of the American civil liberty movement to see that by court decisions

motion pictures and broadcasting enjoy as much constitutional protection as printed matter.

In India, too, one may expect that the question will soon come to be tested in courts as to whether the guarantee of "freedom of expression" in art. 19 (1) (a) is applicable to all the media of expression.

Another Anti-Segregation Decision

OF THE U. S. SUPREME COURT

Following its decisions of June last (vide pp. 111 and 112 in the July number of the BULLETIN) barring segregation in educational institutions and railway dining cars, the Supreme Court of the United States on 16th October delivered another judgment which would have the result of bringing the coloured population in that country to a position of social equality with the whites. On a municipal golf course in Miami the Negroes are allowed to play only on one day in the week. Several Miami Negroes filed a petition in the Florida Supreme Court against this restriction on Negro players, but the Florida Supreme Court had dismissed the petition. When on appeal the matter went to the Federal Supreme Court, the latter vacated the finding of the Florida court and directed "reconsideration in the light of" its own June decisions.

PRESS ACT OF 1931

Sec. 4 (1) (d) Unconstitutional

Applications for the issue of writs of certiorari for quashing the orders of the Government demanding security from them were made in the Madras High Court by Mr. M. Krishna Mohan Rao, keeper of the Avanti Press, and Mr. U. N. Srinivasa Bhat, editor and publisher of "Aruna," a Kannada weekly of Mangalore. The grounds advanced were that sec. 4(1)(a) of the Press Emergency Powers Act, 1931, under which a security of Rs. 2,000 was demanded from Mr. Rao and sec. 4(1)(d) under which a security of Rs. 1,000 was demanded from Mr. Bhat contravened clauses (1) and (2) of art. 19 of the constitution. The High Court delivered judgment in these cases on 2nd November.

POWER TO ISSUE CERTIORARI WRITS

The question that first arose for consideration on these applications was whether the High Court had power to issue writs of certiorari under art. 226 of the constitution. It was contended on behalf of the Government that the High Court had no such power. The Advocate-General's arguments on this point were thus stated by Their Lordships Govinda Menon, Panchapagesh Sastri and Basheer Ahmad Sayeed JJ.: "The Advocate-General rested his argument on an interpretation of articles 225 and 226 of the constitution and relied on the decision of the majority of the full bench of three Judges of the Madhya Bharat High Court in support of his contention. According to the Advocate-General, the proper Legislature, by virtue of

the powers conferred on it, had not invested this Court with the power to issue writs outside its ordinary original jurisdiction after the commencement of the constitution and, therefore, Their Lordships had no power to entertain the present applications. Therefore, what was urged was that unless this Court was specifically empowered under clause (3) of article 32, they would not be justified in invoking article 226 for the issue of such writs in the exercise of their existing jurisdiction."

The Court did not accept this contention.

Their Lordships preferred to follow the conclusions contained in the dissenting judgment of Mehta J. of the Madhya Bharat High Court, as in their opinion his judgment appeared to them to be the correct one. The learned Judge was of the opinion that article 32(3) did not refer to the existing High Courts situated in the States, because, notwithstanding anything contained in article 32, every High Court should have power throughout the territories in relation to which it exercised its jurisdiction, to issue directions, orders, or writs, as mentioned in article 226, for the enforcement of fundamental rights and for any other purpose. What clause (3) of article 32 contemplated was that Parliament might by law provide for conferring jurisdiction on other courts within the jurisdiction of the High Courts. In substance the Advocate-General contended that though under article 226 this Court might have power to issue various writs, the exercise of such powers could arise only when Parliament conferred jurisdiction. Their Lordships did not think that any such interpretation could be put upon the plain meaning of the statute. In their opinion the strained meaning that was sought to be inferred from the plain words of article 226 could not be justified. It seemed to them, therefore, that this Court had both power and jurisdiction to issue writs specified in article 226.

Having disposed of this question of jurisdiction, the Court next considered whether or not there were grounds for issuing writs of certiorari. All the three judges were unanimously of the opinion, following in this respect the decision of the Supreme Court in *Romesh Thapper v. State of Madras* (i. e., the "Cross Roads" case), that sec. 4 (1) (d) of the Press Emergency Powers Act was ultra vires of the fundamental rights conferred under art. 19 (1) of the constitution. This section prohibits the printing, publishing, etc., "of any matter which is calculated to bring into hatred or contempt the government established by law in India or the administration of justice or any class or section of the people or to excite disaffection towards the Government." The Government's case against "Aruna" was that articles therein offended sec. 4 (1) (d) in that they were such as to "bring into hatred or contempt the government established by law," etc., but the High Court, holding the section itself unconstitutional,

allowed the certiorari application and quashed the order of the Government demanding security from the publisher.

Opinion Divided on Sec. 4 (1) (a)

As regards the validity of sec. 4 (1) (a) of the Press Act, the Court was divided. This section prohibits any printing press from printing or publishing any newspaper, book or other documents containing any words, signs or visible representations which "incite to or encourage, or tend to incite to or to encourage, the commission of any offence of murder or any cognisable offence involving violence." Mr. Justice Govinda Menon and Mr. Justice Basheer Ahmed held that sub-clause (a) of sec. 4 (1) was not repugnant to or inconsistent with the constitution, being saved by the reservations contained in clause (2) of art. 19, while Mr. Justice Panchapagesa Sastri held that that sub-clause was as repugnant to the fundamental rights mentioned in the constitution as sub-clause (d). All the three judges came to the conclusion that the offending passages in the book "Vajra Ayudham" published in the Avanti press had for their object incitement of the readers to commit murders and other cognisable offences and came within the mischief of sec. 4 (1) (a) of the Press Act. But the question on the certiorari application was whether the section itself was valid. On this point Mr. Justice Panchapagesa Sastri recorded a dissenting judgment (holding the section void), in which he observed:

The precise question that called for decision now was whether it was open to this Court to hold that the application of section 4 (1) (a) and section 3 (3) of the Press Act, as a result of which the keeper of the printing press had been called upon to make a deposit consequent on the printing and publication of the particular offending matter complained of, could be consistent on the ground that the offending matter aforesaid was such as to undermine the security of the State or tended to overthrow it. His Lordship, after quoting the decision of the Supreme Court, observed that there was nothing to show in this case that the State Government before asking for deposit had applied its mind to the question whether the offending matter was such as to undermine the State or tended to its overthrow and not merely whether the matter came under section 4 (1) (a) of the Press Act as it stood now.

Mr. Justice Govinda Menon and Mr. Justice Basheer Ahmed, on the other hand, expressed a different opinion. The former in a separate judgment said:

Panchapagesa Sastri J. seemed to think that even if a newspaper, book or document contained words which incited or encouraged the commission of the offence of murder or any cognisable offence involving violence and even if such incitement and encouragement might undermine the security of the State or tend to overthrow the same, still section 4 (1) (a) of the Press Act would be ultra vires, because,

as the section now stood, incitement which generally undermined the security of the State or tended to overthrow the same came within its ambit and since it was impossible to separate the two different categories of incitement, the entire section should be held invalid and ultra vires. On merits, His Lordship came to the conclusion that the incitement in the offending passages was intended to overthrow the State by force and undermine its security. He did not think that in such a case section 4 (1) (a) could be held to be ultra vires. Even incitement or encouragement to a single case of murder or a single offence involving violence might have a tendency to overthrow the State. It was very difficult to postulate with any definiteness that the classes of offences mentioned in section 4 (1) (a) of the Press Act would not undermine the security of the State or might not tend to overthrow it. His Lordship, therefore, agreed with Basheer Ahmed Sayeed J. that the application of the "Avanti" press had to be dismissed.

If a full bench of the Madras High Court has by a majority of 2 to 1 upheld sec. 4 (1) (a), a full bench of the Patna High Court by the same majority of 2 to 1 ruled the section invalid as contrary to the constitution (vide p. 170 of the BULLETIN). This conflict of judicial opinion in the High Courts must soon be resolved by a decision of the Supreme Court, and in fact this Madras case is being referred in appeal to that Court.

EXTERNMENT ORDERS SET ASIDE

Section of Police Act Invalid

Mr. Bhogilal Hiralal Shah, who is a native of Wadhwan but was living at Dadar, was ordered by a deputy commissioner of police to remove himself from Greater Bombay under sec. 27 (2-A) of the Bombay City Police Act which states that a person not born in Greater Bombay could be externed from Greater Bombay in certain circumstances. The externment order was challenged in the Bombay High Court and Rajadhyaksh and Chainani JJ., before whom the matter came, ruled (26th October) that the section of the Act under which the order for externment was made was repugnant to the constitution and was void to that extent, and that therefore the order passed under it was illegal.

Mr. Justice Baydekar and Mr. Justice Vyas, at the Bombay High Court, set aside the externment order passed against Mr. Ramchandrakumar, a teacher at the Malad Central School and a worker of the Hindi Prachar Sabha, by the sub-divisional magistrate, Thana.

The petitioner was arrested on August 4, 1950, by the Malad police and brought before the sub-divisional magistrate, Thana, who served on him an order externing him from the State of Bombay. The grounds for

externment were that he was a Communist worker from Bihar and that his activities were prejudicial to public safety in Malad, Kandivli and Borivli.

The petitioner contended that the order of externment was void and illegal, since it deprived him of the fundamental right of free movement granted by the constitution.

Their Lordships accepted the petitioner's contention and set aside the order.

HABEAS CORPUS PETITIONS

Court Releases : State Rearrests

In the Bombay Legislative Assembly it was stated (1st November) on behalf of the Government, in answer to an interpellation by Mr. Peter Alvarez, a member of the Socialist Party, that two persons were rearrested under the Preventive Detention Act after being released by the High Court, one of them being rearrested on the same grounds as those for which he was first arrested, and that in this case supplementary grounds were supplied to the detenu after his release by the High Court. This was followed by the following colloquy :

Was the High Court allowed an opportunity to hear the supplementary grounds ?

No.

Did the supplementary grounds occur to the Government only when the detenu was released or were they already on the Government's files ?

When the detenu was released.

Did the Government withhold supplementary grounds in order to have an opportunity for rearresting the person ?

Government did not withhold anything deliberately.

Forty Detenus Ordered to be Released

In the Bombay High Court the Chief Justice and Mr. Justice Gajendragadkar ordered (25th October) the release of 40 detenus, mostly Communists. Thirty of the detenus were ordered to be released on the ground that "the orders of detention passed against them by the Home Secretary were not valid as they were not expressed to have been made in the name of the Governor."

The same question had arisen the previous day in the case of another detenu, Mr. Purshotam Jog Naik, a Communist peasant of Karwar, who was under detention in Nasik gaol under the Preventive Detention Act. He was first detained under the Public Safety Act and later under the central Act of this year. A fresh order of detention was passed against him under the latter on 17th July. This order, purporting to be made by the Bombay Government, was signed by the Home Secretary, the grounds of detention also being supplied by him.

In a habeas corpus petition, Mr. Naik contended that the order of detention by the Bombay Government did not indicate the person who was satisfied that the detention was necessary. It was argued on behalf of the petitioner that the Home Secretary who had supplied the grounds for detention appeared to be the person who had made the order of detention, and since under the Rules of Business, framed under article 116 of the constitution, he could dispose only of minor matters on his own, the order was invalid.

Mr. Justice Bavdekar and Mr. Justice Vyas, who disposed of the petition, expressed the opinion that if the order of detention was in fact made by the Secretary to the Home Department, it would not be a valid order. Their Lordships also observed that the grounds of detention supplied to the detenu did not enable him to make an effective representation and ordered (24th October) the detenu to be released. Leave was granted to the Government for appeal to the Supreme Court.

Mr. Bandoo Dagdoo Jadhav, a detenu from Nasik, was on 31st October ordered to be released by the Chief Justice and Mr. Justice Gajendragadkar at the Bombay High Court. Mr. Jadhav was detained under the Preventive Detention Act on an order issued by the district magistrate. Their Lordships held that out of the five points given as grounds for detention, three were beyond the scope of the Act and hence the detention order was invalid.

Prosecution of Detenus

The Madras High Court held on 6th November that prosecutions against detenus under the Security Prisoners' Rules could not be launched by Jail Superintendents without obtaining the previous approval of Government.

The question arose out of a petition filed on behalf of Mr. K. T. K. Thangamani, a detenu in the Vellore Central Jail who contended that the prosecution against him under the Security Prisoners' Rules for having been on hunger-strike in November last was launched before the district magistrate of North Arcot without the specific approval of Government and as such, it was "void and inoperative."

It was contended on behalf of Government that by a previous memorandum they had given general permission to all Jail Superintendents to launch such prosecutions against security prisoners.

Mr. Justice Govinda Menon and Mr. Justice Basheer Ahmed Sayeed observed that such directions of Government were contrary to the statutory rules and, as such, the lower court had no jurisdiction to take cognisance of the complaint.

Their Lordships said: "Each case, as and when it occurred, should be reported to Government and they should consider the necessity, expediency or otherwise, of launching prosecutions separately. Only after such approval was accorded, could prosecutions be launched."

Their Lordships, therefore, quashed the proceedings pending before the district magistrate against the petitioner.

Application Refused

The habeas corpus petition praying for the release of Thakur Hazara Singh, pleader of Kangra—a Communist detenu—was dismissed (30th October) by a division Bench of the Punjab High Court consisting of Mr. Justice Bhandari and Mr. Justice Khosla. The detenu was arrested under section 3 of the East Punjab Public Safety Act for carrying on virulent propaganda and spreading disaffection against Government on March 5, 1949. Allegations against him as contained in the grounds supplied to him were that in pursuance of the programme of the Communist Party he instigated the tenants not to share crops with landlords and follow in the footsteps of the Communists in Burma and China, that he addressed meetings delivering speeches condemning capitalists, R. S. S. and jagirdars and issued a pamphlet reproducing a statement of a top-ranking Communist leader to the effect that the Hindu Mahasabha and R. S. S. were responsible for the murder of Mahatma Gandhi and demanding dismissal of the Cabinet Ministers.

C. L. U. NEWS

Punjab C. L. Conference

A Civil Liberties Conference will be held at Ambala on 2nd and 3rd December, at which the Civil Liberties Union for the province of the Punjab will be formed. The Union will be affiliated to the All-India Civil Liberties Council. The Conference will be inaugurated by Mr. Jayaprakash Narayan and presided over by Mr. N. M. Joshi, and the A. I. C. L. C. will be represented at it by Dr. R. G. Kakade, Assistant Secretary, besides the president himself, who is a Vice-President of the Council.

Bombay C. L. Conference

The Bombay C. L. U. has convened a Civil Liberties Conference for the State of Bombay on 16th and 17th December under the presidentship of Mr. S. G. Vaze, who is Secretary of A. I. C. L. C. This is the third session of the Conference, the first being held under the presidentship of Mr. M. C. Setalvad, now Attorney-General of India, and the second under that of Professor P. A. Wadia.

Banning of Meetings

The Punjab branch of the Hind Kisan Panchayat, a Socialist organization, passed on the 18th October a resolution, among others, protesting against the suppression of civil liberties in the State. The resolution says in part:

Meetings, processions and demonstrations are banned for an indefinite time, and it seems the

Government are determined to let the discontent of the people have no democratic outlet and that they are manoeuvring to strangle the new-born democracy at its very inception, which no lover of it should allow to go unchallenged. The coming general elections have invested this issue with irresistible urgency.

REPORT OF THE All-India Civil Liberties Conference

Second Session : Patna, April, 1950

Besides recording all the resolutions passed at the Conference, the Report contains extracts from speeches of

Sri Atul Chandra Gupta, *President*,

Sri Nageshwar Prasad (retired High Court Judge),
Chairman of the Reception Committee, and

Sri Jayaprakash Narayan, who inaugurated the Conference.

A Detailed Analysis of and Comment on the

Preventive Detention Act,

which the Report contains, will be found of much practical help.

Messages condemnatory of the Act from

The International League for the Rights of Man,
The American Civil Liberties Union,
The National Council for Civil Liberties
(Great Britain),

Mr. Fenner Brockway, M. P., and
Mr. M. N. Roy

deserve to be treasured.

An Account of the Work

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